QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 12 ta` Lulju 2018

Kawza Nru. 1
Rik. Nru. 86/17 JZM

L-Onor. Dr. Simon Busuttil

kontra

L-Avukat Generali

u

b`sentenza tat-30 ta` Novembru 2017 gew kjamati fil-kawza l-Onorevoli Prim Ministru Joseph Muscat, l-Onorevoli Ministru Konrad Mizzi, Keith Schembri, Malcolm Scerri, Adrian Hillman, Brian Tonna u Karl Cini

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fid-19 ta` Ottubru 2017 li jaqra hekk :-

1. Illi nhar l-14 ta` Lulju 2017, l-esponenti pprezenta rikors guramentat ai termini tal-artikolu 546 (4A) tal-Kodici Kriminali quddiem il-Magistrat li kien Ghassa dakinhar– allura l-Magistrat Dr. Ian Farrugia – b`notitia criminis lilu taht gurament dwar fatti, ilkoll pubblici u li emanaw mill-hekk imsejha Panama Papers, li jammontaw ghal reati li l-piena ghalihom teccedi t-tliet snin prigunerija, fosthom hasil ta` flus u/jew tentattiv ta` hasil ta` flus, b`dettalji cari dwar il-persuni li ghamlu tali reati, u fejn is-suggett materjali tar-reati imsemmija ghadu jezisti, sabiex il-Magistrat jaghmel il-prova dwar l-in genere kif titlob appuntu l-ligi fl-Artiklu 546(1) tal-istess Kodici;

2. Illi permezz ta` digriet datat 26 ta` Lulju 2017, il-Magistrat Dr. Ian Farrugia ddekreta li avveraw ruhhom il-pre-rekwiziti kollha mehtiega u trid konsegwentement issir investigazzjoni u ghalhekk tiskatta l-inkjesta Magisterjali;

3. Illi dakinhar stess li nghata dan id-digriet u wara li gie notifikat lis-seba` "persuni suspettati" (kliem l-artiklu 546(4)(A) tal-Kodici Kriminali), il-Gvern ta` Malta hareg stqarrija ufficjali numru PR 171785 li tghid li "l-membri tal-Gvern ser ikunu qed jikkoperaw mal-inkjesta in genere li ghadha trid tistabilixxi l-fatti";

4. Illi pero` proprju l-ghada li nghata dan id-digriet, fis-27 ta` Lulju 2017, is-seba` individwi surreferiti ghamlu rikors kull wiehed quddiem il-Qorti Kriminali sabiex id-decizjoni tal-Magistrat Dr. Ian Farrugia tigi revokata u dan ai termini tal-Artikolu 546 (4B) tal-Kodici Kriminali;

5. Illi l-Qorti Kriminali, dakinhar stess u cioe` fis-27 ta` Lulju 2017, permezz tal-On. Imhallef Dott A. Mizzi, tat lill-esponenti ghaxart ijiem tax-xoghol (minkejja li l-artiklu 546 (4B) tal-Kodici Kriminali jezigi li l-appell ikun "deciz bl-urgenza") biex iwiegeb ghal dawn ir-rikorsi u, wara li l-esponenti pprezenta zewg rikorsi bl-urgenza biex jitlob li l-Qorti tappunta l-appell ghal seduta fil-qorti bil-miftuh sabiex ikun jista` jqajjem eccezzjonijiet preliminari skond il-ligi fil-miftuh, appuntatu ghal nhar is-16 ta` Awwissu 2017 fl-10am;

6. Illi f`dik is-seduta tas-16 ta` Awwissu 2017, l-esponenti talab gharrikuza ta` l-imhallef sedenti billi ai termini ta` l-Artikolu 734 (1) (e) tal-Kap. 12 tal-Ligijiet ta` Malta, Imhallef jista` jigi rikuzat jew jastjeni milli joqghod f`kawza "jekk hu, jew il-mara tieghu, jew ir-ragel taghha, ikollhom interess dirett jew indirett dwar kif tinqata` l-kawza`;

7. Illi dan sar ghaliex huwa fatt maghruf li mart l-On. Imhallef Mizzi, Marlene Mizzi, hi l-Membru Parlamentari Ewropew fi hdan il-Progressive Alliance of Socialists and Democrats (S&D), u li giet eletta bhala MEP tal-Partit Laburistà fl-elezzjonijiet ghall-Parlament Ewropew fl-2009 u fl-2014;

8. Illi f`diversi okkazjonijiet fl-ahhar gimghat u xhur l-MEP Marlene Mizzi esprimiet fehmitha rigward il-Panama Papers billi qablet mal-pozizzjoni li ttiehdet mill-Partit taghha u specjalment tal-Kap tal-Partit taghha, l-On. Prim Ministru (u wiehed mill-persuni suspettati ai termini tad-digriet tal-Mag Dr Ian Farrugia tas-26 ta` Lulju 2017), u l-persuni l-ohra nvoluti f`dan l-iskandlu tal-Panama papers, u dan proprju sa gimghatejn qabel ma l-Kap tal-Oppozizzjoni pprezenta n-notitia criminis tieghu, f`diversi nterventi fil-Parlament Ewropew u diversi intervisti;

9. Illi l-istess MEP Marlene Mizzi konsistentement ikkritikat u attakkat, sija bil-fomm u sija bil-kitba, dak li ilu jsostni l-esponenti Kap tal-Oppozizzjoni fuql-involviment tal-"persuni suspettati", uhud b`karigi gholja fil-gvern ta` Malta, fl-iskandlu tal-Panama Papers;

10. Illi waqt it-trattazzjoni ta` l-avukat sottoskritt dwar il-htiega ta` rikuza, l-Imhallef sedenti pubblikament wera u esprima li kien fastidjat bil-kontenut tat-trattazzjoni u ghalhekk wera li ma kellux id-distakkament mehtieg minn gudikant;

11. Illi wara t-trattazzjoni ta` l-avukat sottoskritt, ir-rikorsi kollha gew differiti ghal nhar il-11 ta` Settembru 2017 sabiex is-seba` rikorrenti jaghmlu t-twegibiet taghhom ghat-talba ghar-rikuza u dan dejjem minkejja d-disposizzjoni carissima ta` l-artiklu 546 (4B) tal-Kodici Kriminali li r-rikors jigi deciz b`urgenza. Sussegwentement, ir-rikorsi regghu gew differiti sabiex jinghata provvediment;

12. Illi minkejja li huwa manifestament car li l-MEP Marlene Mizzi ghandha interess fl-ezitu tad-decizjoni tal-Qorti Kriminali presjeduta minn zewgha, l-On. Imhallef Dott. A. Mizzi, it-talba ghal rikuza giet michuda mill-istess On. Imhallef Dott. Mizzi permezz ta` digriet datat 3 ta` Ottubru 2017;

13. Illi b`din id-decizjoni, l-esponenti ma ghandu ebda alternattiva ohra hlief li jipprocedi b`din il-kawza kostituzzjonali sabiex jigu salvagwardjati d-drittijiet fundamentali tieghu ghal smigh xieraq f`kaz fejn hu ovvju li l-gustizzja m`hijiex ser tidher li ser issir u ma tista` qatt tidher li ser issir, iktar u iktar meta l-kliem tal-artiklu 734(1)(e) tal-Kodici ta` Procedura u Organizazzjoni Civili huma cari kristallini u hemel sentenzi tal-Qorti Kostituzzjonali nostrana u tal-

Qorti Ewropea tad-Drittijiet tal-Bniedem jindikaw car li dan hu kaz ta` rikuza tal-On Imhallef li qed jippresjedi l-Qorti Kriminali, jekk mhux ukoll ta` astensjoni, tal-Imhallef in kwistjoni;

Ghaldaqstant u in vista tas-suespost, l-esponenti umilment jitlob lil din l-Onorabbli Qorti sabiex :

1. Tiddikjara illi bid-digriet ta` nhar it-3 ta` Ottubru 2017 tal-Qorti Kriminali presjeduta mill-On. Imhallef Dott. A. Mizzi fejn l-istess Imhallef ma rrikuzax ruhu fis-smigh tar-rikorsi tal-On. Prim Ministru Joseph Muscat, l-On. Ministru KonradMizzi, ic-Chief of Staff tal-Prim Ministru Keith Schembri, Malcolm Scerri, Adrian Hillman, Brian Tonna u Karl Cini biex tigi revokata d-decizjoni tad-digriet tal-Magistrat Dr. Ian Farrugia tas-26 ta` Lulju 2017 fl-atti tar-rikors guramentat tal-Onor. Kap ta` l-Opposizzjoni Dr. Simon Busuttil (ID 242669M) ta` l-14 ta` Lulju 2017, inkiser jew x`aktarx serjinkiser id-dritt ta` smigh xieraq ta` l-esponenti kif sancit mill-Artikolu 39 tal-Kostituzzjoni ta` Malta u mill-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem;

2. Thassar, tannulla u tirrevoka kwalsiasi digriet u/jew sentenza li tat il-Qorti Kriminali presjeduta mill-On. Imhallef A. Mizzi fir-rikorsi surreferiti nkluz, izda mhux limitat ghal, digrieti jew sentenzi li jolqtu l-mertu ta` l-istess rikorsi;

3. Tordna illi r-rikorsi maghmula mill-On. Prim Ministru Joseph Muscat, l-On. Ministru Konrad Mizzi, ic-Chief of Staff tal-Prim Ministru Keith Schembri, Malcolm Scerri, Adrian Hillman, Brian Tonna u Karl Cini biex tigi revokata d-decizjoni tad-digriet tal-Magistrat Dr. Ian Farrugia tas-26 ta` Lulju 2017 fl-atti tar-rikors guramentat tal-Onor. Kap ta` l-Opposizzjoni Dr. Simon Busuttil (ID 242669M) ta` l-14 ta` Lulju 2017 jigu assenjati lil Imhallef iehor sabiex ikomplu jinstemghu u jigu decizi bl-urgenza kif irid l-Artiklu 546(4B) tal-Kodici Kriminali;

4. Tillikwida kumpens ghad-danni sofferti mill-esponenti ghall-ksur jew probabbli ksur tad-dritt fundamentali tieghu ta` smigh xieraq;

5. Tordna lill-intimat ihallas il-kumpens hekk likwidat;

6. Taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tizgura t-twettiq tad-dritt ta` smigh xieraq ta` l-esponenti.

Bl-ispejjez.

Rat ir-risposta li pprezenta l-intimat Avukat Generali fid-9 ta` Novembru 2017 li taqra hekk :-

Illi l-lanjanza tar-rikorrenti hija li bic-cahda tat-talba ta` rikuza tal-Onor. Imhallef li qieghed jippresjedi l-Qorti Kriminali allegatament ser jinkisru d-drittijiet ta` smigh xieraq spettanti lilu kif protetti permezz tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropeja u dan allegatament stante illi "hu ovvju li l-gustizzja m`hijiex ser tidher li ser issir u ma tista` qatt tidher li ser issir, iktar u iktar meta l-kliem tal-artikolu 734 (1) (e) tal-Kodici ta` Procedura u Organizzazzjoni Civili huma cari kristallini u hemel sentenzi tal-Qorti Kostituzzjonali nostrana u tal-Qorti Ewropea tad-Drittijiet tal-Bniedem jindikaw car li dan hu kaz ta` rikuza tal-On. Imhallef li qed jippresjedi l-Qorti Kriminali, jekk mhux ukoll ta` astensjoni, tal-Imhallef in kwistjoni".

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

1. Illi in linea preliminari, l-esponenti jecepixxi n-nuqqas ta` applikabbilita` tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropeja u dan stante li l-proceduri li minnhom qieghed jillanja r-rikorrenti huma proceduri fil-fazi ta` inkjesta magisterjali u ghalhekk ma jinvolvux id-determinazzjoni ta` akkuza kriminali jew dritt jew obbligu civili;

2. Illi in linea preliminari wkoll, l-esponenti jecepixxi li r-rikorrenti ma ghandux l-interess guridiku necessarju sabiex jippromwovi l-azzjoni odjern. Illi certament li r-rikorrenti ma jikkwalifikax u ma jistax jitqies bhala "vittma" ai termini tal-Konvenzjoni Ewropeja u tal-Kostituzzjoni ta` Malta;

3. Illi in linea preliminari wkoll, l-esponenti qieghed jitlob il-kjamata in kawza tal-Prim Ministru Dr Joseph Muscat, tal-Onorevoli Ministru Konrad Mizzi, Keith Schembri, Malcolm Scerri, Adrian Hillman, Brian Tonna u Karl Cini in kwantu li bl-azzjoni attrici r-rikorrenti qieghed jitlob it-thassir, nullita` u revoka ta` "kwalsiasi digriet u/jew sentenza li tat il-Qorti Kriminali presjeduta mill-On. Imhallef A. Mizzi" liema digrieti u/jew sentenza inghataw fl-atti tar-rikorsi tal-appell ipprezentati minn dawn l-individwi u ghalhekk dawn il-persuni ghandhom kull interess li jissejhu f`dawn il-proceduri;

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

Illi jezistu salvagwardji bizzejjed fid-dritt procedurali nostrali sabiex jovvjaw ghal kull periklu ta` ntralc ta` smigh xieraq liema salvagwardji jigarantixxu process xieraq u smigh gjust.

5. Illi r-rikorrenti qieghed jargumenta li huwa ma kellux triq ohra ghajr li jiftah l-proceduri odjerni stante li skont l-istess rikorrent l-elementi tal-Artikolu 734 (1) (e) tal-Kap. 12 jirrizultaw. L-esponenti jissottometti li l-Artikolu 734 (1) (e) tal-Kap. 12 ma japplikax ghall-inkjesti Magisterjali u dan stante li fil-procediment ta` inkjesta ma jkun hemm l-ebda sentenza jew imputazzjoni ta` htija fuq xi individwu. L-esponenti jissottometti li l-appelli li gew intavolati quddiem il-Qorti Kriminali jiffurmaw parti mill-procediment tal-inkjesta Magisterjali bil-konsegwenza li l-garanziji li ghalihom jahsbu l-Artikolu 6 tal-Konvenzjoni u l-Artikolu 39 tal-Kostituzzjoni mhumiex applikabbli. Illi l-inkjesta Magisterjali hija biss intiza sabiex jinstemghu provi sabiex tigi stabbilita` l-verita` o meno ta` l-allegazzjonijiet li saru mir-rikorrenti quddiem il-Magistrat inkwerenti. Illi l-esponenti, minhabba l-kunfidenzjalita` ta` l-inkjesta, ma jistax jikkumenta ulterjorment dwar l-istess.

6. Illi fir-rikors promotur, ir-rikorrenti qieghed jallega li l-Imhallef li lilu gew assenjati l-appelli mhuwiex 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 deciziva 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 qieghed jippresjedi fil-Qorti Kriminali huwa mizzewweg lill-Membru tal-Parlament Ewropew. L-esponenti jirrileva li dan il-fatt fih innifsu bl-ebda mod ma jista` jigi nterpretat li b`xi mod ghandu jwassal ghall-imparzjalita` tal-gudikant: meta persuna tigi mahtura bhala gudikant dik il-persuna hija prezunta li hija mparzjali u li bhala gudikant hija munita bil-garanziji kollha mehtiega sabiex tassigura s-smigh xieraq.

7. Illi certament li l-ebda dritt garantit mill-artikolu 6 tal-Konvenzjoni Ewropeja jew mill-artikolu 39 tal-Kostituzzjoni ta` Malta ma huma mittiefsa bic-cahda tat-talba ghar-rikuza tal-Imhallef sedenti bil-konsegwenza li t-talbiet attrici ghandhom jigu michuda.

8. Salv eccezzjonijiet ulterjuri.

9. Bl-ispejjez.

Rat id-direzzjoni li tat lill-partijiet fl-udjenza tas-7 ta` Novembru 2017 sabiex jittrattaw it-tielet eccezzjoni ta` l-Avukat Generali.

Rat is-sentenza li tat fit-30 ta` Novembru 2017 fejn laqghet it-tielet eccezzjoni ta` l-Avukat Generali, u ghalhekk ordnat il-kjamata fil-kawza tal-Onorevoli Prim Ministru Joseph Muscat, l-Onorevoli Ministru Konrad Mizzi, Keith Schembri, Malcolm Scerri, Adrian Hillman, Brian Tonna u Karl Cini. Il-kap tal-ispejjez thalla riservat ghall-gudizzju finali.

Rat ir-risposta li pprezenta l-kjamat fil-kawza Onorevoli Prim Ministru Dr Joseph Muscat fl-10 ta` Dicembru 2017 li taqra hekk :-

1. Preliminarjament, u minghajr pregudizzju ghall-eccezzjonijiet sussegwenti, ir-rikorrent m`ghandux l-interess guridiku mehtieg sabiex jippromwovi l-azzjoni prezenti.

Dan ghaliex, kontra dak li jallega r-rikorrent, bid-decizjoni tal-Qorti Kriminali tat-3 ta` Ottubru 2017, ebda dritt fundamentali tieghu jew dwaru, kif protett mill-Kostituzzjoni jew l-Att dwar il-Konvenzjoni Ewropea ma nkiser, jew huwa mhedded li jinkiser.

2. F`kull kaz, in kwantu dawn il-proceduri ma jinvolvux id-determinazzjoni ta` xi akkuza kriminali fil-konfront tar-rikorrent jew xi dritt jew obbligu civili tieghu, huwa ma ghandu ebda dritt ghal smiegh xieraq fit-termini tal-artikolu 39 tal-Kostituzzjoni ta` Malta jew tal-artikolu 6 tal-Konvenzjoni Ewropea ezegwibbli bis-sahha tal-Kap 319 tal-Ligijiet ta` Malta.

Il-proceduri mertu ta` din il-kawza, mibdija fuq inizjattiva u b`allegazzjonijiet tar-rikorrent, huma intizi biex iwasslu ghal inkjesta magisterjali bl-iskop li ssir investigazzjoni u jingabru l-provi, jekk ikun il-kaz, sabiex fil-kaz li jirrizultaw l-allegazzjonijiet tal-istess rikorrent ta` ksur tal-ligijiet penali, jinhargu l-akkuzi kontra l-persuni indikati minnu. Ghalhekk, f`dawn il-proceduri, ir-rikorrent mhuwiex indizzjat u lanqas ma jista` jkun parti fl-eventwalita` li ssir l-inkjesta mitluba minnu.

L-inkjesta ssir mill-Magistrat Inkwerenti fil-maghluq u b`segretezza kbira minghajr partijiet. Ghalhekk anke jekk, fid-decizjoni taghha li biha laqghet it-talba ghall-kjamata tal-esponent f`din il-kawza, din il-Qorti kkunsidrat li l-esponent kellu nteress guridiku f`dawn il-proceduri minhabba li d-dritt ghal smiegh xieraq japplika `mhux biss fil-kors ta` proceduri kriminali izda wkoll waqt il-pre-trial stage` dan ma jghoddx ghar-rikorrent.

Ir-rikorrent lanqas ma jista` jippretendi li ghandu interess guridiku bhala parti interessata. F`kaz li ssir l-inkjesta magisterjali mitluba minnu, u din twassal biex jittiehdu proceduri penali kontra xi hadd mill-persuni indikati fir-rikors tieghu, l-istess rikorrent ma jistax ikollu locus standi f`dawk il-proceduri. L-azzjoni kriminali hija essenzjalment azzjoni pubblika li tmiss lill-Istat u titmexxa fl-isem tar-Repubblika ta` Malta bil-mezz tal-Pulizija Ezekuttiva jew tal-Avukat Generali, kif ikun il-kaz, skont il-ligi. (Art. 4(1) tal-Kodici Kriminali). Ir-reati allegati mir-rikorrent mhumiex reati fejn il-ligi thalli t-tmexxija tal-azzjoni f`idejn il-parti privata, jew fejn il-prosekuzzjoni taghhom titmexxa fuq il-kwerela tal-offiz.

3. Fil-mertu, minghajr pregudizzju ghas-suespost, l-allegazzjonijiet u l-pretensjonijiet tar-rikorrent huma infondati fil-fatt u fil-ligi.

Ir-rikorrent jippretendi li huwa seta` jitlob ir-rikuza ta` l-Imhallef sedenti fit-termini ta` l-artikolu 734(1)(e) tal-Kap. 12 tal-Ligijiet ta` Malta. Izda dan l-artikolu ma japplikax fil-kaz ta` inkjesti magisterjali ghaliex dawn mhumiex kawzi u ma jwasslu ghal ebda sentenza jew decizjoni, izda huma intizi unikament, kif jghid l-istess rikorrent fir-risposta tieghu quddiem il-Qorti Kriminali `hu car daqs il-kristall, ghal min hu oggettiv, li la Inkjesta Magisterjali u lanqas it-talba ghal Inkjesta Magisterjali m`huma "hearing", u m`hmiex "Trial" u lanqas "trial proceedings."` [Pagna 20 tar-Risposta ta` Dr. Simon Busuttil tat-8 ta` Awissu 2017 quddiem il-Qorti Kriminali]. L-istess rikorrent ikompli jghid li `Hu fatt in kontestabbli li f`inkjesta Magisterjali, hadd mid-denunzjati qatt m`ghandu dritt "to take part in the hearing" (hadd, fil-fatt), u lanqas li jkun "present at the trial." [Pagna 24 tar-Risposta ta` Dr. Simon Busuttil tat-8 ta` Awissu 2017 quddiem il-Qorti Kriminali]. Huwa jargumenta li f`dawn il-proceduri "ma hemm ebda "charge" li "has been brought". Allura l-garanziji tal-Artiklu 6 ma japplikawx u ma jistax jigi invokat" [Pagna 22 tar-

Risposta ta` Dr. Simon Busuttil tat-8 ta` Awissu 2017 quddiem il-Qorti Kriminali].

Dak li jargumenta r-rikorrent japplika b`sahha akbar fil-konfront tieghu ghaliex f`dawn il-proceduri huwa mhuwiex id-denunzjat.

Apparti dan ukoll, il-Kodici Kriminali stess, wara li jipprovdi li l-Magistrat jista` jigi rikuzat biss f`kawza u ghal xi wahda mir-ragunijiet espressament stipulati (artikolu 368(1) tal-Kodici Kriminali), jkompli jaghmilha cara li lanqas dawn ir-ragunijiet ma jistghu jimpedixxu lill-magistrat milli jaghmel atti dwar l-"in genere", accessi jew "reperti". (artikolu 368(4) tal-Kodici Kriminali).

Fil-kaz tal-Qorti Kriminali, l-Imhallef ukoll ma jistax jigi rikuzat hlief ghal xi raguni espressament provduta fil-ligi u fil-kors ta` kawzi.

Il-procedura prezenti quddiem il-Qorti Kriminali mhijiex kawza. Anqas hija appell kif ir-rikorrent ripetutament isejhilha, izda hija kontinwazzjoni tal-procedura tal-"in genere" fejn il-Qorti Kriminali qeghda tintalab semplicement li tirrevedi u tirrevoka id-decizjoni tal-magistrat. Ghalhekk anke f`dan il-kaz, l-imhallef sedenti mhuwiex mizmum milli jaghmel atti dwar l-"in genere", accessi jew "reperti".

4. In vista tas-suespost u ghar-ragunijiet l-ohra li jirrizultaw waqt it-trattazzjoni tal-kawza, it-talba tar-rikorrent biex din il-Qorti `thassar, tannulla u tirrevoka kalsiasi digriet u/jhew sentenza li tat il-Qorti Kriminali presjeduta mill-On. Imhallef A. Mizzi` hija bla bazi u ghandha tigi michdua.

5. Konsegwentement anke t-talba biex ir-rikors tal-esponent tas-27 ta` Lulju 2017 jigi assenjat lil Imhallef iehor jew li b`xi mod jirregola kif dan ghandu jikkonduci l-proceduri quddiemu, hija bla bazi legali u ghandha tigi michuda. F`kull kaz u f`kull eventwali din il-Qorti m`ghandhiex il-poter li hija tassenja x-xoghol tal-gudikanti.

Huwa l-gudikant innifsu li ghandu r-responsabbilta` fil-qafas tal-ligi u c-cirkostanzi tal-kaz, li jaghzel kif jikkonduci l-proceduri li jkollu quddiemu. Ir-rikorrent jipprova jaghti l-impressjoni li l-imhallef in kwistjoni naqas b`xi mod li jmexxi dawn il-proceduri bl-urgenza li jisthoqqlu l-kaz. Hawnhekk wiehed ma jistax ma jirrimarkax li l-"fatti" li r-rikorrent ressaq bhala denunzja, huma fatti li jmorru lura erba` snin. L-ewwel "fatt" jirreferi ghat-13 ta` Marzu 2013 filwaqt li l-ahhar "fatti" jirreferu ghas-27 ta` April 2016 u t-2 ta` Awissu 2016. Dawn

kollha kienu fatti pubblici maghrufa, izda r-rikorrent dam snin (sena mill-ahhar "fatt") biex ghamel id-denunzja tieghu fl-14 ta` Lulju 2017. L-ghan tar-rikorrent kien biss wiehed ta` strategija politika u xejn aktar.

Anke fil-kors tal-proceduri quddiem il-Qorti Kriminali, r-rikorrent messu gharraf lil din il-Qorti li t-tul tad-differiment wara l-ewwel dehra kien dovut ukoll ghall-fatt li l-avukat tar-rikorrent kien ser ikun imsiefer fuq btala.

6. Anke t-talbiet tar-rikorrent ghall-likwidazzjoni u l-hlas ta` xi danni hija legalment infonadat. Ir-rikorrent mhuwiex parti leza u ma bata ebda pregudizzju kostituzzjonali jew ta` drittijiet fondamentali.

Konsegwentement it-talbiet kollha tar-rikorrent ghandhom jigu michuda bl-ispejjez kontra tieghu.

Rat ir-risposta li pprezenta l-kjamat fil-kawza Adrian Hillman fit-18 ta` ta` Dicembru 2017 li taqra hekk :-

1. Illi r-rikors interpost mir-rikorrent l-Onorevoli Dr. Simon Busuttil huwa infondat fil-fatt u fid-dritt u t-talbiet hemm dedotti ghandhom jigu respinti, bl-ispejjez kontra l-istess rikorrent;

2. Illi l-esponent, kjamat in kawza, ma jistax jifhem kif il-pozizzjoni tar-rikorrent fl-atti li jirriferi ghalihom tista` b`xi mod tigi kwalifikata bhala dik ta` vittma; l-esponent ihoss li jekk hemm xi persuna li hija vittma ta` proceduri mhux necessarji u inutili, dak huwa l-kjamat fil-kawza stess li qieghed jigi mgieghel jissubixxi proceduri fuq proceduri frott ta` allegazzjoni bla ebda fondament jew bazi fil-fatt jew fil-Ligi; intant il-garanziji li taghtih il-Ligi qieghdin jitnaqqru bil-proceduri interposti mir-rikorrent li mhux biss jidher li jippretendi li l-allegazzjonijiet tieghu ghandhom jitwemmnu minghajr ebda indagini imma jrid anke li huwa jkun f`pozizzjoni li jiddetermina hu l-persuna li tiggudika fuq l-inkjesta maghmula fil-konfront tal-kjamati fil-kawza, f`tentattiv car ta` forum shopping, kif diga` sar qabel f`proceduri ohra mhux relatati;

3. Illi r-rikorrent ghalhekk huwa nieqes mill-interess rikjest mil-Ligi biex jipproponi u jmexxi dawn il-proceduri ghaliex fil-fatt huwa lanqas huwa verament parti b`interess legali u guridiku fil-proceduri mibdija fil-konfront, mhux tar-rikorrent, imma tal-kjamati in kawza. Il-kjamati in kawza jinsabu soggetti ghal procedura li taghti lok ghal inkjesta fl-in genere, f`liema stadju r-rikorrent ma ghandu u ma jista` jkollu l-ebda interess personali ghajr ghall-fatt li l-proceduri bdew wara denunzja minnu ppresentata. Dak mhux bizzejjed biex

jirradika l-interess ghat-tmexxija ta` dawn il-proceduri. Una volta mibdija l-inkjesta fl-in genere ir-rikorrent m`ghandux `locus standi` f` dawk il-proceduri, u lanqas ghandu interess personali u guridiku fil-bidu ta` dawk il-proceduri li jikkoncernaw biss l-istat u lill-persuna milquta b` l-inkjesta. Ghalhekk jonqos il-bazi reali ta` azzjoni bhal din;

4. Illi inoltre, d-decizjoni mehuda mill-Onorabbli Qorti Kriminali fil-kaz in ezami kienet wahda korretta u skond il-Ligi, u ma kienx hemm, u ma hemm, l-ebda raguni li hija sufficjenti biex tirrikuza jew iggib l-astensjoni ta` l-Imhallef Sedenti f`dik il-procedura. Ghal dak li jirrigwarda l-esponenti, li bl-ebda mod ma jiehu parti attiva fil-politika u huwa cittadin privat, il-problemi imqajjma mill-istess rikorrent bl-ebda mod ma jmissu l-pozizzjoni tieghu u fil-konfront ta` l-appell tieghu l-allegazzjonijiet fir-rigward tal-politika u tal-fehmiet tal-mara tal-gudikant ma jaghmlu l-ebda sens kwalsijasi fil-konfront tar-rikors ta` l-esponenti quddiem l-Onorabbli Qorti Kriminali. Anke fil-konfront tal-kjamati in kawza l-ohra ma hemmx l-estremi rikjesti mill-ligi biex il-gudikant jastjeni jew jigi rikuzat;

5. Jekk wiehed ihares lejn il-kwistjoni oggettivament jara li l-allegazzjoni tar-rikorrent hija kompletament bla bazi u li ma hemmx fatti li jwasslu biex wiehed jista` legittimament jissuspetta parzjalita` jew nuqqas ta` indipendenza fil-gudikant u ma hemm l-ebda ksur tad-dritt fondamentali tar-rikorrent bit-tmexxija tal-proceduri quddiem il-Qorti tal-Appell Kriminali;

6. Illi r-rikorrent naqas milli minimament jipprova, jew almenu jindika, fit-trattazzjoni tieghu, x`interess, gwadann jew vantagg setghu kisbu l-Imhallef Sedenti, jew martu, sabiex jigi sodisfatt il-vot ta` l-Artikolu 734(e) tal-Kap. 12 tal-Ligijiet ta` Malta u b`hekk ikun hemm lok ghal rikuza ta` l-Imhallef Sedenti, liema vantagg jew gwadann kjarament ma jezistix, kuntrarjament ghal dak dikjarat mir-rikorrenti fil-paragrafu 12 tar-Rikors promotur, li anke f`dan l-istadju lanqas biss ma jaghti ebda indikazzjoni dan x`inhu;

7. Intant huma d-drittijiet fondamentali tal-kjamat in kawza li qeghdin jigu kalpestati u vjolati billi huwa, fil-klima kreata mir-rikorrent u d-difensur tieghu, siehbu fil-politika, mhux ser jkun possibbli ghalih li l-proceduri jitmexxu b`mod seren u b`mod li kollox jikkonkludi ruhu fi zmien ragonevoli u dan b`dannu evidenti tal-kjamat fil-kawza li huwa persuna privata u ghandu l-interess li jista` jimxi fil-hajja minghajr ix-xkiel ta` procedura mhux necessarji u futili;

8. Illi, b`referenza ghall-10 paragrafu tar-Rikors promotur, assolutament ma hux minnu li l-Imhallef Sedenti fil-Qorti Kriminali pubblikament wera u esprima li kien fastidjat bil-kontenut tat-trattazzjoni u

b`hekk wera li ma kellux id-distakkament mehtieg minn gudikant. Dan jistghu jixhduh il-partijiet u l-Avukati kollha, inkluz dawk sottoskritti, li kienu prezenti waqt it-trattazzjoni maghmula ghan-nom tar-rikorrent odjern. L-Imhallef Sedenti wera biss id-dizappunt tieghu li r-rikorrent u d-difensur tieghu kienu qeghdin huma stess jaghmlu dikjarazzjonijiet pubblici biex jinfluwenzaw l-opinjoni pubblika dwar l-allegata parzjalita` ta` l-istess Imhallef Sedenti, qabel u anke wara l-udjenzi quddiem l-Onorabbli Qorti Kriminali, kif jirrizulta ampjament mill-gurnali - prattika certament odjuza u mirata ghal skopijiet politici tar-rikorrenti fil-konfront ta` l-avversarji tieghu u li l-konsegwenza ta` tali azzjoni, bhala hsara kollaterali, hija li l-fiducja fil-Qrati taghna tigi minata;

9. Illi r-rikorrent ghandu wiccu tost meta jalludi li kien hemm dewmien fil-procedura quddiem l-Onorabbli Qorti Kriminali – wara li l-esponenti, u l-kjamati in kawza l-ohra, kellhom biss 48 siegha biex jikkontestaw id-decizjoni ta` l-Onorevoli Magistrat Ian Farrugia, meta r-rikorsi ta` l-esponenti u l-kjamati in kawza l-ohra gew appuntati, flimkien, fi zmien gimghatejn, u meta kien l-istess rikorrent odjern li tawwal il-proceduri quddiem l-Onorabbli Qorti Kriminali bla bzonn. Ir-rikorrent jippretendi li dak mitlub minnu ghandu jigi ttrattat, u akkolt immedjatament, minghajr l-avversarji tieghu, potenzjalment akkuzati, ma jinghataw ebda cans li jharsu l-pozizzjoni taghhom;

10. Illi, fl-aghar ipotesi ghar-rikorrent, f`kaz li l-ewwel tliet talbiet tar-rikorrent jintlaqghu, l-esponenti m`ghandux jigi kkundannat ihallas ebda kumpens lir-rikorrent a tenur tar-raba`u hames talba.

Salv eccezzjonijiet ulterjuri.

Rat ir-risposta li pprezenta l-kjamat fil-kawza Onorevoli Ministru Konrad Mizzi fit-22 ta` Dicembru 2017 li taqra hekk :-

Illi l-esponenti gie notifikat bid-digriet ta` din l-Onorabbli Qorti tat-30 ta` Novembru 2017 fejn ordnat il-kjamata in kawza tal-esponenti u ohrajn kif ukoll bir-rikors promotur;

Illi fir-rikors promotur, ir-rikorrenti, l-Onor. Simon Busuttil prevja li jaghmel varji allegazzjonijiet, qieghed jinvoka l-protezzjoni tal-Art. 39 tal-Kostituzzjoni ta` Malta u tal-Art. 6 tal-Konvenzjoni Ewropea u dan fir-rigward ta` digriet moghti mill-Onorabbli Qorti Kriminali tat-3 ta` Ottubru 2017 li permezz taghha, dik il-qorti kif preseduta iddecidiet li mhemmx bazi ghal rikuza tal-gudikant sedenti u dan fi proceduri li saru ad istanza tal-esponenti u ohrajn a tenur tal-Art. 546 tal-Kap. 9;

Illi l-allegazzjonijiet tar-rikorrenti jinkludu dawn li gej:

(i) Illi mart il-gudikant sedenti, eletta Membru tal-Parlament Ewropew mal-Partit Laburista, konsistentement ikkritikat il-pozizzjoni tar-rikorrenti fil-konfront ta` persuni implikat f`dak li qed isejjahlu l-iskandlu tal-"Panama Papers";

(ii) Illi l-gudikant sedenti pubblikament wera u esprima li kien fastidjat bil-kontenut tat-trattazzjoni tal-avukat tar-rikorrenti dwar ir-rikuza u ghalhek wera li ma kellux id-distakkament mehtieg ghal gudikant;

(iii) Illi b`xi mod ma giex rispettat dak li jipprovdi l-Art. 546 tal-Kap. 9 dwar l-urgenza tal-proceduri;

Illi l-esponenti, jilqa` ghall-azzjoni tar-rikorrenti, a bazi ta` dan li gej:

1. Illi jibda biex jinghad li l-procedura li ghaliha jirreferi r-rikors kostituzzjonali odjern, u cjoe r-rikors tal-esponenti u ohrajn a tenur tal-Art. 546 tal-Kap. 9 jikkostitwixxi procedura sui generis mahsuba fil-Kodici Kriminali taghna fl-ambitu ta` inkjesti bil-magistrat;

2. Illi ghalhekk, la l-Art. 39 tal-Kostituzzjoni ta` Malta u wisq anqas l-Art. 6 tal-Konvenzjoni Ewropea ma jaghtux carte blanche sabiex wiehed jinvoka ksur fi kwalunkwe cirkostanza, inkluz f`ambitu ta` proceduri sui generis bhalma huma dawk li dwarhom qed jilmenta r-rikorrenti. Harris, O`Boyle, Bates u Buckley huma tal-fehma li "the rights guaranteed by Article 6 apply, firstly, when a `criminal charge` is being determined. Article 6 only begins to apply when a criminal investigation has reached the point where the applicant has been `charged` with a criminal offence. It does not extend to ancillary proceedings that are not determinative of a pending `charge` against the applicant such as proceedings concerning… committal for trial" [D-J Harris et al, Law of the European Convention on Human Rights, Third Edition (OUP 2014 Oxford) 373] u dan anke fid-dawl tal-gurisprudenza tal-Qorti Ewropea fil-kawza "Mosbeux v. Belgium." [No. 17083/90] Tal-istess hsieb huwa Schabas – li llum qed jigi ccitat estensivament mill-Qrati taghna – li fil-kummentarju tieghu dwar il-Konvezjoni Ewropea jghid hekk: "The criminal limb of article 6 is engaged by `any criminal charge`." [W Schabas, The European Convention on Human Rights – A Commentary, Third Edition (OUP 2017 Oxford) 276] Imbaghad, l-awtur ikompli jispjega li hu pacifiku li t-test applikat illum huwa dak maghruf bhala "The Engel Criteria" wara s-sentenza tal-Qorti ta` Strasburgu fil-kawza "Engel et v. L-Olanda". Sinifikattiv dak li jghid Archbold fl-aktar edizzjoni ricenti "Appearances may be important but what is at stake is the confidence which the

courts in a democratic society must inspire in the public ***and with regard to the criminal courts, in the defendant****" [Archbold Magistrates` Courts Criminal Practice 2018 / Enfasi tal-esponenti];*

3. Illi wiehed jittama li r-rikorrenti mhuwiex qieghed jittenta jistrieh fuq il-parti tad-dispozizzjonijiet citati li jitrattaw proceduri civili;

4. Illi fejn jirrigwarda l-mertu, irid jigi rilevat li l-ligi taghna tipprovdi mekkanizmu specifiku ghar-rikuza li probabilment huwa aktar avvanzat minn dak ta` varji gurisdizzjonijiet ohra. Ir-rikuza ma tistax tkun kappriccjuza. Multo magis f`kazijiet ta` bixra politika. F`dan ir-rigward din l-Onorabbli Qorti, diversament preseduta fil-kawza fl-ismijiet Avukat Dottor Samuel Azzopardi vs L-Avukat Generali et irriteniet [Rik. 75/2016 LSO] :

"Din il-Qorti trid tibda biex tiehu konjizzjoni gudizzjarja ta` fatt inkonfutabbli li nghixu f`pajjiz politikament polarizzat u maqsum bejn iz-zewg partiti politici ewlenija - il-Partit Laburista u l-Partit Nazzjonalista. Ikun zball, izda, jekk dan il-partiggjanizmu jigi pproggettat in abstracto fuq il-Qrati tal-Gustizzja ghaliex il-kejl tal-imparzjalita` ta` gudikant ma jsirx abbazi tal-opinjoni personali tieghu, imma abbazi tal-mod kif jaqdi l-Kostituzzjoni u tas-saltna tad-dritt.

Ghalkemm il-Qrati ma joperawx f`vacuum, b`hekk ma jfissirx li ghandhom jitnuzzlu ghal-livell tal-partiggjanizmu politiku izda, anzi, huwa doveruz ghalihom, li jintrefghu `il hinn minn dawn il-konsiderazzjonijiet u li s-socjeta` thares lejhom bhala `l fuq minn dawn il-konsiderazzjonijiet. B`konsegwenza ta` dan, dak li jippercepixxi parti f`kawza, ma jfissirx necessarjament li hemm parzjalita` fil-gudikant fis-sens oggettiv kif trid il-ligi."

5. Illi fejn imiss ma` inkjesti bil-magistrat (bhal fil-kaz odjern), il-ligi taghna ghandha dispozizzjoni ad hoc fejn tirrigwarda r-rikuza tal-gudikant.

6. Illi r-rikuza ta` gudikant mghandhiex tkun kwistjoni ta` konvenjenza jew forum shopping kif qed jittenta jrendiha r-rikorrent. Lanqas kull allegazzjoni mghandha tittiehed bhala baz ghal rikuza. Kif esprima ruhu l-Consultative Council of European Judges (CCJE) fl-Opinion No. 3 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the Principles and Rules Governing Judges` Professional Conduct, In Particular Ethics, Incompatible Behaviour and Impartiality:

"27. Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom

of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice.

30. Judges` participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge`s duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges` spouses from taking up such positions.

33. The discussions within the CCJE have shown the need to strike a balance between the judges` freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

7. Illi jsegwi li t-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt;

8. Illi fi kwalunkwe kaz, l-esponenti ma ghandux jigi kkundannat ihallas danni kif qed jitlob ir-rikorrenti.

Bl-ispejjez.

Rat ir-risposta li pprezenta l-kjamat fil-kawza Malcolm Scerri fid-29 ta` Dicembru 2017 li taqra hekk :-

1. Illi in linea preliminari jigi eccepit illi r-rikorrenti m`ghandhux l-interess guridiku necessarju sabiex imexxi din l-azzjoni u dana stante illi r-rikorrenti ma jitqiesx bhala "vittma" ai termini tal-Konvenzjoni Ewropeja, il-Kostituzzjoni ta` Malta, il-Ligijiet nostrani [Vide Kap 359 tal-Ligijiet ta` Malta – Artikolu 2] u r-regoli tal-Unjoni Ewropea [Vide "Id-Decizjoni Kwadru tal-Kunsill tal-15 ta` Marzu 2001 dwar id-drittijiet tal-vittmi fil-proceduri kriminali" li tipprovdi li "vittma" "ghandha tfisser persuna fizika li tkun sofriet danni, inkluz hsara fizika jew mentali, tbatija emozzjonali jew telf ekonomiku, kawzati direttament minn atti jew ommissjonijiet li bi ksur tal-ligi kriminali ta` Stat Membru"] dwar id-definizzjoni tal-istess;

2. Ill in linea preliminari wkoll jigi eccepit illi l-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 tal-Konvenzjoni Ewropea m`ghandhomx applikabilita` ghar-rikorrenti fl-istadju ta` Inkjesta Magisterjali, fejn strettament l-istess rikorrenti legalment u akkademikament m`ghandux jew m`ghandux ikollu locus standi. Dan jinghad ukoll fid-dawl tal-fatt li r-irwol tal-Gudikant f`dan l-istadju ikun limitat ghal indagini, gbir ta` provi u dokumenti li jistghu jew ma jistghux iwasslu biex persuna tigi addebitata b`akkuzi penali;

3. Illi fil-mertu it-talbiet tar-rikorrenti huma infondanti fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess u dan fost l-ohrajn ghas-segwenti ragunijiet:

a. Illi permezz tar-rikors promotur r-rikorrenti jallega ksur ta` dritt fundamentali tieghu ta` smiegh xieraq kif sancit mill-Artikolu 39 tal-Kostituzzjoni ta` Malta u l-Artikolu 6 tal-Konvenzjoni Ewropea;

b. Illi r-rikors promotur jaghti x`jifhem illi l-ilment tar-rikorrenti huwa msejjes fuq dak li jiddisponi l-Artikolu 734(1)(e) tal-Kap 12 tal-Ligijiet ta` Malta li jittratta istanzi fejn Gudikant jista` jigi rikuzat jew jista` jastjeni ruhu milli joqghod fil-kawza.

c. Illi dan ir-rikors jirreferi ghal proceduri fl-istadju ta` in genere li gew mibdija permezz ta` rikors prezentat mir-rikorrenti fil-Qorti tal-Magistrati Bhala Qorti Inkwerenti;

d. Illi fil-waqt li l-Artikolu 734 tal-Kap 12 tal-Ligijiet ta` Malta jista` jkun applikabbli fi stadji ohra tal-process penali, madanakollu fl-istadju tal-in genere il-legislatur provda ghal kwistjonijiet ta` rikuza f`dan l-istadju permezz tal-Artikolu 368(4) tal-Kap 9 tal-Ligijiet ta` Malta illi jipprovdi illi "ebda wahda mir-ragunijiet hawn fuq imsemmija ma timpedixxi lill-Magistrat li johrog mandati jew jaghmel atti dwar l-in genere, accessi jew reperti li jsiru skond id-disposizzjonijiet ta` dan il-Kodici";

e. Illi ghaldaqstant isegwi illi t-talba ghar-rikuza tal-Imhallef Sedenti fi procedura li tikkostitwixxi att dwar l-ingenere m`ghandiex il-komfort tal-Ligi, anzi tmur kontra dak li jipprovdi l-Kodici Kriminali taghna;

f. Illi fi kwalunke kaz, jibqa l-fatt li r-regola bazilari li fuqha huwa mibni l-istitut tar-rikuza hija li Gudikant ma jistghax jigi rikuzat jew jastjeni ruhu f`kawza migjuba quddiemu fil-Qorti li fih ikun mahtur biex joqghod, hlief f`kazijiet eccezzjonali li kemm il-Kodici Kriminali kif ukoll il-Kodici dwar l-Organizzjoni u l-Procedura Civili jidentifikaw;

g. Illi dan il-principju huwa mibni fuq il-fatt illi il-kejl tal-imparzjalita` ta` gudikant ma ssirx a bazi tal-opinjoni personali tieghu izda fuq il-mod kif huwa jaqdi l-Kostituzzjoni u s-saltna tad-dritt;

h. Illi anki d-determinazzjoni tal-imparzjalita suggettiva u jew oggettiva ta` Gudikant certament ma tispettax lill-partijiet f`kawza li jista` jkollhom opinjonijiet divergenti fuq din il-materja;

i. Illi ghalhekk ma jkunx opportun li l-esponenti f`din ir-risposta, jindirizza dak li diga gie indirizzat mill-Imhallef sedenti fid-decizjoni li ma jirrikuzax ruhu mill-proceduri li fuqhom hija msejsa dina l-kawza;

j. Illi l-esponenti pero ser jindirizza l-ilment tar-rikorrenti li sintentikament jghid illi l-fatt li l-Onor. Imhallef Mizzi ma rrikuzax ruhu mill-proceduri indikati fir-rikors promotur ***sarraf jew jista` jsarraf fi ksur tad-dritt ta` smiegh xieraq tar-rikorrenti*** *kif sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u l-Artikolu 39 tal-Kostituzzjoni ta` Malta;*

k. Illi biex jigi determinat jekk jistax ikun hem ksur ta` dritt ikun x`ikun, wiehed irid jara x`pozizzjoni jgawdi r-rikorrenti fil-proceduri li fihom huwa qed jallega sofra dan il-ksur;

l. Illi bhala stat ta` fatt, il-proceduri msemmija bdew fuq rikors tar-rikorrenti illi ghamel numru ta` allegazzjonijiet, li minn ezami taghhom, m`humiex allegazzjonijiet li rrizultaw lilu personalment, izda huma allegazzjoniet maghrufha bhala `detto del detto` jew aghar minn hekk kongetturi li r-rikorrenti bena f`mohhu;

m. Illi dan ifisser li r-rikorrenti, kemm f`dawn il-proceduri u wisq aktar fi kwalunkwe procedura li tista` ssegwi, r-rikorrenti ma jistax ikun "xhud", almenu b`mod determinanti ghall-istess proceduri;

n. Illi jsegwi wkoll illi r-rikorrenti ma jistax jitqies bhala "vittma" jew "parti interessata". Il-Ligi taghna permezz tal-Kap 539 (Att dwar il-Vittmi tal-Kriminalita`) tiddefinixxi "vittma" bhala "persuna fizika li tkun garrbet hsara, inkluz dannu fiziku, mentali jew emozzjonali jew telf finanzjarju, li kien direttament ikkawzat minn reati kriminali";

o. Illi jinghad ukoll illi r-reati prospettati mir-rikorrenti ma humiex reati prosegwibbli fuq kwerela tal-parti;

p. Illi dan ifisser illi r-rikorrenti la jista` jitqies xhud, la parti interessata u wisq anqas vittma f`dawn il-proceduri;

q. Illi ghalhekk difficli wiehed jifhem il-bazi legali li fuqha r-rikorrenti qed jallega li huwa sofra minn lezjoni ta` dritt fundamentali tieghu, anki d-dritt ta` smiegh xieraq;

r. Illi m`hemmx dubbju li d-dritt ta` smiegh xieraq, anki fuq skorta ta` numru ta` decizjonijiet tal-Qorti Ewropea ghandu estensjoni limitata anki favur il-vittmi ta` reat;

s. Illi madanakollu anki fil-konfront tal-istess vittmi tar-reat l-applilabilita` tal-Artikolu 6 hija limitata u certament mhux fuq l-istess binarju ta` persuna li tkun qed tigi investigat jew sahansitra akkuzata b`reat;

t. Illi issa f`dan il-kaz, r-rikorrenti ma jistax jitqies vittma ta` reat u sahansitra l-locus standi tieghu fil-proceduri huma diskutibbli ghall-ahhar. Ghaldqstant l-esponenti jhoss illi dak li qed jallega r-rikorrenti ossija li huwa sofra jew jista` jsofri minn lezjoni ta` dritt fundamentali tiehgu indikat fl-Artikolu 6 tal-Konvenzjoni Ewropea u l-Artikolu 39 tal-Kostituzzjoni, m`hux biss huwa totalment bla bazi izda sahansitra jirrazenta l-frivolu u l-vessatorju.

4. Salv eccezzjonijiet ulterjuri skond il-Ligi.

Rat ir-risposta li pprezenta l-kjamat fil-kawza Keith Schembri fid-29 ta` Dicembru 2017 li taqra hekk :-

1. Illi in linea preliminari jigi eccepit illi r-rikorrenti m`ghandhux l-interess guridiku necessarju sabiex imexxi din l-azzjoni u dana stante illi r-

rikorrenti ma jitqiesx bhala "vittma" ai termini tal-Konvenzjoni Ewropeja, il-Kostituzzjoni ta` Malta, il-Ligijiet nostrani [Vide Kap 359 tal-Ligijiet ta` Malta – Artikolu 2] u r-regoli tal-Unjoni Ewropea [Vide "Id-Decizjoni Kwadru tal-Kunsill tal-15 ta` Marzu 2001 dwar id-drittijiet tal-vittmi fil-proceduri kriminali" li tipprovdi li "vittma" "ghandha tfisser persuna fizika li tkun sofriet danni, inkluz hsara fizika jew mentali, tbatija emozzjonali jew telf ekonomiku, kawzati direttament minn atti jew ommissjonijiet li bi ksur tal-ligi kriminali ta` Stat Membru"] dwar id-definizzjoni tal-istess;

2. Ill in linea preliminari wkoll jigi eccepit illi l-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 tal-Konvenzjoni Ewropea m`ghandhomx applikabilita` ghar-rikorrenti fl-istadju ta` Inkjesta Magisterjali, fejn strettament l-istess rikorrenti legalment u akkademikament m`ghandux jew m`ghandux ikollu locus standi. Dan jinghad ukoll fid-dawl tal-fatt li r-irwol tal-Gudikant f`dan l-istadju ikun limitat ghal indagini, gbir ta` provi u dokumenti li jistghu jew ma jistghux iwasslu biex persuna tigi addebitata b`akkuzi penali;

3. Illi fil-mertu it-talbiet tar-rikorrenti huma infondanti fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess u dan fost l-ohrajn ghas-segwenti ragunijiet:

a. *Illi permezz tar-rikors promotur r-rikorrenti jallega ksur ta` dritt fundamentali tieghu ta` smiegh xieraq kif sancit mill-Artikolu 39 tal-Kostituzzjoni ta` Malta u l-Artikolu 6 tal-Konvenzjoni Ewropea;*

b. Illi r-rikors promotur jaghti x`jifhem illi l-ilment tar-rikorrenti huwa msejjes fuq dak li jiddisponi l-Artikolu 734(1)(e) tal-Kap 12 tal-Ligijiet ta` Malta li jittratta istanzi fejn Gudikant jista` jigi rikuzat jew jista` jastjeni ruhu milli joqghod fil-kawza.

c. Illi dan ir-rikors jirreferi ghal proceduri fl-istadju tal-in genere li gew mibdija permezz ta` rikors prezentat mir-rikorrenti fil-Qorti tal-Magistrati Bhala Qorti Inkwerenti;

d. Illi fil-waqt li l-Artikolu 734 tal-Kap 12 tal-Ligijiet ta` Malta jista` jkun applikabbli fi stadji ohra tal-process penali, madanakollu fl-istadju tal-in genere il-legislatur provda ghal kwistjonijiet ta` rikuza f`dan l-istadju permezz tal-Artikolu 368(4) tal-Kap 9 tal-Ligijiet ta` Malta illi jipprovdi illi "ebda wahda mir-ragunijiet hawn fuq imsemmija ma timpedixxi lill-Magistrat li johrog mandati jew jaghmel atti dwar l-in genere, accessi jew reperti li jsiru skond id-disposizzjonijiet ta` dan il-Kodici";

e. Illi ghaldaqstant isegwi illi t-talba ghar-rikuza tal-Imhallef Sedenti fi procedura li tikkostitwixxi att dwar l-in genere m`ghandiex il-komfort tal-Ligi, anzi tmur kontra dak li jipprovdi l-Kodici Kriminali taghna;

f. Illi fi kwalunke kaz, jibqa` l-fatt li r-regola bazilari li fuqha huwa mibni l-istitut tar-rikuza hija li Gudikant ma jistghax jigi rikuzat jew jastjeni ruhu f`kawza migjuba quddiemu fil-Qorti li fih ikun mahtur biex joqghod, hlief f`kazijiet eccezzjonali li kemm il-Kodici Kriminali kif ukoll il-Kodici dwar l-Organizzjoni u l-Procedura Civili jidentifikaw;

g. Illi dan il-principju huwa mibni fuq il-fatt illi il-kejl tal-imparzjalita` ta` gudikant ma ssirx a bazi tal-opinjoni personali tieghu izda fuq il-mod kif huwa jaqdi l-Kostituzzjoni u s-saltna tad-dritt;

h. Illi anki d-determinazzjoni tal-imparzjalita suggettiva u jew oggettiva ta` Gudikant certament ma tispettax lill-partijiet f`kawza li jista` jkollhom opinjonijiet divergenti fuq din il-materja;

i. Illi ghalhekk ma jkunx opportun li l-esponenti f`din ir-risposta, jindirizza dak li diga gie indirizzat mill-Imhallef sedenti fid-decizjoni li ma jirrikuzax ruhu mill-proceduri li fuqhom hija msejsa dina l-kawza;

j. Illi l-esponenti pero ser jindirizza l-ilment tar-rikorrenti li sintentikament jghid illi l-fatt li l-Onor. Imhallef Mizzi ma rrikuzax ruhu mill-proceduri indikati fir-rikors promotur sarraf jew jista` jsarraf fi ksur tad-dritt ta` smiegh xieraq tar-rikorrenti kif sancit mill-Artikolu 6 tal-Konvenzjoni Ewropea u l-Artikolu 39 tal-Kostituzzjoni ta` Malta;

k. Illi biex jigi determinat jekk jistax ikun hem ksur ta` dritt ikun x`ikun, wiehed irid jara x`pozizzjoni jgawdi r-rikorrenti fil-proceduri li fihom huwa qed jallega sofra dan il-ksur;

l. Illi bhala stat ta` fatt, il-proceduri msemmija bdew fuq rikors tar-rikorrenti illi ghamel numru ta` allegazzjonijiet, li minn ezami taghhom, m`humiex allegazzjonijiet li rrizultaw lilu personalment, izda huma allegazzjoniet maghrufa bhala `detto del detto` jew aghar minn hekk kongetturi li r-rikorrenti bena f`mohhu;

m. Illi dan ifisser li r-rikorrenti, kemm f`dawn il-proceduri u wisq aktar fi kwalunkwe procedura li tista` ssegwi, r-rikorrenti ma jistax ikun "xhud", almenu b`mod determinanti ghall-istess proceduri;

n. Illi jsegwi wkoll illi r-rikorrenti ma jistax jitqies bhala "vittma" jew "parti interessata". Il-Ligi taghna permezz tal-Kap 539 (Att dwar il-Vittmi tal-Kriminalita`) tiddefinixxi "vittma" bhala "persuna fizika li tkun garrbet hsara, inkluz dannu fiziku, mentali jew emozzjonali jew telf finanzjarju, li kien direttament ikkawzat minn reati kriminali";

o. Illi jinghad ukoll illi r-reati prospettati mir-rikorrenti ma humiex reati prosegwibbli fuq kwerela tal-parti;

p. Illi dan ifisser illi r-rikorrenti la jista` jitqies xhud, la parti interessata u wisq anqas vittma f`dawn il-proceduri;

q. Illi ghalhekk difficli wiehed jifhem il-bazi legali li fuqha r-rikorrenti qed jallega li huwa sofra minn lezjoni ta` dritt fundamentali tieghu, anki d-dritt ta` smiegh xieraq;

r. Illi m`hemmx dubbju li d-dritt ta` smiegh xieraq, anki fuq skorta ta` numru ta` decizjonijiet tal-Qorti Ewropea ghandu estensjoni limitata anki favur il-vittmi ta` reat;

s. Illi madanakollu anki fil-konfront tal-istess vittmi tar-reat l-applilabilita` tal-Artikolu 6 hija limitata u certament mhux fuq l-istess binarju ta` persuna li tkun qed tigi investigat jew sahansitra akkuzata b`reat;

t. Illi issa f`dan il-kaz, r-rikorrenti ma jistax jitqies vittma ta` reat u sahansitra l-locus standi tieghu fil-proceduri huma diskutibbli ghall-ahhar. Ghaldqstant l-esponenti jhoss illi dak li qed jallega r-rikorrenti ossija li huwa sofra jew jista` jsofri minn lezjoni ta` dritt fundamentali tiehgu indikat fl-Artikolu 6 tal-Konvenzjoni Ewropea u l-Artikolu 39 tal-Kostituzzjoni, m`hux biss huwa totalment bla bazi izda sahansitra jirrazenta l-frivolu u l-vessatorju.

4. Salv eccezzjonijiet ulterjuri skond il-Ligi.

Rat in-nota li pprezentaw l-kjamati fil-kawza Brian Tonna u Karl Cini fid-9 ta` Jannar 2018.

Rat il-verbal tal-udjenza tad-9 ta` Jannar 2018 fejn *inter alia* kien hemm qbil bejn il-partijiet kollha illi l-Onor. Imhallef Antonio Mizzi huwa mizzewweg lill-Membru Parlamentari Ewropeja l-Onor. Marlene Mizzi.

Rat in-nota b`dokumenti li pprezenta r-rikorrent fit-12 ta` Jannar 2018.

Rat il-provvediment li tat fis-27 ta` Frar 2018 fejn fl-ewwel lok, iddikjarat li ma kenitx sejra tqis id-dokumenti markati C, D, E, F, H, I, u N esebiti man-nota li pprezenta r-rikorrent fit-12 ta` Jannar 2018 (fol 65 et seq) bhala l-prova tal-kontenut tal-istess, u fit-tieni lok fejn iddikjarat ammissibbli bhala prova d-dokumenti markati J, K. u L esebiti mal-istess nota li pprezenta r-rikorrent. Il-kap tal-ispejjez ghal dan il-provvediment thalla riservat ghall-gudizzju finali.

Rat in-nota b`dokumenti li pprezenta r-Registratur, Qrati Civili u Tribunali fit-13 ta` Marzu 2018.

Semghet ix-xiehda ta` Anna Zammit u tar-rikorrent fl-udjenza tal-15 ta` Marzu 2018.

Rat illi l-kawza thalliet ghat-trattazzjoni finali ghat-2 ta` Lulju 2018 bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-nota ta` osservazzjonijiet li pprezentaw il-partijiet kollha hlief ghall-kjamati fil-kawza Brian Tonna u Karl Cini.

Semghet is-sottomissjonijiet tal-ahhar bil-fomm li saru fl-udjenza tat-2 ta` Lulju 2018.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. <u>Xiehda</u>

<u>Anna Zammit</u> – Ufficjal tal-Parlament Ewropew – xehdet li d-dokumenti markati A sa D a fol 182 sa 185 tal-process kienu rilaxxjati mill-Parlament Ewropew. Jikkonsistu fi traskrizzjoni ta` diskors li ghamlet il-Membru Parlament Ewropew Onor Marlene Mizzi fil-Parlament Ewropew fis-seduta tal-14 ta` Gunju 2017 kif ukoll minn *video recording* ta` dak id-diskors. Il-*clip* tinkludi l-introduzzjoni li saret mill-Vici President tal-Parlament Ewropew u d-diskors tal-Onor. Mizzi.

<u>Ir-rikorrent</u> xehed illi din il-kawza ma saritx ghaliex huwa ghandu dubju fl-integrita` tal-Onor. Imhallef Antonio Mizzi.

Skont ir-rikorrent, il-kawza saret ghal tliet ragunijiet.

L-ewwel raguni hija li l-Onor. Imhallef Mizzi huwa mizzewweg lill-Onor. Marlene Mizzi li hija MEP tal-Partit Laburista. Il-fatt wahdu li huma mizzewgin ifisser li hemm diffikulta` biex l-Imhallef Mizzi jisma` l-appell, anke li kieku l-Onor. Mizzi ma tkellmitx fil-Parlament Ewropew. Sahaq li l-gustizzja mhux biss trid issir izda trid tidher li qeghda ssir. Bejn il-konjugi Mizzi hemm il-komunjoni ta` l-akkwisti u jista` jkun li hemm interess finanzjarju mill-fatt illi l-Onor. Mizzi tokkupa l-posizzjoni li ghandha sal-lum. MEP ghandu salarju li jlahhaq il-EUR 100,000 fis-sena, u dak is-salarju jaghmel parti mill-komunjoni tal-akkwist.

It-tieni raguni hija l-agir fil-pubbliku tal-Onor. Mizzi u l-involviment taghha fit-talba li huwa qed jaghmel biex l-iskandlu zvelat fil-Panama Papers jigi nvestigat. L-Onor. Mizzi tkellmet dwar il-kaz mhux biss fl-intervent li ghamlet fil-Parlament Ewropew izda anke permezz ta` *posts* li ghamlet fuq *Facebook*. Fil-*posts* taghha ghamlet argumenti politici favur il-Prim Ministru l-Onor Joseph Muscat, Kap tal-Partit Laburista, u ghamlet argument kontra tieghu u cioe` kontra r-rikorrent. Sostna li hemm rabta cara wkoll bejn l-Onor. Mizzi u zewgha l-Imhallef Mizzi fil-mod kif tesprimi ruhha pubblikament anke meta si tratta ta` hwejjeg li ghandhom x` jaqsmu max-xoghol tieghu tal-Imhallef. Fakkar kif l-Onor. Mizzi haditha pubblikament kontra l-Prim Imhallef Silvio Camilleri dwar il-kwistjoni tal-warrants lil zewg avukati, kwistjoni li qajmet kontroversja. Dak l-agir taghha kien indikattiv tal-fatt illi l-Onor Mizzi titkellem ma` zewgha l-Imhallef Mizzi dwar ix-xoghol tieghu.

It-tielet raguni hija ghaliex l-imgieba tal-Imhallef Antonio Mizzi waqt il-kaz in kwistjoni kemm fil-qorti fil-miftuh u kif ukoll fil-qorti fil-maghluq kienet ostili fil-konfront tieghu u ta` l-Av. Dr. Jason Azzopardi. Ezempju ta` din l-ostilita` huwa l-fatt illi l-Imhallef Mizzi kif appena beda jisma` l-appell ma riedx li l-kaz jinstema` fil-pubbliku u ghalhekk ordna li l-pubbliku imur `il barra. Ezempju iehor huwa li l-Imhallef Mizzi staqsieh jekk dak li kien rappurtat fis-

sens li huwa ma jibqax jisma` l-kawza kienx *a slip of the tongue* tieghu. B`dak il-kliem, huwa hass li kien hemm certu ostilita`. Huwa wiegeb lill-Imhallef li dak li qal pubblikament kien minnu. Ezempju iehor huwa li meta l-Av. Azzopardi semma fit-trattazzjoni tieghu dak li kienet qalet l-Onor. Mizzi fis-sens li r-ragel taghha kien bata fil-karriera tieghu minhabba x-xoghol politiku taghha. L-Imhallef waqfu u qallu li dik tatu fastidju kbir.

Kompla jixhed illi huwa kien qed jitlob li ssir gustizzja dwar il-kaz tal-Panama Papers. It-talba tieghu saret bhala cittadin biex tinfetah investigazzjoni wara li l-Prim Ministru, il-Kummissarju tal-Pulizija u l-Avukat Generali ma ghamluhiex.

Spjega li l-Imhallef Mizzi kemm-il darba rrikuza ruhu f` cirkostanzi simili. Irrefera ghal provvediment ta` rikuza datat 24 ta` April 2015 fejn wara talba ta` Daphne Caruana Galizia accetta t-talba taghha ghal rikuza minhabba li martu kienet MEP tal-Partit Laburista. Ezempju iehor huwa meta l-Imhallef Mizzi, li dak iz-zmien kien ghadu Magistrat, astjena minn kaz li fih kien qed jidher quddiemu dak li kien il-Prim Imhallef Vincent De Gaetano peress li l-Magistrat kien qed jigi nvestigat mill-Kummissjoni ghall-Amministrazzjoni tal-Gustizzja dwar il-partecipazzjoni tieghu fis-settur tal-Isports.

III. <u>L-isfond</u>

Fl-14 ta` Lulju 2017, ir-rikorrent ipprezenta rikors konfermat bil-gurament a tenur ta` l-Art 546(4A) tal-Kap 9 quddiem il-Qorti tal-Magistrati (Malta) bhala Qorti Istruttorja li kienet ippresjeduta mill-Magistrat Dr Ian Farrugia ghar-ragunijiet indikati fl-ewwel paragrafu tar-rikors odjern.

Permezz ta` digriet tas-26 ta` Lulju 2017, il-Qorti, wara li ddikjarat illi kienu avveraw ruhhom il-pre-rekwiziti kollha mehtiega, ordnat il-bidu ta` investigazzjoni u li tiskatta inkjesta magisterjali dwar delitti li jgorru maghhom piena ta` prigunerija ta` iktar minn tlett snin li huwa l-minimu stabbilit mill-Kodici Kriminali sabiex jista` jkun hemm l-*in genere*.

Fis-27 ta` Lulju 2017, l-Onor. Prim` Ministru, l-Onor. Ministru Konrad Mizzi, Keith Schembri, Malcolm Scerri, Adrian Hillman, Brian Tonna u Karl Cini, li huma l-persuni li kienu ndikati fir-rikors tar-rikorrent odjern, ipprezentaw separatament rikorsi fil-Qorti Kriminali fejn talbu r-revoka tal-provvediment tas-26 ta` Lulju 2017 a tenur tal-Art 546(4B) tal-Kap 9.

Is-smigh tal-appell kien assenjat lill-Onor. Imhallef Antonio Mizzi sedenti fil-Qorti Kriminali.

Fis-27 ta` Lulju 2017, il-Qorti Kriminali presjeduta mill-Onor. Imhallef Antonio Mizzi tat zmien lir-rikorrent odjern sabiex iwiegeb bil-miktub ghar-rikorsi tal-persuni llum kjamati fil-kawza fil-procediment odjern.

Ir-rikorsi kienu appuntati ghas-smigh ghas-16 ta` Awissu 2017. Fil-kors ta` din l-udjenza, ir-rikorrent talab ir-rikuza ta` l-Imhallef sedenti.

Fit-3 ta` Ottubru 2017, l-Imhallef sedenti cahad it-talba ghar-rikuza.

Fid-19 ta` Ottubru 2017 ir-rikorrent ipprezenta din il-kawza fejn ghamlet it-talbiet fuq riferiti.

IV. L-istanza

Il-qofol tal-istanza tar-rikorrent hija li bil-fatt illi l-appell jibqa` jinstema` mill-Onor. Imhallef Antonio Mizzi, li huwa mizzewweg mal-MEP tal-Partit Laburista l-Onor Marlene Mizzi, ghar-ragunijiet li ndika waqt id-deposizzjoni tieghu, u abbazi tad-dokumenti li kienu esebiti bhala prova fil-procediment tal-lum, kien ser igarrab ksur tal-jedd tieghu ghal smigh xieraq tar-rikorrenti hekk kif tutelat bl-Art 39 tal-Kostituzzjoni ta` Malta ("il-Kostituzzjoni") u bl-Art 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali ("il-Konvenzjoni").

V. L-Art 6 tal-Konvenzjoni

Il-parti tal-Art 6 li hija rilevanti ghall-procediment tal-lum huwa l-ewwel (1) subartikolu li jaqra 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.*

VI. L-Art 39 tal-Kostituzzjoni

Il-parti tal-Art 39 li hija rilevanti ghall-kawza tal-lum huma l-ewwel (1) u t-tieni (2) subartikoli 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.*

VII. <u>L-Art 546 tal-Kap 9</u>

Ghall-fini ta` apprezzament <u>shih</u> tal-kwistjoni, il-Qorti jidhrilha opportun jekk tirriproduci fl-interezza tieghu l-<u>Art 546 tal-Kap 9</u>, u tissenjala *in calce* dak mid-disposizzjoni li fil-fehma taghha huwa rilevanti ghall-istanza odjerna.

<u>L-Art 546 tal-Kap 9</u> ighid hekk :-

(1) Bla hsara tad-dispozizzjonijiet tas-subartikoli li jigu minnufih wara dan, wara r-rapport, id-denunzja jew il-kwerela ta` reat li jista` jinghata l-piena ta` prigunerija ghal izjed minn tliet snin, u jekk is-suggett materjali tar-reat ikun ghadu jezisti, ghandu jigi deskritt l-istat tieghu, bid-dettalji kollha wiehed wiehed, u ghandu jigi msemmi l-istrument u l-mod li bih dan l-istrument seta` jgib l-effett. Ghall-finijiet ta` kull investigazzjoni bhal din, ghandu jsir access fuq il-post :

Izda fejn jirrizulta li l-fatt li dwaru ma tkunx saret investigazzjoni taht dan is-subartikolu kien jikkostitwixxi reat li ghalih kienet tinghata l-piena msemmija f`dan is-subartikolu, in-nuqqas li tinzamm investigazzjoni taht dan is-subartikolu m`ghandux, ghal dik ir-raguni biss, jippregudika b`kull mod li jkun li jinbdew jew jitkomplew procedimenti kriminali ghal dak ir-reat, jew l-ammissibilità ta` kull prova dwar dak ir-reat f`dawk il-procedimenti :

Izda wkoll minkejja kull dispozizzjoni ohra, meta reat li jkun qed jigi investigat ikun ta` serq tal-elettriku jew reat taht l-artikolu 326(1)(c() (e) u (f) ebda access ma ghandu jsir hlief fuq talba espressa tal-Enemalta plc.

(2) Il-magistrat li lilu jsiru r-rapport, id-denunzja jew il-kwerela msemmija fl-ahhar subartikolu qabel dan jista` ma jaghmilx access jekk il-fatt li ghandu jigi investigat huwa ksur ghall-finijiet tal-artikolu 263(a) kif imfisser fl-ewwel paragrafu tal-artikolu 264(1) u jekk is-serq li ghalih il-ksur jirriferixxi jew jista` jirriferixxi jkun dwar hwejjeg li ma jkunux jiswew aktar minn tlietau ghoxrin euro u disgha u ghoxrin centezmu (23.29), ghalkemm jista` jkun ikkwalifikat kif imsemmi fl-artikolu 261(a) (b) (d) (e) (f) u (g) jew x`whud minnhom, ukoll jekk il-fatt x`aktarx li jikkostitwixxi reat li ghalih hemm il-piena ta` prigunerija ghal izjed minn tliet snin :

Izda d-decizjoni ta` magistrat li ma jaghmilx access skont dan is-subartikolu ma timpedix, dwar il-fatt jew il-fatti li dwarhom dik id-decizjoni tkun ittiehdet, l-istituzzjoni jew it-tkomplija ta` proceduri kriminali ghal reat li jkun iktar gravi, sew minhabba x-xorta tieghu sew minhabba l-ammont involut sew ghal xi raguni ohra, tkun liema tkun, mir-reati msemmija f`dan is-subartikolu.

(3) Meta r-reat li ghandu jigi investigat ikun serq, li ma jkunx serq bi vjolenza kontra l-persuna, il-Magistrat jista` minflok li jaghmel access fuq il-post, jordna lil ufficjal tal-Pulizija mhux taht il-grad ta` spettur biex jistabbilixxi l-fatti rilevanti, u l-ufficjal hekk mahtur u kull fotografu jew espert iehor li jkunu qed jghinuh ghandhom jixhdu fl-inkjesta fuq il-fatti investigati u stabbiliti minnhom u ghandhom jipproducu r-ritratti kollha li jkunu ttiehdu u l-oggetti jew id-dokumenti l-ohra kollha li jkunu rilevanti ghall-investigazzjoni taghhom.

(4) Ir-rapport, id-denunzja jew il-kwerela msemmijin fis-subartikolu (1) u fl-artikolu 551(1) jistghu jsiru bil-fomm lill-magistrat izda f`kull kaz l-istess rapport, denunzja jew kwerela ghandhom isiru bil-miktub lill-magistrat fi zmien jumejn tax-xoghol mill-jum li fih ikunu saru bil-fomm :

Izda l-magistrat jista`, meta jidhirlu li jkun xieraq li hekk jaghmel,jipprocedi skont id-dispozizzjonijiet ta` dan it-Titolu minkejja li r-rapport, id-denunzja jew il-kwerela ma jsirux bil-miktub fiz-zmien imsemmi.

(4A) Meta r-rapport, id-denunzja jew il-kwerela jsiru lil Magistrat taht dan l-artikolu minn xi persuna li ma tkunx l-Avukat Generali jew ufficjal tal-pulizija, ir-rapport, id-denunzja jew il-kwerela ghandhom isemmu car lill-persuna suspettata li ghamlet ir-reat (hawn izjed `il quddiem f`dan l-artikolu msejjha "il-persuna suspettata"). Il-Magistrat ghandu jordna li r-rapport, id-denunzja jew il-kwerela, skont ma jkun il-kaz, jigi notifikat lill-persuna suspettata filwaqt li jaghtiha zmien ghal risposta u wara li jghaddi dak iz-zmien il-Magistrat ghandu jiddeciedi jekk jaghmilx l-access. Il-Magistrat ghandu jiddeciedi li jaghmel l-access biss jekk ikun stabbilixxa li l-prerekwiziti mehtiega biex isir dak l-access ikunu jezistu.

(4B) Id-decizjoni tal-Magistrat taht is-subartikolu (4A) ghandha

tigi notifikata lill-persuna li ghamlet ir-rapport, denunzja jew il-kwerela u lill-persuna suspettata. Kull wiehed minnhom jista`, fi zmien jumejn tax-xoghol mid-data tan-notifika tad-decizjoni, jaghmel rikors lill-Qorti Kriminali biex tigi revokata d-decizjoni tal-Magistrat u l-Qorti Kriminali ghandha taghti d-decizjoni taghha fuq ir-rikors bl-urgenza.

(4C) F`kull kaz fejn ikun ser isir access taht id-dispozizzjonijiet tas-subartikoli (4A) u (4B) il-Magistrat li jmexxi l-access ghandu jinghazel bil-polza minn fost il-Magistrati kollha.

(5) Kopja tar-rapport, denunzja jew kwerela msemmijin fis-subartikolu (1) u fl-artikolu 551(l) ghandhom jintbaghtu mill-magistrat lill-Avukat Generali fi zmien tlett ijiem tax-xoghol minn meta l-magistrat ikun irceva dak ir-rapport, dik id-denunzja jew dikil-kwerela bil-miktub.

(6) Id-decizjoni li ma jsirx access skont is-subartikolu (2) ghandha bl-istess mod tigi notifikata lill-Avukat Generali fi zmien tlett ijiem tax-xoghol minn dik id-decizjoni.

VIII. L-eccezzjonijiet preliminari

1. L-ewwel (1) eccezzjoni preliminari tal-intimat Avukat Generali

Kien eccepit illi l-procediment li huwa l-isfond tal-lanjanza tar-rikorrent jinsab fl-istadju ta` inkjesta magisterjali, u ghalhekk ma hemmx involuta d-determinazzjoni ta` akkuza kriminali, jew ta` dritt jew obbligu civili. Waqt inkjesta magisterjali, ma hemmx akkuzat, izda jkun hemm biss smigh ta` xiehda, tehid ta` ritratti u gbir ta` reperti.

Il-Qorti taghmel referenza ghall-konsiderazzjonijiet li diga` ghamlet fis-sentenza taghha *in parte* tat-30 ta` Novembru 2017, partikolarment dak li qalet fil-pag 15 sa 21 ta` dik is-sentenza (fol 28 sa fol 34 tal-process).

Hemm il-Qorti ppronunzjat ruhha kjarament illi ghalkemm huwa minnu li *wiehed* mill-ghanijiet ta` inkjesta magisterjali huwa li jigi determinat jekk tabilhaqq kienx kommess reat, il-garanziji tas-smigh xieraq skont l-Art 39 tal-Kostituzzjoni u skont l-Art 6 tal-Konvenzjoni ighoddu *anke* f`dak l-istadju.

Tikkonferma dan anke issa minkejja kull disposizzjoni talvolta prezenti fil-Kap 9 illi direttament jew xort`ohra tista` teskludi l-possibilita` tar-rikuza.

Il-Qorti taghmel referenza ghall-"**Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)**" (2014 – European Court of Human Rights – Council of Europe) fejn inghad :-

> *23. As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole. Therefore, some requirements of Article 6, such as the reasonable-time requirement or the right of defence, may also be relevant at this stage of proceedings in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (Imbrioscia v. Switzerland, § 36). Although investigating judges do not determine a "criminal charge", the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply (Vera Fernández-Huidobro v. Spain, §§ 108-114).*
>
> *24. Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any "criminal charge", including the sentencing process (for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set, in Phillips v. the United Kingdom, § 39). Article 6 may also be applicable under its criminal limb to proceedings resulting in the demolition of a house built without planning permission, as the demolition could be considered a "penalty" (Hamer v. Belgium, § 60). However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of the new Criminal Code (Nurmagomedov v. Russia, § 50).*

Similment fil-kapitolu li jgib it-titolu : "**Applicability of Article 6 ECHR**" : li jaghmel parti mit-tezi tad-dottorat : "**The Blindfold of Lady Justice - Judicial Independence and Impartiality in light of the Requirements of Article 6 ECHR**" (Wolf Legal Publishers 2004), **il-Professur Dr Martin Kuijer** (Professur ta` *Human Rights Law* fil-*Free University of Amsterdam* u Kap tal-*Human Rights Department of the Netherlands Ministry of Justice)* jispjega illi :-

> *"The applicability of Article 6 ECHR primarily focuses on the trial in court. However, the judicial protection*

offered by Article 6 undeniably extends to some extent (i.e. indirectly) to the pre-trial stage as well. The Court will look at the entirety of the domestic proceedings, but some elements in the pre-trial stage may have prejudiced the right to a fair trial in such a manner that it affects the fairness of the trial itself. In the Imbrioscia judgment the Court stated :

"[…] it does not follow that the Article [Article 6, MK] has no application to pre-trial proceedings […] Other requirements of Article 6 – especially of paragraph 3 – may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them."

The wording used by the Court changed slightly in subsequent case-law. In the Schöps judgment the Court simply states: "it follows from the wording of Article 6 - and particularly from the autonomous meaning to be given to the notion of `criminal charge` - that this provision has some application to pre-trial proceedings". This applicability of Article 6 ECHR in the pre-trial stage goes hand in hand with leaving the national authorities a margin of appreciation. The Court confirmed this in the Brennan case: "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".

The Imbrioscia, Schöps and Brennan cases were concerned with criminal cases and did not relate to judicial bias, but there is no reason to assume that the Court would rule otherwise in case of a complaint relating to judicial independence or impartiality. Admittedly, many cases in which the Court was confronted with complaints concerning impartiality in pre-trial stages were concerned with the trial judge having taken pre-trial decisions. In these instances there is an issue under Article 6 because of the alleged lack of objectivity of a trial judge. It does not really concern applicability of Article 6 in the pre-trial phase. However, there is one decision taken by the Commission in which the applicant complained about the alleged bias of an investigative judge in the pre-trial stage. In its Stromillo decision – two years before the Imbrioscia judgment of the Court – the Commission eventually

declared the case inadmissible, but it indicated that the complaint had to be examined "having regard to the development of the proceedings as a whole". This seems to indicate that the Commission was willing to take into account deficiencies in the pre-trial stage. It also indicates that some deficiencies in the pre-trial stage may be `remedied` in a later stage of the proceedings. However, one may wonder whether all deficiencies in the pre-trial stage can be remedied in such a manner. Can a lack of judicial control over the lawfulness of intrusive investigative measures as a result of a clearly biased pre-trial judge be sufficiently remedied in a later stage simply by not allowing the ensuing evidence? If not, then the lack of impartiality in the pre-trial stage will affect the overall fairness of the proceedings. In light of the above-mentioned case-law the Court should then find a violation of Article 6 ECHR.

In this regard the Korellis judgment should be mentioned. The applicant complained about interlocutory proceedings which preceded the criminal trial in respect of the charge against the applicant. The applicant maintained that some judges lacked impartiality. This lack of impartiality had resulted in the applicant being deprived of the opportunity to have his own scientific experts examine an important piece of evidence. In its admissibility decision the Court held that these interlocutory proceedings did not determine a criminal charge against the applicant. However, in light of the crucial nature of the evidence, the results of the interlocutory proceedings could have an important bearing on the applicant`s guilt or innocence of the charges. In other words, the pre-trial stage was "crucial for the outcome of the trial". Under these circumstances the Court was in principle willing to base its decision on the pre-trial stage.

Applicability of Article 6 to pre-trial stages also relates to civil cases in case the party is (obliged to be) involved in the pre-trial stage. For example, with regard to `reasonable time` cases the Court has taken into account pre-trial stages in order to determine the starting point of the proceedings. In the Schouten & Meldrum case, the Court used the date on which the applicant applied for an administrative decision in order to start judicial proceedings as a starting point.

The (extent of) applicability of Article 6 to pre-trial stages has been the subject of an extensive discussion. Alkema commented in 1994 that the trend in the Strasbourg case-law was becoming clear: pre-trial proceedings were more and more often taken into account when applying Article 6 ECHR. This statement is certainly true. But it seems to me that there are limits to this trend. The Court will not in the near future extend the applicability of Article 6 to pre-trial stages `directly` and unconditionally. Martens emphasised that the investigative stage and the trial stage need to be carefully distinguished. Article 6 "applies to the second stage only". Deficiencies in the pre-trial stage will remain to be of importance `indirectly`, i.e. if those deficiencies seriously prejudice the trial itself. This `indirect` application suffices in my opinion. It would be impossible to hold Article 6 directly applicable to all sorts of administrative pre-trial stages. However, I would argue in favour of a more generally accepted applicability of Article 6 in case the pre-trial stages are of a judicial nature."

Anke fuq l-iskorta ta` din id-dottrina, din tibqa` tal-fehma li ghalkemm il-procediment mertu tal-lanjanza tar-rikorrent ghadu fl-istadju ta` inkjesta magisterjali, it-tuteli tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni huma veljanti.

Ghalhekk qeghda <u>tichad</u> l-ewwel (1) eccezzjoni preliminari tal-intimat Avukat Generali.

2. <u>L-ewwel (1) eccezzjoni tal-kjamat fil-kawza l-Onor. Prim Ministru Dr Joseph Muscat</u>

Dan il-kjamat fil-kawza (ghad-differenza tal-intimat u tal-kjamati fil-kawza l-ohra) sahaq kwazi ghal kollox in linea preliminari fuq din l-eccezzjoni, specjalment fis-sottomissjonijiet li saru bil-fomm.

Issa huwa principju ewlieni tad-dritt li min jipproponi kawza, irid ikollu interess - (a) **guridiku :** fis-sens illi d-domanda jrid ikun fiha ipotesi ta` l-ezistenza ta` dritt u l-vjolazzjoni tieghu ; (b) **dirett u personali** : fis-sens li jkun dirett meta jezisti fil-kontestazzjoni jew fil-konsegwenzi taghha, u jkun personali fis-sens li jirrigwarda l-attur, hlief ghall-azzjoni popolari (li mhix il-kaz tal-lum) ; u (c) **attwali** fis-sens li jrid johrog minn stat attwali ta` vjolazzjoni ta` dritt,

jigifieri l-vjolazzjoni attwali tal-ligi trid tikkonsisti f`kondizzjoni posittiva jew negattiva kontrarja ghall-godiment ta` dirett legalment appartenenti jew spettanti lid-detentur.` (**Muscat vs Buttigieg** -Vol. LXXIV.II.481).

Fis-sentenza taghha tat-28 ta` Novembru 2003 fil-kawza **"Formosa Gauci vs Lanfranco et"** il-Qorti tal-Appell elenkat l-principji li jikkwalifikaw dan l-interess -

(i) l-interess (guridiku) mehtieg irid ikun wiehed dirett, legittimu, kif ukoll attwali ;

(ii) l-istat attwali ta` ksur ta` jedd jikkonsisti f`kundizzjoni pozittiva jew negattiva li xxejjen jew tinnewtralizza dritt li jkun jappartjeni lid-detentur jew lil dak li lilu jkun misthoqq ;

iii) l-interess guridiku fl-attur huwa dak li l-imharrek jirrifjuta li jaghraf il-jedd ta` l-istess attur u dan billi kull persuna ghandha d-dritt titlob li, fil-konfront taghha, isir haqq jew tigi msewwija ingustizzja li tkun giet maghmula kontriha ;

iv) l-interess guridiku irid ikun iwassal ghal rizultat ta` utilita` u vantagg ghal min irid jezercita l-jedd. Jekk l-azzjoni ma tistax twassal ghal tali rizultat ghal min jibdiha, dik l-azzjoni ma tistax tregi ;

v) l-interess guridiku jrid jibqa` jissussisti tul il-hajja kollha ta` l-azzjoni u mhux biss fil-bidu taghha. Jekk l-interess jintemm, il-konsegwenza mmedjata tkun li l-imharrek. jinheles milli jibqa` fil-kawza ;

vi) l-interess ta` l-attur ghandu jkun jidher mill-att tac-citazzjoni nnifisha. Ghalkemm il-mottiv ta` l-interess mhux mehtieg li jkun imsemmi fic-citazzjoni, dan ghandu jrrizulta mill-provi jekk kemm-il darba jigi kkuntrastat ;

vii) fil-prattika gudizzjarja, wiehed jista` jippromwovi kawza biex jikseb dikjarazzjoni preordinata ghal azzjoni definittiva u ahharija, minkejja li din ma tkunx giet inkluza fl-azzjoni ta` accertament. Madankollu, f`kaz bhal dan, il-Qorti trid tkun sodisfatta li jkun hemm l-interess mehtieg, anki preordinat ghall-kawza l-ohra, u li d-dikjarazzjoni hekk miksuba tkun tifforma l-bazi tal-kawza l-ohra li tista` ssir aktar `il quddiem ;

viii) l-interess mhux bilfors ikun wiehed li jigi kkwantifikat f`somma determinata ta` flus jew gid, imma jista` jkun imsejjes biex ihares jew jaghti gharfien ghal jedd morali jew soggettiv, imbasta l-jedd invokat ma jkunx wiehed ipotetiku ;

ix) jekk azzjoni, ghalkemm tkun imsejsa fuq jedd ta` l-attur, tkun mahsuba biss biex tirreka hsara lill-imharrek bla ebda vantagg utli lill-attur tali

azzjoni titqies bhala wahda llegali – azzjoni maghrufa fid-duttrina bhala wahda *acta ad aemulationem* – u titqies li fiha jkun jonqos l-interess guridiku mehtieg.

Fis-sentenza **"<u>Fenech Adami vs Abela et</u>"** (6 ta` Ottubru 1999 – Vol. LXXXIII.II.331) il-Qorti ta` l-Appell qalet hekk –

Illi d-definizzjoni accettata fil-gurisprudenza nostrana ta` interess guridiku hija dik tal-Mortara li jghid li l-interess guridiku huwa `l`utilita` finale della domanda giudiziale nel tema dell`asserita esistenza o violazione del diritto`.

Illi huwa rekwizit essenzjali li jkun hemm dritt legali li jkun il-bazi li bih l-attur ikun jista` jippromwovi u jitlob l-accertament tieghu permezz ta` l-awtorita` gudizzjarja.

Fis-sentenza ta` din il-Qorti tal-15 ta` Lulju 1952 (Vol.36.II.493), fil-kawza fl-ismijiet **"<u>Baldacchino vs Bellizzi et</u>"** inghad li –

min jistitwixxi azzjoni jrid bilfors ikollu xi dritt – `l`azione civile non puo` essere promossa che per far valere un diritto, e da colui a cui il diritto spetti. Mancando l`uno e l`altro di questi requisiti, l`azione e` infondata ed inammissibile`.

Hekk ukoll fis-sentenza **"<u>Eminyan vs Mousu` pro et noe et</u>"** (A.C. 28 ta` Frar 1997 - Vol. LXX1.II.429) u fis-sentenza **"<u>Scerri et vs Farrugia et</u>"** (P.A. – RCP - 1 ta` Ottubru 2002) kien affermat –

li l-interess guridiku jrid ikun reali u attwali u ghandu jiskaturixxi minn vjolazzjoni jew theddida ta` vjolazzjoni ta` xi dritt li jappartjeni lill-attur u f`dan is-sens allura jrid ukoll ikun personali. Irid jigi stabbilit in-ness guridiku bejn l-agir abbuziv u llegali allegatament kommess mill-konvenut u d-danni jew almenu l-pregudizzju allegatament subit mill-attur konsegwenzjali ghal tali agir.

Issa fil-kaz tal-lum, jirrizulta li kien ir-rikorrent li ghamel id-denunzja skont l-Art 546(4A) tal-Kap 9.

Jirrizulta li kienu l-kjamati fil-kawza li bhala *"persuni suspettati"* abbazi tal-Art 546(4B) tal-Kap 9 talbu rimedju mill-Qorti Kriminali fis-sens li rrizulta li sar fil-kors ta` dan il-procediment.

Jirrizulta li r-rikorrent kellu *locus standi* fil-procediment quddiem il-Qorti Kriminali tant li talab ir-rikuza tal-Imhallef sedenti, liema talba kienet trattata u l-esitu taghha wassal finalment ghall-kawza tal-lum.

Hija l-fehma konsiderata ta` din il-Qorti illi anke in vista tal-premess huwa legalment insostenibbli li r-rikorrent ikun eskluz milli tipproponi l-azzjoni odjerna, fuq allegata karenza ta` interess, meta l-bazi tal-istanza tieghu hija l-pretensjoni li bil-fatt li l-Imhallef sedenti f`dak il-procediment ma rrikuzax ruhu huwa garrab vjolazzjoni ta` d-dritt tieghu ghal smigh xieraq. L-elementi kollha tal-interess li trid il-ligi, kif imfissra fil-gurisprudenza appena citata, jissussistu fl-istanza tar-rikorrent.

Ghalhekk l-ewwel (1) eccezzjoni tal-kjamat fil-kawza l-Onor. Prim Ministru Dr Joseph Muscat qeghda tkun respinta.

3. <u>It-tieni (2) eccezzjoni preliminari tal-kjamat fil-kawza l-Onor. Prim Ministru Dr Joseph Muscat</u>

Ghall-istess ragunijiet li kienet respinta l-ewwel (1) eccezzjoni tal-intimat Avukat Generali qeghda tkun michuda t-tieni (2) eccezzjoni preliminari tal-kjamat fil-kawza Onor. Prim Ministru Dr Joseph Muscat.

4. <u>It-tielet (3) eccezzjoni tal-kjamat fil-kawza Adrian Hillman</u>

Ghall-istess ragunijiet li kienet respinta l-ewwel (1) eccezzjoni tal-intimat Avukat Generali qeghda tkun michuda t-tielet (3) eccezzjoni tal-kjamat fil-kawza Adrian Hillman.

5. <u>L-ewwel (1) u t-tieni (2) eccezzjonijiet tal-kjamat fil-kawza Onor. Ministru Konrad Mizzi</u>

Ghall-istess ragunijiet li kienet respinta l-ewwel (1) eccezzjoni tal-intimat Avukat Generali qeghdin ikunu michuda l-ewwel (1) u t-tieni (2) eccezzjonijiet tal-kjamat fil-kawza Onor. Ministru Konrad Mizzi.

6. <u>It-tieni (2) eccezzjoni preliminari tal-kjamat fil-kawza Malcolm Scerri</u>

Ghall-istess ragunijiet li kienet respinta l-ewwel (1) eccezzjoni tal-intimat Avukat Generali qeghda tkun michuda t-tieni (2) eccezzjoni preliminari tal-kjamat fil-kawza Malcolm Scerri.

7. <u>It-tieni (2) eccezzjoni preliminari tal-kjamat fil-kawza Keith Schembri</u>

Ghall-istess ragunijiet li kienet respinta l-ewwel (1) eccezzjoni tal-intimat Avukat Generali qeghda tkun michuda t-tieni (2) eccezzjoni preliminari tal-kjamat fil-kawza Keith Schembri.

8. <u>It-tieni (2) eccezzjoni preliminari tal-intimat Avukat Generali</u>

Kien eccepit illi r-rikorrent m`ghandux l-interess guridiku sabiex jippromwovi l-azzjoni odjerna, ghaliex ma jikkwalifikax bhala "*vittma*".

Ir-rikorrent la huwa imputat u lanqas persuna suspettata fil-kuntest ta` pretensjoni dwar ksur tal-jedd ghal smigh xieraq.

Skont l-Avukat Generali l-Art 39 tal-Kostituzzjoni u l-Art 6 tal-Konvenzjoni japplikaw biss ghall-imputat, mhux ukoll ghall-*parte civile*.

Il-Qorti tqis illi fl-ambitu tal-Konvenzjoni, l-Art 34 ighid illi "*every natural person as well as every non-governmental organization (NGO) or group of individuals can apply to the European Court of Human Rights (ECtHR)*".

Sabiex ikun hemm "*victim status*", l-Art 34 ighid illi l-applikant ghandu jkun *"the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto"*.

Similment fl-Art 4(1) tal-Konvenzjoni u fl-Art 46(1) tal-Kostituzzjoni, hija persuna li tallega li d-drittijiet taghha gew, qed jigu jew x` aktarx ser jigu miksura li tista` tezercita l-azzjoni.

Fil-**<u>Practical Guide on Admissibility Criteria</u>** mahrug mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem ("**<u>ECHR</u>**") [Fourth Edition – 28 ta` Frar 2017] jinghad hekk dwar *"Victim Status"* :-

> *"15. The word "victim", in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation. Hence,*

Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (Vallianatos and Others v. Greece [GC], §§ 47). The notion of "victim" is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action (Gorraiz Lizarraga and Others v. Spain, § 35), even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (Aksu v. Turkey [GC], § 52; Micallef v. Malta [GC], § 48). It does not imply the existence of prejudice (Brumărescu v. Romania [GC], § 50), and an act that has only temporary legal effects may suffice (Monnat v. Switzerland, § 33).

16. The interpretation of the term "victim" is liable to evolve in the light of conditions in contemporary society and it must be applied without excessive formalism (ibid., §§ 30-33; Gorraiz Lizarraga and Others v. Spain, § 38; Stukus and Others v. Poland, § 35; Ziętal v. Poland, §§ 54-59).

The Court has held that the issue of victim status may be linked to the merits of the case (Siliadin v. France, § 63 ; Hirsi Jamaa and Others v. Italy [GC], § 111).

The Court can examine the question of victim status ex officio (Buzadji v. the Republic of Moldova [GC], § 70).

b. <u>Direct victim</u>

17. In order to be able to lodge an application in accordance with Article 34, an applicant must be able to show that he or she was "directly affected" by the measure complained of (Tănase v. Moldova [GC], § 104; Burden v. the United Kingdom [GC], § 33; Lambert and Others v. France [GC], § 89). This is indispensable for putting the protection mechanism of the Convention into motion (Hristozov and Others v. Bulgaria, § 73), although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (Micallef v. Malta [GC], § 45; Karner v. Austria, § 25; Aksu v. Turkey [GC], § 51).

18. Moreover, in accordance with the Court`s practice and with Article 34 of the Convention,

applications can only be lodged by, or in the name of, individuals who are alive (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], § 96).

c. Indirect victim

19. If the alleged victim of a violation has died before the introduction of the application, it may be possible for the person with the requisite legal interest as next-of-kin to introduce an application raising complaints related to the death or disappearance of his or her relative (Varnava and Others v. Turkey [GC], § 112). This is because of the particular situation governed by the nature of the violation alleged and considerations of the effective implementation of one of the most fundamental provisions in the Convention system (Fairfield v. the United Kingdom (dec.)).

20. In such cases, the Court has accepted that close family members, such as parents, of a person whose death or disappearance is alleged to engage the responsibility of the State can themselves European Court of Human Rights claim to be indirect victims of the alleged violation of Article 2, the question of whether they were legal heirs of the deceased not being relevant (Van Colle v. the United Kingdom, § 86).

21. The next-of-kin can also bring other complaints, such as under Articles 3 and 5 of the Convention on behalf of deceased or disappeared relatives, provided that the alleged violation is closely linked to the death or disappearance giving rise to issues under Article 2.

…

d. Potential victims and actio popularis

28. Article 34 of the Convention does not allow complaints in abstracto alleging a violation of the Convention (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], § 101). In certain specific situations, however, the Court has accepted that an applicant may be a potential victim. For example, where he was not able to establish that the legislation he complained of had actually been applied to him on account of the secret nature of the measures it authorised (Klass and Others v. Germany) or where an

alien`s removal had been ordered, but not enforced, and where enforcement would have exposed him in the receiving country to treatment contrary to Article 3 of the Convention or to an infringement of his rights under Article 8 of the Convention (Soering v. the United Kingdom) or where a law punishing homosexual acts was likely to be applied to a certain category of the population, to which the applicant belonged (Dudgeon v. the United Kingdom). The Court has also held that an applicant can claim to be a victim of a violation of the Convention if he or she is covered by the scope of legislation permitting secret surveillance measures and if the applicant has no remedies to challenge such cover surveillance (Roman Zakharov v. Russia [GC], §§ 173-78).

29. In order to be able to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient (Senator Lines GmbH v. fifteen member States of the European Union (dec.) [GC]). For the absence of a formal expulsion order, see Vijayanathan and Pusparajah v. France, § 46; for alleged consequences of a parliamentary report, see Fédération chrétienne des témoins de Jéhovah de France v. France (dec.); for alleged consequences of a judicial ruling concerning a third party in a coma, see Rossi and Others v. Italy (dec.).

30. An applicant cannot claim to be a victim in a case where he or she is partly responsible for the alleged violation (Paşa and Erkan Erol v. Turkey).

31. The Court has also underlined that the Convention does not envisage the bringing of an action popularis for the interpretation of the rights it contains or permit individuals to complain about a provision of a domestic law simply because they consider, without having been directly affected by it, that it may contravene the Convention (Aksu v. Turkey [GC], § 50; Burden v. the United Kingdom [GC], § 33).

32. However, it is open to a person to contend that a law violates his or her rights, in the absence of an individual measure of implementation, if he or she is required either to modify his or her conduct or risks being prosecuted or if he or she is a member of a class of

people who risk being directly affected by the legislation (ibid., § 34; Tănase v. Moldova [GC], § 104; Michaud v. France, §§ 51-52; Sejdić and Finci v. Bosnia and Herzegovina [GC], § 28).”

Il-Qorti tqis illi l-ECHR accettat l-istatus ta` “*potential victims”* fil-kazi eccezzjonali fejn ikun hemm periklu imminenti ghal dritt protett bil-Konvenzjoni.

Fil-kaz tal-lum, ir-rikorrent jikkontendi li ghandu *locus standi* anke fil-procediment odjern in vista tal-fatt illi kien hu li pprezenta r-rikors a tenur tal-Art 546(4A) tal-Kap 9 sabiex il-Magistrat jaghmel il-prova dwar l-*in genere* kif jitlob l-Art 546(1) tal-Kap 9.

Il-Qorti tqis illi hekk kif ir-rikorrent kellu *locus standi* sabiex jaghti bidu ghall-procediment quddiem il-Magistrat Ian Farrugia sabiex dan jinvestiga jekk kienx hemm il-pre-rekwiziti kollha mehtiega sabiex tibda investigazzjoni u tiskatta l-inkjesta magisterjali, hekk ukoll huwa kellu *locus standi* quddiem il-Qorti Kriminali, wara li sar appell mill-provvediment tal-Magistrat Dr Ian Farrugia. Ladarba r-rikorrent odjern kien mill-bidu nett fil-procediment li tressaq il-Magistrat Ian Farrugia, u kellu *locus standi,* daqstant iehor ghandu *locus standi* li jaghmel l-azzjoni odjerna jekk, fil-fehma tieghu, kien hemm lezjoni tal-jedd tieghu ghal smigh xieraq kif protetti bil-Kostituzzjoni u bil-Konvenzjoni. Ghalhekk ir-rikorrent jikkwalifika bhala “*victim*” ghall-fini tat-tutela tal-jeddijiet fondamentali tieghu, u kwindi ghandu l-interess guridiku li jippromwovi l-azzjoni tal-lum.

Ghalhekk il-Qorti qeghda <u>tichad</u> it-tieni (2) eccezzjoni tal-intimat Avukat Generali.

9. <u>It-tieni (2) eccezzjoni tal-kjamat fil-kawza Adrian Hillman</u>

Ghall-istess ragunijiet li kienet respinta t-tieni (2) eccezzjoni preliminari tal-intimat Avukat Generali qeghda tkun michuda t-tieni (2) eccezzjoni tal-kjamat fil-kawza Adrian Hillman.

10. <u>L-ewwel (1) eccezzjoni preliminari tal-kjamat fil-kawza Malcolm Scerri</u>

Ghall-istess ragunijiet li kienet respinta t-tieni (2) eccezzjoni tal-intimat Avukat Generali qeghda tkun michuda l-ewwel (1) eccezzjoni preliminari tal-kjamat fil-kawza Malcolm Scerri.

11. <u>L-ewwel (1) eccezzjoni preliminari tal-kjamat fil-kawza Keith Schembri</u>

Ghall-istess ragunijiet li kienet respinta t-tieni (2) eccezzjoni tal-intimat Avukat Generali qeghda tkun michuda l-ewwel (1) eccezzjoni preliminari tal-kjamat fil-kawza Keith Schembri.

VIII. <u>L-ewwel (1) it-tieni (2) u t-tielet (3) t-talbiet tar-rikorrent u l-eccezzjonijiet fil-mertu tal-intimat u tal-kjamati fil-kawza</u>

1. <u>Dritt</u>

Fil-ligi ordinarja, u cioe` il-Kap 12 tal-Ligijiet ta` Malta, ir-rikuza jew l-astensjoni ta` Imhallef huma regolati bl-<u>Art 733</u> u l-<u>Art 734</u>.

L-**<u>Art.733 tal-Kap.12</u>** jaqra hekk :-

> *L-imhallfin ma jistghux jigu rrikuzati u lanqas jistghu jastjenu ruhhom milli joqoghdu f`kawza migjuba quddiemhom fil-qorti li fiha huma mahtura biex joqoghdu, hlief ghal xi wahda mir-ragunijiet hawn wara msemmijin.*

L-**<u>Art.734 tal-Kap 12</u>** ighid :-

> *(1) L-imhallef jista` jigi rrikuzat jew jista` jastjeni ruhu milli joqghod fil-kawza -*
>
> *(a) jekk ikun qarib mid-demm jew bi zwieg, f`linja dritta, ma` wahda mill-partijiet ;*
>
> *(b) jekk ikun qarib mid-demm fil-grad ta` hu, ziju jew neputi, pro-ziju jew pro-neputi jew kugin, ta` wahda mill-partijiet, jew qarib bi zwieg fi grad ta` hu, ziju jew neputi, ta` wahda mill-partijiet ;*
>
> *(c) jekk ikun tutur, kuratur, jew werriet prezuntiv ta` wahda mill-partijiet; jew ikun jew kien*

prokuratur ta` wahda mill-partijiet fil-kawza; jekk ikun l-amministratur ta` stabbiliment jew socjetà fil-kawza, jew jekk wahda mill-partijiet tkun il-werrieta prezuntiva tieghu ;

(d)(i) jekk ikun ta l-parir tieghu, ittratta quddiem il-qorti jew kiteb dwar il-kawza jew dwar kull haga ohra li ghandha x`taqsam mal-kawza jew tiddependi minnha,

(ii) jekk il-kawza kienet ga giet quddiemu bhala imhallef jew bhala arbitru :

Izda dan ma jghoddx ghal decizjoni, moghtija mill-imhallef, meta ma tkunx qatghet definitivament il-meritu fil-kwistjoni bejn il-partijiet, u lanqas ghal sentenza li tehles ab observantia,

(iii) jekk ikun hareg flus ghall-kawza,

(iv) jekk ikun xehed, jew jekk wahda mill-partijiet tkun bi hsiebha ssejjahlu bhala xhud ;

(e) jekk hu, jew il-mara tieghu, jew ir-ragel taghha, ikollhom interess dirett jew indirett dwar kif tinqata` l-kawza;

(f) jekk l-avukat jew prokuratur legali li jkun qed jidher quddiem imhallef ikun ibnu jew bintu stess, ir-ragel taghha jew il-mara tieghu jew axxendent tieghu ;

(g) jekk l-avukat jew prokuratur legali li jkun qed jidher quddiem imhallef ikun hu jew oht l-istess gudikant ;

(h) jekk l-imhallef jew ir-ragel taghha jew il-mara tieghu jkollhom kawza pendenti kontra xi wahda mill-partijiet fil-kawza jew ikun kreditur jew debitur ta` xi parti fil-kawza b`mod li jista` ragonevolment jaghti lok ta` suspett ta` interess dirett jew indirett li jista` jinfluwenza l-ezitu tal-kawza.

(2) L-imhallef jista` jigi rikuzat jew jista` jastjeni ruhu milli joqghod f`kawza meta l-kawza tkun ga giet quddiemu u hu jkun tkellem fuq l-istess merti

ta` dik il-kawza meta kien qed joqghod bhala mhallef fil-Qorti ta` gurisdizzjoni volontarja.

2. Dottrina u gurisprudenza

Fis-sentenza ta` din il-Qorti kif presjeduta tas-6 ta` Ottubru 2011 (konfermata mill-Qorti Kostituzzjonali) 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."*

Il-Qorti taghmel referenza ghal dak li jghid il-**Professur Hoong Phun** (li kien id-Dekan tal-Fakolta` tal-Ligi fl-Universita ta` Auckland - New Zealand kif ukoll Imhallef fil-Qorti tal-Appell ta` l-istess pajjiz) fil-ktieb : "**Judicial Recusal: Principles, Process and Problems by Grant Hammond**" [Oxford : Hart Publishing 2009] :

> *"The law relating to judicial recusal may appear to many to be an esoteric topic, with not much significance for the administration of justice. Contrary to such a superficial view, this area of law goes to the very heart of the functioning of a robust and liberal democracy operating under the rule of law. An essential characteristic of the rule of law is the existence of an impartial and independent judiciary. The author expresses this in the following eloquent manner: `Society rightly looks to the courts as bastions of the Rule of Law. If the public cannot look with confidence to judges … the very notion of a "legal system" as a fundamental pillar of western society would collapse.`*
>
> *Judges are individuals who live in the real world: they may own shares in companies; they experience the gamut of human emotions; they may belong to clubs and associations; they may provide voluntary services to charitable organisations; they sometimes engage in public discourse or give speeches on issues of public concern. A number of those who are appointed to senior judicial posts have practised at the Bar or have provided advice to the legislature or executive prior to their judicial appointment. Aspects of this life experience may on occasion constitute the basis of a challenge to the propriety of the judge adjudicating on a*

particular case. The law of judicial recusal contributes to the quality of the justice system but at the same time can be manipulated by a party to a litigation who is disappointed by the outcome and who is seeking an opportunity to have another bite of the cherry.

Dan premess, tajjeb jinghad illi anke jekk skont l-Art 733 u 734 tal-Kap 12 ma jkunx hemm bazi ghar-rikuza jew ghall-astensjoni ta` Imhallef, tista` tinholoq sitwazzjoni fejn il-fatt li talba ghal rikuza jew astensjoni tkun respinta ggib maghha konflitt mal-jeddijiet fondamentali tal-persuna, u ghalhekk il-harsien tal-jeddijiet fondamentali 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 jkunux tali li jintitolaw lill-parti li titlob ir-rikuza tal-gudikant skont il-ligijiet ordinarji ta` procedura, il-parametri ta` dawn il-ligijiet ghandhom jitqiesu li twessghu bid-disposizzjonijiet tal-Kostituzzjoni u tal-Konvenzjoni li jharsu s-smigh xieraq (ara : QK : **Dr. A. Mifsud vs On. Prim Ministru et** : 17 ta` Lulju 1996).

Il-Qorti trid tezamina jekk fil-konkret, mhux fl-astratt, jistax jinghad li hemm jew jistax ikun hemm *bias* fil-gudikant li jirrendi l-operat tieghu soggettivament jew oggettivament parzjali. Kollox ghandu jkun trattat fl-isfond tal-fatti u cirkostanzi tal-kaz partikolari (ara : Ghirxi vs Onor Prim Ministru et (op. cit.) u ; QK : E. T. Rev. Mons. Arcisqof G. Mercieca pro et vs Onor. Prim Ministru noe et : 22 ta` Otubru 1984).

Biex raguni twassal ghall-astensjoni jew ghar-rikuza ta` gudikant, din trid tkun wahda konkreta, mhux merament percepita. 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) l-awturi **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 jaffermaw illi :-

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 jinsistu illi :–

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 isostnu illi :–

> *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.*

Ighidu wkoll fil-Pag. 291 illi :-

> *"The objective test of `impartiality` is comparable to the English Law doctrine that `justice must not only be done : it must also be seen to be done`. In this context the [European] Court [of Human Rights] emphasises the importance of `appearances`. As the Court has stated, `[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public …` In applying the test, the opinion of the party to the case who is alleging partiality is `important but not decisive`; what is crucial is whether the doubt as to the impartiality can be `objectively justified`.*
> [**Sramek v Austria** (1984) para. 42 ; 7 EHRR 351 ;
> **Fey v Austria A 255-A** (1993) ; 6 EHRR 387 para. 30]

Dan l-ahhar bran ta` **Harris, O`Boyle u Warbrick** isib konferma fil-kitba bit-titolu : **Judicial Impartiality Under the European Convention on Human Rights** : fejn **l-Imhallef Luzius Wildhaber**, li kien President tal-ECHR bejn l-1 ta` Novembru 1998 u t-18 ta` Jannar 2007, ikkummenta 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 the standpoint of the accused is important", it is not decisive. What is decisive is whether, in criminal proceedings, the accused`s fear that a judge lacks impartiality can be held to be objectively justified. Thus it is not only that the person directly concerned by the proceedings must have apprehensions, but those fears must appear reasonable to the external observer".

L-imparzjalita` skont l-Art 6(1) tal-Konvenzjoni inghatat tifsira fis-sens ta` 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." (ara : **Lindon Otchakovskylaurens and July v France** deciza fit-22 ta` Ottubru 2007 mill-ECHR ; u **Piersack v. Belgium** : ECHR : 1 ta` Gunju 1982).

Fil-kaz ta` **Hauschildt v. Denmark** deciz fl-24 ta` Mejju 1989, l-ECHR irrimarkat illi :-

"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."

Fid-decizjoni li tat fil-25 ta` Frar 1997 fil-kaz ta` "**Findlay v. United Kingdom**" 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** li kien 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-kaz ta` **Kraska v. Switzerland** li kien deciz fid-19 ta` April 1993, l-ECHR osservat 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) l-awtur **Dovydas Vitkauskas** jaghmel rassenja tal-principji li jsawwru dak li ghandu jfisser *"an impartial tribunal"* b`ezempji ta` sitwazzjonijiet naxxenti minn gurisprudenza tal-ECHR :-

> *"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 objective (**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 indi-vidual 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 and Salaman v. the United Kingdom**, dec. ; S**igurdsson and Pullar v.the United Kingdom**, dec.)."*

Ta` interess ghall-kawza tal-lum kien il-kaz :

Regina v. Bow Street, Metropolitan Stipendiary Magistrate, ex parte Pincohet Ugarte (No. 2) :

li kien deciz mill-House of Lords fil-15 ta` Jannar 1999, maghruf ahjar bhala **The Pinochet Case**.

Wara li l-House of Lords kienet tat decizjoni fl-1998 fis-sens illi d-dittatur tac-Cile Augusto Pinochet Ugarte ma kellux immunita` mill-arrest u ghalhekk seta` jkun hemm l-estradizzjoni tieghu ghal reati kontra l-umanita`, id-difiza ta` Pinochet ghamlet l-argument illi wiehed mill-Imhallfin, Lord Hoffmann kien naqas li jiddikjara li l-mara tieghu kienet tahdem ghal ghoxrin sena bhala *"administrative assistant"* mal-assocjazzjoni favur il-jeddijiet tal-bniedem, Amnesty International, u kif ukoll li huwa stess kien involut ma` *charity* (AICL) konnessa ma` Amnesty International, u li kienet ghamlet rapprezentazzjonijiet u kienet involuta fil-Pinochet Case.

Lord Browne-Wilkinson esprima ruhu kif gej :-

> *As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.*
>
> *The fundamental principle is that a man may not be a judge in his own cause.*
>
> *This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally : if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but*

providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial, (1976), p. 303; De Smith, Woolf & Jowel, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this "automatic disqualification."

In Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L. Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships` House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit: at p. 786. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 793 :

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."

…

On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a

party to the suit: see, for example, Reg. v. Rand (1866) L.R. 1 Q.B. 230; Reg. v. Gough at p. 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the Dimes case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

The importance of this point in the present case is this. Neither AI, nor AICL, have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit to anyone. The interest of AI in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice AI became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of AI and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, AI. One of the constituent parts of that unincorporated association is AICL. AICL was established, for tax purposes, to carry out part of the functions of AI--those parts which were charitable—which had previously been carried on either by AI itself or by AIL. Lord Hoffmann is a Director and chairman of AICL which is wholly controlled by AI, since its members, (who ultimately

control it) are all the members of the International Executive Committee of AI. A large part of the work of AI is, as a matter of strict law, carried on by AICL which instructs AIL to do the work on its behalf.

In reality, AI, AICL and AIL are a close-knit group carrying on the work of AI.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to AI but he is not in fact AI. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running AI. Lord Hoffmann, AICL and the Executive Committee of AI are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing AI to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, AI, shares with the Government of Spain and the CPS, not a financial interest but an interest to establish that there is no immunity for ex-Heads of State in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet`s extradition and trial--a non-pecuniary interest. So far as AICL is concerned, clause 3(c) of its Memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance". AI has, amongst other objects, the same objects. Although AICL, as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, AICL plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that AICL had such an interest necessarily leads to the conclusion that Lord Hoffmann,

as a Director of AICL, was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge`s decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

Can it make any difference that, instead of being a direct member of AI, Lord Hoffmann is a Director of AICL, that is of a company which is wholly controlled by AI and is carrying on much of its work? Surely not. The substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organization as is a party to the suit. There is no room for fine distinctions if Lord Hewart`s famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (see Rex v. Sussex Justices, Ex parte McCarthy [1924] K.B. 256, 259)

Since, in my judgment, the relationship between AI, AICL and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz.

the position of Lady Hoffmann as an employee of AI and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his Directorship of AICL, a company controlled by a party, AI.

…

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a Director of a charity closely allied to AI and sharing, in this respect, AI`s objects. Only in cases where a judge is taking an active role as trustee or Director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Lord Goff of Chieveley qal hekk :-

"Like my noble and learned friend, I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause - nemo judex in sua causa : see Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759, 793, per Lord Campbell. As stated by Lord Campbell in that case at p. 793, the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest. Thus, for example, a judge who holds shares in a

company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous case of Dimes itself. In that case the then Lord Chancellor, Lord Cottenham, affirmed an order granted by the Vice-Chancellor granting relief to a company in which, unknown to the defendant and forgotten by himself, he held a substantial shareholding. It was decided, following the opinion of the judges, that Lord Cottenham was disqualified, by reason of his interest in the cause, from adjudicating in the matter, and that his order was for that reason voidable and must be set aside. Such a conclusion must follow, subject only to waiver by the party or parties to the proceedings thereby affected.

In the present case your Lordships are not concerned with a judge who is a party to the cause, nor with one who has a financial interest in a party to the cause or in the outcome of the cause. Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings. This situation has arisen because, as my noble and learned friend has described, Amnesty International ("AI") was given leave to intervene in the proceedings; and, whether or not AI thereby became technically a party to the proceedings, it so participated in the proceedings, actively supporting the cause of one party (the Government of Spain, represented by the Crown Prosecution Service) against another (Senator Pinochet), that it must be treated as a party. Furthermore, Lord Hoffmann is a Director and Chairperson of Amnesty International Charity Limited ("AICL"). … My noble and learned friend has described in lucid detail the working relationship between AICL, AIL and AI, both generally and in relation to Chile. It is unnecessary for me to do more than state that not only was AICL deeply involved in the work of AI, commissioning activities falling within the objects of AI which were charitable, but that it did so specifically in relation to research publications including one relating to Chile reporting on breaches of human rights (by torture and otherwise) in Chile and calling for those responsible to be brought to justice. It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party

to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of AICL, closely connected with AI which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.

….

The cause is "a cause in which he has an interest", in the words of Lord Campbell in Dimes at p. 793. It follows that in this context the relevant interest need not be a financial interest. This is the view expressed by Professor Shetreet in his book Judges on Trial at p. 310, where he states that "A judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit", giving as an example the chairman or member of the board of a charitable organisation.
…

Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.

It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann`s involvement in AICL; the close relationship between AI, AIL and AICL, which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of AI in the present proceedings in which as a result it either is, or must be treated as, a party.

Fehma ohra kienet dik ta` Lord Hope of Craighead li rrimarka :-

"One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99 the same question as that which arose in Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759 was considered in an appeal from the Court of Session to this House. Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.

In Sellar v. Highland Railway Co. 1919 S.C. (H.L.) 19, the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to Dimes and Lindsay, gave this explanation of the rule at pp. 20-21:

"The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no

objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside."

As my noble and learned friend Lord Goff of Chieveley said in Reg. v. Gough [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so w ll understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of impartiality. This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim

that no-one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the nemo judex in sua causa principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Your Lordships were referred by Miss Montgomery Q.C. in the course of her argument to Bradford v. McLeod 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is Doherty v. McGlennan 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his impartiality.

The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships` House in Reg. v. Gough [1993] A.C. 646 is whether there was a real danger of bias on the part of the relevant member of the tribunal.

I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts.

The aim, as Lord Woolf explained at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in Gough as the reasonable suspicion test. In Bradford v. McLeod 1986 S.L.T. 244,

247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276, 279 where he said :

"Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing that duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person`s impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists."

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity.
It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal`s impartiality. Just as Eve J. may be thought to have been seeking to explain to members of the council of the Chartered Institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no-one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an

unbiased and impartial mind. He must be seen to be impartial.

As for the facts of the present case, it seems to me that the conclusion is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issues concerning personal responsibility.

It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.
But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted.

Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Limited he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside.

Lord Hutton ippronunzja ruhu billi rrefera *inter alia* ghas-segwenti :-

"A similar view was expressed by Deane J. in Webb v. The Queen (1994) 181 C.L.R. 41,74 :

"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. . . . The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings."

An illustration of the approach stated by Lord Widgery and Deane J. in respect of a nonpecuniary interest is found in the earlier judgment of Lord Carson in Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, 618 when he cited with approval the judgments of the Divisional Court in Reg. v. Fraser (1893) 9 T.L.R. 613. Lord Carson described Fraser`s case as one:

" ... where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The Court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: `the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?` Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a

well settled principle of law, which affected the character of the administration of justice."

I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside.

Issir referenza ukoll ghal dak li qal Lord Denning fid-decizjoni fil-kawza **Metropolitan Properties Co. vs. Lannon** (1968) [3 All ER 304] :-

"In considering whether there is a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it might be, who sits in a judicial position. It does not look to see if there was real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."

Il-Qorti taghmel ukoll referenza ghad-decizjoni tal-Qorti Kostituzzjonali Federali tal-Germanja (*Bundesverfassunggerichthof*) dwar proceduri ghall-projbizzjoni ta` *assisted suicide services* (Geschäftsmäßige Förderung der Selbsttötung, § 217 tal-Kodici Kriminali) moghtija fit-13 ta` Frar 2018 u kif rapportata fil-Press Release No. 11/2018 tat-13 ta` Marzu 2018 fejn inghad hekk :-

"The Second Senate of the Federal Constitutional Court has decided that it must render its decision on a constitutional complaint directed against the prohibition of assisted suicide services (§ 217 of the Criminal Code, Strafgesetzbuch – StGB) without participation of Justice Müller on the grounds of possible bias. In this regard, the applicable standard is not whether a Justice is in fact prejudiced or biased; rather, it must be assessed whether it is reasonable for parties to the proceedings, taking into account all relevant circumstances, to doubt the Justice`s impartiality. The overall assessment shows that this standard is met in the present case: prior to his election as Justice of the Federal Constitutional Court, Justice Müller had in his former function as minister president taken a clear stance on a substantive question that is now directly at issue in proceed-ings pending before the Court; he had also introduced a draft law in the Bundesrat that was in most parts identical to the statutory provision in dispute. According to the legal requirements, lots will be drawn to select a Justice of the First Senate as a substitute.

<u>Facts of the Case</u> :

In a speech from the pulpit (Kanzelrede), delivered in 2001 as then Minister President of the Saarland, Justice Müller affirmed the principle that "life is inalienable" and opposed active eu-thanasia, while also demanding that more care and support be provided to dying persons. In 2006, the Land government headed by Minister President Müller held a meeting with church representatives. Regarding the outcome of this meeting, a press release stated that both the Land and the churches condemned "assisted suicide services" brought about by the founding of the association "Dignitas Deutschland" and that the Saarland had declared its intention that, in response to the founding of the association, it would join forces with the Free State of Thuringia in order to take action against permitting this type of active euthanasia and to campaign for making it a punishable offense under criminal law. In the same year, a draft law prohibiting assisted suicide services submitted by Minister President Müller failed to obtain a majority in the Bundesrat. § 217 StGB in the version that is challenged in the current proceedings is based on a legislative draft law that is largely identical to the draft submitted

by Minister President Müller in 2006 and repeatedly refers to the 2006 draft and its explanatory memorandum.

Key considerations of the Senate:

It is inherent and even intended in the legal framework governing the election of Justices of the Federal Constitutional Court that persons who, as representatives of political parties, have exer-cised political functions in parliament or held political office in the executive, may be elected and appointed as members of the Federal Constitutional Court; this way, they can draw on their political experience to enrich the jurisprudence of the Court. The decision of this constitutional and legislative framework rests on the assumption that the Justices of the Federal Constitutional Court possess the independence and distance necessary for ensuring impartiality and objectivity in their decisions, and that they exercise their judicial duties independent of their former involvement in partisan political disputes. The fact that a Justice had previously been tasked with policy-making and, in this context, participated in the battle of opinions in the political arena, this does not in itself suffice to create an apprehension of judicial bias.

Doubts regarding the objectivity of a Justice of the Federal Constitutional Court may, however, be justified if there is an obvious inner connection between a – strongly advocated – political opinion and the Justice`s legal views; the same applies if in the past the Justice concerned had advocated for certain legislative reforms that are directly connected to proceedings brought be-fore the Court during the Justice`s term of office. The decisive factor is whether the relevant con-duct supports the conclusion that the Justice is no longer open and impartial with regard to a legal view contradicting the Justice`s own convictions, but has "already made up his or her mind" in-stead.

According to the wording of the Federal Constitutional Court Act, participation in the legislative process is no sufficient reason for an apprehension of bias; therefore, it must be established that additional circumstances create a particularly close connection between the Justice concerned and the law submitted for constitutional review. This may be the case, for

instance, if, as a former politician, the Justice had strongly and publicly advocated a highly controversial and politically sensitive law, or if the Justice had taken a clear stance regarding a substantive issue that directly concerns the proceedings now pending before the Court.

Such circumstances exist in the present case. In his capacity as Minister President, prior to his election as Justice of the Federal Constitutional Court, Justice Müller positioned himself in a clear and substantive manner by giving the above-mentioned church speech and by sharing his views on euthanasia; this directly concerns the present proceedings before the Court. Moreover, he had introduced a draft law in the Bundesrat that was evidently inspired by the aforementioned political position, and that strongly resembles the provision in dispute. The explanatory memo-randum attached to the former draft law was distinctively based on constitutional law arguments. In this respect, the role of Justice Müller as then Minister President was not limited to a minor, "merely participatory" involvement in the legislative process. Rather, he had provided the political impetus for the legislative project in question and also formally initiated the legislative process; he had personally campaigned in public for a highly controversial politically sensitive law and had expressly opposed associations offering assisted suicide. In view of this particularly close connection to the legal provision under review, that in the case at hand stems from a personal conviction, and the fact that the contents of the legal provision in dispute closely resembles the previous draft law introduced by Justice Müller, even the considerable time that has passed since the relevant legislative process does not rule out the apprehension of bias."

Il-Qorti taghmel referenza ghas-sentenza li tat il-Qorti Kostituzzjonali fit-12 ta` Lulju 2005 fil-kawza : **Sandro Chetcuti et vs. L-Avukat Generali et** : fejn inghad hekk :-

"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`.

Il-Qorti sejra terga` tikkwota mill-ktieb minn "**Law of the European Convention on Human Rights**" tal-awturi **Harris, O`Boyle & Warbrick** (op. cit.) fejn inghad 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 l-ECHR qalet hekk :-

"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."

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

Anke hemm kien trattat it-thassib tar-rikorrenti dwar nuqqas ta` imparzjalita` tal-gudikant sedenti.

L-Ewwel Qorti cahdet it-talbiet tal-atturi, wara li ghamlet 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 participazzjoni 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.

Fid-decizjoni taghha l-Qorti Kostituzzjoni 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."

(ara wkoll il-provvediment ta` din il-Qorti diversament presjeduta moghti fit-30 ta` Mejju 2018 fl-ismijiet **Alfred Degiorgio vs L-Avukat Generali)**

Fis-sentenza li tat fil-31 ta` Mejju 2018 fil-kawza fl-ismijiet **Sharon Rose Roche vs Avukat Generali et** din il-Qorti diversament presjeduta qalet hekk :-

Il-gudikant li jiddeciedi dwar ir-rikuza tieghu stess huwa li huwa indipendenti u imparzjali fid-decizjoni tieghu.

Kif jghid Sir William Blackstone fil-Commentaries on the Laws of England :

"For the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy

censure from those, to whom the judge is accountable for his conduct."

2. L-imparzjalita` tal-gudikant huwa valur fundamentali tal-etika gudizzjarja. Gudikant ghandu l-obbligu li jisma` u jiddeciedi kaz fuq il-provi u s-sottomissjonijiet imressqa u mhux fuq konsiderazzjonijiet mhux xierqa (improper considerations), hieles minn xi pregudizzju jew interess, dirett jew indirett, fl-ezitu tal-kawza jew fil-partijiet jew l-avukati li qed jillitigaw quddiemu. Dan l-obbligu huwa mnisseg fil-guramenti ta` lealta` u ta` hatra li jiehu kull gudikant qabel ma jibda jaqdi dmirijietu .17

3. Il-gudikant ghandu jiddisponi minn talba gharrikuza tieghu b`mod ekwu u gust (fairly) u jekk ma jaghmilx hekk, ikun qed jabbuza mid-diskrezzjoni tieghu, kif cirkoskritta mil-ligi u ikun hemm konsegwenzi serji ghal tali abbuz.

4. Illi f`kaz li ma jilqax it-talba (tar-rikuza), il-kawza titkompla, munita bil-garanziji kollha stabbiliti fil-qafas legali taghna, inkluzi dawk kostituzzjonali u konvenzjonali ghall-protezzjoni tal-jedd tas-smigh xieraq;

5. Dawn il-garanziji jipprotegu lill-partijiet fil-kawza f`kaz li l-gudikant eventwalment juri li huwa parzjali jew jaghti l-apparenza ta` parzjalita` (bias) biex jiddeciedi l-kwistjoni bejn il-partijiet.

[ara wkoll is-sentenza li tat din il-Qorti diversament presjeduta fit-12 ta` Gunju 2018 fil-kawza fl-ismijiet **Avukat Peter Caruana Galizia et vs Kummissarju tal-Pulizija et** (minn liema decizjoni sar appell li huwa pendenti)].

Fil-ktieb : **An Ethics Guide for Judges & Their Families** (2001 : American Judicature Society), **Cynthia Gray** (Director – Centre for Judicial Conduct Organisations) tghid hekk dwar *"Political Activity by Members of a Judge`s Family"* :

It has been suggested that there is "an inevitable public belief" that the publicly stated views of a judge`s politically active spouse "would or must implicate the fundamental thinking of the judge and the court represented by that judge." Application of Gaulkin, 351 A.2d 740 (1976). Consistent with the right to free speech

contained in the First Amendment, however, the code of judicial conduct does not and probably could not prohibit members of a judge`s family from engaging in independent political activity.

Therefore, judges have never been required to compel family members to shun political activity. However, they have been required to encourage family members to do so. The 1972 American Bar Association Model Code of Judicial Conduct provided, in Canon 7B(1)(a) :

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election should encourage members of his family to adhere to the same standards of political conduct that apply to him.

The "standards of political conduct" that applied to judges under the 1972 model code included prohibitions on acting as a leader or holding an office in a political organization, making speeches for a political organization or candidate, publicly endorsing a candidate for political office, attending political gatherings, and running for non-judicial office. The reporter for the ABA committee that drafted the 1972 model code noted that the committee had "considered setting mandatory political conduct standards for members of the candidate`s family but rejected the idea because of lack of a means of enforcement." Thode, Reporter`s Notes to Code of Judicial Conduct, at 98 (ABA 1973).

Examples:

➞ *A judge should not have given a check to the campaign manager for the Democratic candidate for Secretary of State and stated, "I want to give you $100, but, I want you to put it in my wife`s name because I`m a sitting judge and I`m not supposed to be doing this." The judge was publicly reprimanded (In the Matter of Sallee, 579 N.E.2d 75 (Indiana 1991)).*

➞ *"Although a candidate`s spouse as a matter of legal right can hold an office in a political organization and can make speeches for other candidates for political office, the candidate has the duty to try to dissuade his spouse from doing so" (Thode, Reporter`s Notes to*

[1972] Code of Judicial Conduct, at 98 (ABA 1973)). The revised model code, adopted by the ABA in 1990, eliminates the duty to dissuade, except with respect to a judicial candidate`s own campaign. Canon 5A(3)(a) provides :

A candidate for judicial office shall encourage members of the candidate`s family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate.

The change reflects "awareness that the families of judges and judicial candidates are composed of individuals with independent lives, interests and rights, and that any requirement that a judge or judicial candidate seek to influence or control the behavior of those individuals must be narrowly tailored." Milord, The Development of the [1990] ABA Judicial Code, at 49 (1992). The "autonomy of the judge`s spouse should simply be accepted as an understood premise of modern life," and the public can accept the political neutrality of a judge despite the political involvement of the judge`s spouse. Application of Gaulkin, 351 A.2d 740 (New Jersey 1976).

However, "an implicit burden" always rests on the judge "to be vigilant in detecting possible impropriety or the likelihood of public appearance thereof." Application of Gaulkin, 351 A.2d 740 (New Jersey 1976).

A family which chooses to combine a judicial career with political endeavors takes on a particularly heavy burden to protect the judge and the judicial office from appearances of political bias, and it is possible that the judge will be answerable if there exists anything less than a clear division between the political activities of the spouse and the judicial office (Indiana Advisory Opinion 2-93).

As discussed below, nothing in the code of judicial conduct in any state prevents members of a judge`s family from running for political office, supporting others` candidacy for political office, or being involved publicly in other political activities as long as they are careful not to suggest their activities reflect the judge`s convictions as well. Many judicial family members do refrain from such activities and other community

involvement out of concern that their activities may hurt a judge`s re-election chances. Those restrictions, however, are self-imposed and are not required by the code of judicial conduct.

Daqstant fejn si tratta tas-sitwazzjoni fl-Istati Uniti.

Ghar-rigward tas-sitwazzjoni fl-Ewropa, insibu miktub hekk fil-**Judicial Ethics Report (2009-2010)** tal-**Working Group : European Network of Councils for the Judiciary** (**ENCJ)** :-

"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."

F` **The Magna Carta of Judges** li hareg **The Consultative Council of European Judges** jinghad hekk :-

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."

Fil-**Guide for Judges in England and Wales** li kien ippubblikat Marzu 2008 (ara s-sit elettroniku https://www.supremecourt.uk/about/judicial-conduct-and-complaints.html), jinghad hekk dwar l-imparzjalita` :

3. Impartiality

3.1 Each Justice will strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the individual Justice and of the Court.

3.2 Each Justice will seek to avoid extra-judicial activities that are likely to cause him or her to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.

3.3 Each Justice will refrain from any kind of party political activity and from attendance at political gatherings or political fundraising events, or contributing to a political party, in such as way as to

give the appearance of belonging to a particular political party. They will also refrain from taking part in public demonstrations which might diminish their authority as a judge or create a perception of bias in subsequent cases. They will bear in mind that political activity by a close member of a Justice`s family might raise concern in a particular case about the judge`s own impartiality and detachment from the political process.

3.4 However, the Justices recognise that it is important for members of the Court to deliver lectures and speeches, to take part in conferences and seminars, to write and to teach and generally to contribute to debate on matters of public interest in the law, the administration of justice, and the judiciary. Their aim is to enhance professional and public understanding of the issues and of the role of the Court.

3.5 In making such contributions, the Justices will take care to avoid associating themselves with a particular organisation, group or cause in such a way as to give rise to a perception of partiality towards that organisation (including a set of chambers or firm of solicitors), group or cause.

3.6 In their personal relations with individual members of the legal profession, especially those who practise regularly in the Supreme Court, the Justices will avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

<u>Bias and the appearance of bias</u>

3.7 The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a Justice from taking part in a particular case is the subject of United Kingdom and Strasbourg jurisprudence which will guide the Justices in specific situations. Recent UK cases include Porter v Magill [2002] 2 AC 357, Locobail (UK) Ltd v Bayfield Properties Ltd [2002] QB 451, Re Medicaments and Related Classes of Goods (No.2) [2001] 1 WLR 700 and Helow v Secretary of State for the Home Department [2008] 1 WLR 2416.

3.8 Circumstances will vary infinitely and guidelines can do no more than seek to assist the

individual Justice in the judgment to be made, which involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have. What follows are merely signposts to some of the questions which may arise.

3.9 A Justice will not sit in a case where :

he or she has a close family relationship with a party or with the spouse or domestic partner of a partner;

his or her spouse or domestic partner was a judge in a court below;

he or she has a close family relationship with an advocate appearing before the Supreme Court.

3.10 Sufficient reasons for not sitting on a case include :

personal friendship with, or personal animosity towards, a party; friendship is to be distinguished from acquaintance, which may or may not be a sufficient reason depending upon its nature and extent;

current or recent business association with a party; this includes the Justice`s own solicitor, accountant, doctor, dentist or other professional adviser; it does not normally include the Justice`s insurance company, bank or a local authority to which he or she pays council tax.

3.11 Reasons which are unlikely to be sufficient for a Justice not to sit on a case, but will depend upon the circumstances, include:

friendship or past professional association with counsel or solicitors acting for a party;

the fact that a relative of the Justice is a partner in, or employee of, a firm of solicitors or other professional advisers involved in a case; much will depend upon the extent to which that relative is involved in or affected by the result in the case;

past professional association with a party as a client; much will depend upon how prolonged, close, or recent that association was.

3.12 A Justice will not sit in a case in which he or she or, to his or her knowledge, a member of his or her family has any significant financial interest in the outcome of the case. `Family` for this purpose means spouse, domestic partner or other person in a close personal relationship with the Justice; son, son-in-law, daughter, daughter-in-law; and anyone else who is a companion or employee living in the Justice`s household. It is for the Justice to inform himself or herself about his or her personal financial and fiduciary interests and to take reasonable steps to be informed about the interests of members of his or her family.

3.13 A significant financial interest could arise, not from an interest in the outcome of the particular case, but where the decision on the point of law might have an impact upon the Justice`s own financial interests. The Justice will have regard to the nature and extent of his or her interest and the effect of the decision on others with whom he or she has a relationship, actual or foreseeable.

3.14 Previous participation in public office or public debate on matters relevant to an issue in a case will not normally be a cause for a Justice not to sit, unless the Justice has thereby committed himself or herself to a particular view irrespective of the arguments presented to the Court. This risk will seldom, if ever, arise from what a judge has said in other cases, or from previous findings against a party in other litigation.

3.15 If circumstances which may give rise to a suggestion of bias, or the appearance of bias, are present, they should be disclosed to the parties well before the hearing, if possible. Otherwise the parties may be placed in a difficult position when deciding whether or not to proceed. Sometimes, however, advance notification may not be possible.

3.16 Disclosure should be to all parties and, unless the issue has been resolved before the hearing, discussion should be in open court. Even where the parties consent to the Justice sitting, the Justice should refuse himself or herself if, on balance, he or she considers that this is the proper course. Conversely, there are likely to be cases in which the Justice has

thought it appropriate to bring the circumstances to the attention of the parties but, having considered any submissions, is entitled to and may rightly decide to proceed notwithstanding the lack of consent.

Fil-kors tar-ricerka taghha l-Qorti ltaqghet ma` kitba bit-titolu : "**A question of judicial bias**" ta` **Matt Evans** li dehret fisit elettroniku : http://www.thejusticegap.com/2012/09/a-question-of-judicial-bias/ : fejn kien trattat dak li jissejjah : *"subconscious bias"*.

L-awtur ighid hekk :-

So what is the test for apparent judicial bias? At common law it is whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility of bias. Concretely, would such an observer consider that it was reasonably possible that the judge or tribunal member may be subconsciously biased? Lawal v Northern Spirit [2003] ICR 856 at para 21.

All the cases consistently emphasise that what is in issue is unconscious bias. Judges, like politicians, it seems are incapable of being consciously biased.

`[The] simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias.` R v Gough [1993] AC 646 at 659

`Bias` in this sense means that the decision maker `might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him` or they might be `predisposed` to decide the case or an issue in it in a particular way.

Where a challenge is made then it is for the reviewing court to put itself in the position of such an observer in determining whether the test is made out – Locabail (UK) Ltd v Bayfield Propeities Limited [2000] 1 QB 451.

In coming to that conclusion the court will not `pay attention to any statement by the judge concerning the

impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision` – Locabail para 19. The grounds on which a real possibility of bias might arise cannot be definitively stated (though it is arguable that any judge who has kept and still insists on putting on the Black cap or who starts twirling around the birch before hearing a case of TV licence avoidance would give unarguable grounds for challenge). However they include the following as summarised in AWG v Morrison [2006] 1 WLR 1163 :

`[If]there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case … or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him … In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.`

If there is apparent bias then the judge or tribunal member must disqualify himself and there is no discretion not to do so. For the purposes of Article 5(4) and Article 6 of the Convention for the Protection of Human Rights, the Court asks whether suspicions of bias are objectively justified in that there is a rational and demonstrable basis for them. As the above quote makes clear prudence should naturally lean on the side of being safe rather than sorry in cases of alleged bias, and matters of inconvenience, costs and delay will be irrelevant where the principle of judicial impartiality is properly invoked.

Fuq nota finali fil-**Kodici tal-Etika tal-Membri tal-Gudikatura ta` Malta**, hemm stipolat illi :

"15. Il-gudikanti ghandhom jaqdu d-dmirijiet taghhom fid-dawl tal-kuxjenza taghhom b`mod oggettiv bla

biza`, bla favuri u minghajr pregudizzji, u dana skond il-ligijiet u d-drawwiet tal-pajjiz.

16. Il-gudikanti ghandhom d-dover li fil-qadi ta`dmirijiethom iwarbu kull pregudizzju u jiddecidu l-kawzi oggettivament u unikament fuq il-meritu legali u fattwali taghhom.

17. Il-gudikanti ghandhom igibu ruhhom, kemm fil-Qorti u kemm ukoll barra l-Qorti, b`mod li ma jpoggux fid-dubbju l-indipendenza u l-imparzjalità taghhom jew ta` l-ufficcju li jokkupaw

23. Il-gudikanti ma ghandhomx joqghodu f`kawza meta huma jkunu jafu li dwarhom hemm wahda mir-ragunijiet ta` rikuza li jissemmew fil-Kodici ta`Organizzazzjoni u Procedura Çivili jew fejn ikun ovvju l-perikolu jew pregudizzju ghal smigh xieraq, altrimenti huma ghandhom l-obbligu li ma jabdikawx mid-doveri taghhom."

3. <u>Ir-ragunijiet tar-rikorrent</u>

In sostenn tal-istanza tieghu, ir-rikorrent ighid dan li gej :-:

a) Hija vigenti l-komunjoni ta` l-akkwisti bejn l-Onor. Imhallef Antonio Mizzi u martu l-Onor. Marlene Mizzi. Ghalhekk l-Onor Imhallef Mizzi "*bi dritt jippartecipa mill-paga u perkacci tal-MEP Marlene Mizzi li joqorbu l-EUR 100,000 fis-sena.*" (ara pagna 3 tan-nota ta` osservazzjonijiet tar-rikorrent).

b) L-Onor Marlene Mizzi dahlet pubblikament fil-kwistjoni li tat lok ghal rikors li kien prezentat quddiem il-Magistrat Ian Farrugia meta tkellmet fil-Parlament Ewropew dwar il-kwistjoni tal-Panama Papers fid-dibattitu tal-14 ta` Gunju 2017. Barra minn hekk, kitbet *Facebook post* u anke artiklu li deher fil-gurnal Malta Independent fit-30 ta` Gunju 2017.

c) Jikkontendi li hemm rabta cara bejn l-MEP Onor. Mizzi u zewgha tant li hija kienet esprimiet ruhha pubblikament dwar hwejjeg li kellhom x` jaqsmu max-xoghol tieghu bhala Imhallef.

d) Skont ir-rikorrent, l-agir tal-Onor. Imhallef Mizzi fil-konfront tieghu u tal-avukat tieghu waqt is-smigh tal-appell mid-digriet tal-Magistrat Ian Farrugia jikxef *bias*, pregudizzju, ostilita` u nuqqas ta` dehra ta` imparzjalita` tal-Imhallef sedenti. Saret referenza ghall-fatt li l-Imhallef irrimarka l-kliem

"*fastidju u fastidju kbir. Huwa fastidju kbir*" waqt it-trattazzjoni tat-talba ghar-rikuza. Issemmiet l-intervista li l-MEP Onor. Mizzi kienet tat fl-20 ta` Gunju 2010. Ir-rikorrent irrefera ukoll ghal fatt li l-Imhallef ried li l-kaz jsir bil-maghluq milli fil-miftuh u li waqt seduta fil-maghluq kien staqsa mistoqsija lir-rikorrenti li kienet ta` certa ostilita`.

Dan premess, u fuq l-iskorta ta` dawn ir-ragunijiet, il-Qorti sejra tittratta l-kwistjoni dwar jekk l-Art 734(1)(e) tal-Kap 12 ghandux japplika ghall-proceduri li raw il-bidu taghhom fl-14 ta` Lulju 2017 mir-rikorrent.

4. <u>Analizi tar-ragunijiet</u>

L-Art 734(1)(e) tal-Kap 12 japplika ghal *kawzi.* Hekk tghid id-disposizzjoni.

Il-kaz in kwistjoni jirrigwarda investigazzjoni u gbir ta` provi sabiex f` kaz ta` ezitu favorevoli tibda inkjesta magisterjali.

Huwa rilevanti ferm dak li jghid l-Art 368(1) tal-Kap 9 li jelenka dawk ir-ragunijiet fejn magistrat jista` jigi rikuzat ghar-ragunijiet hemm imsemmija filwaqt li jistipola li l-istess ragunijiet ma jistghux jimpedixxu lil Magistrat milli jaghmel atti dwar l-*in genere* jew *reperti.*

Tghid dan anke b`riferenza ghas-sottomissjonijiet tal-ahhar bil-fomm li saru fil-kors tal-udjenza tat-2 ta` Lulju 2018.

Dan premess, din il-Qorti tafferma illi 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, fl-istess waqt jista` jkun hemm ragunijiet tajbin bizzejjed f`kuntest aktar wiesgha fejn gudikant m`ghandux jibqa` jisma` kaz sabiex ikun hemm serhan tal-mohh li bl-akbar mod trasparenti possibbli ikun qed jithares il-jedd ta` smigh xieraq.

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 hu hekk illi skont l-Art 101 tal-Kostituzzjoni, Imhallef m`ghandux jidhol ghad-dmirijiet tal-kariga tieghu sakemm ma jkunx ha u ffirma l-gurament ta` lealtà u dak il-gurament ghall-qadi xieraq tal-kariga tieghu kif jista` jkun preskritt b`xi ligi li ghal dak iz-zmien tkun issehh f`Malta.

Il-gurament skont l-Art 10 tal-Kap 12 jikkonsisti fil-kliem : *"li naghmel bis-sewwa d-dmirijiet ta` Imhallef bla favuri u minghajr ma nzomm ma` hadd, kif irid il-haqq u l-jedd …"*

L-istitut tar-rikuza jew ta` l-astensjoni ta` gudikant jinbena fuq il-presuppost li l-gudikant li quddiemu jitressaq kaz huwa mparzjali u li huwa dmir tieghu (mhux semplici privilegg jew favur) li jisma` u jaqta` kull kawza li titressaq quddiemu.

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

Premess dan kollu, il-Qorti sejra tghaddi ghall-analizi tal-lanjanzi tar-rikorrent.

a) <u>L-interess finanzjarju</u>

Fil-fehma tal-Qorti, l-Onor Marlene Mizzi m`ghandhiex titqies li **<u>ghal ragunijiet finanzjarji</u>** ghandha interess dirett jew indirett dwar kif zewgha l-Onor Imhallef Mizzi sejjer jippronunzja ruhu fl-appell tal-kjamati fil-kawza mid-digriet tal-Magistrat Ian Farrugia.

Ir-rikorrent jaghmel l-argument illi l-Onor Marlene Mizzi ghandha onorarju sostanzjali li jigi mill-fatt li hija MEP u ghal dik ir-raguni ghandha interess dirett u indirett fuq l-esitu tal-appell li sar quddiem zewgha l-Onor. Imhallef Mizzi fejn wiehed mill-appellanti huwa l-kjamat fil-kawza l-Onor Prim Ministru Dr Joseph Muscat, Mexxej tal-Partit Laburista.

Fil-kors tat-trattazzjoni bil-fomm qam argument relatat u cioe` illi ghalkemm ma kienx kontestat li l-Imhallef Mizzi u l-MEP Mizzi huma mizzewgin, kien kontestat mill-kjamati fil-kawza li ma kienx hemm prova li l-onorarji tat-tnejn jaghmlu parti mill-komunjoni tal-akkwisti. Ir-rikorrent irribatta ghal dan billi sostna li l-presunzjoni skont il-ligi taghna hi li ma` zwieg li jsir fil-Gzejjer taghna tidhol fis-sehh il-komunjoni tal-akkwisti. Skont ir-rikorrent, din il-presunjzjoni hija *juris et de jure* u allura kien jispetta lill-kontroparti li taghmel il-prova li l-konjugi Mizzi eskludew il-komunjoni tal-akkwisti mir-regim matrimonjali taghhom.

Il-Qorti mhijiex sejra tidhol fil-kwistjoni ta` jekk saritx il-prova dwar l-esistenza tal-komunjoni tal-akkwisti u lil min dik il-prova kienet tispetta ghaliex ma tqisx li hija rilevanti ghall-fini tal-istanza li ghandha quddiemha.

Tghid hekk ghaliex il-Qorti ma tqisx illi l-fatt li ghax l-Onor Marlene Mizzi hija MEP tal-Partit Laburista **wahdu u b`daqshekk** ifisser li ghandha interess dirett jew indirett fl-ezitu ta` l-pendenza gudizzjarja de qua.

Tghid dan ghaliex il-veduti politici ta` kull cittadin jidhlu fil-kamp tal-privat ta` dak ic-cittadin anke meta zewg cittadini konjugi jmorru jesprimu l-vot taghhom. Xi jsir fil-kabina tal-votazzjoni jafu biss l-elettur li jaghzel li jivvota fl-elezzjonijiet.

Il-Qorti taccetta li l-Onor. Mizzi kienet eletta fi process elettorali fuq il-merti taghha f`isem il-Partit Laburista u li kienet eletta mill-poplu.

Anke dan il-fatt **wahdu** mhux bizzejjed sabiex iwassal lil din il-Qorti biex tibdel il-fehma taghha dwar l-interess dirett jew indirett.

b) L-istqarrijiet pubblici ta` l-Onor Marlene Mizzi dwar il-kaz tal-"Panama Papers"

Irrizulta li l-Onor Marlene Mizzi tkellmet fl-14 ta` Gunju 2017 fil-Parlament Ewropew dwar il-kwistjoni tal-"Panama Papers".

Id-denunzja li ghamel ir-rikorrent lill-Magistrat Ian Farrugia skont kif previst bl-Art 546(4A) tal-Kodici Kriminali kienet dwar il-kaz tal-"Panama Papers".

Id-denunzja tar-rikorrent skattat fil-konfront tal-kjamati fil-kawza **kollha**. Kien ghalhekk li dawn **kollha** ressqu appell fil-Qorti Kriminali skont l-Art 546(4B) tal-Kap 9. Ghalhekk il-posizzjoni tal-kjamati fil-kawza titlaq kollha minn posizzjoni wahda, indipendentement jekk humiex nies tal-politika jew nies tan-negozju jew xort`ohra. Ilkoll kienu nvoluti u lkoll ikollhom iwiegbu fi procediment ta` din ix-xorta, indipendentement mill-kwalifiki taghhom bhala cittadini ta` dan il-pajjiz. Din l-ahhar osservazzjoni qeghda ssir l-aktar b`riferenza ghas-sottomissjonijiet bil-fomm li ghamel il-kjamat fil-kawza Adrian Hillman tramite d-difensur tieghu.

Irrizulta li l-MEP Onor. Mizzi ittrattat il-kwistjoni tal-Panama Papers u esprimiet il-fehma taghha fil-pubbliku dwar din il-kwistjoni.

Quddiem din il-Qorti tressqet <u>l-ahjar prova</u> ta` dak li <u>certament</u> stqarret l-MEP Onor. Mizzi, u cioe` dak li qalet waqt id-dibattitu li sar fil-Parlament Ewropew fl-14 ta` Gunju 2017. Hemm l-Onor Marlene Mizzi tkellmet liberament fil-vesti taghha ta` MEP tal-Partit Laburista bl-aktar mod car dwar dak li dehrilha dwar il-kwistjoni.

Fl-istess waqt, il-Qorti <u>mhijiex sejra tqis bhala l-ahjar prova</u> dak li allegatament inghad mill-MEP Onor. Mizzi fuq Facebook jew fil-gurnali ghaliex f`dak il-kaz l-ahjar prova skont il-ligi kienet tkun il-konferma o meno da parti taghha taht gurament ta` dak riportat fuq Facebook jew fil-gurnali bhala stqarrijiet taghha.

c) <u>L-imgieba tal-Onor Imhallef Antonio Mizzi</u>

Ghalkemm ir-rikorrent jiddikjara fix-xiehda tieghu illi ma kellu xejn xi jghid dwar l-integrita` tal-Imhallef Antonio Mizzi, fl-istess waqt ilmenta dwar il-mod kif l-istess Imhallef gab ruhu mieghu u mal-avukat tieghu fil-kors tat-trattazzjoni tal-appell mill-provvediment tal-Magistrat Ian Farrugia. Jilmenta li l-Imhallef wera ruhu ostili maghhom it-tnejn b`interventi li ghamel.

Din il-Qorti tistqarr illi mhijiex konvinta - abbazi ta` provi meqjusa bil-kejl ta` l-oggettivita` - li bl-imgieba tieghu dakinhar jew inkella b`li stqarr dakinar seta` ta hjiel li kien qed jahmi xi pregudizzju jew ostilita` – reali, attwali jew prezunt - kontra r-rikorrent u l-avukat tieghu, b`mod li seta` jinsorgi xi dubju legittimu ta` pregudizzju.

Dwar allegata ostilita` li tkun espressa minn gudikant, il-Qorti taghmel referenza ghal dak li nghad minn din il-Qorti diversament presjeduta fit-13 ta` Novembru 2017 fil-kawza fl-ismijiet : **<u>Grace Spiteri vs L-Avukat Generali</u>** :-

> *Il-Qorti Ewropea rreteniet illi l-imparzjalita` ghandha signifikat ta` nuqqas ta` pregudizzju jew bias, liema pregudizzju jew bias jista jigi mixtarr f`diversi modi, - principalment permezz ta` analizi jew ezami soggettiv u analizi oggettiv:*

"Impartiality normally denotes 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 endevouring to ascertain personal conviction or interest of a given Judge in a particular case and an objective approach that is deterring whether he or she offered sufficient guarantees to exclude any legitimate doubt in this rispect." (Vide Pabla Ky vs Finland para 30, Bellizzi vs Malta para 51-56 - app No 46575/09, Fey vs Austria deciza 24 ta` Frar 1993 para 27, 28, 30; Pescador Valero vs Spain App. No 62435/00, para 21, deciza fil-24 ta` Settembru 2003 - ECHR; Thomann vs Switzerland deciza fl-10 ta` Gunju 1993 para 30 app no., Morice vs France app no 29369/10 deciza fit-23 ta` April 2015 para 73.)

Meta giet biex tapplika t-test soggettiv, il-Qorti Ewropea affermat konsistentiment illi;

"The personal impartiality of a Judge, must be presumed until there is proof to the contrary. (Vide le Compte, Van Leuvien and De Meyere vs Belgium app no. 6878/75, deciza fit-23 ta` Gunju 1981 para 58; Michallef vs Malta ibid para 94; Driza vs Albania app no 33771/02, deciza fit-13 ta` Novembru 2007 para 75., Hauschildt v. Denmark, deciza 24 ta` Mejju 1989, para 47., Morice vs France app no 29369/10 deciza fit-23 ta` April 2015 para 74.)

Din il-parzjalita` soggettiva tista` tigi accertata fejn per ezempju l-gudikant juri xi ostilita` jew "ill-will for personal reasons" lill-wahda mill-partijiet. (Vide Buscemi vs Italy app no 29569/95, deciza fis-16 ta` Settembru 1999 para 67 u 68; vide ukoll De Cubber vs Belgium app no. 9186/80 deciza fis-26 Ottubru 1984 para 25, 26.) Il-Qorti Ewropea rreteniet li:

"in this rispect even appearances may be of some importance. What is at stake is the confidence which the Courts in a democratic society must inspire in the public." (Case of Castillo Algar vs Spain, deciza 28/10/1998 para 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 applicant is important but not decisive. What is decisive is whether this fear can be

held to be objectively justified" (Kyprianou vs Cyprius app No. 73797/01 deciza fil-15 ta` Dicembru 2005, para 118 and 121; case of Lindon et vs France applik nos. 21279/02 u 36448/02 deciza fit-22 ta` Ottubru 2007 para 77; Gautrin and others vs France app no. 38/822/1025-1028/1997 deciza fl-20 ta` Mejju 1998 para 58.)

Inghad mill-Qorti Ewropea illi Art 6. tal-Konvenzjoni Ewropea tirrikiedi illi Tribunal jew Qrati tkun imparzjali. Fil-kaz ta` Tocono and Profesorii Prometeisti vs. Moldova (App no. 32263/03 deciza 26 ta` Gunju 2007) minkejja li l-Qorti Ewropea sabet illi l-Imhallef ma kienx subjectively biased, qieset pero illi mhux biss iben l-Imhallef kien gie mkecci (expelled) mill-Kap tal-iskola u l-ghalliema Applikanti, izda aghar minn hekk, l-Imhallef kien heddedhom b`retaljazzjoni, u ghalhekk il-bizgha tal-applikant dwar in-nuqqas ta` imparzjalita` tal-Imhallef sedenti, kienet gustifikata taht it-test oggettiv.

L-istess principji gew affermati mill-Qorti Ewropea fil-kaz ta` Ferrantelli and Santangelo vs Italy (App no. 19874/92) fejn l-Imhallef sedenti, fl-ezami oggettiv, gie misjub nieqes mill-imparzjalita mistennija skont Art. 6 tal-Konvenzjoni Ewropea ghaliex kien l-istess Imhallef li kien gia ppresedja f`sentenza ta` ko-akkuzati tal-applikant u kien ukoll l-istess Imhallef li kkundanna lill-applikant meta kien ippreseda fil-Qorti tal-Minorenni.

Fil-kaz ta` Micallef vs Malta (Vide app no. 17056/07 deciza fil-15 ta` Ottubru 2009 para 101 u 100) fejn il-Prim` Imhallef kien iz-ziju tal-Avukat tal-kontroparti u hu l-Avukat l-iehor tal-kontroparti li deheru quddiem il-Qorti, l-Qorti Ewropea ma kienitx perswasa li kien hemm evidenza sufficenti li l-Prim` Imhallef wera "personal bias" izda kienet tal-opinjoni illi l-ligi fiha nnifisha "did not give adequate guarantees of subjective and objective impartiality". Din is-sentenza tal-Qorti Ewropeja kienet tat lok ghall-emenda li introduciet addizzjoni fir-ragunijiet ghar-rikuza tal-Imhallfin, cioe` l-Artikolu 734 (1) (g) tal-Kap.12.

Din il-Qorti **ma ssibx** li bl-imgieba tieghu l-Imhallef Mizzi wera *personal bias* fil-konfront ta` r-rikorrent jew tal-avukat tieghu.

d) <u>Procediment kondott fil-maghluq mhux fil-miftuh</u>

Ir-rikorrent ilmenta li l-procediment quddiem il-Qorti Kriminali presjeduta mill-Onor. Imhallef Mizzi sar bil-maghluq mentri dibattiment dwar rikuza ta` gudikant ghandu jsir fil-miftuh.

Fil-fehma ta` din il-Qorti dan il-fatt bhala tali **<u>ma jgibx pregudizzju</u>** da parti tal-Onor Imhallef Mizzi fil-konfront tar-rikorrent. Tenut kont tas-sensittivita` tal-kaz, il-Qorti **<u>ma tqisx</u>** li ntefa` xi dell fuq ir-regolarita` tal-procediment bil-fatt li sar smigh bil-maghluq.

e) <u>Precedenti</u>

Ir-rikorrent ighid illi f`kazi analogi, l-Onor Imhallef Mizzi rrikuza ruhu, kontra dak li ghamel fil-kaz tal-lum.

Tajjeb li jigi rilevat illi fil-provvediment tal-24 ta` Mejju 2015 fil-kaz ta` **<u>Il-Pulizija vs Daphne Caruana Galizia</u>** l-Onor Imhallef Mizzi kien astjena ghaliex martu u cioe` l-Onor. Marlene Mizzi kienet issemmiet fil-blogs li kienet tikteb l-akkuzata. Fil-kaz l-iehor fejn kien involut l-Prim` Imhallef Vincent De Gaetano bhala *parte civile* f`kawza tal-pulizija, l-Imhallef Mizzi (dak iz-zmien Magistrat) kien astjena ghaliex dak iz-zmien hu personalment kien qieghed jigi nvestigat mill-Kummissjoni ghall-Amministrazzjoni tal-Gustizzja li taghha l-Prim` Imhallef De Gaetano kien Vici-President dwar allegat ksur tal-Kodici tal-Etika tal-Gudikatura billi kien President tal-Malta Basketball Association.

5. <u>Konsiderazzjonijiet</u>

Il-Qorti qieset il-provi kollha ammissibbli u rilevanti fl-assjem taghhom.

Ikkunsidrat il-provi fil-kuntest tal-ilmenti li gab `il quddiem ir-rikorrent.

Gharblet kollox b`mod akkurat u kif jixraq, fl-isfond tad-dottrina u tal-gurisprudenza li diga` ghamlet referenza ghalihom aktar kmieni.

Irreferiet ghad-dottrina u ghall-gurisprudenza sabiex ma jkollhiex ghalfejn terga` tirreferi ghalihom propju issa billi d-dottrina u l-gurisprudenza citata hija fl-assjem taghha rilevanti ghall-kaz f`kuntest jew f`iehor.

B`zieda ma` dak li osservat aktar kmieni dwar ilmenti tar-rikorrent wiehed wiehed, il-Qorti tishaq illi fil-fehma taghha l-fatt – izolat wahdu – li l-Onor Imhallef Mizzi huwa mizzewweg lill-MEP tal-PL l-Onor Marlene Mizzi ma jikkostitwix wahdu riskju ta` mparzjalita`, u allura ta` ksur tal-jedd ghal smigh xieraq tar-rikorrent, jekk ma jirrikuzax ruhu fil-kaz li gie quddiemu.

Fl-istess waqt tishaq ukoll illi d-dikjarazzjonijiet pubblici li ghamlet l-Onor. Mizzi, in partikolari dak mistqarr minnha fis-seduta tal-Parlament Ewropew tal-14 ta` Gunju 2017, marbuta dawn mal-fatt illi hija mizzewga lill-Onor Imhallef Mizzi kellhom iwasslu lill-istess Onor Imhallef Mizzi sabiex jirrikuza ruhu propju ghaliex ir-rabta matrimonjali bejn it-tnejn issa kienet tikkostitwixxi riskju gravi ta` mparzjalita` u allura ksur tal-jedd ghal smigh xieraq tar-rikorrent.

Tajjeb jinghad illi l-Onor Marlene Mizzi – ghax MEP – u allura ghax politiku - kellha kull jedd titkellem fil-Parlament Ewropew dwar il-kaz tal-"Panama Papers". Dak kien dritt ghal kollox legittimu taghha. Hekk irrizulta ppruvat skont il-ligi li ghamlet fl-14 ta` Gunju 2017. Hemm esprimiet il-fehmiet taghha kjarament u minghajr ekwivoci.

Izda meta mbaghad ftit aktar minn xahar biss wara dak id-dikors, u cioe` fis-27 ta` Lulju 2017, tressaq quddiem zewgha l-Onor. Imhallef Mizzi, il-kaz li kien relatat tant mill-qrib ma` dak li martu kienet tkellmet dwaru fil-Parlament Ewropew, il-harsien tal-jedd ghal smigh xieraq, tradott fl-essenza tieghu, f`kondotta li fid-deher tiggarantixxi l-imparzjalita` tieghu kellu jwassal lill-Onor. Imhallef Mizzi sabiex jastjeni.

B`hekk, bl-aktar mod car u kristallin, l-Onor. Imhallef Mizzi kien iwarrab fil-genb, imqar fl-ahjar interess tal-amministrazzjoni tal-gustizzja, kull xrara jew sembjanza ta` dubju dwar kull decizjoni jew provvediment futur tieghu fil-kaz li kellu quddiemu.

Ghalhekk l-eccezzjonijiet fil-mertu tal-intimat u tal-kjamati fil-kawza qeghdin ikunu respinti kollha, u l-ewwel tliet talbiet tar-rikorrent milqugha kollha.

6. <u>Ir-raba` (4) u l-hames (5) talbiet</u>

Fir-raba` u l-hames talbiet, ir-rikorrent talab il-hlas ta` kumpens.

Minn kif inhuma dedotti dawn iz-zewg talbiet mhuwiex car liema tip ta` kumpens qieghed jintalab mir-rikorrent li jigi likwidat u mhallas, u cioe` huwiex kumpens morali jew pekunjarju.

Fl-istess waqt, kien x`kien il-kumpens li kien qed jirreferi ghalih ir-rikorrent, dan ma gab provi ta` xejn dwar dawn it-talbiet.

Fl-assenza ta` prova da parti tar-rikorrent, dawn it-talbiet se jkunu respinti.

7. <u>Is-sitt (6) talba</u>

B`din l-ahhar talba, ir-rikorrent qed jitlob lill-Qorti sabiex :

Taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tizgura t-twettiq tad-dritt ta` smigh xieraq ta` l-esponenti.

In vista tal-fatt illi kienu akkolti l-ewwel tliet talbiet, ir-rikorrent ghandu jqis lilu nnifsu sodisfatt.

Ghalhekk qeghda tastjeni milli tiehu konjizzjoni ulterjuri tas-sitt talba kif dedotta.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi dwar it-talbiet tar-rikorrent, dwar l-eccezzjonijiet l-ohra tal-intimat li baqghu mhux decizi bis-sentenza taghha tat-30 ta` Novembru 2017, u dwar l-eccezzjonijiet tal-kjamati fil-kawza billi :-

Qeghda tichad l-eccezzjonijiet preliminari l-ohra tal-intimat.

Qeghda tichad l-eccezzjonijiet preliminari kollha tal-kjamati fil-kawza.

Qeghda tichad l-eccezzjonijiet fil-mertu tal-intimat u tal-kjamati fil-kawza.

Qeghda tilqa` l-ewwel, it-tieni u t-tielet talbiet tar-rikorrent.

Qeghda tichad ir-raba` u l-hames talbiet tar-rikorrent.

Qeghda tastjeni milli tiehu konjizzjoni ulterjuri tas-sitt talba tar-rikorrent.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta, tordna li kull parti tbati l-ispejjez taghha.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur