MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta ta' l-14 ta' Jannar, 2015

Appell Civili Numru. 44/2013

Michael Axisa ghas-socjeta Lay Lay Co. Ltd

vs

L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell tas-socjeta Lay Lay Co. Ltd tat-28 ta' Gunju 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-13 ta' Gunju 2013 fejn cahdet l-applikazzjoni PA 882/84 f'Plot B, Ghaxaq off Gudja Road, Ghaxaq 'to sanction garages as build';

Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

Rat l-atti kollha u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni tat-22 ta' Frar 1984 – Pre-1993 Application – PA/882/84 l-appellant nomine, f' Plot B, Ghaxaq, off Gudja Road, Ghaxaq, talab:

"to sanction garages as built"

B'rifjut mahrug fis-26 ta' Settembru 2008 l-Kummissjoni dwar il-Kontroll tal-Izvilupp cahdet it-talba ghall-hrug tal-permess relattiv ghar-ragunijiet segwenti:

"1. The site lies outside the limits for development as defined in the South Malta Local Plan for Ghaxaq and so it is located in an area which should remain undeveloped and open. The proposed development would run counter to this Local Plan and would represent unacceptable urban development in the countryside.

2. Paragraph 3.2 of Development Control Guidance for Developments Outside Built-up Areas describes that the areas which contain sporadic development or sites where 3 previous development has fallen into disuse cannot be considered for urban development. This policy document also states that there is a blanket prohibition on all forms of urban development outside the development zone. The proposed development would channel urban development in an area which should remain open and undeveloped. Moreover, there is no justification, as required by SP Policy SET 12, as to why the development cannot be carried out within the development zone rather than in an area that should be left open and untouched. This is even more so when considering the fact that the development boundary is just opposite the site itself. The proposal is thus considered to further urbanize an

area located in an outside development zone. Hence the proposal runs counter to SET 11, 12, BEN 5 and Paragraph 7.6 of the Structure Plan for the Maltese Islands.

3. The proposed development is a typical urban development and would consequently negatively affect the scenic value of the area. The development compromises the rural characteristics of the surrounding countryside. The proposal therefore runs counter Structure Plan policies AHF 5, RCO 2 and RCO 4, which prohibit development that adversely affects the scenic value of an area."

Fl-appell taghhom l-Avukat Noella Azzopardi Grima u l-Perit Catherine Galea ressqu l-aggravji tal-appellant kif gej:

" Our client's application for the issue of the relative permit dates back to 1984 when an application was submitted bearing the number PB 882/84 before the Planning Area Permit's Board (PAPB). The amount of Lm 402.97 out of a total of Lm 614.70 was paid as contribution fee. Upon payment of said amount and in accordance with the policy in force at the time, the Contribution Section in their contribution list 55/87, gave the Planning Area Permits Board (PAPB) clearance to issue the permit. In accordance with the policy in force at the time a development permit was issued upon payment of one fourth of the contribution fee.

On the 20th August 1998 an enforcement notice - ECF/1352/97 - was issued regarding the site in question. Our client filed an appeal against the said enforcement notice. The said appeal was decided on the 20th August 2003.

Among other things it was decided by the Planning Appeals Board that the application PB 882/84 was still pending.

The PAPB procedure was that after the application was positively decided by the PAPB, the applicant was issued with the contribution bill and after the amount requested was paid, the Contribution Section issued the 'clearance' for the permit to be issued. Such procedure was carried out for the above application. In line with this procedure MEP A was therefore obliged to issue the permit as approved by the P APB without processing further the original application since the procedure before the P APB was exhausted.

Instead the DCC requested the applicant to submit fresh plans on the understanding that the Board was considering positively the sanctioning of garages

as built. The applicant submitted fresh plans and changed the proposal to read "to sanction garages as built" in view of the negotiations carried out with the DCC. It is the DCC's normal practice that when the DCC asks applicant to submit fresh plans and these are then submitted in line with what was discussed at the sitting and with what was requested the DCC then proceeds to approve the particular application.

Since what followed was a recommendation for refusal applicant clarified that the change in proposal was only made on the basis of the negotiations with the DCC and therefore requested that the original proposal i.e. "Construction of residences and garages" be considered.

The case Joe Camilleri Vs Planning Authority decided on the 4th March 2004, (Cit. No. 421/97) by the Tribunal for the Investigation of Injustices are very similar to the facts of the case under examination i.e. 882/84 in that also in Camilleri's case "ntbaghat il-kont tal-contribution lir-rikorrent, bir-referenza 3741/86 Board Number 35/87, dwar is-site f’ta’ Bordin limiti ta' Beqqija, Zebbug, minn fejn jirrizulta li l-kont tal-contribution kien ghal Lm295.31 u r-ricevuta ghal Lm100 u Lm100 mhallsa fl-20 ta' Mejju 1987 u l-1 ta' Gunju 1987 u li hemm Cit ossija clearance 42/87" .

The Tribunal for the Investigation of Injustices in its judgment of Joe Camilleri vs Planning Authority above said "l-Awtorita' (l-Awtorita' ta' l-Ippjanar, illum MEPA) ghadha locus standi f'din il-kawza ghax jekk l-allegazzjoni ta' ingustizzja tigi pruvata mir-rikorrent u t-Tribunal isibha gustificata, u jekk il-ligijiet tal-pajjiz jippermettu, allura f'dan il-kaz ikun jinkombi propju fuq l-Awtorita' tal-Ippjanar biex tezegwixxi dik l-ordni. Jekk l-Awtorita' tibqa barra mill-proceduri jkun impossibbli li l-ordni tat-Tribunal jigi implimentat".

The Tribunal went on to say on page 14, "Irrizulta ghas-sodisfazzjoni tat-Tribunal li fil-fatt il-prassi kienet kategorika li wara li wiehed ihallas il-contribution ma kienx jibqa' aktar xi jsir hlief il-formalita' li l-Contribution Section tgharraf lill-Board bil-pagament halli dan jiffinalizza l-hrug tal-permess. Dan ifisser li l-permess messu nhareg mill-PAPB dak iz-zmien u kienet ingustizzja li saret mar-rikorrent mill-PAPB (u ta' dan huwa successor il-Ministru tal-Ambjent li gie kjamat fil-kawza). Dan iwassal lit-Tribunal biex jiddikjara li l-permess kien hemm u kien jonqos biss il-formalita' li johrog mill-PAPB. Peress li hu m'ghadux jezisti dan il-bord izda tezisti l-Awtorita' jinkombi fuqha li tohrog il-permess relattiv u b'hekk tissana ingustizzja li kienet saret mill-PAPB".

According to the above practice, the processing and vetting of the application in the Camilleri case above and also in the case of PB 881/84 was finalised - all that there was left was a formality of issuing the document of the permit; in substance the

application is approved by the P APB. There was nothing left to be done by the applicant, the remaining formality, i.e. the issue of the document of the permit, is the obligation and duty of the competent authority to carry out. Hence the MEPA's role is not to decide about the merits of the application under discussion, that is 882/84, - this was done, MEP A' s role is simply to issue the permit as approved by PAPB. It is not applicant's fault that the application has been kept pending for such a long time. The Board of Appeal in its judgment relative to the application 882/84 i.e. Lay Lay vs. Planning Authority in fact hinted at the possible injustice and abuse committed against the applicant. Should the applicant now suffer further injustice by having his application processed twice with the consequences that this has brought with it? Since the MEPA is today the competent Authority to issue development permits it is for the MEPA to issue the permit~s decided by PAPB.

In its decision of the 20th August 2003, the Appeals Board in fact remarked that:" ..... l-fatt illi l-Awtorita tal-Ippjannar mill-banda l-wahda naqset milli jiehu decizjoni rigward ii-file PB 881/84 u mill-banda l-ohra istitwiet il-proceduri ta' twettieq odjerni jista jaghti lok ghal abbuz amministrativ."

Reference is made to the case Godfrey Cassar vs Joseph Kenely bhala Chairman ta' l-Awtorita tal-Ippjanar decided on the 31st May 1996. The Court of Appeal held:

"Il-ligi allura taghti lill-Bord il-funzjoni li jissindika u jissorvelja mhux il-hrug ta' permessi, ut sic imma l-hrug ta' avviz ta' twettieq biex jigi assigurat illi dan ma jsirx b'mod kappriccjuz jew arbitrarju. Il-Bord ghandu, taht dan l-aspett ukoll, il-funzjoni ta' review ta' decizjonijiet amministrattivi, u jispetta lilu allura li jipprovdi rimedju fejn tali decizjonijiet ikunu manifestament ingusti, diskriminatorji jew addirittura irragjonevoli."

“…hu wkoll kompitu tal-Bord ta' l-Appell li ma jissanzjonax l- esekuzzjoni ta' l-Avviz ta' Twettieq f'dak il-kazijiet fejn ikun jidher manifest illi r-rifjut li jkun was sal ghan-nuqqas ta' permess ikun wiehed ghal kollox kontradditorju u rragonevoli jew fejn - bhal f'dan il-kaz - ir-rifjut ikun inghata ex admissis, mhux minhabb xi nuqqas da parti ta' l-applikant, imma minhabba nuqqas ta' terzi."

"…hu doveruz fuq il-Bord ta' l-Appell li qed jissindika l-operat ta' l-Awtorita illi qabel japplika b'rigur il-provvediment tas-subinciz 6 ta' l-Artikolu 52 jivverifika jekk kienx verament il-kaz li kien hemm rifjut ta' l-applikazzjoni ghall-permess minhabba xi nuqqas sostanzjali ta' l-applikant jew jekk il-permess kienx verament jinghata li kieku ma kienx ghal xi raguni assolutament indipendenti mill-volonta' ta' l-appellant."

"…Il-Bord m'ghandux ikun l-istrument li jissanzjona ingustizzja amministrattiva meta din tista' tigi rrimedjata."

The reasons given for the refusal of the permit in the case under examination is of no relevance in view of the fact that MEPA the application in question did not require any further processing or vetting to what took place before PAPB. MEPA's role was to issue the permit as decided by the PAPB.

Moreover at the same location in Triq Joseph Gravina, Ghaxaq a permit bearing number 01264/04 was recently issued on the 26th October 2005 for the building of a basement garage and one floor dwelling.

In view of the above and of our further submissions during the proceedings, our client requests MEPA to issue the relative development permit for this application."

Fir-rapport taghha l-Awtorita' ressqet il-kummenti taghha inter alia kif gej:

"5.0 COMMENTS ON APPELLANT'S ARGUMENTS

5.1 The Authority has noted the arguments as brought forward in appellant's request for appeal and shall address these issues hereunder:

5.1.1 In this request for appeal, appellant is stating that this application was submitted in 1984 when part of the contribution fees was paid and a permit was expected to be issued. In 1998, an enforcement notice was issued and an appeal decision stated that the notice was to await the final determination of PB 882/84. When this application was subsequently assessed by the Planning Authority, the DCC asked for fresh plans but the Board eventually refused this request for development. Appellant also cited case Joe Camilleri vs Planning Authority in which the tribunal ordered that Authority to issue a permit which is very similar in merit to the case under appeal. Appellant concluded that Permit 1264/04 was issued for garages in the area and which is also relevant to this case.

5.1.2 However, the Authority disagrees with this statement on various accounts. From the documentation in the file it is evident that although this application was submitted in 1984, there was no definite decision taken on this case prior to the time when this application was forwarded to the Planning Authority upon its

enactment when the PAPB no longer existed. In fact, in letter dated 2nd January 1993, architect requested "I had applied for a planning permit for the works, site and client mentioned below to the PAPB. The permit has not yet been issued. Could the newly established Planning Authority kindly consider this request - Construction of garages and maisonette".

5.1.3 In the meantime, the works commenced on site without a permit and an enforcement notice was issued. An appeal against enforcement was decided on 20th August 2003. From evidence given in this appeal it was also revealed that athough the PAPB Board could have considered favourably the requested development, no formal approval was ever given by the secretary of the Minister (and hence, there was no final formal approval).

"Ghalhekk, dan il-Bord huwa tal-fehma illi l-applikazzjoni PB882/84 ghadha pendenti sal-gurnata tal-lum li jfisser fl-ewwel lok illi l-appellant noe ma jistax jippretendi illi ghandu xi permess validu f'idejh illi jawtorizzah jibda l-bini fuq is-sit. Ghalkemm jidher illi l-applikazzjoni ghaddiet minn diversi stadji u giet approvata mill-lat te' Sanita u anke mill-Bord tal-Estetika u, wara rakkomandazzjoni pozittiva mill-PAPB, l-appellant noe kien intalab u hallas parfi mill-kont tal-kontribuzzjoni, dawn ma jistghu qatt jekwivalu ghall-hrug tal-permess relattiv, u dan il-Bord ma jistax jaqbel mat-tezi tal-appellant noe f'dan ir-rigward".

"Attwalment din l-approvazzjoni ma tidhirx illi qatt harget u lanqas ma ttiehdet decizjoni ahharija da parti tal-Planning Areas Permits Board jew il-Kummissjoni ghall-Kontroll tal-Izvilupp".

"Ghalkemm jidher illi sahansitra gie redatt Development Permit Planning Report, jidher illi ghal xi raguni, l-applikazzjoni qatt ma giet ikkunsidrata mill-Awtorita jew mill-Kummissjoni ghall-Kontroll tal-Izvilupp u ghalhekk qatt ma ttiehdet decizjoni ahharija dwar din l-applikazzjoni". (PAB699/98E)

5.1.4 Subsequently, when the case was assessed by the Authority, it resulted that Structure Plan Policies prohibited such urban development in an area which was outside the designated boundary of development, and a refusal was issued on 13th March 2006. When a request for reconsideration was submitted, the case was reassessed and the original refusal was confirmed in notice dated 26th September 2008.

5.1.5 As regards appellant's claim that when the Authority took over the case from the PAPB its role was limited to finalizing and issuing the permit (without any reassessment), the Authority disagrees that its role did not include the continuation of the assessment of the requested development since throughout the period from the submission of the application up to the final refusal by the DCC, there were several correspondences between the Authority and architect in charge wherein architect forwarded arguments to justify the approval of the requested development.

5.1.6 In fact, while the original proposal read "Garages u maisonette", in 20th November 2003 a letter was received from architect stating that "Because of the current situation on site, that is the four built garages, and to be in line with current practice, I on behalf of my client, request that the proposal be changed to read - To sanction garages and construct residence at first floor", (Red 87). Another letter dated 19th October 2004 by architect, it was stated that "Attached please find four copies of plans of garages as built and two copies of block plan. Please also note change in proposal above, i.e. To sanction garages as built". (Red 108). Yet another letter dated 11th November 2005 from architect, stated that" ..... I on behalf of my client, request to revert back to the original proposal of - garages and maisonettes, ... "(Red 118). This clearly shows that the requested development varied throughout the assessment period and the Authority was obliged to assess this application vis-a-vis the relative planning policies at the time.

5.1.7 In this respect, the Authority states that according to the South Malta Local Plan, Map GH 2 - Ghaxaq Building Heights, the site is located outside the boundaries of development without any designated height or official scheme alignment. Hence the requested garages and maisonette contribute to urban development within an area outside the designated residential boundary and hence cannot be approved. Furthermore, the same development is not permissible through the approved PDG - Agriculture, Farm Diversification and Stables, December 2007 Policy due to non eligibility of applicant for agriculture-related buildings and the nature of the development not being directly related to the surrounding agricultural activity.

5.1.8 As regards the cited Tribunal sentence, this issue was raised during the processing of this application by applicant but when legal advise was sought on this matter, it resulted that the cited case is not relevant to this pending application since the facts of both cases differ and that the decision of the Tribunal is only a recommendation. Hence this application is to be determined on its own merits and in line with the relevant policies.

5.1.9 Regarding the cited permit PA 1264/04, this had granted "Proposed basement garage and one floor dwelling" (width of facade 11.2m) since applicant is a full time

cattle breeder having his farm located circa 30m away from this site. Applicant also produced declaration signed by a Notary Public stating that applicant does not own any immovable property nor did he own such property to date, except the site for the proposed development. The Board noted that there is a genuine need for a dwelling close to applicant's farm. In this regard, the Authority states that the cited case differs in merit to the case under appeal due to the eligibility of applicant for development in ODZ and the nature of the requested development vis-a-vis the surrounding agricultural activities.

5.1.10 Conclusively, the Authority states that whilst taking note of appellant's arguments in his request for appeal, the Authority notes that there are no sound planning justifications which could justify a breach to the above cited policies. Hence, reference is made to the reports as presented by the Directorate and to the DCC's decision which dismissed this request for development since the DCC Board had based their decision on the valid relevant policies applicable to this area.

5.2 MEPA therefore reiterates that it acknowledges and confirms that the reasons for refusal can be justified on sound planning considerations which took into consideration all the relevant facts, planning policies, legislation and submissions as required by article 33/1 of Chapter 356 of the Laws of Malta, and thus, respectfully requests the Planning Appeals Board to confirm the decision of the Development Control Commission and to refuse this appeal."

Il-Perit Catherine Galea ghas-socjeta appellant b'nota pprezentata fit-12 ta' Frar 2010 elenkat numru ta' permessi li nghataw, barra z-zona tal-izvilupp, u vicin is-sit mertu ta' dan l-Appell.

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghall-issanzjonar ta' garages gja ezistenti.

Is-sit mertu ta' dan l-appell jinsab fl-indirizz Plot B, Ghaxaq, off Gudja Road, Ghaxaq.

Din l-applikazzjoni giet rifjutata peress li s-sit jinsab barra l-limiti ghall-izvilupp skond il-pjan lokali ghal Hal-Ghaxaq, li l-proposta twassal ghal zvilupp urban f'zona li ghandha tibqa minghajr zvilupp, li l-proposta tmur kontra l-policies SET 11, SET 12,

BEN 5 u l-paragrafu 7.6 tal-pjan ta’ struttura, u li l-proposta tikkomprometti l-karatteristici tal-ambjent fil-vicinanzi tmur kontra l-policies AHF 5, RCO 2 u RCO 4.

L-argumenti li tqajmu mill-partijiet fil-kors tas-smiegh ta’ dan l-appell jistghu jigu migburin fil-qosor kif gej:

L-appellant jissottometti li r-ragunijiet ghar-rifjut mhumhiex relevanti ghall-kaz peress li l-Awtorita’ ma kellha taghmel l-ebda pprocessar ulterjuri in segwitu ta’ dak li sar quddiem il-PAPB u li r-rwol tal-Awtorita’ kien li tohrog il-permess kif deciz mill-PAPB, u li ulterjorment fl-istess zona u cioe’ fi Triq Joseph Gravina inhareg permess ghall-izvilupp ta’ basement garage u residenza ta’ sular.

L-Awtorita’ tissottometti li mhuwiex minnhu li l-applikazzjoni kienet giet deciza meta l-applikazzjoni giet rimessa lill-Awtorita’, li meta l-applikazzjoni giet ezaminata mill-Awtorita’ kien evidenti li l-policies tal-pjan ta’ struttura ma ppermettewx zvilupp urban f’zona li hija barra l-konfini ta’ zvilupp, li skond il-mappa GH2 tal-pjan lokali relattiv is-sit jinsab barra l-konfini tal-izvilupp, u li dwar il-permess citat mill-appellant l-Awtorita’ harget il-permess relattiv ghal ragunijiet specifici u in linea ma bzonnijiet agrikoli.

Kif irrizulta mill-varji decizjonijiet li ttiehdu dwar dan l-kaz, minn diversi organi gudizzjari u kwazi gudizzjarji, cjoe decizjonijiet tal-Bord ta’ l-Appell dwar l-Ippjanar; il-Qorti ta’ l-Appell Sede Inferjuri u l-Qorti Kostituzzjonali, li gew pprezentati fil-kors ta’ smiegh ta’ dan l-appell, dan hu kaz li ilu pendenti ghal snin shah. Ex admissis, l-applikazzjoni originali tal-PAPB saret fin-1984.

Is-socjeta appellanti tissottometti li l-applikazzjoni ghall-izvilupp quddiem il-PAPB kienet giet ipprocessata, approvata u inhadmu l-kontribuzzjonijiet relattivi; li in parti thallsu mis-socjeta’ appellanti.

Il-PAPB ma hargitx il-Permess; izda hi s-sottomissjoni tal-appellant nomine, li billi l-applikazzjoni giet ikkonsidrata u approvata mill-PAPB, l-Awtorita’ kellha l-obbligu li tohrog il-permess, minghajr indagini ulterjuri.

Bhala fatt irrizulta, li l-izvilupp sar, bla permess; Kien hemm l-aspettattiva ta’ permess da parti tal-appellant noe, izda l-PAPB baqghet ma harget l-ebda permess fuq is-sit; In oltre, s-sit jinsab barra z-zona, tal-izvilupp u billi mhux relattat ma attivita’ agrikola, mhux permissibbli barra z-zona tal-izvilupp.

Is-sentenzi citati kkonfermaw ‘inter alia’ li l-izvilupp sar bla permess; li sar barra z-zona tal-izvilupp, u li ghad-dewmien kienet responsabbli l-istess socjeta appellanti u mhux l-Awtorita’ (ara fol. 25 tas-Sentenza tal-Qorti Kostituzzjonali tal-25 ta’ Frar 2011).

Applikazzjonijiet ghall-izvilupp jigu kkunsidrati u determinati fil-kuntest tal-Artikolu 69 tal-Att X ta’ l-2010 Kap. 504, precedentement l-Artiklolu 33 tal-Kap. 356.

Principalment l-Awtorita’ meta tiddeciedi dwar l-applikazzjoni, tirreferi ghall-Plans u Policies approvati. Dan iffisser li r-rekwizit principali u essenzjali hu d-disinjazzjoni taz-zona fejn jinsab is-sit in kwistjoni skond il-Pjan Lokali.

Fil-kaz in ezami, kif konfermat mis-site plan annessa ma dan l-Appell, u s-sit jinsab barra z-zona tal-izvilupp fil-limiti ta’ Hal-Ghaxaq; South Malta Local Plan Map GH2.

L-applikazzjoni hi “To sanction garages as built”; dan hu zvilupp urban li jista’ jigi awtorizzat f’zoni li skond l-Pjani Lokali huma disinjati bhala zoni ta’ zvilupp; eccezzjonalment jista’ jigi awtorizzat bini, barra z-zona tal-izvilupp, izda jinhtieg li jkun relatat ma attivita’ agrikola skond l-policies tal-Pjan ta’Struttura, u l-Policy and Design Guidance, Agriculture, Farm Diversification and Stables ta’ Dicembru 2007.

Mhux kontestat mill-appellant nomine li l-izvilupp minnu propost ta’ garages mhux relatat mal-agrikoltura; izda jittenta jiggustifika l-pozizzjoni tieghu billi jiccita diversi permessi li nghataw, barra z-zona tal-izvilupp.

Dwar dan ghandu jinghad, li l-fatt biss li jezistu numru ta’ dawn il-permess, ma jfissirx necessarjament, kif jallega l-appellant nomine, li ghall-istess raguni, l-proposta tieghu ghandha tigi approvata.

Kull kaz, anke in vista tal-kazijiet eccezzjonali ga msemmija, jinhtieg li jigi ezaminat fil-kuntest tal-fatti specie partikolari ghalih. In fatti wiehed mill-permessi citati PA 1264/04, jirrizulta li nghata billi l-applikant hu full time cattle breeder u ghandu r-razzett cirka 30 metri ‘l noghod mir-residenza. Dan il-permess ghalhekk nghata billi irrizulta li l-applikant kien eligibbli u jissodisfa r-rekwiziti imposti mill-Policies.

Fin-nota ipprezenta fit-12 ta' Frar 2010, l-Perit tal-appellant nomine ghamlet referenza ghall-numru ta' permessi, barra z-zona tal-izvilupp. Apparti li kif gia intqal, l-fatt li jezistu dawn il-permessi, dawn ma jammontawx ghal gustifikazzjoni sufficjenti, biex tigi approvata l-applikazzjoni mertu ta' dan l-appell, jigi rilevat li fil-maggior parti tghhom dawn l-applikazzjonijiet kienu jirreferu ghall-alterazzjonijiet jew estensjonijiet ta' bini ezistenti li kien snin ilu gja' approvat. Ma jistax ghalhekk jsir paragon jew anologija, ma dawn il-permessi, li gew ikkunsidrati fil-kuntest partikolari ghalihom, meta l-uniku fattur komuni hu dak li jinsabu, bhal din in ezami, barra z-zona tal-izvilupp.

Evidentement li gara f'dan il-kaz kien, li l-appellant nomine haseb li kien ser johrog il-permess, u ghalhekk ipproceda bl-izvilupp; billi l-izvilupp sar bla permess, l-Awtorita' harget l-Avviz biex Tieqaf u ta' Twettieq, giet pprezentata l-applikazzjoni 'to sanction' li giet michuda billi l-izvilupp sar barra z-zona tal-izvilupp.

Ezaminati fid-dettal il-motivazzjonijiet tar-rifjut, u l-aggravji tal-appell, fil-kuntest tal-Policies tal-Ippjanar rilevanti, l-appell ma jimmeritax konsiderazzjoni favorevoli.

It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tas-26 ta' Settembru 2008 ghall-applikazzjoni PA 882/84.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal naqas li jikkonsidra l-veru ilment tal-appellant cioe illi meta l-PAPB approvat l-izvilupp u sar il-hlas skond il-prassi ta' dawk iz-zmenijiet, l-appellant kellu dritt vestit u l-permess avolja ma lahaqx inhareg mill-PAPB kellu jinhareg mill-MEPA. In oltre l-appellant mic-cirkostanzi tal-kaz kellu aspettativa li l-permess jinhareg u jekk ma nharigx dan ma kienx attribwibbli lilu. In oltre t-Tribunal naqas li jikkonsidra li dak li gara kienet ingustizzja gravi u li kellha tigi sanata;

2. It-Tribunal naqas li jikkonsidra l-commitment estensiv li kien jezisti fiz-zona;

3. It-Tribunal iddecieda fuq il-policies ezistenti fiz-zmien tad-decizjoni minghajr ma pogga dan fl-isfond tal-istorja tal-applikazzjoni. In oltre ma qies id-dewmien biex il-kwistjoni tigi deciza u l-konsegwenzi li qed igarrab l-appellant, haga li hi ammessa implicitament mill-

Awtorita fir-risposta taghha, meta l-Awtorita kienet ipprocessat l-applikazzjoni b'mod favorevoli izda s-segretarju tal-Ministru ma kienx approva l-peremss kif kienet il-prassi f'dak iz-zmien;

4. L-appellant jilmenta dwar il-ksur tad-drittijiet fondamentali tieghu taht l-artikolu 6 u l-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni;

5. Giet kommessa diskriminazzjoni mal-appellant meta jitqiesu d-diversi permessi li nhargu fiz-zona u f'iqsar zmien.

L-ewwel u r-raba aggravji

L-appellant jilmenta fl-istess nifs dwar dritt kwezit u aspettativa legittima. Hi l-fehma tal-Qorti li l-appellant qed jikkontradixxi lilu nnifsu peress illi jekk qed jallega li gia ghandu dritt vestit ma hemmx kwistjoni ta' aspettativa. Id-dritt kwezit li minnu jista' jilmenta l-appellant hu l-ghoti ta' permess favurih. Irrizulta b'mod car illi l-appellant qatt ma kellu permess mahrug. Il-fatti juru illi fiz-zmien il-PAPB il-prassi kienet illi l-PAPB tirrakomanda l-izvilupp u f'dan il-kaz jidher li r-rakkomandazzjoni kienet favorevoli, tant li thallset anki parti mill-kontribuzzjoni kif kienet il-prassi. Pero din ir-rakkomandazzjoni ma kinitx tekwivali ghal permess. Il-permess kien jinhareg mill-Ministru jew ghall-ezattezza s-segretarju tal-Ministru responsabbli. Hu pacifiku li permess qatt ma inhareg. Kwindi ebda dritt vestit ma jista' jigi reklamat mill-appellant.

Lanqas jista' jinghad li kien hemm aspettativa legittima li jinhareg permess ghaliex ir-rakkomandazzjoni ma kinitx approvazzjoni tant li kien jehtieg l-approvazzjoni finali tal-Ministru. Hu minnu illi r-rakkomandazzjoni tat tama qawwija lil applikant pero dan ma kienx jintitola lil applikant li jibda l-izvilupp qabel l-approvazzjoni. Fil-fatt sehhew zewg fatti li poggew lil applikant f'pozizzjoni difficli, cioe li l-PAPB bhala l-entita li kienet tiehu hsieb l-izviluppi giet abrogata u flokha dahlet l-Awtorita tal-Ippjanar bhala entita distinta u sui generis fejn id-decizjonijiet tehodhom hi u mhux il-Ministru. Ma kien hemm ebda kontinwazzjoni bejn l-operat tal-PAPB u l-MEPA peress li l-funzjonijiet u poteri kienu differenti. Il-MEPA saret entita awtonoma u mhux parti minn dipartiment governattiv. In oltre sar enforcement notice fuq l-izvilupp li l-appellant ghamel bla ma kellu f'idejh permess mahrug kif riedet il-ligi fiz-zmien l-operat tal-PAPB. Din il-Qorti mhix qeghda hawn biex titfa htija izda biex tivverifika

biss jekk hemmx lanjanza valida ta' punt ta' dritt deciz mit-Tribunal. It-Tribunal mexa korrettament f'dan ir-rigward.

Il-Qorti izzid li tant l-appellant ma invokax li kellu aspettativa legittima illi anki quddiem l-Awtorita, b'ittra tat-2 ta' Jannar 2003, il-perit tal-appellant jammetti li l-permess mhux mahrug u jitlob lil Awotrita 'to kindly consider this request'. In oltre l-istess applikant fil-mori tal-applikazzjoni biddel il-proposta fuq is-sit fi tlett okkazzjonijiet bejn l-2003 u l-2005 u dan fl-20 ta' Novembru 2003 wara li f'Awwissu 2003 hareg l-enforcement, fid-19 ta' Ottubru 2004 u l-11 ta' Novembru 2005 biex fl-ahhar wasal ghal din il-proposta sub iudice.

Kwindi hi l-fehma tal-Qorti li hi bla bazi s-sottomissjoni tal-appellant li hemm xi dritt kwezit jew aspettativa legittima.

In kwantu ghall-ilment ta' natura kostituzzjonali, din il-Qorti gia esprimiet ruhha li lanjanzi simili ma jsirux quddiem din il-Qorti meta fl-ewwel lok ghad hemm ir-rimedju ordinarju li qed jigi avvallat mill-istess appellant permezz tal-appell fuq punti ta' ligi decizi mit-Tribunal u in oltre l-kompetenza limitata ta' din il-Qorti kif espressa fil-ligi taghmilha difficli jekk mhux impossibbli ghal Qorti li tinvesti kwistjonijiet ta' natura kostituzzjonali peress illi huma punti ta' ligi decizi mit-Tribunal li jaqghu fil-poter revizjonali tal-Qorti f'materja ta' appelli minn planning. Madankollu l-Qorti ma tistax ma tirrimarkax illi l-appellant gia ivventila l-kwistjoni kostituzzjonali fuq l-istess sit u l-istess cirkostanzi b'ilmenti identici quddiem il-Qorti Kostituzzjonali fl-ismijiet Lay Lay Co. Ltd vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u Avukat Generali deciza kontra s-socjeta Lay Lay fil-25 ta' Frar 2011. Il-Qorti mhix ser tiddelunga fuq id-decizjoni izda qari taghha twassal ghal konkluzjoni li l-ilment impost fl-aggravju odjern gia gie ventilat u deciz.

It-tieni aggravju

Dan l-aggravju ma jista' jkollu ebda rilevanza fic-cirkostanzi odjerni billi dak li jirrizulta hu illegali, tant li qed jintalab sanzjoni ghalih, qatt ma jista' jkun soggett ghal xi forma ta' paragun ma' zviluppi ohra, jew commitment fiz-zona. Il-Qorti tqis li anki kieku ghal grazzja tal-argument inghataw permessi ghal zviluppi fl-istess cirkostanzi, din il-Qorti fl-ebda hin ma

hi ser taghti l-kunsens taghha li jigi perpetrat jew multiplikat l-incidenza ta' illegalita ta' zvilupp fuq il-premessa li zviluppi illegali ohra inghataw permess. Ir-rimedju tal-appellant zgur mhux ser jinstab quddiem din il-Qorti. Apparti dan it-Tribunal ma injorax l-aggravju kif fil-fatt imposta l-aggravju l-appellant. It-Tribunal anzi ikkonsidra l-permessi pero wasal ghal konkluzzjoni gusta illi kull kaz irid jittiehed fil-kuntest tieghu u ghalhekk mhux kull zvilupp li inghata ghalih permess f'ODZ jista' jikkwalifika bhala xi raguni biex applikazzjoni f'ODZ tigi approvata.

Ghalhekk dan l-aggravju qed jigi michud.

Il-hames aggravju

Dan l-aggravju jsegwi dan ta' qablu. Fl-ewwel lok l-ilment ta' diskriminazzjoni kif maghmul ma hux punt ta' ligi per se izda apprezzament ta' fatti li jwasslu ghal decizjoni liema decizjoni tista' tkun differenti minn ohrajn. Tali lment jista' jfisser li hemm commitment fiz-zona u dan ma ittiehitx kont tieghu jew li l-applikant ma rceviex l-istess trattmanet bhal ohrajn identici ghal tieghu. Jidher li f'dan il-kaz l-appellant qed jilmenta fuq permess iehor li inghata fil-vicinanzi. It-Tribunal ikkunsidra l-kwistjoni u wasal ghal konkluzjoni li l-fattispecie mhix simili. Dan hu bizzejjed biex din il-Qorti ma tissindakax oltre, kwistjoni purament fattwali u teknika. Ilment ta' diskriminazzjoni invece jekk jikkostitwixxi punt ta' dritt fondamentali jrid jigi precizat ezattament mill-parti allegatament leza liema fattur jikkostitwixxi ksur tal-Kostituzzjoni jew il-Konvenzjoni Ewropea u jigi stabbilit qabel xejn jekk id-diskriminazzjoni gietx allegatament kommessa mit-Tribunal innifsu u jekk fil-proceduri pendenti quddiem din il-Qorti ghadx hemm possibilita ta' rimedju ordinarju, u jekk hemm allura din il-Qorti zgur mhix ser tissindaka tali lment.

Ghalhekk l-aggravju qed jigi michud.

It-tielet aggravju

Dan l-aggravju wkoll ma fihx mertu. L-Awtorita u t-Tribunal huma obbligati li jiddeciedu fuq il-policies vigenti fil-mument tad-decizjoni. L-isfond tal-applikazzjoni u d-dewmien tal-ezitu ma jistghux jintuzaw bhala argument kontra dan il-principju bazilari ghal determinazzjoni ta' applikazzjoni. Jekk sar xi nuqqas jew abbuz amministrattiv, l-appellant jista' jivventilah fis-sede appozita izda ma jistax jintuza biex ixejjen principju regolatur fid-determinazzjoni ta' applikazzjoni ta' ippjanar. Apparti dan, kif gia inghad, zewg fatturi ta' rilevanza f'dan l-isfond partikolari huma l-fatt tac-cahda tal-proposta sa almenu l-2005 u l-kawza kostituzzjonali mressqa mill-istess appellant li kellha effett fuq l-ezitu tal-applikazzjoni sa ma din il-kawza giet deciza.

Ghalhekk anki dan l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell tas-socjeta Lay Lay Co. Ltd u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-13 ta' Gunju 2013. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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