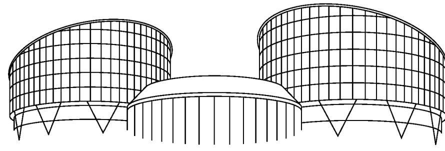

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BRINCAT AND OTHERS v. MALTA

(Applications nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11)

JUDGMENT

STRASBOURG

24 July 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Brincat and Others v. Malta,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, President,
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom, *judges*,
and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 8 July 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in five applications (see Annex for details) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by twenty-one Maltese nationals (“the applicants”) on 23 September 2011.

2. The applicants were represented by Dr J. Galea, a lawyer practising in Valletta. The Maltese Government (“the Government”) were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicants alleged that the State had failed to protect them from the risks related to exposure to asbestos.

4. On 9 July 2012 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants’ names, dates of birth and places of residence may be found in the Annex.

A. Background to the case

6. From the 1950s/60s to early 2000, the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 were full-time employees at the Malta Drydocks Corporation (the MDC), a state-owned enterprise (1968-2003). The applicants in application no. 62338/11 are the wife and children of Mr Attard, who also worked at Malta Drydocks during the same period (having started in 1959) but left in 1974 to take up managerial duties with the Malta Trade Fair Corporation, where he was no longer exposed to asbestos.

7. According to the applicants, the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 and Mr Attard had been constantly and intensively exposed to asbestos during their employment. Asbestos in its various forms was one of the substances kept in stock in Malta Drydocks' storerooms and ships incorporating asbestos as part of their structure regularly entered the docks (or ship repair yard) and were repaired there by workers. Repairs included breaking apart the asbestos casing that was used for insulation purposes, thereby releasing the particles into the surrounding air. Once a machine was repaired, it had to be reinsulated using asbestos retrieved from the store-rooms. Such repairs were carried out both on the ships themselves and in the MDC's workshops.

8. The applicants contended that asbestos particles would settle on the workers' clothing and be carried around in this way, with the result that it could also affect the lives of their family members, creating further anguish and affecting their private and family life.

9. In the 1960s, Malta became a member of the International Labour Organisation ("ILO") (see "Relevant domestic law and international standards" below) and of the World Health Organisation ("WHO"), both organisations having been raising awareness regarding the dangers of asbestos since the 1950s. At the time, however, the employees of MDC had been neither informed about nor protected from the dangers of asbestos in any way. The Government disagreed with the applicants' assertion that international organisations had raised awareness of the dangers of asbestos in the 1960s, noting that the ILO Asbestos Convention had been concluded in 1986 and that the WHO had issued its guidelines much later than the 1960s.

10. The first publicly available – though not publicly disseminated – information concerning the fatal consequences of asbestos at MDC appears to be the judicial acts and judgment relating to a lawsuit brought in the names of *Mary Pellicano proprio et nomine vs Francis Spiteri nomine*, concerning the deceased Paul Pellicano (erroneously referred to by the parties as Joseph Pellicano) who died from asbestosis in 1979. In that case, in a judgment of 30 August 1989, the then Commercial Court established MDC's responsibility for the death of Paul Pellicano and awarded (in a

separate decision of 27 June 1990) damages under Maltese law consisting of *lucrum cessans* and *damnum emergens* (see also “Relevant domestic law” below).

11. No action was taken following that judgment save that employees were assured that adequate ventilation and the wearing of fabric masks would protect them from asbestos.

12. Mr Attard died in 2006, aged sixty-one, as a result of a malignant cancer linked to exposure to asbestos (mesothelioma). Following the death of a number of their colleagues, the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 underwent medical tests, which were performed again in 2012 in the context of proceedings before the Court. With the exception of the case of Mr Dyer, most of the X-rays revealed bilateral pleural plaques (extensive in some cases) compatible with asbestos exposure. The X-rays of some of the applicants also revealed pleural thickening, reticulo-nodular interstitial parenchymal texture in the lungs, and in some cases also pulmonary fibrosis, all of which are consistent with asbestosis. The results suggested that there was a strong probability of the presence of asbestos fibres in their stomach lining, as well as in other digestive organs. Moreover, apart from the physical difficulties such as exercise intolerance that were mainly related to respiratory problems, the presence of asbestos in their bodies made them prone to malignant mesothelioma, as was the case with Mr Attard, abovementioned. From the medical data it was also apparent that the applicants had no pleural effusions and that their lungs were clear, with no filtrates or nodules, and their hearts, hila and upper mediastina were also normal. Most of the applicants are non-smokers.

13. In particular, Mr John Mary Abela has been confined to bed for years as a result of his acute respiratory problems and can only breathe via oxygen cylinders that further reduce his mobility. Mr Dyer’s medical results did not show evidence of asbestos-related disease.

B. Constitutional redress proceedings

1. The applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11

14. On 7 May 2009 these applicants instituted separate constitutional redress proceedings, complaining of a violation of Articles 2, 3 and 8 of the Convention in that the State had failed to protect them from unnecessary risks to their health, which also constituted inhuman treatment and an interference with their private and family life. They asked the court to quantify a fair amount of compensation for the breach of the aforementioned rights, to liquidate that amount, and to order that this pecuniary redress be paid individually to the applicants (“*Tikwantifika*

kumpens xieraq bħala rimedju għal ksur tad-drittijiet fuq indikati jew mil-liema minnhom, tillikwida dan l-ammont, u tordna li dan ir-rimedju pekunjarju jithallas individwalment lir-rikorenti”).

15. In reply to the Government’s objection of non-exhaustion of ordinary domestic remedies in the domestic proceedings the applicants in question maintained that under Maltese law the ordinary civil remedies available did not apply to non-pecuniary damage (known in the domestic system as “moral damage”), but solely to pecuniary damage; they claimed that these types of damage were independent of each other.

16. In four separate but almost identical judgments of 30 November 2010 the first-instance constitutional jurisdiction – namely, the Civil Court (First Hall) in its constitutional jurisdiction – declined to exercise its powers under the Constitution and under the European Convention Act and discharged the defendants *ab observantia iudicii* thereby in effect dismissing the applications on the grounds of non-exhaustion of ordinary domestic remedies. That court held that the applicants should have instituted a civil action for damages arising out of tort or contractual liability. It considered that according to the Court’s case-law, namely *Zavoloka v. Latvia* (no. 58447/00, § 40, 7 July 2009), there was no general or absolute obligation on States to pay compensation for non-pecuniary damage in such cases.

17. By four judgments of 11 April 2011 the Constitutional Court upheld the first-instance decisions. It considered that the Government, as an employer, could be sued under civil law for their failings. It held in effect that the fact that such failings were also of a constitutional nature did not in itself mean that they could not be pursued through ordinary civil proceedings. It also held that a person could not allow the time within which to bring an ordinary civil action to expire and then resort to constitutional proceedings as a remedy *in extremis*. The court considered that constitutional redress proceedings could be instituted only after the applicants had instituted civil proceedings and if, after a final judgment, they still felt that the breaches of their rights had not been adequately redressed. It held that given that neither the Convention nor national law provided for compensation for non-pecuniary damage in such cases, the ordinary remedy would have been effective. In any event, according to the court, in their constitutional application, the applicants made no specific mention of non-pecuniary or moral damage, having claimed compensation for pecuniary damage only.

2. The applicants in application no. 62388/11

18. On 19 April 2010 these applicants, who are the heirs of the deceased Mr Attard, also instituted proceedings, complaining of a violation of Articles 2, 3 and 8 of the Convention.

19. In reply to the Government's objection of non-exhaustion of ordinary domestic remedies in the domestic proceedings, the applicants submitted that under Maltese law the ordinary civil remedies available did not provide for non-pecuniary damage but only for pecuniary damage; they claimed that these types of damage were independent of each other.

20. By a judgment of 30 September 2010 the Civil Court (First Hall) in its constitutional jurisdiction declined to exercise its powers under the Constitution and under the European Convention Act and discharged the defendants *ab observantia iudicii*, thereby in effect dismissing the claims of the applicants on the grounds of non-exhaustion of ordinary remedies. In its analysis of the principles governing the exercise of the above-mentioned powers under the Constitution and the European Convention Act, the court noted, *inter alia*, that the failure to pursue ordinary remedies by an applicant was not in itself a sufficient reason for a court of constitutional jurisdiction to decline to exercise its powers if it could be shown that the ordinary means could not provide a complete remedy. It also held that the decision to decline or otherwise to exercise such powers was to be exercised with prudence, so that where it appears that there is a serious violation of fundamental human rights or even where there is likely to be the violation of such rights, then the court should lean towards exercising its powers. Nevertheless, it considered that what the applicants were ultimately requesting was a sum of money by way of damages. Given that ordinary remedies under the Civil Code could have resulted in an award of monetary compensation, the applicants should have pursued those remedies before instituting constitutional redress proceedings.

21. In a judgment of 11 April 2011 the Constitutional Court upheld the first-instance decision for substantially the same reason indicated in paragraph 17 above.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL STANDARDS

A. Domestic law and practice relating to civil and constitutional remedies

1. Civil remedies

22. The relevant provisions of the Civil Code, Chapter 16 of the Laws of Malta, in respect of actions for damages, read:

Article 1031

"Every person, however, shall be liable for the damage which occurs through his fault."

Article 1032

“(1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias.

(2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.”

Article 1033

“Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.”

Article 1045

“(1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.

(2) The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.”

Article 1046

“Where in consequence of the act giving rise to damages death ensues, the court may, in addition to any actual loss and expenses incurred, award to the heirs of the deceased person damages, as in the case of permanent total incapacity, in accordance with the provisions of the last preceding article.”

2. *Constitutional remedies*

23. Article 46 of the Constitution of Malta, in so far as relevant, reads:

“ (1) ... any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) of this article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said articles 33 to 45 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court."

24. Similarly, Article 4 of the European Convention Act, Chapter 319 of the laws of Malta, provides:

"(1) Any person who alleges that any of the Human Rights and Fundamental Freedoms, has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of subarticle (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, of the Human Rights and Fundamental Freedoms to the enjoyment of which the person concerned is entitled:

Provided that the court may, if it considers it desirable so to do, decline to exercise its powers under this subarticle in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other ordinary law.

(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court."

25. Maltese case-law relating to the examination of a case by the constitutional jurisdictions was summarised in the case of *Dr Mario Vella vs Joseph Bannister nomine*, Constitutional Court judgment of 7 March 1994. These guiding principles were reiterated in several other judgments including *Mourad Mabrouk vs the Minister for Justice and Home Affairs and the Principal Immigration Officer*, judgment of the Civil Court (First Hall) in its constitutional jurisdiction of 4 February 2009. The relevant guiding principles read as follows:

"a. As a general principle, when it is clear that there are available ordinary remedies enabling an applicant to obtain redress for the damage complained of, such ordinary remedies must be undertaken and constitutional proceedings should be instituted only after such ordinary remedies are exhausted or if they were not available.

b. Unless there are grave and serious reasons related to unlawfulness, justice or manifest error, the Constitutional Court will not disturb the exercise of discretion made by the first-instance court, as conferred on it by Article 46 (2) of the Constitution.

c. Each case has its own particular circumstances.

d. The fact that an applicant has failed to pursue an available remedy does not mean that the court [of constitutional jurisdiction] must decline to exercise its jurisdiction if that possible remedy could redress the applicant's complaint only in part.

e. Where an applicant has failed to exhaust an ordinary remedy, if the interference of another person has contributed to this non exhaustion, then it would not be desirable for the court [with constitutional jurisdiction] to refrain from hearing the case.

f. When the first-instance court exercises its discretion and refuses to take cognisance of a case without having examined the relevant subject matter in respect of

which that discretion had to be exercised, the court of second instance should put aside that discretion.”

26. In the judgment of the Constitutional Court in the names *Philip Spiteri vs Sammy Meilaq nomine* of 8 March 1995 it was further held that:

“When the object of the action is complex - and concerns issues which have a remedy under some other law, and other issues that can only be redressed by the Constitutional Court – the latter action should prevail.”

The same was reiterated in the more recent judgment of the Civil Court (First Hall) in its constitutional jurisdiction of 5 June 2014 - still subject to appeal - in the name of *Judge Carmelo Sive Lino Farrugia Sacco vs The Honourable Prime Minister, the Attorney General and the Commission for the Administration of Justice*. In that same judgment the court also held that:

“From an accurate examination of the proviso [to Article 46 (2) of the Constitution], it does not result that the legislator intended to establish as an absolute principle of Maltese constitutional law that before an individual seeks redress before the constitutional jurisdictions, he or she must always, peremptorily, exhaust all the available ordinary remedies, including those which are not reasonably expected to be effective and accessible.”

B. Domestic law and case-law relating to asbestos

1. Legislation

27. The Dock Safety Regulations (Subsidiary Legislation 424.03), were enacted in 1953 and amended in 1965, 1966, 1977, 1991, 1999 and 2009. The regulations make no mention of asbestos or occupational hazards caused by carcinogenic substances and agents.

28. The Work Places (Health, Safety and Welfare) Regulations (Subsidiary Legislation 424.09) entered into force on 9 February 1987. Part III concerns the prevention and control of occupational diseases and reads as follows:

Regulation 16

“(1) No person may import or sell any chemical or material which is toxic, and no employer may use or suffer to be used any such chemical or material in any work place under his charge, without in either case the approval of the Superintendent [of Public Health].

(2) In granting such approval as referred to in sub regulation (1), the Superintendent may impose any conditions as he may deem fit in the interest of public health.”

Regulation 17

“(1) It shall be the duty of the employer in so far as is reasonably practicable or possible, or when so directed by the Sanitary Authority, to substitute a harmful substance, process or technique at a place of work by a less harmful substance, process or technique.”

(2) Without prejudice to the generality of subregulation (1), the following rules shall apply:

(a) sandstone grinding wheels shall be substituted by carbonrundum grinding wheels;

(b) benzene, unless authorised by the Superintendent, shall be substituted by a less toxic solvent;

(c) paints, varnishes, mastics, glues, adhesives and inks shall not contain benzene;

(d) white lead and sulphate of lead and products containing these pigments or other lead compounds shall not be used in the internal paintings of buildings or of articles in buildings, if the dry film of the resulting paint will contain more than 2500 parts per one million parts of metallic lead;

(e) white or yellow phosphorus shall not be used in the manufacture of matches;

(f) sand in sand-blasting shall be substituted by steel-shot or grit;

(g) polychlorinated biphenyls shall not be used or added to any oil, fluid or material."

Regulation 18

"(1) It shall be the duty of the employer to make arrangements when so considered necessary by the Sanitary Authority and to the satisfaction of the said Authority, so that the atmosphere of work-rooms in which potentially dangerous or obnoxious substances are manufactured, handled or used, is tested periodically.

(2) Such tests are to be carried out at sufficiently frequent intervals to ensure that toxic or irritating dusts, fumes, gases, fibres, mists or vapours are not present in quantities which, in the opinion of the Sanitary Authority, are liable to injure health, and to ensure that an atmosphere which is fit for respiration is maintained.

(3) Work in, or entry into any place where there is reason to suspect that the atmosphere is toxic, poisonous, asphyxiating or otherwise dangerous to health, shall not be carried out until the atmosphere is suitably tested and found free from any danger to health.

(4) The employer shall likewise ensure periodical testing of the working environment where a potential hazard exists for heat, noise and other physical agents.

(5) All tests referred to in this regulation shall be conducted by trained personnel and, where possible, supervised by qualified personnel who possess experience in occupational health or hygiene."

Regulation 19

"(1) It shall be the duty of the employer to ensure that provisions are made for the storage under safe conditions of substances dangerous to health.

(2) Without prejudice to the generality of this regulation such provisions should include the use of receptacles adequate to the storage of the dangerous substance, the safe storage of receptacles, their proper labelling with a danger symbol, their proper handling and where necessary an indication of the nature of the risk, the name of the substance or an indication to identify it and, as far as practicable, the essential instructions giving details of the first aid that should be administered if the substance should cause bodily harm or injury.

(3) Where any risk from gases exists, cylinders containing such gases should be stored in well ventilated places as far as possible from the place of work.”

Regulation 20

“It shall be the duty of the employer to inform forthwith the Superintendent of the occurrence in any of his employees of any occupational disease or incidence as are required to be notified by a medical practitioner under the Health Care Professions Act.”

29. The same regulations provided for notification of accidents connected to the place of work, and in so far as relevant the relevant provisions read as follows:

Regulation 22

“(1) For the purposes of these regulations any accident arising out of or in connection with work which results either -

(a) in the death of or a major injury to any person;

...

shall be a notifiable accident and as such shall be reported to the Director [of Labour].

(2) (a) Where the notifiable accident results in the death or a major injury to a person, the employer shall -

(i) notify forthwith the Director or his representative by the quickest practicable means; and

(ii) within seven days from the date of the accident send written notice of the accident to the Director; and

(b) where the notifiable accident falls under subregulation (1)(b), the employer shall inform the Director in writing or by other suitable means, within seven days from the date of the accident.

Regulations 23

“There shall be kept in every work place or in such place outside the work place as may be approved by the Director and Superintendent a register, called the general register, and there shall be entered in or attached to that register:

(a) the prescribed particulars as to every case of industrial accident and industrial disease occurring at the work place of which notice is required to be sent to the Director and the Superintendent;”

Regulation 24

“The general register and every other register or record kept in pursuance of these regulations shall be preserved and shall be kept available for inspection by any officer for two years after the date of the last entry in the register or record.”

30. These regulations also provided for their enforcement and for penalties in the event that they were not complied with.

31. Further emphasis was placed on the duties of employers in the Factories (Health Safety and Welfare) Regulations 1986 which entered into force in 1987 and eventually became part of the General Provisions for Health and Safety at Work Places Regulations, which were amended in 1996, 2002 and 2003. Article 49 of the 1986 text, in its most relevant part read as follows:

> " (1) Saving any other provisions of these regulations every employer shall take all practicable steps to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
>
> (2) Every employer shall take all practicable steps to ascertain the hazards, if any, connected with a trade process or substance."

32. In 1994, a prohibition on the importation of asbestos fibres came into effect by means of subsidiary legislation (S.L. 37.11) to the Customs Ordinance.

33. On 28 June 2002 the Prevention and Reduction of Environmental Pollution by Asbestos Regulations (S.L 504.30, subsidiary legislation to the Environment and Developing Planning Act) came into force, containing in substance the provisions of the Council Directive 87/217/EEC of 19 March 1987 on the prevention and reduction of environmental pollution by asbestos.

34. Finally, Legal Notices 122 and 123 of 2003 enacted, respectively, the Protection of Workers from the Risks related to Exposure to Carcinogens or Mutagens at Work Regulations and the Protection of Workers from the Risks related to Exposure to Asbestos at Work Regulations which, like the regulations mentioned in paragraph 31 above, constitute subsidiary legislation under the Occupational Health and Safety Authority Act, Chapter 424 of the Laws of Malta.

2. Case-law

35. In the case *Mary Pellicano proprio et nomine vs Francis Spiteri nomine*, Commercial Court judgments of 30 August 1989 and 27 June 1990 (see paragraph 10 above), the court established the responsibility of Malta Drydocks for the death of Paul Pellicano and awarded damages consisting of *lucrum cessans* and *damnum emergens* as provided by Maltese law. It found that the applicant had worked at the dock yard for decades until his death as a result of asbestosis. The applicant had been employed at the time when blue asbestos was still used at the ship repair yard and where the only precautionary measure taken was the use of masks, which in any case were considered of inadequate quality by the court-appointed experts. The court shared the conclusions of the experts who took the view that certain precautions had been implemented but they did not take sufficient account of the state of scientific knowledge about the subject matter at the relevant time. More specifically, the use of dangerous asbestos had remained the

norm, the ventilation system was old and inadequate, the masks were inefficient, and other shortcomings had been apparent.

36. In *Godfrey Buhagiar vs Malta Shipbuilding Company Limited* (another state-owned enterprise which in 2003 merged with the MDC to become Malta Shipyards Ltd.), judgment of the First Hall (Civil Court) of 11 October 2001, it was held that the fact that an employee had consented to work in a dangerous environment did not imply acceptance of responsibility for any harm which he might suffer. Therefore, if an employee continues to work despite the fact that the employer has failed to provide a safe working environment, the employer cannot plead the employee's consent as a defence.

C. International standards

37. Malta became a member of the International Labour Organisation ("ILO") on 4 January 1965 and of the World Health Organisation ("WHO") on 1 February 1965.

38. According to the WHO website, all forms of asbestos are carcinogenic to humans and may cause mesothelioma and cancers of the lung, larynx and ovary. Asbestos exposure is also responsible for other diseases, such as asbestosis (fibrosis of the lungs), pleural plaques, thickening and effusions. According to the most recent WHO estimates, more than 107,000 people die each year from asbestos-related lung cancer, mesothelioma and asbestosis resulting from exposure at work.

39. In 1974 the General Conference of the International Labour Organisation adopted the Occupational Cancer Recommendation (1974 - R147), concerning the prevention and control of occupational hazards caused by carcinogenic substances and agents, and in 1986 it adopted the Asbestos Recommendation, R172, concerning safety in the use of asbestos.

40. The ensuing conventions, namely the ILO Convention concerning Safety in the Use of Asbestos (C 162 - the 1986 Asbestos Convention) and the ILO Convention concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents (C 139 - Occupational Cancer Convention, 1974), have not been ratified by Malta.

41. Most European Union ("EU") Directives on the matter such as the EU Directive on the protection of workers from the risks related to exposure to asbestos at work (83/477/EEC, amended in March 2003), became applicable to Malta only when it joined the EU in 2004 (see also paragraph 33 above).

D. Other relevant legislation

42. The relevant provisions of the Department of Health (Constitution) Ordinance) Chapter 94 of the Laws of Malta, as at the time of the present case (and prior to its repeal in 2013) read as follows:

> "4. The Head of the Department of Health shall be the Chief Government Medical Officer who shall also be *ex officio* Superintendent of Public Health.
>
> 16. The Chief Government Medical Officer shall be the chief adviser to the Government on any matter relating to the public health or relating to or in connection with the health services.
>
> 17. (1) It shall be the duty of the Principal Medical Officers to assist the Chief Government Medical Officer and the Minister in planning, direction, development and administration of the health services
>
> (2) The Principal Medical Officers shall moreover –
>
> (a) deal with international health matters and relative commitments;
>
> (b) propose and formulate any such legislative measures as may be necessary in relation to health services."

THE LAW

I. JOINDER OF THE APPLICATIONS

43. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their similar factual and legal background.

II. THE GOVERNMENT'S OBJECTION OF NON-EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' submissions

1. The Government

44. The Government submitted that the applicants had not exhausted domestic remedies in respect of the substantive complaints under Articles 2, 3 and 8 of the Convention, concerning the Government's failure to protect the applicants rights' under those provisions. They had failed to institute an ordinary civil action, opting instead to attempt constitutional redress proceedings at the conclusion of which their claims had been dismissed for non-exhaustion of ordinary remedies. The Government noted that in their application the applicants had themselves cited the *Pellicano* case – which

had been successful at the ordinary level – and the compensation award granted in that case by the Commercial Court.

45. The Government further relied on *Aytekin v. Turkey* (23 September 1998, § 84, *Reports of Judgments and Decisions* 1998-VII) in which, having taken into account the combination of the criminal, civil and administrative law remedies available, and in particular the prospects offered by the criminal proceedings for obtaining redress in respect of the death of the applicant's husband, the Court had not exempted the applicant in that case from the requirement to exhaust such remedies. The Government also made reference to the case of *John Sammut and Visa Investments Limited v. Malta* ((dec.), no. 27023/03, 28 June 2005), in which the Court had held that an action in tort could have resulted in an award of civil damages and that the aggregate of remedies could have redressed the applicants' second grievance.

46. Referring to Articles 1030-1033 of the Civil Code concerning an action in tort, the Government submitted that, like any other person, they could, through their representatives, be held liable for damages. Indeed the State had on numerous occasions been held liable for the payment of damages by the domestic courts (various examples were submitted to the Court). The Government referred in particular to the case of *Carmena Fenech et vs Chairmen of the Malta Drydocks noe et* (Court of Appeal, 3 December 2010), which concerned asbestos exposure and where the Government had been ordered to pay approximately EUR 103,000 in damages.

47. The Government conceded that – like any employer – they were obliged to provide a safe working environment and noted that they had been sued at various times for allegedly failing to provide such an environment. They cited *Francis Busuttil vs Sammy Meilaq nomine* (First Hall, Civil Court, 9 December 2002) and *Gatt vs Chairman Malta Drydocks* (sic.) (First Hall, Civil Court, 9 December 2002), in which the courts had found Malta Drydocks liable for damages because it had failed to provide a safe working environment and had been negligent in the maintenance of tools, thereby causing an accident that had resulted in the claimants' permanent disability. Similarly, in a comparable case, the State-owned airline, Air Malta, had been held liable for damages. Indeed, domestic courts had found the Government liable for damages when the governmental act complained of constituted a breach of duty which was classified either as a negligent act or as a failure to carry out duties properly. Moreover, in *Godfrey Buhagiar vs Malta Shipbuilding Company Limited* (11 October 2011) the domestic courts had held that the fact that an employee consented to work in a dangerous environment did not mean that the employee accepted responsibility for any harm which he might suffer, with the result that the employer could therefore not raise the plea that the employee accepted such working conditions.

48. As to the applicants' claim that compensation for non-pecuniary damage could not be awarded in an ordinary action, referring to *Zavoloka v. Latvia* (cited above) the Government noted that in that case the Court had found that there was no absolute obligation to award such damages in circumstances such as those in that case. Moreover, while it was true that the law did not provide for compensation for non-pecuniary damage, known as "moral damage" in the domestic context (except for a few specific circumstances), and that such damages were not awarded in actions for tort, the way compensation was calculated allowed for the inclusion of non-pecuniary damage, although this was not mentioned. One such example was awarding loss of future earnings, based on a loss of opportunities, which in the Government's view was a veiled type of "moral damage", that is to say, non-pecuniary damage as understood in the Convention case-law. Moreover, the Government considered that civil law did not prohibit such damage and cited two examples (*Dr J Pace noe vs The Prime Minister*, Civil Court (First Hall), 1 June 2012, and *Mario Gerada vs The Prime Minister*, Civil Court (First Hall), 14 November 2012) in which the applicants had been awarded compensation for "moral damage" in cases involving breach of contract and unfair dismissal respectively.

2. The applicants

49. The applicants contended that an ordinary civil action against the Government as employer for material damage would not have been capable of addressing the multiple issues arising from the breaches of Articles 2, 3 and 8. Accepting that the Government could, like private individuals, be found liable in a tort action, the applicants submitted that an ordinary action of that nature could not have established the State's responsibility in line with Convention standards reflected in the Constitution. It followed that their complaints could therefore only be raised before the courts with constitutional jurisdiction as established by Article 46 of the Constitution (see "Relevant domestic law" above).

50. Moreover, they noted that according to domestic case-law, in instances where the merits of a case were complex and had aspects which fell under both ordinary and constitutional law, the constitutional action was to prevail (*Anthony Mifsud vs Superintendent Carmelo Bonello et*, Constitutional Court, 18 September 2009).

51. The applicants noted that they were seeking damages arising from death and grievous bodily harm which were not the result of normal torts such as a traffic accidents but which were a result of the Government's failure to fulfil their positive obligations under the Convention, namely to safeguard a person's life, to investigate properly any death or harm for which the State was responsible, to provide information about any risk to life or health, and to identify the persons responsible for the violation. It

followed that they were also entitled to compensation for non-pecuniary damage.

52. An ordinary civil action in tort could only provide for compensation for pecuniary damage, namely *damnum emergens* and *lucrum cessans*, the expressly limited heads of damage provided for by Maltese law. In fact, compensation for non-pecuniary damage was not provided for in law, as shown by decades of case-law where judges had repeatedly held that no compensation for non-pecuniary damage could be awarded. Moreover, proposals had recently been made in Parliament to make provision for compensation for non-pecuniary damage in certain cases – proposals which would be pointless if the Government's contention that such damage were not precluded were true. Moreover, an occasional lapse by a good-hearted judge extending the scope of pecuniary damage could hardly be considered the right way of dealing with human rights violations. In the applicants' view the only available remedy was constitutional redress proceedings, which they had unsuccessfully instituted.

53. Furthermore, the ineffectiveness of such an ordinary remedy was evident in so far as the law (Article 1032 of the Civil Code) provided that no one was to be found liable in the absence of any express legal provision. Indeed, ordinary law did not provide for actions dealing with activities that breached Article 8 of the Convention – a provision which the applicants had also relied on and which, moreover, did not correspond to any constitutionally protected right in Malta.

54. The applicants argued that the Constitutional Court had dismissed their claims on the grounds of failure to use a remedy that was ineffective. It had, moreover, found that only if the applicants still felt that the breaches of their rights had not been redressed by that remedy could they opt for constitutional redress proceedings. The applicants contended that, although part of their claim could have been addressed by the ordinary courts, the courts with constitutional jurisdiction were not precluded from addressing the case to its full extent. They submitted that in *Carmena Fenech vs Chairman of the Malta Drydocks*, (cited above) one of the cases relied on by the Government, the claimant (who was the widow of a dry-docks employee who had succumbed to malignant mesothelioma) had been awarded out-of-pocket damages and compensation for loss of future earnings in respect of her husband. Thus, if she had wished to claim any compensation for non-pecuniary damage, she would still have had to lodge another claim with the courts with constitutional jurisdiction. It followed that the applicants had rightly brought their claim before the only court that could have found that there had been a breach of their human rights and awarded the compensation for non-pecuniary damage sought.

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. 29392/95, § 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. *Application to the present case*

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. 55352/12, § 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.

72. The Government's objection is therefore dismissed.

III. ALLEGED VIOLATION OF ARTICLES 2 AND 8 OF THE CONVENTION

73. The applicants complained under Articles 2 and 8 of the Convention in respect of their exposure to asbestos (or that of their deceased relative in the case of application no. 62338/11) and of the Government's failings in that respect. The relevant provisions read:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

74. The Government contested that argument.

A. The substantive complaints

1. Admissibility

(a) The parties’ submissions as to the applicability of the provisions

75. The Government submitted that the medical certificates produced by the applicants did not establish a direct link between their medical complaints and the fact that they were employed in the shipbuilding or ship repair industry. The medical certificate in the case of Mr Attard stated that his death was “likely to be a result of asbestos exposure”. The same comment appeared on the other certificates. The Government further submitted that although chest X-rays were the most common tool for detecting asbestos-related diseases, they could not detect asbestos fibres in the lungs.

76. The Government contended that everyone was exposed to asbestos at some time during their life as low levels of asbestos are present in the air, water and soil. Relying on a factsheet of 5 January 2009 issued by the National Cancer Institute entitled “Asbestos Exposure and Cancer Risk”, the Government noted that the risks of developing an asbestos-related disease depended on various factors, including how much asbestos one was exposed to, the length of the exposure, the size, shape and chemical composition of the asbestos fibres, the source of the exposure, and individual risk factors such as smoking and pre-existing lung disease. Indeed the combination of smoking and asbestos exposure was particularly hazardous. However, exposure did not necessarily lead subsequently to lung disease.

77. They explained that if products containing asbestos were disturbed, tiny asbestos fibres were released into the air. When these were breathed in, they became trapped in the lungs and over time could accumulate and cause scarring and inflammation, which could affect breathing. It was rare for a cancer of the thin membranes that lined the chest and abdomen to develop from asbestos exposure and the more likely consequence was an increased

risk of asbestosis, an inflammatory condition affecting the lungs and causing shortness of breath, coughing and lung damage, and other non-malignant lung and pleural disorders including pleural plaques (changes in the membrane surrounding the lung), pleural thickening and benign pleural effusions (abnormal collections of fluid between the thin layers of tissue lining the lungs and the wall of the chest cavity). According to the Government, it was well known in the medical community that pleural plaques were not precursors to lung cancer.

78. The applicants considered that through negligence, recklessness and lack of commitment on the part of the authorities they were robbed of their life expectancy through an irrevocable process of pain and lethal illness. The Government's responsibility was even more evident considering that those actions and/or omissions had taken place at MDC, a Government-controlled entity – that is to say, at the applicants' place of work.

(b) The Court's assessment

79. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of unjustified force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III, and *Paul and Audrey Edwards*, cited above, § 54).

80. This obligation is construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities which by their very nature are dangerous, such as the operation of waste-collection sites (see *Öneryıldız v. Turkey* [GC], no. 48939/99, §71, ECHR 2004-XII) or nuclear testing (see *L.C.B.* cited above, § 36) or cases concerning toxic emissions from a fertiliser factory (see *Guerra and Others v. Italy*, 19 February 1998, §§ 60 and 62, *Reports* 1998-I, although in this case the Court found that it was not necessary to examine the issue under Article 2, it having been examined under Article 8).

81. The Court considers that the same obligations may apply in cases, such as the present one, dealing with exposure to asbestos at a workplace which was run by a public corporation owned and controlled by the Government.

82. The Court reiterates that it has applied Article 2 both where an individual has died (see, for example, *Öneryıldız*, cited above) and where there was a serious risk of an ensuing death, even if the applicant was alive at the time of the application. Examples include cases where the physical integrity of an applicant was threatened by the action of a third party (see *Osman v. the United Kingdom*, 28 October 1998, §§ 115-122, *Reports* 1998-VIII) or as a result of a natural catastrophe which left no doubt as to

the existence of a threat to the applicants' physical integrity (see *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 146, ECHR 2008 (extracts)). More particularly, the Court has repeatedly examined complaints under Article 2 from persons suffering from serious illnesses. Such cases include *G.N. and Others v. Italy* (no. 43134/05, 1 December 2009) in which the applicants suffered from the potentially life-threatening disease hepatitis C; *L.C.B. v. the United Kingdom* (cited above), where the applicant suffered from leukaemia diminishing her chances of survival, *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, ECHR 2012 (extracts), concerning applicants suffering from different types of terminal cancer; *Karchen and Others v. France* ((dec.), no. 5722/04, 4 March 2008) and *Oyal v. Turkey* (no. 4864/05, 23 March 2010), in which the applicants had been infected with the HIV virus, which endangered their life; *Nitecki v. Poland* ((dec.), no. 65653/01, 21 March 2002), in which the applicant suffered from amyotrophic lateral sclerosis; *Gheorghe v. Romania* ((dec.), no. 19215/04, 22 September 2005), in which the applicant suffered from haemophilia; and *De Santis and Olanda v. Italy* ((dec.), 35887/11, 9 July 2013) in which the applicant – who was severely disabled – suffered a cerebral haemorrhage as a consequence of an infection acquired in hospital.

83. The medical certification indicated that Mr Attard's death was likely to be a result of asbestos exposure; malignant mesothelioma is known to be a rare cancer associated with asbestos exposure. The Court observes that it has not been contested or denied that Mr Attard worked at Malta Drydocks for more than a decade (1959-1974), during which time he was repeatedly exposed to asbestos. Neither has it been shown that Mr Attard could have been contaminated elsewhere or that he was affected by other factors that could have led to the disease. In these circumstances, and given that Mr Attard has died as a result of his cancer, the Court considers that Article 2 is applicable to the complaint brought by the applicants in application no. 62338/11 relating to the death of the said Mr Attard.

84. As to the remaining applicants who also worked at MDC, the documentation presented indicates that all but one applicant (Mr Dyer) have respiratory problems and plaques in their lungs, together with some other complications related to exposure to asbestos, but have not to date been diagnosed with malignant mesothelioma. It can neither be said that their conditions constitute an inevitable precursor to the diagnosis of that disease, nor that their current conditions are of a life-threatening nature. It follows that Article 2 does not apply in their case and the complaint brought by the remaining applicants under the Article under examination is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a), and must be rejected in accordance with Article 35 § 4.

85. However, in the context of dangerous activities, the scope of the positive obligations under Article 2 of the Convention largely overlaps with

that of those under Article 8 (see *Öneryıldız*, cited above, §§ 90 and 160). The latter provision has allowed complaints of this nature to be examined where the circumstances were not such as to engage Article 2, but clearly affected a person's family and private life under Article 8 (see *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C and *Guerra and Others*, cited above). The Court therefore considers it appropriate to examine the complaints in respect of the remaining applicants under Article 8, which is applicable in the present case (see also *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 155-156, ECHR 2005-X).

(c) Other admissibility issues

86. The Court notes that it has jurisdiction *ratione temporis* to deal with the complaints in so far as they relate to the period after 23 January 1967, when the Convention entered into force in respect of Malta.

87. The Court further notes that it has previously recognised the standing of the victim's next-of-kin to submit an application where the victim had died or disappeared in circumstances which were alleged to engage the responsibility of the State giving rise to issues under Article 2 (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 92, ECHR 1999-IV, and *Bazorkina v. Russia* (dec.), no. 69481/01, 15 September 2005), it follows that the applicants in application no. 62338/11 have victim status in respect of the complaint under Article 2.

88. Lastly, the Court notes that the relevant complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds.

89. It follows that the substantive complaint under Article 2 in respect of the applicants in application no. 62338/11 and that under Article 8 in respect of the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 must be declared admissible.

90. Given that the tests to be carried out under Articles 2 and 8 are similar (see *Budayeva and Others*, cited above, § 133), the Court will carry out its examination of the complaints under these Articles together.

2. *Merits*

(a) The parties' submissions

(i) The applicants

91. The applicants complained that the Government had failed to fulfil their positive obligations under the relevant Convention provisions.

92. The applicants submitted that the causal link between asbestos and respiratory disease had been documented as early as 1938 and that the causal link between mesothelioma and asbestos exposure had been

conclusively established in the early 1960s. Information on the dangers of asbestos had been available since the 1950s and – given that it was members of the ILO who had raised awareness of the issue – the authorities should have known of the risks it posed to the health of employees, even more so following 1979 when the Government had been one of the parties to a lawsuit involving the subject matter (see paragraph 10 above). Nevertheless, the MDC employees had been neither informed about nor protected from the dangers of asbestos in any way and they had been assured that adequate ventilation and the wearing of cloth masks would protect them from it. The applicants claimed that these masks, made of flimsy disposable material, had provided insufficient protection, them being totally inadequate for use at their place of work or for the purposes of protection from asbestos. According to the applicants, the "adequate ventilation" could not be considered to have been sufficient either, as was clearly apparent from their medical tests, which had shown that they were suffering from asbestos-related diseases.

93. The applicants pointed out that the Government had admitted that nothing had been done apart from the enactment of specific legislation in 2006. Neither had the Government demonstrated that they had a clear policy for removing asbestos, as had been shown by the fact that asbestos was currently still to be found at a site at their former place of work, in a disused tunnel which had been walled up. Furthermore, the applicants highlighted the fact that the Government's refusal to ratify the Asbestos Convention only showed their lack of sensitivity to the grave dangers of asbestos.

94. In the applicants' view, the enactment of legislation without proper implementation, precautions and dissemination of information was not sufficient to exempt the State from its obligations. Moreover, there was no justification for the tardy legislative response. The applicants submitted a list (twenty-four pages long) containing the titles of publications produced between 1912 and 1997 concerning the hazardous effects of asbestos. They claimed that most of these publications had been routinely available, as from the 1940s, to Maltese medical students (who had often also studied in Britain), let alone doctors and the Government. Nevertheless, legislative action only came to pass over fifty years later. Moreover, until the end of the century, asbestos-laden ships had freely entered the ship repair facilities and workers had been instructed to work on them.

(ii) The Government

95. The Government pointed out that until a few decades ago asbestos had been one of nature's best raw materials, being widely used in the building, construction and shipbuilding industries to insulate boilers, steam pipes and hot water pipes. After it was established that it probably caused latent effects on the lungs of those who came into contact with it, there was initially a slow reaction worldwide, but that had since gathered momentum.

The Government argued that the dangers associated with asbestos had only come to the fore in the late 1970s at international level, and at that time the means of communication and disseminating information were not as prolific as they were today. They pointed out that the applicants had failed to prove that the publications they referred to had been available to the Government, medical practitioners and medical students.

96. Nonetheless, once the Government had become aware of the dangers associated with asbestos, they had embarked on an exercise to phase out the material, and legislation had been enacted to terminate the importation of asbestos into Malta. Laws were passed in order to protect employees from the dangers of asbestos exposure as early as 1987 (and not 2006 as claimed by the applicants) in the form of the Work Place (Health, Safety and Welfare) Regulations, which had entered into force on 9 February 1987, the Protection of Workers from the Risks related to Exposure to Carcinogens or Mutagens at Work Regulations, which had entered into force on 16 May 2003, and the Protection of Workers from the Risks related to Exposure to Asbestos at Work Regulations, which had entered into force on 15 December 2006 (see "Relevant domestic law" above). Furthermore, according to the Government, the Occupational Health and Safety Authority provided preventive information and guidelines concerning the management and use of asbestos material. In particular, they highlighted the fact that in the late 1990s a sophisticated asbestos removal operation had been carried out at MDC on vessels undergoing repairs. The Government denied that the employees had been made to work on asbestos-laden ships, noting that after the Government had become aware of the hazardous nature of the material, employees who chose to work on such ships had been given an allowance as compensation. However, the Government pointed out that it was impossible for a country to be totally asbestos-free and for a worker never to come in contact with the material, particularly a worker in the shipbuilding or ship repair sector. They contended that anyone employed in such a work environment would be fully aware of the hazards involved.

97. The Government noted that Malta had not ratified all the ILO conventions, and of the sixty-one it had ratified, only fifty-four were in force. In particular, Malta had not ratified the ILO 1986 Asbestos Convention (which had come into force in 1989, having been ratified by thirty-five States at the time) and consequently it had not been bound to implement its measures or recommendations. Nevertheless, the subsidiary legislation (mentioned above), enacted for the purposes, had been in line with the WHO guidelines.

98. The Government accepted that the applicants had been employed at the dockyard in the 1950s and had continued their career there, but noted that the MDC was now in liquidation. Consequently it was difficult for the Government to provide any information about the extent of any information material given to the applicants at the time, since those persons

administering the company at the time had by now retired or died. In any event the Government considered that they had not been responsible for not having disseminated information before the dangers of asbestos were known and generally accepted as correctly ascertained. Distinguishing the instant case from *Guerra and Others* (cited above), they pointed out that no reports existed in this case. Moreover, the Government contended that the legislative enactments contained sufficient information and warnings to employees.

99. In the Government's view, while a State was required to take preventive measures to protect individuals from risks to their life, there was a margin of appreciation left to the State in balancing the competing interests involved. In their view the legislative enactments, coupled with protective clothing (implying the provision of information), namely a mask similar to those used by workers exposed to volatile material - which admittedly could not be compared to modern equipment but which the Government had considered adequate for those days – had satisfied their obligations under Article 2. Moreover, the applicants had not proved that there had been any better equipment available at the time to protect employees.

100. Similarly, the Government submitted that they had fulfilled their positive obligations under Article 8 since, as soon as awareness of the harmful effects of asbestos exposure had been raised, legislation had been put in place to regulate its use in the workplace, to ban its importation, and to remove it from the shipbuilding process. Moreover, the employees had been given masks to minimise damage and had been paid an allowance by the ship owners to compensate for the risk they were exposed to.

(b) The Court's assessment

(i) General principles

101. The Court makes reference to its general principles as stated in *Öneryıldız* and further elaborated on in *Budayeva and Others* (both cited above), as summarised in *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, §§ 157-161, 28 February 2012, and as reiterated in *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, § 220, 5 December 2013:

> "The Court reiterates that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 151 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life (see Öneryıldız, cited above, § 89, and Budayeva and Others, cited above, § 129).
>
> The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous. In the particular context of dangerous activities special emphasis must be placed on

regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (see Öneryıldız, cited above, §§ 71 and 90).

Among these preventive measures particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels (see Öneryıldız, cited above, §§ 89-90, and Budayeva and Others, cited above, § 132).

As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres (see Budayeva and Others, cited above, §§ 134-35).

In assessing whether the respondent State complied with its positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved. The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation (see Budayeva and Others, cited above, §§ 136-37)."

102. The Court has also held on many occasions that the State has a positive duty to take reasonable and appropriate measures to secure an applicant's rights under Article 8 of the Convention (see, among many other authorities, *López Ostra*, cited above, § 51, Series A no. 303-C; *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 41, Series A no. 172; and, more recently, *Di Sarno and Others v. Italy*, no. 30765/08, § 96, 10 January 2012). In particular, the Court has affirmed a positive obligation of States, in relation to Article 8, to provide access to essential information enabling individuals to assess risks to their health and lives (see, by implication, *Guerra and Others*, cited above, §§ 57-60; *López Ostra*, cited above, § 55; *McGinley and Egan*, cited above, §§ 98-104; and *Roche*, cited above, §§ 157-69). In the Court's view, this obligation may in certain circumstances also encompass a duty to provide such information (see, by implication, *Guerra and Others*, cited above, §§ 57-60; and *Vilnes and Others*, cited above § 235). It has also recognised that in the context of

dangerous activities, the scopes of the positive obligations under Articles 2 and 8 of the Convention largely overlap (see *Budayeva and Others*, cited above, § 133). Indeed, the positive obligation under Article 8 requires the national authorities to take the same practical measures as those expected of them in the context of their positive obligation under Article 2 of the Convention (see *Kolyadenko and Others*, cited above, § 216).

(ii) Application to the present case

103. In the absence of more detail in the Government's submissions, the Court will assess the case on the basis of the material available to it.

104. On the basis of the material in its possession, the Court considers it established that the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 and Mr Attard (hereinafter "the applicants" for ease of reference) were exposed to asbestos during their careers as employees at the ship repair yard run by the MDC. Indeed, while admitting that all workers were exposed to some extent, the Government contended that after they had become aware of the relevant dangers, they had ensured that the applicants were not made to work on asbestos-laden ships, without submitting what other possible functions or work they had been assigned at their place of work or any details regarding the dates when they had ceased to work with such material. Given the information and documents available, the Court finds no reason to doubt the applicants' assertions as to their working history.

105. The Court must also consider whether the Government knew or ought to have known of the dangers arising from exposure to asbestos at the relevant time (from the entry into force of the Convention for Malta in 1967 onwards) (see, in a different context, *O'Keeffe v. Ireland* [GC] no. 35810/09, 28 January 2014, §§ 152 and 168). In this connection the Court notes that the Government implicitly admitted to have known of these dangers in or around 1987, as they stated that as soon as they had become aware of the dangers associated with asbestos, laws were enacted to protect employees from these dangers as early as 1987. Nevertheless, given that Mr Attard had left the dry docks in 1974, the Court must examine whether at the time while he was exposed, that is, at least in the early 1970s, the Government knew or ought to have known of the relevant dangers.

The Court acknowledges that the ILO Asbestos Recommendation and subsequent Convention which contained the minimum standards applicable concerning the use of asbestos were adopted in 1986. Nevertheless, as in many cases, the adoption of such texts comes after considerable preparatory work which may take significant time, and in the ambit of the ILO after having undertaken meetings with representatives of governments, and employers' and workers' organisations of all member countries of the organisation. They are usually preceded by a number of guidelines, and before concrete proposals can be made there is a thorough search for a

consensus between the stake holders, namely public authorities as well as employers and workers. It is also common knowledge that the issues surrounding asbestos have been greatly debated amongst stakeholders all over the world, and that given the interests involved, particularly economic and commercial ones, acknowledging its harmful effects has not been easy. In this connection the Court observes that up to this date a number of countries have not yet banned the substance and only thirty-five countries out of the one hundred and ninety-eight United Nations Member States have ratified the Asbestos Convention. It appears logical, that this cannot be taken to mean that the dangers of asbestos are today still unknown.

106. Thus, as to whether the Maltese Government knew or ought to have known in the early seventies, the Court must rely on other factors, most evident amongst them being objective scientific research, particularly in the light of the domestic context. The Court takes account of the list, submitted by the applicants, which contains references to hundreds of articles or other publications concerning the subject at issue published from 1930 onwards - many of them taken from reputable British medical journals. The Court observes that medical studies at the then Royal University of Malta were modelled on, and followed closely upon, the corresponding United Kingdom system, with many graduates in medicine continuing their studies in England and Scotland. Particularly in view of this situation, even accepting the Government's argument - that is, that information was at the time not as readily available as it is today - it is inconceivable that there was no access to any such sources of information, at least, if by no one else, by the highest medical authorities in the country, notably the Chief Government Medical Officer and Superintendent of Public Health (as provided for in the, now repealed, Department of Health (Constitution) Ordinance, Chapter 94 of the Laws of Malta, see paragraph 42 above). In fact, according to Maltese law it was precisely the duty of the Superintendent of Public Health to remain abreast of such developments and advise the Government accordingly. The Court, further, observes that it has not been submitted that there had been any specific impediment to access the necessary information. Furthermore, the Government failed to rebut the applicants' assertion with any signed statement by a medical expert or authority, who could have attested that the medical professionals in the country were, in or around the 1970s, unaware of these worrying medically related findings at the time.

Moreover, the *Pellicano* judgment by the Commercial Court (see paragraph 35 above) is in itself an implicit acknowledgement by a domestic court that in the years preceding Mr Pellicano's death in 1979 the authorities knew or ought to have known of the dangers of working with asbestos and that they had failed to provide adequate health and safety measures in that respect.

Against this background, the Court concludes that for the purposes of the present case, it suffices to consider that the Maltese Government knew or ought to have known of the dangers arising from exposure to asbestos at least as from the early 1970s.

107. As to the fulfillment of the ensuing obligations, as stated above, the respondent Government claimed that as soon as they had become aware of the dangers associated with asbestos, laws were enacted to protect employees from these dangers and this as early as 1987 by means of the Work Place (Health, Safety and Welfare) Regulations. It follows that, by Government's admission, up until 1987 no positive action was taken in the nearly two decades (four years in the case of Mr. Attard who left the MDC in 1974) during which the applicants had been exposed to asbestos.

108. As to the steps taken after 1987, the Court firstly notes that the mentioned regulations make no reference to asbestos, unlike the later legislation which was enacted for that precise purpose. Consequently, it is difficult to accept the Government's argument that the Work Place (Health, Safety and Welfare) Regulations were the first proactive attempt to safeguard the applicants against these dangers by means of legislation.

109. However, even assuming that the Work Places (Health, Safety and Welfare) Regulations were indeed a legislative reaction to the dangers of asbestos exposure and that, therefore, the Government treated asbestos as falling into the category of a "toxic material" or "dangerous substance" for the purposes of that legislation, the Court notes the following.

In accordance with Regulation 16, no employer may use or suffer to be used any chemical or material which is toxic without the approval of the Superintendent of Public Health. The Government did not find it expedient to explain whether such approval had been sought or given for asbestos and, if so, on what grounds. Even if approval was given, by the Government's implicit admission, asbestos continued to be used and employees continued to work on it.

Pursuant to Regulation 18, it was the duty of the employer to ensure that the atmosphere in workrooms in which potentially dangerous or obnoxious substances were handled or used was tested periodically to ensure that, *inter alia*, toxic or irritating fibres were not present in quantities that could injure health, and to maintain an atmosphere fit for respiration. Moreover, no work should have been carried out unless such tests had been done. Again, the Government have not indicated that any such tests had ever been carried out in the workrooms (or elsewhere) where the applicants, like the other employees, had been exposed to asbestos.

Apart from the above-mentioned regulations (16 and 18), the Work Places (Health, Safety and Welfare) Regulations made no provision for any other practical measures which could or should have been taken in order to protect the applicants, nor were there any provisions concerning the right to access information. It was only the legislation enacted in 2003 and 2006

which introduced such measures, including (but not limited to) the duty to provide the applicants and people in their situation with information about the risks to health and safety which they were facing.

110. The Court considers that enacting specific legislation fifteen years after the time in the mid-1980s when the Government accept that they were aware of the risks can hardly be seen as an adequate response in terms of fulfilling a State's positive obligations. Furthermore, by the time the 2002, 2003 and 2006 legislation had been enacted and came into force (see paragraphs 33 and 34 above), the applicants had little if anything to gain since the timing coincided with the end of their careers, when they were leaving or had already left Malta Drydocks (see paragraph 6 above).

111. Consequently, from the information provided, it is apparent that from the mid-1980s to the early 2000s, when the applicants (except for Mr Attard) left the MDC, the legislation was deficient in so far as it neither adequately regulated the operation of the asbestos-related activities nor provided any practical measures to ensure the effective protection of the employees whose lives might have been endangered by the inherent risk of exposure to asbestos. Moreover, even the limited protection afforded by that legislation had no impact on the applicants since it appears to have remained unenforced.

112. The Court considers that, while there is a primary duty to put in place a legislative and administrative framework, it cannot rule out the possibility, *a priori*, that in certain specific circumstances, in the absence of the relevant legal provisions, positive obligations may nonetheless be fulfilled in practice. In the present case, however, the only practical measure that appears to have been taken by the State, as the employer, was to distribute masks, on unspecified dates and at unspecified intervals (if distributed repeatedly at all). The Court notes in this connection that the apparently disposable masks (which were shown to the Court) were considered by experts in the *Pellicano* case to be of "inadequate quality" and "did not take sufficient account of the state of scientific knowledge about the subject matter at the relevant time" (see paragraph 33 above). These findings are sufficient for the Court to conclude that such practical attempts left much to be desired.

113. As to the duty to provide access to essential information enabling individuals to assess risks to their health and lives and the duty to provide such information, the Court notes that the Government submitted that no information reports were in fact available and that it was difficult for them to provide any information about the extent of any informative material given to the applicants. They noted, however, that the Occupational Health and Safety Authority (OHSA) provided preventive information and guidelines concerning the management and use of asbestos.

114. It would therefore appear that no information was ever collected or studies undertaken or reports compiled specifically about the asbestos

situation at the applicants' place of work. Furthermore, the Government did not even argue that any general information was, in fact, accessible or made available to the applicants. Instead the Government, seemingly oblivious to the obligations arising from the Convention, opted to consider that it was not their responsibility to provide information at the outset and that anyone in such a work environment would in any case be fully aware of the hazards involved. The Court considers the latter statement to be in stark contrast to the Government's repeated argument that they (despite being employers and therefore well acquainted with such an environment) were for long unaware of the dangers. The Court further finds inappropriate the Government's contention that the distribution of the above-mentioned masks was an implicit source of information. 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. It follows that in practice no adequate information was in fact provided or made accessible to the applicants during the relevant period of their careers at the MDC.

115. Lastly, the Court notes that the Government submitted a general statement to the effect that employees who had worked on asbestos (after its dangers became known to the Government) were offered compensation or a special allowance to perform such work. The Court firstly draws attention to the domestic case-law on the matter (see paragraph 34 above). But more importantly, it notes that the Government have not provided any relevant information specific to the instant case. They did not submit whether the applicants in the present case had been entitled to such compensation and if so whether they had accepted it or received it. Neither has it been submitted or shown that, because they were not working on asbestos from a specific date onwards, they were not entitled to compensation. Nor did the Government submit any information as to when such compensation had in fact become available. In that light, such an abstract affirmation can have no bearing on the Court's conclusion.

116. The above considerations lead the Court to conclude that in view of the seriousness of the threat at issue, despite the State's margin of appreciation as to the choice of means, the Government have failed to satisfy their positive obligations, to legislate or take other practical measures, under Articles 2 and 8 in the circumstances of the present case.

117. It follows that there has been a violation of Article 2 in respect of the applicants in application no. 62338/11 relating to the death of Mr Attard and a violation of Article 8 in respect of the remaining applicants.

B. The procedural complaint under Article 2

118. In their applications, the applicants also appeared to complain – albeit in unclear terms – that the Government had failed to investigate the

circumstances of the case and prosecute those responsible, in violation of their procedural obligations under Article 2 of the Convention. They contended that the very knowledge that people were dying of malignant mesothelioma (as shown from death certificates which were publicly available) should have prompted the authorities to take the necessary steps and comply with their duty to investigate and institute some sort of proceedings against those responsible. The State's inability to point to any such action was tantamount to an admission of their failure to comply with their procedural obligations under Article 2.

119. The Government argued that it was incumbent on the victims or their heirs to institute proceedings before the ordinary domestic courts and to prove the link between asbestos exposure and the damage claimed. Moreover, the Government had been aware of only two deaths connected with the subject matter, namely those of Mr Pellicano and Mr Attard, which had occurred after the dry docks had ceased operating.

120. The Court reiterates that the provision is applicable only in respect of the applicants in application no. 62338/11 relating to the death of Mr Attard.

121. The Court observes that – unlike in medical negligence cases, where a civil remedy may suffice (see *Calvelli and Ciglio* v. Italy [GC], no. 32967/96, § 51, ECHR 2002-I) – in cases concerning incidents resulting from dangerous activities under Article 2, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in any capacity whatsoever in the chain of events concerned (see *Öneryıldız*, cited above, § 94 and *Budayeva*, cited above, § 142).

122. In *Öneryıldız* (deaths resulting from a landslide caused by a methane explosion) the Court in fact adopted that approach after it had found the following § 93:

> "It should be pointed out that in cases of homicide the interpretation of Article 2 as entailing an obligation to conduct an official investigation is justified not only because any allegations of such an offence normally give rise to criminal liability (see Caraher v. the United Kingdom (dec.), no. 24520/94, ECHR 2000-I), but also because often, in practice, the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities (see McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A no. 324, pp. 47-49, §§ 157-64, and İlhan, cited above, § 91).
>
> In the Court's view, such considerations are indisputably valid in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents."

123. It follows that, although in most cases requiring an investigation a complaint is generally lodged with the authorities in order to obtain such an investigation, it is not mandatory in cases where the authorities are better placed to know about the original cause of the claim.

124. The Court notes that the present case concerns a death that did not result from one particular instance but rather from circumstances which were spread over a number of decades, and which did not ensue from uncertain conditions - indeed, the State's responsibility has been established by the domestic courts in similar circumstances even where there was no investigation. In fact the Pellicano case was decided, in so far as responsibility in concerned, in 1989 and Mr Attard died in 2006. There is no doubt that during that period information about asbestos related consequences was publicly available.

125. It follows that it cannot be said that the circumstances of Mr Attard's death were confined within the knowledge of state officials and therefore that the Government should have conducted an investigation *ex officio.*

126. The Court further notes that there was nothing preventing the applicants from lodging a complaint in order to bring their concerns to the Government's attention. In these circumstances, the applicants in application no. 62338/11 should have at least lodged a complaint with the relevant authorities concerning the death of Mr Attard and requested an investigation and the prosecution of those responsible. However, no such action was undertaken by the applicants.

127. It follows that this part of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

128. The applicants complained that the Government had failed to protect them from suffering inhuman and degrading treatment within the meaning of Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

129. The Government argued that it was evident that they had fulfilled their positive obligations under Article 3 but they in any event submitted that no evidence had been produced by the applicants to prove that they had been ill-treated or tortured or subjected to any degrading treatment.

130. Having examined the medical reports submitted by the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11, the Court considers that while the conditions in which those applicants have lived in recent years – which were even more severe in the case of Mr John Mary

Abela – have undoubtedly caused some difficulties and discomfort, they cannot be considered to amount to degrading treatment within the meaning of Article 3 (see, *mutatis mutandis*, *López Ostra*, cited above, § 60) and cannot therefore trigger the state's positive obligations under that provision (see *Fadeyeva v. Russia* (dec.), no. 55723/00, 16 October 2003).

131. It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

132. In respect of the applicants in application no. 62338/11, namely the relatives of the deceased Mr Attard, the Court considers that – even assuming that the suffering of Mr Attard can be considered to have reached the relevant threshold for the purposes of this provision – bearing in mind the findings in paragraph 113 above and the strictly personal nature of Article 3 and the complaint at issue, the circumstances of the present case do not lead to the conclusion that the Article 3 claim is transferrable to the heirs on the grounds of either general interest or strong moral interest (see *Kaburov v. Bulgaria* (dec.) §§ 56-57, 19 June 2012). For these reasons, the applicants in application no. 62338/11 cannot be considered to have victim status in respect of this complaint.

133. The Court considers that their complaint is therefore incompatible *ratione personae* with the provisions of the Convention for the purposes of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

134. The applicants complained of a violation of Article 13 in so far as the Constitutional Court judgment in their cases deprived them of an effective remedy under Article 13 in conjunction with Articles 2, 3 and 8 of the Convention. Article 13 reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

135. The Government contested that argument. They argued that if the applicants were complaining about the judgment of the Constitutional Court, they should have instituted a fresh set of constitutional redress proceedings to complain about the matter, and the Constitutional Court would have had the competence and necessary impartiality to examine it. Furthermore, they contended that the applicants had in fact had an effective remedy for the purposes of Articles 2 and 3 of the Convention, namely an action in tort. They referred to their observations for the purposes of their plea of non-exhaustion of domestic remedies.

136. The Court firstly notes that it has already established in the context of Maltese cases before it that even though Maltese domestic law provides for a remedy against a final judgment of the Constitutional Court, the length

of the proceedings detracts from the effectiveness of that remedy and, in view of the specific situation of the Constitutional Court in the domestic legal order, this is not a remedy which needs to be used in order to fulfil the exhaustion requirement (see *Saliba and Others v. Malta*, no. 20287/10, § 78, 22 November 2011 and *Bellizzi v. Malta*, no. 46575/09, § 44, 21 June 2011). Thus, contrary to the Government's arguments, the applicants are entitled to raise their complaint before the Court at this stage.

137. The Court reiterates that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, 18 December 1996, § 95, *Reports* 1996-VI, and *Aydın v. Turkey*, 25 September 1997, § 103, *Reports* 1997-VI). However, the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Sürmeli v. Germany* [GC], no. 75529/01, § 98, ECHR 2006-VII), and the mere fact that an applicant's claim fails is not in itself sufficient to render the remedy ineffective (*Amann v. Switzerland*, [GC], no. 27798/95, §§ 88-89, ECHR 2002-II).

138. In relation to the complaint in conjunction with Articles 2 and 8, the Court has already explained in paragraph 63 above that an effective remedy existed (contrast *Di Sarno*, cited above, § 118). The fact that the use of that remedy did not lead to a finding in favour of the applicants or remained unused in the particular circumstances does not render it ineffective.

139 In relation to the complaint in conjunction with Article 3, the Court reiterates that Article 13 does not apply if there is no arguable claim. As it has found above, the complaints under that Article were either manifestly ill-founded or inadmissible *ratione personae*. Consequently there was no such claim. It follows, that Article 13 is not applicable in conjunction with Article 3.

140. In conclusion, the entirety of the complaint under Article 13 is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

141. Lastly, the applicants also appear to be complaining that their families were equally victims of the above-mentioned provisions in so far as they were affected by the third-party transfer of asbestos particles.

142. The Court notes that only the relatives of the deceased Mr Attard have applied to it. The relatives of the other applicants have not lodged any

complaints with the Court. It follows that any complaint lodged by the other applicants on behalf of their families – who have not themselves applied to be parties to the proceedings – must be rejected as incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

143. Thus, the complaint of which the Court takes cognisance can concern only the family of Mr Attard, namely the applicants in application no. 62338/11.

144. The Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way that their private and family life are adversely affected even without seriously endangering their health (see *López Ostra*, cited above, § 51). However, in the present case, in so far as the complaint goes beyond that examined under Article 2 of the Convention, the Court considers that the complaint concerning the applicants in person does not appear to have been sufficiently developed before the domestic courts with constitutional jurisdiction. The same applies in respect of the applications lodged with the Court.

145. The complaint is therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

146. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

147. The applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 claimed 40,000 euros (EUR) per applicant (except for Mr John Mary Abela who claimed EUR 70,000 given his specific condition) in respect of pecuniary damage in the form of biological damage to their lungs, loss of independence as a result of their impaired lung function and the need for regular visits to a lung specialist. In the case of Mr John Mary Abela this also covered fees incurred in relation to mobility assistance. They also claimed EUR 100,000 per applicant in respect of non-pecuniary damage for the four alleged violations.

148. The first applicant in application no. 62338/11 claimed EUR 94,500 in respect of pecuniary damage. That sum included EUR 74,500 covering the pay Mr Attard would have received over the four

years up to retirement had he not passed away at the age of sixty-one as a result of his asbestos-related disease (based on his annual pay in 2004 of approximately EUR 18,635, submitted to the Court) and an additional EUR 20,000 for maintaining a home until his wife reached eighty years of age. The applicants in application no. 62338/11 claimed EUR 120,000 each in respect of non-pecuniary damage.

149. The Government submitted that the computation of pecuniary damage in the applicants' cases was a matter for the domestic courts in ordinary civil proceedings and could not be based on data from an insurance website, which was what the applicants had utilised. The Government submitted that the applicants had, moreover, not provided proof of any such pecuniary damage. Furthermore, there was no causal link between the quantum of damages and the alleged hazard. As to the claims in respect of non-pecuniary damage, the Government submitted that the mere finding of a violation would suffice – the underlying principle of human rights being to provide standards – and that if the Court considered that an award should be made in respect of non-pecuniary damage, it should not exceed EUR 1,000 per applicant.

150. The Court has accepted the link between the medical conditions affecting the relevant applicants and their exposure to asbestos during the time they worked at MDC, and it thus discerns a causal link between the violation found and some of their claims in respect of pecuniary damage. However, none of the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 has substantiated these claims, which are therefore dismissed. In respect of the claims of the first applicant in application no. 62338/11, the Court notes that the retirement age in Malta is in fact sixty-one years of age and that there was therefore no guarantee that Mr Attard would have worked any longer had he not passed away. Moreover, the Court sees no causal link between his wife's claim for household maintenance and the violations alleged. It follows that these claims are also dismissed.

151. On the other hand, given the violations of either Article 2 or 8 of the Convention in the present case – which the mere finding of a violation in this judgment is not sufficient to remedy – the Court awards the applicants the following amounts in respect of non-pecuniary damage:

The applicants in application no. 62338/11, EUR 30,000 in total; Mr John Mary Abela EUR 12,000; Mr Dyer, EUR 1,000; and the remaining applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11, EUR 9,000 each.

B. Costs and expenses

152. The applicants also claimed the following costs and expenses incurred before the domestic courts and the Court:

Application no. 60908/11: EUR 15,112 (comprising EUR 4,302 as per the attached bill of costs plus an additional EUR 780 in VAT for legal counsel and interest at 8%, together with extrajudicial fees towards payment for legal counsel of EUR 7,080 (inclusive of VAT) in conjunction with the domestic proceedings, and EUR 2,950 – amounting to EUR 600 per applicant, plus VAT – for proceedings before the Court).

Application no. 62110/11: EUR 13,467 (comprising EUR 4,177 as per the attached bill of costs, plus an additional EUR 794 in VAT for legal counsel and interest at 8%, together with extrajudicial fees towards payment for legal counsel of EUR 5,664 (inclusive of VAT) in conjunction with the domestic proceedings, and EUR 2,832 – amounting to EUR 600 per applicant, plus VAT – for proceedings before the Court).

Application no. 62129/11: EUR 15,525 (comprising EUR 4,163 as per the attached bill of costs, plus an additional EUR 742 in VAT for legal counsel and interest at 8%, together with extrajudicial fees towards payment for legal counsel of EUR 7,080 (inclusive of VAT) in conjunction with the domestic proceedings, and EUR 3,540 – amounting to EUR 600 per applicant, plus VAT – for proceedings before the Court).

Application no. 62312/11: EUR 13,499 (comprising EUR 4,328 as per the attached bill of costs, plus an additional EUR 782 in VAT for legal counsel and interest at 8%, together with extrajudicial fees towards payment for legal counsel of EUR 5,664 (inclusive of VAT) in conjunction with the domestic proceedings, and EUR 2,724 – amounting to EUR 600 per applicant, plus VAT – for proceedings before the Court).

Application no. 62338/11: EUR 14,915 (comprising EUR 7,154 as per the attached bill of costs, plus an additional EUR 1,388 in VAT for legal counsel and interest at 8%, together with extrajudicial fees towards payment for legal counsel of EUR 4,248 (inclusive of VAT) in conjunction with the domestic proceedings, and EUR 2,124 – amounting to EUR 600 per applicant, plus VAT – for proceedings before the Court).

153. The Government did not contest the part of the claims concerning the costs incurred by the applicants before the domestic courts (as per the taxed bill) but they contested the part concerning the expenses payable in respect of the opposing parties (the Occupational Health and Safety Authority and the Government) since the applicants had not shown that those payments had actually been made. They further contended that no interest was due on the judicial bill of costs. The Government further noted that all costs related to the domestic proceedings were included in the taxed bill of costs (including the lawyer's fees) and therefore no extrajudicial legal fees were due. Lastly, the Government noted that the applicants had claimed EUR 14,170 in total for the proceedings before the Court, but argued that, given that the applications had been dealt with together and that the applications and submissions were identical, the Court should not award more than EUR 2,500 for proceedings before it.

154. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court firstly notes that if any dues relating to the domestic proceedings are still unpaid, they remain payable to the relevant parties in accordance with domestic law. In the present case, taking into account the documents in its possession and the above criteria, and in particular the fact that, as argued by the Government, legal fees are already included in the taxed bill of costs and the applications before the Court were treated jointly, the Court considers it reasonable to award the sum of EUR 6,000 per application covering costs under all heads.

C. Default interest

155. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the substantive complaint under Article 2 in respect of the applicants in application no. 62338/11 and that under Article 8 in respect of the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11 admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been a violation of Article 2 of the Convention under its substantive head in respect of the applicants in application no. 62338/11 concerning the death of Mr Attard;

4. *Holds* that there has been a violation of Article 8 of the Convention in respect of the applicants in applications nos. 60908/11, 62110/11, 62129/11 and 62312/11;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 30,000 (thirty thousand euros) jointly to the applicants in application no. 62338/11, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 12,000 (twelve thousand euros) to Mr John Mary Abela, plus any tax that may be chargeable in respect of non-pecuniary damage;

(iii) EUR 1,000 (one thousand euros) to Mr Dyer, plus any tax that may be chargeable in respect of non-pecuniary damage;

(iv) EUR 9,000 (nine thousand euros) to each of the remaining applicants, plus any tax that may be chargeable in respect of non-pecuniary damage;

(v) EUR 6,000 (six thousand euros) jointly to the group of applicants in each one of the applications, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Mark Villiger
Deputy Registrar	President

ANNEX

No.	Application no.	Lodged on	Applicant's name date of birth place of residence
1.	60908/11	23/09/2011	Joseph BRINCAT 15/03/1942 Luqa Emmanuel MARTIN 15/01/1935 Birkirkara Carmelo CAMILLERI 22/11/1936 St Julians Carmelo FARRUGIA 22/01/1948 Mosta Joseph SPITERI 19/01/1941 Hamrun
2.	62110/11	23/09/2011	Carmel CACHIA 28/12/1935 Isla Anthony CASSAR 06/01/1936 Luqa Carmelo CASSAR 19/07/1934 Luqa Nazzareno ZAMMIT 21/08/1931 Tarxien

3.	62129/11	23/09/2011	Joseph ATTARD 15/06/1948 Tarxien Louis CASTAGNA 07/04/1949 Santa Lucija John GALEA 10/09/1940 Rabat Joseph Mary GALEA 30/04/1948 Naxxar Joseph SARGENT 10/04/1950 Birkiruara
4.	62312/11	23/09/2011	John Mary ABELA 30/07/1941 Zejtun Francis John DYER 01/10/1949 Qrendi William John HENDY 24/07/1943 Santa Lucia Joseph MANARA 29/11/1938 Birzebbuga
5.	62338/11	23/09/2011	Marthese ATTARD 25/06/1950 Iklin Claudine ATTARD 10/05/1976 Balzan Anthony ATTARD 18/09/1981 Iklin