

- ART.39 (2) TAL-KOSTITUZZJONI TAL-MALTA

- ART 6(1) TAL-KONVENZJONI EWROPEA

- TRIBUNAL IMPARZJALI

- RIKUŽA - RABTIET POLITIČI PREĆEDENTI TAL-IMHALLEF -

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- ART 734 TAL-KAP 12 TAL-LIGIJIET TA' MALTA



QORTI CIVILI PRIM' AWLA

MHALLEF

ONOR. GRAZIO MERCIECA

Seduta tas-6 ta' Diċembru 2018

Rikors Ĝuramentat Numru 599/2018

Jonathan Ferris (K.I. 255473M)

VS

1. Is-Segretarju Prinċipali
Permanenti

2. Philip Massa inkarigat mill-External Whistleblower Unit fl-Uffiċċju tal-Prim Ministro, kif ukoll f'ismu proprju għal kull interess li jista' jkollu

Il-Qorti:

I. **PRELIMINARI**

Illi dan huwa provvediment dwar talba mill-attur għal rikuża tal-imħallef sedenti f'kawża li fiha qiegħed jitlob a tenur tal-Artiklu 469A tal-Kapitlu 12 li jiġi ddikjarat li d-deċiżjoni, jew nuqqas ta' deċiżjoni, tal-konvenuti li ma jagħrfu ħx bħala *whistleblower* huma illegali u bi ksur tan-normi tal-ġustizzja. Fir-rikors ġuramentat l-attur jiispjega li f'Novembru 2016 beda jaħdem mal-FIAU fil-kariga ta' Manager Financial Analysis Section, fosthom dwar hasil ta' flus. Sal-ahħar t'April 2017 kien inkarikat biex jispezzjona nvestigazzjonijiet fuq membri u/jew uffiċċiali tal-Gvern. Fl-1 ta' Mejju (meta thabbret id-data tal-elezzjoni generali) twarrab fil-ġemb sakemm fis-16 ta' Ĝunju 2017 l-impjieg tiegħu ġie terminat mingħajr ma ngħata raġuni b'effett immedjat, u dan wara li l-Ministru tal-Finanzi ġareg bit-‘tejorija’ li rapport tal-FIAU kienew miktuba sabiex jiġu *leaked*. L-attur jilmenta li l-imħallef sedenti kien fil-passat qarib ħafna persuna b'konnessjonijiet ta' politika partiġġjana ta' natura pubbika u magħrufa; kien persuna ta' fiducja tal-Gvern prezenti. Billi l-każ tar-rikorrent għandu sfond qawwi ta' kxif ta' korruzzjoni serja minn individwi fil-Gvern jew viċin tiegħu, ir-rikorrent ma jistax ikollu serhan il-moħħ illi l-ġustizzja tkun tidher li saret miegħu; lanqas

is-soċjeta` in ġenerali li qed titlef il-fiduċja fl-istituzzjonijiet;

II. RATIO TAL-HARSIEN TAL-INDIPENDENZA U MPARZJALITA` TAL-ORATI

Illi l-Artiklu 6 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem u l-Artiklu 39 tal-Kostituzzjoni ta' Malta jartikolaw il-jedd ta' kull persuna għal smieġħi ġust u pubbliku minn tribunal indipendenti u imparzjali stabbilit bil-ligi waqt kontestazzjoni tad-drittijiet u obbligazzjonijiet civili tagħha. Dan il-jedd jinsab fil-qalba tat-thaddim ta' demokrazija robusta u liberali mhaddma taħt is-saltna tad-dritt. Ma jistax ikun hemm saltna tad-dritt mingħajr ġudikatura imparzjali u indipendenti. Imħallfin li ma jiddependu minn ħadd, partikolarment mhux mill-fergħa eżekuttiva tal-Istat, u li ma jkunux infettati b'xi interess jew preġudizzju favur naħha jew oħra tal-partijiet li jidhru quddiemhom biex iħarsu d-drittijiet tagħhom. Mingħajr dan l-aċċess ghall-ħarsien mill-ghassiesa indipendenti u imparzjali, id-drittijiet l-oħrajn jibqgħu fuq il-karta iżda fil-verita` jisfumaw fix-xejn;

Illi l-ilment tal-attur f'din il-kawża ma jestendix ghall-indipendenza ta' din il-Qorti billi huwa ristrett ghall-allegat imparzjalita` tal-imħallef sedenti;

III. RAĠUNIJIET GHAL RIKUŻA MHUX RISTRETT GHAL DAWK ELENKATI FIL-KODIČI RITWALI

Illi l-kodiċi ritwali tagħna, permezz tal-**Artiklu 733** tiegħu, jagħti lista ta' raġunijiet għal rikuża jew astensjoni ta' mħallef li fil-qosor jikkonsistu fil-qrubija tiegħu ma', jew ikun tutur, kuratur, werriet jew prokuratur ta' xi

parti; qrubija mal-avukati difensuri; ikun involut b'xi mod fil-kawża billi jkun ġareg xi flus għaliha, jkun xhud, ikun ta' parir dwarha, jew tkun diga` ġiet quddiemu; hu jew martu/żewġha jkollhom interess dirett jew indirett kif tinqata' l-kawża; jew ikollhom kawża kontra xi parti jew ikunu kredituri jew debituri tagħha. Skont l-**Artiklu 733**, dawn ir-raġunijiet huma tassattivi billi l-ebda rikuża jew astensjoni ma tista' ssir jekk mhux għal xi waħda minnhom, anke jekk il-legislatur żied l-ghadd u x-xorta ta' raġunijiet specjalment f'dawn l-aħħar snin¹ – li juri li wara kollox ir-raġunijiet għar-rikuża jew astensjoni *cannot be cast in stone* minkejja l-pretenzjonijiet tal-legislatur li jkun qiegħed ikoprihom kollha bil-monopolju li almenu mis-Seklu Tmintax sa żminnijiet Moderni kien jippretendi li għandu fuq il-produzzjoni legislattiva. L-introduzzjoni fil-ligi tagħna tal-Kostituzzjoni u tal-Konvenzjoni Ewropeja ġiebet fonti ta' dritt ġodda u ġerarkikament superjuri għall-kodiċi ritwali b'mod li llum minkejja dak li jghid l-**Artiklu 733** jista' jkun hemm għadd indeterminat ta' raġunijiet oħra bażi tar-rikuża jew astenzjoni, abbażi tal-**Artiklu 39 tal-Kostituzzjoni u tal-Artiklu 6 tal-Konvenzjoni Ewropeja** li jesīgu li s-smieħi tal-kawzi jsir minn tribunal indipendenti u mparzjali.² Raġunijiet li jiġu identifikati u elaborati mill-ġurisprudenza kemm tal-pajjiżi firmatarji tal-Konvenzjoni kif ukoll mill-Qorti soprannazionali tad-Drittijiet Umani ta' Strasburgu;

IV. IMPARZJALITA` OĞGETTIVA U SOĞGETTIVA

Illi l-Qorti Ewropeja tad-Drittijiet tal-Bniedem evolviet id-distinzjoni bejn

¹ Att XLVI.1973.108; XXIV.1995.281; IX.2004.11; VII.2007.22

² Ara per eżempju sentenzi Qorti Kostituzzjonal Sant vs Kummissarju tal-Pulizija 2/4/90; Cachia vs Onor.Prim Ministr et 10/10/91; Bugeja et vs Onor.Prim Ministr noeet 17/6/94 u PA (Sede Kostituzzjonal) Ghirxi vs Onor.Prim Ministr et 1/11/96; Dr. A. Mifsud vs On. Prim Ministr et -17 ta' Lulju 1996

imparzialita` soggettiva u dik oggettiva. Fis-sentenza ***Hauschmidt vs Denmark*** (1989) hekk fissret id-distinzjoni bejniethom:

"The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect";³

Illi f'dan il-każ, l-ilment tal-attur huwa limitat għal allegat nuqqas ta' imparzialita` oggettiva. Ingħad li *"under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw"*.⁴

V. FAIR MINDED AND INFORMED OBSERVER

Illi b'danakollu huwa intuwittiv li mhux kull biża' ta' imparzialita` għandu jwassal għal rikuża. Il-Professur Phun iwissi li *"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 at the cherry."*⁵

³ *De Cubber* judgment of 26 October 1984, Series A no. 86, pp. 13-14, para. 24;

⁴ op.cit. para. 26.

⁵ Hoong Phun, Dekan tal-Fakulta` tal-Liġi fl-Universita` ta' Auckland u mhallef fil-Qorti tal-Appell fi New Zealand, ikkwotat fil-ktieb *Judicial Recusal: Principles, Process and Problems* ta' Grant Hammond, 2009

Apparti minn hekk, din il-Qorti, ippreseduta mill-Onor. Imħallef Joseph Zammit McKeon, wissiet li “r-rikuża mhux ħaga ta’ konvenjenza iżda ta’ ġustizzja u għalhekk sabiex wieħed jirrikorri ġħaliha, ir-raġuni trid tkun fondata; altrimenti tagħti lok għall-abbuż”.⁶ Il-House of Lords, f’*Porter v Magill*⁷ iddikjarat li dak li għandu jiġi stabbilit hu jekk “*the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*”. Fi kliem **Lord Woolf** – awtur tal-Woolf Reforms li ġiebu riforma radikali fis-sistema ta’ ġustizzja civili Ingliza - il-“fair minded and informed observer” “*could be expected to understand the legal traditions and culture of this jurisdiction. He regarded those to be sufficient safeguards of high standards of integrity*”.⁸ Woolf kien qiegħed jikkummenta f’kawża fejn l-imħallef kien klijent tal-avukat tal-attur, li ma żammlux flus meta biddillu t-testment.⁹ Tenut kont li l-bniedem raġonevoli kellu jkun jaf sew it-tradizzjonijiet u l-kultura tan-nies tal-ligi, il-Privy Council, f’appell minn New Zealand, iddeċieda li l-assocjazzjoni preċedenti ta’ klijent u avukat bejn xhud u imħallef tmien snin qabel ma kinitx issarraf f’imparzjalita’.¹⁰ F’kawża oħra ġie ritenut li “*the fair minded and informed observer would not discount the matters of judicial training, experience and ethos*”.¹¹ Lord Browne-Wilkenson qal fil-kawża ta’ Pinochet, li “*the fact that the Law Lord’s wife was employed by Amnesty International would not lead to automatic disqualification*”; il-Qorti tal-Appell Ingliża qalet li “*the fact that the husband of the judge was a barrister in chambers that undertook*

⁶ *Cecil Pace v Prim Ministru* 06.10.2011 Prim’ Awla, konfermata mill-Qorti Kostituzzjonal

⁷ *Porter v Magill* (2001) UKHL 67

⁸ *De Smith’s Judicial Review*, 8th ed. 2018, paġna 551

⁹ *Taylor v Lawrence* (2002) EWCA Civ 566

¹⁰ *Man O’War Station Ltd v Oakland City Council* (no 1) (2002) UKPC 28

¹¹ *Resolution Chemicals* (2013) EWCA Civ 1515

*work for one of the parties neither led to automatic disqualification nor, in the circumstances, to any implication of bias”;*¹²

Illi l-fehma tal-litigant li jitlob ir-rikuża hija importanti, iżda mhix deċiżiva. Čertament mhix fehma oggettiva, anke jekk tista' tkun ġusta: “*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*”.¹³ Il-liġi ma tridx li, sempliċement għax parti jew oħra f'kawża ‘thoss’ jew ‘jidhrilha’ li ġudikant jista’ jkun parzjali, allura dak il-ġudikant għandu ma jiħux konjizzjoni ta’ dik il-kawża. Apparti l-obbligu li l-liġi timponi fuq il-ġudikant li joqghod f’kull kawża li tiġi lilu assenjata skond il-liġi u li jastjeni jew jilqa’ l-eċċeżżjoni tar-rikuża fil-każijiet biss fejn ikun legalment ġustifikat li huwa ma jkomplix jieħu konjizzjoni ta’ dik il-kawża, mhux kull ‘hsieb’ ta’ parzjalita’ li jista’ talvolta jgħaddi minn mohħ parti jew oħra, jista’ jingħad li huwa ‘oggettivament ġustifikat’. It-test oggettiv tal-imparzjalita’, anke kif mifhum mill-Qorti Ewropea tad-Drittijiet tal-Bniedem jirrikjedi li jkun hemm **bażi oggettivament riskontrabbli**.¹⁴ “*The Court of Appeal observed that ‘the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant.’ Indeed, the litigant has been noted to not be the fair-minded observer, lacking the objectivity which is the hall-mark of the fair-minded observer, being ‘far from dispassionate’; since litigation is a stressful and expensive business, most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively,*

¹² *Jones v Das Legal Expenses Insurance Co Ltd* (2003) EWCA Civ 1071; (2004) IR.L.R. 218

¹³ “Dan kollu jwassal lil din il-Qorti tikkonkludi illi, kif irriteniet il-Qorti Ewropea fil-każ St. Leonard’s Band Club vs Malta deċiża fid-29 ta’ Lulju 2004) b’referenza wkoll ghall-każ ta’ Ferrantelli and Santangelo vs Italy,

¹⁴ ara : QK : *Dr Joseph Zammit Tabona et vs Direttur Generali tal-Qrati tal-Gustizza 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

their perception is not well-founded". Il-Qorti żieded tgħid li dan it-test "ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias";¹⁵

Illi huwa minnu li "justice must not only be done, it must also be seen to be done"¹⁶ u dan minħabba l-htiega li l-pubbliku jkollu kunfidenza fil-Qorti. B'danakollu, t-test tajjeb huwa dak tal-fair minded and informed observer u mhux tas-sentiment popolari. Anzi jkun imparzjali dak l-imħallef li jbaxxi rasu għal din it-tip ta' pressjoni: "*For impartiality it is required that the court is not biased with regard to the decision to be taken, does not allow itself to be influenced by information from outside the court room, by popular feeling, or by any pressure whatsoever, but bases its opinion on objective arguments on the ground of what has been forward at the trial*";¹⁷

Illi l-abbli avukati difensuri tal-attur, fin-nota ta' sottomissjonijiet, jiċċitaw dan il-bran minn sentenza ta' Lord Denning:

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself... It does not look to see if there was a 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 as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a

¹⁵ De Smith's Judicial Review, 10-017, page 453. L-awtur jikkwota l-Qorti tal-Appell tal-Ingilterra in re: Herb v Aziz (2016) EWCA Civ 556

¹⁶ De Cubber v Belgium 26.10.1984; Meznaric v Croatia 15.07.2005 no. 71615/01; Micallef v Malta 15.01.2008 no. 17056/06

¹⁷ Van Jijk, Van Hoof, Van Run, Zwaak, *Theory and Practice of the European Convention of Human Rights* 5th ed. 2017, pagna 602

real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.”

Illi in re: **Grech v Avukat Generali**, il-Qorti Kostituzzjonal, kuntrarjament għall-ewwel Qorti, sabet li kien hemm dehra ta’ imparzjalita` oggettiva:

“Għalkemm huwa minnu illi, kif jixhed l-istatut tal-Assoċjazzjoni Radju Marija, dik l-assoċjazzjoni u t-tmexxija tar-radju huma indipendenti mill-Arċidjoċesi, u ma hemm ebda rabta ġerarkika formali bejn l-Arċi-djoċesi u r-radju, ma hijiex għalkollox imġebba l-perċezzjoni ta’ rabta mill-qrib bejniethom. Din il-perċezzjoni tiġi ġgħejja mill-fatt oggettiv illi d-direttur tal-programmi għandu dejjem ikun kjeriku, meta tqis l-istqarrirja tal-istess direttur illi jekk “jisgarra” jibgħat għalih l-Arċisqof, u meta tqis ukoll illi l-Provinċjal tad-Dumnikani kellu s-setgħa li jesīġi u jikseb ir-riżenza tal-istess direttur tal-programmi minn dik il-ħatra. Huwa minnu illi hemm distinzjoni bejn ir-rwol tad-direttur tal-programmi u dak tal-president tal-assoċjazzjoni iżda t-tnejn għandhom rwol ewljeni fit-tmexxija tal-istess assoċjazzjoni li, għar-ragunijiet imsemmija fuq, ma hijiex għal kollex ħielsa minn rabta, li tista’ wkoll tidher ġerarkika, mal-Arċidjoċesi.

“Fiċ-ċirkostanzi għalhekk, ma hijiex irraġonevoli l-perċezzjoni li hemm rabta tali bejn l-Arċidjoċesi u l-assoċjazzjoni li tagħha l-imħallef huwa president li tista’ tolqot hażin id-dehra ta’ imparzjalità oggettiva ta’ min għandu rwol fit-tmexxija ta’ dik l-assoċjazzjoni. Id-dubju ma huwiex wieħed li ma jitqiesx oggettivament ġustifikat, ukoll jekk dak id-dubju ma jolqotx l-imparzjalità sogġettiva tal-imħallef”;

Illi l-każ ta' **Pinochet** ukoll għandu ġertu xebħ ma' **Grech v Avukat Generali**. Augusto Pinochet tressaq quddiem il-House of Lords li ddeċidiet li ma kellux immunita` minn proċeduri t'arrest u estradizzjoni dwar l-imġieba tiegħu meta kien fil-poter. Amnesty International interveniet fil-kawża. Wieħed mil-Law Lords kien direttur u ċermen, bla ħlas, ta' Amnesty International Charity Ltd., li kellha relazzjonijiet mill-qrib ma' Amnesty International. B'danakollu, is-sentenza ġiet imħassra. Lord Browne-Wilkonson qal: "*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 directly 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*",¹⁸

Illi fil-każ odjerm, kuntrarjament għaż-żewġ kazijiet li għadhom kif ġew iċċitati, ċertament m'hemm l-ebda rabta attwali bejn l-Imħallef u l-Gvern jew partit politiku;

VI. INVOLVIMENT POLITIKU RIČENZJURI

Illi apparti s-silta li jiċċita l-attur, tajjeb jinħad ukoll dak li jkompli jgħid Lord Denning: "*Nevertheless there must be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice... would, or did, favour one side unfairly, at the expense of the other... Justice*

¹⁸ **Pinochet** (No.2) (2000) 1 A.C. 119

must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased’”;

Illi tajjeb li kliem Lord Denning jittieħed fil-kuntest li fih intqal. Fil-kawża in kwistjoni, Lannon kien iċ-ċerman tal-Rent Assessment Committee. Freshwater Company għamlet talba quddiem ir-Rent Assessment Committee. Missieru kellu kawża pendenti dwar il-kera kontra Freshwater Company. Lord Denning skwalifikah milli joqgħod fuq il-Committee. Iktar tard huwa kiteb li:¹⁹ “*Applying these principles, I ask myself: Ought Mr John Lannon to have sat? I think not. If he was himself a tenant in difference with his landlord about the rent of his flat, he clearly ought not to sit on a case against the selfsame landlord, also about the rent of a flat, albeit another flat. In this case he was not a tenant, but the son of a tenant. But that makes no difference*”;²⁰

Illi l-każ ta' Lord Denning huwa wieħed mill-kažijiet ta' imparzjalita` oggettiva fejn tipikament ikun hemm xi fatt estern li jikkomprometti lill-imħallef **waqt is-smiegh tal-kawża**;

Illi l-istanzi cċitati mill-attur fejn tinstab imparzjalita` oggettiva kienu kažijiet li fihom ikun hemm konnessjoni **attwali** bejn l-imħallef u parti jew il-kwistjoni li tqanqal il-parti. Fil-każ ta' L-Onor. **Dr. Simon Busuttil vs L-Avukat Generali et** iċċitat mill-attur, mart l-imħallef *ivi* sedenti kienet membru tal-Parlament Ewropew li esprimiet ruħha dwar il-materja mqanqla fl-istess kawża. Fil-każ ta' **Lawrence Grech v Avukat Generali et**, l-

¹⁹ *Metropolitan Properties Co (FGC) Ltd v Lannon*

²⁰ ara Lord Denning, *The Discipline of Law*, 1979, paġni 86 u 87

imħallef kien, waqt is-smiegh tal-kawża kontra l-Kurja, ċermen ta' Radju Marija. Min-naħha l-oħra, l-attur qiegħed jitlob ir-rikuża minħabba li l-imħallef sedenti “**kien** persuna ta' fiduċja tal-Gvern prezenti u *stante* illi l-każ tar-rikorrent għandu sfond qawwi u materjali ta' kxif ta' korruzzjoni serja fil-‘kursturi tal-poter’ tal-istess Gvern prezenti u minn individwi jew fil-Gvern jew viċin persuni ta' poter fil-Gvern” u minħabba li “kellu, **fil-passat qarib hafna**, konnessjonijiet ta' politika partiggjana ta' natura pubblika u magħrufa”;²¹

Illi f'Azzopardi v'Avukat Generali²² din il-Qorti, diversament ippreseduta, irrimarkat li “it-trapass qasir taż-żmien li jilmenta bih ir-rikorrent, mhuwiex per se raġuni suffiċjenti sabiex twassal persuna raġjonevoli għall-konkluzjoni li l-preżunzjoni tal-imparzjalita` tal-ġudikant qed tiġi mminata, u m'għandux l-effett li jitfa' dell negattiv ta' parzjalita` fuq in-newtralita` ġudizzjarja tal-ġudikant. Jingħad ukoll li, ghalkemm din il-Qorti tifhem li dan il-fattur seta' ħoloq fir-rikorrent il-biża` ta' parzjalita` tal-Maġistrat favur tal-kontro-parti, il-Qorti, tenut ukoll il-mertu xejn politiku tal-kawża tal-libell, hija konvinta illi dan it-trapass ta' żmien, qasir kemm huwa qasir, m'huwiex biżżejjed biex jinstawra biża` oggettivament ġustifikabbli li l-Maġistrat ma jkollhiex imparzjalita` suffiċjenti għall-finijiet tal-**Artikolu 6 tal-Konvenzjoni u l-Artikolu 39 tal-Kostituzzjoni**;

“F'dan l-istadju wkoll, huwa opportun li jiġi senjalat li din il-Qorti ma rriskontrat ebda prova li mqar tagħti x'tifhem li l-Maġistrat żammet xi rabta jew relazzjoni mal-Partit Laburista, jew baqgħet tesprimi b'xi mod il-fehmiet političi tagħha minkejja t-trapass pjuttost qasir ta' żmien bejn l-involviment tagħha fil-politika u l-hatra tagħha bhala ġudikant. *Inoltre*, in-

²¹ ara fol 17

²² Samuel Azzopardi v-L-Avukat Generali 04.07.2017 Qorti Ċivili, Prim'Awla, sede Kostituzzjonal, per Onor. Imh. Lorraine Schembri Orland

natura u l-grad ta' dik ir-rabta li kellha l-Maġistrat qabel il-ħatra tagħha m' humiex tali li jistgħu jiġgustifikaw oggettivament id-dehra ta' nuqqas ta' imparzjalita` da parti tagħha bħala ġudikant, jew li tista' tagħti lok għal xi thassib oggettiv dwar l-imparzjalita` tagħha”;

Il-Qorti Kostituzzjonal²³, li kkonfermat is-sentenza msemmija, qalet li : Din il-Qorti, bhall-ewwel Qorti qabilha, ma tistax ma tfakkarkx illi s-socjeta` Maltija hija dik li hi f'termini ta' limitazzjonijiet anke fil-qasam tal-politika li, inevitabbilment, hija wahda partīgħana u f'kull każ ser jiġi riskontrati dawk il-kawzi b'xejra ftit jew wisq politika li ser jiġi assenjati lil ġudikanti li jkunu esprimew il-fehma politika tagħhom fil-passat qabel il-ħatra tagħhom għall-ġudikatura. Madanakollu, diment li dawn il-fehmiet ma jibqgħux jiġi espressi jew b'xi mod manifestati esternament wara l-ġurament tal-ħatra, u diment li jista' jiġi identifikat distakk ċar bejn l-espressjonijiet tal-fehmiet - fosthom dawk soċjali, morali, reliġjużi u politici - u r-rwol tal-ġudikant, u fin-nuqqas ta' provi manifesti u inkonfutabbi li juru l-kuntrarju, hija l-fehma kkonsidrata ta' din il-Qorti illi f'dawn iċ-ċirkostanzi l-perċezzjoni oggettiva ta' imparzjalita` tibqa' intatta”;

“Illi r-rikorrent isemmi l-fattur taż-żmien billi kien hemm ftit wisq żmien bejn l-parteċipazzjoni attiva tal-Maġistrat fil-ħajja politika u l-elevazzjoni tagħha. Dan hu fatt. Iżda għalkemm huwa prudenti li wieħed iħalli aktar żmien jgħaddi, dan fih innifsu ma jneħħi xejn mis-solennita` tal-ħatra u tal-ġurament li jieħu ġudikant;

“Illi dwar dan ir-rikorrent irribatta li l-ġurament fih innifsu ma jservix biex jgħatti l-apparenza ta' parzjalita`. Dan hu minnu imma fil-fehma ta' din il-Qorti, **jenħtieg li ikun hemm fatturi oħra oltre iż-żmien sabiex twarrab l-imparzjalita` preżunta tal-ġudikant** - ‘*There is no reason to doubt in*

²³ 26.01.2018

particular that a judge would regard his oath on taking judicial office as taking precedence over any other social commitments or obligations.’ (Salaman v the United Kingdom ECtHR - 15/06/2009);”

“Din il-Qorti tirribadixxi dak li ġja` osservat li l-każ odjern m’għandux dimensjoni politika tal-kejl li jfisser ir-rikorrent fl-appell tiegħu, salv għall-fattur wieħed biss, jiġifieri dak li l-partijiet huma politici minn partiti opposti. Għalhekk ukoll, il-fattur taż-żmien bejn il-partecipazzjoni tal-Maġistrat fil-hajja politika u l-ħatra tagħha bħala ġudikant huwa immaterjali u m’għandux l-effett li qed jipprova jagħtih ir-rikorrenti bit-talba għar-rikuża proposta minnu…

“Il-Qorti tissenjala li l-ġurament tal-ħatra jopera biex joqtol u jxejjen kull rabta mal-passat tal-ġudikant fir-rigward ta’ dawn il-fehmiet fosthom dawk politici li setgħu gew imħaddna minnu qabel inħatar bħala ġudikant, u huwa immaterjali kemm ikun **ghadda zmien bejn l-espressjoni tal-fehmiet politici jew l-attività` fil-qasam politiku u l-ħatra tal-persuna bħala ġudikant ghall-finijiet tal-presunzjoni oggettiva tal-imparzjalita`**, għax altrimenti tkun qed tīgi wkoll imminata serjament is-saħħa u s-solennita` tal-ġurament tal-ħatra li żgur hija ħaża li għandha tīgi evitata akkost ta’ kollox in vista tal-fatt illi, kif gie rapportat:- “*The principle of impartiality is an important element in support of the confidence which the courts must inspire in a democratic society*”;²⁴

Illi l-maġistrat imsemmija kienet kandidata ghall-elezzjonijiet ġenerali **ftit xhur qabel** ma semgħet il-kawża in kwistjoni. L-imħallef sedenti kien

²⁴ *Sramek v. Austria*, deciza 22 Ottubru 1984, p. 20, para. 42, citat f’*Pullar*

persuna ta' fiduċja **sa ftit iktar minn tlett snin ilu**. F'Ottubru 2015 inħatar court attorney u qata' kull kuntatt mal-politika;

VII. INVOLVIMENT POLITIKU PRECEDENTI

Illi ingħad li “*Although judges may have a political preference and/or adhere to a specific religion or philosophy of life, and although it is right that the various political streams, religions and philosophies of life are also ‘represented’ within the judiciary, it must not make any difference for the person involved whether he is tried by a judge with one or other preference*²⁵” u li “l-espressjoni ta' twemmin jew konvinzjoni politika qabel ma persuna tinħatar bhala ġudikant fiha innifisha m'għandhiex issarraf f'sejbien ta' preġudizzju da parti tal-istess ġudikant jekk wieħed jew aktar mill-partijiet li jidhru fil-kawża huma ta' twemmin politiku differenti. Ir-rikorrent jargumenta li bħala kandidata, iktar minn espressjoni, il-Magistrat uriet konvinzjoni politika shiħa u konformita` mal-linja politika tal-partit li kienet timmilita fiha. Għal dan l-aggravju, din il-Qorti in re: **Azzopardi v-L-Avukat Generali** wieġbet hekk:

“Illi kif ġja` premess ġaladarba persuna tīgi maħtura bħala ġudikant dik il-persuna hija preżunta li hija mparżjali. Ir-rikorrent ma ressaq l-ebda prova ta' preġudizzju attwali lejh fil-Magistrat għajr ghall-kumment u għall-konvinzjoni politika tagħha. Ir-rwol tagħha bħala kandidata politika kien

²⁵ Van Jijk, Van Hoof, Van Run, Zwaak, *Theory and Practice of the European Convention of Human Rights* 5th ed. 2017, paġna 602

anteċedenti għall-ħatra u l-kontendenti kienu unanimi li l-Magistrat ma żammet l-ebda rabta mal-partit politiku tagħha wara l-ħatra;

“Illi din il-Qorti temmen li kull gudikant għandu jwieġeb għall-*standards* għoljin għalkemm kull ġudikant huwa uman. Madanakollu kulħadd għandu jifhem li malli ġudikant jieħu l-ġuramenti tal-uffiċju tiegħi/tagħha, jinqata' mill-ambjent ta' politika u ta' partiġġjaniżmu politiku kif jinqata' mill-isfera tad-dibattitu pubbliku. Malli ġudikant jieħu l-ġuramenti tal-ħatra, l-opinjonijiet u twemmin tiegħi/tagħha jiġu ridimensjonati u jidħlu fl-isfera ta' opinjoni jew twemmin prettament privat u personali. Dejjem jibqa' fid-dmir li jiġġudika skont il-liġi u l-fatti”;

Illi fil-kawża **Busuttil v Avukat Generali**, li l-attur stieden lil din il-Qorti sabiex tifli sewwa, din il-Qorti, denjament ippreseduta mill-Onor. Imħallef Joseph Zammit McKeon, ma sabitx imparzjalita` fil-fatt li mart l-Imħallef Antonio Mizzi kienet involuta fil-politika, fil-veste tagħha ta' membru parlamentari fil-parlament Ewropew mal-partit li f'Malta jinsab fil-Gvern u li l-attur f'dik il-kawża kien qiegħed jixli b'xi attivitajiet mikxufin permezz tal-hekk imsejjha *Panama Papers*; hija iżda sabet li kien hemm l-apparenza ta' *bias* bil-fatt li l-Onorevoli Mizzi tkellmet ukoll pubblikament proprju fuq l-affari tal-Panama Papers:

“a) L-interess finanzjarju

“Fil-fehma tal-Qorti, l-Onor Marlene Mizzi m'għandhiex titqies li għal ragunijiet finanzjarji għandha interess dirett jew indirett dwar kif żewġha l-Onor Imħallef Mizzi sejjer jippronunzja ruħu fl-appell tal-kjamati mid-digriet tal-Magistrat Ian Farrugia...

“Il-Qorti taċċetta li l-Onor. Mizzi kienet eletta fi process elettorali fuq il-

merti tagħha f'isem il-Partit Laburista u li kienet eletta mill-poplu.

“Anke dan il-fatt waħdu mhux biżżejjed sabiex iwassal lil din il-Qorti biex tibdel il-fehma tagħha dwar l-interess dirett jew indirett.

“b) L-istqarrijiet pubblici ta’ l-Onor Marlène Mizzi dwar il-każ tal-“Panama Papers”

“Irrizulta li l-Onor Marlène Mizzi tkellmet fl-14 ta’ Gunju 2017 fil-Parlament Ewropew dwar il-kwistjoni tal-“Panama Papers”.

“B’żieda ma` dak li osservat aktar kmieni dwar ilmenti tar-rikorrent wieħed wieħed, il-Qorti tishaq illi fil-fehma tagħha l-fatt – iżolat waħdu – li l-Onor Mizzi huwa miżżewwiegħ lill-MEP tal-PL l-Onor Marlène Mizzi ma jikkostitwix waħdu riskju ta’ mparzjalita’, u allura ta’ ksur tal-jedd għal smiġħ xieraq tar-rikorrent, jekk ma jirrikużax ruħu fil-każ li gie quddiemu.

“Fl-istess waqt tishaq ukoll illi d-dikjarazzjonijiet pubblici li għamlet l-Onor. Mizzi, in partikolari dak mistqarr minnha fis-seduta tal-Parlament Ewropew tal-14 ta’ Gunju 2017, marbuta dawn mal-fatt illi hija miżżewwga lill-Onor Imħallef Mizzi kellhom iwasslu lill-istess Onor Imħallef Mizzi sabiex jirrikuża ruħu propju għaliex ir-rabta matrimonjali bejn it-tnejn issa kienet tikkostitwixxi riskju gravi ta’ mparzjalita’ u allura ksur tal-jedd għal smiġħ xieraq tar-rikorrent.

“Tajjeb jingħad illi l-Onor Marlène Mizzi – ghax MEP – u allura ghax politiku - kellha kull jedd titkellem fil-Parlament Ewropew dwar il-każ tal-“Panama Papers”. Dak kien dritt għal kollox legittimu tagħha. Hekk irriżulta ppruvat skont il-ligi li għamlet fl-14 ta’ Gunju 2017. Hemm esprimiet il-fehmiet tagħha kjarament u mingħajr ekwivoċi.

“Iżda meta mbagħad ftit aktar minn xahar biss wara dak id-dikors, u cioe` fis-27 ta’ Lulju 2017, tressaq quddiem żewgha l-Onor. Imħallef Mizzi, il-każ li kien relatax tant mill-qrib ma` dak li martu kienet tkellmet dwaru fil-Parlament Ewropew, il-ħarsien tal-jedd għal smiġħ xieraq, tradott fl-essenza tiegħu, f'kondotta li fid-deher tiggarantixxi l-imparzjalita` tiegħu kellu jwassal lill-Onor. Imħallef Mizzi sabiex jastjeni.

“B’hekk, bl-aktar mod ċar u kristallin, l-Onor. Imħallef Mizzi kien iwarra fil-ġenb, imqar fl-ahjar interess tal-amministrazzjoni tal-ġustizzja, kull xrara jew sembjanza ta’ dubju dwar kull deċiżjoni jew provvediment futur tiegħu fil-każ li kellu quddiemu.

“Għalhekk l-eċċeżzjonijiet fil-mertu tal-intimat u tal-kjamati fil-kawża qegħdin ikunu respinti kollha, u l-ewwel tliet talbiet tar-rikorrent milquġha kollha”;²⁶

Illi għalhekk, il-konnessjonijiet passati tal-imħallef sedenti mal-politika ma jsarrfux tabilfors f’imparzialita` oggettiva. Dan appartu li l-fattispeċje tal-mertu tal-każ tallum, li huwa dwar in-nuqqas tal-ġhoti tal-*istatus* ta’ *whistleblower* lill-attur, seħħi meta l-imħallef sedenti ma kienx għadu persuna ta’ fiduċja kif ukoll għaliex m’għandux x’jaqsam, minnu nnifsu, mal-politika, imma m’għemil amministrattiv. Dak li ngħad **f’Azzopardi v-Avukat Generali** jgħodd ghall-każ preżenti: għalkemm fl-isfond jista’ jkun hemm riperkussjoni politika, il-kawża nnifisha mhix ta’ natura politika;

VIII. PERSUNA TA’ FIDUĆJA

Illi b’danakollu, l-attur qiegħed jilmenta mhux biss mill-konnessjoni fil-passat tal-imħallef sedenti mal-politika, imma wkoll għax kien persuna ta’ fiduċja “tal-Gvern preżenti”. Għall-preċiżjoni, fis-sena 2015 kien hawn Gvern differenti, anke jekk kompost mill-istess partit politiku. U l-imħallef sedenti jista’ jingħad li kien persuna ta’ fiduċja tal-“Gvern” fis-sens biss li kien persuna ta’ fiduċja tal-Ministru Għal Għawdex ta’ dak iż-żmien. Il-

²⁶ *Onor. Dr. Simon Busuttil v-L-Avukat Generali et* 12.07.2018 Qorti Civili Prim’Awla. Is-sentenza ġiet imħassra mill-Qorti Kostituzzjonali fit-21.10.2018 izda għal raġunijiet differenti minn dawk suesposti, u li għalhekk m’hemmx pronunzjament kontrihom mill-Qorti Kostituzzjonali.

Ministeru għal Għawdex għandu setgħat limiti għat-territorju tal-gżira Ghawdxija. Il-Qorti tifhem li l-attur mhux qed jallega korruzzjoni fi ħdan dan il-Ministeru. Kieku kien hekk, l-imħallef sedenti ma kien ikollu l-ebda eżitazzjoni li jastjeni bħalma għamel f'każ fejn kien hemm ilment (mhux ta' korruzzjoni) li seta' nvolva lill-istess Ministeru waqt li huwa kien jaqdi l-inkariku tiegħu hemmhekk – kif jaf wieħed mill-abbli avukati difensuri tal-attur odjern li jippattroċinja wkoll lill-attur. Lanqas ma hija din il-kawża diretta kontra l-persuni msemmijin fin-nota ta' sottomissjoniet tal-attur, għalkemm il-Qorti tifhem ukoll li tista' teffettwahom. Imma apparti minn hekk, certament li l-imħallef sedenti fil-qadi tiegħu ta' persuna ta' fiduċja tal-Ministru għal Għawdex ma kellu l-ebda konoxxenza u wisq inqas involvement f'dak li dawn l-individwi setgħu għamlu dak iż-żmien;

Illi l-qagħda tal-imħallef sedenti għandha ġertu xebħi mal-kawża **Pullar v. United Kingdom**:²⁷

“A. The trial

“6. The applicant, Robert Pullar, is a British citizen who was born on 9 October 1949. Prior to his conviction on 17 July 1992 he was an elected member of Tayside Regional Council, a local authority in Scotland.

“7. On 13 July 1992 Mr Pullar and another member of the Council were brought before the Perth Sheriff Court for trial on a charge under section 1 (1) of the Public Bodies Corrupt Practices Act 1889. It was alleged that they had offered, in exchange for money, to vote for and to use their influence on the Council in favour of an application for planning permission made by Mr

²⁷ kawża numru 20/1995/526/612

John McLaren, a partner in a firm of architects, and Mr Alastair Cormack, a partner in a firm of quantity surveyors. The latter two were the key prosecution witnesses.

“8. One of the members of the public called for jury service at Perth Sheriff Court on the day of Mr Pullar's trial was Mr Brian Forsyth, a junior employee in Mr McLaren's firm, which employed fifteen people in total...”

“9. Mr Forsyth and Mr McLaren walked to the court house together. Neither of them knew that Mr Forsyth might be selected to sit on the jury in Mr Pullar's trial, although they both knew that Mr McLaren was to give evidence in it.”

Illi Mc Laren instab ħati u appella quddiem il-High Court.

“16. The appeal was heard on 5 and 12 February 1993, and dismissed on 26 February 1993.

“Lord Hope, the Lord Justice General, commented that the clerk ought to have informed the sheriff about the connection between Mr McLaren and Mr Forsyth, and that if he had done so Mr Forsyth would probably have been excused under section 133 of the Criminal Procedure (Scotland) Act 1975 because there would have been cause for an objection to have been made by the defence under section 130 (4) of the same Act... However, a mere suspicion that a juror was biased was insufficient to justify quashing a verdict; it was necessary to prove that a miscarriage of justice had in fact taken place. There was no evidence to show that Mr Forsyth knew anything about the circumstances of the alleged offences, and in any case it could not be assumed that he would have ignored the evidence and the sheriff's

directions and voted, in defiance of his oath, on the basis of any personal prejudice held by him...

“33. With regard to the second requirement, the applicant argued that the circumstances surrounding the selection of Mr Forsyth as a juror in his case would have caused an objective observer to doubt the impartiality of the tribunal.

“In support of this proposition he referred to the facts that both Mr Forsyth and Mr McLaren were sufficiently concerned about their relationship to bring it to the attention of the sheriff clerk..., and that the High Court confirmed that, had the connection become known to the sheriff in the course of the trial, Mr Forsyth would probably have been discharged from the jury... Thus, the defence was deprived of its right to object to Mr Forsyth's presence by the failure of the sheriff clerk to inform the appropriate persons.

“Furthermore, it was reasonable to suppose that Mr Forsyth had formed a view about the credibility of Mr McLaren prior to the trial, as a result of working in the same firm as him. In addition, Mr McLaren testified in his statement that the allegations against Mr Pullar "would have been the topic of conversation within the office"

“34. The Commission was also of the opinion that there were justifiable grounds on which to doubt the impartiality of the tribunal.

“It found it significant that Mr Forsyth would probably have been discharged from the jury if the sheriff had known of his connection with

Mr McLaren. It also agreed with the applicant that an objective observer would have presumed that Mr Forsyth had more than a casual acquaintance with Mr McLaren after working in the same small firm as him for over two years. Although Mr Forsyth was only one of fifteen jurors, his influence might have been decisive, and he could have taken the sheriff clerk's failure to act as a tacit permission solely upon his prior knowledge.

“35. The Government submitted that the fact that Mr Forsyth worked in the same firm as Mr McLaren would not in itself have been sufficient to give rise to a legitimate doubt about the tribunal's impartiality. It had to be borne in mind that Mr Forsyth held a junior position in the firm, had not worked on the project in question and, as he told the sheriff clerk, had no personal knowledge of the two defendants or of the circumstances of the case”;

Illi 1-Qorti Ewropeja ma qablitx mal-Commission. Hija kkonkludiet li:

“37. It is recalled that Mr Pullar's misgivings as to the impartiality of the tribunal were based on the fact that one member of the jury, Mr Forsyth, was employed by the firm in which the prosecution witness, Mr McLaren, was a partner. Understandably, this type of connection might give rise to some anxiety on the part of an accused (see, mutatis mutandis, the Sramek v. Austria judgment of 22 October 1984, Series A no. 84, pp. 19-20, paras. 41-42). However, the view taken by the accused with regard to the impartiality of the tribunal cannot be regarded as conclusive. What is decisive is whether his doubts can be held to be objectively justified (see, for example, the Remli v. France judgment of 23 April 1996, Reports of Judgments and Decisions 1996-II, p. 574, para. 46).

“38. The principle of impartiality is an important element in support of the

confidence which the courts must inspire in a democratic society (see the above-mentioned Sramek judgment, p. 20, para. 42). However, it does not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.

“39. *In the present case, Mr Forsyth, a junior employee within Mr McLaren's firm, had not worked on the project which formed the background to the accusations against Mr Pullar and had been given notice of redundancy three days before the start of the trial (see paragraphs 8 and 15 above). On these facts, it is by no means clear that an objective observer would conclude that Mr Forsyth would have been more inclined to believe Mr McLaren rather than the witnesses for the defence.*

“40. *In addition, regard must be had to the fact that the tribunal offered a number of important safeguards. It is significant that Mr Forsyth was only one of fifteen jurors, all of whom were selected at random from amongst the local population. It must also be recalled that the sheriff gave the jury directions to the effect that they should dispassionately assess the credibility of all the witnesses before them, ...and that all of the jurors took an oath to a similar effect.*

“41. *Against this background, Mr Pullar's misgivings about the impartiality of the tribunal which tried him cannot be regarded as being objectively justified.*

Illi bħall-każ ta' Pullar, l-imħallef intrabat bil-ġurament u ma kienx involut

la fil-każ quddiemu u lanqas f'dak li l-attur isostni li hemm fl-isfond tiegħu;

IX. RIKAPITULAZZJONI

Illi l-fiduċja tal-pubbliku fil-Qrati titlob li jekk ikun jidher li hemm imparjalita` l-imħallef għandu jwarrab. B'danakollu, kif tajjeb ingħad ukoll minn din il-Qorti, ippreseduta mill-Onor. Imħallef Joseph Zammit McKeon, “biex raġuni twassal ghall-astensjoni jew għar-rikuża ta’ ġudikant, din trid tkun waħda konkreta, mhux merament perċepita”²⁸ Trid tkun tali li jasal għaliha il-“*fairminded and informed observer*” li allura jifhem l-etika u l-ġurament li bihom huma marbutin il-ġudikanti kollha, u jifhem li l-ġurament tal-ħatra joftom lill-imħallef mill-passat tiegħu. Biex dan isir m’hemmx għalfejn jgħaddi xi żmien konsiderevoli. Fi kwalunkwe kaž-żewmin u saħansitra attivżmu politiku (jew ta’ xort’oħra, per eżempju religjuż - iżda dawn ma jolqotx il-każ preżenti) m’humiex raġuni għar-rikuża. Lanqas hija awtomatikament raġuni l-impieg fl-istess entita` (f’dan il-każ il-Gvern) li uffiċċjali oħrajn tagħha b’xi mod tkun involuta fil-kawża quddiem l-imħallef. Biex ikun hemm lok għal din ir-raġuni, jew perċezzjoni pubblika, l-imħallef irid ikun involut fl-attività li tispicċċa mertu tal-kontenzjoni fil-kawża quddiemu; jew ikun hemm rabta qawwija bejnu u l-uffiċċjali kkonċernati. Fil-każ preżenti, l-imħallef sedenti kien attiv fil-politika iżda waqaf saħansitra żmien qabel ma laħaq Magistrat. Il-mertu tal-każ preżenti – li lanqas hu wieħed proprijament “politiku” - twieled wara li hu laħaq ġudikant. Huwa kien *person of trust* tal-Ministru għal Għawdex u bħala tali ma kellux jiġi pperċepit minn osservatur newtrali li kellu, xi konnessjoni jew konoxxenza mal-affari li allegatament kien nvoluti fiha uffiċċjali oħrajn f’Ministeri differenti tal-Gvern. Għalhekk ma jirriżultax dak il-*bias* oggettiv li qiegħed jara l-attur;

²⁸ *Simon Busuttil v Avukat Generali* 12.07.2018, Prim' Awla, sede Kostituzzjoni

X. **DECIDE**

Għar-raġunijiet suespsti, it-talba tal-rikuża ma tistax tiġi milquġha.

Spejjeż riżervati għall-ġudizzju finali.

Onor. Imħallef

Grazio Mercieca