



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF MICALLEF v. MALTA

(Application no. 17056/06)

JUDGMENT

STRASBOURG

15 January 2008

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
15/10/2009**

This judgment may be subject to editorial revision.

In the case of Micallef v. Malta,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,
Giovanni Bonello,
Kristaq Traja,
Lech Garlicki,
Ljiljana Mijović,
Ján Šikuta,
Päivi Hirvelä, judges,
Lawrence Early, *Section Registrar*,

Having deliberated in private on 11 December 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 17056/06) against Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Joseph Micallef (“the applicant”) on 15 April 2006.

2. The applicant was represented by Dr T. Azzopardi, a lawyer practising in Valletta (Malta). The Maltese Government (“the Government”) were represented by their Agent, Mr S. Camilleri, Attorney General.

3. The applicant alleged that Mrs M. had been denied a fair hearing before an impartial tribunal contrary to Article 6 of the Convention.

4. On 5 September 2006 the Court decided to communicate the complaint concerning the fairness of the appeal proceedings and the alleged lack of impartiality of the Court of Appeal to the Government and declared the rest of the application inadmissible. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the complaint at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant is a Maltese national and lives in Vittoriosa.

A. Background of the case

6. The applicant is the brother of Mrs M. In 1985 the latter was a party to civil proceedings concerning a dispute between neighbours living in a block of apartments. Mrs M. lived above Mr F. The dispute related to Mr F.'s objection to Mrs M.'s habit of hanging out wet clothes to dry over Mr F.'s yard, thereby allegedly interfering with his property rights. Mr F. relied on the provisions of section 403 of the Maltese Civil Code in this connection. Pending the trial of the dispute, Mr F. applied for an injunction to restrain Mrs M. from hanging out clothes to dry over his yard.

7. On one occasion during the application for injunction proceedings, and after Mrs M. and her lawyer, Dr A., had already left the court room, the presiding magistrate changed the date of a future hearing, which had already been fixed. As a consequence, Mrs M. was not aware of the new date and was not present at the hearing. In her absence the presiding magistrate issued the injunction in favour of Mr F. On 6 March 1992 the relevant court trying the merits of Mr F.'s civil action found against Mrs M and issued a permanent injunction against her.

B. Proceedings before the Civil Court in its ordinary jurisdiction

8. On an unspecified date Mrs M. instituted proceedings before the Civil Court (First Hall) in its ordinary jurisdiction, claiming that the injunction had been issued in her absence and without giving her the opportunity to testify.

9. By a judgment of 15 October 1990, the Civil Court upheld her claim. It held that the *audi alteram partem* principle was applicable to the procedure for issuing an injunction. Referring to Article 873 (2) of the Code of Organisation and Civil Procedure, which stated that an injunction should not be issued unless the court was satisfied that it was necessary in order to preserve any right of the person seeking it, the Civil Court held that the relevant test was a matter for the court's discretion. However, if the court found it necessary to hear the parties, they should be duly heard in accordance with the principles of natural justice. In the present case, the court held that through no fault of her own, Mrs M. had been denied her right to be heard and therefore the said warrant was null and void.

C. Proceedings before the Court of Appeal

10. Mr F., the other party to the civil proceedings, appealed against the judgment of 15 October 1990. In the first-instance proceedings, Mr F. had been assisted by Dr U., while at the appeal stage he had appointed the latter's son, Dr C. The Court of Appeal was presided over by the Chief

Justice, who sat with two other judges. The Chief Justice was Dr U.'s brother and Dr C.'s uncle.

11. At the appeal hearing of 12 October 1992, the Chief Justice, after asking some questions, alleged that the conduct of Dr A. was unethical, as he had impugned, without justification, the conduct of Mr. F's lawyer. When it was noted that in the first-instance proceedings Mr F. had been represented by the Chief Justice's brother, the Chief Justice threatened to refer the case to "the competent authorities". Furthermore, he dictated a note to this effect, which read as follows:

"The Court is asking Dr A., who himself is declaring that the date of the hearing at first instance had been changed when he and his client had already left the courtroom, why he insisted that the said change of date occurred consequent to a request by a lawyer. Dr A.'s reply is: "I deduce so, as there were two lawyers present: Dr U. and me."

... Mrs M.'s lawyer asserts facts and has no problem hypothesising about the behaviour of another lawyer and the judge, after he and his client had walked out of the courtroom."

12. Dr A. said a few words in his own defence, but no oral submissions regarding the merits of the appeal were heard. The Chief Justice suspended the hearing and went to his chambers. A few minutes later the lawyers of both parties were called into the Chief Justice's chambers. Explanations were heard and no further action appears to have been taken.

13. By a judgment of 5 February 1993, the Court of Appeal found against Mrs M. and reversed the judgment of the Civil Court. It held that principles of natural justice were not mandatory and could not be invoked in preliminary proceedings that were essentially conditional and of a temporary nature. Moreover, the Court of Appeal did not agree with the issue of fact mentioned in the first-instance judgment.

D. Proceedings before the Civil Court in its constitutional jurisdiction

14. On 25 May 1993 Mrs M. instituted proceedings before the Civil Court (First Hall) in its constitutional jurisdiction. Relying on Article 6 of the Convention, she alleged that the President of the Court of Appeal (the Chief Justice) lacked objective impartiality by reason of his family ties with the other party's lawyers and that this had been manifest in the incident of 12 October 1992. Observing that the Court of Appeal had denied facts which had been already proved, she further submitted that her right to a fair trial had been violated.

15. As Mrs M. had died before her constitutional claim could be determined, on 22 May 2002 the applicant intervened in the proceedings before the Civil Court in his capacity as brother of the plaintiff.

16. In a judgment of 29 January 2004, the Civil Court dismissed Mrs M.'s claim as frivolous and vexatious. Although it noted that the plaintiff had failed to request the Chief Justice to withdraw from the case before the pronouncement of the final judgment, it rejected the Government's plea of non-exhaustion of ordinary remedies and decided to exercise its constitutional jurisdiction. As to the merits, it made a thorough analysis of the notions and rights emanating from Article 6 of the Convention, including equality of arms, but placed particular emphasis on the requirement of impartiality of the Civil Court. However, it was unable to find any link between the incident of 12 October 1992 and the content of the judgment of 5 February 1993. As confirmed by Dr A. himself, the incident had been defused; however, this could not have given Mrs M. or her lawyer any expectation that the Court of Appeal would rule in her favour. Furthermore, the Court of Appeal was composed of two other judges, who had not been involved in the incident, and there had been no doubt that the judgment, which appeared to be well-reasoned, had been delivered by the bench as a whole.

E. Proceedings before the Constitutional Court

17. The applicant appealed to the Constitutional Court.

18. By a judgment of 24 October 2005, the Constitutional Court declared the appeal inadmissible. It reiterated that in accordance with Article 46 § 5 of the Constitution, no appeal lay against a decision dismissing an application as frivolous and vexatious.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Article 873 of Title VI, Sub-Title V of the Code of Organisation and Civil Procedure, regarding warrants of prohibitory injunction, reads as follows:

“(1) The object of a warrant of prohibitory injunction is to restrain a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant.

(2) The court shall not issue any such warrant unless it is satisfied that such warrant is necessary in order to preserve any right of the person suing out the warrant, and that *prima facie* such person appears to possess such right.”

20. Under Maltese law, as it stood at the time of the present case, a judge could be challenged or could abstain from hearing a case if one of the parties was represented by the former's son or daughter, spouse or ascendant. Nothing prevented a judge from sitting in a case if the representative in issue was his or her brother or uncle. The pertinent articles

of the Code of Organisation and Civil Procedure, in so far as relevant, read as follows:

Article 733

“The judges may not be challenged, nor may they abstain from sitting in any cause brought before the court in which they are appointed to sit, except for any of the reasons hereinafter mentioned.”

Article 734

“(1) A judge may be challenged or abstain from sitting in a cause -

...

(e) if he, or his spouse, is directly or indirectly interested in the event of the suit;

(f) if the advocate or legal procurator pleading before a judge is the son or daughter, spouse or ascendant of the said judge;”

The relevant article of the Code of Organisation and Civil Procedure was amended in 2007 to include another ground:

“(g) if the advocate or legal procurator pleading before a judge is the brother or sister of the said judge;”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. The applicant complained that the Court of Appeal had lacked impartiality and that Mrs M. had consequently been denied the opportunity to make submissions, in breach of her right to a fair hearing as provided in Article 6 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

22. The Government contested that argument.

A. Admissibility

1. Victim status

23. The Court must first address the question of Mr Micallef's right to pursue the application, since his sister, who had brought the proceedings in question, died before making any application to the Court.

24. The existence of a victim of a violation, that is to say, an individual who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Karner v. Austria*, 40016/98, § 25, ECHR 2003-IX).

25. The Court, through its jurisprudence, has developed various criteria to determine whether an applicant can be considered to have victim status after the death of the "direct" victim. The Court normally permits the next-of-kin to pursue an application provided he or she has sufficient interest, where the original applicant has died after the introduction of the application before the Court (see *Malhous v. the Czech Republic* (dec.), no. 33071/96, ECHR 2000-XII). However, the situation is more complex where the direct victim dies before lodging an application in Strasbourg (see *Sanles Sanles v. Spain*, (dec.), no. 48335/99, ECHR 2000-XI; *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, 5 July 2005; *Biç and Others v. Turkey*, no. 55955/00, 2 February 2006; and *Ressegatti v. Switzerland* no. 17671/02, 13 July 2006). Different criteria apply depending on the Convention right in issue.

26. Where the proposed application primarily concerns a complaint under Article 6 of the Convention, the Court interprets the concept of victim autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act (see *Sanles Sanles*, cited above). However, the fact that an applicant had been a party to the domestic proceedings, though by itself not sufficient and not always indispensable, can be considered as a preliminary step to be able to bring proceedings before the Court. Indeed in *Nolkenbockhoff v Germany*, (judgment of 25 August 1987, Series A no. 123-A, § 33), while holding that the widow had a material and legitimate interest to pursue proceedings under the Convention, the Court also noted that the Federal Constitutional Court, whose individual recourse procedure was similar to that of the Convention, had not rejected the applicant's request for lack of victim status. Its preliminary nature was further highlighted in *Georgia Makri and others v. Greece* ((dec.), no. 5977/03, 24 March 2005), where the Court held that relatives of a deceased person could not be considered as victims in respect of complaints concerning, *inter alia*, Article 6 - length of proceedings - since they had not participated in their own name in the domestic proceedings at issue nor had

they intervened as heirs in the proceedings before the “Conseil d’Etat” after the direct victim’s decease.

27. Where the applicant has himself become a party to domestic proceedings, a further set of criteria has been applied. In *Sanles Sanles* (cited above) a complaint concerning Article 6 § 1 - length of proceedings - victim status had been supposed in favour of the applicant and therefore held to be a transferable right. In *Loyen* (cited above, § 29) victim status was again upheld in respect of Article 6 § 1 - length of proceedings and fair trial - both in view of the fact that it raised an issue of general interest and because the heirs had a legitimate interest in continuing the complaint. In *Ressegatti* (cited above, § 25) victim status in respect of Article 6 – fair trial - was upheld on the basis of the direct effect on the applicant’s patrimonial rights. On the contrary, in *Biç and Others* (cited above) the Court held that the applicants were not affected by the length of the criminal proceedings and there existed no general interest which required it to examine the complaint under Article 6.

28. In the present case the Court notes that the direct victim survived the proceedings giving rise to the alleged violation. She further instituted constitutional proceedings before the Civil Court in order to redress the alleged violation and died while these were pending. The Court notes that in the Maltese legal system, the institution of constitutional proceedings is the only way to seek redress in such cases and is a required step in order to exhaust remedies before bringing proceedings before this Court. Thus, the Court is persuaded that Mrs M. wished to complain about the alleged breach.

29. The Court further notes that on Mrs M.’s death, the Civil Court (constitutional jurisdiction) did not reject the applicant’s request to intervene in the proceedings before it in his capacity as brother of the plaintiff, nor was there any opposition to him appealing to the Constitutional Court – the last remedy required to be exhausted before the complaints could be introduced under the Convention.

30. The Court further recalls that it has discretion as regards the granting of victim status when the complaint relates to an issue of general interest (see *Karner*, cited above, § 25). It reiterates the Commission’s position in relation to the instances when a question of general interest affecting the observance of the obligations undertaken by the High Contracting Parties would justify a further examination of the application: -

“Such a situation can arise in particular where an application in fact concerns (...) the legislation or a legal system or practice of the defendant state (see *Kofler v. Italy*, Decisions and Reports no. 30, p. 9, § 18).

This might be so in particular where not only an individual case but also legislation, or a legal system or practice were at issue (see *Altun v Germany*, Decisions and Reports no. 36, p. 9, § 18).”

31. The Court is of the view that the question of a defect in the relevant law which made it impossible to challenge a judge on the basis of his or her relationship with a party's advocate (see paragraph 79 below), is a matter of sufficient general interest, in particular for the Contracting State concerned, since it goes to the fundamental issue of the impartiality requirements of a tribunal. Thus, the applicant's complaint fulfils the general interest criterion.

32. The Court further notes that the Maltese Government have not raised any objection relating to the applicant's victim status, or lack of it.

33. In conclusion, the Court considers that for the foregoing reasons the applicant has standing to introduce the present application.

2. The Government's objection ratione materiae

34. The Government submitted that Article 6 was not applicable to the proceedings before the Court of Appeal.

35. They submitted that no determination of a civil right or obligation arose from the injunction proceedings, since they did not involve any determination of the merits of the right or obligation claimed. Consequently, the proceedings before the Court of Appeal, in which Mrs M. had requested that the injunction proceedings be declared null and void, were not decisive of any civil right or obligation.

36. The applicant submitted that the proceedings complained of were formal proceedings commenced by writ of summons before the Court of Appeal which were concluded by a judgment at first instance and on appeal. Consequently, unlike injunction proceedings, which were merely preliminary proceedings and were concluded by a decree, the proceedings at issue were indeed decisive of civil rights and obligations.

37. The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("contestations" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question (see *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A, p. 14, § 31). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence (see *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 39, § 94).

38. Preliminary proceedings, such as those concerned with the grant of an interim measure such as an injunction, are not normally considered to be decisive of civil rights and obligation and do not therefore normally fall within the protection of Article 6 unless the character of the interim decision

exceptionally otherwise requires (see *Markass Car Hire Ltd v. Cyprus*, (dec.), no. 51591/99, 23 October 2001).

39. However, the second set of proceedings involved the determination of the question whether a party to post-injunction proceedings had a right to be heard. The Court reiterates that Article 6 is applicable to matters which are not strictly of an economic nature, such as, *inter alia*, the right to a healthy environment (see *Taskin and others v Turkey*, judgment of 10 November 2004, *Reports of Judgments and Decisions* 2004-X), the right to liberty (see *Laidin v. France* (no. 2), no. 39282/98, 7 January 2003), the right to a good reputation (see *Helmets v. Sweden*, 29 October 1991, series A n° 212-A) and the right of access to administrative documents (see *Loiseau c. France* (dec.), no. 46809/99, 18 November 2003, ECHR 2003-XII).

40. The Court notes that the court of first instance upheld Mrs M.'s complaint on the basis of domestic law or at least an interpretation of such. While it is true that the complaint was subsequently rejected, the Court of Appeal may be regarded as having examined the merits of the application and in so doing determined the dispute over the right to be heard (*audi alteram partem*). In such a situation where it appears that the domestic law and practice of the respondent State recognised that there existed a right to be heard during injunction proceedings, the Court considers that the applicant could claim on at least arguable grounds that the proceedings were covered by Article 6 (see, *inter alia*, *Neves e Silva v. Portugal*, judgment of 27 April 1989, Series A no. 153-A, p. 14, § 37).

41. The Court recalls its judgment in *Eskelinen v. Finland* ([GC], no. 63235/00, 19 April 2007, § 61), where it introduced the new concept that, independently of the Court's autonomous application of Article 6, its applicability would be recognised by the Court, if the domestic system had recognised it formerly:

“If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6. If it does not, then there is no issue and Article 6 § 1 will apply.”(emphasis added)

In other words *Eskelinen* recognised the principle that Article 6 protection should not be less in Strasbourg than under the domestic system.

42. Moreover, no plea of inapplicability of Article 6 was raised in the domestic proceedings, a factor which has previously been given weight in the debate regarding the applicability of Article 6 (see *San Leonard Band Club v. Malta*, judgment of 29 July 2004, ECHR 2004-IX, § 46).

43. The Court notes that the applicant put forward his complaint before the Civil Court in its constitutional jurisdiction and that the Government did not raise any plea as to the inapplicability of Article 6; nor did the domestic court raise such a matter of its own motion, as both could and should have done had they considered Article 6 inapplicable. On the contrary, the Government disputed the merits of the application and the violation or

otherwise of Article 6, and the Civil Court rejected the claim only after a thorough analysis of Article 6 in relation to the merits. Thus, it appears that the applicability of Article 6 to post-injunction proceedings was so clearly established in the Maltese legal system that it did not need to be further established and neither the Government nor the domestic court saw fit to question its applicability to post-injunction proceedings.

44. The Court reiterates that through its system of collective enforcement of the rights it establishes, the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, p. 17, § 28), but never limits it (Article 53 of the Convention). The Court does not countenance the view that human rights protection in any particular area should be weaker in Strasbourg than it is in domestic tribunals.

45. That being so, the Court notes that the concept of “civil right” under Article 6 § 1 cannot be construed as limiting an enforceable right in domestic law within the meaning of Article 53 of the Convention (see *Okuy and Others v. Turkey*, no. 36220/97, § 68, 12 July 2005).

46. Moreover, Article 6 reflects the fundamental principle of the rule of law which underpins the whole Convention system and is expressly referred to in the Preamble to the Convention (see *Golder v United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 16, § 34). In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 § 1 would not correspond to the aim and the purpose of that provision (see, *mutatis mutandis*, *Delcourt v. Belgium*, no. 2689/65, § 25 *in fine*, 17 January 1970, Series A no. 11) and this restriction must be very compellingly established.

47. In sum, Article 6 is applicable in the instant case and the application falls within the jurisdiction of the Court *ratione materiae*. Consequently, the Government’s objection is dismissed.

3. *The Government’s objection of non exhaustion of domestic remedies.*

48. The Government submitted that it did not appear that at any stage of the appeal proceedings a complaint had been registered or submitted to the Court of Appeal regarding the lack of opportunity to make submissions; nor had any application been made in order to allow Mrs M.’s legal counsel to make further oral or written submissions.

49. Consequently, it appeared that the only issue was whether the Chief Justice should have continued to sit in the Court of Appeal, given that his brother was appearing for one of the parties to the proceedings. The Government submitted that Mrs M. had never requested that the Chief Justice withdraw from the case, a plea which would not have been decided by the Chief Justice alone, but by the three judges sitting in the case.

According to the Government, since Mrs M. believed that the Chief Justice should have withdrawn she should have made such a request under Article 734(e) (see Relevant Domestic Law above) which reflected the *nemo iudex in causa propria* rule in general. The Government made reference to various domestic decisions in which the courts had repeatedly attributed overriding importance to the fact that justice should not only be done but be seen to be done and that this had been an acknowledged legitimate ground for the withdrawal of or challenge to a judge.

50. Moreover, Mrs M. could have raised the issue under Article 6 of the Convention and Article 30 of the Constitution, which specifically permitted the raising of such an issue during the court case and which, unless deemed frivolous and vexatious, would have been referred to the competent court for decision. Alternatively, she could have directly lodged such an application with the Constitutional Court in view of the fact that her rights were being or were likely to be infringed. However, Mrs M. failed to take any of the above measures and therefore the application should be declared inadmissible for non-exhaustion of domestic remedies.

51. The applicant submitted that the grievance arose on 12 October 1992, the date of the hearing of the appeal lodged by the opposing party, when the Chief justice had expressed a mistaken and already formed opinion which had weighed heavily in the balance. Due to the Chief Justice's anger and consequent suspension of the hearing (for judgment), there had been no opportunity to register a complaint regarding the conduct of the hearing.

52. The Chief Justice must have known before the hearing that he would be raising the issue about his brother. However, Mrs M. and her legal counsel had had no idea of this and until the moment of the incident had had no reason to complain. Furthermore, the incident seemed to have been defused when the Chief Justice could not find any denigrating reference to his brother in the records of the case. Thus, Mrs M.'s legal counsel, who had claimed to have been reassured by this, had been under the impression that the matter had ended, at least until the appeal judgment had been delivered, some months later, which again made reference to the accusation.

53. Subsequently, Mrs M., who was later succeeded by the applicant, lodged a constitutional complaint with the Civil Court and appealed against the latter's decision to the Constitutional Court in proceedings which dragged on from 1993 to 2005. Consequently, it was evident that the applicant had exhausted available domestic remedies.

54. The Court reiterates that, in accordance with Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

55. Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Zarb Adami v. Malta* (dec.), no. 17209/02, 24 May 2005).

56. In the present case, the Court observes that a request under Article 734 (e) as suggested by the Government would not have been a proper remedy in accordance with the rule *lex specialis derogat generalis*. Article 734 (f) specifically referred to family relationships, but excluded siblings. Had the legislator intended to cover siblings it would have been included specifically in accordance with the principle *ubi voluit dixit, ubi noluit tacuit*. Thus, the Court considers that the applicant could not have challenged the Chief Justice under Article 734 of the Code of Organisation and Civil Procedure, since at the time a sibling relationship between advocate and judge was not amongst the listed grounds for challenge.

57. The Court notes that after the judgment complained of, Mrs M., succeeded by the applicant, instituted constitutional proceedings before the Civil Court (First Hall) alleging a breach of the right to a fair trial as guaranteed by Article 6 of the Convention in view of the Court of Appeal's lack of impartiality and the lack of opportunity to make submissions before it. The applicant further appealed to the Constitutional Court against the Civil Court's judgment rejecting his claim. The Court considers that in raising this plea before the domestic constitutional jurisdictions, which rejected the Government's objection of non-exhaustion of domestic remedies and did not reject the claims on procedural grounds but examined the substance of the claim, the applicant has made normal use of the remedies which were accessible to him and which related, in substance, to the facts complained of at the European level (see, *mutatis mutandis*, *Zarb Adami*, cited above). The mere fact that the applicant could have attempted to remedy the alleged violation in alternative ways throughout the different stages of the proceedings (see paragraph 50 above) does not alter this conclusion.

58. It follows that the application cannot be rejected for non-exhaustion of domestic remedies and that the Government's objection should be dismissed.

4. The Court's decision on admissibility

59. In conclusion, the Court finds that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The observations of the parties

(a) The applicant

60. The applicant submitted that the appeal hearing of 12 October 1992 and the subsequent judgment had violated Mrs M.'s right to a fair hearing.

61. The applicant submitted that the Chief Justice had been biased on account of the fact that his brother had been the lawyer of the opposing party during the injunction proceedings. Notwithstanding that the Chief Justice must have known that the issue relating to his brother's behaviour was going to be raised, he had not withdrawn and, as transpired also from the events in question, his objectivity was open to doubt, thus causing justified fears about his lack of impartiality. The same had been confirmed upon delivery of the judgment in that a part of the judgment read as follows:

"The plaintiff's lawyer, after he and the plaintiff had left the court room, affirms facts which are alleged to have taken place and does not hesitate at all to hypothesise about the conduct of another lawyer and of the judge."

This comment had been made in response to a question put by counsel, which had been based on concrete information. No wrongdoing had been attributed to anyone, neither to the brother of the Chief Justice nor the Chief Justice himself.

62. The applicant contested the assessment of the evidence during the appeal proceedings and considered the appeal hearing and subsequent judgment as a negation of justice.

63. The applicant disputed the Government's argument regarding the Chief Justice's career record and stated that on several occasions in separate constitutional redress proceedings the constitutional courts had upheld violations of the right to a fair hearing in cases presided over by the Chief Justice. In the present case, the Chief Justice had manifested serious bias which could be seen as linked to his family ties, and consequently the Court of Appeal had not been an impartial tribunal within the meaning of Article 6 § 1 of the Convention.

64. The applicant moreover complained that the behaviour of the Chief Justice had made it impossible for Mrs M.'s legal counsel to put forward any arguments. Consequently, the right to make oral submissions at the

appeal stage had not been respected and in fact the appeal had been decided and the first judgment set aside without his ever having had the opportunity of making any submissions on the merits.

65. The applicant made reference to the evidence submitted during the proceedings. He reiterated the sequence of events: the fact that the Chief Justice had been annoyed and angry and that the atmosphere had been tense; during that time everyone had stood in silence; the hearing had then been suspended and was never resumed. Moreover, the applicant submitted that the Government, which had not been present at the proceedings, were not in a position to state whether or not all submissions had been made.

(b) The Government

66. In respect of the impartiality issue the Government submitted that had Mrs M. harboured concerns she would have challenged the judge. She had not done so. Moreover, her legal counsel had himself said that after the meeting in chambers he had been satisfied that no bias existed and he had not added anything regarding his submissions. In addition, bias had only been alleged after the judgment was delivered, four months after the incident. Consequently, the applicant's sister adopted a "wait and see attitude", resulting in her claim before the constitutional courts being rejected as frivolous and vexatious.

67. According to the Government, the said judgment did not disclose any bias on the part of the Chief Justice. On the contrary, it was a detailed and objective judgment which dispassionately analysed the facts and the legal issues involved, thus showing that the court had reached a decision in accordance with existing domestic case-law. No link was apparent between the reasoning and conclusions of the judgment and the incident of 12 October 1992.

68. The Government submitted that in the period of almost seven years in which the Chief Justice had served as a judge, he had dealt with scores of cases where one of the lawyers had been his nephew and this was the only case where the issue of impartiality had been raised.

69. In so far as the complaint referred to Mrs M.'s alleged lack of opportunity to make submissions, the Government submitted that she had had a fair hearing and that the principle of equality of arms had been respected since she had not suffered any disadvantage during the proceedings. There was nothing to indicate that Mrs. M had not been given the opportunity to make oral submissions. The fact that one of the judges had raised questions, as he was duly entitled to do, even if in a robust and raised voice, in the course of the applicant's lawyer's submissions, did not mean that her lawyer had not been able to complete them. The Government contested the allegation that her counsel had been prevented from making submissions, since irrespective of the length of these submissions he had still been allowed to make them. The essence of the counsel's argument was

that the date of the adjourned hearing had been changed without his own or his client's knowledge, with the result that they had not been present at the date of the adjourned hearing and consequently the warrant had been issued in violation of the *audi alteram partem* principle, an argument which, in the Government's view, had been amply made.

2. The Court's assessment

(a) The general principles

70. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see *Mežnarić v. Croatia*, no. 71615/01, § 27, 15 July 2005). The Court will take such rules into account when making its own assessment as to whether the tribunal presided by the Chief Justice was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see, *mutatis mutandis*, *Pescador Valero v. Spain*, no. 62435/00, §§ 24-29, ECHR 2003-VII)

71. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255, p. 12, §§ 27, 28 and 30, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII). It must be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, Reports 1996-III, p. 794, § 38).

72. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein v. Switzerland*, cited above, § 43). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will for personal reasons (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 14, § 25).

73. The Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-....).

74. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44; and *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58).

75. In this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 14, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Wettstein* loc. cit.; and *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45).

(c) Application of the above principles to the present case

76. In the instant case the Court notes that specific provisions regarding the challenging of judges were set out in Article 734 of the Code of Organisation and Civil Procedure. The Court cannot but observe that Maltese law as it stood at the time of the present case was deficient on two levels. Firstly, there was no automatic obligation on a judge to withdraw in cases where impartiality could be an issue, a matter which remains unchanged in the law in force at present. Secondly, at the time of the present case the law did not recognise as problematic and therefore as a ground for challenge a sibling relationship between judge and advocate, let alone that arising from relationships of a lesser degree such as those of uncles or aunts in respect of nephews or nieces. Thus, the Court considers that the law in itself did not give adequate guarantees of subjective and objective impartiality. However, the Court points out that its task is not to review the relevant domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of Article 6 § 1 in the present case (see, *inter alia*, *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 24, and

Hauschildt v. Denmark, judgment of 24 May 1989, Series A no. 154, p. 21, § 45).

77. Despite the applicant's contention that the Chief Justice had preconceived ideas about the legal representative's behaviour and notwithstanding the Chief Justice's abrupt behaviour, the Court is not persuaded that there is sufficient evidence that the Chief Justice displayed personal bias.

78. Although in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, it must be remembered that the requirement of objective impartiality provides a further important guarantee (see *Pullar*, cited above, p. 793, § 32).

79. As to the objective test, the Court observes that this complaint is directed at a defect in the relevant law under which it was not possible to challenge judges on the basis of a relationship with a party's advocate unless it was a first degree relationship of consanguinity or affinity (Malta adopts the civil-law countries parental degree system). Consequently, in the present case, Mrs M. was faced with a panel of three judges, one of whom was the brother and at a later stage the uncle of the opposing parties' advocate. The Court cannot overlook the fact that Malta is a small country and that entire families practising law is a common phenomenon. Furthermore, it also notes that the relationship at issue did not involve any professional or financial dependence. However, it is of the view that the close family ties between the opposing parties' advocate and the judge suffice to justify objectively the applicant's fears that the presiding judge lacked impartiality and the facts of the present case did nothing to dispel the applicant's concerns. Moreover, in view of the latest amendment to the said law, the Government also seem to have endorsed this conclusion, at least in so far as it covers sibling relationships.

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

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

82. These conclusions make it unnecessary for the Court to rule on the complaint that the judge's behaviour affected Mrs M's right to make submissions.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Pecuniary damage

84. The applicant did not submit a claim for pecuniary damages.

B. Non-pecuniary damage

85. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage for mental suffering and distress.

86. The Government submitted that the applicant's claims were unjustified and in any case manifestly exorbitant, as had been demonstrated by the fact that the applicant eventually lost the case on the merits.

87. In respect of the distress allegedly caused in the circumstances of the present case the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered (see *Chmelíř v. the Czech Republic*, no. 64935/01, § 74, ECHR 2005-IV and *Coyne v. the United Kingdom*, judgment of 24 September 1997, *Reports* p.1856, § 64).

C. Costs and expenses

88. The applicant submitted that in 1985 when the original proceedings were held Mrs. M was unmarried and unemployed and could not pay the legal fees. She had only paid the court fees in order to file the first-instance proceedings and the constitutional redress proceedings following the proceedings complained of. The applicant therefore claimed 600 Maltese liras (MTL - approximately 1,390 euros (EUR)) for the professional legal fees incurred for the first-instance and appeal proceedings, MTL 900 (approximately EUR 2,100) for the constitutional proceedings before the domestic courts, MTL 209 (approximately EUR 484) for the fees which he had paid to counsel, on behalf of Mrs. M, which covered disbursements for lodging the constitutional proceedings, and MTL 600 (approximately EUR 1,390) for those incurred before this Court.

89. The Government submitted that since Mrs M. had been at the time unmarried and unemployed she would have been entitled to legal aid. Similarly the applicant appeared also to have been eligible for legal aid;

however, neither of them had applied for legal aid. Thus, any legal fees which they would not have incurred had they applied for legal aid could not now be claimed. Moreover, no receipt had been provided evidencing that the sum of MTL 209 had indeed been paid, nor that any other costs and expenses had actually been incurred. The lump sums for professional fees had not been itemised and no taxed bills of costs for the different domestic proceedings had been produced. Furthermore, the original domestic proceedings had no causal link with the violation found, since the applicant would have had no guarantee that she would not have been made to pay those costs had there not been a violation. Consequently, this claim should be rejected in its entirety.

90. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicant only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 573, § 49).

91. In respect of the costs claimed for the proceedings before the first-instance court and the Court of Appeal, the Court rejects the claim since they were not incurred to prevent or redress the violations found (see, *mutatis mutandis*, *Schutte v. Austria*, no. 18015/03, § 52, 26 July 2007).

92. The Court observes that the Government's argument regarding the availability of legal aid has no bearing on the question whether the sums claimed by the applicant were or were not incurred. Legal aid is not mandatory and individuals have a choice as to whether to apply for such a benefit or not. Thus, the fact that in the present case the applicant failed to avail himself of such a benefit does not exempt the Government from paying any expenses which are reasonable as to quantum at this stage of the proceedings.

93. In respect of the claims for professional legal fees for the domestic constitutional proceedings, the Court rejects the claim as the applicant has failed to prove that these have actually been incurred; indeed the applicant admitted that only a minimal sum had been paid to the lawyer and no evidence has been submitted even of that.

94. In respect of any other legal expenses including court fees and professional legal fees incurred before this Court, the Court notes that the applicant has failed to submit a detailed note of the expenses which had been sustained or any taxed bills of costs. However, the Court considers that, although the applicant failed to submit any evidence in respect of these costs and expenses (see *Mammadov v. Azerbaijan*, no. 34445/04, § 101, 11 January 2007), before lodging his application in Strasbourg, the applicant introduced constitutional proceedings to redress the violation complained of and undoubtedly incurred some expenses in those proceedings. The Court therefore accepts that the applicant incurred some costs, both at the national and at the European level, in order to put right the violation of the

Convention (see *Kadem v. Malta*, no. 55263/00, § 64, 9 January 2003). The Court observes lastly that other than submitting that there were no receipts, the Government did not contend that the legal fees claimed by the applicant were excessive (see *Ramazanoğlu v. Turkey*, no. 39810/98, § 34, 10 June 2003). It therefore considers it appropriate to award the applicant EUR 2,000 for the costs incurred before the domestic courts and for the proceedings before it.

D. Default interest

95. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible by a majority;
2. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention on account of the lack of objective impartiality of the Court of Appeal;
3. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 6 § 1 of the Convention in relation to the equality of arms principle;
4. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
5. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

- (a) Concurring opinion of Judge Bonello;
- (b) Joint dissenting opinion of Judge Bratza, joined by Judges Traja and Hirvelä.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE BONELLO

1. I had no hesitation in voting with the majority to find that a system which allows lawyers in adversarial proceedings to plead before courts presided over by their close relatives violates in itself the Article 6 guarantee of an impartial tribunal, independently of the judge's conduct in the specific circumstances.

2. It has to be borne in mind that quite often in civil proceedings what the presiding judge is called upon to determine may not be the factual merits of the lawsuit, but the professional competence, expertise, honesty, strategies and diligence of the defending lawyers. The court may be required to establish whether the lawyer's management of the case was sound, fanciful, negligent or downright erroneous. (Did the lawyer sue the defendant in the competent court? Did the lawyer comply with the formalities required in written pleadings? Did the lawyer mislead the court? Did the lawyer summon all the relevant witnesses? Were time limits allowed to lapse?) When a court brands an advocate's handling of a case as defective, this may open the way to an action for damages by the client against the lawyer. The Maltese system, until recently, allowed judges to determine whether their son, daughter, parents, spouse or sibling could be sued in tort. The impartiality of presiding judges called upon to decide the professional virtue or otherwise of their closest relatives would be seen to be rather problematic, and not solely by the passionately paranoid. This injury to fairness was retained in the Maltese legal system with a firmness of purpose worthier of causes more noble. We could all come round to accepting that the family is a fundamental value in society, but surely we would not want to take this value that far.

3. It seems to me that all members of the Court, whether in the majority or in the minority, decried as markedly unacceptable this blissful all-in-the-family jamboree, in lighter moments sometimes called administration of justice. What they disagreed about is whether the particular court proceedings (in which the impugned behavior of the presiding judge allegedly in favour of his brother's professional conduct occurred) attract the protection of the Article 6 fair trial guarantees or not. The minority has suggested that this evil occurred in the course of injunction proceedings, and that, according to the Court's case-law, these fall outside the protection of the fair trial guarantees enshrined in Article 6.

Injunction proceedings?

4. Let me state from the outset that I do not believe that the alleged violation occurred in injunction proceedings at all – and with this I will deal later. Equally at the outset I want to make clear that I find distressing, to say the least, this non-applicability of Article 6 to injunction proceedings determined by courts. The old case-law of the Strasbourg organs seems to have taken on board as altogether in conformity with the Convention the view that injunctions should be issued or denied by a biased judge, by a judge in the pocket of one of the parties, or by a judge with a personal or family interest in the outcome of that injunction. Family business which is none of Strasbourg's business. I would be less than thrilled to be identified with a doctrine so bizarre, and fight back, with moderate success, an impelling urge to invite the European Court of Human Rights to grow up where Article 6 is concerned.

5. The argument of the non-interventionists is that injunctions do not really determine civil rights and obligations and are thus outside the ambit of Article 6. I have but little doubt that injunction proceedings *do* determine civil rights and obligations – even if provisionally. They hinder or permit the exercise of civil rights, and they determine – temporarily – civil rights and obligations, sometimes with extremely far-reaching consequences for the parties. Nowhere does the Convention, nor the basics of rationality, mandate that civil rights and obligations should be determined irretrievably in order for Article 6 to be allowed entry. If that were so, Article 6 would equally not apply at all to first instance civil proceedings, subject as they are to reversal on appeal and annulment by cassation. The inscrutable logic of leaving Article 6 out in the cold where civil injunctions are concerned struggles to climb very high on my scale of judicial virtue or virtuosity.

6. I grudgingly concede, but solely for the purpose of this opinion, that Article 6 fails to apply to injunction proceedings. The core question however remains whether the alleged misconduct of the court and the inability to disqualify a judge by reason of his close kinship with the adversary's lawyer, occurred in injunction proceedings or not.

7. The answer, in my view, is clearly that they did not. Unless the sequence of these lawsuits in Malta is kept in mind, the pitfalls of lumping together the injunction proceedings with subsequent proceedings which with injunctions had nothing to do at all, will be hard to avoid.

8. The Maltese legal system incorporates provisions for the issue of injunctions to regulate civil controversies provisionally. More to the point, the system recognises as enforceable and autonomous civil rights the observance of the principles of natural justice in court proceedings, coupled with the corresponding civil right to annul anything done in violation of these principles. The basic issue is whether the violation of Article 6

occurred in injunction proceedings, or, as the majority established, in the ambit of a totally different civil action which dealt with and determined irrevocably the separate *audi alteram partem* civil right.

9. In Malta the litigants went through three wholly distinct sets of civil proceedings:

a. The original civil lawsuit during which the plaintiff sought and obtained an injunction against the applicant. The Article 6 violation complained of did *not* occur in these proceedings.

b. This was followed by the *audi alteram partem* proceedings which the applicant instituted in accordance with Maltese civil law jurisprudence – not to review the merits of the injunction, but to establish whether her civil right to benefit from the principles of natural justice in civil proceedings had been complied with or not. In first instance the civil court ascertained that the plaintiff/applicant’s ‘natural law’ civil rights had been breached. On appeal, the court was presided over by the brother of the lawyer of the other party, and this court revoked in favour of the defendant the judgment given by the first court in favour of the applicant. It is during these appeal proceedings which determined the applicant’s civil right of *audi alteram partem* - and not in any way the merits of the injunction - that the alleged violation of Article 6 occurred.

c. These were in turn followed by the Constitutional proceedings which challenged the violation of Article 6 by the court of appeal. The court of constitutional jurisdiction dismissed the applicant’s Article 6 complaint as frivolous and vexatious. The ECHR, subscribing to a rather different school of thought, found that complaint to be significant, momentous – and well-founded too.

10. In the injunction proceedings, at stake was whether the court should issue a restraining order against the defendant or not. The court set the case down for public hearing, but, allegedly on the initiative of the other party’s lawyer, issued the injunction without hearing the defendant at all. These were standard injunction proceedings to which the Court’s case-law denies the protection of Article 6. It is not, however, this irregularity that forms the basis of the Strasbourg complaint.

11. After this, a totally different set of civil proceedings was instituted by the defendant in which the matter at issue had absolutely nothing to do with the merits of the injunction or with whether the plaintiff in the original civil lawsuit was right in requesting and obtaining a restraining order against the defendant. This second set of proceedings *were aimed at determining exclusively and conclusively* the applicant’s autonomous civil right, recognised by Maltese law, to be heard when the adjudicating court had established that a hearing was essential for the proper administration of justice. The first set of proceedings discussed exclusively a neighbour’s right to restrain another tenant from hanging washing over his yard – standard injunction proceedings. The second set of proceedings, on the other

hand, concerned exclusively the final determination of the eminently civil right of *audi alteram partem* according to the principles of natural justice - a civil right legally enforceable in Malta as an independent right. *It is in this second set of non-injunction proceedings that the court was presided over by the brother and uncle of the opponent's lawyers, and when the violation of Article 6, ascertained by this Court, occurred.*

12. What was at stake in the *first* proceedings was whether to restrain clothes from dripping into a neighbour's yard. What was at stake in the second set proceedings had nothing to do with wet washing and everything to do with determining finally the plaintiff's autonomous civil right enshrined in Maltese law to be heard when a court opts to set down a judicial controversy for hearing. It was in these non-injunction proceedings that Article 6 was violated. The civil court determined this civil right in the applicant's favour. The court of appeal, presided over by the brother and uncle of the defendant's lawyers, determined this civil right in the defendant's favour. The inescapable conclusion is that these proceedings determined finally the civil rights of the applicant which were the merits of the second action. Should this deformed final determination of a civil right be immune from Article 6 too?

13. I already find it difficult to concede that judges owe no responsibility at all to Article 6 in injunction proceedings. But I find it wholly unacceptable that this jaundiced principle of irresponsibility should also contaminate proceedings which have absolutely nothing to do with injunctions or their merits. That is why the majority voted for the applicability of Article 6 to the *audi alteram partem* appeal presided over by the brother of the defendant's lawyer.

Vilho Eskelinen, Subsidiarity and Exhaustion of Domestic Pleading

14. This case also raised other compelling issues I would not be at all happy to overlook. The non-applicability of Article 6 to the second set of proceedings was only pleaded by the defendant government in Strasbourg (and solely after a specific question to this effect had been put to them at the communication stage). The Government could have pleaded in the Constitutional law-suit (the third set of proceedings in Malta), the non-applicability of Article 6 - and they did not. The civil court in its Constitutional jurisdiction too could have raised that overriding plea *ex officio*, and again it did not. On the contrary, the court of constitutional jurisdiction which decided the merits proceeded on the premise that Article 6 did apply, and went on to examine and determine the case in accordance with its reading of Article 6.

15. This judicial schizophrenia (Article 6 protection flourishes in the domestic jurisdiction, but falls effortlessly dead on the doorstep of the Strasbourg Court) brings into play two other pre-eminent considerations.

Firstly, it goes frontally against the *Vilho Eskelinen* principle that when Article 6 applies to a controversy in the domestic jurisdiction, it is only exceptionally that it should be deemed inapplicable in Strasbourg. The ECHR, says *Vilho Eskelinen*, should never be seen to afford lesser protection to human rights than the domestic courts do. The *Vilho Eskelinen* doctrine, in my view, supersedes in time and breath the older case-law regarding the inapplicability of Article 6 to injunction proceedings. The Court still has an obligation to apply its old case-law, but in the light of the supervening *Vilho Eskelinen* doctrine – in the sense that when the domestic courts deem Article 6 applicable to a judicial controversy, Strasbourg would do ill to act differently.

16. Secondly, the fact that the Government only raised the inapplicability of Article 6 in Strasbourg challenges the principle of subsidiarity of the European system to the domestic one. Neither the respondent Government nor the domestic courts ever questioned the applicability of Article 6 to these proceedings in Malta. The domestic jurisdictions were *never* given the opportunity to examine and determine this issue before it was served for lunch to the supranational European tribunal. It was only in Strasbourg that the Government first brought the issue up for adjudication.

17. I have heard very few persuasive reasons why the domestic jurisdiction should have been cheated of its function of being the first to determine this question. Even fewer why applicants should be denied access to this Court if they fail to exhaust domestic remedies, while Governments should walk the red carpet all the way to Strasbourg when they fail to exhaust domestic pleas. Actions and pleas are mirror images of each other in the symmetry of the adversarial judicial process, and an international supervisory court should be the last to disturb this symmetry. Why one weight and one measure for the applicant, and none at all for the Government? Why this slap in the face of equality of arms between the two contenders? Why is the principle of subsidiarity so religiously adhered to when the applicant contravenes it, and so submissively set aside for the Government? Exactly the same reasons which require the applicant to exhaust remedies in the domestic fora should require the Government to exhaust pleas in the domestic fora too. Otherwise this Court turns into one of last resort for the applicant and of first resort for the Government.

DISSENTING OPINION OF JUDGE BRATZA, JOINED BY
JUDGES TRAJA AND HIRVELÄ

1. I regret that I am unable to agree with the majority of the Chamber that the present case is admissible or, in consequence, with the majority's view that Article 6 has been violated. In my view, the applicant's complaint should have been declared inadmissible on the grounds that Article 6 was inapplicable to the proceedings in which the impugned decision of the Court of Appeal was taken and that the application is accordingly incompatible *ratione materiae*.

2. The facts underlying the application are of considerable importance to the question of the applicability of Article 6 and merit repetition.

The applicant's sister, Mrs M., was the defendant to civil proceedings brought by her neighbour, Mr F., who claimed that the hanging out of her washing interfered with his property rights. In the proceedings, he sought, *inter alia*, injunctive relief to restrain the further infringement of his rights. While the proceedings were pending, Mr F. applied for the grant of an interim or interlocutory injunction pending the determination of the merits of the dispute. An interlocutory injunction was granted by the presiding magistrate in the absence of Mrs M. and her lawyer and without her having been given notice of the date of the hearing.

3. Since no appeal lay in interlocutory proceedings, Mrs M. brought fresh proceedings in the Civil Court (First Hall) complaining of the breach of the *audi alteram partem* principle in the grant of the interlocutory injunction. On 15 October 1990 the Civil Court upheld her claim, and declared the injunction to be null and void.

4. Mr F. appealed to the Court of Appeal against the judgment of 15 October 1990. However, before the appeal was heard, the merits of the dispute were determined on 6 March 1992 after an *inter partes* hearing attended by both parties. The court decided in favour of Mr F. and granted a permanent injunction to restrain Mrs M. from violating his property rights in the manner alleged. It has not been suggested that the determination of the dispute failed to comply with Article 6 and it would not appear that Mrs M. appealed against the court's decision.

5. Despite the fact that the substantive action had been decided, the appeal against the setting aside of the interim injunction proceeded. The decision of the Court of Appeal upholding Mr F.'s appeal which is the

subject of the present complaint under Article 6 was delivered on 15 February 1993. Since Mr F.’s action had been resolved in his favour and a permanent injunction granted, the Court of Appeal’s decision was without practical effect. Nevertheless, Mrs M. sought to pursue her complaint about the fairness of the interlocutory proceedings by lodging a constitutional complaint before the Civil Court (First Hall) in its constitutional jurisdiction but died before her claim could be determined. The claim, which was taken up by the applicant in his capacity as Mrs M.’s brother, was dismissed on 29 January 2004.

6. As this recital of the facts makes clear, the applicant’s complaint relates to the impartiality of the Court of Appeal in ruling on the fairness of the interlocutory proceedings which had led to the grant of an interim injunction.

7. The Court’s case-law on the applicability of Article 6 to interlocutory proceedings relating to interim orders or other provisional measures adopted prior to the determination of the merits of a claim is well-established and is encapsulated in the decision of the Court in the case of *APIS a.s. v. Slovakia* (dec.), no. 39754/98, 13 January 2000. The applicant company in that case had filed an action with the Bratislava City Court claiming entitlement to 51% of the shares in another limited company. The applicant company at the same time applied for an interim injunction ordering the defendant not to sell the shares at issue pending the outcome of the proceedings. The application was granted by the City Court and its decision was upheld by the Supreme Court. The City Court subsequently dismissed the defendant’s request for annulment of the interim measure but, on appeal, the Supreme Court quashed the interim measure without having heard the parties. The Constitutional Court rejected the petition of the applicant company alleging a violation of its right to a fair and public hearing before the Supreme Court, noting that the interlocutory proceedings had not determined the merits of the company’s claim.

In declaring inadmissible the applicant company’s complaint of a violation of its right under Article 6 to a fair and public hearing in the proceedings leading to the Supreme Court’s decision, the Court noted that the alleged violation had occurred in the course of interlocutory proceedings relating to an interim injunction. The Court continued:

“The decision of the Supreme Court... was only an interim order and did not involve a decision on the merits of the case, which was at that time dealt with by the Bratislava City Court. In these circumstances the Court finds that the interlocutory proceedings complained of did not involve a “determination” of the applicant company’s civil rights or obligations within the meaning of Article 6 § 1 of the Convention...

It follows that the application is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.”

The same principle has been re-affirmed and applied in the subsequent cases of *Starikow v. Germany* (dec.), no. 23395/02, 10 April 2003 (provisional grant of parental authority); *Libert v. Belgium* (dec.), no. 44734/98, 8 July 2004 (interim stay of execution of a judgment); *Dogmoch v. Germany* (dec.), no. 26315/03, 18 September 2006, ECHR 2006- (order for the attachment of the applicant’s assets); *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007 (order for seizure of applicants’ assets); and *Saarekallas Oü v. Estonia*, no. 11548/04, 8 November 2007 (prohibition on disposal of applicant company’s building).

8. Only very exceptionally has the Court considered Article 6 to be applicable to proceedings relating to interim orders. In the case of *Markass Car Hire Ltd v. Cyprus* (dec.), no. 51591/99, 23 October 2001, to which reference is made in paragraph 38 of the judgment of the Chamber, the Court confirmed its earlier case-law to the effect that Article 6 did not apply to proceedings relating to interim orders but found the case-law to be inapplicable in the particular circumstances of that case. In that case the applicant company, which was the owner of a fleet of vehicles, was the defendant to proceedings in which K. sought damages for breach of contract for the delivery of vehicles. At the same time, K. sought and obtained an interim order requiring the applicant company to hand over a number of vehicles which were still in the applicant’s possession at the time. Having noted that the interim decision partly coincided with the main action and that, unless reversed by the Appeal Court within a short time-limit, would affect the legal rights of the parties resulting from the contract, the Court continued as follows:

“In this respect, the Court cannot overlook the drastic character of the interim decision which concerned, as the applicant maintains, almost the whole of the company’s fleet of vehicles and disposed to a considerable degree of the relevant civil action against the applicant. The combined effect of the measure and its duration caused irreversible prejudice to the applicant’s interest and drained to a substantial extent the final outcome of the proceedings of its significance.

In these circumstances the Court considers that the interim decision in effect partially determined the rights of the parties in relation to the final claim against the applicant... and thereby acquired the character of a “dispute” over a civil right and obligation to which Article 6 of the Convention was applicable.”

9. It cannot arguably be said in the present case that the interlocutory injunction granted by the presiding magistrate caused irreversible prejudice to the applicant's interests and I do not understand the majority of the Chamber to suggest that it did. Instead, emphasis is placed in the judgment on the fact that the impugned decision of the Court of Appeal was taken not in the course of the interlocutory injunction proceedings brought by Mr F. but in separate proceedings brought by Mrs M., which involved the determination of the question whether a party had, as a matter of domestic law, a right to be heard. It is said that the Court of Appeal may be regarded as having examined the merits of Mrs M.'s application and, in so doing, to have determined the dispute over the right to be heard, a dispute which the applicant could claim at least on arguable grounds was covered by Article 6.

10. I am unable to accept this conclusion or reasoning. In particular, I find wholly artificial the reliance placed on the fact that the impugned decision of the Court of Appeal was reached in separate proceedings rather than in an appeal from the grant of the interim injunction. Had Maltese law allowed such an interlocutory appeal, and had the Court of Appeal rejected an appeal by Mrs M. based on the fact that she had not been heard when the injunction was granted, the case would have fallen squarely within the Court's constant case-law. The fact that, in the absence of an interlocutory appeal, Mrs M. was required to resort to separate proceedings to have the injunction set aside does not in my view change anything. The proceedings were clearly brought not, as the judgment suggests, for the purpose of establishing that she had a right to be heard under domestic law but for the purpose of setting aside the injunction which had in her submission been granted in breach of that principle. Furthermore, even if as the judgment asserts the procedural requirement of *audi alteram partem* can be said to be a substantive "right" under domestic law, I do not consider that it could be regarded as a "civil right" for the purpose of Article 6, such that any dispute concerning such right would attract the protection of that Article.

11. I similarly cannot agree with the view of the majority that the applicant's case is assisted by the Grand Chamber's recent decision in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, 19 April 2007, ECHR 2007-). The Court in that case was concerned with the specific problem of the applicability of Article 6 to disputes involving civil servants, which had traditionally been treated by the Court as falling within a special category so far as the right of access to court was concerned. In reversing its decision in the case of *Pellegrin v. France* ([GC], no. 28541/95, ECHR 1999-VIII) so as to widen the scope of application of Article 6 to include disputes concerning civil servants, the Court noted that it was primarily for Contracting States to identify those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the

interests of the individual to have access to a court must give way. It was in this context that the Court observed (as noted in paragraph 41 of the current judgment) that if the domestic system barred access to a court, the Court would verify that the dispute was indeed such as to justify the application of the exception to the guarantees of Article 6, but that, if it did not, there was no issue and Article 6 § 1 would apply. This statement of the Court was confined to the case of civil servants and was not intended to overrule or otherwise affect the Court's established case-law as to the applicability of Article 6 in other contexts. This was indeed made clear in the very next subparagraph of the Court's judgment, where it was emphasised that:

“...this situation is distinct from other cases, which due to the claims being made are regarded as falling outside the civil and criminal heads of Article 6 § 1 of the Convention (see, *inter alia*, for the assessment of tax, *Ferrazzini v. Italy* ([GC], no. 44759/98 ECHR 2001–VII); for matters of asylum, nationality and residence in a country, *Maaouia v. France* ([GC], no. 39652/98, ECHR 2000–X); and for the adjudication of election disputes in respect of members of Parliament, *Pierre-Bloch v. France*, cited above). The reasoning in this case is therefore limited to the situation of civil servants.”

12. In paragraph 46 of the judgment, the majority of the Chamber emphasise that Article 6 reflects the fundamental principle of the rule of law which underpins the whole Convention system and that the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 would not correspond to the aim and purpose of that provision. I fully share these sentiments but I am unable to conclude that they are such as to justify the Chamber in departing from well-established case-law so as to find Article 6 to be applicable to what in my view are to be seen as interlocutory proceedings.

13. My conclusion that the application is incompatible *ratione materiae* relieves me of the need to consider the difficult issue of the victim status of the applicant, who was not directly concerned with the impugned proceedings and whose only involvement arose at the stage of Mrs M.'s constitutional complaint.