



**QORTI ĊIVILI
PRIM' AWLA
(ĠURISDIZZJONI KOSTITUZZJONALI)**

**ONOR IMHALLEF
DR FRANCESCO DEPASQUALE
LL.D. LL.M. (IMLI)**

**Seduta ta' nhar it-Tlieta
Disgha u ghoxrin (29) ta' Marzu 2022**

Rikors Numru 801/2021 FDP

Fl-ismijiet

Paul Attard

Vs

Avukat Ġenerali, l-Avukat tal-Istat, Kummissarju tal-Pulizija

Il-Qorti:-

1. Rat it-talba tar-rikorrent, illi saret fis-seduta tat-3 ta' Frar 2022, fejn ir-rikorrent talab is-segwenti:

L-attur fid-dawl tad-digriet mogħti minn din il-Qorti nhar 20.1.2022 jitlob bir-rispett ir-rikuża tas-sedja fid-dawl tal-Art 734 (1) (d) (i) (ii) ta' COCP u dana fid-dawl ta' digriet kif ifisser dawn l-artikoli għal ċirkostanzi simili fl-ismijiet Kevin Attard vs Philip Cardona mogħti mill-On Imħallef Mintoff u dana minħabba li l-attur jikkontendi bir-rispett illi l-paragrafu 27 tad-digriet tal-20.01.2022 jitratta l-mertu tal-kawża odjerna.

2. Rat illi l-intimati opponew għal tali talba w il-kawża giet differita għat-trattazzjoni għall-21 ta' Marzu 2022 b'dan illi l-partijiet kienu awtorizzati jagħmlu sottomissjonijiet bil-miktub qabel tali trattazzjoni.
3. Rat illi, għalkemm il-partijiet ipprezentaw is-sottomissjonijiet tagħhom bil-miktub fil-mori tad-differiment, dawna ma ġewx inseriti fil-proċess, u għalhekk il-partijiet, seduta stante, ipprezentaw kopja tas-sottomissjonijiet tagħhom bil-miktub filwaqt illi ttrattaw ulterjorment it-talba.

4. Rat illi il-kawża imbagħad giet differita għall-21 ta' Marzu 2022 għad-digriet.

Ikkunsidrat

5. Jirriżulta, illi fil-proċeduri Kostituzzjonali 801/2021 fl-ismijiet 'Paul Attard vs Avukat Ġenerali et' intavolati fil-15 ta' Diċembru 2021, ir-rikorrent, permezz ta' rikors appożitu ppreżentat fil-21 ta' Diċembru 2021, talab is-segwenti:

Għaldaqstant, pendenti d-determinazzjoni tal-lanjanzi ta' natura kostituzzjonali mressqa quddiem dina l-Onorabbli Qorti, ir-rikorrent bir-rispett jitlob, fid-dawl ta' dak maħsub fl-artikolu 23 tad-Deċiżjoni Kwadru, li a tenur tal-Artikolu 46 (2) tal-Kostituzzjoni ta' Malta, tinhareg miżura provviżorja ossia interim measure bl-effett li jiġi ordnat il-ħelsien mill-arrest tar-rikorrent pendenti s-smiegħ ta' dina l-istess kawża.

6. Jirriżulta illi b' digriet mogħti fl-20 ta' Jannar 2022, din il-Qorti, kif ippresjeduta, ċaħdet it-talba għall-ħelsien mill-arrest tar-rikorrenti pendenti s-smiegħ tal-kawża li qed tinstema' quddiemha.
7. Jirriżulta illi, permezz ta' talba magħmula lil dina l-Qorti fit-3 ta' Frar 2022, ir-rikorrent talab ir-rikuża peress illi, fi kliem l-abbli difensur tar-rikorrenti fis-sottomissjonijiet tiegħu:

“l-esponenti għandu il-biża li din l-Onorabbli Sedja diġa' fformat opinjoni dwar din il-vertenza ta' din il-kawża minn qabel ma bdew s-sottomissjonijiet tal-provi u jinstemgħu x-xhieda rilevanti. Huwa inkonċepibbli f'moħħ l-esponent, li tista' ssir gustizzja miegħu f'din il-kawża kif presjeduta.”

8. Jirriżulta illi, fil-verbal illi wassal għall-proċeduri odjerni, l-abbli difensuri tar-rikorrent indikat li dana l-ħsieb tagħhom huwa naxxenti mid-diċitura tal-paragrafu 27 tad-digriet ta' dina l-Qorti.
9. Jirriżulta illi l-paragrafu 27 tad-digriet tal-20 ta' Jannar 2022 kien jgħid is-segwenti:

27. Ikkunsidrati l-elementi u l-argumenti kollha kif fuq indikati, jirriżulta illi t-talba tar-rikorrenti għall-ħruġ ta' miżura provviżorja ma hijiex waħda mistħoqqa, u dan għar-raġunijiet segwenti:

a. It-terminu sabiex jiġi ċedut r-rikorrent lill-Istat Taljan ma jistax jitqies bħala wieħed skadut għalkemm il-proċess tal-estradizzjoni għandu jitqies bħala konkluż, u dana stante illi l-Istat Malti ma jistax jipproċedi għall-estradizzjoni tar-rikorrent minħabba f'raġunijiet barra mill-kontroll tiegħu, ossia minħabba ir-reżistenza tar-rikorrent li jiġi estradit, u dan billi nieda l-proċeduri Kostituzzjonali odjerni;

b. Ma jirriżultax, prima facie, illi hemm ksur ta' xi jedd fundamentali tar-rikorrent, stante illi jirriżulta illi huwa jinsab miżmum a tenur ta' dan ipprovdut fil-Deċiżjoni Kwadru kif ukoll il-Legislazzjoni Sussidjarja fuq indikata;

c. Ma jirrizulta ebda urġenza estrema da parte tar-rikorrent li għandha twassal għall-ħrup ta' xi miżura provviżorja;

d. Ma jeżisti ebda riskju imminenti ta' ħsara irrimedjabbli illi ser ibagħti r-rikorrent u li għandha twassal għall-ħruġ ta' xi miżura provviżorja;

10. Jirrizulta illi l-abbli difensuri tar-rikorrent ibbażaw l-argumentazzjoni tagħhom fuq digriet datat 27 ta' Marzu 2019 fil-kawża fl-ismijiet '**Kevin Attard vs Philip Cardona**', kopja ta' liema digriet qatt ma nġieb a konjizzjoni ta' dina l-Qorti, w ladarba mhux aċċessibbli għal dina l-Qorti, dina l-Qorti ma tistax tagħmel referenza għall-argumentazzjoni tal-Qorti f'dawk iċ-ċirkostanzi.

Ikkunsidrat

11. Jirrizulta illi, kif indika l-Avukat tar-rikorrent, in vista tad-digriet tal-Qorti, din il-Qorti "*diġa' fformat opinjoni dwar il-vertenza*" u "*huwa inkonċepibbli ... li tista' ssir ġustizzja miegħu f'din il-kawża kif presjeduta*".
12. Jirrizulta illi, qabel ma jiġu kkunsidrati l-aspetti legali tat-talba kif redatta, ikun opportun illi jiġi indikat x'inhija l-vertenza li qiegħda tinstema' minn dina l-Qorti, kif ippresjeduta, minn liema proċeduri r-rikorrent qiegħed jitlob ir-rikuża ta' dina l-Qorti, u x' qiegħed jintalab.
13. Jirrizulta illi fir-rikors Kostituzzjonali intavolat mir-rikorrent fil-15 ta' Dicembru 2021, huwa talab is-segwenti:

Għaldaqstant ir-rikorrent bir-rispett jitlob lil din l-Onorabbli Qorti joghġobha:

1. Tilqa' t-talba tar-rikorrenti minnu mressqa fl-ewwel aggravju tiegħu fis-sens illi l-artikolu 16 tal-Kap.276 tal-Liġijiet ta' Malta jikser d-Dritt Ewropew stante li ma jagħtix lok għall-applikazzjoni tal-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea;

2. Tilqa' t-talba tiegħu fit-tieni aggravju sabiex issir Referenza Preliminari taħt l-Artikolu 5 tal-Kap 460 tal-Liġijiet ta' Malta u sabiex b'hekk timxi skond id-dettami u tweġiba li tintbagħat mill-Qorti tal-Ġustizzja tal-Unjoni Ewropea;

3. Tiddikjara li l-proċedimenti ta' estradizzjoni fil-konfront tar-rikorrent ma rrispettawx id-dritt għar-rispett tal-ħajja privata u l-familja tar-rikorrenti kif sanciti fl-Artikolu 32 (ċ) tal-Kostituzzjoni ta' Malta, l-Artikolu 8 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem, u l-Artikolu 7 tal-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea;

4. Tilqa' wkoll it-talba tiegħu minnu mressqa fit-tielet aggravju tiegħu fis-sens illi dina l-Onorabbli Qorti tordna għal informazzjoni supplimentari mill-awtoritajiet Taljani ai termini tal-Artikolu 13A tal-L.S. 276.05 tal-Liġijiet ta' Malta u dan sabiex jiġi kkonfermat jekk l-Awtoritajiet Olandiżi għamlux ċediment tal-ġurisdizzjoni fuq l-imsemmi rikorrenti;

5. Tiddikjara li l-proċedimenti ta' estradizzjoni fil-konfront tar-rikorrent ma irrispettawx id-dritt għan-non diskriminazzjoni kif sanciti l-Artikolu 14 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem, u l-Artikolu 21 tal-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea;

6. Tiddikjara li l-proċedimenti ta' estradizzjoni fil-konfront tar-rikorrent ma irrispettawx id-dritt għar-rimedju effettiv u għal proċess imparzjali tar-rikorrenti kif sanciti fl-Artikolu 39 tal-Kostituzzjoni ta' Malta, l-Artikolu 6 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem, u l-Artikolu 47 tal-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea;

7. Tiddikjara li l-proċedimenti ta' estradizzjoni fil-konfront tar-rikorrent ma' irrispettawx id-dritt għal protezzjoni kontra il-projbizzjoni tat-tortura jew tal-pieni jew trattamenti inumani jew degradanti tar-rikorrenti kif sanciti fl-Artikolu 33 u 36 tal-Kostituzzjoni ta' Malta, l-Artikolu 2 u 3 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem, u l-Artikolu 4 tal-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea;

8. Sabiex wara li tilqa` t-talbiet su esposti kollha jew uħud minnhom, tgħaddi sabiex minhabba li l-akkuża miġjuba kontra l-esponenti ma hijiex magħmula in bona fide fl-interess tal-gustizzja, u stante li meta jiġu kkunsidrati ċ-ċirkostanzi kollha tal-każ de quo, huwa ingust jew oppressiv li l-esponenti jiġi mregġa' lura, tordna li l-esponenti jiġi meħlus u li ma jintbagħatx lejn l-Italja.

9. Fl-eventwalita` biss, li t-talbiet supra indikati jkun miċhuda in toto sabiex dina l-Onorabbli Qorti tordna u tikkonferma li:

(i) Bl-applikazzjoni tal-artikolu 28A tal-L.S. 276.05, stante li l-esponenti għandu proċeduri penali oħra pendenti fil-konfront tiegħu hawn Malta attwalment quddiem il-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali (per Mag. Dr I. Farrugia) fl-ismijiet "Il-Pulizija (Spt. R. Stivala) vs Paul Attard, huwa jintbagħat biss lura lejn l-Italja għaladarba tali proċess jkun ġie res ġudikata.

(ii) Tikkonferma t-talba sussidjarja tar-rikorrenti kif diġa milqugħa mill-Qorti tal-Appell Kriminali fis-sentenza tagħha tad-9 ta' Dicembru 2021, u tordna li l-estradizzjoni tal-esponenti qegħda ssir bil-kondizzjoni li l-estradizzjoni tal-estradant lejn l-Italja tkun soġġetta dejjem għal- "law of speciality" ossija in konnessjoni mar-reat addebitat lilu fil-MAE li a bazi tiegħu saru dawn il-proċeduri, u msemmi fir-regolament 18 tal-L.S. 276.05

(iii) Tilqa' t-talba sussidjari tar-rikorrenti sabiex jiġi applikat a favur tiegħu dak li jiddisponi l-artikolu 5(3) tad-Deċiżjoni Kwadru, li kemm pendente lite matul il-proċeduri penali ġewwa l-Italja, kif ukoll sabiex fl-eventwalita' ta' dikjarazzjoni ta' htija tal-esponenti in segwitu għal proċeduri penali kontrih fl-Italja, f'liema proċeduri huwa jkun ġie mogħti piena ta' prigunerija effettiva, li, l-istess appellant jkun ritornat lil Malta sabiex huwa jservi f'Malta l-piena fuqu imposta.

9. Tagħti dawk il-provvedimenti kollha li hija tħoss neċessarji sabiex jiġu salvagwardjati d-drittijiet fundamentali tar-rikorrenti.

14. Il-Qorti tosserva wkoll illi jkun opportun illi jitqies x'kienet il-bażi għat-talba tal-miżura provvizorja mitluba li saret mir-rikorrent fir-rikors tal-21 ta' Diċembru 2021 u li għet miċhuda minn dina l-Qorti fl-20 ta' Jannar 2022.

15. Jirrizulta, illi, fir-rikors tal-21 ta' Diċembru 2021, ir-rikorrent ibbaża t-talba tiegħu billi qal is-segwenti:

1. Permezz ta' sentenza mogħtija nhar id-9 ta' Diċembru 2021, il-Qorti tal-Appell Kriminali ċaħdet l-aggravji ntentati mir-rikorrenti u per konsegwenza ordnat it-treġġiegh tar-rikorrenti lura lejn il-pajjiż rikjedent ossia lejn l-Italja kif mitlub mill-awtoritajiet ġudizzjarji Taljani skond il-Mandat ta' Arrest Ewropew (MAE) de quo u li l-estradant għandu jinżamm taħt il-kustodja fi stennija għat-treġġiegh lura tiegħu lejn l-istess pajjiż;

2. In forza ta' dak maħsub fl-artikolu 16 tal-Kap. 276 tal-Liġijiet ta' Malta moqri flimkien mar-regolament 25(2) tal-Leġislazzjoni Sussidjarja 276.05 tal-Liġijiet ta' Malta, ir-rikorrent gie debitament mgharraf mill-Qorti tal-Appell Kriminali li huwa ma huwiex ser jiġi mreġġa' lura lejn il-pajjiż rikjedent ossia lejn l-Italja qabel ikunu iddekorrew sebat (7) ijiem mid-data tal-ordni ta' kustodja u ċioe' minn nhar id-9 ta' Diċembru 2021;

3. Tali terminu ta' sebat (7) ijiem illum iddekorra fl-intier. Billi pero' r-rikorrenti ntavola l-kawża kostituzzjonali odjerna permezz ta' rikors ipprezentat nhar il-15 ta' Diċembru 2021, huwa ma ntbagħatx lura lejn il-pajjiż rikjedent u kwindi għadu f'dan l-istadju miżmum ġewwa l-Facilita' Korrettiva ta' Kordin;

4. F'dan l-isfond, ir-rikorrent iġib a konjizzjoni ta' din l-Onorabbli Qorti id-dispost tas-subincizi (2) u (5) tal-artikolu 232 tad-Deċiżjoni Kwadru tal-Kunsill (2002/584/JHA) ossia d-Deċiżjoni Kwadru applikabbli in materja ta' MAE, li testwalment jistipulaw hekk:

“2. Il-persuna għandha tiġi ċeduta mhux aktar tard minn għaxart ijiem wara d-deċiżjoni finali fuq l-eżekuzzjoni tal-mandat ta' arrest Ewropew.

...

5. Fuq l-iskadenza tal-limiti tal-hin imsejha fil-paragrafi 2 sa 4, jekk il-persuna għadha qed tinzamm fil-kustodja għandha tiġi rilaxxata.”
[sottolinejar tar-rikorrent].

5. Tali Deċiżjoni Kwadru gie lokalment traspost permezz tal-Leġislazzjoni Sussidjarja 276.05 tal-Liġijiet ta' Malta, liema leġislazzjoni tikkontempla terminu ta' sebat (7) ijiem u mhux għaxart (10) ijiem kif maħsub fid-Deċiżjoni Kwadru msemmi. Madanakollu, jibqa' l-fatt li l-liġi tesigi li

appenna tali limitu ta' hin ikun skada, l-estradant ma jistax jibqa' taht kustodja u għandu jiġi rilaxxat.

16. Jirrizulta, għalhekk, illi t-talba għal miżura provviżorja tar-rikorrent kienet ibbażata fuq il-fatt illi, minkejja li kienu għaddew aktar minn sebat ijiem minn meta gie ordnat li jiġi estradit b'digriet tal-Qorti tal-Appell Kriminali tad-9 ta' Diċembru 2021, huwa kien għadu ma gie estradit, u għalhekk kellu jiġi rilaxxjat sakemm il-proċeduri odjerni, minnu intavolati, jiġu deċiżi.

Kunsiderazzjoni Legali dwar l-istitu ta' rikuża.

17. Jirrizulta illi l-Artikolu 733 tal-Kap 12 jipprovdi dan li ġej:

L-Imħallfin ma jistgħux jiġu rrikuzati u lanqas jistgħu jastjenu ruħhom milli joqogħdu f'kawża miġjuba quddiemhom fil-qorti li fiha huma mahtura biex joqogħdu, hlief għal xi waħda mir-raġunijiet hawn wara msemmijin.

18. Jirrizulta illi l-artikolu li jipprovi għal raġunijiet ta' rikuża huwa l-Artikolu 734 tal-Kap 12, li jgħid is-segwent:

(1) L-Imħallef jista' jiġi rrikuzat jew jista' jastjeni ruħu milli joqgħod fil-kawża –

(a) jekk ikun qarib mid-demem jew bi żwieġ, f'linja dritta, ma' waħda mill-partijiet ;

(b) jekk ikun qarib mid-demem fil-grad ta' hu, ziju jew neputi, pro-ziju jew pro-neputi jew kuġin, ta' waħda mill-partijiet, jew qarib bi żwieġ fi grad ta' hu, ziju jew neputi, ta' waħda mill-partijiet;

(c) jekk ikun tutur, kuratur, jew werriet prezuntiv ta' waħda mill-partijiet; jew ikun jew kien prokuratur ta' waħda mill-partijiet fil-kawża; jekk ikun l-amministratur ta' stabbiliment jew soċjetà fil-kawża, jew jekk waħda mill-partijiet tkun il-werrieta prezuntiva tiegħu ;

(d) (i) jekk ikun ta l-parir tiegħu, ittratta quddiem il-qorti jew kiteb dwar il-kawża jew dwar kull haġa oħra li għandha x' taqsam mal-kawża jew tiddependi minnha, (emfażi ta' dina l-Qorti)

(ii) jekk il-kawża kienet ġia ġiet quddiemu bhala Imħallef jew bhala arbitru: (emfażi ta' dina l-Qorti)

Iżda dan ma jgħoddx għal deċiżjoni, mogħtija mill-Imħallef, meta ma tkunx qatgħet definittivament il-meritu fil-kwistjoni bejn il-partijiet, u lanqas għal sentenza li teħles ab observantia,

(iii) jekk ikun ħareġ flus għall-kawża,

(iv) jekk ikun xehed, jew jekk waħda mill-partijiet tkun bi ħsiebha ssejjaħlu bhala xhud;

- (e) jekk hu, jew il-mara tiegħu, jew ir-raġel tagħha, ikollhom interess dirett jew indirett dwar kif tinqata l-kawża;
- (f) jekk l-avukat jew prokuratur legali li jkun qed jidher quddiem Imħallef ikun ibnu jew bintu stess, ir-raġel tagħha jew il-mara tiegħu jew axxendent tiegħu;
- (g) jekk l-avukat jew prokuratur legali li jkun qed jidher quddiem Imħallef ikun hu jew oħt l-istess ġudikant ;
- (h) jekk l-Imħallef jew ir-raġel tagħha jew il-mara tiegħu jkollhom kawża pendent kontra xi waħda mill-partijiet fil-kawża jew ikun kreditur jew debitur ta` xi parti fil-kawża b`mod li jista` raġonevolment jagħti lok ta` suspett ta` interess dirett jew indirett li jista` jinfluwenza l-eżitu tal-kawża.
- (2) L-Imħallef jista` jiġi rikuzat jew jista` jastjeni ruħu milli joqgħod f`kawża meta l-kawża tkun ġia giet quddiemu u hu jkun tkellem fuq l-istess merti ta` dik il-kawża meta kien qed joqgħod bħala Imħallef fil-Qorti ta` ġurisdizzjoni volontarja.

19. Jirrizulta illi r-rikorrenti qiegħed jitlob ir-rikuża ta' dina l-Qorti, kif komposta, abbażi tal-Artikolu 734 (1) (d) (i) u 734 (1) (d) (ii).
20. Jirrizulta illi talba bħal dik tar-rikorrenti hija waħda li ssir ta' spiss quddiem dawna l-Qrati, u għalhekk ġia giet ampjament ikkunsidrata minn dawna l-Qrati. Hawnhekk, il-Qorti tqis illi għandha tagħmel referenza ampja għal dak espress mill-Imħallef Joseph Zammit McKeon f`kawża Kostituzzjonali indirizzata preċiżament fuq allegat leżjoni wara li talba għal rikuzat giet miċhuda, ossija il-kawża **Joseph Borg et vs Avukat Ġenerali**, deċiża fit-30 ta' Mejju 2019 u mhux appellata, fejn għamel rassenja vasta u ampja tad-dottrina u ġurisprudenza in konnessjoni ma' tali talba, liema ħsbijiet dina l-Qorti tabbraċċja pjenament u tagħmel tagħha filwaqt illi, għal kull buon fini, ser tirripoduċihom hawnhekk sabiex il-ħsieb ta' dina l-Qorti jkun ċar.
21. Jirrizulta, illi l-Prim' Awla tal-Qorti Ċivili, (Sede Kostituzzjonali), presjeduta mill-Imħallef Joseph Zammit Mckeon, fil-kawża fuq imsemmija '**Joseph Borg et vs Avukat Ġenerali**', Rikors Ġuramentat 22/2018 deċiża fit-3 ta' Mejju 2019 u mhux appellata, kellha dan xi tgħid dwar il-ġurisprudenza u dottrina relatata ma' talba għal rikuzat ta' Ġudikant:

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

“Ir-rikuża mhix haġa ta` konvenjenza iżda ta` Ġustizzja u għalhekk sabiex wiehed jirrikorri għaliha, ir-raġuni trid tkun fondata; altrimenti tagħti lok għall-abbuż.”

Issir referenza għal dak li kiteb il-Professor Hoong Phun (li kien id-Dekan tal-Fakolta` tal-Liġi fl-Universita ta` Auckland - New Zealand kif ukoll Imħallef

fil-Qorti tal-Appell ta' l-istess pajjiż) 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 premiss, tajjeb jingħad illi anke jekk skont l-Art 733 u 734 tal-Kap 12 ma jkunx hemm bażi għar-rikuża jew għall-astensjoni ta' Imħallef, tista' tinħoloq sitwazzjoni fejn il-fatt li talba għal rikuża jew astensjoni tkun respinta għib magħha konflitt mal-jeddijiet fundamentali tal-persuna, u għalhekk il-ħarsien tal-jeddijiet fundamentali jipprevalu fuq id-disposizzjonijiet tal-liġi 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' Ġunju 1994 ; u PA/K : **Ghirxi vs Onor Prim Ministru et** : 1 ta' Novembru 1991)*

*Indipendentement mill-fatt jekk iċ-ċirkostanzi jkunux tali li jintitolaw lill-parti li titlob ir-rikuża tal-ġudikant skont il-liġijiet ordinarji, il-parametri ta' dawn il-liġijiet għandhom jitqiesu li jkunu twessgħu bid-disposizzjonijiet tal-Konstituzzjoni u tal-Konvenzjoni li jħarsu s-smiġħ xieraq (ara : QK : **Dr. A. Mifsud vs On. Prim Ministru et** : 17 ta' Lulju 1996).*

*Il-Qorti trid teżamina jekk fil-konkret, mhux fl-astratt, jistax jingħad li hemm jew jistax ikun hemm bias fil-ġudikant li jirrendi l-operat tiegħu soġġettivament jew oġġettivament parzjali. Kollox għandu jkun meqjus abbażi tal-fatti u ċirkostanzi ta' kull każ (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' Ottubru 1984).*

Biex raġuni twassal għall-astensjoni jew għar-rikuża ta` ġudikant, din trid tkun waħda konkreta, mhux merament perċepita. Inġhad illi :-

*“il-liġi ma trid li, semplicement għax parti jew oħra f`kawża ‘thoss’ jew ‘jidhrilha’ li ġudikant jista` jkun parzjali, allura dak il-ġudikant għandu ma jhux konjizzjoni ta` dik il-kawża. Apparti l-obbligu li l-liġi timponi fuq il-ġudikant li joqgħod f`kull kawża li tiġi lili assenjata skond il-liġi u li jastjeni jew jilqa` l-eċċezzjoni tar-rikuża fil-kazijiet 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 moħħ parti jew oħra, jista` jingħad li huwa ‘ogġettivament ġustifikat’. It-test ogġettiv ta` l-imparzjalita`, anke kif mifhum mill-Qorti Ewropea tad-Drittijiet tal-Bniedem jirrikjedi li jkun hemm bażi ogġettivament riskontrabbli.” [ara : QK : **Dr Joseph Zammit Tabona et vs Direttur Ġenerali tal-Qrati tal-Ġustizzja et** : 25 ta` Novembru 2016 ; QK : 12 ta` 12 ta` Ġunju 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-Paġna 201 ta` “Law of the European Convention on Human Rights (Second Edition ; 2009 ; OUP) l-awturi Harris, O`Boyle u Warbrick jgħidu hekk dwar l-Art 6 tal-Konvenzjoni :-

The Court (b`riferenza għall-ECTHR) 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-Paġna 202 ikompli 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 court being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial.

Fil-Paġna 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-Paġna 224 jgħidu :-

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.

Imbagħad fil-Pagna 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.

Jgħidu wkoll fil-Pagna 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-aħħar bran minn "Law of the European Convention on Human Rights isib konferma fil-kitba : **Judicial Impartiality Under the European Convention on Human Rights** fejn l-Imħallef Luzius Wildhaber, li kien President tal-ECtHR 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 ingħatat tifsira fis-sens ta` nuqqas ta` preġudizzju 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* deċiża fit-22 ta` Ottubru 2007 mill-ECTHR ; u *Piersack v. Belgium* : ECtHR : 1 ta` Ġunju 1982).*

*Fil-każ ta` **Hauschildt v. Denmark** deċiż fl-24 ta` Mejju 1989, l-ECtHR 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-deċiżjoni li tat fil-25 ta` Frar 1997 fil-każ ta` “**Findlay v. United Kingdom**” l-ECtHR kellha l-okkażjoni tippronunzja ruħha 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-każ ta` **Daktaras v Lithuania** li kien deċiż fl-10 ta` Ottubru 2000, l-ECtHR sostniet il-prinċipju 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-każ ta` **Kraska v. Switzerland** li kien deċiż fid-19 ta` April 1993, l-ECtHR 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 jagħmel rassenja tal-prinċipji li jsawwru dak li għandu jfisser “an impartial tribunal” b`eżempji ta` sitwazzjonijiet naxxenti minn ġurisprudenza tal-ECtHR :-*

*“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 individualisation/causal link, requiring personal bias to be shown by any member of the tribunal vis-à-vis one of the parties; subjective impartiality is presumed unless there is proof to the contrary (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 criminal case (Lavents; this case involved a finding of the pre-suspension 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 of presumption of innocence arose);*
- *statement by an investigative judge in a decision to commit the applicant for trial that there was “sufficient evidence of the applicant’s guilt”, where that judge subsequently tried the 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 be 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 functions by 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 legislative/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 political party which had been the principal target of the allegedly defamatory material (Holm, but see Salaman, dec.). A jury where certain members had previously made racist jokes concerning the applicant, despite the fact that those damaging statements were subsequently rebutted as improper by an individual juror who had made them and by the jury itself (Sander). Prosecutor speaking to jurors informally during a trial break, the presiding judge failing to inquire from the jurors on the nature of the remarks exchanged and the possible influence they might have had on the jurors' opinions (Farhi). Close family ties (uncle-nephew) between a judge and lawyer of the opposite party (Micallef v. Malta). Two members of a trial court who had earlier set or varied remand – including detention – referring to justification which had not been based on the prosecutor's request for detention and which had implied admission of sufficiency of evidence against the applicant (Cardona Serrat v. Spain). Extremely virulent press campaign surrounding trial of two minor co-accused, coupled with the lack of effective participation 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 ascertain social group or association – such as belonging to the same political party or religious confession as one of the parties in the case – is not sufficient to sustain the legitimacy of the doubt under the objective test; a sufficient degree of individualisation/causal link of the alleged bias of the tribunal is necessary even under the objective test (compare, for instance, the different conclusions in similar circumstances in Holm and Salaman v. the United Kingdom, dec. ; Sigurdsson and Pullar v. the United Kingdom, dec.).”

*Issir referenza ukoll għal dak li ngħad minn Lord Denning fid-deċiżjoni fil-kawża **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 tirreferi għas-sentenza li tat il-Qorti Kostituzzjonali fit-12 ta` Lulju 2005 fil-kawża : **Sandro Chetcuti et vs L-Avukat Ġenerali et** : fejn ingħad 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-eżekuttiv ;

“Imparzialita” tista` tkun soġġettiva jew oġġettiva. Hija soġġettiva meta “the tribunal is subjectively impartial in the sense that its members are free from personal bias” u oġġettiva “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-imparzialita` tal-membri tat-tribunal għandha tkun preżunta sakemm ma tingiebx prova bil-kuntrarju (ara Le Compte, Van Leuven and De Meyere 23.6.91)

Huwa paċifiku wkoll fil-ġurisprudenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem illi, id-deċiżjoni jekk teżistix jew le imparzialita` ai termini ta` l-Artikolu 6(1) tal-Konvenzjoni, trid tiġi bbażata fuq test soġġettiv, ċioe` fuq il-konvinzjoni personali tal-ġudikant partikolari f`każ speċifiku, u wkoll fuq test oġġettiv, u ċioe` jekk il-ġudikant ikunx fil-każ partikolari joffri garanziji suffiċjenti sabiex jeskludi kull dubju legittimu ta` parzjalita`.

*Il-Qorti sejra terġa` tiċċita minn “**Law of the European Convention on Human Rights**” (op. cit.) fejn ingħad 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-każ ta` **Kyprianou vs Cyprus** tal-15 ta` Diċembru 2005 l-ECtHR 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, ECTHR 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, ECTHR 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-kawża fl-ismijiet **Lawrence Grech et vs L-Avukat Ġenerali**.*

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

L-Ewwel Qorti ċaħdet it-talbiet tal-atturi, wara li għamlet dawn l-osservazzjonijiet :-

Din il-qorti tqis illi hu minnu li l-gustizzja trid tidher li qed issir. Jibda biex jingħad illi l-għażla tal-gudikant għal kawża ma ssirx mill-gudikant innifsu iżda minn mekkanizmu appożitu li jithaddem mir-registratur tal-qrati, bla ebda interferenza jew partiċipazzjoni jew addirittura l-konozzenza a priori tal-istess gudikant li lilu ser tmiss il-kawża. Il-gudikant hu għal kollox estraneju għall-mekkanizmu li bih kawża tiġi assenjata lilu bl-eċċezzjoni ta` kawżi speċjalizzati fejn din partikolari ma taqax f`tali kategorija. Id-diċitura `gustizzja trid tidher li qed issir` ma għandhiex tifsira soġġettiva bħal per eżempju parti mhix kuntenta bl-għażla tal-gudikant. Lanqas ma tfisser li `the ordinary man in the street` mhux ben infurmat fuq il-fatti speċifiċi u t-tema legali involuta b`perċezzjoni limitata għalhekk tal-assiem fattwali u legali ta` dak li qed jiġi deċiż jista` jew għandu b`xi mod jinfluwenza l-interpretazzjoni tal-istess diċitura. Id-diċitura `gustizzja trid tidher li qed issir` għandha tkun miftehma u espressa fil-konkret tagħha u applikata mill-kulleġġ tal-gudikanti skond il-fattispecie u n-natura ta` kull kawża. Wara kollox hu prinċipju regolatur illi l-gudikant hu prezunt imparzjali għax l-imparzjalità hi parti intima mill-gurament tal-ħatra tiegħu u li għandu jżomm quddiem għajnejh u jattwa f`kull kawża u kull ċirkostanza sakemm hu msejjaħ jippresjedi u jiġġudika disputa. Din hi garanzija li l-gudikant hu marbut li jagħti biex isostni l-applikazzjoni tal-gustizzja skond il-liġi, l-ugwaljanza għal kull min jidher quddiemu, u fil-prattika jsaħħaħ id-demokrazija, fonti tal-libertà tal-bniedem f`soċjetà ċivili (ara artikolu 10 tal-Kap. 12) anki jekk iħossu skomdu għal kwalsiasi raġuni tkun xi tkun bil-vertenza quddiemu għax dak hu l-prezz tal-gurament li jkun ha quddiem l-istat u quddiem Alla.

Il-kwistjoni attriċi hi jekk din il-garanzija fil-kawża ċivili li tat lok għal din il-vertenza hiex minsusa b`tali mod li hemm dubju serju oġġettiv u konkret u mhux biss perċezzjoni astratta jew soġġettiva għar-rikorrenti li l-gustizzja jista` jkun li ma ssirx.

Ir-rikorrenti jibbażaw l-ilment prinċipali tagħhom fuq nuqqas ta` imparzjalità oġġettiva. Qed jallegaw bażikament illi hemm raġuni legittima li gġegħelhom jibzghu li l-gudikant jonqos fih l-element ta` imparzjalità. Jorbtu dan il-biża` mal-fatt illi bħala president ta` Radju Marija jista` jxaqleb jew iħares b`għajjn aktar beninja lejn l-intimata Arċidjoċesi ta` Malta.

Din il-qorti fliet il-provi u ma tistax issib dan il-biża` bħala wieħed fondat mill-ottika oġġettiva. Irriżulta li ma hemm ebda rabta ta` ebda natura bejn il-gudikant involut, Radju Marija u l-intimat Kurja Arċiveskovili.

Radju Marija hi organizazzjoni volontarja, magħmula minn soċji li jagħtu s-sehem tagħhom fl-ispirtu tal-volontarjat. Il-finanzi ta` Radju Marija jiġu biss minn donazzjonijiet tal-fidili. L-Arcidjoċesi ta` Malta ma tipprovdi ebda għajjnuna finanzjarja jew mod ieħor. Il-ġudikant innifsu bħala president jagħti sehem biss fl-amministrazzjoni tar-radju bla ebda jedd jew poter fuq dak li jixxandar u minn min jixxandar. Dak hu fdat fidejn saċerdot li hu l-uniku soċju jekk trid issejjaħlu hekk li jappartjeni lis-saċerdozju. Radju Marija hu fil-fatt assoċjazzjoni lajkali.

L-uniku punt ta` vergenza li hemm bejn ir-radju u l-Arcidjoċesi hu biss ir-religjon Kattolika. Ir-radju hu kommess li jxandar u jxerred il-kelma ta` Alla b`enfasi speċjali fuq il-Madonna kif espressa fir-religjon Kattolika u l-intimita Arcidjoċesi 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-ġudikant fil-kawża ċivili mertu ta` dawn il-proċeduri hu oġġettivament biased għax preżumibilmment jipprattika l-istess religjon għalkemm ebda prova ut sic ma saret dwar liema religjon jipprattika l-ġudikant in kwistjoni.

...

Li kieku din il-qorti kellha b`eċċess ta` kawtela, fil-fehma tagħha ingustifikata, taċċetta t-teżi tar-rikorrenti, dan ifisser li ġudikant li għandu kwalsiasi fehma, kemm politika, kemm religjuża, kemm sportiva jew kulturali u li quddiemu jersqu in ġudizzju persuni jew entitajiet ta` fehma dikjaratament differenti, allura ser nispiċċaw bir-riskju li ma ssibx ġudikanti li lesti jiddeċiedu, jew, aghar, li jsir abbuż mill-partijiet mis-sistema ġudizzjarja jew li addiritura l-għażla ta` ġudikant b`fehma li tissimpatizza ma` waħda mill-partijiet fit-twemmin jew fil-politika jew affarijiet oħra ser jispiċċa bilfors jiddeċiedi favur dik il-parti.

...

Il-qorti tenfasizza li għalkemm il-ġudikant għandu bħal kull persuna oħra l-opinjoni personali tiegħu fuq kull aspett tal-ħajja ċivili u morali u għandu l-umanità fragili tiegħu bħal kull bniedem ieħor però hu wkoll imsejjaħ għal servizz li jagħmel ġustizzja skont il-liġi, u għalhekk irid, b`responsabilità akbar u b`obbligu solenni li għalih ikkommetta ruħu b`ġurament, ipogġi fil-ġenb kull opinjoni jew fehma personali biex b`kuraġġ, b`saħħa u b`kuxjenza saffa jqis li ssir ġustizzja safejn tippermettilu l-liġi.

Ma hemm xejn fl-atti li juri li l-ġudikant imsejjaħ jiddeċiedi l-kawża ċivili ser jonqos minn dan id-dover jew hemm xi biza` fondat u serju li mhux ser jaqdi dan l-obbligu li hu msejjaħ jadempixxi b`serjetà, onestà u b`rispett għal-liġijiet u Kostituzzjoni ta` Malta.

Fid-deċiżjoni tagħha l-Qorti Kostituzzjoni hasbitha diversament. Qalet hekk :-

“9. Hemm diversi osservazzjonijiet f’dawn is-sottomissjonijiet tal-atturi li ma huwiex korretti. Ċertament ma huwiex u ma jistax ikun il-każ illi l-kriterju ta’ imparzjalità soġġettiva “jiddependi biss mill-perspettiva tal-appellanti”, jew li “l-iċken dubju ta’ imparzjalità oġġettiva minn naħa tal-ġudikant seta’ raġonevolment jiġi pperċepit mill-appellanti li ser jippreġudika d-dritt ta’ smiġħ xieraq”, għax “il-kawża hija tal-appellanti”.

Li tammetti dawn it-teoriji jfisser illi parti f’kawża effettivament għandha veto fuq il-ħatra ta’ mħallef biex jisma’ l-każ tagħha.

10. Ukoll, ma huwiex korrett li tgħid illi, għax Imħallef ma jastjenix meta jara li parti għandha “biża’ qawwi jekk hux ser issir ġustizzja”, dan juri “nuqqas ta’ imparzjalità oġġettiva”. Hija għalhekk inkorretta l-osservazzjoni tal-atturi illi, għax il-parti l-oħra fil-kawża wriet “reżistenza qawwija” għall-eċċezzjoni ta’ rikuzza, dan huwa sinjal ta’ parzjalità favur dik il-parti. Jekk eċċezzjoni ta’ rikuzza titressaq mhux għal raġunijiet oġġettivament ġustifikabbli iżda għax il-ġudikant ma jogħġobx lil parti, tagħmel sew il-parti l-oħra li tirreżisti l-eċċezzjoni.

11. Lanqas ma hu minnu li, għax ġudikant jgħix it-twemmin tiegħu “pubblikament u b’partecipazzjoni attiva”, b’hekk “jinħolqu ċirkostanzi dubbjużi”; ġudikant mhux bilfors ikollu jgħix it-twemmin tiegħu fil-katakombi biex jitqies oġġettivament imparzjali.

12. L-Imħallef tal-ewwel istanza evidentement kien tal-fehma li r-regoli ta’ rekuza fil-Kodiċi ta’ Proċedura kienu jipprekluduh milli jastjeni mis-smiġħ tal-kawża u li skont il-liġi kien għalhekk obligat li jismagħha.

Mill-perspettiva kostituzzjonali, iżda, japplikaw konsiderazzjonijiet oħrajn. Il-kwistjoni hi jekk hemmx raġunijiet li oġġettivament jiġġustifikaw il-biża’ ta’ parzjalità. Għalkemm dak li tħoss jew taħseb jew tibża’ parti f’kawża dwar il-parzjalità jew imparzjalità tal-ġudikant huwa wkoll relevanti għall-għanijiet tal-imparzjalità, ma huwiex il-kriterju determinanti: li hu determinanti hu jekk dak il-biża’ jew dik il-perċezzjoni huwiex imsejjes fuq konsiderazzjonijiet oġġettivi hekk li persuna raġonevoli u mingħajr preġudizzji tagħha tasal biex hi wkoll ikollha dubji dwar l-imparzjalità tal-ġudikant.

13. L-apparenzi wkoll jistgħu jkun konsiderazzjonijiet oġġettivi li joħolqu dubji. Ukoll jekk ma hemmx rabtiet ġerarkiċi bejn ġudikant u parti fil-kawża, jekk l-apparenzi huma hekk li persuna raġonevoli tista’ wkoll mingħajr wisq tiġbid jagħtu x’taħseb li hemm dawk ir-rabtiet, id-dubju ta’ dik il-persuna dwar l-imparzjalità tal-ġudikant jista’ jkun dubju oġġettivament ġustifikat.

14. Fejn jeżistu dubji bħal dan, ikun fl-interess mhux biss tal-parti li oġġettivament tara raġunijiet ta` parzjalità kontriha li l-ġudikant ma jkomplix jisma` l-każ; ikun ukoll fl-interess tal-parti l-oħra għaliex il-ġudikant jista`, biex jegħleb kull dubju dwar l-imparzjalità tiegħu ixaqleb, imqar inkonxjament favur l-parti l-oħra.

15. Il-kwistjoni issa hi jekk fil-każ tal-lum hemmx raġunijiet oġġettivi li f'osservatur raġonevoli u imparzjali jistgħu joħolqu dehra ta` rabtiet bejn ġudikant u parti f'kawża hekk li tiddgħajjef il-fiduċja fl-imparzjalità ta` dak il-ġudikant.

16. 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-Arċidjoċesi u r-radju, ma hijiex għal kollox imgebbda l-perċezzjoni ta` rabta mill-qrib bejniethom. Din il-perċezzjoni tiġi gġenerata mill-fatt oġġettiv illi d-direttur tal-programmi għandu dejjem ikun kjeriku, meta tqis l-istqarrija tal-istess direttur illi jekk "jiżgarra" jibgħat għalih l-Arċisqof, u meta tqis ukoll illi l-Provinċjal tad-Dumnikani kellu s-setgħa li jeżiġi u jikseb ir-riżenja 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 ewlieni fit-tmexxija tal-istess assoċjazzjoni li, għar-raġunijiet imsemmija fuq, ma hijiex għal kollox ħielsa minn rabta, li tista` wkoll tidher ġerarkika, mal-Arċidjoċesi.

17. 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 oġġettiva ta` min għandu rwol fit-tmexxija ta` dik l-assoċjazzjoni. Id-dubju ma huwiex wieħed li ma jitqiesx oġġettivament ġustifikat, ukoll jekk dak id-dubju ma jolqotx l-imparzjalità soġġettiva tal-Imħallef.

18. Għal dawn ir-raġunijiet il-qorti tilqa` l-appell u tħassar is-sentenza appellata: tipprovdi dwar l-ewwel żewġ talbiet billi tgħid illi jkun hemm ksur tal-jedd tal-atturi għal smiġħ xieraq jekk ma tintlaqax l-eċċezzjoni ta` rikuzza tal-Imħallef li qiegħed jisma` l-kawża fl-ismijiet Lawrence Grech et v. Carmelo Pulis et (rik.489/2013), u għalhekk tordna li l-kawża ma titkompliex quddiem l-istess Imħallef; ma huwa meħtieġ ebda provvediment dwar it-tielet u r-raba` talbiet billi s-surroga tal-Imħallef issir kif iġid u jrid il-Kodiċi ta` Organizzazzjoni u Proċedura Ċivili."

(ara wkoll il-provvediment ta` din il-Qorti diversament presjeduta mogħti fit-30 ta` Mejju 2018 fl-ismijiet Alfred Degiorgio vs L-Avukat Ġenerali li għaddiet in ġudikat)

*Fis-sentenza li tat fil-31 ta` Mejju 2018 fil-kawża fl-ismijiet **Sharon Rose Roche vs Avukat Ġenerali et** (konfermata b`sentenza tal-Qorti Kostituzzjonali tad-29 ta` Marzu 2019) din il-Qorti diversament presjeduta kien qalet hekk :-*

Il-ġudikant li jiddeċiedi dwar ir-rikuża tiegħu stess huwa li huwa indipendenti u imparzjali fid-deċiżjoni tiegħu.

Kif jgħid 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-ġudikant huwa valur fundamentali tal-etika ġudizzjarja. Ġudikant għandu l-obbligu li jisma` u jiddeċiedi każ fuq il-provi u s-sottomissjonijiet imressqa u mhux fuq konsiderazzjonijiet mhux xierqa (improper considerations), hieles minn xi preġudizzju jew interess, dirett jew indirett, fl-eżitu tal-kawża jew fil-partijiet jew l-avukati li qed jillitigaw quddiemu. Dan l-obbligu huwa mnisseġ fil-ġuramenti ta` lealta` u ta` ħatra li jieħu kull ġudikant qabel ma jibda jaqdi dmirijietu.

3. Il-ġudikant għandu jiddisponi minn talba għar-rikuża tiegħu b`mod ekwu u gust (fairly) u jekk ma jagħmilx hekk, ikun qed jabbuża mid-diskrezzjoni tiegħu, kif ċirkoskritta mil-liġi u jkun hemm konsegwenzi serji għal tali abbuż.

4. Illi f`każ li ma jilqax it-talba (tar-rikuża), il-kawża titkompla, munita bil-garanziji kollha stabbiliti fil-qafas legali tagħna, inklużi dawk kostituzzjonali u konvenzjonali għall-protezzjoni tal-jedd tas-smiġħ xieraq;

5. Dawn il-garanziji jipproteġu lill-partijiet fil-kawża f`każ li l-ġudikant eventwalment juri li huwa parzjali jew jagħti l-apparenza ta` parzjalita` (bias) biex jiddeċiedi l-kwistjoni bejn il-partijiet.

[ara wkoll is-sentenza li tat il-Qorti Kostituzzjonali fil-5 ta` Ottubru 2018 fil-kawża fl-ismijiet Avukat Peter Caruana Galizia et vs Kummissarju tal-Pulizija et].

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

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 hareġ 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, jingħad 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 a 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.

Bias and the appearance of bias

*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.*

...

3.14 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-riċerka taġġha l-Qorti ltaqġhet ma` kitba bit-titolu : “**A question of judicial bias**” ta` Matt Evans li dehret fis-sit elettroniku : <http://www.thejusticegap.com/2012/09/a-question-of-judicial-bias/> : fejn kien trattat dak magħruf bħala : “subconscious bias”. L-awtur jgħid 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 Properties 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-*Kodiċi tal-Etika tal-Membri tal-Ġudikatura ta` Malta*, hemm stipolat illi :

"15. Il-ġudikanti għandhom jaqdu d-dmirijiet tagħhom fid-dawl tal-kuxjenza tagħhom b`mod oġġettiv bla biża`, bla favuri u mingħajr preġudizzji, u dana skond il-liġijiet u d-drawwiet tal-pajjiż.

16. Il-ġudikanti għandhom d-dover li fil-qadi ta` dmirijiethom iwarrbu kull preġudizzju u jiddeċiedu l-kawzi oġġettivament u unikament fuq il-meritu legali u fattwali tagħhom.

17. Il-ġudikanti għandhom iġibu ruħhom, kemm fil-Qorti u kemm ukoll barra l-Qorti, b`mod li ma jpoġġux fid-dubbju l-indipendenza u l-imparzjalità tagħhom jew ta` l-uffiċċju li jokkupaw.

...

23. Il-ġudikanti ma għandhomx joqogħdu f`kawża meta huma jkunu jafu li dwarhom hemm waħda mir-raġunijiet ta` rikuża li jissemew fil-Kodiċi ta`Organizzazzjoni u Proċedura Ċivili jew fejn ikun ovvju l-perikolu jew preġudizzju għal smiġħ xieraq, altrimenti huma għandhom l-obbligu li ma jabdikawx mid-doveri tagħhom."

L-imparzjalità ta` ġudikant hija dejjem prezunta salv għal prova kuntrarja. L-istitut tar-rikuża jew ta` l-astensjoni ta` ġudikant jinbena fuq il-presuppost li l-ġudikant li quddiemu jitressaq każ huwa mparzjali u li huwa dmir tiegħu (mhux sempliċi privileġġ jew favur) li jisma` u jaqta` kull kawża li titressaq quddiemu. Fil-fehma ta` din il-Qorti, kemm għal dak li jirrigwarda t-test oġġettiv u kif ukoll dak soġġettiv, il-fattur li għandu jagħti lok għal dubbju dwar l-imparzjalità tal-ġudikant għandu jkun wiehed gravi.

Konsiderazzjonijiet finali

22. Jirrizulta illi mill-assjem tat-tagħlim kif fuq dettaljat, jidher ċar illi sabiex Ġudikant jirrikuża ruħu, dana jrid ikun ukoll ibbażat kemm fuq dak ipprovdut fil-Ligi, kif ukoll fuq fatti u konsiderazzjonijiet ben aċcertabbli u oġġettivament ġustifikati.
23. Jirrizulta mill-fatti odjerni, illi r-rikorrent talab li dina l-Qorti tipprovdri sabiex jingħata l-helsien mill-arrest bħala miżura provviżorja peress illi l-perjodu stabbilit fl-Avviż Legali 276.05 għaż-żamma taħt kustodja fi stennija għat-treġġiegh kien skada.
24. Jirrizulta illi din il-Qorti, kif komposta, ikkunsidrat unikament tali vertenza u dwar jekk skadiex jew le fl-ambitu ta' dak mitlub, u qieset li ma skadiex stante illi kien ir-rikorrent stess li waqqaf it-treġġiegh lura bil-proċeduri odjerni.
25. Jirrizulta, mill-banda l-oħra, il-proċeduri Kostituzzjonali w it-talbiet hemm magħmula, illi qed jistemgħu quddiem dina l-Qorti, ma għandhom ebda ness mar-rikjesta jekk ir-rikorrenti għandux jingħatax il-helsien mill-arrest jew le, peress illi, kif redatti, jirrigwardaw l-Legislazzjoni Sussidjarja 276.05 tal-Liġijiet ta' Malta w kif din hija rilfessa jew le mid-Deciżjoni Kwadru tal-Kunsill 2002/584/JHA u kif in-nuqqasijiet o meno f' tali legislazzjoni setgħu qed jinpingu fuq id-drittijiet fundamentali tar-rikorrent.
26. Jirrizulta, għalhekk, a differenza ta' dak allegat mill-Avukat tar-rikorrent, illi dina l-Qorti, kif komposta, ma għaddiet u ma setgħet qatt tgħaddi ebda deciżjoni u/jew iffurmat ebda opinjoni dwar il-vertenza tal-kawża odjerna, peress illi dak ikkunsidrat minn dina l-Qorti fid-deciżjoni tagħha tal-20 ta' Jannar 2022, li wasslet għat-talba tar-rikuża da' parte tar-rikorrent, tirrigwarda meritu distint u separat minn dak li qiegħed jiġi diskuss u trattat quddiem dina l-Qorti, bħala Qorti ta' kompetenza Kostituzzjonali.
27. Salv il-fatt illi r-rikorrent ma huwiex kuntent bid-deciżjoni ta' dina l-Qorti illi jithalla ġewwa l-Facilita' Korrettiva ta' Kordin, ma jidher illi jeżistu ebda fatti aċcertabbli u oġġettivament ġustifikabbli illi jistgħu, b'xi mod, iwasslu lil dana il-Ġudikant sabiex jastjeni mill-obbligi u doveri minnu assunti bħala Ġudikant tal-Qrati ta' Malta, kif qiegħed jinsisti r-rikorrent li għandha tagħmel dina l-Qorti.
28. Għaldaqstant, il-Qorti ma tara ebda raġuni għaliex għandha tilqa' t-talba kif redatta mir-rikorrent fil-verbal illi sar fis-seduta tat-3 ta' Frar 2022.

Konkluzjoni

Il-Qorti,

Wara illi rat s-sottomissjonijiet tal-avukati tal-partijiet u semgħet it-trattazzjoni ta' l-abblidifensuri tal-partijiet;

Tgħaddi biex tiddeciedi t-talba ta' rikuża kif redatta mill-konsulent legali tar-rikorrent billi:

Tiċhad t-talba kif redatta.

Spejjeż ikunu kkunsidrati fl-aħħar tal-proċeduri odjerni.

Il-Qorti għalhekk tordna t-tkomplija tal-provi.

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Imhallef

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