MALTA

QORTI CIVILI

PRIM' AWLA

(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tat-30 ta' Settembru, 2014

Rikors Numru. 11/2012

Paul Magri (ID 928950M)

u martu Jane (ID card 499053M)

kontra

Prim` Ministru

u

s-Sindku u s-Segretarju Esekuttiv Kunsill Lokali Qormi

u

Awtorita` ta` Malta dwar

l-Ambjent u l-Ippjanar

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fl-20 ta` Frar 2012 li jaqra hekk –

Illi huma proprjetarji ta` art illi tinsab bejn Valletta Road u l-wied f`Hal Qormi, maghrufa bhala tal-Ghadira.

Illi zmien ilu, u cioe` madwar l-1994, haddiema tal-Gvern, fuq passagg proprjeta` privata tal-esponenti, waqt li kien qed isir xoghol fl-inhawi, kienu ghamlu l-kisi tal-wicc tal-passagg li minnu kien jghaddu bl-ingenji kbar minhabba x-xoghol fil-wied. Kienet tolleranza dak iz-zmien da parti tal-esponenti, meta kien qed isir ix-xoghol fil-wied.

Fl-ebda zmien ma saret xi procedura ghall-akkwist da parti tal-Gvern skont il-Kap 88 tal-Ligijiet ta` Malta. Fuq din il-proprjeta` l-Gvern qatt ma ghandu jew kellu xi titlu kif gie stabbilit fix-xhieda tar-rapprezentant tad-Dipartiment tal-Artijiet fil-kawza "Is-Sindku et Qormi vs. Paul Magri" deciza mill-Qorti tal-Appell fl-24 ta` Gunju 2011.

Illi f`dik il-kawza l-Kunsill Lokali Qormi vvanta pretenzjoni li ghandu l-pussess tal-passagg ghax fuqu saret kisja, u dan bl-ebda titlu fil-ligi jew skont il-ligi. Dan kien pussess "ex turpi causa" kif jigi riferit aktar `il quddiem. Wara s-sentenza tal-Qorti tal-Appell citata, l-esponenti baghtu att gudizzjarju lis-Segretarju Parlamentari u lid-Direttur tad-Dipartiment tal-Kunsilli Lokali dwar l-okkupazzjoni llegali anke ta` bicca art ohra tar-rikorrenti fl-istess inhawi. Baqghu bla twegiba.

Illi din l-art, skont applikazzjoni PA 05787/08 tar-rikorrenti Paul Magri setghet tinbena bhala ground floor gymnasium / fitness centre "overlying existing site". Ir-rapport kien miexi regolarment u sahansitra kien hemm ir-rapport tal-istess ufficjali tal-MEPA illi dan kien jaqbel mal-local plan u r-rakkomandazzjoni kienet illi l-istess jigi approvat. Dan sahansitra skont dokument tad-9 ta` Frar 2012. Din l-applikazzjoni ilha tkaxkar mis-sena 2008.

Illi fil-frattemp il-Kunsill Lokali ta` Hal Qormi ghamel applikazzjoni (PC 9/11) biex fuq l-art privata tghaddi triq. It-talba kienet li "include the ***existing road*** *into a schemed road".*

Din l-applikazzjoni giet kunsidrata u approvata mill-Board tal-Awtorita` fis-seduta tas-26 ta` Jannar 2012. L-Awtorita` tat-Transport f`Malta, komunement maghrufa bhala Transport Malta, kien gibdet l-attenzjoni li ma kien hemm l-ebda triq fuq l-istess art. Ir-rikorrenti opponew ghax kien hemm

falsita` li jinghad li kien hemm "existing road". Il-MEPA accettat li kien hemm triq meta fuq l-istess pjanti taghha tali triq ma tirrizultax. Tirrizulta biss minn de facto expropriation li saret mill-awtoritajiet governattivi li taghhom hu responsabbli l-Prim` Ministru kif ukoll il-Kunsill Lokali Qormi. Illi b`tali decizjoni l-MEPA sfrattat l-uzu legittimu li r-rikorrenti riedu li jaghmlu mill-proprjeta` taghha, skont kif jidher mill-applikazzjoni PA 05787/2008. Id-decizjoni tal-Board tal-MEPA ma kienx skont il-ligi u ghalhekk ma jistax jinghad li kien "lawful" kif jigi spjegat aktar `il quddiem.

Illi skont l-Artikolu 28 tal-Kap 356 illi jidher li ghadu japplika ghall-kaz, (stante illi l-Artikolu 59 tal-Kap 504 ghadu ma dahalx in vigore) ma hemmx appell minn tali decizjoni fuq l-applikazzjoni tal-Kunsill Lokali Qormi (PC 9/11).

Illi l-agir tal-awtoritajiet Maltin jikkostitwixxi ndhil mhux gustifikat u mhux skont il-ligi tal-proprjeta` privata li qieghda fil-pussess tar-rikorrenti u dan bi ksur tal-Artikolu 1 tal-Ewwel Protokol tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem, kif ukoll bi ksur tal-Artikolu 37 tal-Kostituzzjoni ta` Malta.

Il-kawzali huma dawn li gejjin.

1. Ma hemmx dubju illi l-art in kwistjoni hija proprjeta` privata u li l-Gvern m`ghandu l-ebda titolu fuqha.

2. Illi l-pretenzjoni illi ghandu l-Kunsill Lokali ta` Hal-Qormi illi din hija trejqa pubblika hija ghal kollox infondata fil-fatt u fid-dritt u tali pretenzjoni tikkostitwixxi esproprijazzjoni de facto tal-istess art. Illi l-esproprijazzjoni tal-art

tista` ssir biss skont il-Kap 88 tal-ligijiet ta` Malta. Dan definittivament qatt ma sar.

3. Illi l-esponenti skont il-local plan approvat mill-Parlament kellu dritt illi jmexxi l-applikazzjoni PA 05787/08. Kif diga` inghad dan il-permess kien ghall-approvazzjoni. Sahansitra r-rapport li ntbaghat lir-rikorrenti fid-9 ta` Frar 2012 f`paragrafu 4.d jghid illi dan l-izvilupp ghandu jigi rakkomandat, imbaghad immedjatament wara jinqatghu b`interlinear diversi konsiderazzjonijiet u l-konkluzjoni tigi li ghandu jigi rifjutat. Dan abbazi tad-decizjoni li kienet ittiehdet fuq l-applikazzjoni PC 9/11 li ghamel il-Kunsill Lokali halli l-passagg isir triq pubblika.

4. Illi tali decizjoni timpingi fuq l-uzu, id-disponibilita` u d-dritt tal-proprjeta` li jikkonsisti f`usus abusus et fructus. Dan ghaliex anke l-uzu legittimu li jrid jaghmel minnha gie sfrattat b`decizjoni tal-MEPA illi stante t-tibdil, l-applikazzjoni legittima tieghu lanqas tista` tigi kunsidrata.

5. Illi jidher illi l-Awtorita` ta` Malta ghall-Ambjent u l-Ippjanar agixxiet fuq l-Artikolu 28 tal-Kap 356. Parti mill-Att 356 giet revokata u parti minnu le. L-att illi dahal minfloku Kap 504 ma dahalx kollu fis-sehh u precizament l-Artikolu 59 tal-istess ghadu ma dahalx in vigore. Konsegwentement wiehed irid imur ghal-ligi ta` qabel u jaqa` fuq l-Artikolu 28 tal-Kap 356. Illi l-Artikolu 28 tal-Kap 356 jitkellem fuq ***emendi minuri*** *li jista` jitlobhom kull persuna u fost dawn hemm fuq l-allinejament tat-triq. Ma jidhrix illi giet applikata xi ligi ohra taht ic-Chapter 356. Issa l-Artikolu 28 jaghmel cross reference dwar il-procedura li ghandha tigi segwita ghall-Artikolu 32 tal-Kap 356 isib li dan gie revokat.*

6. L-Awtorita` tal-MEPA ma mxietx skont il-ligi taghha stess. Il-poter taghha kien limitat li taghmel "minor amendments" fis-sens ta` tibdil fuq l-

allinejament tat-triq (suppost ezistenti) imma ma setghetx taghmel tibdil tal-allinejament meta l-awtorita` Transport Malta gibditilha l-attenzjoni li triq ma kienx hemm. Lanqas setghet tghid li hu "zoning". Barra minn hekk ma kellhiex il-poter li tbiddel il-pjan lokali b`mod sostanzjali.

7. Illi l-Kunsill Lokali Qormi ma setax jaghmel tali applikazzjoni. L-ewwelnett ghax kien qed jiddikjara falsament, u dan fuq "de facto expropriation", (ex turpi causa) li kien hemm triq, meta triq pubblika ma kienx hemm. Fit-tieni lok, l-istess Kunsill Lokali ma setax jaqbez il-poteri tieghu kif stabbiliti fl-Artikolu 33(1)(f) tal-Kap 363 fejn ghandu poter li jaghmel rakkomandazzjonijiet lill-awtoritajiet kompetenti, u dan ma jinkludix li nome proprio isir applikant quddiem il-MEPA. L-art in kwestjoni qatt ma giet devoluta lill-Kunsill Lokali, anke kieku kienet tal-gvern.

8. Illi kif gew issa l-affarijiet l-esponenti ma jistax jaghmel uzu mill-art tieghu u jizviluppaha skont il-ligi u d-dritt, u Plans tal-istess MEPA. Jibqa` mizmum u mdendel ad infinitum.

Illi minn dan kollu johorgu l-ilment gustifikati taht l-Artikolu 1 tal-Ewwel Protokol tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem u l-Artikolu 37 tal-Kostituzzjoni :-

(a) Illi kien hemm esproprijazzjoni ***de facto*** *da parti tal-awtoritajiet specjalment meta l-Kunsill Lokali ta` Hal Qormi ppretenda u mexxa kawza ghax qal li kellu l-pussess tat-triq, li skont it-Transport Malta ma tezistix.*

*(b) Illi ma gewx osservati l-ligijiet tal-pajjiz dwar l-istess u ghalhekk ma jistax jinghad illi kienet "**lawful**". Dan japplika kemm ghall-esproprijazzjoni de facto u kemm ghall-agir tal-MEPA illi agixxiet fuq procedura illi ma tezistix u cioe` l-Artikolu 29 u 32 tal-Kap 356 u inoltre tmur kontra dak illi approva l-Parlament u ghandu s-sahha ta` ligi dwar l-uzu u l-izvilupp illi jista` jsir fl-art*

in kwistjoni li mieghu l-applikazzjoni PA 058787/08 hija konformi u li ilha pendenti ghal kwazi erba` snin filwaqt illi l-PC application ghaddiet qisha ziffa rih. Il-MEPA kellha biss li tbiddel l-allinejament ta` triq ezistenti u li tkun tidher fuq il-pjanti taghha u mhux li tfassal triq gdida fuq pjanta.

(c) Illi t-tfassil tat-toroq huwa prerogativa tat-Transport Malta skont l-Artiklu 7(b) tal-Kap 499, u ghalhekk il-Kunsill Lokali ma setax jitlob u l-MEPA tapprova formazzjoni ta` triq. Ir-raguni hija semplici ghala hija Transport Malta li tiddeciedi fejn taghmel triq. Hija l-awtorita` li trid tara jekk hix se timpingi fuq il-proprjeta` privata u ghalhekk jinholoq id-dritt ta` kumpens wara esproprijazzjoni. Fl-istess Artiklu 7(b) hemm proviso li jghid li Transport Malta ma tkunx obbligata li tifforma t-triq hi meta xi hadd jipprogetta triq <u>taht xi ligi ohra, ir-responsabbilta` taqa` fuqu</u>. Il-MEPA mhux se taghmel it-triq, u l-Kunsill Lokali mhux se jaghmel it-triq ghax poter ta` "maintenance" biss ghandu u ma tridx tkun proprjeta` privata (Art. 33(a) tal-Kap 363). Mela min se jaghmel din it-triq ?

(d) Illi jekk wiehed jikkunsidra l-kwistjoni bhala kontroll tal-uzu tal-proprjeta` din ukoll trid tkun konformi mal-ligi u tigi segwita l-procedura nderogabbli u li ma tkunx in konflitt mas-supremazija tal-Parlament. Illi l-Parlament ma ddelegax lil MEPA il-poter illi tibdel dak illi jkun stabbilixxa l-istess Parlament.

*(e) Illi lanqas hemm a "**fair balance**". Fl-ewwel lok ma kienx hemm interess pubbliku. Ta` min ifakkar li l-Pjan Lokali gie approvat ricentement, u dan ma kenitx inkluza bhala triq. Kif jirrizulta l-esponenti kien ghamel applikazzjoni ghall-gym u kollox kien skont ir-regoli. Mal-Kunsill Lokali Qormi ghandu kwestjoni pendenti quddiem il-Qorti Civili peress li dahal fuq bicca art ohra u nkorpora fi ground, bla kliem u bla sliem. Inoltre kif jidher mill-pjanti waqt li abusivament qed tigi mfassla "ipotetikament" din it-triq. Dan li gie approvat bil-PC Application 9/11 izomm lill-esponenti mmillil jista` juza l-art kif irid huwa bhala proprjetarju. Dak biss kien l-iskop.*

Illi in sostenn ta` dawn l-argumenti, l-esponenti qed jaghmel riferenza ghas-sentenza Belvedere Alberghiera srl v Italy (deciza mill-Qorti ta` Strasbourg

fit-30 ta` Mejju 2000) fejn il-fatti kienu jixbhu hafna ghax kunsill jew municipality ghaddew triq minn fuq proprjeta` privata.

Il-Qorti qalet hekk :-

*"**B. Compliance with Article 1 of Protocol No. 1***

1. The Court reiterates that Article 1 of Protocol No. 1 contains three distinct rules: "The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, `distinct` in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among other authorities, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, partly following the terms of the Court`s analysis in the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also the Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, p. 31, § 56, and Iatridis v. Greece [GC], no. 31107/96, § 55, ECHR 1999-II).

1. Whether there has been an interference

2. The Court notes that it is common ground that there has been a deprivation of possessions.

3. In order to determine whether there has been a deprivation of possessions within the meaning of the second rule, the Court must not confine itself to examining whether there has been dispossession or formal expropriation, it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether that situation amounted to a de facto expropriation. (see the Sporrong and Lönnroth judgment cited above, pp. 24-25, § 63).

4. The Court notes that in the present case, by applying the constructive-expropriation rule in its decision, the Consiglio di Stato deprived the applicant company of the possibility of obtaining restitution of its land. In the circumstances, the Court finds that the effect of the judgment of the Consiglio di

Stato was to deprive the applicant company of its possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (see Brumărescu v. Romania [GC], no. 28342/95, § 77, ECHR 1999-VII).

5. In order to be compatible with Article 1 of Protocol No. 1, such an interference must be "in the public interest", "subject to the conditions provided for by law and by the general principles of international law" and must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights (see the Sporrong and Lönnroth judgment cited above, p. 26, § 69). Furthermore, the issue of whether a fair balance has been struck "becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary" (see Iatridis cited above, § 58, and Beyeler v. Italy [GC], no.33202/96, § 107, ECHR 2000-I).

2. Compliance with the requirement of lawfulness and the aim of the interference

6. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see Iatridis cited above, § 58) and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it.

7. The Court does not consider it necessary to decide in the abstract whether the role in the continental-law system of a rule, such as the constructive-expropriation rule, established by the courts is comparable to that of statutory provisions. However, it reiterates that the requirement of lawfulness means that rules of domestic law must be sufficiently accessible, precise and foreseeable (see the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42, and the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 47, § 110).

8. In that connection, the Court observes that the case-law on constructive expropriations has evolved in a way that has led to the rule being applied inconsistently (see paragraphs 22 to 36 above), a factor which could result in unforeseeable or arbitrary outcomes and deprive litigants of effective protection of their rights and is, as a consequence, inconsistent with the requirement of lawfulness.

9. The Court also notes that under the rule established by the Court of Cassation in its judgment no. 1464 of 1983 every constructive expropriation follows the unlawful taking of possession of the land. The unlawfulness may exist at the outset or arise subsequently. The Court has reservations as to the compatibility with the requirement of lawfulness of a mechanism which,

generally, enables the authorities to benefit from an unlawful situation in which the landowner is presented with a fait accompli.

10. In any event, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention.

11. In the instant case, the Court notes that on 2 December 1987 the Tuscany RAC quashed with retrospective effect the resolution passed by the authorities as being unlawful and not in the public interest. However, that finding of the Tuscany RAC, in which it held that the occupation of the applicant company`s land was unlawful and not in the public interest (see paragraph 11 above), did not result in restitution of the land, since the Consiglio di Stato held that the transfer of property to the authorities had become irreversible.

12. The Court considers that the interference in question was not compatible with Article 1 of Protocol No. 1. That conclusion makes it unnecessary for it to examine whether a fair balance was struck between the requirements of the general interest of the community and the need to protect individual rights.

13. Consequently, there has been a violation of Article 1 of Protocol No. 1.”

Interessanti wkoll kienet l-opinjoni qawwija tal-Imhallef Giovanni Bonello, li ghalkemm qabel maghha, zied id-doza.

CONCURRING OPINION OF JUDGE BONELLO

1. I have voted with the majority to find a violation of Article 1 of Protocol No. 1 and, in principle, I fully subscribe to the reasoning which leads to that finding.

2. This separate opinion addresses what I consider the Court`s inadequate response to the Government`s pleadings and to the judgment of the Italian Constitutional Court (no. 188 of 1995).

3. It is not disputed in the present case (a) that the decision to occupy the applicant`s land was illegal and invalid; and (b) that the construction works carried out on the applicant`s land in pursuance of that invalid notice of expropriation were equally illegal.

4. The Italian Constitutional Court, however, in the said judgment, approved the so-called “constructive-expropriation rule” created by the Court of Cassation (absent in any statute book) by virtue of which private property, illegally designated for expropriation and illegally built upon, anyway becomes

public property once the works constructed on it are completed. The Constitutional Court added that the fact that the authorities had become owners of the land by taking advantage of their own unlawful conduct did not pose any difficulty under the Constitution, since the public interest in the preservation of works for the public good outweighed the individual interest in the right of property (see paragraph 33 of the present judgment).

5. Article 1 of Protocol No. 1 makes deprivation of private property subject to the existence of a law and to the observance of the conditions provided for by that law. There is no statutory law in Italy authorising expropriation in the circumstances sanctioned by the Constitutional Court. But, solely for the sake of argument, I will concede that a surge of judicial activism by a Court of Cassation ratified by a Constitutional Court has sufficient efficacy at law to fill the conspicuous gap in the Italian statute book and can stand as "law" in lieu of an inexistent statutory provision. The problem, however, remains whether this "quasi-law" satisfies at all the minimum criteria posited by the Convention.

6. Differently from the Italian Constitutional Court, the unlawful conduct of the authorities does pose a difficulty for me. I only stockpile embarrassment in attempting to convince myself that one illegal act is an illegal act, but the sum of two illegal acts gives birth to rights in favour of the wrongdoer. I hesitate to buy new brands of legal ethics by which, once unlawfully acquired land has been unlawfully built upon, abuse somehow transfigures itself into lawfulness. Construction programmes are, no doubt, endowed with bountiful virtues; turning wrong into right is not, to my knowledge, one of them.

7. In developing the basic rule that all interferences with the enjoyment of fundamental rights and freedoms have to be "in accordance with the law", the Convention organs (in other cases, referring to other rights) have refined this concept considerably. They have established that the expression " `in accordance with the law` ... also relates to the quality of that law, requiring it to be compatible with the rule of law mentioned in the Preamble to the Convention".

8. I find very insignificant suggestions of compatibility with the rule of law in a judicially procreated norm that makes the acquisition of rights depend on the delinquency of the wrongdoer. Arguments by which rights can be earned ex turpis causa should not, in my view, feature very high in the "quality" scale of the rule of law.

9. The Court has, it seems to me, lost a priceless opportunity to extend the examination of the "quality of law" principle adopted in other cases to the case of deprivation of property under Article 1 of Protocol No. 1. It is a pity."

F`dan il-kaz tal-lum, bejn il-Gvern, il-Kunsill Lokali u l-Board tal-MEPA, gara dak li kien qed jikkritika l-Imhallef Giovanni Bonello. Ma` din il-pozizzjoni r-rikorrenti jaqblu, hlief li l-avukat sottoskritt ikollu jghid li l-espressjoni bil-Latin kellha tkun "ex turpi causa".

L-esponenti jaghmlu wkoll riferenza ghas-sentenzi tal-Qorti Ewropeja Bugajny v Poland tas-6 ta` Novembru 2007, u ghall-gurisprudenza hemm kwotata fuq de facto expropriation, u ghal toroq fi proprjeta` privata.

Ghaldaqstant l-esponenti jitolbu bir-rispett li din l-Onorabbli Qorti joghgobha :-

(1) tiddikjara li l-intimati vvjolaw l-Artiklu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem; u konsegwentement tordna li l-art tigi ritornata lura lir-rikorrenti minghajr ebda pretenzjoni da parti tal-intimat Prim Ministru u l-intimati Sindku u Segretarju Esekuttiv tal-Kunsill Lokali Qormi.

(2) tiddikjara nulla u bla effett id-decizjoni favorevoli tal-Board tal-Awtorita` ta` Malta ghall-Ambjent u l-Ippjanar fuq l-applikazzjoni PC 00009/11 mehuda fis-26 ta` Jannar 2012, basata fuq illegalita`.

(3) tiffissa l-kumpens ghall-okkupazzjoni llegali da parti tal-ewwel zewg intimati u tordnalhom li t-tnejn ihallsu s-somma likwidata in solidum bejniethom.

(4) tiffissa kumpens ghad-danni mhux pekunjarji minhabba l-vjolazzjoni, u tikkundanna lit-tlett intimati ghall-hlas tal-istess.
Bl-ispejjez.

Rat ir-risposta tal-intimati Sindku u Segretarju Ezekuttiv tal-Kunsill Lokali Qormi prezentata fl-14 ta` Marzu 2012 li taqra hekk –

1. L-esponenti jeccepixxu li dina l-kawza Kostituzzjonali saret inutilment u ghalhekk m`ghandhomx jehlu ebda spejjez f`dan ir-rigward.

Illi fl-2007 Paul Magri kien ipprezenta kawza civili Rikors Guramentat numru 425/07 GV kontra l-Kunsill Lokali Qormi fejn wara li ppremettew li l-

Kunsill kien abbuzivament ghamel uzu mill-art tieghu u li kiser il-Kostituzzjoni u l-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem talab li l-kunsill jigi zgumbrat u dan b`riserva ghad-danni subiti.

Il-Kunsill Lokali kien ikkontesta t-talba ta` Paul Magri u fost l-eccezzjonijiet ohra tieghu kien eccepixxa l-inkompetenza tal-Qorti stante n-natura tat-talba fejn inghad li l-Kunsill kien kiser il-Kostituzzjoni u l-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni. Eccepixxa wkoll li mhux il-legittimu kontradittur billi f`kawzi ta` natura Kostituzzjonali huwa l-Istat li ghandu jwiegeb ghal-lanjanzi ta` natura Kostituzzjoni u Konvenzjonali u mhux il-Kunsill li jrid jiggarantixxi li ma jkunx hemm ksur tal-Kostituzzjoni u l-Konvenzjoni.

Illi huwa ben risaput li l-Prim Awla tal-Qorti Civili, barra l-gurisdizzjoni ordinarja taghha, ghandha wkoll gurisdizzjoni kostituzzjonali, (Artikolu 46(3) tal-Kostituzzjoni), u meta lamentela kostituzzjonali / konvenzjonali titqajjem quddiemha, hija ghandha tikkonverti ruhha f`din il-gurisdizzjoni kostituzzjonali taghha fl-istess kawza, u tiddeciedi l-punt sollevat hija stess minghajr il-htiega li jsir kawza kostituzzjonali ohra separata jew referenza. Dan il-punt gie deciz diversi drabi u l-istess punt dahlet fih fil-fond il-Qorti Kostituzzjonali fil-kawza Q.K. ***Angelo Spiteri vs Kummissarju tal-Pulizija et*** *tas-16 ta` April 1999.*

Illi ghalhekk il-Qorti fil-kawza fl-ismijiet Paul Magri et vs Sindku u Segretarju Ezekuttiv Kunsill Lokali Qormi (425/97 JZM), u dana, anke in vista tal-eccezzjoni li kienet giet sollevata mill-esponenti hemmhekk, kellha hija stess tidhol fil-mertu tal-lamentela kostituzzjonali u konvenzjonali mqajma mill-istess Paul Magri f`dik il-kawza stess u r-rikorrent ma kellux jiftah din il-kawza inutilment.

2. Illi f`dawn il-proceduri l-Kunsill Lokali intimat ma jistax jitqies bhala legittimu kontradittur f`dawn il-proceduri u dan kif se jigi ppruvat waqt it-trattazzjoni tal-kawza.

3. L-esponenti jeccepixxu li r-rikorrent kellu r-rimedji ordinarji li huwa kellu jezawrixxi qabel ma jitlob ir-rimedji kostituzzjonali. Huwa qed jibbaza t-talba tieghu fuq allegata llegalita` tad-decizjoni tal-MEPA li laqghet it-talba tal-Kunsill Lokali li t-triq tigi dikjarata schemed road billi fil-fatt ma kellhiex il-poter skont il-ligi taghmel hekk stante ma kien hemm ebda existing road, u di piu` l-art qatt ma giet esproprjata. Illi r-rikorrenti setghu attakkaw dik l-allegata llegalita` permezz ta` proceduri ta` stharrig gudizzjarju ta` eghmil amministrattiv u ghalhekk ma gewx ezawriti r-rimedji ordinarji qabel ma giet intavolata din il-kawza.

4. Bla pregudizzju l-esponenti jeccepixxu ulterjorment li huwa r-rikorrent li jrid jipprova t-titolu tieghu ghal dina l-art in kwistjoni, li dwar l-istess titolu hemm proceduri pendenti quddiem il-Prim Awla tal-Qorti Civili, liema proceduri ssir riferenza ghalihom aktar `l fuq u jindika precisament liema hija l-art tieghu u liema qed jghid li giet mehuda mill-Gvern Centrali u moghtija lill-Kunsill Lokali biex jamministraha. Illi ghalhekk, il-fatt li l-kawza hawn fuq citata ghadha pendenti, ikompli jsostni li punt li r-rikorrenti ma ezawrewx ir-rimedji ordinarji kif tehtieg il-ligi.

5. Illi minghajr pregudizzju ghal dak gia espost, semmai huwa l-Gvern Centrali qabel ma gew stabbiliti l-Kunsilli Lokali li allegatament witta t-triq minn fuq art tar-rikorrent u mhux il-Kunsill Lokali li l-funzjoni tieghu hija biss li jamministra t-toroq afdati f`idejh u ghalhekk m`huwiex il-legittimu kontradittur tar-rikorrent.

6. Illi l-esponenti qatt ma esproprjaw l-art tar-rikorrent, u huwa l-Gvern li jista` jaghmel dana. Ghalhekk kull referenza li ssir fit-talbiet ghal esproprjazzjoni de facto m`ghandhiex tigi diretta kontra l-Kunsill izda kontra l-Gvern Centrali kif rapprezentat mill-intimat l-iehor.

7. Illi l-fatt li l-Kunsill Lokali kien jiehu hsieb triq, li dwar it-titolu taghha hemm kontestazzjoni, peress li tali triq kienet ghaddiet lill-istess Kunsill

Lokali fit-twaqqif tieghu wara dhul fis-sehh tal-Kunsilli Lokali, ma jistax jinghad illi l-Kunsill Lokali esproprija proprjeta` tar-rikorrent.

Illi l-Kunsill Lokali, kien istitwixxa kawza civili dwar spoll (Rikors Guramentat 959/08 JA) kommess minn Paul Magri dwar l-istess art billi huwa kien spussessa lill-Kunsill Lokali mill-art li huwa kien gie awtorizzat mill-Gvern Centrali li jamministra u jmantni u dan kif ikkonfermat mill-Qorti tal-Appell fis-sentenza minnha moghtija f`din il-kawza.

Illi dawn il-fatti ma jwasslux ghal esproprjazzjoni kif qed jallegaw ir-rikorrenti fir-rikors taghhom.

8. Illi meta t-triq / gnien / ground liema tkun ilha wahda pubblika, u ilha hekk qabel in-1994 u giet ikkunsidrata hekk anke mir-rikorrent li haseb li kienet giet esproprjata mill-Gvern. Anke fir-rikors odjern jidher li l-appellant hekk qed jikkunsidra dina l-art tant li fis-sottomissjonijiet tieghu huwa jidhol fi kwistjonijiet li l-Qorti tista` taghmel jekk wiehed jitkellem dwar esproprjazzjoni, jew esproprjazzjoni de facto jew kontroll u uzu.

9. Fil-kaz in ezami l-art in kwistjoni kienet ilha zmien f`idejn il-Gvern u saru xoghlijiet fiha fl-interess pubbliku bhal gnien u triq u r-rikorrenti kien jaf b`dan zmien ilu tant illi ghaddew snin twal qabel mar-rikorrent ressaq l-allegazzjonijiet tieghu permezz ta` att gudizzjarju. Sa llum il-pussess ghadu qatt ma gie dikjarat illegali minn ebda Qorti. Ghalhekk anke jekk ghal grazzja tal-argument ir-rikorrent baqghalu xi titolu fuq din l-art, illum il-gurnata hu ma jistax jitlob ir-restituzzjoni in integrum minn fejn ghaddejja triq imma r-rimedju li ghandu huwa li jitlob kumpens jew danni jekk jirrizulta li hija tieghu.

10. Illi l-Kunsill Lokali intimat ressaq applikazzjoni quddiem l-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar in rigward din it-triq li qed jilmintaw dwarha r-rikorrenti u l-fatt li ressaq applikazzjoni quddiem l-istess Awtorita` bl-ebda mod ma jistax jitqies li kiser id-drittijiet fundamentali tal-istess rikorrenti dan kif se jigi ppruvat waqt it-trattazzjoni tal-kawza.

11. Illi l-Kunsill Lokali intimat ma jistax iwiegeb ghall-operat tal-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar u ghalhekk kull talba maghmula in rigward id-decizjonijiet tal-istess Awtorita`, il-Kunsill Lokali intimat ma jistax la jinzamm responsabbli ghalihom u lanqas jigi kkundannat dwarhom.

12. Illi t-talbiet tar-rikorrenti ghandhom jigu kollha michuda peress li huma nfondati fil-fatt u fid-dritt.

Salv eccezzjonijiet ohra jekk ikun il-kaz.

Rat ir-risposta tal-intimata Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar prezentata fil-15 ta` Marzu 2012 li taqra hekk –

1. Preliminarjament illi fil-konfront tal-eccipjenti l-azzjoni odjerna hija ghal kollox intempestiva.

2. Preliminarjament ukoll l-eccipjenti tissottometti illi mhijiex il-legittimu kontradittur ghal-lanjanzi tar-rikorrenti u ghalhekk ghandha tinheles mill-osservanza tal-gudizzju.

3. Illi preliminarjament ukoll ir-rikorrenti m`ezawrewx ir-rimedji kollha ordinarji a disposizzjoni taghhom.

4. Ir-rikorrenti odjerni jridu jippruvaw il-"locus standi" u l-interess guridiku taghhom f`dawn il-proceduri ossia jridu jipprovaw it-titolu vantat minnhom.

5. Illi minghajr pregudizzju ghas-suespost, l-allegazzjoni tar-rikorrenti li d-decizjoni tal-eccipjenti hija bbasata fuq illegalita` jew li b`xi mod l-eccipjenti ma mxietx skont il-Ligi hija allegazzjoni frivola u vessatorja u nfondata fil-fatt u fid-dritt u ghaldaqstant qeghda tigi michuda. In fatti bil-qima jinghad illi kif se jirrizulta waqt it-trattazzjoni tal-kawza, l-Awtorita` esponenti qdiet u qed taqdi l-obbligi kollha taghha u wzat il-poteri taghha skont il-ligi.

6. Illi m`hemm assolutament ebda ksur tad-drittijiet fundamentali kif allegat mir-rikorrent la taht il-Konstituzzjoni u lanqas taht il-Konvenzjoni Ewropea da parti tal-eccipjenti.

7. Illi m`hemm l-ebda bazi fuq xiex ir-rikorrenti jistghu jitolbu kumpens mill-eccipjenti.

8. Ghaldaqstant, in vista tas-sueccepit it-talbiet tar-rikorrenti huma ghal kollox infondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess rikorrenti.

9. Salvi, jekk ikun il-kaz, risposti, ossia eccezzjonijiet ulterjuri.

BL-ISPEJJEZ kollha kontra r-rikorrenti.

Rat ir-risposta tal-intimat Prim` Ministru prezentata fl-20 ta` Marzu 2012 li taqra hekk –

1. Illi fl-ewwel lok u in linea preliminari l-esponent mhuwiex il-legittimu kontradittur a tenur tal-artikolu 181B tal-Kap 12 tal-Ligijiet ta` Malta u ghaldaqstant ghandu jigi liberati mill-osservanza tal-gudizzju.

2. Illi minghajr pregudizzju ghas-suespost u dejjem in linea preliminari, hija l-umli fehma tal-esponenti li din l-Onorabbli Qorti ghandha tirrifjuta li tezercita s-setghat taghha skont il-proviso tal-artikolu 46(2) tal-Kostituzzjoni ta` Malta u tal-proviso tal-artikolu 4(2) tal-Kap 319 in kwantu mir-rikors promotur ma jirrizultax li r-rikorrent ezawrixxa r-rimedji kollha ordinarji a disposizzjoni taghhom.

3. Illi fil-mertu u minghajr pregudizzju ghas-suespost, l-esponent jopponi l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti in kwantu huma nfondati fil-fatt u fid-dritt ghar-ragunijiet segwenti li qed jigu elenkati minghajr pregudizzju ghal xulxin :

3.1 Illi ma hemm l-ebda ksur tal-Artikolu 37 tal-Kostituzzjoni u / jew tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropeja ghad-Drittijiet tal-Bniedem kif allegat mir-rikorrenti ;

3.2 Illi mill-fatti kif prospettati mir-rikorrenti ma jirrizultax li kien hemm xi tehid forzuz ta` proprjeta` ;

3.3 Illi inoltre, kif tghallem il-gurisprudenza tal-Qorti Ewropea ghad-Drittijiet tal-Bniedem, "for there to have been a deprivation of property, (in terms of article 1 of the first protocol) the applicant must, of course, demonstrate that he or she had a title to it" [Holy Monasteries v Greece A 301-A (1995); 20 EHRR 1] u fil-kaz odjern jispetta lir-rikorrenti jippruvaw it-titolu vantat minnhom.

4. Illi finalment u minghajr pregudizzju, dato ma non concesso li gew lezi d-drittijiet sanciti fl-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem u / jew l-Artikolu 37 tal-Kostituzzjoni ta` Malta kif qed jallegaw ir-rikorrenti, l-esponenti jissottometti wkoll illi r-rimedji mitluba mir-rikorrenti mhumiex gustifikati.

5. Salv eccezzjonijiet ulterjuri.

Ghaldaqstant l-esponent, jitlob bir-rispett lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti bl-ispejjez kontra taghhom.

Rat id-dokumenti li r-rikorrenti pprezentaw flimkien ma` nota taghhom tat-12 ta` Marzu 2012.

Rat il-verbal tal-udjenza tat-22 ta` Marzu 2012 fejn il-Qorti dderigiet lill-partijiet sabiex igibu provi dwar u jittrattaw l-ewwel u t-tieni eccezzjonijiet tal-

Prim` Ministru ; it-tieni, it-tielet u r-raba` eccezzjonijiet tal-kunsill lokali intimat, u l-ewwel, it-tieni, it-tielet u r-raba` eccezzjonijiet ta` l-Awtorita` intimata.

Rat ix-xiehda bl-affidavit tar-rikorrent u ta` Alexander Bellia.

Rat id-digriet taghha moghti fl-udjenza tal-11 ta` Gunju 2012, fejn wara talba tar-rikorrenti li ghaliha l-intimati rrimettew ruhhom, ordnat illi kopja tax-xiehda li ta Charles Camilleri mid-Dipartiment tal-Artijiet fil-kawza bin-Rik. Gur. Nru. 425/2007 JZM u kopja ta` l-kuntratt tal-akkwist tar-rikorrenti li kien esebit fl-istess kawza jigu nseriti fl-atti tal-kawza tal-lum u jkunu jikkostitwixxu prova.

Semghet ix-xiehda ta` Ivor Robinich u ta` John Farrugia fl-udjenza tal-11 ta` Gunju 2012 u rat id-dokumenti li pprezentaw ix-xhieda.

Semghet ix-xiehda ta` Charles Camilleri fl-udjenza tat-30 ta` Ottubru 2012.

Rat in-nota b`dokumenti li pprezentaw ir-rikorrenti fid-29 ta` Ottubru 2012.

Rat in-nota b`dokumenti li pprezentat l-Awtorita` ntimata fid-19 ta` Frar 2013.

Semghet ix-xiehda in kontroezami ta` r-rikorrent u ta` Kenneth Brincat.

Rat id-digriet taghha moghti fl-udjenza tal-20 ta` Gunju 2013, fejn wara talba tar-rikorrenti li ghaliha l-intimati rrimettew ruhhom, accettat li tiehu konjizzjoni u taghmel taghha kwalsiasi prova diga` akkwisita fl-atti tal-kawza fl-ismijiet *Paul Magri et vs Sindku u Segretarju Ezekuttiv Kunsill Lokali Qormi* (Rik. Gur. Nru. 425/2007 JZM).

Rat l-atti ta` l-kawza li ghaliha saret riferenza fil-paragrafu ta` qabel.

Rat in-noti ta` sottomissjonijiet tal-partijiet.

Rat id-digriet taghha moghti fl-udjenza tal-20 ta` Gunju 2013 fejn halliet il-kawza ghas-sentenza dwar l-eccezzjonijiet preliminari fuq indikati.

Rat l-atti l-ohra tal-kawza.

Ikkunsidrat :

II. <u>Provi</u>

Ir-**<u>rikorrent</u>** xehed illi l-art in kwistjoni tinsab bejn il-wied ta` Hal Qormi u Valletta Road. Akkwista l-art minghand l-ahwa Grima. Mal-kuntratt tal-akkwist kienet annessa pjanta li hejja l-Perit Salvu Borg. Huwa ghandu negozju fil-wied ta` Hal-Qormi. Ma kienx jahdem l-art in kwistjoni. In segwitu xtara razzett fil-qrib u pogga xi xoghol fl-art. Dak iz-zmien l-ghalqa in kwistjoni kienet imdawra b` hitan tas-sejjieh. Ghal habta tas-snin disghin kien qieghed isir xoghol fil-wied ta` Hal Qormi u l-haddiema tal-gvern jew tal-kuntrattur qabdu u ghaddew minn fuq l-art tieghu in kwistjoni. Dak iz-zmien ma qalghax kwistjonijiet. Fil-fatt dawk il-haddiema battmu l-art ghax bdew ighaddu b` ingenji kbar u anke waddbu xi tarmac. Qatt ma rcieva xejn minghand hadd li l-art tieghu kienet ittiehdet. In segwitu l-kunsill intimat ha parti mill-istess art biex inkorporaha fi ground tal-futbol u dan minghajr ma rcieva xi ittra li l-art kienet ser tittiehed. In segwitu saret applikazzjoni biex isir tibdil fil-ground ; din id-darba l-kunsill lokali ghadda l-art lill-klabb tal-futbol. Huwa oggezzjona izda l-MEPA ma tatx kaz ta` l-oggezzjonijiet tieghu. Gara li l-applikazzjoni waqghet fuq punt tekniku u l-kaz waqaf hemm. Minkejja dan kollu l-art baqghet taghmel parti mill-ground.

Ir-rikorrenti stqarr illi huwa jrid jutilizza l-art peress li nbidlu l-iskemi tal-bqija tas-sit u setghu johorgu permessi. Hlief ghall-parti mill-art tieghu li marret mal-ground, huwa ghalaq il-bqija b`hajt fuq zewg nahat ghaliex hemm kien propjeta` tieghu. Billi saru xi lmenti, kien ordnat iressaq il-hajt peress li kien qieghed jixref fuq art tal-Gvern. Il-kunsill intimat ipprezenta kawza ta` spoll kontra tieghu ghaliex bil-hitan inghalqet it-triq ; il-kawza kienet deciza favur il-kunsill. Insista li l-art baqghet tieghu u l-kunsill qatt ma gab prova tat-titolu tieghu.

Kompla jixhed illi intant huwa ressaq l-applikazzjoni nru 5787/2008 lill-MEPA sabiex jibni gymnasium. Il-MEPA harget rapport illi kollox kien in regola u d-Direttorat irrakkomanda lill-Bord tal-MEPA biex japprova l-applikazzjoni. Il-kunsill lokali pprezenta l-applikazzjoni PC 9/11 fejn talab biex ighaddi triq.

Qal li l-post fejn applika l-kunsill ma kien triq xejn peress li ma jaghti access lil hadd billi fuq naha hemm il-hajt tal-ground u fuq in-naha l-ohra hemm hajt li jifred l-art mill-wied. Waqt id-diskussjoni, Transport Malta kienet sostniet li ma kienx hemm triq ezistenti. Il-MEPA rragunat li la kienu jghaddu n-nies, dik kienet triq pubblika. L-applikazzjoni tieghu waqfet billi kienet saret l-applikazzjoni tat-triq ; infatti r-rakkomandazzjoni nbidlet fis-sens illi l-progett tal-gymnasium ma kellux isir billi kien hemm il-hsieb li tghaddi triq. Huwa tqieghed f`sitwazzjoni illi jekk it-triq qatt ma tigi ffurmata jew il-Gvern qatt ma jesproprja, jibqa` mdendel ghaliex ma seta` jaghmel xejn. Kompla jinsisti li ma kienx minnu li kien hemm triq ezistenti kif allega l-kunsill lokali. Billi fuq l-applikazzjoni li ressaq il-kunsill lill-MEPA ma setax jappella, huwa pprezenta l-kawza tal-lum.

Fil-**kontroezami**, ir-rikorrent xehed illi ma jiftakarx li fejn hemm il-football ground, kien hemm gnien jew bandli ; kien hemm bicca art imharbta mdawra b`hajt. Ma setax ighid jekk l-art tieghu bdietx tintuza bhala passagg qabel l-1994.

Alexander Bellia jigi r-ragel tat-tifla tar-rikorrenti. Huwa xehed li tgharras fil-familja tar-rikorrenti fl-1997. Sar jaf bl-art in kwistjoni u l-uzu li sar minnha waqt li kienu qeghdin isiru x-xogholijiet fil-wied. Huwa personalment ghamel tiftix biex jara x` kien qed jigri ; mar id-Dipartiment tat-Toroq, id-Dipartiment tal-Artijiet u d-Dipartiment tax-Xogholijiet u t-tlieta cahdu li kellhom x`jaqsmu ma` l-art. Cahdu wkoll illi temporanjament ghaddew minnha bl-ingenji u li ghamlu xi tarmac. Fl-2001 il-kunsill lokali ta` Hal Qormi ghamel applikazzjoni biex jizviluppa parti mill-art u mid-dokumenti li nghataw irrizulta li l-art qatt ma kienet giet esproprjata mill-Gvern. Intbaghtet ittra lill-kunsill sabiex jigi infurmat li kien qed japplika fuq parti minn art li kienet ta` r-rikorrenti. Il-kunsill wiegeb billi talab kopja tal-kuntratt ta` l-akkwist tar-rikorrenti u kopja tal-pjanti. Hu mar bid-dokumenti personalment u halliehom l-ufficju tal-kunsill lokali izda baqa` minghajr l-ebda twegiba.

Kompla jixhed illi r-rikorrenti ghamlu oggezzjoni mal-MEPA. Il-ground tal-futbol effettivament inbena in parti fuq art tal-gvern u in parti fuq art ta` r-rikorrenti. Il-bqija tal-art tar-rikorrenti giet maghluqa b` *fencing* u l-parti l-ohra li kienet intuzat biex jghaddu minnha ghax-xogholijiet tal-wied giet maghluqa b` hajt kif kienet originarjament. Meta nbena dan il-hajt, kienu marru rapprezentanti tad-Dipartiment tal-Artijiet u insistew li l-hajt jinbena f`post partikolari peress li fejn inbena kien f`xifer l-art tal-Gvern.

Stqarr illi fl-2008, ir-rikorrenti applikaw mal-MEPA biex jibnu gymnasium u r-rakkomandazzjoni kienet li l-applikazzjoni tkun approvata. In segwitu l-kunsill lokali dahhal applikazzjoni fejn talab li fejn kien propost li jinbena l-gymnasium kien hemm *existing road* u ried li din tigi *schemed road*. Huwa personalment ghamel verifiki ma` Transport Malta u ma rrizultax li kien hemm *existing road*. L-applikazzjoni tal-kunsill kienet deciza b`heffa. Minnha r-rikorrenti ma setghux jaghmlu appell. L-applikazzjoni tar-rikorrenti kienet michuda. Intbaghtet ittra lid-Dipartiment tal-Artijiet li kkonferma li l-posizzjoni kienet l-istess bhal fl-2001.

Ivor Robinich mill-Awtorita` ntimata xehed illi fl-4 ta` Dicembru 2008 ir-rikorrent applika mal-MEPA sabiex jsir gymnasium u fitness centre. Fit-30 ta` April 2012, hareg ir-rifjut. Sar appell quddiem il-Bord ta` Revizjoni tal-MEPA bin-nru PAB 119.12 li ghadu pendenti. Qal li fuq is-sit in kwistjoni kien ukoll PC application li hija talba fejn entita` titlob ghal spustjar, zieda jew tnehhija ta` triq jew tip ta` skema ohra. L-applikazzjoni saret mill-kunsill lokali Qormi u giet approvata. Id-decizjoni ma kenitx kontestata. L-applikazzjoni kienet sabiex tinfetah triq jew sabiex triq tibqa` fejn kienet.

Fil-**kontroezami** ix-xhud fisser illi PC application ma tistax tigi appellata, izda hemm modi kif tista` tigi kontestata quddiem il-qrati. Ladarba kienet approvata l-PC application, ir-rakkomandazzjonijiet u l-applikazzjonijiet l-ohra kellhom jigu konformi maghha. L-applikazzjoni ta` Magri pprecediet l-PC application. Ikkonferma li l-applikazzjoni ta` Magri kienet giet rakkomandata ghall-approvazzjoni. Il-PC application affettwat l-applikazzjoni ta` Magri. L-

applikazzjoni tieghu giet rifjutata peress li l-proposta kienet tmur kontra l-linja ufficjali tal-bini billi kien hemm din it-triq. Kull permess li johrog huwa soggett ghal-linja ufficjali. Malli saret l-applikazzjoni ta` Magri, il-kunsill lokali kien mill-ewwel beda korrispondenza mal-MEPA li hemmhekk hemm triq ; in segwitu ressaq il-PC application. Qal ukoll li meta tohrog l-iskema, u jkun hemm siti li jkun *grey areas*, id-Direttorat jassenja l-applikazzjoni *on a planning point of view.*

John Farrugia kien Segretarju Ezekuttiv tal-kunsill intimat bejn l-1999 u l-2012. Xehed illi l-kunsill lokali kien ikkuntattjat mir-rikorrent dwar l-art de qua fl-2007 jew l-2008. Ir-rikorrent kien ghamel kawza kontra l-kunsill dwar l-istess art li ghadha pendenti. Il-kunsillipprezenta kawza ta` spoll kontra r-rikorrent izda ghad li l-kawza kienet deciza favur il-kunsill, ir-rikorrent rama krejn fis-sit b`mod li hadd ma jista` jghaddi bil-vettura minn din it-triq. Il-kunsill lokali kien ilu jiehu hsieb din it-triq sa minn mindu kienet iffurmata. Il-wicc tat-triq kien bit-tarmac. Ipprezenta aerial photos tat-triq mehuda fi snin differenti. It-triq hija lokali mhux arterjali u ghalhekk Transport Malta ma tidholx fil-kwistjoni. It-triq tintuza bhala *short-cut* biex il-pubbliku jevita li jdur mal-lokalita` kollha. Meta Magri applika biex jizviluppa s-sit li kien jikkomprendi t-triq, il-kunsill kien oggezzjoni.

Fil-**kontroezami**, ix-xhud stqarr li fiz-zmien fis-sit kien hemm gnien li kien qed jigi vvandalizzat u ghalhekk kien deciz li jsir ground tal-football. Meta hareg il-permess mill-MEPA, kien infurmat il-Lands Department. Magri jsostni li l-art hija propjeta` tieghu. Kull ma sar mill-kunsill lokali kien illi fejn darba kien gnien isir ground ; bl-ebda mod ma kabbar xi parti mis-sit. Fisser illi mhux kull gnien go lokalita` jkun devolut lill-kunsill lokali. Meta ma jkunx hekk devolut, il-kunsill lokali jkun jrid jitlob l-awtorizzazzjoni tad-Dipartiment tal-Artijiet ; hekk sar fil-kaz tal-lum. Insista li triq li tinghata t-tarmac ma tibqax privata izda ssir pubblika.

Charles Camilleri xehed illi d-Dipartiment tal-Artijiet kien ircieva l-formola li timtela mill-periti meta l-proprjeta` ma tkunx ta` min ikun ser

jizviluppa. Din il-formola saret fil-15 ta` Mejju 2001 mill-Perit Alan Saliba ghall-kunsill ta` Hal-Qormi. L-ewwel korrispondenza mal-kunsill lokali intimat kienet fl-1 ta` Ottubru 2001. Metaa ntbaghtet kopja tal-permess tal-MEPA, id-Dipartiment kien informa lill-kunsill lokali sabiex jibghat il-pjanti li kienu approvati mill-MEPA. Meta dawn intbaghtu fit-18 ta` Frar 2002, il-kunsill lokali kien infurmat li jekk riedu li din l-art tghaddi ghandhom, kellhom jaghmlu talba formali tramite d-Dipartiment tal-Kunsilli Lokali. Din it-talba qatt ma saret.

Fil-**<u>kontroezami</u>**, ix-xhud spjega li meta saret il-formola mal-MEPA kien dikjarat li l-art ma kenitx tal-kunsill lokali. L-art kienet in parti tal-Gvern u in parti tal-privat. Id-Dipartiment tal-Artijiet kien wissa lill-kunsill lokali sabiex ma jaghmilx qabel ma` tinghata l-approvazzjoni. Saret spezzjoni mill-Perit Scotto fit-28 ta` Dicembru 2001, u rrizulta li l-izvilupp tal-ground kien tlesta.

<u>Kenneth Brincat</u> huwa s-Segretarju Ezekuttiv attwali tal-kunsill lokali intimat. Sar Segretarju fl-1 ta` April 2012. Xehed illi l-art mertu ta` din il-kawza qeghda tintuza bhala ground tal-futbol min-nursery ta` Hal Qormi. Hdejn il-ground hemm triq li bhalissa hija mblukkata bi crane u ma tistax tintuza. Qabel il-ground kien hemm gnien. Infatti hemm ittri mid-Dipartiment ta` l-Agrikoltura li jidentifikaw dak is-sit bhala gnien fosthom ittra tat-2 ta` Mejju 2005. Fit-3 ta` Jannar 2001, saret mozzjoni biex isir playing field izda in segwitu kien deciz li jsir football ground. Dwar it-triq xehed illi din kienet diga` tezisti fil-bidu li kien kostitwit il-kunsill intimat.

Fil-**<u>kontroezami</u>** ix-xhud spjega li l-kunsill lokali jiehu hsieb toroq li huma pubblici u t-triq in kwistjoni kienet triq pubblika.

Ikkunsidrat :

III. <u>L-ewwel eccezzjoni tal-intimat Prim` Ministru</u>

L-**<u>Art 181B tal-Kap 12</u>** jaqra hekk –

(1) Il-Gvern ghandu jkun rapprezentat fl-atti u fl-azzjonijiet gudizzjarji mill-kap tad-dipartiment tal-gvern li jkun inkarigat fil-materja in kwistjoni :

Izda, minghajr pregudizzju ghad-disposizzjonijiet ta` dan l-artikolu :

(a) kawzi ghall-gbir ta` ammonti dovuti lill-Gvern jistghu f`kull kaz isiru mill-Accountant General ;

(b) kawzi li jinvolvu kwistjonijiet dwar impieg jew obbligu ta` servizz mal-Gvern jistghu f`kull kaz isiru mis-Segretarju Permanenti Ewlieni ;

(c) kawzi dwar kuntratti ta` provvista jew ta` appalt mal-Gvern jistghu f`kull kaz isiru mid-Direttur tal- Kuntratti.

(2) L-Avukat Generali jirrapprezenta lill-Gvern f`dawk l-atti u l-azzjonijiet gudizzjarji li minhabba n-natura tat-talba ma jkunux jistghu jigu diretti kontra xi wiehed jew aktar mill-kapijiet tad-dipartimenti l-ohra tal-Gvern.

(3) Kull rikors, guramentat jew le, jew att gudizzjarju iehor maghmul kontra l-Gvern ghandu jigi notifikat lil kull kap ta` dipartiment tal-gvern li kontra tieghu jkun dirett u lill-Avukat Generali u kull terminu biex issir risposta dwar att bhal dak minn kull kap ta` dipartiment tal-gvern

li jkun konvenut jew intimat fi proceduri gudizzjarji ma jibdiex jiddekorri qabel ma l-att jigi notifikat lill-kap jew kapijiet ta` dipartimenti tal-gvern li kontra taghhom ikun dirett u lill-Avukat Generali. In-notifika lill-Avukat Generali ssir bla hlas lir-registratur.

Meta jitqiesu l-premessi u t-talbiet, huwa evidenti ghal din il-Qorti illi l-Prim` Ministru ma jinkwadrax bhala kontradittur tar-rikorrenti. Dawn jilmentaw minn lezjoni ghad-dritt fondamentali taghhom kif tutelat bl-Art 1 Prot 1 tal-Konvenzjoni minhabba l-mod kif applikazzjoni ghal zvilupp taghhom li ghall-ewwel kienet rakkomandata biex tkun approvata mill-Bord tal-MEPA kienet respinta wara li l-kunsill lokali ntimat ressaq PC application fuq parti mill-art mertu tal-izvilupp propost minnhom, liema art kienet tappartjeni lir-rikorrenti. Il-lezjoni lamentata mir-rikorrenti testendi wkoll ghall-fatt illi fuq l-art taghhom saret triq bla giet esproprijata l-art. Huwa evidenti li fir-rwol istituzzjonali tieghu, il-Prim` Ministru ma jwegibx ghall-allegata lezjoni. Din il-Qorti mhijiex tikkondividi l-argument tar-rikorrenti illi meta vjolazzjoni ma tkunx allegatament kommessa minn kap ta` dipartiment tal-Gvern izda minn Awtorita` r-rapprezentanza tispetta lill-Prim` Ministru. Fil-fehma konsiderata tal-Qorti, it-tieni (2) subinciz tal-Art 181B jahseb ghal sitwazzjoni ta` din ix-xorta billi qieghed id-dmir ta` rappresentanza fuq spallejn l-Avukat Generali.

Il-Qorti qeghda tilqa` l-ewwel eccezzjoni preliminari tal-intimat Prim` Ministru u tillibera lill-intimat Prim` Ministru mill-osservanza tal-gudizzju.

Billi qeghda tillibera lill-intimat Prim` Ministru mill-osservanza tal-gudizzju, il-Qorti qeghda tastjeni milli tiehu konjizzjoni ulterjuri tat-tieni eccezzjoni preliminari u ta` l-eccezzjonijiet l-ohra tal-intimat Prim` Ministru.

Ikkunsidrat :

IV. <u>It-tieni eccezzjoni tal-Awtorita` ntimata</u>

Fil-fehma konsiderata tal-Qorti, din l-eccezzjoni hija nfondata. It-tieni talba tolqot l-operat tal-Awtorita`. Ghalkemm fil-mertu l-Awtorita` tikkontendi li hija ttrattat il-PC application li ghamel il-kunsill lokali ntimat skond il-ligi u l-*policies* vigenti, il-Qorti ma tistax tghid illi l-Awtorita` mhijiex legittimu kontradittur tar-rikorrenti in vista tat-tieni talba.

Il-Qorti qeghda tichad it-tieni eccezzjoni preliminari tal-Awtorita` ntimata.

Ikkunsidrat :

V. <u>It-tieni eccezzjoni tal-kunsill lokali ntimat</u>

Fin-nota ta` osservazzjonijiet tieghu, il-kunsill lokali ntimat gabar ir-ragunijiet tieghu wara din l-eccezzjoni u cioe` :-

a) illi l-mansjonijiet ta` kunsill lokali huma stabbiliti mill-Art 33 tal-Kap 363 ; imkien f`din id-disposizzjoni ma jirrizulta li kunsill lokali ghandu l-jedd li jesproprija art ;

b) illi l-kunsill lokali ntimat wettaq id-dmirijiet tieghu fuq art li kien ghaddielu l-Gvern Centrali ;

c) illi l-kunsill lokali ntimat ma jistax iwiegeb ghat-tieni talba tar-rikorrenti billi kwistjonijiet ta` ppjanar ma jaqghux fil-mansjonijiet tal-kunsilli lokali.

Hija l-fehma konsiderata ta` din il-Qorti illi dawn ir-ragunijiet aktar milli jsostnu t-tieni eccezzjoni jista` jkollhom rilevanza fil-konsiderazzjoni tal-mertu. Il-Qorti jidhrilha li l-kunsill lokali huwa kontradittur legittimu fl-assjem tal-istanza tar-rikorrenti ; irrizulta kjarament illi wara li kien kostitwit b`ligi, il-kunsill lokali ntimat kien involut mill-bidu nett u direttament fid-diversi stadji u xejriet illi hadet il-vertenza tar-rikorrenti. Anzi l-Qorti hija tal-fehma li minhabba l-mod kif svolgiet il-grajja tul is-snin, il-gudizzju ma kienx ikun integru minghajr l-partecipazzjoni attiva bhala parti tal-kunsill lokali ntimat.

Il-Qorti qeghda tichad it-tieni eccezzjoni preliminari tal-kunsill lokali ntimat.

Ikkunsidrat :

VI. <u>It-tielet eccezzjoni tal-kunsill lokali ntimat u t-tielet eccezzjoni tal-Awtorita` ntimata</u>

B`dawn l-eccezzjonijiet, dawn l-intimati kkontestaw l-istanza tar-rikorrenti abbazi tal-pretest li qabel intavolaw istanza kostituzzjonali r-

rikorrenti kellhom ghad-disposizzjoni taghhom rimedji ordinarji li ma ezawrewx, u ghalhekk il-Qorti ghandha tiddeklina milli tiehu konjizzjoni tat-talbiet tar-rikorrenti.

a) **<u>Dritt</u>**

L-**<u>Art 46(2)</u>** tal-Kostituzzjoni jaqra hekk :-

Il-Prim`Awla tal-Qorti Civili ghandu jkollha gurisdizzjoni originali li tisma` u tiddecidi kull talba maghmula minn xi persuna skont is-subartikolu (1) ta` dan l-artikolu, u tista` taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tizgura t-twettiq ta` kull wahda mid-disposizzjonijiet tal-imsemmija artikoli 33 sa 45 (maghdudin) li ghall-protezzjoni taghhom tkun intitolata dik il-persuna :

Izda l-Qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skont dan is-subartikolu f `kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli favur dik il-persuna skont xi ligi ohra.

L-**<u>Art 4(2)</u>** tal-Kap 319 jaqra hekk :-

Il-Prim`Awla tal-Qorti Civili ghandu jkollha gurisdizzjoni originali li tisma` u tiddeciedi kull talba maghmula minn xi persuna skond is-subartikolu (1) ta` dan l-artikolu, u tista` tagmmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tiggura t-twettiq tad-Drittijiet tal-Bniedem u Libertajiet Fundamentali li ghat-tgawdija taghhom tkun intitolata dik il-persuna :

Izda l-qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skond dan is-subartikolu f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat

huma jew kienu disponibbli favur dik il-persuna skond xi ligi ordinarja ohra.

b) <u>Principji generali</u>

Il-Qorti sejra taghmel riferenza ghall-principji generali li ghandhom iservu bhala gwida fil-kaz ta` eccezzjonijiet ta` din ix-xorta. Dawn il-principji jemergu mill-gurisprudenza tal-Qrati taghna u tal-Qorti ta` Strasbourg. In partikolari, il-Qorti sejra ticcita minn zewg sentenzi li nghataw matul din is-sena : wahda ta` din il-Qorti u l-ohra tal-Qorti ta` Strasbourg. Il-Qorti trid taghmilha cara illi l-analizi taghha f`dan l-istadju mhijiex sejra tkun *l-applikazzjoni* ta` l-principji generali fiz-zewg sentenzi, propju ghaliex kull kaz ghandu l-istorja u l-fattispeci tieghu, izda l-Qorti sejra tghid x`qalet il-gurisprudenza dwar il-principji generali.

c) <u>Gurisprudenza tal-Qrati taghna</u>

Fis-sentenza taghha tal-15 ta` April 2014 fil-kawza "**<u>Grech et vs it-Tabib Principali tal-Gvern (Sahha Pubblika) et</u>**" din il-Qorti diversament presjeduta (**<u>PA/JRM</u>**) qalet hekk *inter alia* :-

… Il-Qorti taghraf li l-ghadd ta` drabi li din l-eccezzjoni qieghda titqajjem kiber mal-ghadd ta` kawzi dwar ilmenti ta` ksur ta` jeddijiet fundamentali li qeghdin ta` kuljum jitressqu quddiem din il-Qorti. Dan jidher ukoll, b`mod partikolari, fejn il-parti rikorrenti tressaq ilment li, x`aktarx, ikun ilu jinhema zmien twil, u fejn sata` ittiehed rimedju li xi ligi tkun taghti izda li jkun ghalaq iz-zmien statutorju biex jintalab dak ir-rimedju ;

…

Illi l-intimati jsejsu l-eccezzjoni taghhom fuq il-fatt li r-rikorrenti baqghu ma fethu qatt kawza quddiem il-qrati ta` kompetenza civili. Din is-sottomissjoni kienet konfermata mill-gharef difensur tar-rikorrenti waqt is-smigh tal-31 ta` Ottubru, 2013. Huma jghidu li azzjoni bhal dik kienet taghti lir-rikorrenti rimedju xieraq u effettiv jekk tassew riedu jinghataw rimedju ghall-ilmenti kollha taghhom ;

Illi kif inghad ghadd ta` drabi, l-ezistenza ta` rimedju iehor lill-parti li tressaq azzjoni ta` allegat ksur ta` jedd fondamentali taht il-Kostituzzjoni jew taht il-Konvenzjoni ghandha tirrizulta lill-Qorti bhala stat ta` fatt attwali u oggettiv, u d-diskrezzjoni li tista` twettaq il-Qorti biex ma tezercitax is-setghat taghha "jekk tqis li jkun desiderabbli li hekk taghmel" minhabba l-ezistenza ta` rimedju iehor hija decizjoni fuq tali stat ta` fatt. Kemm hu hekk, huwa biss meta jew jekk jirrizulta lill-Qorti bhala fatt li (kien) jezisti rimedju iehor effettiv lir-rikorrent li l-Qorti tista` tiddelibera jekk ghandhiex twarrab milli tezercita s-setghat taghha li tisma` l-ilment imressaq quddiemha. F`kaz li ma jirrizultax li kien hemm rimedju iehor xieraq, il-Qorti trid tiehu konjizzjoni tal-ilment, u f`kaz li kien hemm rimedju iehor, il-Qorti xorta wahda jibqaghlha s-setgha li tiddeciedi li ma ccediex l-ezercizzju tas-setgha taghha ;

Illi ma jrid bl-ebda mod jintesa li d-diskrezzjoni li l-Qorti ghandha f`dan ir-rigward trid titwettaq b`mod korrett u mmirata lejn l-iskop li l-legislatur ried li jilhaq biha : jigifieri, li filwaqt li ma jithallewx isiru kawzi kostituzzjonali bla bzonn, min-naha l-ohra ma jigrix li, minhabba thaddim "liberali" tad-diskrezzjoni, persuna tinzamm milli tmexxi `l quddiem azzjoni bhal din meta jkun jidher li l-kaz huwa wiehed serju li jimplika t-telf jew tnaqqir ta` jedd fondamentali ghal dik il-persuna. Kif inghad b`ghaqal f`dan ir-rigward, din id-diskrezzjoni ghandha dejjem tigi wzata fl-ahjar interess tal-amministrazzjoni tal-gustizzja biex, min-naha l-wahda, il-Qrati ta` indoli kostituzzjonali ma jsibux ma` wicchom kawzi li messhom jew setghu tressqu quddiem Qrati ohrajn kompetenti jew li dwarhom messhom jew setghu jitfittxu rimedji ohrajn effettivi, u biex, min-naha l-ohra, persuna ma tigix imcahhda mir-rimedji li ghandha jedd tfittex taht il-Kostituzzjoni jew taht il-Kap 319 tal-Ligijiet ta` Malta lil min genwinament ifittex rimedju kostituzzjonali ;

Illi meta jinghad li jkun hemm rimedju iehor xieraq, dejjem ikun qieghed jitfisser li tali rimedju jrid jitqies fid-dawl tal-ksur tal-jedd fondamentali li jkun qed jigi allegat li nkiser jew li jkun mhedded li sejjer jinkiser : ghandu jkun rimedju accessibbli, xieraq, effettiv u adegwat biex jindirizza l-ksur jew theddid ta` ksur lamentat. M`hemmx ghalfejn li, biex jitqies bhala effettiv, ir-rimedju jintwera bhala wiehed li se jaghti lir-rikorrent success garantit, ghaliex ikun bizzejjed li jintwera li jkun wiehed li jista` jigi segwit b`mod prattiku, effettiv u effikaci. Fuq kollox, ir-rimedju "ordinarju" moghti jghodd ukoll fejn dan jinghata bis-sahha ta` ligi, imqar jekk biex jindirizza ksur ta` jedd fundamentali li diga` sehh jew li x`aktarx isehh ;

Illi johrog ukoll li l-ezistenza ta` rimedju "ordinarju" trid tkun murija kif imiss minn min iqanqal l-eccezzjoni. F`dan il-kaz, kienu l-intimati li qajmu l-eccezzjoni li r-rikorrenti naqsu li jinqdew b`rimedji ohra li kellhom ghad-dispozizzjoni taghhom, u huwa ghalhekk dmir taghhom li juru li r-rikorrenti tassew kellhom dawk ir-rimedji u li naqsu li jinqdew bihom ;

Illi f`dan ir-rigward inghad li :- "Remedies must be real and practical and not theoretical or illusory, e.g. genuine fear of reprisals, intimidation. Account will be taken not only of the personal circumstances of the applicant, but the general legal and political context in which the alleged remedies operate. An unduly formalistic approach is not to be taken by the Convention organs which will apply a certain degree of flexibility. Remedies must be effective, i.e. capable of providing redress for the complaint … ; the speed of the procedure may also be relevant to its effectiveness ; the remedy must be capable of remedying directly the state of affairs ; form part of the normal process of redress and involving normal use of the remedy … ; be accessible … ; offer reasonable prospects of success ; a mere doubt as to the prospect of success in going to court does not exempt from exhaustion. Where case-law is unclear, contradictory or in the process of ongoing interpretation, an applicant may be expected to pursue an action or appeal which allows the courts to rule on the issues. ... Also, if there is more than one remedy available, an individual is not required to try more than one ; an applicant is generally not required to try the same body again by way of a repeated request or application".

…

Illi, madankollu, l-ezistenza ta` rimedju iehor trid titqies fiz-zmien tal-allegat ksur tal-jedd fondamentali li dwaru jitressaq l-ilment, u mhux fiz-zmien li jkun tressaq l-ilment kostituzzjonali jew konvenzjonali. M`huwiex moghti lil persuna l-beneficcju li l-ewwel thalli jghaddi ghalxejn iz-zmien li fih setghet tiehu r-rimedju ghall-ksur tal-jedd taghha, u mbaghad tressaq ilment kostituzzjonali jew konvenzjonali dwar l-istess ksur bhallikieku l-procedura kostituzzjonali jew konvenzjonali kienet xi rimedju in extremis li wiehed jista` jirrikorri ghalih biex isewwi zball jew nuqqas li ma messux twettaq qabel ;

Illi huwa mghallem ukoll li :- "it is not only judicial remedies which must be sought, but every remedy under national law which may lead to a decision that is binding on the authorities, including the possibility of appeal to administrative bodies, provided that the remedy concerned is adequate and effective" ;

Illi f`ghadd ta` sentenzi moghtijin f`dawn l-ahhar snin mill-Qorti Kostituzzjonali, gew stabiliti principji li ghandhom jigu segwiti minn Qorti biex tqis jekk huwiex minnu li r-rikorrent kellu ghad-dispozizzjoni tieghu rimedju alternativ effettiv. Fost dawn il-principji wiehed isib li (a) meta jidher car li jezistu mezzi ordinarji disponibbli ghar-rikorrent biex jikseb rimedju ghall-ilment tieghu, ir-rikorrent ghandu jirrikorri ghal tali mezzi qabel ma jirrikorri ghar-rimedju kostituzzjonali, u huwa biss wara li jkun fittex dawk il-mezzi jew wara li jidher li dawk il-mezzi ma jkunux effettivament disponibbli li ghandu jintuza r-rimedju kostituzzjonali ; (b) li d-diskrezzjoni li tuza l-Qorti biex tqis jekk ghandhiex twettaq is-setghat taghha li tisma` kawza ta` natura kostituzzjonali ghandha torbot, sakemm ma tingiebx xi raguni serja u gravi ta` illegalita`, ingustizzja jew zball manifest fl-uzu taghha ; (c) m`hemm l-ebda kriterju stabbilit minn qabel dwar l-uzu tal-imsemmija diskrezzjoni, billi kull kaz jehtieg jigi mistharreg fuq ic-cirkostanzi tieghu ; (d) in-nuqqas wahdu ta` tehid ta` mezzi ordinarji mir-rikorrent m`huwiex raguni bizzejjed biex Qorti ta` xejra kostituzzjonali taqtaghha li ma tuzax is-setghat taghha li tisma` l-ilment, jekk jintwera li l-imsemmija mezzi ma kinux tajbin biex jaghtu rimedju shih lir-rikorrent ghall-ilment tieghu ; (e) in-nuqqas ta` tehid ta` rimedju ordinarju – ukoll jekk sata` kien ghal kollox effettiv biex jindirizza l-ilment tar-rikorrent – minhabba l-imgiba ta` haddiehor m`ghandux ikun raguni biex il-Qorti twarrab is-setghat taghha li tisma` l-ilment kostituzzjonali tar-rikorrent ; (f) l-ezercizzju minn Qorti (tal-ewwel grad) tad-diskrezzjoni taghha bla ma tistharreg il-materja necessarja li fuqha tali diskrezzjoni ghandha titwettaq, jaghti lil Qorti tat-tieni grad is-setgha li twarrab dik id-diskrezzjoni u (g) meta r-rimedju jaqa` fil-kompetenza ta` organu iehor jew meta s-smigh tal-ilment tar-rikorrent se` jwassal

biex l-indagni gudizzjarja u l-process l-iehor tas-smigh tar-rimedju ordinarju jkunu duplikazzjoni ta` xulxin, il-Qorti kostituzzjonali ghandha ttendi lejn ir-rifjut li tuza s-setghat taghha kostituzzjonali, sakemm l-indagni gudizzjarja tal-kaz ma tkunx, min-natura taghha, ixxaqleb izjed lejn kwestjoni kostituzzjonali ;

Illi d-diskrezzjoni li l-Qorti taghzel li tiehu jekk twettaqx jew le s-setghat taghha kostituzzjonali biex tisma` kawza ghandha tigi ezercitata bi prudenza, b`mod li fejn jidher li hemm jew sejjer ikun hemm ksur serju ta` drittijiet fondamentali, l-Qorti xxaqleb lejn it-twettiq ta` dawk is-setghat ;

Illi fil-qasam tal-istharrig tal-ezistenza ta` rimedji ohrajn xierqa, jinsab

stabilit li :- "With respect to the way in which and the time-limits within which proceedings must be instituted, national law is decisive. If in his appeal to a national court an applicant has failed to observe the procedural requirements or the time-limits, and his case has accordingly been rejected, the local remedies rule has not been complied with. ... The interpretation and application of the relevant provisions of national law in principle belong to the competence of the national authorities concerned". Dak li jinghad dwar it-tehid tar-rimedji quddiem l-awtoritajiet nazzjonali qabel ma wiehed jista` jmexxi kaz quddiem il-Qorti ta` Strasbourg jidher li jista`, fil-qafas generali, jghodd ukoll ghall-kwestjoni tat-tehid tar-rimedji "ordinarji" qabel ma wiehed jmexxi `l quddiem bil-procedura specjali tal-ilment dwar ksur ta` jedd fondamentali quddiem il-Qrati nazzjonali ;

Illi fil-kaz li ghandna quddiemna, l-ilment tar-rikorrenti huwa wiehed ta` allegat ksur "kostituzzjonali", mahsub biex jikkumpensahom finanzjarjament ghall-hsara li garrbu u li huma jghidu li ma tistax titregga` lura. L-azzjoni mhix qeghda titlob it-thassir ta` xi ligi jew ta` xi provvediment b`sahha ta` ligi ...

Fis-sentenza appena citata l-Qorti ghamlet riferenza ghall-gurisprudenza u ghad-dottrina segwenti : Kost. 31.5.1999. "Zahra vs Awtorita` tal-Ippjanar" (Kollez. Vol: LXXXIII.i.179) ; Kost. 27.2.2003. "John Sammut vs Awtorita` tal-Ippjanar et" ; Kost. 31.10.2003. "Mediterranean Film Studios Limited vs Korporazzjoni ghall-Izvilupp ta` Malta et" ; Kost 5.4.1991. "Vella vs Kummissarju tal-Pulizija et (Kollez. Vol: LXXV.i.106) ; P.A. Kost. 9.3.1996. "Clifton Borg vs Kummissarju tal-Pulizija" (mhix pubblikata) ; Kost. 11.4.2011.

"Joseph Brincat et vs Policy Manager ta` Malta Shipyards et" ; K Reid "A Practitioner`s Guide to the European Convention on Huma Rights" (3rd. Edit, 2007) §I-040, pg. 31 – 2 ; Kost. 9.10.2001. "Paul McKay vs Kummissarju tal-Pulizija et" ; Kost. 25.6.1999. "Spiteri vs Chairman Awtorita` tal-Ippjanar et" (Kollez. Vol: LXXXIII.i.201) ; Van Dijk, van Hoof, van Rijn, Zwaak "Theory and Practice of the European Convention on Human Rights" § 2.2.10.3 f`pag. 133 ; P.A. (Kost.) VDG 9.2.2000 "Victor Bonavia vs L-Awtorita` tal-Ippjanar et" ; Kost. 7.3.1994. "Vella vs Bannister et" (Kollez. Vol: LXXVIII.i.48) ; Kost. 12.12.2002. "Visual & Sound Communications Ltd. vs Il-Kummissarju tal-Pulizija et" ; P.A. Kost 29.10.1993. "Martin Gaffarena vs Kummissarju tal-Pulizija" (mhix pubblikata) ; Kost. 14.5.2004. "David Axiaq vs Awtorita` Dwar it-Trasport Pubbliku" ; u Van Dijk, van Hoof, van Rijn, Zwaak op cit, § 2.2.10.3, f`pag. 134.

d) <u>Gurisprudenza tal-Qorti ta` Strasbourg</u>

Fis-sentenza taghha tal-24 ta` Lulju 2014 fil-kawza "**<u>Brincat and others vs Malta</u>**" il-Qorti ta` Strasbourg (Fifth Section) qalet hekk dwar il-principji generali relatati ma` eccezzjoni dwar *exhaustion of domestic remedies* :-

55. The Court reiterates that the rule on exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body until they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. It thus represents an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see Kudła v. Poland [GC], no. 30210/96, § 152, ECHR 2000-XI, and Handyside v the United Kingdom, 7 December 1976, § 48, Series A no. 24).

56. The only remedies which Article 35 § 1 requires to be exhausted are those which relate to the alleged breach and which are available and sufficient (see McFarlane v. Ireland [GC], no. 31333/06, § 107, 10 September 2010), that is to say a remedy that offers the chance of redressing the alleged breach and is not a pure repetition of a remedy already exhausted (see Dreiblats v. Latvia (dec.), no. 8283/07, 4 June 2013). There is no requirement to use another remedy which has essentially the same objective (see T.W. v. Malta [GC], no. 25644/94, § 34, 29 April 1999). However, noting the strong affinity between Article 35 § 1 and Article 13, the Court has ruled that if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see Čonka v. Belgium, no. 51564/99, § 75, ECHR 2002-I; Kudła, cited above, § 157; T.P. and K.M. v. the United Kingdom [GC], no. 28945/95, § 107, ECHR 2001-V; and Rotaru v. Romania [GC], no. 28341/95 § 69, ECHR 2000-V).

57. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available both in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicants` complaints, and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see Ananyev and Others v. Russia, nos. 42525/07 and 60800/08, § 94, 10 January 2012).

58. The Court emphasises that the application of the rule must, however, make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that the rule on exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see Cardot v. France, 19 March 1991, § 34, Series A no. 200). It has further recognised that the rule on exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed, it is essential to have regard to the particular circumstances of each individual case (see Van Oosterwijck v. Belgium, 6 November 1980, § 35, Series A no. 40). This means – amongst other things – that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they

operate as well as the personal circumstances of the applicants (see Akdivar and Others v. Turkey, 16 September 1996, §§ 65-68, Reports 1996-IV).

e) <u>Risultanzi</u>

Huwa evidenti fuq l-iskorta ta` l-gurisprudenza citata illi sabiex tkun akkolta eccezzjoni ta` din ix-xorta, il-Qorti trid tkun sodisfatta : 1) illi kienu disponibbli ghar-rikorrenti mezzi xierqa ta` rimedju effettiv ghall-ksur allegat ; u 2) illi r-rimedju kien tassew adegwat u effettiv, cioe` illi kien rimedju li seta` jigi adoperat biex adegwatament jikkompensa lill-vittma ghal-lezjoni lamentata, jew illi jaghmel tajjeb ghal dak il-ksur, billi l-att leziv jigi dikjarat null ghall-finijiet u effetti kollha tal-ligi, sabiex il-vittma titqieghed f`pozizzjoni mhux diskriminatorja fil-konfront ta` ohrajn f` sitwazzjoni simili.

Fil-kaz tal-lum, mill-assjem tal-provi, irrizulta li hemm kawza pendenti, u li sejra wkoll tigi deciza llum ukoll minn din il-Qorti hekk kif ippreseduta, li ggib in-Nru 425/2007 JZM, fejn ir-rikorrenti tal-lum talbu l-izgumbrament tal-kunsill lokali ntimat mill-art f`Qormi, Valletta Road, faccata ta` Triq il-Merrill, u fejn talbu lill-Qorti sabiex tnehhi kull haga, mobbli jew immobbli li saret abbusivament, u dan fi zmien qasir u perentorju. F`dik il-kawza tressqet kawzali ta` indoli kostituzzjonali li tghid : *prevja kull dikjarazzjoni mehtiega u moghti kull provvediment opportun, inkluz jekk hemm bzonn li l-agir tal-konvenuti huwa lesiva ghad-dritt tal-proprjeta` tal-atturi skont il-Kostituzzjoni u l-Artiklu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea.*

Dan premess, jigi rilevat illi fil-kawza tal-lum ir-rikorrenti qeghdin jitolbu lill-Qorti sabiex tiddikjara li l-intimati kisru l-Art 1 tal-Ewwel Protokoll tal-Konvenzjoni, u talbu sabiex l-art kontestata tinghata lura lilhom.

Minn ezami tal-atti tal-kawza Rik. Gur. Nru. 425/2007 JZM, jirrizulta li dik il-kawza tittratta dwar art li l-kunsill lokali ntimat uza biex minnha jaghmel ground tal-football li llum qieghed jintuza min-nursery tal-Qormi FC. Il-kawza tal-lum fir-realta` hija ffokata fuq dik il-parti ta` l-art li ntuzat bhala triq. Madankollu l-kawza Rik. Gur. Nru. 425/2007 JZM hija ezempju car ta` rimedju ordinarju li r-rikorrenti kellhom ghad-disposizzjoni taghhom ghar-rigward ta` l-art li ntuzat biex issir triq, qabel ma jirrikorru ghall-procediment kostituzzjonali. Il-fatt li r-rikorrenti pprezentaw din l-istanza tal-lum bla ma rrikorrew ghall-procediment ordinarju hekk kif fil-fatt kienu ghamlu fil-kaz ta` dik il-parti li kienet integrata fi ground tal-football huwa konferma li r-rikorrenti tassew ma kienux ezawrew ir-rimedji ordinarji a disposizzjoni taghhom. Huwa minnu li fil-kawza tal-lum ir-rikorrenti talbu kumpens - inkluzi danni mhux pekunjarji - izda talba ta` dik ix-xorta tista` tkun disponibbli lir-rikorrenti fil-kaz li l-procediment ordinarju jkollu esitu favorevoli ghar-rikorrenti. Skond ix-xiehda tar-rikorrent, irrizulta huwa ma ntavola l-ebda procediment iehor apparti dan tal-lum ghajr ghall-kawza Rik. Gur. Nru. 425/2007 JZM. Hemm ir-rikorrenti talbu rimedju fuq parti mill-art kif fuq inghad, l-istess seta` sar fil-parti l-ohra tal-art tar-rikorrenti.

Din il-Qorti hija konsapevoli illi fil-kawza tal-lum saret it-tieni talba. Madankollu anke f`dan ir-rigward hija tal-fehma li ma kienux ezawriti r-rimedji ordinarji peress illi l-vertenza tittratta decizjoni li hadet l-Awtorita` ntimata ; ghal dik l-Art 469A tal-Kap 12 kien ikun rimedju effettiv. Huwa minnu li minn dik id-decizjoni ma kienx hemm appell, izda dak l-istat tad-dritt ma kienx iwarrab istanza fil-parametri ta` l-Art 469A tal-Kap 12. Il-Qorti hadet kont tal-argumenti li gabu r-rikorrenti fis-sens illi fi procediment ghal stharrig gudizzjarju ta` eghmil amministrattiv, ir-rimedji li tista` taghti l-Qorti huma limitati – anke ghar-rigward tad-danni skond ma jiddisponi s-subinciz (5) tal-Art 469A. Madankollu din l-argomentazzjoni kienet tkun wahda ta` soljev ghar-rikorrenti li kieku talbu t-thassir tad-decizjoni tar-rifjut tal-applikazzjoni ghall-permess flimkien ma` talba ghall-approvazzjoni tal-permess li ghalih kien applika.

Meqjus l-assjem ta` fatti u cirkostanzi ta` l-kaz tal-lum, il-Qorti hija tal-fehma illi r-rikorrenti kellhom rimedji ordinarji xierqa, effettivi u adegwati bizzejjed fejn jindirizzaw l-allegat ksur tal-jeddijiet taghhom <u>qabel</u> intavolaw l-azzjoni tal-lum. Ghalhekk il-Qorti sejra taghzel li ma twettaqx is-setghat kostituzzjonali taghha billi ma tismax il-mertu ta` l-kaz li r-rikorrenti ressqu quddiemha.

Il-Qorti qeghda tilqa` t-tielet eccezzjoni tal-kunsill lokali ntimat u t-tielet eccezzjoni tal-Awtorita` ntimata.

Billi qeghda tilqa` din l-eccezzjoni preliminari, il-Qorti qeghda tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet l-ohra ta` dawn l-intimati.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi hekk –

Tichad it-tieni eccezzjoni tal-kunsill lokali ntimat.

Tilqa` t-tielet eccezzjoni tal-kunsill lokali ntimat.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet l-ohra tal-kunsill lokali ntimat.

Tichad it-tieni eccezzjoni tal-Awtorita` ntimata.

Tilqa` t-tielet eccezzjoni tal-Awtorita` ntimata.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet l-ohra tal-Awtorita` ntimata.

Tilqa` l-ewwel eccezzjoni tal-intimat Prim` Ministru.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet l-ohra tal-intimat Prim` Ministru.

Tehles lill-intimati kollha milli jibqghu aktar fil-kawza.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta tordna li kull parti tbati l-ispejjez taghha.

< Sentenza Finali >

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