QORTI CIVILI PRIM’ AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF MARK CHETCUTI LL.D.

Illum l-Erbgha, 14 ta’ Gunju 2017

Numru 3

Rikors Nru. 70/2015

Maria Rosaria Fenech armla ta’ John u wliedhom
Karen mizzewga Lagana u Audrey mizzewga Mashburn

vs

Tabib Principali tal-Gvern (Sahha Pubblika)
fil-kwalita rapprezentattiva tieghu;
Avukat Generali

Il-Qorti,

Rat ir-rikors tar-rikorrenti tal-15 ta’ Settembru 2015 li jghid hekk:

1. Illi r-rikorrenti huma l-familjari tal-mejjet John Fenech li miet fit-8 ta’ Settembru tas-sena 2011, u dan kawza ta' falliment respiratorju u asbestosis (vide certifikat tal-mewt taI-imsemmi John Fenech - Dok. 1);

2. IIli Maria Rosaria Fenech tigi mart I-imsemmi mejjet John Fenech mentri Karen u Audrey Anne huma wliedhom (vide certifikat tat-twelid tar-rikorrenti Karen u Audrey Anne – Dok. 2 u 3);

3. IIli I-imsemmi mejjet John Fenech miet intestat u l-eredi tieghu huma r-rikorrenti kollha (vide certifikat ricerka testmenti – Dok. A);

4. IIli l-imsemmi John Fenech kien jahdem bhala Fitter (Marine & Heavy Machinery) mal-Malta Drydocks Corporation; Dan kien l-uniku impjieg tieghu (vide 'employment history' tal-ETC anness u mmarkat Dok. 5);

5. Illi matul il-perjodu li John Fenech dam hekk impjegat l-asbestos kien "staple material" fl-imsemmija korporazzjoni u kien jintuza f'ammonti kopjuzi minghajr l-ebda kontrol effettiv;

6. Illi ilu ghal ghexieren shah ta' snin maghruf li l-esposizzjoni ghall-asbestos tirreka dannu serju ghal sahhet il-bniedem, twassal ghal mard serju respiratorju, u tista' wkoll tikkaguna l-mewt;

7. Illi minkejja tali gharfien, l-awtoritajiet tas-sahha, il-Ministeru li tahtu kienet taqa' d-direzzjoni u l-kontroll tat-tarznari, id-Dipartiment tal-Impjiegi u Relazzjonijiet Industrijali naqsu milli jipprovdu lil John Fenech bi protezzjoni adegwata biex jilqghu ghall-hsara ikkagunata mill-asbestos, u infatti John Fenech miet minhabba tali esposizzjoni;

8. Illi hadd minn dawk imsemmija fil-paragrafu precedenti ma informa lill-istess John Fenech bl-effetti nocivi involuti mill-esposizzjoni ghall-asbestos;

9. Illi kien biss wara lir-rikorrenti u l-mejjet missierhom bdew jisimghu bil-mard u mwiet ikkagunati mill-asbestos ta' whud mill-kollegi ta' missierhom, li saru konxji tal-effetti nocivi tal-esposizzjoni ghall-asbestos;

10. Illi tali gharfien kien gradwali u maghruf minghajr l-intervent tal-entitajiet fuq indikati li kellhom l-obbligu jissuplixxu tali informazzjoni;

11. Illi l-esposizzjoni ghall-asbestos u l-effetti tieghu affettwat b'mod negattiv il-kwalita tal-haja tar-rikorrenti li gew imcahda prematurament minn presenza sinifikanti hafna f'hajjithom minhabba marda ingustament u intortament kontratta minnu;

12. Illi ghalhekk jissodisfaw il-kriterji biex ikollhom locus standi bhala vittmi, u dan, ai termini tal-artiklu 34 tal-Kovenzjoni Ewropea dwar id-Drittijiet tal-Bniedem applikabbli f'Malta tramite l-Kap. 319 tal-Ligijiet ta' Malta;

Ghaldaqstant ghall-fatti u ghar-raguni fuq premess, u ghal dawk kollha li jistghu jirrizultaw matul il-procedura odjerna, ir-rikorrent jitlob lil din l-Onorabbli Qorti tiddikjara li fil-konfront individwali tar-rikorrent inkiser gie vjolat:

1. Id-dritt ghall-protezzjoni tal-hajja, u li l-hajja ta' individwu ma titqieghedx f'periklu bla bzonn, ai termini tal-artikolu 33 tal-Kostituzzjoni ta' Malta, u tal-artikolu 2 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem, applikabbli ukoll lokalment via l-Kap. 319 fuq gia riferit;

2. Id-dritt ghar-rispett tal-hajja privata u tal-familja tal-individwu, ai termini tal-artikolu 8 tal-istess Konvenzjoni Ewropea, applikabbli wkoll lokalment via l-Kap. 319 fuq gia riferit;

3. Id-dritt ghar-rispett tal-hajja privata fit-termini tal-paragrafu precedenti pero f'dak li ghandu x'jaqsam mad-dritt ghall-informazzjoni dwar perikli marbutin mal-asbestos;

4. Tikkwantifika kumpens xieraq bhala rimedju ghal ksur tad-drittijiet fuq indikati jew liema minnhom fil-konfront tar-rikorrenti individwalment;

5. Tillikwida dan l-ammont ta' kumpens;

6. Tordna li l-ammont hekk likwidat bhala rimedju pekunjarju jithallas lir-rikorrenti individualment;

7. Tordna li jigu rifuzi lil Maria Rosaria Fenech l-ispejjez konnessi mal-funeral ta' zewgha u cioe euro 1,546.82 u dan in linea ta' damnum emergens skond il-Kap. 16 (vide Dok. 6);

Rat ir-risposta tal-intimati li tghid hekk:

Illi preliminarjament jigi rilevat li l-ilmenti konvenzjonali tar-rikorrenti ghall-perjodu ta' qabel it-30 ta' April 1987 ma jistghux jigu mistharrga minn din l-Onorabbli Qorti a sensu tal-artikolu 7 tal-Kap. 319 tal-Ligljlet ta' Malta;

Illi fil-mertu u minghajr pregudizzju ghas-suespost, l-esponent jlrrespingu l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti stante li huma infondati, u dan ghas-segwenti ragunijiet:

Illi fl-ewwel lok, ir-rikorrenti ghandhom igibu prova li John Fenech kien fil-fatt espost ghal asbestos waqt li kien jahdem bhala Fitter (Marine & Heavy Machinery) mal-Malta Drydocks Corporation u li l-falliment respiratorju u asbestosis kienu l-konsegwenza u l-kawza unika tal-fatt li hu kien hekk espost;

Illi fit-tieni lok jinghad li hadd mill-intimati odjerni ma qieghed il-hajja tar-rikorrenti fil-periklu jew b'xi mod cahhadhom mid-dritt ghal hajjithom;

Illi ghalhekk mhemm l-ebda ksur tal-artikolu 33 tal-Kostituzzjoni ta' Malta u tal-artikolu 2 tal-Konvenzjoni Ewropea de quo;

Illi fit-tielet lok, il-fatt li John Fenech miet kawza ta' falliment respiratorju u asbestosis ma jitqiesx li jikkostitwixxi x’interferenza mill-intimati fil-hajja privata jew familjari tar-rikorrenti, liema hajja tista' tibqa' tigi ezercitata f'kull hin;

Illi la l-artikolu 8 u lanqas ebda artikolu iehor fil-Konvenzjoni Ewropea u fil-Kostituzzjoni ta' Malta ma jistabilixxi xi dritt fundamentali ta' informazzjoni dwar perikli assocjati mal-asbestos jew ma' kwalunkwe materjal iehor kif qed jippretendu r-rikorrenti;

Illi ghalhekk mhemm l-ebda ksur tal-artikolu 8 tal-Konvenzjoni in dizamina;

Illi minghajr hsara ghal dawk suespost, jigi wkoll rilevat li hekk kif il-Gvern Malti sar jaf bir-riskju ta' dan il-materjal, huwa ha dawk il-passi u l-mizuri mehtiega biex jindirizza l-problema tal-asbestos karcinogenu fit-tarzna. Dan billi biddel u ghadda ligijiet biex iwaqqaf l-importazzjoni ta' dan il-materjal filwaqt li l-amministrazzjoni tat-Tarzna provdiet maskri u taghmir protettiv lill-haddiema u gie zgurat li jkun hemm ventilazzjoni adegwata ghaddejja:

Salv eccezzjonijlet ohra jekk ikun il-kaz.

Ghaldaqstant, l-esponent ghar-ragunijet fuq esposti jitolbu bir-rispett li din l-Onorabbli Qorti joghgobha tiddikjara Ii mhemm ebda ksur tad-drittijiet fundamentali tar-rikorrenti u tichad l-allegazzjonijiet u t-talbiet kollha tar-rikorrenti.

Bl-ispejjez.

Rat l-atti u n-noti ta' sottomissjonijiet;

Rat li l-kawza thalliet ghas-sentenza.

Ikkunsidrat

Ir-rikorrenti bhala armla u eredi ta' John Fenech li miet fit-8 ta' Settembru 2011 ta' 73 sena qed jallegaw li fiz-zmien twil li dam impjegat mal-Malta Drydocks mill-1959 sal-1995 kien espost ghal ammonti kopjuzi ta' asbestos li esponewh ghal marda qerrieda li waslitu sal-mewt tieghu. Skond ir-rapport mediku u c-certifikat tal-mewt John Fenech miet minhabba respiratory failure u asbestosis.

Fatti

Skond ix-xiehda tal-Professur Joseph Cacciatolo, kap tad-dipartment tal-medicina fl-Universita, riprodotta minn kawza ohra fuq fatti simili ghal din, jghid li hemm ness ta' kawzalita diretta bejn l-espozizzjoni ghall-asbestos ma' peritoneal mesothelcima , li hu kancer tal-pulmun, pero tista' teffettwa r-riti tal-imsaren, madwar il-qalb u t-testikoli. Dan in-ness ta' kawzalita bejn l-espozizzjoni ghall-asbestos mal-kancer ilu ppruvat xjentifikament mill-1960 mill-British Medical Journal li hu wiehed miz-zewg gurnali principali medici li jinqraw mit-tobba.

Giet ukoll riprodotta x-xiehda ta' Ray Busuttil, supretendent tas-sahha pubblika wkoll mehuda minn kawza ohra fuq fatti simili li qal li informazzjoni dwar l-asbestos u s-sahha pubblika bejn l-1956 u s-sena 2010 ma kien hemm xejn fuq livell nazzjonali u ma kienx hemm direzzjoni dwar l-uzu tal-asbestos in generali.

Maria Rosaria Fenech, armla ta' John Fenech xehdet li zewgha dahal jahdem it-tarzna ta' erbatax-il sena u baqa' jahdem hemm sakemm gie boarded out fl-1995 ta' 57 sena. Gie boarded out peress li kellu problemi f'dahru minhabba n-natura iebsa tax-xoghol tieghu bhala fitter. Ma kellux problemi ohra ta' sahha. Hu miet kawza tal-marda qerrieda konsegwenza ghall-espozizzjoni tieghu ghall-asbestos meta kien jahdem d-drydocks. Il-marda tfaccat f'salt fl-2011 wara li waqa' d-dar u beda jilmenta minn ugiegh f'dahru u qtugh ta' nifs. Miet fi ftit xhur.

Ulied John Fenech ikkonfermaw ix-xiehda ta' ommhom.

Joseph Saliba, policy manager ta' Malta Shipyards fil-Ministeru tal-Infrastruttura f'xiehda wkoll riprodotta minn kawza ohra simili qal li l-ahhar kariga li kellu kien ta' health and safety manager mal-Malta Shipyard li qabel kienet Malta Drydocks. Kien ilu jokkupa l-kariga mill-1993. Xoghlu kien li jiehu hsieb is-sahha u sigurta tal-haddiema. L-asbestos jintuza f'diversi affarijiet bhal insulation, boards u wiring. Fl-investigazzjonijiet li kienu ghamlu fit-Tarzna sabu tlett tipi ta' asbestos, l-aktar hu dak l-inqas nociv pero sabu ftit li hu l-aktar forma ta' asbestos nociva. F'Malta saru konxji dwar il-periklu tal-asbestos fin-nofs tad-disghinijiet, u bil-mod bdew jittestjaw ghal u jigbru l-asbestos minn fejn sabuh fid-Drydocks ghal habta tal-ahhar tad-disghinijiet. L-asbestos tnehha kollu mid-Drydocks u gie esportat b'mod legali ghad-distruzzjoni tieghu. Bhala prekawzjoni wkoll bdew igibu nies apposta biex jittestjaw vapuri li jidhlu t-tarzna ghal xoghol fuqhom sabiex jivverifikaw kellhomx asbestos. It-tarzna hadet ukoll il-prekawzjoni li tiehu l-haddiema ghal check ups l-isptar fejn qabel il-haddiema kienu jinghataw dangerous employment allowance li nqatghet. Zied li meta kien gie mpjegat mat-tarzna fis-sittinijiet, l-asbestos kien jintuza bhala sheeting kontra s-shana. Ghalkemm l-asbestos hu assocjat mat-tarzna ghax jidhlu hafna vapuri, pero jinsab ukoll f'gaskits tal-karozzi, corrugated sheeting u tankijiet tal-ilma fuq il-bejt.

Dr George Peplow kwalifikat fil-kimika analitika li x-xiehda tieghu giet ukoll riprodotta minn kawza ohra qal li l-asbestos hu perikoluz pero f'certi cirkostanzi jista' jkun aktar perikoluz jekk tnehhih minhabba l-fibri li jarmi fl-arja. Hu ghamel diversi konsulenzi fosthom l-isptar St. Luke's. Qal li kien hemm awareness fuq il-periklu assocjat mal-asbestos mill-ahhar tas-sittinijiet pero bhala ligijiet anki internazzjonali dawk waslu

aktar tard, anki barra minn Malta. Fil-bidu tas-sebghinijiet il-prekawzjonijiet li kienu jittiehdu f'Malta kien li jekk tuza l-asbestos tahsel idejk u li toqghod attent ma jigix fuq hwejgek, pero ma kienx hemm sens tal-estent u kejl tar-riskju involut. Dan beda jsir b'mod aktar xjentifiku fid-disghinijiet. L-aktar li jintuza l-asbestos hu fuq il-vapuri bhal insulaturi ghal hot water pipes, partitions bejn bibien bhala fire retardant, pero jintuza wkoll f'affarijiet ohra bhala corrugated sheeting. L-ewwel ligi f'Malta saret fl-2003 biex tipprotegi l-haddiema, ghalkemm fit-tmenijijiet ma setghax jigi importat aktar f'Malta. Ix-xhud spjega li l-fatt li hemm asbestos f'sit, dan mhux necessarjament perikoluz jekk fl-arja ma hemmx livell gholi ta' fibri tal-asbestos. Jekk pero l-asbestos jigi iddisturbat il-livelli fl-arja ser joghlew.

Eccezzjoni li l-lanjanzi li jirreferu ghal perjodu ta' qabel it-30 ta' April 1987 ma jistghux jigu mistharrga mill-Qorti ai termini tal-artikolu 7 tal-Kap. 319

Din l-eccezzjoni ma ghandhiex mis-sewwa billi l-lanjanza tar-rikorrenti qed tirreferi ghal episodji li veru sabu l-origini taghhom qabel l-1987 pero l-effetti taghhom baqghu oltre l-1987 sakemm missier ir-rikorrenti miet fl-2006 allegatament kawza tal-asbestos li kien espost ghalih fil-perjodu li kien jahdem mad-Drydocks mill-1959-1982. (Ara **Raymond Cassar Torreggiani et vs Avukat General et**, Kost 29/04/2016).

Mertu

Il-mertu tal-azzjoni hu wiehed semplici. Ir-rikorrenti qed jallegaw li l-marda ta' John Fenech cioe kancer tal-pulmun kien ir-rizultat dirett tal-fatt li hu kien espost ghal diversi snin qabel mewtu ghal kontaminazzjoni minn asbestos fil-post tax-xoghol minghajr ma ttiehdu prekawzjonijiet mill-awtoritajiet tas-sahha biex jipprevjenu tali mard.

Irrizulta mill-provi illi John Fenech dam aktar minn 30 sena jahdem id-Drydocks, entita pubblika tal-Gvern, fejn kien hemm materjal tal-asbestos prezenti u li sa mis-sittinijiet kien hemm informazzjoni medika dwar il-periklu assocjat mal-asbestos u ghal persuni li jigu esposti ghalih. Saret ukoll il-prova illi l-awtoritajiet tas-sahha bdew

jiehdu mizuri preventivi fid-disghinijiet, cioe ftit qabel ma John Fenech irtira mix-xoghol.

Gie stabbilit mix-xiehda tal-Professur Cacciatolo, kap tad-dipartiment tal-medicina fl-universita li hemm ness dirett bejn il-marda tal-kancer u l-espozizzjoni tal-bniedem ghall-asbestos. John Fenech miet kawza ta' din il-marda kif juri c-certifikat tal-mewt u l-inkartament tal-isptar esebit. Hu beda juri sintomi avvanzati ta' din il-marda fl-2011 kif jidher mill-istess notamenti u miet fl-istess sena. Ghalkemm hu minnu illi l-marda tfaccat b'mod accertat klinikament snin wara li John Fenech spicca mill-impjieg pero n-ness dirett tal-marda max-xoghol tieghu fid-Drydocks ma giex meghlub bi prova kuntrarja mill-intimati, nonostante it-trapass taz-zmien. In oltre jigi rilevat li x-xoghol ta' John Fenech kien esklussivament fit-tarzna u ma ngiebet ebda prova li seta' kkontratta l-marda banda ohra jew minn sors iehor.

Ir-rikorrenti jilmentaw illi minhabba l-marda li biha miet John Fenech kien hemm vjolazzjoni tal-art. 33 tal-Kostituzzjoni u tal-art. 2 u l-art. 8 tal-Konvenzjoni:

> 33. (1) Hadd ma jista' jigi pprivat mill-hajja tieghu intenzjonalment hlief fl-esekuzzjoni tas-sentenza ta' qorti dwar reat kriminali skont il-ligi ta' Malta li tieghu jkun gie misjub hati.
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> 2. (1) Id-dritt ghall-hajja ta' kulhadd ghandu jigi protett b'ligi. Hadd ma ghandu jigi ipprivat mill-hajja tieghu intenzjonalment hlief fl-esekuzzjoni tas-sentenza tal-qorti wara li jigi misjub hati ta' delitt li dwaru tkun provduta mil-ligi din il-piena
>
> 8. (1) Kulhadd ghandu d-dritt ghar-rispett tal-hajja privata tieghu u tal-familja tieghu ...

Il-Qorti tirreferi ghas-sentenza tal-Prim Awla Sede Kostituzzjonali fl-ismijiet **Mary Grace Farrugia et vs Tabib Principal ital-Gvern (Sahha Pubblika) et** deciza fil-31 ta' Jannar 2017 fejn irreferiet ghal kaz tal-ECHR **Brincat vs Malta** f'aktar dettall. Il-Qorti tqis illi ezami tas-sentenza tal-kaz Brincat hargu s-segwenti principji:

> 79. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of unjustified force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, L.C.B. v. the United Kingdom, 9 June 1998, § 36, Reports 1998-III, and Paul and Audrey Edwards, cited above, § 54).

80. This obligation is construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities which by their very nature are dangerous, such as the operation of waste-collection sites (see Öneryıldız v. Turkey [GC], no. 48939/99, §71, ECHR 2004-XII) or nuclear testing (see L.C.B. cited above, § 36) or cases concerning toxic emissions from a fertiliser factory (see Guerra and Others v. Italy, 19 February 1998, §§ 60 and 62, Reports 1998-I, although in this case the Court found that it was not necessary to examine the issue under Article 2, it having been examined under Article 8).

81. The Court considers that the same obligations may apply in cases, such as the present one, dealing with exposure to asbestos at a workplace which was run by a public corporation owned and controlled by the Government.

106. Thus, as to whether the Maltese Government knew or ought to have known in the early seventies, the Court must rely on other factors, most evident amongst them being objective scientific research, particularly in the light of the domestic context. The Court takes account of the list, submitted by the applicants, which contains references to hundreds of articles or other publications concerning the subject at issue published from 1930 onwards - many of them taken from reputable British medical journals. The Court observes that medical studies at the then Royal University of Malta were modelled on, and followed closely upon, the corresponding United Kingdom system, with many graduates in medicine continuing their studies in England and Scotland. Particularly in view of this situation, even accepting the Government's argument - that is, that information was at the time not as readily available as it is today - it is inconceivable that there was no access to any such sources of information, at least, if by no one else, by the highest medical authorities in the country, notably the Chief Government Medical Officer and Superintendent of Public Health (as provided for in the, now repealed, Department of Health (Constitution) Ordinance, Chapter 94 of the Laws of Malta, see paragraph 42 above). In fact, according to Maltese law it was precisely the duty of the Superintendent of Public Health to remain abreast of such developments and advise the Government accordingly. The Court, further, observes that it has not been submitted that there had been any specific impediment to access the necessary information. Furthermore, the Government failed to rebut the applicants' assertion with any signed statement by a medical expert or authority, who could have attested that the medical professionals in the country were, in or around the 1970s, unaware of these worrying medically related findings at the time.
Moreover, the Pellicano judgment by the Commercial Court (see paragraph 35 above) is in itself an implicit acknowledgement by a domestic court that in the years preceding Mr Pellicano's death in 1979 the authorities knew or ought to have known of the dangers of working with asbestos and that they had failed to provide adequate health and safety measures in that respect.
Against this background, the Court concludes that for the purposes of the present case, it suffices to consider that the Maltese Government knew or

ought to have known of the dangers arising from exposure to asbestos at least as from the early 1970s.

107. As to the fulfillment of the ensuing obligations, as stated above, the respondent Government claimed that as soon as they had become aware of the dangers associated with asbestos, laws were enacted to protect employees from these dangers and this as early as 1987 by means of the Work Place (Health, Safety and Welfare) Regulations. It follows that, by Government's admission, up until 1987 no positive action was taken in the nearly two decades (four years in the case of Mr. Attard who left the MDC in 1974) during which the applicants had been exposed to asbestos.

111. Consequently, from the information provided, it is apparent that from the mid-1980s to the early 2000s, when the applicants (except for Mr Attard) left the MDC, the legislation was deficient in so far as it neither adequately regulated the operation of the asbestos-related activities nor provided any practical measures to ensure the effective protection of the employees whose lives might have been endangered by the inherent risk of exposure to asbestos.

Tajjeb jinghad illi d-decizjoni ta` Brincat (op. cit.) kienet tittratta kwistjoni identika ghal din tal-lum fejn l-ECHR ikkonkludiet li kien ippruvat ness ta` kawzalita` sufficjenti in kwantu malignant mesothalioma hija maghrufa bhala kancer rari assocjat ma` esposizzjoni ghal asbestos. Inghad hekk :-

83. The medical certification indicated that Mr Attard's death was likely to be a result of asbestos exposure; malignant mesothelioma is known to be a rare cancer associated with asbestos exposure. The Court observes that it has not been contested or denied that Mr Attard worked at Malta Drydocks for more than a decade (1959-1974), during which time he was repeatedly exposed to asbestos. Neither has it been shown that Mr Attard could have been contaminated elsewhere or that he was affected by other factors that could have led to the disease. In these circumstances, and given that Mr Attard has died as a result of his cancer, the Court considers that Article 2 is applicable to the complaint brought by the applicants in application no. 62338/11 relating to the death of the said Mr Attard.

Fil-kaz ta` Brincat (op. cit.) inghad ukoll:-

85. However, in the context of dangerous activities, the scope of the positive obligations under Article 2 of the Convention largely overlaps with that of those under Article 8 (see Öneryıldız, cited above, §§ 90 and 160). The latter provision has allowed complaints of this nature to be examined where the circumstances were not such as to engage Article 2, but clearly affected a person's family and private life under Article 8 (see López Ostra v. Spain, 9 December 1994, Series A no. 303-C and Guerra and Others, cited above).

Il-konkluzjoni kienet illi fil-kaz tal-haddiema li mietu bil-mesothelioma l-ilment taghhom kellu jigi trattat fil-kuntest ta` vjolazzjoni tal-Art 2 mentri fil-kaz tal-

> haddiema illi mardu bil-mesiothelioma l-ilment kellu jigi trattat biss fl-ambitu tal-Art 8.

Din il-Qorti tikkondividi l-linja traccjata mill-ECHR u sejra tqis il-mewt ta' John Fenech, ghar-ragunijiet fuq esposti, bhala vjolazzjoni tal-art. 2 mhux tal-art. 8.

In kwantu ghall-artikolu 33 tal-Kostituzzjoni fil-kawza **James Agius vs Avukat Generali et**, deciza mill-Qorti Kostituzzjonali fl-14 ta' Dicembru 2015, intqal hekk:

> L-artikolu 33 tal-Kostituzzjoni "Ir-rikorrenti qed tallega ksur ta' dan l-artikolu flimkien malartikolu 2 tal-Konvenzjoni. Il-kliem tal-artikolu 33 mhuwiex ezattament l-istess bhat-test tal-artikolu 2. L-artikolu 2 jibda bis-sentenza "Everyone's right to life shall be protected by law". Dan il-principju assolut mhuwiex rispekkjat fl-artikolu 33 li jinkorpora biss it-tieni frazi tal-artikolu 2. Wiehed jista' jirraguna li din il-frazi thalliet barra appozitament u ghalhekk l-artikolu 33 jitkellem biss dwar indhil dirett mill-Istat.
> Izda dan l-artikolu ghandu jinghata l-istess applikazzjoni bhall-artikolu 2 tal-Konvenzjoni ghal diversi ragunijiet. L-ewwel nett hu pacifiku li rresponsabbilita guridika temani mhux biss fuq att pozittiv u dirett, imma anke minn att ta' omissjoni fejn persuna tonqos milli taghmel dak li hu mistenni ragonevolment minnha. Att ta' omissjoni jista' jkun leziv daqs att ta' kommissjoni. "Inoltre, l-obbligazzjoni sancita bl-artikolu 33 hija wahda essenzjalment tal-protezzjoni tal-hajja minn azzjonijiet illegali u arbitrarji tal-Istat. Dan jirrikjedi li l-Istat ghandu jkun marbut mhux biss milli jindahal fit-tgawdija ta' tali dritt imma anke li jiehu mizuri pozittivi biex jassigura t-tharis tad-dritt; altrimenti dan l-artikolu ikun wiehed dghajjef u ineffettiv.

A bazi ta' dawn l-osservazzjonijiet il-Qorti issib li mill-provi prodotti l-mewt ta' John Fenech kienet ta' rizultat ta' ommissjoni serja da parti tal-istat li mhux biss ma aggornax ruhu bil-legislazzjoni mal-gharfien tal-perikli tal-asbestos u l-uzu tieghu izda naqas ukoll li jaghmel rakkomandazzjonijiet pubblici dwar mizuri ta' prevenzjoni u eliminazzjoni tal-uzu f'waqtha ta' din is-sustanza nociva ghas-sahha tal-bniedem. Dan wassal biex John Fenech ghamel snin twal espost ghal dan il-materjal bla ebda hjiel tal-periklu li kien qed jigi espost inkonxjament ghalih, periklu li mill-ahhar tas-sittinijiet kien gia evidenti u rikonoxxut medikament. Il-Qorti ghalhekk taqbel ma' dak li ntqal mill-ECHR fi Brincat vs Malta u dak kunsidrat mill-Qorti Maltija kif fuq riportat u ribadut mill-istess Qorti diversament preseduta fil-kawza **George Spiteri et vs Policy Manager tal-Malta Shipyards et**, deciza fit-23 ta' Novembru 2016.

Kumpens

Stabbilit illi John Fenech miet probabilment kawza tal-kancer assocjat mal-espozizzjoni tieghu ghall-asbestos fi zmien li kien jahdem mat-tarzna, l-eredi tieghu cioe martu u uliedu li kienu vicin tieghu fil-mumenti l-aktar difficli ta' hajtu cioe l-ahhar sena qabel ma miet batew is-sofferenza ta' mara li tara lil zewgha u uliedu li jaraw lil missierhom ibati fl-ahhar ta' hajtu minn marda li originat mill-materal uzat fil-post tax-xoghol tieghu. Il-Qorti tqis li dan mhux kaz fejn id-dikjarazzjoni ta' lezjoni hi rimedju sufficjenti. Il-Qorti tqis illi f'dan il-kaz ghandhom jinghataw danni non prekunjarji ghas-sofferenza lil mart u eredi ta' John Fenech. Il-Qorti taghmel referenza ghaz-zewg sentenzi Maltin gia msemmija aktar il-fuq cioe dak ta' Spiteri u Farrugia u l-kumpens hemm likwidat. Il-Qorti tqis li f'dan il-kaz hemm differenza sostanzjali mill-kawzi l-ohra cioe t-trapass ta' zmien bejn meta John Fenech irtira u meta jidher pruvat li l-marda qerrieda qabdet mieghu cioe l-ahhar sena ta' hajtu. Fil-kawzi l-ohra l-eta tal-persuni milquta kienu fis-sittinijiet u ghalhekk ta' eta pjuttost zghira u f'perjodu fejn il-kapacita lavorattiva u l-kontribuzzjoni familjari attiva kienet ghadha qawwija. Jigi rilevat ukoll illi John Fenech miet ta' 76 sena cioe sittax-il sena wara li irtira u ta' eta avvanzata ghalkemm mhux xjuhija kbira. Dawn il-fatturi jwasslu lil Qorti tikkonkludi illi l-kumpens non pekunjarju ghas-sofferenza subita bil-vjolazzjoni tad-dritt msemmi ghandu jkun ta' €9,000.

Billi dawn id-danni huma ta' natura mhix pekunarji ghal lezjoni tad-dritt fundamentali ma tqis illi hu gustifikat is-seba' talba attrici ghal hlas tal-ispejjez tal-funeral ta' John Fenech bhala danni civili mif mitlub.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' t-talbiet tar-rikorrenti safejn kompatibbli ma' dak deciz fis-sens li ssib li kien hemm lezjoni tal-artikolu 2 tal-Konvenzjoni Ewropea u l-artikolu 33 tal-Kostituzzjoni, u tillikwida favur ir-rikorrenti kumpens ta' €9,000 li ghandu jinqasam ugwalment bejn ir-rikorrenti li ghandu jithallas in solidum bejn l-intimati, u ghal bqija tichad it-talbiet l-ohra tar-rikorrenti.

L-ispejjez ibatuhom l-intimati in solidum bejniethom.

Onor. Mark Chetcuti LL.D.
Imhallef

Anne Xuereb
Deputat Registratur