FIL-PRIM'AWLA TAL-QORTI ĊIVILI

IMĦALLEF

ONOR. JOSEPH R. MICALLEF LL.D.

ILLUM il-Ħamis, 31 ta' Ottubru, 2019

Kawża Nru. 12

Rik. Nru. 897/16JRM

Sabri **REZK**

vs

AWTORITA' GĦAT-TRASPORT F'MALTA; l-Onorevoli Ministru għall-Finanzi; u t-*Transfer of Residence Exemption Board*

The Court:

Having taken cognizance of the Sworn Application filed by Sabri Rezk on the 6th of August, 2011, by virtue of which and for the reasons therein mentioned, he requested that this Court: (1) declare that the decision of the respondents not to permit the re-export of his vehicle being a *Jeep Cherokee* bearing the Italian registration number EF03KX violates his fundamental rights as protected by articles 32, 37 and 39 of the Constitution of Malta and as well as by article 6 of the European Convention on Human Rights and Fundamental

Freedoms; (2) declare that the respondents failed to observe the principles of natural justice and/or procedural requirements both in deliberations before having taken their decision not to allow him to re-export his vehicle as afore-mentioned, as well as in the same decision to impound his vehicle and not to release it in his favour; (3) orders and authorizes him to re-export the said vehicle from Malta and declare that he is not liable to pay any fine or penalty due to the fact that the vehicle has been impounded in Malta; (4) declare that, in view of the premises, the plaintiff is not liable for the payment of taxes, fines and penalties by reason of the fact that the said vehicle is in Malta and, at any rate, to declare that such taxes, fines and penalties demanded by defendants are exorbitant and discriminatory to his detriment and in blatant violation of European Union Law; (5) declares that the defendants have caused and causing him damages by their stance and are solely responsible towards him for those damages; (6) to liquidate the damages suffered by him as a result, if need be, by appointing an expert to assist the Court to this effect; and (7) to condemn the respondents to pay him the damages thus liquidated. Plaintiff requested also the payment of costs;

Having seen the plaintiff's note filed on the 10th of October 2016[1], whereby he declared that his action is a judicial review case in terms of article 469A of the Code of Organisation and Civil Procedure;

Having seen its interlocutory decree of the 14th of October 2016[2], whereby it ordered service of the Application on the respondents and gave directions to the plaintiff as to the production of evidence on his part;

Having taken cognizance of the Sworn Reply filed by respondent Authority on October 25th, 2016[3], whereby by way of preliminary pleas, it raised the issue of the nullity of the Application in terms of article 156(1)(a) of the Code of Organisation and Civili Procedure in that the action is nebulous and does not specify which administrative act the plaintiff is complaining against; it also raised the issue that, in so far as plaintiff is contesting the refusal made by the other defendant (the Transfer of Residence Exemption Board), it is non-suited to stand in judgment against that complaint; that in so far as plaintiff is attacking the validity of a law which imposes the taxes and dues which he contests, such action cannot be sustained in an action for judicial review of administrative action, since a law is not an administrative act; and it raised also the plea that the defendant Board has no legal standing, since it does not enjoy a separate legal personality. It also raised pleas on the merits;

[1] Page 10 of the records.
[2] Pages 11 – 2 of the records.
[3] Pages 17 – 2 of the records.

Having taken cognizance of the Sworn Reply filed by the other respondents on November 7th, 2016[4], whereby they contested the plaintiff's suit by way of preliminary pleas, raising the plea of nullity of the action on the grounds that plaintiff did not comply with the requirements of article 460 of the Code of Organisation and Civil Procedure; that the respondent Minister is non-suited in terms of article 181B of the same Code, in that he was in no way involved with the events and actions complained of by plaintiff; that the respondent Board does not enjoy legal standing; that, without prejudice to the other preliminary pleas, whereas plaintif declared that he founds his action in terms of article 469A of Chapter 12 of the Laws of Malta, this action cannot be sustained in terms of sub-article (4) of the said article, in that another law provided him with an adequate remedy to cater for his complaint and should not have had recourse to an action for judicial review of administrative action; that ther third and fourth claims do not fall within the competence of this Court; that any allegations of a violation of any fundamental huma rights as protected both under the Constitution of the Republic of Malta as well as under the Convention cannot form the subject-matter of an action for judicial review of administrative action. They also raised pleas on the merits;

Having seen the plaintiff's note filed on November 10th, 2016[5];

Having ruled by decree made during the hearing of December 6th, 2016[6], on a request to that effect by counsel to plaintiff, that all proceedings of this case would henceforth be conducted in English; as well as to deal with the dispute and treat the first and second preliminary pleas raised by the respondent Authority and the first and fourth preliminary pleas raised by the other respondents and to deliver judgment thereon and also granted parties time for written submissions;

Having heard the witnesses produced by parties and taken cognizance of the filed documentary evidence;

Having seen the Note of Submissions filed by plaintiff on February 8th, 2017[7], relating to defendants' preliminary pleas;

Having seen the Note of Submissions filed by the defendant Authority on March 9th, 2017[8], related to its first and second preliminary pleas;

[4] Pp 25 to 88 of the records.
[5] Pp 91 – 3 of the records.
[6] Pp. 94 to 94A of the record
[7] Pp. 101 to 105 of the record
[8] Pp. 113 to 118 of the record

Having seen the Note of Submissions filed by the other defendants on May 30th, 2017[9], related to their first and fourth preliminary pleas;

Having seen the second Note of Submission filed by plaintiff on July 10th, 2017[10], in reply to the written submissions filed by the defendants;

Having examined all the relevant acts in the records of the case;

Having put off the case for judgment on the said preliminary pleas;

Having Considered:

That this is an action for judicial review of an administrative act. Plaintiff is aggrieved by a decision taken in respect of a vehicle he owns and which he brought over to Malta. He claims that his request for an exemption from the payment of the motor vehicle regisitration tax was turned down by the respondent Transfer of Residence Exemption Board (hereinafter referred to as 'the Board'). Plaintiff further holds that the respondent Malta Transport Authority (hereinafter referred to as "the Authority) likewise turned down his request to release the vehicle for re export purposes, which vehicle was seized, impounded and was to be sold by by public auction. He also claims that the Authority failed to substantiate its refusal, and furthermore requested him to pay taxes and penalties which had became due, failing which his vehicle would not be released and would be auctioned;

That, as a consequence, plaintiff claims that the decision of the Authority to refuse to release the vehicle is unlawful, discriminatory, in breach of the principles of natural justice and or procedural requirements. He requests a declaration that he be allowed to re-export the vehicle from Malta without having to pay penalties or other dues given that such payment is in itself discriminatory and excessive. He requested damages for the unlawful action of the defendants;

The defendants rebutted plaintiff's grievance on the merits by stating that the Board and the Authority acted in a wholly correct manner and that plaintiff's claims are unfounded. They also raised a number of preliminary pleas: The Authority pleaded the nullity of the sworn application on the basis that it lacks the necessary clarity in terms of article 156(1)(a) of Chapter 12. It pleaded also that if the action was directed towards the defendant Board, then

[9] Pp. 120 – 3 of the record
[10] Pp. 125 – 8 of the record

the Authority was not the proper defendant. On the other hand, if the action is directed toward the Authority, it is the Minister and Board who are non-suited. Furthermore, it transpires that the plaintiff failed to contest the decision of the Board before the Administrative Review Tribunal. As a consequence, Article 469A(4) of the Code of Civil Procedure would kick in and render this action for judicial review invalid;

That the respondent Minister for Finance (hereinafter referred to as "the Minister") and the Board pleaded that the plaintiff failed to comply with the requisites of article 460(1) of the said Code by filing a judicial act before the filing this lawsuit. Furthermore, the respondent Minister pleaded the existence of a remedy available to plaintiff under another law and, therefore, the invalidity of this suit in terms of Article 469A(4) of the Code;

That this judgement is to deal with the afore-said preliminary pleas, as ordered in its decree of December 6th, 2016;

That the relevant facts which emerge from the records of the case show that plaintiff is an Italian citizen[11] who took up residence in Malta some time during 2015[12]. He owns a vehicle of the make Jeep, bearing registration number EF803KX[13];

That on August 2nd, 2016[14], the plaintiff filed an application with the Authority for exemption from the payment of the motor vehicle registration tax on his vehicle, which application was refused by the Board on the grounds that it was in breach of rule 4(3)(a) of the relevant Regulations[15]Legal Notice 440 of 2013. The outcome of the application was communicated to the plaintiff on the 9th September, 2016[16]. In the same communication, the plaintiff was informed of his right at law to appeal from the decision within twenty one (21) days before the Administrative Review Tribunal (hereinafter referred to as "the Tribunal"). The plaintiff failed to appeal before the Tribunal[17];

That on September 7th, 2016[18], plaintiff filed a judicial protest against the Authority contesting the seizure and the advertised auction of his vehicle which was to be held three days later[19];

[11] Pp. 47 to 74 of the record
[12] Application at p. 1 of the record. Refer also to documents at pp. 81 and 82 of the record
[13] See documents at pp. 75 to 82 of the record
[14] Doc. "MFIN1" at pp. 25 – 7 of the record
[15] Reference is here made to the Exemption from Motor Vehicles Registration Tax Rules (L.N. 196/2009, as amended)(S.L. 368.01)
[16] Doc. "A" at p. 7 of the record. Refer also to Doc. "AF" at p. 96 of the record
[17] Application at p. 2 and Doc. "AF" at p. 96 of the record
[18] Doc. "A" at pp. 97 – 8 of the record
[19] Doc. "B" at p. 8 of the record

That on September 12th, 2016[20], plaintiff filed an application for the issue of a Warrant of Prohibitory Injunction against the Authority, which application was provisionally upheld on the same day[21], and eventually revoked[22] following a declaration by the Authority that the vehicle will not be auctioned pending a lawsuit plaintiff declared he intended filing to contest the action taken[23];

That plaintiff filed this action on the October 7th, 2016;

That the legal deliberations relating to the issue under examination must deal with the declared preliminary pleas raised by the defendants to the suit. The Court shall examine each plea under separate heads in sequence against the evidence which has been tendered and in the context of the submissions made thereto by respective counsel. In truth, all these preliminary pleas are procedural, and it is precisely because of this prevailing procedural aspect that the Court had ruled that, before proceeding any further to examine the merits, it had to rule on the validity or otherwise of the said pleas;

That the Authority bases its first plea of nullity on the percieved lack of clarity of the subject-matter of the plaintiff's cause [art. 156(1)(a) of Chap 12]. During the written submissions, the Authority's learned counsel drew the Court's attention to a mandatory procedural violation which the law expressly visits with the sanction of nullity. He argues that if the action was directed toward the Board, then the Authority should not stand as a defendant in the suit. On the other hand, if the action is directed toward the Authority, it is the Minister and the Board which should not stand as defendants. In other words, the Authority avers that the action is in reality an amalgam of multiple actions which are incompatible with one another by reason of the persons asked to rebut them;

That, apart from the above, the Authority argues that it transpires that the plaintiff failed to contest the decision of the Board before the Tribunal, which was the proper body to deal with the type of complaint which he raises in this action. As a consequence, the Authority argues that the provisions of article 469A(4) of the Code would hamper the continuance of the action filed before this Court;

That, on his part, plaintiff's learned counsel clarifies[24], that the demands are constured as referring to the defendants' failure to allow the

[20] Doc. "D" at pp. 130 to 171 of the record
[21] Page 21 of the record
[22] Page 161 of the record
[23] Page 158 of the record
[24] Pages 101 and 102 of the record

plaintiff to re-export his vehichle from Malta following the issue of the letter dated September 9th, 2016, by the Board. In so far as Article 469A(4) of Chapter 12 is concerned, plaintiff claims that he did not have enough time to file a judicial protest against the Minister and the Board as well, although he points out that he did proceed with the filing of a judicial protest against the Authority in due time before filing the present law-suit;

That the Court can never emphasize enough that, in matters relating to the validity of judicial acts, the distinction has to be drawn between absolute and relative nullity. In the latter case, the Court is duty bound to draw the parties' attention or to make *ex officio* orders, whereas this is not at all possible in the case of absolute nullity prescribed by law under the former[25]. Furthermore, it is settled law that for a judicial act to be struck down as being null "*jeħtieġ li jkunu jikkonkorru raġunijiet gravi, fosthom nuqqasijiet ta' evidenti preġudizzju għad-difiża tal-konvenut; u huwa risaput li l-leġislazzjoni u l-ġurisprudenza patrija ilhom progressivament jirrifuġġu mill-formliżmu eċċessiv, fonti ta' litiġji żejda u prokrastinazzjonijiet inutili, purke' ovvjament ma tirriżultax l-effettiva vjolazzjoni tal-liġi*"[26];

That when the law prescribes that the Sworn Application should consist of a "statement which gives in a clear and explicit manner the subject of the cause in separate numbered paragraphs", this is to be taken to mean that the recitals should guide the person who peruses of the Application to understand the reason or reasons behind the claim or claims made by the plaintiff. Coupled to this is the need for the defendant to be in a position to contest the claim[27]. Where there is no inherent contradiction between what is premised and what is claimed, then a plea of nullity of a judicial act should not be lightly entertained. For a Sworn Application (or Counter-Claim) to pass the rigours of the law, it is enough that the party sued can discern what the party suing is claiming against him[28], and that the judicial act is such as to allow the defendant to set up a proper defence to the plaintiff's claim[29];

That it is pertinent to point out that the success or otherwise of the plea of nullity of judicial acts depends on whether it can validly rely on at least one of the four instances under the provisions of article 789(1) of the Code of Organisation and Civil Procedure. It appears that the Authority's plea relies on the provisions of article 789(1)(c) and or (d) of the said Code. It has been authoritatively explained that the distinction to be drawn between a nullity under paragraph (ċ) and one under paragraph (d) of the said sub-section,

[25] Vide F.H. SM **1.10.1910** in re ***Ludovico Magro vs Pio Żammit*** (unpublished), which contains a clear exposition of the effects of nullity of judicial acts
[26] Comm. App. **15.4.1977** in ***John Mallia vs Maria Assunta Borġ et*** (not published)
[27] Cfr., for example, P.A. 5.6.1959 in Sciortino et vs Micallef (Kollez. Vol: **XLIII.ii.748**)
[28] F.H. **14.2.1967** in re ***Coleiro vs Ellul*** (Kollez. Vol: **LI.ii.779**)
[29] Comm. App. **20.1.1986** in re ***Bonniċi vs Żammit noe et*** (Kollez. Vol: **LXX.ii.243**)

consists in the fact that, under the latter, the judicial act lacks an essential requisite and not a simple violation of the prescribed form[30]. One must underline the fact that the law refers to "essential particulars" and not to any particular, which means that certain defects which are not "essential" fall beyond the ambit of the sanction of nullity. For a particular to be considered "essential" in a judicial act, it is necessary that its violation seriously and irremediably hampers one or more of the basic procedural rules by virtue of which a cause may proceed swiftly, efficiently, diligently and in full and proper observance of the parties' rights and of the tenets of natural justice[31];

That to cite but one judgment which addresses cogently this question, it is authoritatively stated that: "... *ma hemmx kwestjoni li dottrinarjament huwa importanti li jiġu, għall-finijiet ta' l-oġġett tat-talba u tad-dritt li jiddeterminaha, eżaminati attentament il-fattijiet li jkunu taw lok għallġudizzju, u dawn il-fattijiet ma jistgħux ma jkunux a konjizzjoni talkontendenti; jekk minn dawn il-fattijiet jitnissel aktar minn dritt wieħed sabiex id-domanda tkun imressqa 'l quddiem f'ġudizzju, ma hemm xejn fil-liġi li l-attur li jippromwoviha ma jkunx jista' jiddeduċihom jekk jittendi li huma ntiżi għall-otteniment ta' l-oġġett propost, salv li l-istess ma humiex inkonċiljabbli. Dina r-redazzjoni ta' l-att taċ-ċitazzjoni ma tirrendix dak listess att għall-kawżalijiet tiegħu mhux ċar, iżda se mai turi in forza ta' liema drittijiet ("jus petendi") l-attur ikun qiegħed jippromwovi l-azzjoni. Apparti dana, ebda preġudizzju ma jitnissel lill-konvenut minn dana l-aġir ġuridiku, ilgħaliex huwa jkun jista' jirripudja l-azzjoni attriċi għad-drittijiet kollha radikati fl-att promotorju tal-kawża. . .* "[32];

That as to the issue of clarity of the plaintiff's action in this cause, the Court has no doubt whatsoever that this is lucidly laid out and easily understandable. The action is a clear action relating to judicial review. The allegations made by the plaintiff in his sworn statement are clear enough to comprehend, and defendants were in no difficulty to set up their respective defences. Thus, insofar as the Authority's preliminary plea concerns the issue of clarity of plaintiff's action, the Court finds no reason to apply the sanction of nullity of the judicial act;

That for the above-mentioned reasons, the Court rejects the Authority's first preliminary plea and declares that the plaintiff's action is not affected by formal nullity;

[30] Cfr, for example, F.H C.S. **4.11.1988** in re ***Carmelo Galea vs Pawlu Cuschieri*** (unpublished)
[31] F.H GCD **31.10.2008** in re ***Diane Vella et vs Medserv Operations Limited***
[32] Ċiv. App. **14.11.1949** in re ***Borġ noe vs Vincenti*** (Kollez.Vol: **XXXIII.i.535**, at p. 538)

That in relation to its **second preliminary plea**, the defendant Authority raises two specific grounds: firstly, that the defendant Authority is non-suited, and secondly, that the action as filed cannot proceed because plaintiff had avaialble another remedy prescribed by law and he failed to resort to it. The second part of the Authority's second plea was also raised as a fourth plea by the other respondents, and shall be determined first;

That during its written submissions, the respondent Minister's and the Board's learned counsel[33] drew the Court's attention to paragraph (4) of Section 469A which makes this article inapplicable where the mode of contestation or of obtaining redress with respect to any particular administrative act before a court or tribunal is provided for in any other law. They argue that such a remedy was available to the plaintiff in terms of the Administrative Justice Act[34], by way of an appeal appeal before the Administrative Review Tribunal;

That, on his part, plaintiff's learned counsel clarifies[35], that such would have been the case had the plaintiff been contesting the decision by the Board of the 12th September, but the demand relates to the Authority's failure to allow plaintiff to re-export the vehicle, a matter which is only catered for under an action for judicial review under article 469A of the Civil Procedure Code;

That article 469A(4) of Chapter 12 is an exception to the general rule that the Courts have jurisdiction. It is settled caselaw that the Court's exclusion from determining administrative action is only justified if the Court is satisfied that, in practice, the individual had an effective and adequate remedy to resort to, and he failed to do so for no just reason[36]. It is the Court's understanding that for the Court's jurisdiction to determine administrative action be withdrawn, the remedy provided by the other law, should be just and adequate[37]. There should be no doubt that where an alternative remedy under a special law is not availbale to an individual not due to his fault or due to circumstances beyond his control, the individual's right to request a court to determine an administrative action should not be withheld[38]. It should also be shown that the person did not avail itself of the alternative remedy capriciously, in which case, it would not be correct for the individual concerned to proceed before this Court and seek redress by instituting proceedings in terms of Article

[33] Pages 122 and 123 of the record
[34] Act V of 2007 (Chap 490)
[35] Pages 126 to 128 of the record
[36] Civ. App. **6.5.1998** in re ***Bunker Fuel Oil Company Ltd. vs Paul Gauċi et*** (unpublished) and Civ. App. **5.10.2001** in re ***Cauchi vs Chairman Awtorita' tal-Ippjanar*** (Kollez. Vol: **LXXXV.ii.943**)
[37] F.H. PS **28.1.2004** in re ***Joseph Muscat et vs Chairman tal-Awtorita' tad-Djar et***
[38] F.H. GV **29.3.2004** in re ***Dr. Philip Galea et vs Tigné Development Co. Ltd. et***

469A after having failed to resort to the other statutory remedy without a valid reason;

That within the context of the above deliberations, the Court shall determine whether the plaintiff had an alternative adequate remedy under the law identified by the defendants, and whether the plaintiff failed to proceed before such Tribunal without any just cause;

That the defendants refer to the remedy available to the plaintiff as that envisaged under Chapter 490 of the Laws of Malta. They argue that the plaintiff should have filed an appeal before the Tribunal in terms of regiulation 4(11) of the applicable Rules. The law grants an aggrieved person the right to appeal before the Tribunal from a decision of the Board rejecting an application for an exemption from motor vehicle registration tax. A further remedy is applicable under Chapter 490 in that a party aggrieved by the decision of the Tribunal can appeal before the Court of Appeal in its inferior jurisdiction[39]. The plaintiff, on the other hand, claims that his demands do not relate to the Board's decision of the 9th September, 2016, but to the decision by the Authority not to release the vehicle unless the imposed fines and taxes are paid. He argues that this latter decision does not fall within the purview of that Tribunal;

That from the facts of the case, it transpires that the decision taken on September 9th, 2016, relates to a refusal by the Board for the granting of an exemption from the payment of motor vehicle registration tax. That decision was not in any manner challenged by the plaintiff before the Administrative Tribunal which is patently competent to deal with such an issue. The decision was also accompanied by a direction to the effect that plaintiff could challenge it by appealing within the prescribed time-frame to the Tribunal. Irrespective of that advice, plaintiff does not seem to have taken up the remedy;

That, instead, two days before, that is on the 7th September, he had filed a judicial protest against the respondent Authority requesting it not to sell the vehicle by auction. Plaintiff also claims that days later, he requested the release of the vehicle for re-export purposes, which request was likewise declined;

That the Court, after taking cognisance of the arguments raised by both parties, comes to the conclusion that the defendants' plea is justified. In the letter of the 9th September, 2016, the plaintiff was informed of the Board's refusal to an exemption from motor vehicle registration tax, and to the procedure envisaged under regulation 4 of The Exemption from Motor Vehicles

[39] Article 22(1) of Chap. 490

Registration Tax Regulations (S.L. 368.01), relating to the registration or re-exportation of the vehicle, and the payment of the relative fees and taxes, the latter being the basis of the plaintiff's demands. In the Court's opinion, there was only one decision, that issued by the Board on the 9th September, 2016, and the "secondary refusal" which the applicant is trying to contest before this Court is not separate from the decision of the 9th September but is merely consequential to it, and the jurisdiction to deal with it lay with the Tribunal. The fact that the plaintiff failed to appeal the decision of the Board before the Tribunal does not now entitle him to contest "related" matters before this Court under the strength of an action for judicial review. Neither does the fact that his request for the issue of a warrant of prohibitory injunction was withdrawn on the strentgh of a declaration made on his behalf that he was instituting the present action justify or validate this action, if it was objectively unavailable because of the alternative procedural remedy outlined above;

That on the strength of its findings under this plea, which will be upheld, the Court does not see any useful purpose of examining the plea any further on the other ground on which it was raised;

For the above-mentioned reasons, the Court hereby declares and decides:

To reject the first preliminary plea raised by respondent Authority as unfounded in fact and at law; and

To uphold the second preliminary plea raised by the respondent Authority and the **fourth preliminary plea** raised by the respondent Minister and Board, and declares that in terms of article 469A(4) of Chapter 12 of the Laws of Malta, the plaintiff had an alternative effective remedy under another law to challenge the administrative act of which he feels aggrieved, which he failed to pursue, and that therefore the present action for judicial review is untenable; and

Thus **dismisses** the Application **with costs** against plaintiff.

Read and delivered

Joseph R. Micallef LL.D.,
Judge

Marisa Bugeja
Deputy Registrar

31st October, 2019

31st October, 2019