CONSTITUTIONAL COURT

JUDGES

CHIEF JUSTICE SILVIO CAMILLERI
JUSTICE GIANNINO CARUANA DEMAJO
JUSTICE NOEL CUSCHIERI

Sitting of Wednesday 25th April 2018

Case number 16

Application number 19/2013 JZM

Patricia Graham, James Parsons, Richard Cooper, Johanna van't Verlatt, Nigel Hall, Margaret Alder, Julia Partridge, David Pike, Bryan Douglas, John Wilks, Brian Bush, John Besford, Peter Sellers, Elana Bianchi, Nuot Raschar, Kevin Bryant, Marie Poule Wagner, Michael Murray, John Murgatroyd, Howard Hodgson, Robin Smith-Saville, Maria Wiborg, Anders Wiborg, Reginald Joseph Fitzpatrick, George Thomas Goodall

v.

The Attorney General; The Minister of Finance, the Economy and Investment (responsible for Enemalta Corporation and the Water Services Corporation); The Minister for Resources and Rural Affairs; and by a note of the 18th November 2014 the Minister for Energy and Health took over the acts of this case instead of the Minister of Finance, the Economy and Investment, and the Minister for Resources and Rural Affairs; and by a note of the 26th September 2017 the Minister for Energy and Water Management took over the acts of this case instead of the Minister for Energy and Health; The Malta Resources Authority; Enemalta Corporation (now Enemalta p.l.c.); Water Services Corporation

1. This decree concerns a request by plaintiffs for a preliminary reference to be made to the Court of Justice of the European Union in terms of art. 267 of the Treaty on the Functioning of the European Union.

2. The present case concerns plaintiffs' claim for a declaration that the dual tariff system for water and electricity consumption, as implemented under the Electricity Supply Regulations, 1939, and the Water Supply Regulations, 1948, as subsequently amended, is invalid because it conflicts with art. 65(1) of the Constitution of Malta ["the Constitution"], artt. 43 and 49 of the Treaty on European Union, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ["Directive 2006/123"], and Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity ["Directive 2009/72"].

3. The relevant facts are as follows: The Electricity Supply (Amendment) (No. 2) Regulations, 2008 (Legal Notice 330 of 2008) introduced reg. 36 (tariffs for the supply of electricity) in the Electricity Supply Regulations, 1939. Reg. 36 was subsequently substututed by the Electricity Supply (Amendment) Regulations, 2009 (Legal Notice 164 of 2009) and amended by the Electricity Supply (Amendment) Regulations, 2012 (Legal Notice 103 of 2012).

4. At the relevant time reg. 36 read as follows:

»**36.** (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 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 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.«

5. Similar provisions were introduced in the Water Supply Regulations, 1948. The Water Supply (Amendment) Regulations, 2008 (Legal Notice 331 of 2008), introduced a new reg. 12 in the principal regulations. Reg. 12 was subsequently amended by the Water Supply (Amendment) Regulations, 2010 (Legal

Notice 36 of 2010) and by the Water Supply (Amendment) Regulations, 2012 (Legal Notice 102 of 2012).

6. At the relevant time reg. 12 read as follows:

> »**12.** (1) For the purposes of these regulations, a Residential Premises Service shall be charged for in accordance with the First Schedule.
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> »(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.
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> »(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.«

7. Plaintiffs' original complaint was that they were discriminated against when compared with Maltese nationals because they were charged at the domestic tariff, which is more expensive than the residential tariff, which, they claim, is the tariff under which they ought to have been charged. They therefore assert that the legislation implementing the dual-tariff system is invalid in terms of Directive 2006/123 and Directive 2009/72.

8. Plaintiffs cite, in particular, artt. 14 and 20 of Directive 2006/123:

> »Article 14
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> »Prohibited requirements
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> »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:
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> »1) discriminatory requirements based directly or indirectly on nationality … … …
>
> »Article 20
>
> »Non-discrimination
>
> »1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.
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> »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.«

and artt. 2 and 3 of Directive 2009/72:

> »Article 2
>
> »Definitions
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> »For the purposes of this Directive, the following definitions apply:
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> »… … …

»10. ‘household customer’ means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities;

»11. ‘non-household customer’ means a natural or legal persons purchasing electricity which is not for their own household use and includes producers and wholesale customers;

»Article 3

»Public service obligations and customer protection

»… … …

»2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may 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. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.

»Member States shall 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. To ensure the provision of universal service, Member States may appoint a supplier of last resort. Member States shall impose on distribution companies an obligation to connect customers to their network under terms, conditions and tariffs set in accordance with the procedure laid down in Article 37(6). Nothing in this Directive shall prevent Member States from strengthening the market position of the household, small and medium-sized consumers by promoting the possibilities of voluntary aggregation of representation for that class of consumers.«

9. Plaintiffs also cite recital (95) of Directive 2006/123:

»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. Neither does it follow that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination.«

10. In view of what they perceived to be discriminatory treatment in their regard when being charged at the higher, domestic, tariff, plaintiffs requested the first court to:

> »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[1] and L.S. 423.03[2] respectively by tenure (*sic*) 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;«

11. During the hearing – and, indeed, from a reading of the relevant provisions themselves – it transpired that the impugned legislation did not discriminate between nationals and non-nationals, or even between residents and non-residents, but rather between primary residences – which were charged at the lower, residential, tariff – and other residences – which were charged at the higher, domestic, tariff – irrespective of whether the account holder is or is not a Maltese national. It also transpired that plaintiffs were being charged at the higher tariff because of difficulties in proving that their place of residence was their

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1 The Electricity Supply Regulations, 1939, as amended.

2 The Water Supply Regulations, 1948, as amended.

primary residence and also, in the case of some of them, because their landlord was registered as the account holder and, obviously, the consumer's residence was not the landlord's primary residence and therefore did not qualify for the lower tariff.

12. Eventually the authority responsible for ascertaining the account holder's place of primary residence – which is not a party to the present action – changed its policy on the requirements of proof of residence, and plaintiffs can now easily prove their primary residence where applicable. As a result of this change in administrative practice plaintiffs now pay at the lower rate on their primary residence even though the impugned legislation remained unchanged.

13. By its final judgment of 27 June 2017 the first court allowed defendants' pleas on the merits and rejected plaintiffs' demands. The reasons given by the first court for its decision, in so far as they are relevant to the matter at issue, are the following:

> »Applicants argued that, being non-Maltese EU nationals, they were being precluded from benefiting 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.
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> »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 *pendente lite.*

»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 [*sic*] 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.

»… … …

»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 S.L. 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 sham-

bolic 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 [*sic*] 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 S.L. 423.01 and S.L. 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. Con-

sequently, 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.

»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.«

14. Plaintiffs filed an application of appeal on 7 July 2017. *Enemalta p.l.c.* replied on 19 July 2017 and the Prime Minister (who took over responsibility for Energy and Water services previously within the remit of the Minister for Energy and Health) replied on 27 July 2017.

15. After a *verbatim* reproduction of the original application and of an extract from the first court's decision, plaintiffs' appeal application states their ground of appeal, or, as they put it, the "basis of appellants' grievance", laconically as follows:

> »That indeed if:
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> > »"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"
>
> »then it follows:
>
> »that the court of 1st instance should have acceded to the applicants' request(s) because such a lower tariff cannot be applied on the basis of residence (primary or otherwise). This is clearly spelled out in the legal instruments cited by the applicants.«

16. At this point the court observes that plaintiffs shifted their ground on various occasions during the hearing before the first instance court, first claiming that the action was based on article 46(3)[3] of the Constitution, then claiming that it was based on art. 46(1)[4] while at the same time declaring that "that they are not relying on any alleged violation of the human rights provisions of the Constitution as a basis for their claim", then changing tack once again and claiming a breach of their right, under the Constitution and under the European Convention on Human Rights, not to be discriminated against, and finally claiming also a breach of their right to a peaceful enjoyment of their possessions under art.

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3 Art. 46(3) provides that if in any proceedings in any Court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of the human rights provisions of the Constitution, that court shall refer the question to the Civil Court, First Hall which shall give its decision thereon.

4 Art. 46(1) provides that anyone who alleges a breach of his rights under the human rights provisions of the Constitution may apply to the Civil Court, First Hall., for redress.

1 of the First Protocol to the European Convention. Since plaintiffs seem to have adopted a change-your-position-as-you-go-along sort of strategy, it is necessary to define the parameters of the dispute so that the proceedings do not drift and lose focus.

17. In this regard, respondent *Enemalta p.l.c.* raises the following plea in its reply to the appeal:

> »That in the first place, and on a preliminary basis, respondent humbly submits that the appeal of the claimants does not observe the requirements laid down by the law of procedure as it does not provide the reasons on which it is entered. Respondents are unable to decipher exactly what the claimants' appeal is all about, and the lack of reasons in the appeal application is seriously prejudicing their right to defend themselves in these proceedings. Indeed, it is also unclear what this court is being called upon to decide. All that one finds in the application for appeal is a statement that the court of first instance should have acceded to the claimants' requests because according to them "a lower tariff [for electricity and water] cannot be applied on the basis of residence (primary or otherwise). This is clearly spelled out in the legal instruments cited by the applicants". Although the claimants state that their submission is clearly spelt out in the legislation, they even fail to indicate where it is so stated: Are the claimants relying on the Constitution? the European Convention? the European Union Treaties? Directive 2009/72? Directive 2006/123? All these instruments were garbled together in a very confused and distorted way in the original application of 26th February 2013 (which was supposed to be a constitutional application filed in terms of article 46(1) of the Constitution). The claimants were never able to explain clearly the legal basis of the their claim, and now we find ourselves in the same confused situation, if not worse, even at appeal stage. With all due respect, respondent submits that this court should not permit, and should strike out, such an appeal as lodged by the claimants since it adversely affects the rights of respondents to respond effectively to the appeal and the proper conduct of the appeal process.
>
> »That, also on a preliminary basis, and in view of the unclear formulation of the appellants' grievance with respect to the judgment of the first court, it is to be noted that any point raised on appeal needs to be limited to the original parameters of the dispute before the first court. It is a well-established principle

that it is not permitted to raise new issues at appeal stage. … … …«

18. A similar plea was raided by the Prime Minister.

19. Since the question whether the matter should be referred to the European Court of Justice presupposes the validity of the proceedings in which the request for such a reference is made, the issue of the validity of the appeal must be determined before any decision can be taken on the request for a reference; if the pleas of nullity of the appeal are allowed, the other issue will no longer be relevant. For this reason a decision on the request for a reference would be premature at this stage.

20. The hearing is therefore put off so that the parties may make verbal submissions on the pleas of nullity of the appeal.

21. The matter of costs will be determined in the final judgment.

Silvio Camilleri President	Giannino Caruana Demajo Judge	Noel Cuschieri Judge

Deputy Registrar
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