MALTA
TRIBUNAL TA' REVIZJONI AMMINISTRATTIVA
MAGISTRAT DR. CHARMAINE GALEA

13 ta' Frar 2020

Rikors Numru 75/2019

Kenneth Tabone

Vs

Awtorita` tal-Artijiet

It-Tribunal,

Ra r-rikors ta' **Kenneth Tabone** ipprezentat fid-19 ta' Awwissu 2019 li permezz tieghu ppremetta s-segwenti:-

"1. Illi permezz ta' ittra datata 24 ta' Lulju 2019 (Dokument ASD1) l-esponenti gie nfurmat mill-intimati Awtorita' tal-Artijiet li fuq it-talba tieghu ghal "No Objection in Principle" ghal "Kiosk for selling food at Part of Triq Burmarrad, San Pawl il-Bahar" li b'decizjoni tal-Bord tal-Gvernaturi mehuda fis-19 ta' Lulju 2019 din giet michuda.
2. Illi l-imsemmija ittra ndikat bhala motivazzjoni ta' tali decizjoni li "peress li ma hemmx bzonn ghal kiosk ohra f'dak l-ambjent peress li diga' jezistu numru ta' stabbilimenti kummercjali u talli kiosk tista' tohloq perikolu ghat-traffiku".
3. Illi l-esponenti jhossu aggravat b'din id-decizjoni u minnha bil-prezenti qieghed jressaq umili appell quddiem dan it-Tribunal Onorabbli.
4. Illi l-aggravju huwa car u manifest u jikkonsisti fis-segwenti
a. Illi fl-ewwel lok l-esponenti ma jara ebda raguni valida fil-ligi sabiex ma jkunx hemm l-accettazzjoni tat-talba tieghu kif stabbilita u fuq dan bir-rispett huwa jirrileva li l-imsemmija ittra ma fiha ebda spjegazzjoni jew motivazzjoni valida imma hija decizjoni li tidher arbitrarja u mhux ibbazata fuq il-ligi. U dan ghalhekk imur kontra s-subartikolu tnejn (2) "h" tal-Kapitolu 490 Att Dwar il-Gustizzja Amministrattiva li jghid li s-sentenzi ghandhom ikunu motivati "Tribunal Amministrattiv ghandu jaghti, b'mod bizzejjed car, il-motivi li fuqhom tkun mibnija decizjoni". U dan kif huwa rifless fl-insejament konstituzzjonali taghna senjatament kif gie deciz mill-Prim' Awla tal-Qorti Civili (Sede Kostituzzjonali) fil-kawza Raymond Gauci vs Il-Pulizija et fis-27 ta' Gunju 2002 fejn il-Qorti rriaffermat li ghandha bzonn ta' decizjoni motivata u dan huwa parti mill-principju ta' smigh xieraq u ta' appell.

b. Illi fit-tieni lok l-esponenti umilment jissottometti li r-raguni qsajra mressaq u cioe' "li ma hemmx bzonn ghal kiosk ohra f'dak l-ambjent peress li diga' jezistu numru ta' stabbilimenti kummercjali u tali kiosk jista' johloq perikolu ghat-traffiku" huma f'kull kaz zbaljati.
Dan jirrizulta ampjament ghax mill-pjanti debitament minnu sottomessi preparati dettaljatament mill-Perit Jesmond Mugliett (Dokument ASD2) jidher car li ma huwiex ser ikun hemm xi forma ta' kunflitt jew ostruzzjoni. L-istruttura proposta hija wahda kompatta dezinjata apposta biex toqghod f'parti "interna" fejn ma xxekkilx anzima ttellifx la l-terzi u wisq anqas it-traffiku.
Minn ezami tal-post jidher car li hemm triq wiesgha u fejn min irid jieqaf ghandu kull hin biex jersaq fil-genb dejjem jekk dan ikun gej b'vettura u mhux jahdem fl-akwati nnifishom. Mhux biss imma hemm ukoll spazju ghal iktar minn dawn l-istrutturi ghal min irid jaghti servizz kif qieghed jipproponi l-applikant ghax prezentement ma hemmx dawn l-istrutturi temporanji fuq il-post. U ghalhekk tali applikazzjoni hija konsonati mal-uzu intelligenti ghal zieda tar-rizorsi tal-Awtorita' ghall-izvilupp ekonomiku u socjali tal-post.
Ghaldaqstant l-appellantiu filwaqt li jaghmel referenza ghas-suespost, ghall-prova diga' prodotta u dawk producibbli quddiem dan it-Tribunal Onorabbli kif ukoll ghas-sottomossjonijiet li saru u dawk sollevabbli jitlob bir-rispett li dan it-Tribunal joghgbu jirrevoka, ihassar u jannulla d-decizjoni li ttiehdet mill-Awtorita' tal-Artijiet kif kontenuta fl-ittra tal-24 ta' Lulju 2019 u konsegwentement li jinghataw dawk l-ordnijiet jew provvedimenti ohra li jidhirlu xierqa u gusti. Bl-ispejjez kontra l-imsemmija Awtorita'.

Ra r-risposta tal-Awtorita` intimata ipprezentata fid-9 ta' Settembru 2019 li permezz taghha eccepiet is-segwenti:-

"1. Illi l-Awtorita' esponenti rceviet l-Appell tal-appellant Kenneth Tabone. L-Awtorita' ma taqbilx mal-kontenut tar-rikors tal-Appell hekk kif imressaq u per konsegwenza qieghda tinterponi din l-umli risposta taghha;
2. Illi din il-kawza u l-appell jitrattaw decizjoni li ha l-Bord tal-Gvernaturi tal-Awtorita' tal-Artijiet inkonnessjoni ma' talba mressqa mill-appellant sabiex jottjeni permess biex jopera Kiosk fi Triq San Pawl il-Bahar, Burmarrad;
3. Illi tajjeb li jinghad illi ghalkemm l-Awtorita' hija vestita b'diskrezzjoni wiesa' fit-tehid tad-decizjonijiet taghha, jidher car li f'dan il-kaz id-decizjoni ttiehdet fl-interess pubbliku in generali ghaliex huwa car li fiz-zona inkwistjoni diga' hemm stabbilimenti bizzejjed u apparti dan sabiex ma jigix ikkreat perikolu fi triq li diga' hija traffikuza ferm!;
4. Fil-kuntest jidhol l-element ta' dak li huwa "ragonevoli" ('reasonableness') in linea ta' konsiderazzjoni ta' dritt u li ghandu jkun segwit minn awtorita' pubblika meta tiddeciedi jew tezercita d-diskrezzjoni taghha.
H.W.R Wade (Administrative Law) jikkummenta hekk –
"A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is intended to do so – he must not in the exercise of his discretion do what he likes but what he ought. In other words, he must by the use of his reason ascertain and follow the course which reason directs. He must act reasonably."
Ikompli hekk –
"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly,

merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits.
With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority. As Lord Halisham L.C. has said [in re W (An Infant) – 1971 – A.C. 682 at 700] two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. This is not therefore the standard of "the man on the Clapham omnibus". It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to. It distinguished between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come.
Lord Greene MR fil-kawza "Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation" [1948] 1 KB 223 jghid hekk –
"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.
5. Minn hawn johrog car illi l-Awtorita' applikat id-diskrezzjoni taghha fil-parametri tar-ragjonevolezza u ghall-konsiderazzjonijiet li huma rilevanti ghall-kaz li kellha quddiemha. Tant huwa hekk li l-Awtorita' rat ukoll illi l-kiosk in kwistjoni mhux biss m'hemmx bzonnu, izda ser johloq perikolu meta jibdew jieqfu l-vetturi fi triq li diga' hija traffikuza;
6. Isegwi mis-suespost, bhala konkluzjoni ghalhekk, li l-Awtorita' Intimata fl-ewwel lok applikat il-ligi u fit-tieni lok agixxiet skont il-principji amministrattivi u ssodisfat il-principju generali amministrattiv tar-ragjonevolezza ghad-decizjoni taghha [Vide zewg sentenzi fl-ismijiet 'CCD Limited v. Awtorita' Dwar it-Trasport ta' Malta' tal-Prim' tal-PAQC datata 17/6/2013 u tal-Qorti tal-Appell datata 18/7/2017]. L-Awtorita' kellha diskrezzjoni li hija ezercitat fil-limiti tar-ragjonevolezza u per konsegwenza dan it-Tribunal ghandu jkun sodisfatt li l-Awtorita' Intimata mxiet legalment korrett.
Ghaldaqstant l-Awtorita' Esponenti qieghda titlob li l-appell hekk kif imressaq jigi respint a spejjez interament tar-rikorrent Kenneth Tabone.
Daqstant l-Awtorita' Esponenti ghandha l-unur li twiegeb u thalli ghas-savju u superjuri gudizzju ta' dan it-Tribunal."

Sema' x-xhieda;

Ra d-dokumenti kollha pprezentati;

Sema' t-trattazzjoni tal-partijiet;

Ra li r-rikors thalla ghal-lum ghas-sentenza.

Ikkunsidra:

Illi r-rikorrenti hassu aggravat b'decizjoni tal-Bord tal-Gvernaturi tal-Awtorita` ta' l-Artijiet datata 19 ta' Lulju 2019 li permezz taghha gie infurmat illi l-applikazzjoni tieghu ghal *no objection in principle* ghal *"kiosk for selling food at Part of Triq Burmarrad, San Pawl il-Bahar"* kienet qieghda tigi michuda stante *"li ma hemmx bzonn ghal kiosk ohra f'dak l-ambjent peress li diga` jezistu numru ta' stabbilimenti kummercjali u tali kiosk tista' tohloq periklu tat-traffiku."*

Ir-rikorrent xehed illi huwa jahdem fil-*catering* u ghalhekk wara li ghamel ftit ricerka iddecieda li japplika biex iwaqqaf *kiosk* fuq l-art in kwistjoni ghaliex irrizultalu li ma kienx hemm kiosks ohra fil-vicin u peress li ma kinitx ha tinholoq problema ghat-traffiku. Da parti tieghu, il-Perit Jesmond Mugliette, Perit inkarigat mir-rikorrent, xehed illi l-materjal mahsub ghall-kiosk in kwistjoni kien wiehed tal-injam u bhala posizzjoni poggiha f'genb fejn deherlu li jkun hemm l-inqas telf ta' parkegg.

Illi permezz tal-ewwel aggravju tieghu ir-rikorrent jishaq illi d-decizjoni appellata ma fiha ebda spjegazzjoni jew motivazzjoni valida u jikkwota artikolu 2 (h) tal-Kapitolu 490 tal-Ligijiet ta' Malta liema Kapitolu jirregola, fost ohrajn, l-imgieba ta' **tribunali amministrattivi.** Illi dan it-Tribunal jirrileva illi l-Bord tal-Gvernaturi ta' l-Awtorita` intimata ma huwiex "tribunal amministrattiv" u ghalhekk artikolu 2 tal-Kapitolu 490 ma japplikax ghalih. Madankollu, kif inghad diversi drabi, decizjonijiet ammistrattivi ghandhom ikunu motivati halli min ihossu aggravat bid-decizjoni jifhem sew ghala l-awtorita` pubblika tkun waslet ghad-decizjoni taghha. Illi fil-kaz odjern, it-Tribunal jidhirlu li d-decizjoni appellata hija motivata u ghalkemm ma fihiex hafna kliem, id-decizjoni hija wahda li tista' tinftiehem sew. Ghaldaqstant dan l-aggravju qieghed jigi michud.

Ghaldaqstant, issa t-Tribunal se jdur fuq it-tieni aggravju, u cioe` illi d-decizjoni appellata mhix wahda ragjonevoli fic-cirkostanzi u dana ghaliex skont hu ma hemmx iktar *kiosks* fil-vicinanzi u l-vetturi li jistghu jieqfu biex jixtru mill-istess *kiosk* ghandhom spazju fejn jistghu jieqfu minghajr ma jtellfu l-*flow* tat-traffiku.

Illi s-sit fejn hu propost il-kiosk in kwistjoni huwa fetha li taghti ghal fuq triq principali u traffikuza li tiehdok mir-roundabout ta' San Pawl il-Bahar ghar-roundabout ta' Targa Gap. Illi mis-*site plan* esebita mir-rikorrent jirrizulta illi l-art li qieghed jitlob li jpoggi l-kiosk fuqha qieghda f'kantuniera f'din il-wesgha. Illi fir-risposta taghha l-Awtorita` intimata eccepiet illi *"huwa car li fiz-zona in kwisjtoni diga hemm stabbilimenti bizzejjed"*. Illi din l-asserzjoni bl-ebda mod ma giex ippruvata quddiem dan it-Tribunal u kwindi fic-cirkostanzi, u fin-nuqqas ta' tali prova, dan it-Tribunal ma jsibx illi tali raguni hija wahda gustifikata. Illi t-tieni raguni hija relatata mat-traffiku generat fl-istess triq. Illi r-rikorrent jishaq

illi t-traffiku mhux se jigi mfixkel ghax il-vetturi li jieqfu jistghu jipparkjaw fil-fetha biswit il-kiosk. Illi t-Tribunal isib li dan ir-ragunament ma tantx huwa wiehed reali ghaliex filwaqt li huwa veru li fir-ritratti pprezentati minnu a fol. 9 jidhru biss vettura u karru pparkjati fl-istess zona, ma jfissirx illi f'din il-fetha ma jipparkjawx vetturi. Jekk dan is-sit ikollu vetturi pparkjati allura ma jkunx hemm wisq spazju fejn jistghu jipparkjaw vetturi li jieqfu sakemm is-sidien taghhom jinzlu jixtru, minghajr ma jostakolaw il-karreggjata tat-traffiku. Illi, ghalhekk, fl-opinjoni tat-Tribunal, l-attivita` generata mill-kiosk tista' tohloq perikolu kemm ghal min jieqaf biex jixtri mill-kiosk, u dan billi jista' jkun li jrid ihalli l-vettura tieghu ipparkjata hazin, u kif ukoll ghall-vetturi li jkunu ghaddejjin mill-istess triq stante li se jkun hemm vetturi li jipparkjaw hazin, jifthu l-bieba ghal fuq il-karreggjata minn fejn ikunu ghaddejjin l-istess vetturi b'dan illi joholqu perikolu ghalihom u ghall-istess vetturi.

DECIDE

Ghaldaqstant it-Tribunal, ghar-ragunijiet hawn fuq esposti, qieghed jilqa' parzjalment l-appell tar-rikorrent in kwantu jirrevoka d-decizjoni appellata fir-rigward tac-cahda tal-applikazzjoni abbazi tal-fatt li ma hemmx bzonn kiosks ohra fl-akwati, pero` jzommha ferma in kwantu rifjutata abbazi li tali kiosk jista' johloq perikolu ghat-traffiku u ghaldaqstant jilqa' l-eccezzjonijiet tal-Awtorita` intimata in kwantu kompatibbli ma' dak li nghad hawn fuq.

Bl-ispejjez jibqghu bla taxxa bejn il-partijiet.

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

Diane Gatt
Deputat Registratur