QORTI ĊIVILI
PRIM' AWLA

ONOR IMĦALLEF
DR FRANCESCO DEPASQUALE
LL.D. LL.M. (IMLI)

Seduta ta' nhar il-Ħamis
Erbgħatax (14) ta' Marzu 2024

Rikors Numru 807/2023 FDP

Fl-ismijiet

TSG Interactive Gaming Europe Ltd. (C-54266)

kontra

Markus Zisser (Passaport Awstrijak numru P7967876) debitament rappreżentat mill-mandatarja speċjali tiegħu l-Avv Dr Sarah Sultana (K.I. Nru. 0012581M)

Il-Qorti:-

1. Rat ir-rikors datat 25 ta' Lulju 2023, li permezz tiegħu s-soċjeta' rikorrenti talbet s-segwenti:

   1. *Tiddikjara u tiddeċiedi li r-rikonixximent estera tal-Qorti "Regional Court Eisenstadt" ġewwa l-Awstrija fid-29 ta' Lulju 2022 fil-kawża fl-ismijiet Markus Zisser vs TSG Interactive Gaming Europe Ltd. (Każ numru 3 Cg 51/22z-15) huwa manifestament kontra l-istrateġija pubblika (ordre public) fl-Istat Membru indirizzat (jiġifieri Malta) ai termini tal-Artikolu 45(1)(a) tar-Regolament UE Nru 1215/2012 dwar il-ġurisdizzjoni u r-rikonoxximent u l-eżekuzzjoni ta' sentenzi fi kwistjonijiet ċivili u kummerċjali (riformulazzjoni) tenut kont inter alia tal-Artikolu 56A(a)(i) u (ii) tal-Att dwar il-Logħob, Kap 583 tal-Liġijiet ta' Malta;*

   2. *Tiddikjara u tiddeċiedi illi r-rikonoxximent tas-sentenza estera tal-Qorti "Regional Court Eisenstadt" ġewwa l-Awstrija fid-29 ta' Lulju 2022 fil-kawża fl-ismijiet Markus Zisser vs TSG Interactive Gaming Europe Ltd. (Każ numru 3 Cg 51/22z-15) għandu jiġi rrifjutat ai termini tal-Artikolu 45(1)(a) tar-Regolament (UE) Nru. 1215/2012 tal-Parlament Ewropew u tal-Kunsill tat-12 ta' Diċembru 2012 dwar il-*

ġurisdizzjoni u r-rikonoxximent u l-eżekuzzjoni ta' sentenzi fi kwistjonijiet ċivili u kummerċjali (riformulazzjoni), dan in kwantu ir-rikonoxximent tal-imsemmija sentenzi jkun manifestament kontra l-istrateġija pubblika (ordre public) tal-istat Malti, tenut kont inter alia tal-Artikolu 56A tal-Att dwar il-Logħob, Kap 583 tal-Liġijiet ta' Malta.

3. *Tiddikjara u tiddeċiedi illi l-eżekuzzjoni tas-sentenza estera tal-Qorti "Regional Court Eisenstadt" ġewwa l-Awstrija fid-29 ta' Lulju 2022 fil-kawża fl-ismijiet Markus Zisser vs TSG Interactive Gaming Europe Ltd. (Każ numru 3 Cg 51/22z-15) għandu jiġi rrifjutat ai termini tal-Artikolu 46 tar-Regolament (UE) Nru. 1215/2012 tal-Parlament Ewropew u tal-Kunsill tat-12 ta' Diċembru 2012 dwar il-ġurisdizzjoni u r-rikonoxximent u l-eżekuzzjoni ta' sentenzi fi kwistjonijiet ċivili u kummerċjali (riformulazzjoni), dan in kwantu l-eżekuzzjoni tal-imsemmija sentenzi jkun manifestament kontra l-istrateġija pubblika (ordre public) tal-istat Malti, tenut kont inter alia tal-Artikolu 56A tal-Att dwar il-Logħob, Kap 583 tal-Liġijiet ta' Malta;*

2. Rat illi fil-11 ta' Diċembru 2023, l-intimat, debitament rappreżentat mill-mandatarja speċjali Dr Sarah Sultana, laqgħet għal dak mitlub billi, flimkien ma' eċċezzjonijiet fil-meritu, ressqet eċċezzjoni preliminari illi tgħid is-segwenti:

EĊĊEZZJONI: RIKUŻA Al TERMINI TA' L-ARTIKOLU 734(1)(d)(i) tal-Kap. 12 tal-Liġijiet ta'Malta

2. Illi preliminarjament l-intimat qed iressaq l-eċċezzjoni tar-rikuża ta' 1-Imħallef Sedenti Dr. Francesco Depasquale ai termini ta' l-Artikolu 734(1)(d)(i) tal-Kap. 12 tal-Liġijiet ta' Malta li jiddisponi illi Imħallef għandu jirrikuża ruħu milli jisma' kawża "jekk ikun ta' l-parir tiegħu, ittratta quddiem il-Qorti jew kiteb dwar il-kawża jew dwar kull ħaġa oħra li għandha x'taqsam mal-kawża jew tiddependi minnha";

3. Illi din l-eċċezzjoni qed titressaq b'riferenza għal dak li ddeċidiet din 1-Onorabbli Qorti b'digriet tat-8 ta' Awwissu 2023 fir-rigward tat-talba għall-ħruġ ta' mandat ta' sekwestru eżekuttiv numru 829/2023 preżentat fit-22 ta' Mejju 2023 u assenjat lill-istess Imħallef Sedenti għal digriet, fl-ismijiet Jasmin BUCIEGGER, detentriċi tal-liċenzja tas-sewqan numru 13093747 debitament rappreżentata mill-mandatarja speċjali tagħha Dr. Sarah Sultana (K.I. 0012581N) vs. Rabbit Entertainment Ltd.

4. Illi dan il-mandat ta' sekwestru intalab li jinħareġ, ai termini tar-Regolament UE 1215/2012 sabiex ssir l-eżekuzzjoni ta' sentenzi Awstrijaċi simili għal dawn preżenti fejn l-operatur tal-logħob Malti, f'dak il-każ Rabbit Entertainment Ltd, ġia ikkundannat bħal fil-każ ta' TSG Interactive Gaming Europe Ltd. hawnhekk, tħallas it-telf kollu mġarrab mill-ġugatriċi Jasmin Buchegger fuq is-sit tal-logħob online ġestit minn dak l-operatur minħabba il ma għandux liċenzja sabiex jopera ġewwa l-Awstrija, u għaldaqstant ai termini tal-liġi Awtsrijaka, kwalsiasi kuntratti konklużi ma' ġugatur ġewwa l-Awstrija huma nulli u bla effett, jammontaw għall-arrikiment indebitu u dan iwassal għar-rifużjoni ta' flus depożitati li jkunu ġew mitlufa;

5. ILLI din l-eżekuzzjoni u l-ħruġ tal-mandat ta' sekwestru eżekuttiv 829/2023 intalab a bażi tar-Regolament (UE) 1215/2012 li jistabilixxi illi r-rikonoxximent u l-eżekuzzjoni ta' sentenzi esteri bejn l-istati membri huma awtomatiċi u persuna b'sentenza estera tista' tmexxi bl-eżekuzzjoni tagħha ġo stat membru ieħor mill-ewwel u fl-immedjat; Tali miżura ta' enfurzar tippreċedi proċeduri mibdija mid-debitur għar-rifjut ta' l-eżekuzzjoni taħt l-Artikolu 46 ta' l-istess Regolament, proprju kif ġara fil-każ ta' Markus Zisser. Din il-miżura ta' enfurzar hija waħda minn mijiet oħra li intalbu lil din l-Onorabbli Qorti diversament presjeduta, li ġew milqugħa;

6. ILLI wara digriet mogħti fid-29 ta' Mejju 2023 li permezz tiegħu din il-Qorti kif presjeduta talbet lil Jasmin Buchegger tissostitwixxi l-mandat ta' sekwestru minnha intavolat wara li kkonstatat li dak il-mandat kien fih diversi żbalji, u wara illi dan l-istess mandat ġie sostitwit fil-11 ta' Lulju 2023 kif mitlub mill-istess Qorti, permezz ta' digriet ulterjuri tat-8 ta' Awwissu 2023 (kopja annessa bħala Dok. SS), din l-Onorabbli Qorti kif presjeduta irrifjutat li tapplika s-supremazija tal-liġi Ewropeja, u r-Regolament UE 1215/2012 li a bażi tiegħu fuq kollox intalab il-ħruġ tal-mandat eżekuttiv 829/2023 u ma ħallietx lill-ġugatriċi Jasmin Buchegger tipproċedi bl-eżekuzzjoni tas-sentenzi tagħha.

7. Dana billi l-Qorti kif presjeduta, qabdet u applikat l-Artikolu 56A tal-Kapitolu 583 suriferut fi ħruġ ta' mandat ta' sekwestru, fejn l-uniku eżerċizzju li din il-Qorti kellha tagħmel kien li tassigura illi r-rekwiżiti kollha mitluba mir-Regolament UE 1215/2012, partikolarment l-Artikoli 42 u 43 ta' l-istess rikjesti qabel il-ħruġ ta' miżura ta' enfurzar ta' sentenza ta' stat membru ieħor kienu ġew sodisfatti, u li dak li jiddisponi tassativament l-Artikolu 375 u 376 tal-Kap. 12 għall-ħruġ ta' mandati eżekuttivi kien ukoll sodisfatt, u xejn aktar;

8. ILLI minkejja li r-rekwiżiti kollha mitluba mil-liġi fi ħruġ ta' mandat eżekuttiv ġew sodisfatti, din il-Qorti kif presjeduta iddeċidiet, fi proċedura bħall-mandat ta' sekwestru fejn ma jinstemgħux il-partijiet u ma jsiru l-ebda sottomissjonijiet, illi tapplika minflok, sostantivament liġi bħall-Artikolu 56A tal-Kap. 583 meta ma setgħet qatt tagħmel hekk fil-ħruġ tal-mandat ta' sekwestru eżekuttiv u per di piu wieħed mitlub ai termini tar-Regolament UE 1215/2012 li japplika b'mod suprem għal-liġi Maltija fi kwistjonijiet li jikkonċernaw l-eżekuzzjoni ta' sentenzi mogħtija minn stati membri ta' l-Unjoni, b'effett mhux biss tar-Regolament innifsu imma tal-Primary Law Ewropeja, Artikolu 288 tat-Trattat dwar il-Funzjonament ta' l-Unjoni Ewropeja (TFEU), u tal-Artikolu 825A tal-Kap. 12 tal-Liġijiet ta' Malta li jrid li f'eżekuzzjonijiet ta' sentenzi ta' stati membri oħra ta' l-Unjoni, tkun il-liġi Ewropeja, u f'dan il-każ ir-Regolament UE 1215/2012 li jipprevalixxi fuq kwalsiasi liġi nazzjonali, kif ukoll kontra d-dettami tal-Qorti tal-Ġustizzja Ewropeja li trid illi kwalsiasi liġi jew prattika nazzjonali li tmur kontra l-liġi suprema Ewropeja applikabbli direttament fl-istati membri, bħal fil-każ tar-Regolament, tiġi mwarrba u ma tiġix applikata mill-Qorti nazzjonali ta' stat membru b'awtorita' tagħha stess u mingħajr ma titlob jew tistenna minn qabel illi dik il-liġi jew prattika

nazzjonali titħassar jew tiġi dikjarata bħala inapplikabbli, anki bl proċeduri kostituzzjonali;

9. ILLI konsegwentement allura, ġialadarba fil-proċeduri odjerni din il-Qorti qed tintalab tagħti ġudizzju fir-rigward ta' dawn il-proċeduri ta' rifjut ta' rikonoxximent u eżekuzzjoni u di piu li tapplika l-Artikolu 56A tal-Kap. 583 tal-Liġijiet ta' Malta kif jirriżulta pależament mir-rikors promotur (u di fatti l-esponenti ser ikun qed jindirizza l-Artikolu 56A tal-Kap. 583 f'intestatura hawn aktar 'l isfel paragrafi numri 57-86) u ġialadarba din il-Qorti kif presjeduta diġa qabdet u applikat l-Artikolu 56A f'rikors għal ħruġ tal-mandat eżekuttiv 829/2023 kif fuq spjegat, meta ma kellha l-ebda poter li tidderoga mir-Regolament UE 1215/2012 li japplika b'mod dirett u suprem ġewwa l-istati membri kollha ta' l-Unjoni Ewropeja, inkluża Malta u meta l-applikabilita' o meno ta' l-Artikolu 56A għall-proċeduri ta' rifjut ta' eżekuzzjoni ta' sentenzi esteri ma kellhiex tiġi bl-ebda mod mistħarrġa fil-ħruġ ta' mandat eżekuttiv imma fil-mertu waqt il-proċeduri ta' rifjut inizjati mid-debitur kif jiddisponi l-istess Regolament fl-Artikoli 45 u 46 ta' l-istess u wara li l-Qorti tisma' l-provi u s-sottomissjonijiet kollha tal-partijiet, bħalma fuq kollox qed jintalab fil-proċeduri odjerni ta' Markus Zisser, l-esponenti huwa ta' l-umli fehma illi din l-Onorabbli Qorti ma tista' qatt tkun oġġettiva fil-ġudizzju tagħha u ma tista' qatt tagħti ġudizzju li huwa imparzjali u independenti, meta kienet din il-Qorti stess li qabdet u applikat l-Artikolu 56A tal-Kap 583 kontra l-liġi suprema Ewropeja direttament applikabbli, kontra r-regoli ta' proċedura kif kontenuti fil-Kap 12 fi stadju ta' ħruġ ta' mandat ta' sekwestru u qabel lanqas biss bdiet tisma' l-provi, aktar u aktar meta din il-Qorti diġa' kellha quddiemha diversi rikorsi ta' rifjut ta' rikonoxximent u eżekuzzjoni tas-sentenzi Awstrijaċi inizjati minn operaturi varji, inkluż Mr. Green Limited taħt l-Artikolu 45 u 46 tar-Regolament UE 1215/2012 u li lkoll għadhom fl-istadju tal-provi ta l-operaturi mhux tal-ġugaturi:

10. ILLI l-massima "justice must not only be done (and within a reasonable time), but must also be seen to be done" għandha tapplika b'mod partikolari anki fil-kawża odjerna u din il-Qorti għandha fiċ-ċirkostanzi tal-każ ta' quddiemha, tirrikuża ruħha milli tkompli tisma' dawn il-proċeduri fl-interess tal-ġustizzja u f'salvagwardja għad-dritt fundamentali ta' l-esponenti għal smiegħ xieraq quddiem Qorti imparzjali u independenti, li kjarament din l-Onorabbli Qorti kif presjeduta m'hijiex u ma tista' qatt tkun, ladarba diġa' għaddiet il-ġudizzju li għaddiet fil-ħruġ tal-mandat ta' sekwestru eżekuttiv numru 829/2023 su-riferut, liema ġudizzju għandu, b'mod bil-wisq ovvju u pależi, x'jaqsam ħafna u b'mod dirett mal-proċeduri odjerni għalkemm dawn il-proċeduri huma f'ismijiet differenti (b'dana illi l-mandatarja tibqa' l-istess, ossia l-avukata sottofirmata in rappreżentanza tal-ġugaturi) u kontra operatur differenti;

11. Illi l-perċezzjoni tal-esponenti u ħafna ġugaturi oħra bħalu, hija li din il-Qorti ma tista' qatt tkun oġġettiva għaliex diġa ġo moħħha applikat l-Artikolu 56A biex taqta' saqajn kreditur kontra kull liġi Ewropeja u d-drittijiet tagħha fil-mument li ġiet sabiex teżegwixxi s-sentenzi tagħha b'miżura ta' enfurzar bħalma huwa l-mandat ta' sekwestru eżekuttiv, u

għalhekk ma hemm l-ebda garanzija li din il-Qorti kif presjeduta, mhux diġa waslet għal deċiżjoni f'moħħha li tapplika anki hawnhekk l-Artikolu 56A bi preġudizzju serjissimu fil-konfront tal-esponenti, jinġabu kemm jinġabu provi u sottomissjonijiet quddiem din il-Qorti li juru li t-talba tas-soċjeta' rikorrenti m'għandhiex tintlaqa', u dana kif ser jiġi ppruvat u sottomess ulterjorment fit-trattazzjoni ta' din l-ewwel eċċezzjoni;

3. Rat illi, in vista tal-eċċezzjoni preliminari ta' Dr Sarah Sultana noe, fis-seduta tal-1 ta' Frar 2024, ġie maqbul illi tali eċċezzjoni tiġi deċiża qabel ma l-kawża titkompla tinstema'.

4. Rat illi fl-1 ta' Frar 2024, il-kawża ġiet differita għas-sottomissjonijiet bil-miktub tal-partijiet.

5. Rat illi fis-16 ta' Frar 2024, ġew ippreżentati s-sottomissjonijiet bil-miktub tas-soċjeta' TSG Interactive Gaming Europe Limited.

6. Rat illi fit-23 ta' Frar 2024, ġew ippreżentati s-sottomissjonijiet bil-miktub ta' Dr Sarah Sultana nomine.

7. Rat illi fis-7 ta' Marzu 2024, il-kawża ġiet differita għas-sentenza preliminari.

Ikkunsidrat

8. Jirriżulta, mill-kontenut tal-eċċezzjoni preliminari ta' Dr Sarah Sultana nomine, illi hija qiegħda titlob dina l-Qorti sabiex tirrekuża ruħha a tenur tal-Artikolu 734 (1) (d) (i) tal-Kap 12, u dana wara illi Mandat ta' Sekwestru Eżekuttiv Nru 829/2023, fl-ismijiet Jasmin Buchegger vs Rabbit Entertainment Limited, ġie miċħud fit-8 ta' Awissu 2023 minn dina l-Qorti kif ippresjeduta, liema ċaħda saret wara li l-Qorti applikat dak leġiżlat mill-Kamra tar-Rappreżentanti ta' Malta u introdott fl-Artikolu 56A tal-Kap 583 tal-Liġijiet ta' Malta.

9. Jirriżulta illi l-abbli difensuri taż-żewġ partijiet ressqu sottomissjonijiet fir-reqqa sabiex fejn, fil-każ ta' Dr Sarah Sultana nomine, tiġġustifika t-talba tagħha, u fil-każ tas-soċjeta' TSG Interactive, tikkontradiċi l-argumenti għar-rikuża ta' din il-Qorti.

10. Din il-Qorti tqis illi, aktar milli tagħti l-veduti tagħha dwar dak illi talbet Dr Sarah Sultana nomine, hija għandha tagħmel referenza għall-ġurisprudenza nostrana dwar talba bħal dik magħmula minn Dr Sarah Sultana li ġia indirizzat l-ilment imressaq minnha.

Ġurisprudenza dwar Rikuża

11. Fil-kawża mogħtija mill-Qorti Ċivili, Prim' Awla (Ġurisdizzjoni Kostituzzjonali), fl-ismijiet **Grace Spiteri vs Avukat Ġenerali et** per Imħallef Joseph Zammit Mc Keon, mogħtija fit-13 ta' Lulju 2020 u kkonfermata sussegwentement mill-Qorti Kostituzzjonali fil-17 ta' Marzu 2021, saret rassenja dettaljata, erudita u ben studjata tal-istituzzjoni ta' rikuża w in-natura tagħha, w jimmerita illi dina l-Qorti tirriproduċi in extenso dak hemm kkunsidrat, sabiex il-ħsibijiet u konklużjonijiet jiġu hawn riprodotti. Dik il-Qorti kienet għamlet is-segwenti osservazzjonijiet:

V. Dottrina / Ġurisprudenza

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 ħaġa ta` konvenjenza iżda ta` Ġustizzja u għalhekk sabiex wieħed jirrikorri għaliha, ir-raġuni trid tkun fondata; altrimenti tagħti lok għall-abbuż."*

*Issir referenza għal dak li kiteb il-**Professur Hoong Phun** (li kien id-Dekan tal-Fakolta` tal-Liġi fl-Universita' ta` Auckland – New Zealand kif ukoll Imħallef fil-Qorti tal-Appell tal-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 premess, 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 ġġib magħha konflitt mal-jeddijiet fondamentali tal-persuna, u għalhekk il-ħarsien tal-jeddijiet fondamentali 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-Kostituzzjoni u tal-Konvenzjoni li jħarsu s-smigħ 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. Arċisqof 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.

Ingħad illi :-

> *"il-liġi ma tridx li, sempliċement għax parti jew oħra f`kawża `tħoss` 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 joqgħod f`kull kawża li tiġi lilu assenjata skond il-liġi u li jastjeni jew jilqa` l-eċċezzjoni tar-rikuża fil-każijiet biss fejn ikun legalment ġustifikat li huwa ma jkomplix jieħu konjizzjoni ta` dik il-kawża, mhux kull `ħsieb` ta` parzjalita` li jista` talvolta jgħaddi minn moħħ parti jew oħra, jista` jingħad li huwa `oġġettivament ġustifikat`. It-test oġġettiv tal-imparzjalita`, anke kif mifhum mill-Qorti Ewropea tad-Drittijiet tal-Bniedem jirrikjedi li jkun hemm bażi oġġettivament 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-Pag 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-Pag 202 ikomplu jaffermaw illi :-

> *The Court also allows States a wide margin of appreciation as to the manner in which national courts operate ... A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct, with national 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-Pag 204 jinsistu illi :–

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

Fil-Pag 224 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-Pag 251 isostnu illi :–

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

Jgħidu wkoll fil-Pag. 291 illi :-

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

Dan l-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, (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 deciza 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-kazż 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 tothe 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 "impartial tribunal" b'eżempji ta` sitwazzjonijiet li kienu trattati fil-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-sumption of innocence on these grounds), or giving negative characteristics of the applicant (Olujić, §§56-68);*
>
> - *statement by judges in the courtroom that they were "deeply insulted" while finding the applicant lawyer guilty of contempt of court (Kyprianou, 118-135, where the Court also held that no separate issue under the heading of presumption of innocence arose);*
>
> - *statement by an investigative judge in a decision to commit the applicant for trial that there was "sufficient evidence ofthe applicant`s guilt", where that judge subsequently 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 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 trail 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 acertain 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 ;*
>
> *"Imparzjalita” 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-imparzjalita` tal-membri tat-tribunal għandha tkun preżunta sakemm ma tinġiebx prova bil-kuntrarju (ara Le Compte, Van Leuven and De Meyeree 23.6.91).*
>
> *Huwa paċifiku wkoll fil-ġurisprudenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem illi, id-deċiżjoni jekk teżistix jew le imparzjalita` ai termini tal-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 dubbju leġittimu 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, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see Ferrantelli and Santangelo v. Italy, judgment of 7 August 1996, Reports 1996-III, pp. 951-52, § 58, and Wettstein v. Switzerland, no. 33958/96, § 44, ECHR 2000-XII).

...

An analysis of the Court`s case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature : where the judge`s personal conduct is not at all

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

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

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

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

> *Din il-qorti tqis illi hu minnu li l-ġustizzja trid tidher li qed issir. Jibda biex jingħad illi għażla tal-ġudikant għal kawża ma ssirx mill-ġudikant innifsu iżda minn mekkaniżmu appożitu li jitħaddem mir-reġistratur tal-qrati, bla ebda interferenza jew parteċipazzjoni jew addirittura l-konoxxenza a priori tal-istess ġudikant li lilu ser tmiss il-kawża. Il-ġudikant hu għal kollox estraneju għall-mekkaniżmu li bih kawża tiġi assenjata lilu bl-eċċezzjoni ta` kawżi speċjalizzati fejn din partikolari ma taqax f`tali kategorija. Id-diċitura `ġustizzja trid tidher li qed issir` ma għandhiex tifsira soġġettiva bħal per eżempju parti mhix kuntenta bl-għażla tal-ġudikant. 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 `ġustizzja trid tidher li qed issir` għandha tkun miftehma u espressa fil-konkret tagħha u applikata mill-kulleġġ tal-ġudikanti skond il-fattispecie u n-natura ta` kull kawża. Wara kollox hu prinċipju regolatur illi l-ġudikant hu preżunt imparzjali għax l-imparzjalità hi parti intima mill-ġurament 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-ġudikant hu marbut li jagħti biex isostni l-applikazzjoni tal-ġustizzja 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-ġurament li jkun ħa 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-ġustizzja jista` jkun li ma ssirx.

Ir-rikorrenti jibbażaw l-ilment prinċipali tagħhom fuq nuqqas ta` imparzjalità oġġettiva. Qed jallegaw bażikament illi hemm raġuni leġittima li ġġegħelhom jibżgħu li l-ġudikant jonqos fih l-element ta` imparzjalità. Jorbtu dan il-biża` mal-fatt illi bħala president ta` Radju Marija jista` jxaqleb jew iħares b`għajn 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-ġudikant 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-Arċidjoċesi ta` Malta ma tipprovdi ebda għajnuna finanzjarja jew mod ieħor. Il-ġudikant innifsu bħala president jagħti sehmu biss fl-amministrazzjoni tar-radju bla ebda jedd jew poter fuq dak li jixxandar u minn min jixxandar. Dak hu fdat f`idejn 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` verġenza li hemm bejn ir-radju u l-Arċidjoċesi hu biss ir-reliġjon Kattolika. Ir-radju hu kommess li jxandar u jxerred il-kelma ta` Alla b`enfasi speċjali fuq il-Madonna kif espressa fir-reliġjon Kattolika u l-intimita Arċidjoċesi ta` Malta tħaddan l-istess reliġjon Kattolika, liema reliġjon hi wkoll ir-reliġjon 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 preżumibilment jipprattika l-istess reliġjon għalkemm ebda prova ut sic ma saret dwar liema reliġjon jipprattika l-ġudikant in kwistjoni.

…

Li kieku din il-qorti kellha b`eċċess ta` kawtela, fil-fehma tagħha inġustifikata, taċċetta t-teżi tar-rikorrenti, dan ifisser li ġudikant li għandu kwalsiasi fehma, kemm politika, kemm reliġjuża, 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, agħar, 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-opinjonijiet personali tiegħu fuq kull aspett tal-ħajja ċivili u morali u għandu l-umanità fraġili tiegħu bħal kull bniedem ieħor però hu wkoll imsejjaħ għal servizz li jagħmel ġustizzja skont il-liġi, u għalhekk irid, b`responsabbilità akbar u b`obbligu solenni li għalih ikkommetta ruħu b`ġurament, ipoġġi fil-ġenb kull opinjoni jew fehma personali biex b`kuraġġ, b`saħħa u b`kuxjenza safja 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 biża` fondat u serju li mhux ser jaqdi dan l-obbligu li hu msejjaż jadempixxi b`serjetà, onestà u b`rispett għal-liġijiet u Kostituzzjoni ta` Malta.*

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

> *"9. Hemm diversi osservazzjonijiet f`dawn is-sottomissjonijiet tal-atturi li ma humiex 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 min-naħa tal-ġudikant seta` raġonevolment jiġi pperċepit … … … mill-appellanti li ser jippreġudika d-dritt ta` smigħ 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` rikuża, dan huwa sinjal ta` parzjalità favur dik il-parti. Jekk eċċezzjoni ta` rikuża 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`parteċipazzjoni 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` rekuża fil-Kodiċi ta` Proċedura kienu jipprekluduh milli jastjeni mis-smigħ tal-kawża u li skont il-liġi kien għalhekk obbligat 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 jkunu 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 imġebbda l-perċezzjoni ta` rabta mill-qrib bejniethom. Din il-perċezzjoni tiġi ġġenerata 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 ħażin 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 smigħ xieraq jekk ma tintlaqax l-eċċezzjoni ta` rikuża 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 jgħid 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), ħieles 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 ġust (fairly) u jekk ma jagħmilx hekk, ikun qed jabbuża mid-diskrezzjoni tiegħu, kif ċirkoskritta mil-liġi u ikun 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-smigħ 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 ħareġ The Consultative Council of European Judges jingħad 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 as way as to give the appearance of belonging to a particular political party. They will also refrain from taking part in public demonstrations which might diminish their authority as a judge or create a perception of bias in subsequent cases. They will bear in mind that political activity by a close member of a Justice`s family might raise concern in a particular case about the judge`s own impartiality and detachment from the political process.

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

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

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

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 tagħha l-Qorti ltaqgħet 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-kawżi 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-dubju l-indipendenza u l-imparzjalità tagħhom jew tal-uffiċċju li jokkupaw.*
>
> *...*
>
> *23. Il-ġudikanti ma għandhomx joqogħdu f`kawża meta huma jkunu jafu li dwarhom hemm waħda mir-raġunijiet ta` rikuża li jissemmew fil-Kodiċi ta` Organizzazzjoni u Proċedura Ċivili jew fejn ikun ovvju l-perikolu jew preġudizzju għal smigħ xieraq, altrimenti huma għandhom l-obbligu li ma jabdikawx mid-doveri tagħhom."*

L-imparzjalita` ta` gudikant hija dejjem preżunta salv għal prova kuntrarja. L-istitut tar-rikuża jew tal-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 dubju dwar l-imparzjalita` tal-ġudikant għandu jkun wieħed gravi.

12. Il-Qorti tqis illi, minkejja tali investigazzjoni fid-dettall ta' meta u kif għandha tintalab u tintlaqa' rikjesta għal rikuża, hija għandha wkoll tagħmel referenza għal digriet mogħti mill-Prim' Awla, Sede Ċivili, fil-kawża '**Costantino Muscat et vs Nazzareno Muscat**' Rik Nru 1058/2010, mogħti fil-31 ta' Ottubru 2016, fejn wara talba ta' rikuża, il-Qorti kienet għamlet is-segwenti osservazzjonijiet:

> *VII. Ġurisprudenza*
>
> *Dwar l-Art 734(1)(d)(ii) tal-Kap 12, kien rilevat fis-sentenza li tat il-Qorti tal-Appell fis-6 ta` Novembru 1967 fil-kawża "Carmelo Gauci vs Giorgio Gatt et"illi :-*
>
> > *"Ġie dejjem ritenut illi l-każijiet li fihom Imħallef jista` jastjeni jew jiġi rikużat huma dawk biss tassattivament imsemmija fl-imsemmi artikolu. Ġie wkoll dejjem ritenut illi l-kliem "il-kawża" fid-disposizzjoni hawn fuq ċitata jirriferixxu għall-istess kawża li fiha tkun ingħatat id-deċiżjoni preċedenti ...*
> >
> > *Imħallef jista` jiġi rikużat f`kawża meta din tkun ġa ġiet quddiemu bħala Imħallef. Iżda d-deċiżjoni tiegħu f`dik il-kawża trid tkun tinvolvi l-istess meritu f`liema huwa ġa ppresjeda. Jekk il-mertu jkun differenti l-espressjoni da parti tal-Imħallef ta` opinjoni dwar il-provi miġbura mill-parti fil-kawża preċedenti ma tassoġġettahx għall-possibilita` ta` rikuża."*

Fis-sentenza li tat fil-15 ta` Marzu 1996 fil-kawża "Dr Alfred Mifsud vs Onor Prim` Ministru et" il-Qorti Kostituzzjonali qalet hekk dwar l-istess disposizzjoni:-

> *Kif osservat mill-Imħallef Xuereb fis-sentenza 'Caruana vs De Piro' (15 ta` Mejju 1889 a Vol XII p.241) l-użu fil-liġi tal-kelma 'kawża' preċeduta mill-artikolu determinattiv ('il-kawża') juri li l-liġi kkontemplat kawża determinata li ma tistax tkun ħlief il-kawża pendenti, molto piu` in vista tal-kliem spjegattivi aġġunti mil-liġi riferibbilment għal-limitazzjoni tal-każijiet ta` rikuża għall-Imħallef li jkun 'qata' definittivament l-mertu tal-kwistjoni bejn il-partijiet ... (enfasi u sottolinear ta` din il-qorti).*

Fil-provvediment li tat fis-17 ta` Novembru 2014 fil-kawża "L-Imħallef Dottor Carmelo sive Lino Farrugia Sacco vs L-Onorevoli Prim Ministru et" il-Qorti Kostituzzjonali qalet hekk :-

> *9. Illi tabilħaqq ir-raġunijiet li għalihom ġudikant jista` jiġi rikużat milli jkompli jisma` kawża huma biss dawk li l-liġi nnfisha ssemmi u, f`każijiet eċċezzjonali, raġunijiet oħrajn serji li jwasslu bħala xierqa u f`posthom ("conveniente") tali astensjoni jew rikuża. L-istitut tar-rikuża jew tal-astensjoni huwa maħsub biex iħares l-aħjar interessi tal-ġustizzja ...*
>
> *10. Illi minbarra dan, l-istitut tar-rikuża jew l-astensjoni tal-ġudikant jinbena fuq il-presuppost li l-ġudikant li quddiemu titressaq kawża la huwa parzjali u lanqas korrott u li fuq kollox huwa – dmir tiegħu u mhux sempliċi privileġġ jew favur li huwa jisma` u jaqta` kull kawża li titressaq quddiemu. U l-fatt waħdu li l-liġi nnfisha tagħti lil dak il-ġudikant is-setgħa li jqis jekk għandux jilqa` jew le talba biex jastjeni mis-smigħ ta` kawża ma ġġibx lil dak il-ġudikant daqslikieku sar waħda mill-partijiet fil-kawża ;*
>
> *11. Illi d-disposizzjoni tal-Art 734(1)(d) tal-Kap 12 tgħodd għall-każ fejn l-istess kawża terġa` titqiegħed quddiem il-ġudikant rikużat wara li kien ta sentenza fl-istess kawża, imma ma tgħoddx fejn dik is-sentenza tkun qatgħet impar parti mill-mertu u tkun għadha quddiemu biex jiddeċiedi talbiet oħrajn fil-mertu tal-istess kawża ;*
>
> *12. Illi dik id-disposizzjoni ma tgħoddx fejn id-deċiżjoni mogħtija ma tkunx qatgħet definittivament il-mertu tal-kawża u lanqas fejn il-kitba dwar il-kawża ma tkunx messet il-qalba fil-mertu tal-kwestjoni nvoluta ;*
>
> *13. Illi l-enunċjazzjoni ta` prinċipji legali minn Qorti f`sentenza tagħha bla ma tkun għaddiet biex tapplika dawk il-prinċipji fil-kawża li jkollha quddiemha ma titqiesx bħala raġuni tajba biżżejjed biex iġġib fis-seħħ it-tħaddim tal-Artikolu 734(1)(d)(ii) tal-Kodiċi Proċedurali ;*

> …
>
> ***17. Illi mill-banda l-oħra l-fatt li ġudikant titressaq quddiemu kwestjoni legali f`kawża li dwarha jkun diġa` ta deċiżjoni tiegħu f`kawża oħra ma jġibx b`daqshekk raġuni tajba biex dak il-ġudikant jastjeni jew ikun rikużat milli jkompli jisma` l-kawża ta` wara. Fl-ewwel lok, kull deċiżjoni tiddependi mhux biss mill-prinċipji legali imma wkoll mill-fatti u ċ-ċirkostanzi partikolari li jsawru l-każ ; fit-tieni lok, il-fehma li ġudikant ikun wera f`deċiżjoni tiegħu ta` qabel tista` tieħu xejra oħra fid-dawl ta` argumenti ġodda li jistgħu jitressqu quddiemha jew fid-dawl ta` żviluppi ġurisprudenzjali jew dottrinali li jkunu seħħew minn dakinhar li kienet ingħatat id-deċiżjoni ta` qabel (enfasi ta` din il-qorti).***

13. Il-Qorti tirrileva illi tista' tagħmel referenza għal ħafna aktar każijiet, kemm lokali kif ukoll esteri, in konnessjoni ma' tali materja, iżda tħoss illi ż-żewġ sentenzi fuq rappurtati jagħtu stampa ċara u limpida tal-kwistjoni ta' rikużi u dwar kif għandha tinterpretaha din il-Qorti.

Ikkunsidrat

14. Jirriżulta illi l-intimata nomine, Dr Sarah Sultana, li qed tidher bħala mandatarja speċjali ta' Markus Zisser, permezz ta' l-ewwel eċċezzjoni tagħha, talbet lil dina l-Qorti sabiex tirrekuża ruħha billi, skond l-istess intimata nomine, din il-Qorti ġia espremiet ruħha fuq il-meritu tal-każ odjern meta hija ċaħdet Mandat ta' Sekwestru Eżekuttiv minnha maħruġ, din id-darba għan-nom ta' Jasmin Buchegger, liema ċaħda seħħet fit-8 ta' Awissu 2023.

15. Jirriżulta wkoll illi, in oġġezzjoni tat-talba ta' rikuża kif imressqa minn l-intimata nomine, s-soċjeta' rikorrenti, tramite l-konsulenti legali tagħha, insistiet illi tali eċċezzjoni hija waħda infondata fil-fatt u fid-dritt u għal kollox assurda. L-istess soċjeta' rikorrenti saħqet illi l-intimata nomine, permezz ta' tali eċċezzjoni, qiegħda tittanta xortiha billi tressaq talba għal rikuża sabiex ixxekkel il-progress tal-proċeduri odjerni filwaqt illi tagħżel il-forum ġuridiku tagħha (forum shopping).

16. Din il-Qorti, hawnhekk tibda billi tosserva illi t-talba ta' l-intimata nomine hija bbażata fuq dak ipprovdut fl-Artikolu 734 (1) (d) (i) li jgżid illi ġudikant <u>jista'</u> jastjeni jekk:

> *" … ikun <u>ta' l-parir tiegħu</u>, <u>itratta quddiem il-Qorti</u>, jew <u>kiteb dwar il-kawża jew dwar kull ħaġa oħra</u>* ***li għandha x'taqsam*** *mal-kawża jew tiddependi minnha"*

17. Ma jista' jkun hemm assolutament ebda dubju illi fil-każ odjern, fejn l-intimata qiegħda tidher għal Markus Zisser, illi dina l-Qorti la tat parir, la ttrattat qabel dwar il-każ u wisq anqas ma kitbet xi ħaġa in konnessjoni mal-kawża odjerna.

18. Kull ma għamlet il-Qorti, illi f'kwistjoni totalment separat u distint mill-każ odjern, fejn saret talba, inċidentalment, mill-istess intimata, iżda din id-darba fejn qiegħda tidher

għal persuna oħra distinta u separata minn Markus Zisser, din il-Qorti ċaħdet talba illi kienet saret, u dana bħal parti mill-mijiet u eluf ta' digrieti u deċiżjoni illi dina l-Qorti tagħti kull sena.

19. Jidher illi l-intimata ma hijiex kuntenta bid-deċiżjoni illi dina l-Qorti ħadet, u għalhekk għażlet illi, f'kull kawża fejn hija qiegħda tidher bħala mandatarja għal xi persuna barranija fuq kwistjonijiet ta' enforzar ta' sentenzi esteri quddiem dina l-Qorti kif ippresjeduta, hija tressaq, permezz ta' eċċezzjoni, talba għar-rikuża ta' dina l-Qorti, u dan in vista tad-deċiżjoni mogħtija minn dina l-Qorti, kif ippresjeduta, f'kawża totalment distinta u separata mill-każ odjern.

20. Jidher ċar illi, fi ħsieb l-intimata, meta Qorti tagħti sentenza fuq kwalsiasi meritu, ikun li jkun, li ma huwiex a sodisfazzjon tagħha, la darba dik il-Qorti tkun tat dak il-ġudizzju, l-istess Qorti għandha tiġi prekluża milli qatt terġa' tagħti deċiżjoni oħra fuq dak il-meritu, u dana peress illi, skond l-intimata, bħala "*fair minded and informed observer*", tqis illi huwa "*oġġettivament u raġjonevolment ... diffiċilissimu ... li l-Qorti ser tikkonvinċi ruħha bl-oppost*", kif del resto l-istess intimata ssottomettiet fis-sottomissjonijiet in skritt tagħha.

21. Il-Qorti hawnhekk tqis illi jkun opportun illi tagħmel referenza għal osservazzjoni magħmula minn Qorti oħra, diversament ippresjeduta, fil-każ ta' Rampelsreiter noe, degretat fid-9 ta' Jannar 2024 (Rik Nru 819/23 TA), fejn għal darba oħra l-intimata nomine għamlet talba għal rikuża peress illi ma kinetx kuntenta b'deċiżjoni meħuda minn dik il-Qorti kif ippresjeduta, fejn dik il-Qorti għamlet is-segwenti osservazzjonijiet:

> *L-intimata anke tagħti x'jifhem li kellu jkun l-Imħallef li min jheddu jastjeni. Kull ġudikant jimxi skond il-kuxjenza tiegħu u l-kuxjenza tal-Imħallef sedenti tgħidlu, li m'għandux għalfejn jastjeni tenut kont tal-proċedura li għandu quddiemu. Hu kwantu għall-azjoma ta' "Justice must not only be done but must be seen to be done", dak li jkun irid dejjem iżomm dan it-tagħlim fil-kuntest tiegħu, bħal fost oħrajn li l-ġustizzja ma tiġix a' la carte. Illi huwa minnu li "justice must not only be done, it must also be seen to be done" u dan minħabba l-ħtieġa 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" (Ara* ***Van Jijk, Van Hoof, Van Run, Zwaak, Theory and Practice of the European Convention of Human Rights 5th ed. 2017, paġna 602****).*
>
> *Kif mgħallem li "filwaqt li jrid jitħares il-prinċipju li l-ħaqq irid isir u jidher li qiegħed isir (l-hekk imsejħa "imparzjalita' suġġettiva"), mhux kull suspett jew sensazzjoni ta' parti f'kawża dwar dak li tqis bħala okkażjoni ta' parzjalita' fil-ġudikant li quddiemha jkun tressaq il-każ*

tagħha għandha twassal biex tirnexxi t-talba għar-rikuża ta' dak il-ġudikant". (Ara ***Appell Kriminali tat-23 ta' Jannar 2001 fil-kawża Ir-Repubblika ta' Malta -vs- Meinrad Calleja u Appell Kriminali tal-15 ta' Novenbru 2004 fil-kawża Ir-Repubblika ta' Malta -vs- Ibrahim Ramadan Ghamber Shnishah****).*

22. Ftit li xejn għandha dina l-Qorti x'iżżid mal-osservazzjonijiet fuq magħmula, salv illi tirrileva li ma teżisti ebda raġuni ġustfikabbli li tista' b'xi mod tqajjem 'l hekk imsejjaħ "*legitimate reason to fear that a particular body lacks impartality*", u dana peress illi dina l-Qorti ser tibqa' tapplika l-liġi b'mod oġġettiv u imparzjali, 'l hinn minn kull dubju, ibbażat esklussivament fuq il-liġijiet, kemm nostrani kif ukoll esteri, kif dejjem għamlet tul is-snin kollha kemm ilha ġudikant, li qiegħda tagħmel bħalissa u li ser tibqa' tagħmel sakemm ikollha s-saħħa taħdem.

Konklużjoni

Il-Qorti,

Wara illi rat l-atti;

Wara illi rat is-sottomissjonijiet ta' l-abbli difensuri tal-partijiet;

Tgħaddi biex tiddeċiedi l-vertenza billi:

Tiċħad l-eċċezzjonijiet ta' rikuża ai termini ta' l-Artikolu 734 (1) (d) (i) tal-Kap 12 imressqa mill-intimata nomine, u għalhekk:

Tordna l-prosegwiment tal-kawża.

Spejjeż tal-proċeduri odjerni ikunu kollha a kariku ta' l-intimata nomine.

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