MALTA

QORTI KOSTITUZZJONALI

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

ONOR. IMHALLEF
JOSEPH D. CAMILLERI

ONOR. IMHALLEF
JOSEPH A. FILLETTI

Seduta tal-25 ta' April, 2008

Appell Civili Numru. 41/2006/1

Simon Caruana

v.

L-Onorevoli Prim Ministru u l-Avukat Generali

Il-Qorti:

<u>Preliminari u sentenza ta' l-ewwel Qorti</u>

1. Dan hu appell, interpost minn Simon Caruana, minn sentenza moghtija mill-Prim Awla tal-Qorti Civili fis-26 ta' Jannar 2007. Il-fatti li taw lok ghal din il-vertenza, il-

premessi u l-allegazzjonijiet tar-rikorrent (illum appellant) Simon Caruana, kif ukoll l-eccezzjonijiet tal-intimati (illum appellati) Prim Ministru u Avukat Generali jinsabu ben riportati fis-sentenza appellata, li qed tigi hawn aktar 'l quddiem riprodotta fl-intier taghha. Ghandu jinghad li f'din il-kawza ma nstemghu ebda provi – il-kawza kienet ibbazata esklussivament fuq il-premessi kif esposti fir-rikors promotorju, premessi li l-ewwel qorti ttimbrat bhala "possibilitajiet astratti". Is-sentenza ta' l-ewwel qorti taqra hekk:

"F'din il-kawża r-rikorrent qiegħed igħid illi l-jedd tiegħu għal smigħ xieraq, imħares taħt l-art. 39(2) tal-Kostituzzjoni ta' Malta ["il-Kostituzzjoni"] u l-art. 6(1) tal-Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali ["il-Konvenzjoni"], qiegħed jinkiser fi proċeduri li fihom huwa parti u li qegħdin jinstemgħu quddiem it-Tribunal għal Talbiet Żgħar ["it-Tribunal"].

"Ir-rikorrent igħid illi hu ġie mħarrek minn *Fogg Insurance Agencies Limited* f'isem is-soċjetà barranija *Norwich Union International Insurance Limited*, u minn Cristino Azzopardi sabiex jiġi kundannat iħallas sitt mija u tmenin lira u tlieta u sebgħin ċenteżmu (Lm608.73) bħala danni wara inċident li seħħ meta hu kien qiegħed isuq rota, u ġie msejjaħ biex jidher quddiem it-Tribunal presjedut mill-Avukat Philip Manduca.

"Deċiżjoni dwar id-drittijiet u l-obbligi ċivili tar-rikorrent għandha tingħata minn qorti jew awtorità oħra mwaqqfa b'liġi li għandha tkun indipendenti w imparzjali, kif iridu l-art. 39 tal-Kostituzzjoni u l-art. 6 tal-Konvenzjoni, iżda t-Tribunal, kif imwaqqaf bl-Att dwar Tribunal għal talbiet Żgħar [Kap 380], ma huwiex tribunal indipendenti w imparzjali.

"Dan it-Tribunal huwa dejjem presjedut minn avukat prattikanti, li jalterna x-xogħol tiegħu ta' avukat quddiem il-qrati kollha barra l-istess Tribunal max-xogħol ta' ġudikant – jew ġudikatur kif jissejjaħ fl-Att

– fit-Tribunal. Jinħatar bħala ġudikatur mill-President ta' Malta għal ħames snin, iżda matul dawk il-ħames snin jista' jkompli jaħdem ta' avukat quddiem il-qrati ordinarji. B'hekk ikun jippatroċinja partijiet kontra avukati oħra li jkunu qegħdin jippatroċinaw lill-parti l-oħra, u b'hekk ma jistax umanament ikun imparzjali meta, bħala ġudikatur, jidhru quddiemu l-istess partijiet li kontra tagħhom kien qiegħed jaħdem bħala avukat.

"Li dan jikser il-Kostituzzjoni ħassu l-leġislatur stess meta għadda b'liġi l-art. 4(4)(*b*) tal-Kap. 380 li jżomm lill-ġudikaturi milli jaħdmu ta' avukati f'kawżi quddiem it-Tribunal.

"Ir-rikorrent għalhekk qiegħed jitlob illi din il-qorti tgħid illi, għax hu ġie mħarrek quddiem it-Tribunal, qiegħed iġarrab ksur tad-dritt tiegħu mħares taħt l-art. 39(2) tal-Kostituzzjoni u l-art. 6(1) tal-Konvenzjoni, Qiegħed jitlob ukoll illi, sabiex jitħarsu l-jeddijiet tiegħu taħt il-liġi, hu jiġi ġudikat quddiem qorti jew tribunal imparzjali w indipendenti, u illi, għalhekk, din il-qorti tgħid illi ma jiswewx l-art. 4 u 7(1) tal-Kap. 380 u tagħtih kull rimedju xieraq.

"L-intimati wieġbu illi r-rikorrent seta', u għadu jista', jinqeda b'rimedji ordinarji sabiex iħares il-jeddijiet tiegħu, għal dawn ir-raġunijiet:

1. mill-kliem tar-rikors jidher illi l-każ tar-rikorrent quddiem it-Tribunal għadu ma nqatax, u għalhekk ir-rikorrent għadu ma nqediex bir-rimedji li jagħtuh il-proċeduri quddiem it-Tribunal; u

2. jekk it-Tribunal ġà iddeċieda dwar il-każ tar-rikorrent, dan jista' jappella taħt l-art. 8 tal-Kap. 380 li fil-para. (2)(*d*) igħid illi jista' jsir appell ukoll "meta t-Tribunal ikun b'mod gravi mar kontra d-dettami ta' l-imparzjalità u ta' l-ekwità skond il-liġi u dik l-azzjoni tkun ippreġudikat il-jeddijiet ta' min jappella"; jekk ir-rikorrent ma jinqediex bil-jedd li jappella ikun naqas milli jinqeda bir-rimedju ordinarji

kollha li tagħtih il-liġi, u għalhekk din il-qorti għandha tirrifjuta li teżerċita s-setgħat kostituzzjonali tagħha u ma tqisx aktar dan il-każ;

"L-intimati komplew iwieġbu illi mir-rikors ma jirriżulta b'ebda mod kif l-għemil tat-Tribunal u tal-ġudikant inkarigat minnu qiegħed fil-konkret jikser id-drittijiet fondamentali tar-rikorrent: Ir-rikorrent ma huwiex qiegħed jilmenta kontra dak li għamel it-Tribunal kontra l-interessi tiegħu iżda qiegħed iressaq numru ta' lanjanzi *in abstracto* kontra l-liġi li waqqfet lit-Tribunal. Għalhekk jonqos l-interess ġuridiku dirett u attwali, għax l-azzjonijiet dwar ksur ta' drittijiet fondamentali jistgħu jinġiebu biss minn min ikun il-vittma ta' dak il-ksur. Fil-każ tallum ir-rikorrent qiegħed biss iressaq għadd ta' lmenti ipotetiċi mibnija fuq interpretazzjonijiet tal-Kap. 380 illi, igħid hu, jistgħu jwasslu biex jinkiser il-jedd għal smigħ xieraq, u ma jistax jagħmel mod ieħor għax ma għandu ebda prova ta' xi fatt li twettaq kontrieh li jsaħħaħ dak li qiegħed jallega dwar ksur ta' drittijiet.

"L-intimati jgħidu wkoll illi l-fatt illi fuq it-Tribunal jippresjedi avukat prattikanti ma jikkompromettix l-imparzjalità tiegħu, għax il-liġi ma tħallix illi każ jiddeċidieh ġudikant li għandu interess personali jew professjonali fih. Din ma hijiex ħlief applikazzjoni tal-liġi dwar ir-rikużi u l-astensjonijiet għall-fatti partikolari tal-każ, u jekk minn dawk il-fatti hemm dehra ta' nuqqas ta' imparzjalità il-ġudikant ma jkunx jista' jisma' l-każ. L-art. 5 tal-Kap. 380 jgħid illi l-art. 734 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili dwar rikuża ta' mħallef igħodd ukoll għall-proċeduri quddiem it-Tribunal, u għalhekk l-imparzjalità ta' ġudikatur tat-Tribunal hija mħarsa bl-istess mod bħall-imparzjalità ta' mħallef.

"Għaldaqstant, igħidu l-intimati, ladarba l-kwistjoni dwar jekk ġudikatur jitqiesx li għandu interess f'kawża hija kwistjoni li għandha tiġi determinata skond il-fatti ta' dik il-kawża partikolari, ma huwiex il-każ illi f'din il-kawża tallum jiġu delinejati s-sitwazzjonijiet

partikolari meta ġudikatur jista' jitqies li ma huwiex imparzjali.

"L-intimati jgħidu wkoll illi r-rikorrent ma semma ebda prova ta' parzjalità tal-ġudikatur kontra tiegħu, u l-fatt illi l-ġudikatur huwa wkoll avukat prattikanti fih innifsu ma joħloqx preżunzjoni ta' parzjalità: ma hemm xejn fil-liġi u l-ġurisprudenza li jwasslu biex tgħid illi jekk il-ġudikatur f'kawża partikolari jkun jippatroċinja klijenti oħrajn quddiem qorti fuq ċirkostanzi differenti minn dawk tal-kawża li jkollu quddiemu bħala ġudikatur, mela huwa sejjer ikun parzjali. Anzi, dan il-prinċipju jibqa' jiswa wkoll jekk il-ġudikant ikun jippatroċinja parti li tkun qiegħda tidher quddiemu, basta dan ikun f'każ ieħor li ma jkollux x'jaqsam, iżda r-rikorrent lanqas ma hu qiegħed jallega li teżisti sitwazzjoni bħal dik.

"Ir-rikorrenti għalhekk talbu illi l-qorti tiċħad it-talbiet tar-rikorrenti.

"Din il-qorti, wara li qieset sew dak li qalu l-partijiet fir-rikors u fit-tweġiba, u qieset ukoll dak li kompla igħid ir-rikorrent fin-nota ta' osservazzjonijiet tiegħu, hija tal-fehma illi t-talbiet tar-rikorrent, għalkemm iqanqlu kwistjoni li toħloq preokkupazzjoni serja, madankollu fiċ-ċirkostanzi tal-każ tallum ma jistgħux jintlaqgħu, għar-raġunijiet li sejrin jissemmew.

"L-ilment tar-rikorrent f'din il-kawża tallum huwa speċifiku ħafna: Ma huwiex qiegħed igħid illi t-Tribunal ma huwiex wieħed indipendenti w imparzjali għax mhux imwaqqaf b'liġi, jew għax ma hemmx garanziji kontra t-tneħħija tal-ġudikatur, jew għax jista' jsir indħil mill-fergħa eżekuttiva tal-gvern – dawn huma kollha kwistjonijiet li ġà ġew mistħarrġa u ngħatat deċiżjoni dwarhom f'sentenza mogħtija minn din il-qorti fl-10 ta' Jannar 2003 fil-kawża fl-ismijiet Kenneth Brincat *versus* l-Avukat Ġenerali *et*; l-ilment fil-kawża tallum huwa illi, għax il-ġudikatur huwa wkoll avukat prattikanti, "ma jistax umanament ikun imparzjali meta bħala ġudikatur jidhru quddiemu l-

istess partijiet li kontra tagħhom kien qed jaġixxi bħala avukat", u meta jidhru quddiemu avukati li dehru f'kawżi fejn hu kien deher bħala avukat għall-parti l-oħra.

"Ir-raġunijiet għala din il-qorti hija tal-fehma illi ma għandhiex tilqa' t-talbiet tar-rikorrent biex tagħtih ir-rimedju mitlub huma dawn:

"Din ma hijiex azzjoni popolari taħt l-art. 116 tal-Kostituzzjoni, fejn "persuna li ġġib azzjoni bħal dik ma tkunx meħtieġa turi xi interess personali b'appoġġ għall-azzjoni tagħha", iżda hija azzjoni għall-ħarsien tal-jeddijiet fondamentali mħarsa taħt id-dispożizzjonijiet tal-Kostituzzjoni jew tal-Konvenzjoni, fejn hu meħtieġ illi persuna li ġġib azzjoni bħal dik turi illi xi waħda minn dawk id-dispożizzjonijiet "tkun qed tiġi jew tkun x'aktarx ser tiġi miksura dwarha". Għalhekk ma huwiex biżżejjed għar-rikorrent illi jistrieħ fuq possibiltajiet astratti ta' preġudizzju, iżda jrid juri l-eżistenza ta' sitwazzjoni konkreta illi tikser, jew x'aktarx sejra tikser, il-jeddijiet fondamentali tagħha.

"Fi kliem ieħor, ma huwiex biżżejjed għar-rikorrent li jgħid illi l-president tat-Tribunal jista' jkun illi kien deher bħala avukat f'kawżi quddiem il-qrati ordinarji fl-interess ta' persuna illi issa qiegħda tidher quddiemu bħala parti f'kawża kontra r-rikorrent; irid juri illi din il-possibbiltà seħħet f'każ konkret. Din il-prova iżda ma nġibitx, u għalhekk il-kawża tallum saret biss eżerċizzju akkademiku dwar possibiltajiet ta' konsegwenzi ħżiena li tista' twassal għalihom il-liġi, u mhux każ dwar ksur konkret ta' dritt fondamentali. Ir-rikorrent għalhekk ma weriex li għandu dak l-interess ġuridiku li trid il-liġi sabiex il-kawża tiegħu tista' timxi.

"L-istess jingħad dwar l-argument tar-rikorrent illi jista' jiġri "li avukat li jeżerċita biss il-professjoni jista' jsib ruħu illi l-operat tiegħu bħala avukat se jiġi ġudikat minn avukat li ftit sigħat qabel kien qed

jirrappreżenta l-kontro-parti tal-klijent ta' l-avukat eżerċenti li però mhuwiex ġudikatur": ma nġiebet ebda prova illi dan seħħ fil-każ tallum.

"In-nuqqas tar-rikorrent illi juri preġudizzju konkret mhux biss ineħħilu l-leġittimazzjoni attiva biex iressaq din il-kawża minħabba nuqqas ta' interess iżda wkoll ifisser illi r-rikorrent ma nqediex – għax għadha ma nqalgħetx okkażjoni konkreta għalhekk – bir-rimedji li tagħtih il-liġi ordinarja, partikolarment fl-art. 5 tal-Kap 380, li jgħid illi "d-disposizzjonijiet tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili li għandhom x'jaqsmu ma' l-astensjonijiet minn, u r-rikużi ta' maġistrat … … … għandhom, *mutatis mutandis*, japplikaw għal ġudikaturi". Ir-rikorrent għalhekk jista', jekk tinqala' l-ħtieġa, jinqeda bid-dispożizzjonijiet ta' l-art. 734 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili biex jitlob ir-rikuża tal-ġudikatur. Partikolarment relevanti fid-dawl ta' l-argumenti li ressaq ir-rikorrent fil-kawża tallum huwa l-art. 734(1)(*e*), li jgħid illi hemm raġuni ta' astensjoni jew rikuża jekk il-ġudikatur ikollu "interess dirett jew indirett dwar kif tinqata' l-kawża".

"Li r-rimedju tar-rikuża huwa rimedju biżżejjed joħroġ mill-każ tal-Qorti Ewropea tad-Drittijiet tal-Bniedem, imsemmi mir-rikorrent stess fin-nota ta' osservazzjonijiet tiegħu, ta' Piersack kontra l-Belġju[1] – il-każ fejn l-imħallef fil-qorti domestika kien, qabel ma nħatar imħallef, id-deputat tal-Prokuratur tar-re li l-uffiċċju tiegħu kien mexxa l-prosekuzzjoni kontra Piersack. Għalkemm l-imħallef personalment ma kienx ħa sehem fit-tmexxija tal-prosekuzzjoni kontra Piersack, u kien hemm qbil illi ma kienx ippreġudikat kontra tiegħu, il-qorti xorta sabet illi kien hemm ksur ta' l-art. 6 tal-Konvenzjoni fejn dan irid li tribunal ikun imparzjali, u qalet illi:

"30. … … … it is not possible to confine oneself to a purely subjective test. In this area, even appearances

[1] 1 t'Ottubru 1982, rikors nru 8692/79.

may be of a certain importance (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 … … … any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.

"Ir-rimedju, iżda, kif jidher minn din is-silta, hu illi dak il-ġudikant "*must withdraw*" u ma jkomplix jisma' dak il-każ partikolari, u mhux illi *ex*-prosekuturi ma jinħatru qatt imħallfin. Fil-fatt il-qorti kompliet tgħid hekk:

"30. (b) It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department, would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality; the Court concurs with the Government on this point.

"Għaldaqstant ir-rikorrent ikollu rimedju biżżejjed, jekk tinqala' l-ħtieġa għalih, minn interpretazzjoni korretta u konformi tad-dispożizzjonijiet dwar ir-rikuża u l-astensjoni, u ma jkunx meħtieġ ir-rimedju straordinarju li qiegħed jitlob illum.

"Għal dawn ir-raġunijiet il-qorti hija tal-fehma illi t-talbiet tar-rikorrent ma jistħoqqilhomx illi jintlaqgħu, u

għalhekk taqta' l-kawża billi tiċħad it-talbiet tar-rikorrent u tikkundannah iħallas l-ispejjeż kollha tal-kawża."

L-appell ta' Simon Caruana

2. Ir-rikorrent Simon Caruana appella minn din is-sentenza b'rikors datat 7 ta' Frar 2007. Huwa bazikament jilmenta mill-fatt li, skond hu, l-ewwel qorti "ma fehmitx l-gherq tal-kawza" u cioe` li "l-kostituzzjoni [i.e. komposizzjoni] stess tat-Tribunal tat-Talbiet z-Zghar [**recte:** Tribunal ghal Talbiet Zghar] fejn tirrigwarda min huma l-gudikaturi li jippresjedu t-Tribunal tirrendi l-istess Tribunal bhala wiehed mhux "imparzjali" u b'hekk jivvjola l-Artikolu 39(2) tal-Kostituzzjoni u l-Artikolu 6(1) tal-Konvenzjoni". Skond l-appellant "…kull gudikatur minhabba n-natura stess ta' l-i*status* tieghu bhala gudikatur pubbliku li pero` jipprattika wkoll u kontemporanjament il-professjoni ta' avukat privat, ma jikkostitwix [**recte:** ma jaghtix] dik il-garanzija ta' imparzjalita` li kull qorti u tribunal ghandhom ikollhom biex jigu sodisfatti il-voti tal-Kostituzzjoni u tal-Konvenzjoni". L-appellant ikompli billi jikkritika xi brani mis-sentenza – kritika, pero`, li effettivament ma zzid xejn mas-sustanza ta' l-aggravju tieghu.

Konsiderazzjonijiet ta' din il-Qorti

3. Din il-kawza hija prattikament identika ghal kawza ohra, li qed tigi deciza llum stess, fl-ismijiet **David Aquilina v. L-Onorevoli Prim Minitsru et** (Rikors Kostituzzjonali 42/2006 JRM). Fiz-zewg kawzi l-lanjanzi tar-rikorrenti w appellanti huma l-istess, u cioe` li t-Tribunal ghal Talbiet Zghar jiddifetta min-nuqqas ta' imparzjalita` oggettiva minhabba l-fatt li l-gudikaturi li jippresjedu dan it-Tribunal huma awtorizzati li jkomplu jahdmu ta' avukati ghajr quddiem l-istess tribunal. Fil-kaz ta' **Aquilina** din il-Qorti qalet – u dan jghodd pjenament anke ghal dan il-kaz, cioe` ta' **Caruana** – hekk:

"8. Minn x'hiex ilmenta l-appellant fir-rikors promotorju tieghu tal-14 ta' Lulju 2006? Huwa car –

anke meta wiehed jaqra wkoll ir-rikors ta' appell – li l-appellant ma hux jilmenta mill-<u>indipendenza</u> tat-Tribunal ghal Talbiet Zghar, ossia li dan it-Tribunal ma hux indipendenti mill-Ezekuttiv jew minn kwalsiasi awtorita` jew setgha ohra fil-pajjiz, jew mill-partijiet. Anqas ma hu jilmenta mill-<u>imparzjalita` soggettiva</u> tat-tribunal li quddiemu kellu jidher, cioe` mhux jilmenta li l-gudikatur f'dak il-kaz (li kellha tkun l-Avukata, illum Magistrat, Dott. Doreen Clarke) kienet personalment ixxaqleb lejn naha jew ohra. Huwa qed jilmenta biss mill-<u>imparzjalita` oggettiva</u> tat-Tribunal – u independentement mill- fattispeci tal-kaz tieghu – peress li jikkontendi li kif inhu kostitwit dan it-Tribunal, b'gudikant li huwa *part-time* u li jista' jipprattika l-professjoni legali tieghu fil-qrati u tribunali kollha minbarra fi u quddiem l-istess Tribunal ghal Talbiet Zghar, dan it-tribunal ma jaghtix garanzija adegwata li huwa imparzjali. L-imparzjalita` oggettiva, jew in-nuqqas taghha, ta' qorti jew tribunal giet b'mod konciz imfissra hekk mill-awturi van Dijk u van Hoof fil-ktieb taghhom *Theory and Practice of the European Convention on Human Rights* [2]:

"The objective approach refers to the question whether the way in which the tribunal is composed and organised, or whether a certain coincidence or succession of functions of one of its members, may give rise to doubt as to the impartiality of the tribunal or that member. If there is reason for such doubt, even if subjectively there is no concrete indication of partiality of the person in question, this already amounts to an inadmissible jeopardy of the confidence which the court must inspire in a democratic society. The fear that the tribunal or a particular judge lacks impartiality must 'be held to be objectively justified', so the stand point of the accused on this matter, although important, is not decisive." [3]

[2] Kluwer Law Intenational (The Hague), 1998.
[3] *op.cit.* pages 454-455.

9. Issa, ma hemmx dubju li wiehed jista' jaqbel jew ma jaqbilx mat-twaqqif tat-Tribunal ghal Talbiet Zghar, twaqqif li sehh fl-1995. Dan it-Tribunal twaqqaf principalment biex, flok ma jizdied in-numru ta' gudikanti ordinarji – imhallfin u magistrati, pero` principalment magistrati – biex jiehdu hsieb in-numru kbir ta' kawzi fil-qrati, l-Ezekuttiv iddecieda li johrog barra mis-sistema tal-qrati ordinarji numru limitat ta' kawzi, u cioe` dawk fejn it-talba tkun biss tirreferi ghal ammont ta' flus u fejn l-ammont ta' flus hekk mitlub huwa meqjus li huwa "zghir" (ma jeccedix certu ammont). Kif gustament osservat *passim* il-Prim Awla tal-Qorti Civili fis-sentenza taghha fl-ismijiet Kenneth Brincat v. L-Avukat Generali et, *supra*, is-sistema li nholqot, cioe` dik tat-Tribunal ghal Talbiet Zghar presjedut minn gudikatur li jkun in effetti gudikant *part-time*, ma hiex neccessarjament l-ahjar soluzzjoni. In fatti l-uniku vantagg li din il-Qorti, kif illum komposta, tara f'dan it-tribunal huwa li x-xoghol ta' gudikatur iservi bhala forma ta' tirocinju ghal dawk li ghada pitghada jistghu jkunu magistrati u imhallfin. Pero` hemm differenza kbira bejn li wiehed ighid li l-affarijiet setghu jew jistghu jkunu ahjar u li jghid li it-Tribunal <u>kif kostitwit</u> ma jaghtix il-garanzija <u>ta' imparzjalita` oggettiva</u>.

10. Il-Kostituzzjoni ta' Malta, filwaqt li tistabilixxi l-qrati ordinarji, cioe` dawk presjeduti minn imhallfin u magistrati, ma teskludix li decizjonijiet "dwar l-ezistenza jew l-estensjoni ta' drittijiet jew obbligi civili" jittiehdu minn awtorita` <u>ohra</u> gudikanti li ma tkunx qorti, purche` li din l-awtorita` ohra tkun "indipendenti u imparzjali" – ara l-Artikolu 39(2) tal-Kostituzzjoni[4]. Fil-fehma ta' din il-Qorti ma jistax ikun

[4] L-Artikolu 6(1) tal-Konvenzjoni jitkellem b'mod generiku dwar "<u>tribunal</u> indipendenti u imparzjali" – kelma li giet dejjem interpretata bhala li tinkludi anke dawk li ma humiex il-qrati ordinarji tal-pajjiz: "For the notion of 'tribunal' it is essential that there exists a power to decide matters 'on the basis of rules of law, following proceedings conducted in a prescribed manner' and a power to set aside the decisions of the bodies below 'on questions of law and fact'. The decision taken by the tribunal may not be deprived of its effects by a non-judicial authority to the disadvantage of the individual party." – ara van Dijk u van Hoof, *op.cit.* p. 541. Fil-kaz **Belilos v. Switzerland**, imsemmi mill-appellant fir-rikors ta' appell tieghu, il-Qorti ta' Strasbourg qalet hekk: *"64. According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its*

hemm dubju li l-<u>ahjar</u> garanzija ta' indipendenza w imparzjalita` hija moghtija mill-qrati ordinarji, b'gudikanti *full-time* li huma dedikati <u>esklussivament</u> ghall-funzjoni aggudikattiva, li ma jistghux jahdmu ta' avukati jew arbitri (hlief fil-kazijiet eccezzjonali imsemmija fil-ligi, u bil-permessi skond il-ligi – ara l-Artikolu 10(1) tal-Kap. 12), u li huma marbuta wkoll b'kodici ta' etika li jissuplixxi fejn il-ligi principali tista' tkun mankanti. Pero` il-fatt wahdu, u *in abstracto*, li gudikant, bhalma huma gudikaturi tat-Tribunal, jista' jkompli jipprattika il-professjoni legali tieghu hlief in konnessjoni ma' kazijiet quddiem it-Tribunal (Art. 4(4)(b), Kap. 380), <u>ma jfissirx necessarjament</u> li tigi nieqsa l-imparzjalita` oggettiva tat-Tribunal. F'dan is-sens esprimiet ruhha wkoll il-Prim Awla tal-Qorti Civili fis-sentenza Kenneth Brincat v. L-Avukat Generali et li diga` saret referenza ghaliha[5]. Veru li Malta hija zghira u kulhadd jaf lil xulxin, u li hemm hafna okkazjonijiet, mhux biss ghal gudikaturi izda anke ghall-imhallfin u ghall-magistrati, li jiltaqghu socjalment ma' avukati – haga fiha nnifisha innokwa. Dak li qed jilmenta minnu, pero`, l-appellant huwa l-fatt li avukat illum jista' jkun qieghed jikkontesta kawza f'qorti ordinarja fejn l-avukat *ex adverso* huwa Dott "X", u ghada l-istess avukat ikun qed jiddeciedi kawza bhala gudikatur fejn wiehed mill-avukati li qed jidher quddiemu huwa proprju Dott "X". Din certament hija possibilita`. Pero` b'daqshekk tigi nieqsa l-imparzjalita` oggettiva tat-Tribunal? Fil-fehma tal-Qorti r-risposta ghandha tkun

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judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see, as the most recent authority, the judgment of 30 November 1987 in the case of H v Belgium, Series A no. 127, p. 34, § 50). It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 § 1 (art. 6-1) itself (see, inter alia, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 24, § 55).

[5] Dik il-qorti qalet hekk: "Illi wara li l-Qorti rat dawn l-artikoli tasal ghall-konkluzjoni illi ghalkemm ikun ahjar u forsi anke ideali li kieku l-gudikatur kellu jkun *full-time*, anke peress li ma hemm l-ebda dubju li quddiem l-istess Tribunal qed jigu trattati decizjonijiet dwar obbligi u drittijiet civili u l-ezistenza u l-estensjoni taghhom, kazi li sa ftit zmien ilu kienu qed jigu trattati minn Gudikatur [<u>recte</u>: Gudikant] (Magistrat u qabel anke Imhallef) appuntat skond il-Kostituzzjoni ta' Malta, pero` dan ma jfissirx li l-fatt li l-istess gudikatur hu *part-time* jivvjola b'xi mod jew neccessarjament l-artikolu 6(1) tal-Konvenzjoni Ewropea u lanqas l-artikolu 39(2) tal-Kostituzzjoni."

fin-negattiv. Is-semplici fatt li gudikatur fit-Tribunal ikollu quddiemu bhala avukat persuna li f'xi okkazjoni precedenti kien qed jikkontesta maghha f'qorti ohra ma jistax ragjonevolment jaghti lok ghal suspett li dak il-gudikatur ser ikun parzjali billi jxaqleb kontra t-tezi tal-parti patrocinata minn dak l-avukat. Kieku kien mod iehor, il-konvivenza civili, fl-ambitu tal-funzjonament tas-sistema gudizzjarja, ssir impossibbli ghax jekk l-argument jittiehed ghall-konkluzjoni logika tieghu, anke imhallef jew magistrat jispicca ma jkunx oggettivament imparzjali ghas-semplici fatt li meta kien avukat kellu hafna kawzi li kkontesta fil-konfront ta' dan jew dak l-avukat. Tkun differenti, per ezempju, s-sitwazzjoni jekk jirrizulta li hemm xi kwistjoni "tahraq" bejn zewg avukati (anke jekk mhux fil-kuntest ta' kawza quddiem il-qrati ordinarji) u in segwitu, u meta dik il-kwistjoni ghadha ma gietx rizolta, wiehed minnhom jispicca gudikatur u l-iehor qed jidher jippatrocinja klijent fit-Tribunal quddiem dak il-gudikatur; jew sitwazzjoni fejn avukat li jidher quddiem it-Tribunal ikun mill-istess ufficju li minnu jkun ghadu jipprattika l-gudikatur; jew wahda mill-partijiet quddiem it-Tribunal tkun qed tinghata jew tkun qed tigi patrocinata, quddiem il-qrati ordinarji u f'kawza ohra, mill-gudikatur. Dawn jistghu certament ikunu sitwazzjonijiet fejn l-apparenzi jkun jirrikjedu astensjoni tal-gudikatur minhabba l-hekk imsejha "gravi ragioni di convenienza" (ara John Mary Chircop v. Il-Kummissarju tal-Pulizija et, Qorti Kostituzzjonali, 4/9/2007, Ir-Repubblika ta' Malta v. Dr. Patrick Vella, Qorti ta' l-Appell Kriminali, 5/10/2006, Ir-Repubblika ta' Malta v. Meinrad Calleja, Qorti Kriminali 2/10/2000). Din il-Qorti hi konfortata f'din il-fehma taghha bid-decizjoni tal-Qorti ta' Strasbourg fl-ismijiet Wettstein v. Switzerland, deciza fil-21 ta' Dicembru 2000. Dan kien kaz fejn quddiem Qorti Amministrattiva tnejn mill-imhallfin kienu mhallfin *part-time* u li kienu intitolati li jipprattikaw il-professjoni legali taghhom bhala avukati, ghal xi zmien anke quddiem l-istess Qorti Amministrattiva. Il-Qorti Ewropea qalet hekk:

“41. The Court recalls at the outset that in proceedings originating in an individual application it has to confine itself, as far as possible, to a examination of the concrete case before it (see the Minelli v. Switzerland judgment of 25 March 1983, Series A no. 62, p. 17, § 35). Accordingly, in the present case there is no reason to doubt that legislation and practice on the part-time judiciary in general can be framed so as to be compatible with Article 6. What is at stake is solely the manner in which the proceedings were conducted in the applicant's case.

“42. According to the Court's constant case-law, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect – the objective approach (see the Thomann v. Switzerland judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 815, § 30).

“43. As regards the subjective aspect of such impartiality, the Court notes that there was nothing to indicate in the present case any prejudice or bias on the part of judges R. and L.

“44. There thus remains the objective test. Here, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his 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 (see the Castillo Algar v. Spain judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see the Ferrantelli and Santangelo v. Italy judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58).

“45. Turning to the present case, the Court notes that judge R. acted against the applicant in separate building proceedings as the legal representative of the Küsnacht municipality. Judges R. and L. both shared office premises with lawyer W. who had previously acted as legal representative in other building proceedings in the Kloten municipality. This situation arose in the Canton of Zürich where, as with the courts of many other cantons, the Administrative Court is composed of both full-time and part-time judges. The latter may practise as legal representatives. The Administrative Judiciary Procedure Act in force at the relevant time contained no provisions as to the incompatibility of such legal representation with judicial activities. Section 34(2) of the Act currently in force provides that part-time judges may not act as legal representatives before the Administrative Court.

“46. It is true that there was no material link between the applicant's case before the Administrative Court and the separate proceedings in which R. and W. acted as legal representatives. Furthermore, R. and W. had been acting as trained lawyers who were called upon to represent the interests of constantly varying parties.

“47. Nevertheless, the Court notes that, when on 15 February 1995 the applicant instituted the present proceedings before the Administrative Court with R. as a judge on the bench, the parallel proceedings in which R. acted as legal representative for the Küsnacht municipality against the applicant were pending before the Federal Court, which gave its decision eight months later on 24 October 1995 (see paragraph 11 above). Less than two months after these proceedings had been terminated the Administrative Court gave its judgment on 15 December 1995. There was, therefore, an overlapping in time of the two proceedings with R. in the two functions of judge, on the one hand, and of legal representative of the opposing party, on the other. As a result, in the proceedings before the Administrative Court, the applicant could have had reason for concern that judge R. would continue to see in him the opposing party. In the Court's opinion this situation

could have raised legitimate fears in the applicant that judge R. was not approaching his case with the requisite impartiality.
"48. The fact that W., an office colleague of judges R. and L., had in other proceedings represented the party opposing the applicant, while only of minor relevance, could be seen as further confirming the applicant's fear that judge R. was opposed to his case.
"49. In the Court's view, these circumstances serve objectively to justify the applicant's apprehension that judge R. of the Administrative Court of the Canton of Zürich lacked the necessary impartiality.
"50. Consequently, in the present case there has been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal."

11. Karen Reid, fit-tieni edizzjoni tal-ktieb taghha *A Practitioner's Guide to the European Convention on Human Rights* [6] tissintetizza l-posizzjoni hekk:

"While there is no problem as such arising from a judge acting as a lawyer, the Court found an applicant could legitimately fear that a judge, who was acting as lawyer for another party in proceedings involving the applicant, continued to view him as the opposing party. Similarly, the fact that a judge had regular, close and financially lucrative links as a professor with the university sued by the applicant justified fears that he might lack impartiality. Involvement of a judge in a financial agreement between her husband and a bank which was a party in proceedings in which she sat was considered to disclose links of 'such a nature and amplitude' and was so close in time to the hearing of the case that the applicant could entertain reasonable fears that the court lacked the requisite impartiality." [7]

12. Fil-kaz in dizamina ma hemm xejn minn dan. L-appellant – rikorrent quddiem l-ewwel qorti – qed jattakka l-imparzjalita` oggettiva tat-tribunal mhux

[6] Sweet & Maxwell (London), 2004.
[7] Pagna 116, para. IIA-092.

b'referenza ghal xi cirkostanza li tolqot il-kaz partikolari tieghu, izda b'mod generali ossia fl-astratt. Din il-Qorti, bhall-ewwel qorti, ma tarax li tista' tghid li l-appellant ghandu raguni oggettivament gustifikata biex jghid li ma kellux jew mhux ser ikollu smigh xieraq minhabba s-semplici fatt li l-gudikatur fit-Tribunal ghal Talbiet Zghar jista' jipprattika ta' avukat quddiem il-qrati ordinarji u quddiem tribunali u bordijiet ohra.

13. Din il-Qorti tosserva wkoll li l-kaz ta' Belilos v. Switzerland, citat mill-appellant, ma jaghmilx ghall-kaz. Hawnhekk kellna bord – *Police Board* – maghmul minn membru wiehed, liema bord inghata funzjonijiet gudizzjarji. Biex joqghod fuq dan il-bord gie mahtur avukat mill-Kwartieri Generali tal-Pulizija u li baqa' jiffunzjona bhala *civil servant* fl-istess Kwartieri Generali tal-Pulizija. Il-Qorti ta' Strasbourg qalet hekk:

"66. However, the Police Board is given a judicial function in Vaud law and the proceedings before it are such as to enable the accused to present his defence. Its single member is appointed by the municipality, but that is not sufficient to cast doubt on the independence and impartiality of the person concerned, especially as in many Contracting States it is the executive which appoints judges.
"The appointed member, who is a lawyer from police headquarters, is a municipal civil servant but sits in a personal capacity and is not subject to orders in the exercise of his powers; he takes a different oath from the one taken by policemen, although the requirement of independence does not appear in the text of it; in principle he cannot be dismissed during his term of office, which lasts four years. Moreover, his personal impartiality has not been called into question in the instant case.
"67. Nonetheless, a number of considerations relating to the functions exercised and to internal organisation are relevant too; even appearances may be important (see, mutatis mutandis, the De Cubber judgment of 26 October 1984, Series A no. 86, p. 14, §

26). In Lausanne the member of the Police Board is a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society.
"In short, the applicant could legitimately have doubts as to the independence and organisational impartiality of the Police Board, which accordingly did not satisfy the requirements of Article 6 § 1 (art. 6-1) in this respect."

4. Din il-Qorti ma tara li ghandha ghalfejn izzid xejn aktar ma' dan kollu li ghadu kif inghad hawn fuq.

Decide

5. Ghall-motivi premessi, tichad l-appell u tikkonferma s-sentenza appellata. L-ispejjez ta' dina l-istanza jithallsu kollha mill-appellant Simon Caruana.

< Sentenza Finali >

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