QORTI CIVILI PRIM`AWLA
(SEDE KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tlieta 15 ta` Settembru 2015

Kawza Nru. 1
Rik. Nru. 9/15 JZM

1) Mary Grace Farrugia (K.I. 627655M)

2) Joseph Psaila (K.I. 49757M)

3) Adriana Cutajar (K.I. 94561M)

4) Ines Psaila (K.I. 345168M)

kontra

1) Tabib Principali tal-Gvern (Sahha Pubblika), fil-kwalita` rapprezentattiva tieghu ;

2) Kap Ezekuttiv tal-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol, fil-kwalita` rapprezentattiva tieghu ;

3) Avukat Generali

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fid-<u>29 ta` Jannar 2015</u> li jaqra :-

1. Illi r-rikorrenti huma ulied u eredi tal-mejtin Andrew Psaila li miet fil-25 ta` Awissu 1988, ta` 60 sena u ta` martu Maria Psaila nee` Farrugia (vide certifikat tat-twelid tar-rikorrenti – Dok 1 sa 4, certifikat tal-mewt ta` l-imsemmi Andrew Psaila – Dok 5 u martu – Dok 6, u certifikat taz-zwieg tal-imsemmija Andrew u Maria – Dok 7).

2. Illi l-imsemmi Andrew Psaila miet kagun ta` cáncer tal-peritoneum ikkagunat esklussivament mill-esposizzjoni ghall-asbestos, maghru bhala Malignant Mesothelioma (vide kawza tal-mewt fic-certifikat tal-mewt Dok 5 u dokumenti medici ohra enumerati Dok 9.1 sa 9.9).

3. Illi dan Andrew Psaila kien jahdem bhala pipe worker mal-Malta Drydocks Corporation u dan kien l-uniku impjieg tieghu (vide 'employment history' tal-ETC anness u mmarkat Dok 8).

4. Illi matul il-perijodu li Andrew Psaila dam hekk impjegat l-asbestos kien 'staple material' fl-imsemmija korporazzjoni u kien jintuza f`ammonti kopjuzi minghajr l-ebda kontroll effettiv.

5. Illi ilu ghexieren shah ta` snin maghruf li l-esposizzjoni ghall-asbestos kienet tirrena dannu serju ghal sahhet il-bniedem, twassal ghal mard serju u tista` wkoll tikkaguna l-mewt.

6. Illi minkejja tali gharfien, l-awtoritajiet tas-sahha, il-Ministeru li taht kienet taqa` d-direzzjoni u l-kontroll tat-tarznari, id-Dipartiment tal-Impjiegi u Relazzjonijiet Industrijali naqsu milli jipprovdu lil Andrew Psaila bi protezzjoni adegwata biex jilqghu ghall-hsara kkagunata mill-asbestos, u infatti Andrew Psaila miet minhabba tali esposizzjoni.

7. Illi hadd minn dawk imsemmija fil-paragrafu precedenti ma nforma lill-istess Andrew Psaila bl-effetti nocivi involuti mill-esposizzjoni ghall-asbestos.

8. Illi kien biss wara li r-rikorrenti u l-mejjet misserhom bdew jisimghu bil-mard u mwiet ikkagunati mill-asbestos ta` uhud mill-kollegi ta` missierhom, fosthom certu Pellicano li kien habib ta` Andrew Psaila, li saru konxji ta` l-effetti nocivi ta` l-esposizzjoni ghall-asbestos.

9. Illi tali gharfien kien gradwali u maghruf minghajr l-intervent tal-entitajiet fuq indikati li kellhom l-obbligu jissupplixxu tali informazzjoni.

10. Illi l-esposizzjoni ghall-asbestos u l-effetti tieghu affettwat b`mod negattiv il-kwalita` tal-hajja tar-rikorrenti li gew imcahhda prematurament minn presenza sinjifikanti hafna f`hajjithom u li kienu fil-kura palljattiva ta` missierhom minhabba marda ngustament u ntortament kontratta minnu.

11. Illi ghalhekk jissodisfaw il-kriterji biex ikollhom locus standi bhala vittmi, u dan ai termini ta` p-artikolu 34 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem applikabbli f`Malta tramite l-Kap 319 tal-Ligijiet ta` Malta.

Ghaldaqstant ghall-fatti u ghar-raguni fuq premessi, u ghal dawk kollha li jistghu jirrizultaw matul il-procedura odjerna, ir-rikorrent jitlob lil din l-Onorabbli Qorti tiddikjara li fil-konfront individwali tar-rikorrenti gie vjolat :-

1) Id-dritt ghall-protezzjoni tal-hajja, u li l-hajja tal-individwu ma titqieghedx f`periklu bla bzonn, ai termini tal-artikolu 33 tal-Kostituzzjoni ta` Malta, u ta` l-artikolu 2 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem, applikabbli ukoll lokalment via l-Kap 319 fuq gia riferit.

2) Id-dritt ghar-rispett tal-hajja privata u tal-familja tal-individwu ai termini tal-artikolu 8 tal-istess Konvenzjoni Ewropea, applikabbli wkoll lokalment via l-Kap 319 fuq gia` riferit.

3) Id-dritt ghar-rispett tal-hajja privata fit-termini tal-paragrafu precedenti pero` f`dak li ghandu x`jaqsam mad-dritt ghall-informazzjoni dwar perikli marbutin ma` l-asbestos.

4) Tikkwantifika kumpens xieraq bhala rimedju ghal ksur tad-drittijiet fuq indikati jew liema minnhom fil-konfront tar-rikorrenti ndividwalment.

5) Tillikwida dan l-ammont ta` kumpens.

6) Tordna li l-ammont hekk likwidat bhala rimedju pekunjarju jithallas lir-rikorrenti ndividwalment.

Bl-imghaxijiet legali u l-ispejjez inkluzi dawk ta` l-ittra ufficjali tad-9 ta` Settembru 2014 u l-mandat ta`inibizzjoni numru 1080/14 kontra l-intimat minn issa ngunt ghas-subizzjoni.

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

Rat ix-xiehda bl-affidavit ta` kull wiehed mill-erba` rikorrenti.

Rat ir-risposta li pprezenta l-intimati Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika) fis-27 ta` Frar 2015 li taqra hekk :-

1. Illi fir-rikors promotur ir-rikorrenti bhala eredi tal-mejjet Andrew Psaila qeghdin jallegaw illi l-istess Andrew Psaila matul l-impjieg tieghu fit-Tarzna kien espost ghall-asbestos u li dan wassal biex hu jlaqqat il-marda qerrieda tal-kancer b`dan ghalhekk li gew lesi d-drittijiet fundamentrali tieghu kif protetti bl-artikolu 33 tal-Kostituzzjoni ta` Malta u bl-artikoli 2 u 8 tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem.

Illi l-esponenti jikkontestaw l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti bhala infondati fil-fatt u fid-dritt ghas-segwenti ragunijiet :-

2. Illi in linea preliminari, l-esponenti jeccepixxu li r-rikorrenti ma ezawrewx ir-rimedji ordinarji li taghtihom il-ligi u allura ghandu jirrizulta li r-rikors kostitituzzjonali huwa intempestiv. Il-principji li jirregolaw il-materja tat-twettiq ta` rimedji ordinarji fl-sfond tal-azzjonijiet kostituzzjonali jinsabu fl-artikolu 46(2) tal-Kostituzzjoni u l-artikolu 4(2) tal-Kap 319 tal-Ligijiet ta` Malta. Fihom

insibu specifikat li l-qorti b`kompetenza kostituzzjonali ghandha tirrifjuta milli tinqeda b`dawn is-setghat specjali moghtija lilha mil-ligi, jekk kemm il-darba hija tkun sodisfatta li kien hemm disponibbli mezzi xierqa ta` rimedju taht il-ligi ordinarja biex jindirizzaw il-pretensjonijiet tar-rikorrenti.

Illi in kwantu l-esponenti qeghdin jifhmu li b`din l-azzjoni taghhom ir-rikorrenti qeghdin ifittxu kumpens pekunjarju minhabba li Andrew Psaila allegatament thalla jahdem f`ambjent tax-xoghol fejn kien espost kontinwament ghall-asbestos, liema esposizzjoni allegatament halliet konsegwenzi tragici fuq hajjet Andrew Psaila, allura r-rikorrenti kellhom kull opportunita` li jipprocedu b`kawzi civili ordinarja ghar-rizerciment tad-danni kontra l-principal tax-xoghol tieghu minhabba li huwa naqas milli jipprovdilu "a safe system of work" jew "a safe working environment" ;

F`dan l-ambitu bil-kemm ghandu ghalfejn jinghad li proceduri ta` bixra kostituzzjonali bhalma huma kawzi kostituzzjonali mhumiex mahsuba biex jiehdu post il-proceduri ordinarji li kellhom u setghu jigu prospettati primarjament. Inkella minflok immorru quddiem il-fora ordinarji nibdew nipprocedu mill-ewwel quddiem il-Qrati Kostituzzjonali – haga li tmur lil hinn mill-iskop tal-proceduri kostituzzjonali ;

Ghalhekk fid-dawl ta` dan in-nuqqas ta` ezawriment tar-rimedji ordinarji, l-esponenti umilment jitolbu lil din l-Onorabbli Qorti sabiex tieqaf milli tezercita s-setghat kostituzzjonali taghha ai termini tal-artikolu 46(2) tal-Kostituzzjoni u l-proviso tal-artikolu 4(2) tal-Kap 319 tal-Ligijiet tas` Malta.

3. Illi minghajr pregudizzju ghall-premess, hadd mit-Tabib Principali tal-Gvern (Sahha Pubblika) u mill-Avukat Generali ma jista` jitqies bhala l-legittimu kontradittur lejn it-talbiet tar-rikorrenti ghaliex hadd minnhom ma assoggetta lir-rikorrenti ghall-materjal tal-asbestos, apparti li ebda wiehed minnhom ma huwa responsabbli mill-izvilupp u mill-implimentazzjoni tal-istrategija biex titheggeg u tigi mtejba s-sahha pubblika.

Maghdud ma` dan il-Kap 44 tal-Ligijiet ta` Malta jispecifika min huwa mghobbi bir-responsabilita` tal-hwejjeg li jikkoncernaw it-Tarzna ta` Malta.

4. Illi ghal dak li ghandu x`jaqsam mal-mertu tal-ilmenti tar-rikorrent, qabel xejn ir-rikorrenti jehtigilhom juru li Andrew Psaila kien tassew espost ghall-asbestos u kif ukoll li l-kancer malinju li nstab fuqu hija konsegwenza u kawza unika tal-fatt li l-imsemmi Andrew Psaila kien espost ghall-asbestos.

Tabilhaqq mhux daqstant differenti minn kawzi civili ordinarji, ghalkemm hawn qeghdin fil-kamp kostituzzjonali, ir-rikorrenti xorta jridu jippruvaw n-ness tal-kawzalita` u ma jistghu jistriehu fuq semplici suspetti, ipotezijiet u kongetturi.

5. Illi safejn l-ilment tar-rikorrenti jinsab imsejjes fuq l-allegazzjoni ta` ksur tad-dritt ghall-hajja, kif imhares bl-artikolu 33 tal-Kostituzzjoni u l-artikolu 2 tal-Konvenzjoni Ewropea, dan huwa assolutament bla bazi kemm bhala fatt u bhala dritt peress li hadd mill-intimati ntenzjonalment ma qieghed hajjet Andrew Psaila fil-perikolu jew b`xi mezz gie mcahhad mill-jedd ghall-hajja.

Fis-sewwa hadd mill-intimati ma kellu l-animus nocendi li jnehhi hajjet Andrew Psaila jew l-animus nocendi li jikkaguna xi hsara fisika.

6. Illi dwar l-ahhar ilment tar-rikorrenti, marbut mal-jedd tal-privatezza kif protett tahjt l-artikolu 8 tal-Konvenzjoni Ewropea l-esponent josserva li r-rikorrenti ma elaboraw xejn dwar din ix-xilja. Tassew imkien fir-rikors kostituzzjonali ma gie spejgat b`liema mod l-intimati ndahlulhom fi hwejjighom jew fil-hajja privata taghhom jew tal-familja taghhom. Ghalhekk inkwantu dan l-ilment ma giex sufficjentement imfisser, dan ghandu jigi mwarrab ukoll.

Madanakollu biex l-argument ikun shih, l-esponenti assolutament jichdu bhala fatt li huma ndahlu jew hadu xi mizuri biex jikkompromettu jew ifixklu l-hajja privata u familjarji tar-rikorrenti.

Salvi eccezzjonijiet ulterjuri.

Ghaldaqstant fid-dawl tas-suespost l-esponent jissottometti lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrentio bl-ispejjez kontra taghhom.

Rat ir-risposta li pprezentat l-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol fis-27 ta` Frar 2015 li taqra hekk :-

1. Illi fl-ewwel lok u in linea preliminari jigi eccepit illi l-Awtorita` esponenti m`hijiex legittima kontradittur u ghandha tigi liberata mill-osservanza tal-gudizzju bl-ispejjez kontra r-rikorrenti ghas-segwenti ragunijiet :-

1.1 Illi l-mewt ta` Andrew Psaila sehhet fil-25 ta` Awissu 1988 u l-allegati lanjanzi necessarjament jirreferu ghall-perjodu li jipprecedi l-imsemmija data. Illi l-

Awtorita` esponenti giet kostitwita b`ligi fis-sena 2000 permezz ta` l-Att XXVII tal-2000 u cioe` 12-il sena wara l-mewt ta` l-imsemmi Andrew Psaila u b`hekk fil-perjodu ta` l-allegati lanjanzi, l-awtorita` espenenti definittivament ma kenitx tezisti.

1.2 Illi minghajr pregudizzju ghas-suespost, il-lanzjanzi mressqa mir-rikorrenti bl-ebda mod ma jolqtu xi agir ta` l-Awtorita` esponenti li jista` b`xi mod jigi interpretat li jlledu d-drittijiet fundamentali tar-rikorrenti u konsegwentement ma tista` qatt tirrispondi ghall-addebiti mressqa kontra taghha. Illi di fatti, imkien fir-rikors promotur ma tissemma b`xi mod l-Awtorita` esponenti jew xi agir ta` l-istess Awtorita` u minn imkien ma tirrizulta xi allegazzjoni fil-konfront tal-istess. Di piu` ma tezisti l-ebda relazzjoni guridika bejn ir-rikorrenti u l-Awtorita` esponenti ;

1.3 Illi wkoll minghajr pregudizzju ghas-suespost, l-Awtorita` esponenti qatt ma setghet tinforma lill-istess Andrew Psaila bl-effetti nocivi involuti mill-allegata esposizzjoni ghall-asbestos stante li fil-perjodu lamentat l-istess Awtorita` esponenti ma kenitx tezisti. Illi di fatti, dan il-punt gie anke trattat mill-Qorti Ewropea ghad-Drittijiet Fundamentali tal-Bniedem fil-kaz Brincat and others vs Malta fejn jinghad illi :-

"Additionally in relation to the Government`s reference to the information available at the OHSA, the Court notes that this authority was only created after the year 2000 and it could therefore not have been a source of information before that date." [emfasi tal-esponent]

2. Illi r-rikorrenti jirrikorru ghall-procedura straordinarja meta huma kellhom a disposizzjoni taghhom rimedji ordinarji sabiex jivventilaw it-talbiet taghhom, senjtament il-proceduri civili ordinarji, liema proceduri ma gewx segwiti mir-rikorrenti..

3. Illi ghar-raguni fuq imsemmija u konformement mad-disposizzjonijiet tal-ligi dina l-Onorabbli Qorti ghandha tiddeklina milli tezercita l-gurisdizzjoni taghha fil-proceduri odjerni. Illi dan l-istess punt kien gie trattat in profundis minn dina l-Qorti diversament presjeduta fis-segwenti sentenzi fejn ic-cirkostanzi kienu identici ghal dawk odjerni :-

a) Maria sive Marthese Attard et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 31/2010/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;

b) *Carmel Cachia et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 28/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;*

c) *John Mary Abela et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 25/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;*

d) *Joseph Attard et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 26/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011 ;*

e) *Joseph Brincat et vs Policy Manager, Manager tal-Malta Shipyards (Rik. Kost. Nru. 27/2009/1) deciza mill-Qorti Kostituzzjonali fil-11 ta` April 2011.*

4. Illi wkoll in linea preliminari, minghajr pregudizzju ghas-suespost, ir-rikorrenti Mary Grace Farrugia, Joseph Psaila, Adriana Cutajar u Ines Psaila m`ghandhom ebda locus standi fil-kawza odjerna ghal dak li jirrigwarda t-talbiet taghhom taht il-Konvenzjoni Ewropeja. Illi l-imsemmija rikorrenti ma jikkwalifikawx bhala "vittmi" ai termini ta` l-artikolu 34 tal-Konvenzjoni stante li m`hemm l-ebda ness bejn l-allegat dannu ghas-sahha kkagunata lil Andre Psaila u xi ksur ta` dritt fundamentali tar-rikorrenti.

5. Illi in kwantu l-ilment tar-rikorrenti skatta minn episodji li jmorru lura ghal perijodi fern qabel l-adozzjoni tal-Konvenzjoni Ewropea ghad-Drittijiet tal-Bniedem fil-ligijiet nostrali fl-1987, u b`hekk ma jistghux jigu mistharrga minn din l-Onorabbli Qorti u dan a tenur tal-Artikolu 7 tal-Kap 319 tal-Ligijiet ta` alta.

6. Illi minghajr pregudizzju ghall-premess, l-imsemmija artikoli jistabilixxu l-principju illi hadd ma jista` jigi pprivat mill-hajja tieghu intenzjonalment hlief fl-ezekuzzjoni tas-sentenza ta` Qorti dwar reat kriminali skond il-ligi ta` Malta li tieghu jkun gie misjuib hati. Illi sabiex jissussisti ksur ta` dan l-artikolu, huwa necessarju illi dd-dritt tal-hajja jigi pprivat intenzjonalment. Fil-kaz in dizamina, bl-ebda sforz ta` l-immaginazzjoni u bl-ebda tigbid ta` l-interpretazzjoni tal-ligi ma jista` jinghad illi l-Awtorita` esponenti ghamel xi haga deliberatament bil-hsieb li tolqot lir-rikorrenti u b`hekk din l-allegazzjoni hija kompletament infondata fil-fatt u fid-dritt u hija frivola u vessatorja u ghaldaqstant ghandha tigi michuda fl-intier taghha.

7. Salv eccezzjonijiet ohra.

Ghaldaqstant u in vista tal-premess, l-Awtorita` esponenti umilment titlob lil dina l-Onorabbli Qorti joghgobha tichad it-talbiet tar-rikorrenti kollha u tiddikjara illi l-lanjanzi kostituzzjonali mqajma mir-rikorrenti u illi dwarhom sar ir-rikors kostituzzjonali odjern huma nfondati fil-fatt u fid-dritt u dan ghar-ragunijiet premessi u tiddikjara wkoll illi t-tqanqil tal-kwistjonijiet kostituzzjonali min-naha tar-rikorrenti huma fiergha u vessatorji u dan taaht dawk il-provvedimenti li dina l-Onorabbli Qorti jidhrilha xierqa u opportuni, bl-ispejjez kontra r-rikorrenti.,

Rat il-verbal tal-udjenza tat-2 ta` Marzu 2015 fejn il-Qorti dderigiet lill-partijiet sabiex jittrattaw it-tieni u t-tielet eccezzjonijiet tal-intimati Avukat Generali u Tabib Principali tal-Gvern, kif ukoll l-eccezzjoni markata 1 li tinqasam fi tliet (3) paragrafi tal-intimata Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol.

Rat in-nota b`dokumenti li pprezentat l-Awtorita` ntimata fit-8 ta` April 2015.

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat id-digriet li tat fl-udjenza tad-19 ta` Mejju 2015 fejn halliet il-kawza ghas-sentenza ghal-lum dwar it-tieni u t-tielet eccezzjonijiet tal-intimati Avukat Generali u Tabib Principali tal-Gvern, kif ukoll dwar l-eccezzjoni markata 1 li tinqasam fi tliet (3) paragrafi tal-Awtorita` ntimata.

Rat l-atti l-ohra tal-kawza.

II. Is-sentenza tal-lum

Bis-sentenza tal-lum qeghdin jigu decizi :-

1) It-tieni eccezzjoni tal-Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika)

Taqra hekk :-

Illi in linea preliminari, l-esponenti jeccepixxu li r-rikorrenti ma ezawrewx ir-rimedji ordinarji li taghtihom il-ligi u allura ghandu jirrizulta li r-rikors kostitituzzjonali huwa intempestiv. Il-principji li jirregolaw il-materja tat-twettiq ta` rimedji ordinarji fl-sfond tal-azzjonijiet kostituzzjonali jinsabu fl-artikolu 46(2) tal-Kostituzzjoni u l-artikolu 4(2) tal-Kap 319 tal-Ligijiet ta` Malta. Fihom insibu specifikat li l-qorti b`kompetenza kostituzzjonali ghandha tirrifjuta milli tinqeda b`dawn is-setghat specjali moghtija lilha mil-ligi, jekk kemm il-darba hija tkun sodisfatta li kien hemm disponibbli mezzi xierqa ta` rimedju taht il-ligi ordinarja biex jindirizzaw il-pretensjonijiet tar-rikorrenti.

Illi in kwantu l-esponenti qeghdin jifhmu li b`din l-azzjoni taghhom ir-rikorrenti qeghdin ifittxu kumpens pekunjarju minhabba li Andrew Psaila allegatament thalla jahdem f`ambjent tax-xoghol fejn kien espost kontinwament ghall-asbestos, liema esposizzjoni allegatament halliet konsegwenzi tragici fuq hajjet Andrew Psaila, allura r-rikorrenti kellhom kull opportunita` li jipprocedu b`kawzi civili ordinarja ghar-rizerciment tad-danni kontra l-principal tax-xoghol tieghu minhabba li huwa naqas milli jipprovdilu "a safe system of work" jew "a safe working environment" ;

F`dan l-ambitu bil-kemm ghandu ghalfejn jinghad li proceduri ta` bixra kostituzzjonali bhalma huma kawzi kostituzzjonali mhumiex mahsuba biex jiehdu post il-proceduri ordinarji li kellhom u setghu jigu prospettati primarjament. Inkella minflok immorru quddiem il-fora ordinarji nibdew nipprocedu mill-ewwel quddiem il-Qrati Kostituzzjonali – haga li tmur lil hinn mill-iskop tal-proceduri kostituzzjonali ;

Ghalhekk fid-dawl ta` dan in-nuqqas ta` ezawriment tar-rimedji ordinarji, l-esponenti umilment jitolbu lil din l-Onorabbli Qorti sabiex tieqaf milli tezercita s-setghat kostituzzjonali taghha ai termini tal-artikolu 46(2) tal-Kostituzzjoni u l-proviso tal-artikolu 4(2) tal-Kap 319 tal-Ligijiet tas` Malta.

2) It-tielet eccezzjoni tal-Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika)

Taqra hekk :-

Illi minghajr pregudizzju ghall-premess, hadd mit-Tabib Principali tal-Gvern (Sahha Pubblika) u mill-Avukat Generali ma jista` jitqies bhala l-legittimu kontradittur lejn it-talbiet tar-rikorrenti ghaliex hadd minnhom ma assoggetta lir-rikorrenti ghall-materjal tal-asbestos, apparti li ebda wiehed minnhom ma huwa responsabbli mill-izvilupp u mill-implimentazzjoni tal-istrategija biex titheggeg u tigi mtejba s-sahha pubblika.

Maghdud ma` dan il-Kap 44 tal-Ligijiet ta` Malta jispecifika min huwa mghobbi bir-responsabilita` tal-hwejjeg li jikkoncernaw it-Tarzna ta` Malta.

3) <u>L-ewwel eccezzjoni tal-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol</u>

Taqra hekk :-

1. Illi fl-ewwel lok u in linea preliminari jigi eccepit illi l-Awtorita` esponenti m`hijiex legittima kontradittur u ghandha tigi liberata mill-osservanza tal-gudizzju bl-ispejjez kontra r-rikorrenti ghas-segwenti ragunijiet :-

1.1 Illi l-mewt ta` Andrew Psaila sehhet fil-25 ta` Awissu 1988 u l-allegati lanjanzi necessarjament jirreferu ghall-perjodu li jipprecedi l-imsemmija data. Illi l-Awtorita` esponenti giet kostitwita b`ligi fis-sena 2000 permezz ta` l-Att XXVII tal-2000 u cioe` <u>12-il sena</u> wara l-mewt ta` l-imsemmi Andrew Psaila u b`hekk fil-perjodu ta` l-allegati lanjanzi, l-awtorita` espenenti definittivament ma kenitx tezisti.

1.2 Illi minghajr pregudizzju ghas-suespost, il-lanzjanzi mressqa mir-rikorrenti bl-ebda mod ma jolqtu xi agir ta` l-Awtorita` esponenti li jista` b`xi mod jigi interpretat li jlledu d-drittijiet fundamentali tar-rikorrenti u konsegwentement ma tista` qatt tirrispondi ghall-addebiti mressqa kontra taghha. Illi di fatti, <u>imkien</u> fir-rikors promotur ma tissemma b`xi mod l-Awtorita` esponenti jew xi agir ta` l-istess Awtorita` u minn imkien ma tirrizulta xi allegazzjoni fil-konfront tal-istess. Di piu` ma tezisti l-ebda relazzjoni guridika bejn ir-rikorrenti u l-Awtorita` esponenti ;

1.3 Illi wkoll minghajr pregudizzju ghas-suespost, l-Awtorita` esponenti qatt ma setghet tinforma lill-istess Andrew Psaila bl-effetti nocivi involuti mill-allegata esposizzjoni ghall-asbestos stante li fil-perjodu lamentat l-istess Awtorita` esponenti ma kenitx tezisti. Illi di fatti, dan il-punt gie anke trattat mill-Qorti Ewropea ghad-Drittijiet Fundamentali tal-Bniedem fil-kaz <u>Brincat and others vs Malta</u> fejn jinghad illi :-

"Additionally in relation to the Government`s reference to the information available at the OHSA, the Court notes that this authority was only created after the year 2000 and it could <u>therefore not have been a source of information before that date</u>." [emfasi tal-esponent]

III. Konsiderazzjonijiet

1) It-tieni eccezzjoni tal-Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika)

Id-difiza tan-**non-ezawriment tar-rimedji ordinarji** kienet sollevata fil-kaz ta` "**Brincat and Others v. Malta**" li nstema` mill-Qorti Ewropea tad-Drittijiet tal-Bniedem ("ECHR") u li kellu mertu simili hafna ghal dak tal-kawza tal-lum.

Din il-Qorti sejra ticcita l-brani mis-sentenza li tat l-ECHR fl-24 ta` Lulju 2014 fil-kaz ta` "**Brincat and Others v. Malta**" fejn kienet trattata l-kwistjoni tal-*exhaustion of ordinary remedies.*

L-ECHR qalet hekk :-

B. The Court's assessment

1. General principles

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).*

59. *According to the Court's case-law, in the event of a breach of Articles 2 and 3, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies (see Z and Others v.*

the United Kingdom [GC], no. 29292/95, § 109, ECHR 2001-V; Keenan v. the United Kingdom, no. 27229/95, § 130, ECHR 2001-III ; Paul and Audrey Edwards v. the United Kingdom, no. 46477/99 §§ 97-98, ECHR 2002-II and Ciorap v. Moldova (no. 2), no. 7481/06, §§ 24-25, 20 July 2010). The principle applies also where the violation arises from the alleged failure by the authorities to protect persons from the acts of others (see Z and Others*, cited above, § 109; and Kontrová v. Slovakia*, no. *7510/04 §§ 63-65, 31 May 2007).*

60. *In appropriate cases, also when the violation relates solely to Article 8, the Court may still consider under Article 13 that, compensation for the pecuniary and non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress (see T.P. and K.M. v. the United Kingdom [GC], cited above, § 107).*

2. <u>Application to the present case</u>

61. *The Government appear to raise this objection on the basis of three arguments : firstly that the Convention did not provide for a right to compensation for non-pecuniary damage and that therefore an ordinary action in tort would have sufficed, but the applicants failed to pursue it ; secondly, even assuming that there was a right to compensation for non-pecuniary damage, the applicants could still have had a chance of obtaining it – subject to the good will of the judge – in ordinary tort proceedings, which the applicants did not institute ; and thirdly, they appear to invoke the effectiveness of an aggregate of remedies, which the Court understands as comprising an ordinary action in tort which could have awarded compensation for pecuniary damage plus a subsequent constitutional redress action which could have awarded compensation for non-pecuniary damage.*

62. *As transpires from the general principles and the case-law of the Court already cited, in the circumstances of the present case concerning, inter alia, complaints under Articles 2 and 3, compensation for the pecuniary and non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress accessible to the applicants. The same must be held in respect of the complaint under Article 8 which in this specific case is closely connected to the said provisions.*

63. *As to the ordinary civil proceedings in the form of an action in tort, the Court has no doubts about the possibility of bringing such an action against the Government and about the prospects of success of such an action as also transpires from the case-law submitted. Nevertheless, the Court notes that an action in tort*

which is perfectly capable of awarding material/pecuniary damage does not in general provide for an award of non-pecuniary damage ("moral damage" as understood in the Maltese context). While it is true that the Government submitted two recent examples of such damages being awarded, they were unable to identify a legal provision for awards of such non-pecuniary damage. Moreover, against a background of decades during which the domestic courts have consistently interpreted Article 1045 of the Civil Code (see paragraph 22 above) as excluding non-pecuniary damage, and in the light of the fact that one of these two judgments (delivered by the same judge) has been appealed against by the Government and is still pending before the Court of Appeal, an ordinary civil claim for damages in tort cannot be considered to be a sufficiently certain remedy for the purposes of providing any non-pecuniary damage which may be due for such breaches (see, mutatis mutandis, Aden Ahmed v. Malta, *no. 555352/12, § 59, 23 July 2013). The Court further notes that loss of opportunity, to which the Government referred, is a type of pecuniary, and not non-pecuniary, damage. Lastly, it does not appear that the ordinary court in such an action would have had the competence or authority to give any other form of redress relevant to their complaints.*

64. *In so far as the Government pleaded that there existed an aggregate of remedies which the applicants did not exhaust, it is true that the Court has sometimes found under certain conditions that an aggregate of remedies sufficed for the purposes of Article 13 in conjunction with Articles 2 and 3 (see, for example, Giuliani and Gaggio v. Italy [GC], no. 23458/02, § 338, ECHR 2011 (extracts)). This concept generally refers to a number of remedies which can be taken up one after the other or in parallel and which cater for different aspects of redress, such as a civil remedy providing for compensation and a criminal action for the purposes of satisfying the procedural aspect of Articles 2 and 3 (ibid., § 337). The Court has also encountered the notion or system of applying for different heads of damages through different procedures and found no particular problem with such a system (see Dreiblats, cited above), both being available options.*

65. *Turning to the present case, the Court acknowledges that an action in tort could appropriately address the issue of pecuniary damage (see paragraphs 22 and 63 above). The Court also considers that the remedy provided by the courts exercising constitutional jurisdiction provides a forum guaranteeing due process of law and effective participation for the aggrieved individual. In such proceedings, courts exercising constitutional jurisdiction can take cognisance of the merits of the complaint, make findings of fact and order redress that is tailored to the nature and gravity of the violation. These courts can also make an award of compensation for non-pecuniary damage and there is no limit as to the amount which can be awarded to an applicant for such a violation* (see, *mutatis mutandis, Gera de Petri Testaferrata Bonici Ghaxaq v. Malta, no. 26771/07, § 69, 5 April 2011, in relation to Article 1 of Protocol No. 1, and Zarb v.* Malta, *no. 16631/04, § 51, 4 July 2006, in*

relation to Article 6). The ensuing judicial decision will be binding on the defaulting authority and enforceable against it. The Court is therefore satisfied that the existing legal framework renders the constitutional remedy capable, in theory at least, of affording, inter alia, appropriate compensatory redress concerning both pecuniary and non-pecuniary damage.

66. *The domestic system thus offers one legal avenue which would have provided solely for pecuniary damage and another one which allowed for a finding of a violation, provided for all heads of damage, and, moreover, could have afforded any other means of redress relevant to the complaints at issue. The Court observes that it does not transpire that in such cases national law necessarily requires that ordinary civil proceedings be undertaken as a sine qua non before the institution of constitutional redress proceedings, and neither has this been claimed by the Government. The same was in fact held recently by the Civil Court (First Hall) in its constitutional jurisdiction (see paragraph 26, in fine, above). The Constitutional Court's decision, and, before that, the similar decision of the Civil Court (First Hall) in its constitutional jurisdiction, declining the exercise of its jurisdiction was therefore not mandatory under procedural rules, or in accordance with any well-established case-law to that effect, but rather was a matter of discretion, that is to say it was based on the judgment of the judges sitting on that bench, as provided for in the Constitution (see relevant domestic law). It follows that there is nothing legally incorrect about the rulings of the constitutional organs, and the use of an ordinary remedy before the constitutional redress proceedings is not only customary but also desirable in order to avoid burdening the constitutional jurisdictions unnecessarily with cases. It may be that such an aim would be better achieved if the ordinary courts had the power to award also non-pecuniary ("moral") damage. However, even though in the Maltese legal system the ordinary remedy was limited in scope, it cannot be considered ineffective if followed by constitutional redress proceedings, and therefore the existence of an effective aggregate of remedies cannot be denied.*

67. *Nevertheless, in the present case the Court notes that the Constitutional Court's decision seems to have been based on a very broad reading of the Court's case-law. The Court notes that, in Zavoloka it held, solely, that there was no right to non-pecuniary damage in circumstances such as those of that specific case, where the applicant's daughter had died as a result of a traffic accident due to the negligence of a third party and where no responsibility, whether direct or indirect, could be attributed to the authorities.*

68. *Furthermore, in connection with the specific circumstances of the present case, the Court notes that the applicants (apart from the family of Mr Attard and Mr Dyer) were found to have pleural plaques in their lungs, were experiencing physical difficulties and were prone to malignant mesothelioma (as occurred in the*

case of the deceased Mr Attard) and they were challenging the Government for having failed to protect them against such negative consequences. Mr Dyer although not affected to date was at risk of suffering the same fate. For the purpose of seeking redress, they were confronted with the two possibilities available under the Maltese legal order, namely (i) instituting an ordinary civil action which could only partly redress their grievances (and which could have taken years to decide – in the Pellicano case the action was commenced in 1980 and was only finally determined ten years later) followed by constitutional redress proceedings which could redress the remaining unsatisfied claims or (ii) instituting constitutional redress proceedings which could deal with the entirety of their requests for redress. It has not been submitted that their applications before the courts with constitutional jurisdiction had no prospects of success; these courts could have chosen to exercise otherwise their discretion and take cognisance of the case, instead of declining to do so. Indeed, the latter course of action would appear to have been the most appropriate approach even from the perspective of domestic case-law (see paragraphs 25-26 and 47 above) and probably the only approach possible in the case of Mr Dyer.

69. *Consequently, in the circumstances of the present case and particularly in the absence of any pre-existing mandatory legal requirements ensuing from law or well-established case-law requiring the institution of civil tort actions before recourse to the constitutional organs (in circumstances such as those of the present case), the Court considers that the applicants cannot be held to blame for pursuing one remedy instead of two. Moreover, such an action would have also served the interests of economy of proceedings given that – in any event – the applicants would have been bound to go before the constitutional organs to obtain the full range of redress which they claimed.*

70. *The Court also notes that in their applications before the constitutional jurisdictions the applicants concerned requested the court to quantify a fair amount of compensation for the breach of their rights, to liquidate such amount and to order that this pecuniary redress be paid individually to each applicant (see paragraph 14 above). The Court considers that this general wording used by the applicants does not specifically exclude, as the Constitutional Court seems to have held (see paragraph 17, in fine, above) non-pecuniary damage as understood in the Court's case-law. On the contrary it must be taken as including both pecuniary ("material" damage, consisting under domestic law* of *damnum emergens* and *lucrum cessans) and non-pecuniary ("moral") damage, the term 'pecuniary' used by the applicants meaning simply 'monetary' and therefore before the domestic courts the relevant applicants' request cannot be said to have been deficient.*

71. In the specific circumstances of the case, the Court is therefore satisfied that the national judicial authorities were provided with the

opportunity to remedy the alleged violations of the Convention but failed to do so. Consequently, from the Court's perspective, the applicants' institution of constitutional proceedings sufficed in the present case for the purpose of exhaustion of domestic remedies in respect of the substantive complaints under Articles 2, 3 and 8. (enfasi ta` din il-Qorti)

72. The Government's objection is therefore dismissed. (enfasi ta` din il-Qorti)

Id-difiza tan-**non-ezawriment tar-rimedji ordinarji** kienet ukoll trattata fis-sentenza li tat il-Qorti Kostituzzjonali fid-29 ta` Mejju 2015 fil-kawza "**Lawrence Grech et vs Tabib Principali tal-Gvern (Sahha Pubblika) et**" li kellha wkoll mertu simili hafna ghal dak tal-kawza tal-lum.

Hemm il-Qorti Kostituzzjonali hassret dik il-parti tas-sentenza li tat din il-Qorti diversament presjeduta fil-15 ta` April 2014 fejn ghazlet li ma twettaqx is-setghat taghha li tisma` l-kawza skond il-proviso tal-Art 46(2) tal-Kostituzzjoni u tal-Art 4(2) tal-Kap 319 ghaliex kienet tal-fehma li r-rikorrenti naqsu milli jinqdew b`rimedji gudizzjarji ordinarji disponibbli ghalihom.

Din il-Qorti sejra ticcita l-brani mis-sentenza li tat il-Qorti Kostituzzjonali fil-kawza "**Lawrence Grech et vs Tabib Principali tal-Gvern (Sahha Pubblika) et**" fejn kienet trattata l-kwistjoni tal-*exhaustion of ordinary remedies.*

Il-Qorti Kostituzzjonali qalet hekk :-

24. *Dan iwassalna għall-kwistjoni ewlenija fil-każ tallum, li hija din : ladarba fiċ-ċirkostanzi tal-każ tal-lum jista' jkun hemm jedd għad-danni morali, azzjoni ordinarja quddiem il-qrati ta' ġurisdizzjoni ċivili tista' twassal biex jingħata rimedju tajjeb u biżżejjed ?*

25. *Tassew illi bi ftit eċċezzjonijiet il-ġurisprudenza ta' dawn il-qrati hija kostantement fis-sens li l-qrati ta' ġurisdizzjoni ċivili ma jagħtux danni morali. Ġie ritenut li hu hekk fuq l-iskorta tal-Art. 1045 tal-Kodiċi Ċivili li jelenka bi preċiżjoni d-diversi xorta ta' ħsara li għandha twieġeb għalihom il-persuna responsabbli u li fosthom ma tinkwadrax il-ħsara morali jew non-pekunjarja. Il-lokuzzjoni preċiża tad-dispożizzjoni msemmija ma tippermettix interpretazzjoni xort'oħra, anqas minn din il-Qorti. Dan ifisser li hu biss b'intervent leġislattiv li dik id-dispożizzjoni tista'*

tiġi riformulata, jekk ikun il-każ, sabiex tippermentti lill-qrati ta' kompetenza ċivili sabiex fil-każijiet idoneji jikkundannaw ukoll għall-ħlas ta' danni morali jew mhux pekunjarji.

26. *L-ewwel qorti effettivament kienet korretta meta qalet illi l-atturi ma nqdewx bir-rimedji illi tagħti l-liġi ordinarja u li ġew meqjusa li kienu tajbin u biżżejjed anki minn din il-Qorti li f'diversi kawżi b'ċirkostanzi analoġi għal dawk tal-lum ikkonfermat sentenzi tal-qorti ta' prim' istanza li permezz tagħhom il-Prim' Awla tal-Qorti Ċivili ddeklinat milli teżerċita l-ġurisdizzjoni kostituzzjonali tagħha. Il-qrati kostituzzjonali ta' pajjiżna dan għamluh fuq l-iskorta tas-sentenza tal-Qorti fi Strasburgu fl-ismijiet <u>Zavoloka v. Latvia</u> li fiha dik il-qorti, wara li rribadiet li vjolazzjoni tal-Artikolu 2 tal-Konvenzjoni kien fil-prinċipju jesiġi il-possibilita tal-ħlas ta' danni morali, ikkonkludiet li, tenut kont tad-diversita kbira ta' kif il-materja ta' kumpens f'każ ta' mewt hi regolata fl-ordinamenti ġuridiċi differenti tal-iStati kontraenti, ma setgħetx tinferixxi obbligazzjoni assoluta u ġenerali li jingħata kumpens pekunjarju għal dannu morali bħal dak f'dak il-każ.*

27. Ilum, iżda, din il-Qorti ma tistax ma tieħux kont tas-sentenza riċenti Brincat and others v. Malta li permezz tagħha l-Qorti fi Strasburgu tat interpretazzjoni aktar ristretta minn dik li tat din il-Qorti lis-sentenza fi <u>Zavoloka</u> filwaqt li tat tifsira aktar wiesa' tal-portata tar-rimedju "pekunjarju" mitlub fil-proċeduri f'Malta f'dak il-każ bħal ma hu mitlub ukoll f'dan il-każ. Fl-istess waqt ġie rriaffermat li fil-każijiet ta' leżjoni tal-Artikoli 2 u 3 u possibilment, fiċ-ċirkostanzi idoneji, tal-Artikolu 8 tal-Konvenzjoni, għandu dejjem ikun possibli bħala rimedju l-ħlas ta' danni mhux pekunjarji. (enfasi ta` din il-Qorti)

28. Apparti l-kunsiderazzjonijiet l-oħra li ġia saru fis-sentenza ta' din il-Qorti fl-ismijiet George Spiteri v. Policy Manager tal-Malta Shipyards et, tenut kont tal-konkluzjonijiet raġġunti fis-sentenza msemmija ta' Brincat and Others v. Malta din il-Qorti hi tal-fehma li fiċ-ċirkostanzi kif issa żviluppaw ma hux aktar desiderabbli li l-qrati kostituzzjonali jirrifjutaw li jeżerċitaw is-setgħat tagħhom kif previst fl-Artikoli 46(2) tal-Kostituzzjoni u 4(2) tal-Kap. 319 tal-Liġijiet ta' Malta minkejja r-rimedji li indubbjament kellhom għad-dispożizzjoni tagħhom ir-rikorrenti appellanti. (enfasi ta` din il-Qorti)

Din il-Qorti taghmel taghha d-direzzjoni gurisprudenzjali li harget mis-sentenzi "Brincat and Others v. Malta" tal-ECHR u "Lawrence Grech et vs Tabib Principali tal-Gvern (Sahha Pubblika) et" tal-Qorti Kostituzzjonali, tadottaha kif inhi ghaliex tghodd ghall-kawza tal-lum, u

abbazi taghha qed <u>tichad</u> it-tieni eccezzjoni tal-intimati Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika).

2) <u>It-tielet eccezzjoni tal-Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika)</u>

Dwar din l-eccezzjoni, fin-nota ta` osservazzjonijiet taghhom, l-Avukat Generali u t-Tabib Principal ital-Gvern (Sahha Pubblika) **<u>fil-qosor</u>** ighidu illi l-funzjonijiet u r-rwoli rispettivi taghhom huma stabbiliti fil-ligi, u jaghmlu riferenza ghal diversi disposizzjonijiet tal-ligi. Jinsistu li l-Kap 466 jistabilixxi min huwa responsabbli ghall-hwejjeg li jirrigwardaw it-Tarzna ta` Malta fejn kien jahdem Andrew Psaila.

Min-naha taghhom, ir-rikorrenti **<u>fil-qosor</u>** jikkontendu li t-Tabib Principali tal-Gvern huwa l-legittimu kontradittur taghhom fil-kuntest tal-allegat ksur tal-Art 2 u l-Art 8 tal-Konvenzjoni. Inoltre skond l-Art 3(1) tal-Kap 466 : *all liabilities of the Corporation and of the Company* (riferibbilment ghat-Tarzna ta` Malta) … *shall vest and be due by the Government.*

Ir-rikorrenti qeghdin jilmentaw minn lezjoni tal-Art 2 u tal-Art 8 tal-Konvenzjoni kif ukoll tal-Art 33 tal-Kostituzzjoni.

Il-Qorti taghmel distinzjoni bejn l-illegittimita` tal-persuna u r-responsabilita` tal-persuna.

Kwistjoni hija jekk fil-procediment tal-lum ghandux it-Tabib Principali tal-Gvern (Sahha Pubblika) joqghod ghall-gudizzju ta` din il-Qorti fil-kawza tal-lum tenut kont li qieghed ikun mixli bi ksur tal-artikoli fuq riferiti, u ohra hija l-kwistjoni jekk tirrizultax il-prova ta` lezjoni tal-jeddijiet fondamentali tar-rikorrenti hekk kif tutelati bl-artikoli citati. Ghal din il-Qorti, l-eccezzjoni, kif impostata, qeghda tindirizza t-tieni kwistjoni <u>mhux</u> l-ewwel wahda u cioe` qeghda tittratta l-mertu, materja li fl-istadju attwali tal-kawza hija prematura. Din il-Qorti mhijiex sejra tidhol fil-mertu, pero` trid tghid illi l-ECHR fis-sentenza taghha (op. cit.) fil-kaz ta` "**<u>Brincat and Others v. Malta</u>**" ghamlet analizi ta` x`kien jispetta lill-Awtoritajiet tas-Sahha ta` Malta li jaghmlu dwar taghrif lill-pubbliku dwar l-asbestos (ara para. 106 tad-decizjoni).

Fic-cirkostanzi din il-Qorti **ma tistax tilqa`** l-pregudizzjali tat-Tabib Principali tal-Gvern illi m`ghandux jitqies bhala *inkapaci skond il-ligi li joqghod f`kawza* (ara l-Art 780 tal-Kap 12).

Ir-relazzjoni guridika li r-rikorrenti qeghdin jaghmlu tat-Tabib Principali tal-Gvern (Sahha Pubblika) mal-allegat ksur minnhom lamentat ma tistax titqabbel mar-rabta li qeghdin jimputaw mal-Avukat Generali. Id-distinzjoni tohrog kjarament, fil-fehma ta` din il-Qorti, mill-kawzali li jipprecedu t-talbiet.

Ghal din il-Qorti huwa evidenti li l-Avukat Generali kien citat fil-gudizzju tal-lum minhabba l-kwistjoni tar-rappresentanza gudizzjarja tal-Gvern.

Il-kwistjoni tar-rapprezentanza gudizzjarja tal-Gvern hija regolata bl-Art 181B tal-Kap 12 li gie introdott bl-Att XXIV tal-1995. Dan l-artikolu, filwaqt li jitkellem dwar ir-rapprezentanza tal-Gvern, ma jaghmel ebda distinzjoni bejn proceduri ordinarji u dawk ta` natura kostituzzjonali jew konvenzjonali. Hemm jinsab provdut espressament fis-subinciz (1) li, bhala regola generali, illi "*l-Gvern ghandu jkun rapprezentat fl-atti u fl-azzjonijiet gudizzjarji mill-kap tad-dipartiment tal-gvern li jkun inkarigat fil-materja in kwistjoni".* B`dana kollu nsibu fis-subinciz (2) tal-istess artikolu illi d-dritt ta` rapprezentanza tal-Gvern jinvesti fl-Avukat Generali fil-kaz ta` 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".*

Wara ezami tal-kawzali, u wara li qieset dak li nghad mir-rikorrenti fin-nota ta` osservazzjonijiet taghhom, din il-Qorti hija tal-fehma li l-Avukat Generali huwa legittimu kontradittur tar-rikorrenti fil-kawza tal-lum ghar-raguni illi jekk jirrizulta ppruvat li l-allegati lezjonijiet lamentati mir-rikorrenti huma imputabbli lit-Tarzna ta' Malta, bis-sahha tal-Kap 3(1) tal-Kap 466, ghandu jwiegeb il-Gvern ta` Malta. Billi fil-kaz tat-Tarzna ta` Malta, ma tistax tiskatta r-rapprezentanza gudizzjarja skond l-Art 181B(1) tal-Kap 12, certament tirrizulta r-rapprezentanza tal-Avukat Generali skond l-Art 181B(2).

It-tielet eccezzjoni tal-Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika) qeghda tkun michuda.

3) L-ewwel eccezzjoni tal-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol

Fin-nota ta` osservazzjonijiet taghhom, ir-rikorrenti jaghtu r-raguni ghala l-Awtorita` ntimata kienet citata fil-gudizzju tal-lum :

" … *is-sitwazzjoni amministrattiva tal-pajjiz tipprovdi li parti mir-responsabilita` mill-harsien fuq il-post tax-xoghol illum jispetta lill-OHSA. Fiz-zmien tal-esposizzjoni, il-funzjonijiet tal-OHSA kienu fdati f`idejn entitajiet taht isem Differenti (ez Labour inspectors) imma essenzjalment il-materja li dwarha fuqha hi msejsa din il-kawza hija kompitu tal-OHSA u ghalhekk ghandha tigi mharrka skond l-Art 181B tal-Kap 12 : The judicial representation of the Government in judicial acts and actions shall vest in the head of government in whose* ***charge*** *the matter in dispute falls. Il-kelma "charge" tindika funzjoni : jigifier jekk tkun materja ta` labour safety (anke jekk il-fatt sehh qabel ma kienet stabbilita l-OHSA) ghandha tigi mharrka l-OHSA ghaliex illum dik il-materja taqa` fil-kompetenza taghha."*

Bir-rispett kollu, din il-Qorti ma taqbel xejn mal-argument li qeghdin igibu `l quddiem ir-rikorrenti.

Sabiex twiegeb ghal dak li qeghdin jipprospettaw ir-rikorrenti, il-Qorti trid ta` bilfors, anke fl-istadju tal-eccezzjonijiet preliminari, taghmel analizi tal-izvilupp legislattiv fil-qasam tas-sahha u s-sigurta` fuq il-post tax-xoghol, fil-kuntest tal-fatti ta` dan il-kaz :-

1) Jirrizulta li Andrew Psaila miet fil-25 ta` Awissu 1988. U beda jahdem it-Tarzna ta` Malta fit-30 ta` Marzu 1959.

2) Matul iz-zmien kollu li Andrew Psaila kien impjegat mat-Tarzna ta` Malta, il-ligi specjali li kienet tirregola s-sahha u s-sigurta` fuq il-post tax-xoghol kienet l-Ordinanza dwar il-Fabbriki tal-1940 – dik li kienet il-Kap 169 tal-Ligijiet ta` Malta. Skond din il-ligi, l-infurzar tal-ligi principali u tar-regolamenti li saru bis-sahha tal-Ordinanza kienet tispetta principalment lid-Direttur tax-Xoghol, u limitatament ghal xi aspetti ta` sanita` fuq il-post tax-xoghol, lit-Tabib Principali tal-Gvern.

3) L-Ordinanza kienet revokata bl-Att VII tal-1994 u cioe` l-Att dwar il-Promozzjoni tas-Sahha u tas-Sigurta` fuq il-Post tax-Xoghol (Kap 367 tal-Ligijiet ta` Malta) li dahal fis-sehh fl-intier tieghu fl-1 ta` Mejju 1995. Anke taht din il-ligi, l-infurzar kien jispetta lid-Direttur tax-Xoghol. Il-ligi kellha wkoll *saving clause* li permezz taghha r-regolamenti kollha li saru bis-sahha tal-Ordinanza baqghu fis-sehh.

4) L-Att VII tal-1994 kien revokat bl-Att XXVII tal-2000 dwar l-Awtorita` ghas-Sahha u s-sigurta` fuq il-Post tax-Xoghol (Kap 424 tal-Ligijiet ta` Malta) li dahal fis-sehh in parte fit-3 ta` Mejju 2001 u l-bqija fid-29 ta` Jannar 2002. Din id-darba, l-obbligu tal-infurzar qalb lista twila ta` funzjoni gie jispetta lill-Awtorita` lista twila ta` funzjonijiet. Anke taht din il-ligi, dahlet ukoll *saving clause* li permezz taghha r-regolamenti kollha li saru bis-sahha tal-Kap 169 u tal-Kap 367 baqghu fis-sehh.

Dan kollu jfisser illi jekk ir-rikorrenti qeghdin jilmentaw minn ksur tal-jeddijiet fondamentali taghhom minhabba karenza ta` infurzar u dmirijiet ohra relatati, ma jistghux iharrku lill-Awtorita` ntimata ghal dak l-iskop billi dik ir-responsabilita` tal-Awtorita` ma kenitx fis-sehh qabel t-3 ta` Mejju 2001.

Din il-Qorti tghid minghajr l-icken esitazzjoni illi fejn ir-rikorrenti riedu jimputaw rapport guridiku lill-Awtorita` ntimata, ma jistax ikun kopert mill-Avukat Generali skond l-Art 181B(2) tal-Kap 12 billi l-*head of government in whose* ***charge*** *the matter in dispute falls* (riferibbilment ghn-nota ta` osservazzjonijiet tar-rikorrenti) ghadu hemm sal-lum, u dan huwa d-Direttur Responsabbli mill-Impiegi u r-Relazzjonijiet Industrijali, li minkejja l-bidla fid-desinjazzjoni tieghu, ha fuqu l-d-dmirijiet kollha li kellu d-Direttur tax-Xoghol, specjalment fil-kaz ta` din id-*dispute* li ddur kemm iddur tirrigwarda xejn izjed u xejn anqas iz-zmien meta d-Direttur tax-Xoghol kien responsabbli ghall-ilmenti tar-rikorrenti, li naturalment ghad iridu jigu ppruvati fil-mertu.

Il-Qorti qeghda ghalhekk tilqa` l-ewwel eccezzjoni tal-Awtorita` ntimata u tilliberaha mill-osservanza tal-gudizzju. Konsegwentement qeghda tastjeni milli tiehu konjizzjoni ulterjuri tal-eccezzjonijiet l-ohra tal-istess Awtorita` ntimata.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi billi :-

Tichad it-tieni u t-tielet eccezzjonijiet tal-intimati Avukat Generali u Tabib Principali tal-Gvern (Sahha Pubblika), spejjez ghall-istess intimati.

Tilqa` l-ewwel eccezzjoni tal-Awtorita` dwar is-Sahha u s-Sigurta` fuq il-Post tax-Xoghol, spejjez ghar-rikorrenti.

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

Tillibera lill-Awtorita` ntimata mill-osservanza tal-gudizzju.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur