



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tat-22 ta' April, 2015

Appell Civili Numru. 48/2014

Antoine Borg

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Antoine Borg tat-12 ta' Awwissu 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-24 ta' Lulju 2014 li cahdet l-applikazzjoni PA 4545/03 'to sanction existing semi basement garages including addition and alterations in order to create a dwelling';

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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' Awwissu 2003, Full Development Permission PA4545/03, l-appellant fil-fond 'Ringo Garage', Triq il-Buskett, Dingli, talab:

“To sanction existing semi-basement garages including addition and alterations in order to create a dwelling.”

L-applikazzjoni giet michuda fit-28 ta' Ottubru 2003, saret talba ghal reconsideration, izda d-decizjoni originali giet kkonfermata b'rifjut tal-4 ta' Awwissu 2004 ghar-ragunijiet segwenti:

“1. The proposed residential development is not acceptable in principle since the site lies within a Level 3 Area of Ecological Importance (Buffer Zone). The proposal runs counter to paragraph 15.39 of the Structure Plan Explanatory Memorandum, which prohibits residential development and infrastructure/public utility works within a Level 3 Area of Ecological Importance. The proposal would thus run counter to the rural conservation and ecological objectives of the Structure Plan, particularly policies RCO 10 and RCO 12.

2. The proposed change of use is not related to public recreation, running counter to the objectives of Structure Plan policy AHF 5 and Policy PLP 20.

3. In view that the existing building is not considered of architectural or historical interest, there is no valid justification for the conservation of the building through conversion. Since the proposal does not cater for public access, the proposed

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change of use does not meet the first objective of Section 8.1(i) of PLP 20 and Structure Plan policy UCO 11.

4. The existing development is very urban in character and fails to assimilate within the surrounding rural context and Area of High Landscape Value, running counter to the objectives of the adopted Policy & Design Guidance: Farmhouses and Agricultural Buildings, and consequently to Structure Plan policy RCO 4.

5. The proposal is not essential to the needs of agriculture in view that the applicant is not a registered full-time arable farmer tilling at least 20 tumoli of dry agricultural land or its equivalent in the vicinity of the site for at least two years prior to this application. The applicant does not therefore satisfy the criteria set out in paragraph 11.2 (a) of the Structure Plan Explanatory Memorandum and so the proposal runs counter to Structure Plan policies AHF 5 and SET 11 and to the Malta Environment & Planning Authority's Policy and Design Guidance - Farmhouses and Agricultural Buildings.

6. The proposal is not essential to the needs of agriculture in view that the applicant is not a registered full-time breeder running an animal farm in the vicinity of the site for at least two years prior to this application. The applicant does not therefore satisfy the criteria set out in paragraph 11.2(b) of the Structure Plan Explanatory Memorandum and so the proposal runs counter to Structure Plan policies AHF 5 and SET 11 and to the Malta Environment & Planning Authority's Policy and Design Guidance - Farmhouses and Agricultural Buildings.

7. The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. The development does not fall into a category of non urban development which may be permitted outside existing or committed built-up areas in accordance with Paragraph 7.6 of the Structure Plan. The proposed development also therefore runs counter to policy BEN 5.

8. There is no justification for the development of this site as required by Structure Plan policy SET 12. It is apparent that there are no reasons from a planning point of view why the proposed development can not be located in an area designated for development or in an existing built up area.

9. The site lies outside the limits for development defined in the Temporary Provisions scheme for Dingli and so it is located in an area which should remain

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undeveloped. The proposed development would run counter to this scheme and would represent unacceptable urban development, counter to Structure Plan policies RCO 2, AHF 5, SET 11 and SET 12.

10. The site lies within a Level 3 Area of Ecological Importance (GN 403/1996, dated 25/06/1996), where further human intervention, particularly in the form proposed, is not desirable. The proposal would therefore adversely affect the area, hinder its protection, and run counter to the rural conservation and ecological objectives of the Structure Plan, particularly Structure Plan policies RCO 10 and RCO 12.”

Fl-appell tagħha, l-Avukat Dottor Joanne Vella Cuschieri għall-appellant issottomettiet s-segwenti:

“Nikteb għan-nom ta' Antoine Borg, ta' Ringo Garage, Triq il-Buskett, Dingli u filwaqt li nagħmel referenza għar-rifjut da' parti tal-Kummissjoni għall-Kontroll ta' l-Iżvilupp tal-applikazzjoni hawn fuq imsemmija datat 4 ta' Awissu, 2004, l-klijent tiegħi permezz ta' din l-ittra qiegħed formalment jinterponi appell kontra l-istess decizjoni.

Qed nannetti flimkien ma' din l-ittra l-ircevuta relattiva tal-hlas ta' l-appell kif

ukoll qed nannetti kopja tad-decizjoni għall-infortnazzjoni tal-Bord,

l-klijent tiegħi bir-rispett kollu ma jaqbilx mar-ragunijiet għar-rifjut għar-ragunijiet segwenti:

1. L-appellant fl-ewwel lok ma jistax jifhem għalfejn qed jingħata trattament divers minn applikanti oħra fejn hafna kazijiet ingħataw diversi permessi simili għal dak mitlub minnu barra z-zona ta' żvilupp. Qed isir elenku ta' ftit minn dawn il-permessi li ammont minnhom jinsabu fil-vicinanze tas-sit tal-applikant, ikoll barra z-zona ta' żvilupp:

Dingli stess:

Residenzi: 634/98, 930/99, 2321/00, 6428/00, 2012/01, 4070/01, 6522/01, 7036/02, 418/03,

Kummercjali: 4595/01,

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Rabat:

Residenzi: 6017/97, 6998/97, 7096/98, 5886/98, 6058,98, 710/99, 1746/99, 4873/99, 4560/00, 800/00, 2059/00, 2803/00, 6154/00, 2963/01, 1890/02, 1687/02, 2515/02, 4713/02,5317/02,6463/02,3585/03,

Zvilupp Kummercjali / Stores: 5985/98, 1807/99, 4955/99, 2465/00, 6817/00, 671/01, 1732/01,4245/01,5889/01,2622/03,

Mtarfa:

Zvilupp Kummercjali: 5408/98,5061/97,4396/03

Residenzjali: 5436/97,212/99, 1465/02, 4084/02, 4467/02,

Swimming Pool: 3204/00

Bidnija:

Residenzjali: 5280/02

Bahrija:

Residenzjali: 6216/00,3651/03,

Wardija:

Swimming pool: 3734/98

San Pawl il-Bahar:

Swimming pool: 1118/01,

Siggiewi:

Residenzi: 3981/98,

Store: 1152/02

Mgarr (Malta):

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Swimming Pool: 2896/00

Store: 493/03,3451/03,

Illi ghalkemm jidher car minn dak suespost li tkun qed tigi kommissa ingustizzja u diskriminazzjoni fil-konfront ta' l-applikant jekk din l-applikazzjoni tigi rifjutata ghaliex diversi applikanti ohra inghataw permess ta' zvilupp taht l-istess cirkustanzi, l-Kummissjoni ta' Zvilupp fil-konsiderazzjoni taghha ta' din l-applikazzjoni injorat ghal kollox dawn il-permessi u dan minghajr ebda raguni valida.

In vista tal-hrug tal-permessi hawn fuq ikkwotati, wiehed bilfors jasal ghall-konkluzjoni li r-ragunijiet tar-rifjut f'dan il-kaz huma futili stante li l-istess 'policies' kienu japplikaw fil-kazijiet hawn fuq ikkwotati izda, ghall-kuntrarju ta' dan il-kaz, dawn ma servewx sabiex iwaqqfu l-ghoti ta' dawk il-permessi.

Ghalhekk qed jigi umilment sottomess li anki abbazi ta' dak suespost biss, l-permess mitlub kellu jinghata sabiex b'hekk kull cittadin jkun qed jigi ttattat b'mod ugwali fghajnejn il-ligi mill-Kummissjoni appellata u mill-Awtorita' ta' l-Ippjanar;

2. Illi s-sit in kwistjoni llum il-gurnata huwa kommess ghall-izvilupp stante li hemm diversi binjiet inkluzi garaxxijiet, stores u villet li ilhom jezistu sa mill-bidu tas-snin tmenin, liema bini kien tela bil-benevolenza ta' l-Awtoritajiet ta' dak iz-zmien, liema permessi izda sfortunatament llum il-gumata ma jistghux jinstabu. Kien biss minhabba dan in-nuqqas li nhargu Avvizi ta' twettiq fuq is-sit in kwistjoni u l-appellant kien sfurzat li jissottometti applikazzjoni sanatorja sabiex jevita li jigi mwaqqa bini li ilu ezistenti aktar minn ghoxrin sena shah;

3. Illi in oltte l-appellant jixtieq jinforma l-Bord li diversi residenti taz-zona in kwistjoni ssottomettew talba sabiex din iz-zona tigi rikonoxxuta bhala 'hamlet' in vista tal-ammont konsiderevoli ta' residenzi u jidher li dawn it-talbiet, fl-ahhar, mhux qed jaqaw fuq widnejn torox u din iz-zona ser tigi rikonoxxuta bhala tali. Ma hemm l-ebda dubju li llum il-gurnata z-zona hija 'committed built-up area' u ghaldaqstant is-Set 11 fdan il-kaz ma japplikax ghall-kuntrarju ta' dak sottomess mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp fir-rifjut taghha;

4. Illi rigward ir-raguni tar-rifjut li tissottolinja li z-zona in kwistjoni hija 'Level 3 Area of Ecological Importance (Buffer Zone)', bir-rispett kollu jigi umilment sottomess li llum il-gurnata din ir-raguni ma tantx taghmel sens fattwali. Kif gia espost hawnhekk si ttatta ta' zona li ilha ghal aktar minn ghoxrin sena mimlija bir-residenzi u zvilupp iehor u ghalhekk certament ma' hemm xejn ta' importanza ekologika. F'kaz li

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jitwaqqa l-bini kollu ezistenti jibqa biss gebel maqtugh u radam u xejn aktar, li bl-ebda mod ma jkollu xi importanza ekologika. Fil-fatt fzona fejn twaqqa bini mill-istess Awtorita' ta' l-Ippjanar llum il-gurnata wiehed isib biss rdim u gebel;

5. Illi huwa ta' mportanza krucjali l-fatt li s-sit in kwistjoni jintuza bhala residenza da parti ta' l-appellant u uliedu, ghaldaqstant jekk jigi konfermat ir-rifjut, l-appellant u uliedu jkunu fir-riskju li jispicaw barra fit-triq minghajr saqaf fuq rashom. Hawnhekk ta' min jerga' jemfasizza li dan il-bini ilu ezistenti aktar minn ghoxrin sena u kien biss recentement li 1-Awtorita' ta' l-Ippjanar, minhabba li ma setghux jigu rintracati l-permessi originali ddecidiet unilateralment li tiehu passi sabiex dan l-lzvilupp jigi mwaqqa minghajr ma bl-ebda mod ikkunsidrat x'ser jigri mill-ghexieren ta' nies li lkoll jirrisjedu f'din iz-zona nkluz l-appellant u uliedu. Mhux biss l-appellant jiddependi fuq dan is-sit bhala r-residenza tieghu izda wkoll l-impjieg tieghu u konsegwentement l-ghixien tieghu u ta' uliedu jiddependu fuq l-ezistenza ta' dan is-sit;

Fl-ahhar nett l-appellant jiddikjara lil dan il-Bord li huwa lest li jaghmel il-landscaping kollu neccessarju fil-kaz in kwistjoni sabiex ikun hemm l-anqas impatt possibbli fuq id-dintorni.

Ghaldaqstant nitlob ghan-nom tal-klijent tieghi, in vista ta' dak kollu suespost, sabiex il-Bord joghgbu jiddikjara bhala nulla d-decizjoni ta' rifjut da parti tal-Kummissjoni ghall-Kontroll ta' l-lzvilupp u jordna l-hrug tal-permess relativ.

B'riserva ghal sottomissjonijiet ulterjuri u sottomissjonijiet da parti tal-Perit ta' l-appellant 1-Perit Edgar Montalto.

Nitolbok tinforma lili u l-appellant bid-data tas-smiegh ta' dan l-appell.”

Fir-rapport taghha, l-Awtorita' kkummentat kif gej:

“5.0 REFUSAL NOTICE

5.1 The proposed development was refused by the DCC on 28th October 2003, and a subsequent reconsideration request was dismissed on 20th July 2004. The main grounds for this refusal were due to development not being a legitimate form of development that may be considered outside the development zone, and therefore

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considered to be in conflict with Structure Plan policies SET 11, SET 12, and RCO 2. Furthermore, the proposed development was also refused on the grounds that it constitutes of an undesirable form of development within a Level 3 Area of Ecological Importance.

6.0 JUSTIFICATION FOR REFUSAL NOTICE

6.1 In the first instance, the proposed development requests to sanction the construction of six garages. In accordance with Structure Plan policies SET 11 & SET 12, and paragraph 7.6 the proposed garages do not constitute of a legitimate form of development which may be considered outside the development zone. There is no valid justification on sound planning grounds for favourably considering this proposed sanctioning, especially when considering that a previous attempt to sanction these garages was dismissed by the Planning Appeals Board on 23rd July 2003 (PAB 325/02, Carmel Borg vs DCC).

6.2 With the inclusion of a request to alter part of the garages and form a dwelling, the proposed development still remains unacceptable on sound planning grounds. The creation of new dwelling units also constitute of illegitimate urban development outside the development zone boundary, in accordance with Structure Plan policies SET 11 & SET 12 and paragraph 7.6.

6.3 With respect to the arguments presented by the appellant to justify this appeal, the MEPA still finds no justification for accepting this proposed development. There has been no change in policy to depart from the refusal of development permission already issued for this application, or to depart from the dismissal that was previously issued on this site by the Planning Appeals Board for PAB 325/02. The Planning Appeals Board clearly acknowledged that:

- the development constitutes of illegitimate development outside the development zone, and
- by accepting this proposed development, both the visual and ecological value of the site and its surroundings would be undermined.”

Il-konsulent legali tal-appellant fin-nota taghha tal-14 ta' April 2005, ghamlet referenza ghall-permess PA 4150/02 – permess li jawtorizza l-bini ta' store, faccata tas-sit inkwistjoni; u allegat diskriminazzjoni fil-konfront tal-appellant. Fis-seduta tal-21 ta' April 2006, ghan-nom ta' l-appellant ipprezenta pjanta li turi li fin-North West Local Plan qed jigi propost li l-area tkun Category 3 Small Rural Settlement.

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L-Awtorita' pero' fis-second statement tat-2 ta' Ottubru 2006, ikkonfermat li skond in-North West Local Plan, approvat f'Lulju 2006, is-sit u l-bini fil-vicinanze ma gewx klassifikati bhala Rural Settlement.

B'nota ipprezentata fis-16 ta' Novembru 2007, il-Konsulent Legali tal-appellant allegat diskriminazzjoni fil-konfront tal-appellant, billi gie approvat il-permess PA 4742/05, f'isem Marco Millo dwar sit faccata ta' dak mertu tal-appell.

L-Awtorita' fit-third statement irrispondiet kif gej:

"2. Comments on Appellant's Submissions

The appellant's submissions mainly state that a permit issued on the opposite side of the road through PA 4742/05 should serve as a precedent in favour of this application subject to appeal. The appellant claims that although the DCC approved the development of this site as an 'infill' development, the developments adjacent to the site consist of illegal development. The appellant claims that on the same grounds, the development applied for in PA 4545/03 should be permitted, inconsiderate of the fact that the whole length of development along this frontage consists of illegal development.

In reply to the appellant's arguments, reference is made to the attached DOC 1A & 1B. As can be noted, the pocket of development adjacent to the site subject to appeal (Site K) all consists of illegal development (Sites E-M). On some sites, direct action was also carried out by MEPA to remove the illegal development.

In the case of the precedent cited by the appellant (Site C), MEPA confirms that permission on this site was appropriately issued as it was located between valid and legally existing residential development. Although enforcement action has been initiated on sites A & B through ECF 362/06 and ECF 364/06, these illegalities consist of additional development over-and-above the original permits issued on these sites. In the case of Site A, permission was issued through PB 3126/71 for the construction of a residence, while Site B is committed with the construction of a 150sq. feet store through PB 4710/84. In the case of Site D, which adjoins the other side of Site C, the permits issued for the construction of a dwelling were approved as the development would replace an existing residential building that was also dully covered by permit.

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The details listed on the attached DOC 1A & 1B clearly illustrate the context under which permission was issued on sites C & D, and the different context which is applicable to the site under consideration (Site K). It is also important to remark, that on the site subject to appeal, the Planning Appeals Board has already refused a request to sanction the existing development on site in PAB 325/02 & PAB 323/02."

Fis-seduta tal-24 ta' Marzu 2011, l-Konsulent Legali tal-Awtorita' ghamel referenza ghall-Artikolu 70 u s-Sitt Skeda tal-Att X ta' l-2010, Kap. 504, billi l-applikazzjoni prezenti qed titlob ssanzjonar ta' illegalita' li tinsab f'area skedata.

Fil-fourth statement, l-Awtorita' dwar l-illegalita' kkummentat hekk:

"1.2.2 Re: Issue of illegality

The appellant is trying to justify the construction of a new dwelling and its ancillary facilities through its long-term use as a residence. However, this fact alone does not present sound planning justification to legitimize the building. As long as the activity and development on site was carried out illegally, the enforcement actions taken on site are still active. This was confirmed in the Court of Appeal decision of 31st May 1996: Francis Mugliett vs. the Planning Authority, which confirmed the presence of illegal development on a site notwithstanding that the illegal development existed on site for more than 40 years, even if with the knowledge of the authorities and no action was taken by these authorities during these 40 years.

The appellant is alleging that the Authority has issued permits for residential dwellings in the vicinity of the site. As already remarked in the previous statements, the street along which the development is located is characterized by a number of illegal developments all of which have either been refused or are currently being heard at appeals. The only permit cited by the appellant as applicable to this case is PA 4742/05 since permission PA 4150/02 was not issued for a residential development but for an agricultural store which is of a different planning nature than a residential development.

The Authority has already commented on PA 4742/05 in the third report to the Tribunal (see paragraph 2). The permit issued in this case was warranted since the site was an infill site between two legally established developments (one residential, the other a very large store) which although subject enforcement, the enforcement related to development over-and-above the original permits issued on these sites,

the illegalities consisted of development which followed after the issuance of the original permits for the construction of dwellings.

In addition to the site's location (infill site) of PB 4742/05, the original permit issued on this site for residential development was granted prior to the enactment of the Local Plans. At the time of these permits, ODZ applications were determined on their own merits. In several instances, as in the case of the two permits cited by the appellant, residential development would be favorably considered on committed sites, sites adjacent to blank party walls, and/or on infill sites.

However the Local Plans recognized that further policy guidance was required to control development in such areas. The Local Plans recognized that some areas were more committed than others, and some merited greater environmental sensitivity. This exercise led to the designation of Rural Settlements (Category 1, 2 & 3), where only within these designated areas could a certain extent of residential development be considered as provided for in Policies NWRS 2 & NWRS 3. Within the areas falling outside the designated rural settlements, new residential development is no longer permitted, with the implementation of the Local Plan.

The site subject to appeal does not fall within a recognized rural settlement, and whether this area should have qualified as such cannot be contested in this development permission application. As already outlined in previous reports, the site falls within an earmarked Natura 2000 site within which no new dwellings are permissible. Therefore, the area cannot be termed a de facto hamlet just because the site is committed by dwellings, the absolute majority of which have been illegally built as testified by the number of applications to sanction.

1.2.3 Re: Issue of site sensitivity

The appellant is alleging that the scheduling of the surrounding area was not an issue in applications filed for development adjacent and facing his site. On the contrary, the planning history of these buildings indicates that the development has been carried out without a valid permit. The Buskett Roadhouse facing the appellant's site was subject to two appeals PB339/01 and PB 181/05 lodged against the refusal of PA 1098/01 both of which were eventually withdrawn by the applicant. PA 1098/01 and the preceding application PA1408/94 were both refused solely on the incompatibility of the proposal with the area in view of its ecological value. On the same note, the building immediately adjacent to the appellant's site subject to application PA 5656/98 was also refused by the DCC since 'the construction of garages outside development zone is not considered as development essential for the need of agriculture, scenic or ecological interests.'

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It is also telling to note that even had the site not been scheduled and assessed as a pre-local plan application it would have also been found to run counter to the established policy. It would have had to be assessed according to the provisions of the PLP 20 which does not permit new dwellings in the ODZ except under the most stringent criteria which the proposal does not satisfy. Nevertheless, it is an established principle that applications are always decided according to policies and legislation in vigore at the time of the decision.”

Ikkunsidra ulterjorment dwar l-eccezzjoni preliminari;

L-Appellant qed jipproponi sanctioning ta' 6 garages, kif ukoll alterazzjonijiet fi tlieta minnhom biex dawn jigu kkonvertiti f'residenzi.

Is-sit jinsab barra z-zona tal-izvilupp, f'lokali maghrufa bhala Ta' Xuxa, limiti ta' Dingli. L-access ghas-sit hu minn Buskett Road.

L-Awtorita' kkonfermat li fuq is-sit saru dawn l-applikazzjonijiet:

PA 4974/98	To regularize existing garages for private use. Din l-applikazzjoni giet michuda fit-28 ta' Lulju 1999, saret talba ghal reconsideration, li kkonfermat r-rifjut fl-24 ta' Lulju 2002. Sar appell quddiem il-Bord tal-Appell dwar l-Ippjanar, li cahad l-appell b'decizjoni tat-23 ta' Lulju 2003 (PAB 325/02)
PA 4975/98	To regularise existing garages/workshops. Din l-applikazzjoni giet michuda fil-11 ta' Awwissu 1999, u r-reconsideration giet michuda fl-24 ta' Lulju 2002. Sar appell li gie michud mill-Bord fit-23 ta' Lulju 2003 (PAB 323/02)

Fuq is-sit harget Enforcement Notice ECF 686/98 billi sar zvilupp bla permess, sar appell li gie michud mill-Bord fit-2 ta' Frar 1999.

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Dan iffisser li l-istrutturi mertu tal-appell nbnew qabel is-sena 1998, bla permess u barra z-zona tal-izvilupp, u ghalhekk jikkostitwixxu zvilupp illegali, u saru zewg applikazzjonijeit biex jigi sanzjonat l-istess zvilupp, li gew michuda, kemm mid-DCC, kif ukoll mill-Bord ta' l-Appell dwar l-Ippjanar.

L-applikazzjoni prezenti hi semplicement repetizzjoni tal-applikazzjonijiet precedenti.

L-appellant jallega diskriminazzjoni, u jinsisti li l-fatt li l-istrutturi ilhom jezistu mis-snin 80, din hi cirkostanza partikolari li ghandha tinghata l-importanza dovuta, fil-kuntest partikolari ta' applikazzjoni ta' sanctioning. L-Awtorita' mill-banda l-ohra tikkontendi li illegalita' tibqa dejjem illegalita' sakemm ma tigix ssanata; u l-perkors taz-zmien wahdu ma jaghmilx l-illegalita' aktar sanabbli minn wahda aktar ricenti.

L-appellant dwar z-zona insista li din kienet timmerita' disinjazzjoni ta' Category 3 Rural Settlement, pero effettivament skond il-Pjan Lokali ppubblikat f'Lulju 2006, iz-zona baqghet wahda ODZ – cjoe Barra z-Zona tal-Izvilupp; u l-konsiderazzjoni determinanti skond l-ligi fl-ghoti tal-permessi hi d-disinjazzjoni taz-zona fejn jinsab s-sit skond il-Pjan Lokali.

Is-sit hu disinjat bhala Level 3 Area of Ecological Importance u Site of Scientific Importance u Natura 2000 site skond l-Avviz Legali 257/03, u l-avviz tal-Gvern 877/03; sit li hu Special Area of Conservation with International Importance.

L-Awtorita' fis-seduta tal-24 ta' Marzu 2011 ddikjarat li japplika ghal kaz l-Artikolu 70 u s-Sitt Skeda annessa mal-Att X ta' l-2010 Kap. 504 li ma jippermettix li illegalita' f'area skedata tigi sanzjonata.

L-appellant ma ghamel l-ebda sottomissjoni dwar l-imsemmi artikolu.

Dan it-Tribunal kellu l-okkazzjoni jitratta diversi appelli fejn l-Awtorita' ssollewat din l-eccezzjoni; fosthom dak fl-ismijiet: 'Carmelo Psaila vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar' Appell numru 624/11, deciz fit-30 ta' Jannar 2014.

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F'dawn il-kazijiet invarjabilment zewg konsiderazzjonijiet huma necessarji u cjoe: 1) liema ligi hi applikabbli, jekk hi dik fis-sehh fiz-zmien li saret l-applikazzjoni, jew invece, dik in vigore meta tigi determinata l-applikazzjoni; u 2) jekk fil-ligi hemmx xi dispozizzjoni ta' natura transitorja, dwar meta ghandu japplika l-imsemmi Artikolu.

Fis-sentenza ga citata', dwar dan intqal hekk:

“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".

Fil-kas in ezami rrizulta li l-art giet skedata fl-2003.

“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 jigu sanzjonati garages li nbnew 'ex adminsis' fis-snin tmenin, f'area li llum hi skedata.

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

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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 daww 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-Ambjent u l-Ippjanar skond il-Kap. 504. Skond l-istess Avviz Legali, l-appelli l-ohra kollha kellhom jigu decizi minn dan it-Tribunal.”

It-Tribunal, ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istes, jikkonferma r-rifjut tal-4 ta' Awwissu 2004 ghall-applikazzjoni PA 4545/03, u jilqa' l-eccezzjoni preliminari ta' l-Awtorita' li l-proposta ta' sanzjonar ta' zvilupp illegali f'area skedata, hi in kontravvenzjoni tal-Artikolu 70 u s-Sitt Skeda annessa mal-Att X ta' l-2010, Kap. 504.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ma applikax il-kuncett tal-commitment massicc fiz-zona. Il-fatt li f'permessi ohra fiz-zona gie indikata bhala rural settlement jikkreja commitment;
2. It-Tribunal ma iddecidix il-kwistjoni ta' diskriminazzjoni imqajma in vista ta' peremssi ohra mahruqa u trattati biss obiter;
3. It-Tribunal applika l-artikolu 70 u Skeda 6 tal-Kap. 504 retroattivament meta l-applikazzjoni saret fl-2003 u wara li kienet giet determinata mill-Awtorita meta kienet ghadha in vigore l-

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Kap. 356. Ma hemm ebda dispozizzjoni fil-Kap. 504 li taghti effett retroattiv ghal ligijiet li ma kienux jezistu meta saret l-applikazzjoni u giet determinata mill-Awtorita. Ligi b'applikazzjoni retroattiva trid tigi msejha hekk mill-legistaur;

4. Ir-raguni ta' rifjut a bazi tal-artikolu 70 u Skeda 6 tal-Kap. 504 ma kinitx wahda mir-ragunijiet ta' rifjut u t-Tribunal ma setax jezamina raguni ta' rifjut li ma gietx deciza bhala tali mill-Awtorita.

It-tielet u r-raba aggravji

Dan l-aggravju ghandu jigi trattat l-ewwel peress illi d-decide tat-Tribunal kien ibbazat principalment fuq l-eccezzjoni preliminari tal-Awtorita li saret fil-mori tal-appell illi ebda sanzjonar ma jista' jsir f'zoni skedati a bazi tal-artikolu 70 tal-Kap. 504 u s-Sitt Skeda tal-istess Kapitolu. Jekk id-decizjoni tat-Tribunal hi gusta allura ebda aggravju fil-mertu ma ghandu jew kellu jigi trattat anqas mit-Tribunal, ghalkemm it-Tribunal xorta esprima l-fehma tieghu fuq il-mertu tal-appell ghalkemm ma kienx jiffirma parti mid-decide.

Il-Qorti tinnota illi l-appellant ma ressaq ebda argument quddiem it-Tribunal kontra din l-eccezzjoni u l-argument imressaq quddiem din il-Qorti dwar din l-eccezzjoni qed isiru ghall-ewwel darba. Madankollu l-kwistjoni hi wahda ta' natura legali u din il-Qorti trid tikkunsidraha anki in vista tal-argumenti migjuba mill-appellant.

Kif qalet din il-Qorti fl-appell **Margaret Mercieca vs L-Awtorita ta' Malta Dwar l-Ambjent u l-Ippjanar** (11/12/2014):

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 gda 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 obligu li ma jistax jezonera ruhu minnu u li ma ghandu ebda diskrezzjoni li jinjora. Il-Qorti hi tal-fehma illi t-Tribunal ghandu l-obligu 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

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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.

Din l-eccezzjoni tqajmet mill-Awtorita fil-mori tal-appell u ghalhekk proceduralment bhala eccezzjoni ta' natura perentorja setghet titqajjem f'dan l-istadju u fejn il-partijiet kellhom l-opportunita li jiehd u konjizzjoni taghha u jitrattawha

Il-Qorti izzid illi:

It-Tribunal stess ex officio seta' qajjem il-kwistjoni peress illi l-ligi kienet tipprekludi l-izvilupp propost u t-Tribunal bhal Qorti ghandu 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.

Hi giurisprudenza 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-ispecificu 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 jizviluppa 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

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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 ghadha 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' ligijiet, 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 specificat.

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 speċjalment 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 kompjudi, 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 kompjud), 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:-

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- 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 effikacija 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 ghalix il-pjanijiet u policies jinbidlu jew jigu aggstati 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' pjanar 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.

l-certezza legali tal-applikazzjoni tal-ligijiet, pjan u policies fi zmien tad-decizjoni 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 tuzufriuxxi 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.

Il-Qorti wkoll tirrimarka rigward l-argument tal-appellant illi l-paragrafu 2 tas-Sitt Skeda li hu applikabbli ghal kaz ma kienx applikabbli minhabba li l-legislatur ikkreja transitory provision fir-rigward tal-paragrafu 1 u 3 meta tissemma' s-sena 2008 u li l-paragrafu 2 ma jintrabat ma ebda data. Il-Qorti tqis illi d-data imposta fil-paragrafu 1 u 3 tas-Sitt Skeda tirreferi ghad-data

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meta jkun sar l-izvilupp illegali izda fil-kaz ta' skedar il-ligi ma tintrabat ma ebda data li jfisser illi l-kaz ta' art skedata, kull zvilupp illegali, sar meta sar ma jistax jigi sanat.

Ghalhekk il-Qorti tqis illi dan l-aggravju ma jistax jigi milqugh u stante li d-decizjoni ghalhekk toqtol l-appell fil-mertu l-Qorti ma tqis li ghandha tidhol f-dawn il-kwistjonijiet.

In kwantu ghall-argument li l-applikazzjoni giet determinata mill-Awtorita taht ir-regim tal-Kap. 356, din il-Qorti tqis illi l-konsiderazzjoni tat-Tribunal fuq din il-kwistjoni hi cara u ma tehtieg ebda kjarifika ulterjuri. It-Tribunal qal hekk:

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-Ippjanar skond il-Kap. 504. Skond l-istess Avviz Legali, l-appelli l-ohra kollha kellhom jigu decizi minn dan it-Tribunal.”

Kwindi l-applikazzjoni prezenti kellha tigi deciza a bazi tal-Kap. 504 skond id-dispozizzjonijiet tal-istess ligi.

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Dawn l-istess principji wkoll gew ribaditi fis-sentenza **Richard Tua vs L-Awtorita ta' Malta Dwar l-Ambjent u l-Ippjanar** (27/11/2014) u din il-Qorti ma tqis li inghad xejn gdid li jimmerita konsiderazzjoni differenti ghal dan il-kaz.

Ghalhekk il-Qorti tqis li dan l-aggravju ma jistax jigi milqugh u stante li d-decizjoni ghalhekk toqtol l-appell fil-mertu billi kwistjonijiet ta' commitment u diskriminazzjoni naxxenti minn tali commitment ma jstghux ikunu ta' relevanza fejn iz-zona giet skedata fil-mori tal-proceduri u ebda allegazzjoni ta' abbuz tal-poter legislattiv jew amministrattiv ma sar rigward ta' din l-applikazzjoni partikolari, il-Qorti mhix u ma ghandhiex tiddetermina aggravji simili.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Antoine Borg u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-24 ta' Lulju 2014;

Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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