MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tal-11 ta' Dicembru, 2014

Appell Civili Numru. 15/2014

Angiolina Buttigieg

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta’ Angiolina Buttigieg tas-26 ta’ Marzu 2014 mid-decizjoni tat-Tribunal ta’ Revizjoni tal-Ambjent u l-Ippjanar tat-13 ta’ Marzu 2014 rigward PA 6541/00 ’to sanction the construction of concrete platform, to sanction change of use of land for outside tables and to sanction canopy in front of existing bar’;

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 pprezentata fis-6 ta' Dicembru 2010, Full Development Permission, PA 6541/00, l-appellanti fil-post 75, Dwejra Bar, Id-Dwejra, limiti ta' San Lawrenz talbet:

"To sanction the construction of concrete platform, to sanction change of use of land for outside tables and to sanction canopy in front of existing bar."

L-applikazzjoni giet michuda b'rifjut tal-21 ta' April 2010 ghar-ragunijiet segwenti:

"1. The site is located at the Dwejra Inland Sea, within a site of international scientific importance because of the complex of features of geological, geomorphological, ecological, archaeological, historical, and aesthetic interest in this area. The area is a potential Natural World Heritage Site. The proposed development is considered to have an adverse impact on the environmental characteristics of the area and thus it runs counter to the conservation objectives of the Structure Plan, for the area of Dwejra and the Inland Sea, as detailed in Structure Plan Policies REC 9, REC 10 and REC 12; Policies RCO 35, RCO 36, RCO 37 and RCO 38; and Policies MCO 6 and CZM 3.

2. The proposed platform for the placing of tables and chairs together with other ancillary development are not permitted uses according to Policy DMP1 of the Qawra/Dwejra Heritage Park Action Plan. The proposal is unacceptable since the application runs against the requirements of Section 4.2.2 of the Qawra/Dwejra Heritage Park Action Plan.

3. The proposal cannot be considered further unless the following illegal development is first sanctioned or removed and this in terms of policy Circulars 2/96 and 2/98. The illegal development consists of unauthorised extension to the existing bar."

Fl-appell taghha, l-Avukat Dottor Georgine Schembri ghall-appellanti issottomettiet s-segwenti:

"Nikteb f'isem Angolina Buttigieg ta' 17, Triq Wied Merill, San Lawrenz, Ghawdex.

Permezz ta' din l-ittra qieghed nissottometti l-appell tal-mittenti mid-decizjoni mehuda mill-Bord tal-MEPA fit-8 ta' April 2010 li permezz taghha giet michuda din l-applikazzjoni.

Permezz ta' din l-applikazzjoni intalab li jigi sanzjonat platform tal-konkos u canopy quddiem bar ezistenti.

Il-motivazzjoni moghtija ghar-rifjut ta' din l-applikazzjoni kienu s-segwenti: (i) peress li l-istruttura in kwistjoni tinsab f'zona ekologika u li ghandha tigi kkonservata ; (i) peress li fil-fehma tad-Direttorat, l-izvilupp in kwistjoni ser ikerrah ix-xenarju u l-valur estetiku ta' l-inhawi fejn jinsab ; u (iii) peress li hemm illegalita' fis-sit in kwistjoni konsistenti f' "unauthorised change of use of land for commercial use"

Huwa sottomess pero' li dan ir-rifjut ma kienx gustifikat.

Il-bar li saret din l-applikazzjoni inkonnessjoni mieghu ilu ezistenti ghexieren kbar ta' snin, u min qabel is-sena 1965. Dan jikkonsisti f'bar zghir hafna li fl-antik kien jikkonsisti boat house. Ghalkemm huwa operat b'mezzi rudimentali huwa regolament licenzjat bhala bar. In oltre, iz-zona fejn jinsab dan il-bar hija fil-parti l-kbira mwittija bil-konkos. Bhala hemm ukoll il-parti ta' quddiem il-bar li fuqha jitqeghdu xi mwejjed fuq barra. Dawn l-imwejjed jitqieghdu fuq ir-rampa li antikament kienet isservi sabiex minnha tiddahhal id-dghajsa ghal gol boathouse.

Stretament, il-mittenti ma kienitx tehtieg tissanzjona dan il-konkos ghax fl-ahhar mill-ahhar, kif inghad, iz-zona kollha hija ffurmata b'dan il-mod. Pero', biex tkun strettament konformi mal-ligi, hija ntavolat l-applikazzjoni odjerna.

Ir-raguni ghal din ir-rezistenza kollha ghal ilqugh ta'din l-applikazzjoni hija bbazata fuq dak li jipprovdi l-Qawra Dwejra Heritage Park Action Plan. Dan jipprovdi bazikament li l-karatteristici partikolari tal-bajja tad-Dwejra m'ghandhomx jigu mittiefsa.

Huwa sottomess pero' li ezami akkurat tac-cirkostanzi ghandu jwassal ghall-konkluzjonijiet opposti u jiggustifika din l-applikazzjoni.

Kif diga inghad, il-bajja in kwistjoni hija mizghuda bil-konkos u ghalhekk dak mertu ta' din l-applikazzjoni ma jbiddel u jgharraq xejn mill-inhawi in kwistjoni. Il-konkos in kwistjoni stess ilu jezisti mill-antik u kien jikkonsisti f'rampa ghal dghajsa. Ghalhekk m'huwa se jnaqqas xejn mill-valur ekologiku tal-post jew mix-xenarju tiehgu, u dan appuntu ghaliex ma fih xejn gdid u ma fih xejn differenti mill-inhawi li jinsab fih, bl-art pubblika b'kollox, li hi miksija bil-konkos.

Huwa wkoll sottomess li l-allegata illegalita' li tezisti fis-sit ma tezisti xejn u dan ghaliex fis-sit in kwistjoni ma hemm l-ebda 'unauthorized use for commercial use'.

Fl-isfond ta' dan kollu, il-mittenti hija disposta li filwaqt li tigi milqugha l-applikazzjoni taghha, tigi suggetta ghal kundizzjonijiet ragjonevoli ntenzjonati li jippreservaw il-karatteristici tal-post.

Ghalhekk, hija thoss li ma hemm ebda gustifikazzjoni ghaliex l-applikazzjoni taghha ma ghandhiex tigi akkordata taht is-segwenti kondizzjonijiet :-

a) Il-permess ikun ghal zmien determinat u ghalhekk fl-iskadenza taz-zmien koncess ikun mehtieg li ssir talba ohra mill-gdid jew jitnehhew ix-xogholijiet oggett ta' din l-applikazzjoni.

b) Ikun permess biex xogholijiet ta' natura temporanja li jistghu jitnehhew minghajr ma jhallu tracci sinifikattivi fuq l-istrutturi ezistenti. Ghalhekk hija disposta li tistalla canopy li titnehha kuljum, kif ukoll li kwalunkwe mwejjed u siggijiet jitnehhew kuljum ukoll.

c) Fl-eventwalita' li titwaqqaf xi Mangament Authority biex tirregola d-Dwejra, l-applikanta tkun tenuta thares kwalunkwe decizjoni, regola jew ordni li tigi moghtija lilha mill-istess Awtorita'.

Fl-ahharnett, l-applikanta taghmel referenza ghal permesss PA 2231/93 koncess mahrug dwar it-tqeghid ta' mwejjed ma kiosk fid-Dwejra ukoll liema permess gie approvat soggett ghal kundizzjonijiet imposti."

L-Awtorita’ fir-rapport taghha dwar dan l-appell, ikkummentat kif gej:

"5.1 The proposed development has been refused by MEPA on the grounds that the proposed facilities will serve as an extension to the existing Class 6 establishment. Class 6 uses are not listed as an acceptable use that may be allocated within the Inland Sea area as per the Qawra/Dwejra Heritage Park Action Plan, and hence the intensification of such existing uses is not desired. The proposed development is not considered to be justified on sound planning grounds, as required by Structure Plan Policies SET 11 & 12.

5.2 The appellant states that the sanctioning of the existing concrete platform should be considered as justified on the grounds that the presence of several other surrounding concreted areas within the Inland Sea area entail that this proposal does not negatively affect the ecological and scenic value of this area. The presence of other concreted platforms in the vicinity does not justify the proposed sanctioning of this particular concrete platform, especially when considering that its use is not intended to facilitate the fishing activities of the area, but to extend the existing Class 6 outlet. The appellant even confirmed that several concreted areas in the vicinity were created to serve as a jetty to transport boats from boathouses to and from the water. On the other hand, the sanctioning of the proposed concreted area for the placing of tables and chairs is not justified.

5.3 The appellant further argues that they would be willing to abide by conditions limiting the tables and chairs and the canopy as temporary uses. Such conditions could be implied by MEPA, however as already outlined in paragraph 5.1, the extension to the existing Class 6 outlet through the use of this outdoor area is not desired and would conflict with the provisions of the Action Plan. Hence, the proposed facilities are still objectionable, even if conditions were to be implied regulating their temporary use. The appellant also refers to a permit issued for tables and chairs to an existing kiosk, and cites PA 2231/93 as such a precedent. However, this application does not refer to such a development and nor is it located remotely close to the site subject to this appeal.

5.4 With regards to the third reasons for refusal, it is to be pointed out that the illegal extension to the existing bar is subject to sanctioning in the application PA 5738/00. This application is also subject to an appeal in PAB 118/10, and as long as both these appeals are heard and decided together, the third reason for refusal may be omitted."

Fin-nota pprezentata fl-1 ta’ Settembru 2010, l-Avukat Dottor Georgine Schembri ghall-appellanti ssottomettiet kif gej:

"F’dan ir-rapport il-MEPA sostniet bazikament illi : (i) l-uzu tas-sit in kwistjoni m’huwiex meqjus bhala accettabbli abbazi tal-Qawra Dwejra Heritage Park Action Plan, u ghalhekk ma jsitax jitqies bhala accettabbli ; (ii) l-ezistentza ta’ concrete fl-inhawi fejn jinsab il-concrete platform in kwistjoni ma ghandux iservi bhala raguni ghaliex dan jigi sanzjonat; (iii) fit-tielet lok, li l-permess PA 2231/93 imsemmi fl-appell ta’ l-esponenti m’ghandu l-ebda rilevanza ghal kaz odjern ; u (iv) finalment li hija disposta tirtira t-tielet raguni ghall-oggezzjoni taghha ghal dan l-appell, kemm-il darba l-appell odjern u appell iehor bin-numru PAB 118/10 jinstemghu kontestwalment.

Huwa sottomess li l-oggezzjonijiet tal-MEPA ghal dan l-appell m’humiex gustifikati; u dan qed jinghad ghar-ragunijiet li se jigu issa spjegati :

Fl-ewwel lok huwa sottomess li l-Qawra Dwejra Heritage Park Action plan jipprovdi bazikament li l-karettestici partikulari tal-bajja tad-Dwejra m’ghandomx jigu mittiefsa. Dan hu l-ispirtu baziku tieghu. Ghaldaqstant kull kaz irid jigi evalwat fic-cirkustanzi partikolari tieghu, u jgi ezaminat jekk dak propost bl-applikazzjoni huwiex sejjer b’xi mod jafettwa l-karetteristici tad-Dwejra. Issa, kif ga gie spjegat fl-appell promotur, il-bajja in kwistjoni hija mizghuda bil-konkos u ghalhekk dak mertu ta’ din l-applikazzjoni ma jbiddel u jgharraq xejn mill-inhawi in kwistjoni. Il-konkos in kwistjoni stess ilu jezisti mill-antik u kien jikkonisti f’rampa ghal dghajsa. Ghalhekk m’huwa se jnaqqas xejn mill-valur ekologiku tal-post jew mix-xenarju tiehgu, u dan appuntu ghaliex ma fih xejn gdid u ma fih xejn differenti mill-inhawi li jinsab fih, bl-art pubblika b’kollox, li hi miksija bil-konkos. Ghalhekk, il-QWHPAP m’ghandu xejn per se kuntrarju ghall-applikazzjoni odjerna.

Fit-tieni lok, huwa sottomess li l–MEPA tizbalja meta ma tarax l-applikazzjoni odjerna mill-aspetti u konsegwenzi vizwali taghha. Filwaqt li hija taccetta li l-bajja fejn jinsab il-bar in kwistjoni huwa mizghud bil-concrete, liema concrete m’huwa xejn differenti minn dak mertu ta’ din l-applikazzjoni, hija tohloq distinzjoni bejn konkrit li jintuza ghal skop u konkrit li jintuza ghal skop iehor. Kif ga nghad fuq, l-iskop tal-QWHPAP huwa li jigi regolat l-aspett vizawali tal-bajja, u li jigi assigurat li l-valur ekologiku u x-xenarju tieghu ma jmorrux lura. L-appellanti ssostni fil-fatt li billi konkrit li ilu ezistenti eghxieren kbar ta’ snin – bhalma ilu wkoll il-bar in kwistjoni – jintuza biex jitpoggew l-imwejjed fuqu zgur li m’hu se jaffettwa la l-valur ekologiku u l-anqas ix-xenarju tal-bajja.

Fit-tielet lok, u fir-rigward tal-permess nurmu 2231/93 kwotat fl-appell odjern, huwa sottomess li dan il-permess gie ndikat b’dan in-numru semplicement bi zball ortografiku. Fil-fatt il-permess li riedu jirreferu ghalih huwa dak bin-numru PA 2321/93, li ricentement gie wkoll imgedded fuq decizjoni tal-Bord ta’ l-Appell dwar l-Ippjanar. Dan kien il-permess li kkonceda t-tqeghid ta’ mwejjed ta’ kiosk fid-Dwejra wkoll liema permess gie approvat soggett ghall-kundizzjonijiet imposti. Kopja tad-decizjoni relattiva qed tigi annessa ma’ din l-ittra.

Fir-rigward ta’ l-ahhar punt imsemmi mill-MEPA, huwa sottomess li l-appellanti m’ghandhiex oggezzjoni biex l-appell odjern u dak numru 118/10 jinstemghu kontestwalment U b’hekk tigi sorvolata t-tielet raguni ta’ oggezzjoni tal-MEPA ghal dan il-permess"

L-Awtorita’ fis-second statement taghha kkummentat kif gej:

"2.1 Illegalities on site and previous decisions

This application proposes to sanction the construction of a concrete platform, canopy, and to place outside tables. The appellant had already presented the same proposal except for the sanctioning by way of application PA5430/96. This application was refused and the appeal PAB367/97SMS was dismissed by the Appeals Board on the 21st July 1999. Notwithstanding this refusal, the appellant carried on with the works and is now requesting their sanctioning.

2.2 The proposal vis-à-vis the Qawra - Dwejra Heritage Park Action Plan Unlike what is claimed by the appellant the Qawra - Dwejra Heritage Park Action Plan is not only intended regularise the area in terms of visual aspect but also the type of activities permissible within given the sensitivity and importance of this scheduled park.

The proposed development has been refused by MEPA on the grounds that the proposed facilities will serve as an extension to the existing Class 6 establishment. Class 6 uses are not listed as an acceptable use that may be allocated within the Inland Sea area as per the Qawra/Dwejra Heritage Park Action Plan, and hence the intensification of such existing uses is not desired. It is important to highlight that the proposal includes a canopy stretching the length of the platform.

2.3 The nature of the concrete platform

The appellant is stating that the concrete platform is acceptable because (1) it is not an eysore, (2) it does not have an impact on the existing ecology and (3) that there are similar platforms in the vicinity.

The presence of other concreted platforms in the vicinity does not justify the proposed sanctioning of this particular concrete platform, especially when considering that its use is not intended to facilitate the fishing activities of the area, but to extend the existing Class 6 outlet. The appellant even confirmed that several concreted areas in the vicinity were created to serve as a jetty to transport boats from boathouses to and from the water. On the other hand, the sanctioning of the proposed concreted area for the placing of tables and chairs is not justified.

Moreover surely the appellant cannot claim that the platform does not have an impact on the ecology of the area when this is not backed by any proof. Definitely the platform has taken place on the natural pebble/shingle beach and rocky surroundings to the obvious detriment to the associated ecosystem and the geological formation itself; i.e. naturally the concrete platform substituted the natural geological formation and the associated ecosystem.

The Authority does not distinguish only between platforms required for boats/fishing and those for other uses but also those that are legal and not. Illegal concrete platforms and jetties in the area where served with an enforcement notice and subsequently removed (e.g. ECF 983/05).

The appellant cannot claim that since the concrete platform is an old one than it should be accepted. The platform is an illegal structure and used for an activity that is not permissible. Hence it shall be removed.

2.4 The merits of PA763/97 - PAB12/98 KA

This permit was grated at Appeals Board stage for placing four (4) tables and chairs in front of an existing kiosk in Dwejra. It is important to highlight that:

a. this kiosk is not within the Inland Sea but outside in the vicinity of the chapel. This area merits different considerations as it is characterised by a different setting and context.

b. no canopies are involved in this application.

c. the Qawra-Dwejra Heritage Park Action Plan was not yet in existence when the decision was taken."

B’nota pprezentata fis-17 ta’ Mejju 2011, il-konsulenti legali tal-appellanti ghamlu enfasi partikolari fuq il-‘commitment’ u ccitaw diversi sentenzi u permessi dwar dan, u insistew li l-proposta prezenti mhux ser ihallu impatt negattiv fuq il-post.

L-Awtorita’, permezz tat-Third Statement taghha rrispondiet kif gej:-

"1. The appellant has submitted on 19th May 2011 a reply to the Authority's second statement.

2. The appellant has also submitted revised drawings (copy of which have not been forwarded to the Authority) and a method statement indicating changes to the structure in order not to impact on the pebble shingle beach. The Authority notes that such drawings are not admissible at this stage. The Authority asserts that the appellant may only regularise this situation by way of a new application. The appellant cannot submit fresh drawings because in order to address the illegalities and irregularities mentioned above, the substance of the matter as presented to the Authority will definitively change (example different policies will apply). This is clearly not permitted according to the proviso of Schedule 2 (2) of Act X of 2010 (Environment and Development Planning Act).

3. The site is located in a scheduled area

The Authority respectfully asserts that this Tribunal cannot hear and decide on the merits of this appeal because the proposed development is to sanction illegal development in a scheduled area (GN 37/11 – Area of High Landscape Value of Id-Dwejra and Environs). Article 70 (1) and Schedule 6 (2) of Act X of 2010 (Environment and Development Planning Act) unequivocally state that no development may be regularised in scheduled property.

4. Issue of Commitment

The appellant is arguing that the site is committed and thus in line with the concept of cerimus paribus and in line with some decisions by MEPA and the Board of Appeals where permits were granted for development not strictly in line with the local plan/Structure Plan, the present application should be accepted as well.

The Authority really cannot understand what commitment is the appellant referring to. None of the permits mentioned by the appellant refer to a Class 6 development in a scheduled area, let alone the Dwejra Area as is this application. The permits quoted by the appellant all refer to issues related to height limitation - and thus not comparable in their merit to this application. Therefore it is obvious that the concept of cerimus paribus is not applicable. Furthermore the issue of commitment in those permits was referring to similar buildings in the area with a height comparable to that proposed.

In this case the only commitment in the area is the existing old small bar itself which is now being requested in this application to have its area doubled and more than tripled in a separate but accompanying application PA5738/00 (PAB 118/10). This clearly does not constitute commitment in the sense that permits for similar development have been issued in the neighbourhood."

Ikkunsidra ulterjorment dwar l-eccezzjoni preliminari:

L-Awtorita' qed tecepixxi li billi l-area hi skedata, ma jistax jsir 'sanctioning' ta' zvilupp illegali billi dan hu in kontravenzjoni tal-Artikolu 70(1) u l-iskeda 6(2) tal-Att X ta' l-2010, Kap. 504.

Il-lokalita' mertu ta' dan l-appell giet skedata b'Avviz tal-Gvern 37/11 – Area of High Landscape Value of Id-Dwejra and Environs. L-izvilupp li tieghu qed jintabal sanctioning, kien gie propost bl-applikazzjoni PA 5430/96 li giet michuda; sar appell, PAB 367/97 SMS, li gie michud mill-Bord ta' l-Appell dwar l-Ippjanar fil-21 ta' Lulju 1999.

Billi l-izvilupp propost, sar xorta wahda, bla permess, s-sit kien milqut b'Avviz biex Tieqaf u ta' Twettiq, u ghalhekk saret l-applikazzjoni 'to sanction'.

Dan iffisser li l-izvilupp li qed jintalab li jigi sanzjonat hu zvilupp illegali, billi sar bla permess.

Dan it-Tribunal, digja kellu okkazzjoni jiddeciedi kazijiet fejn l-Awtorita' ssollevat din l-eccezzjoni; fosthom App Nru. 624/11 deciz fit-30 ta' Jannar 2014 fl-ismijiet "Carmelo Psaila u l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar."

Wara li jigi kkonfermat li l-area hi skedata, u li l-izvilupp li qed jintalab li jigi sanzjonat hu illegali, f'appelli simili zewg kunsiderazzjonijiet in partikolari huma mehtiega; cjoe' liema ligi hi applikabbli, jekk hijiex dik li kienet fis-sehh meta sar l-izvilupp, jew dik in vigore, meta jigi deciz il-kaz; u meta l-imsemmi Artikolu dahal fis-sehh, jekk kienx hemm xi 'Transitory Provisions' dwar meta effettivament jidhol fis-sehh.

Fis-sentenza citata dwar l-ewwel punt, it-Tribunal iddikjara s-segwenti:

"Dwar liema ligi hi applikabbli, cioe' jekk hix dik ta' meta saret l-applikazzjoni jew dik meta tigi finalment deciza l-applikazzjoni, l-Awtorita' ghamlet referenza ghal zewg decizjonijiet tal-Qorti tal-Appell li stabbilew il-principju li l-ligi applikabbli hi dik vigenti meta tigi deciza l-applikazzjoni.

Dan gie stabbilit b'sentenza fl-ismijiet 'Angelo Farrugia vs Chairman tal-Awtorita' tal-Ippjanar' deciza mill-Qorti tal-Appell fl-24 ta' April 1996 u dik f'ismijiet 'Emanuel Mifsud vs il-Kummissjoni ghall-Kontroll tal-Izvilupp' deciza mill-Qorti tal-Appell fil-31 ta' Mejju 1996. Dan gie kkonfermat b'sentenzi aktar ricenti tal-Qorti tal-Appell Inferjuri fosthom 'Stella Buttigieg vs Joseph Cordina vs MEPA deciza fid-29 ta' Jannar 2009 RCP A.I.C. li ccitat sentenza precedenti tal-istess Qorti fl-ismijiet 'Philip Micallef vs MEPA deciza fis-26 ta' April 2007 fejn intqal is-segwenti :-

"Illi fil-fatt huwa principju legali kkonfermat guridizzjarjament li l-istess Bord u l-Awtorita’ huma tenuti li japplikaw l-ligi li tezisti waqt li tkun qed tigi determinata l-applikazzjoni u dan s’intendi japplika ukoll meta l-kas ikun quddiem il-Bord".”

Dwar meta l-Artikolu 70 tal-Kap. 504 dahal fis-sehh t-Tribunal fl-imsemmija sentenza ddikjara kif gej:

“L-Artikolu 70(1) tal-Kap. 504 jitratta dwar ‘Supplimentary Provisions regarding permissions and licences. Minn dan l-Artiklu huma eskluzi pero’ l-kazijiet elenkati fis-sitt Skeda annessa mal-Att – fosthom dik numru 2 – applikazzjoni biex jigi regolarizzat zvilupp fi propjeta’ skedata.”

L-applikazzjoni prezenti qed titlob li jigi sanzjonat l-kostruzzjoni ta’ concrete platform, change of use tal-art u l-canopy quddiem il-bar. Dawn saru fl-1996 billi l-enforcement rilevanti hu ECF 1188/96, f’area li illum hi skedata

Skond dan l-artikolu ghalhekk il-proposta prezenti ma tistax tigi awtorizzata.

L-Artikolu 97 (1) tal-Kap. 504 jawtorizza lill-Ministru li jistabilixxi data permezz ta’ avviz fil-gazzetta tal-Gvern meta jigu revokati l-Att dwar l-Ippjanar tal-Izvilupp Kap. 356 u l-Att dwar il-Harsien tal-Ambjent, Kap. 435.

Dawn id-dati gew stabiliti bl-Avviz Legali 512 tal-2010 u l-Avviz Legali 513 tal-2010 rispettivament.

Bl-Avviz Legali 511 tal-2010 – Avviz ta’ Bidu fis-sehh, giet stabbilita d-data tal-31 ta’ Dicembru 2010 bhala d-data meta d-disposizzjoni ta’ diversi Artikoli tal-Kap. 504 fosthom l-Artikolu 70 u s-sitt Skeda, dahlu fis-sehh.

L-Artikoli 14 u 15 tal-Kap. 356 li jirreferu ghall-komposizzjoni u funzjonijiet tal-Bord tal-Appell dwar l-Ippjanar ma gewx revokati bl-Avviz Legali 512 tal-2001 billi skond l-Avviz Legali 27 tal-2011 –Planning Appeals Board and Environment and Planning Review Tribunal (Transitory Provisions) Regulations 2011 dawk l-appelli li kienu gew differiti ghas-sentenza qabel il-31 ta’ Dicembru 2010, kellhom jigu decizi mill-Bord tal-Appell tal-Ippjanar, cioe’ skond il-Kap. 356 u mhux mit-Tribunal ta’ Revizjoni tal-Ambjnet u l-Ippjananr skond il-Kap.

504. Skond l-istess Avviz Legali, l-appelli l-ohra kollha kellhom jigu decizi minn dan it-Tribunal.

Fic-cirkostanzi ghalhekk, billi l-Artikolu 70 u s-Sitt Skeda tal-Kap. 504 dahhlu fis-sehh fil-31 ta' Dicembru 2010, u ma saret l-ebda rizerva dwar meta sar l-izvilupp illegali, l-eccezzjoni tal-Awtorita' tirrizulta fondata.

Jixraq li jigi rilevat, mill-aspett purament tekniku, li l-izvilupp in kwistjoni kien originarjament sar bla permess; harget l-Enforcement Notice ECF 1188/96 u saret applikazzjoni 'to sanction' PA 5430/96 li giet michuda. Sar appell li gie michud fil-21 ta' Lulju 1999, PAB 367/97.

L-applikazzjoni prezenti PA 6541/00 hi prattikament identika ghal dik gia michuda wara li ghaddiet mill-process kollu.

L-appellanti tipprova tiggustifika l-agir taghha billi tikkontendi li l-provvizjoni ta' servizz ta' bar, akbar mill-qisien originali hu mehtieg biex iservi t-turisti numeruzi li jiffrekwentaw din il-lokalita'.

Anke jekk din l-konsiderazzjoni hi wahda korretta, s-soluzzjoni,mhux proposta, izda unilateralemnt implimentata mill-appellanti, mhix necessarjament l-unika jew l-ahjar soluzzjoni.

Indubbjament l-kostruzzjoni ta' concrete platform f'area tant sensittiva mhix l-ahjar alternattiva biex tikber l-area tal-bar; hemm diversi possibilitajiet ohra, fosthom estensjonijiet tal-injam fuq pulastrini tal-injam (timber deck), b'mod li l-area tikber, minghajr interventi invadenti li f'area tant sensittiva jaghmlu hsara irreparabbli. Kwalunkew intervent, ghalhekk f'dan is-sit partikolari, jirrikjedi method statement tekniku, detaljat u xjentifiku biex jigi assikurat, li din l-lokalita' tingahta l-protezzjoni li timmerita; u fl-istess hin jigu provduti s-servizzi necessarji, biex jissodisfaw d-domanda turistika.

It-Tribunal, ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess, jikkonferma r-rifjut tal-21 ta' April 2010 ghall-applikazzjoni PA 6541/00, billi jilqa' l-eccezzjoni preliminari tal-Awtorita' li l-proposta ta' sanzjonar ta' zvilupp illegali f'area skedata, hi in kontravenzjoni tal-Artikolu 70 u sitt skeda annessa mal-Att X tal-2010, Kap. 504.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ma kellux il-fakolta li jidhol fi kwistjonijiet godda mqajma fi stadju ta' appell senjatament l-artikolu 70 u Sitt Skeda li dahlu fi-sehh bl-emendi tal-2010 fil-ligijiet tal-ippjanar u gie skedat is-sit mertu tal-applikazzjoni meta l-istess applikazzjoni kienet ilha pendenti mill-2003 u l-kwistjoni tal-iskedar qatt ma tqajment hlief fl-istadju tal-appell mill-istess Awtorita. It-Tribunal kellu l-obbligu biss li jqis u jirrevedi biss dak li tqajjem u gie deciz quddiem l-Awtorita. Dan jilledi d-dritt ta' aspettativa legittima tal-applikant li l-applikazzjoni tieghu tigi milqugha fuq dak imressaq sal-istadju tad-decizjoni mill-Awtorita mentri l-Awtorita giet agevolata bl-introduzzjoni tal-artikolu 70 u Sitt Skeda tal-Kap. 504;

2. L-appellant ma jaqbilx mal-gurisprudenza li l-ligijiet u policies li ghandhom jigu applikati huma dawk vigenti fiz-zmien tad-decizjoni ghaliex (i) kienu l-ligijiet u policies applikabbli fiz-zmien li qed tigi kunsidrata u deciza l-applikazzjoni mill-Awtorita li ghandhom jiddeterminaw l-applikazzjoni; (ii) ligi ma ghandhiex effett retroattiv sakemm ma jigix specifikat; (iii) huwa kontra kull principji legali u l-principji bazici tal-Unjoni Ewropea li ligijiet jigu applikati b'mod retroattiv peress li dan imur kontra l-massima ta' legal certainty; (iv) tali applikazzjoni tmur kontra l-principju kostituzzjonali ta' nullum crimen sine lege; (v) il-fatt li l-Avviz Legali li stabilixxa d-data bhala l-31 ta' Dicembru 2010 meta d-dispozizzjonijiet tal-artikolu 70 u Sitt Skeda tal-Kap. 504 ghandhom jidhlu fis-sehh juri kemm l-artikolu in kwistjoni ma ghandux effett retroattiv u li t-Tribunal ma setax jinjora u tikkostitwixxi dritt kwezit favur l-applikant li s-Sitt Skeda introdott bl-Att X tal-2010 ma kellhiex ikollha effett retroattiv;

3. Hu fatt li tirrizulta li rapprezentant tal-Awtorita kif jirrizulta fis-seduta quddiemha tas-16 ta' Gunju 2011 esprima li 'the issue is to be clarified in L.N. 514/2010 so that 'Sixth Schedule' is not applied retroactively'. It-Tribunal injora din id-dikjarazjoni li kkrejat aspettativa legittima lil applikant li t-Tribunal ma setax jinjora u tikkostitwixxi dritt kwezit favur l-applikant li s-Sitt Skeda introdott bl-Att X tal-2010 ma kellhiex ikollha effett retroattiv;

4. Bl-introduzzjoni tal-artikolu 70 u Sitt Skeda tal-Kap. 504 gie lez id-dritt tal-appellant li jigi trattat l-istess in konnessjoni mal-commitment ezistenti gia fis-sit, b'referenza partikolari ghad-Dwejra Action Plan 2005 fejn is-sit kien gie kompromess ghal attivita kummercjali u dan skond diversi permessi li gew rilevati mill-appellant, uhud minnhom li nhargu wara l-iskedar;

5. It-Tribunal naqas li jikkunsidra l-element ta' diskriminazzjni meta nhargu permessi simili ghal dak sub iudice nonostante l-introduzzjoni tal-artikolu 70 u Sitt Skeda tal-Kap. 504;

6. Jekk l-aggravji jigu michuda, l-appellant jilmenta li d-dewmien fl-ipprocessar tal-applikazzjoni ppregudikat il-pozizzjoni tal-appellant fejn id-decizjoni setghet inghatat qabel l-introduzzjoni tal-artikolu 70 u Sitt Skeda tal-Kap. 504.

L-ewwel aggravju

Dan l-aggravju irid jittiehed fil-prospettiva gusta tieghu. Fl-ewwel lok jigi rilevat illi l-Kapitolu 504 hu ligi regolat bid-disposizzjonijiet specifici tieghu ghalkemm bla dubju l-principju ta' gustizzja naturali jridu jigu rispettati f'kull hin. In linea ta' principju t-Tribunal hu marbut bl-aggravji mressqa u r-risposta li tkun saret ghal tali aggravji sakemm il-kwistjoni gdida li titqajjem mill-partijiet jew it-Tribunal ex officio mhix wahda ta' ordni pubbliku fost cirkostanzi eccezzjonali ohra. Wiehed pero irid izomm quddiem ghajnejh li hu l-obligu principali tat-Tribunal li japplika l-ligijiet, pjanijiet u policies u dan hu obbligu li ma jistax jezonera ruhu minnu u li ma ghandu ebda diskrezzjoni li jinjora. Il-Qorti hi tal-fehma illi t-Tribunal ghandu l-obbligu fi kwistjonijiet ta' ippjanar li jqajjem ex officio kwistjonijiet ta' ippjanar li jmorru direttament kontra xi ligi pjan jew policy anki jekk mhix mqajma mill-partijiet basta li dan jirrizulta mill-parametri specifici proposti fl-applikazzjoni. Hu d-dmir tat-Tribunal li ma jhallix li ssir approvazzjoni ta' applikazzjoni jekk ikun qed jigi vvjolat pjan, ligi jew policy cari. B'danakollu t-Tribunal irid jirrispetta l-principju ta' gustizzja naturali u jekk jirrizulta xi punt li jekk ma jigix indirizzat jista' jwassal ghal vjolazzjoni ta' ligi, pjan jew policy ghandu jew jirrimetti l-atti lura lil Awtorita biex terga' tixtarr mill-gdid l-applikazzjoni fid-dawl tal-kwezit li qam fl-istadju tal-appell jew jekk iridu l-partijiet il-kwistjoni tigi ventilata direttament u l-kwistjoni tigi deciza mit-Tribunal. Hi pero l-fehma tal-Qorti illi hi l-ewwel triq li t-Tribunal ghandu jiffavorixxi biex ikun hemm il-possibilita tad-doppio esame.

F'dan il-kaz il-kwistjoni mhix wahda li tqajmet ex officio mit-Tribunal izda mill-istess Awtorita fil-mori tal-appell. Il-kwistjoni mhix wahda li setghet tqajmet quddiem l-l-Awtorita peress li l-artikolu 70 u Sitt Skeda ma kienux vigenti f'dak iz-zmien izda saru vigenti fil-mori tal-appell. L-applikazzjoni li f'dak l-istadju kienet gia rigettata u l-appell kien qed isir mill-applikant kienet qed tilledi l-artikolu 70 u Sitt Skeda. Dan kien punt ta' dritt li tqajjem fiz-zmien meta l-Awtorita setghet tqajjmu u li dwaru l-partijiet kellhom l-opportunita li jiehdu konjizzjoni tieghu u jittrattaw. It-Tribunal stess ex officio seta' qajjem il-kwistjoni peress illi l-ligi kienet tipprekludi l-izvilupp propost u t-Tribunal bhal Qorti ghandua dejjem id-dritt li jqajjem hu punt ta' dritt

sakemm dawn ikunu pertinenti ghal azzjoni jew bhal f'dan il-kaz, ghal izvilupp innifsu. Wara kollox 'skedar' hu zgur kwistjoni ta' ordni u dritt pubbliku intiz fl-interess generali socjali ghall-izvilupp sostenibbli tal-pajjiz u jista' jkun ta' importanza fl-ambitu ambjentali, kulturali, xjentifiku jew storiku tal-pajjiz. Dan jiddistingwi l-ligi tal-ippjanar minn ligijiet ohra peress li l-ligi tal-ippjanar hi intiza primarjament ghall-uzu tajjeb u sostenibbli tal-ambjenti kollha ta' pajjizna fl-interess generali tas-socjeta Maltija li hafna drabi jipprevali fuq l-interess purament privat. Il-kwistjoni ta' aspettativa legittima ma jidholx f'din il-kwistjoni billi fl-ewwel lok l-applikazzjoni kienet gia giet rigettata mill-Awtorita u fit-tieni lok l-applikazzjoni hi biss talba biex isir zvilupp skond il-ligijiet ta' ippjanar vigenti.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju jkompli fuq l-ewwel wiehed. Hi gurisprudenza kostanti, minhabba n-natura stess tal-ligijiet ta' ippjanar intizi fl-interess tas-socjeta in generali biex jirregolaw l-uzu u l-izvilupp tal-ambjent in generali u fl-ispecifiku u dan skond iz-zminijiet u l-evoluzzjoni kontinwu tal-ambjent li nghixu fih, illi applikazzjoni ma tikkreja ebda drittijiet lil applikant izda biss talba jew xewqa li jizivluppa s-sit soggett ghal applikazzjoni, dejjem jekk dan l-izvilupp hu kompatibbli mal-ligijiet, pjanijiet u policies vigenti fil-mument li tinghata d-decizjoni finali. Dan ma jikkreja ebda zvantagg fuq applikant ghax kif il-ligijiet ta' ippjanar jistghu jinbidlu biex jirrestringu zvilupp hekk ukoll jistghu jinbidlu biex jestenduh u l-applikazzjoni tibqa' miftuha ghal dawn l-izviluppi sad-decizjoni finali. Id-decizjoni tal-Awtorita ma tikkrejax drittijiet ghal applikant izda stat ta' fatt u, jekk ma jsirx ebda talba ta' rikonsiderazzjoni jew appell, allura f'dak il-mument dan l-istat ta' fatt jikkreja stat guridiku li jaghti dritt kwezit lil applikant in linea tal-permess li jkun inghata fiz-zmien meta applikazzjonijiet bl-istess fatti specie ghandhom jircevu l-istess soluzzjoni. Fl-invers ic-cahda ta' applikazzjoni ma tippredludix lil applikant milli jerga' japplika fuq binarju differenti jew anki l-istess jekk fi zmien wara jinbidlu l-ligijiet, pjanijiet jew policies li huma ta' natura mutabbli skond ic-cirkostanzi u l-bzonnijiet generali li

jirrikjedi l-pajjiz. Il-gurisprudenza kostanti kienet u ghahda l-istess (ara fost ohrajn **Stella Buttigieg et vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar** , App Inf 29/01/2009 u **Ted Mizzi vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 29/01/2009, u decizjonijiet ohra moghtija minn din il-Qorti kif preseduta).

F'dan il-kuntest ma hux ta' ebda import il-kwistjoni ta' retroattivita ta' ligjijiet, pjanijiet u policies tal-ligi ta' ippjanar la darba huma l-ligijiet, pjanijiet u policies vigenti fil-mument tad-decizjoni finali li japplikaw ghad-determinazzjoni tal-izvilupp propost. Applikazzjoni ma takkwista ebda jedd awtomatiku ghal approvazzjoni izda biss talba fakolattiva maghmula min applikant ghal hrug ta' permess ghal zvilupp kif jixtieq l-istess applikant tenut in konsiderazzjoni kull ligi, pjan jew policy in vigore fil-mument tad-decizjoni finali, hemm jekk id-decizjoni tkun favur jew kontra l-interessi tal-applikant li huwa subordinat ghall-interess generali tas-socjeta u tal-ambjent u s-sostenibilita tal-pajjiz li nghixu fih, liema interess hu fdat lil entitajiet appoziti, approvati mill-Gvern biex jigi delineat u specifikat.

Madankollu fuq il-kwistjoni legali specifika ta' retroattiva l-insenjament li taghti l-Qorti tal-Appell Inferjuri fil-kawza **Jack M.A. Olin et vs Anthony Sant Portanier nomine** deciza fis-6 ta' Ottubru 2010 tinkapsula l-principji

regolaturi in materja fejn jinghad hekk:

> Huwa utli li jibda biex jigi osservat illi, kif deciz, "meta gudikant jew interpretu jigi biex japplika l-ligi ghall-kaz prattiku, l-ewwel tfittxija u indagni li ghandha ssir minnhom hija dik li jaraw liema ligi ghandha tigi applikata; u din in-necessita tidher aktar cara specjalment meta ligi gdida tigi attivata u maghmula effikaci dwar materja li qabel jew ma tkunx regolata, jew li tkun regolata mil-ligi anterjuri. Dan aktar u aktar johrog car meta jigi kunsidrat fejn il-materja in diskussjoni tkun tirrigwarda fattijiet kompjuti, jew li kellhom il-bidu u l-inkomincjament taghhom taht l-imperu tal-ligi antika jew anterjuri li tkun irregolathom u jipprotraw ruhhom, f'din l-ahhar ipotesi (mhux fl-ewwel wahda tal-fatt kompjut), taht il-ligi l-gdida". ("**Chev. Antonio Cassar Torreggiani nomine -vs- Nutar Dr. Vincenzo Gatt nomine**", Appell Civili, 12 ta' Mejju, 1950);

> Din il-predetta decizjoni tkompli tillustra fuq l-insenjament ta’ awturi kontinentali illi f’tema ta’ dritt transitorju ghandhom jigu rigwardati fost ohrajn dawn il-principji:-
>
> i. li l-attijiet jew it-trasferimenti huma regolati mil-ligi li tahtha jkunu gew kompjuti;
>
> ii. li l-attijiet mibdija taht il-ligi l-antika u li jestendu ruhhom taht il-gdida, ghandhom jigu regolati minn din ta’ l-ahhar;
>
> iii. li meta jkun jezisti veru u proprju dritt kwezit kompjut taht il-ligi antecedenti, dak id-dritt ghandu effikacja fih innifsu li jirrezisti ghall-applikazzjoni tal-ligi l-gdida f’kaz ta’ mutament tal-ligi anterjuri;

Applikati dawn il-principji ghal kaz in ezami, din il-Qorti tqis kif gia nghid illi applikazzjoni ghal zvilupp ma tikkostitwix dritt izda biss rieda u xewqa ghal zvilupp sakemm dan ikun permissibbli skond il-pjanijiet u policies vigenti meta jinhareg jew tigi rifjutata l-applikazzjoni. Dan ghaliex il-pjanijiet u policies jinbidlu jew jigu aggustati jew modifikati tul iz-zmien fl-interess generali tal-izvilupp sostenibbli fil-pajjiz u fejn allura l-interess pubbliku irid jipprevali fuq l-interess purament privat. Applikazzjoni mhix att kompjut jew terminat izda biss process mibdi taht regim antik li jista’ jestendi ruhu taht ligi gdida fejn allura ma japplikax u ma jigix regolat mir-regim l-antik izda dak gdid.

Din hi sitwazzjoni prevalenti fil-ligijiet ta’ ppjanar kif tifhimha din il-Qorti, u ghalhekk it-Tribunal kellu kull dritt japplika l-artikolu 70 u Sitt Skeda kif ezistenti fiz-zmien li ttiehdet id-decizjoni. It-tibdil fil-ligi hu biss modifikazzjoni ta’ kif ghandhom jittiehdu d-decizjonijiet li jolqtu zviluppi li ghadhom sotto skrutinju u mhux gia approvati f’liema kaz jikkostiwixxu dritt kwezit favur dak li favur tieghu gia ghandu permess. Din il-Qorti tqis li l-artikolu 70 u Sitt Skeda li jitratta l-effett retroattiv ta’ ligijiet godda ghandu jitqies fil-kuntest tal-principju regolatur dwar dak li jikkostitwixxi att jew trasferiment kompjut u kwindi regolat bir-regim legali applikabbli fiz-zmien tal-att jew trasferiment.

Huma ghalhekk fiergha s-sottomissjonijiet tal-appellant illi tali principju jmorru kontra l-ligijiet Ewropej jew il-principju tan-nullum crimen sine lege, massima applikabbli purament fil-kamp kriminali mhux fil-kamp civili jew amministrattiv. Ic-certezza legali tohrog minn zewg fatti cioe illi l-applikazzjoni ma tikkreja ebda dritt u illi c-certezza legali tohrog mill-fatt stess li sad-data

ta' decizjoni finali, kull applikazzjoni ghandha l-potenzjalita li tuzufruixxi minn kull ligi, pjan jew policy maghmula sa dak inhar basta li l-partijiet ikollhom il-possibilita li qabel id-decizjoni finali jgawdu mis-salvagwardji tal-principji ta' gustizzja naturali. B'dan il-mod ukoll ikun hemm uniformita u certezza fid-determinazzjoni ta applikazzjonijiet ta' zvilupp f'kull zmien partikolari.

Ghalhekk dan l-aggravju qed jigi michud.

It-tielet aggravju

Dan l-aggravju ma fihx mertu. Fl-ewwel lok l-appellant qed jirreferi ghal pubblikazzjoni tal-Awtorita dwar 'frequently asked questions' fejn a fol. 50 tal-process hemm risposta mill-istess Awtorita li l-artikolu 70 u Sitt Skeda ser japplikaw ghal applikazzjonijiet maghmula wara Jannar 2011. Bir-rispett kollu lejn dan l-argument, opinjoni jew fehma jew modus operandi tal-Awtorita ma tista' qatt tinnewtralizza l-effeti tal-ligi. Hu f'dan il-kaz li l-principju ta' legal certainty japplika. Jekk l-Awtorita ser tuza diskrezzjoni arbitrarja meta ser tibda tapplika xi ligi pjan jew policy, din ser tmur kontra l-principju tac-certezza tad-dritt billi llum l-Awtorita tista' tahsibha mod u ghada tbiddel fehmitha mentri ligi tinbidel jew tigi emendata b'ligi ohra jew fejn appozitu b'Avviz Legali.

Ghalhekk dan l-aggravju ma jistax jintlaqa' peress li l-Qorti tiddeciedi biss fuq dak li jghidu l-ligijiet, pjanijiet u policies.

Ir-raba aggravju

Dan l-aggravju ma jistax jintlaqa' ghal raguni semplici illi l-Awtorita u t-Tribunal huma obligati qabel kollox li japplikaw il-ligijiet, pjanijiet u policies u dan kif irid l-artikolu 69 tal-Kap. 504 gia artikolu 33 tal-Kap. 356 u kwistjonijiet ta' commitment minhabba zvilupp ohra li gew permessi, huma fl-istadju ta' appell quddiem din il-Qorti, irrelevanti jekk tali kwistjoni tivvjola l-istess ligi, pjan jew policy, jew sakemm it-Tribunal mhux munit, skond l-istess ligi, pjan jew

policy, b'diskrezzjoni li jista' jqis kwistjonijiet ohra ghalkemm ta' sustanza fejn allura hu obligat iqishom u jasal ghal konkluzjonijiet tieghu. F'dan il-kaz il-ligi hi cara u ebda diskrezzjoni ma hi fdata lit-Tribunal jew lil din il-Qorti f'din il-mansjoni li titratta kwistjoni bhal din. Din hi l-fehma ta' din il-Qorti kif wiehed jista' jara minn sentenzi tal-istess Qorti kif preseduta fuq din il-materja.

Il-hames aggravju

Dan l-argument tad-diskriminazzjoni tqajjem divers drabi u ma hux aggravju fuq punt ta' ligi li jista' jigi investigat min din il-Qorti salv u impregudikat drittijiet ohra naxxenti mill-allegazzjoni ta' diskriminazzjoni mhollija biex jinstemghu mill-organi amministrattivi u gudizjarji li ghandhom poteri jisimghuhom. Din hi gurisprudenza kostanti ta' dawn il-Qrati u din il-Qorti ma tqis li ghandha tigi minsusa (ara f'dan is-sens **Ted Mizzi vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 29/01/2009, **Guido Falzon vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App 10/11/199, u sentenzi ricensuri fl-istess vena min din il-Qorti kif preseduta).

Is-sitt aggravju

Dan l-aggravju hu wkoll barra mill-poter tal-Qorti tal-Appell fil-mansjoni li ghandha u kwistjonijiet ta' dewmien li jistghu jikkrejaw lok ghal azzjoni rimedjali mill-parti aggravata iridu jitqiesu fis-sede appozita biex tismaghhom.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Angiolina Buttigieg u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-13 ta' Marzu 2014. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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