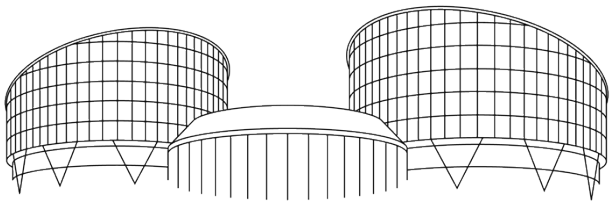

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

GRAND CHAMBER

CASE OF MICALLEF v. MALTA

(Application no. 17056/06)

JUDGMENT

STRASBOURG

15 October 2009

In the case of Micallef v. Malta,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Françoise Tulkens,
Giovanni Bonello,
Corneliu Bîrsan,
Karel Jungwiert,
Anatoly Kovler,
Vladimiro Zagrebelsky,
Elisabet Fura,
Khanlar Hajiyev,
Egbert Myjer,
Davíd Thór Björgvinsson,
Dragoljub Popović,
Giorgio Malinverni,
András Sajó,
Zdravka Kalaydjieva,
Mihai Poalelungi, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 22 October 2008 and on 9 September 2009,

Delivers the following judgment, which was adopted on the last-mentioned 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 a Maltese national, Mr Joseph Micallef ("the applicant"), on 15 April 2006.

2. The applicant, who had been granted legal aid, was represented by Dr T. Azzopardi, a lawyer practising in Valetta. The Maltese Government ("the Government") were represented by their Agent, Dr S. Camilleri, Attorney-General.

3. The applicant alleged that Mrs M. had been denied a fair hearing, in particular because of her lack of opportunity to make submissions before an impartial tribunal, contrary to Article 6 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 5 September 2006 a Chamber of that Section, composed of Nicolas Bratza, President, Josep Casadevall,

Giovanni Bonello, Matti Pellonpää, Lech Garlicki, Ljiljana Mijović and Ján Šikuta, judges, 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. It also decided to examine the merits of the complaint at the same time as its admissibility, pursuant to Article 29 § 3 of the Convention. On 15 January 2008 a Chamber of that Section, composed of Nicolas Bratza, President, Giovanni Bonello, Kristaq Traja, Lech Garlicki, Ljiljana Mijović, Ján Šikuta and Päivi Hirvelä, judges, by a majority declared the remainder of the application admissible and, by four votes to three, held that there had been a violation of Article 6 of the Convention. A concurring opinion of Judge Bonello and a joint dissenting opinion of Judges Bratza, Traja and Hirvelä were appended to the judgment.

5. On 7 July 2008 a panel of the Grand Chamber granted the Government's request to refer the case to the Grand Chamber in accordance with Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the Government each filed observations on the admissibility and merits. In addition, third-party comments were received from the Government of the Czech Republic, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 October 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Dr S. CAMILLERI, Attorney-General, *Agent*,
Dr P. GRECH, Deputy Attorney-General, *Adviser*;

(b) *for the applicant*
Dr T. AZZOPARDI, *Counsel*.

The Court heard addresses by Dr T. Azzopardi and Dr S. Camilleri, and also their replies to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1929 and lives in Vittoriosa.

A. Background of the case

10. The applicant is the brother of Mrs M., who lived in an apartment above Mr F.

11. On 17 July 1985 Mr F. applied for an injunction to restrain Mrs M. from hanging out clothes to dry over the courtyard of his apartment, thereby allegedly interfering with his property rights. Mr F. relied on the provisions of Article 403 of the Maltese Civil Code in this connection.

12. On one occasion following a hearing on the injunction, and after Mrs M. and her lawyer, Dr A., had already left the courtroom, 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, on 29 November 1985 the presiding magistrate issued the injunction in favour of Mr F.

13. According to Maltese law as it stood at the time, Mr F. had to institute proceedings in respect of the property claim preserved by the warrant within four days of the issuing of the injunction; otherwise the injunction would cease to have effect. Accordingly, on 5 December 1985, Mr F. lodged a writ of summons to start proceedings.

14. 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. On 24 March 1992, as no appeal had been lodged, the case became final.

B. Proceedings before the Civil Court in its ordinary jurisdiction

15. On 6 December 1985 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 (see paragraph 77 below).

16. 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 (see paragraph 27 below), 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

17. Mr F. 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.

18. 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 myself.'
>
> ... 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."

19. 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.

20. 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, in respect of the change in date leading to Mrs M.'s absence at the hearing. In this respect the judgment repeated in part the note which had been dictated during the hearing – "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". The Court of Appeal further ordered the removal from the records of the case of a report which supported Mrs M.'s claim, which had been drawn up by the judicial assistant appointed by the Civil Court.

D. Proceedings before the Civil Court in its constitutional jurisdiction

21. On 25 March 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 and that this had been manifest in the incident of 12 October 1992. Observing that the Court of Appeal had denied facts which had already been proved, she further submitted that her right to a fair trial had been violated.

22. Mrs M. died on 20 January 2002, 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.

23. 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

24. The applicant appealed to the Constitutional Court.

25. 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

26. Article 403 of the Civil Code reads as follows:

> "(1) Tenements at a lower level are subject in regard to tenements at a higher level to receive such waters and materials as flow or fall naturally therefrom without the agency of man.
>
> (2) It shall not be lawful for the owner of the lower tenement to do anything which may prevent such flow or fall.
>
> (3) Nor shall it be lawful for the owner of the higher tenement to do anything whereby the easement of the lower tenement is rendered more burdensome."

27. 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."

28. 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 nephew. 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; ..."

29. 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; ..."

30. Article 39 § 2 of the Maltese Constitution, in so far as relevant, reads as follows:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; ..."

III. COMPARATIVE AND EUROPEAN UNION LAW AND PRACTICE

A. National systems

31. On the basis of the material available to the Court in respect of the legislation of a relevant number of member States of the Council of Europe, it appears that there is widespread consensus on the applicability of Article 6 safeguards to interim measures, including injunction proceedings. This conclusion is inferred from constitutional texts, codes of civil procedure and domestic case-law. In the majority of States (Albania, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, Estonia, France, Germany, Hungary, Ireland, Italy, The Netherlands, Poland, Russia, San Marino, Serbia, Spain, Sweden, Switzerland and the United Kingdom) legislation suggests that Article 6 procedural safeguards (particularly the impartiality requirement) apply to interim and injunction proceedings either because the legislation makes no distinction as to the stage or type of proceedings to which the safeguards apply (such as the Constitutions of Greece, Italy, Spain and Switzerland), or because specific provisions governing interim measures reflect in some way the main safeguards embedded in Article 6 – as, for example, legislation which specifies that provisions governing proceedings on the merits apply *mutatis mutandis* to injunction proceedings (such as Poland), or will do so, unless otherwise stipulated (such as Germany). The Belgian courts have explicitly dealt with the issue (see the judgments of the Court of Cassation in the cases of *Greenpeace Belgium* and *Global Action in the Interest of Animals*, of 14 January 2005) and held that Article 6 of the Convention was in principle applicable to interim proceedings (*référé*).

B. European Union

32. Article 47 of the Charter of Fundamental Rights of the European Union guarantees the right to a fair trial. Unlike Article 6 of the Convention,

the provision of the Charter does not confine this right to disputes relating to "civil rights and obligations" or to "any criminal charge" and does not refer to the "determination" of such. In *Bernard Denilauler v. SNC Couchet Frères* (ECJ, Case C 125/79, 21 May 1980) the European Court of Justice ("the ECJ") held that provisional measures given *ex parte* without hearing the defendant could not be recognised according to its case-law. This implies that such safeguards should apply also outside the context of final decisions.

THE LAW

33. 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 for 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."

34. The Government contested that argument.

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

35. The Government contested the admissibility of the application on a number of grounds under Articles 34 and 35 § 1 of the Convention.

Article 34 provides:

> "The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ... "

Article 35 § 1 states:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

A. Victim status

1. The Chamber's conclusion

36. The Chamber, which raised the matter of its own motion, noted that Mrs M., the direct victim, died while pursuing domestic remedies, implying that she intended to complain about the alleged breach before the Court. It further noted that after the direct victim's death the domestic courts did not

reject the applicant's request to intervene in the constitutional proceedings and later to appeal in his capacity as brother of the plaintiff. Moreover, the Court had discretion to recognise the victim status of an applicant and to continue examining an application when it concerned a matter of general interest. The Chamber considered that the impossibility under domestic law to challenge a judge on the basis of his or her relationship with a party's advocate was a matter of sufficient general interest. Having further observed that the Government had not filed an objection in this respect, the Chamber concluded that the applicant had standing to introduce the present application.

2. The Government's submissions

37. The Government submitted that the applicant did not have victim status in so far as he was not a party to the proceedings complained of. The only direct victim was his sister, who had died during the domestic constitutional proceedings. The Government argued that it was irrelevant that the applicant was permitted to intervene in the latter proceedings in his sister's stead. According to Maltese law, this was standard practice based on the civil-law principle of succession whereby an heir succeeds to the legal personality of the deceased, irrespective of the heir's victim status for the purposes of the Convention.

38. Moreover, the Government contested the Chamber's interpretation regarding the Court's discretion to grant victim status on the basis of "sufficient general interest". This in their view was not in conformity with Article 34 of the Convention and would verge on acceptance of an *actio popularis*. However, even if this were so, in the present case there was no relevant defect in the law justifying the exercise of the alleged discretion by the Chamber.

3. The applicant's submissions

39. The applicant first submitted that it was an abuse of proceedings and contrary to the principle of subsidiarity for the Government to raise a novel argument before the Court at this stage of the proceedings. Since they had not contested this matter before the domestic courts or the Chamber, they should be estopped from doing so now.

40. In any case, the applicant submitted that the direct victim had died while pursuing domestic remedies, without which she could not apply to the Court. Indeed, after Mrs M.'s death the national courts had accepted the applicant's *locus standi* in constitutional proceedings in accordance with domestic law. Moreover, once the applicant became a party to the domestic proceedings he was made to bear the costs of the constitutional case instituted by his sister and had thus also suffered financial prejudice. According to the applicant, this status once acquired was irreversible.

41. Lastly, the applicant submitted that there was a moral dimension to the application which raised serious questions affecting the interpretation or application of the Convention and a serious issue of general importance. Thus, it could not be said that the general interest criterion referred to by the Chamber did not apply to the present case.

4. The submissions of the third-party Government

42. The Government of the Czech Republic submitted that it was acceptable for the Court to grant *locus standi* to the applicant's next of kin where the applicant died during the proceedings before the Court. However, if the direct victim died before lodging the application, victim status should only be recognised exceptionally. This would be so in cases where the alleged violation prevented the direct victim himself from asserting his claims (see *Bazorkina v. Russia*, no. 69481/01, § 139, 27 July 2006) or where persons aspiring to have victim status, usually the heirs, were themselves affected by what were claimed to be the negative consequences of the alleged violation (see *Ressegatti v. Switzerland*, no. 17671/02, § 25, 13 July 2006).

43. Moreover, the Court had no discretion to grant victim status on the ground that the complaint related to an issue of general interest. However, it did have discretion under Article 37 § 1 of the Convention to continue the examination of an application even in the absence of a person wishing to complete the battle embarked upon by the deceased applicant. Applying this discretion to proceedings initiated by a next of kin, who did not fulfil the exceptional criteria mentioned above, would amount to allowing the Court to choose of its own motion which applications would be examined.

5. The Court's assessment

44. In order to be able to lodge a petition in pursuance of Article 34, a person, non-governmental organisation or group of individuals must be able to claim "to be the victim of a violation ... of the rights set forth in the Convention ...". In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008).

45. This criterion is not to be applied in a rigid, mechanical and inflexible way (see *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX). The Court has acknowledged that human rights cases before it generally also have a moral dimension and persons near to an applicant may thus have a legitimate interest in seeing to it that justice is done even after the applicant's death. This holds true all the more if the leading issue raised by the case transcends the person and the interests of the applicant and his heirs in that it may affect other persons (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII).

46. The Court has discretion, in particular circumstances, to find that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case (Article 37 § 1 *in fine* of the Convention). This discretion is dependent on the existence of an issue of general interest (see *Karner*, cited above, § 27, and *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, § 29, 5 July 2005). The latter may arise in particular where an application concerns the legislation or a legal system or practice of the defendant State (see *Altun v. Germany*, no. 10308/83, Commission decision of 3 May 1983, Decisions and Reports 36, p. 209, and, *mutatis mutandis*, *Karner*, cited above, §§ 26 and 28).

47. 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*, cited above). However, the situation varies where the direct victim dies before bringing his or her complaint before the Court (see *Fairfield v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI).

48. 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 v. Spain* (dec.), no. 48335/99, ECHR 2000-XI), even though the Court should have regard to the fact that an applicant had been a party to the domestic proceedings. Regarding complaints under Article 6, the Court has been prepared to recognise the standing of a relative either when the complaints were of a general interest and the applicants, as heirs, had a legitimate interest in pursuing the application (see *Marie-Louise Loyen and Bruneel*, cited above, § 29, and, conversely, *Biç and Others v. Turkey*, no. 55955/00, § 23, 2 February 2006) or on the basis of the direct effect on the applicant's patrimonial rights (see *Ressegatti*, cited above, § 25).

49. In the present case, the Court notes that the direct victim died during the constitutional proceedings, which lasted over ten years at first instance and were necessary to exhaust domestic remedies. The constitutional jurisdictions did not reject the applicant's request to intervene in the proceedings in his capacity as brother and heir of the plaintiff, nor did they refuse to entertain his appeal. Furthermore, he was made to bear the costs of the case instituted by his sister and can thus be considered to have a patrimonial interest to recover the costs.

50. Moreover, the Court considers that the question of an alleged defect in the relevant law which made it impossible to challenge a judge on the basis that the lawyer appearing before him was his nephew or that the issue at stake in the case related to the conduct of his brother is a matter which raises issues concerning the fair administration of justice and thus an important question relating to the general interest.

51. In conclusion, the Grand Chamber, like the Chamber, considers that for both of the foregoing reasons, the applicant has standing to introduce the present application. The Government's objection is thus dismissed.

B. Non-exhaustion of domestic remedies

1. The Chamber's conclusion

52. The Chamber considered that, according to Maltese law and with reference to the Court of Appeal hearing of 12 October 1992, there was no specific ground on which to challenge the judge on the basis that he was the uncle of one of the advocates appearing before him and consequently Mrs M. could not have asked for the judge's withdrawal. Moreover, the applicant had brought the complaint before the Civil Court in its constitutional jurisdiction after the incident in question, and the latter had rejected the Government's objection of failure to exhaust ordinary remedies and dealt with the merits of the case.

2. The parties' submissions

53. The Government submitted that during the hearing of 12 October 1992 Mrs M. did not complain that she had not been given an opportunity to make submissions, nor did she lodge a request to make further submissions. Similarly, she did not challenge the judge at any stage of the proceedings and during the same proceedings she failed to raise before the relevant courts the issue under Article 6 of the Convention that her right to an impartial tribunal was "likely" to be infringed. Mrs M. never requested that the Chief Justice withdraw from her 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, Mrs M. could have made such a request under Article 734 § 1 (e) of the Code of Organisation and Civil Procedure (see paragraph 28 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. However, at the hearing before the Grand Chamber the Government admitted that there had been no domestic case-law proving that a challenge under Article 734 § 1 (e) of the Code of Organisation and Civil Procedure in such a case as the present one would have been successful.

54. The applicant made no submissions on this point.

3. The Court's assessment

55. In accordance with Article 35 § 1 of the Convention, the Court 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). 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). However, the rule of exhaustion of domestic remedies requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective (see *Raninen v. Finland*, 16 December 1997, § 41, *Reports of Judgments and Decisions* 1997-VIII).

56. The Grand Chamber, like the Chamber, considers that the applicant could not have challenged the Chief Justice under Article 734 of the Code of Organisation and Civil Procedure (see paragraph 28 above), since at the time a nephew-uncle relationship between advocate and judge was not among the listed grounds for challenge. Article 734 § 1 (f) specifically referred to certain family relationships (see paragraph 28 above). However, it excluded siblings or other more distant relatives, who would have been mentioned had this been the legislator's intention. The fact that the law is silent as regards these relationships does not support the argument that they can be assumed to be covered by the relevant legal provision in the absence of specific case-law to this effect. Nor has it been shown by the Government that Article 734 § 1 (e), a more general provision, would have provided the basis for a remedy. Moreover, in this respect, the Government conceded that there had been no domestic case-law showing that a challenge under Article 734 §1 (e), in a case such as the present one, had ever been successful. It follows that in the present case the applicant could not reasonably have been expected to take this course of action.

57. Most importantly, the Court notes that, following the impugned judgment, 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 subsequently 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 ordinary remedies and did not reject the claim on procedural grounds but examined the substance of it, the applicant 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).

58. The mere fact that the applicant could have attempted to remedy the alleged violation in alternative ways throughout the different stages of the proceedings or that he waited till the end of the proceedings to make such complaint, as was permissible under domestic law, does not alter this conclusion. Under the established case-law, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see, *inter alia*, *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009).

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

C. Incompatibility *ratione materiae*

1. The Chamber's conclusion

60. Distinguishing between the injunction proceedings arising out of the main action and the proceedings complained of, the Chamber considered the latter as "post-injunction proceedings", that is, a new and distinct set of proceedings by which the flaws of the interim injunction decision could be contested. Both the Court of First Instance and the Court of Appeal had examined the merits of Mrs M.'s complaint and therefore determined the dispute over "the right to be heard" in the injunction proceedings. Thus, the applicant could claim on at least arguable grounds that the proceedings were covered by Article 6. Moreover, when the applicant eventually complained of the unfairness of these "post-injunction proceedings", the constitutional jurisdiction looked at the merits of the applicant's complaint regarding the impartiality of the Court of Appeal and, consequently, recognised the applicability of Article 6 to these proceedings. The Chamber noted that according to the Court's judgment in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 61, ECHR 2007-II) 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." Furthermore, the concept of a "civil right" under Article 6 § 1 could not be construed as limiting an enforceable right in domestic law within the

meaning of Article 53 of the Convention (see *Okyay and Others v. Turkey*, no. 36220/97, § 68, ECHR 2005-VII). It followed that Article 6 was applicable to the present case.

2. The Government's submissions

61. The Government submitted that, as evidenced by the documents submitted to the Grand Chamber, they had contested the applicability of Article 6 during the domestic proceedings, albeit not in their initial submissions before the domestic court. However, under domestic law, they were not estopped from putting forward this objection at a later stage of the domestic proceedings. Moreover, the only reason why the domestic court had not dealt with this issue was that it had accepted their preliminary objection based on the argument that the case was frivolous and vexatious.

62. The proceedings complained of concerned the allegation that the right to be heard had been breached during injunction proceedings. Firstly, the latter were not covered by Article 6 as they were preliminary precautionary measures without any determination of the merits of any right or obligation claimed. Whether or not a claimant was successful in obtaining an injunction, he or she could institute the appropriate action to put forward his or her claim on the merits. It followed that any action arising from injunction proceedings did not also determine any rights or obligations. Even if, according to procedural law, these proceedings had to be instituted by means of a separate action, they were a continuation of injunction proceedings, equivalent to an appeal against the injunction, and therefore could not in any way determine the merits of the initial claim.

63. Moreover, the right to be heard in injunction proceedings was not established in Maltese law. According to domestic case-law, such guarantees could be done away with in injunction proceedings in view of the particular requirements, for example speediness, of such an action. The fact that the Civil Court (First Hall) had found in favour of Mrs M., stating that a right to be heard existed when injunction proceedings were set down for a hearing, did not suffice to give the applicant an arguable claim and make Article 6 applicable to such proceedings, since this did not amount to a determination of civil rights.

64. The only civil right arising in the various sets of proceedings in the present case was the right to hang out the washing, which was the central part of the merits of the original claim that was conclusively decided on 6 March 1992, no appeal having been lodged against it. Indeed, as stated by the Court of Appeal, the arguments on the right to be heard in injunction proceedings could easily have been submitted when defending the substantive action and that was what economy of proceedings demanded.

65. With respect to the Chamber's interpretation of *Vilho Eskelinen and Others* (cited above) and of Article 53 of the Convention, the Government

shared the view of the three judges in their dissenting opinion attached to the Chamber judgment and the intervener's observations.

3. The applicant's submissions

66. The applicant submitted that once a warrant of prohibitory injunction was issued, it continued to have effect until the final outcome of the proceedings, unless it was revoked before that date. Thus, the injunction proceedings in which the warrant was granted affected the civil rights of the parties, albeit provisionally, for a certain period of time. Thus, considering the far-reaching effects resulting from such a warrant, Article 6 of the Convention applied, especially in the Maltese context.

67. However, the proceedings complained of were distinct from the injunction proceedings and also covered by Article 6. They constituted formal *ad hoc* proceedings instituted by a writ of summons followed by an appeal petition and concluded by a judgment at first instance and a judgment on appeal. Indeed, they were listed for hearing before a different court and not before the judge who decided the injunction proceedings. The civil right at issue in these proceedings was "the right to be heard" and the nature of the case was not different from that of any other case before the ordinary domestic courts.

68. The applicant submitted that the fact that the original proceedings, regarding the right to hang out the washing, had been concluded on 6 March 1992 did not render the judgment complained of with no practical effect. Indeed, it had been Mr F. who had lodged the appeal and who had not sought to withdraw it once the merits of the original complaint had been determined, thus reaffirming the utility and separate nature of this action. Moreover, since the Government had not correctly submitted this plea in domestic proceedings nor had the domestic courts raised it of their own motion, the Government should not be allowed to raise the plea now, otherwise they would be in a more favourable position than the applicant, who had to exhaust all his claims before the domestic courts.

69. The applicant submitted that the *Vilho Eskelinen and Others* judgment (cited above) need not be relied on in the present case since Article 6 was in any case applicable for the above reasons. Moreover, he agreed with the Chamber's interpretation of Article 53 of the Convention, whereby the protection of human rights in any area could not be lower before the Court than before the domestic courts.

4. The submissions of the third-party Government

70. The Government of the Czech Republic submitted that the Court should adhere to its case-law that Article 6 did not apply to proceedings concerning interim measures because they were only provisional determinations. They submitted that interim measures could not be seen as

independent proceedings but only within the context of the main proceedings. Accordingly, a departure from the Court's jurisprudence in the matter could be accepted in so far as the provisional aspect no longer constituted a valid reason for "that part of the proceedings" not to be covered by Article 6. It followed that Article 6 could be applicable to interim measures; however, a violation would arise only where any shortcoming in the interim measure proceedings rendered the entire proceedings unfair. It followed that it would be difficult to imagine the finding of a violation where the main proceedings had been definitively disposed of.

71. Moreover, Article 6 should be applicable only on condition that the measure sought concerned, albeit provisionally, the determination, the existence, scope or conditions of civil rights and obligations. The same held for proceedings ancillary to the interim measure proceedings, though it would be difficult for a procedural right (such as the right to be heard as in the present case) to qualify as a civil right.

72. They further submitted that the judgment in *Vilho Eskelinen and Others* (cited above) was limited to proceedings between civil servants and the State in relation to access to court. Moreover, giving protection at domestic level did not mean that Article 6 was applicable and whether or not applicability was contested in domestic proceedings was an irrelevant factor that should not be considered by the Court.

73. In respect of Article 53 of the Convention, the Czech Government submitted that this provision was put in place to prevent the standard attained in the protection of human rights from being lowered on the ground that a certain right was not guaranteed by the Convention. They reiterated that there was nothing preventing national courts from going beyond the standards established by the Convention.

5. The Court's assessment

(a) General principles

74 The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute (*contestation* in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is also protected under the Convention. 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, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, *inter alia*, *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X, and *Gülmez v. Turkey*, no. 16330/02, § 28, 20 May 2008). The character of the legislation which governs how the matter is to be determined (civil,

commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are therefore of little consequence (see *J.S. and A.S. v. Poland*, no. 40732/98, § 46, 24 May 2005).

75. Preliminary proceedings, like those concerned with the grant of an interim measure such as an injunction, are not normally considered to determine civil rights and obligations and do not therefore normally fall within the protection of Article 6 (see, *inter alia*, *Wiot v. France* (dec.), no. 43722/98, 15 March 2001; *APIS a.s. v. Slovakia* (dec.), no. 39754/98, 13 January 2000; *Verlagsgruppe News GmbH v. Austria* (dec.), no. 62763/00, 16 January 2003; and *Libert v. Belgium* (dec.), no. 44734/98, 8 July 2004). It follows that in length-of-proceedings cases, the Court has applied Article 6 only from the initiation of the case on the merits and not from the preliminary request for such measures (see *Jaffredou v. France* (dec.), no. 39843/98, 15 December 1998, and *Kress v. France* [GC], no. 39594/98, § 90, ECHR 2001-VI). Nevertheless, in certain cases, the Court has applied Article 6 to interim proceedings, notably by reason of their being decisive for the civil rights of the applicant (see *Aerts v. Belgium*, 30 July 1998, *Reports* 1998-V, and *Boca v. Belgium*, no. 50615/99, ECHR 2002-IX). Moreover, it has held that an exception is to be made to the principle that Article 6 will not apply when the character of the interim decision exceptionally requires otherwise because the measure requested was drastic, disposed of the main action to a considerable degree, and unless reversed on appeal would have affected the legal rights of the parties for a substantial period of time (see *Markass Car Hire Ltd v. Cyprus* (dec.), no. 51591/99, 23 October 2001).

(b) Classification of the proceedings in the present case

76. The present case deals with four tiers of proceedings, (i) the proceedings granting the injunction; (ii) the set of proceedings in which the fairness of the injunction was contested (the appeal against which is the subject of the complaint before this Court); (iii) the main proceedings regarding Mr F.'s claim; and (iv) the set of constitutional proceedings.

77. Unlike the Chamber, the Grand Chamber considers that it is more appropriate to take a global approach when considering the proceedings. A request for an injunction was granted as a preliminary measure which was followed by the main action on the merits of the case. Meanwhile, another set of proceedings was instituted to contest the fairness of the injunction granted. The Grand Chamber, like the Government, views the latter as analogous to what in other jurisdictions would classify as an appeal against the injunction. It has not been contested that at the time of the present case, the Maltese legal system did not allow for an appeal against such an injunction. It was however possible for injunctions to be impugned in a "fresh" set of proceedings which allowed for two levels of jurisdiction,

namely, the Civil Court (First Hall) in its ordinary jurisdiction and the Court of Appeal. Thus, the injunction proceedings and the consequent challenge to their fairness cannot be seen as distinct from each other. They were one set of proceedings connected to the merits of the cause that fell to be determined in the main action. The fact that they involved three levels of jurisdiction does not mean that they should be regarded as anything other than traditional injunction proceedings. Accordingly, the Grand Chamber will decide on the applicability of Article 6 to the present case on this basis.

(c) Whether there is a need for a development of the case-law

78. The Court observes that there is widespread consensus among Council of Europe member States, which either implicitly or explicitly provide for the applicability of Article 6 guarantees to interim measures, including injunction proceedings (as explained in paragraph 31 above). Similarly, as can be seen from its case-law (see paragraph 32 above), the European Court of Justice ("the ECJ") considers that provisional measures must be subject to the guarantees of a fair trial, particularly to the right to be heard.

79. The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same "civil rights or obligations" and have the same resulting long-lasting or permanent effects.

80. Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by Article 6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation.

81. The Court thus considers that, for the above reasons, a change in the case-law is necessary. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see, *mutatis mutandis*, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I, and *Vilho Eskelinen and Others*, cited above, § 56). It

must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (see, *inter alia*, *Folgerø and Others v. Norway* [GC], no. 15472/02, § 100, ECHR 2007-III, and *Salduz v. Turkey* [GC], no. 36391/02, § 51, ECHR 2008).

82. In this light, the fact that interim decisions which also determine civil rights or obligations are not protected by Article 6 under the Convention calls for a new approach.

(d) The new approach

83. As previously noted, Article 6 in its civil "limb" applies only to proceedings determining civil rights or obligations. Not all interim measures determine such rights and obligations and the applicability of Article 6 will depend on whether certain conditions are fulfilled.

84. Firstly, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the Convention (see, *inter alia*, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 39, Series A no. 301-B; *König v. Germany*, 28 June 1978, §§ 89-90, Series A no. 27; *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X).

85. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.

86. However, the Court accepts that in exceptional cases – where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process – it may not be possible immediately to comply with all of the requirements of Article 6. Thus, in such specific cases, while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In any subsequent proceedings before the Court, it will fall to the Government to establish that, in view of the purpose of the proceedings at issue in a given case, one or more specific procedural safeguards could not be applied without unduly prejudicing the attainment of the objectives sought by the interim measure in question.

(e) Applicability of Article 6 in the present case

87. The Court notes that the substance of the right at stake in the main proceedings concerned the use by neighbours of property rights in accordance with Maltese law, and therefore a right of a civil character

according to both domestic law and the Court's case-law (see *Ferrazzini*, cited above, § 27, and *Zander v. Sweden*, 25 November 1993, § 27, Series A no. 279-B). The purpose of the injunction was to determine, albeit for a limited period, the same right as the one being contested in the main proceedings, and which was immediately enforceable. It follows that the injunction proceedings in the present case fulfil the criteria for Article 6 to be applicable and no reasons have been established by the Government to limit the scope of its application in any respect (see paragraph 86 above).

88. The Court observes that the applicant's complaint concerned appeal proceedings which ended with a judgment of 5 February 1993, at a time when the merits of the main claim had already been determined by a judgment of 6 March 1992. Consequently, the Court is aware that at the time of the contested judgment the dispute at issue had actually been resolved. However, in 1990, when the proceedings were instituted, the merits of the claim had not yet been determined, and Article 6 was, in principle, applicable as has been established above. The Court sees no reason why Article 6 should not have continued to apply to those same proceedings at a later stage. Moreover, it notes that the continuation of those proceedings was not due to any fault on the part of Mrs M. since it was Mr F. who appealed.

89. It follows that Article 6 is applicable to the proceedings complained of and that the Government's objection must therefore be dismissed.

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

A. The Chamber's conclusion

90. The Chamber was not persuaded that there was sufficient evidence that the Chief Justice displayed personal bias. However, it found that the close family ties between the opposing party's advocate and the judge sufficed to justify objectively the applicant's fears that the presiding judge lacked impartiality and that the facts of the present case did nothing to dispel the applicant's concerns. It therefore found a violation of Article 6 § 1 (impartiality of tribunal) and held it unnecessary to examine separately the complaint regarding the equality-of-arms principle.

B. The applicant's submissions

91. The applicant submitted that the present case reflected both subjective and objective bias on the part of the Chief Justice, contrary to Article 6 of the Convention. 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. His bias was evident from the incident of

12 October 1992, which left both the other judges on the panel speechless, as well as from the final judgment. The latter judgment found against Mrs M. and ordered the removal from the records of a report drawn up by the judicial assistant which had been in favour of Mrs M. and made reference to her legal counsel's actions *vis-à-vis* the brother of the Chief Justice (see paragraph 20 above). Indeed, since the personal impartiality of a judge was presumed until there was proof to the contrary, the applicant had had no reason to request the judge's withdrawal until the above events occurred. However, the Chief Justice should have known that he himself would have brought up the issue related to his brother and should therefore have withdrawn of his own motion. Moreover, the applicant opined that the Chief Justice's behaviour during the incident and the sibling relationship were not separate issues but reflected two sides of the same coin.

C. The Government's submissions

92. The Government submitted that no issue as to impartiality arose in the present case. Had legal counsel been concerned about the alleged bias, the obvious course of action would have been to request the judge to withdraw, which he had not done. On the contrary, legal counsel had accepted that the incident had been defused after meeting the Chief Justice in chambers. Indeed, at the domestic level the applicant had not based his allegation of a lack of fair hearing, on grounds of the alleged denial of his right to make submissions, on the family relationships of the Chief Justice; that connection had only been made before this Court. Moreover, the Court of Appeal judgment did not disclose any bias on the part of the Chief Justice and even if it did, this could not give rise to *ex post facto* concerns. The Court of Appeal was impartial within the meaning of Article 6 § 1 of the Convention notwithstanding the Chief Justice's family ties with the lawyers of Mrs M.'s opponent.

D. The Court's assessment

1. General principles

93. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition,

offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, 24 February 1993, §§ 27, 28 and 30, Series A no. 255-A, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

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

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

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

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

decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

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

99. Moreover, in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation (see *Piersack v. Belgium*, 1 October 1982, § 30 (d), Series A no. 53). 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*, cited above, § 27). The Court will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see, *mutatis mutandis*, *Pescador Valero v. Spain*, no. 62435/00, §§ 24-29, ECHR 2003-VII).

2. Application to the present case

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

101. The Court is not persuaded that there is sufficient evidence that the Chief Justice displayed personal bias. It therefore prefers to examine the

case under the objective impartiality test which provides for a further guarantee.

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

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

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

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. 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. Damage

1. The Chamber judgment

107. The Chamber considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

2. The parties' submissions

108. The applicant maintained his claim of 5,000 euros (EUR) for non-pecuniary damage suffered.

109. The Government submitted that there were no reasons to revise the Chamber's conclusion.

3. The Court's decision

110. The Grand Chamber agrees with the Chamber that in respect of the distress allegedly caused in the circumstances of the present case 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*, 24 September 1997, § 64, *Reports* 1997-V).

B. Costs and expenses

1. The Chamber judgment

111. The Chamber rejected the costs claimed for the proceedings before the first-instance and appeal courts, since they were not incurred to prevent or redress the violations found. It further rejected the sums claimed for professional legal fees for the domestic constitutional proceedings because the applicant had failed to prove that these had actually been incurred. It considered however that the applicant had incurred some costs, both at the national and at the European level, in order to put right the violation of the Convention and awarded the applicant EUR 2,000 for the costs incurred before the domestic courts and for the proceedings before it.

2. The parties' submissions

112. The applicant claimed EUR 1,177 for the proceedings before the Chamber, including EUR 850 for written pleadings, EUR 250 for translation of documents and EUR 77 for administrative costs, and EUR 2,193 for the proceedings before the Grand Chamber, including EUR 850 for written submissions, EUR 350 in connection with the preparation of the legal aid request, EUR 300 for preparation of the address to the Grand Chamber, EUR 250 for translation of written pleadings, EUR 300 for the appearance at the oral hearing and EUR 143 for administrative costs.

113. The Government submitted that the amount claimed for the proceedings before the Chamber was less than that awarded by the Chamber and the amount claimed for the proceedings before the Grand Chamber was excessive and various items constituted double billing.

3. The Court's decision

114. The Grand Chamber notes that the award of the Chamber covered the costs and expenses of the domestic proceedings and those of the Convention proceedings up to the Chamber judgment, and, accordingly, confirms the award of EUR 2,000 made by the Chamber.

115. In respect of the costs and expenses for the proceedings before the Grand Chamber, the Court reiterates that according to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the above criteria and the information in its possession, notably the fact that the applicant did not submit any evidence substantiating the claims and the absence of details as to the number of hours worked and the rate charged per hour, the Court is not convinced that all the costs incurred in the Grand Chamber proceedings were necessarily incurred and were reasonable as to quantum. Taking into account the sum of EUR 1,854.86 in legal aid paid by the Council of Europe in respect of the Grand Chamber proceedings, the Court does not make an award under his head.

116. Consequently, the Court confirms the award of EUR 2,000 under the head of costs and expenses for proceedings before the Chamber.

C. Default interest

117. The Court considers it appropriate that the default interest rate 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. *Dismisses* by eleven votes to six the preliminary objections submitted by the Government;

2. *Holds* by eleven votes to six that there has been a violation of Article 6 § 1 of the Convention in respect of the impartiality requirement;

3. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint concerning Mrs M.'s right to make submissions;

4. *Holds* by eleven votes to six
   (a) that the respondent State is to pay the applicant, within three months, EUR 2,000 (two thousand euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 October 2009.

Michael O'Boyle
Deputy Registrar

Jean-Paul Costa
President

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

(a) joint dissenting opinion of Judges Costa, Jungwiert, Kovler and Fura;

(b) partly dissenting opinion of Judges Davíd Thór Björgvinsson and Malinverni;

(c) joint concurring opinion of Judges Rozakis, Tulkens and Kalaydjieva.

J.-P.C.
M.O'B.

JOINT DISSENTING OPINION OF JUDGES COSTA, JUNGWIERT, KOVLER AND FURA

(Translation)

There are several reasons why we have not been able to agree with the majority of the Grand Chamber in this case.

1. First of all, Mrs M., the applicant's sister (now deceased), does not appear to us to have incurred a significant disadvantage in this case, which concerned a trivial dispute between neighbours, and respect for human rights did not, in our view, require our Court to examine this case on the merits. Admittedly, Protocol No. 14 (which has been signed and ratified by Malta) has not yet come into force. However, without waiting for the amendment to Article 35 § 3 of the Convention that will be made once this Protocol does come into force, it is surprising that the Court – overburdened as it is with applications – did not consider this application to be inadmissible, particularly as an "abuse of the right of application" within the meaning of Article 35 § 3 *in fine* of the current text. It will suffice to recall how the case originated: it started in 1985 with an injunction being taken out to restrain Mrs M. from hanging her washing out to dry over her neighbour's yard. The Civil Court subsequently made two orders, followed by a judgment; after that, the Court of Appeal gave a judgment, and then Mrs M. lodged a constitutional appeal which her brother – the applicant – took up nine years after it had been lodged, following his sister's death. The Civil Court and the Constitutional Court ruled two and three years later respectively, and, lastly, a Chamber of the European Court of Human Rights, by a majority of four votes to three, declared the application admissible and found a violation of Article 6 § 1 of the Convention. The disproportion between the triviality of the facts and the extensive use – or rather over-use – of court proceedings is an affront to good sense, especially as serious human rights violations subsist in a number of States Parties. Is it really the role of our Court to determine cases such as this?

2. Next, we are not at all convinced that the applicant can be considered to have victim status. In this respect we fully agree with the very well argued opinion of our colleagues, Judges Davíd Thór Björgvinsson and Malinverni.

Whatever the importance of sibling ties, we do not see any sufficient interest on the part of the applicant in lodging an application with the Court alleging impartiality of the domestic courts fourteen years after Mrs M.'s death. We are verging on an *actio popularis* here. In this respect too there is an element of abuse of the right of petition because even if impartiality, which is a fundamental plank of the right to a fair trial, is a matter of general interest, Mr Micallef cannot rely on it without having personally sustained prejudice. Moreover, the European Court of Human Rights, which does not

have the power to deliver opinions on its own initiative, has always taken care to rule *in concreto* and not decide legal issues in the abstract.

3. We will pass over the Government's preliminary objection regarding the failure to exhaust domestic remedies, debatable though it is.

4. However, we cannot find Article 6 § 1 applicable in the present case. It is clearly not applicable under its criminal limb. As regards its civil limb, we entirely agree with the view expressed in the dissenting opinion annexed to the Chamber judgment (opinion of Judge Bratza, joined by Judges Traja and Hirvelä). In substance, we find that the Grand Chamber stretches the notion of a dispute over civil rights and obligations to an almost unlimited degree and places undue weight on the decision in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II), which was confined to extending the applicability of Article 6 § 1 to disputes involving civil servants, thus reversing the decision in *Pellegrin v. France* (([GC], no. 28541/95, ECHR 1999-VIII – see paragraph 61 of the judgment in *Vilho Eskelinen and Others*, cited in point 11 of the above-mentioned dissenting opinion of Judge Bratza).

We have also observed the following procedural anomaly. In the present *Micallef* case the Civil Court gave a judgment *on the merits* (and not in interlocutory proceedings) on 6 March 1992. In that judgment the court recognised the merits of the complaints made by the neighbour, Mr F., and awarded costs against Mrs M. The latter never appealed against that judgment, which accordingly became final. Article 6 § 1 could have been found to be applicable to those proceedings, but by preferring to continue the proceedings relating to the *interlocutory* application, Mrs M., and subsequently the applicant – her brother – chose to pursue proceedings which, in our view, did not concern a dispute over civil rights or obligations and, in any event, did not settle it. As our colleague, Judge Bratza, explained, proceedings relating to interim orders should only very exceptionally attract the protection of Article 6 § 1 because this provision requires the court to *determine* civil rights (décide *d'une contestation* in French). This was not the case here. This argument supplements and supports those expressed in the excellent dissenting opinion annexed to the Chamber judgment.

5. So – assuming that Mr Micallef can be regarded as a victim (of what?) – Article 6 § 1 is inapplicable. Accordingly, it cannot have been infringed.

PARTLY DISSENTING OPINION OF JUDGES DAVÍD THÓR BJÖRGVINSSON AND MALINVERNI

(Translation)

1. We disagree with the majority in this case in that, in our view, the applicant could not claim to be a victim of a violation of Article 6. According to the case-law, in order to claim to be a victim of a violation of the Convention, a person must be directly affected by the impugned measure (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008).

Admittedly, the Court has always stated that the concept of victim cannot be applied in a rigid, mechanical and inflexible way (see *Karner v. Austria*, no. 40016/98, 24 July 2003, § 25, ECHR 2003-IX). It has, for example, recognised that the cases before it generally also have a moral dimension and that persons near to an applicant may thus have a legitimate interest in seeing to it that justice is done. This holds true all the more if the leading issue raised by the case transcends the individual and the interests of the applicant and may affect other persons.

We also know that the Court may decide, in certain circumstances, that respect for human rights as defined in the Convention and the Protocols thereto requires the Court to continue the examination of the case (Article 37 § 1 *in fine* of the Convention), where it raises an issue of general interest (see *Karner*, cited above, and *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, § 29, 5 July 2005). Such an issue may arise in particular where an application concerns the legislation or a legal system or practice of the respondent State (see *Altun v. Germany*, no. 10308/83, Commission decision of 3 May 1983, Decisions and Reports 36, p. 209, and, *mutatis mutandis*, *Karner*, cited above, §§ 26 and 28).

Regarding more particularly complaints under Article 6, the Court has been prepared to recognise the standing of a relative either when the complaints were of a general interest and the applicants, as heirs, had a legitimate interest in pursuing the application (see *Marie-Louise Loyen and Bruneel*, cited above, § 29, and, conversely, *Biç and Others v. Turkey*, no. 55955/00, § 23, 2 February 2006), or on the basis of the direct effect on the applicant's patrimonial rights (see *Ressegatti v. Switzerland*, no. 17671/02, § 25, 13 July 2006).

2. It is mainly on the basis of the foregoing considerations that, like the Chamber, the majority of the Grand Chamber held that the applicant had standing to lodge the application with the Court (see paragraphs 49-51 above).

3. We would point out, for our part, that even if, in assessing the applicant's victim status, it takes account of the fact that the applicant, as in this case, was a party to the domestic proceedings, the Court interprets the

concept of victim autonomously (see *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI).

4. In the present case the direct victim, Mrs M., died during the constitutional proceedings at domestic level.

In assessing the victim status of an applicant in the event of the death of the direct victim, the case-law makes a distinction according to whether the death occurred *before* or *after* the application was lodged with the Court.

(a) Where the direct victim has died *after* the application was lodged with the Court, the latter normally grants the members of the victim's family leave to pursue the application, on condition that they have a sufficient interest.

Accordingly, in of *Malhous v. the Czech Republic* ((dec.) [GC], no. 33071/96, ECHR 2000-XII), the Court recognised the victim status of the applicant's nephew, who had sought leave to pursue the application lodged with the Court by the applicant, on the ground that the latter had designated his nephew as universal heir of his estate and that there were prospects of his being eventually recognised as such, in which case at least part of the applicant's estate would accrue to him.

Similarly, in *Dalban v. Romania* ([GC], no. 28114/95, ECHR 1999-VI) the Court recognised the victim status of the applicant's widow, who had merely pursued the proceedings instituted before the Court by her husband before he died.

(b) The situation is different, however, where the direct victim has died *before* having lodged an application with the Court. Thus, in *Fairfield v. the United Kingdom* ((dec.) no. 24790/04, ECHR 2005-VI), the Court found that the daughter and executors of a person who had died – the application had been lodged in that person's name after his death – did not have victim status even though the executors had been granted leave to pursue the appeal at domestic level.

An analysis of the case-law shows that where the direct victim has died *before* the application was lodged with the Court, the latter will only very exceptionally recognise the members of the victim's family as having victim status. This will be the case where, for example, the very nature of the alleged violation has prevented the direct victim from asserting his or her complaints in person. Thus the members of the family of a person missing and presumed dead have standing to rely on Article 2.

Such will also be the case where an applicant is himself affected by what he considers to be the adverse consequences of the alleged violation. In *Ressegatti* (cited above, § 25), the Court held that the alleged violation of the right to a fair trial had had a direct effect on the applicants' patrimonial rights given that, by virtue of their capacity as heirs, the judgment had become binding on them and that, by virtue of the *res judicata* principle, they could not obtain any further decision in the same case.

5. In our opinion, the above-mentioned conditions were not fulfilled in the present case. As the concept of victim is an autonomous one, it is irrelevant, in our view, that the domestic courts did not reject the application lodged by the applicant with a view to intervening in the proceedings in his capacity as brother and heir of the complainant or that they did not refuse to rule on his application.

While it is true that the legal issue raised in the present case concerned the proper administration of justice and could be considered to constitute a matter of general interest, it did not, in our view, do so to the point of extending the concept of victim to such a degree. It is worth pointing out in this connection that in its judgment of 29 January 2004 the Civil Court dismissed Mrs M.'s claim as frivolous and vexatious (see paragraph 23 above). As the Court rightly stated in its decision in *Fairfield*, Article 34 does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention or permit individuals to complain against a law.

Nor is the present case comparable to the *Ressegatti* case, because in this case the applicant had to pay only the costs of the proceedings instituted by his sister.

6. Lastly, it is debatable whether the applicant could still legitimately rely on a *current* interest seeing that on 6 March 1992 the court having jurisdiction to try the merits of the civil action brought by Mr F. found against Mrs M. and that, as no appeal had been lodged, that decision became final on 24 March 1992 (see paragraph 14 above).

7. This is where our disagreement with the majority ends. Aside from that, we approve this judgment and welcome the development of the case-law that it inaugurates, in so far as it extends the application of Article 6 to interim measures including injunctions (see paragraphs 78-89 above).

JOINT CONCURRING OPINION OF JUDGES ROZAKIS, TULKENS AND KALAYDJIEVA

While we are in agreement with the reasoning and the conclusions reached by the majority in the judgment, regretfully we have to contest a statement made by the Court in its judgment which is reflected particularly in paragraph 83 and deals with the "new approach" to be followed regarding the compatibility *ratione materiae* of interim measures of protection with Article 6 of the Convention.

In determining the question whether proceedings concerning interim measures of protection fall within the ambit of the protection of Article 6, in its civil limb, the Court rightly concludes that "[n]ot all interim measures determine civil rights and obligations", and hence the guarantees of Article 6 are not applied indiscriminately to all cases where interim measures are at stake. Paragraph 83 of the judgment states that certain conditions must be fulfilled before the Court will decide that the rights and obligations in question attract the protection afforded by Article 6.

We fully agree with the finding of the Court, as stated in paragraph 85 of the judgment:

> "... the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable."

Yet that general and well-considered position seems to be contradicted by the position of the Court enunciated in paragraph 84 of the judgment, which precedes the general statement in paragraph 85, and provides:

> "[In order for Article 6 to be applicable in a case concerning an interim measure], the right at stake in both the main and injunction proceedings should be 'civil' within the autonomous meaning of that notion under Article 6 of the Convention ..."

That means, in other words, that if proceedings concerning interim measures refer to a matter which is clearly *civil*, but the main proceedings concern issues which, by themselves, are not civil – even according to the broad, autonomous interpretation that the Court has given to the concept of "civil" – these interim proceedings are not covered by the protection of Article 6 of the Convention.

Is this restrictive approach, taken at a time when a change is being made to the case-law on the matter, the correct approach?

To our mind, it is not, particularly if one takes into account that despite the generous and extensive interpretation given to the concept of "civil rights and obligations", as a result of which proceedings not considered by the internal orders of the Contracting States as "civil" today enjoy the guarantees of the Convention, there are still certain categories of proceedings that are entirely excluded from that protection according to our

present case-law. Why, by imposing this undesirable condition, do we have to exclude from the protection of Article 6 – sometimes, as the Court has concluded, definitively – interim-measures proceedings which by their nature determine "civil rights and obligations"? What is the *ratio* of such a condition, and what real interest does it serve?

Our position is clear: if it is established that an interim measure effectively determines a civil right and obligation, then the measure should fall under the protection of Article 6, irrespective of the nature of the main proceedings. Since we accept that interim measures can determine such rights and obligations – sometimes with grave repercussions on the person who is affected by them – the existence of an independent and impartial tribunal, together with the guarantees of Article 6, should accompany the administration of justice.