Human Rights Feature

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Micallef v. Malta (2009)[1]

In this case, the applicant Mr Micallef applied on behalf of his deceased sister alleging that she had been denied a fair hearing because of her lack of opportunity to make submissions before an independent and impartial tribunal as required according to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). He complained that the equality of arms principle was ignored as a consequence of the close family of one of the judges being the uncle of the opposing party's advocate and the brother of the advocate acting for the opposing party during the first instance proceedings.

In the preliminary objections, the government contested the admissibility of the application on several grounds. The latter stated that Mr Micallef did not have the victim status required as set forth in Article 34 of the Convention, and that he had not exhausted all the domestic legal remedies available before proceeding to the European Court of Human Rights (the "ECtHR"), as per Article 35(1). Moreover, the government stated that the guarantees provided for in Article 6(1) of the Convention were not applicable to proceedings that concerned interim measures.

On the above matters the Chamber came to the conclusion that the applicant had standing to introduce the application. According to the Chamber, Mr Micallef had victim status as he had to bear the costs of the actions instituted by his sister and because the domestic courts did not reject the applicant's request to intervene in the constitutional proceedings, and later to appeal in his capacity as Ms Micallef's brother. Furthermore, the court considered that deciding the case was in the interest of the general public, specifically to honour the principle of *nemo judex in causa sua.*

With regard to the non-exhaustion of domestic remedies, the court pointed out that according to Maltese law there were no grounds on which to challenge a judge on the basis of his relationships as brother and uncle of the opposing party's lawyers. One can note that the Maltese Civil Court in its constitutional jurisdiction had previously rejected the government's objection of failure to exhaust ordinary remedies and dealt with the case on its merits. Accordingly, domestic remedies resulted to have been sought before the submission of this case to the ECtHR.

[1] *Micallef v. Malta* App no. 17056/06 (ECtHR, 15 October 2009)

Lastly, the court reiterated that preliminary precautionary measures such as injunction proceedings are not normally considered to determine a 'civil right and obligation,' and the safeguards of Article 6 are not normally applicable. However, in certain cases, the court has applied Article 6 in view of the fact that they are being decisive for the civil rights of the applicant.[2] In the present case the injunction proceedings in which the warrant was granted concerned the implementation by the neighbours of property rights, albeit provisionally, for a considerable period of time. Accordingly, due to the far-reaching effects resulting from such a warrant, Article 6 of the Convention applied, especially in the Maltese context.

In relation to the merits of the case, the Court's assessment included the definition of impartiality as being 'absence of prejudice and bias,'[3] which must be scrutinised by using a subjective test where regard is had to the personal behaviour of the particular judge, and an objective test which ascertains whether the system of courts or tribunals offered sufficient guarantees to exclude any doubts as regards its impartiality. The court stated that in some cases it may be problematic to find sufficient evidence to satisfy the subjective test, but an objective test can serve as a further guarantee to safeguard the right under article 6(1). As reasoned in **Pullar v. The United Kingdom**,[4] apart from the judge's specific conduct, it must be determined whether there are facts which may raise doubts as to his neutrality, because 'justice must not only be done, but must be seen to be done'[5].

The Grand Chamber, like the Chamber examined the legal position in Malta and noted that a two-fold deficiency was prominent. First of all there was no automatic obligation for a judge to withdraw in the case where impartiality could be of concern. Moreover, at the time of the proceedings the national law did not recognise as problematic a close relationship between a judge and an advocate that between siblings, let alone a relationship of a lesser degree. The court stated that there was no sufficient evidence of bias in the adjudicating panel that could satisfy the subjective criterion and consequently, chose to examine the case using the objective criterion. The Grand Chamber considered and concluded how the close family ties in question sufficed to objectively create concern as to the impartiality of the presiding Judge. The Grand Chamber therefore found in favour of the plaintiff and held that there has been a violation of Article 6(1) of the Convention by eleven votes to six.

The essence of this judgment lies in the way it acted as a catalyst for reform within Maltese law in relation to family ties and the withdrawal of a judge in such cases by Act VII of 2007, specifically if the advocate or a legal procurator pleading before a judge is the brother or sister of the said judge. The principles of Natural Justice and Procedural Fairness are of utmost significance in the execution of justice, which ultimately concerns each and every one of us.

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[2] See Aerts v. Belgium, App no 25357/94 (ECtHR, 30 July 1998), and Boca v. Belgium, App no. 50615/99 (ECtHR, 15 November 2002)
[3] Micallef v. Malta, Para 93
[4] App no. 22399/93 (ECtHR, 10 June 1996)
[5] Micallef v. Malta, Para 98

Demicoli v. Malta (1991)[6]

The Demicoli case, as colloquially referred to, was the first to be launched against Malta. In 1987, Malta had just accepted the right to individual petition, wherein an individual is granted the possibility of lodging a complaint before the ECtHR, obviously after having extinguished all other possible and local remedies.

Demicoli had published a satirical Article on a parliamentary debate and following this, the House of Representatives passed a resolution claiming that the Article constituted a breach of privilege. It summoned Demicoli to appear before it to state why he should not be found guilty of the abovementioned breach of privilege. After being found guilty by the House, Demicoli referred the case to the Civil Courts of Malta where he obtained a favourable judgement, but this was later reversed by the Constitutional Court. He then reappeared before the House and was heftily fined.

Following this, Demicoli sought action before the ECtHR where the object of his request was to obtain a decision as to whether Malta acted in breach of Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 6 (1)(2), when Demicoli had to appear and be adjudicated by a resolution of the House of Representatives, and when the burden of proving innocence was placed on him respectively. The court delved into the issue of whether breach of privilege of which Mr Demicoli was found guilty was to be regarded as 'criminal' within the meaning of the aforementioned Article 6. Accordingly, the court deemed that there had been a breach of Article 6 (1) as the impartiality of the adjudicating body appeared to be in open doubt. In view of the above-mentioned findings, the court did not consider it necessary to examine the issue of Article 6 (2). Finally, the court held that Malta, as the respondent state, had to pay Demicoli a sum of money in respect of all costs and expenses as deemed necessary.

It may be concluded and simultaneously noted that Article 6(1) of the Convention has undoubtedly proved to be one of the most controversial and disputed Articles in the history of human rights law, with contracting states playing a significant role in its interpretation.

[6] *Demicoli v. Malta*, App No. 13057/87 (ECtHR, 1991

Vinter and Others v. The UK (2013)[7]

In this case, the applicants Mr Douglas Gary Vinter, Mr Jeremy Neville Bamber and Mr Peter Howard Moore maintained that their whole life orders were incompatible with Article 3 of the Convention, which provides: '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*'.[8]

A State's choice of a specific criminal justice system is 'outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention'.[9] Contracting States are allowed a margin of appreciation in deciding the appropriate length of prison sentences for particular crimes and remain free to impose life sentences on adult offenders for especially serious crimes. A life sentence is not prohibited by or irreconcilable with Article 3 when imposed by an independent judge who has considered all of the mitigating and aggravating factors present in any given case. It is the imposition of an irreducible life sentence, which may raise an issue under Article 3 as 'there must be both a prospect of release and a possibility of review'.[10]

A prisoner cannot be detained unless there are 'legitimate penological grounds'[11] such as punishment, deterrence, public protection and rehabilitation.[12] Although many of these grounds are present at the time when a life sentence is imposed the justifications for detention are 'not necessarily static and may shift in the course of the sentence'.[13] Therefore, what is originally a primary justification for detention may not be so after a lengthy period into the service of the sentence. It is only by reviewing the justifications for continued detention at an appropriate point in the sentence that these shifts can be properly evaluated.

If there is neither any prospect of release nor the possibility of having a life sentence reviewed, there is the risk that the prisoner can never atone for his offence. Thus, even if a whole life sentence is justified at the time of its imposition, with the passage of time it becomes 'a poor guarantee of just and proportionate punishment'.[14]

In relation to a general conclusion with respect to life sentences, Article 3 is to be construed as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life of the prisoner are so significant, and whether progress towards rehabilitation has been made in the course of the sentence, in such a way that continued detention is no longer justified on legitimate penological grounds.[15]

A whole life prisoner should not be obliged to wait and serve an indeterminate number of years before being able to raise the complaint that his sentence fails to comply with the requirements of Article 3. At the outset, a whole life prisoner is

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[7] *Vinter and Others v. the United Kingdom*, App No. 66069/09, 130/10, 3896/10 (ECtHR, 9 July 2013)
[8] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 3
[9] *Vinter and Others v the United Kingdom*, Para 104
[10] Ibid, Paragraph 110
[11] Ibid, Paragraph 111
[12] These grounds were recognised in *R v Bieber* [2009] 1 WLR 223
[13] P *Vinter and Others v the United Kingdom*, Para 111
[14] Lord Justice Laws in *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72
[15] *Vinter and Others v the United Kingdom*, Para 119

entitled to know what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism for review of a whole life sentence, incompatibility with Article 3 immediately arises 'at the moment of the imposition of the whole life sentence and not at a later stage of incarceration'.[16]

[16] Ibid, Paragraph 122