CIVIL COURT FIRST HALL
(CONSTITUTIONAL JURISDICTION)

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MCKEON

Sitting of Tuesday 27 June 2017

Case no. 3
Application No. 19/13 JZM

1. Patricia Graham
British Passport 707260831

2. James Parsons
Irish PT3712106

3. Richard Cooper
British Passport 801299620

4. Johanna Van` TVerlatt
Dutch Passport NS 5CH9JK7

5. Nigel Hall
British Passport 703242974

6. Margaret Alder
British Passport 761077078

7. Julia Partridge
British Passport 800978954

8. David Pike

British Passport 108200710

9. Bryan Douglas
Irish PC1316947

10. John Wilks
British Passport 205468746

11. Brian Bush
British Passport 029729096

12. John Besford
British Passport 093163442

13. Peter Sellers
British Passport 706199934

14. Elana Bianchi
Italian Passport Y406692

15. Nuot Raschar
Swiss Passport F 2851139

16. Kevin Bryant
British Passport 507014072

17. Marie Poule Wagner
French Passport 12 AV215281

18. Michael Murray
British Passport 706452911

19. John Murgatroyd
British Passport 107244391

20. Howard Hodgson
IPS 801292081

21. Dr Robin Smith-Saville
British Passport 707472998

22. Maria Wiborg
Sweedish Passport No. 34292287

23. Anders Wiborg

Sweedish Passport No. 85599606

24. Reginald Joseph Fitzpatrick
Maltese I.D. 0033588A

25. George Thomas Goodall
Maltese I.D. 0028358A

vs

1. The Attorney General ;

2. The Minister of Finance, the Economy and Investment (as responsible for Enemalta Corporation and the Water Services Corporation) ;

3. The Minister for Resources and Rural Affairs ; and by a note of the 18th November 2014 the Minister for Energy and Health assumed the acts of this case instead of the Minister of Finance, the Economy and Investment, and the Minister for Resources and Rural Affairs ;

4. The Malta Resources Authority ;

5. Enemalta Corporation, and by decree given on the 20th January 2015 the name "Enemalta Corporation" was substituted by the name "Enemalta plc" ;

6. Water Services Corporation

The Court :

I. <u>Introduction</u>

On the 26 February 2013, applicants filed the application in the Maltese language – together with a translation in English.

By decree of the 28 February 2013, service of the application was ordered on respondents, who were granted twenty (20) days to enter a reply.

A hearing of the suit was set for the 26 March 2013.

Following due service, respondents each filed a reply in the Maltese language.

The acts in question were all served on applicants` legal counsel.

At the hearing of the 26 March 2013, applicants requested the Court that proceedings be conducted in English as none were familiar with the Maltese language. As there was no opposition to this request, the Court acceded.

From that moment onwards, proceedings were conducted in English.

II. <u>The application</u>

The English version of the application states as follows –

That the scope of these proceedings is to declare null acts of parliament (precisely regulations that, according to Art 2(1) of Chapter 249 of the Laws of Malta, are deemed as such) on the basis of their being ultra vires of the legislative powers conferred upon Parliament by the Maltese People : Article 65(1) of the Constitution of Malta reads thus :

"Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta`s international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003." ;

Therefore this application is being filed before this Honorable Court in terms of Art. 46(3) of the Constitution of Malta and according to disposition 5 of Subsidiary Legislation 12.09 of the Laws of Malta ;

As in exercise of the powers conferred by articles 20 and 39 of the Enemalta Act, Enemalta, with the approval of the Minister responsible for Enemalta, and with the approval of the Malta Resources Authority and the Minister for Resources and Rural Affairs, or any of the same, a series of regulations were laid on the table of the House of Representatives and, in due course, were published by means of Legal Notices and today form part of the Electricity Supply Regulations (1940) (S.L.423.01) ;

As the said regulations introduced in Malta, as of the 1st October of 2008, a dual-tariff system for the non-commercial use of electricity - denominated as residential and domestic tariffs (see Regulation 36(1) and 36(3) of L.S.423.01). For the purposes of this action, the following is highlighted :

i) Domestic Tariffs, unit per unit, are roughly 30% higher than Residential Tariffs. This results from the First Schedule (Residential Tariffs) and the Third Schedule (Domestic Tariffs) of S.L. 423.01 ;

ii) Primary and Secondary Residences benefit from an Eco Reduction Scheme on the amount due for the consumption of electricity for the period covered in the bill, calculated on a pro rata basis, of 25% on the first 2000 kwh in the case of a single resident, and in the case of multiple residents 25% on the first 1000 kwh and 15% on the subsequent 750 kwh of the relative cumulative annual consumption (First Schedule of S.L. 423.01) whereas a domestic resident does not benefit at all from the said Eco Reduction Scheme ;

As in the European Union the electricity sector is regulated by the same through a series of directives which Member States of the Union are bound to implement ;

As amongst these directives, there is in force Directive 2009/72/EC (`Concerning Common Rules for the Internal Market in Electricity`). The scope

of this Directive is to establish common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements (See Chap. I, Art.1).

As Directive 2009/72/EC distinguishes between a `household customer` which means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities and a `nonhousehold customer` which means a natural or legal persons purchasing electricity which is not for their own household use and includes producers and wholesale customers (see Chap. I, Art. 2, 10 and 11) ;

As Directive 2009/72 obliges Member States to impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers. (see Chap. II. Art. 2, 3);

As Directive 2009/72 obliges Member States to ensure that all household customers, enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non- discriminatory prices. (see Chap. II. Art. 3, 3) ;

As in exercise of the powers conferred on the Minister responsible for the Water Services Corporation, the same Corporation with the approval of the Malta Resources Authority, or any of the same, a series of regulations were laid on the table of the House of Representatives and, in due course, were published by means of Legal Notices and today form part of the Water Supply Regulations (1940) (L.S.423.03) ;

As the said amendments introduced in Malta, as of the 1st of January 2010, a dual-system of tariffs for the non-commercial use of water designated as Kopja Informali ta` Sentenza Pagna 7 minn 35 Qrati tal-Gustizzja residential and domestic tariffs (see Regulation 12(1) u 12(3) respectively of S.L. 423.03). The residential tariff for the consumption of water for each quantity not in excess of 33 m3 is set at €1.47 per m3 whereas the domestic tariff for the consumption of water for each quantity not in excess of 33m3 is set at €2.30 per m3 (see Schedule 1 (residential) and Schedule 3 (domestic) of S.L. 423.03) ;

As Directive 2006/123/EC (On Services in the Internal Market) delineates :

(95) The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient`s nationality or place of residence. It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment.

As Directive 2006/123/EC (On Services in the Internal Market) provides in Section 2, Article 14 :

Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following :

1. discriminatory requirements based directly or indirectly on nationality …

and in Article 20 :

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

As the ultimate effect of this dual-system of water and electricity tariffs for non-commercial use based on the criterion of residency or otherwise of a E.U. national in Malta (created-as aforementioned-by means of S.L.423.01 and L.S. 423.03 respectively) undermines the applicant`s exertion of their rights under Articles 43 and 49 of the TEU and is in violation of the scope of the Directives above-mentioned ;

Let therefore the defendants submit their reasons as to why this Court should not :

Declare null and without effect the dual-tariff system for electricity and water for non-commercial use based on the criterion of residency of a E.U. National in Malta created by means of S.L.423.01 and L.S. 423.03 respectively by tenure of Article 65(1) of the Constitution of Malta and Chapter 460 of the Laws of Malta and in violation of Directives 2009/72, and 2006/123 and Articles 43 u 49 of the TEU, or any thereof ;

The applicants reserve every right at law for reimbursement of payment effected, including legal interest, for their water and electricity bills when the said payments effected were not legally due.

The applicants subpoena the defendants, and request the reimbursement of all expenses and damages incurred in connection with the subject of these proceedings, including legal interest, and including the expenses of the judicial protests filed against any of the defendants to date.

With the application, claimants filed a list of witnesses and a list of documents.

The Court has seen the documents that were filed.

III. The reply of the Attorney General ; the Minister of Finance, the Economy and Investment ; and the Minister for Resources and Rural Affairs

These three respondents filed one reply, common for the three, on the 22 March 2013.

They stated the following in Maltese –

1. Illi fl-ewwel lok u in linea preliminari :

(i) Illi l-azzjoni tar-rikorrenti in kwantu bazata fuq l-Artikolu 46(3) tal-Kostituzzjoni ta` Malta u l-Artikolu 5 tal-Legislazzjoni Sussidjarja 12.09 tal-Ligijiet ta` Malta hija irrita u nulla stante li dawn l-Artikoli japplikaw biss ghall-poter ta` Qorti (li ma tkunx Prim Awla jew Kostituzzjonali) sabiex tibghat riferenza kostituzzjonali lill-Prim Awla tal-Qorti Civili u ma jikkoncedu ebda dritt lil xi parti li taghmel "riferenza kostituzzjonali" hi kif qed jaghmlu rrikorrenti odjerni ;

(ii) Illi kull wiehed mir-rikorrenti ghandu jipprova x`inhu l-interess guridiku tieghu biex jippromwovi l-proceduri odjerni ;

(iii) Illi ghalkemm fl-introduzzjoni tar-rikors promotur ir-rikorrenti jindikaw li l-iskop ta` dawn il-proceduri huwa sabiex jigu attakkati Atti tal-Parlament, effettivament mis-sustanza u mit-talbiet taghhom jidher b`mod car li l-ghan tal-proceduri odjerni huwa li jattakkaw legislazzjoni sussidjarja mahruga bil-poter tal-Ministru koncernat, liema Ministru huwa debitament parti minn din il-kawza – konsegwentement l-esponent Avukat Generali m`huwiex il-legittimu kontradittur ghat-talbiet tar-rikorrenti u ghandu jigi liberat mill-osservanza tal-gudizzju ;

(iv) Illi inoltre, subordinament u bla pregudizzju ghas-suespost, din l-Onorabbli Qorti ghandha tiddeklina milli tezercita l-gurisdizzjoni kostituzzjonali taghha a tenur tal-proviso tal-Artikolu 46(2) tal-Kostituzzjoni stante d-disponibilita` ta` mezzi ohra xierqa ta` rimedju ordinarju li r-rikorrenti ghandhom sabiex jivvantaw il-pretensjonijiet taghhom fosthom dik ta` azzjoni ta` stharrig gudizzjarju quddiem il-Qrati ordinarji, kif ukoll rimedji ohra opportuni kontemplati mill-Kap 387 u l-Kap 423 tal-Ligijiet ta` Malta ;

(v) Illi fi kwalunkwe kaz u bla pregudizzju ghas-suespost minkejja li dawn huma proceduri kostituzzjonali ma hemm ebda ndikazzjoni ta` liema mill-Artikoli 33 sa 45 tal-Kostituzzjoni gew allegatament lezi fil-konfront tarrikorrenti u ghalhekk l-esponenti qeghdin minn issa jirrizervaw id-dritt li jirrispondu ulterjorment wara li r-rikorrenti jiccaraw il-lanjanzi taghhom ;

(vi) Illi wkoll bla pregudizzju ghas-suespost ir-rikorrenti ma specifikawx liema partijiet mil-legislazzjoni sussidjarja 423.01 u 423.03 huma allegatament lezivi tad-drittijiet fundamentali taghhom u f`dan il-kuntest l-esponent qeghdin ukoll minn issa jirrizervaw id-dritt li jirrispondu ulterjorment wara li rrikorrenti jaghmlu din il-kjarifika.

2. Illi fit-tieni lok, fil-mertu, l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt.

3. Illi kemm ir-Regolamenti fuq il-Provvista tal-Elettriku (L.S. 423.01) kif ukoll ir-Regolamenti dwar il-Fornitura ta` l-Ilma (L.S. 423.03) huma pjenament konformi mal-provvedimenti tal-Artikolu 65(1) tal-Kostituzzjoni, mal-Kap 460 tal-Ligijiet ta` Malta, mad-Direttivi 2006/123 u 2009/72 u mal-Artikoli 43 u 49 tat-Trattat tal-Unjoni Ewropea.

4. Illi l-ligi tal-Unjoni Ewropea mkien ma tipprojbixxi r-regolamentazzjoni ta` tariffi. Ghal finijiet tal-kaz odjern jigi fil-fatt rilevat li din ir-regolamentazzjoni saret, u saret b`mod proporzjonali minghajr ebda distinzjoni bejn cittadini tal-Unjoni Ewropea inkluzi dawk Maltin.

5. Illi finalment id-Direttivi citati mir-rikorrenti mkien ma jipprekludu l-uzu ta` tariffi li mhumiex specifikati fid-Direttivi stess.

Ghalhekk u fid-dawl tas-suespost l-allegazzjonijiet u t-talbiet tar-rikorrenti ghandhom jigu michuda bl-ispejjez kontra taghhom. Salvi eccezzjonijiet ulterjuri.

IV. <u>The reply of Enemalta plc</u>

In its reply filed on the 22 March 2013, respondent Enemalta Corporation (later the name changed to Enemalta plc) stated as follows in Maltese –

1. Illi preliminarjament l-azzjoni odjerna hija rrita u nulla stante illi hija msejsa fuq artikoli, senjatament l-artikolu 46(3) tal-Kostituzzjoni u l-artikolu 5 tal-Legislazzjoni sussidjarja 12.09 tal-Ligijiet ta` Malta, li jaghtu poter lill-Qrati hemm definiti sabiex jaghmlu referenza kostituzzjonali u mhux sabiex ir-referenza kostituzzjonali ssir mir-rikorrenti ;

2. Illi wkoll preliminarjament kull rikorrent ghandu jgib prova tallocus standi tieghu sabiex jinterponi din l-azzjoni ;

3. Illi wkoll preliminarjament din l-Onorabbli Qorti ghandha tirrifjuta li tezercita s-setghat kostituzzjonali taghha ai termini tal-artikolu 46(2) tal-Kostituzzjoni stante illi r-rikorrenti ghogobhom jinterponu din l-azzjoni minghajr ma ezawrew ir-rimedji ordinarji li tipprovdilhom il-ligi, fost l-ohrajn, taht il-Kap 423 u l-Kap 387 tal-Ligijiet ta` Malta ;

4. Illi fi kwalunkwe kaz u minghajr pregudizzju ghas-suespost il-Korporazzjoni tirriserva li tipprezenta risposta ulterjuri jekk ikun mehtieg u dan minhabba l-fatt illi r-rikorrenti ma ghamlu l-ebda referenza ghal dak li skont huma huwa d-dritt fundamentali taghhom stabbilit mill-artikoli 33 sa 45 tal-Kostituzzjoni li gie lez, liema artikoli tal-ligijiet sussidjarji, skont huma, ghandhom jigu dikjarati nulli u bla effett u in generali ma ssostanzjawx ilpremessi taghhom f`mod car u ezawrienti ;;

5. Illi fil-mertu u minghajr pregudizzju ghas-suespost, it-talbiet tarrikorrenti huma nfondati stante illi ma gie lez ebda dritt taghhom u regolamenti ghall-provvista tal-elettriku (SL423.01) huma pjenament konformi mal-Kostituzzjoni ta` Malta, mal-Kap 460 tal-Ligijiet ta` Malta u mad-Direttivi 2009/72, 2006/123 u l-Artikoli 43 u 49 tat-TEU (sic) ;

6. Illi fil-fatt is-sistema tat-tariffi in kwistjoni hija perfettament kompatibbli mar-rekwiziti tal-ligi u fl-ebda mod ma ccahhad lill-ebda cittadin tal-Unjoni Ewropeja, inkluzi dawk Maltin, minn kwalsiasi dritt li jista` jkollhom;

7. Salv eccezzjonijiet ulterjuri.

Ghaldaqstant, in vista tas-suespost, il-Korporazzjoni Enemalta titlob birrispett li din l-Onorabbli Qorti joghgobha tichad it-talbiet tar-rikorrent bhala nfondati kemm fil-fatt kif ukoll fid-dritt ;

Bl-ispejjez.

V. The reply of Water Services Corporation

In its reply filed on the 22 March 2013, respondent Water Services Corporation stated as follows in Maltese –

Illi preliminarjament, l-intempestivita` tal-azzjoni odjerna, stante li fil-konfront tal-Korporazzjoni ghas-Servizzi tal-Ilma, qatt ma kien hemm xi nterpellazzjoni ufficjali da parti tar-rikorrenti, jew min minnhom, sabiex l-esponenti tirregola l-pozizzjoni taghha ;

Illi minghajr pregudizzju ghas-suespost, u in linea preliminari wkoll, il-Korporazzjoni esponenti ma hijiex il-legittimu kontradittur, stante li hija m`ghandha l-ebda awtorita` li taghmel jew tibdel il-ligi, u ghaldaqstant ghandha tigi liberata mill-osservanza tal-gudizzju ;

Illi intant, u minghajr pregudizzju ghas-suespost, il-process tat-twaqqif ta` tariffa mill-Korporazzjoni esponenti, huwa soggett ghal ex ante awtorizzazzjoni mill-Awtorita` ta` Malta dwar ir-Rizorzi u dan ai termini tal-Artikolu 27 tal-Kap. 255 tal-Ligijiet ta` Malta ;

Illi minghajr pregudizzju ghas-suespost, u inoltre, ir-rikorrenti jehtiegilhom, qabel xejn, jindikaw b`mod ezatt dawk l-emendi, ossija Avvizi Legali, illi huma qeghdin jittantaw jimpunjaw permezz tal-proceduri odjerni ;

Illi di piu, il-Korporazzjoni esponenti tikkontendi li l-Avviz/i Legali mertu ta` din il-vertenza jikkostitwixxu mizuri tal-Istat ;

Illi minghajr pregudizzju ghas-suespost, u in linea preliminari wkoll, l-azzjoni odjerna, in kwantu hija bbazata fuq l-Artikolu 46(3) tal-Kostituzzjoni ta` Malta u l-Artikolu 5 tal-Legislazzjoni Sussidjarja 12.09 tal-Ligijiet ta`

Malta hija rrita u nulla stante illi l-poter hemm imnissel huwa mholli biss lill-Qrati hemm definiti sabiex jaghmlu riferenza kostituzzjonali u mhux lir-rikorrenti kif donnhom qed jikkontendu ;

Illi minghajr pregudizzju ghas-suespost, u in linea preliminari wkoll, din l-Onorabbli Qorti ghandha tirrifjuta li tezercita s-setghat kostituzzjonali taghha a tenur tal-artikolu 46(2) tal-Kostituzzjoni stante li r-rikorrenti ma ezawrewx irrimedji ordinarji li tipprovdilhom il-ligi, partikolarment, imma mhux limitatament, dawk kontemplati taht il-Kapijiet 387 u 423 tal-Ligijiet ta` Malta ;

Illi minghajr pregudizzju ghas-suespost, u inoltre, ir-rikorrenti jehtiegilhom jispecifikaw liema dritt fundamentali taghhom suncit fl-artikoli 33 sa 45 tal-Kostituzzjoni, allegatament gie lez.

Ghaldaqstant il-Korporazzjoni esponenti qeghda minn issa tirriserva illi tipprezenta risposta ulterjuri ; Illi minghajr pregudizzju ghas-suespost, u inoltre, ir-rikorrenti jehtiegilhom ilkoll jippruvaw l-interess u r-relazzjoni guridika rispettiva taghhom u li b`xi mod gew diskriminati skont il-pretensjonijiet rispettivi taghhom ;

Illi fil-mertu, u minghajr pregudizzju ghas-suespost, id-distinzjoni bejn tariffi residenzjali u tariffi domestici fil-legislazzjoni lokali fiha nnifisha ma hijiex projbita mid-dritt Malti jew dak Ewropej, senjatament mal-Artikolu 65(1) tal-Kostituzzjoni, mal-Kap 460 tal-Ligijiet ta` Malta, mad-Direttivi 2006/123 u 2009/72 u mal-Artikoli 43 u 49 tat-Trattat tal-Unjoni Ewropea; u ma hijiex applikata b`mod diskriminatorju bejn cittadini Maltin u dawk tal-Unjoni Ewropea ;

Illi ghaldaqstant, it-talbiet tar-rikorrenti, fil-konfront tal-Korporazzjoni intimata ghandhom jigu michuda bl-ispejjez kontra l-istess rikorrenti ;

B`riserva ghall-eccezzjonijiet ulterjuri.

Bl-ispejjez.

VI. The reply of Malta Resources Authority

On the 22 March 2013, respondent Malta Resources Authority filed a reply in Maltese, together with a translation in English.

The latter states as follows –

The exponent is contesting the allegations and claims made by the applicant as unfounded in fact and in law for the following reasons :

1. Whereas, preliminarily the Malta Resources Authority is not the correct respondent at law in terms of Article 181B of the Code of Organisation and Civil Procedure (Cap. 12 of the Laws of Malta) and is hence humbly requesting to be non suited with costs.

2. Whereas, also preliminarily the action of the applicants is null and void as it is based on Article 46(3) of the Constitution of Malta and regulation 5 of S.L. 12.09 of the Laws of Malta, as those provisions apply only to the power of a Court which is not the First Hall of the Constitutional Court to make a constitutional reference to the First Hall of the Civil Court and that the same does not confer any right to any party to make "a constitutional reference" itself such as in the case of the applicants.

3. Whereas, also preliminarily, the applicants should prove their juridical interest proof of which is totally absent in their first application.

4. Whereas, preliminarily the applicants should correctly specify their claims for the reason that they are vague and that there does not result any nexus between the facts as exposed and the claims made in their first application.

5. Whereas, preliminarily the applicants should specify which of the provisions of articles 33 to 45 (inclusive) of the Constitution of Malta (Cap. 1 of the Laws of Malta) which allegedly they are entitled of their protection thereof.

6. Whereas, preliminarily the application and the claims made therein lack any legal basis under the Constitutional procedure for the reason that Article 65(1) of the Constitution and Chapter 460 of the Laws of Malta and Directives 2009/72/EC and 2006/123 and articles 43 and 49 of the TFEU, do not in any manner substantiate the applicants` claims under the Constitutional procedure.

7. Whereas, preliminarily the applicants are making abuse of the Constitutional procedure in that they are making use of an extraordinary procedure as the current procedure is when they instead may avail themselves of ordinary remedies to safeguard any rights asserted by themselves. In this instance the exponent refers to Article 46(2) of the Constitution and to the proviso to Article 4(2) of Chapter 319 of the Laws of Malta. Whereas also the same applicants may have filed a complaint with the exponent Authority to investigate the alleged breach of the relevant laws or of a regulatory requirement by means of a formal and substantive complaint. Whereas the same applicants were informed of this by means of the Authority`s counter-protest of the 4th January 2013 (see doc. MRA attached with this reply), instead of which the applicants chose to proceed by filing an action by means of this extraordinary procedure.

8. In that on the merits, subordinately and without prejudice to what has been premised, even if for the sake of argument it has to be conceded that the applicants have any right which is protected under the current procedure, the subsidiary legislation 423.01 does not contravene any of the rights protected under the Constitution. In that inasmuch even the same applicants are not specifying in their application which fundamental human right protected under the Constitution is being contravened by the exponent.

9. In that subordinately and without prejudice to what has been premised, the claim made by the applicants that this Honourable Court should "declare null and without effect the dual-tariff system for the electricity and water" simply on the basis of their allegations runs counter to the Constitution and this because it is based as it is, on mere allegations that it is not compliant with Constitutional obligations, and must hence be denied. Whereas in any case such tariffs are wholly compatible in fact and in law with Maltese and European law.

10. In that subordinately and without prejudice to what has been premised, in view of the nebulous and abstract manner the alleged breaches

have been expressed by the applicants, the exponent Authority is hereby as from now reserving its right to respond further as the case may be.

Saving any other pleas.

Therefore the applicant, respectfully requests this Honourable Court to deny all the claims of the applicants with expenses against them.

Respondent presented a list of witnesses and a list of documents.

VII. The preliminary pleas

The Court directed the parties to present evidence and make submissions regarding the preliminary pleas for the Court to give judgement on the preliminary pleas before considering the merits.

VIII. The *note verbale* of the 26 March 2013

During the hearing of the 26 March 2013, the following *note verbale* was entered in the records of the proceedings :-

Dr Galea for the applicants refers to the third paragraph of the application which reads from "Therefore this application is being filed" till "Laws of Malta", and declares that this premise is not an integral part of the claims but is merely a supporting argument. Therefore, for clarity`s sake, applicants declare that their action is based exclusively on Art. 65(1) of the Constitution, for reasons laid down in the application and which still hold to date. Furthermore, for clarity`s sake, applicants declare that they are not relying on any alleged violation of the human rights` provisions of the Constitution as a basis for their claim. Dr Galea re-affirms the position that the lawsuit was filed in the proper Court, in the sense that according to the premises and claims being made by applicants, this remains a case with Constitutional application, for reasons already explained.

Dr Sciberras, Dr Degiorgio, Dr Young and Dr Pace, having heard the explanation submitted by applicants` lawyer, submit as follows :

That contrary to what Dr Galea is stating, the reference to Art 46(3) of the Constitution is not merely a supporting argument, but it is the article on which the whole action is based, as emerges from the wording of the application. Therefore they insist that for these reasons the application is null and void as indicated in the preliminary pleas.

IX. The decree of the 6 June 2013

On the 17 April 2013, applicants filed an application with a request to correct their original application in the light of the *note verbale* of the 26 March 2013. Respondents opposed claimants` request.

At the hearing of the 6 June 2013, claimants entered another *note verbale* where, in addition to what they had stated in their application of the 17 April 2013, made the following declaration :-

At the Court`s request, Dr Galea submits that taking into account the nature of the application and the alleged breaches to the rights of her clients by means of the legislation in question, the appropriate reference to the Constitution was always intended to be a reference to Art 46(1) and not Art 46(3), because that in question is a freestanding procedure, i.e. it is not related to any other lawsuit. Furthermore it also relates to merits that fall under the jurisdiction of the same Court.

By decree delivered in open court on the 6 June 2013, the Court acceded to claimants` request for the deletion of the third paragraph of their original application and its substitution with the following –

Therefore this application is being filed before this Honourable Court in terms of Art 46(1) of the Constitution of Malta and according to disposition 4 of Subsidiary Legislation 12.09 of the Laws of Malta.

In view of this decree, the Court gave respondents ten (10) days to reply in writing to the original application as amended.

X. The hearing of the 30 September 2013

At the hearing of the 30 September 2013, applicants entered the following *note verbale* –

Plaintiffs make reference to fol. 195 of the proceedings. This is an annex indicating a list of plaintiffs together with their official identification document references and a corresponding ARMS account number. The defendants have raised in their note of submissions on the preliminary pleas that this information is not sufficient as is.

The plaintiffs in view of the Constitutional nature of this procedure are humbly requesting this Court to witness one of the plaintiffs who will verify on oath her passport or ID Number together with an electricity bill for the purpose approving the locus standi of at least one of the plaintiffs.

The plaintiffs however leave the matter regarding the sufficiency of the evidence regarding the locus standi to the better Judgement of this Honorouble Court.

The respondents opposed this request for reasons that result from the note verbal of the hearing.

The Court gave the following decree in open court –

Having heard the request made by applicants.

Having noted the objections of respondents.

Considers that the nature of these procedures render it imperative onto Court to look thoroughly into the aspects of the proper administration of justice in a manner that respects the rights of each party.

Considers that the request made is not in consistent with any rule of substantive justice and more than that is not in any matter prejudicial to the position taken by respondents in these proceedings taking it into account that the preliminary pleas are various in nature.

Therefore the Court authorises each respondent to confirm the statement at folio. 195 of the Court file by way of evidence for the purposes of the matter

under scrutiny, and if need be should the Court enter into the merits of the dispute.

The Court then heard the testimony of those applicants who were present. With regard to the others who were absent, their lawyer Dr Juliette Galea gave an account on oath.

In essence, the applicants – each in his or her regard – confirmed their nationality, testified that they were resident in Malta, gave details of their Maltese identity card and of their ARMS account.

XI. The judgement of the 16 January 2014 on the preliminary pleas

On the 16 January 2014, the Court gave judgement on the preliminary pleas.

The Court decided as follows –

The Court abstains from taking further notice of plea marked 1(i) of respondents the Attorney General ; the Minister of Finance, the Economy and Investment ; and the Minister for Resources and Rural Affairs ; of the plea marked 1 of respondent Enemalta Corporation ; of the sixth plea of respondent Water Services Corporation ; and the second plea of respondent Malta Resources Authority.

The Court orders applicants to bear the costs of judgement on this matter.

The Court rejects the plea marked 1(ii) of respondents the Attorney General, the Minister of Finance, the Economy and Investment, and the Minister for Resources and Rural Affairs ; plea marked 2 of respondent Enemalta Corporation ; the ninth plea of respondent Water Services Corporation ; and the third plea of respondent Malta Resources Authority.

The Court orders that each party bears its own costs with regard to judgement on this matter.

The Court accepts the plea marked 1(iii) of respondents the Attorney General ; the Minister of Finance, the Economy and Investment ; and the Minister for Resources and Rural Affairs, declares respondent the Attorney General as an improper defendant in this cause and declares the Attorney General as nonsuited.

The Court orders applicants to bear the costs of judgement on this matter.

The Court rejects the plea marked 1(iv) of respondents the Attorney General, the Minister of Finance, the Economy and Investment, and the Minister for Resources and Rural Affairs, the plea marked 2 of respondent Enemalta Corporation ; the seventh plea of respondent Water Services Corporation ; and the seventh plea of respondent Malta Resources Authority.

The Court orders respondents to bear the costs of judgement on this matter.

The Court rejects the pleas marked 1(v) and (vi) of respondents the Attorney General ; the Minister of Finance, the Economy and Investment ; and the Minister for Resources and Rural Affairs, the plea marked 4 of respondent Enemalta Corporation ; the fourth and eight pleas of respondent Water Services Corporation ; and the fifth and eight pleas of respondent Malta Resources Authority.

The Court orders that each party bears its own costs with regard to judgement on this matter.

The Court accepts the plea marked 1 of respondent Malta Resources Authority, declares said respondent as an improper defendant in this cause and declares the Malta Resources Authority as non-suited.

The Court orders applicants to bear the costs of judgement on this matter.

The Court accepts the plea marked 2 of respondent Water Services Corporation, declares said respondent as an improper defendant in this cause and declares the Water Services Corporation as non-suited.

The Court orders applicants to bear the costs of judgement on this matter.

XII. The two decrees of the 11 March 2014

Following this judgement, two applications were filed by respondents the Attorney General, the Minister of Finance, Economy and Investment, the Minister for Resources and Rural Affairs, on the one hand, and Enemalta Corporation, on the other, for leave to enter an appeal.

By means of two separate decrees given in open court at the hearing of the 11 March 2014, the Court rejected the above respondents` requests for leave to appeal.

XIII. The *note verbale* of the 11 March 2014

At the hearing of the 11 March 2014, the following *note verbale* was entered into the records of the proceedings :-

Dr Susan Sciberras is raising a point in the sense that applicants are to specify and identify which provisions of the Constitution and/or the Convention are in issue in this cause.

Dr Juliette Galea declares that the rights invoked are the right to the peaceful enjoyment of property (Art 1 Protocol 1 of the Convention) together with Art 14 of the Convention relating to discrimination.

The Court acceded to respondents` request to file an additional reply.

XIV. The joint additional reply

On the 20 March 2014, respondents the Attorney General, the Minister of Finance, Economy and Investment, the Minister for Resources and Rural Affairs, and Enemalta Corporation filed a joint additional reply which *inter alia* states the following :-

i. *On a preliminary basis, since as resulted from the acts of this case this Court is vested with a Constitutional Jurisdiction emanating from the provisions of Article 46 of the Constitution and Article 4 of the European Convention on Human Rights and Fundamental Freedoms, then its competence is to decide issues falling within the parameters of the said Articles. It thus follows that this Honourable Court in Constitutional Jurisdiction does not have the competence ratione materiae to take cognizance of and decide the issues and claims raised …*

ii. *That without prejudice to the above, in merit, applicants` application that the subsidiary legislations in question violate their human rights are unfounded in fact and at law.*

iii. *That there is no breach of Article 1 Protocol 1 of the Convention since S.L. 423.01 and S.L. 423.03 are not depriving applicants of the peaceful enjoyment of their possessions as will be proven during the course of the proceedings.*

iv. *That subordinately and without prejudice to the above, should this Court nonetheless determine that applicants are subject to any deprivation of such possessions, respondents reiterate that this is justifiable because it is being done in the public interest and in conformity with the conditions provided for by national and international law.*

v. *That moreover and also without prejudice to the above, if this Court finds that there is any interference with the rights of applicants under this Article of the Convention, such interference is legitimate and falls within the State`s margin of appreciation to legislate in accordance with the general interest as will be proven during the course of the proceedings.*

vi. *That there is also no breach of Article 14 of the Convention. Respondents point out that not every difference in treatment amounts to discrimination in the context of the Convention. Moreover for an action under Article 14 to be successful, comparison for the purpose of establishing whether there has*

been discrimination or not has to be done with respect to analogous situations, that is on a `like with like` basis.

vii. That in the present case applicants are not receiving any discriminatory treatment by virtue of S.L. 423.01 and S.L. 423.03 when compared to an analogous category of people in their same situation.

XV. The hearing of the 10 April 2014

At the hearing of the 10 April 2014, parties` lawyers made verbal submissions regarding the additional reply. They agreed that due to the nature of the issues raised by that additional reply, it would be opportune that this Court, before even entering into the merits, gives judgement on the points raised in the additional reply.

The Court endorsed the parties` approach and adjourned the suit for judgement on the joint additional reply of respondents the Attorney General, the Minister of Finance, Economy and Investment, the Minister for Resources and Rural Affairs, and Enemalta Corporation.

XVI. The judgement of the 31 July 2016

On the 31 July 2016, the Court gave judgement on respondents` additional reply.

The Court decided as follows :-

… the Court dismisses the preliminary plea marked (i) raised by respondents the Attorney General, the Minister of Finance, the Economy and Investment, the Minister for Resources and Rural Affairs and Enemalta Corporation in their joint additional reply. Relative costs are to be borne by respondents.

The Court then directed the parties to put forward their evidence on the merits.

XVII. Evidence of the merits

The Court heard the testimony of Frederick Azzopardi, Chairman and Chief Executive Officer of Enemalta plc on the 23 October 2014 and the 20 January 2015.

The Court took formal notice of the note presented by the Minister for Energy and Health on the 18th November 2014 wherein in view of changes in nomenclature and responsibilities of several Ministries within the Government, the Minister for Energy and Health had become defendant in the lawsuit in lieu of the Minister of Finance, Economy and Investment, and the Minister for Resources and Rural Affairs.

The Court acceded to the request of Enemalta plc on the 20 January 2015 and ordered that relative changes be made in the records of the proceedings in the sense that reference to Enemalta Corporation be substituted by Enemalta plc.

XVIII. Request for a preliminary reference to the Court of Justice of the European Union (CJEU)

On the 18 March 2015, claimants requested the Court to consider making a preliminary reference to the CJEU according to the procedure established in Section X of LN 279 of 2008.

Respondents objected to this request by virtue of their respective replies presented on the 30 March 2015 and 29 April 2015.

After hearing their final oral submissions on the 25th May 2015, the Court considered the request premature and reserved its position to give final consideration to the matter after all parties conclude their evidence and before the parties make their final submissions.

XIX. Further evidence of the merits

On the 15 September 2015, Carmen Ciantar gave evidence whereas on the 24 November 2015, Patricia Graham testified in cross-examination. Josielle Grech Zerafa gave evidence during the sitting held on the 1 February 2016.

XX. A further request for a preliminary reference to the CJEU

After that all evidence was concluded, the applicants reiterated their request for a preliminary reference to the CJEU.

Respondents declared that such a reference *prima facie* was not necessary.

The Court directed claimants to file a note whereby they sustain their request.

Having seen the note filed by applicants on the 15 June 2016, and the replies by respondents of the 1 September 2016 and 2 September 2016, and having heard final on the 29th September 2016, the Court gave a decree in open court on the 15 December 2016 wherein it rejected the claimants` request for a preliminary reference to the CJEU.

XXI. Considerations of the Court

The Court granted the parties leave to file notes of submission on the merits.

The parties did file their notes of submissions.

Having viewed and considered the acts of the proceedings, the Court is in a position to give judgement on the merits.

1. The evidence

The following is a brief summary of the evidence.

Adv. Dr. Andre` Buttigieg from respondent the Malta Resources Authority (MRA) testified that the applicants are alleging that Electricity Supply Regulations (S.L 423.01) as well as the Water Supply Regulations (S.L. 423.03) are in breach of the provisions of Article 65(1) of the Constitution, Chapter 460 of the Laws of Malta, EU Directives 2006/123 and 2009/72, and Articles 43 and 49 of the Treaty on European Union.

He stated that MRA in terms of the Malta Resources Authority Act (Chap 423 of the Laws of Malta) is the body responsible for the regulation, monitoring and keeping under review of all practices, operations and activities relating to energy, water and mineral resources.

After referring to Art 46(2) of the Constitution, he stated that the applicants may have availed themselves of several other means of ordinary redress without the need to seek access to a court of extraordinary jurisdiction. Despite there being said means, the applicants refrained from doing anything at all and resorted right away to the current procedure which is manifestly premature as a course of action.

Patricia Graham testified that she holds ARMS account numbers 1010000203382 and 41100045585. She chairs a social lobby group called Up in Arms which assists primarily non-Maltese EU nationals in obtaining lower residential rates (as opposed to higher domestic rates) when applying for their utilities.

She stated that prior to the setting up of ARMS in 2010, all utility billing was handled by the Water Services Corporation and each person was automatically entitled to be placed on the same lower tariff. After the introduction of the electricity supply regulations and the creation of a dual system of non-commercial rates, the billing cycles became erratic and it was many months in the making before householders like herself realized that she had been placed on the almost double domestic rate.

She affirmed that when she relocated to Malta, she called the service providers for service and expected bills for the property services to come in her name. This however did not apply to the water and electricity bills and when she enquired the reason, she was told that she had to speak to the landlord. She was informed that the she needed permission from the landlord via a form endorsed by the latter in order to obtain the residential rate. In

her case, the landlord refused to endorse the form and so she had to vacate the property.

When she moved elsewhere, she insisted on having the utility bills in her name as she thought that this would ensure the application of the residential rate in her regard. However, she was denied the residential rate once again as she had an A identity card - not a residency permit. She was personally refused a residency permit, as it was not her intention to seek employment in Malta. Her Maltese children could not be registered on the account as residents of the property. The introduction of the E residency card is a sham – according to Graham. She complained of long queues, lack of informed customer service and shortage of staff. Then the authorities announced that the expiration date on A identity cards would be extended until the end of 2015.

She stated that her own application that was filed two years back was not issued. She pointed out that the waiting times for such cards and the bureaucracy surrounding their issue for an EU national contradicted EU law.

In November 2013, after much pressure from the lobby group, ARMS announced that the A identity card or a passport would be accepted for persons living in their primary residence to apply for the residential rate. It was then one year later that her bills were placed on the residential rate as her landlord agreed to endorse the required paperwork. Had her landlord not agreed to endorse the form, she would have been still put on the higher tariff.

Graham underlined the fact that her bills are now almost halved. No changes to the law were made.

When **cross-examined**, Patricia Graham testified that she resided in in Sliema first, then St. Julians and then Pembroke. In the first two, she was charged the domestic rate ; in Pembroke, she managed to receive the residential rate. In 2008, she resided in Sliema with her partner, her four fostered children and her own child. Her fostered children were Maltese and they were denied the residential rate because she was a foreigner. In 2008, she was informed that if she wanted to receive the bill in her name, she had contact her landlord, who was the registered account holder. The landlord refused to give her permission to put the meters in her name ; so she could not be given the residential rate. That is why she eventually left that property. When she moved to St Julians she requested the landlord to fill in

the form so that the meters would be in her name. There was no objection from this landlord, but ARMS requested the residency card. This document is issued by a different authority – not ARMS or Enemalta. ARMS did not accept the A identity card and insisted on the residency card. She confirmed that had she been in possession of that card, ARMS would have given her the residence tariff. She was informed by the security guard at the door that if she was not intend to work and pay taxes in Malta, there was no need for her to apply. She applied for the residency card when the A identity cards were about to expire. Today she is on the residential rate as the landlord gave his consent for the meters to be in her name. She applied in 2012 and received the residency rate in November 2013.

She explained that her complaints were basically two – (i) there was a problem with the landlords as they were not giving their consent and (ii) there was the question of the residency permit. She confirmed that from November 2013, anybody who had the landlord`s permission and who was a foreign national holding an A id card would have the residential rate. The law never changed however policies were indeed changed. In 2012, her electricity supply was interrupted and disconnected for non-payment of the bill. She denied that she owed Enemalta €22,000 in bills. She stated that the account was in her partner`s name. Julia Partridge, and that ARMS had claimed the payment of EUR 27,000 for two years of electricity and water. She insisted that according to her workings, she owed EUR 4,500 which she paid.

James Parsons testified that his ARMS account number is 101000183043, is an EU national, and that he has been resident in Birgu since 2007.

Richard Douglas Cooper testified that his ARMS account number is 101000250078, and that he is an EU citizen residing in Malta.

Julia Partridge stated that her ARMS account number is 101000037682.

John Newton Besford and **Sonja Besford** stated that they are British citizens and that they reside in Rabat. Their ARMS account number is 101000245898. They own the property where they reside in Malta.

Adv. Dr. Juliette Galea confirmed that all applicants listed in document marked JG1 are known to her in her capacity as their lawyer. She stated that she has personally verified the information regarding her clients` identification details as well as their corresponding utility bills details from original documents.

Ing. Frederick Azzopardi Chairman and CEO of Enemalta Corporation testified that Enemalta is not the billing company and thus it is not responsible for the policy regarding the dual system of the tariffs for water and electricity introduced in 2008. ARMS Limited is the billing company. Enemalta Corporation and Water Services Corporation are joint shareholders in ARMS. The policies derive from legislation. The policies are set by ARMS.

He confirmed that a dual tariff system was introduced in Malta for electricity and water bills by legal notice, prior to the constitution of ARMS. Before Water Services Corporation used to issue the water and electricity bills. He insisted that Enemalta does not have a policy with regard to the dual tariff system.

He stated that Enemalta does not interfere with the day to day running of the company. The implementation of the dual tariff system is the responsibility of ARMS and this has been the case since the inception of ARMS. The tariffs and billing are the responsibility of ARMS. The tariffs are today determined and monitored by the Malta Resources Authority. He said that he does not know whether Enemalta had any role in the setting up of the dual tariff system. Enemalta is only consulted when tariffs are being established by Malta Resources Authority. When ARMS took over control of billing from Water Services Corporation, all the accounts were forwarded to ARMS. He exhibited the rates for domestic and residential tariffs between 2010 and 2013. He also presented the percentage rate of non-Maltese EU nationals on the domestic rate for the years 2010-2013, and also two reports. He was appointed as Enemalta CEO when the double tariff procedure was already in force.

Carmen Ciantar - General Manager - ARMS Limited – testified that the Energy Service Regulation contemplates three rates : residential ; domestic ; and non-residential. The residential rate is applied on the first residence of the applicant which is basically the place where the individual would normally reside for the longest period. The domestic rate is applied on all other premises of a residential nature, a second home and a second

apartment. There is non-residential rate which is applied for all commercial premises. These rates are apply to all applicants, irrespective of nationality. She explained that there is no distinction between people who come from the EU and people who come from third party counties. The system depends on the type of premises and the type of account, and applies to all irrespective of nationality.

She continued to state that prior to January 2014, ARMS used to request the presentation of a residency permit. After January 2014, ARMS requested the owners of the account to declare in an appropriate form (Form H) what the situation was in actual fact. The purpose was to simplify matters. Therefore for an applicant to benefit from the residential rate he has to fill in Form H. Once the form is presented with supporting documents, ARMS applies the residential rate.

She stated that system as applied and as envisaged by law was not discriminatory at all. Out of the all the plaintiffs, all benefit from the subsidy except five. Three of these never applied for the subsidy while the other two transferred their account to other account holders. She stated that Margaret Alder closed her account but prior to that she never applied for the subsidy. Elena Bianchi, Robin Smith Seville and Nuat Rascar never applied for the subsidy. Kevin Briant closed his account but prior to that never applied for the subsidy. The rest applied and are being billed on the residential rate. The rate is calculated on the number of people residing on the premises in question.

She reiterated that every applicant for a meter in Malta has to fill in and present Form H where the applicant indicates the number of people who reside in the premises, and has to present a proof of identity. Prior to January 2014, the applicants were not benefitting from the residential rate, as they had to present a residency permit. ARMS now relies on the account holder`s *bona fide* declaration that he resides in Malta. The procedure applies to Maltese and non-Maltese alike.

She explained that at times ARMS does come across situations where the landlord refuses to transfer the account to the tenant. ARMS has a contractual obligation with the account holder. Issues of this nature should be cleared before a contract of lease is concluded. If the account holder who happens to be the landlord refuses to transfer the meter on the tenant, then the tenant should look for another premises to rent.

On **cross examination**, Carmen Ciantar testified that ARMS was incorporated in 2008. Prior to 2008, electricity and water bills were sent and money was collected by Water Services Corporation in its own name and for Enemalta Corporation. In 2008 ARMS required Maltese applicants to present their identity card whereas non-Maltese applicants were asked to produce an e-residency card. In the past, an EU passport was not sufficient as a means of identification from a non-Maltese. The passport nowadays is used as a means of identification. Today the procedure has been simplified. Policy requirements were changed after January 2014.

Josielle Grech Zerafa – Executive – Customer Care – ARMS Limited – testified that Julia Partridge had an account in her name with regard to a property in St Julians. She confirmed that ARMS was threatening to suspend the supply of electricity as there were several bills for dues amounting to EUR 14,704.44 which had not been settled. As regards Patricia Graham and her property in Pembroke, witness stated that she is being charged at the residential rate. Her bills are being duly paid.

2. The position at law

The Court has considered the provisions at law on which applicants are sustaining their demands.

a) The Constitution of Malta

Art 65(1) of the Constitution reads :-

> *"Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta`s international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003." ;*

Claimants` application was filed in terms of **Art 46(1) of the Constitution** which states :-

Subject to the provisions of sub-articles (6) and (7) of this article, any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

According to **Reg 4(1) of S.L. 12.09** :-

Subject to the provisions of sub-rule (3) of this rule and rule 8, in the cases referred to the Civil Court, First Hall, as provided in article 46(1) of the Constitution of Malta, in article 4(1) of the European Convention Act, and in the cases referred to in article 95(2)(c), (d), (e) and (f) of the Constitution of Malta, the application shall be served on the defendant or the respondent without delay and the court shall fix a date for hearing within eight working days from the date of the filing of the application, or from the filing of a reply by respondent within the time limit therefore, or if no such reply is filed from the expiry of such time :

Provided that where the Court considers that the subject matter of the application is not of an urgent nature, the defendant or respondent shall always be given twenty days for the filing of the reply.

b) The Electricity Supply Regulations (S.L. 423.01) and the Water Supply Regulations (L.S. 423.03)

With effect from 1 October of 2008, a dual-tariff system was introduced for the non-commercial use of electricity – referred to as residential and domestic tariffs.

The matter involved different tariffs depending on whether the account in question was determined as residential or domestic.

The relevant provision is Reg 36 which states :-

> *(1) For the purposes of these regulations, a Residential Premises Service shall be charged for in accordance with the First Schedule.*
>
> *(2) For the purposes of these regulations, a Non-Residential Premises Service shall be charged for in accordance with the Second Schedule.*
>
> *(3) For the purposes of these regulations, a Domestic Premises Service shall be charged for in accordance with the Third Schedule.*
>
> *(4) Notwithstanding the provisions of any other law, the Chairman shall, at any time and in his discretion, having regard to the provisions of these regulations, determine whether a Service is to be deemed a Residential Premises Service, a Non-Residential Premises Service or a Domestic Premises Service for the purposes of these regulations.*
>
> *(5) For the purposes of these regulations, a consumer shall be entitled to submit an application requesting that a Service to individual units of residence, used solely and regularly as private dwellings, as may be confirmed by documentary evidence, be registered as a Domestic Premises Services;*
>
> *Provided that the Service to the common parts of a condominium consisting entirely of premises used exclusively for residential purposes may also be submitted for registration as a Domestic Premises Service;*
>
> *Provided further that, unless otherwise authorized by the Chairman, for good and sufficient cause, a consumer shall only be entitled to register as a Domestic Premises Service, a Service to one Primary Residence, a Service to one Secondary Residence and a Service to one Garage which does not exceed 30 square metres in area and is used exclusively for private, non-commercial purposes.*

Provided also that in the case of uninhabited premises intended for residential use, the Corporation may allow such a service to be registered as a Domestic Premises Services for a period of up to twelve months.

(6) For the purposes of these regulations, a consumer shall be entitled to submit an application requesting the Chairman to register individuals having their primary residence in Malta on a Residential Premises Service in relation to such primary residence;

Provided that no one individual shall be registered on more than one Residential Premises Service at the same time and that no individual shall be registered on a garage or on the common parts of a condominium.

(7) For the purposes of these regulations, a Service which is not registered as a Domestic Premises Service or as a Residential Premises Service in terms of this regulation or a Service which has not been submitted for registration as a Domestic Premises Service or a Residential Premises Service in terms of this regulation, shall be considered as a Non-Residential Premises Service, unless otherwise determined by the Chairman.

(8) The following provisions shall apply with respect to the registration of persons on a Domestic Premises Service or on a Residential Premises Service:

(a) a consumer shall furnish in writing to Enemalta, within such time as may be stipulated by Enemalta, any information together with any supporting documents which may be required for the purpose of such registration;

(b) a consumer shall notify Enemalta writing of any change in the circumstances, on the basis of

which such registration is made, not later than one month from when such change occurs;

(c) any change in the number of persons registered on a Domestic Premises Service or on a Residential Premises Service shall be taken into account, for the purpose of such registration, from the date of the first normal meter reading following the date on which the change in the number of persons occurs or the date on which Enemalta is notified in writing of such a change, at the discretion of Enemalta;

(d) a person residing in a tenement may apply to Enemalta so that he shall be registered on a tenement as a Domestic Premises Service other than that in which he resides;

(e) any application shall be made in such form as may be issued by Enemalta from time to time;

(f) every arrangement made in terms of this sub-regulation shall be valid until the 31st December of the year in which it was made or for which it was renewed, and it shall be deemed to have been renewed for the next following year, unless the consumer, not later than the last day of November of the year in which the arrangement is in force, gives notice in writing to Enemalta that he does not want the said arrangement to be so renewed.

As from 1 January 2010, a dual-system of tariffs for the non-commercial use of water, designated as residential and domestic tariffs, was introduced where the residential tariff was significantly lower than the domestic tariff.

The relevant provision being Reg 12 states :-

(1) For the purposes of these regulations, a Residential Premises Service shall be charged for in accordance with the First Schedule.

(2) For the purposes of these regulations, a Non-Residential Premises Service shall be charged for in accordance with the Second Schedule.

(3) For the purposes of these regulations, a Domestic Premises Service shall be charged for in accordance with the Third Schedule.

(4) Notwithstanding the provisions of any other law, the Chief Executive shall, at any time and in his discretion, having regard to the provisions of these regulations, determine whether a Service is to be deemed a Residential Premises Service, a Non-Residential Premises Service or a Domestic Premises Service for the purposes of these regulations.

(5) For the purposes of these regulations, a consumer shall be entitled to submit an application requesting that a Service to individual units of residence, used solely and regularly as private dwellings, as may be confirmed by documentary evidence, be registered as a Domestic Premises Services;

Provided that the Service to the common parts of a condominium consisting entirely of premises used exclusively for residential purposes may also be submitted for registration as a Domestic Premises Service;

Provided further that, unless otherwise authorized by the Chief Executive, for good and sufficient cause, a consumer shall only be entitled to register as a Domestic Premises Service, a Service to one Primary Residence, a Service to one Secondary Residence and a Service to one Garage which does not exceed 30 square metres in area and is used exclusively for private, non-commercial purposes.

Provided also that in the case of uninhabited premises intended for residential use, the Corporation may allow such a service to be registered as a Domestic Premises Services for a period of up to twelve months.

(6) For the purposes of these regulations, a consumer shall be entitled to submit an application requesting the Chief Executive to register individuals having their primary residence in Malta on a Residential Premises Service in relation to such primary residence;

Provided that no one individual shall be registered on more than one Residential Premises Service at the same time and that no individual shall be registered on a garage or on the common parts of a condominium.

(7) For the purposes of these regulations, a Service which is not registered as a Domestic Premises Service or as a Residential Premises Service in terms of this regulation or a Service which has not been submitted for registration as a Domestic Premises Service or a Residential Premises Service in terms of this regulation, shall be considered as a Non-Residential Premises Service, unless otherwise determined by the Chief Executive.

(8) The following provisions shall apply with respect to the registration of persons on a Domestic Premises Service or on a Residential Premises Service:

(a) a consumer shall furnish in writing to the distribution system operator, within such time as may be stipulated by the distribution system operator, any information together with any supporting documents which may be required for the purpose of such registration;

(b) a consumer shall notify the distribution system operator in writing of any change in the circumstances, on the basis of which such registration is made, not later than one month from when such change occurs;

(c) any change in the number of persons registered on a Domestic Premises Service or on a Residential Premises Service shall be taken into account, for the purpose of such registration, from

the date of the first normal meter reading following the date on which the change in the number of persons occurs or the date on which the Corporation is notified in writing of such a change, at the discretion of the Corporation;
(d) a person residing in a tenement may apply to the Corporation so that he shall be registered on a tenement as a Domestic Premises Service other than that in which he resides;
(e) any application shall be made in such form as may be issued by the Corporation from time to time;
(f) every arrangement made in terms of this sub-regulation shall be valid until the 31st December of the year in which it was made or for which it was renewed, and it shall be deemed to have been renewed for the next following year, unless the consumer, not later than the last day of November of the year in which the arrangement is in force, gives notice in writing to the Corporation that he does not want the said arrangement to be so renewed.

Applicants submit that that domestic tariffs were much higher than residential tariffs. They contend that being non-Maltese EU nationals, they were being unfavourably discriminated, due to the fact that Maltese nationals were being charged the residential tariff as opposed to them as they were being charged the domestic tariff.

The rates chargeable for domestic and residential tariffs for 2010 - 2013 were produced as evidence.

The Court notes a difference in amount between the two tariffs.

c) <u>Directive 2009/72/EC</u>

The claimants allege that Directive 2009/72/EC ('Concerning Common Rules for the Internal Market in Electricity') distinguishes between a 'household customer' meaning a customer purchasing electricity for his own household consumption, excluding commercial or professional activities and a 'non-household customer' meaning natural or legal persons purchasing

electricity which is not for their own household use and includes producers and wholesale customers.

The Directive obliges Member States to impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations must be clearly defined, transparent, non-discriminatory, verifiable and guarantee equality of access for electricity undertakings of the Community to national consumers. Furthermore Member States are to ensure that all household customers enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non- discriminatory prices.

According to applicants, the division of household consumers into Residential and Domestic runs counter to the Directive as the Directive guarantees to household consumers of electricity uniform treatment and justifies different tariffs only on objective grounds.

d) <u>Directive 2006/123/EC</u>

Applicants also refer to Directive 2006/123/EC ("On Services in the Internal Market").

Art 95 of the Directive states :-

> *The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient`s nationality or place of residence. It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the*

provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment.

Applicants claim that there was a breach of Art 14(2) of the Directive which states :-

Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following :

discriminatory requirements based directly or indirectly on nationality …

They also allege that there was a breach in their regard of Art 20 which stipulates :-

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.
2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

Regarding the interpretation of Art 20, respondent the Prime Minister referred to the opinion of Advocate General Trstenjak in re Joined Cases C-585/08 and C-144/09 **Peter Pammer** wherein it was noted that :

" *…Article 20(2) of the Services Directive allows for the possibility of providing for differences in the conditions of access to a service that are based on the nationality or place of residence of the recipient where the differences are directly justified by objective criteria. Article 20 of the Services Directive*

therefore permits unequal treatment to be based on the nationality or place of residence of the recipient of the service where such treatment is objectively justified, which is to be ascertained in each individual case."

Indeed in Joined Cases C 523/11 and C 585/11 **Prinz** , the CJEU stated that it may be legitimate for a Member State, in order to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden with consequences on the overall level of assistance which may granted by that State, to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.

e) Art 43 and 49 of the Treaty of the European Union

Applicants submitted that apart from breaching the above-mentioned Directives, the ultimate effect of this dual-system of water and electricity tariffs for non-commercial use based on the criterion of residency or otherwise of an E.U. national in Malta undermines the applicant`s rights under Art 43 and 49 of the TEU.

The consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – state in Art 20 (formerly Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and formerly Articles 11 and 11a TEC) that :

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union`s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all

Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.

3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union.

4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union.

By virtue of Art 49 (formerly Article 49 TEU) :

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the

contracting States in accordance with their respective constitutional requirements.

f) <u>The European Convention for the Protection of Human Rights and Fundamental Freedoms</u>

Claimants further allege that they suffered a breach of Art 14 and Prot 1 Art 1 of the Convention.

Art 16 states :-

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The meaning of discrimination was defined as the different treatment without an objective and reasonable justification of persons in analogous or relevantly similar situations (ECHR – 10 March 2011 - **<u>Kiyutin v. Russia</u>**) Indeed the matter was further explained by the ECJ in its decision in Case C 391/97 re **<u>Frans Gschwind and Finanzamt Aachen-Aubenstadt</u>** namely that : "*it is settled law that discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations."*

It must be pointed out that Art 14 does not have a separate and autonomous existence in the sense that it can only be applied in relation to the violation of any of their fundamental rights and freedoms protected by the Convention. As stated by this court in its judgement of the 11 May 2017 in re **<u>Josephine Azzopardi et vs Onor Prim Ministru et</u>** and in the judgement of the 13 June 1979 by the ECHR in re **<u>Marcks v. Belgium</u> :-**

"[a]rticle 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by those provisions."

In the judgement of the 24 April 1985 in re **Abdulaziz, Cabales and Balkandali v. The United Kingdom** the ECHR affirmed that :-

> *"[a]rticle 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter."*

In that case, Art 14 was invoked in connection with an alleged violation of Art 1 Prot 1 of the Convention.

In its judgement of the 31 January 2014 in re **AIC Joseph Barbara et v. L-Onorevoli Prim Ministru et** the Constitutional Court stated :-

> *"L-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropeja jinkorpora tliet regoli distinti: l-ewwel regola migjuba fl-ewwel sentenza tal-ewwel paragrafu, hija ta` natura generali u tesponi l-principju tat-tgawdija pacifika tal-proprjeta`; it-tieni regola, migjuba fit-tieni sentenza tal-ewwel paragrafu, tkopri l-privazzjoni mill-possedimenti u tassoggettaha ghal certi kundizzjonijiet; it-tielet regola li tinsab fit-tieni paragrafu tirrikonoxxi li l-iStat huwa ntitolat inter alia li jikkontrolla l-uzu tal-proprjeta` konformement mal-interess generali. It-tliet regoli, izda, ghalkemm distinti ma humiex disgunti wahda mill-ohra, peress li t-tieni u t-tielet regola jirrigwardaw sitwazzjonijiet partikolari ta` indhil mad-dritt ghall-godiment pacifiku tal-proprjeta` u ghalhekk iridu jinftehmu fid-dawl tal-principju generali espost fl-ewwel regola (ECHR **Hutten-Czapska v. Poland**, [GC], 19/6/2006 #157 u s-sentenzi hemm riferiti, ara wkoll **Edwards v. Malta**, 24/10/2006 # 57; **Ghigo v. Malta,** 26/9/2006 #48; **Dec. Amm. Nobel v. The Netherlands and others**, 2/7/2013 #30).*

3. The merits

Applicants argued that being non-Maltese EU nationals, they were being precluded from benefitting from the lower non-commercial utility tariff rates to which Maltese EU nationals citizens are entitled when they apply for the provision of such utilities for the first time.

Applicants further allege that they were so precluded because they were requested to supply ARMS Ltd with documents satisfying the proof of their residence in Malta over a period of time.

They stated further that these documents were not readily available to them.

During the pendency of this lawsuit, it results that ARMS effected a change of policy requirements, but legislation remained intact upholding the two tier non-commercial tariff system. Because of the change in policy, the applicants started to benefit from the residential tariff. However they submitted that they had no guarantee at all that a future change in policy would be prejudicial to their rights. They therefore insisted on a judgement by this court on the merits despite the developments that occurred *pendent elite.*

The Court points out that according to Art 4 of the European Convention Act, a person is entitled to seek redress in order to protect against potential violations of fundamental rights and freedoms. Claimants are weary of the fact that a possible future change of policy may be detrimental to them. On their part respondents have submitted that for an alleged breach of the Convention to be successful, applicants have to prove that they qualify as *victims* in terms of the Convention. Respondents submit that while applicants` allegations are purely hypothetical, they do not satisfy the requirement.

The Court does not endorse this argument.

The issue as to who is a *victim* was addressed by the Constitutional Court in its judgement of the 29 May 2015 in re **Lawrence Grech et vs.Tabib Prinċipali tal-Gvern (Saħħa Pubblika) et** :-

> *"Illi l-intimati jgħidu li biex xi ħadd jista' jressaq azzjoni ta' lment ta' ksur ta' jedd fundamentali kif imħares taħt il-Kostituzzjoni jew*

taħt il-Konvenzjoni, irid juri li huwa ġarrab jew sejjer iġarrab dak il-ksur….. Huma jsejsu din is-sottomissjoni tagħhom kemm fuq il-fatt li azzjoni bħal din teħtieġ l-interess tal-parti li tressaqha (Artt 46(1) Kost u 4(1) Kap 319) u kif ukoll fuq il-bażi ta' deċiżjonijiet tal-Qorti ta' Strasbourg (u l-Linji-Gwida maħruġa minn dik il-Qorti dwar l-Ammissibilta' tat-Talbiet) (Practical Guide on Admissibility Criteria (Council of Europe, March 2011) §§ 22 sa 33) dwar dan l-element essenzjali biex titressaq u titmexxa 'l quddiem azzjoni bħal din. Huma jaslu biex jagħrfu li jista' jkun hemm ċirkostanzi fejn persuna tista' tressaq 'il quddiem u tmexxi kawża bħala l-"vittma indiretta" tal-ksur, iżda dawn iċ-ċirkostanzi huma eċċezzjonali li jinħalqu bil-mewt tal-vittma diretta, l-assenza, jew xi impediment fiżiku jew legali tagħha, u ma jagħmlux ir-regola;

…..Fuq kollox, l-Awtorita' intimata ttemm tgħid li biex persuna tista' titqies li kienet vittma diretta ta' ksur ta' xi jedd fundamentali, jeħtiġilha turi effett dirett fuq il-persuna jew fuq il-ġid tagħha b'riżultat tal-egħmil (jew omissjoni) li jissarrfu fi ksur ta' jedd bħal dak (Q.E.D.B. 25.6.1996 fil-kawża fl-ismijiet Amuur vs Franza (Applik.Nru. 19776/92) § 36);

….."Illi l-Qorti tagħraf li azzjoni taħt il-Kostituzzjoni dwar ilment ta' ksur ta' jedd fundamentali trid titħares mil-lenti tal-interess ġuridiku tal-parti li titlob ir-rimedju.

Għall-kuntrarju ta' azzjoni popolari (dwar is-siwi ta' xi liġi) taħt lartikolu 116 tal-Kostituzzjoni, azzjoni dwar ilment ta' ksur ta' jedd fundamentali titlob l-eżistenza ta' dak l-interess ġuridiku fil-persuna li tallega li ġarrbet ksur ta' jedd jew jeddijiet imħarsin fil-Kapitolu IV tal-Kostituzzjoni. Huwa l-istess interess ġuridiku li jsejjes u li jeħtieġ lijintwera f'kull proċediment ieħor quddiem il-Qrati ta' kompetenza ċivili u jitlob l-istess kejl rigoruż li jintalab f'kull waqt ta' proċediment bħal daksal-għoti tas-sentenza;

"Illi min-naħa l-oħra, azzjoni li tissejjes fuq allegat ksur ta' xi jedd fundamentali taħt il-Konvenzjoni tiġbed fuqha r-regoli maħsuba taħt il- Konvenzjoni nnifisha biex jistabilixxu min jista' jitqies bħala l-"vittma" li jisthoqqilha l-ħarsien u r-rimedju għal ksur bħal dak;"

3. Illi hawnhekk l-ewwel Qorti fis-sentenza appellata għamlet rassenja kopjuża tal-linji gwida maħruġa mill-Qorti ta' Strasbourg dwar l-elementi meħtieġa biex persuna titqies tajba biex tressaq talba quddiem dik il-Qorti kif ukoll dwar min jista' jikkwalifika bħala "vittma indiretta" għall-finijet ta' procedure quddiem l-istess

Qorti. Irreferiet ukoll għal xi ġurisprudenza tal-Qorti ta' Strasbourg u kkonkludiet:

"Illi l-Qorti tqis li r-regoli fuq imsemmija ma jeskludux li, f'ċirkostanzi partikolari, azzjoni waħda dwar ksur ta' jedd fundamentali tista' titressaq kemm mill-'vittma diretta' u kif ukoll minn 'vittma indiretta', sakemm kull wieħed u waħda minnhom tagħraf turi tabilħaqq l-eżistenza ta' interess ġuridiku attwali u dirett biżżejjed biex irieġi dik l-azzjoni;

"Illi meta wieħed iħaddem dawn il-prinċipji għall-każ li l-Qorti għandha quddiemha, wieħed jasal għall-fehma li l-eċċezzjoni mhijiex tajba. …Dan iwassal ukoll biex il-Qorti tilmaħ f'kull wieħed u waħda mir-rikorrenti l-attwalita' ta' interess ġuridiku li jmexxu 'l quddiem l-istess kawża, wkoll jekk dan l-interess mhuwiex għal kollha kemm huma l-istess. Għalhekk, kull wieħed u kull waħda mir-rikorrenti huma attivament leġittimati biex jiftħu u jmexxu din il-kawża;

….11. Sabiex ikun jista' jiġi deċiż f'dan l-istadju preliminari jekk ir-rikorrenti
għandhomx locus standi f'dawn il-proċeduri wieħed irid neċessarjament jistrieħ fuq dak allegat fir-rikors promotorju tal-ġudizzju. Dan ma jfissirx, iżda, li s-sempliċi allegazzjoni tar-rikorrenti hi waħedha biżżejjed. Wieħed irid jara jekk, meta tassumi li l-vjolazzjoni allegata avverat ruħha, huwiex plawżibbli li r-rikorrent hu vestit b'tali locus standi u dan fuq il-bażi tal-fatti allegati minnu u dawk miġjuba mill-intimati.

…L-ewwel Qorti qalet sewwa fis-sentenza appellata li "l-azzjoni taħt il-Kostituzzjoni dwar ilment ta' ksur ta' jedd fundamentali trid titħares mil-lenti tal-interess ġuridiku tal-parti li titlob ir-rimedju". U in vista tal-premess, mill-istess lenti trid titħares ukoll azzjoni taħt l-Att Dwar il-Konvenzjoni Ewropea li tilmenta minn leżjoni ta' xi wieħed md-Drittijiet tal-Bniedem u Libertajiet Fondamentali tal-Bniedem miġjuba fl-Ewwel Skeda mal-istess Att.

15. Id-domanda li trid issir, għalhekk, hi jekk mart ir-rikorrent Lawrence Grech u r-rikorrenti uliedu għandhomx interess ġuridiku kif mifhum fl-ordinament ġurdiku tagħna sabiex jippproponu l-azzjoni ta' llum. Ġie kostantement ritenut mill-Qrati tagħna10 li l-interess irid ikun (a) ġuridiku, fis-sens li d-domanda jrid ikun fiha ipotesi tal-eżistenza ta' dritt u ta' vjolazzjoni tiegħu; (b) dirett fis-sens lil jeżisti fil-kontestazzjoni jew fil-konsegwenzi tagħha; (c) personali, fis-sens li jirrigwarda lill-atturi, ħlief fil każ tal-azzjoni

popolari; (d) attwali, fis-sens li jrid joħroġ minn stat attwali ta' vjolazzjoni ta' dritt, u ċioè l-vjolazzjoni attwali tal-liġi trid tikkonsisti f'kundizzjoni pozittiva jew negattiva kontrarja għall-godiment ta' dritt legalment appartenenti jew spettanti lid-detentur.

In sintesi, l-interess ġuridiku jeżisti fejn konvenut jirrifjuta li jirrikonoxxi dritt appartenenti lill-attur.

16. Din il-Qorti hi sodisfatta li r-rikorrenti kollha għandhom l-interess ġuridiku neċessarju bil-kwalitajiet kollha li trid il-liġi sabiex jippproponu l-azzjoni ta' llum ...."

This Court is of the considered opinion that all applicants qualify to be considered as *victims* for the purposes of the Convention. They hold an ARMS account and are subjected to the dual-tariff system for electricity and water for non-commercial use by means of S.L.423.01 and L.S. 423.03.

This Court does not endorse the argument submitted by Enemalta plc that in the absence of any indication that respondents have any intention of re-introducing the administrative procedure complained of and given that the claimants have been placed on the lower tariff, this effectively means that the claimants have no juridical interest to continue with these procedures. It was submitted that this Court should raise the plea of lack of juridical interest *ex officio.*

The Court disagrees.

Applicants are still being subjected to a dual-tariff system which they contest.

Consequently, they do have a juridical interest to take action on the matter, irrespective of the fresh or modified administrative procedures that were adopted during the pendency of the action.

Whether applicants` claims are admissible on the merits is another matter which is being decided today.

According to claimants, there is nothing in the present legislation that prevents the government from re-creating the previous situation where non-Maltese EU citizens were forced to pay higher tariffs than their Maltese counterparts. Plaintiffs insist that they have every right to expect that their fundamental right not to be discriminated in the matter be better protected by means of a clear judicial declaration in that sense. Non-Maltese EU nationals are placed in a position which was financially disadvantageous to them when compared to the Maltese nationals because of the two-tier system of tariffs. They were in actual fact placed on a higher tariff rate than the average Maltese national who benefits from the lower tariff rate when the latter files a first application for utilities.

Applicants submit that respondents could not offer any justification as to why this system was introduced. No vacation periods, different pricing and no extra risks were identified. Moreover the statistical data presented by the sole electricity supplier in Malta indicates that even the financial impact of this system is practically negligent, and therefore there is no reason why the system should remain in place in Malta. The provision of electricity in Malta is subject to tax which at present is one of the lowest in the EU member states. All these facts and circumstances are proof of breach.

In their evidence, some applicants complained that they witnessed problems because applicants needed the permission and consent of the landlord to benefit from the residential rate. If the landlord refused to endorse their request, they could not obtain the residential tariff.

The Court is of the opinion that this complaint is unfounded.

The same conditions apply when a Maltese national rents a premises in Malta and wants the utilities to be registered in his name.

The water and electricity utilities providers have a contractual relationship with the landlord. The landlord is the registered subscriber. For there to be a change in the registration of the meters, which boils down to bills being issued in the name of the tenant and not any longer in the name of the landlord, the latter must signify his express consent on a Form H that is completed by the prospective or actual tenant. This procedure is applicable to Maltese nationals and non Maltese EU nationals alike.

The registration of the tenant of the premises with the utilities provider, duly endorsed by the landlord, a new contractual relationship is brought out between the provider and the tenant ; there the tenant would be held responsible for anything related to the service, as opposed to the landlord who will not be responsible in any manner whatsoever to the provider as the meters would not be registered in the name of the landlord.

Applicant Patricia Graham testified that even when she vacated the property she was renting due to the fact that the landlord had refused to endorse Form H, and started having the bills in her own name instead of in the name of her landlord, the problem as regards the tariffs still persisted.

This latter fact confirms that the applicants` complaint is of no relevance to this case and cannot in any way be classified as discrimination against non-Maltese EU nationals.

The essence of the complaint in this cause was explained by Patricia Graham as being due to the fact that notwithstanding that she started receiving bills in her name, she was still denied the residential rate as she had an « A » Maltese identity card and not a residency permit. She complained that with the introduction of the E residency card, which she described as shambolic and chaotic, there were long queues and lack of informed customer service due to shortage of staff.

Notwithstanding all this, Patricia Graham acknowledged the fact that even though she still was not issued with a E-residency card, ARMS Ltd had brought about a change in policy in that an A identity card or passport was being accepted as a means of identification for persons living in their primary residence to apply for the residential rate.

The Court considers that, as also confirmed by Patricia Graham herself, the residency card had to be given by a different authority unrelated with ARMS Ltd or with the water or electricity providers. Had Patricia Graham been granted a residency permit by the appropriate authority, she would have been granted the residence tariff as requested by her.

The question which follows is whether the request to submit a residency card instead of presenting some other proof of identity such as a

passport or an identity card was indeed discriminatory with regard to non-Maltese EU nationals.

The Court considers that indeed a dual tariff system was introduced by subsidiary legislation in Malta for electricity and water bills, but as the law stands, there is no discrimination or violation of any of the legal dispositions mentioned by applicants in their application.

For the Court, it is absolutely clear that the problems which arose were not due to the aforementioned subsidiary legislation. That legislation which brought about the dual tariff system in no manner whatsoever discriminated between non-Maltese EU nationals and Maltese nationals. The law applied in the same way whether the applicant was Maltese or a non-Maltese EU national.

On the basis of the evidence, it has transpired that the residential rate is applied on the first residence of the applicant which is basically the place where the individual would normally reside for the longest period. The domestic rate is applied for all other premises of a residential nature, a second home or place of residence. There is then a non-residential rate which is applicable for all commercial premises. The important point that emerged from the evidence is that all rates are applied to all persons, irrespective of nationality. The dual tariff system depends on the type of premises and the type of account. Consequently the system is applicable to all and sundry, forms included, irrespective of nationality.

It appears that difficulties arose due to proof of residence. Whereas Maltese nationals could show their Maltese identity card which denoted a letter M or G and this was considered as sufficient, non-Maltese who had a Maltese identity card denoting a letter A were not considered as having brought sufficient proof of their residency and thus were asked to produce a residency permit. This was the policy at a time where the identity cards denoting a letter A were being phased out by the residency permit and were being given an expiry date upon which they would have no longer been valid.

The Court understands that the residency permit had to be issued through another Authority unrelated to respondents. It is not within the framework of the dispute for the Court to proceed to examine as to whether the procedure for applying for a residency permit was chaotic and shambolic as described by applicant Patricia Graham. The Authority in charge is not a

party to the suit. Furthermore this case does not deal with residency permits and their mode of issue, but on the dual tariff system – a matter distinct and separate from the issue of residency permits.

It is significant to note that in January 2014, there was a change of policy at ARMS in the sense that for an applicant to be granted the residential tariff it became sufficient for him or her to sign a declaration accompanied by any means of identification. Nonetheless there was no change whatsoever at law. There was only a change of policy. Prior to January 2014, ARMS used to investigate whether what applicant was stating was in order or not. After January 2014, ARMS requested the applicant account holders themselves to declare in the form what is the truth of the situation and to take full responsibility for that declaration. Prior to January 2014, ARMS relied on the residency permit. After January 2014, ARMS accepted applicant`s declaration in an attempt to simplify procedures.

At this point, whilst reverting to the question as to whether the request for submission of a residency card instead of presenting some other proof of identity was indeed discriminatory with regard to non-Maltese EU nationals, the Court underlines as a point of law that it is bound to decide on the demands made by claimants in their application. The Court has to decide on those demands. In this case, the Court was requested specifically of declaring null and without effect the dual tariff system for electricity and water for non commercial use based on the criterion of residency of a EU national in Malta created by means of SL 423.01 and SL 423.03 . There is no request to declare the policies being adopted to implement this dual tariff system as discriminatory. The Court cannot examine whether the policy at the time when a residency card or permit was requested was in fact discriminatory or not. For this Court it is clear that the law as outlined in the above mentioned subsidiary legislation does not discriminate on the basis of the applicant being a non-Maltese EU national or a Maltese EU national. Indeed, since the policy was changed, non-Maltese EU nationals were granted the residential tariff on the basis of a declaration on their part with a supporting means of identification.

On examining the legislation in question, the Court finds that the applicants challenged the application of an electricity tariff system which has a legal basis provided in two national regulations. The aim pursued in these regulations is that of establishing a lower tariff to persons residing in the property as their primary residence, irrespective of their nationality. Consequently, if a person owns or otherwise occupies other secondary residences in Malta, he would not be eligible to apply for the residential

tariff. The rationale behind this dual tariff system is that of offering a subsidised residential rate for primary residences but its application does not depend on the nationality of the individual but on the place of the primary residence, a criteria which is objective and non-discriminatory.

Consequently, the Court is of the opinion that the law *per se* which introduced the dual tariff system is by no means in breach or in violation of any of the legal instruments referred to by the applicants.

On a final note, the Court notes that in their written submissions, applicants referred to their request for a preliminary ruling under Art 267 of the TFEU, which was rejected by this Court, and insisted that they disagree with that ruling.

Moreover claimants stated that they wished to address an evaluative exercise of the facts within the context of both the EU`s electricity policy and its fundamental values, and that this exercise can in no way be determined solely by the applicants given the non-existence of local case law in this regard. In their concluding submissions, applicants yet again reserved their right to make further submissions in case the matter is referred to the CJEU as per Art 267 of the TFEU. The Court noted respondents` position.

On its part, this Court reaffirms its ruling of the 15 December 2016 and declares that there is nothing further to add on its part. As far as this Court is concerned, the question of a preliminary reference to the CJEU is a closed matter.

Decision

For all the reasons above, the Court hereby decides the merits of the cause as follows :-

Accepts the pleas submitted by respondents with regard to the merits of applicants` demands.

Rejects applicants` demands.

Orders applicants to pay all costs related with or deriving from this judgement.

Mr Justice
Joseph Zammit McKeon

Amanda Cassar
Deputy Registrar