QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

Onor. Imhallef
Joseph Zammit McKeon

Illum il-Hamis 14 ta` Dicembru 2017

Kawza Nru. 3
Rikors Nru. 33/2017 JZM

General Workers` Union

kontra

(1) Avukat Generali ;

u

(2) Onorevoli Kap tal-Oppozizzjoni Dottor Simon Busuttil (K.I. 0242669M), Onorevoli Dottor Beppe Fenech Adami (K.I. 0309568M), Onorevoli Dottor Mario De Marco (K.I. 0500265M), Onorevoli Dottor Anthony Abela (K.I. 0053556M), Onorevoli David Agius (K.I. 0486068M), Onorevoli Robert Arrigo (K.I. 0856454M), Onorevoli Frederik Azzopardi (K.I. 0070549G), Onorevoli Dr. Jason Azzopardi (K.I. 0143871M), Onorevoli Perit Anthony Bezzina (K.I. 0486069M), Onorevoli Charlo Bonnici (K.I. 0066667M), Onorevoli Antoine Borg (K.I. 0155783M), Onorevoli Claudette Buttigieg (K.I

0093868M), Onorevoli Ryan Callus (K.I. 0324283M), Onorevoli Robert Cutajar (K.I. 0124272M), Onorevoli Kristy Debono (K.I. 0077982M), Onorevoli Tonio Fenech (K.I. 0200669M), Onorevoli Perit Censu Galea (K.I. 0587656M), Onorevoli Mario Galea (K.I. 0366362M), Onorevoli Dr. Michael Gonzi (K.I. 0726560M) Onorevoli Dr. Karl Gouder (K.I. 0282479M), Onorevoli Claudio Grech (K.I. 0392174M), Onorevoli Dr. Peter Micallef (K.I. 0050768M), Onorevoli Dr. Carmelo Mifsud Bonnici (K.I. 0267360M), Onorevoli Dr. Paula Mifsud Bonnici (K.I. 0006173M), Onorevoli Dr. Marthese Portelli (K.I. 0015276G), Onorevoli Clyde Puli (K.I. 0369769M), Onorevoli Perit George Pullicino (K.I. 0263464M), Onorevoli Dr. Christopher Said (K.I. 0018970G), Onorevoli Dr. Stephen Spiteri (K.I. 0168567M), Onorevoli Edwin Vassallo (K.I. 0450761M), Onorevoli Dr. Francis Zammit Dimech (K.I. 0771754M) ; u

(3) Kummissarju tal-Artijiet ;

u

4) Sciacca Grill Ltd. (C50533) ;

u

5) Automated Revenue Management Services Limited (C 46054)

ghal kull interess li jista` jkollhom

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors ippreżentat fit-12 ta` Mejju 2017 li jaqra hekk :–

Illi permezz ta` rikors guramentat, prezentat quddiem din l-Onorabbli Qorti fil-gurisdizzjoni ordinarja taghha, nhar is-6 ta` Frar, 2017, fl-ismijiet "Onorevoli Kap tal-Oppozizzjoni Dr Simon Busuttil et vs Josef Bugeja noe et" (Rik. Gur. Nru: 109/2017 JPG), ir-rikorrenti f`dik l-istanza, lkoll membri tal-Kamra tad-Deputati talbu lill-Qorti sabiex, prevja dikjarazzjonijiet, thassar u tannulla l-koncessjoni enfitewtika li l-esponenti ghandha fir-rigward tal-kwartieri taghha gewwa l-Belt Valletta;

Illi l-esponenti, laqghet ghal din l-azzjoni billi eccepiet dan li gej :

1. *Preliminarjament, il-karenza tal-interess guridiku tal-atturi stante li dik qed jippostulaw hija actio popolaris liema jedd ta` azzjoni mhuwiex konsentit ghal proceduri bhal dawk odjerni;*

2. *Illi subordinatament u minghajr pregudizzju ghall-premess, kemm-il darba l-azzjoni de quo hija msejjsa fuq id-dispozizzjonijiet tal-Art. 4(2) tal-Att dwar Trasferiment ta` Artijiet tal-Gvern (Kap. 268), l-azzjoni ma tistax tirnexxi stante li ebda jedd talvolta moghti mill-eccipjenti lil terzi ma jikkostitwixxi "trasferiment" ghall-ghanijiet tal-Art. 3 tal-Kap. 268;*

3. *Illi subordinatament u minghajr pregudizzju ghall-premess, kif sewwa jippremettu l-atturi, l-eccipjenti fdiet ic-cens gravanti s-sit in kwistjoni u mhemmx xkiel ghall-ezercizzju tal-jeddijiet petitorji taghha;*

4. *Illi subordinatament u minghajr pregudizzju ghall-premess, dato ma non concesso li xi jedd moghti mill-eccipjenti lil terzi jikkostitwixxi "trasferiment" li ghalih japplika l-Art. 3 tal-Kap. 268 jew li ghalih japplika tali Att, a tenur tal-artikolu 4(2) tal-istess Att, ir-rikorrenti jistghu biss jitolbu n-nullità ta` tali "trasferiment" u mhux it-thassir tal-koncessjoni emfitewtika u lanqas it-thassir tac-cedola ta` fidi ta` cens u kwindi l-azzjoni kif proposta ma tistax tintlaqa`;*

5. *Illi subordinatament u minghajr pregudizzju ghas-suespost, it-talba tar-rikorrenti hija infondata fil-fatt u fid-dritt stante li, fi kwalunkwe kaz, l-attivitajiet kollha gestiti mill-Workers` Memorial Building huma ghall-beneficcju tal-membri tal-Union esponenti, kif ukoll jikkomplimentaw l-ghanijiet tal-Union esponenti kif se jigi ppruvat fil-mori tal-kawza;*

6. *Illi subordinatament u minghajr pregudizzju ghas-suespost, it-talba tar-rikorrenti hija infondata fil-fatt u fid-dritt;*

7. *Salvi eccezzjonijiet ulterjuri.*

Illi inoltre, permezz ta` rikors prezentat nhar it-13 ta` Frar 2017, l-esponenti talbet ir-rikuza tal-imhallef sedenti u dan wara li ppremettiet illi r-rikorrenti fil-kawza huma assistiti mid-ditta legali Fenech & Fenech ta` 198 Old Bakery Street, Valletta, u r-rikors guramentat gie ffirmat u pprezentat minn senior partner tal-istess ditta, Dott. Edward DeBono u mill-prokuratrici legali tad-ditta Ms Katrina Zammit Cuomo, imbaghad ziedet tippremetti dan li gej :

Illi bhala senior partner iehor tad-ditta Fenech & Fenech hemm Dott. Kenneth Grima, li nzerta huwa hu il-gudikant sedenti ;

Illi bhala prokuratrici legali tad-ditta Fenech & Fenech hemm Rowena Grima, li nzertat hija oht il-gudikant sedenti ;

Illi inoltre, l-gudikant sedenti hija relatata wkoll ma` zewg il-managing partner tad-ditta Fenech & Fenech, Dott. Ann Fenech ;

Illi l-Art. 734(1) tal-Kap. 12 tal-Ligijiet ta` Malta jipprovdi li Imhallef jista` jigi rrikuzat jew jista` jastjeni ruhu milli joqghod fil-kawza jekk, inter alia, "l-avukat jew prokuratur legali li jkun qed jidher quddiem imhallef ikun hu jew oht l-istess gudikant" ;

Illi, kif premess, Dott. Edward DeBono huwa sieheb anzjan fid-ditta legali flimkien maz-zewg ahwa tal-gudikant sedenti, filwaqt li l-PL Katrina Zammit Cuomo hija dipendenti ta`, u tahdem taht struzzjonijiet ta` hu l-gudikant sedenti u l-partners l-ohra tal-istess ditta ;

Illi l-imsemmija Dott. Edward DeBono u PL Katrina Zammit Cuomo jaghtu s-servizzi professjonali taghhom esklussivament bhala membri tad-ditta Fenech & Fenech, li hija d-ditta li ghaliha jaghtu s-servizzi professjonali taghhom b`mod esklussiv l-ahwa tal-gudikant sedenti, u ghalhekk huwa wkoll car li hija d-ditta legali tal-ahwa tal-gudikant sedenti li qed tassisti lill-atturi f`din il-kawza ;

Illi dan premess jissodisfa r-rekwiziti tal-Art. 734(1)(g) tal-Kap. 12 tal-Ligijiet ta` Malta u ghalhekk jikkostitwixxi raguni tajba u bizzejjed sabiex il-gudikant assenjata biex tisma` din il-kawza tastjeni ruhha milli toqghod f`din il-kawza ;

Illi, minghajr pregudizzju ghas-suespost, oltre li huma sodisfatti l-imsemmija rekwiziti tal-Kap. 12 ghall-fini ta` rikuza, kemm il-darba tkun din l-Onorabbli Qorti kif presjeduta li tisma` l-kawza, ma jkunx qed jigi sodisfatt il-kriterju ta` imparzjalità sostanzjali impost sia mill-Kostituzzjoni ta` Malta u wkoll mill-Konvenzjoni Ewropea, fejn il-kriterji huma wisq aktar stringenti mill-kriterji imposti mill-Kap. 12 tal-Ligijiet ta` Malta ;

Illi l-Qorti Ewropea tad-Drittijiet tal-Bniedem digà kellha opportunità li tikkummenta u tiddeciedi fuq kwistjonijiet simili, fejn ma llimitatx ruhha ghal dak li jipprovdu r-regoli ta` procedura lokali, izda marret `l fuq minn dawn biex tara jekk hemmx tassew rispett lejn l-imparzjalità u, wkoll, id-dehra ta` imparzjalità gudizzjarja. Issir ghalhekk referenza ghas-sentenza "Micallef vs Malta" moghtija mill-Qorti Ewropea tad-Drittijiet tal-Bniedem nhar il-15 ta` Ottubru 2009 fejn inghad kif gej :

98. In this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see De Cubber, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see Castillo Algar v. Spain, 28 October 1998, § 45, Reports 1998-VIII).

99. Moreover, in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation (see Piersack v. Belgium, 1 October 1982, § 30 (d), Series A no. 53). The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature`s concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see Mežnarić, cited above, § 27). The Court will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether the applicant`s fears can be held to be objectively justified (see, mutatis mutandis, Pescador Valero v. Spain, no. 62435/00, §§ 24-29, ECHR 2003-VII).

2. Application to the present case

100. The Court notes that specific provisions regarding the challenging of judges were set out in Article 734 of the Code of Organisation and Civil Procedure (see paragraph 28 above). The Grand Chamber, like the Chamber, cannot but observe that Maltese law as it

stood at the time of the present case was deficient on two levels. Firstly, there was no automatic obligation for a judge to withdraw in cases where impartiality could be an issue, a matter which remains unchanged in the law in force at present. Secondly, at the time of the present case the law did not recognise as problematic – and therefore as a ground for challenge – a sibling relationship between judge and advocate, let alone that arising from relationships of a lesser degree such as those of uncles or aunts in respect of nephews or nieces. Thus, the Grand Chamber, like the Chamber, considers that the law in itself did not give adequate guarantees of subjective and objective impartiality.

Il-Qorti Ewropea stqarret ukoll illi :

The Grand Chamber is of the view that the close family ties between the opposing party`s advocate and the Chief Justice sufficed to objectively justify fears that the presiding judge lacked impartiality. It cannot be overlooked that Malta is a small country and that entire families practising law are a common phenomenon.

Osservatur ragonevoli fil-proceduri odjerni bla dubju jqis li l-union esponenti ghandha ghalfejn thossha skomda fi proceduri fejn il-gudikant hija oht avukat u PL li huma parti integrali mid-ditta legali li qed tassisti lill-atturi. Dan huwa t-test oggettiv tal-imparzjalità li titkellem dwaru l-Qorti Ewropea fis-sentenza fl-ismijiet "Hauschildt vs Denmark", moghtija fl-24 ta` Mejju 1989. Il-Qorti hemm emfasizzat li:

48. Under the objective test, it must be determined whether, quite apart from the judge`s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect, even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.

Fl-istess vena wiehed ukoll jinnota il-Judges` Charter in Europe, mahrug f`Marzu tal-1993 mill-European Association of Judges. F`dan id-dokument wiehed isib principji ta` etika u Artikolu 3 tal-istess jemfasizza l-imparzjalità, senjatament mhux biss l-imparzjalità per se, izda wkoll il-bzonn li l-Qorti ***tidher*** *ukoll li hija imparzjali.*

Jinghad fl-ENCJ Working Group Judicial Ethics Report (2009-2010) li :

To guarantee impartiality, the judge :

- *Fulfils his judicial duties without fear, favouritism or prejudice;*

- *Adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality and minimises the situations which might lead to a recusal;*
- *Recuses himself from cases when:*

    - *he cannot judge the case in an impartial manner in the eyes of an objective observer;*

    - *he has a connection with one of the parties or has personal knowledge of the facts, has represented, assisted or acted against one of the parties, or there is another situation which, subjectively, would affect his impartiality;*

    - *he or a member of his family has an interest in the outcome of the trial.*

Fis-sentenza moghtija fit-12 ta` Lulju 2005 mill-Onorabbli Qorti Kostituzzjoniali fl-ismijiet "Sandro Chetcuti vs l-Avukat Generali", dik l-Onorabbli Qorti qalet li:

> *"Anke jekk skond id-disposizzjonijiet relattivi tal-Kap 12 ma hemmx lok ghal rikuza - anzi jista` jkun hemm divjiet ta` astensjoni - izda tista` tinholoq sitwazzjoni fejn ikun hemm kuntrast mad-drittijiet fundamentali u kostituzzjonali ta` l-individwu bil-konsegwenza li dawn ta` l-ahhar ghandhom jipprevalu fuq id-disposizzjonijiet l-ohra tal ligi ordinarja." (ara sentenzi Qorti Kostituzzjonali Sant vs Kummissarju tal-Pulizija 2/4/90; Cachia vs Onor. Prim Ministru et 10/10/91; Bugeja et vs Onor. Prim Ministru noe et 17/6/94 u PA (Sede Kostituzzjonali) Ghirxi vs Onor. Prim Ministru et 1/11/96).*
>
> *"....Indipendentement mill-fatt jekk ic-cirkostanzi kinux tali li kienu jintitolaw lill-parti li titlob ir-rikuza tal-gudikant skond il-ligijiet ta` procedura. Il-parametri ta` dawk il-ligijiet ghandhom jitqiesu li twessghu bil-provvedimenti tal-Kostituzzjoni u tal-Konvenzjoni Ewropeja li jiggarantixxu s-smiegh xieraq. Irid ghalhekk jigu interpretati fl-ispirtu taghhom u fil-dawl tal-principji enuncjati fil-gurisprudenza tal-Qorti u tal-Kummissjoni Ewropeja." (Dr. A. Mifsud vs On. Prim Ministru et filz-17 ta` Lulju 1996 (Kost).*
>
> *"Il-Qorti ghalhekk trid tezamina jekk fil-konkret, u mhux fl-astratt, jistax jinghad li hemm jew jista` jkun hemm "bias" fil-gudikant li jirrendi l-operat tieghu soggettivament jew*

oggettivament parzjali. L-aforisma "justice must not only be done but must be seen to be done" trid tigi valutata fl-isfond tal-kaz partikolari. [PA (Sede Kostituzzjonali) Ghirxi vs Onor.Prim Ministru et 1/11/96; ara wkoll E. T. Rev. Mons. Arcisqof G. Mercieca pro et vs Onor. Prim Ministru noe et 22/10/1984 Kost.].

Fil-gurisprudenza tal-Qrati taghna gie accettat ghalhekk li jista` jkun hemm sitwazzjonijiet eccezzjonali, li b`interpretazzjoni stretta ma jkunux koperti taht l-Artikolu 734 tal-Kap. 12, fejn ikun hemm obbligu ta` astensjoni, u dan fuq il-mudell tal-Kodici ta` Procedura Penali Taljan vigenti, cioè meta jkun hemm dawk li f`dak il-kodici jissejhu "altre gravi ragioni di convenienza".[1]

"Konvenjenza" hawnhekk ghandha s-sinjifikat ta` "conviene" (bit-Taljan), cioè li hekk ghandu jsir, hekk huwa xieraq li jsir, u tirreferi ghal dawk ir-ragunijiet jew cirkostanzi eccezzjonali, oggettivament riskontrabbli, li ghalkemm ma jissemmewx espressament f`xi kap tal-Artikolu 734 tal-Kap. 12, ikunu guridikament rilevanti peress li oggettivament joholqu suspett fondat dwar l-imparzjalità tal-gudikant, cioè suspett li jeghleb il-presunzjoni qawwija li gudikant huwa dejjem kapaci li joghla `l fuq, u jiddistakka ruhu, minn dawk is-simpatiji jew antipatiji normali li persuna jista` jkollha ghal persuna jew persuni ohra jew ghall-meritu tal-vertenza bejn iz-zewg partijiet. (*Ara is-sentenza fl-ismijiet John Mary Chircop vs. Il-Kummissarju tal-Pulizija et u s-sentenza tal-Qorti Kriminali tat-2 ta` Ottubru 2000 fl-ismijiet Ir-Repubblika ta` Malta vs. Meinrad Calleja).* (*Dan stabbilit f`Dragon Forge Limited (C32308) vs. Malta Industrial Parks Limited, provvediment moghti mill-Onor. L. Mintoff, 5 ta` Ottubru 2015).*

Illi l-union esponenti umilment tissottometti li c-cirkostanzi odjerni huma tali li huwa soddisfatt it-test oggettiv u li kieku l-kaz kellu jkompli jinstema` minn din l-Onorabbli Qorti kif presjeduta, ma tkunx qed tidher li qed issir gustizzja u ma jkunx jidher li l-union esponenti tkun qed tigi ggudikata minn qorti indipendenti u imparzjali;

Illi filwaqt li l-esponenti m`ghandhom ebda raguni jiddubitaw mill-integrità tal-gudikant sedenti, fid-dawl tal-bosta konnessjonijiet familjari taghha ma` membri tad-ditta legali Fenech & Fenech li qed tippatrocina lill-atturi, il-union esponenti u l-pubbliku in generali li se jkun qed isegwi

dan il-kaz li nghata xejra politika, ma jistghux ikollhom is-serenità ta` process gudizzjarju indipendenti u imparzjali, u huwa ghalhekk fl-ahjar interess tal-gustizzja li ma tkunx il-gudikant sedenti li tisma` u tiddeciedi l-kaz odjern;

Illi fis-seduta tat-3 ta` April 2017, l-avukati difensuri kollha prezenti qablu "li Dr Edward Debono huwa Senior Partner ta` Fenech & Fenech, Dr Kenneth Grima huwa Senior Partner ta` Fenech & Fenech u Rowena Grima hija mpjegata ta` Fenech & Fenech Advocates. Dr Daniel Buttigieg u l-PL Katrina Zammit Cuomo huma mpjegati ta` Fenech & Fenech Advocates. Dr Kenneth Grima u Rowena Grima huma ahwa tal-Imhallef Sedenti." In vista ta` dan il-verbal il-kontendenti ddikjaraw li m`ghandhomx aktar provi x`jipproduci fuq ir-rikors ghar-rikuza.

Illi b`digriet tal-10 ta` April 2017, l-Onorabbli Prim`Awla tal-Qorti Civili cahdet it-talba ghar-rikuza u ordnat il-prosegwiment tal-kawza;

Illi l-esponenti thoss li tali decizjoni hija leziva tal-jeddijiet taghha kif sanciti bl-Art. 39 tal-Kostituzzjoni ta` Malta u bl-Art. 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali;

Illi tali lezjoni hija dovuta ghall-fatt li l-Imhallef sedenti fil-kawza suriferita ghandha parentela diretta ma` persuni li huma fil-qalba tat-tmexxija tad-ditta "Fenech & Fenech" li taghha huma socji l-avukati patrocinanti l-atturi fl-istess kawza, u tali socji stess jistghu jibbenefikaw direttament mill-ezitu tad-decizjoni li ghad trid tinghata mill-Imhallef sedenti. Ghalhekk tali parentela tqanqal ragunijiet li oggettivament jiggustifikaw il-biza` ta` parzjalità. Kif se jirrizulta fis-smiegh tal-kawza odjerna, din il-biza` hija msejjsa fuq konsiderazzjonijiet oggettivi li ghal persuna ragonevoli u minghajr pregudizzji taghha tasal biex hi wkoll ikollha dubji dwar l-imparzjalità tal-gudikant;

Ghaldaqstant, in vista tas-suespost, ir-rikorrenti titlob bir-rispett illi din l-Onorabbli Qorti joghgobha :

1. Tiddikjara li hemm jew jista` jkun hemm ksur tad-drittijiet fundamentali ta` smigh xieraq a bazi tal-Art. 39 tal-Kostituzzjoni ta` Malta u l-Art. 6 tal-Konvenzjoni dwar Drittijiet Fundamentali tal-Bniedem (kif inkorporata fil-ligi taghna a tenur tal-Kap. 319 tal-Ligijiet ta` Malta) in vista tan-nuqqas ta` imparzjalità oggettiva tal-gudikant lmhallef Onorevoli Jacqueline Padovani Grima fil-kawza fl-ismijiet "Onorevoli Kap

tal-Oppozizzjoni Dr Simon Busuttil et vs Josef Bugeja noe et" (Rik. Gur. Nru: 109/2017 JPG).

2. Konsegwentement tordna r-rikuza tal-Imhallef Onorevoli Jacqueline Padovani Grima fil-kawza imsemmija.

3. Taghti dawk l-ordnijiet u r-rimedji li jidhrilha xierqa u opportuni fic-cirkostanzi.

Rat ir-risposta li pprezenta l-intimat Avukat Generali fis-6 ta` Gunju 2017 li taqra hekk :–

Illi l-lanjanza tal-Unjoni rikorrenti hija ta` allegazzjoni ta` vjolazzjoni tal-Artikolu 39 tal-Kostituzzjoni ta` Malta u tal-Artikolu 6 tal-Konvenzjoni Ewropeja u dan allegatament stante "Illi tali lezjoni hija dovuta ghall-fatt li l-Imhallef sedenti fil-kwaza suriferita ghandha parentela diretta ma` persuni li huma fil-qalba tat-tmexxija tad-ditta `Fenech & Fenech` li taghha huma socji l-avukati partrocinati l-atturi fl-istess kawza, u tali socji stess jistghu jibbenefikaw direttament mill-ezitu tad-decizjoni li ghad trid tinghata mill-Imhallef sedenti. Ghalhekk tali parentela tqanqal ragunijiet li oggettivament jiggustifikaw il-biza ta` parzjalita`. Kif se jirrizulta fis-smiegh tal-kawza odjerna, din il-biza` hija msejjsa fuq konsiderazzjonijiet oggetttivi li ghal persuna ragonevoli u minghajr pregudizzji taghha tasal biex hi ukoll ikollha dubji dwar l-imparzjalita` tal-gudikant".

Illi l-esponenti jikkontesta l-allegazzjonijiet u l-pretensjonijiet tal-Unjoni rikorrenti stante li huma nfondati fil-fatt fid-dritt ghar-ragunijiet segwenti :

1. Illi in linea preliminari, l-esponenti jemmen li l-azzjoni tal-Unjoni rikorrenti hija ghal kollox intempestiva. Dan ghaliex kif tajjeb intqal mill-Qorti Kostituzzjonali fis-sentenza Darren Aquilina vs Onorevoli Prim Ministru et deciza fil-31 ta` Mejju 2013, ladarba f`dan il-kaz il-process li minnu qed tilmenta l-Unjoni rikorrenti ghadu mhuwiex mitmum, l-Unjoni rikorrenti ma tistax tallega li ser tigi zvantagjata waqt is-smigh tal-kawza taghha. Jigi b`hekk, li f`dan l-istadju tal-proceduri mhuwiex indikattiv li l-ilment tal-Unjoni rikorrenti jigi diskuss u trattat in vacuo u b`hekk din l-Onorabbli Qorti hija marbuta biex ma tezercitax is-setghat kostituzzjonali u konvenzjonali taghha. Illi f`dan il-kuntest huwa stabbilit anke f`gurisprudenza konsistenti, li biex tinsab lenzjoni tas-smigh xieraq kif imhares taht l-artikolu 6 tal-Konvenzjoni Ewropea u tal-artikolu

39 tal-Kostituzzjoni ta` Malta, huwa mehtieg li l-process gudizzjarju jigi ezaminat fil-kumpless kollu tieghu. Allura l-ilment ta` nuqqas ta` smigh xieraq imqanqal mill-Unjoni rikorrenti jista` jigi biss ezaminat ladarba l-kwaza tigi konkluza ;

2. Illi fil-mertu, in kwantu ghal dak li jirrigwarda l-artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropeja, l-esponenti jibda biex jissottometti l-artikolu 39 (1) u (2) tal-Kostituzzjoni ta` Malta jipprovdi li sabiex jigi garantit id-dritt ghal smigh xieraq, is-smiegh ghadu jsir fi zmien ragjonevoli, ui jinstemgha minn Qorti indpendenti u imparzjali mwaqqfa b`ligi. L-artikolu 6 (1) tal-Kap. 319 tal-Ligijiet ta` Malta jmur oltre meta jipprovdi li s-smiegh ghandu jkun pubbliku u ghandu jkun quddiem tribunal indipendenti u imparzjali mwaqqaf b`ligi.

Illi jezistu salvagwardji bizzejed fid-dritt procedurali nostrali sabiex jovvjaw ghal kull periklu ta` ntralc ta` smigh xieraq liema salvagwardji jigaratixxu process xieraq u smiegh gjust ;

3. Illi l-Unjoni r-rikorrenti qieghda targumenta li fil-kaz odjern kien jimmerita li l-Artikolu 734 tal-Kap. 12 jigi interpretat b`mod mhux daqstant strett u dan stante li skont l-Unjoni rikorrenti jista` jkun hemm cirkostanzi eccezzjonali li ghalkemm ma jissemmewx espressament fl-Artikolu 734 tal-Kap. 12 madankollu jkunu jikkostitwixxu bazi ta` rikuza. L-esponenti jissottometti li certament li la l-Artikolu 39 tal-Kostituzzjoni u lanqas l-Artikolu 6 tal-Konvenzjoni ma jigarantixxu li ligijiet procedurali fin-natura taghhom huma ta` ordni pubbliku jigu interpretati b`mod elasticcizzat kif qieghdha tipretendi l-Unjoni rikorrenti. Dawn l-artikoli ma jipprovdu l-ebda garanzija dwar mertu ta` decizjonijiet fis-sens li decizjoni tkun interpretazzjoni gjusta jew le ta` ligi partikolari.

Illi kemm il-Qrati nostrana u kemm il-Qorti Ewropeja dejjem osservaw li l-fatt fih innifsu li ligi procedurali timponi certu restrizzjonijiet (bhal termini perentorji, hlas ta` registru) b`daqshekk ma jfissirx li jkun b`xi mod vjolat id-dritt ghal smigh xieraq tal-individwu.

4. Illi l-Unjoni rikorrenti qieghdha tallega wkoll li l-gudikant li qed tisma` l-proceduri ordinarji civili fl-ismijiet "Onorevoli Kap tal-Oppozizzjoni Dr Simon Busuttil et vs Joseph Bugeja noe et" (rikors guramentat numru 109/2017JPG) mhijiex oggettivament imparzjali. L-esponenti jirribatti li l-kuncett ta` imparzjalita` suggettiva u/jew oggettiva ta` gudikant ma tiddependix fuq l-opinjoni ta` parti f`kawza: certament li tali opinjoni mhijiex decisiva izda dak li jrid jintwera huwa li d-dubju fuq l-imparzjalita` tkun gustifikata b`mod oggettiv. Dan ifisser li huwa necessarju li jkun hemm dubju legittimu dwar l-imparzjalita` suggettiva

u/jew oggettiva ta` gudikant naxxenti minn fatti u dan peress li l-gudikant huwa dejjem prezunt li huwa imparzjali.

Illi dak li qed jigi allegat fir-rikors promotur huwa li l-Imhallef li qieghdha tippresjedi fil-proceduri civili tigi oht avukat u prokuratur legali kif ukoll parentata ma` avukat iehor fl-istess ufficju legali mal-avukati u l-prokuratur legali li qeghdin jippattrocinaw lill-atturi fil-kawza civili ordinarja. L-esponenti jirrileva li dan il-fatt bl-ebda mod ma jista` jigi nterpretat li b`xi mod ghandu jwassal ghall-imparzjalita` tal-gudikant. Kien ikun differenti li kieku kienu hut l-Imhallef sedenti li jkunu qieghdin jippatrocinaw lil xi parti f`kawza li tkun qiedghha tinstema` u tigi deciza quddiem l-Imhallef li tkun huwhom jew ohthom. Illi gialadarba persuna tigi mahtura bhala gudikant dik il-persuna hija prezunta li hija imaprzjali u li bhala gudikant hija munita bil-garanziji kollha mehtiega sabiex tassigura s-smigh xieraq.

5. Illi certament li l-ebda dritt garantit mill-artikolu 6 tal-Konvenzjoni Ewropeja jew mill-artikolu 39 tal-Kostituzzjoni ma huma mittiefsa bic-cahda tat-talba ghar-rikuza tal-Imhallef sedenti. Illi dak li rrrizulta fl-istadju li waslu fihom l-proceduri civili huwa li l-istandards ta` gustizzja li huma vitali ghall-esistenza ta` rule of law gew milhuqa. Illi jidher evidenti li l-partijiet kollha fil-kawza qed jinghataw drittijiet ugwali procedurali. Illi mill-atti tal-kawza civili jidher evidenti li l-Unjoni rikorrenti nghatat l-opportunita` li taghmel l-oggezzjonijiet u ta-talbiet li hasset li kellha taghmel kif jirrizulta kemm mir-rikors ipprezentat minnha fejn talbet ir-rikuza tal-Imhallef li qieghdha tisma` l-kawza civili kif ukoll fit-trattazjoni li ghamlet l-istess Unjoni rikrrenti fuq dan il-punt. Illi l-Imhallef sedenti semghet tali oggezzjoni u tat il-pronunzjament motivat taghha u dan kif inhu rikjest mil-kariga ta` gudikant.

Illi jidher ghalhekk li d-dritt ta` smigh xieraq qed jigi rispettat mill-Magistrat sedenti u dan in konformita` ma` dak li huwa rikjest mill-artikolu 6 tal-Konvenzjoni Ewropeja u mill-artikolu 39 tal-Kostituzzjoni;

Salv eccezzjonijiet ulterjuri.

Bl-ispejjez.

Rat ir-risposta li pprezentat l-intimata Automated Revenue Management Services Limited (C46054) fit-12 ta` Gunju 2017 li taqra hekk :-

Illi permezz taghha tindika li qieghda tirrimetti ruhha ghad-decizjoni ta` din l-Onorabbli Qorti.

Rat ir-risposta li pprezentat l-intimata Sciacca Grill Ltd [C-50533] ipprezentata fis-16 ta` Gunju 2017 li taqra: ;

1. Illi preliminarjament jigi rilevat illi s-socjeta` intimata Sciacca Grill Ltd [C-50533] mhijiex il-legittimu kontradittur u ghalhekk ghandha tigi liberata mill-osservanza tal-gudizzju bl-ispjejjez kontra l-Unjoni rikorrenti. Illi f`dan il-kaz l-Unjoni rikorrenti bl-ebda mod ma hu qed jattribbwixxi l-allegat ksur tad-dritt ghal smigh xieraq, ghal xi nuqqas minn naha tas-socjeta` intimata u ghal dan l-allegat nuqqas zgur li ma jistghax iwiegeb jew jigi tenut responsabbli l-esponenti.

2. Illi fil-mertu, u strettament minghajr pregudizzju ghas-suespost, jigi rilevat illi s-socjeta` intimata qeghda tirrimetti ruhha ghad-decizjoni moghtija minn din l-Onorabbli Qorti.

Salv eccezzjonijiet ulterjuri jekk ikun il-kaz.

Bl-ispejjez kollha kontra l-istess union rikorrenti.

Semghet ix-xiehda tal-Av. Dr. Ann Fenech fl-udjenza tal-4 ta` Lulju 2017.

Rat il-provi l-ohra li tressqu fil-kors tal-kawza, inkluzi tal-atti kollha tal-kawza fl-ismijiet *"Onor. Dr Simon Busuttil et vs Josef Bugeja noe et" (Rik. Gur. Nru. 109/17 JPG).*

Rat illi l-kawza thalliet ghas-sentenza ghal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet li pprezentat il-union rikorrenti u l-intimat Avukat Generali.

Rat l-atti l-ohra tal-kawza.

II. <u>Provi</u>

Il-Qorti hadet konjizzjoni tal-provi illi jirrizultaw mill-atti tal-kawza fl-ismijiet "*Onor. Dr Simon Busuttil et vs Josef Bugeja noe et*" *(Rik. Gur. Nru. 109/17 JPG).*

<u>Av. Dr. Ann Fenech</u> xehdet illi d-ditta ta` avukati Fenech & Fenech hija *a civil partnership.* Hija tokkupa l-kariga ta` *managing partner* u ilha hekk sa mill-2008.

Xehdet illi l-partners kienu l-Avukati : Dr Mark Fenech, Dr Kenneth Grima, Dr Edward De Bono, Dr Joseph Ghio, Dr Antonio Ghio, Dr Josianne Brimmer, Dr Monica Galea, Dr Alison Vassallo u Dr Paul Gonzi.

Xehdet illi d-ditta timpjega ghadd ta` persuni, fosthom il-P.L. Rowena Grima.

Kompliet tixhed illi l-P.L. Rowena Grima, l-Av. Dr. Kenneth Grima u l-Onor. Imhallef Jacqueline Padovani Grima huma ahwa.

Spjegat li hija personalment m`ghandha l-ebda relazzjoni tad-demm jew taz-zwieg mal-Onor. Imhallef Jacqueline Padovani Grima.

Stqarret illi l-mara ta` Dr Kenneth Grima tigi l-kugina tar-ragel taghha.

Kompliet tixhed illi d-dhul mill-*partnership* jidhol go fond komuni. Minnu jitnaqqsu l-ispejjez. Li jibqa` jinqasam bejn il-*partners,* bi ftit eccezzjonijiet.

Fissret illi meta persuna tkun *partner* jew impjegat tad-ditta, dik il-persuna taghmel xoghol legali biss in konnessjoni mad-ditta Fenech & Fenech.

Kull klijent li jidhol fid-ditta Fenech & Fenech ikun klijent ta` d-ditta u mhux tal-*partner* individwali jew tal-impjegat li jipprestalu s-servizz.

Fil-**kontroezami** Dr Fenech xehdet illi parti mix-xoghol ta` d-ditta huwa litigazzjoni. Id-ditta jkollha kawzi quddiem il-qrati presjeduti minn diversi gudikanti.

Qalet illi safejn taf hi, id-ditta taghhom qatt ma kellha kawzi fejn intalbet ir-rikuza ta` l-Imhallef minhabba parentela ma` *partners* ta` d-ditta.

Spjegat li hija gieli kellha kawzi quddiem l-Imhallef Jacqueline Padovani Grima li kienu decizi kontra l-assistit taghha.

III. Il-kwistjoni

Il-kwistjoni tirrigwarda talba li qeghda ssir lil din il-Qorti sabiex tiddikjara li hemm jew jista` jkun hemm ksur tad-drittijiet fundamentali ta` smigh xieraq tar-rikorrenti a bazi tal-Art. 39 tal-Kostituzzjoni ta` Malta ("**il-Kostituzzjoni**") u ta` l-Art. 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali ("**il-Konvenzjoni**") minhabba nuqqas ta` imparzjalità oggettiva tal-lmhallef Onorevoli Jacqueline Padovani Grima li qeghda tisma` l-kawza fl-ismijiet "**Onorevoli Kap tal-Oppozizzjoni Dr Simon Busuttil et vs Josef Bugeja noe et**" (Rik. Gur. Nru : 109/2017 JPG). Ghalhekk saret talba sabiex din il-Qorti tordna r-rikuza tal-istess Onorevoli Imhallef fil-kawza imsemmija.

IV. L-ewwel (1) eccezzjoni tal-Avukat Generali

Fl-ewwel eccezzjoni, l-Avukat Generali jeccepixxi l-intempestiva tal-azzjoni peress li sabiex tinsab lezjoni tad-dritt ghal smigh xieraq, huwa mehtieg li l-process gudizzjarju jigi ezaminat fil-kumpless kollu tieghu.

Ghalkemm jirrizulta li l-procediment li dwaru l-union rikorrenti qeghda tilmenta ghadu mhuwiex mitmum, il-Qrati taghna diga` ppronunzjaw ruhhom dwar l-eccezzjoni tal-intempestivita`. Inghad mill-Qrati taghna illi ghalkemm huwa minnu li t-tutela tad-dritt ta` smigh xieraq tista` tigi evalwata in relazzjoni ghall-proceduri kollha u ghalhekk ikun prematur li wiehed jiddeciedi fi stadju bikri tal-process, meta diga` jkun hemm ragunijiet bizzejjed li fuqhom il-Qorti tkun tista` ssib li hemm lezjoni, hija m`ghandhiex toqghod tistenna sakemm jintemm il-kaz kollu jew tistenna li attwalment miksur id-dritt pretiz biex tiddeciedi jekk

hemmx lezjoni jew le. Dan ghaliex jista` jaghti l-kaz li jkun tard wisq jew li l-persuna tibqa` minghajr rimedju.

Fis-sentenza li tat fil-25 ta` Marzu 2011 fil-kawza fl-ismijiet **David sive David Norbert Schembri vs Avukat Generali**, il-Qorti Kostituzzjonali ghamlet referenza ghal dak li qalet l-Ewwel Qoorti meta din sostniet illi :-

> *"kellha tqis il-process kollu, u mhux episodju wiehed mehud wahdu. Ghalkemm dwar id-decizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza ma hemmx rimedju ordinarju iehor, ghax dik id-decizjoni hija finali, dwar id-decizjoni fuq l-akkuza nfisha il-process ordinarju ghadu ghaddej, u ghalhekk ir-rikorrent ghadu jista` jinqeda bir-rimedji li taghtih il-ligi ordinarja. Dan huwa relevanti ghax il-jedd imhares taht l-Artikolu 6 huwa dwar id-decizjoni fuq l-akkuza kriminali, u mhux dwar iddecizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza. Fil-kaz tal-lum id-decizjoni illi l-kawza kriminali kontra r-rikorrent ghandha titmexxa `l quddiem, fiha nfisha u wehedha, ma tolqot ebda jedd fondamentali mhares taht l-artikolu tal-Konvenzjoni li fuqu qieghed jistrieh ir-rikorrent".*

Il-Qorti Kostituzzjonali osservat illi l-appellant ma kienx qabel mal-Ewwel Qorti dwar il-kwistjoni illi kellu jitqies il-process kollu u mhux episodju wiehed. L-appellant ghamel l-argument illi :-

> *" … l-ghoti ta` rimedju jista` jigi anticipat jekk ikun se jinkiser dritt. Fis-sentenza tal-Qorti ta` Strasbourg fil-kaz fl-ismijiet Imbroscia v. Switzerland jinghad li :*
>
> *`The manner in which article 6(1) and 3(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. 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.`*

Kif tikteb Karen Reid fil-ktieb "A Practitioner`s Guide to the European Convention on Human Rights", 3 rd 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".

Minkejja dan l-argument, il-Qorti Kostituzzjonali kkonfermat dak li kien deciz mill-Ewwel Qorti u cahdet dak l-aggravju.

Fid-decizjoni li tat fit-22 ta` Frar 2013 dwar Referenza li kienet saret mill-Qorti Kriminali fil-kawza : **Repubblika ta` Malta vs Carmel Camilleri** : il-Qorti Kostituzzjonali osservat illi mhuwiex necessarjament il-kaz illi l-Ewwel Qorti kellha tistenna sakemm jintemm il-process kriminali qabel ma tqis ilment dwar ksur tal-jedd ghal smigh xieraq sabiex dak il-jedd jigi *"evalwat fir-rigward tat-totalità tal-procedura"*, kif irid l-Avukat Generali.

Inghad illi :-:

"Tassew illi l-gurisprudenza generalment hija kif ighid l-Avukat Generali. Ukoll fil-kaz ta` Imbrioscia v. l-Isvizzera (Q.E.D.B. 24 ta` Novembru 1993, rikors 13972/88.4), li wkoll kien dwar id-dritt ghall-ghajnuna ta` avukat waqt l-interrogazzjoni, il-Qorti Ewropeja qalet illi kellha taghmel "a scrutiny of the proceedings as a whole" . Dan huwa principju generali li japplika ghall-jedd ghal smigh xieraq u ma jidhirx li hemm xi raguni ghala filkuntest tal-jedd ghall-ghajnuna ta` avukat ghandu jkun differenti.

Madankollu, kif qalet din il-qorti fil-kaz ta` Il-Pulizija v. Alvin Privitera (Q. Kost. 11 ta` April 2011) , jista` jigri illi episodju wiehed ikun determinanti ghall-ezitu tal-process kollu u ghalhekk ma jkunx il-kaz illi l-qorti tistenna sakemm jintemm il-kaz. Dan jista` facilment jigri fil-kaz ta` ammissjoni ta` htija. Huwa minnu illi, jekk ikollha raguni ghax tahseb illi

dik lammissjoni ma jkollhiex mis-sewwa, il-qorti tista` ma toqghodx fuqha. Ma jistax ma jinghadx, izda, illi stqarrija ta` htija aktar iva milli le tkun determinanti.

Din il-qorti ghalhekk ma tarax illi hemm ragunijiet bizzejjed biex tiddisturba din il-konkluzjoni li waslet ghaliha l-Ewwel Qorti, u li wasslitha biex taghti decizjoni qabel ma jkun intemm il-process penali.

Barra minn hekk, dan il-kaz inbeda b`referenza mill-Qorti Kriminali, li waqqfet is-smigh quddiemha sakemm ikollha t-twegiba ghal dik ir-referenza. Ma setghetx ghalhekk l-Ewwel Qorti ma twegibx ghar-referenza billi tistenna sakemm jinghalaq il-process kriminali.

Safejn irid illi l-qorti tqis it-"totalità tal-procedura" qabel ma twiegeb ghar-referenza, l-aggravju huwa ghalhekk michud."

Fid-decizjoni li tat fis-26 ta` April 2013 fir-Referenza li kienet saret mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fil-kawza fl-ismijiet **Il-Pulizija vs Dr Melvyn Mifsud**, il-Qorti Kostituzzjonali osservat illi hija l-gurisprudenza kostanti taghha u tal-ECHR illi l-ezami dwar ikunx hemm vjolazzjoni tad-dritt ghal smiegh xieraq irid isir billi jittiehed qies tal-procedimenti kollha fl-assjem taghhom u li ghalhekk dan l-ezercizzju, fil-principju, huwa ndikat li jsir biss fi tmiem il-procedimenti u mhux qabel.

Il-Qorti rrilevat hekk :-

"Dan hu ugwalment applikabbli meta din il-Qorti jkollha tikkunsidra jekk x`aktarx tkunx ser issehh tali vjolazzjoni. Huwa minnu li kemm din il-Qorti kif ukoll l-organi ta` Strasburgu kkoncedew li in linea eccezzjonali xi fattur partikolari tal-proceduri jista` jkun tant determinanti ghad-dritt ghal smigh xieraq li ma jkunx mehtieg li l-Qorti tistenna sa tmiem il-proceduri sabiex tiddeciedi jkunx hemm vjolazzjoni tad-dritt in kwistjoni (Ara inter alia Repubblika ta` Malta v. Carmel Camilleri, ibid) izda dan ma hux il-kaz li ghandha l-Qorti quddiemha llum.

Fil-kaz tal-lum anki kieku kien minnu li naqsu xi notamenti bil-miktub li kienu xi darba jifformaw parti mill-atti - haga li, kif inghad, ma tirrizultax pruvata f`dawn il-proceduri mill-appellant fil-grad li trid il-ligi - il-Qorti ta` kompetenza kriminali tkun ghad trid tevalwa r-relevanza ta` dik il-kitba allegatament nieqsa tenut kont tal-fatt li l-appellant jallega li jehtieg dik il-prova sabiex isostni l-eccezzjoni tieghu tal-preskrizzjoni filwaqt li l-prosekuzzjoni ssostni li r-reat li bih huwa akkuzat l-appellant huwa wiehed ta` natura permanenti u li bhala konsegwenza jgib mieghu il-fatt li t-terminu preskrittiv anqas biss jibda jiddekorri sakemm jibqa` jissusisti l-fatt projbit mil-ligi u cioe` fil-kaz de quo n-nuqqas tal-pagament tal-ammonti allegatament dovuti lill-avukat Dr. Carmelo Grima; il-Qorti riferenti jista` jehtigilha tipprovdi jekk ghandhiex tammetti xi prova sekondarja in sostituzzjoni ta` xi prova primarja u tkun ghad trid tiddetermina jekk il-prosekuzzjoni intentax l-azzjoni penali fiz-zmien previst mil-ligi u jekk tkunx ippruvat il-htija talakkuzat sal-grad previst mil-ligi penali u cioe` oltre ddubbju ragjonevoli; u eventwalment, fid-dawl ta` dan kollu, tkun trid tiddeciedi dwar il-htija o meno tal-appellant.

Ikunx hemm vjolazzjoni tad-dritt ghal smigh xieraq, ghalhekk, jiddependi minn kif il-Qorti riferenti tittratta u tiddisponi mid-diversi kwistjonijiet u tappi processwali appena elenkati, fost ohrajn, li jistghu jitqieghdu quddiemha fil-kors tal-process u ghalhekk certament il-fatt wahdu previst mill-appellant sabiex fuqu jsostni t-talba tieghu ghal riferenza lil din il-Qorti ma hux wahdu determinanti tal-kwistjoni minnu sollevata li ghalhekk hi ghal kollox intempestiva u prematura u daqstant intempestiva u prematura hi r-referenza tal-Qorti referenti."

Fid-decizjoni li tat fis-16 ta` Marzu 2011 fil-kawza **<u>Morgan Ehi Egbomon vs Avukat Generali</u>** il-Qorti Kostituzzjonali accettat dak li kienet qalet l-Ewwel Qorti illi sabiex il-qorti tkun tista` tiddeciedi dwar allegazzjoni ta` nuqqas ta` smigh xieraq hemm bzonn illi jsir apprezzament tal-process kriminali kollu. Ladarba f`dak il-kaz il-process

kriminali kien ghadu mhux mismugh u mitmum, kien ghadu mhux maghruf kif u taht liema cirkostanzi jistghu joperaw ir-regoli illi l-appellant qieghed jilmenta dwarhom. Inghad :

> *"Ghalhekk, sewwa qalet l-ewwel qorti illi, qabel ma jkun sar u ntemm il-process penali, ikun prematur illi jsir minn din il-qorti l-ezercizzju li jrid l-Appellant, kemm ghax l-Appellant ghad ghandu ghad-dispozizzjoni tieghu r-rimedji u l-mezzi ta` harsien kollha li jaghtih il-process penali – u ghalhekk ghad ghandu rimedji taht il-ligi ordinarja – u kif ukoll ghax din il-qorti ghadha ma tistax tqis il-process penali kollu kemm hu – ghax ghadu ma sarx – biex tkun tista` tghid kienx hemm ksur tal-jeddijiet fondamentali, mhux f`episodju izolat, izda fil-kuntest tal-process meqjus kollu kemm hu u bl-applikazzjoni in concreto tad-dispozizzjoniiet tal-ligi attakkati."*

Fil-Pag 140-141 tal-ktieb : **<u>A Commentary on the Constitution of Malta</u>** : Dr Tonio Borg ighid hekk :-

> *The trial or proceedngs had to be seen as a whole and one incident or irregularity does not necessarily vitiate the entire proceedings. (See Anthony Zarb et vs Minister for Justice (CC) (16 October 2002) (729/99): "For the question to be decided whether a fair hearing took place or not, according to the previously mentioned articles of the Constitution, one cannot and should not simply focus one`s attention on a part only of the proceedings before a court and if one finds any shortcoming, whatever it may be, one comes to the inexorable conclusion that the entire proceedings are therefore vitiated. On the other hand, for one to arrive at the conclusion whether there was a breach of the fundamental right of a fair hearing, it is necessary that the entire iter of the judicial proceedings be analysed. The assessment has to be based on the entirety of all the elements which form the judicial proceedings since it is only through such a comprehensive assessment that one can reasonably decide whether there was any violation of the said fundamental right" (see also Dr L Pullicino vs Prime Minister et (CC) (18 August 1998)*

(kollezzjoni Vol LXXII.1.159) where though some irregularities in the jury trial had occurred, the trial as a whole had been fair; see also Josephine Calleja vs Attorney General et (465/94) and Gregorio Scicluna vs Attorney General et (463/94) (both decided by the (CC) on 15 October 2003). See also Victor Lanzon et noe vs Commissioner of Police (CC) (29 November 2004) (15/02) where the interview by Police of a minor in absence of lawyer was not by itself deemed to be in breach of Article 6. See also Police vs Carmelo Ellul Sullivan et (CC) (25 September 2015) (29/10) where the fact that a new magistrate had been appointed who had not heard the witnesses viva voce was not per se considered to be in breach of Article 6 because the trial had not yet been concluded, and the defence would have the right to cross-examine the witnesses before the new magistrate, and the trial had to be seen as a whole; and George Pace v Attorney General et (CC) (31 October 2014) (56/11): "The right to a fair hearing is granted so that after a hearing within a reasonable time, a person who is innocent is not given a guilty verdict, and such person is given all the necessary means for such purpose; and also so that guilty persons do not evade the consequences of their actions."

(ara wkoll : **<u>Malcolm Said vs Avukat Generali et</u>** : 24 ta` Gunju 2016)

Fid-decizjoni li tat fis-7 ta` April 2003 fil-kawza fl-ismijiet **<u>Glenn Bedidngfield vs Kummissarju tal-Pulizija et</u>** il-Qorti Kostituzzjonali tat tifsira ghall-kliem : "*x` aktarx ser jigi miksur*" :

"Kwantu ghat-tieni aggravju, huwa veru li s-subartikolu (1) ta` l-Artikolu 4 tal-Kap. 319 jitkellem dwar allegazzjoni ta` dak li jkun li xi dritt fondamentali tieghu "x`aktarx ser jigi miksur", izda din l-espressjoni qatt ma giet interpretata, sia fil-kuntest ta` l-imsemmi Artikolu 4 u sia fil-kuntest taddisposizzjoni analoga fil-Kostituzzjoni, li l-Prim Awla (fil-gurisdizzjoni kostituzzjonali taghha) jew din il-Qorti ghandhom jiddeciedu kwistjonijiet jew fl-

astratt jew flipotesi li tavvera ruhha xi kontingenza partikolari. Biex wiehed jista` jallega li "x`aktarx ser jigi miksur" xi dritt fondamentali il-fatti jridu jkunu tali li jistghu jwasslu ragjonevolment ghal stat ta` fatt determinat, liema stat ta` fatt ikun jikkozza ma xi wiehed jew aktar mid-drittijiet fondamentali tal-bniedem."

(ara wkoll : QK : 30 ta` Mejju 2003 : **Joseph Hili maghruf bhala Nadia Hili vs Avukat Generali et)**

Fid-decizjoni li tat fit-12 ta` Frar 2016 fil-kawza fl-ismijiet **General Workers` Union vs L-Avukat Generali**, il-Qorti Kostituzzjonali spjegat illi :

"Dwar jekk l-azzjoni hijiex intempestiva l-Avukat Generali jilmenta li l-ewwel Qorti kienet zbaljata meta ma ikkonsidratx li f`kuntest ta` allegata lezjoni tad-dritt ghal smigh xieraq l-azzjoni ttentata mill-union hija wahda intempestiva peress li l-proceduri li minnhom qed tilmenta l-istess Union (GWU v. l-Enemalta Corporation – fuq tilwima tax-xoghol dwar allegazzjoni ta` ksur ta` ftehim li kien iffirmat bejn il-partijiet fis-sena 2002 fir-rigward ta` Stephen Leonardi, membru tal-union,) ghadhom pendenti.

L-Avukat Generali jargumenta li stharrig dwar allegazzjoni ta` ksur tad-dritt tas-smigh xieraq jitlob li l-evalwazzjoni tal-procedura li minnha jkun qed isir lament titqies fit-totalita` taghha. Jghid li huwa inkoncepibbli li f`dan l-istadju ssir l-evalwazzjoni necessarja tal-garanziji kostituzzjonali u konvenzjonali peress li tali evalwazzjoni tista` ssir biss meta l-process ikun mitmum ladarba l-evalwazzjoni trid issir b`riferenza ghall-process fl-intier tieghu … Waqt illi taht il-Konvenzjoni l-Qorti Ewropea tad-Drittijiet tal-Bniedem ma ghandhiex is-setgha illi tqis allegazzjoni dwar ksur ta` drittijiet fondamentali qabel ma min iressaq l-ilment ikun inqeda bir-rimedji domestici kollha, taht il-Kostituzzjoni u taht l-Att dwar il-Konvenzjoni Ewropea il-Prim`Awla tal-Qorti Civili "tista`, jekk tqis li jkun desderabbli li hekk taghmel,

tirrifjuta li tezercita s-setghat taghha ... f`kull kaz meta tkun sodifatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli ... skont xi ligi ohra".

Huwa ghalhekk imholli fid-diskrezzjon`i tal-Prim`Awla – dejjem fil-parametri stabbiliti fil-gurisprudenza – li taghzel "li tezercita s-setghat taghha" wkoll meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju, u meta l-Prim`Awla taghzel li tinqeda bis-setghat kostituzzjonali taghha l-Qorti Kostituzzjonali bhala regola ma tiddisturbax dik l-ghazla hlief meta tkun manifestament hazina jew meta hekk ikun mehtieg biex il-proceduri kostituzzjonali ma jigux trivalizzati.

Din il-Qorti tapprezza illi jkun ta` ostakolu ghall-efficjenza tal-gustizzja u talamministrazzjoni pubblika jekk, malli titressaq kawza b`allegazzjoni li lprocess quddiem tribunal jew korp imwaqqaf b`ligi huwa bi ksur tal-jedd ghal smigh xieraq, dak it-tribunal jew korp ma jkunx jista` jibda jwettaq iddmirijiet tieghu qabel tinqata` dik il-kawza jekk il-Prim`Awla wisq facilment taghzel li tinqeda bis-setghat kostituzzjonali taghha flok tistenna li jintemmu l-proceduri quddiem dak it-tribunal jew korp biex tqis il-process fl-intier tieghu.

Madankollu, il-Qorti tifhem ukoll illi fic-cirkostanzi tal-kaz tal-lum ikun aktar xieraq illi l-aggravju dwar rimedju ordinarju ma jintlaqax, u illi l-appell jinstema` wkoll fil-meritu, partikolarment billi d-difett allegat fl-istruttura tat-Tribunal jibqa` jipperdura jkun xi jkun l-ezitu tal-proceduri quddiem it-Tribunal u wkoll ghax ma jkunx ghaqli illi jitkompla process meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali. Dan l-aggravju huwa ghalhekk michud."

Fil-kaz ta` **<u>Dimech vs Malta</u>**, li kien deciz mill-ECHR fit-2 ta` April 2015, il-Gvern Malti kien ghamel l-argument illi l-ilment kien prematur billi qal :-

The Government submitted that the applicant`s complaint was premature as the trial by jury had not yet taken place. It was thus possible that the applicant would not be found guilty, in which case he could not be considered a victim in terms of the Convention (they referred to Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicant`s complaint at this stage would not enable the Court to assess the basis of the applicant`s "conviction", which had not yet taken place. The Government further noted that the constitutional jurisdictions had not "opted" to take cognisance of the case, but simply could not decline the exercise of jurisdiction given that the applicant`s referral request had been accepted by the Criminal Court.

L-ECHR accettat it-tezi tal-Gvern Malti :-

The Court accepts the Government`s argument that the constitutional jurisdictions had no choice but to take cognisance of the case according to the functioning of the domestic system. However, the Court notes that those jurisdictions did not take cognisance of the case only to find later that the claim was inadmissible. In fact, the constitutional jurisdictions did not reject the case as being premature despite the fact that the proceedings were still pending. Nor did they reject it for non-exhaustion of ordinary remedies on the ground that the applicant had not asked for a lawyer (admittedly, as established in domestic case-law (see paragraph 31 above), there would have been little point in so doing given the inexistence of such a right in Maltese law at the time). On the contrary, the constitutional jurisdictions took cognisance of the case, opting to examine it on the merits and give judgment accordingly.

The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the

Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, X. v. Norway, Commission decision of 4 July 1978, Decisions and Reports (DR) 14, p. 228; Bricmont v. Belgium, 7 July 1989, Series A no. 158; Papadopoulos v. Greece, (dec.), no. 52848/99, 29 November 2001; Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005 and Pace v. Malta (dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia, X v. Switzerland, no. 9000/80, Commission decision of 11 March 1982, DR 28, p. 127; B v. Belgium, Commission decision of 3 October 1990, DR 66, p. 105; Cervero Carillo v. Spain, (dec.), no. 55788/00, 17 May 2001; Mitterrand v. France (dec.) no. 39344/04, 7 November 2006 and more recently, De Villepin v. France (dec.), no. 63249/09, 21 September 2010).

The Court observes 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). The same situation appears to obtain in the present case. 45. Nevertheless, unlike in the above mentioned examples, the criminal proceedings in the present case have not come to an end. Thus, despite the peculiar interpretation of the Court`s case-law by the Constitutional Court, and although it may be unlikely, it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legalassistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose.

Furthermore, even assuming that the above scenario would not come to be, the Court considers that it cannot be excluded that the applicant be eventually acquitted or that proceedings be discontinued.

The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simons v. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010).

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant`s possibility of bringing new

proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature. Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.

Fil-kaz ta` **<u>Tyrone Fenech and others vs Malta</u>** deciz fil-5 ta` Jannar 2016, l-ECHR qalet hekk :-

The Government submitted that the applicants` complaint was premature as their criminal proceedings were still pending. It was thus possible that the applicants would not be found guilty in which case they could not be considered victims in terms of the Convention (they referred to Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicants` complaint at this stage would not enable the Court to assess the basis of the applicants` "conviction", which had not yet taken place.

The applicants` observations were submitted outside the time-limit set by the Court and no explanation was submitted as to why they had remained outstanding. The President of the relevant Section, thus decided that they should not be included in the case-file for consideration by the Court.

The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, Papadopoulos v. Greece (dec.), no. 52848/99, 29 November

2001; Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005 and Pace v. Malta (dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia, Mitterrand v. France (dec.) no. 39344/04, 7 November 2006 and more recently, De Villepin v. France (dec.), no. 63249/09, 21 September 2010). In the present case the criminal proceedings concerning the applicants have not come to an end. Thus, although the constitutional jurisdictions have already decided the matter, the Court considers that it cannot be excluded that, inter alia, the applicants be eventually acquitted or that proceedings be discontinued (compare, Dimech, cited above, § 46).

The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, Dimech, cited above, § 48, Kesik v. Turkey, (dec.), no. 18376/09, 24 August 2010 and Simonsv. Belgium (dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see Bouglame v. Belgium (dec.), no. 16147/08, 2 March 2010).

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicants` possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicants are currently pending before the domestic courts, the Court finds this complaint to be premature.

Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies."

Il-principju li johrog minn din il-gurisprudenza huwa li meta l-proceduri li fil-kuntest taghhom isir l-ilment ikunu ghadhom ma ntemmewx, u ma jkunx ghadu maghruf kif se jkun zvantaggjat ir-rikorrent, il-procediment kotituzzjonali jkun intempestiv. Ilment waqt proceduri li jkunu pendenti jista` jinghata konsiderazzjoni jekk id-dritt lamentat jkun x`aktarx ser jigi vjolat u l-ksur ikun wiehed reali u imminenti.

Din il-Qorti hadet ukoll konjizzjoni ta` dak li ntqal fi kwistjoni simili ghal din tal-lum minn din il-Qorti diversament presjeduta fil-kawza ismijiet **Avukat Dr Samuel Azzopardi vs L-Avukat Generali et** deciza fl-4 ta` Lulju 2017(appell pendenti) :-

"Illi l-intimati eccipew l-intempestivita` tat-talbiet odjerni fil-kuntest tal-artikolu 6(1) tal-Konvenzjoni u tal-artikolu 39(2) tal-Kostituzzjoni billi hu pacifiku fil-gurisprudenza taghna li l-Qorti tinvestiga l-proceduri fl-assjem taghhom.

*Illi kif gie ritenut mill-Qorti Kostituzzjonali fil-kaz **Victor Lanzon et v Kummissarju tal-Pulizija** (Q. Kost. dec. fid-29 ta` Novembru 2004).*

"Huwa principju accettat kemm fil-gurisprudenza ta` Strasbourg kif ukoll f`dik ta` din il-Qorti li, biex wiehed jiddeciedi jekk kienx hemm nuqqas ta` smigh xieraq wiehed irid jara u jezamina l-procedura gudizzjarja kollha kemm hi fit-totalita` taghha. " (Ara wkoll ad.ezempju l-kaz Van Mechelen and Others v. The Netherlands, dec. 23 April 1997 – para. 50).

Illi l-Avukat Generali eccepixxa l-intempestivita` tal-proceduri odjerni permezz tal-ewwel eccezzjoni tieghu billi l-kaz pendenti quddiem il-Qorti tal-Magistrati (Ghawdex) ghadu mhuwiex deciz. Ghalhekk jghid li biex tinsab lezjoni skont l-artikoli ccitati, jehtieg li l-process gudizzjarju jigi ezaminat fil-kumpless totali tieghu. Kwindi

talab li din il-Qorti ma tezercitax is-setghat kostituzzjonali u konvenzjonali taghha. L-intempestivita` ta` din l-azzjoni hija wkoll sollevata mill-intimat Dr. Anton Refalo fir-raba` paragrafu tar-risposta tieghu.

Illi qabel xejn jigi senjalat li skont il-Kostituzzjoni kif ukoll skont il-Konvenzjoni Ewropea kif addottata fl-ordinament guridiku taghna permezz tal-Kap 319 tal-Ligijiet ta` Malta, kull persuna tista` tfittex harsien fejn id-drittijiet u l-libertajiet fondamentali tieghu/taghha mhux biss qed jigu miksura imma anke jekk x`aktarx ser jigu miksura.(art.46(1) tal-Kostituzzjoni u 4(1) tal-Kap 319 tal-Ligijiet ta` Malta).

Illi l-art.39(2) tal-Kostituzzjoni jiddisponi li "Kull qorti jew awtorità ohra gudikanti mwaqqfa b`ligi ghad-decizjoni dwar l-ezistenza jew l-estensjoni ta` drittijiet jew obbligi civili ghandha tkun indipendenti u imparzjali; u meta l-proceduri ghal decizjoni bhal dik huma mibdija minn xi persuna quddiem qorti jew awtorità ohra gudikanti bhal dik, il-kaz ghandu jigi moghti smigh xieraq gheluq zmien ragonevoli."

Ukoll fl-artikolu 6(1) tal-Konvenzjoni Ewropea "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 ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b`ligi...."

Illi izda, kontrarjament ghal dak sottomess mill-intimati, l-artikoli sucitati ma jimpedux lill-Qorti milli tinvestiga allegat ksur (attwali jew potenzjali) anke qabel ma jigu konkluzi l-proceduri pendenti quddiem il-Qorti tal-Magstrati (Ghawdex).

Illi skont l-awturi Harris, O`Boyle & Warbrick , fil-ktieb ***"Law of the European Convention on Human Rights"***

"A number of specific rights have been added to Article 6(1) through the medium of its `fair

hearing` guarantee. The first of these to be established were `equality of arms` and the right to a hearing in one`s presence. A breach of such a specific right may itself amount to a breach of the right to a `fair hearing` without any need to consider other aspects of the proceedings. As noted, in cases not involving a breach of a specific right, the Court may nonetheless find a breach of the right to a `fair hearing on a `hearing as a whole` basis".

Dan gie rikonoxxut u applikat mill-Qorti Ewropea, ad esempju, fil-kaz fl-ismijiet ***Arrigo and Vella v Malta*** *fejn gie ribadit li :*

"The Court recalls that the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, i.e. once they have been concluded. However, it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see R.D. v. Spain, no. 15921/89, Commission decision of 1 July 1991, Decisions and Reports (DR) 71, pp. 236, 243-244). The Court, noting that the criminal proceedings in question have not yet been completed, finds that the applicants` submissions do not disclose any such circumstances (see Putz v. Austria, no. 18892/91, Commission decision of 3 December 1993, DR 76-A, pp.51, 64).

…

Hekk ukoll ad ezempju fil-kaz aktar recenti fl-ismijiet ***Federation of Estate Agents v Direttur Generali(Kompetizzjoni)*** *- QK 3/05/2016, il-Qorti Kostituzzjonali sabet li kienu jezistu tali cirkostanzi. Il-fatt li kien hemm gja sentenza ta` Qorti ta` gurisdizzjoni kostituzzjonali kien ifisser li ma kienx ghaqli "illi jitkompla l-process quddiem id-Direttur meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali u dik is-sentenza ghalkemm ghadha mhix finali tkun*

thassret mhux ghal ragunijiet ta` meritu izda minhabba punt procedurali."

Il-kwistjoni li trid tindirizza din il-Qorti hija jekk fil-kaz odjern, jezistu cirkostanzi tali li jimmeritaw konsiderazzjoni minnkejja li l-proceduri kienu ghadhom kemm jitwieldu.

Ikkonsidrat li t-talba ghar-rikuza ta` gudikant ghandha issir in limine litis sakemm ir-raguni ghar-rikuza ma tkunx inqalghet wara (art. 739 tal-Kap 12 tal-Ligijiet ta` Malta).

Il-gurisprudenza tal-Qrati taghna hija mizghuda b`ezempji fejn il-Qrati kellhom jikkonsidraw ic-cahda ta` talba ghar-rikuza fi stadju bikri tal-proceduri f`sede kostituzzjonali fil-kuntest tad-dritt ghas-smigh xieraq (ara ad. ez. ***Lawrence Grech et v Avukat Generali et*** *- Q.K. 7.03.2017;* ***Vella and Arrigo v Malta*** *fuq citat;* ***L-On.Imhallef Dottor Anton Depasquale v Avukat Generali*** *- Q.K. 5.10.2001 - pendenti l-istadju tal-Appell;* ***L-Imh. Dottor Carmelo sive Lino Farrugia Sacco v L-On.Prim Ministru et*** *– QK 27/01/2014; u* ***l-E.T. Rev. Mons. Arcisqof Giuseppe Mercieca pro. et. noe v l-On. Prim Ministru noe et*** *-QK - 27.9.1984).*

Illi mhuwiex ikkontestat li ghadhom lanqas bdew jitressqu l-provi quddiem il-Qorti tal-Magistrati (Ghawdex) billi t-talba ghar-rikuza tqajmet fl-ewwel seduta fi stadju meta, addirittura, l-intimat Dr. Refalo kien lanqas gie notifikat.

Madanakollu, fil-fehma ta` din il-Qorti c-cirkostanzi partikolari tal-kaz jimmeritaw li din il-Qorti tkompli tisma` l-kaz proprju ghaliex ir-rikorrent qed jsostni li l-allegat dell politiku percepit fir-rigward tal-Magistrat sedenti jxejjen ghal kollox u aprijoristikament kull garanzija ta` imparzjalita` fis-smigh tal-kaz tieghu. L-imparzjalita` ta` gudikant huwa aspett kritiku tas-saltna tad-dritt (rule of law) u jekk tirrizulta manifest f`dan l-istadju bikri tal-proceduri, huwa evidenti li l-proceduri m`ghandhomx jitkomplu quddiem l-istess gudikant.

Huwa minnu li ma hemmx izjed rabtiet politici bejn il-gudikant u partit politiku izda r-rikorrent jitkellem dwar il-prossimita` fiz-zmien bejn il-kandidatura u l-hatra tal-gudikant, u dwar il-prossimita` fit-twemmin li tohloq, dejjem skont ir-rikorrent, ness bejn il-gudikant min-naha u wiehed mill-kontendenti, minn naha l-ohra. Dawn huma l-fatturi ewlenija li jaghtu lok ghall-parzjalita` percepita skont ir-rikorrent fil-kuntest ta` kontestazzjoni li hu jikkwalifika bhala wahda li ghandha dimensjoni essenzjalment politika.

Fid-dawl tal-premess, din il-Qorti hi tal-fehma li ghandha tichad l-eccezzjoni tal-intempestivita` billi l-kwistjoni tal-imparzjalita` tat-tribunal ghandha tigi rizolta in limine u mhux posposta, altrimenti l-proceduri kollha jinzammu that l-ombra tad-dubbju.

Ghaldaqstant tichad din l-eccezzjoni."

Din il-Qorti qieset il-gurisprudenza fl-assjem u fil-kuntest taghha u hasbet fit-tul dwar kif ghandha tkun applikata ghall-fattispeci u cirkostanzi tal-kawza tal-lum.

Tqis illi lment dwar il-jedd ta` smigh xieraq meta relatat direttament mal-imparzjalita` ta` gudikant ghandha tigi trattata u deciza *in limine litis*.

Ghal din il-Qorti, huwa essenzjali li kwistjoni ta` din ix-xorta tigi risolta u deciza mill-ewwel, u mhux il-proceduri li fil-kuntest taghhom ikun sar l-ilment jithallew jipprocedu meta jkun diga` tqajjem suspett ta` parzjalita` minn xi parti.

Il-Qorti qeghda tichad l-ewwel eccezzjoni tal-Avukat Generali, spejjez ghall-Avukat Generali.

V. <u>L-ewwel (1) eccezzjoni ta` Sciacca Grill Ltd</u>

Din l-intimata tghid illi mhijiex il-legittimu kontradittur tar-rikorrenti peress li din mhijiex qed tilmenta minn nuqqas ta` smigh xieraq fil-konfront taghha.

Fis-sentenza li tat fit-22 ta` Frar 2013 fil-kawza fl-ismijiet **Raymond Cassar Torreggiani et vs Avukat Generali et** il-Qorti Kostituzzjonali fissret min huwa l-legittimu kontradittur fi procediment ta` din ix-xorta.

Fis-sentenza taghha tas-27 ta` Settembru 2012, l-Ewwel Qorti kienet qalet hekk :-

> *"Illi l-kwestjoni ta` min huwa l-legittimu kontradittur xieraq f`azzjoni ta` ksur ta` jedd fundamentali tmur lil hinn mill-kwestjoni tal-interess guridiku tal-parti. Il-qofol tal-azzjoni ta` lment dwar ksur ta` jedd fundamentali huwa l-ghoti ta` rimedju xieraq ghal tali ksur, minbarra s-sejbien fih innifsu tal-ksur;*
>
> *"Illi l-Qorti taghraf il-fatt li l-kwestjoni dwar min ghandu jwiegeb ghall-ilment ta` ksur ta` jedd fundamentali tal-bniedem ilha zmien tkidd lil min ikun involut f`kawzi bhal dawn. Biz-zmien, tfasslu regoli ta` prattika biex jingharaf kontra min kawza bhal din imissha titressaq (Per ezempju, ara Kost. 7.12.1990 fil-kawza fl-ismijiet Abela v. Il-Prim Ministru et (Kollez. Vol: LXXIV.i.261). Il-hsieb dejjem kien li eccezzjoni bhal din m`ghandhiex isservi biex jitwal il-process tas-smigh tal-ilment fil-mertu, imma biex jigi mistharreg min tassew jista` jaghti r-rimedju f`kaz li jirrizulta li l-ilment tal-ksur tad-dritt fundamentali kien wiehed misthoqq (Kost. 6.8.2001 fil-kawza fl-ismijiet Joseph M. Vella et v. Kummissarju tal-Pulizija et). Mad-dhul fis-sehh fil-bidliet estensivi li saru fil-Kodici tal-Procedura fl-1995, u b`mod partikolari fl-artikolu dwar ir-rapprezentanza tal-Gvern fil-kawzi, jidher li tqies li l-problema tal-legittimu kuntradittur kienet b`hekk twittiet darba ghal dejjem. Dan l-izjed minhabba li l-artikolu 181B ma kien jaghmel l-ebda distinzjoni dwar l-ghamla ta` procedura gudizzjarja li ghaliha kien jirreferi.*

Mhux hekk biss, imma l-imsemmi artikolu jaghmel parti minn Titolu tal-Kodici li d-dispozizzjonijiet tieghu "jghoddu ghall-qrati kollha" (Art. 193 tal-Kap 12);

...."Illi l-Qorti tqis li l-kwestjoni ta` min ghandu jwiegeb ghal xilja ta` ksur ta` jedd fondamentali tintrabat sewwa mal-ghamla tal-ksur li jkun u wkoll mal-ghamla ta` rimedju li jista` jinghata. Ilu zmien li l-Qrati taghna gharfu din ir-rejalta` u ghalhekk sawru d-distinzjonijiet mehtiega applikabbli ghall-bicca l-kbira mill-kazijiet. Ghalhekk, illum il-gurnata jingharfu kategoriji differenti ta` persuni li jistghu jitqiesu bhala legittimi kuntradituri f`azzjonijiet kostituzzjonali. Dawn jinqasmu fi tliet kategoriji, jigifieri (a) dawk li jridu jwiegbu direttament jew indirettament ghall-ghamil li jikser id-dritt fundamentali ta` persuna, (b) dawk li jridu jaghmlu tajjeb (billi jipprovdu r-rimedju xieraq) ghan-nuqqasijiet jew l-eghmejjel li bihom haddiehor jikser xi jedd fundamentali ta` xi hadd, u (c) dawk il-partijiet kollha li jkunu f`kawza meta kwestjoni ta` xejra kostituzzjonali jew konvenzjonali tqum waqt is-smigh ta` xi kawza f`qorti (Kost. 7.12.1990 fil-kawza fl-ismijiet Abela v. Onor. Prim Ministru et (Kollez. Vol: LXXIV.i.261); u Kost. 6.8.2001 fil-kawza fl-ismijiet Joseph Mary Vella et v. Kummissarju tal-Pulizija et).

Ma` dawn, u dejjem jekk ikollhom interess fil-kawza, jistghu jiddahhlu persuni ohrajn bil-ghan li jaghmlu shih il-gudizzju u jaghmluh rapprezentattiv ta` kull interess involut fil-kwestjoni;

"Illi jekk wiehed iqis kif inhuma mfassla t-talbiet tar-rikorrenti f`din il-kawza, wiehed isib li hija l-ligi nnifisha li qieghda tkun attakkata bhala dik li biha huma qeghdin igarrbu ksur ta` jedd fundamentali taghhom. Huwa minnu li huma m`humiex qeghdin jattakkaw is-siwi nnifsu tal-ligi, izda huma qeghdin jilmintaw minn ligi li, bil-mod kif tithaddem, iggibilhom hsara fit-tgawdija ta` hwejjighom.

Minbarra dan, qeghdin jitolbu li jinghataw rimedju (kumpens) minhabba l-effetti ta` dik il-ligi;

"Illi, jekk il-kaz tar-rikorrenti jittiehed f`dan id-dawl, jigi li, filwaqt li l-azzjoni tar-rikorrenti kontra l-intimat Avukat Generali tressqet sewwa kontrih, ma jistax jinghad l-istess dwar l-intimati mizzewgin Tabone;

… "Illi, min-naha l-ohra, l-intimati mizzewgin Tabone ghandhom ragun jghidu li huma la kellhom x`jaqsmu meta ghaddiet il-ligi, la kienu huma li dahhluha fis-sehh u lanqas kienu huma l-awtorita` li ippromulgatha. Il-qaghda taghhom f`din il-kwestjoni hija biss li huma nqdew bil-jeddijiet li tathom l-imsemmija ligi u mxew maghha.

Minhabba f`hekk, la jistghu jaghtu rimedju lir-rikorrenti u wisq anqas jistghu jinstabu hatja li qeghdin jikkommettu l-ksur ilmentat. Kif inghad, ir-rikorrenti jishqu li l-intimati huwa posthom fil-kawza minhabba li, bhala l-kerrejja tal-post, ghandhom tabilfors interess qawwi fl-ezitu taghha;

"Illi, kif inghad aktar qabel, l-interess tal-intimati f`dak li jista` jsehh ma jissarrafx minnu nnifsu f`legitimazzjoni passiva tal-azzjoni tar-rikorrenti, l-aktar meta wiehed iqis it-termini partikolari ta` azzjoni ta` lment dwar ksur ta` jeddijiet fundamentali. Huwa minnu li l-intimati seta` kellhom interess li jintervjenu fil-kawza wkoll kieku ma kenux imharrkin, izda dan is-sehem taghhom fil-kawza kien ikun bhala "amicus curiae" fid-determinazzjoni tal-kwestjoni jew, fl-aqwa ipotezi, ghal ghanijiet ta` integrita` tal-gudizzju;

"Illi, madankollu, l-Qorti tqis li minn kif inhija mfassla lazzjoni tar-rikorrenti, ma jistax iwassal li l-intimati (ladarba ghazlu din il-linja ta` difiza) ghandhom ikunu huma li jwiegbu ghall-ilmenti tal-istess rikorrenti, u wisq anqas li jkunu huma li jaghtu l-kumpens mitlub. Wara kollox, jekk wiehed ihaddem il-principju li qui suo jure utitur neminem laedere videtur, wiehed

qajla jista` jara kif l-intimati Tabone, talli qeghdin jinqdew minn harsien u jedd li taghtihom ligi u fil-limiti ta` dik il-ligi, jistghu jkunu hatja ta` ksur ta` jedd ta` haddiehor (is-sid tal-post);
"Illi, fid-dawl ta` dawn il-konsiderazzjonijiet, il-Qorti ssib li ghandha tichad l-eccezzjoni safejn din tressqet mill-intimat Avukat Generali, izda tilqaghha safejn tressqet (taht iz- zewg eccezzjonijiet preliminari relativi) mill-intimati mizzewgin Tabone."

Sar appell kontra l-estromissjoni mill-kawza tal-intimati konjugi Tabone ghar-raguni li *"jekk issib it-talbiet attrici huma fondati ma tkunx tista` taghti r-rimedju effettiv ta` zgumbrament kif mitlub mit-tieni talba ghat-tgawdija tal-proprjeta` taghhom, u ghalhekk l-intimati Tabone ghandhom jibqghu in kawza."*

Fis-sentenza taghha, il-Qorti Kostituzzjonali ma kenitx tal-istess fehma bhall-Ewwel Qorti.

Qalet hekk :-

[11] Illi fl-ewwel lok jigi osservat li, kif ritenut fil-gurisprudenza lokali, biex gudizzju jkun integru jehtieg li, ghall-ahjar gudizzju tal-Qorti, jippartecipaw fih dawk kollha li huma nteressati fil-kawza. B`hekk tigi assigurata kemm jista` jkun l-effikacita` tal-gudizzju inkwantu dan jorbot biss lil dawk li jkunu partecipi fih, kif ukoll jigi rispettat il-principju tal-ekonomija tal-gudizzju sabiex ma jkunx hemm bzonn ta` ripetizzjoni ta` proceduri kontra l-persuni kollha interessati fid-diversi kawzi billi dawn ma jkunux hadu parti f`gudizzju wiehed. Il-gudizzju jibqa` integru mill-mument li jiehdu parti fih dawk li jkollhom id-dritt, u dawk li kontra taghhom dak l-istess dritt jikkompeti (App.Civ.Joseph Borg v. Francis Vassallo [2000] Vol.LXXXIV.II.42; App.C.Zahra De domenico v. Zahra Dedomenico 15.01.1992.)

[12] Fil-kaz in dizamina, ir-rikorrenti qed jitolbu li din il-Qorti tiddikjara li l-applikazzjoni fil-konfront taghhom tal-Artikolu 5 tal-Kap. 158

tal-Ligijiet ta` Malta, huwa leziv tad-dritt fundamentali taghhom ghat-tgawdija tal-proprjeta`, in kwantu dan l-Artikolu, kif emendat bl-Att XXIII tas-sena 1979, huwa ta` ostakolu legali ghalihom biex jirriprendu l-pussess tal-proprjeta` taghhom minghand l-inkwilini, l-intimati konjugi Tabone, wara li kien skada l-perjodu lokatizju ta` hames snin pattwit fl-iskrittura privata tas-7 ta` Marzu 1979. Inoltre, fir-rikors promotur ir-rikorrenti qed jitolbu li jinghataw rimedju xieraq.

[13] Mill-premess ghandu jirrizulta car li l-intimati konjugi Tabone, bhala inkwilini tal-fond de quo, u tenut kont tal-fatt li proprju l-inkwilinat taghhom jifforma l-mertu tal-kawza odjerna, ghandhom interess guridiku u ghalhekk ikunu partecipi fil-kawza li jista` jkollha effetti legali anke fuqhom.

[14] Inoltre, din il-Qorti tosserva li l-istadju li fih ghadha l-kawza, mhuwiex opportun li jigi diskuss il-punt tar-rimedju xieraq, meta ghadu ma giex deciz il-punt pre-ordinat ghall-istess, u cioe` jekk fil-fatt tezistix il-lezjoni pretiza mir-rikorrenti ghad-drittijiet fundamentali taghhom.

[15] Ghaldaqstant l-aggravju huwa gustifikat, u ser jigi milqugh.

Fil-kaz tal-lum, Sciacca Grill Ltd kienet imharrka ghal kull interess li jista` jkollha peress li t-talbiet jirrivolvu dwar talba ghal rikuza tal-Imhallef li qed tisma` l-kaz fl-ismijiet **Onorevoli Kap ta` l-Oppozizzjoni Dr Simon Busuttil et vs Josef Bugeja noe et** (Rik Gur nru 109/2017 JPG). Sciacca Grill Ltd hija parti fil-kawza, u ghalhekk bhala tali, din il-Qorti tghid illi tajjeb sar illi kienet mharrka wkoll fil-procediment tal-lum.

Ghalhekk qeghda tichad l-ewwel eccezzjoni, spejjez ghal Sciacca Grill Ltd.

VI. Il-mertu

1. Dritt

Il-parti rilevanti tal-**Art 6(1) tal-Konvenzjoni** taqra hekk :–

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.

Il-parti rilevanti l-Art 39 Kostituzzjoni huma s-subartikolu (1) u (2) li jipprovdu hekk :-

(1) Kull meta xi hadd ikun akkuzat b`reat kriminali huwa ghandu, kemm-il darba l-akkuza ma tigix irtirata, jigi moghti smigh xieraq gheluq zmien ragonevoli minn qorti indipendenti u mparzjali mwaqqfa b`ligi.

(2) Kull qorti jew awtorità ohra gudikanti mwaqqfa b`ligi ghad-decizjoni dwar l-ezistenza jew l-estensjoni ta` drittijiet jew obbligi civili ghandha tkun indipendenti u imparzjali ; u meta l-proceduri ghal decizjoni bhal dik huma mibdija minn xi persuna quddiem qorti jew awtorità ohra gudikanti bhal dik, il-kaz ghandu jigi moghti smigh xieraq gheluq zmien ragonevoli.

L-allegata vjolazzjoni lamentata mir-r-rikorrenti tirrigwarda l-imparzjalita` tal-Imhallef sedenti fil-kawza fuq riferita.

Fil-Kap 12, ir-rikuza jew l-astensjoni ta` Imhallef huma regolati bl-**Art 733** u l-**Art 734**.

2. Gurisprudenza u dottrina

Fis-sentenza ta` din il-Qorti kif presjeduta tas-6 ta` Ottubru 2011 (konfermata fl-appell) fil-kawza fl-ismijiet **Cecil Pace vs Onorevoli Prim Ministru et** nghad illi :-

> *"Ir-rikuza mhix haga ta` konvenjenza izda ta` Gustizzja u ghalhekk sabiex wiehed jirrikorri ghaliha, ir-raguni trid tkun fondata ; altrimenti taghti lok ghall-abbuz."*

Dan premess, tajjeb jinghad illi anke jekk skont l-Art 733 u 734 tal-Kap 12 ma jkunx hemm lok ghal rikuza ta` Imhallef, anzi jista` jkun

hemm divjiet ta` astensjoni, tista` tinholoq sitwazzjoni fejn ikun hemm konflitt mad-drittijiet fundamentali tal-persuna, bil-konsegwenza li l-harsien ta` dawn id-drittijiet li huma wkoll tutlati bil-ligi ghandhom jipprevalu fuq id-disposizzjonijiet tal-ligi ordinarja (ara : QK : **Sant vs Kummissarju tal-Pulizija** : 2 ta` April 1990 ; QK : **Cachia vs Onor Prim Ministru et** : 10 ta` Ottubru 1991 ; QK : **Bugeja et vs Onor Prim Ministru noe et** : 17 ta` Gunju 1994 ; u PA/K : **Ghirxi vs Onor Prim Ministru et** : 1 ta` Novembru 1991)

Indipendentement mill-fatt jekk ic-cirkostanzi kinux tali li kienu jintitolaw lill-parti li titlob ir-rikuza tal-gudikant skont il-ligijiet ta` procedura, il-parametri ta` dawk il-ligijiet ghandhom jitqiesu li twessghu bil-provvedimenti tal-Kostituzzjoni u tal-Konvenzjoni li jiggarantixxu s-smiegh xieraq. (ara : QK : **Dr. A. Mifsud vs On. Prim Ministru et** : 17 ta` Lulju 1996).

Il-Qorti ghalhekk trid tezamina jekk fil-konkret, mhux fl-astratt, jistax jinghad li hemm jew jista` jkun hemm "bias" fil-gudikant li jirrendi l-operat tieghu soggettivament jew oggettivament parzjali.

"**The Judge`s Relative is Affiliated with Counsel of Record: The Ethical Dilemma**"

L-applikazzjoni ta` dan il-principju trid tigi analizzata fl-isfond tal-kaz partikolari (ara : **Ghirxi vs Onor Prim Ministru et** (op. cit.) u ; **E. T. Rev. Mons. Arcisqof G. Mercieca pro et vs Onor. Prim Ministru noe et** : QK : 22 ta` Otubru 1984).

Biex raguni twassal ghall-astensjoni jew ghar-rikuza ta` gudikant din trid tkun wahda konkreta u mhux biss misthajla.

B`mod partikolari inghad li :

"il-ligi ma tridx li, semplicement ghax parti jew ohra f`kawza `thoss` jew `jidhrilha` li gudikant jista` jkun parzjali, allura dak il- gudikant ghandu ma jihux konjizzjoni ta` dik il-kawza. Apparti l-obbligu li l-ligi timponi fuq il-gudikant li joqghod f`kull kawza li tigi lilu assenjata skond il-ligi u li jastjeni jew jilqa` l-eccezzjoni tar-rikuza fil-kazijiet biss fejn ikun legalment gustifikat li huwa ma jkomplix jiehu konjizzjoni ta` dik il-kawza, mhux kull `hsieb` ta` parzjalita` li jista` talvolta jghaddi minn mohh parti jew ohra, jista` jinghad li huwa `oggettivament gustifikat`. It-test oggettiv ta` l-imparzjalita`, anke kif mifhum mill-Qorti Ewropea tad-Drittijiet tal-Bniedem jirrikjedi li jkun hemm bazi oggettivament

riskontrabbli." [ara : QK : **Dr Joseph Zammit Tabona et vs Direttur Generali tal-Qrati tal-Gustizzja et** : 25 ta` Novembru 2016 ; QK : 12 ta` 12 ta` Gunju 2017 : **Joseph Borg et vs Onorevoli Prim Ministru et** ; QK : **Antonio Pace et vs Rev Henry Abela OP et noe** : 26 ta` Frar 2009).

Fil-Pag 201 ta` **"Law of the European Convention on Human Rights** (Second Edition ; 2009 ; OUP) Harris, O`Boyle u Warbrick ighidu hekk dwar l-Art 6 tal-Konvenzjoni :-

> *The Court (b`riferenza ghall-Qorti ta` Strasbourg) has stressed that "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively" (Perez v France – 2004-I ; 40 EHRR 909 para 64 GC).*

Fil-Pag 202 ikomplu :-

> *The Court also allows States a wide margin of appreciation as to the manner in which national courts operate … A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct, with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial.*

Fil-Pag 204 ikomplu :–

> *In some contexts a breach of Article 6 will only be found to have occurred upon proof of "actual prejudice" to the applicant.*

Fil-Pag 224 ighidu :–

> *Article 6 does not control the content of a state`s national law ; it is only a procedural guarantee of a right to a fair hearing in the determination of whatever legal rights and obligations a state chooses to provide in its law.*

Imbaghad fil-Pag 251 jinghad :–

> *The right to a fair hearing supposes compliance with the principle of equality of arms. This principle, which applies to civil as well as criminal proceedings, requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In general terms, the principle incorporates the idea of a fair balance between the parties.*

L-imparzjalita` ta` qorti skont l-Art 6(1) tal-Konvenzjoni , normalment tfisser nuqqas ta` pregudizzju jew bias :-

> *"There are two tests for assessing whether a tribunal is impartial: the first consists in seeking to determine a particular judge`s personal conviction or interest in a given case and the second is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect..... As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified."* (**Lindon Otchakovskylaurens and July v France** deciza fit-22 ta` Ottubru 2007 mill-Qorti Ewropeja ghad-Drittijiet Umani). (Ara wkoll **Piersack v. Belgium,** Qorti Ewropea dwar id-Drittijiet tal-Bniedem, A 53 (1982)).

Fil-kaz ta` **Hauschildt v. Denmark** [A 154 para 46 (1989)] l-ECHR qalet hekk :-

> *"The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal*

conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."

Fis-sentenza ta` "**Findlay v. United Kingdom**" tal-25 ta` Frar 1997 l-ECHR kellha l-okkazzjoni tippronunzja ruhha dwar l-indipendenza u l-imparzjalita` ta` tribunal :-

(a) The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had `inter alia` to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

(b) As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

Fil-kaz ta` **Daktaras v Lithuania** deciz fl-10 ta` Ottubru 2000, l-ECHR sostniet il-principju li :-

*"The Court recalls that there are two aspects to the requirement of impartiality in Article 6 para. 1 of the Convention. First, the tribunal must be subjectively impartial, i.e. no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, i.e. it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see **Academy Trading Ltd. And Others v. Greece**, no. 30342/96, 4.4.2000, para. 43)."*

Qalet ukoll:

"Under the objective test, it must be determined whether there are ascertainable facts, which may nevertheless raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings (ibid. para. 45)."

Fil-kitba tieghu **Judicial Impartiality Under the European Convention on Human Rights**, Luzius Wildhaber, li kien President tal-ECHR bejn l-1 ta` Novembru 1998 u t-18 ta` Jannar 2007, qal hekk :-

"The difficulty in establishing a lack of personal impartiality has led the Court to concentrate on an objective approach, that is determining whether a judge offers sufficient guarantees to exclude any legitimate doubt as to a lack of impartiality. In other words, in view of the difficulty of establishing to the required standard of proof whether or not a court is actually impartial, the case-law has looked at whether courts can be seen to be impartial. It is here that the Court has introduced the notion of appearances; what is at stake, as the Court has held, is the confidence which the courts must inspire in the public in a democratic society. Whether misgivings as to impartiality are to be regarded as objectively justified depends on the circumstances of each case. The Court has held that in criminal proceedings "while thevstandpoint of the accused is important", it is not decisive. What isvdecisive is whether, in criminal proceedings, the accused`s fear that avjudge lacks impartiality can be held to be objectively justified. Thus itvis not only that the person directly concerned by the proceedings must have apprehensions, but those fears must appear reasonable to the external observer".

Fil-kaz ta` **Kraska v. Switzerland** li kien deciz fid-19 ta` April 1993, l-ECHR irrilevat illi :-

"32. The Court has already stressed on numerous occasions the importance of appearances in the administration of justice, but

*it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified (see, among other authorities, mutatis mutandis, the **Hauschildt v. Denmark** judgment of 24 May 1989, Series A no. 154, p. 21, para. 48)".*

Fil-ktieb : **Protecting the right to a fair trial under the European Convention** : Council of Europe Human Rights Handbook : , Strasbourg 2012 : Dovydas Vitkauskas : Espert mil-Litwanja tal-Konvenzjoni : ighid hekk dwar x`ghandu jfisser : *"impartial tribunal"* :

*"While the notion of the "independence" of the tribunal involves a structural examination of statutory and institutional safe-guards against interference in the judicial matters by other branches of power, "impartiality" entails inquiry into the court`s independence vis-à-vis the parties of a particular case (**Piersack**). … Independent and impartial tribunal established by law may lead to a violation of the impartiality requirement, even if there are no reasons to doubt the impartiality of other (or a majority of other) judges (**Sander v. the United Kingdom,** §§18-35)."Impartiality" is a lack of bias or prejudice towards the parties.The impartiality test exists in two forms: subjective and objec-tive (**Piersack**).*

*The subjective test requires a more stringent level of individu-alisation/causal link, requiring personal bias to be shown by any member of the tribunal vis-à-vis one of the parties; subjec-tive impartiality is presumed unless there is proof to the con-trary (**Piersack**). Examples of a lack of subjective impartiality:*

*public statements by a trial judge assessing the quality of the defence and the prospects of the outcome of the crimi-nal case (**Lavents**; this case involved a finding of the pre-sumption of innocence on these grounds), or giving negative characteristics of the applicant (**Olujić**, §§56-68);*

*statement by judges in the courtroom that they were "deeply insulted" while finding the applicant lawyer guilty of contempt of court (**Kyprianou**, 118-135, where the Court also held that no separate issue under the heading ofpresumption of innocence arose);*

*statement by an investigative judge in a decision to commit the applicant for trial that there was "sufficient evidence ofthe applicant`s guilt", where that judge subsequently triedthe applicant`s case and found him guilty (**Adamkiewicz v.Poland**, §§93-108).*

…

*The objective test of impartiality necessitates a less stringent level of individualisation/causal link and, accordingly, a less serious burden of proof for the applicant. An appearance of bias or a legitimate doubt as to the lack of bias is sufficient from the point of view of an ordinary reasonable observer (**Piersack**). By contrast with the subjective test, an allegation of lack of objective impartiality creates a positive presumption for the applicant that can only rebutted by the respondent state if sufficient procedural safeguards are shown which exclude any such legitimate doubt (**Salov v. Ukraine**, §§80-86; **Farhi v. France**,§§27-32). Legitimate doubts as to the impartiality may appear as a result of previous employment of a judge with one of the parties (**Piersack**), intertwining of prosecutorial and judicial functionsby the same person at different stages of the same proceedings(**De Cubber v. Belgium**, §§24-30), attempt at participation by the same judges at different levels of court jurisdiction (**Salov**), interference by a non-sitting judge (**Daktaras**), overlap of legis-lative/advisory and judicial functions (**Procola**, §§41-46), family,business or other previous relations between a party and the judge (**Sigurdsson v. Iceland**, §§37-46), and the same social habits and practices such as religious affiliation involving a party and the member of the tribunal (**Holm v. Sweden**, §§30-33).*

*Nonetheless, a sufficiently strong causal link must be shown between a feature alleged to call into question the objective impartiality of the tribunal on the one hand, and, on the other, the facts to be assessed (**Kleyn v. the Netherlands**, §§190-202) or the persons (**Sigurdsson**) involved in the particular case. As a few jurors in defamation trial who were members of the polit-ical party which had been the principal target of the allegedly defamatory material (**Holm,** but see **Salaman**, dec.).A jury where certain members had previously made racist jokes concerning the applicant, despite the fact that those damaging statements were subsequently rebutted as improper by an individual juror who had made them and by the jury itself (**Sander**).Prosecutor speaking to jurors informally during a trial break, the presiding judge failing to inquire from the jurors on the nature of the remarks exchanged and the possible influence they might have had on the jurors` opinions (**Farhi**).Close family ties (uncle-nephew) between a judge and lawyer of the opposite party (**Micallef v. Malta**).Two members of a trial court who had earlier set or varied remand – including detention – referring to justification which had not been based on the prosecutor`s request for detention and which had implied admission of sufficiency of evidence against the applicant (**Cardona Serrat v. Spain**).Extremely virulent press campaign surrounding trail of two minor co-accused, coupled with the lack of effective participa-tion by the defendants (**T. and V. v. the United Kingdom**, §§83-89; see also the effective participation requirement, page 54 below).*

…

the mere affiliation by the member of the tribunal to acertain social group or association – such as belonging to thesame political party or religious confession as one of the parties in the case – is not sufficient to sustain the legitimacy of thedoubt under the objective test; a sufficient degree of individual-isation/causal link of the alleged bias of the tribunal is neces-sary even

under the objective test (compare, for instance, the different conclusions in similar circumstances in ***Holm andSalaman v. the United Kingdom****, dec.;* ***Sigurdsson and Pullar v.the United Kingdom****, dec.)."*

Rilevanti huwa l-kaz ta` **Wettstein vs Switzerland** deciz fil-21 ta` Dicembru 2000.

Hemm l-ECHR sabet vjolazzjoni ta` l-Art 6(1) tal-Konvenzjoni ghal nuqqas ta` mparzjalita`.

Kien kaz fejn wiehed mill-imhallfin sedenti (li kien hemm fuq bazi *part time)* irrizulta li kien l-avukat difensur tal-kontroparti tal-applikant fi zmien ta` inqas minn xahrejn mill-gudizzju tal-applikant.

F` dak il-kaz, inghad illi kemm l-Iimhallef u kif ukoll l-Imhallef l-iehor sedenti kienu ghadhom joperaw bhala avukati prattikanti minn ufficju legali wiehed.

Il-Qorti qalet hekk :-

"32. The applicant complained of the lack of impartiality of the two administrative court judges R. and L. These judges had themselves, or through their office partner W., acted against the applicant in other proceedings. The applicant relied on Article 6 § 1 of the Convention which provides, in its relevant parts:

"1. In the determination of his civil rights and obligations ... , everyone is entitled to a ... hearing ... by an independent and impartial tribunal ..."

33. The Government submitted that the proceedings complied with Article 6 § 1 of the Convention.

....

41. The Court recalls at the outset that in proceedings originating in an individual

application it has to confine itself, as far as possible, to a examination of the concrete case before it (see the Minelli v. Switzerland judgment of 25 March 1983, Series A no. 62, p. 17, § 35). Accordingly, in the present case there is no reason to doubt that legislation and practice on the part-time judiciary in general can be framed so as to be compatible with Article 6. What is at stake is solely the manner in which the proceedings were conducted in the applicant`s case.

42. According to the Court`s constant case-law, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect – the objective approach (see the Thomann v. Switzerland judgment of 10 June 1996, Reports of Judgments and Decisions 1996-III, p. 815, § 30).

43. As regards the subjective aspect of such impartiality, the Court notes that there was nothing to indicate in the present case any prejudice or bias on the part of judges R. and L.

44. There thus remains the objective test. Here, it must be determined whether, quite apart from the judge`s conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see the Castillo Algar v. Spain judgment of 28 October 1998, Reports 1998-VIII, p. 3116, § 45). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see the Ferrantelli and Santangelo v. Italy judgment of 7 August1996, Reports 1996-III, pp. 951-52, § 58).

45. Turning to the present case, the Court notes that judge R. acted against the applicant in separate building proceedings as the legal representative of the Küsnacht municipality. Judges R. and L. both shared office premises with lawyer W. who had previously acted as legal representative in other building proceedings in the Kloten municipality. This situation arose in the Canton of Zürich where, as with the courts of many other cantons, the Administrative Court is composed of both full-time and part-time judges. The latter may practise as legal representatives. The Administrative Judiciary Procedure Act in force at the relevant time contained no provisions as to the incompatibility of such legal representation with judicial activities. Section 34(2) of the Act currently in force provides that part-time judges may not act as legal representatives before the Administrative Court.

46. It is true that there was no material link between the applicant`s case before the Administrative Court and the separate proceedings in which R. and W. acted as legal representatives. Furthermore, R. and W. had been acting as trained lawyers who were called upon to represent the interests of constantly varying parties.

47. Nevertheless, the Court notes that, when on 15 February 1995 the applicant instituted the present proceedings before the Administrative Court with R. as a judge on the bench, the parallel proceedings in which R. acted as legal representative for the Küsnacht municipality against the applicant were pending before the Federal Court, which gave its decision eight months later on 24 October 1995 (see paragraph 11 above). Less than two months after these proceedings had been terminated the Administrative Court gave its judgment on 15 December 1995. There was, therefore, an overlapping in time of the two proceedings with R. in the two functions of judge, on the one hand, and of legal representative of the opposing party, on the other. As a result, in the proceedings before the Administrative Court, the applicant could have had reason for concern that judge R. would

continue to see in him the opposing party. In the Court`s opinion this situation could have raised legitimate fears in the applicant that judge R. was not approaching his case with the requisite impartiality.

48. The fact that W., an office colleague of judges R. and L., had in other proceedings represented the party opposing the applicant, while only of minor relevance, could be seen as further confirming the applicant`s fear that judge R. was opposed to his case.

49. In the Court`s view, these circumstances serve objectively to justify the applicant`s apprehension that judge R. of the Administrative Court of the Canton of Zürich lacked the necessary impartiality.

50. Consequently, in the present case there has been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal."

Il-Qorti tkompli billi taghmel riferenza ghal dak li qalet il-Qorti Kostituzzjonali fis-sentenza taghha tat-12 ta` Lulju 2005 fil-kawza fl-ismijiet : **Sandro Chetcuti et vs. L-Avukat Generali et** :-

"Dwar x`inhu independent and impartial tribunal, l-artikolu 6 tal-Konvenzjoni u l-artikolu 39 tal-Kostituzzjoni jitolbu li t-tribunal ikun indipendenti u imparzjali. "Indipendenza" tfisser indipendenza kemm mill-partijiet kif ukoll mill-esekuttiv ;

"Imparzjalita" tista` tkun soggettiva jew oggettiva. Hija soggettiva meta "the tribunal is subjectively impartial in the sense that its members are free from personal bias" u oggettiva "whether from an objective point of view there is sufficient appearance of impartiality or whether the guarantees of impartiality in a given situation are such as to exclude any legitimate doubt on the matter".

"L-imparzjalita` tal-membri tat-tribunal ghandha tkun prezunta sakemm ma tingiebx

prova bil-kuntrarju (ara Le Compte, Van Leuven and De Meyeree 23.6.91)
Huwa pacifiku wkoll fil-gurisprudenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem illi, id-decizjoni jekk tezistix jew le imparzjalita` ai termini ta` l-Artikolu 6(1) tal-Konvenzjoni, trid tigi bbazata fuq test soggettiv, cioe` fuq il-konvinzjoni personali tal-gudikant partikolari f`kaz specifiku, u wkoll fuq test oggettiv, u cioe` jekk il-gudikant ikunx fil-kaz partikolari joffri garanziji sufficijenti sabiex jeskludi kull dubbju legittimu ta` parzjalita`.

Issir referenza ghad-decizjoni ta` din il-Qorti diversament presjeduta tal-20 ta` Gunju 2017 fil-kawza : **Medcast Foundry Limited vs Avukat Generali et.**

Inghad hekk :-

"Dwar xi tfisser `Qorti imparzjali` ghall-finijiet tal-artikolu 6 tal-Konvenzjoni Ewropea, fil-ktieb taghhom Law of the European Convention on Human Rights (Tieni Edizzjoni), l-awturi Harris, O`Boyle & Warbrick jispjegaw illi:

"`Impartiality` means lack of prejudice or bias. To satisfy the requirement, the tribunal must comply with both a subjective and objective test:
The existence of impartiality for the purpose of article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."

Fil-kaz ta` **Kyprianou v Cyprus** tal-15 ta` Dicembru 2005, il-Qorti Ewropea rriteniet illi:

*"The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see **Padovani v. Italy**, judgment of 26 February 1993, Series A*

no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see ***Piersack v. Belgium****, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30, and* ***Grieves v. the United Kingdom*** *[GC], no. 57067/00, § 69, 16 December 2003). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see* ***Castillo Algar v. Spain****, judgment of 28 October 1998, Reports 1998-VIII, p. 3116, § 45, and* ***Morel v. France****, no. 34130/96, § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see* ***Ferrantelli and Santangelo v. Italy****, judgment of 7 August 1996, Reports 1996-III, pp. 951-52, § 58, and* ***Wettstein v. Switzerland****, no. 33958/96, § 44, ECHR 2000-XII).*

...

An analysis of the Court`s case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge`s personal conduct is not at all impugned, but where, for instance, the exercise of different functions within the judicial process by the same person (see Piersack, cited above), or hierarchical or other links with another actor in the proceedings

*(see court martial cases, for example, Grieves, cited above, and **Miller and Others v. the United Kingdom**, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in Buscemi, cited above, but it may also be of such a nature as to raise an issue under the subjective test (see, for example, Lavents, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct."*

Fil-kaz ta` **Warsicka v Poland** tas-16 ta` Jannar 2007 intqal hekk:

"As regards the objective test, the Court is of the view that the requirements of a fair hearing as guaranteed by Article 6 § 1 of the Convention do not automatically prevent the same judge from successively performing different functions within the framework of the same civil case. In particular, it is not prima facie incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined (Eur. Comm. HR, R.M.B. v. the United Kingdom, No. 37120/97, dec. 9 September 1998). The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a

decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge."

Fis-sentenza citata ***Central Mediterranean Development Corporation Limited v Malta*** *il-Qorti Ewropea kompliet billi qalet hekk:*

"In the instant case, the concerns regarding the Court of Appeal`s impartiality stemmed from the fact that its bench on 14 December 2005 was composed of the same three judges who had previously decided the applicant company`s request for a stay of execution "at firstinstance".

As regards the subjective test, it has not been shown or argued that the Court of Appeal held or manifested any personal convictions such as to cast doubt on its subjective impartiality.

As regards the objective test, the Court reiterates that it is not prima facie incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined (see Warsicka v. Poland, no. 2065/03, § 40, 16 January 2007 and Eur. Comm. HR, R.M.B. v. the United Kingdom, No. 37120/97, dec. 9 September 1998). The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge (see Warsicka, cited above, § 40).

It is true that in the present case the applicant company did not have the possibility of a further recourse in the terms of the Warsicka case.

Unlike in Warsicka, where the applicant had recourse to the Supreme Court having a full remit to decide on the applicant`s claims, in the instant case, the proceedings the applicant company brought before the constitutional jurisdictions could only deal with the impartiality issue and not with the admissibility or merits of the applicant company`s request. Nevertheless, the absence of such a review cannot alone be determinative. The Constitutional Court found that the applicant company`s impartiality complaint was unfounded.

Having regard to the nature of the issues involved, namely that the Court of Appeal concluded that Article 229 invoked by the applicant company did not apply in those circumstances, as no appeal lay against the final judgment delivered by the Court of Appeal on 3 November 2005, it considered that the fact that the same formation gave a judgment on the merits of a case and subsequently decided that the applicant`s request in the form of an appeal application was null and void, could not be in violation of Article 6 (see paragraph 13 above).

As in Indra v. Slovakia, (no. 46845/99, §§ 51-54, 1 February 2005) the Court considers it appropriate to examine whether there was a close link between the issues examined by the Court of Appeal on the two occasions at issue. In the present case, the question determined by the Court of Appeal on 14 December 2005 was not the same as the question which the Court of Appeal had determined on 3 November 2005. In the November hearing the court was examining the substance of the applicant company`s request for a stay of execution. In the December decision, the court had to determine whether the applicant company`s request for reconsideration under Article 229 (4) of the COCP was compatible with domestic law and procedure, and could be allowed. Only if that had been the case could the court have carried out an examination of the merits, a phase which never materialised in the circumstances of the case. Thus, in the Court`s view, the scope of the examination involved, which can be considered tantamount to an

assessment of admissibility, cannot be said to be the same or intrinsically linked to the merits of the original claim.

Hence, the Court considers that, in the instant case, the Court of Appeal when deciding on the applicant company`s request for reconsideration under Article 229 was not called upon to assess and determine whether, for example, sitting as a bench, it had correctly applied the relevant domestic law to the applicant`s case or whether or not it had committed an error of legal interpretation or application in its previous decision (see San Leonard Band Club, cited above). There was no such link between the substantive issues determined on 3 November 2005 regarding the merits of a request for a stay of execution and the decision of 14 December 2005 on whether the applicant company had a legal avenue of access to an appeal or reconsideration of the previous decision, which would cast doubt on the impartiality of that court."

Importanti wkoll kienet is-sentenza li tat il-Qorti Kostituzzjonali fis-7 ta` Marzu 2017 fil-kawza fl-ismijiet **Lawrence Grech et vs L-Avukat Generali.**

Anke hemm kienet trattata preokkupazzjoni da parti tar-rikorrenti dwar nuqqas ta` imparzjalita` tal-gudikant sedenti.

L-Ewwel Qorti cahdet it-talbiet tal-atturi, abbazi ta` dawn l-osservazzjonijiet :-

Din il-qorti tqis illi hu minnu li l-gustizzja trid tidher li qed issir. Jibda biex jinghad illi l-ghazla tal-gudikant ghal kawza ma ssirx mill-gudikant innifsu izda minn mekkanizmu appozitu li jithaddem mir-registratur tal-qrati, bla ebda interferenza jew partecipazzjoni jew addirittura l-konoxxenza a priori tal-istess gudikant li lilu ser tmiss il-kawza. Il-gudikant hu ghal kollox estraneju ghall-mekkanizmu li bih kawza tigi assenjata lilu bl-eccezzjoni ta`

kawzi specjalizzati fejn din partikolari ma taqax f`tali kategorija. Id-dicitura `gustizzja trid tidher li qed issir` ma ghandhiex tifsira soggetiva bhal per ezempju parti mhix kuntenta bl-ghazla tal-gudikant. Lanqas ma tfisser li the ordinary man in the street mhux ben infurmat fuq il-fatti specifici u t-tema legali involute b`percezzjoni limitata ghalhekk tal-assiem fattwali u legali ta` dak li qed jigi deciz jista` jew ghandu b`xi mod jinfluwenza l-interpretazzjoni tal-istess dicitura. Id-dicitura `gustizzja trid tidher li qed issir` ghandha tkun miftehma u espressa fil-konkret taghha u applikata mill-kullegg tal-gudikanti skond il-fattispecie u n-natura ta` kull kawza. Wara kollox hu principju regolatur illi l-gudikant hu prezunt imparzjali ghax l-imparzjalità hi parti intima mill-gurament tal-hatra tieghu u li ghandu jzomm quddiem ghajnejh u jattwa f`kull kawza u kull cirkostanza sakemm hu msejjah jippresjedi u jiggudika disputa. Din hi garanzija li l-gudikant hu marbut li jaghti biex isostni l-applikazzjoni tal-gustizzja skond il-ligi, l-ugwaljanzza ghal kull min jidher quddiemu, u fil-prattika jsahhah id-demokrazija, fonti tal-libertà tal-bniedem f`socjetà civili (ara artikolu 10 tal-Kap. 12) anki jekk ihossu skomdu ghal kwalsiasi raguni tkun xi tkun bil-vertenza quddiemu ghax dak hu l-prezz tal-gurament li jkun ha quddiem l-istat u quddiem Alla.

Il-kwistjoni attrici hi jekk din il-garanzija fil-kawza civili li tat lok ghal din il-vertenza hiex minsusa b`tali mod li hemm dubju serju oggettiv u konkret u mhux biss percezzjoni astratta jew soggettiva ghar-rikorrenti li l-gustizzja jista` jkun li ma ssirx.

Ir-rikorrenti jibbazaw l-ilment principali taghhom fuq nuqqas ta` imparzjalità oggettiva. Qed jallegaw bazikament illi hemm raguni legittima li ggeghelhom jibzghu li l-gudikant jonqos fih l-element ta` imparzjalità. Jorbtu dan il-biza` mal-fatt illi bhala president ta` Radju Marija jista` jxaqleb jew ihares b`ghajn aktar beninja lejn l-intimata Arcidjocesi ta` Malta.

Din il-qorti fliet il-provi u ma tistax issib dan il-biza` bhala wiehed fondat mill-ottika oggettiva. Irrizulta li ma hemm ebda rabta ta` ebda natura bejn il-gudikant involut, Radju Marija u l-intimat Kurja Arciveskovili.

Radju Marija hi organizazzjoni volontarja, maghmula minn socji li jaghtu s-sehem taghhom fl-ispirtu tal-volontarjat. Il-finanzi ta` Radju Marija jigu biss minn donazzjonijiet tal-fidili. L-Arcidjocesi ta` Malta ma tipprovdi ebda ghajnuna finanzjarja jew mod iehor. Il-gudikant innifsu bhala president jaghti sehmu biss fl-amministrazzjoni tar-radju bla ebda jedd jew poter fuq dak li jixxandar u minn min jixxandar. Dak hu fdat f`idejn sacerdot li hu l-uniku socju jekk trid issejjahlu hekk li jappartjeni lis-sacerdozju. Radju Marija hu fil-fatt assocjazzjoni lajkali.

L-uniku punt ta` vergenza li hemm bejn ir-radju u l-Arcidjocesi hu biss ir-religjon Kattolika. Ir-radju hu kommess li jxandar u jxerred il-kelma ta` Alla b`enfasi specjali fuq il-Madonna kif espressa fir-religjon Kattolika u l-intimita Arcidjocesi ta` Malta thaddan l-istess religjon Kattolika, liema religjon hi wkoll ir-religjon rikonoxxuta ta` Malta fil-Kostituzzjoni ta` Malta artikolu 2.

Din il-qorti ma tqisx illi l-gudikant fil-kawza civili mertu ta` dawn il-proceduri hu oggettivament biased ghax prezumibilment jipprattika l-istess religjon ghalkemm ebda prova ut sic ma saret dwar liema religjon jipprattika l-gudikant in kwistjoni.

…

Li kieku din il-qorti kellha b`eccess ta` kawtela, fil-fehma taghha ingustifikata, taccetta t-tezi tar-rikorrenti, dan ifisser li gudikant li ghandu kwalsiasi fehma, kemm politika, kemm religjuza, kemm sportive jew kulturali u li quddiemu jersqu in gudizzju persuni jew entitajiet ta` fehma dikjaratament differenti, allura ser nispiccaw bir-riskju li ma ssibx gudikanti li lesti jiddeciedu, jew, aghar, li jsir abbuz mill-partijiet

mis-sistema gudizzjarja jew li addiritura l-ghazla ta` gudikant b`fehma li tissimpatizza ma` wahda mill-partijiet fit-twemmin jew fil-politika jew affarijiet ohra ser jispicca bilfors jiddeciedi favur dik il-parti.

…

Il-qorti tenfazizza li ghalkemm il-gudikant ghandu bhal kull persuna ohra l-opinjonijiet personali tieghu fuq kull aspett tal-hajja civili u morali u ghandu l-umanità fragili tieghu bhal kull bniedem iehor però hu wkoll imsejjah ghal servizz li jaghmel gustizzja skont il-ligi, u ghalhekk irid, b`responsabilità akbar u b`obbligu solenni li ghalih ikkommetta ruhu b`gurament, ipoggi fil-genb kull opinjoni jew fehma personali biex b`kuragg, b`sahha u b`kuxjenza safja jqis li ssir gustizzja safejn tippermettilu l-ligi.

Ma hemm xejn fl-atti li juri li l-gudikant imsejjah jiddeciedi l-kawza civili ser jonqos minn dan in-dover jew hemm xi biza` fondat u serju li mhux ser jaqdi dan l-obbligu li hu msejjah jadempixxi b`serjetà, onestà u b`rispett ghal-ligijiet u Kostituzzjoni ta` Malta.

Huwa evidenti mis-sentenza li tat illi l-Qorti Kostituzzjonali hasbitha diversament.

Qalet hekk :-

"9. Hemm diversi osservazzjonijiet f`dawn is-sottomissjonijiet tal-atturi li ma humiex korretti. Certament ma huwiex u ma jistax ikun il-kaz illi l-kriterju ta` imparzjalità soggettiva "jiddependi biss mill-perspettiva tal-appellanti", jew li "l-icken dubju ta` imparzjalità oggettiva min-naha tal-gudikant seta` ragonevolment jigi ppercepit … … … mill-appellanti li ser jippregudika d-dritt ta` smigh xieraq", ghax "il-kawza hija tal-appellanti".

Li tammetti dawn it-teoriji jfisser illi parti f`kawza effettivament ghandha veto fuq il-hatra ta` mhallef biex jisma` l-kaz taghha.

10. Ukoll, ma huwiex korrett li tghid illi, ghax imhallef ma jastjenix meta jara li parti ghandha "biza` qawwi jekk hux ser issir gustizzja", dan juri "nuqqas ta` imparzjalità oggettiva". Hija ghalhekk inkorretta l-osservazzjoni tal-atturi illi, ghax il-parti l-ohra fil-kawza wriet "rezistenza qawwija" ghall-eccezzjoni ta` rikuza, dan huwa sinjal ta` parzjalità favur dik il-parti. Jekk eccezzjoni ta` rikuza titressaq mhux ghal ragunijiet oggettivament gustifikabbli izda ghax il-gudikant ma joghgobx lil parti, taghmel sew il-parti l-ohra li tirrezisti l-eccezzjoni.

11. Lanqas ma hu minnu li, ghax gudikant ighix it-twemmin tieghu "pubblikament u b`partecipazzjoni attiva", b`hekk "jinholqu cirkostanzi dubbjuzi"; gudikant mhux bilfors ikollu jghix it-twemmin tieghu fil-katakombi biex jitqies oggettivament imparzjali.

12. L-Imhallef tal-ewwel istanza evidentement kien tal-fehma li r--regoli ta` rekuza fil-Kodici ta` Procedura kienu jipprekluduh milli jastjeni mis-smigh tal-kawza u li skont il-ligi kien ghalhekk obbligat li jismaghha.

Mill-perspettiva kostituzzjonali, izda, japplikaw konsiderazzjonijiet ohrajn. Il-kwistjoni hi jekk hemmx ragunijiet li oggettivament jiggustifikaw il-biza` ta` parzjalità. Ghalkemm dak li thoss jew tahseb jew tibza` parti f`kawza dwar il-parzjalità jew imparzjalità tal-gudikant huwa wkoll relevanti ghall-ghanijiet tal-imparzjalità, ma huwiex il-kriterju determinanti: li hu determinanti hu jekk dak il-biza` jew dik il-percezzjoni huwiex imsejjes fuq konsiderazzjonijiet oggettivi hekk li persuna ragonevoli u minghajr pregudizzji taghha tasal biex hi wkoll ikollha dubji dwar l-imparzjalità tal-gudikant.

13. L-apparenzi wkoll jistghu jkunu konsiderazzjonijiet oggettivi li joholqu dubji. Ukoll jekk ma hemmx rabtiet gerarkici bejn

gudikant u parti fil-kawza, jekk l-apparenzi huma hekk li persuna ragonevoli tista` wkoll minghajr wisq tigbid jaghtu x`tahseb li hemm dawk ir-rabtiet, id-dubju ta` dik il-persuna dwar l-imparzjalità tal-gudikant jista` jkun dubju oggettivament gustifikat.

14. Fejn jezistu dubji bhal dan, ikun fl-interess mhux biss tal-parti li oggettivament tara ragunijiet ta` parzjalità kontriha li l-gudikant ma jkomplix jisma` l-kaz; ikun ukoll fl-interess tal-parti l-ohra ghaliex il- gudikant jista`, biex jeghleb kull dubju dwar l-imparzjalità tieghu ixaqleb, imqar inkonxjament favur l-parti l-ohra.

15. Il-kwistjoni issa hi jekk fil-kaz tal-lum hemmx ragunijiet oggettivi li f`osservatur ragonevoli u imparzjali jistghu joholqu dehra ta` rabtiet bejn gudikant u parti f`kawza hekk li tiddghajjef il-fiducja fl-imparzjalità ta` dak il-gudikant.

16. Ghalkemm huwa minnu illi, kif jixhed l-istatut tal-Assocjazzjoni Radju Marija, dik l-assocjazzjoni u t-tmexxija tar-radju huma indipendenti mill-Arcidjocesi, u ma hemm ebda rabta gerarkika formali bejn l-Arcidjocesi u r-radju, ma hijiex ghalkollox imgebbda l-percezzjoni ta` rabta mill-qrib bejniethom. Din il-percezzjoni tigi ggenerata mill-fatt oggettiv illi d-direttur tal-programmi ghandu dejjem ikun kjeriku, meta tqis l-istqarrija tal-istess direttur illi jekk "jisgarra" jibghat ghalih l-Arcisqof, u meta tqis ukoll illi l-Provincjal tad-Dumnikani kellu s-setgha li jesigi u jikseb ir-rizenja tal-istess direttur tal-programmi minn dik il-hatra.

Huwa minnu illi hemm distinzjoni bejn ir-rwol tad-direttur tal-programmi u dak tal-president tal-assocjazzjoni izda t-tnejn ghandhom rwol ewlieni fit-tmexxija tal-istess assocjazzjoni li, ghar-ragunijiet imsemmija fuq, ma hijiex ghalkollox hielsa minn rabta, li tista` wkoll tidher gerarkika, mal-Arcidjocesi.

17. Fic-cirkostanzi ghalhekk, ma hijiex irragonevoli l-percezzjoni li hemm rabta tali bejn l-Arcdjocesi u l-assocjazzjoni li taghha l-imhallef

huwa president li tista` tolqot hazin id-dehra ta` imparzjalità oggettiva ta` min ghandu rwol fit-tmexxija ta` dik l-assocjazzjoni. Id-dubju ma huwiex wiehed li ma jitqiesx oggettivament gustifikat, ukoll jekk dak id-dubju ma jolqotx l-imparzjalità soggettiva tal-imhallef.

18. Ghal dawn ir-ragunijiet il-qorti tilqa` l-appell u thassar is-sentenza appellata: tipprovdi dwar l-ewwel zewg talbiet billi tghid illi jkun hemm ksur tal-jedd tal-atturi ghal smigh xieraq jekk ma tintlaqax l-eccezzjoni ta` rikuza tal-imhallef li qieghed jisma` l-kawza fl-ismijiet Lawrence Grech et v. Carmelo Pulis et (rik.489/2013), u ghalhekk tordna li l-kawza ma titkompliex quddiem l-istess imhallef; ma huwa mehtieg ebda provvediment dwar it-tielet u r-raba` talbiet billi s-surroga tal-imhallef issir kif ighid u jrid il-Kodici ta` Organizzazzjoni u Procedura Civili."

Terga` tirreferi ghad-decizjoni fil-kawza : **<u>Av. Dr. Samuel Azzopardi vs L-Avukat Geerali et</u>** : op. cit. : fejn sar ezami tal-kwistjoni tal-imparzjalita` ta` gudikant fid-dawl ta` l-Art 6 tal-Konvenzjoni u l-Art 39 tal-Kostituzzjoni ta` Malta.

Inghad :

*"Illi huwa principju assodat li "Is-sistema Maltija hija fondata fuq il-premessa li `il giudice non si presume ne` parziale ne`corrotto".(**<u>Farrugia Sacco v Prim Minstru</u>** sucitat).*

Hu dmir ta` gudikant li jiddeciedi kawza u mhux xi vantagg jew privilegg; jekk ikun hemm vantagg jew privilegg, dan hu li jirrendi l-gudikant parti fil-kawza. La huwa mhux ser jirbah u mhux ser jitlef billi jkun jew ma jkunx jaghmel parti minn tribunal, m`ghandu ebda interess personali jekk ikomplix jisma` l-kawza jew jastjeni ruhu.

L-Artikolu 734 tal-Kap 12 ma jeskludix ragunijiet ohra ghar-rikuza/astensjoni ta` gudikant.

*Illi l-Qorti taghraf li tabilhaqq ir-ragunijiet li ghalihom gudikant jista` jigi rikuzat milli jkompli jisma` kawza m`humiex biss dawk li l-ligi nnifisha ssemmi u, f`kazijiet eccezzjonali, jista` ikun hemm ragunijiet ohrajn serji li jwasslu bhala xierqa ghal tali astensjoni jew rikuza (Ara, per ezempju, Kost. 18.2.2008 fil-kawza fl-ismijiet **Il-Pulizija (Spettur Norbert Ciappara) vs Joseph Lebrun)**. L-istitut tar-rikuza jew tal-astensjoni huwa mahsub biex ihares l-ahjar interessi tal-gustizzja, b`mod partikolari f`dak li jirrigwarda l-jedd ta` smigh xieraq b`mod imparzjali u kif ukoll it-tishih tal-fiducja pubblika fl-amministrazzjoni tal-gustizzja. Dan il-principju jsib applikazzjoni akbar fil-qafas ta` kawza ta` natura kostituzzjonali.*

...

*L-awturi Van Dijk Van Hoof u Van Rijn fil-ktieb **"Theory and Practice of the European Convention on Human Rights"** (4th ed) isostnu wkoll:*

"The adjectives `independent` and `impartial` are the expression of two different concepts. The notion of `independence` refers to the lack of any connection between the tribunal and other parts of government, whereas the `impartiality must exist in relation to the parties to the suit and the case at issue. However, the Court has not always drawn a clear borderline between the two concepts, and often considers both concepts together."

L-istess awturi ikomplu:

"For impartiality it is required that the court is not biased with regard to the decision to be taken, does not allow itself to be influenced by information from outside the court room, by popular feeling, or by any pressure whatsoever, but bases its opinion on objective arguments on the ground of what has been forward at the trial."

Imparzjalita` Soggettiva jew Oggettiva

*Il-Qorti Ewropea fis-sentenza "**Hauschildt vs Denmark**"(1989) fissret ir-rekwiziti hekk:*

*"46. The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the **De Cubber** judgment of 26 October 1984, Series A no. 86, pp. 13-14, para. 24).*

47. As to the subjective test, the applicant has not alleged, either before the Commission or before the Court, that the judges concerned acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary and in the present case there is no such proof.

There thus remains the application of the objective test.

*48. Under the objective test, it must be determined whether, quite apart from the judge`s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the **De Cubber** judgment previously cited, Series A no. 86, p.14, para. 26).*

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not

*decisive (see **the Piersack** judgment of 1 October 1982, Series A no. 53, p. 16, para. 31).*

What is decisive is whether this fear can be held objectively justified."

*Inoltre, kif fuq premess, "Personal impartiality is to be presumed until there is proof to the contrary." (**Le Compte, Van Leuven and De Meyere v Belgium** (1983).*

*Illi l-Qorti Ewropea fil-kaz ta` **Kyprianou v Cyprus** (15/12/2005 Application no. 73797/01) kompliet tfisser dawn l-elementi:*

*"2. An analysis of the Court`s case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge`s personal conduct is not at all impugned, but where, for instance, the exercise of different functions within the judicial process by the same person (see Piersack, cited above), or hierarchical or other links with another actor in the proceedings (see court martial cases, for example, **Grieves**, cited above, and **Miller and Others v. the United Kingdom**, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in Buscemi, cited above, but it may also be of such a nature as to raise an issue under the subjective test (see, for example, Lavents, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct."*

*Il-Qorti Ewropea (GC) fil-kaz **Micallef v Malta** (15/10/2009 (Application no. 17056/06) kompliet tapprofondixxi t-testijiet ta` soggettivita` u oggettivita:*

"3. As to the subjective test, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, ***Kyprianou v. Cyprus*** *[GC], no. 73797/01, § 119, ECHR 2005-XIII). The Court has held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see Wettstein, cited above, § 43). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see* ***De Cubber v. Belgium,*** *26 October 1984, § 25, Series A no. 86).*

4. In the vast majority of cases raising impartiality issues the Court has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective
test) but may also go to the issue of his or her personal conviction (subjective test) (see Kyprianou, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge`s subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see ***Pullar v. the United Kingdom****, 10 June 1996, § 32, Reports 1996-III).*

5. As to the objective test, it must be determined whether, quite apart from the judge`s conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see Wettstein,

*cited above, § 44, and **Ferrantelli and Santangelo v. Italy**, 7 August 1996, § 58, Reports 1996-III).*

*6. The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings (see court martial cases, for example, **Miller and Others v. the United Kingdom,** nos. 45825/99, 45826/99 and 45827/99, 26 October 2004; see also cases regarding the dual role of a judge, for example, **Mežnarić v. Croatia**, no. 71615/01, 15 July 2005, § 36, and Wettstein, cited above, § 47, where the lawyer representing the applicant`s opponents subsequently judged the applicant in a single set of proceedings and overlapping proceedings respectively) which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (see Kyprianou, cited above, § 121). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see Pullar, cited above, § 38).*

*7. In this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see De Cubber, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see **Castillo Algar v. Spain**, 28 October 1998, § 45, Reports 1998-VIII)."(Ara f`dan l-istes sens **Hauschildt vs Denmark**"(1989) citat supra).*

…

Illi din il-Qorti temmen li kull gudikant ghandu iwiegeb ghall-istandards gholjin ghalkemm kull gudikant huwa uman.

Madanakollu kulhadd ghandu jifhem li malli gudikant jiehu l-guramenti tal-ufficju tieghu/taghha, jinqata` mill-ambjent ta` politika

u ta` partiggjanizmu politiku kif jinqata` mill-isfera tad-dibattitu pubbliku. Malli gudikant jiehu l-guramenti tal-hatra, l-opinjonijiet u twemmin tieghu/taghha jigu ridimensjonati u jidhlu fl-isfera ta` opinjoni jew twemmin prettament privat u personali. Dejjem jibqa` fid-dmir li jiggudika skont il-ligi u l-fatti.

Inoltre ghalkemm jitkellem dwar konnessjoni jew kollegjalita` personali bejn kandidati tal-istess distrett fl-istess partit (il-Magistrat u l-Ministru Dr Anton Refalo) ir-rikorrent ma gab l-ebda prova li hemm tali pregudizzju soggettiv jew bias kontrih. Anzi l-Magistrat stess enfasizzat li dejjem qdiet onestement u fedelment dak rikjest mill-guramenti taghha "u li zgur mhix ser tagixxi bi ksur tal-istess gurament f`dan il-kaz partikolari u fl-ebda kaz iehor quddiemha." Din l-istqarrija ma inghatatx piz mir-rikorrent izda fil-fehma ta` din il-Qorti kellha sservi bhala garanzija ta` imparzjalita` fl-assenza ta` provi konkreti ta` bias favur l-intimat Dr. Anton Refalo.

Ghalhekk din il-Qorti ma ssibx li l-parzjalita` soggettiva giet ippruvata.

Illi jsegwi li l-kwistjoni kollha tirrisolvi ruhha fl-apparenza ta` imparzjalita` li hija mehtiega sabiex jigi zgurat smigh xieraq (justice must not only be done but must also be seen to be done) ossia imparzjalita` oggettiva. Ghalkemm dak li thoss jew tahseb jew tibza` parti f`kawza dwar il-parzjalità jew imparzjalità tal-gudikant huwa wkoll relevanti ghall-ghanijiet tal-ligi, ma huwiex il-kriterju determinanti: li hu determinant hu jekk dak il-biza` jew dik il-percezzjoni huwiex imsejjes fuq konsiderazzjonijiet oggettivi hekk li persuna ragonevoli u minghajr pregudizzji taghha tasal biex hi wkoll ikollha dubji dwar l-imparzjalità tal-gudikant.

Fuq dan il-punt, kif gja osservat, ir-rikorrent iccita konfluwenza ta` fatti li huma gja elenkati ampjament f`din is-sentenza. Il-qofol tal-kwistjoni hija jekk gudikant li qabel il-hatra tieghu/taghha, kien jimmilita f`partit politiku

bhala kandidat ghandu jigi fdat b`kawzi li jkollhom xejra jew dimensjoni politika, jew fil-kuntest tal-mertu trattat, jew b`riferenza ghall-partijiet fil-kawza.

Illi din il-Qorti mhix daqstant konvinta li l-mertu tal-kawza quddiem il-Magistrat Vella Cuschieri hija wahda li "hadet dimensjoni politika". Forsi dan hu lampanti ghall-persuni li jghixu bin-nifs politiku izda ghall-Qorti, il-kaz li ghandu jigi deciz hu wiehed ta` libell semplici li jirrikjedi l-apprezzament ta` elementi guridici ben stabbiliti. Kazijiet ta` libell jiffjorixxu f`pajjizna u l-bosta jmissu ma` xi aspett politiku jew iehor.

Id-dimensjoni politika f`dan il-kaz partikolari, fil-fehma ta` din il-Qorti, ma tirrigwardax il-mertu imma pjuttost il-fatt li iz-zewg partijiet jigu min-nahat opposti tal-political spectrum u l-kandidatura fil-passat vicin tal-magistrat sedenti.

Illi dwar l-apparenza ta` parzjalita`, il-Qorti Kostituzzjonali fil-kaz fl-ismijiet ***<u>Lawrence Grech et v L-Avukat Generali et</u>*** *(7/03/2017)irribadiet:*

"13. L-apparenzi wkoll jistghu jkunu konsiderazzjonijiet oggettivi li joholqu dubji. Ukoll jekk ma hemmx rabtiet gerarkici bejn gudikant u parti fil-kawza, jekk l-apparenzi huma hekk li persuna ragonevoli tista` wkoll minghajr wisq tigbid jaghtu x`tahseb li hemm dawk ir-rabtiet, id-dubju ta` dik il-persuna dwar l-imparzjalità tal-gudikant jista` jkun dubju oggettivament gustifikat.

14. Fejn jezistu dubji bhal dan, ikun fl-interess mhux biss tal-parti li oggettivament tara ragunijiet ta` parzjalità kontriha li l-gudikant ma jkomplix jisma` l-kaz; ikun ukoll fl-interess tal-parti l-ohra ghaliex il-gudikant jista`, biex jeghleb kull dubju dwar l-imparzjalità tieghu ixaqleb, imqar inkonxjament favur l-parti l-ohra."

17. Fic-cirkostanzi ghalhekk, ma hijiex irragonevoli l-percezzjoni li hemm rabta tali bejn l-Arcdjocesi u l-assocjazzjoni li taghha l-imhallef huwa president li tista` tolqot hazin id-dehra ta` imparzjalità oggettiva ta` min ghandu rwol fit-tmexxija ta` dik l-assocjazzjoni. Id-dubju ma huwiex wiehed li ma jitqiesx oggettivament gustifikat, ukoll jekk dak id-dubju ma jolqotx l-imparzjalità soggettiva tal-imhallef."
F`dik il-kawza ir-rabtiet bejn il-gudikant u l-Arcdjocesi kienu baqghu vigenti kontrarjament ghall-kaz odjern.

Illi r-rikorrent isemmi l-fattur taz-zmien billi kien hemm ftit wisq zmien bejn l-partecipazzjoni attiva tal-Magistrat fil-hajja politika u l-elevazzjoni taghha. Dan hu fatt. Izda ghalkemm huwa prudenti li wiehed ihalli aktar zmien jghaddi, dan fih innifsu ma jnehhi xejn mis-solennita` tal-hatra u tal-gurament li jiehu gudikant.

Illi dwar dan ir-rikorrent irribatta li l-gurament fih innifsu ma jservix biex jghatti l-apparenza ta` parzjalita`. Dan hu minnu imma fil-fehma ta` din il-Qorti, jenhtieg li ikun hemm fatturi ohra oltre iz-zmien sabiex twarrab l-imparzjalita` prezunta tal-gudikant.

*"There is no reason to doubt in particular that a judge would regard his oath on taking judicial office as taking precedence over any other social commitments or obligations." (**Salaman v the United Kingdom** ECtHR - 15/06/2009).*

Illi dan kollu premess il-Qorti jidhrilha li ma saret l-ebda prova skont il-kejl oggettiv li l-Magistrat bil-kondotta taghha tat xi hjiel li tinnutra xi pregudizzju reali u attwali kontra r-rikorrent jew li ghandu jqum dubbju legittimu ta` tali pregudizzju. Il-fatt wahdu li kienet kandidata politika qabel il-hatra, minghajr fatturi ohra pregudizzjevoli konkomitanti u susseguenti ghall-hatra ma joholqux tali dubbju sal-grad rikjest mill-artikoli kostituzzjonali u konvenzjonali fuq citati.

Jezistu bizzejjed garanziji kemm fil-hatra ta` gudikant, fliskrutinju tal-kondotta tal-istess fil-qadi ta` dmirijietu/ha u anke mir-regoli procedurali nostrali, ordinarji u fondamentali, biex jizguraw li l-process jitkompla b`mod xieraq."

(ara wkoll : QK – 7 ta` April 2000 – **Savio Spiteri vs vs Avukat Generali)**

3. Risultanzi

Il-Qorti tibda billi tghid illi minn qari ta` l-Art. 734 tal-Kap 12, ma jirrizultax illi dak li qeghda tilmenta minnu r-rikorrenti jaqa` taht xi wahda mid-disposizzjoniijiet, lanqas is-subincinizi (f) u (g) tas-subartokulu (1). Infatti fil-kaz tal-lum, la xi avukat involut fil-kaz, u lanqas xi prokuratur legali, m`ghandhom l-ebda relazzjoni ta` parentela ma` l-Imhallef Padovani Grima.

Il-Qorti taghmel referenza ghal dak li sahqet din il-Qorti hekk kif diversament presjeduta fil-kawza fl-ismijiet **Anthony Giorgio noe vs Tristar Freight Services Limited** (Nru 243/2012 JPG).

Hemm il-Qorti kienet mitluba tastjeni milli tiehu konjizzjoni tal-vertenza peress li r-rikorrent f` dik il-kawza kien assistit minn avukat li kienet in-neputija tal-Imhallef sedenti.

Il-Qorti tat digriet fil-25 ta` April 2013 fejn cahdet it-talba peress li "*Art 734(1)(a) jitkellem fuq il-familjarita` mal-partijiet, waqt li Art 734(1)(g) tal-Kap 12 teskludi biss " hu jew oht l-istess gudikant"."*

Dan premess, din il-Qorti tikkoncedi li jista` jkun hemm cirkostanzi fejn, minkejja li raguni ghall-astensjoni jew ir-rikuza ta` gudikant ma tkunx taqa` taht xi wahda mid-dispozizzjonijiet tal-Kap 12, jista` jkun hemm ragunijiet tajbin bizzejjed f`kuntest aktar wiesgha sabiex gudikant ma jibqax jisma` kawza sabiex ikun hemm serhan tal-mohh li fit-trasparenza qieghed jithares il-jedd ta` smigh xieraq ta` xi parti fil-kawza.

F` cirkostanzi bhal dawn, l-imparzjalita` personali ta` gudikant kienet dejjem prezunta salv ghal prova kuntrarja. Ladarba persuna

tinhatar bhala gudikant, dik il-persuna tibqa` prezunta bhala imparzjali, u li sejra tagixxi b`imparzjalita` dejjem. Tant dan huwa hekk illi l-istitut tar-rikuza jew ta` l-astensjoni ta` gudikant jinbena fuq il-presuppost li l-gudikant li quddiemu titressaq kawza la huwa parzjali u lanqas korrott u li fuq kollox huwa d-dmir tieghu u mhux semplici privilegg jew favur li huwa jisma` u jaqta` kull kawza li titressaq quddiemu.

Dan premess, nigu ghal-lum tal-kaz tal-lum.

Fil-kaz odjern, irrizulta li hu l-Imhallef Jacqueline Padovani Grima u cioe` l-Av. Kenneth Grima, huwa partner fid-ditta ta` avukati Fenech & Fenech.

Irrizulta li din id-ditta timpjega ghadd ta` avukati.

Irrizulta wkoll illi l-Av. Kenneth Grima kemm bhala persuna kif ukoll bhala avukat direttament m`ghandu l-ebda involvement ta` xi xorta fil-kawza bin-Nru 109/2017 JPG.

Dan l-ahhar fatt huwa mill-aktar evidenti.

Sar ilment ukoll il-posizzjoni tal-P.L. Rowena Grima u tal-Av. Dr. Ann Fenech.

Huwa fatt ippruvat illi dawn il-persuni mhux involuti fil-kaz li ghandha quddiemha l-Imhallef Padovani Grima.

Fil-fehma ta` din il-Qorti, kemm ghal dak li jirrigwarda t-test oggettiv u kif ukoll dak soggettiv, il-fattur li jaghti lok ghal dubju dwar imparzjalita` ta` Qorti ghandu jkun wiehed gravi.

Ghall-finijiet ta` dritt komparattiv, senjatament id-dritt Amerikan, il-Qorti tirreferi ghall-kitba ta` Cynthia Gray : **<u>Disqualification issues – When a Judge is related to a lawyer</u>** : State Justice Institute : 2001 : American Judicature Society : fejn inghad hekk :-

> *"If a relative of a judge within the third degree is a partner with another lawyer or a partner in a law firm, many courts and advisory committees*

have adopted a per se rule that automatically prohibits the judge from presiding over cases in which one of the judge`s partners or an associate of the firm represents one of the parties. In* ***Regional Sales Agency v. Reichert****, 830 P.2d 252 (Utah 1992), the Utah Supreme Court addressed whether a judge must disqualify when a law firm appearing before the judge employed the judge`s father-in-law and brother-inlaw as partners, even though another attorney with the firm had exclusive responsibility for the case. The court noted that disqualification would be required if the firm`s fee was contingent on the outcome of the case and if the relative`s compensation, through profit sharing or other mechanisms, might ultimately be affected by the outcome. To avoid a detailed examination of the billing and compensation practices of the relative`s firm in every case, the court adopted a "bright-line proscription:" a relative of the requisite degree of relationship has an interest that might be sufficiently affected by the outcome of a case to require disqualification in every situation in which the judge`s relative is a partner or otherwise an equity participant in a firm that represents a party to the case. Other jurisdictions have also adopted that "bright-line" rule. See Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, § 8.5.5 (Little Brown 1996); Florida Advisory Opinion 84-24; Indiana Advisory Opinion 1-89; Nebraska Advisory Opinion 96-4; Nebraska Advisory Opinion 98-5 (the judge is disqualified even if the partners do not share profits or any equity interest); New Mexico Advisory Opinion 89-7; New York Advisory Opinion 87-3; U.S. Advisory Opinion 58 (1998).

Opinions in other jurisdictions, however, have stated that the mere fact that a judge`s relative is a partner in a law firm does not require automatic disqualification from cases in which the law firm appears, although ethics committees advise the judge to disclose the relationship and consider whether additional factors require disqualification. See, e.g., Alabama Advisory Opinion 93-500; Michigan Advisory Opinion J-4 (1991); Tennessee Advisory Opinion 95-4; Texas

Advisory Opinion 29 (1978); Washington Advisory Opinion 88-12; Washington Advisory Opinion 91-6. The Alabama advisory committee stated, first, the judge should disclose the existence of the relationship to the parties and their attorneys. Second, the judge must determine on a case-by-case basis whether there are any other factors that would cause the judge`s impartiality to be reasonably questioned, including:

• Whether the lawyer-relative would receive a commission, contingency, or bonus from the case or all of the firm`s cases for a period.
• Whether the relative would receive a salary increase when the firm reaches a certain dollar amount in a given time period.
• The degree of kinship between the judge and the relative.
• The number of cases the firm has before the judge.
• Any other connections, dealings, or relationships to other members of the firm.

Third, the judge should determine whether the lawyer-relative has an interest in the law firm that could be substantially affected by the outcome of the proceedings.

Noting that the judge`s disclosure of the relationship gives the parties and their attorneys an opportunity to supply additional information, the committee stated that the judge need not initiate an investigation into additional factors that may require disqualification, although the judge is required to make a reasonable effort to be informed about the financial interests of the judge`s spouse."

Il-kitba tkompli ghas-sitwazzjoni : *"When the lawyer-relative is an associate in a law firm":*

"The states are split on whether, if a judge`s relative is an associate in a law firm and, therefore, receives a fixed salary, the judge may preside over a case in which another attorney from the law firm appears.

• In some jurisdictions, absent additional factors, a judge may preside over proceedings in which a law firm representing one of the parties employs a relative as an associate. Alabama Advisory Opinion 97-665; Illinois Advisory Opinion 96-18; Michigan Advisory Opinion J-4 (1991); New Mexico Advisory Opinion 87-2; New York Advisory Opinion 88-21; New York Advisory Opinion 94-1; South Carolina Advisory Opinion 4-1980; Wisconsin Advisory Opinion 00-1; U.S. Advisory Opinion 58 (reissued 1999).

• Some jurisdictions advise judges to disqualify when a relative is an associate in a law firm appearing in a case unless the parties waive the disqualification. Florida Advisory Opinion 84-24; Indiana Advisory Opinion 1-89; Nebraska Advisory Opinion 89-3; New Mexico Advisory Opinion 86-10; Utah Advisory Opinion 97-2.

The committees that require disqualification note that "a firm`s ability to offer raises or pay Christmas or year-end associates bonuses, or, ultimately, to make payroll is directly related to its financial success." Utah Advisory Opinion 97-2. According to the Utah committee, adopting a bright-line rule for associates eliminates the necessity of expensive, time-consuming, awkward inquiries into an associate`s compensation package, the internal financial arrangements of a law firm, and whether the relative has worked in the case."

Kitba ohra kienet dik ta` Leslie W. Abramson : **The Judge`s Relative is Affiliated with Counsel of Record : The Ethical Dilemma**" : Vol 32, Issue 4, Hofstra Law Review 2004.

Jinghad :-

One of the specific examples in both the 1972 and 1990 Code (Model Code of Judicial Conduct) requires recusal where the "judge or the judge`s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . . (ii) is acting as a lawyer in the

proceeding." Both versions of the Code thus require judicial recusal when a close relative appears as counsel or works on the case. No exceptions exist; when the judge`s relative is counsel of record, the judge is disqualified.

When the judge`s relative does not appear as counsel of record in the proceeding but is a lawyer in the same firm as counsel of record, the specific standard is inapplicable. The judge`s relative is not acting as a lawyer in the proceeding but is merely affiliated with the firm. Is the judge then able to preside over the proceeding without any ethical concern? The Codes contain two sources of guidance.

First, the Commentary 14 of each Code, like the aforementioned standards, is nearly identical. The 1990 Commentary states in part [with bracketed deletions for the 1972 version of the Commentary]:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a [lawyer-] relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "[his] the judge`s impartiality might reasonably be questioned" under Section [3C(1)] 3E(I) ... may require [his] the judge`s disqualification. I

The Commentary leaves open the possibility that mere affiliation by a judge`s relative with counsel of record may be sufficient for disqualification. The textual basis for disqualification is the general standard requiring recusal when the judge`s "impartiality might reasonably be questioned. Because the language following the general rule mandates recusal "including but not limited to" the specific examples, courts interpret and apply the appearance of partiality beyond the rule`s explicit illustrations.`

Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. Any conduct that would lead a reasonable [person] knowing all the

circumstances to the conclusion that the judge`s impartiality mifht reasonably be questioned" is a basis for the judge`s disqualification.

The appearance of partiality thus functions as an inclusive "catchall" provision available as the source for evaluating recusal in two situations: (1) when facts do not altogether match the language of the specific examples; or (2) when the situation obviously falls outside the specific scenarios. In either case, the general rule operates as a "fall-back" position for any judge or party considering judicial disqualification.

When the Commentary describes the issue of judicial disqualification for judges whose "lawyer-relative" is in the same law firm as counsel of record, the scope of such relationships are presumably the same as the Code`s explicit standard-a family relationship between a judge and the judge`s spouse, the third degree of relationship to either the judge or the judge`s spouse, or the spouse of such third-degree relative. Because the Commentary indicates that disqualification is not automatic, the nature of the relationship as well as the face of the relationship may be relevant. For example, spousal relationships are regarded by the average person "as the closest of all human relationships," so that a judge and his or her spouse would be unable to maintain a wall between their personal lives and their professional responsibilities. In Smith v. Beckman, the court presumed that a marriage relationship between a judge and a prosecutor-spouse required the judge`s recusal, without any other facts necessary to call into question the judge`s impartiality:

[A]n appearance of impropriety is created by the close nature of the marriage relationship. A husband and wife generally conduct their personal and financial affairs as a partnership. In addition to living together, a husband and wife are also perceived to share confidences regarding their personal lives and employment situations. Generally, the public views married people as "a couple," as "a partnership," and as

participants in a relationship more intimate than any other kind of relationship between individuals.

Thus, the risk of favoritism and the chance that confidential information might be transferred may appear greater when the law firm of which a judge`s spouse is a partner represents a party before the judge.

B. Relative-Lawyer`s Interest

The second textual source for disqualification when the judge`s relative is affiliated with counsel of record is Canon 3E(1)(d)(iii). It requires recusal when the same family relationship mentioned in Canon 3E(1)(d)(ii) exists and the relative "is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding. The judge must make a reasoned assessment of the relative`s interest and whether that interest could be substantially affected by the case. The 1972 Code uses similar language in Canon 3C(1)(d)(iii). However, the 1972 standard and the federal statute refer (1) to any "interest" rather than "more than a de minimis interest" by the relative, and (2) to the effect that the "outcome of the proceeding" could have on the relative`s interest.26 In addition to this black-letter approach, the Commentary also addresses the situation [with a bracketed exception for the 1972 version of the Commentary]:

Under appropriate circumstances, the fact that ... the [lawyer-]relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3 [C]E(1)(d)(iii) may require the judge`s disqualification.

Regardless of whether the analysis is based on the appearance of partiality or the "interest" approach, the size of the firm and the potential fee from the case are important but often overlooked parts of the analysis about whether disqualification is necessary "under appropriate circumstances:"

For example, if the judge`s relative is a member of a two-person law firm in a case in which the firm stands to earn a $1,000,000 contingency fee, then disqualification is clearly required. On the other hand, if the judge`s relative is a new associate in a ninety-person law firm in a case in which the firm stands to earn a fee of $1,000, disqualification clearly is not required.

The nature of the "interest" that may be affected by the lawyer relative`s representation is usually monetary. Some cases also discuss whether the judge`s role in the case would advance the relative`s nonpecuniary interest such as the reputation of the relative or the firm, or the interest in goodwill which attracts clients. The interests in reputation and goodwill also may create an appearance of impropriety.

….

II. THE LAWYER-RELATIVE`S LAW FIRM POSITION

A. Lawyer-Relative as Partner

Courts are most willing to disqualify a judge when his or her relative is a partner in the law firm of record. Judicial analysis of the recusal issue for judges whose lawyer-relatives are partners in law firms often begins with discussion of established agency and partnership principles. An agency relationship exists between law firm partners and between each partner and the law firm. As a result of the rights, duties and liabilities of the partnership relationship, a partner has an interest in every matter handled by the firm. The result of any firm representation can affect each partner`s financial interest as well as his or her non-economic interest such as reputation or good will. Thus, the law firm`s appearance or an entry of appearance by an individual partner of that firm is the equivalent of an entry by each lawyer in the firm.

Several cases apply a per se rule of judicial disqualification when the judge`s lawyer-relative

is a partner in the same law firm as counsel of record; as with ***Potashnick v. Port City Construction Company****, all have applied the specific "interest that could be substantially affected by the outcome" standard. Equity partners typically receive a fixed percentage of the law firm`s income that is not dependent on the outcome of any particular case, and that partnership share always has the potential to be affected by the outcome of each of the firm`s cases. A rule of automatic disqualification may be harsh and inconvenient, but the opinions regard the public`s confidence in the integrity and impartiality of the judiciary and the specific judge as more important.*

In contrast to the per se cases, a fact-bound application of the ethical standard may result in a conclusion that disqualification is unnecessary. The Code and federal statutory standards prescribe recusal when a close relative "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. Pashaian v. Eccelston Properties, Ltd criticized the per se recusal cases by stating that it is "unrealistic to assume... that partners in today`s law firms invariably `have an interest that could be substantially affected by the outcome of any case in which any other partner is involved.`` After considering in camera the extent of financial participation of the judge`s wife`s sister`s husband in the net income of the law firm of record and the amount in controversy in the instant case, the judge concluded that the lawyer-relative`s interest in the law firm would not be "substantially affected" by the outcome of the case.

Pashaian`s approach is more realistic than Potashnick`s for measuring whether a lawyer-relative has an interest which could be substantially affected by the outcome of a case. Increasingly, law firms have different levels of partnership based in large part on investment and compensation. Traditionally, all law firm partners shared in the profits (or losses) of the firm, but many large firms now have both equity partners and salaried partners. Because salaried

partners have a set income with no investment in the partnership, it is more difficult to identify how they possess an interest that could be substantially affected by the outcome of a particular case. Thus, whether a lawyer-relative has an "interest" in the outcome of a proceeding, requiring judicial disqualification, may depend in large part on the type of partnership held by the relative.

Even if disqualification is denied because the judge`s relative lacks an "interest" in the outcome of the case, disqualification is also possible when lawyer-relatives are partners, under the general "appearance of impropriety" criterion and pursuant to the Codes` Commentary. In ***Jenkins v. Forrest County General Hospital****, the judge`s brother was a senior partner in the law firm representing a hospital, and the medical community had assisted in electing the judge. Finding no wrongdoing by the judge, the appellate court nevertheless found that its "potential" for wrongdoing and how the situation appears to the public and the parties would raise doubts in reasonable persons` minds about the judge`s impartiality.*

The appearance of partiality also may be a concern when the judge`s relative is a partner in a firm that does not represent a party in the current case, but instead represents it in other litigation and therefore receives fees from that client. In ***Microsoft Corporation v. United States****, Chief Justice Rehnquist stated that he had not recused himself from consideration of Microsoft`s petition for certiorari in an antitrust suit brought by the United States, even though his son is a partner in party`s law firm retained as local counsel by Microsoft in private antitrust litigation. He conceded that the Court`s decision could affect Microsoft`s exposure in other antitrust lawsuits, but he reasoned that [e]ven our most unremarkable decision interpreting an obscure federal regulation might have a sigiificant impact `on the clients of our children who practice law. Giving such a broad sweep to [the appearance of impropriety rule] seems*

contrary to the "reasonable person" standard which it embraces.

Certainly, every case decided by an appellate judge may affect a client represented by a law firm that includes a judge`s relative. However, Chief Justice Rehnquist`s broad statement ignores the fact that he had decided a case involving not just any party, but the same party his son`s firm was representing in pending litigation about the same types of issues. An objective observer might conclude that his participation in the certiorari application would give rise to an appearance of partiality, and that observer at least would be interested in knowing more information about the connection between the Supreme Court appeal and the other litigation before a definitive conclusion could be reached.

In 1993, seven Justices of the United States Supreme Court issued a "Statement of Recusal Policy" about lawyer-relatives of Justices who are partners in law firms appearing before the Court. The pertinent portions state:

We have spouses, children or other relatives within the degree of relationship covered by 28 U.S.C. § 455 who are or may become practicing attorneys .... We think it desirable to set forth what our recusal policy will be... when the covered lawyer is a partner in a firm appearing before us ....

The provision of the recusal statute that deals specifically with a relative`s involvement as a lawyer in the case requires recusal only when the covered relative "[i]s acting as a lawyer in the proceeding." § 455(b)(5)(ii). It is well established that this provision requires personal participation in the representation, and not just membership in the representing firm, see, e.g., Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1113 (CA5), cert. denied, 449 U.S. 820 (1980). It is also apparent, from use of the present tense, that current participation as lawyer, and not merely past involvement in earlier stages of the litigation, is required.

A relative`s partnership status, or participation in earlier stages of the litigation, is relevant, therefore, only under one of two less specific provisions of § 455, which require recusal when the judge knows that the relative has "an interest that could be substantially affected by the outcome of the proceeding," § 455(b)(5)(iii), or when for any reason the judge`s "impartiality might reasonably be questioned," § 455(a). We think that a relative`s partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not automatically trigger these provisions. If that were the intent of the law, the per se "lawyer-related recusal" requirement of § 455(b)(5)(ii) would have expressed it. Per se recusal for a relative`s membership in the partnership appearing here, or for a relative`s work on the case below, would render the limitation of § 455(b)(5)(iii) [sic] to personal work, and to present representation, meaningless.

We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court. Given the size and number of today`s national law firms, and the frequent appearance before us of many of them in a single case, recusal might become a common occurrence, and opportunities would be multiplied for "strategizing" recusals, that is, selecting law firms with an eye to producing the recusal of particular Justices. In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.

[We will recuse ourselves where] the amount of the relative`s compensation could be substantially affected by the outcome here. That would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits. It seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that... the outcome will have a substantial effect upon each partner`s compensation. Since it is impractical to assure ourselves of the absence of such consequences in each individual case, we shall recuse ourselves from all cases in which appearances on behalf of parties are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives` partnership shares.

The statement covers past, active involvement of the lawyer relative in the instant proceeding, as well as the lawyer-relative situation. For the lawyer-partner, the Statement observes that the federal statutes may suggest recusal under the "two less specific provisions of § 455"-"`an interest that could be substantially affected by the outcome of the proceeding"` and the appearance of partiality-but it notes that a lawyer-relative`s partnership in a firm appearing before it, or the relative`s earlier work on a case later coming before the Court do "not automatically trigger these provisions."

The final text of the "Statement of Recusal Policy" suggests a series of drafts and compromises which led to a rather disjointed result. The Justices initially stated that it does not serve the public interest to recuse "out of an excess of caution, whenever a relative is a partner in the firm before us." They noted that unnecessary recusals would harm the Court`s functioning. "Needless recusal[s]" affect the certiorari process and may produce an even division on the merits of the case. In addition, they would produce opportunities for the "comAnon occurrence" of recusal especially as a preferred matter of strategy. 61 The Statement

assumes that the relatives will be in "national law firms" that frequently appear before the Court. At this point in the Statement, recital of these legitimate arguments suggests to the reader that the Justices will presume that recusal is not essential and instead look at the possibility of recusal on a case-by-case basis.

In a stunning turnabout from the declarations in the earlier part of the Statement, the Justices then stated that recusal will occur in "all cases in which appearances on behalf of parties are made by firms in which our relatives are partners." They recognized "that in virtually every case before us with retained counsel there exists a genuine possibility that the outcome will have a substantial effect upon each partner`s compensation." Their statement appears to exclude those case where the lawyer-relative`s large firm is representing a party pro bono or as the result of a court appointment.

The Statement also seems conclusively to eliminate any nonpecuniary interest in reputation or goodwill as relevant to the Justices` recusal decision. "The policy takes no account of the prestige benefit of winning a case in the Supreme Court---especially a controversial case." The primary benefit to a law firm of taking and winning a case in the Court may well be to the enhanced reputation of the law firm and its partners instead of a financial interest. And complying with the Statement by not providing a portion of the fees derived from a case in the Court to the lawyer-relative does not prevent him or her from receiving a reputational benefit attaching to all partners.

For the signatories to the Statement, the only exception to the bright-line recusal in the Statement occurs when the Court has "received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives` partnership shares." Imprecision in this exclusion leaves open such issues as when the written assurance needs to be received. Common sense indicates that the law firm would forward

the written assurance no later than the time when a response to a petition for certiorari is due.

Second, does "permanent basis" for the relative`s exclusion from the partnership share refer only to the case at bar? It is possible to read the "permanent basis" language so that law firms with relatives of Supreme Court Justices will effectively "register" their financial arrangement with the relative-partner so that it is effective for any case thereafter in which the firm is appearing. Otherwise, it could be argued that the Statement`s reference to "permanent basis" could be construed to be a case-by-case financial agreement perhaps excluding the lawyer relative from compensation as long as each case is pending before the Court.

Finally, why did the Justices not acknowledge the possibility that the parties can waive the disqualification? As already mentioned, the federal statute permits a waiver of judicial recusal for an appearance of partiality but not for an "interest that could be substantially affected by the outcome" of the case. Failing to consider waiver as an alternative may leave the Court with the "possibility of an even division on the merits of the case, and.., a distorting effect upon the certiorari process" that the Statement itself seeks to avoid.

B. Lawyer-Relative as a Non-Partner

Case law generally shows a judicial reluctance to disqualify when the judge`s lawyer-relative is merely affiliated with a law firm but is not a partner. The analysis generally focuses on whether the relative`s association with the law firm raises the issue of whether the judge`s "impartiality might reasonably be questioned., One of the earlier cases that addressed the issue was ***United States ex rel. Weinberger v. Equifax, Inc****., in which the trial judge refused to recuse after discovering that his son was an associate in the law firm representing one of the parties. Conceding that the issue might be resolved differently if the judge`s son were a*

partner in the law firm, the court found that automatic disqualification was inappropriate because the son`s salary interest as an associate was "too remote" to constitute a "financial interest" under the federal statutory scheme.

After assuming that the relative-judge had examined the lawyers` arguments, the Equifax court also concluded that the judge had not abused his discretion by denying the motion to recuse under the general appearance of partiality standard. While the court recognized that the judicial viewpoint for deciding the appearance of partiality issue is that of the reasonable person, the court noted that the trial judge had "perceived no justification for removing himself," perhaps implying that the analysis was exclusively from the judge`s subjective perspective.

As mentioned, most appellate decisions rely on the appearance of partiality standard, because it is generally assumed that a non-partner lawyer-relative is salaried. As the Commentary and the decisions state without explanation, the affiliation with the law firm by itself provides no reasonable basis for questioning the judge`s impartiality, even when the relationship with the judge is a first-degree connection. On the other hand, a concern for the harm caused to public confidence in the judicial system creates an arguable appearance of partiality even when a nonpartner-relative`s firm appears before the judge. The reasonable person may conclude that, "No wonder that party won. The judge`s relative works for their law firm!""

Il-kitba taghlaq billi tghid illi :-

"Public confidence in the judiciary can be restored by modifying the interpretation and application of ethical norms. Judges may not recuse themselves as frequently as may be necessary to preserve public confidence in the judiciary. The black-letter language of the ABA Code and the federal statute should be modified so that a judge is disqualified:

When the judge knows that a lawyer in a proceeding is affiliated with a law firm in which a relative of the judge is a partner or has an ownership interest in the law firm.

The new standard clarifies that recusal is mandatory when the lawyer-relative is a partner, regardless of how the relative`s partnership interest in the firm is defined. Recusal is necessary whether the lawyer relative is an equity or salaried partner. The status of the lawyer-relative as a partner, rather than the method of remuneration, determines whether recusal is compulsory. From the perspective of the reasonable person, a lawyer-relative`s partnership position in a law firm creates the appearance of partiality, or an interest that could be substantially affected by the outcome of the case, or both. Withholding litigation profits from the lawyer-relatives is not an alternative to recusal, because removing the financial interest still leaves a reputational or goodwill interest for the lawyer-relative. Nevertheless, the parties and attorneys could still use the remittal provisions to waive the conflict.

For non-partner, lawyer-relatives who are affiliated with a law firm or government agency, the Commentary to the Codes should be amended to emphasize the importance of a careful factual analysis under the appearance of partiality standard.

Under appropriate circumstances, when the judge knows that the relative is affiliated with a law firm of record in a proceeding disqualification may also be required, because "the judge`s impartiality might reasonably be questioned." The relevant factors for making a decision about recusal include consideration of (1) the size of the lawyer-relative`s law firm, the nature and notoriety of the proceeding, (2) the fee arrangement between the law firm and the client, (3) whether the lawyer-relative is working for a private law firm or a public agency, (4) whether the lawyer-relative`s reputation or goodwill will be significantly enhanced by a successful result

in the proceeding, (5) the nature and degree of the relationship between the judge and the lawyer-relative, (6) the prospect of an imminent decision regarding promotion or retention for the lawyer-relative, and (7) whether the law firm`s compensation plan includes a bonus or other reward system.

While it is possible that these factors often will result in judicial disqualification, a per se rule is inappropriate for all the various combinations of factors under the Commentary. As a Commentary should, the language informs judges, lawyer-relatives, and other lawyers and parties about the relevant standards which a judge should weigh when faced with a motion to disqualify or a decision to recuse sua sponte. The list is not exhaustive, but it reflects important circumstances in the current case law. As more legal decisions are reported, other factors can be added."

Daqstant fejn si tratta tal-qaghda fl-Istati Uniti.

Ghar-rigward tal-qaghda fl-Ewropa, il-*Working Group* fl-*European Network of Councils for the Judiciary* (ENCJ) ipprepara **Judicial Ethics Report (2009-2010)** fejn inghad hekk :-

"IMPARTIALITY

Impartiality and people`s perception of impartiality are, with independence, essential to a fair trial.

The impartiality of the judge represents the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment.

The judge is aware of the possibility of his own prejudices. (It is a matter of subjective and objective impartiality. Objective impartiality is related to the functions and the subjective impartiality concerns the personality of the individual).

To guarantee impartiality, the judge :

- Fulfils his judicial duties without fear, favouritism or prejudice;
- Adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality and minimises the situations which might lead to a recusal ;

- Recuses himself from cases when:
o he cannot judge the case in an impartial manner in the eyes of an objective observer ;
o he has a connection with one of the parties or has personal knowledge of the facts, has represented, assisted or acted against one of the parties, or there is another situation which, subjectively, would affect his impartiality;
o he or a member of his family has an interest in the outcome of the trial.

A judge has a duty of care to prevent conflicts of interest between his judicial duties and his social life. If he is a source of actual or potential conflicts of interest, the judge does not take on, or withdraws immediately from, the case, to avoid his impartiality being called into question.

A judge ensures that his private life does not affect the public image of the impartiality of his judicial work.

Impartiality does not prevent a judge from taking part in social life in order to carry on his professional activity.

He is entitled to complete freedom of opinion but must be measured in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organisation.

In any event, this freedom of opinion cannot be manifested in the exercise of his judicial duties."

The Magna Carta of Judges li hareg il-*Consultative Council of European Judges* ighid :-

*"**Rule of law and justice***

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

Judicial Independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

Guarantees of independence

5. Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence.

6. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

7. Following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate

remuneration and be provided with an adequate pension scheme, to be established by law.

8. Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.

9. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation).

10. In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.

11. Judges shall ensure equality of arms between prosecution and defence. An independent status for prosecutors is a fundamental requirement of the Rule of Law.

12. Judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society.

Body in charge of guaranteeing independence

13. To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.

Access to justice and transparency

14. Justice shall be transparent and information shall be published on the operation of the judicial system.

15. Judges shall take steps to ensure access to swift, efficient and affordable dispute resolution; they shall contribute to the promotion of alternative dispute resolution methods.

16. Court documents and judicial decisions shall be drafted in an accessible, simple and clear language. Judges shall issue reasoned decisions, pronounced in public within a reasonable time, based on fair and public hearing. Judges shall use appropriate case management methods.

17. The enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice.

Ethics and responsibility

18. Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training.

19. In each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure.

20. Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.

21. The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state.

22. It is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

International courts

23. These principles shall apply mutatis mutandis to judges of all European and international courts."

Premess dan kollu, hija l-fehma konsiderata ta` din il-Qorti illi fil-kaz tal-lum ir-relazzjoni tal-gudikant fil-kawza in kwistjoni (fis-sens mill-aktar wiesgha tal-kelma) ma` *partner* jew ma` mpjegata fid-ditta ta` avukati li qed jippatrocinaw lil xi ntimati fil-kawza in kwistjoni hija bil-wisq remota sabiex iggib maghha dubju legittimu dwar l-imparzjalita` ta` l-Qorti, u dan kemm ghall-fini tat-test soggettiv kif ukoll ghal dak oggettiv.

Fil-fehma taghha, daqstant konsiderata, din il-Qorti tghid illi fil-kaz tal-lum ma hemmx fatti jew cirkostanzi daqstant gravi jew impellenti li jaghtu lok ghal dubji serji li l-gudikant mhijiex sejra tkun imparzjali.

Il-Qorti m`ghandhiex dubju li fil-kaz tal-lum xejn ma ser igib fix-xejn l-aforisma : *justice seen to be done* (op. cit.)

Fil-kaz tal-lum, it-thassib dwar parzjalita` tal-gudikant huwa nsufficjenti propju ghaliex dak it-thassib – jew biza` - sejjahlu li trid – huwa nfondat.

Il-Qorti trid timxi fuq il-provi, u fuq dawn trid issawwar il-konsiderazzjonijiet taghha.

Din il-Qorti tistqarr illi ma tressqet l-ebda prova - meqjusa bil-kejl oggettiv - li l-Imhallef sedenti bil-kondotta taghha tat xi hjiel li qeghda turi xi pregudizzju reali u attwali kontra r-rikorrenti jew li taghti lok li jqum dubju legittimu ta` tali pregudizzju.

Il-fatt wahdu li l-Imhallef sedenti ghandha konnessjoni familjari ma` xi membri tad-ditta legali li tippatrocina lil xi intimati fil-kawza in kwistjoni, liema persuni bl-aktar mod assolut mhux involuti fil-kawza, la jista` u lanqas ghandu johloq dubju dwar imparzjalita` sal-grad rikjest mid-disposizzjonijiet tal-Kostituzzjoni u tal-Konvenzjoni citati mir-rikorrenti.

Il-Qorti ghandha mohha mistrieh illi *ex lege* hemm bizzejjed garanziji fil-ligi stess illi jizguraw li l-process gudizzjarju jimxi u jigi deciz bil-massima serenita` ghall-partijiet u kif trid il-ligi.

Il-Qorti ma tarax illi hemm jew x`aktarx li jista` jkun hemm ksur tad-drittijiet fundamentali ta` smigh xieraq tar-rikorrenti skont l-Art 39 tal-Kostituzzjoni u l-Art 6 tal-Konvenzjoni abbazi tal-fatt illi xi intimati fil-kawza tal-lum huma patrocinati mid-ditta Fenech & Fenech, liema ditta ghandha (i) bhala *senior partner* lill-Av. Kenneth Grima li jigi hu l-Onor Imhallef Padovani Grima ; u (ii) lill-P.L. Rowena Grima li wkoll tigi oht l-Onor Imhallef Padovani Grima.

Lanqas ma tara li hemm jew li jista` jkun hemm ksur ta` d-dritt fondamentali ghal smigh xieraq bil-fatt li l-Imhallef Padovani Grima ghandha xi relazzjoni familjari distanti – *per dire il meno* – ma` Dr Ann Fenech.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi hekk :-

Tichad l-ewwel (1) eccezzjoni tal-intimat Avukat Generali, spejjez ghall-istess intimat.

Tichad l-ewwel (1) eccezzjoni tal-intimata Sciacca Grill Ltd spejjez ghall-istess intimata.

Tilqa` l-bqija ta` l-eccezzjonijiet tal-intimat Avukat Generali.

Tichad it-talbiet tar-rikorrenti.

Salv kif fuq premess, tordna lir-rikorrenti sabiex thallas il-bqija tal-ispejjez tal-kawza.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur