MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
TONIO MALLIA

Seduta tat-12 ta' Ottubru, 2012

Rikors Numru. 45/2012

Philip Grima

vs

Avukat Generali

Il-Qorti;

Rat ir-rikors li r-rikorrent ipprezenta fil-31 ta’ Lulju 2012, li jaqra hekk:

L-esponenti ghandu kawza li issa qeghda quddiem il-Qorti Kostituzzjonali, komposta ukoll mill-Onor. Imhallef Dr. Giannino Caruana Demajo. L-esponenti kellu l-kaz tieghu quddiem l-istess Imhallef fil-Prim’Awla tal-Qorti Civili (Sede Kostituzzjonali) li kienet miexja ma’ ohra quddiem l-istess Imhallef li fiha involut Brian Bajada. Gara li fil-kaz

“Brian Bajada”, l-Onor. Imhallef lahaq ta s-sentenza, filwaqt li ta’ l-esponenti giet mibghuta ghand l-Onor. Imhallef Anthony Ellul, li prattikament mexa pass pass ma’ l-istess sentenza, hlief li zied kundanna ghall-hlas ta’ danni da parti ta’ l-istat. Meta beda l-appell, l-esponenti talab ir-rikjuza ta’ l-Onor. Imhallef Dr. Giannino Caruana Demajo, li kien se jippresjedi fuq kawza kostituzzjonali li mxiet pass pass ma’ sentenza moghtija ftit qabel minnu stess.

Il-kawzi li qed issir referenza ghalihom huma:

(1) Angela sive Gina Balzan v Onor. Prim Ministru et (15/08 GCD deciza fil-11 ta’ Ottubru 2011)

(2) Perit Joseph Barbara et v Onor. Prim Ministru et (65/07 AE deciza fit-28 ta’ Ottubru 2011)

Bid-digriet moghti fis-7 ta’ Mejju 2012, fil-kawza Kostituzzjonali 65/2007, il-Qorti Kostituzzjonali cahdet it-talba ghar-rikuza peress li qalet ma jirrikorri l-ebda wiehed mill-elementi previst mil-ligi (Maltija) ghal tali rikuza.

L-esponenti qed jaghmel din il-kawza ghax barra mill-Kap. 12 bhala ligi Maltija hemm ukoll il-Kap. 319 tal-Ligijiet (ta’ Malta ukoll), u skont l-artiklu 6 ta’ l-Iskeda tal-Kap. 319, u cioe’ l-Konvenzjoni Ewropea ghad-drittijiet tal-Bniedem, tali rikuza kienet necessarja biex tizgura l-imparzjalita’ tal-gudikant.

Jekk wiehed jargumenta li l-Imhallef huwa biss gudikant wiehed minn tlieta, bizzejjed li wiehed ifakkar li fil-kaz Micallef v Malta, (15/10/2009) mhux it-tlett Imhallfin kienu jigu z-zijiet ta’ avukat partikolari. Il-Qorti Ewropea sabet ksur mhux tal-Kap. 12 imma ta’ l-ekwivalenti ta’ l-iskeda tal-Kap. 319, intqal fiha hekk:

1. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court’s constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test

where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case, and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia, Fey v. Austria*, 24 February 1993, Series A no. 255, §§ 27, 28 and 30, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

2. As to the subjective test, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-...). The Court has held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wetstein*, cited above, § 43). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, Series A no. 86, § 25).

3. In the vast majority of cases raising impartiality issues, the Court has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) [see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge’s subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. The United Kingdom*, 10 June 1996, *Reports* 1996-III, § 32).

4. As to the objective test, it must be determined whether, quite apart from the judge’s conduct, there are ascertainable facts which may raise doubts as to his

impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, *Reports* 1996-III, § 58).

5. The objective test mostly concerns hierarchial or other links between the judge and other actors in the proceedings (see court martial cases, for example, *Miller and Others v. The United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004; see also cases regarding the dual role of a judge, for example, *Meznaric v. Croatia*, no. 71615/01, 15 July 2005, § 36 and *Wettstein*, cited above, § 47, where the lawyer representing the applicant's opponents subsequently judged the applicant in a single set of proceedings and overlapping proceedings respectively) which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (see *Kyprianou*, cited above, § 121). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

6. In this respect, even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, *Reports* 1998-VIII, § 45).

7. Moreover, in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation

[see *Piersack*, cited above, § 30 (d)]. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see *Meznaric*, cited above, § 27). The Court will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see, *mutatis mutandis, Pescador Valero v. Spain*, no. 62435/00, §§ 24-29, ECHR 2003-VII).

2. Application to the present case

8. The Court notes that specific provisions regarding the challenging of judges were set out in Article 734 of the COCP (see paragraph 28 above). The Grand Chamber, like the Chamber, cannot but observe that Maltese law, as it stood at the time of the present case was deficient on two levels. Firstly, there was no automatic obligation for a judge to withdraw in cases where impartiality could be an issue, a matter which remains unchanged in the law in force at present. Secondly, at the time of the present case, the law did not recognise as problematic – and therefore as a ground for challenge – a sibling relationship between judge and advocate, let alone that arising from relationships of a lesser degree such as those of uncles or aunts in respect of nephews or nieces. Thus, the Grand Chamber, like the Chamber, considers that the law in itself did not give adequate guarantees of subjective and objective impartiality.

9. The Court is not persuaded that there is sufficient evidence that the Chief Justice displayed personal bias. It therefore prefers to examine the case under the objective impartiality test which provides for a further guarantee.

10. As to the objective test, this part of the complaint is directed at a defect in the relevant law under which it was not possible to challenge judges on the basis of a relationship with a party's advocate unless it was a first-degree relationship of consanguinity or affinity (see paragraph 28 above). Consequently, in the present case, Mrs. M. was faced with a panel of three judges, one of whom was the uncle of the opposing party's advocate and the brother of the advocate acting for the opposing party during the first instance proceedings whose conduct was at issue in the appeal. The Grand Chamber is of the view that the close family ties between the opposing party's advocate and the Chief Justice sufficed to objectively justify fears that the presiding judge lacked impartiality. It cannot be overlooked that Malta is a small country and that entire families practising law are a common phenomenon. Indeed, the Government have also acknowledged that this had become a recurring issue which necessitated action resulting in an amendment to the relevant law, which now includes sibling relationships as a ground for withdrawal (see paragraph 29 above).

11. The foregoing considerations are sufficient to enable the Court to conclude that the composition of the court was not such as to guarantee its impartiality and that it failed to meet the Convention standard under the objective test.

12. There has therefore been a violation of Article 6 § 1 of the Convention.

Having found a violation of this provision, the Court considers that there is no need to make a separate ruling on the complaint that the judge's behaviour affected Mrs. M.'s right to make submissions.

Dan hu bizzejjed, imma fuq ir-rikuza ta' l-Imhallfin hemm ukoll kaz iehor kontra Malta, ghalkemm il-Kap. 12 ghadu jghid dak li kien jghid qabel u dan b'referenza ghall-kaz ta' ritrattazzjoni. Qed issir referenza ghall-kaz St. Leonard Band Club v. Malta. Fiha intqal:

“14. In the instant case, the concerns regarding the Court of Appeal’s impartiality stemmed from the fact that its bench was composed of the same three judges who had previously heard the merits of the case and adopted the impugned judgement of 30 December 1993.

15. The Court accepts that, that situation could raise doubts in the applicant company’s mind about the impartiality of the Court of Appeal. However, it has to decide whether those doubts were objectively justified. The answer to this question depends on the circumstances of the case.

16. In this connection, the Court observes that, as regards the request for a retrial, the Court of Appeal was essentially called upon to ascertain whether its previous judgement of 30 December 1993 was based on a misinterpretation of the law. Thus, the same judges were called upon to decide whether or not they themselves had committed an error of legal interpretation or application in their previous decision, being in fact requested to judge themselves and their ability to apply the law.

17. The Court notes that the present case is distinguishable from that of *Thomann*, cited by the Government (see paragraph 52 above). In the latter case, during the retrial proceedings new and comprehensive information was available to the judges, who were undertaking a fresh consideration of the whole matter and were not called upon to evaluate and determine their own alleged mistakes (p. 816 § 35). In the instant case, the trial judges were called upon to assess and determine whether their own application of the law had been adequate and sufficient.

18. These circumstances are sufficient to hold the applicant company’s fears as to the lack of impartiality of the Court of Appeal to be objectively justified.

19. There has accordingly been a breach of Article 6 § 1 of the Convention.”

Qed issir tali referenza ghax juru li minkejja l-Kap. 12, hija applikabbli l-Konvenzjoni. U r-ratio taz-zewg sentenzi jindikaw ukoll fuq it-test oggettiv li ghandu jsir, li s'issa mhux inkorporat fil-Kap. 12, li kkwotat biss il-Qorti Kostituzzjonali fid-digriet precitat.

Issa dan il-kaz ghandu serjeta' kbira ghax jikkoncerna l-kostituzzjonalita' ta' ligi. Iz-zewg kazi kienu l-istess mertu prattikament, u t-tnejn kienu kwazi fotokopja ta' xulxin, kif jista' jidher mir-rikors promotur u mis-sentenzi tal-Prim'Awla tal-Qorti Civili (Sede Kostituzzjonali).

It-tnejn kienu qed jiddikjaraw jekk l-Art. 12A tal-Kap. 158 imurx kontra l-Art. 1 ta' l-Ewwel Protokoll tal-Konvenzjoni Ewropea. Anzi fis-sentenza ta' l-esponenti, il-Qorti stess tghid li rat is-sentenza l-ohra (ghalkemm appellata) u mxiet fuqha. Tant imxiet fuqha, li **dwar il-kostituzzjonalita' ta' l-Artiklu 12A ghamlet l-istess dikjarazzjoni u decizjoni**. Din ma kinitx kawza fejn Qorti qed tapplika r-regoli maghrufa ta' l-imghax jew l-azzjoni ta' spoll u applikathom ghall-fatti li jirrizultaw. Hawn si trattaw li b'ligi tigi attakkata ligi ohra.

Ghaldaqstant, l-esponenti jitlob bir-rispett li din l-Onorabbli Qorti joghgobha tiddikjara li (a) id-digriet moghti mill-Qorti Kostituzzjonali fis-7 ta' Mejju 2012, fil-kawza Kostituzzjonali 65/2007 "Perit Joseph Barbara et v. Onor. Prim Ministru", li cahad ir-rikuza ta' l-Imhallef Onor. Dr. Giannino Caruana Demajo jivvjola l-Art. 6 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem u (b) konsegwentement bhala rimedju thassar l-istess digriet.

Bl-ispejjez.

Rat ir-risposta li l-intimat ipprezenta fil-15 ta' Gunju 2012, li in forza taghha eccepixxa illi:

Fil-kawza odjerna r-rikorrent qed jitlob lil din l-Onorabbli Qorti sabiex tiddikjara li d-digriet moghti mill-Qorti Kostituzzjonali fis-7 ta' Mejju 2012 fil-kawza fl-ismijiet *"Il-Perit Joseph Barbara et vs Onor Prim Ministru et"* (Rik

65/2007) huwa leziv tad-drittijiet fundamentali tieghu stante li allegatament bic-cahda ta' dik l-istess Qorti tat-talba tieghu ghar-rikuza tal-Onor Imhallef Giannino Caruana Demajo ma giex rispettat il-kriterju tal-imparzjalita' a tenur tal-Artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

L-esponent jirrespingi dawn l-allegazzjonijiet u l-pretensjonijiet bhala nfondati fil-fatt u fid-dritt ghar-ragunijet segwenti:

Fl-ewwel lok bhala stat ta' fatt jirrizulta mill-atti li -

(I) Il-kaz *Perit Joseph Barbara vs Onor Prim Ministru et* (Rik 65/2007) u li fih jinsab parti r-rikorrent odjern ghalkemm originarjament kien qieghed jinstema' quddiem l-Onor Imhallef Giannino Caruana Demajo, dan gie trasferit ghal quddiem l-Imhallef Anthony Ellul fis-6 ta' Gunju 2011 fi stadju ta' sottomissjonijiet/trattazzjoni.

(II) L-Onor. Imhallef Caruana Demajo ma kellu ghalhekk ebda rwol deciziv jew influwenti f'dik il-kawza ghax kien proprju l-Imhallef Anthony Ellul li ddelibera l-mertu u wasal ghall-konkluzjonijet tieghu fis-sentenza.

(III) Il-fatt li fil-konsiderazzjonijiet tieghu l-Imhallef Ellul indika li "ra" s-sentenza ta' Angela Balzan deciza mill-Imhallef Caruana Demajo dan ma jfissirx li b'xi mod "mexa fuqha" kif qed jallega r-rikorrent fl-ahhar pagna tar-rikors promotur tieghu.

(IV) Anzi jirrizulta li s-sentenza ta' Angela Balzan kienet biss wahda minn diversi kunsiderazzjonijiet li l-Imhallef Ellul ghamel qabel wasal ghall-konkluzjonijiet tieghu u ma hemm ebda dubju li s-sentenza ta' Balzan ma kinitx il-motivazzjoni unika li a bazi taghha l-Imhallef Ellul wasal ghad-decizjoni tieghu fis-sentenza tat-28 ta' Novembru 2011.

Fid-dawl tas-suespost ghalhekk, ir-rwol prezenti tal-Onor. Imhallef Giannino Caruana Demajo fl-appell Kostituzzjonali fil-kawza tal-Perit Joseph Barbara b'ebda

mod m'ghandu jixhet xi dubju dwar l-imparzjalita' oggettiva jew suggettiva tieghu. Ghalkemm fil-kawzi tal-Perit Barbara u ta' Angela Balzan gie attakkat l-istess provvedimenti tal-ligi, senjatament l-Artikolu 12A tal-Kap 158, iz-zewg gudikanti in kwistjoni applikaw il-principji legali rilevanti ghac-cirkostanzi u l-fatti partikolari li kull wiehed minnhom kellu quddiemu u kien biss wara dan l-ezercizzju li waslu ghall-konkluzjoni taghhom anke jekk finalment l-ezitu fiz-zewg sentenzi kien l-istess.

Ghalhekk, jekk l-Imhallef Caruana Demajo fil-kawza ta' Angela Balzan wasal ghall-konkluzjoni li l-Artikolu 12A tal-Kap 158 kien qed jikser id-drittijiet fundamentali ta' Angela Balzan fic-cirkostanzi personali tal-kaz taghha, ma jfissirx li ghax issa ser ikollu quddiemu kaz li fih ser ikun qed jerga' jezamina mill-gdid l-Artikolu 12A tal-Kap 158 dan ser ikun diga' pregudikat minn qabel sabiex isib lezjoni tad-drittijiet fundamentali ghax tkun xi tkun id-decizjoni tal-Qorti Kostituzzjonali, huwa flimkien maz-zewg gudikanti l-ohra fl-appell, irid jezamina mill-gdid il-principji legali rilevanti u japplikahom esklussivament ghac-cirkostanzi partikolari tal-kaz tal-Perit Barbara.

Kienet ghalhekk korrettissima l-Qorti Kostitiuzzjonali meta fil-provvediment taghha tas-7 ta' Mejju 2012 fil-kawza "Il-Perit Joseph Barbara et vs Onor Prim Ministru et" qalet li ghalkemm il-fatti taz-zewg kawzi jixxiebhu u l-kunsiderazzjonijet legali li jghoddu ghal kaz x'aktarx illi jghoddu ghall-iehor ukoll, ma jistax jinghad illi z-zewg kawzi huma l-istess, b'mod li meta l-Imhallef Caruana Demajo ta l-fehma tieghu fis-sentenza ta' Balzan kien qieghed jaghti *a priori* l-fehma tieghu fuq il-kaz ta' Barbara fejn il-partijiet huma differenti u l-appartament huwa wkoll differenti.

Il-kuncett ta' mparzjalita' oggettiva u/jew suggettiva ta' gudikant ma' tistax tigi allacjata mal-gudizzju fuq mertu simili jew identiku anke jekk bejn partijiet diversi ghax altrimenti tinholoq krizi fis-sistema gudizzjarja kemm f'Malta u anke fil-Qrati Ewropej inkluz dik ghad-Drittijiet dwar il-Bniedem stante li huwa fatt indisputabbli li kull gudikant minn zmien ghal zmien jigu quddiemu kawzi

b’mertu simili fosthom dawk li jattakkaw l-istess dispozizzjonijiet tal-istess ligijiet u alla hares f’kull wahda minn dawn is-sitwazzjonijiet il-gudikant in kwistjoni jkollu jastjeni minn jeddu jew jigi rikuzat ghax kieku l-ebda pajjiz ma jkun jista’ jlahhaq man-numru ta’ Mhallfin li jkollu jispicca jahtar biex jissostitwixxu l-gudikanti li jkollhom jastjenu jew jigu rikuzati!

L-esponent ulterjorment jirrileva li fil-ktieb “Law of the European Convention on Human Rights” jinghad hekk:

“As to a judge sitting in two related cases, a judge may participate in related civil and/or criminal cases concerning the applicant without this in itself raising a legitimate doubt as to his impartiality.”

Jekk allura l-fatt li gudikant jippresjedi kazijiet relatati li jikkoncernaw l-istess persuna ma jammontax wahdu ghal nuqqas ta’ mparzjalita’, ahseb u ara kemm jista’ jregi l-argument tar-rikorrent odjern meta’ l-kaz ta’ Angela Balzan li qed jirreferi ghalih inghata fil-konfront ta’ persuna differenti.

Inoltre, fil-kaz *Gillow v The United Kingdom* intqal hekk:
“73. The Court notes first that, although there was a factual nexus between the two appeals heard by the Royal Court, they related to two different people and two different questions: a civil case concerning the propriety of the refusals by the Housing Authority to grant licences to Mrs. Gillow and a criminal case concerning Mr. Gillow's alleged unlawful occupation of "Whiteknights". Admittedly, with one exception, each member of the Royal Court who had sat in the first case also took part in the second, but this in itself is not reasonably capable of giving rise to legitimate doubts as to the impartiality of the Royal Court. ***It is in fact common in the Convention countries that higher courts deal with similar or related cases in turn”***

U fil-kaz *Lindon, Otchakovsky-Laurens and July v France*, il-kaz kien hekk:

“Arguments of the applicant

72. The third applicant pointed out that the article of 16 November 1999, on account of which he had been convicted of defamation, had reproduced in full a petition openly criticising the conviction of the first two applicants for defamation and complicity in defamation by the Paris Criminal Court in a judgment upheld by the Paris Court of Appeal on 13 September 2000. He complained that two out of the three judges on the bench of the Paris Court of Appeal which ruled on his case had also sat on the bench which previously convicted the first two applicants. He emphasised that, according to the judgment given in his case by that court on 21 March 2001, the court had simply referred to its first decision to justify the second, at least as regards the characterisation of the impugned remarks as defamatory.

In his submission, under those circumstances the two judges concerned had necessarily had a preconceived idea and thus he had not been heard by an impartial tribunal. This was all the more true as the judgment given in his case by the Paris Court of Appeal had criticised the authors of the petition for “repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks”, thus indicating, in the applicant’s view, that the judges had felt overtly and personally targeted by the impugned article.

The Court

77. 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 (see, for example, Gautrin and Others and Kyprianou, both cited above, § 58 and § 118 respectively).

In the present case, the fear of a lack of impartiality stemmed from the fact – moreover a proven one – that two out of the three judges on the bench of the Paris Court of Appeal which upheld the third applicant's conviction for defamation on account of the publication of the impugned petition had previously, in the case of the first two applicants, ruled on the defamatory nature of three of the offending passages from the novel which were cited in the petition.

The Court understands that this situation may have aroused doubts in the third applicant's mind as to the impartiality of the "tribunal" which heard his case, but considers that such doubts are not objectively justified.

78. ***The Court notes that, even though they were connected, the facts in the two cases differed and the "accused" was not the same****: in the first case the question was whether the publisher and author, by publishing certain passages from "Jean-Marie Le Pen on Trial", had been guilty of the offence of defamation and of complicity in that offence; in the second, the court had to decide whether, in a journalistic context, the publication director of Libération had committed the same offence by publishing the text of a petition which reproduced those same passages, and whose signatories, repeating them with approval, denied that they were defamatory in spite of the finding to that effect against the publisher and author (see, a fortiori, Craxi v. Italy (dec.), no. 63226/00, 14 June 2001). It is moreover clear that the judgments delivered in the case of the first two applicants did not contain any presupposition as to the guilt of the third applicant (ibid.).*

79. ***Admittedly, in the judgment given on 21 March 2001 in the third applicant's case, the Paris Court of Appeal referred back, in respect of the defamatory nature of the impugned passages, to the judgment***

that it had given on 13 September 2000 in the case of the first two applicants. However, in the Court's view this does not objectively justify the third applicant's fears as to a lack of impartiality on the part of the judges*.*

…….

81. Consequently, any doubts the third applicant may have had as regards the impartiality of the Court of Appeal when it ruled in the second case cannot be regarded as objectively justified."

Ghalkemm mhux il-fatti kollha f'dawn iz-zewg huma identici ghall-kaz odjern, minnhom jirrizultaw principji mportanti u rilevanti u cioe' li huwa normali u komuni li l-gudikanti jippresjedu kazijiet ta' natura simili jew identika u inoltre l-fatt li kaz b'mertu simili/identiku jkun ser jinghata fil-konfront ta' persuni differenti *per se* ma jwassalx ghal xi dubju dwar l-imparzjalita' o meno tal-gudikant.

Huwa sinifikanti li fiz-zewg kawzi fuq citati ma nstab ebda ksur tal-Artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

Finalment jigi eccepit li z-zewg kawzi tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem huma totalment irrelevanti ghal finijiet tal-kaz odjern. Fil-kaz *Micallef v Malta* il-Qorti sabiet ksur tal-imparzjalita' ta' wiehed mill-gudikanti f'kuntest totalment differenti in vista tal-parentela diretta tieghu ma' wiehed mill-avukati li kien qed imexxi l-kaz tal-klijent tieghu quddiemu. U fil-kaz tas-*San Leonard Band Club v. Malta*, il-ksur instab biss ghax il-gudikanti in kwistjoni kienu rinfaccjati b'talba biex jiddeciedu jekk huma stess kinux ikkommettew applikazzjoni hazina tal-ligi fid-decizjoni li kienu ddecidew ftit qabel li allura kien ifisser li huma riedu jiggudikaw lilhom infushom dwar l-abbilta' taghhom li japplikaw il-ligi.

Ghaldaqstant, u fid-dawl tas-suespost, m'ghandu jirrizulta li hemm ebda ksur tad-drittijiet fundamentali tar-rikorrent Philip Grima u din l-Onorabbli Qorti ghandha

konsegwentement tichad l-allegazzjonijiet u t-talbiet kollha bl-ispejjez kontra tieghu.

Salvi eccezzjonijiet ulterjuri.

Rat l-atti tal-kawzi li waslu ghal dawn il-proceduri, partikolarment il-kawza "Il-Perit Joseph Barbara et vs Onor. Prim Ministru et" pendenti quddiem il-Qorti Kostituzzjonali;

Rat l-atti kollha tal-kawza u dokumenti esebiti;

Rat in-Noti ta' l-Osservazzjonijiet tal-partijiet;

Ikkunsidrat;

Illi fil-kawza "Il-Perit Joseph Barbara et vs Onor. Prim Ministru et", pendenti quddiem il-Qorti Kostituzzjonali komposta mis-Sinjoria tieghu, il-Prim'Imhallef u l-Onor. Imhallef Giannino Caruana Demajo u Noel Cuschieri, ir-rikorrent Philip Grima talab ir-rikuza ta' l-Onor. Imhallef Giannino Caruana Demajo peress li, meta kien sedenti l-Prim'Awla tal-Qorti Civili kien iddecieda kawza ohra b'mertu simili ghall-mertu ta' din il-kawza. Din il-kawza kienet bdiet tinstema' quddiem il-Prim'Awla tal-Qorti Civili ppresjeduta mill-Onor. Imhallef Caruana Demajo, pero', qabel ma ta d-decizjoni tieghu, din il-kawza giet trasferita ghal quddiem l-Onor. Imhallef Anthony Ellul li ta s-sentenza li minnha sar appell ghal quddiem il-Qorti Kostituzzjonali. Ir-rikorrent jargumenta li meta l-Onor. Imhallef Ellul ta s-sentenza tieghu f'din il-kawza, segwa l-principji li gew enuncjati mill-Onor. Imhallef Caruana Demajo fil-kawza l-ohra ("Balzan vs Onor. Prim Ministru", deciza fil-11 ta' Ottubru 2011), u ghalhekk qed jissottometti li l-Imhallef Onor. Caruana Demajo ma jistax ikun imparzjali ghax qed ikun qed jirrevedi decizjoni li tixbah sentenza li hu kien ta sedenti l-Prim'Awla tal-Qorti Civili. Quddiem il-Qorti Kostituzzjonali din it-talba giet michuda minn dik il-Qorti b'decizjoni tas-7 ta' Mejju 2012.

Fil-kawza "Balzan vs Onor. Prim Ministru et", din il-Qorti, kif presjeduta mill-Onor. Imhallef Caruana Demajo kienet

iddecidiet illi l-applikazzjoni ta’ l-artikolu 12A tal-Kap. 158 ghall-proprjeta’ attrici msemmija fir-rikors tikser il-jeddijiet taghha mharsa taht l-artikolu 1 ta’ l-Ewwel Protokoll tal-Konvenzjoni Ewropea. Dak l-artikolu jipprovdi dritt ghal censwalist cittadin Malti, li jkun qed jokkupa l-fond bhala residenza ordinarja tieghu, li f’gheluq ic-cens jikkonverti b’titolu f’wiehed ta’ kera u jibqa’ in okkupazzjoni tal-fond billi jhallas kera daqs kemm kien ic-cens qabel b’zieda sa mhux aktar mid-doppju skont l-indici ta’ l-gholi tal-hajja. Il-Qorti qalet li dak l-artikolu applikat ghall-fattispecie partikolari tal-kaz li kellha quddiemha, ma jharisx l-proporzjonalita’ u t-tqassim xieraq ta’ pizijiet u beneficcji li jrid l-1 artikolu ta’ l-Ewwel Protokoll.

Fil-kawza “Barbara et vs Onor Prim Ministru et”, din il-Qorti, kif presjeduta mill-Onor. Anthony Ellul, waslet ghall-istess konkluzjoni wara li qieset ic-cirkostanzi partikolari tal-kaz li kellha quddiemha. Din il-Qorti, f’din il-kawza, irreferiet ghad-decizjoni “Balzan vs Onor. Prim Ministru et” li kienet giet deciza precedentement, izda l-aktar li strahet kien fuq diversi decizjonijiet tal-Qorti Ewropea, fosthom “Amato Gauci vs Malta”, deciza fil-15 ta’ Settembru 2009, u “Spadea et vs Italy”, deciza fit-28 ta’ Settembru 1995. Il-Qorti qalet li, fic-cirkostanzi tal-kaz, il-piz li s-sid qieghed jintalab li jgorr hu eccessiv u ma hemmx “a fair balance” li trid il-Konvenzjoni.

Ghalkemm il-principji legali li gew segwiti fiz-zewg kawzi jista’ jidher l-istess, fil-verita, il-principju ta’ proporzjonalita’ u li s-sid ma ghandux jitghabba “with an excessive burden” huwa principju li, tista’ tghid, inholoq bhala punt ta’ dritt mill-Qorti Ewropea, u dak li ghamlet din il-Qorti fiz-zewg kawzi msemmija kien li applikat dawn il-principji ghall-fattispecie tal-kaz li kellha quddiemha. Ic-cirkostanzi taz-zewg kawzi kienu simili hafna ghax il-provenjenza taz-zewg proprjetajiet jirrisalu ghall-istess att ippubblikat min-Nutar Dr. Paul Pullicino fl-14 ta’ Gunju 1957, pero’, dan ma jfissirx li z-zewg kawzi huma l-istess, b’mod li meta l-Imhallef Caruana Demajo ta l-fehma tieghu fis-sentenza “Balzan vs Onor. Prim Ministru et”, intrabat li jaghti l-istess fehma fuq il-kaz li ta lok ghal dawn il-proceduri, fejn il-partijiet huma differenti u l-appartament huwa ukoll

differenti. Wiehed irid jenfasizza ukoll illi filwaqt fil-kawza "Balzan vs Onor. Prim Ministru et", l-Onor. Imhallef Caruana Demajo kien qed jippresjedi din il-Qorti, issa qed jippresjedi qorti kolleggjali komposta minn tlett Imhallfin, fejn allura, il-vuci ta' l-Imhallef Caruana Demajo hija f'minoranza.

Fuq kollox ukoll, mhux inawdit li gudikant ibiddel il-fehma tieghu fuq materja avolja c-cirkostanzi bejn iz-zewg kawzi jkunu jixxiebhu (ara, per ezempju, il-kawza "Spiteri vs Sciberras", deciza mill-Prim'Awla tal-Qorti Civili fl-20 ta' Ottubru 2005, fejn il-gudikant wera li kien qed ibiddel fehmtu minn dak minnu stess espress f'kawza ohra precedenti), u ma ghandux jigi prezunt li gudikant sejjer a priori jibqa' jwebbes rasu anke jekk, f'kawza ohra, iressqulu argumenti konvincenti.

Kif intqal fil-ktieb ta' van Dijk et ("Theory and Practice of the European Convention on Human Rights", 4th Edit., 2006, pagna 614):

"*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.*"

Zgur li ma jistax jinghad, f'dan il-kaz, li l-Qorti Kostituzzjonali, kif komposta, ma taghtix fiducja oggettiva li sejra titratta l-kaz a bazi ta' argumenti li jirrizultaw f'dan il-kaz. Il-fatt li gudikant wiehed komponenti din il-Qorti ta' sentenza f'kawza li ghandha cirkostanzi simili, ma jfissirx li dak il-gudikant ma jistax ikun oggettiv f'din il-kawza ukoll.

Kif inghad fl-imsemmi ktieb ta' van Dijk et (ibid pagna 618), "*doubts about impartiality is also justified in case a judge who participated in a judgment of first instance also participates in the hearing of an appeal against the same judgment*", pero', dan mhux il-kaz hawnhekk ghax iz-zewg kawzi m'humiex l-istess. Hu komuni u inevitabbli li gudikant, anke f'sede differenti, jitratta kawzi b'cirkostanzi

simili u relatati (ara bhala rifless fuq dan il-punt il-kaz "Gillow vs The United Kingdom", deciz mill-Qorti Ewropea fl-24 ta' Novembru 1986).

Fl-ahhar nett, fil-fehma tal-Qorti, iz-zewg kawzi tal-Qorti Ewropea dwar id-Drittijiet tal-Bniedem, li ghalihom irrefera r-rikorrent, huma totalment irrelevanti ghall-finijiet tal-kaz odjern. Fil-kaz *Micallef v. Malta*, il-Qorti sabet ksur ta' l-imparzjalita' ta' wiehed mill-gudikanti f'kuntest totalment differenti in vista tal-parentela tieghu ma' wiehed mill-avukati li kien qed imexxi l-kaz tal-klient tieghu quddiemu. Filwaqt li fil-kaz tas-*San Leonard Band Club v. Malta*, il-ksur instab biss ghax il-gudikanti in kwistjoni, kienu rinfaccjati b'talba biex jiddeciedu jekk huma stess kinux ikkommettew applikazzjoni hazina tal-ligi fid-decizjoni li kienu ddecidew ftit qabel li allura kien ifisser li huma riedu jiggudikaw lilhom infushom dwar l-abilita' taghhom li japplikaw il-ligi.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mit-talbiet tar-rikorrent billi tichad l-istess, bl-ispejjez jithallsu mir-rikorrent Philip Grima.

< Sentenza Finali >

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