



**QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 30 ta` Mejju 2019

**Kawza Nru. 5
Rikors Nru. 22/2018 JZM**

**Joseph u Maria Victoria
konjugi Borg**

kontra

Avukat Generali

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-12 ta` Marzu 2018 li jaqra hekk :-

Illi fi proceduri quddiem il-Qorti Kostituzzjonali fl-ismijiet "Joseph u Maria Victoria konjugi Borg vs. Onorevoli Prim Ministru; Ministru ghall-Infrastruttura, Trasport u Komunikazzjoni; Awtorita` dwar it-Trasport ta` Malta" (Rikors mahluf numru 1118/2009 JPG), ir-rikorrenti odjerni ssollevaw l-eccezzjoni tar-rikuza fir-rigward tas-S.T.O. Silvio Camilleri, President tal-Qorti, u dan permezz ta` nota tal-20 ta` Frar 2017.

Illi l-kawza hija dwar jekk zewg Avvizi Legali humiex bi ksur ta` drittijiet imharsa bil-Kostituzzjoni u bil-Konvenzjoni Ewropeja ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali. Wiehed minn dawk l-Avvizi Legali sar fl-2001, meta l-President tal-Qorti kien avukat fl-Ufficcju tal-Avukat Generali, u l-iehor sar fl-2009, meta l-istess President tal-Qorti kien Avukat Generali. F` din il-kawza, l-istess President tal-Qorti hu msejjah "biex jistharreg Avviz Legali li kien gie approvat minnu stess meta huwa kien jokkupa l-kariga ta` Avukat Generali ta` Malta".

Illi l-eccezzjoni tar-rikuza giet michuda permezz ta` provvediment tat-12 ta` Gunju 2017 wara li qieset li l-eccezzjoni ta` rikuza ma ghandha ebda bazi konkreta.

Illi fit-2 ta` Novembru 2017, ir-rikorrenti talbu lill-Qorti Kostituzzjonali, li quddiemha qamet il-kwistjoni, biex taghmel "referenza kostituzzjonali" taht l-art. 46 tal-Kostituzzjoni ta` Malta u l-art. 4 tal-Att dwar il-Konvenzjoni Ewropeja (Kap 319).

Illi l-punt gie dibattut fis-seduta tas-6 ta` Novembru 2017 u gie rregistrat dan il-verbal :

Illi fit-12 ta` Frar 2018, il-Qorti Kostituzzjonali tat provvediment li bih iddecideiet illi hija la tista` tibghat il-kwistjoni quddiem il-Prim`Awla tal-Qorti Civili u lanqas ma ghandha taqtaghha hi.

B`danakollu, jista` dejjem jigi pprezentat rikors kostituzzjonali gdid quddiem il-Prim`Awla tal-Qorti Civili (Sede Kostituzzjonali) biex il-kwistjoni tigi mistharrga u maqtugha hemm, bi dritt ta` appell quddiem il-Qorti Kostituzzjonali.

Illi l-Qorti Kostituzzjonali pprefiggiet xahar zmien lir-rikorrenti biex jipprocedu b`rikors kostituzzjonali. Ghalhekk, ir-rikorrenti qeghdin jipprezentaw dan ir-rikors sabiex il-kwistjoni tigi mistharrga u maqtugha minn dina l-Qorti, bi dritt ta` appell quddiem il-Qorti Kostituzzjonali.

Illi r-rikorrenti dejjem sostnew illi t-talba ghal rikuzza tas-STO Silvio Camilleri giet michuda a bazi tal-informazzjoni provduta mill-Ufficcju ta` l-Avukat Generali, li, kif irrizulta, ma jzomm l-ebda registru dwar pariri moghtija.

Illi l-legislazzjoni li qieghda tigi impunjata hija legislazzjoni primarja u ta` importanza nazzjonali. Ghaldaqstant, jiftakar jew ma jiftakarx jekk kienx ta` parir lill-Gvern, il-persuna li kienet tokkupa l-kariga ta` Avukat Generali fiz-zmien relevanti ghal dina l-kawza, bir-rispett kollu, mhijiex persuna adatta biex tippresjedi din l-Onorabbli Qorti f`kawza ta` dina l-portata. L-Avukat Generali huwa l-avukat tal-Gvern u l-legislazzjoni li qed tigi impunjata giet promossa mill-Gvern. Huwa appena necessarju li jigi ribadit illi l-gustizzja mhux biss trid issir izda trid tkun tidher li qieghda ssir.

Illi r-rifjut tar-rikuza msemija jilledi d-dritt tar-rikorrenti ghal smigh xieraq.

Illi l-provvediment dwar l-eccezzjoni tar-rikuza moghti fit-12 ta` Gunju 2017 ukoll jilledi d-dritt tar-rikorrenti ghal smigh xieraq u huwa bbazat fuq impressjonijiet tal-President tal-Qorti u fuq dawk li gie

riferut lilu mill-Ufficcju tal-Avukat Generali fejn jahdmu l-avukati tal-kontroparti.

Illi l-Avukat Generali huwa l-Avukat tal-Gvern, u dak li jaghmlu l-Avukati li jahdmu fl-Ufficcju tal-Avukat Generali jkunu qeghdin jaghmluh f` isem l-Avukat Generali ta` Malta.

Illi l-provvedimenti tat-12 ta` Gunju 2017 u tat-12 ta` Frar 2018 inghataw kolleggjalment mill-Qorti komposta mill-President tal-Qorti u mill-Onor. Imhalled Gianniino Caruana Demajo u l-Onor. Imhalled Noel Cuschieri.

Illi r-rikorrenti jilmentaw illi jekk il-kawza 1118/2009 tkompli tinstema` u tigi deciza (a) mill-President tal-Qorti u (b) mill-imsemmija Imhallfin, huma sejr in isofru vjolazzjoni tad-dritt fundamentali taghom ghal smigh xieraq.

Ghaldaqstant ir-rikorrenti jitolbu bir-rispett illi din l-Onorabbli Qorti joghgobha –

(1) tiddikjara illi jekk il-kawza 1118/2009 tkompli tinstema` u tigi deciza mill-President tal-Qorti u mill-imsemmija Imhallfin li cahdu l-eccezzjoni tar-rikuza, ir-rikorrenti sejr in isofru vjolazzjoni tad-dritt fundamentali taghom ghal smigh xieraq garantit mill-Artikolu 6 tal-Konvenzjoni Ewropeja (Kap 319) u mill-Artikolu 39 tal-Kostituzzjoni ta` Malta.

(2) tiddikjara illi l-provvediment tat-12 ta` Gunju 2017 li ma hemmx raguni ghar-rikuza, u dak tat-12 ta` Frar 2018 li ma ghandhiex tilqa` t-talba biex il-kwistjoni tar-rikuza tigi deciza mill-Qorti Kostituzzjonali diversament komposta, kif ukoll ic-cahda tar-rikors tat-

2 ta` Novembru 2017, jilledu d-dritt fundamentali tar-rikorrenti ghal smigh xieraq, u konsegwentement tordna t-thassir tagghom.

(3) tirrevoka kull ordni biex ir-rikorrenti jbatu l-ispejjez gudizzjarji in konnessjoni mal-kwistjoni tar-rikuza.

(4) tordna l-hlas ta` kumpens xieraq ghal dan il-ksur u tordna li l-kawza 1118/2009 tkompli tinstema` quddiem Imhallfin differenti.

Bl-ispejjez kollha kontra l-intimat Avukat Generali.

Rat ir-risposta prezentata fl-4 ta` April 2018 li taqra hekk :-

Illi din il-kawza tirrigwarda procediment li hemm pendent quddiem il-Qorti Kostituzzjonali fl-ismijiet "Joseph u Maria Victoria konjugi Borg vs. Onor. Prim Ministru" (numru 1118/2009) fejn ir-rikorrenti talbu r-rikuza tal-President tal-Qorti Dr. Silvio Camilleri ghaliex fil-fehma tagghom, peress li l-Prim Imhalled kien jokkupa l-kariga ta` Avukat Generali dan huwa ta` pregudizzju ghalihom galadarba l-mertu tal- kawza kostituzzjonali hija dwar jekk zewg avvizi legali humiex bi ksur ta` drittijiet imharsa bil-Kostituzzjoni u bil-Konvenzjoni Ewropea liema avvizi legali gew approvati meta l-istess President kien Avukat Generali. Apparti ir-rikuza tal-President tal-Qorti ir-rikorrenti qed jitolbu wkoll ir-rikuza tal-Onor. Imhalled Giannino Caruana Demajo u l-Onor. Imhalled Noel Cuschieri.

Illi l-esponent jibda biex jirrileva li l-allegazzjonijiet u l-insinwazzjonijiet kollha li ghamlu ir-rikorrenti fir-rikors tagghom huma infondati fil-fatt u fid-dritt u jrendu l-kwistjoni li qed iqanqlu assurda.

Il-ligi hija cara dwar meta imhalled ghandu jirrikuza ruhu u dan ai termini tal-artikolu 734 tal-Kap 12. L-esponent jghid li r-rikorrenti ma ressu l-ebda raguni valida sabiex l-Imhalled jirrikuza ruhu mill-kawza.

Fl-udjenza tal-20 ta` Marzu 2017 quddiem mil-Qorti Kostituzzjonali kawza numru 118/2009 , gie vverbalizzat is-segwent i :

"Dr. Abigail Caruana b`referenza ghall-verbal tas-seduta tal-20 ta` Frar, 2017 li mill- files tal-Avukat Generali u tal-Ufficcju tal-Prim Ministru u tal-Ministeru tat-Trasport u Infrastruttura ma jirrizultax li inghata xi parir bil-miktub jew oralment dwar il-kwistjoni mertu ta` dan l-appell mill-President tal-Qorti meta kien jokkupa l-ufficcju tal-Avukat Generali u anqas bhala avukat fl-ufficcju tal-Avukat Generali u anqas jirrizulta li l-ufficcju tal-Avukat Generali ta xi parir dwar l-istess mertu.

"Dr. Ivan Gatt ghall Awtorita` tat-Trasport jiddikjara li mir-records tal-Awtorita tat-Trasport ma rrizultax li l-President tal-Qorti la bhala Avukat Generali u anqas bhala avukat fl-ufficcju tal-Avukat Generali u anqas xi hadd mill-ufficcju tal-Avukat Generali qatt taw xi parir bilmiktub jew oralment dwar il-mertu ta` dan l-appell.

L-esponent jaghmel imbaghad referenza ghal-provediment li tat il-Qorti Kostituzzjonali fit-12 ta` Gunju 2017 meta giet biex tiddeciedi dwar l-eccezzjoni tar-rikuza imqajjma mir-rikorrenti u jaghmel tieghu l-konsiderazzjonijiet tal-Qorti li qalet is-segwent i:

L-Artikolu tal-Ligi rilevanti ghall-eccezzjoni odjerna huwa dak kontemplat fl-Artikolu 734(1)(d)(i) tal-Kap. 12 tal-Ligijiet ta` Malta li jistipula:

"(1) L-Imhalled jista` jigi rikuzat jew jastjeni ruhu milli joqghod fil-kawza: ... "(d)(i) jekk ikun ta l-parir tieghu, ittratta quddiem il-qorti

jew kiteb dwar il-kawza jew dwar kullhaga ohra li ghandha x`taqsam malkawza jew tiddependi minnha”.

8. *In vena legali ssir referenza ghad-decizjoni ta` din il-Qorti fl-ismijiet "Dr Joseph Zammit Tabona et vs. Direttur Generali tal-Qrati et" moghtija fil-25 ta` Novembru 2016, fejn inghad:*

"11. Fir-rigward jinsab ritenut :

"... .. Illi f`dan ir-rigward tajjeb jinghad li biex raguni twassal ghall-astensjoni jew ghar-rikuza ta` gudikant din trid tkun wahda konkreta u mhux biss misthajla. B`mod partikolari inghad li "il-ligi ma tridx li, semplicement ghax parti jew ohra f`kawza `thoss` jew `jidhrilha` li gudikant jista` jkun parzjali, allura dak il-gudikant ghandu ma jiehux konjizzjoni ta` dik il-kawza. Apparti l-obbligu li l-ligi timponi fuq ilgudikant li joqghod f`kull kawza li tigi lilu assenjata skond il-ligi u li jastjeni jew jilqa` l-eccezzjoni tar-rikuza fil-kazijiet biss fejn ikun legalment gustifikat li huwa ma jkomplix jiehu konjizzjoni ta` dik ilkawza, mhux kull `hsieb` ta` parzjalita` li jista` talvolta jghaddi minn mohh parti jew ohra, jista` jinghad li huwa `oggettivament gustifikat`. Ittest oggettiv ta` l-imparzjalita`, anke kif mifhum mill-Qorti Ewropea tad-Drittijiet tal-Bniedem jirrikjedi li jkun hemm bazi oggettivament riskontrabbli."

9. *Inghad ukoll fis-sentenza ta` din il-Qorti fl-ismijiet "Antonio Pace et vs Rev Henry Abela OP et noe" deciza 26 ta` Frar 2009 illi :*

"[Ir-rikuza] Hu rimedju li ghandu jinghata biss wara li jirrizulta b`mod konkret, u mhux biss ipotetikament, li tassew ragonevolment u oggettivament hemm jew jista` tassew ikun hemm lok ta` parzjalita` filgudikant li jkun ". [sottolinear tal-Qorti]

Ferm il-premess, din il-Qorti hadet konjizzjoni tal-kontenut tannota tar-rikorrenti datata 20 ta` Frar 2017 (iktar `il fuq riprodotta).

Tat ukoll il-piz misthoqq lid-dikjarazzjoni tal-President tal-Qorti tal-istess data, li permezz taghha qal li hu ma ta ebda parir jew b`xi mod gie kkonsultat dwar l-Avviz Legali in kwistjoni. Hadet ukoll konjizzjoni taddikjarazzjonijiet maghmula mid-difensuri tal-intimati, wara konsultazzjoni u tfittxija fl-ufficcji taghhom, li ma taw ebda riskontru pozittiv ghal dak allegat mir-rikorrenti.

11. Fid-dawl ta` dan kollu, din il-Qorti hi tal-fehma li l-eccezzjoni ta` rikuza mressqa mir-rikorrenti ma ghandha ebda bazi konkreta u hija bbazata biss fuq ipotezi u, ladarba ma ngabu ebda provi konkreti li jistghu jindikaw li l-President tal-Qorti kien ta xi parir bil-miktub jew oralment dwar ir-regolamenti in kwistjoni, meta huwa kien jokkupa lkariga ta` Avukat Generali, allura l-allegazzjoni tar-rikorrenti qed tigi meqjusa li hi bbazata biss fuq kongettura u mhux fuq fatti.

Decide

Ghaldaqstant, din il-Qorti, qeghdha tichad l-eccezzjoni ta` rikuza sollevata mir-rikorrent.

Il-Qorti Kostituzzjonali kienet cara hafna fid-decizjoni taghha li ma tilqax it-talba ghar-rikuza tal-Prim Imhalled. Certament ir-rikorrenti ma jistghux iggieghlu bilfors Imhalled jirrikuza ruhu u joqghodu isabbtu saqqajhom jekk ma jigriex kif jghidu huma. Il-fatt wahdu li din it-talba giet michuda mil-Qorti zgur ma jaghtix lok ghal xi forma ta` vjolazzjoni tad-drittjiet fundamentali tar-rikorrenti.

Illi huwa inkredibbli kif ir-rikorrenti issa qed jitolbu wkoll li anke l-Onorevoli Imhallfin Dr. Giannino Caruana Demajo u Dr. Noel Cuschieri ma jkomplux jisimghu u jiddecidu l-kawza in kwistjoni. Pero` fi kwalunkwe kaz xorta ir-rikorrenti iridu jissodisfaw dak li jghid l-artikolu 734 tal-Kap 12 u l-esponent huwa tal-umli fehma li m`hemm l`ebda raguni oggettiva jew soggettiva sabiex l-imsemmija Imhallfin huma wkoll jirrikuzaw ruhhom.

Ghalhekk l-ilment tar-rikorrenti kif impost fuq l-artikolu 6 tal-Konvenzjoni Ewropea u l-artikolu 39 tal-Kostituzzjoni huwa frivolu u vessatorju u ghandu jigi michud.

Semghet ix-xiehda u rat il-provi l-oħra li tressqu fil-kors tal-kawza.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet li pprezentaw iz-zewg nahat.

Rat l-atti l-oħra tal-kawza.

II. Fatti

B`rikors tas-16 ta' Novembru 2009, ir-rikorrenti ntavolaw il-kawza fl-ismijiet "**Joseph Borg et vs Onorevoli Prim Ministru et**" (Rik. Nru. 1118/09) fejn *inter alia* talbu li l-Avviz Legali 293/2001 u l-Avviz Legali 200/2009 jigu dikjarati nulli u bla effett billi huma diskriminatorji u konsegwentement abbuzivi u llegali.

B`sentenza moghtija minn din il-Qorti diversament presjeduta fil-5 ta` Mejju 2016, it-talbiet tar-rikorrenti kienu michuda.

Ir-rikorrenti appellaw mis-sentenza.

B`rikors tal-20 ta` Frar 2017, ir-rikorrenti talbu r-rikuza tal-President tal-Qorti Kostituzzjoni, l-Onor. Prim` Imhalled Silvio Camilleri, ghar-raguni illi :-

"...wara li ntebhu li r-Regolamenti li qeghdin jigu impunjati, l-Avviz Legali 200 tal-2009, kienu gew approvati u kien inghata parir dwarhom mill-Avukat Generali fis-sena 2009 qabel ma dawn ir-Regolamenti dahlu fis-sehh, u dan in segwitu ghas-sentenza tal-Qorti tal-Appell tad-19 ta' Mejju 2009 fl-ismijiet "Maria Victoria Borg et vs Sindku u Segretarju Ezekuttiv in rapprezentanza tal-Kunsill Lokali Pieta` (949/2004)", l-appellanti qeghdin jissollevaw l-eccezzjoni tar-rikuza tas-Sinjurijsa Tiegħu l-President ta' din l-Onorabbli Qorti biex jistharreg Avviz Legali li kien gie approvat minnu stess meta huwa kien jokkupa l-kariga ta' Avukat Generali ta' Malta".

Fit-12 ta' Gunju 2017, il-Qorti Kostituzzjonali cahdet it-talba tar-rikuza billi pprovdiet hekk :-

"... .. din il-qorti hadet konjizzjoni tal-kontenut tan-nota tar-rikorrenti datata 20 ta' Frar 2017. Tat ukoll il-piz misthoqq lid-dikjarazzjoni tal-President tal-Qorti tal-istess data, li permezz tagħha qal li hu ma ta ebda parir jew b'xi mod gie kkonsultat dwar l-Avviz Legali in kwistjoni. Hadet ukoll konjizzjoni tad-dikjarazzjonijiet magħmula mid-difensuri tal-intimati, wara konsultazzjoni u tfittxija fl-ufficcji tagħhom, li ma taw ebda riskontru pozittiv għal dak allegat mirrikorrenti.

Fid-dawl ta' dan kollu, din il-Qorti hi tal-fehma li l-eccezzjoni ta' rikuza mressqa mir-rikorrenti ma għandha ebda bazi konkreta u hija bbazata biss fuq ipotezi u, ladarba ma ngabu ebda provi konkreti li jstgħu jindikaw li l-President tal-Qorti

kien ta xi parir bil-miktub jew oralment dwar ir-regolamenti in kwistjoni, meta huwa kien jockupa lkariga ta' Avukat Generali, allura l-allegazzjoni tar-rikorrenti qed tigi meqjusa li hi bbazata biss fuq kongettura u mhux fuq fatti."

B'rikors tat-2 ta' Novembru 2017, l-appellanti talbu li ssir referenza kostituzzjonali ghal dawn ir-ragunijiet :-

"Illi l-legislazzjoni li qieghda tigi impunjata hija legislazzjoni primarja¹ u ta' importanza nazzjonali. Ghaldaqstant, jiftakar jew ma jiftakarx jekk kienx ta parir lill-gvern, il-persuna li kienet tokkupa l-kariga ta' Avukat Generali fiz-zmien rilevanti ghal dina l-kawza, bir-rispett kollu, mhijiex persuna adatta biex tippresjedi din l-onorabbli qorti f'kawza ta' dina l-portata. L-Avukat Generali huwa l-avukat tal-gvern u l-legislazzjoni li qed tigi impunjata giet promossa mill-gvern. Huwa appena necessarju li jigi ribadit illi l-gustizzja mhux biss trid issir izda trid tkun tidher li qieghda ssir. Illi f'dawn ic-cirkostanzi l-esponent ihoss illi ghandu jissollewa kwistjoni kostituzzjonali.

... ..

Ghaldaqstant l-esponenti, filwaqt li tissollewa kwistjoni kostituzzjonali fuq ir-rifjut tal-eccezzjoni tar-rikuza tal-President, titlob bir-rispett illi din l-onorabbli qorti joghgobha tapplika l-artikolu 46 tal-Kostituzzjoni u l-artikolu 4 tal-Kap. 319 biex ikun hemm id-debita determinazzjoni tarreferenza kostituzzjonali fir-rigward ta' din il-kwistjoni."

Fil-verbal tal-udjenza tas-6 ta' Novembru 2017 quddiem il-Qorti Kostituzzjonali nghad hekk :-

"Dr Tonio Azzopardi [ghall-atturi] spjega illi huwa qiegħed jitlob lil din il-qorti jew li tirreferi l-kwistjoni lill-Prim'Awla tal-Qorti Civili jew din il-qorti stess, diversament komposta, tiddeciedi hi stess il-kwistjoni sollevata mir-rikorrent.

Fuq domanda tal-qorti Dr Azzopardi kompli jispjega li jekk din il-qorti tkun tal-fehma li ma tistax tilqa' t-talba tieghu biex il-kwistjoni tigi riferuta lill-Prim'Awla tal-Qorti Civili allura l-istess kwistjoni għandha tigi deciza minn din il-qorti diversament komposta.

Il-qorti fic-cirkostanzi tiddiferixxi l-appell għall-provvediment fuq irrikors ta' Joseph Borg tat-2 ta' Novembru 2017 dwar jekk din il-qorti għandhiex tirreferixxi l-kwistjoni sollevata fir-rikors u skont il-verbal tallum u/jew din il-qorti għandhiex is-setgħa li tiddeciedi hi stess il-kwistjoni sollevata."

Fit-12 ta' Frar 2018 il-Qorti Kostituzzjonali ipprovdiet dwar irrikors tat-2 ta' Novembru 2017. Qalet hekk :-

"6. L-ewwel kwistjoni hija jekk din il-qorti għandhiex is-setgħa, jew, ahjar, għandhiex il-htiega Ii tibghat il-kwistjoni quddiem il-Prim'Awla tal-Qorti Civili. L-art. 46 tal-Kostituzzjoni li jirregola l-materja jghid hekk:

"46. (3) Jekk f'xi proceduri f'xi qorti li ma tkunx il-Prim'Awla tal-Qorti Civili jew il-Qorti Kostituzzjonali tqum xi kwistjoni dwar il-ksur ta' xi wahda mid-disposizzjonijiet tal-imsemmija artikoli 33 sa 45 (magħdudin), dik il-qorti għandha tibghat il-kwistjoni quddiem il-Prim'Awla tal-Qorti Civili kemm-il darba fil-fehma tagħha t-tqanqil tal-kwistjoni ma tkunx

semplicement frivola jew vessatorja; u dik il-qorti ghandha taghti d-decizjoni taghha fuq kull kwistjoni mibghuta quddiemha skont dan issubartikolu u, bla hsara ghad-disposizzjonijiet tas-subartikolu (4) ta' dan l-artikolu, il-qorti li quddiemha tkun qamet il-kwistjoni ghandha tiddisponi mill-kwistjoni skont dik id-decizjoni.

(4) Kull parti fi proceduri migjuba quddiem il-Prim'Awla tal-Qorti Civili skont dan l-artikolu jkollha dritt ta' appell quddiem il-Qorti Kostituzzjonali.

7. L-art. 4 tal-Kap. 319 jirregola l-materja bl-istess mod.

8. Is-setgha li tibghat kwistjoni quddiem il-Prim'Awla tal-Qorti Civili tinghata meta l-kwistjoni tqum "f'xi proceduri f'xi qorti li ma tkunx il-Prim'Awla tal-Qorti Civili jew il-Qorti Kostituzzjonali"; mela ma hemmx dik is-setgha meta l-qorti tkun il-Prim'Awla tal-Qorti Civili jew il-Qorti Kostituzzjonali. Ma hemmx is-setgha ghax ma hemmx il-htiega. Kemm il-Prim'Awla tal-Qorti Civili u kemm il-Qorti Kostituzzjonali ghandhom kompetenza kostituzzjonali u ghalhekk il-kwistjoni jistghu jaqtghuha huma stess bla htiega li jibaghtuha quddiem xi qorti ohra. Li kieku l-Qorti Kostituzzjonali ma kellhiex is-setgha li taqta' l-kwistjoni hi ma kienx jaghmel sens li ma jkollhiex ghall-inqas is-setgha li tibghat ilkwistjoni quddiem il-Prim'Awla tal-Qorti Civili.

9. Nghaddu mela ghall-meritu tal-kwistjoni: il-fatt li l-President tal-Qorti kien Avukat Generali meta saru l-Avvizi Legali impunjati f'din il-kawza jaghti lill-President tal-Qorti interess li jiddeciedi li ma

hemmx inkonsistenza tal-Avvizi Legali mal-Kostituzzjoni jew mal-Konvenzjoni ?

10. Din il-qorti gà iddecidiet, bis-sentenza tat-12 ta' Gunju 2017, li ma hemmx raguni ghar-rikuza. Kien ghalhekk illi l-atturi talbu illi, jekk ma tistax issir referenza, il-kwistjoni taqtaghha din il-qorti stess "diversament komposta".

11. Izda jekk il-kwistjoni tibqa' biex tinqata' minn din il-qorti "diversament komposta" tkun qiegħda b'hekk effettivament tintlaqa' l-eccezzjoni ta'

12. Il-qorti ghalhekk hija tal-fehma illi ma ghandhiex tilqa' t-talba biex ilkwistjoni tar-rikuza "tigi deciza minn din il-qorti diversament komposta".

13. Dan ifisser illi l-Qorti Kostituzzjonali la tista' tibghat il-kwistjoni quddiem il-Prim'Awla tal-Qorti Civili u lanqas ma ghandha taqtaghha hi. Ma jfissirx izda li ma hemmx rimedju għal min irid iqanqal ilkwistjoni, għax jista' dejjem jiftah kawza b'rikors quddiem il-Prim'Awla tal-Qorti Civili biex ilkwistjoni tigi mistharrga u maqtugħa hemm, bi dritt ta' appell quddiem il-Qorti Kostituzzjonali.

14. Il-qorti ghalhekk tichad it-talba magħmula mill-atturi bir-rikors tagħhom tat-2 ta' Novembru 2017.

15. L-ispejjez ta' dan l-episodju jhallsuħom l-atturi."

Fil-verbal tal-istess udjenza tnizzel ukoll :-

"Il-Qorti tipprefiggi terminu ta' xahar millum sabiex l-atturi appellanti jiddeducu l-pretensjoni li jista'

ghandhom dwar il-kwistjoni kostituzzjonali sollevata minnhom fil-Prim'Awla tal-Qorti Civili."

Il-kawza thalliet ghall-kontinwazzjoni ghas-7 ta' Mejju 2018.

Fis-seduta tas-7 ta' Mejju 2018 ma sar ebda accenn ghal proceduri odjerni li kienu ntavolati mir-rikorrenti fit-terminu prefiss mill-Qorti Kostituzzjonali.

Il-kawza thalliet ghat-2 ta' Lulju 2018 ghat-trattazzjoni finali.

B`nota tal-5 ta' Gunju 2018, l-appellanti talbu r-rikuza tal-Onorevoli Imhallef Giannino Caruana Demajo u tal-Onorevoli Imhallef Noel Cuschieri :-

"peress li huma, flimkien mal-Unur Tieghu il-Prim Imhallef Uxxenti Silvio Camilleri, iddecidew l-eccezzjoni tar-rikuza fil-konfront tal-Prim Imhallef, u inoltre, flok ma insistew mieghu illi l-appell pendent i jigi differit ghal Mejju "sic et simpliciter" sabiex l-Unur Tieghu Silvio Camilleri jkun lahaq irtira bl-eta` f'April 2018, ipprefigge terminu ta' xahar mit-12 ta' Frar 2018 "sabiex l-atturi appellanti jiddeducu l-pretenzjoni li jista' ghandhom dwar il-kwistjoni kostituzzjonali sollevata minnhom fil-Prim'Awla tal-Qorti Civili", liema proceduri kostituzzjonali kellhom ghalhekk jigu pprezentati inutilment bi spiza zejda ghall-esponenti".

Ghalkemm l-udjenza tat-2 ta' Lulju 2018 kienet intiza ghat-trattazzjoni finali tar-rikors tal-appell, jirrizulta mill-verbal tal-udjenza illi :-

"L-appellant assistit minn Dr. Tonio Azzopardi insista li jinghata provvediment dwar it-talba tieghu kontenuta fin-nota tal-5 ta' Gunju 2018.

Il-Qorti ghalhekk thalli l-appell ghall-5 ta' Ottubru 2018 fid-9.00 a.m. ghall-provvediment."

Fil-5 ta' Ottubru 2018 il-Qorti Kostituzzjonali tat provvediment dwar in-nota tal-5 ta' Gunju 2018.

Il-Qorti Kostituzzjonali qalet hekk :-

3. Ir-ragunijiet li fuqhom hija bbazata l-imsemmija "eccezzjoni ta' rikuza" mertu ta' dan il-provvediment odjern huma tnejn:

- (i) il-fatt li l-Imhalledf Giannino Caruana Demajo (GCD) u l-Imhalledf Noel Cuschieri (NC) iddecidew il-kwistjoni ta' rikuza fil-konfront tal-Prim Imhalledf Silvio Camilleri (SC), flimkien mal-istess Prim Imhalledf u*
- (ii) il-fatt li flok mal-imhalledf Giannino Caruana Demajo (GCD) u l-Imhalledf Noel Cuschieri (NC) "insistew" mal-Prim Imhalledf Silvio Camilleri (SC) li l-appell pendent i jigi differit ghal Mejju (cioe` wara li jkun irtira l-istess Prim Imhalledf bleta`) ipprefiggew terminu ta' xahar sabiex fiha huma jiddeducu quddiem il-Prim'Awla tal-Qorti Civili l-pretensjoni li "jista' jkun ghandhom dwar il-kwistjoni kostituzzjonali sollevata minnhom", liema proceduri kostituzzjonali kellhom jigu pprezentati inutilment bi spejjez zejda ghalihom.*

4. L-ewwel argument tal-atturi ghalhekk hu li gialadarba l-Imhallfin Giannino Caruana Demajo (GCD) u Noel Cuschieri (NC) flimkien mal-Prim Imhalledf Silvio Camilleri (SC) kienu ddecidew li ma kienx il-kaz li l-Prim Imhalledf jirrikuzaw ruhu, mela allura huwa l-kaz li jirrikuzaw ruhhom huma stess. Din il-Qorti hija perplessa b'dan l-argument li huwa kompletament bla bazi u legalment infondat. Bl-ebda mod ma jinkwadra taht xi wahda mis-sitwazzjonijiet ikkontemplata fl-Artikolu 7343 tal-Kapitolu 12. Il-fatt li l-Imhallfin Giannino Caruana Demajo (GCD) u Noel Cuschieri (NC) dehrilhom li ma kienx il-kaz li l-Prim Imhalledf jirrikuzaw ruhu bl-ebda mod ma jipogghom f'pozizzjoni fejn jigi li ghandhom jirrikuzaw irwiehhom huma stess.

5. Fit-tieni lok l-atturi jilmentaw bil-fatt li din il-Qorti (komposta mill-Prim Imhalledf Silvio Camilleri (SC) u l-Imhallfin Giannino Caruana Demajo (GCD) u Noel Cuschieri (NC)) flok ma "sic et simpliciter" iddiferiet l-appell ghal wara li jkun lahaq irtira l-Prim Imhalledf (cioe` ghal wara April 2018), tathom terminu ta' xahar biex fiha jiddeducu quddiem il-Prim'Awla tal-Qorti Civili l-pretensjoni kostituzzjonali li jista' jkun ghandhom. Jargumentaw li bhala konsegwenza ta' dan kellhom jipprezentaw proceduri kostituzzjonali inutilment bi spejjez zejda ghalihom u allura iqisu li dan huwa argument iehor ghaliex l-Imhallfin Giannino Caruana Demajo (GCD) u Noel Cuschieri (NC) ghandhom jirrikuzaw ruhhom.

6. Din il-Qorti pero` taghmel is-segweni osservazzjoni: jekk l-atturi dehrilhom li kellhom jissollevaw kwistjoni kostituzzjonali minhabba l-fatt li l-Prim Imhalledf Silvio Camilleri (SC) kien l-Avukat Generali fiz-zmien li l-Avviz Legali 200/2009 giet promossa mill-gvern, u jekk fit-12 ta' Frar 2018, meta inghataw xahar biex jiddeducu tali kwistjoni

kostituzzjonali quddiem il-Prim'Awla tal-Qorti Civili, l-appell gie differit "ghallkontinwazzjoni ghas-7 ta' Mejju 2018" (cioe` ghal wara l-irtirar tal-Prim Imhallef Silvio Camilleri (SC)) mela allura l-istess atturi kienu jafu li meta l-Qorti Kostituzzjonali kienet ser tiddeciedi l-kaz taghhom il-Prim Imhallef ma kienx ser ikun Silvio Camilleri (SC) izda persuna ohra⁴ (4 Li l-Prim Imhallef Silvio Camilleri kien ser jirtira f'April 2018 kien fatt li kien ilu zmien jissemma' fuq il-media, u ben maghruf mal-avukati.). Ghaldagstant kwalsiasi problema li seta' kellhom bil-fatt li l-Prim Imhallef Silvio Camilleri (SC) kien qed jippresjedi din il-Qorti, kienet ser tkun ghebet sad-differiment sussegwenti. Ma kellhomx ghalfejn l-atturi appellanti jipprezentaw proceduri kostituzzjonali. Kellhom "sic et simpliciter" jistennew sad-differiment sussegwenti. Dan l-ilment taghhom ghalhekk huwa wiehed superfluwu u infondat ghall-ahhar, u daqstant iehor hija superfluwa u infondata l-pretenzjoni taghhom li bhala konsegwenza ta' dan kollu ghandhom jirrikuzaw ruhhom l-Imhallfin Giannino Caruana Demajo (GCD) u Noel Cuschieri (NC). Hawnhekk ukoll, mhux applikabbli l-Artikolu 734 tal-Kap 12.

Decide

7. Ghal dawn il-motivi din il-Qorti qeghda tichad l-eccezzjoni sollevata mill-atturi li mhux biss hija infondata izda addirittura hija frivola u l-vessatorja.

8. L-ispejjez ta' dan l-episodju ghandhom ihallsuhom l-istess atturi appellanti. Bl-applikazzjoni tal-Artikolu 10 tat-tariffa A tal-Kap. 12 il-Qorti tordna ukoll lill-istess appellanti jhallsu s-somma ta' elf euro (€1,000) lir-Registratur tal-Qorti.

III. Xhieda

Ir-rikorrent **Joseph Borg**¹ xehed illi kien fetah kawza kontra l-Kunsill Lokali tal-Pieta' ghaliex kien inghata citazzjoni wara li kien ipparkja l-vettura tieghu f`zona riservata biss ghar-residenti tal-Pieta`. Il-kawza kienet deciza favur tieghu fl-ewwel istanza. Sar appell u s-sentenza kienet ikkonfermata fit-tieni istanza wkoll.

Kompla jixhed illi in segwitu l-Ministeru ghall-Infrastruttura, Trasport u Komunikazzjoni hareg zewg Avvizi Legali li permezz taghhom kien permess illi certa residenti setghu jipparkjaw anke f`zoni fejn solitament mhux permess il-parkegg ta` vetturi. Huwa deherlu li dawn l-avvizi legali kienu jiddiskrimaw bejn cittadin u iehor. Kien ghalhekk illi saru l-proceduri fil-qrati.

Stqarr illi l-kwistjoni hija mpernjata fuq il-fatt illi l-Avvizi Legali mpunjati hargu fiz-zmien meta s-Sinjorija Tieghu l-Prim Imhalledf Silvio Camilleri kien avukat fl-ufficcju tal-Avukat Generali ; u meta hareg it-tieni Avviz Legali kien anke jokkupa l-kariga ta` Avukat Generali. Huwa deherlu li f`dawk ic-cirkostanzi ma kienx ser jinghata smigh xieraq u ghalhekk talab ir-rikuza tieghu.

Kompla fisser illi ttellghu diversi persuni sabiex jixhdu fl-appell.

Qal illi l-Prim Imhalledf Camilleri kien iddikjara li ma jiftakarx li kien ta xi parir dwar l-Avvizi Legali in kwistjoni.

Ir-rikorrent stqarr illi anke jekk ma kienx il-Prim Imhalledf Camilleri li ta parir dwar l-Avvizi Legali in kwistjoni, il-fatt wahdu li kien Avukat Generali kien iqieghed fuqu r-responsabbilta` ghall-pariri li kienu ngataw u ghalhekk kellu jirrikuza ruhu.

¹ Ara din ix-xhieda a fol. 23 sa 31 tal-process.

Xehed illi t-talba tar-rikuza kienet respinta mill-Qorti Kostituzzjonali.

Billi l-Prim Imhallef Camilleri kien ser jirtira bl-eta` f'April 2018, ir-rikorrent xehed illi huwa talab li jinghata differiment ghal Mejju 2018 sabiex b'hekk il-kwistjoni tar-rikuza tintemm wahedha bil-hatra ta` Prim Imhallef gdid. Gara pero` li minflok sar hekk, il-Qorti taghtu zmien xahar sabiex jekk irid jipprezenta procediment kostituzzjonali. Huwa ma kellux ghazla u fit-terminu prefiss, ipprezenta l-kawza odjerna.

Stqarr illi anke jekk illum hemm Prim Imhallef gdid, l-ilment tieghu jibqa` dak li huwa fil-konfront taz-zewg Imhallfin l-ohra li flimkien mal-Prim Imhallef jippresjedu l-Qorti Kostituzzjonali, billi dawk iz-zewg Imhallfin kienu appoggjaw lill-Prim Imhallef Camilleri fil-provvedimenti li wasslu biex kienet istitwita l-kawza tal-lum.

Av. Dr. Tonio Azzopardi xehed illi huwa kellu jaghti parir lir-rikorrenti sabiex jiprocedu bil-kawza tal-lum, ghaliex ladarba l-Qorti Kostituzzjonali kienet ipprefiggiet terminu lir-rikorrenti, dak it-terminu kellu jigi rispettati.

Stqarr illi huwa ried jevita li r-rikorrenti jkunu rinfaccjati bin-nuqqas ta' ottempranza ta` dak il-provvediment.

Xehed illi l-Qorti Kostituzzjonali setghet facilment tat differiment ghal wara d-data ta` l-irtirar ta` l-Onor. Prim Imhallef Silvio Camilleri izda mhux hekk sar.

Xehed illi kienet respinta mill-Qorti t-talba ghar-rikuza taz-zewg Imhallfin l-ohra li jippresjedu l-Qorti Kostituzzjonali. Addirittura kienet imposta fuq ir-rikorrenti penali fl-ammont ta' €1,000 il-ghaliex l-

eccezzjoni tar-rikuza ma kenitxx irtirata. Dak il-provvediment inghata mill-Qorti Kostituzzjoni kif komposta llum.

Fil-kontroezami, ix-xhud ikkonferma li l-penali ta` €1000 kienet imposta ghaliex il-Qorti Kostituzzjoanli dehrilha illi t-talba ghar-rikuza kienet frivola u vessatorja.

Av. Dr. Abigail Caruana Vella mill-Ufficcju tal-Avukat Generali xehdet li l-Prim Imhalledf Silvio Camilleri talabha taghmel verifiki dwar jekk hu kienx ta xi parir dwar l-Avvizi Legali mpunjati.

Xehdet illi ghamlet verifiki nterni ma` l-ufficjali illi jiehdus hsieb il-*files* tal-Avukat Generali, mal-Ministeru tat-Trasport, u mal-ufficcju tal-Prim Ministru.

Stqarret illi mill-ufficcju tal-Avukat Generali ma rrizultax illi kien hemm *files* li jikkoncernaw din il-vertenza. Min-naha tal-Ministeru tat-Trasport u min-naha tal-Ufficcju tal-Prim Ministru ma rrizultax li kien inghata parir legali mill-ufficcju tal-Avukat Generali b`rabta mal-Avvizi Legali in kwistjoni.

Qalet illi billi rrizulta illi l-Avukat Generali ma kellu l-ebda nvolviment fil-kaz tal-Avvizi Legali mpunjati, sar verbal fl-udjenza tal-20 ta' Marzu 2017 quddiem il-Qorti Kostituzzjonali li kien ighid hekk :-

"Dr. Abigail Caruana b'referenza ghall-verbal tas-seduta tal-20 ta' Frar, 2017 li mill- files tal-Avukat Generali u tal-Ufficcju tal-Prim Ministru u tal-Ministeru tat-Trasport u Infrastruttura ma jirrizultax li inghata xi parir bil-miktub jew oralment dwar il-kwistjoni mertu ta' dan l-appell mill-President tal-Qorti meta kien jikkupa l-ufficcju tal- Avukat Generali u anqas bhala avukat fl-ufficcju tal-Avukat Generali u anqas jirrizulta li l-

ufficcju tal-Avukat Generali ta xi parir dwar l-istess mertu."

Kompliet tixhed illi hija bdiet tahdem bhala avukat fl-ufficcju tal-Avukat Generali fl-2011 mentri l-vertenza tmur lura ghall-2009.

Xehdet illi mill-esperjenza taghha setghet tghid illi meta jinghata parir mill-ufficcju tal-Avukat Generali dn ikun go *file*. Normalment parir jinghata permezz ta` email, u kopja ta` din tinzamm mill-avukat li jkun ta l-parir. Anke jekk l-Avukat Generali ma jzommx *file* ghal kull parir illi jinghata, il-parir jinzamm go *file* fid-dipartiment li jkun ikkoncernat.

Ziedet tixhed illi kull parir li jinghata dwar kwistjonijiet ta` importanza, bhal fil-kaz ta` avviz legali, dan jinghata dejjem b` email. Pariri li jinghataw bit-*telephone* jew bil-fomm ma jkunux registrati.

Stqarret li l-procedura dwar kif jinghataw il-pariri tapplika ghall-ufficjali kollha fl-ufficcju tal-Avukat Generali. Din tghodd aktar u aktar meta l-parir jinghata direttament mill-Avukat Generali ghaliex il-pariri illi jaghti hu ikunu ta` mportanza akbar.

Qalet illi l-Ministeri m`ghandhom l-ebda obbligu illi jiehdu parir legali mill-ufficcju tal-Avukat Generali qabel ma johorgu xi Avviz Legali.

Fissret illi kull dipartiment ghandu l-ufficcju legali tieghu. Dan huwa distint u separat mill-ufficcju tal-Avukat Generali.

IV. L-ewwel talba

Tnejn huma r-ragunijiet li fuqhom hija fondata l-ewwel talba tar-rikorrenti.

1. L-ewwel raguni

Fl-ewwel lok, ir-rikorrenti jghidu illi kieku l-kawza kellha tkompli tinstema' mill-Qorti presjeduta mill-Prim Imhalled Silvio Camilleri huma kienu sejrin igarrbu ksur tal-jedd taghhom ghal smigh xieraq hekk kif dak il-jedd huwa tutelat bl-Art 39 tal-Kostituzzjoni ta' Malta ("**il-Kostituzzjoni**") u bl-Art 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali ("**il-Konvenzjoni**"). Skont ir-rikorrenti, il-Prim Imhalled Silvio Camilleri kien ta parir in relazzjoni mal-Avvizi Legali mpunjati meta kien avukat fl-ufficcju tal-Avukat Generali u wara meta kien hu stess l-Avukat Generali. Fin-nota ta' sottomissjonijiet taghhom, ir-rikorrenti jsostnu illi l-eccezzjoni ta' rikuza tal-Prim Imhalled Silvio Camilleri kienet michuda "*a bazi tal-informazzjoni provduta mill-Ufficcju tal-Avukat Generali, li, kif irrizulta, ma jzomm l-ebda registru dwar pariri moghtija*".

Din il-fehma tar-rikorrenti mhijiex kondiviza mill-Qorti.

Dak illi jirrizulta mill-provi huwa li bhala fatt tinzamm kopja ta' kull parir li jkun hareg mill-ufficcju tal-Avukat Generali, sew ta' dawk il-pariri illi jinghataw mill-avukati f'dak l-ufficcju, u aktar u aktar ta' dawk li jinghataw mill-Avukat Generali nnifsu. Fil-kaz taz-zewg Avvizi Legali in kwistjoni, jirrizulta li ma nghata ebda parir mill-ufficcju tal-Avukat Generali. Huwa ghalhekk biss illi ma tressqitx prova, mhux ghaliex, kif kien allegat mir-rikorrenti, l-Avukat Generali "*ma jzomm ebda registru dwar pariri moghtija*".

Abbazi tal-provi akkwiziti, il-Qorti Kostituzzjonali setghet tasal ghall-konkluzjoni taghha li tiddikjara li ma kienx hemm lok ghar-rikuza

tal-President tal-Qorti. Il-partijiet inghataw kull opportunita li jaghmlu r-rapprezentazzjonijiet taghhom. Kien imbaghad jispetta lill-Qorti li taghrbel il-provi u tasal ghad-decizjoni taghha.

L-ilment tar-rikorrenti kif dirett fil-konfront tal-Prim Imhallef Silvio Camilleri huwa nfondat.

Tajjeb jinghad illi l-kawza tal-lum kienet intavolata fit-12 ta' Marzu 2018. Il-Prim Imhallef Silvio Camilleri rtira bl-eta` b'effett mis-26 ta' April 2018.

Ghalhekk fi kwalunkwe kaz dak l-ilment tar-rikorrenti gie ukoll ezawrit.

2. It-tieni raguni

Fit-tieni lok, ir-rikorrenti jilmentaw illi hemm lok ukoll ghal dikjarazzjoni ta` vjolazzjoni anke fil-kaz tal-Imhallef Giannino Caruana Demajo u ta` l-Imhallef Noel Cuschieri ghaliex dawn kienu qeghdin jippresjedu l-Qorti Kostituzzjonali flimkien mal-Prim Imhallef Silvio Camilleri meta nghatat id-decizjoni dwar it-talba ghar-rikuza ta` l-President tal-Qorti. Isostnu r-rikorrenti illi l-Imhallfin Caruana Demajo u Cuschieri ma nsistewx mal-President tal-Qorti sabiex jinghata differiment tal-kawza ghal data wara li jkun irtira l-Prim` Imhallef Camilleri. Ir-rikorrenti jikkontendu li bil-fatt illi l-appell taghhom jibqa` jinstema` mill-Imhallfin Caruana Demajo u Cuschieri sejr in igarrbu ksur tal-jedd taghhom ghal smigh xieraq.

a) Dritt

i) L-Art 6 tal-Konvenzjoni

Mill-Art 6 il-parti rilevanti għall-procediment tal-lum huwa l-ewwel (1) subartikolu li jaqra hekk :-

Fid-decizjoni tad-drittijiet civili u ta` l-obbligi tiegħu jew ta` xi akkuza kriminali kontra tiegħu, kulhadd huwa ntolat għal smigh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u imparzjali mwaqqaf b`ligi.

ii) L-Art 39 tal-Kostituzzjoni

Mill-Art 39 il-partijiet rilevanti għall-kawza tal-lum huma l-ewwel (1) u t-tieni (2) subartikoli li jipprovdu hekk :-

(1) Kull meta xi hadd ikun akkuzat b`reat kriminali huwa għandu, kemm-il darba l-akkuza ma tigix irtirata, jigi mogħti smigh xieraq għeluq zmien ragonevoli minn qorti indipendenti u mparzjali mwaqqfa b`ligi.

(2) Kull qorti jew awtorità oħra gudikanti mwaqqfa b`ligi għad-decizjoni dwar l-eżistenza jew l-estensjoni ta` drittijiet jew obbligi civili għandha tkun indipendenti u imparzjali; u meta l-proceduri għal decizjoni bħal dik huma mibdija minn xi persuna quddiem qorti jew awtorità oħra gudikanti bħal dik, il-kaz għandu jigi mogħti smigh xieraq għeluq zmien ragonevoli.

iii) L-Art 733 tal-Kap 12

Ighid :-

L-imhallfin ma jistghux jigu rrikuzati u lanqas jistghu jastjenu ruhhom milli joqoghdu f`kawza migjuba quddiemhom fil-qorti li fiha huma mahtura biex joqoghdu, hlief ghal xi wahda mir-ragunijiet hawn wara msemmin.

iv) L-Art 734 tal-Kap 12

Id-disposizzjoni taqra :-

(1) L-imhallef jista` jigi rrikuzat jew jista` jastjeni ruhu milli joqoghdu fil-kawza -

(a) jekk ikun qarib mid-demm jew bi zwieg, f`linja dritta, ma` wahda mill-partijiet ;

(b) jekk ikun qarib mid-demm fil-grad ta` hu, ziju jew neputi, pro-ziju jew pro-neputi jew kugin, ta` wahda mill-partijiet, jew qarib bi zwieg fi grad ta` hu, ziju jew neputi, ta` wahda mill-partijiet ;

(c) jekk ikun tutur, kuratur, jew werriet prezuntiv ta` wahda mill-partijiet; jew ikun jew kien prokuratur ta` wahda mill-partijiet fil-kawza; jekk ikun l-amministratur ta` stabbiliment jew socjeta` fil-kawza, jew jekk wahda mill-partijiet tkun il-werrieta prezuntiva tieghu ;

(d)(i) jekk ikun ta l-parir tieghu, ittratta quddiem il-qorti jew kiteb dwar il-kawza jew dwar kull haga ohra li ghandha x`taqsam mal-kawza jew tiddependi minnha,

(ii) jekk il-kawza kienet ga giet quddiemu bhala imhallef jew bhala arbitru :

Izda dan ma jghoddx ghal decizjoni, moghtija mill-imhalled, meta ma tkunx qatghet definitivament il-meritu fil-kwistjoni bejn il-partijiet, u lanqas ghal sentenza li tehles ab observantia,

(iii) jekk ikun hareg flus ghall-kawza,

(iv) jekk ikun xehed, jew jekk wahda mill-partijiet tkun bi hsiebha ssejjahlu bhala xhud ;

(e) jekk hu, jew il-mara tieghu, jew ir-ragel taghha, ikollhom interess dirett jew indirett dwar kif tinqata` l-kawza;

(f) jekk l-avukat jew prokuratur legali li jkun qed jidher quddiem imhalled ikun ibnu jew bintu stess, ir-ragel taghha jew il-mara tieghu jew axxendent tieghu ;

(g) jekk l-avukat jew prokuratur legali li jkun qed jidher quddiem imhalled ikun hu jew oht l-istess gudikant ;

(h) jekk l-imhalled jew ir-ragel taghha jew il-mara tieghu jkollhom kawza pendenti kontra xi wahda mill-partijiet fil-kawza jew ikun kreditur jew debitur ta` xi parti fil-kawza b`mod li jista` ragonevolment jaghti lok ta` suspett ta` interess dirett jew indirett li jista` jinfluwenza l-ezitu tal-kawza.

(2) L-imhalled jista` jigi rikuzat jew jista` jastjeni ruhu milli joqghod f`kawza meta l-kawza tkun ga giet quddiemu u hu jkun tkellem fuq l-istess mertu ta` dik il-kawza meta kien qed joqghod bhala mhalled fil-Qorti ta` gurdizzjoni volontarja.

b) Dottrina /urisprudenza

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

"Ir-rikuza mhix haga ta` konvenjenza izda ta` Gustizzja u ghalhekk sabiex wiehed jirrikorri ghalha, ir-raguni trid tkun fondata ; altrimenti taghti lok ghall-abbuz."

Issir referenza ghal dak li kiteb il-**Professor Hoong Phun** (li kien id-Dekan tal-Fakolta` tal-Ligi fl-Universita ta` Auckland - New Zealand kif ukoll Imhalled fil-Qorti tal-Appell ta` l-istess pajjiz) fil-ktieb **"Judicial Recusal : Principles, Process and Problems by Grant Hammond"** [Oxford : Hart Publishing 2009] :

"The law relating to judicial recusal may appear to many to be an esoteric topic, with not much significance for the administration of justice. Contrary to such a superficial view, this area of law goes to the very heart of the functioning of a robust and liberal democracy operating under the rule of law. An essential characteristic of the rule of law is the existence of an impartial and independent judiciary. The author expresses this in the following eloquent manner: `Society rightly looks to the courts as bastions of the Rule of Law. If the public cannot look with confidence to judges ... the very notion of a "legal system" as a fundamental pillar of western society would collapse.`"

Judges are individuals who live in the real world: they may own shares in companies; they experience the gamut of human emotions; they

may belong to clubs and associations; they may provide voluntary services to charitable organisations; they sometimes engage in public discourse or give speeches on issues of public concern. A number of those who are appointed to senior judicial posts have practised at the Bar or have provided advice to the legislature or executive prior to their judicial appointment. Aspects of this life experience may on occasion constitute the basis of a challenge to the propriety of the judge adjudicating on a particular case. The law of judicial recusal contributes to the quality of the justice system but at the same time can be manipulated by a party to a litigation who is disappointed by the outcome and who is seeking an opportunity to have another bite of the cherry.

Dan premiss, tajjeb jinghad illi anke jekk skont l-Art 733 u 734 tal-Kap 12 ma jkunx hemm bazi ghar-rikuza jew ghall-astensjoni ta` Imhallef, tista` tinholoq sitwazzjoni fejn il-fatt li talba ghal rikuza jew astensjoni tkun respinta ggib maghha konflitt mal-jeddijiet fundamentali tal-persuna, u ghalhekk il-harsien tal-jeddijiet fundamentali jipprevalu fuq id-disposizzjonijiet tal-ligi ordinarja (ara : QK : **Sant vs Kummissarju tal-Pulizija** : 2 ta` April 1990 ; QK **Cachia vs Onor Prim Ministru et** : 10 ta` Ottubru 1991 ; QK : **Bugeja et vs Onor Prim Ministru noe et** : 17 ta` Gunju 1994 ; u PA/K : **Ghirxi vs Onor Prim Ministru et** : 1 ta` Novembru 1991)

Indipendentement mill-fatt jekk ic-cirkostanzi jkunux tali li jintitolaw lill-parti li titlob ir-rikuza tal-gudikant skont il-ligijiet ordinarji, il-parametri ta` dawn il-ligijiet ghandhom jitqiesu li jkunu twessghu bid-disposizzjonijiet tal-Kostituzzjoni u tal-Konvenzjoni li jharsu s-smigh xieraq (ara : QK : **Dr. A. Mifsud vs On. Prim Ministru et** : 17 ta` Lulju 1996).

Il-Qorti trid tezamina jekk fil-konkret, mhux fl-astratt, jistax jinghad li hemm jew jistax ikun hemm *bias* fil-gudikant li jirrendi l-operat tieghu soggettivament jew oggettivament parzjali. Kollox ghandu jkun meqjus abbazi tal-fatti u cirkostanzi ta` kull kaz (ara : **Ghirxi vs Onor Prim Ministru et** (op. cit.) u ; QK : **E. T. Rev. Mons. Arcisgof G. Mercieca pro et vs Onor. Prim Ministru noe et** : 22 ta` Ottubru 1984).

Biex raguni twassal ghall-astensjoni jew ghar-rikuza ta` gudikant, din trid tkun wahda konkreta, mhux merament percepita. Inghad illi :-

“il-ligi ma tridx li, semplicement ghax parti jew ohra f`kawza `thoss` jew `jidhrilha` li gudikant jista` jkun parzjali, allura dak il- gudikant ghandu ma jihux konjizzjoni ta` dik il-kawza. Apparti l-obbligu li l-ligi timponi fuq il-gudikant li joqghod f`kull kawza li tigi lilu assenjata skond il-ligi u li jastjeni jew jilqa` l-eccezzjoni tar-rikuza fil-kazijiet biss fejn ikun legalment gustifikat li huwa ma jkomplix jiehu konjizzjoni ta` dik il-kawza, mhux kull `hsieb` ta` parzjalita` li jista` talvolta jghaddi minn mohh parti jew ohra, jista` jinghad li huwa `oggettivament gustifikat`. It-test oggettiv ta` l-imparzjalita`, anke kif mifhum mill-Qorti Ewropea tad-Drittijiet tal-Bniedem jirrikjedi li jkun hemm bazi oggettivament riskontrabbli.” [ara : QK : **Dr Joseph Zammit Tabona et vs Direttur Generali tal-Qrati tal-Gustizzja et** : 25 ta` Novembru 2016 ; QK : 12 ta` 12 ta` Gunju 2017 : **Joseph Borg et vs Onorevoli Prim Ministru et** ; QK : **Antonio Pace et vs Rev Henry Abela OP et noe** 26 ta` Frar 2009).

Fil-Pag 201 ta` **“Law of the European Convention on Human Rights** (Second Edition ; 2009 ; OUP) l-awturi **Harris, O`Boyle u Warbrick** ighidu hekk dwar l-Art 6 tal-Konvenzjoni :-

*The Court (b` riferenza għall-ECtHR) has stressed that "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively" (**Perez v France** – 2004 I ; 40 EHRR 909 para 64 GC).*

Fil-Pag 202 ikomplu jaffer maw illi :-

The Court also allows States a wide margin of appreciation as to the manner in which national courts operate ... A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of results as of conduct, with national court being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial.

Fil-Pag 204 jinsistu illi :-

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

Fil-Pag 224 ighidu :-

Article 6 does not control the content of a state`s national law ; it is only a procedural guarantee of a right to a fair hearing in the determination of whatever legal rights and obligations a state chooses to provide in its law.

Imbagħad fil-Pag 251 isostnu illi :-

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

Ighidu wkoll fil-Pag. 291 illi :-

"The objective test of `impartiality` is comparable to the English Law doctrine that `justice must not only be done : it must also be seen to be done`. In this context the [European] Court [of Human Rights] emphasises the importance of `appearances`. As the Court has stated, `[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public ...`"

*In applying the test, the opinion of the party to the case who is alleging partiality is `important but not decisive`; what is crucial is whether the doubt as to the impartiality can be `objectively justified`. [**Sramek v Austria** (1984) para. 42 ; 7 EHRR 351 **Fey v Austria A 255-A** (1993) ; 6 EHRR 387 para. 30]*

Dan l-ahhar bran minn "**Law of the European Convention on Human Rights** isib konferma fil-kitba : **Judicial Impartiality Under the European Convention on Human Rights** : fejn **I-Imhallef Luzius Wildhaber**, li kien President tal-ECtHR bejn l-1 ta` Novembru 1998 u t-18 ta` Jannar 2007, ikkummenta hekk :-

"The difficulty in establishing a lack of personal impartiality has led the Court to concentrate on an

objective approach, that is determining whether a judge offers sufficient guarantees to exclude any legitimate doubt as to a lack of impartiality. In other words, in view of the difficulty of establishing to the required standard of proof whether or not a court is actually impartial, the case-law has looked at whether courts can be seen to be impartial. It is here that the Court has introduced the notion of appearances; what is at stake, as the Court has held, is the confidence which the courts must inspire in the public in a democratic society. Whether misgivings as to impartiality are to be regarded as objectively justified depends on the circumstances of each case. The Court has held that in criminal proceedings "while the standpoint of the accused is important", it is not decisive. What is decisive is whether, in criminal proceedings, the accused's fear that a judge lacks impartiality can be held to be objectively justified. Thus it is not only that the person directly concerned by the proceedings must have apprehensions, but those fears must appear reasonable to the external observer".

L-imparzjalita` skont l-Art 6(1) tal-Konvenzjoni inghatat tifsira fis-sens ta` nuqqas ta` pregudizzju jew *bias* :-

"There are two tests for assessing whether a tribunal is impartial : the first consists in seeking to determine a particular judge's personal conviction or interest in a given case and the second is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect ... As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that

body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified.” (ara : **Lindon Otchakovskylaurens and July v France** deciza fit-22 ta` Ottubru 2007 mill-ECtHR ; u **Piersack v. Belgium** : ECtHR : 1 ta` Gunju 1982).

Fil-kaz ta` **Hauschildt v. Denmark** deciz fl-24 ta` Mejju 1989, l-ECtHR irrimarkat illi :-

“The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.”

Fid-decizjoni li tat fil-25 ta` Frar 1997 fil-kaz ta` **“Findlay v. United Kingdom”** l-ECtHR kellha l-okkazjoni tippronunzja ruhha dwar l-indipendenza u l-imparzjalita` ta` tribunal :-

(a) The Court recalls that in order to establish whether a tribunal can be considered as “independent”, regard must be had `inter alia` to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question

whether the body presents an appearance of independence.

(b) As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

Fil-kaz ta' **Daktaras v Lithuania** li kien deciz fl-10 ta' Ottubru 2000, l-ECHR sostniet il-principju li :-

*"The Court recalls that there are two aspects to the requirement of impartiality in Article 6 para. 1 of the Convention. First, the tribunal must be subjectively impartial, i.e. no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, i.e. it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see **Academy Trading Ltd. And Others v. Greece**, no. 30342/96, 4.4.2000, para. 43)."*

Qalet ukoll:

"Under the objective test, it must be determined whether there are ascertainable facts, which may nevertheless raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings (ibid. para. 45)."

Fil-kaz ta' **Kraska v. Switzerland** li kien deciz fid-19 ta' April 1993, l-ECtHR osservat illi :-

*"32. The Court has already stressed on numerous occasions the importance of appearances in the administration of justice, but it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified (see, among other authorities, mutatis mutandis, the **Hauschildt v. Denmark** judgment of 24 May 1989, Series A no. 154, p. 21, para. 48)".*

Fil-ktieb : **Protecting the right to a fair trial under the European Convention** (Council of Europe Human Rights Handbook : Strasbourg : 2012) l-awtur **Dovydas Vitkauskas** jaghmel rassenja tal-principji li jsawwru dak li ghandu jfisser "*an impartial tribunal*" b'ezempji ta' sitwazzjonijiet naxxenti minn guriprudenza tal-ECtHR :-

*"While the notion of the "independence" of the tribunal involves a structural examination of statutory and institutional safe-guards against interference in the judicial matters by other branches of power, "impartiality" entails inquiry into the court's independence vis-à-vis the parties of a particular case (**Piersack**). ... Independent and impartial tribunal established by law may lead to a violation of the impartiality requirement, even if there are no reasons to doubt the impartiality of other (or a majority of other) judges (**Sander v. the United Kingdom**, §§18-35). "Impartiality" is a lack of bias or prejudice towards the parties. The impartiality test*

exists in two forms: subjective and objective (**Piersack**).

The subjective test requires a more stringent level of individualisation/causal link, requiring personal bias to be shown by any member of the tribunal vis-à-vis one of the parties; subjective impartiality is presumed unless there is proof to the contrary (**Piersack**). Examples of a lack of subjective impartiality :

public statements by a trial judge assessing the quality of the defence and the prospects of the outcome of the criminal case (**Lavents**; this case involved a finding of the presumption of innocence on these grounds), or giving negative characteristics of the applicant (**Olujic**, §§56-68);

statement by judges in the courtroom that they were "deeply insulted" while finding the applicant lawyer guilty of contempt of court (**Kyprianou**, 118-135, where the Court also held that no separate issue under the heading of presumption of innocence arose);

statement by an investigative judge in a decision to commit the applicant for trial that there was "sufficient evidence of the applicant's guilt", where that judge subsequently tried the applicant's case and found him guilty (**Adamkiewicz v. Poland**, §§93-108).

...

The objective test of impartiality necessitates a less stringent level of individualisation/causal link and, accordingly, a less serious burden of proof for the applicant. An appearance of bias

or a legitimate doubt as to the lack of bias is sufficient from the point of view of an ordinary reasonable observer (**Piersack**). By contrast with the subjective test, an allegation of lack of objective impartiality creates a positive presumption for the applicant that can only be rebutted by the respondent state if sufficient procedural safeguards are shown which exclude any such legitimate doubt (**Salov v. Ukraine**, §§80-86; **Farhi v. France**, §§27-32). Legitimate doubts as to the impartiality may appear as a result of previous employment of a judge with one of the parties (**Piersack**), intertwining of prosecutorial and judicial functions by the same person at different stages of the same proceedings (**De Cubber v. Belgium**, §§24-30), attempt at participation by the same judges at different levels of court jurisdiction (**Salov**), interference by a non-sitting judge (**Daktaras**), overlap of legis-lative/advisory and judicial functions (**Procola**, §§41-46), family, business or other previous relations between a party and the judge (**Sigurdsson v. Iceland**, §§37-46), and the same social habits and practices such as religious affiliation involving a party and the member of the tribunal (**Holm v. Sweden**, §§30-33).

Nonetheless, a sufficiently strong causal link must be shown between a feature alleged to call into question the objective impartiality of the tribunal on the one hand, and, on the other, the facts to be assessed (**Kleyn v. the Netherlands**, §§190-202) or the persons (**Sigurdsson**) involved in the particular case. As a few jurors in a defamation trial who were members of the political party which had been the principal target of the allegedly defamatory material (**Holm**, but see **Salaman**, dec.). A jury where certain members

had previously made racist jokes concerning the applicant, despite the fact that those damaging statements were subsequently rebutted as improper by an individual juror who had made them and by the jury itself (**Sander**). Prosecutor speaking to jurors informally during a trial break, the presiding judge failing to inquire from the jurors on the nature of the remarks exchanged and the possible influence they might have had on the jurors' opinions (**Farhi**). Close family ties (uncle-nephew) between a judge and lawyer of the opposite party (**Micallef v. Malta**). Two members of a trial court who had earlier set or varied remand – including detention – referring to justification which had not been based on the prosecutor's request for detention and which had implied admission of sufficiency of evidence against the applicant (**Cardona Serrat v. Spain**). Extremely virulent press campaign surrounding trial of two minor co-accused, coupled with the lack of effective participation by the defendants (**I. and V. v. the United Kingdom**, §§83-89; see also the effective participation requirement, page 54 below).

...

the mere affiliation by the member of the tribunal to ascertain social group or association – such as belonging to the same political party or religious confession as one of the parties in the case – is not sufficient to sustain the legitimacy of the doubt under the objective test; a sufficient degree of individualisation/causal link of the alleged bias of the tribunal is necessary even under the objective test (compare, for instance, the different conclusions in similar circumstances in **Holm and Salaman v. the United Kingdom**, dec. ;

Sigurdsson and Pullar v.the United Kingdom,
dec.).”

Issir referenza ukoll ghal dak li nghad minn Lord Denning fid-decizjoni fil-kawza **Metropolitan Properties Co. vs. Lannon** (1968) [3 All ER 304] :-

"In considering whether there is a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it might be, who sits in a judicial position. It does not look to see if there was real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."

Il-Qorti tirreferi ghas-sentenza li tat il-Qorti Kostituzzjonali fit-12 ta` Lulju 2005 fil-kawza : **Sandro Chetcuti et vs L-Avukat Generali et** : fejn inghad hekk :-

"Dwar x` inhu independent and impartial tribunal, l-artikolu 6 tal-Konvenzjoni u l-artikolu 39 tal-Kostituzzjoni jitolbu li t-tribunal ikun indipendenti u imparzjali. "Indipendenza" tfisser indipendenza kemm mill-partijiet kif ukoll mill-esekuttiv ;

"Imparzialita" tista` tkun soggettiva jew oggettiva. Hija soggettiva meta "the tribunal is subjectively impartial in the sense that its members are free from personal bias" u oggettiva "whether from an objective point of view there is sufficient appearance of impartiality or whether the guarantees of impartiality in a given situation are

such as to exclude any legitimate doubt on the matter”.

“L-imparzjalita` tal-membri tat-tribunal ghandha tkun prezunta sakemm ma tingiebx prova bil-kuntrarju (ara Le Compte, Van Leuven and De Meyere 23.6.91)

Huwa pacifiku wkoll fil-gurisprudenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem illi, id-decizjoni jekk tezistix jew le imparzjalita` ai termini ta` l-Artikolu 6(1) tal-Konvenzjoni, trid tigi bbazata fuq test soggettiv, cioe` fuq il-konvinzjoni personali tal-gudikant partikolari f`kaz specifiku, u wkoll fuq test oggettiv, u cioe` jekk il-gudikant ikunx fil-kaz partikolari joffri garanziji sufficijenti sabiex jeskludi kull dubbju legittimu ta` parzjalita`.

Il-Qorti sejra terga` ticcita minn **“Law of the European Convention on Human Rights”** (op. cit.) fejn inghad illi :-

“Impartiality` means lack of prejudice or bias. To satisfy the requirement, the tribunal must comply with both a subjective and objective test :

The existence of impartiality for the purpose of article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.”

Fil-kaz ta` **Kyprianou vs Cyprus** tal-15 ta` Dicembru 2005 l-ECtHR qalet hekk :-

"The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see **Padovani v. Italy**, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see **Piersack v. Belgium**, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30, and **Grievés v. the United Kingdom** [GC], no. 57067/00, § 69, 16 December 2003). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see **Castillo Algar v. Spain**, judgment of 28 October 1998, Reports 1998-VIII, p. 3116, § 45, and **Morel v. France**, no. 34130/96, § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see **Ferrantelli and Santangelo v. Italy**, judgment of 7 August 1996, Reports 1996-III, pp. 951-52, § 58, and

Wettstein v. Switzerland, no. 33958/96, § 44, ECHR 2000-XII).

...

*An analysis of the Court`s case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature : where the judge`s personal conduct is not at all impugned, but where, for instance, the exercise of different functions within the judicial process by the same person (see Piersack, cited above), or hierarchical or other links with another actor in the proceedings (see court martial cases, for example, Grieves, cited above, and **Miller and Others v. the United Kingdom**, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in Buscemi, cited above, but it may also be of such a nature as to raise an issue under the subjective test (see, for example, Lavents, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.”*

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

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

L-Ewwel Qorti cahdet it-talbiet tal-atturi, wara li ghamlet dawn l-osservazzjonijiet :-

Din il-qorti tqis illi hu minnu li l-gustizzja trid tidher li qed issir. Jibda biex jinghad illi l-ghazla tal-gudikant ghal kawza ma ssirx mill-gudikant innifsu izda minn mekkanizmu appozitu li jithaddem mir-registratur tal-qrati, bla ebda interferenza jew partecipazzjoni jew addirittura l-konoxxenza a priori tal-istess gudikant li lilu ser tmiss il-kawza. Il-gudikant hu ghal kollox estraneju ghall-mekkanizmu li bih kawza tigi assenjata lilu bl-eccezzjoni ta` kawzi speċjalizzati fejn din partikolari ma taqax f`tali kategorija. Id-dicitura `gustizzja trid tidher li qed issir` ma ghandhiex tifsira soggettiva bhal per ezempju parti mhix kuntenta bl-ghazla tal-gudikant. Lanqas ma tfisser li the ordinary man in the street mhux ben infurmat fuq il-fatti specifici u t-tema legali involuta b`percezzjoni limitata ghalhekk tal-assiem fattwali u legali ta` dak li qed jigi deciz jista` jew ghandu b`xi mod jinfluwenza l-interpretazzjoni tal-istess dicitura. Id-dicitura `gustizzja trid tidher li qed issir` ghandha tkun miftehma u espressa fil-konkret taghha u applikata mill-kullegg tal-gudikanti skond il-fattispecie u n-natura ta` kull kawza. Wara kollox hu principju regolatur illi l-gudikant hu prezunt imparzjali ghax l-imparzjalità hi parti intima mill-gurament tal-hatra tieghu u li ghandu jzomm quddiem ghajnejh u jattwa f`kull kawza u kull cirkostanza sakemm hu msejjah jippresjedi u jiggudika disputa. Din hi garanzija li l-gudikant hu marbut li jaghti biex isostni l-applikazzjoni tal-gustizzja skond il-ligi, l-ugwaljanza ghal kull min jidher quddiemu, u fil-

prattika jsahhah id-demokrazija, fonti tal-libertà tal-bniedem f`socjetà civili (ara artikolu 10 tal-Kap. 12) anki jekk ihossu skomdu ghal kwalsiasi raguni tkun xi tkun bil-vertenza quddiemu ghax dak hu l-prezz tal-gurament li jkun ha quddiem l-istat u quddiem Alla.

Il-kwistjoni attrici hi jekk din il-garanzija fil-kawza civili li tat lok ghal din il-vertenza hiex minsusa b`tali mod li hemm dubju serju oggettiv u konkret u mhux biss percezzjoni astratta jew soggettiva ghar-rikorrenti li l-gustizzja jista` jkun li ma ssirx.

Ir-rikorrenti jibbazaw l-ilment principali taghhom fuq nuqqas ta` imparzjalità oggettiva. Qed jallegaw bazikament illi hemm raguni legittima li ggegghelhom jibzghu li l-gudikant jonqos fih l-element ta` imparzjalità. Jorbtu dan il-biza` mal-fatt illi bhala president ta` Radju Marija jista` jxaqleb jew ihares b`ghajn aktar beninja lejn l-intimata Arcidjocesi ta` Malta.

Din il-qorti fliet il-provi u ma tistax issib dan il-biza` bhala wiehed fondat mill-ottika oggettiva. Irrizulta li ma hemm ebda rabta ta` ebda natura bejn il-gudikant involut, Radju Marija u l-intimat Kurja Arciveskovili.

Radju Marija hi organizazzjoni volontarja, maghmula minn socji li jaghtu s-sehem taghhom fl-ispirtu tal-volontarjat. Il-finanzi ta` Radju Marija jigu biss minn donazzjonijiet tal-fidili. L-Arcidjocesi ta` Malta ma tipprovdi ebda ghajnuna finanzjarja jew mod iehor. Il-gudikant innifsu bhala president jaghti sehmu biss fl-amministrazzjoni tar-radju bla ebda jedd jew poter fuq dak li jixxandar u minn min jixxandar. Dak hu fdat f`idejn sacerdot li hu l-uniku socju jekk trid issejjahlu hekk li jappartjeni

lis-sacerdozju. Radju Marija hu fil-fatt assocjazzjoni lajkali.

L-uniku punt ta` vergenza li hemm bejn ir-radju u l-Arcidjocesi hu biss ir-religjon Kattolika. Ir-radju hu kommest li jxandar u jxerred il-kelma ta` Alla b`enfasi specjali fuq il-Madonna kif espressa fir-religjon Kattolika u l-intimita Arcidjocesi ta` Malta thaddan l-istess religjon Kattolika, liema religjon hi wkoll ir-religjon rikonoxxuta ta` Malta fil-Kostituzzjoni ta` Malta artikolu 2.

Din il-qorti ma tqisx illi l-gudikant fil-kawza civili mertu ta` dawn il-proceduri hu oggettivament biased ghax prezumibilmest jipprattika l-istess religjon ghalkemm ebda prova ut sic ma saret dwar liema religjon jipprattika l-gudikant in kwistjoni.

...

Li kieku din il-qorti kellha b`ecess ta` kawtela, fil-fehma taghha ingustifikata, taccetta t-tezi tar-rikorrenti, dan ifisser li gudikant li ghandu kwalsiasi fehma, kemm politika, kemm religjuza, kemm sportiva jew kulturali u li quddiemu jersqu in gudizzju persuni jew entitajiet ta` fehma dikjaratament differenti, allura ser nispicaw bir-riskju li ma ssibx gudikanti li lesti jiddeciedu, jew, aghar, li jsir abbuz mill-partijiet mis-sistema gudizzjarja jew li addiritura l-ghazla ta` gudikant b`fehma li tissimpatizza ma` wahda mill-partijiet fit-twemmin jew fil-politika jew affarijiet ohra ser jispicca bilfors jiddeciedi favur dik il-parti.

...

Il-qorti tenfasizza li ghalkemm il-gudikant ghandu bhal kull persuna ohra l-opinjonijiet personali

tieghu fuq kull aspekt tal-hajja civili u morali u ghandu l-umanità fragili tieghu bhal kull bniedem iehor però hu wkoll imsejjah ghal servizz li jaghmel gustizzja skont il-ligi, u ghalhekk irid, b`responsabilità akbar u b`obbligu solenni li ghalih ikkommetta ruhu b`gurament, ipoggi fil-genb kull opinjoni jew fehma personali biex b`kuragg, b`sahha u b`kuxjenza safja jqis li ssir gustizzja safejn tippermettilu l-ligi.

Ma hemm xejn fl-atti li juri li l-gudikant imsejjah jiddeciedi l-kawza civili ser jonqos minn dan indover jew hemm xi biza` fondat u serju li mhux ser jaqdi dan l-obbligu li hu msejjah jadempixxi b`serjetà, onestà u b`rispett ghal-ligijiet u Kostituzzjoni ta` Malta.

Fid-decizjoni taghha l-Qorti Kostituzzjoni hasbitha diversament.

Qalet hekk :-

"9. Hemm diversi osservazzjonijiet f`dawn is-sottomissjonijiet tal-atturi li ma huwiex korretti. Certament ma huwiex u ma jistax ikun il-kaz illi l-kriterju ta` imparzjalità soggettiva "jiddependi biss mill-perspettiva tal-appellanti", jew li "l-icken dubju ta` imparzjalità oggettiva min-naha tal-gudikant seta` ragonevolment jigi ppercepit mill-appellanti li ser jippregudika d-dritt ta` smigh xieraq", ghax "il-kawza hija tal-appellanti".

Li tammetti dawn it-teoriji jfisser illi parti f`kawza effettivament ghandha veto fuq il-hatra ta` mhallef biex jisma` l-kaz taghha.

10. Ukoll, ma huwiex korrett li tghid illi, ghax imhallef ma jastjenix meta jara li parti ghandha

"biza` qawwi jekk hux ser issir gustizzja", dan juri "nuqqas ta` imparzjalità oggettiva". Hija ghalhekk inkorretta l-osservazzjoni tal-atturi illi, ghax il-parti l-ohra fil-kawza wriet "rezistenza qawwija" ghall-eccezzjoni ta` rikuza, dan huwa sinjal ta` parzjalità favur dik il-parti. Jekk eccezzjoni ta` rikuza titressaq mhux ghal ragunijiet oggettivament gustifikabbli izda ghax il-gudikant ma joghgox lil parti, taghmel sew il-parti l-ohra li tirrezisti l-eccezzjoni.

11. Lanqas ma hu minnu li, ghax gudikant ighix it-twemmin tieghu "pubblikament u b`partecipazzjoni attiva", b`hekk "jinholqu cirkostanzi dubbjuzi"; gudikant mhux bilfors ikollu jghix it-twemmin tieghu fil-katakombi biex jitqies oggettivament imparzjali.

12. L-Imhallef tal-ewwel istanza evidentement kien tal-fehma li r-regoli ta` rekuza fil-Kodici ta` Procedura kienu jipprekluduh milli jastjeni mis-smigh tal-kawza u li skont il-ligi kien ghalhekk obligat li jismaghha.

Mill-perspettiva kostituzzjonali, izda, japplikaw konsiderazzjonijiet ohrajn. Il-kwistjoni hi jekk hemmx ragunijiet li oggettivament jiggustifikaw il-biza` ta` parzjalità. Ghalkemm dak li thoss jew tahseb jew tibza` parti f`kawza dwar il-parzjalità jew imparzjalità tal-gudikant huwa wkoll relevanti ghall-ghanijiet tal-imparzjalità, ma huwiex il-kriterju determinanti: li hu determinanti hu jekk dak il-biza` jew dik il-percezzjoni huwiex imsejjes fuq konsiderazzjonijiet oggettivi hekk li persuna ragonevoli u minghajr pregudizzji taghha tasal biex hi wkoll ikollha dubji dwar l-imparzjalità tal-gudikant.

13. *L-apparenzi wkoll jistghu jkunu konsiderazzjonijiet oggettivi li johlqu dubji. Ukoll jekk ma hemmx rabtiet gerarkici bejn gudikant u parti fil-kawza, jekk l-apparenzi huma hekk li persuna ragonevoli tista` wkoll minghajr wisq tigbid jaghtu x` tahseb li hemm dawk ir-rabtiet, id-dubju ta` dik il-persuna dwar l-imparzjalità tal-gudikant jista` jkun dubju oggettivament gustifikat.*

14. *Fejn jezistu dubji bhal dan, ikun fl-interess mhux biss tal-parti li oggettivament tara ragunijiet ta` parzjalità kontriha li l-gudikant ma jkomplix jisma` l-kaz; ikun ukoll fl-interess tal-parti l-oħra ghaliex il-gudikant jista`, biex jeghleb kull dubju dwar l-imparzjalità tieghu ixaqleb, imqar inkonxjament favur l-parti l-oħra.*

15. *Il-kwistjoni issa hi jekk fil-kaz tal-lum hemmx ragunijiet oggettivi li f`osservatur ragonevoli u imparzjali jistghu johlqu dehra ta` rabtiet bejn gudikant u parti f`kawza hekk li tiddghajjed il-fiducja fl-imparzjalità ta` dak il-gudikant.*

16. *Għalkemm huwa minnu illi, kif jixhed l-istatut tal-Assocjazzjoni Radju Marija, dik l-assocjazzjoni u t-tmexxija tar-radju huma indipendenti mill-Arcidjocesi, u ma hemm ebda rabta gerarkika formali bejn l-Arcidjocesi u r-radju, ma hijjex għal kollox imgebbda l-percezzjoni ta` rabta mill-qrib bejniethom. Din il-percezzjoni tigi ggenerata mill-fatt oggettiv illi d-direttur tal-programmi għandu dejjem ikun kjeriku, meta tqis l-istqarrija tal-istess direttur illi jekk "jsgarra" jibghat għalih l-Arcisqof, u meta tqis ukoll illi l-Provincjal tad-Dumnikani kellu s-setgħa li jesigi u jikseb ir-rizenja tal-istess direttur tal-programmi minn dik il-hatra.*

Huwa minnu illi hemm distinzjoni bejn ir-rwol tad-direttur tal-programmi u dak tal-president tal-assocjazzjoni izda t-tnejn ghandhom rwol ewlieni fit-tmexxija tal-istess assocjazzjoni li, ghar-ragunijiet imsemmija fuq, ma hijjex ghal kollox hielsa minn rabta, li tista` wkoll tidher gerarkika, mal-Arcidjocesi.

17. Fic-cirkostanzi ghalhekk, ma hijjex irragonevoli l-percezzjoni li hemm rabta tali bejn l-Arcidjocesi u l-assocjazzjoni li taghha l-imhalled huwa president li tista` tolqot hazin id-dehra ta` imparzjalità oggettiva ta` min ghandu rwol fit-tmexxija ta` dik l-assocjazzjoni. Id-dubju ma huwiex wiehed li ma jitqiesx oggettivament gustifikat, ukoll jekk dak id-dubju ma jolqotx l-imparzjalità soggettiva tal-imhalled.

18. Ghal dawn ir-ragunijiet il-qorti tilqa` l-appell u thassar is-sentenza appellata: tipprovdi dwar l-ewwel zewg talbiet billi tghid illi jkun hemm ksur tal-jedd tal-atturi ghal smigh xieraq jekk ma tintlaqax l-eccezzjoni ta` rikuza tal-imhalled li qiegħed jisma` l-kawza fl-ismijiet Lawrence Grech et v. Carmelo Pulis et (rik.489/2013), u ghalhekk tordna li l-kawza ma titkompliex quddiem l-istess imhalled; ma huwa mehtieg ebda provvediment dwar it-tielet u r-raba` talbiet billi s-surroga tal-imhalled issir kif ighid u jrid il-Kodici ta` Organizzazzjoni u Procedura Civili.”

(ara wkoll il-provvediment ta` din il-Qorti diversament presjeduta mogħti fit-30 ta` Mejju 2018 fl-ismijiet **Alfred Degiorgio vs L-Avukat Generali** li ghaddiet in gudikat)

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

Il-gudikant li jiddeciedi dwar ir-rikuza tieghu stess huwa li huwa indipendenti u imparzjali fid-decizjoni tieghu.

Kif jghid Sir William Blackstone fil-Commentaries on the Laws of England :

"For the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy censure from those, to whom the judge is accountable for his conduct."

2. L-imparzjalita` tal-gudikant huwa valur fundamentali tal-etika gudizzjarja. Gudikant ghandu l-obbligu li jisma` u jiddeciedi kaz fuq il-provi u s-sottomissjonijiet imressqa u mhux fuq konsiderazzjonijiet mhux xierqa (improper considerations), hieles minn xi pregudizzju jew interess, dirett jew indirett, fl-ezitu tal-kawza jew fil-partijiet jew l-avukati li qed jillitigaw quddiemu. Dan l-obbligu huwa mnisseg fil-guramenti ta` lealta` u ta` hatra li jiehu kull gudikant qabel ma jibda jaqdi dmirijietu.

3. Il-gudikant ghandu jiddisponi minn talba ghar-rikuza tieghu b`mod ekwu u gust (fairly) u jekk ma jaghmilx hekk, ikun qed jabbuza mid-

diskrezzjoni tieghu, kif cirkoskritta mil-ligi u ikun hemm konsegwenzi serji ghal tali abbuz.

4. *Illi f`kaz li ma jilqax it-talba (tar-rikuza), il-kawza titkompli, munita bil-garanziji kollha stabbiliti fil-qafas legali taghna, inkluzi dawk kostituzzjonali u konvenzjonali ghall-protezzjoni tal-jedd tas-smigh xieraq;*

5. *Dawn il-garanziji jiprotegu lill-partijiet fil-kawza f`kaz li l-gudikant eventwalment juri li huwa parzjali jew jaghti l-apparenza ta` parzjalita` (bias) biex jiddeciedi l-kwistjoni bejn il-partijiet.*

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

Fil-**Judicial Ethics Report (2009-2010)** tal-**Working Group : European Network of Councils for the Judiciary (ENCJ)** :-

"IMPARTIALITY

Impartiality and people`s perception of impartiality are, with independence, essential to a fair trial.

The impartiality of the judge represents the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment.

The judge is aware of the possibility of his own prejudices. (It is a matter of subjective and objective impartiality. Objective impartiality is related to the functions and the subjective

impartiality concerns the personality of the individual).

To guarantee impartiality, the judge :

- Fulfils his judicial duties without fear, favouritism or prejudice;

- Adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality and minimises the situations which might lead to a recusal ;

- Recuses himself from cases when:

o he cannot judge the case in an impartial manner in the eyes of an objective observer ;

o he has a connection with one of the parties or has personal knowledge of the facts, has represented, assisted or acted against one of the parties, or there is another situation which, subjectively, would affect his impartiality;

o he or a member of his family has an interest in the outcome of the trial.

A judge has a duty of care to prevent conflicts of interest between his judicial duties and his social life. If he is a source of actual or potential conflicts of interest, the judge does not take on, or withdraws immediately from, the case, to avoid his impartiality being called into question.

A judge ensures that his private life does not affect the public image of the impartiality of his judicial work.

Impartiality does not prevent a judge from taking part in social life in order to carry on his professional activity.

He is entitled to complete freedom of opinion but must be measured in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organisation.

In any event, this freedom of opinion cannot be manifested in the exercise of his judicial duties.”

F` **The Magna Carta of Judges** li hareg **The Consultative Council of European Judges** jinghad hekk :-

Rule of law and justice

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

Judicial Independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in

respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

Guarantees of independence

5. Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence.

6. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

7. Following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.

8. Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.

9. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation).

10. In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.

11. *Judges shall ensure equality of arms between prosecution and defence. An independent status for prosecutors is a fundamental requirement of the Rule of Law.*

12. *Judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society.*

Body in charge of guaranteeing independence

13. *To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.*

Access to justice and transparency

14. *Justice shall be transparent and information shall be published on the operation of the judicial system.*

15. *Judges shall take steps to ensure access to swift, efficient and affordable dispute resolution; they shall contribute to the promotion of alternative dispute resolution methods.*

16. *Court documents and judicial decisions shall be drafted in an accessible, simple and clear language. Judges shall issue reasoned decisions,*

pronounced in public within a reasonable time, based on fair and public hearing. Judges shall use appropriate case management methods.

17. The enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice.

Ethics and responsibility

18. Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training.

19. In each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure.

20. Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.

21. The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state.

22. It is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

International courts

23. *These principles shall apply mutatis mutandis to judges of all European and international courts."*

Fil-**Guide for Judges in England and Wales** li kien ippubblikat Marzu 2008², jinghad hekk dwar l-imparzjalita` :

3. Impartiality

3.1 *Each Justice will strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the individual Justice and of the Court.*

3.2 *Each Justice will seek to avoid extra-judicial activities that are likely to cause him or her to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.*

3.3 *Each Justice will refrain from any kind of party political activity and from attendance at political gatherings or political fundraising events, or contributing to a political party, in such a way as to give the appearance of belonging to a particular political party. They will also refrain from taking part in public demonstrations which might diminish their authority as a judge or create a perception of bias in subsequent cases. They will bear in mind that political activity by a close member of a Justice`s family might raise concern in a particular case about the judge`s own impartiality and detachment from the political process.*

² Ara s-sit elettroniku:

<https://www.supremecourt.uk/about/judicial-conduct-and-complaints.html>

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

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

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

Bias and the appearance of bias

3.7 The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a Justice from taking part in a particular case is the subject of United Kingdom and Strasbourg jurisprudence which will guide the Justices in specific situations. Recent UK cases include *Porter v Magill* [2002] 2 AC 357, *Locobail (UK) Ltd v Bayfield Properties Ltd* [2002] QB 451, *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 and *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416.

3.8 Circumstances will vary infinitely and guidelines can do no more than seek to assist the individual Justice in the judgment to be made, which involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have. What follows are merely signposts to some of the questions which may arise.

3.9 A Justice will not sit in a case where :

he or she has a close family relationship with a party or with the spouse or domestic partner of a partner;

his or her spouse or domestic partner was a judge in a court below;

he or she has a close family relationship with an advocate appearing before the Supreme Court.

3.10 Sufficient reasons for not sitting on a case include :

personal friendship with, or personal animosity towards, a party; friendship is to be distinguished from acquaintance, which may or may not be a sufficient reason depending upon its nature and extent;

current or recent business association with a party; this includes the Justice`s own solicitor, accountant, doctor, dentist or other professional adviser; it does not normally include the Justice`s insurance company, bank or a local authority to which he or she pays council tax.

3.11 Reasons which are unlikely to be sufficient for a Justice not to sit on a case, but will depend upon the circumstances, include:

friendship or past professional association with counsel or solicitors acting for a party;

the fact that a relative of the Justice is a partner in, or employee of, a firm of solicitors or other professional advisers involved in a case; much will depend upon the extent to which that relative is involved in or affected by the result in the case;

past professional association with a party as a client; much will depend upon how prolonged, close, or recent that association was.

...

3.14 Previous participation in public office or public debate on matters relevant to an issue in a case will not normally be a cause for a Justice not to sit, unless the Justice has thereby committed himself or herself to a particular view irrespective of the arguments presented to the Court. This risk will seldom, if ever, arise from what a judge has said in other cases, or from previous findings against a party in other litigation.

3.15 If circumstances which may give rise to a suggestion of bias, or the appearance of bias, are present, they should be disclosed to the parties well before the hearing, if possible. Otherwise the parties may be placed in a difficult position when deciding whether or not to proceed. Sometimes, however, advance notification may not be possible.

3.16 Disclosure should be to all parties and, unless the issue has been resolved before the

hearing, discussion should be in open court. Even where the parties consent to the Justice sitting, the Justice should refuse himself or herself if, on balance, he or she considers that this is the proper course. Conversely, there are likely to be cases in which the Justice has thought it appropriate to bring the circumstances to the attention of the parties but, having considered any submissions, is entitled to and may rightly decide to proceed notwithstanding the lack of consent.

Fil-kors tar-ricerka taghha l-Qorti ltaqghet ma` kitba bit-titolu : **"A question of judicial bias"** ta` **Matt Evans** li dehret fis-sit elettroniku : <http://www.thejusticegap.com/2012/09/a-question-of-judicial-bias/> : fejn kien trattat dak maghruf bhala : "*subconscious bias*".

L-awtur ighid hekk :-

*So what is the test for apparent judicial bias? At common law it is whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility of bias. Concretely, would such an observer consider that it was reasonably possible that the judge or tribunal member may be subconsciously biased? **Lawal v Northern Spirit** [2003] ICR 856 at para 21.*

All the cases consistently emphasise that what is in issue is unconscious bias. Judges, like politicians, it seems are incapable of being consciously biased.

`[The] simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind

may unconsciously be affected by bias.` **R v Gough** [1993] AC 646 at 659

`Bias` in this sense means that the decision maker `might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him` or they might be `predisposed` to decide the case or an issue in it in a particular way.

*Where a challenge is made then it is for the reviewing court to put itself in the position of such an observer in determining whether the test is made out – **Locabail (UK) Ltd v Bayfield Properties Limited** [2000] 1 QB 451.*

*In coming to that conclusion the court will not `pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision` – **Locabail** para 19.*

*The grounds on which a real possibility of bias might arise cannot be definitively stated (though it is arguable that any judge who has kept and still insists on putting on the Black cap or who starts twirling around the birch before hearing a case of TV licence avoidance would give unarguable grounds for challenge). However they include the following as summarised in **AWG v Morrison** [2006] 1 WLR 1163 :*

`[If]there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely

acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case ... or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him ... In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.

If there is apparent bias then the judge or tribunal member must disqualify himself and there is no discretion not to do so. For the purposes of Article 5(4) and Article 6 of the Convention for the Protection of Human Rights, the Court asks whether suspicions of bias are objectively justified in that there is a rational and demonstrable basis for them. As the above quote makes clear prudence should naturally lean on the side of being safe rather than sorry in cases of alleged bias, and matters of inconvenience, costs and delay will be irrelevant where the principle of judicial impartiality is properly invoked.

Fuq nota finali fil-**Kodici tal-Etika tal-Membri tal-Gudikatura ta` Malta**, hemm stipolat illi :

"15. Il-gudikanti ghandhom jaqdu d-dmirijiet taghhom fid-dawl tal-kuxjenza taghhom b`mod oggettiv bla biza`, bla favuri u minghajr pregudizzji, u dana skond il-ligijiet u d-drawwiet tal-pajjiz.

16. Il-gudikanti ghandhom d-dover li fil-qadi ta` dmirijethom iwarbu kull pregudizzju u jiddecidu

l-kawzi oggettivament u unikament fuq il-meritu legali u fattwali tagghom.

17. Il-gudikanti ghandhom igibu ruhhom, kemm fil-Qorti u kemm ukoll barra l-Qorti, b`mod li ma jpoggux fid-dubbru l-indipendenza u l-imparzjalità tagghom jew ta` l-ufficju li jokkupaw

23. Il-gudikanti ma ghandhomx joqghodu f`kawza meta huma jkunu jafu li dwarhom hemm wahda mir-ragunijiet ta` rikuza li jissemmwew fil-Kodici ta`Organizzazzjoni u Procedura Ċivili jew fejn ikun ovvju l-perikolu jew pregudizzju ghal smigh xieraq, altrimenti huma ghandhom l-obbligu li ma jabdikawx mid-doveri tagghom."

L-imparzjalita` ta` gudikant hija dejjem prezunta salv ghal prova kuntrarja. L-istitut tar-rikuza jew ta` l-astensjoni ta` gudikant jinbena fuq il-presuppost li l-gudikant li quddiemu jitressaq kaz huwa mparzjali u li huwa dmir tieghu (mhux semplici privilegg jew favur) li jisma` u jaqta` kull kawza li titressaq quddiemu. Fil-fehma ta` din il-Qorti, kemm ghal dak li jirrigwarda t-test oggettiv u kif ukoll dak soggettiv, il-fattur li ghandu jaghti lok ghal dubju dwar l-imparzjalita` ta` l-gudikant ghandu jkun wiehed gravi.

c) Risultanzi

Il-Qorti sejra tghaddi ghall-analizi tal-lanjanzi tar-rikorrenti.

Jibda biex jinghad illi l-impozizzjoni tal-penali fl-ammont ta' €1,000 hija marbuta mal-fatt illi fil-fehma tal-Qorti Kostituzzjonali, ir-rikuza li talbu r-rikorrenti ghar-rikuza tal-Imhallfin Caruana Demajo u Cuschieri kienet frivola u vessatorja. Mhumiex korretti r-rikorrenti meta jinsinwaw, fin-nota ta' sottomissjonijiet tagghom, illi l-penali kienet imposta ghaliex mexxew bil-kawza tal-lum.

Iz-zmien ta` xahar kien stabbilit mill-Qorti Kostituzzjonali wara li cahdet it-talba tar-rikorrenti ghal referenza kostituzzjonali.

Sabiex taccerta ruhha li r-rikorrenti jkollhom ic-cans kollu li jgibu `l quddiem l-ilment taghhom, u allura b`harsien tad-dritt taghhom ghal smigh xieraq, il-Qorti Kostituzzjonali akkordat zmien xahar biex, jekk ir-rikorrenti jidhrilhom, jintavolaw huma proceduri kostituzzjonali dwar l-ilment taghhom. Mhux il-kompitu ta` din il-Qorti kif adita illi tindaga jekk il-Qorti Kostituzzjonali ghamlitx sewwa meta tat dak il-provvediment.

B`dak il-provvediment fis-sehh, ir-rikorrenti kellhom zewg ghazliet :-

JEW

- i. Jottempraw ruhhom, bil-presentata tal-proceduri kostituzzjonali, kif fil-fatt hassew il-htiega illi jaghmlu ;

JEW

- ii. Jistennew illi l-Prim Imhallef Camilleri jirtira bl-eta` , u *del resto* kif qalu l-istess rikorrenti, il-kwistjoni tar-rikuza kienet tmut mewta naturali.

Il-Qorti tosserva illi meta nghata l-provvediment, il-Qorti Kostituzzjonali halliet il-kawza ghall-kontinwazzjoni ghas-7 ta' Mejju 2018, u cioe` wara d-data tal-irtirar tal-Prim Imhallef Camilleri. Ir-rikorrenti setghu stennew id-data tas-7 ta` Mejju 2018, u jkomplu bl-appell minghajr ma jintavolaw il-kawza tal-lum. Kien biss b`nota tal- 5 ta' Gunju 2018 illi r-rikorrenti talbu r-rikuza tal-Imhallfin Caruana Demajo u Cuschieri. Ma jirrizultax illi qabel dakinhar ir-rikorrenti esprimew xi lment jew thassib dwar dawn iz-zewg Imhallfin. Ghalhekk ir-rikuza taz-zewg Imhallfin l-ohra kienet sollevata fi stadju avanzat

tal-appell. Kienet sollevata wkoll li l-Prim Imhallef Camilleri kien diga` rtira u wara li kienet saret din il-kawza.

Premessi dawn il-konsiderazzjonijiet ta` fatt, tajjeb jinghad illi l-ilment tar-rikorrenti fil-konfront tal-Imhallfin Caruana Demajo u Cuschieri, bhala membri flimkien mal-Prim Imhallef Camilleri, tal-Qorti Kostituzzjonali, jitlaq mill-fatt illi huma :-

- i. Iddecidew l-kwistjoni tar-rikuza tal-Prim Imhallef Camilleri flimkien mieghu ;

u

- ii. Ma nsistewx mal-Prim Imhallef Camilleri biex jinghata differiment ghal wara li jirtira.

It-tliet Imhallfin li jippresjedu l-Qorti Kostituzzjonali jiddeliberaw flimkien.

Fil-kaz tal-lum irrizulta li d-differiment li tat il-Qorti kien ghas-7 ta' Mejju 2018 u allura wara d-data ta` irtirar tal-Prim Imhallef Camilleri.

Dan il-fatt ixejjen it-tieni lment tar-rikorrenti fil-konfront ta` l-Imhallfin Caruana Demajo u Cuschieri.

Harsa lejn il-provvediment tal-Qorti Kostituzzjonali turi illi kollegjalment l-Imhallfin ta` l-Qorti Kostituzzjonali kienu tal-fehma illi dak li jipprovdi l-Kap 12 dwar ir-rikuza kien jipprekludihom milli jastjenu. Kien ghalhekk li t-talba tar-rikuza kienet respinta.

Din il-Qorti hija tal-fehma illi fil-kaz tal-lum ma rrizultawx fatti jew cirkostanzi daqstant gravi jew impellenti li jaghtu lok ghal dubji serji li l-Imhallfin ma kinux sejrin ikunu mparzjali.

It-thassib jew biza` prospettat mir-rikorrenti dwar allegata parzjalita` tal-Imhallfin Caruana Demajo u Cuschieri hija ghal kollox infondata.

Il-Qorti trid timxi fuq il-provi, u fuq dawn trid issawwar il-konsiderazzjonijiet taghha.

Din il-Qorti tistqarr illi ma tressqet l-ebda prova - meqjusa bil-kejl oggettiv - li l-Imhallfin sedenti, bil-kondotta taghhom, esprimew xi hjiel ta` pregudizzju reali u attwali kontra r-rikorrenti jew li taw lok li jqum dubju legittimu ghal pregudizzju jew imparzjalita` sal-grad rikjest mill-Kostituzzjoni u mill-Konvenzjoni kif allegat mir-rikorrenti.

Il-Qorti ghandha mohhha mistrieh illi hemm bizzejjed garanziji fil-ligi illi jizguraw li l-process gudizzjarju jimxi u jigi deciz bil-massima serenita` ghall-partijiet u kif trid il-ligi.

Il-Qorti ma tarax illi hemm jew x`aktarx li jista` jkun hemm ksur tad-dritt ta` smigh xieraq kif allegat mir-rikorrenti.

L-ewwel talba qeghda tkun michuda.

V. It-tieni u t-tielet talbiet

Ghaliex huma konsegwenzjali, il-Qorti sejra tqis dawn iz-zewg talbiet flimkien.

Il-Qorti tikkondividi l-fehma tal-Avukat Generali illi l-funzjoni taghha mhuwiex li sservi bhala *terzo grado di appello* li l-ligi taghna ma tippermettix.

Fil-kawza fl-ismijiet **Domenico Savio Spiteri vs Avukat Generali et** li kienet deciza fit-2 ta` Ottubru 2001, din il-Qorti diversament preseduta ghamlet referenza ghad-dottrina u ghall-gurisprudenza :

*"... fis-sentenza "**Nicholas Ellul vs Kummissarju tal-Pulizija**" (Appell Kostituzzjonali, 22 ta' Mejju 1991 - Vol.LXXV.i.240) intqal illi:-*

"Dwar f'hiex ma kienx hemm fair trial, jew smiegh xieraq, ir-rikorrent prattikament ma jghid xejn, hlief li jallega li l-Qorti Istrutturja interpretat hazin id-disposizzjonijiet tal-Kodici Kriminali applikabbli ghall - in genere u reperti; il-Qorti Istrutturja interpretat korrettament id-disposizzjonijiet relevanti anki fuq l-iskorta ta' gurisprudenza kostanti tal-Qorti ta' kompetenza Kriminali, izda fi kwalunkwe kaz din m'hix materja kostituzzjonali u din il-Qorti m'ghandha ebda kompetenza fir-rigward."

*Fil-ktieb "**Article 6 of the European Convention on Human Rights - The right to a fair trial**" (Andrew Grotrian, 1994) l-awtur qal hekk:-*

"The question of whether proceedings have been 'fair' is of course quite separate from the question of 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."

L-istess kienet riaffermat fid-decizjoni li tat din il-Qorti diversament presjeduta fis-sentenza fl-ismijiet **Peter Paul Muscat vs Mario Muscat pro et noe** li kienet deciza fil-21 ta` Jannar 2010, fejn inghad hekk :

"Illi fir-rigward tar-rwol ta' din il-Qorti kif adita mir-rikorrent, din il-Qorti tibda billi tghid li taqbel mal-intimati li l-funzjoni taghha fl-istharrig taghha tal-iment kostituzzjonali jew konvenzjonali mressaq mir-rikorrent m'ghandux jissarra f'appell iehor mis-sentenzi kontestati. Fuq dan, jaqbel ir-rikorrent ukoll. Din il-Qorti hija moghtija s-setgha li, f'kaz ta' ilment dwar ksur tad-dritt fundamentali tal-persuna ghal smigh xieraq quddiem qorti indipendenti u imparzjali, tistharreg l-imgiba ta' kull Qorti ohra, imqar jekk tkun wahda gerarkikament oghla minnha. Izda din is-setgha wiesgha hija limitata fis-sens li l-Qrati ta' gurdizzjoni kostituzzjonali m'ghandhomx iqisu jekk il-Qrati mixlija bi ksur ta' jedd ta' smigh xieraq ikkommettewx zball ta' ligi jew ta' fatt fid-decizjonijiet taghhom. Hija setgha limitata biex tqis jekk il-procediment li minnu tressaq ilment ta' nuqqas ta' smigh xieraq kienx tassew wiehed imparzjali u "skond il-ligi".

Illi f'dan l-istadju l-Qorti jidhrilha li ghandha ticcita fehma cara murija mill-Qorti Kostituzzjonali u li taghti hjiel tal-parametri safejn din il-Qorti tista' tibqa' sejra biex tistharreg allegat ksur ta' dritt fundamentali mwettaq minn Qorti ohra. Inghad hekk:

"Allahares kellu jigi ammess il-principju illi r-rimedju ghal meta, per ezempju Qorti ta'

gurdizzjoni kriminali, tifhem hazin il-ligi u tapplika u tinterpreta dispozizzjoni tal-Kodici Kriminali jew ta' xi ligi penali ohra b'rizultat ta' liema dak li jkun jnistab hati, allura awtomatikament jitwieled id-dritt kostituzzjonali ta' rimedju minhabba nuqqas ta' smigh xieraq. Dan ikun jammonta ghal interpretazzjoni kompletament novella pero' li qatt ma giet accettata anqas fi Strasbourg ta' x'verament ifisser id-dritt ta' smigh xieraq. certament, kemm il-Prim'Awla tal-Qorti civili kif ukoll il-Qorti Kostituzzjonali m'humieq prekluzi milli jiddeciedu, meta jkun il-kaz, illi xi Qorti ohra tkun illediet xi wiehed mid-drittijiet fundamentali tal-individwu - decizjonijiet li bhalhom ittiehdu diversi drabi kemm f'dak li jirrigwarda per ezempju liberta' provvizorja kif ukoll f'dak li jirrigwarda smigh xieraq fi zmien ragonevoli, fost kazijiet ohra."

Il-Qorti tirreferi wkoll ghad-decizjoni li tat il-Qorti Kostituzzjonali fil-kawza fl-ismijiet **Emanuel Camilleri vs Avukat Generali**, li kienet deciza fit-28 ta' Gunju 2012, fejn inghad hekk :

*"Illi huwa opportun hawnhekk li l-Qorti taghmel referenza ghal ktieb ta' **Jacobs and White**, The European Convention on Human Rights, Third Edition, fejn f'pagna 140, fejn l-awturi jikkumentaw fuq l-hekk imsejha "**fourth instance**" doctrine, u l-kuncett zbaljat li jezisti dwar is-sistema tal-Konvenzjoni Ewropea. Il-Qorti qed tislet minn dan il-ktieb dawn il-principji:*

1. The Court has no jurisdiction under Article 6 to reopen domestic legal proceedings or to substitute its own findings of fact or national law for the findings of domestic courts.

2. *The Court's task with regard to a complaint under Article 6 is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Convention.*

3. *Unlike a national court of appeal, it is not concerned with the questions whether the conviction was safe, the sentence appropriate, the award of damages in accordance with national law, and so on.*

4. *And a finding by the Court that an applicant's trial fell short of the standards of Article 6 does not have the effect of quashing the conviction or overturning the judgement, as the case may be.*

5. *The Court calls this principle the 'fourth instance' doctrine, because it is not to be seen as a third or fourth instance of appeal from national courts.*

(ara wkoll : **Fatiha Khallouf vs Il-Kummissarju tal-Pulizija et**, P.A. Kost., 28 ta` Dicembru 2001; **Micallef vs Avukat Generali et**, Qorti Kostituzzjonali, 9 ta` Ottubru 2001 (Kollez. Vol: LXXXV.i.328)

Din il-Qorti taghmel taghha dawn l-insenjamenti.

Is-setgha ta' din il-Qorti bhala qorti ta` gurisdizzjoni kostituzzjonali huwa cirkoskritt u arginat ghall-istharrig ta` jekk avveratx ruhha l-lezzjoni tal-jeddijiet fundamentali lamentat mir-rikorrenti.

Kwalunkwe konsiderazzjoni ohra tmur lil hinn mill-kompetenza taghha.

Ghalhekk it-tieni u t-tielet talbiet qeghdin jigu michuda wkoll.

VII. Ir-raba` talba

Propju ghaliex diga` sabet illi r-rikorrenti ma garrbu l-ebda ksur tal-jeddijiet fundamentali taghhom, anke r-raba` talba qeghda tkun respinta.

Decide

Ghar-ragunijiet kollha premissi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi :

Tilqa` l-eccezzjonijiet kollha.

Tichad it-talbiet kollha.

Tordna lir-rikorrenti sabiex ihallsu l-ispejjez kollha ta` din il-kawza.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**