MALTA

# QORTI CIVILI
# PRIM' AWLA
# (GURISDIZZJONI KOSTITUZZJONALI)

**ONOR. IMHALLEF**
**JOSEPH ZAMMIT MC KEON**

Seduta tat-3 ta' Frar, 2012

Rikors Numru. 23/2006

**Carmel sive Charles Cutajar**

***kontra***

**Avukat Generali, u b`digriet tat-18 ta` Dicembru 2006 Joseph Mary sive Josephine Cutajar (ID253849M) u Conrad Cutajar (ID421776M) intervjenew fil-kawza *in statu et terminis***

**Il-Qorti :**

## A. <u>Preliminari</u>

Rat ir-rikors prezentat fil-11 ta` April 2006 li jaqra hekk –

*Illi l-esponent twieled fil-15 ta` Lulju 1951. Fis-sena 1969 huwa beda johrog ma` xebba, Josephine Xuereb. Fil-21 ta` April 1974 l-esponent u l-imsemmija Josephine Xuereb izzewwgu fil-Knisja ta` G`Mangia. F`Novembru 1975 martu harget tqila, dak iz-zmien l-esponent kellu 24 sena. Fil-15 ta` Awissu 1976 martu weldet tifel Conrad.*

*Illi f`Gunju 1987, it-tobba sabu li l-esponent kien qed ibati minn kondizzjoni msejha `Sertoli Cell Only Syndrome` li biha huwa ma setax ikollu wlied. L-esponent zar diversi laboratorji u tobba u dawn ilkoll qablu li din il-kondizzjoni x`aktarx ezistiet mit-twelid tieghu izda zgur kienet tezisti mill-puberta`. L-esponent sahansitra gie nvistat minn Consultant Endocrinologist f`Londra, il-Professur Maurice Katz, u dan iccertifika li fl-esperjenza twila tieghu ma kien jaf bl-ebda mara li nharget tqila minn ragel li kien qed ibati minn "Sertoli Cell Only Syndrome" -*

***"… it is likely that you were born with this condition. Certainly it was present by the time you went through puberty."***

***(omissis)***

***"To my knowledge the `Sertoli Cell Only Syndrome is not acquired after puberty. … To my knowledge, I am not aware of a pregnancy being recorded in a male with histologically established `Sertoli Cell Only Syndrome".***

*Ghalhekk, fl-1987, l-esponent ipprezenta kawza ta` denegata paternita` kontra martu Josephine Cutajar fil-Prim` Awla tal-Qorti Civili fejn talab lill-Qorti tiddikjara li Conrad Cutajar ma kienx ibnu naturali peress li din il-kondizzjoni kienet tipprekludi li l-esponent ikun il-missier.*

*Illi peress li l-esponent kien gie sfurzat minn missieru, anke permezz ta` theddid, biex jizzewweg lill-imsemmija Josephine Xuereb minkejja li l-esponent kien stqarr li kien ihobb xebba ohra, Marlene Camilleri, u mhux lil Josephine Xuereb, l-esponent issuspetta li Conrad kien twieled minn relazzjoni bejn mart l-esponent u missieru, l-mejjet John Cutajar. Dak iz-zmien, l-esponent u missieru kienu pulizija u kellhom sighat ta` xoghol twal. Ghalhekk l-esponent kien ikun assenti mid-dar ghal hinijiet twal.*

*Illi l-esponent kien ilu jhobb u jiffrekwenta lil Marlene Camilleri zmien twil qabel ma gie sfurzat jizzewweg lil Josephine Xuereb minn missieru. Kien ilu jkollu relazzjonijiet intimi ma` Marlene Camilleri mill-1972, filwaqt li z-zwieg ma` Josephine Xuereb sar fil-21 ta` April 1974. F`Novembru 1981, l-esponent telaq mid-dar matrimonjali u f`dan iz-zmien kollu baqa` jiffrekwenta lil Marlene Camilleri. Huma bdew jikkoabitaw mis-sena 1984 u baqghu dejjem flimkien, kwazi hajjithom kollha.*

*Fil-kawza civili ta` denegata paternita`, l-perit mediku mahtur mill-Onorabbli Qorti Civili Prim` Awla rrakomanda li jsir it-test tad-DNA sabiex jghin biex tigi stabbilita l-verita` dwar dan il-kaz. Fis-sottomissjonijiet quddiem il-Prim` Awla, l-konvenuta Josephine Cutajar strahet fuq ir-rizultat tat-tieni test tad-DNA li sar fil-kors tal-kawza, filwaqt li l-esponent strah principalment fuq zewg opinjonijiet medici rilaxxjati mill-Professur Maurice Katz (wahda minnhom ikkonfermata minnu bil-gurament gewwa Londra) kif ukoll opinjonijiet simili moghtija minn tobba ohra. Il-kampjuni tad-demm li kienu sejrin jintuzaw fit-test tad-DNA gew mehuda fi Clinipath Laboratory f`Malta fil-prezenza ta` perit legali, l-kompjant Dr. Joseph M. Ciappara, li ssorvelja t-tehid u `labeling` tal-kampjuni tad-demm u tellaghhom darbtejn l-Ingilterra sabiex it-test isir minn Cellmark Diagnostics gewwa Abingdon, kif fil-fatt sar.*

*Wara li Cellmark Diagnostics ezaminaw l-ewwel set ta` kampjuni tad-demm, qalu li kien hemm 'mislabeling' tal-kampjuni f`Malta. Dan ir-rizultat ta` l-ewwel DNA test (`mislabeling`) gie kkontestat mill-perit legali mahtur mill-Prim` Awla li accerta lil Cellmark Diagnostics illi l-kampjuni kienu gew attentament mehuda u mmarkati ndividwalment fil-prezenza tieghu u accertahom li ma kien sar l-ebda 'mislabeling'. Il-Prim` Awla awtorizzat li jsir it-tieni DNA test, liema ezami sar u ta r-rizultat li fuqu kienet qed tistrieh il-konvenuta Josephine Cutajar. L-esponent isostni li dak li nduca lil Cellmark Diagnostics jghidu li sar 'mislabeling' kien ir-rizultat bizarr li hareg mid-DNA test bhala konsegwenza tal-fatt li l-esponent u missieru kellhom l-istess 'markers'.*

*In segwitu ghal dan it-tieni rizultat, fuq rikjesta ta` l-esponent, il-Prim` Awla tal-Qorti Civili hatret periti addizzjonali, li kienu zewg esperti medici u avukat. Fir-relazzjoni taghhom, il-periti addizzjonali qalu li l-Qorti ghandha tistrieh fuq ir-rizultat tat-tieni DNA test.*

*B`sentenza moghtija fil-21 ta` Gunju 2002, l-Onorabbli Qorti Civili Prim` Awla cahdet it-talba ta` l-esponent ghad-diskonoxximent tal-paternita` u ziedet tghid li l-esponent kien akkuza lill-konvenuta li kkommettiet adulterju matul iz-zwieg minghajr ebda bazi.*

*Illi l-esponent appella mis-sentenza quddiem l-Onorabbli Qorti ta` l-Appell. B`sentenza moghtija fis-17 ta` Frar 2004, l-Onorabbli Qorti ta` l-Appell ikkonfermat is-sentenza ta` l-ewwel Qorti.*

*Fit-28 ta` Ottubru 2004 l-esponent ipprezenta talba ghal ritrattazzjoni tal-kawza fil-grad ta` appell. Huwa sostna li l-periti addizzjonali kienu naqsu li jindikaw lill-Qorti l-avanzi teknologici ricenti li kienu jezistu fiz-zmien meta huma espletaw l-inkarigu taghhom, liema avanzi xjentifici huma kienu jafu jew kien imissihom jafu bihom u*

*li kienu jippermettu l-ksib ta` rizultat ferm aktar preciz u korrett milli kien possibbli li jinkiseb meta sar it-tieni DNA test. L-esponent argumenta li kien jezisti ezami li kien xjentifikamement aktar avanzat, maghruf bhala PowerPlex 16 System, u li r-rizultat tieghu seta` jkun deciziv. L-esponent kien gie moghti parir mill-Forensic Science Consultant Christopher Farrugia li "**such analysis could determine whether Conrad is indeed Mr. Carmel Cutajar`s half brother or his son".***

*Illi l-esponent ibbaza t-talba tieghu ghal ritrattazzjoni fuq is-subinciz (k) ta` l-Artiklu 811 tal-Kap. 12 li jittratta dwar il-ksib ta` dokument deciziv:*

*"(k) jekk, wara s-sentenza, jkun instab dokument deciz, u li l-parti li ggibu ma kinitx taf bih, inkella, illi, bil-mezzi li taghti l-ligi, ma setghatx iggibu qabel dik is-sentenza."*

*Fis-sottomissjonijiet tieghu, l-esponent fisser lill-Onorabbli Qorti ta` l-Appell illi l-kwistjoni jekk Conrad kienx ibnu jew huh kienet l-aktar haga mportanti f`hajtu u li hu kien qed jaghmel minn kollox, biex isir jaf il-verita`, ghall-gid ta` kulhadd.*

*Illi b`sentenza moghtija fid-29 ta` April 2005, l-Onorabbli Qorti ta` l-Appell mhux biss cahdet it-talba ta` l-esponent ghal ritrattazzjoni, izda ddikjarat li l-esponent kien qed jipprova johloq it-tieni appell ghall-kaz tieghu u li dan kien jammonta ghal abbuz tal-process gudizzjarju u kkundannatu jhallas spejjez addizzjonali fl-ammont ta` mitejn u hamsin lira (Lm250).*

*Illi in vista ta` dak li kien gie deciz mill-Onorabbli Qorti tal-Appell, l-esponent hass li kien ikun inutli li jadixxi xi qorti ohra f`Malta minhabba l-periklu li din tifforma l-impressjoni zbaljata li huwa qed jisfida lill-Onorabbli Qorti ta` l-Appell billi jkompli jabbuza mill-process gudizzjarju. Ghalhekk, l-esponent ipprezenta Petizzjoni quddiem il-*

*Qorti Ewropea ghad-Drittijiet tal-Bniedem li fiha huwa ressaq diversi lanjanzi rigward ksur ta` l-artikoli 6, 8 u 13 tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem.* [1]

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*1 The primary complaint is that applicant`s right to a fair trial under* ***Article 6*** *of the Convention has been violated in that the sworn opinion of Consultant Endocrinologist Professor Maurice Katz was disregarded and instead the Court chose to rely on an outdated second DNA test result and on the recommendations of the additional court referees, who failed to advise the Court that more recent technological advances could yield a more accurate result than the one obtained when the second DNA test was carried out. Both the Civil Court First Hall and the Court of Appeal disregarded the fact that on account of his medical condition applicant was precluded from having children and consequently from being Conrad`s Father.*

*With regard to his request for a retrial of the case of the appeal stage in terms of Article 811 of the Maltese Code of Civil Procedure, the Court of Appeal`s decision to dismiss his request for a modern DNA test resulted in serious prejudice and procedural unfairness in so far as the Court of Appeal could have ordered a modern DNA test which had the capability of yielding an accurate result instead of rejecting applicant`s request, and this in view of the importance of the matter at issue for applicant. Instead, the Court chose to dismiss the simple request and to chastise the applicant.*

*The action for disavowal of paternity and the subsequent appeal and request for a retrial at the appeal stage together constituted applicant`s efforts to determine whether the son that his wife Josephine had given birth to was in truth his son, as claimed by her, of his own brother. Two apparent contradictory realities stared applicant in the face: the doctor`s diagnosis that he could not have children and his wife`s claim that Conrad was his son. Applicant`s efforts to determine the true civil status of Conrad vis -a- vis himself was an exercise of his*

*fundamental right to family life guaranteed by Article 8 of the European Convention. Article 8 does not merely require the State to abstain from interferences in the rights protected; there is a positive element to the protection required by Article 8. A failure by the State to secure respect for the rights protected by this article amounts to a breach of Article 8. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to the primary negative undertaking, there may be positive obligations inherent to an effective respect for private or family life. In the present case, the State hindered the applicant from determining the true civil status of Conrad vis-a`-vis applicant himself. The harsh attitude adopted by the Court of Appeal constituted an unjustified interference and a disproportionate hindrance with the exercise of his Article 8 right.*

*Applicant further complains that the complaint he raises in his request for a retrial i.e. the availability of a more accurate DNA test is clearly `arguable`. Where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. It follows that under Article 13, the State is under a duty to provide a domestic process for adjudicating upon the applicant`s Claims. Since no such process exists, the applicant submits that his rights under Article 13 of the Convention have been violated.*

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*Illi l-Qorti Ewropea ghad-Drittijiet tal-Bniedem irriteniet illi l-esponent ma kienx ghadu ezawrixxa r-rimedji kollha disponibbli ghalih f`pajjizu peress li qatt ma pprezenta proceduri kostituzzjonali dwar il-lanjanzi li huwa kien ressaq quddiemha.*

*Illi konsegwentement l-esponent qed jipprezenta l-prezenti rikors kostituzzjonali li jirrigwarda l-istess lanjanzi li huwa ressaq quddiem il-Qorti Ewropea fi Strasbourg.*

*(1) Illi l-lanjanza principali tar-rikorrent hija li kien hemm* ***vjolazzjoni tad-dritt tieghu ghal smigh xieraq garantit bl-Artiklu 6*** *tal-Konvenzjoni Ewropea peress li l-opinjoni mahlufa tal-Consultant Endocrinologist, il-Professur Maurice Katz giet imwarrba u minflok il-Qorti ghazlet li tistrieh fuq rizultat ta` DNA test li kien skadut u fuq ir-rakkomandazzjonijiet tal-periti addizzjonali mahtura, liema periti kienu naqsu li jindikaw lill-Qorti li avanzi xjentifici recenti kienu jippermettu l-ksib ta` rizultat ferm aktar preciz minn dak li kien inkiseb fiz-zmien meta sar id-DNA test li fuqu strahu l-istess periti addizzjonali. Kemm l-Onorabbli Qorti Civili Prim`Awla kif ukoll l-Onorabbli Qorti ta` l-Appell skartaw il-fatt inneglibbli illi in vista tal-kondizzjoni medika tieghu, l-esponent kien prekluz milli jkollu wlied u konsegwentement prekluz milli jkun missier Conrad.*

*(2) Illi fir-rigward tat-talba ta` l-esponent ghal ritrattazzjoni tal-kawza fi grad ta` appell a tenur tas-subinciz (k) tal-Artiklu 811 tal-Kap 12, id-decizjoni mehuda mill-Onorabbli Qorti ta` l-Appell li tichadlu t-talba ghal DNA test modern u aggornat, ikkawzatlu pregudizzju serju u ingustizzja procedurali, peress illi l-Onorabbli Qorti ta` l-Appell setghet tawtorizza DNA test modern u aggornat, liema ezami kellu l-kapacita` li jforni rizultat preciz. Dan anke in vista tad-dritt ta` l-esponent li jkun jaf il-verita` dwar il-materja in kwistjoni u l-importanza taghha f`hajtu. Minflok, l-Onorabbli Qorti ta` l-Appell ghazlet li tichadlu din ir-rikjesta semplici u li tippenalizah anke finanzjarjament b`somma ta` Lm250 addizzjonali.*

*(3) In vista tal-fatt li l-esponent kellu quddiem ghajnejh zewg realitajiet konfliggenti – d-dikjarazzjoni cara ta` l-esperti medici tieghu illi hu zgur ma setax ikollu wlied minn zmien il-puberta` u l-pretenzjoni ta` martu li Conrad*

*kien ibnu, l-isforzi tal-esponent li jfittex li tigi stabbilita darba ghal dejjem il-verita` dwar haga daqshekk vitali ghalih gew ippenalizzati u mfixkla. L-isforzi tieghu biex jiddetermina l-istatus civili veru ta` Conrad fil-konfront tieghu kienu biex jikkostitwixxu ezercizzju tad-dritt ta` l-esponent ghall-hajja tal-familja li jinsab garantit fl-Artiklu 8 tal-Konvenzjoni Ewropea. L-Artiklu 8 mhux biss jirrikjedi li l-istat joqghod lura milli jinterferixxi fl-ezercizzju tad-drittijiet protetti mill-Konvenzjoni, izda wkoll jimponi obbligu pozittiv fuq l-istat. In-nuqqas da parti ta` stat li jassigura r-rispett tad-drittijiet protetti b`dan l-artiklu jammonta ghal* ***vjolazzjoni ta` Artiklu 8****. Ghalkemm l-ghan ta` l-Artiklu 8 huwa essenzjalment dak li jipprotegi lill-individwu mill-interferenza arbitrarja mill-awtorita` pubblika, dan l-artiklu mhux biss jimponi obbligu negattiv fuq l-istat biex jiddezisti minn tali ndhil arbitrarju, izda wkoll jesigi mill-istat ir-rispett ghall-hajja tal-familja bhala obbligu pozittiv. Fil-kaz prezenti, l-Onorabbli Qorti ta` l-Appell fixklet, anzi mpediet, lill-esponent milli jiddetermina l-istatus civili veru ta` Conrad fil-konfront tieghu. L-atitudni harxa mehuda mill-Onorabbli Qorti ta` l-Appell, tikkostitwixxi nterferenza mhux gustifikata u tfixkil spoporzjonat (`a disproportionate hindrance` fis-sens ta` gurisprudenza ta` Strasbourg) fl-ezercizzju tad-dritt tieghu garantit mill-Arttiklu 8 tal-Konvenzjoni.*

*(4) L-esponent qed jikkontendi wkoll illi l-lanjanza tieghu kontenuta fit-talba ghal ritrattazzjoni i.e. l-ezistenza ta` DNA test aktar modern, aggornat u preciz, tikkostitwixxi `an arguable claim` fis-sens tal-gurisprudenza ra` Strasbourg. Kull persuna li tqis lilha nfisha li giet pregudikata b`decizjoni li fil-fehma taghha tkun bi vjolazzjoni tal-Konvenzjoni ghandu jkollha rimedju quddiem l-organi gudizzjarji nazzjonali sabiex jipprovdu r-rimedju konsentit minn xi wiehed mid-drittijiet tal-Konvenzjoni Ewropea. Konsegwentement, skond l-Artiklu 13 tal-Konvenzjoni, l-istat ghandu l-obbligu li jipprovdi rimedju domestiku ghad-determinazzjoni tal-pretenzjoni ta` l-esponent. La darba r-rimedju mitlub mill-esponent quddiem l-Onorabbli Qorti ta` l-Appell ma giex kkonsistentit u anzi gie ritentut li huwa qed jipprova jikkrea*

*ghalih it-tieni appell, id-dritt tieghu ghal rimedju effettiv garantit bl-Artiklu 13 tal-Konvenzjoni gie vvjolat.*

*Ghaldaqstant, l-esponent jitob bir-rispett illi din l-Onorabbli Qorti joghgobha taghti dawk ir-rimedji kollha necessarji, taghmel dawk l-ordnijiet u tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex id-drittijiet fundamentali tieghu jigu protetti, billi tiddikjara illi kien hemm ksur ta` l-Artikli 6, 8, u 13 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem (Kapitlu 319) u tordna li jsir ezami tad-DNA bil-PowerPlex 16 System jew test iehor aktar preciz u modern sabiex jigi stabbilit l-istat civili veru ta` Conrad fil-konfront ta` l-esponent, u okkorrendo tiddikjara nulla u bla effett is-sentenza moghtija mill-Onorabbli Qorti ta` l-Appell fid-29 ta` April 2005 li biha cahdet it-talba ta` l-esponent ghal ritrattazzjoni fil-kawza fi grad ta` appell u thassar il-kundanna ghall-hlas ta` spejjez addizzjonali ta` Lm250, u inoltre tordna l-hlas ta` kumpens xierqa ghall-ksur tad-drittijiet fondamentali taghha.*

Rat ir-risposta ta` l-Avukat Generali prezentata fil-21 <u>ta` April 2006</u> li taqra hekk –

*Illi fl-ewwel lok l-esponent jidhirlu illi stante li t-talbiet attrici, fl-ipotezi li dawn jintlaqghu minn din l-Onorabbli Qorti, ser ikollhom certament impatt determinanti fuq il-hajja u d-drittijiet fundamentali relevanti ta` zewg persuni, cioe` Josephine Cutajar u Konrad Cutajar. Dan billi l-attur fit-tentattiv sabiex jirrespingi l-paternita` tieghu fil-konfront ta` Conrad Cutajar qieghed sahanistra jitlob li tigi dikjarata nulla is-sentenza quddiem l-Onorabbili Qorti ta` l-Appell fl-ismijiet Carmel Cutajar vs Josephine Mary sive Josephine Cutajar u Konrad Cutajar` (App. Civ. Nru, 659/1997/2. Ghaldaqstant l-esponent jidhirlu li r-rikorrent messu wkoll iccita f`din il-kawza lil dawn iz-zewg persuni sabiex tigi assikurata l-integrita` tal-gudizzju u sabiex dawn ikunu f`pozizzjoni li jharsu d-drittijiet taghhom quddiem din il-Qorti.*

***<u>L-Artiklu Sitta tal-Konvenzjoni Ewropea</u>***

*Illi fit-tieni lok, l-esponent ma jista` jirriskontra ebda ksur ta` l-Artikolu 6 tal-Konvenzjoni Ewropea, stante li ma sehh xejn tul il-proceduri kollha mnedija mir-rikorrent li jista` jindika nuqqas ta` smigh xieraq. L-ewwel Qorti kellha kull dritt tistrieh fuq l-opinjoni ta` periti mqabbda minnha, liema periti addizzjonali kienu nies rikonoxxuti bhala kompetenti li dwaru kienu qed jirrelataw u li ghalihom ir-rikorrent ma ghamel ebda oggezzjoni valida. Inoltre, kif anke kkonkludiet il-Qorti ta` l-Appell fil-fazi tar-ritrattazzjoni, r-rikorrent odjern ma rnexxielux jipprova li huwa qatt ma seta` jkollu tfal. Ressaq biss l-opinjoni ta` endokrinologista barrani, izda wara li l-periti mqabbda mill-Qorti ma kkonvalidawx tali opinjoni l-Prim` Awla gustament hassitx li setghet tikkonvidiha. Ir-rikorrent pero` donnu qed jippretendi li hu jifhem aktar mill-esperti peritali u li l-Qorti kellha toqghod fuq l-opinjoni medika li hu jippreferi u li qed iressaq hu stess. Fil-verita`, l-Qorti precedenti ghamlu apprezzament ragonevoli tal-fatti quddiemhom, u ghalhekk l-attur ma jistax issa juza l-procedura Kostituzzjonali sabiex jerga` jiftah mill-gdid proceduri li diga` gew ezawriti.*

*Ghar-rigward tac-cahda tal-Qorti ta` l-Appell ghat-ritrattazzjoni, l-esponent jirrimarka li din ma qabdietx u agixxiet hekk bla ebda ragunament. F`decizjoni mahsuba, l-Qorti ta` l-Appell, fil-proceduri tal-appell qalet li –*

*`Din il-Qorti ezaminat b`hafna reqqa –precizament kif ghamlet l-ewwel Qorti – l-provi kollha prodotti u, mhux biss ma ssibx x`ticcensura fl-apprezzament ta` dawn il-provi maghmul mill-Ewwel Qorti, imma taqbel kompletament ma` l-istess apprezzament li wassal lil dik il-Qorti illi tinkludi korrettement illi `…il-konsegwenza logika li tista` twassal ghal akkoljiment tat-talba ta` l-attur hija li l-konvenuta… marret ma xi ragel iehor u kkommettiet adulterju….; dan certament ma giex ippruvat*

*mill-attur u ghalhekk il-Qorti, apparti kull analizi genetiku li seta` sar u li kollha ndikaw li t-talba ta` l-attur ma kelliex tigi milqugha lanqas fuq bazi xjentifika, l-Qorti ma tarax li l-attur irnexxielu jipprova li martu kkomettiet adulterju la ma` missieru u lanqas ma` xi terza persuna li seta` wassal ghat-tqala taghha u ghat-twelid ta` Conrad`;*

*Il-Qorti ta` l-Appell kompliet tosserva li –*

*`L-ewwel Qorti mhux skartat dak illi qed jghid l-appellant izda waslet ghall-konkluzjoni gusta illi l-allegazzjoni ta` l-attur - liema allegazzjoni hija l-bazi tat-talbiet attrici – illi huwa `qatt ma seta` jkollu tfal` mhix sorretta mill-provi prodotti, senjatament dawk ta` natura xjentifika rizultanti mill-opinjoni studjata u akkademika ta` l-esperti medici addizzjonali '*

***<u>L-Artiklu Tmienja</u>***

*Illi ghar-rigward ta` l-allegat ksur ta` l-Artiklu 8 tal-Konvenzjoni Ewropea, ma jirrizultax li l-gurisprudenza Ewropea taghti xi ndikazzjoni ta` ksur ta` dan id-dritt fundamentali f`cirkostanzi bhal dawk odjerni. L-istat pogga ghad-dispozizzjoni tar-rikorrent il-mezzi legali kollha, nkluza din il-procedura Kostituzzjonali, izda r-rikorrent ma jistax issa jehodha kontra l-Istat ghax s`issa ma rnexxielux jiehu raguni f`tali proceduri. Inoltre, l-esponent ihoss illi jigi attribwit lill-Qorti ta` l-Appell agir li jimpedixxi lir-rikorrent fl-ezercizzju tad-drittijiet tieghu huwa komportament illi wiehed bilfors ikollu jsejjahlu zbaljat u bla gustifikazzjoni, meta dik l-istess Qorti kienet wara kollox qieghda tassigura li jintwera r-rispett dovut lill-istess process gudizzjarju. Ir-reazzjoni tal-Qorti ghat-talba tar-rikorrent ghar-ritrattazzjoni tista` wkoll tinftiehem ahjar fid-dawl tal-fatt li r-rikorrent kien wieghed lill-Qorti li se jressaq zewg dokumenti mportanti bhala prova biex imbaghad irrizulta li din kienet biss `messa in scena`.*

***L-Artiklu Tlettax***

*Illi fl-ahharnett ghar-rigward ta` l-allegat ksur ta` l-artiklu 13 ghandu jinghad illi l-argumenti tar-rikorrent, ghalkemm kellu dritt iressaqhom fl-istadju tar-ritrattazzjoni, ma kienux ta` natura tant impellenti li l-Qorti ta` l-Appell kellha bilfors taqbel maghhom. Rimedju effettiv ma jista` qatt jitqies li jfisser rimedju cert. Ir-rimedju tas-smigh tal-fazijiet tal-prim` istanza, appell u ritrattazzjoni huma rimedji effettivi izda bla dubju ma jiggarantux li min jutilizzahom bilfors se jiehu dak li qed jitlob. Huwa ghalhekk li f`cirkostanzi simili l-Qorti Ewropea qatt ma dehrilha li kellha tiskontra ksur ta` l-Artiklu 13 tal-Konvenzjoni. Terga` minn qari tas-sentenzi kollha li ggenera s`issa dan il-kaz ghandu jirrizulta li l-Qrati kollha nvoluti ghamlu dmirhom u taw il-kaz l-attenzjoni kollha li kien jixraqlu.*

*Ghaldaqstant l-esponent jitlob bir-rispett li din l-Onorabbli Qorti joghgobha tirrespingi r-rikors odjern bl-ispejjez kontra r-rikorrent.*

Rat id-deposizzjoni ta` Christopher Farrugia waqt seduta li saret fit-28 ta` Gunju 2006 quddiem l-Assistent Gudizzjarju Dr. Natasha Buontempo.

Rat ix-xiehda bl-affidavit tar-rikorrent li kienet prezentata fl-istess seduta.

Rat ir-rikors ta` Carmel sive` Charles Cutajar tas-16 ta` Ottubru 2006 fejn talab lil din il-Qorti sabiex *tordna li jsir DNA Testing bil-mezzi teknologikament avvanzati li jezistu llum biex jigi stabbilit jekk Conrad Cutajar huwiex iben jew hu r-rikorrent Carmel sive` Charles Cutajar, u dan billi jittiehdu kampjuni minghand Conrad Cutajar, ommu Josephine Cutajar u Carmel sive` Charles Cutajar.*

Rat id-digriet ta` din il-Qorti diversament presjeduta moghti fl-udjenza tas-27 ta` Ottubru 2006 fejn laqghet it-talba tar-rikorrent sabiex jigi allegat (mal-atti tal-kawza tal-lum) il-process tal-kawza fl-ismijiet *Carmel Cutajar vs Josephine Cutajar et (Citaz. Nru. 659/87)* li kien deciz mill-Qorti tal-Appell fid-29 ta` April 2005.

Rat id-digriet ta` din il-Qorti diversament presjeduta tat-18 ta` Dicembru 2006 fejn laqghet it-talba ta` Josephine Mary sive` Josephine Cutajar u Conrad Cutajar sabiex jintervjenu f`din il-kawza *in statu et terminis.*

Rat id-digriet ta` din il-Qorti diversament presjeduta tal-10 ta` Jannar 2007 fejn laqghet it-talba tal-intervenuti fil-kawza sabiex jipprezentaw risposta ghar-rikors ta` Carmel sive` Charles Cutajar tas-16 ta` Ottubru 2006 fuq riferit.

Rat ir-risposta tal-intervenuti fil-kawza tat-13 ta` Frar 2007 fejn, ghar-ragunijiet hemm indikati, talbu lill-Qorti sabiex tichad it-talba tar-rikorrent.

Rat ir-replika ta` Carmel sive Charles Cutajar tal-21 ta` Frar 2007.

Rat id-deposizzjoni ta` Dr. Renald Blundell fl-udjenza tal-21 ta` Frar 2007 quddiem din il-qorti diversament presjeduta.

Rat in-nota ta` osservazzjonijiet tar-rikorrent li kienet prezentata fis-7 ta` Mejju 2007 in sostenn tar-rikors tieghu tas-16 ta` Ottubru 2006 fuq riferit.

Rat id-deposizzjoni ta` Dr. Ronald Blundell fl-udjenza tal-10 ta` Dicembru 2007 quddiem din il-Qorti diversament presjeduta, u d-dokumenti li kienu esebiti mix-xhud fl-istess udjenza.

Rat il-verbal tal-udjenza tas-27 ta` Frar 2008 quddiem din il-Qorti diversament presjeduta fejn *inter alia* saret talba mir-rikorrent ghall-hatra ta` espert fid-DNA.

Rat il-verbal tal-udjenza tat-12 ta` Marzu 2008 quddiem din il-Qorti diversament presjeduta fejn id-difensuri tar-rikorrent u tal-intimat qablu fuq in-nomina ta` Dr. Anthony Abela Medici bhala espert tad-DNA. Fl-istess waqt, id-difensur tal-intervenuti fil-kawza talab lill-qorti sabiex taghti decizjoni jekk l-azzjoni tar-rikorrent kenitx proponibbli u ammissibbli.

Rat is-sentenza ta` din il-Qorti diversament presjeduta moghtija fl-udjenza tat-30 ta` Gunju 2008 fejn, ghar-ragunijiet hemm moghtija, iddecidiet hekk –

*… qabel ma tiddeciedi jekk l-azzjoni odjerna tar-rikorrent hiex proponibbli jew ammissibbli,*

*se tinnomina espert biex jirrelata dwar meta bdew isiru t-testijiet bil-PowerPlex 16 f`Malta u barra minn Malta.*

*jirrelata dwar l-istess test, jekk hux aktar modern, aggornat u preciz mit-test li sar minn Cellmark Diagnostic,*

*u jekk sarux xi testijiet jew avvanzi fl-identifikazzjoni tal-paternita` permezz tat-test PowerPlex 16*

*u dana biex eventwalment jekk ikun il-kaz, jigi stabbilit bi precizjoni l-istatus civili veru ta` Conrad Cutajar fil-konfront tar-rikorrent,*

*u dan wara li jezamina x-xhieda ta` Christopher Farrugia u Dr. R. Blundell u d-dokumenti minnhom ezibiti.*

*Spejjez provvizorjament tar-rikorrent.*

Rat il-verbal tal-udjenza ta` din il-Qorti kif presjeduta tas-27 ta` April 2009 .

Rat id-digriet taghha moghti fl-istess udjenza fejn hatret bhala espert tekniku lill-Professur Alex Felice, Professur tal-Bio Teknologija fl-Universita` ta` Malta u Kap tad-DNA Research Laboratories tal-Universita` ta` Malta sabiex, wara li jiehu konjizzjoni tal-provvediment moghti minn din il-Qorti diversament presjeduta fit-30 ta` Gunju 2008, jirrelata dwar meta bdew isiru t-testijiet bil-PowerPlex 16 f`Malta u barra minn Malta, jirrelata dwar l-istess test, jekk hux aktar modern, aggornat u preciz mit-test li sar minn Cellmark Diagnostic, u jekk sarux xi testijiet jew avvanzi fl-identifikazzjoni tal-paternita` permezz tat-test PowerPlex 16, u dana sabiex eventwalment jekk ikun il-kaz, jigi stabbilit bi precizjoni l-istatus civili veru ta` Conrad Cutajar fil-konfront tar-rikorrent. Ghall-fini ta` l-inkarigu tieghu, l-espert tekniku kellu jezamina x-xhieda ta` Christopher Farrugia u Dr. R. Blundell u d-dokumenti minnhom ezibiti. In vista ta` dan id-digriet, din il-Qorti rrevokat *contrario imperio* l-hatra ta` Dr. Anthony Abela Medici li kienet saret minn din il-Qorti diversament presjeduta fit-30 ta` Gunju 2008 (ara fol 130 tal-process).

Rat il-verbal tal-udjenza tad-19 ta` Jannar 2010 u d-digriet taghha li tat fl-istess udjenza.

Rat id-digriet taghha tal-4 ta` Mejju 2010 fejn cahdet it-talba tar-rikorrent ghas-sostituzzjoni tal-espert tekniku u fejn ikkonfermat lill-Professur Alex Felice fl-inkariku tieghu.

Rat il-verbal tal-udjenza tat-2 ta` Dicembru 2010 fejn l-espert tekniku halef ir-rapport tieghu.

Rat ir-relazzjoni peritali.

Rat li ma saret l-ebda talba ghall-hatra ta` periti addizzjonali.

Rat li l-partijiet ghalqu l-provi taghhom fl-udjenza tal-24 ta` Jannar 2011.

Rat in-nota ta` osservazzjonijiet tar-rikorrent li kienet prezentata fid-29 ta` Marzu 2011.

Rat in-nota ta` sottomissjonijiet tal-intervenuti fil-kawza li kienet prezentata fis-16 ta` Mejju 2011.

Rat in-nota ta` sottomissjonijiet tal-Avukat Generali li kienet prezentata fil-31 ta` Mejju 2011.

Rat id-digriet taghha moghti fl-udjenza tat-2 ta` Gunju 2011 fejn halliet il-kawza ghas-sentenza.

Rat l-atti tal-kawza.

**Ikkunsidrat :**

**B. <u>Il-lanjanzi tar-rikorrent</u>**

Ir-rikorrent ighid illi bil-mod kif il-Prim`Awla tal-Qorti Civili bis-sentenza taghha tal-21 ta` Gunju 2002, il-Qorti tal-Appell bis-sentenza taghha tas-17 ta` Frar 2004 u l-Qorti tal-Appell bis-sentenza taghha tat-28 ta` Ottubru 2004 (dwar it-talba tieghu ghar-ritrattazzjoni tal-kawza fil-grad tal-appell) ittrattaw u ddecidew kontra l-istanza tieghu ghad-diskonoxximent tal-paternita` tal-intervenut fil-kawza Conrad Cutajar, huwa garrab lezjoni tal-jeddijiet fundamentali tieghu kif tutelati minn tliet artikoli tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem ("il-Konvenzjoni") li taghmel parti mil-ligi taghna bis-sahha tal-Kap.319 tal-Ligijiet ta` Malta u cioe` : id-dritt ghal smigh xieraq (Art.6), id-dritt ghall-hajja tal-familja (Art.8) u l-obbligu ta` l-Istat li jipprovdi rimedju domestiku ghad-determinazzjoni tal-pretenzjoni tieghu (Art.13).

Qabel tiddeciedi jekk l-azzjoni tar-rikorrent kenitx proponibbli jew ammissibbli, din il-Qorti diversament presjeduta, permezz ta` provvediment moghti fl-udjenza tat-30 ta` Gunju 2008, hatret espert sabiex jirrelata dwar meta bdew isiru t-testijiet bil-PowerPlex 16 f`Malta u barra minn Malta, jirrelata dwar l-istess test, jekk hux aktar modern, aggornat u preciz mit-test li sar minn Cellmark Diagnostic, u jekk sarux xi testijiet jew avvanzi fl-identifikazzjoni tal-paternita` permezz tat-test PowerPlex 16, dan sabiex eventwalment, jekk ikun il-kaz, jigi stabbilit bi precizjoni l-istatus civili veru ta` Conrad Cutajar fil-konfront tar-rikorrent.

Ghal dan l-inkariku, din il-Qorti, kif presjeduta, hatret lill-Professur Alex Felice. Ir-relazzjoni tieghu tirrizulta a fol 189 u 190 tal-process.

1. <u>Dwar meta bdew isiru t-testijiet bil-PowerPlex 16 f`Malta u barra minn Malta</u>,

l-espert irrelata hekk –

***Il-Kit Powerplex 16 tfacca fis-suq mdwar is-sena 2000 u beda jintuza minn laboratorju f`Malta ftit wara. Huwa prodott minn Promega. Difficli jinghad meta meta preciz beda jintuza ghaliex mhux il-Laboratorju taghna u l-kumpannija li dak iz-zmien kienet topera m`ghadhiex.***

2. <u>Dwar l-istess test, jekk hux aktar modern, aggornat u preciz mit-test li </u> <u>sar minn Cellmark Diagnostic</u>,

l-espert irrelata hekk –

***Il-Powerplex 16 huwa kit li jinxtara minn laboratorji li joffru servizz ta` identita` kemm fic-cirkostanzi ta` parentela komuni, forensika jew ohrajn. Jintuzaw 16-il marker tad-DNA li jvarjaw bizzejjed fil-propolazzjoni biex jiggenera "DNA fingerprint" li fic-cirkostanzi komuni imsemmija jservu biex jeskludu jew jidentifikaw persuna bi probabilita` tant gholja li twassal ghal certezza.***

***Cellmark Diagnostic jipprovdu servizz ta` identita` u mhux dejjem possibbli jinghad x`metodu jintuza. Pero` Cellmark huma meqjusa "reference laboratory" ghal dan it-tip ta` xoghol. Jidher li ghalkemm illum forsi mhux modern daqs il-Powerplex 16, il-metodu wzat minn Cellmark fis-sena 1993 kellu 21 "DNA marker" wkoll variabbli u jista` jinghad li kien preciz ukoll.***

3. <u>Dwar jekk sarux xi testijiet jew avvanzi fl-identifikazzjoni tal-paternita` permezz tat-test PowerPlex 16</u>,

l-erspert irrelata hekk –

***B`hekk ma jidhirx li f`dan il-kaz il-Powerplex 16 joffri xi vantagg fuq dak li sar minn Cellmark fl-1993. Il-gurnal li jaghmel riferenza ghalih Dr. Blundell ma huwa xejn hlief it-trade magazine ta` Promega, b`hekk ma ghandux ir-reputazzjoni akkademika / intellettwali ta` gurnal xjentifiku li jkun "peer reviewed".***

Dwar il-piz probatorju u guridiku ta` relazzjoni peritali, il-Qrati taghna qalu hekk –

1. *Kemm il-kostatazzjonijiet tal-perit tekniku nominat mill-Qorti kif ukoll il-konsiderazzjonijiet u opinjonijiet esperti tieghu jikkostitwixxu skond il-ligi prova ta` fatt li kellhom bhala tali jigu meqjusa mill-Qorti. Il-Qorti ma kenitx obbligata li taccetta r-rapport tekniku bhala prova determinanti u kellha dritt li tiskartah kif setghet tiskarta kull prova ohra. Mill-banda l-ohra pero', huwa ritenut minn dawn il-Qrati li kellu jinghata piz debitu lill-fehma teknika ta' l-espert nominat mill-Qorti billi l-Qorti ma kellhiex leggerment tinjora dik il-prova. Hu manifest mill-atti u hu wkoll sottolinejat fir-rikors ta' l-appell illi l-mertu tal-prezenti istanza kien kollu kemm hu wiehed ta' natura teknika li ma setax jigi epurat u deciz mill-Qorti minghajr l-assistenza ta' espert in materja. B'danakollu dan ma jfissirx illi l-Qorti ma kellhiex thares b'lenti kritika lejn l-opinjoni teknika lilha sottomessa u ma kellhiex tezita li tiskarta dik l-opinjoni jekk din ma tkunx wahda sodisfacentement u adegwatament tinvesti l-mertu, jew jekk il-konkluzjoni ma kenitx sewwa tirrizolvi l-kwezit ta' natura teknika.* (Qorti tal-Appell – 19 ta` Novembru 2001 - **"<u>Calleja vs Mifsud</u>**")

2. In linea ta` principju, ghalkemm qorti mhix marbuta li taccetta l-konkluzjonijiet ta` perit tekniku kontra l-konvinzjoni taghha (*dictum expertorum numquam transit in rem judicata*), fl-istess waqt dak *ma jfissirx pero` illi qorti dan tista' taghmlu b' mod legger jew kapriccjuz. Il-*

*konvinzjoni kuntrarja taghha kellha tkun ben informata u bazata fuq ragunijiet li gravament ipoggu fid-dubju dik l-opinjoni teknika lilha sottomessa b' ragunijiet li ma ghandhomx ikunu privi mill-konsiderazzjoni ta` l-aspett tekniku tal-materja taht ezami.* (Qorti tal-Appell – 29 ta` Mejju 1998 - "**Grima vs Mamo et noe"**)

3. *Jigifieri qorti ma tistax tinjora r-relazzjoni peritali sakemm ma tkunx konvinta li l-konkluzjoni ta` tali relazzjoni ma kienetx gusta u korretta. Din il-konvinzjoni pero` kellha tkun wahda motivata minn gudizzju ben informat, anke fejn mehtieg mil-lat tekniku.* (Qorti tal-Appell – 6 ta` Ottubru 1999 - "**Cauchi vs Mercieca"** u Qorti tal-Appell - 28 ta` Jannar 2000 - **"Saliba vs Farrugia**")

4. *Il-giudizio dell`arte espress mill-perit tekniku ma jistax u ma ghandux, aktar u aktar fejn il-parti nteressata ma tkunx ipprevaliet ruhha mill-fakolta` lilha moghtija ta' talba ghan-nomina ta` periti addizzjonali, jigi skartat facilment, ammenokke` ma jkunx jidher sodisfacentement illi l-konkluzjonijiet peritali huma, fil-kumpless kollha tac-cirkostanzi, irragonevoli*" – (Qorti tal-Appell – 23 ta` Gunju 1967 - "**Bugeja *et* vs Muscat et"**).

**Ghal din il-Qorti, il-kostatazzjonijiet tal-Professur Alex Felice fil-kawza tal-lum jolqtu l-mertu tal-kwistjoni u jikkostitwixxu prova ta` fatt li din il-Qorti sejra taghtihom il-piz li jixirqilhom. Din il-Qorti tghid dan anke ghaliex wara li l-Professur Alex Felice halef fir-relazzjoni tieghu mhux biss ma saret l-ebda talba mill-partijiet ghall-hatra ta` periti addizzjonali jew ghall-eskussjoni tieghu, izda l-partijiet ghalqu l-provi taghhom.**

Din il-Qorti sejra tghaddi issa biex tara kif il-prova ta` fatt kostitwita mill-konkluzjonijiet tal-espert tinfluwixxi fuq il-mertu ta` l-istanza tar-rikorrent kif dedotta. Dan sejra

taghmlu billi tqis l-artikoli tal-Konvenzjoni citati mir-rikorrent bhala l-bazi tal-azzjoni tieghu.

## I. **<u>Dritt ghal Smigh Xieraq (Art.6)</u>**

Skond ir-rikorrent, kien hemm ksur tad-dritt tieghu ghal smigh xieraq meta l-opinjoni mahlufa tal-*Consultant Endocrinologist*, il-Professur Maurice Katz giet imwarrba u minflok il-Qorti ghazlet li tistrieh fuq rizultat ta` DNA test li kien skadut. Fir-rakkomandazzjonijiet taghhom, il-periti addizzjonali mahtura naqsu li jindikaw lill-Prim`Awla tal-Qorti Civili li kien hemm avvanzi xjentifici recenti li kienu jippermettu li jinkiseb rizultat ferm aktar preciz minn dak li kien hareg fiz-zmien meta sar id-DNA test li fuqu qaghdu l-istess periti addizzjonali.

Skond ir-rikorrent, il-Prim`Awla tal-Qorti Civili u l-Qorti tal-Appell skartaw il-fatt illi minhabba l-kondizzjoni medika tieghu, huwa kien prekluz milli jkollu wlied u ghalhekk ma setax ikun il-missier ta` l-intervenut fil-kawza Conrad Cutajar.

Skond ir-rikorrent, meta kienet michuda it-talba tieghu li tigi ritrattata s-sentenza tal-Qorti tal-Appell, il-Qorti kienet ikkawzatlu pregudizzju serju u ingustizzja procedurali ghaliex setghet tawtorizza DNA test modern u aggornat, li kien jaghti rizultat preciz. Minflok ghamlet hekk, il-Qorti imponiet anke multa, apparti li cahdet it-talba ghal ritrattazzjoni.

Ghall-fini tal-kawza tal-lum, il-parti **<u>rilevanti</u>** ta` dan l-artikolu huwa **<u>l-ewwel subinciz (1)</u>** li jaqra hekk -

*Fid-decizjoni tad-drittijiet civili u ta' l-obbligi tieghu jew ta` xi akkuza kriminali kontra tieghu, kulhadd huwa ntitolat ghal smigh imparzjali u pubbliku fi zmien*

*ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b'ligi. Is-sentenza ghandha tinghata pubblikament izda l-istampa u l-pubbliku jista' jigi eskluz mill-proceduri kollha jew minn parti minnhom fl-interess tal-morali, ta' l-ordni pubbliku jew tas-sigurtà nazzjonali f`socjeta` demokratika, meta l-interessi tal-minuri jew il-protezzjoni tal-hajja privata tal-partijiet hekk tehtieg, jew safejn ikun rigororament mehtieg fil-fehma tal-qorti f'cirkostanzi specjali meta l-pubblicità tista' tippregudika l-interessi tal-gustizzja.*

Illum huwa accettat illi l-kuncett ta' smigh xieraq huwa wiehed kumpless. Huwa l-assjem ta' diversi elementi tul il-process gudizzjarju illi flimkien jiggarantixxu dan id-dritt. Il-Qrati taghna, il-Qorti Ewropea tad- ghad-Drittijiet tal-Bniedem ("il-Qorti ta` Strasbourg") u l-awturi kellhom diversi okkazzjonijiet fejn ittrattaw l-elementi kostituttivi ta` dan id-dritt.

Fis-sentenza taghha tat-30 ta` Mejju 2002 fil-kawza "**Aquilina vs l-Avukat Generali et**", din il-Qorti diversament presjeduta (PA – GV) qalet hekk –

*Hu principju stabbilit li anke fl-istadju ta' appell, fejn dan id-dritt hu koncess, is-smigh tal-kawza jrid ikun ukoll wiehed xieraq, biex jigu salvagwardjati d-drittijiet fondamentali.*

*Biex wiehed japprezza jekk proceduri humiex xierqa jew le, wiehed m'ghandux ihares biss lejn xi nuqqasijiet procedurali li jokkorru imma jekk, fl-assjem taghhom, il-proceduri kienux jew le kondotti b'gustizzja fis-sostanza u fl-apparenza.*

Fil-pag.65 ta` ***A Practitioner`s Guide to the European Convention on Human Rights*** *(Third Edition),* Karen Reid tghid illi *the key principle governing Art.6 guarantees is fairness … of the proceedings as a whole.*

Fl-istess sens, fil-ktieb ***Article 6 of the European Convention on Human Rights – The Right To a Fair Trial***, Andrew Grotrian ighid –

*The requirement of fairness covers the proceedings as a whole, and not only those in an oral hearing. The question of whether a person has had a 'fair hearing' is thus approached by looking at the whole proceedings, although a particular incident may have a decisive effect.*

U jkompli hekk –

*The most established right added to Article 6 (1) is the principle of the* ***equality of arms****. This is important to understand the operation of the underlying principle of 'fairness' and although it is not explicitly expressed in Article 6(1) it is necessarily implied. This concept comprises the idea that each party should have an equal opportunity to present his case and that neither party should enjoy any substantial advantage over his opponent. This concept of equality of arms was first mentioned in the* **Neumaister case** *(27/6/1968) and has been a feature of Article 6 (1) ever since. The Commission has expressed the principle in respect of both criminal and non-criminal cases. And in the context of civil cases between private parties, the Court has said : "The court agrees with the Commission that as regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis a vis his opponent." (****"Dombo Beheer BV vs The Netherlands"****, 27 ta' Ottubru 1993)".*

Fis-sentenza taghha tal-25 ta` Frar 1997 fil-kawza ***"Findlay vs United Kingdom"*** il-Qorti ta` Strasbourg elenkat ir-rekwiziti sabiex il-Qorti tasal ghall-konkluzjoni li kien hemm smigh xieraq minn tribunal indipendenti u mparzjali :-

*(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.*

*(c) The concepts of independence and impartiality are closely linked and the Court will consider them together as they relate to the present case.*

Fil-ktieb ***"Law of the European Convention on Human Rights" (Second Edition)*** Harris, O`Boyle & Warbrick ighidu –

*… The Court 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*). (Pg.201)

*… The Court also allows States a wide margin of appreciation as to the manner in which national courts operate … A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct,* ***with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial****.* (Pg.202) (enfasi ta` din il-Qorti)

… ***In some contexts a breach of Article 6 will only be found to have occurred upon proof of <u>"actual prejudice"</u> to the applicant.*** (Pg.204) (enfasi ta` din il-Qorti)

… *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.* (Pag.224)

… *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*. (Pg.251)

Fil-pag.578 ta` ***<u>Theory and Practice of the European Convention on Human Rights</u>*** L-awturi **Van Dijk, Van Hoof, Van Rijn, Leo Zwaak** fil-ktieb **<u>"</u>" - Fourth Edition – Intersentia – 2006** jaghmlu din l-analizi -

*When is a hearing fair ? In the Kraska case* (sentenza tad-19 ta` April 1993) *the Court took as a starting-point that the purpose of Article 6 is inter alia "to place the tribunal under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessments of whether they are relevant to its decision.*

Fis-sentenza taghha tat-30 ta` Settembru 2011 fil-kawza "**<u>J.E.M. Investments Limited vs Avukat Generali et</u>**", il-Qorti Kostituzzjoni qalet hekk –

***… id-dritt ghas-smigh xieraq ma jiggarantix il-korrettezza tas-sentenzi fil-meritu izda jiggarantixxi biss l-aderenza ma' certi principji procedurali (indipendenza u imparzjalita` tal-Qorti u tal-gudikant, audi alteram partem u smigh u pronuncjament tas-sentenza fil-pubbliku) li huma konducenti ghall-amministrazzjoni tajba tal-gustizzja. Il-funzjoni tal-Qorti, fil-gurisdizzjoni Kostituzzjonali taghha, m'hijiex illi tirrevedi s-sentenzi ta' Qrati ohra biex tghid jekk dawn gewx decizi 'sewwa' jew le, izda hija limitata ghall-funzjoni li tara jekk dawk is-sentenzi kisrux il-Kostituzzjoni jew il-Konvenzjoni Ewropea.*** (enfasi ta` din il-Qorti)

*Effettivament il-Qorti Ewropea dwar Drittijiet tal-Bniedem dejjem sostniet li :*

*a. "The question whether proceedings have been 'fair' is of course quite separate from the question whether the tribunal's decision is correct or not. As the Commission has frequently pointed out under its so called "fourth instance formula", it has no general jurisdiction to consider whether domestic courts have committed errors of law or fact, its function being to consider the fairness of the proceedings". (Application 6172/73, X v. U.K.)*

*b. "It is primarily for the national law to lay down rules on the admissibility of evidence and for the national court to assess the evidence which is adduced".*

*c. "Notwithstanding the general statements above, the Commission stated that it would intervene where the assessment of evidence disclosed gross unfairness or arbitrariness. (Applikazzjoni: 7987/77). What this means in practice has not been explored. The fact that a judge prefers the evidence of a particular witness is unlikely to be sufficient, unless his stated reasons for doing so disclose a fundamental unsoundness. (Schuler–Zgraggen v Switzerland 1993).*

*Ghalhekk skont il-Qorti ta' Strasbourg l-allegazzjoni li l-kawza giet deciza hazin wahedha ma tirradikax ksur ta' dritt ghal smigh xieraq.*

Fil-pag.119 ta` ***__A Practitioner`s Guide to the European Convention on Human Rights__*** *(Third Edition),* Karen Reid tghid illi "*Article 6, para.1 does not lay down any rules as to the admissibility of evidence which is primarily a matter for the regulation under national law. Relevant are any aspects which might remedy or mitigate the alleged unfairness and whether the matter was subject to careful scrutiny by the appeal courts".*

Skond ir-rikorrent, huwa garrab pregudizzju serju u ingustizzja procedurali ghaliex il-Qorti tal-Appell ma awtorizzatx test tad-DNA bil-PowerPlex 16 li, skond ir-rikorrent, huwa test aktar modern, aggornat u preciz minn dak li kien kondott minn Cellmark Diagnostic. Bhala fatt kien it-test ta` din tal-ahhar li wassal ghall-konferma tal-paternita` tar-rikorrent fil-konfront ta` l-intervenut fil-kawza Conrad Cutajar. L-allegazzjoni tar-rikorrent hija kontrastata mill-prova tal-espert tekniku li tghid illi *ma jidhirx li f`dan il-kaz il-Powerplex 16 joffri xi vantagg fuq dak li sar minn Cellmark fl-1993.* Din il-prova f`termini ta` dritt tfisser li bil-fatt li l-Qorti tal-Appell ma ordnatx li jsir test tad-DNA bil-PowerPlex 16 ma kienx vjolat id-dritt tar-rikorrent ghal smigh xieraq u konsegwentement ma hemmx lok ghar-rimedju rikjest mir-rikorrent..

Apparti l-kwistjoni tat-test bhala tali, jidher illi l-lanjanza tar-rikorrent fl-assjem taghha tingabar fil-mod kif it-tliet qrati (li ttrattaw il-kwistjoni tal-paternita`) qiesu l-provi u ezercitaw id-diskrezzjoni taghhom. In partikolari, dwar l-ewwel stadju ta` gudizzju, ir-rikorrent isemmi bhala bazi ghall-azzjoni tal-lum ic-certifikat tal-Professur Maurice Katz li, skond ir-rikorrent, kien injorat, u, skond ir-rikorrent

ukoll, in-nuqqas tal-perit addizzjonali li jghidu lill-qorti li kien jezisti test tad-DNA aktar preciz minn ta` Cellmark.

Din il-Qorti rat il-process tal-kawza fl-ismijiet *Carmel Cutajar vs Josephine Cutajar et (Citaz. Nru. 659/87)* li kienet konkluza bid-decizjoni dwar it-talba ghal ritrattazzjoni mill-Qorti tal-Appell fid-29 ta` April 2005 u tghid li matul l-iter twil u kompless tal-kawza jirrizulta li r-rekwiziti kollha li jaghmlu d-dritt ghal smigh xieraq kienu osservati kollha.  Dan huwa manifest mill-mod kif ir-rikorrent ressaq il-provi tieghu, kif kkontrasta l-provi tal-parti avversa u l-osservazzjonijiet li ghamel qabel inghatat decizjoni.  Is-sentenza tal-Prim`Awla tal-Qorti Civili u z-zewg sentenzi tal-Qorti tal-Appell huma prova mill-aktar manifesta ta` kif matul il-process kollu tal-kawza kienet tutelata bis-shih *the rule of law* mill-bidu sal-ahhar fir-rispett tad-drittijiet kollha kostituzzjonali u konvenzjonali tal-partijiet, inkluz tar-rikorrent.

Fl-isfond tal-kostatazzjonijiet tal-espert mahtur fil-kawza tal-lum, meqjusa fil-kuntest tal-provi l-ohra ta` natura medika li jaghmlu parti mill-process tal-kawza *Carmel Cutajar vs Josephine Cutajar et (Citaz. Nru. 659/87)* din il-Qorti tghid li bl-azzjoni tieghu fi procediment specjali, bhal ma hija dik tal-lum, ir-rikorrent ittenta jitfa` dell iswed fuq ir-regolarita` ta` process li bil-maqlub ghal dak allegat mir-rikorrent kien rispettuz tad-drittijiet tal-partijiet.

Ir-rikorrent ma jistax jinqeda bil-procedura tal-lum sabiex jikkontesta d-diskrezzjoni li kienet ezercitata skond il-ligi fil-kawza *Carmel Cutajar vs Josephine Cutajar et (Citaz. Nru. 659/87)* bhal meta lmenta li l-Prim`Awla tal-Qorti Civili u l-Qorti tal-Appell skartaw il-fatt illi minhabba l-kondizzjoni medika tieghu, huwa kien prekluz milli jkollu wlied u ghalhekk ma setax ikun il-missier ta` l-intervenut fil-kawza Conrad Cutajar. Jekk wiehed iqis il-lanjanzi tar-rikorrent fil-procedura tal-lum, fl-isfond ta` dak li ssottometta fil-kawza tar-ritrattazzjoni, jirrizulta li dawk il-

lanjanzi tressqu ghall-konsiderazzjoni tal-Qorti tal-Appell u ghalhekk certament din il-Qorti ma tistax isservi ta’ qorti ta’ revizjoni ghall-Qorti tal-Appell. Fis-sentenzi taghhom il-qrati ordinarji dahlu fil-fond tal-allegazzjonijiet tar-rikorrent u ppronunzjaw ruhhom dwarhom. Dak kien ezercizzju ghal kollox interpretattiv, fejn kienu applikati r-regoli tal-ligi, ezercizzju li jsir minn kull gudikant, taqbel jew ma taqbilx mieghu. Din il-Qorti tirriafferma l-principju li ma ghandhiex tigi kjamata sabiex tissostitwixxi d-diskrezzjoni taghha ghal dik tal-Qrati f’kompetenza ordinarja, u lanqas ghandha tissindaka l-apprezzament ta’ provi kif sar mill-qrati ordinarji, nkluz dik ezercitata mill-Qorti tal-Appell u dan ghaliex ir-rimedju kostituzzjonali ma huwiex u ma ghandux jigi uzat bhala xi ghamla ta` appell tat-tielet grad li mhux permess fil-ligi taghna. F`din is-sede il-kompitu ta` l-Qorti huwa li taccerta ruhha li ma kienx hemm ksur tad-drittijiet tutelati mill-Konvenzjoni mhux li tirrevedi s-sentenzi tal-qrati l-ohra sabiex tghid kienux decizi korrettament inkella le. Fil-kaz tal-lum, din il-Qorti tghid li l-process ta` l-kawza *Carmel Cutajar vs Josephine Cutajar et (Citaz. Nru. 659/87)* kien fl-assjem tieghu *fair* u ghalhekk ma kienx hemm lezjoni tad-dritt tas-smigh xieraq lanqas ghar-ragunijiet li ressaq ir-rikorrent.

## II. <u>Id-dritt ghall-hajja tal-familja (Art.8)</u>

Ghall-kawza tal-lum, il-parti rilevanti tal-Art.8 tal-Konvenzjoni huwa l-ewwel subinciz li jaqra hekk –

*Kulhadd ghandu d-dritt ghar-rispett tal-hajja privata tieghu u tal-familja tieghu, ta’ daru u tal-korrispondenza tieghu.*

Ir-rikorrent isostni li l-isforzi tieghu biex jiddetermina l-istatus civili veru ta` l-intervenut fil-kawza Conrad Cutajar fil-konfront tieghu kienu sabiex jezercita d-dritt tieghu ghall-hajja tal-familja skond l-Art.8. Fil-kaz prezenti, ighid ir-rikorrent, il-Qorti ta` l-Appell fixklet, anzi mpedietu milli

jiddetermina l-istatus civili veru ta` l-intervenut fil-kawza Conrad Cutajar fil-konfront tieghu. Inoltre, ighid ir-rikorrent, l-attitudini harxa tal-Qorti tal-Appell tikkostitwixxi `*a disproportionate hindrance*` fl-ezercizzju tad-dritt tieghu garantit mill-Arttiklu 8 tal-Konvenzjoni.

Fil-pag.494 ta` ***A Practitioner`s Guide to the European Convention on Human Rights*** (op. cit.) Karen Reid tghid hekk –

*The determination of an applicant`s legal relations with a putative child concerns private life, even where what is at issue is a father`s attempt to disprove paternity. In that context a fair balance has to be struck between the general interest of the protection of legal certainty of family relationships and a father`s right to have the legal presumption of his paternity reviewed in the light of the biological evidence …*

*Courts should take into account scientific developments such as DNA testing in deciding whether to re-open previous decisions on paternity (Tavli v. Turkey, November 9, 2006 where DNA evidence was not a domestic ground for re-opening a past decision). The Court has generally not been convinced that bars on proceedings which fly in the face of reality serve the interests of protecting the child who it has said also has an interest in knowing its true father.*

Fil-kuntest ta` dak li qieghed isostni r-rikorrent fir-rigward tal-allegat ksur tad-drittijiet tieghu skond l-Art.8, l-awturi Van Dijk, Van Hoof, Van Rijn, Leo Zwaak fil-pag.739 ta` ***Theory and Practice of the European Convention on Human Rights*** (op. cit.) ighidu hekk –

*In the Kroon Case the Court summarised its approach in this respect as follows : "The Court reiterates that the essential object of Article 8 is to protect the*

*individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life. However the boundaries between the State`s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to* ***the <u>fair</u> balance that has to be struck between the competing interests of the individual and of the community as a whole ; and in both contexts the State enjoys a <u>certain</u> margin of appreciation****.* (enfasi u sottolinear ta` din il-Qorti).

Din il-Qorti hasbet fit-tul dwar il-lanjanza tar-rikorrent fl-ambitu tal-Art.8 u tghid li mhijiex fondata.

Jekk tassew l-"isforzi" tar-rikorrent kienu illi jiddetermina l-istatus civili veru ta` l-intervenut fil-kawza Conrad Cutajar, allura kien messu r-rikorrent qaghad fuq id-decizjonijiet li nghataw fil-kawza *Carmel Cutajar vs Josephine Cutajar et (Citaz. Nru. 659/87)* ghaliex illum (u cioe` wara r-relazzjoni tal-espert fil-kawza tal-lum) ma jistax ir-rikorrent javvanza aktar l-pretensjoni tieghu li l-qrati ordinarja kkommettew fil-konfront tieghu "*a disproportionate hindrance*".

Fil-kaz tal-lum ma jirrizultax li tissussisti l-htiega li *a father`s right to have the legal presumption of his paternity reviewed in the light of the biological evidence* (Karen Reid – op. cit.) propju ghaliex il-*biological evidence* li jrid igib ir-rikorrent ma jaghtix affidament ahjar minn dak li stabilixxa l-paternita` tieghu fil-konfront tal-intervenut fil-kawza Conrad Cutajar.

Fin-nota ta` osservazzjonijiet tieghu, ir-rikorrent jiccita l-kawza "**<u>Mizzi v Malta</u>**". Ghall-fini tal-kawza tal-lum, din il-Qorti ma tqisx li dik is-sentenza ghandha rilevanza diretta fuq il-kawza tal-lum propju ghaliex l-mertu hemm

kienet il-perentorjeta` taz-zmien ghall-azzjoni ta` denegata paternita`.

Fil-fehma taghha, din il-Qorti tghid minghajr l-icken esitazzjoni li dak tal-lum mhuwiex kaz fejn il-Qorti ta` l-Appell *fixklet*, anzi *mpediet* (kliem ir-rikorrent) lir-rikorrent milli jiddetermina l-istatus civili veru ta` l-intervenut fil-kawza Conrad Cutajar fil-konfront tieghu.

Propju mhux hekk huwa l-kaz. Il-qrati ordinarji stabbilew wara process twil, akkurat, metikoluz u fuq kollox gust li r-rikorrent ma kellux ragun fl-istanzi tieghu. U l-prova teknika fil-kawza tal-lum hija konferma ulterjuri. Ghalhekk ir-riferenza tar-rikorrent ghas-sentenza tal-Qorti ta` Strasbourg fil-kaz "**Tavli v Turkey**" ma tidholx fil-kuntest tal-istanza tal-lum. Ma hemm l-ebda bilanc x`jigi milhuq bil-fatt li r-rikorrent jesigi li jsir test bil-PowerPlex 16 meta rrizulta li dik il-prova ma tistax twassal ghal rizultat aktar affidabbli minn dak li kien meqjus fil-kawza kawza *Carmel Cutajar vs Josephine Cutajar et (Citaz. Nru. 659/87)*

**III. L-obbligu ta` l-Istat li jipprovdi rimedju domestiku ghad- determinazzjoni tal-pretenzjoni tieghu (Art.13)**

L-Art.13 tal-Konvenzjoni jaqra hekk –

*Kull min ikollu miksura d-drittijiet u l-libertajiet tieghu kontemplati f`'din il-Konvenzjoni ghandu jkollu rimedju effettiv quddiem awtorità nazzjonali ghalkemm dak il-ksur ikun sar minn persuni li jkunu qed jagixxu f`kariga ufficjali.*

Fil-lanjanza tieghu, ir-rikorrent jitlaq mill-premessa illi l-ezistenza ta` *DNA test aktar modern, aggornat u*

*preciz* (kliem ir-rikorrent) tikkostitwixxi `*an arguable claim*` fis-sens tal-gurisprudenza ta` Strasbourg.

Ighid ukoll ir-rikorrent illi ladarba r-rimedju li talab lill-Qorti tal-Appell (l-istess wiehed li talab fil-kawza tal-lum) kien ritenut bhala tentattiv li jipprova jikkrea ghalih it-tieni appell, id-dritt tieghu ghal rimedju effettiv garantit bl-Artiklu 13 tal-Konvenzjoni gie vvjolat.

Ikompli ghalhekk ir-rikorrent illi billi safa` pregudikat l-Istat, skond l-Art.13, ghandu l-obbligu li jipprovdi rimedju domestiku ghad-determinazzjoni tal-pretenzjoni tieghu.

Fil-pagna 998 et seq ta` ***<u>Theory and Practice of the European</u> <u>Convention on Human Rights</u>*** (op. cit.) l-awturi van Dijk, van Hoof, van Rijan u Zwaak ighidu hekk –

***Article 13 <u>cannot</u> be invoked independently from, but only in <u>conjunction with</u>****, one or more of substantive rights and freedoms of the Convention (articles 2-12 or Article 14) or of its Protocols … Article 13 aims to accord a means whereby individuals can obtain relief at a national level for violations of their Convention rights before having recourse to the Strasbourg supervision … The Court has held that a claim submitted to a domestic tribunal can be presumed to be both ‘genuine and serious’ except in case of clear indications to the contrary, as in the case oof the claim that is frivolous or vexatious or lacking in foundation.* (enfasi u sottolinear ta` din il-Qorti)

Huwa evidenti li fil-kaz tal-lum ma jistax ir-rikorrent jinvoka t-tutela tal-Art.13 meta l-istanza tieghu fondata fuq l-Art.6 u l-Art.8 giet respinta ghar-ragunijiet diga` moghtija.

**<u>Decide</u>**

**Ghar-ragunijiet kollha premessi, din il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi, filwaqt li qeghda tilqa` l-eccezzjonijiet tal-intimat, qeghda tichad it-talbiet kollha tar-rikorrent.**

**Tordna li l-ispejjez tal-kawza ghandhom jithallsu mir-rikorrent, hlief ghal dawk tal-intervenuti fil-kawza, li unikament ghaliex huma intervenuti fil-kawza, ghandhom jibqghu a kariku taghhom.**

**< Sentenza Finali >**

--------------------------------TMIEM--------------------------------