MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
TONIO MALLIA

Seduta ta' l-14 ta' Ottubru, 2004

Rikors Numru. 12/2004/1

A & J Hili Ta' Miema Ltd

Vs

Kummissarju tat-Taxxa fuq il-Valur Mizjud

Il-Qorti,

Rat ir-Rikors ippreżentat mis-socjeta' rikorrenti fl-14 ta' April, 2004, li in forza tieghu, wara li ppremettiet illi:

Fit-23 ta' Lulju, 1996, is-socjeta' rikorrenti interponiet appell quddiem il-Bord ta' l-Appelli Dwar it-Taxxa fuq il-Valur Mizjud minn stima tad-Dipartiment tat-Taxxa fuq il-Valur Mizjud, liema appell gie mismugh u deciz mill-Bord ta' l-Appelli fl-4 ta' Novembru, 1999.

Fl-14 ta' Dicembru, 1999, is-socjeta' rikorrenti interponiet appell quddiem l-Onorabbli Qorti ta' l-Appell mid-decizjoni tal-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud *ai termini* ta' l-artikolu 36 ta' l-Att Numru XII ta' l-1994.

L-appell tas-socjeta' rikorrenti ma ntlaqax mill-Onorabbli Qorti ta' l-Appell peress illi gie dikjarat irritu u null ghar-ragunijiet li t-talba fir-rikors ta' l-appell *"la tikkontjeni talba ta' revoka u lanqas ta' riforma tas-sentenza appellata".*

Fl-istess sentenza l-Onorabbli Qorti ta' l-Appell ziedet tghid illi jekk is-socjeta' appellanti kien jidhrilha li ma nghatatx smiegh xieraq kif kontemplat fl-artikolu 39 subinciz (12) tal-Kostituzzjoni ta' Malta u fl-artikolu 6 subinciz (1) tal-Kovenzjoni Ewropeja, din *"kien messha tindirizza l-lanjanza taghha f'Qorti ohra u bi procedura differenti skond il-ligi"*.

In effetti, id-dritt fundamentali tas-socjeta' appellanti ghal smiegh xieraq kif protett bid-dispozizzjoni tal-Kostituzzjoni ta' Malta u tal-Konvenzjoni Ewropeja gie miksur fil-kors tal-proceduri quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud.

Minkejja l-fatt li s-socjeta' rikorrenti pprezentat l-appell taghha quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud fit-23 ta' Lulju, 1996, is-socjeta' rikorrenti ma rceviet l-ebda avviz bid-data tas-smiegh ta' l-appell taghha quddiem il-Bord qabel is-26 ta' Ottubru, 1999.

L-avviz tas-smiegh datat 26 ta' Ottubru, 1999 informa lis-socjeta' rikorrenti li l-appell taghha quddiem il-Bord ta' l-Appelli kien ser jinstema' fl-4 ta' Novembru, 1999, jigifieri ftit jiem biss wara.

Fl-4 ta' Novembru, 1999, il-membri tal-Bord, b'mod partikolari c-*chairman*, dehru li kienu decizi li dan l-appell kellu jinqata' malajr kemm jista' jkun, jigifieri f'dik is-seduta stess. Tant hu hekk illi l-Bord ried li r-rapprezentanti tas-socjeta' rikorrenti jibdew jittrattaw il-punti tal-kaz mill-ewwel.

Ir-rapprezentanti tas-socjeta' ghamlu diversi talbiet sabiex il-Kummissarju tat-Taxxa fuq il-Valur Mizjud jaghti spjegazzjoni kif id-Dipartiment tat-Taxxa fuq il-Valur Mizjud hareg, fil-konfront tas-socjeta' A & J Hili ta' Miema Ltd., stima li tammonta ghal madwar tmienja u ghoxrin elf lira Maltin (Lm28,000). Il-Bord ma laqghax dawn it-talbiet u sostna li r-rapprezentanti tas-socjeta' rikorrenti ma kellhomx dritt ghal tali spjegazzjoni. Il-Bord baqa' jinsisti li l-ufficjali tas-socjeta' kellhom jittrattaw il-kaz.

Ir-rapprezentanti tas-socjeta' rikorrenti fl-ahhar accettaw li jibdew it-trattazzjoni taghhom.

Fil-kors tat-trattazzjoni tieghu, il-Kummissarju tat-Taxxa fuq il-Valur Mizjud *"issottometta rapport ippreparat minnu dwar fatti li johorgu mit-taxpayer's file (Dok. A mehmuz)".*

Fid-dawl ta' dan ir-rapport, ir-rapprezentanti tas-socjeta' rikorrenti talbu lill-Bord joghgbu jaghtihom ftit zmien biex huma jkunu jistghu jwiegbu ghall-allegazzjonijiet imressqa mill-Kummissarju fir-rapport tieghu u jressqu il-provi dokumentarji taghhom biex isahhu t-twegiba taghhom.

L-Bord, ghal darb'ohra, cahad din it-talba minhabba li l-membri ma riedux li l-procedura titwal.

F'mument minnhom, is-segretarja tal-Bord harget mill-kamra li fiha kien qed jinstema' l-appell qabel ma spiccat is-seduta. Minkejja l-fatt li l-Bord kien sprovvist mis-servizzi essenzjali tas-segretarja tieghu, kif *del reso* titlob il-partita 2 tas-Sitt Skeda ta' l-Att Nru. XII ta' l-1994 moqrija flimkien mar-Regolament 9 ta' l-Avviz Legali Nru. 50 ta' l-1996, ic-*chairman* tal-Bord insista li s-smiegh ta' l-appell kellu jitkompla u ghalhekk ir-rapprezentanti tas-socjeta' rikorrenti kellhom ikomplu bit-trattazzjoni taghhom.

Ir-rapprezentanti tas-socjeta' rikorrenti regghu ghamlu talba ohra ghal zmien sufficjenti u adegwat sabiex jingiebu d-dokumenti mehtiega. Il-Bord rega' ma laqax it-talba u sahansitra c-*chairman* ghamilha aktar milli cara li l-appell

kien ser jigi deciz dak in-nhar stess meta uza l-kliem *“Mhux lilkom biss ghandna”.*

Fl-gheluq tas-seduta, minkejja d-diversi talbiet li ripetutament ghamlu matul is-seduta r-rapprezentanti tas-socjeta’ rikorrenti ghal zmien sufficjenti u adegwat sabiex jingiebu d-dokumenti mehtiega, ic-*chairman* ordna li jitnizzel verbal fis-sens li s-socjeta’ appellanti ma kellhiex iktar sottomissjonijiet u provi xi tressaq quddiem il-Bord ta’ l-Appelli.

Fil-fehma umli tas-socjeta’ rikorrenti, huwa car u manifest li d-dritt fundamentali tas-socjeta’ rikorrenti ghal smiegh xieraq, kif protett mill-Kostituzzjoni ta’ Malta u mill-Konvenzjoni Ewropeja, gie miksur matul il-proceduri quddiem il-Bord ta’ l-Appelli dwar it-Taxxa fuq il-Valur Mizjud. Is-socjeta’ rikorrenti kellha kull dritt titlob u tinghata z-zmien sufficjenti biex ir-rapprezentanti taghha ikunu jistghu janalizzaw u jevalwaw il-kontenut tar-rapport sottomess mill-Kummissarju tat-Taxxa fuq il-Valur Mizjud waqt is-smiegh ta’ l-appell u jressqu t-twegibiet taghhom kif opportun permezz ta’ sottomissjonijiet u provi dokumentarji mehtiega. Fil-fatt, ir-rapprezentanti tas-socjeta’ rikorrenti ma kellhomx maghhom id-dokumenti kollha li setghu jghinu sabiex jigu respinti l-allegazzjonijiet indiretti ta’ evazjoni fiskali maghmula mill-Kummissarju, u ghalhekk kull cahda tal-Bord ghaz-zmien mitlub kienet tikkostitwixxi ksur tal-principju *audi alteram partem* li huwa wiehed mill-principji ta’ gustizzja naturali li fuqhom huwa imsejjes id-dritt fundamentali ta’ smiegh xieraq.

Inoltre, bl-agir tieghu il-Bord ghamilha iktar difficli ghas-socjeta’ rikorrenti sabiex tissodisfa l-obbligu legali ta’ l-oneru tal-prova *ai termini* tal-partita 4(2) tas-Sitt Skeda ta’ l-Att Nru. XII ta’ l-1994, oneru ta’ prova li minnu nniffsu huwa ferm difficli biex jingheleb. Is-socjeta’ rikorrenti kellha il-provi taghha xi tressaq biex tipprova tissodisfa l-kriterji li titlob il-ligi dwar dan l-oneru, *pero’*, ma thallitx taghmel dan minhabba l-ghagla zejda li biha l-Bord ta’ l-Appelli ried jaghlaq dan il-kaz.

Barra minn hekk, il-mod kif il-Bord ittratta lis-socjeta' rikorrenti matul il-proceduri *sotto* ezami jammonta ghal *"appraisal of guilt"* li hija tassew hbiet il-veru dhul taghha. *Inoltre,* il-fatt li hija giet ikkunsidrata mill-Bord ta' l-Appelli li ghamlet dikjarazzjonijiet inveritjeri jgib fix-xejn il-principju garantit mill-Kostituzzjoni u mill-Konvenzjoni Ewropeja dwar il-*"prezunzjoni ta' l-innocenza"*, u dan effettivament minghajr ma' s-socjeta' rikorrenti thalliet tressaq il-provi kollha li hi kellha f'idejha sabiex tirrespingi l-allegazzjonijiet infondati u mhux imsahhha tal-Kummissarju.

Ghaldaqstant il-proceduri ta' l-appell quddiem il-Bord ta' l-Appelli dwar it-taxxa fuq il-Valur Mizjud jikkostitwixxu ksur tad-dritt fundamentali tas-socjeta' rikorrenti ghal smiegh xieraq u imparzjali kif protett mill-artikolu 39 tal-Kostituzzjoni ta' Malta u mill-artikolu 6(1) tal-Konvenzjoni Ewropeja ghall-Protezzjoni tad-Drittijiet u Libertajiet Fundamentali tal-Bniedem (Kap. 319).

Ghaldaqstant, is-socjeta' rikorrenti titlob bir-rispett illi din l-Onorabbli Qorti joghgobha (1) tiddikjara li waqt il-proceduri ta' l-appell quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud kien hemm ksur tad-dritt fundamentali ghal smiegh xieraq u imparzjali fil-konfront tas-socjeta' rikorrenti kif protett mill-Artikolu 39 tal-Kostituzzjoni ta' Malta u mill-artikolu 6(1) tal-Konvenzjoni Ewropeja ghall-Protezzjoni tad-Drittijiet u Libertajiet Fundamentali tal-Bniedem (Kap. 319); (2) tiddikjara nulli u bla effett il-proceduri fi stadju ta' appell quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud u d-decizjoni ta' l-4 ta' Novembru 1999 moghtija mill-istess Bord ta' l-Appelli; u (3) tordna li jinghataw dawk ir-rimedji li fil-gudizzju savju u suprem taghha jidhrilha xierqa fic-cirkostanzi. Bl-ispejjez.

Rat id-digriet ta' din il-Qorti tal-15 ta' April, 2004;

Rat ir-risposta tal-intimat li in forza taghha eccepixxa illi;

1. *Stante* illi mis-sentenza tal-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud hemm appell fuq punt ta' dritt lill-

Qorti ta' l-Appell u *stante* illi huwa manifest illi kull kwistjoni illi tikkoncerna s-smiegh xieraq hija insitament kwistjoni li tqajjem punt ta' dritt, huwa indikat illi din il-Qorti tastjeni milli tezercita l-mansjoni taghha taht l-Artikolu 46 tal-Kostituzzjoni u l-Artikolu 4 tal-Kap. 319 billi s-socjeta' rikorrenti kellha *a* dispozizzjoni taghha mezzi xierqa ta' rimedju ghal-lanjanzi imressqa minnha u naqset illi tuzhom kif suppost meta m'ghamlitx appell validu. Illi dawn il-proceduri ma jistghux jintuzaw bhala mod kif jigi rimedjat in-nuqqas fl-ezercizzju tad-dritt ta' appell b'mod illi, kif qed isir, tintalab ripetizzjoni tal-proceduri tal-appell *tramite* l-abbuz tal-procedura kostituzzjonali u tal-Kap. 319.

2. Subordinatament u minghajr pregudizzju ghall-premess, illi d-dritt ghal smiegh xieraq skond l-Artikolu 39 tal-Kostituzzjoni u 6 tal-Konvenzjoni Ewropeja ma japplikax fil-qasam tat-taxxa, liema qasam ma jinvolvix id-*"determinazzjoni ta' drittijiet jew obbligi civili"* (ta' natura ta' dritt privat) izda jinvolvi biss obbligazzjonijiet ta' natura ta' dritt pubbliku li jaqghu barra l-ambitu ta' l-imsemmija artikoli.

Illi dwar l-inapplikabilita' ta' l-Artikolu 6(1) tal-Konvenzjoni (u b'implikazzjoni l-Art. 39 Kost li huwa *pari passu*) ghal proceduri dwar hlas ta' taxxa l-esponenti jirreferu ghas-sentenza recenti tal-*"Grand Chamber"* tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem tat-12 ta' Lulju, 2001 fl-ismijiet "Ferrazzini vs Italy" fejn il-Qorti Ewropeja proprju investiet il-punt dwar jekk l-eskluzjoni tal-proceduri dwar hlas ta' taxxa mill-Artikolu 6 kinitx ghadha gustifikata fiz-zminijiet ta' llum. Dik il-Qorti spiccat biex irrispondiet ghal dik id-domanda fl-affermattiv u l-kors tar-ragunament taghha kien is-segwenti:

"24. According to the Court's case-law, the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State. The Court has on several occasions affirmed the principle that this concept is "autonomous", within the meaning of Article 6 § 1 of the Convention (see, among other authorities, the

***Kőnig vs Federal Republic of Germany** judgement of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89, and the **Baraona vs Portugal** judgement of 8 July 1987, Series A no. 122, pp. 17-18, § 42). The Court confirms the case-law in the instant case. It considers that any other solution is liable to lead to results that are incompatible with the object and purpose of the Convention (see, mutatis mutandis, the Kőnig judgement cited above, § 88, and **Maaouia vs France [GC],** no. 39652/98, § 34, ECHR 2000-X).*

25. Pecuniary interests are clearly at stake in tax proceedings, but merely showing that a dispute is "pecuniary" in nature is not in itself sufficient to attract the applicability of Article 6 § 1 under its "civil" head (see the **Pierre-Bloch vs France** judgement of 21 October 1997, Reports of Judgements and Decisions 1997-VI, p. 2223, § 51, and **Pellegrin vs France [GC]**, no. 28541/95, § 60, ECHR 1999-VIII, cf. **The Editions Périscope vs France** judgement of 26 March 1992, Series A no. 234-B, p. 66, § 40). In particular, according to the traditional case-law of the Convention institutions,

There may exist "pecuniary" obligations vis-à-vis the State or its subordinate authorities which, for the purpose of Article 6 § 1, are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of "civil rights and obligations". Apart from fines imposed by way of "criminal sanction", this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society" (see, among other authorities, the **Schouten and Meldrum vs the Netherlands** judgement of 9 December 1994, Series A no. 304, p. 21, § 50; application no. 11189/84, Commission decision of 11 December 1986, Decisions and Reports (DR) 50, p. 121, at p. 140; and application no. 20471/92, Commission decision of 15 April 1996, DR 85, p. 29, at p. 46).

26. The Convention is, however, a living instrument to be interpreted in the light of present-day conditions (see, among other authorities, The Johnston and Others vs Ireland judgement, Series A no. 112, p. 25, § 53), and it is incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of Article 6 § 1 should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.

27. Relations between the individual and the State have clearly developed in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of "public law" could come within the purview of Article 6 under its "civil" head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages (see, among other authorities, the Ringeisen vs Austria judgement of 16 July 1971, Series A no. 13, p. 39 § 94, the Kőnig judgement cited above, p. 32, §§ 94-95; the Sporrong and Lönnroth vs Sweden judgement of 23 September 1982, Series A no. 52, p. 19, § 79; the Allan Jacobsson vs Sweden judgement of 25 October 1989, Series A no. 163, pp. 20-21, § 73; the Benthem vs the Netherlands judgement of 23 October 1985, Series A no. 97, p. 16, § 36; and the Tre Traktörer Aktiebolag vs Sweden judgement of 7 July 1989, Series A no. 159, p. 19, § 43). Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required

the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as "civil" (see, among other authorities, the Feldbrugge vs The Netherlands judgement of 29 May 1986, Series A no. 99, p. 16, § 40; the Deumeland vs Germany judgement of 29 May 1986, Series A, no. 100, p. 25, § 74; the Salesi vs Italy judgement of 26 February 1993, Series A, no. 257-E, pp. 59-60, § 19; and the Schouten and Meldrum judgement cited above, p. 24, § 60).

28. However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the National Assembly (see the Pierre-Bloch judgement cited above, p. 2223, § 50), even though in those proceedings the applicant's pecuniary interests were at stake (ibid., § 51), are not civil in nature, with the consequence that Article 6 § 1 does not apply. Neither does that provision apply to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law (see Pellegrin vs France [GC], no. 28541/95, §§ 66-67, ECHR 1999-VIII). Similarly, the expulsion of aliens does not give rise to disputes (contestations) over civil rights for the purpose of Article 6 § 1 of the Convention, which accordingly does not apply (see the Maaouia judgement cited above §§ 37-38).

29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the "civil" sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the

relationship between the taxpayer and the tax authority remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, the "Gasus-Dosier – und Fördertechnik GmbH vs the Netherlands" judgement of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.

30. The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective "civil" (with the restriction that that adjective necessarily places on the category of "rights and obligations" to which that Article applies) were not present in the text.

31. Accordingly, Article 6 § 1 does not apply in the instant case". (enfasi tal-esponenti)".

3. Subordinatament u minghajr pregudizzju ghall-premess, illi fil-fatt, fi kwalunkwe kaz, is-socjeta' rikorrenti inghatat smiegh xieraq u imparzjali mill-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Mizjud. Huwa sinifikanti f'dan ir-rigward illi s-socjeta' rikorrenti kienet assistita mill-*accountant* konsultent taghha u rapprezentata minn Direttur taghha fil-proceduri in kwistjoni u illi hija nghatat kull opportunita' biex tressaq il-provi u biex tipprezenta l-kaz taghha kif fil-fatt jirrizulta mid-decizjoni stess tal-Bord (annessa bhala (Dok KTVA 1) u mill-minuti tas-seduta tal-4 ta' Novembru 1999 (Dok KTVA 2). Illi huwa evidenti illi

s-socjeta' rikorrenti marret ghas-seduta tal-Bord bil-hsieb illi ttawwal il-proceduri u issa qed tipprezenta l-iskuzi illi hija giebet quddiem il-Bord bil-hsieb li ttawwal bhala "ragunijiet" ghax qed issostni illi, kien hemm nuqqas ta' smiegh xieraq. Huwa car mill-banda l-ohra illi n-nuqqas ta' preparazzjoni jew ta' volonta' ta' parti biex tipprezenta l-kaz taghha ma jistax jingieb bhala raguni illi validament issostni xi allegazzjoni ta' nuqqas ta' smiegh xieraq *stante* illi dak in-nuqqas huwa attribwibbli lis-socjeta' rikorrenti stess u mhux lill-Bord. Illi fil-fatt ma hemm xejn fl-agir tal-Bord illi jindika xi nuqqas ta' indipendenza jew imparzjalita soggettiva jew oggettiva.

4. Illi t-talbiet tas-socjeta' rikorrenti huma nfondati fil-fatt u fid-dritt kif se jintwera aktar dettaljatament waqt it-trattazzjoni tal-kawza.

Rat l-atti kollha tal-kawza u d-dokumenti ezebiti;

Rat is-sentenza tal-Onorabbli Qorti tal-Appel tas-27 ta' Gunju, 2003;

Semghet lid-difensuri tal-partijiet;

Rat li l-kawza thalliet ghal lum ghas-sentenza fuq l-ewwel eccezzjoni;

Ikkunsidrat;

Illi s-socjeta' rikorrenti rceviet stima minghand id-Direttur tad-Dipartiment tat-Taxxa fuq il-Valur Mizjud u wara li kkontestat, bla ezitu favorevoli ghaliha, dik l-istima, sahansitra anke b'appell quddiem il-Bord tal-Appelli Dwar it-Taxxa fuq il-Valur Mizjud, l-istess socjeta' rikorrenti interponiet appell quddiem l-Onorabbli Qorti tal-Appell, liema appell kien gie wkoll michud fuq teknikalita', u *cioe'*, peress li l-appell interpost kien proceduralment *monk* peress illi dak ir-rikors ta' l-appell *"la tikkontjeni talba ta' revoka u lanqas ta' riforma tas-sentenza appellata".*

L-ilment principali tas-socjeta' rikorrenti wara d-decizjoni tal-Bord tal-Appell Dwar it-Taxxa fuq il-Valur Mizjud kien

bazat fuq l-allegazzjoni li quddiem dak il-Bord hi ma kienetx inghatat smiegh xieraq bi ksur tal-principju ta' *audi alteram partem.* Fil-kors tad-decizjoni taghha, l-Onorabbli Qorti tal-Appell kienet anke osservat illi jekk is-socjeta' rikorrenti kien jidhrilha li ma nghatatx smiegh xieraq kif kontemplat fl-artikolu 39 subinciz (12) tal-Kostituzzjoni ta' Malta u fl-artikolu 6(1) tal-Konvenzjoni Ewropeja, din kien messha tindirizza l-lanjanza taghha f'Qorti ohra u bi procedura differenti skond il-ligi.

Is-socjeta' rikorrenti *"obdiet"*, u qieghda issa, b'dawn il-proceduri, tressaq il-lanjanzi taghha quddiem din il-Qorti fil-kompetenza taghha kostituzzjonali. Fl-ewwel eccezzjoni tieghu, l-intimat qed jinvita lil din il-Qorti tezercita d-diskrezzjoni taghha billi tiddeklina milli tezercita l-mansjoni taghha taht l-artikolu 46 tal-Kostituzzjoni ta' Malta u l-artikolu 4 tal-Kap. 319, u dana billi s-socjeta' rikorrenti kellha *a* dispozizzjoni taghha mezzi xierqa ta' rimedju ghal lanjanzi imressqa minnha u naqset li tuzhom kif suppost meta m'ghamlitx appell validu.

Din il-Qorti tibda biex tosserva li l-principji ta' gustizzja naturali, li wahda minnhom huwa l-principju ta' smiegh xieraq, huma principji ta' ligi ordinarja li jistghu u ghandhom jigu ezaminati u mistharga minn dawn il-Qrati fil-kompetenza ordinarja taghhom. Il-principji tal-gustizzja naturali huma principji li kienu japplikaw minn qabel ma giet adottata l-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem, u din il-Konvenzjoni, anzi, hija bazata fuq dawn il-principji ta' gustizzja naturali u drittijiet ohra li minn dejjem kienu jitqiesu inerenti u fundamentali ghal persuna tal-bniedem. Il-principji ta' gustizzja naturali jitqiesu dejjem materja ta' dritt, anzi ta' dritt pubbliku, u n-nuqqas ta' osservanza taghhom jaghti mhux biss dritt ta' appell meta dan hu koncess (anke jekk limitatament fuq punt ta' dritt), izda ukoll ghad-dritt ta' *review* mill-Qrati ordinarji.

Il-principju *'audi alteram partem"* huwa principju fundamentali mixhut fuq kull minn gie moghni b'poter li jiddeciedi. L-awtur S.A. de Smith fil-ktieb *"Constitutional and Administrative Law"* (*Penguin Books, 3rd Edit)* jghid, *a pagna* 564, li dan il-principju, *"Is the more interesting and*

important rule of natural justice. In its crudest form, it means that nobody shall be penalized by a decision of a court or tribunal unless he has been given (a) prior notice of the charge or case he has to meet, and (b) a fair opportunity to answer the case against him and to put his own case". Fil-kawza famuza Ingliza "Ridge vs Baldwin", deciza mill-*House of Lords* fl-1964, intqal li d-dritt ghal smiegh xieraq *"is a rule of universal application"* u *Lord Loreburn*, fil-kawza "Board of Education vs Rice", deciza wkoll mill-*House of Lords* fl-1911, kien qal li d-dover li jaghti smiegh xieraq hu impost *"upon everyone who decides anything"*.

Din il-Qorti fil-kawza importanti "Sammut vs Bell McCance", deciza fid-29 ta' Mejju, 1946 (Kollez. Vol. XXXII.II.350), osservat hekk fuq din ir-regola:

"Ir-regola 'audi alteram partem' ghandha tigi skrupolozament osservata, u l-partijiet ghandhom id-dritt li jkunu prezenti fl-investigazzjonijiet li jaghmel id-delegat tal-Board, biex ikunu jistghu jikkontrollaw l-informazzjoni li jigu moghtija lil dak id-delegat ghall-finijiet ta' dik l-investigazzjoni. Il-vjolazzjoni tar-regola 'audi alteram partem' hija regola ta' gustizzja naturali u bhala tali hija ta' interess pubbliku, u ghalhekk m'hix rinunzjabbli 'per inpliciter' billi jinghad illi kien hemm akkwijexxenza mill-parti li giet pregudikata bil-vjolazzjoni ta' dik ir-regola".

Tant hu mportanti dan il-principju, li r-regola li n-nullita' ta' sentenza m'ghandhiex tigi attiza jekk is-sentenza tkun sostanzjalment gusta, hi meqjusa li ma tapplikax f'kaz ta' vjolazzjoni ta' dan il-principju. *Lord Wright* fil-kawza ingliza, "General Medical Council vs Spackman", deciza mill-*House of Lords* fl-1943 osserva:

"If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision".

Dwar l-implikazzjoni ta' din ir-regola, hafna jiddependi minn natura tat-tribunal u tal-kaz li jkun qed jigi mistharreg. *Lord Denning*, bhala *Master of the Rolls*, kien qal fil-kawza "R vs Gaming Board for Great Britain ex p. Benaim et", deciza mill-*Queen's Bench* fl-1970 li *"it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. Everything depends on the subject matter"*. *Pero'*, bhala minimu, kif qal l-istess *Lord Denning,* din id-darba fil-*House of Lords* fil-kawza "Kanda vs Government of Malaya", deciza fl-1962, *"He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them".*

L-awtur Wade & Forsyth, fil-ktieb *"Administration Law"* (*Oxford University Press, 7th Edit.)*, jghidu *a pagna* 538 li;

"Where an oral hearing is given, it has been laid down that a tribunal must (a) consider all relevant evidence which a party wishes to submit, (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently, (c) allow witnesses to be questioned, (d) allow comment on the evidence and argument on the whole case. Failure to allow the last two rights, which include the right to cross-examination, has led to the quashing of punishments awarded by prison visitors in a series of cases".

Fil-gurisprudenza lokali ntqal li d-dritt tas-smiegh moghti liz-zewg partijiet f'kawza irid jinghata fit-termini tar-regoli tal-ligijiet procedurali – "Farrugia vs Wismayer", deciza mill-Onorabbli Qorti tal-Appell fil-25 ta' Gunju, 1997. Mhux nuqqas ta' Qorti li tghaddi ghas-sentenza meta l-konvenut wera *non-kuranza* u ma deherx biex iressaq il-provi – "Falzon vs Debono", deciza mill-Onorabbli Qorti tal-Appell fit-13 ta' Jannar, 1975, u "Pontalleresco vs Starbrite Cleaners", deciza mill-Onorabbli Qorti tal-Appell (Sede Inferjuri), fit-12 ta' Mejju, 2003. Il-principju ta' *'audi alteram partem'* ma jfissirx bilfors li l-provi tal-konvenut iridu jinstemghu, izda li jkollu l-opportunita' li jressaq il-provi – "Camilleri noe vs Players Coaches Complaints

Board tal-Malta Football Association", deciza minn din il-Qorti fit-23 ta' Novembru, 2001. Fl-istess sens hija d-decizjoni ta' din il-Qorti moghtija fil-kawza "Power Projects Ltd vs Agius", fis-16 ta' Gunju, 2003.

Fil-kawza "Vassallo vs Bondin", deciza mill-Onorabbli Qorti tal-Appell fil-5 ta' Dicembru, 2001, gie osservat li:

"M'hemmx ghalfejn jinghad wisq dwar l-import tal-principju 'audi alteram partem' fis-sens illi dan ma kienx jimporta illi l-parti in kawza setghet tabbuza bil-process gudizzjarju u taghzel li tinjora d-direttivi tal-Qorti fil-kondotta tal-process. Kien principju li jobbliga lill-parti ghall-kuntrarju illi ssegwi 'ad ungwem' r-regoli procedurali kemm dawk statutorji kif ukoll dawk moghtija mill-gudikant ghall-ahjar prosegwiment tal-process. Jekk wiehed jaghzel li jinjora dawn ir-regoli jaghmel dan a riskju tieghu".

F'dan il-kaz, is-socjeta' rikorrenti kellha opportunita' moghti lilha bil-ligi biex tressaq l-ilmenti taghha quddiem l-Onorabbli Qorti ta' l-Appell, u fil-fatt, kienet uzufruwit minn dak ir-rimedju moghti lilha, izda b'nuqqas taghha u/jew tal-konsulenti taghha, dak l-appell gie dikjarat irritu u null. Kif intqal mill-Onorabbli Qorti tal-Appell fil-bran aktar qabel kwotat, huwa obbligu tal-parti *"illi ssegwi ad ungwen r-regoli procedurali"* statutorji, u jekk is-socjeta' rikorrenti naqset li taghmel dan, it-tort m'hu ta' hadd hlief taghha. Meta l-Onorabbli Qorti tal-Appell cahdet l-appell imressaq mis-socjeta' rikorrenti f'dan il-kaz, dan m'ghamlitux fuq il-motivazzjoni li dik is-socjeta' messha ressqet il-lanjanzi taghha bi proceduri ohra differenti, (f'liema kaz, bir-rispett kollu dovut, dik l-Onorabbli Qorti kienet tkun zbaljata, ghax, kif intwera, il-vjolazzjoni tar-regola *'audi alteram partem'* taghti lok ghas-sindikat tal-Qrati ordinarji), izda ghax fir-rikors tal-appell ma gewx segwiti certi regoli li dik l-Onorabbli Qorti qieset ta' importanza kbira tant li jwasslu ghan-nullita' tal-istess appell.

Minn naha l-ohra, hu ovvju li jekk is-socjeta' rikorrenti qed tilmenta minn ksur tal-Kostituzzjoni ta' Malta jew tal-Konvenzjoni Ewropeja, dak il-ksur irid jitressaq bhala ilment quddiem din il-Qorti fil-kompetenza taghha

kostituzzjonali, *pero'*, m'ghandhux jitressaq hekk l-ilment taghha, meta rimedju ghal dak l-istess ilment jezisti taht il-ligi ordinarja u hu rimedju effettiv u tajjeb, kif inhu il-kaz f'din il-kawza. Ma jirrizultax li n-nuqqas ta' tehed ta' rimedju ordinarju jew it-tehid hazin tal-opportunita' li kellha s-socjeta' rikorrenti kien rizultat ta' imgieba ta' haddiehor, f'liema kaz din il-Qorti m'ghandix twarrab is-setghat taghha li tisma' l-ilment kostituzzjonali (ara "Vella vs Bannister", deciza mill-Onorabbli Qorti Kostituzzjonali fis-7 ta' Marzu, 1994). Kieku s-socjeta' rikorrenti uzufruwit kif suppost ir-rimedju moghti lilha, l-ilmenti taghha kienu jigu mistharga mill-Onorabbli Qorti tal-Appell, u f'kaz ta' ezitu favorevoli ghaliha, dik l-Onorabbli Qorti tal-Appell kienet tkun tista' thassar is-sentenza tal-Bord tal-Appell dwar it-Taxxa fuq il-Valur Mizjud bhala li kienet moghtija bi ksur tal-principji ta' gustizzja naturali. Li dan il-process ma sarx hu tort biss tas-socjeta' rikorrenti, u rimedju kostituzzjonali m'ghandux jitqies rimedju *in extremis* li wiehed jista' jirrikorri ghalih biex isewwi zball jew nuqqas li ma messux twettaq qabel (ara "Spiteri vs Chairman Awtorita' tal-Ippjanar", deciza mill-Onorabbli Qorti Kostituzzjonali fil-25 ta' Gunju, 1999). Kif intwera, ir-rimedju kien jezisti taht il-ligi ordinarja, u kien rimedju adegwat u effettiv. In-nuqqas tas-socjeta' rikorrenti li taghmel uzu u tinqeda b'dan ir-rimedju kif suppost, huwa nuqqas taghha stess, u ma tistax issa titlob rimedju straordinarju meta n-nuqqas li tinghata rimedju effettiv kien minhabba n-nuqqas taghha li tiehu l-opportunita' li tipprovdi l-ligi ordinarja tal-pajjiz.

Din il-Qorti mhux qed tghid li s-socjeta' rikorrenti ghandha ragunijiet validi ghal-lanjanzi taghha, izda qed tghid li l-ligi ordinarja kienet tipprovdi metodu ordinarju u effettiv kif dawk il-lanjanzi setghu gew mistharga minn Qorti indipendenti u imparzjali, u li dan ma sarx, f'dan il-kaz, huwa tort tas-socjeta' rikorrenti. *Kwindi*, hi ma tistax issa tipprova tiehu b'dawn il-proceduri dak li ma hadetx konsegwenza tan-nuqqasijiet taghha.

L-ewwel eccezzjoni tal-Kummisarju intimat timmerita, ghalhekk, li tigi milqugha.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-kawza billi tilqa' l-ewwel eccezzjoni tal-intimat, u peress li tqies li s-socjeta' rikorrenti kellha rimedju alternattiv u effettiv *a* dispozizzjoni taghha, tiddeciedi li tastjeni milli tezercita l-mansjonijiet taghha taht l-artikolu 46 tal-Kostituzzjoni ta' Malta u l-artikolu 4 tal-Kap. 319 tal-Ligijiet ta' Malta, u b'hekk tillibera lill-intimat mill-osservanza tal-gudizzju.

L-ispejjez ta' dawn il-proceduri jithallsu kollha mis-socjeta' rikorrenti.

< Sentenza Finali >

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