



MALTA
TRIBUNAL TA' REVIZJONI AMMINISTRATTIVA
MAGISTRAT DR. CHARMAINE GALEA

22 ta' Novembru 2018

Rikors Numru 45/2018

Ignatius Farrugia

Vs

Lands Authority

It-Tribunal,

Ra r-rikors ta' **Ignatius Farrugia** ipprezentat fit-22 ta' Mejju 2018 li permezz tieghu ppremetta s-segwenti:-

“

1. *Illi l-esponenti ghandu mobile kiosk u jopera dan il-mobile kiosk minn gewwa id-Dwejra limiti ta' San Lawrenz, Ghawdex;*
2. *Illi huwa jpoggi dina l-mobile kiosk fuq art pubblika li hemm fid-Dwejra;*
3. *Illi l-esponenti ghamel talba lill-Awtorita` tal-Lands ghal Encroachment liema talba ggib in-numru RP006/2018 ICW L215/2015.*
4. *Illi filwaqt illi tali talba ghal Encroachment giet milqugha, l-ammont ta' hlas mitlub u cioe` Euro 8,500 huwa wiehed esagerat;*
5. *Illi di fatti jirrizulta illi:*
 - (i) *din hija l-ghola hlas li sidien ta' mobile kiosks ser ikunu mitluba jhallsu;*
 - (ii) *persuni ohrajn li qed joperaw fl-istess inhawi qed jintalbu hlas inqas u ghalhekk qed tinholoq diskriminazzjoni bejn sidien differenti ta' kiosks li qed joperaw mill-istess post;*

- (iii) *it-turizmu f'din iż-zona naqas drastikament wara l-waqa' tat-tieqa tad-Dwerja u għalhekk caso mai kellu tintalab hlas inqas u mhux din iż-zieda drastika;*
- (iv) *il-qliegħ tal-esponenti ma jippermettix li jsir hlas tant għoli għal mobile kiosk.*

Għaldaqstant l-esponenti jitlob bir-rispett li dan it-Tribunal jogħgħbu:

1. *Tvarja d-decizjoni mehuda mill-Bord tal-Gvernaturi fit-3 ta' April, 2018 billi filwaqt li tikkonferma l-accettazzjoni tal-applikazzjoni għal Encroachment tirriduci l-hlas mitlub għal ammont li dana l-Onorabbli Tribunal iħoss li huwa gust u ekwu."*

Ra r-risposta tal-Awtorita` ta' l-Artijiet datata 13 ta' Gunju 2018 li permezz tagħha eccepjet is-segwenti:-

“

1. *Illi r-rikorrent talab l-Awtorita' esponenti għal encroachment permezz ta' talba li għgib in-numru RP006/2018 ICW L215/2015;*
2. *Illi l-Awtorita' tal-Artijiet b'decizjoni tal-Bord tal-Gvernaturi datata 3 ta' April, 2018 laqat it-talba għall-'encroachment of temporary parking of a mobile kiosk at Dwejra limits of San Lawrenz, Għawdex' u liema decizjoni giet ippublikata;*
3. *Illi wara li t-talba giet milqugħa ir-rikorrenti talab lil dan l-Onorabbli Tribunal sabiex 'tvarja id-decizjoni tal-Bord tal-Gvernaturi mehuda fit-3 ta' April, 2018 billi filwaqt li tikkonferma l-accettazzjoni tal-applikazzjoni għal encroachment tirriduci l-hlas mitlub għal ammont li dana l-Onorabbli Tribunal iħoss li huwa gust u ekwu'.*
4. *Illi r-rikorrent tenna illi ħassu aggravat mid-decizjoni tal-Awtorita' għar-raġunijiet segwenti:*
 - a. *Illi din hija l-għola hlas li sidien ta' mobile kiosks ser ikunu mitluba jħallsu;*
 - b. *Illi persuni oħrajn li qed joperaw fl-istess inħawi qed jintalbu hlas inqas u għalhekk qed tinħoloq diskriminazzjoni bejn sidien differenti ta' kiosks li qed joperaw mill-istess post;*
 - c. *Illi t-turizmu f'din iż-zona naqas drastikament wara l-waqa' tat-tieqa tad-Dwejra u għalhekk caso mai kellu tintalab hlas inqas u mhux din iż-zieda drastika; u*
 - d. *Illi il-qliegħ tal-esponenti ma jippermettix li jsir hlas tant għoli għal mobile kiosk.*
5. *Illi l-Awtorita' esponenti tirrespingi dawn l-aggravji għar-raġunijiet illi ġejjin:*
 - a. *Illi r-rata li giet applikata sabiex jinħadem l-ammont mitlub mir-rikorrent għall-hlas ta' l-imsemmi encroachment huwa wieħed gust u reali;*
 - b. *Illi wieħed ma jistax iqabbel il-hlas mitlub ma hlasijiet ta' nies oħra joperaw fiż-zona jekk mhux mgħoti encroachment lilhom fl-istess żmien u fl-istess circostanzi stante illi l-preżż ikun maħdum fuq fatturi speċifiċi li ma jistgħux jiġu nġorati kif ser jiġi muri aħjar fil-mori tal-kawża u li b'daqshekk ma hemm l-ebda diskriminazzjoni;*
 - c. *Illi dan tant huwa minnu illi f'decizjoni oħra illi l-Bord tal-Gvernaturi tal-Awtorita' ħa rigward encroachment simili, mgħoti fl-istess żmien u fl-istess*

ċirkustanzi l-prezz kien wieħed identiku (Ara d-decizjoni tal-Bord fil-każ ta' Jane Portelli li wkoll jinsab quddiem dan it-Tribunal f'kawża separata);

- d. *Illi għalkemm huwa ben fatt li t-tieqa tad-Dwejra d-delipidat b'mod illi m'għadiex eżistenti, din iż-żona xorta waħda baqgħat titqies bħala żona turistika, dan mhux biss għax tqanqal sens ta' kurżita għal dak it-turist li ma kellux l-opportunità li jarha, iżda wieħed għadu jista jammira l-Ġebli tal-Ġeneral u d-Dwejra. Ta' min wieħed tajjeb li jsemmi illi din tibqa wkoll waħda mill-lokalitajiet tant prominenti mal-bughaddasa u issa wisq iktar għaladarba t-tieqa ggarfet għax qieghda tigi offruta bħala attrazzjoni għdida;*
 - e. *Illi l-encroachment fees ma jiddependux mill-qliegh o meno tal-applikant għaliex huwa l-valur ta' l-art illi jrid jigi meqjus.*
6. *Illi Art7(2)(c) tal-Kap 563 jagħmilha l-funzjoni tal-Awtorita' tal-Artijiet illi "tamministra bl-akbar mod assolut sabiex isir l-aħjar użu tal-art kollha tal-Gvern ta' Malta u kull art li tiffirma parti mill-isfera pubblika" w'għaldaqstant kienet fid-drittijiet pjeni tagħha meta hadet id-decizjoni li fuqha qed jigi magħmul dan l-appell.*
 7. *Illi t-talba tar-rikorrenti għandha tigi miċhuda stante li ma giet indikata l-ebda bażi legali fondata, mill-istess rikorrenti, li tikkostitwixxi raġuni valida kemm fil-fatt u kemm fid-dritt amministrattiv li timmerita reviżjoni ta' dan l-għemil amministrattiv;*

Għaldaqstant dan l-Onorabbli Tribunal għandu jiċhad it-talba mressqa quddiemu mis-soċjetà rikorrenti bl-ispejjeż interament għall-istess soċjetà rikorrenti."

Sema' x-xhieda;

Ra d-dokumenti kollha pprezentati;

Ra n-noti ta' sottomissjonijiet tal-partijiet;

Ra li r-rikors thalla għal-lum għas-sentenza.

Ikkunsidra:

Illi r-rikorrenti hassu aggravat b'decizjoni tal-Bord tal-Gvernaturi tal-Awtorita' ta' l-Artijiet datata 3 ta' April 2018 u komunikata lilu permezz ta' ittra datata 11 ta' April 2018 li permezz tagħha gie mgharraf illi t-talba tieghu għal *encroachment of temporary parking of a mobile kiosk at Dwejra limiti ta' San Lawrenz, Ghawdex* kienet qieghda tigi milqugha għall-perjodu bejn l-1 ta' Marzu 2018 u l-31 ta' Ottubru 2018 versu l-hlas ta' tmint elef u hames mitt ewro (€8500).

Ir-rikorrenti xehed illi huwa jopera trakk bis-*souvenirs* u hwejjeg gewwa d-Dwejra. Jghid li din mhux l-ewwel sena li ntalaba ihallas €8500 pero` peress li issa waqgħat it-tieqa tad-Dwejra ix-xogħol mar lura. Jispjega li hemm operaturi ohra li jhallsu €93 fis-sena pero` huma m'għandhomx kaxxa riservata

ghalihom biex jipparjaw. Huwa jhoss li mhux gust li s-sidien tat-trakkijiet l-ohra jhallsu ammont mizeru meta huwa gie mitlub ihallas ammont ferm gholi.

Il-Perit Christina Refalo, Perit adetta mal-Awtorita` intimata, spjegat illi jezistu *standard rates* skont l-*area* tas-*site* tal-*kiosk*. Tispjega li s-sit in kwistjoni huwa kklassifikat bhala “*site for mobile kiosk*” fejn is-sit ikun riservat ghal *mobile kiosk*. Tispjega li r-rata li ntab ir-rikorrent giet mahduma abbazi tal-*area* li l-*kiosk* tieghu jikkupa. Mistoqsija jekk taghmilx differenza jekk il-*kiosk* ikun *fixed* jew *mobile*, ix-xhud qalet li normalment meta l-*kiosk* ikun *fixed* isir process ta’ *tendering* pero r-rati jibqghu kwazi xorta. Tispjega wkoll illi permessi simili ghal dak tar-rikorrenti inghataw bl-istess rati u esebiet dokumenti rigwardanti terzi li jipprovaw dan.¹

Ikkunsidra:

Illi l-kwistjoni odjerna hija wahda pjuttost semplici. Ir-rikorrenti ma jaqbilx mar-rati li gew imposti fuqu sabiex jigi koncess *encroachment* ta’ spazju ta’ parkegg fejn ikun jista’ jipparjja l-*mobile kiosk* tieghu. Dan ghaliex, fost affarijiet ohra, skond hu, sidien ta’ *mobile kiosks* ohra fil-vicinanze qeghdin jintalbu hlas inqas u wkoll ghaliex il-kummerc naqas drastikament wara li waqghat it-tieqa tad-Dwejra.

Illi fir-rigward tal-fatt illi sidien ta’ *mobile kiosks* ohra qeghdin ihallsu inqas rrizulta, anke minn dak li xehed l-istess rikorrenti, illi dawn m’ghandhomx spazju ta’ parkegg riservat ghalihom u ghalhekk kuljum iridu jaraw fejn ha jipparjaw il-*kiosk* tagghom. Min-naha l-ohra ir-rikorrenti bil-permess tal-*encroachment* ghandu mohhu mistrieh li x’hin imur fuq is-sit hemm zona riservata ghall-*kiosk* tieghu biss. Kwindi z-zewg sitwazzjonijiet ma jistghux jigu paragonati f’termini ta’ rati mhallsa. Kwindi , ghalkemm materji ta’ diskriminazzjoni jaqghu ‘il barra mill-gurisdizzjoni ta’ dan it-Tribunal, ma jhossx illi jista’ jingibed xi paragon.

Illi fil-mori tal-kawza l-Awtorita` intimata pprezentat estratt ta’ rapport tal-Awditur Generali intitolat *An Investigation into the Issuance of Encroachment Permits between December 2012 and 2013* ippublikat fl-2015 fejn f’paragrafu 2.1.7 gew kklassifikati 25 kategorija ta’ *encroachments*, fosthom *kiosks* u *parking spaces*. F’paragrafu 2.1.15 hemm innizzel is-segwent: “***Encroachment permit rates for kiosks applied by the Department vary, largely due to when the permit was first issued and the area encroached on. In the case of encroachment permits that were originally issued a number of years back, a fixed rate of €2,027 is charged. The only consideration applied in this case is that the site must not exceed an area of 20 metres squared. In the case of more recent applications, the GPD takes into account other factors,***

¹ Ara fol 49 *et seq* tal-process

such as the location, whether use is subject to seasonal fluctuations and the dimensions of the site. To this end, permits for kiosks are subject to a minimum charge of €100 per metre squared and to a maximum charge of €475 per metre squared. For instance, the chargeable rate for an encroachment permit for a kiosk in Sliema would be €475 per metre squared per annum. On the other hand, 80 per cent of the maximum rate per metre squared is charged for kiosks in Bugibba, that is, €380. Similarly, encroachment permits for kiosks located in Gozo are charged at 75 per cent of the maximum rate, that is, €356 per metre squared.”²

Min-naha l-ohra paragrafu 2.1.20 jitfa' dawl fuq x'jikkonsisti *encroachment* ta' *parking space* u cioe`:-

“2.1.20 In the case of encroachments relating to parking spaces, the Department adopts a similar dichotomous approach. Large parking areas are charged between the minimum and maximum rates of €5 and €7 per metre squared, whereas rates for parking spaces, such as those located outside banks, are charged at €52 per metre squared.”

Hawn wiehed jinnota differenza kbira bejn ir-rati ta' *encroachment* ghal kiosks u *encroachment* ghal parkegg u dana ghaliex necessarjament in-natura taz-zewg *encroachments* hija totalment differenti.

Illi min-naha l-ohra id-difensur tar-rikorrenti ghamel referenza ghal paragraflu iehor tal-istess rapport dwar *kiosk* fl-Imgarr, Ghawdex fejn intqal is-segwent:

“A Kiosk at Mgarr Harbour, Gozo

3.5.12 On 29 July 2012, the GPD received a request from an encroachment grantee in whose name a mobile kiosk located at Mgarr Harbour, Gozo was registered. According to the request, the grantee intended to sell the business to a third party, and hence required the transfer or the issue of a new encroachment permit to the buyer. The request was signed by both parties. Following this request, a site plan was prepared by the GPD and the Director Land sought the approval of the DG GPD for the transfer or issuance of a new encroachment permit to the new owner on 8 January 2013. The DG GPD indicated his agreement to the issuance of a new encroachment permit on 9 January 2013; however, a new rent assessment was to be carried out.

3.5.13 Further to the above, a rent assessment of the site in question was carried out by a GPD Architect on 23 January 2013, estimating the rental value of the 22.75 metres squared area at €4,100 per annum. Factors that were considered relevant in the calculation of this fee included: a. the dimensions of the site; and b. similar allocations.

3.5.14 The NAO noted that the fee charged was in accordance with the standard rates applied by the GPD for mobile kiosks. The encroachment permit was issued to the new owner on 5 February 2013. Payment for this permit was effected in December 2013, while encroachment fees due with respect to the subsequent years were promptly settled.

3.5.15 This Office also noted that in October 2010 the previous owner had entered into a repayment agreement with the GPD for the settlement of outstanding dues. Until the transfer of the business, the previous owner still owed the Department €9,000 in unsettled encroachment fees. This balance was settled in three payments, effected in December 2013, September 2014 and April 2015. In this Office's opinion, it would have been advisable had the GPD ensured the settlement of all outstanding amounts prior to the issuance of an

² A fol. 35

encroachment permit to the new owner. The NAO deems the recovery of such arrears more difficult once the new encroachment permit was granted."³

Ghaldaqstant filwaqt li l-Awtorita` intimata qieghda tishaq illi hija mxiet ma` rati *standard* abbazi tar-rapport tal-Awditur, u specifikament ma` paragrafu 2.1.15, id-difensur tar-rikorrent jishaq illi kellha tigi applikata *semmai* ir-rata imsemmija f`paragrafu 3.5.13. li nhadmet b`mod differenti minn dik imsemmija f`paragrafu 2.1.15. Ir-raguni ghala dan sar ma gietx stabbilita pero` mid-dokumenti esebiti mill-Perit Christina Refalo jirrizulta illi r-rata fil-kaz odjern, u f`kazijiet simili, giet mahduma abbazi tas-segwentu u cioe`:-

1. Id-daqs tas-sit in kwistjoni;
2. Il-lok, il-lokalita` u l-madwar tas-sit;
3. I-fatt li s-sit in kwistjoni se jintuza biex jitpogga *mobile kiosk*
4. Rati ricenti ta' allokazjonijiet simili.⁴

Issa filwaqt li huwa minnu li fil-kaz tal-*kiosk* tal-Imgarr imsemmi f`paragrafu 3.5.12 *et seq* tar-rapport su citat giet applikata ghalih rata differenti fl-2013, pero` huwa minnu wkoll illi *encroachments* ohra identici ghal dak moghti lir-rikorrenti gew trattati bl-istess rati li gew mitluba lilu. Illi l-kaz tal-*kiosk* tal-Imgarr gie rrapurtat fir-rapport tal-Awditur Generali b`osservazzjoni tal-istess Awditur mhux tant fuq xi rata applikata imma gie osservat li kien ikun iktar ghaqli li kieku d-Dipartiment gabar l-arretati dovuti qabel ma hareg permess gdid ta' *encroachment* lis-sid il-gdid. Jibqa' l-fatt pero` li l-*standard rate* hija dik imsemmija ta' €356 kull metru kwadru. Jekk kien sar xi zball, jew kien hemm xi ragunijiet ohra ghala giet applikata rata differenti, dan it-Tribunal ma ngabx a konjizzjoni tagghom. It-Tribunal lanqas ma jaqbel ma' dak sottomess mid-difensur tar-rikorrenti illi r-rata tal-*encroachment* ghandha tkun dik ta' *parking space* ghaliex in-natura tal-*encroachment* partikolari mhix wahda ta' semplicement parkegg.

Illi ghaldaqstant, filwaqt li t-Tribunal jista' jifhem li forsi n-negozju tar-rikorrenti ha daqqa ta' harta wara l-grajjiet ricenti tal-waqgħa tat-tieqa tad-Dwejra, ma jsibx illi l-Awtorita` intimata imxiet b`xi mod arbitrarju jew skorrett u dan ghaliex applikat ir-rati stabbiliti u ma wettqet l-ebda tip ta' diskriminazzjoni fir-rati applikati fil-konfront tal-*encroachment* permess lir-rikorrenti. Ghaldaqstant it-Tribunal huwa tal-opinjoni illi d-decizjoni appellata hija wahda valida fil-ligi.

³ Dan ir-rapport ma giex esebiti fl-intier tieghu pero` huwa faciment accessibbli mis-sit <http://nao.gov.mt/en/recent-publications>

⁴ Ara fol. 55 u 56

DECIDE

Ghaldaqstant, it-Tribunal, ghar-ragunijiet hawn fuq moghtija qiegħed jichad l-appell tar-rikorrenti u jilqa' r-risposta tal-Awtorita` intimata.

Bl-ispejjez kontra r-rikorrenti.

Magistrat Dr. Charmaine Galea
President tat-Tribunal ta' Revizjoni Amministrattiva

Diane Gatt
Deputat Registratur