MALTA

TRIBUNAL TA' REVIŻJONI AMMINISTRATTIVA
MAĠISTRAT DR. CHARMAINE GALEA

1 ta' Novembru 2022

Rikors Numru 34/2022

Kunsill Lokali tal-Gżira

Vs

L-Awtorità tal-Artijiet

It-Tribunal,

Ra r-rikors tal-**Kunsill Lokali tal-Gżira (iktar 'il quddiem "il-Kunsill")** ippreżentat fid-29 ta' April 2022 li permezz tiegħu ppremetta s-segwenti:-

Illi l-Kunsill rikorrenti huwa r-rapprezentanti tar-residenti tal-lokalita tal-Gzira – lokalita li qed issir dejjem iktar kummerċjalizzata u fejn l-izvilupp bla razzan wassal għal nuqqas ta' spazji miftuħa li ir-residenti jistgħu juzaw għar-rikreazzjoni u mistrieħ.

Illi l-uniku spazju miftuħ u aħdar fil-lokalita tal-Gzira huwa l-Gnien tal-Kunsill tal-Ewropa, liema ġnien ilu devolut lil Kunsill mit-tmienja (8) ta' Marzu elfejn (2000) permezz tal-ftehim tal-istess data.

Illi l-Kunsill rikorrenti ħallas il-kera dovuta skond l-istess ftehim, għamel manutenzjoni u saħansitra għamel pjanijiet sabiex jitejjeb u jiġi msebbaħ il-ġnien għal benefiċċju tal-komunita, tar-residenti u għas-saħħa u iktar aċċessibilta tal-utenti kollha tiegħu.

Illi permezz ta' ittra datata 11 t'April 2022[1]*, l-Awtorita tal-Artijiet infurmat lil Kunsill li parti minn dan il-ġnien ta' 902 metru kwadru hija meħtieġa lura u li l-allokazzjoni ta' din il-parti tal-ġnien ser tiġi terminata fi zmien xahar min-notifika tal-istess ittra.*

[1] Li waslet il-Kunsill fit-13 t'April 2022.

Illi l-Kunsill esponenti ħassu aggravat minn din id-deċiżjoni u għalhekk qiegħed jinterponi dan l-appell.

L-AGGRAVJI

Illi l-aggravji huma ċari u manifesti u jikkonsistu fis-segwenti:

1. ***Illi l-awtorita' ma mxietx mal-prinċipju "audi et alteram partem" biex wasslet għad-deċiżjoni tagħha – il-Kunsill ma ingħatax "right of first refusal"***

   Illi minkejja l-ġnien hu spazju miftuħ u ahdar u oasi fil-lokalita urbanizzata tal-lokalita tal-Gzira u mfittex mir-residenti u utenti oħra, l-Awtorita' qatt ma bagħtet għal Kunsill rikorrenti biex tisma' x' għandu xi jgħid dwar l-intenzjoni tal-Awtorita li tneħħi parti sostanzjali tal-ġnien mill-amministrazzjoni u uzu tal-Kunsill tal-Gzira u r-residenti l-oħra. Għalekk l-esponenti jħoss li l-intimata awtorita' aġixxiet b'mod inġust mal-Kunsill meta ma tatux il-possibilita' li jagħmel rappreżentazzjonijiet tiegħu dwar dan il-każ. Dan in-nuqqas jikostitwixxi ksur tal-prinċipju ta' ġustizzja naturali audi alteram partem. Inoltre l-Kunsill ma ingħatax l-opportunita ta' jagħmel l-ewwel offerta sabiex ikompli jikri l-interita tal-ġnien.

2. ***Illi l-awtorita intimata ma tatx raġunijiet għad-deċizjoni tagħha – ma mmotivatx id-deċizjoni tagħha – kontra l-prinċipju ta' ġustizzja naturali "the duty to give reasons" – lanqas biss ma provdiet kopja tad-deċizjoni tal-Bord ta Gvernaturi***

   Illi l-ittra mibgħuta mill-Awtorita intimata hija nieqsa minn kull motivazzjoni jew raġuni u dan jikkostitwixxi ksur tal-prinċipji ta' imġieba tajba amministrattiva għal deċizjonijiet motivati.

3. ***Illi l-Awtorita intimata ' qed tonqos mill-obbligi tagħha li tamministra l-propjeta' pubblika bl-aħjar mod – waslet għad-deċizjoni tagħha a bazi ta konsiderazzjonijiet irrilevanti u mhux xierqa***

Illi kif ġie appena spjegat, meta jiġi kkunsidrat li l-Awtorita intimata qed iċċaħħad il-Kunsill esponenti mill-kirja u amministrazzjoni ta' ġnien pubbliku (u in estensjoni lill-utenti kollha tal-lokalita) għar-ragunijiet misturi, hija qed tmur kontra l-obbligi tagħha li tamministra l-propjeta' pubblika bl-aħjar mod possibbli u dan għax qed iċċaħħad il-pubbliku mit-tgawdija tal-istess ġnien għal konsiderazzjonijiet mhux xierqa u irrilevanti.

Għaldaqstant, ghar-raġunijiet premessi, u għar-raġunijiet kollha li jirrizultaw waqt is-smigħ u trattazzjoni ta' dan l-appell, il-Kunsill rikorrenti filwaqt li jagħmel referenza għall-provi kollha miġjub minnu u għall-provi kollha li jirrizultaw waqt is-smigħ u trattazzjoni ta' dan l-appell qiegħed umilment jitlob lil dan l-Onorabbli Tribunal jogħġbu jilqa' t-talba tal-Kunsill rikorrenti kif kontenuta fl-appell tiegħu, fis-sens li jogħġbu jħassar u jirrevoka d-deċizjoni tal-Awtorita' tal-Artijiet fejn gie deċiz illi jiġi terminat l-allokazzjoni u kirja ta' parti tal-ġnien (902 metru kwadri) tal-Ġnien Kunsill tal-Ewropa fil-Gzira u jordna li l-ispejjez ta' dan l-appell jitħallsu mill-Awtorita intimata, u dana skond kull provvediment li dan l-Onorabbli Tribunal jidhirlu xieraq li jimponi.

Ra r-risposta **tal-Awtorità tal-Artijiet (iktar 'il quddiem "l-Awtorita`")** ippreżentata fit-18 ta' Mejju 2022 li permezz tagħha eċċepiet is-segwenti:-

Dikjarazzjoni tal-Fatti

1. *Illi din hija risposta għar-Rikors tal-Appell tal-Kunsill Lokali tal-Gżira.*
2. *Illi l-Kunsill rikorrenti appella quddiem dan l-Onorabbli Tribunal wara li rċieva ittra datata 11 ta' April, 2022, li fiha ġie informat li 'parti minn dan il-ġnien ta' 902m2 hija meħtieġa..Għaldaqstant il-lokazzjoni ta' din il-parti tal-ġnien ser tkun qiegħda tiġi terminata fi żmien xahar min-notifika lilkom tal-ittra'*
3. *Illi l-Kunsill rikorrenti ħassu aggravata u interpona dan l-appell.*

Eċċezzjoni Preliminari

4. *Illi preliminarjament l-Awtorità intimata qed teċepixxi li r-rikorrenti m'għandux id-dritt ta' appell quddiem dan l-Onorabbli Tribunal stante li ma ntbgħatet l-ebda deċiżjoni lill-appellant, iżda ittra b'informazzjoni li skatat klawsola minn kuntratt iffirmat bejn il-partijiet, ossia r-rikorrenti u l-Awtorità intimata*
5. *Illi għalhekk tali skattat ta' kundizzjoni minn kuntratt ċertament ma jikkwalifikax bħala deċiżjoni ai termini ta Artikolu 57(a) tal-Kapitlu 563 tal-Liġijiet ta' Malta u ma jikkwalifikax ukoll bħala att amminsitrattiv jew xi piena ai termini ta' Artikolu 57(b)*
6. *Illi inoltre d-definizzjoni ta' 'att amministrattiv' f'Kapitolu 490 tal-Liġijiet ta' Malta jispeċifika b'mod mill-aktar ċar li att amministrattiv 'jinkludi l-ħruġ mill-amministrazzjoni ipubblika ta' ordni, liċenza, permess, warrant, awtoriżżazzjoni, konċessjoni, deċiżjoni jew ċaħda ta' xi talba magħmila minn membru tal-pubbliku, iżda ma tinkludix miżura li tittieħed għall-organiżżazzjoni interna jew ta' amministrazzjoni fi ħdan l-istess amministrazzjoni pubblika'*
7. *Illi għalhekk l-ittra mibgħuta mill-Awtorità intimata u li minnha r-rikorrent ħassu aggravat u per konsegwenza qed jinterponi dan l-appell, ma tinvolvix la deċiżjoni, la piena u wisq anqas att amministrattiv, u għalhekk ir-rekwiżiti imposti mill-Kapitolu 563 tal-Liġijiet ta' Malta sabiex isir appell quddiem dan l-Onorabbli Tribunal ma jissustux;*
8. *Illi għalhekk tenut kont tal-fatti kis spjegati hawn fuq u interpretati skond ir-rekwiżiti legali, preliminarjament l-Awtorità intimata qed teċepixxi li m'hemmx lok biex isir dan l-appell quddien dan it-Tribunal;*

Raġunijiet biex jiġi miċħud l-Appell

I. *Illi inoltre l-Awtorità tal-Artijiet aġixxiet u skatat klawsola numru tnejn (2) tal-kuntratt iffirmat bejn il-partijiet, datat tmienja (8) ta' Marzu tas-sena elfejn (2000) bejn Albert V Mamo in rappreżentanza tal-Gvern Malti u s-Sindku u s-Segretarju tal-Kunsill Lokali tal-Gżira, hawn anness u mmarkat* ***DOK AA1***

II. *Illi klawsola 2 tal-kuntratt sureferit tistipula li:- 'it is hereby agreed that if at any time during the term of lease, Government requires back the property let or any part thereof, the Lessees shall surrender the property let or the part required within one month from a written notice to this effect'*

III. *Illi għalhekk l-Awtorità intimata kienet sempliċiment qed taġixxi legalment u ai termini tal-kuntratt iffirmat bejn il-partijiet;*

<u>L-Ewwel Aggravju</u>

IV. *Illi b'rabta mal-ewwel aggravju tar-rikorrenti u ċioe li l-Kunsill Lokali ma ngħatax the right of first refusal, l-Awtorità intimata tispeċifika li dan id-dritt tal-ewwel rifjut jingħata biss f'każijiet ta' kirjiet kummerċjali u mhux f'każijiet odjerni jew inkelli ai termini ta' Artiklu 32 tal-Kapitlu 573 tal-Liġijiet ta' Malta. Illi pero' lanqas fil-każ tal-Artiklu 32, l-Awtorità mhix obbligata li toffri d-dritt tal-ewwel rifjut, iżda l-liġi tistipula li offerti għal trasferiment ta' art tal-gvern* ***'<u>jistgħu</u> junu soġetti għal dritt magħruf tal-ewwel rifjut'***

V. *Illi inoltre dritt tal-ewwel rifjut jista' jiġi kkunsidrat f'każ ta' offerti għal trasferiment, pero' f'dan l-istadju m'hemm l-ebda sejħa għall-offerti;*

VI. *Illi l-appell odjern qed isir minn dritt eżeċritabbli mill-Awtorità li tittermina kirja ta' parti minn ġnien skond il-klawsola kuntrattwali msemmija li l-Kunsill appellant kien pjenament kosapevoli minnha, anzi qabel u ffirma għaliha u għalhekk ukoll pacta sunt servanda. Dan mhux appell mill-fatt li ma ġiex ikkunsidrat dritt tal-ewwel rifjut;*

VII. *Illi f'xenarji fejn id-dritt tal-ewwel rifjut jiġi kkunsidrat, irid ikun hemm applikazzjoni għal tali dritt, liema applikazzjoni ma nġibitx prova tagħha fir-rikors promotur li sar mir-rikorrent;*

VIII. *Illi di piu' b'rabta wkoll mal-aggravju fejn qed jiġi allegat li l-Awtorità ma mxiets mal-prinċipju ta' 'audi alterm partem', dan il-prinċipju m'għandu x'jaqsam assolutament xejn f'ċirkostanza fej l-Awtorità qed tħaddem kundizzjoni magħrufa miż-żewġ partijiet u ffirmata miż-żewġ partijiet f'kuntratt bejniethom;*

IX. *Illi għalhekk fl-opinjuoni tal-Awtorità intimata, dan l-ewwel aggravju għandu jiġi miċħud.*

<u>It-Tieni aggravju</u>

X. *Illi b'rabta mat-tieni aggravju, ċioe' li l-Awtorità ma mmotivatx id-deċiżjoni tagħha skond il-prinċipju amministrattiv ta' 'duty to give reasons' , in primis l-Awtorità tispeċifika li l-ittra tagħha ma kien fiha l-ebda deċiżjoni imma kienet ittra ta' informazzjoni dwar skattar ta' klawsols mill-Kuntratt li għaliha qabel, aċċetta u ffirmha għaliha l-Kunsill apellant, kif diġa' spjegat. Inoltre, bla preġudizzji għal dan l-argument, l-Awtorità ġġustifikat u spjegat sew li ser tiskatta l-kundizzjoni speċifika tal-Kuntratt.*

XI. *Illi għalhekk it-tieni aggravju għandu jiġi miċħud.*

<u>It-Tielet aggravju</u>

XII. *Illi b'rabta mat-tielet u l-aħħar aggravju, kif ġie spjegat sew, l-Awtorità bl-iskattar tal-kundizzjoni numru 2 tal-kuntratt, ser tkun qed tieħu lura parti mill-ġnien u mhux il-ġnien kollu.*

XIII. *Illi b'dan l-iskattar ta' din il-kundizzjoni, l-Awtorità ser tkun qed taġixxi skond id-drittijiet u d-dmirijiet legali tagħha u entro l-parametri l-klawsoli li jirregolaw ir-relazzjoni kuntrattwali ta' bejn il-partijiet;*

XIV. *Illi bid-dovut rispett, l-Awtorità tal-Artijiet bħala amministratur tal-art, ikollha stampa aktar ħolistika mir-rikorrent, ta' kif l-art tista' tiġi amminsitrata bl-aħjar mod possibbli fl-interess tas-soċjetà kollha.*

Għaldaqstant għar-raġunijiet elenkati hawn fuq, l-esponenti Awtorità titlob lil dan l-Onorabbli Tribunal biex tiċħad l-appell interpost quddiemu mill-Kunsill appellant.

B'riserva li tipprovdi raġunijiet ulterjuri għalda dan l-Appell għandu jiġi miċħud.

Ra d-dokumenti kollha ppreżentati;

Sema' x-xhieda;

Sema' t-trattazzjoni;

Ra li r-rikors tħalla għal-lum għal sentenza.

Ikkunsidra:

Illi l-Kunsill ħassu aggravat b'deċiżjoni tal-Awtorita` kif kontenuta f'ittra datata 11 ta' April 2022 li permezz tagħha ġie mgħarraf bis-segwenti, u ċioe`:

Inkarigat niktbilkom għan-nom tal-Awtorità tal-Artijiet fir-rigward tal-ġnien su-ċitat. Nagħmel referenza għall-kundizzjoni numru 2 tal-'Lease Agreement for the Administration and Use of Yacht Marina Garden by the Gżira Local Council' iffirmat nhar it-8 ta' Marzu tas-sena 2000.

Permezz tal-preżenti, l-Awtorità tal-Artijiet qiegħda tinfurmakon li parti minn dan il-ġnien ta' 902m^2 hija meħtieġa lura, u din kif indikata bil-kulur blu fuq il-pjanta PD 185_99_1 u liema qed tiġi annessa ma' din l-ittra. Għaldaqstant, l-allokazzjoni ta' din il-parti tal-ġnien (902m^2) ser tkun qiegħda tiġi terminata fi żmien xahar min-notifika lilkom ta' din l-ittra.

Il-Kunsill sejjer jibqa' igawdi l-allokazzjoni relattiva fuq il-parti rimanenti ta' dan il-ġnien kif indikata bl-aħmar fuq l-istess annessa site plan.

Illi fiż-żmien li ġej, l-Awtorità ser tkun qed tikkomunika magħkom ir-rata ġdida ta' kera dovuta fir-rigward tal-porzjon rimanenti. Tali terminazzjoni issir ukoll mingħajr preġudizzju għall-kwalunkwe kwistjoni pendenti oħra li jista' ikun hemm fuq l-istess ġnien.

Illi ċ-ċitata kundizzjoni numru 2 tal-*Lease Agreement for the Administration and Use of Yacht Marina Garden by the Gżira Local Council* tgħid hekk:

2. It is hereby agreed that if at any time during the term of lease, Government requires back the property let or any part thereof, the Lessee shall surrender the property let or the part required within one month from a written notice to this effect.

Illi mill-provi prodotti jirriżulta illi fis-snin disgħin kien hemm proġettat tibdil infrastrutturali fil-Gżira u proprjament fejn hemm lokata pompa tal-petrol. Illi l-istess pompa tal-petrol tinsab ftit metri bogħod mill-ġnien in kwistjoni.

Jirriżulta wkoll illi minħabba l-imsemmi proġetti kellha titneħħa l-pompa minn fejn kienet, u għaldaqstant sid il-pompa daħal f'diskussjoni ma' diversi entitatjiet governattivi dwar il-possibilita` li l-istess pompa tiġi rilokata. Permezz ta' ittra datata 1 ta' Settembru 1998, il-predeċessur tal-Awtorita` kiteb lil ċertu Joseph Muscat u infurmah bis-segwenti:

I am directed to inform you that the alternative site identified for your Petrol Station by the Roads Department is that shown washed orange on the attached site plan.

I would like to inform you that this Department is prepared to consider the allocation of the site in question as an alternative site, to be used as a petrol station if the necessary consent is given by the Planning Authority.

In the circumstances, you are advised to seek Planning Authority's approval to your proposal, this of course without prejudice to the final outcome of the eventual allocation. Moreover, ths department is in no way to be held responsible for any expenses incurred in seeking Planning Authority's approval.[2]

Għaldaqstant fl-1999 ċertu Simon Muscat ssottometta applikazzjoni mal-Awtorita ta' l-Ippjanar għal "*Re allocation of existing Service station due to road widening exercise"*. Peress li l-art fejn kienet se tiġi rilokata l-pompa kienet art tal-Gvern, Muscat innotifika lill-Kummissarju tal-Artijiet bl-applikazzjoni li huwa ssottometta mal-Awtorita` ta' l-Ippjanar.[3]

Illi din l-applikazzjoni ġiet finalment approvata mill-Awtorita` ta' l-Ippjanar wara diversi snin u appellata mill-Kunsill Lokali tal-Gżira quddiem it-Tribunal ta' Reviżjoni tal-Ambjent u l-Ippjanar li permezz ta' deċiżjoni datata 2 ta' Lulju, 2020 ikkonferma l-approvazzjoni għall-permess maħruġ mill-Awtorita` ta' l-Ippjanar. Illi l-Kunsill appella tali deċiżjoni bil-Qorti ta' l-Appell Inferjuri, fil-15 ta' Ottubru, 2020, tikkonferma d-deċiżjoni tat-Tribunal.[4]

Illi jirriżulta wkoll illi preċedentement għad-deċiżjoni appellata, l-Awtorita` kienet diġà wettqet eżerċizzju identiku għal dak appellat fejn b'referenza għal kundizzjoni 2 tal-kuntratt ta' kirja, itterminat parti mill-kirja tal-Kunsill fuq il-ġnien in kwistjoni u dan kif jirriżulta minn ittra datata 3 ta' Marzu 2004 u oħra datata 20 ta' Jannar, 2015.[5]

Illi għalhekk dan it-Tribunal għandu quddiemu sitwazzjoni fejn il-Kunsill igawdi minn kirja fuq art pubblika u li fuqha jamministra ġnien pubbliku però bil-kundizzjoni li jekk il-Gvern ikollu ħtieġa li jieħu l-istess proprjetà lura, jew parti minnha, il-Kunsill huwa obbligat li jirrilaxxa l-istess fi żmien xahar minn meta jirċievi notifika bil-miktub dwar dan.

Illi t-Tribunal għandu quddiemu wkoll sitwazzjoni fejn il-ġestur tal-pompa kien ġie avżat mill-predeċessur tal-Awtorita` sabiex iġib l-approvazzjoni tal-Awtorita` ta' l-Ippjanar għar-rilokazzjoni tal-pompa, u dan mingħajr ebda preġudizzju għall-eventwali deċiżjoni tal-istess predeċessur rigward l-allokazzjoni għal sit alternattiv.

Jirriżulta wkoll illi l-ġestur tal-pompa għamel dak li kien avżat jagħmel, u llum il-ġurnata l-iżvilupp huwa kopert bil-permessi neċessarji ta' l-ippjanar. Kien għalhekk li ladarba l-ġestur kellu l-permessi f'idejh huwa reġa' avviċina lill-

[2] A fol. 148
[3] A fol. 63
[4] It-Tribunal ha *judicial notice* ta' dawn il-fatti minn fuq is-sit elettroniku tal-Qrati
[5] A fol. 39 u fol. 41

Awtorita` sabiex issir l-allokazzjoni tal-art pubblika minn fejn ikun jista' jiġġestixxi l-pompa tal-*petrol*.

Skont ma' xehed is-Sindku Conrad Borg Manche, l-applikazzjoni odjerna sar jaf biha b'kumbinazzjoni u dana peress li meta reġgħet telgħet fuq l-aġenda tal-Awtorita` tal-Ippjanar wara ħafna snin, ħadd ma kien informahom. Madanakollu l-Kunsill irnexxielu jsemma leħnu kontra dan l-iżvilupp, appella mill-permess u wkoll appella mid-deċiżjoni tat-Tribunal ta' Reviżjoni tal-Ambjent u l-Ippjanar, liema proċeduri kellhom eżitu sfavorevoli għall-istess Kunsill.

Illi l-proċeduri odjerni, għalkemm għandhom elementi komuni mal-proċeduri hawn fuq imsemmija, huma purament dwar il-fatt jekk l-Awtorita` imxietx amministrattivament b'mod raġjonevoli u jekk segwietx il-proċeduri amministrattivi mistennija minnha f'deċiżjonijiet ta' din ix-xorta.

Ikkunsidra:

Illi t-Tribunal se jibda biex jittratta eċċezzjoni preliminari mqajjma mill-Awtorita`, u ċioe` illi l-ittra mibgħuta lill-Kunsill kienet biss informazzjoni skattata minn klawsola f'kuntratt bejniethom u kwindi ma tistax' tammonta għal "deċiżjoni" f'sens amministrattiv. Kwindi, l-Awtorita` ssostni, li l-Kunsill ma kellux dritt ta' appell quddiem dan it-Tribunal stante li ma ġie mwettaq ebda "att amministrattiv."

It-Tribunal jagħmel referenza għal artikolu 57 tal-Kapitolu 563 tal-Liġijiet ta' Malta (Att Dwar l-Awtorita` ta' l-Artijiet) li jgħid is-segwenti, u ċioe`:

(1) It-Tribunal ta' Reviżjoni Amministrattiva mwaqqaf bl-artikolu 5 tal-Att dwar il-Ġustizzja Amministrattiva għandu jkun kompetenti biex jisma' u jiddetermina:

(a) l-oġġezzjonijiet magħmula minn kull persuna aggravata b'xi deċiżjoni tal-Awtorità; u
(b) l-oġġezzjonijiet magħmula minn kull persuna aggravata minn xi att amministrattiv jew xi pieni oħra imposti fuq dik il-persuna mill-Awtorità:

Iżda t-Tribunal ta' Reviżjoni Amministrattiva ma għandu bl-ebda mod ikun kompetenti biex jisma' u jiddeċiedi kawżi li jaqgħu taħt il-kompetenza tal-Bord ta' Arbitraġġ tal-Artijiet:

Iżda wkoll, sakemm ma jkunx preskritt mil-liġi, oġġezzjoni magħmula skont dan is-subartikolu lit-Tribunal ta' Reviżjoni Amministrattiva għandha tiġi ppreżentata fi żmien għoxrin ġurnata minn meta dik il-persuna tirċievi d-deċiżjoni tal-Awtorità.

Illi għal dan it-Tribunal huwa ċar li l-ittra mibgħuta lill-Kunsill tammonta għal "deċiżjoni" tal-Awtorita` li permezz tagħha ddeċidiet li tittermina parti mill-kirja li kien igawdi l-Kunsill. Illi di piu` fl-istess ittra hemm ordni ta' terminazzjoni ta' parti mill-kirja, liema "ordni" tidħol fid-definizzjoni ta' "att amministrattiv"

ai termini tal-Kapitolu 490 tal-Liġijiet ta' Malta (Att Dwar il-Ġustizzja Amministrattiva). Kwindi din l-eċċezzjoni qiegħda tiġi miċħuda.

Illi t-Tribunal sejjer issa jittratta l-aggravji mressqa mill-Kunsill.

Permezz tal-ewwel u t-tieni aggravji l-Kunsill isostni illi l-Awtorita` ma mxietx mal-prinċipju tal-*audi alteram partem* biex waslet għad-deċiżjoni tagħha, u wkoll li ma tatx raġunijiet għad-deċiżjonijiet tagħha, u kwindi ma segwietx il-prinċipji tal-ġustizzja naturali.

Illi l-materja dwar jekk il-prinċipji tal-ġustizzja naturali japplikawx fl-isfera tal-atti amministrattivi ġiet diskussa f'numru ta' sentenzi kemm tal-Qrati tagħna u kif ukoll dawk Ingliżi, u kif ukoll ġiet dibattuta minn diversi awturi legali, fosthom lokali.

Fl-istudju li sar minn Dr. Tonio Borg, intitolat *Judial Review of Administrative Action in Malta* insibu hekk:

Another application of the rules to entities which were not administrative tribunals occurred in the landmark judgment of Mary Grech v. Minister responsible for the Development of Infrastructure.[6] *A permit had been issued by the Planning Areas Permits Board (PAPB) to plaintiff under the condition that such permit could be withdrawn at any time. Subequently such permit was withdrawn, without any notice or opportunity given to plaintiff to make representations. Even though a right of appeal from such decision of withdrawal existed to the minister, the court ruled that the loose fashion in which proceedings took place in the absence of plaintiff and without any reasons registered in the records, made such appeal futile, and therefore applying the principles of natural justice, quashed such withdrawal. It then made the substantive ruling that:*

in matters where the rights of the individual were materially and substantially affected, as in cases where a building permit was withdrawn, it was a principle of justice that the authority withdrawing the permit had first of all to hear the party concerned before the effecting of such withdrawal (emphasis added).

Consequently, the decision of withdrawal was quashed, but the court did not take any decision on the permit itself since the matter was referred to the board for a final decision after observing the rules of natural justice.[7]

What is interesting is that for the first time the Court of Appeal announced the principle that the rules of natural justice apply each time a public officer or authority takes decisions in

[6] (CA) (29 January 1993).

[7] In *George Falzon v. Minister Rural Affairs and Environment et* (FH) (27 January 2010 (1010/03) (Mr Justice R. Pace) the fact that several warnings had been issued, and site inspections held indicated that an opportunity was given for an animal breeder to air his views prior to the withdrawal of his abbatoir licence; *in Agostino Bartolo et v. Director of Land et* (FH) (30 October 2015) (104/04) (Mr Justice A. Ellul), it was decided that the refusal to grant an encroachment permit on government land which had been so occupied under same title by father of applicant, was not covered by natural justice rules.

matters where the rights of the individual are materially and substantially affected. This pronouncement is important for in most cases dealing with natural justice, the issuse had been that of reviewing decisions of adminstrative tribunals which patently had a judicial function. Here the principles were extended to cover any decision by a public officer or authority which deals with the rights of individuals in a material respect.[8]

It-Tribunal jagħmel ukoll referenza għad-deċiżjoni fl-ismijiet ***Midi plc vs Awtorita` Dwar it-Trasport ta' Malta et*** deċiża mill-Prim'Awla tal-Qorti Ċivili *per* Onor. Imħallef Toni Abela fis-16 ta' Novembru, 2017, fejn intqal hekk:

24. Għandu jingħad li, l-prinċipji tal-Ġustizzja Naturali ma humiex iddettati, esklużi jew modifikati minn id il-bniedem. Dawn huma minquxa fil-kuxjenza ta' dak li għandu mis-sewwa u ġust. Ebda leġislazzjoni ma tista' tidderoga mill-ħtieġa tagħhom fejn din il-ħtieġa tirriżulta.

25. Għalhekk, konstatat dan il-punt mhux dejjem jiswa l-argument ikkostruwit fuq massimi bħal "ubi lex voluit dixit" jew " lex specialis derogat lex generalis". L-osservanza u ħarsien tal-prinċipji tal-Ġustizzja Naturali ma humiex degorabbli jew u l-anqas ma jistgħu jkunu eskluži fejn oġġettivament għandhom jitħarsu. Stabbiliti dawn il-punti, il-Qorti ser tikkonsidra jekk f'dan il-każ , il-prinċipji msemmija ġewx osservati.

....
F'dan l-istadju, huwa valevoli li ssir referenza għal dak li josserva Evans De Smith`s f'Judicial Review of Administrative Action (4th Edition pg. 196):-

"Natural Justice generally requires that the persons liable to be directly affected by the proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they might be in a position : (a) to make representations on their own behalf ; or (b) to appear at a hearing or inquiry (if one is to be held) ; and (c) effectively to prepare their own case and to answer the case (if any) they have to meet ... In a large majority of the reported cases where breach of the audi alteram partem rule has been alleged, no notice whatsoever of the action taken or proposed to be taken was given to the person claiming to be aggrieved, and failure to give him proper notice was tantamount to denial of an opportunity to be heard on that matter." (ara ukoll Sentenza tal-Qorti tal-Appell fl-ismijiet Paul Borg vs l-Awtorita` dwar it-Trasport Pubbliku tat-28 ta' Settembru 2012 u Rik. Nru. 1101/07TA 22 Sentenza tal-Prim Awla Qorti Ċivili tal-Kompjant Imħallef Ray Pace tas27 ta` Jannar 2011 fl-ismijiet Falzon vs Ministru għall-Affarijiet Rurali u l-Ambjent et)

39. Minn dan jemerġi, li skont De Smith, fiċ-ċirkostanzi fejn tassew ikun meħtieġ, l-avviż għandu jingħata lill-persuna mhux sempliċiment biex ikun mgħarraf, iżda biex ikollu l-opportunita` taħt forma jew oħra, jgħid tiegħu qabel u mhux wara li ssir il-ftira.

....

[8] See also *Paul Cassar noe v. Malta Transport Authority* (CA) (25 January 2013) (1146/06) regarding the revocation of a licence for a vehicle roadworthiness rest (VRT) garage: 'It has been proven in this case that there was a breach of the principle of natural justice for there was no fair hearing, no equality of arms, non-observance of the principle of *audi alteram partem* and also plaintiff was never informed that he was being charged with behaviour which if founf that he was responsible for, would entail a penalty of Lm50,000 which in fact was inflicted by the Authority's decision. 'See also *Francesco Fenech Services Ltd v. Director of Contracts* (FH) (22 October 2014) (2302/00) (Mr Justice S. Meli) where an order for resubmission of samples in a public works tendering process was deemed to be in violation of the rules of natural justice.

62. Il-fatt li liġi ma tipprovdix għal dan espressament, ma jeżonorax lill-Awtorita` milli tagħti l-minimu ta' smiegħ lill-persuna, meta ċ-ċirkostanzi hekk ikunu jiddettaw. Meta d-dritt ta' smiegħ ma jissemmiex espressament mil-liġi, l-Awtorita` ma tistax tiddeċiedi b'dinżinvoltura daqs li kieku l-prinċipji fuq imsemmija ma jesistux. Anzi, fejn il-liġi tibqa' siekta f'dan ir-rigward, bħal ma jagħmel artiklu 4(1) tar-Regolamenti, l-Awtorita` trid timxi b'aktar kawtela. Dan għaliex il-piż tad-diskrezzjoni huwa itqal u aktar onoruż minn meta ssmiegħ ta' liema xorta jkun, tiddettah espressament il-liġi.

Dan it-Tribunal jagħmel referenza wkoll għas-sentenza fl-ismijiet ***CCD Limited vs Awtorita` Dwar it-Trasport ta` Malta u b`digriet tal-1 ta` Novembru, 2010, l-Awtorita` għat-Trasport f`Malta assumiet l-atti minflok l-Awtorita` Dwar it-Trasport ta` Malta*** deċiża fis-17 ta' Ġunju, 2013, mill-Prim'Awla tal-Qorti Ċivili *per* Onor. Imħallef Joseph Zammit McKeon fejn intqal hekk:

*Huwa risaput li l-prinċipji tal-ġustizzja naturali huma dawk il-prinċipji **minimi** li għandhom ikunu osservati waqt proċeduri anke ta` entita' amministrattiva illi għandha l-kompitu li tiddeċiedi dwar fatti li fuqhom imbagħad Qrati tal-Ġustizzja għandha s-setgħa li tieħu deċiżjonijiet li jaffettwaw id-drittijiet tal-persuna. Il-prinċipji tal-ġustizzja naturali huma audi alteram partem u nemo judex in causa propria. Fil-kawża **"Board of Education v. Rice"** (1911 – AC 179), Lord Loreburn afferma li l-applikazzjoni tal-prinċipji tal-ġustizzja naturali 'is a duty lying upon everyone who decides anything'.*

Il-prinċipju audi alteram partem jirrikjedi li qabel ma tittieħed deċiżjoni amministrativa fil-konfront ta` persuna, din ta` l-aħħar mhux biss għandha tkun mgħarrfa, iżda għandha tingħata l-opportunita` li tgħid tagħha. Fuq kollox jingħata widen tassew għal dak li l-persuna konċernata għandha xi tgħid, u fl-istess waqt tingħata l-opportunita` li tiddefendi l-każ kif inhu xieraq.

*Fis-sentenza Ingliża **"Ridge v. Baldwin"** (1964 – AC 40) 'the right to a fair hearing' kien iddikjarat bħala 'a rule of universal application'. F`dik is-sentenza, Lord Reid qal hekk – before attempting to reach any decision they were bound to inform him of the grounds on which they proposed to act and give him a fair opportunity of being heard in his own defence'. U jkompli hekk – Accordingly, in my judgment, a local authority is under a duty, when dealing with entertainment licences, first, to inform the applicant of the substance of any objection or of any representation in the nature of any objection ... and secondly, to give him an opportunity to make representations in reply'.*

*Fis-sentenza **"Borg vs l-Awtorita' dwar it-Trasport Pubbliku"** deċiża fil-21 ta` Mejju, 2009, minn din il-Qorti diversament presjeduta **(PA/JRM)** [u konfermata mill-Qorti tal-Appell fit-28 ta` Settembru 2012] ingħad hekk dwar il-prinċipji tal-ġustizzja naturali –*

"Bil-kemm għandu jingħad li l-ħtieġa li t-tribunal jew awtoritajiet amministrattivi jħarsu b'mod skrupoluż it-tħaddim ta' dawn il-prinċipji hija waħda li m'għandux hemm disposizzjoni espressa tal-liġi sabiex wieħed japplikaha. It-tħaris ta' dawn il-prinċipji fit-tmexxija tal-amministrazzjoni pubblika għandu jkun il-kejl minimu li jiggarantixxi t-trasparenza u s-siwi tal-egħmil amministrattiv. Għall-kuntrarju in-nuqqas ta' tħaris ta' dawn il-prinċipji jwassal għall-irritwalita' tal-egħmejjel hekk imwettqa u għat-tħassir tagħhom."

*Fil-paġ 196 ta` **Evans De Smith`s Judicial Review of Administrative Action** (4th Edition) ingħad hekk –*

"Natural Justice generally requires that the persons liable to be directly affected by the proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they might be in a position : (a) to make representations on their own behalf ; or (b) to appear at a hearing or inquiry (if one is to be held) ; and (c) effectively to prepare their own case and to answer the case (if any) they have to meet … In a large majority of the reported cases where breach of the audi alteram partem rule has been alleged, no notice whatsoever of the action taken or proposed to be taken was given to the person claiming to be aggrieved, and failure to give him proper notice was tantamount to denial of an opportunity to be heard on that matter".

*Dan il-bran kien ċitat fis-sentenza **"Borg vs l-Awtorita` dwar it-Trasport Pubbliku"** [op. cit.] u fis-sentenza ta` din il-Qorti **[PA/RCP]** tas-27 ta` Jannar 2011 fil-kawża **"Falzon vs Ministru għall-Affarijiet Rurali u lAmbjent et".***

*Fil-ktieb **"Administrative Law" (H.W.R. Wade & C.F. Forsyth** – 10th Edition – Pg 428) kien osservat illi a proper hearing must always include a "fair opportunity" to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.*

*Fis-sentenza **"A & J Ta` Miema Ltd vs Kummissarju tat-Taxxa fuq il-Valur Miżjud"** deċiża minn din il-Qorti (Sede Kostituzzjonali) **(PAK/TM)** fl-14 ta' Ottubru, 2004 [u konfermata mill-Qorti Kostituzzjonali] kien ippreċiżat li "ovvjament, il-prinċipju audi alteram partem, ma jfissirx li l-parti milquta trid bilfors tinstema', iżda li tingħata l-opportunita' tressaq il-każ tagħha."*

*Fil-każ **"L`Alliance des Professeurs Catholiques de Montreal vs Labour Relations Board of Quebec"** (1953) riportat f`The Application of the European Convention Human Rights – J.E.S. Fawcett – Pġa 148, ingħad illi –*

"The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be at stake, is of universal equity. Nothing less would be necessary than an express declaration of the legislature to put aside this requirement, which applies to all courts and to all bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual."

*Fil-**Garner's Administrative Law** (8th Edition – B Jones and K Thompson - Butterworths – 1996) jinghad hekk –*

"An issue upon which the courts have failed always to express a consistent view is whether a successful audi alteram partem challenge requires that the court be satisfied that, had the applicant been given the full procedural protection to which he was entitled, the decision taken by the public authority might have been different in substance. Or, alternatively, is there such a thing as a "technical" breach of natural justice, in respect of which the court will grant a remedy in order to uphold procedural rights even though quite satisfied that the decision would have been the same even had the applicant been afforded a fair hearing. The difference between the two possible approaches is a fairly fundamental one, reflecting different ideas as to the aims of judicial review. Is the purpose of judicial review simply to "police" decisions which may be wrong or bad in substance because of procedural irregularities ; or is part of its purpose to prescribe standards of decision-making which it will enforce regardless

of whether the end result, when the decision is properly taken, is likely to be different in substance.
In principle there may be some attraction in the idea that the courts should intervene to protect procedural rights without seeking to pre-judge whether the breach of natural justice was "technical" or "substantial". There are, indeed, statements in some of the cases which lend support to this idea. However, the preponderance of authority seems now to point to the other way. This is perhaps inevitable. In particular, the discretionary nature of the various judicial review remedies, and the natural unwillingness of courts to seem to be acting in vain, combine to deprive of such a remedy the litigant who is perceived to have no chance of eventual substantive success. To an extent the issue becomes purely linguistic. Should one say that a technical breach of natural justice has occurred but that in the exercise of discretion no remedy will be granted ? Or should one say that because no substantial prejudice appears to have occurred there has been no breach of natural justice ?"

Kien sostna Lord Bridge fil-kawża ***"Lloyd vs McMahon"*** *tal-1987 ċitata f`paġna 335 tal-Judicial Review Handbook (1994) –*

"the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates"[9]

Illi dan it-Tribunal huwa konxju illi fil-passat ippronunzja ruħu dwar il-prinċipju tal-*audi alteram partem* għal dak li jirrigwarda diversi applikazzjonijiet li jiġu sottomessi quddiem l-Awtorita`. F'dawk id-deċiżjonijiet it-Tribunal kien tal-fehma illi meta wieħed jista' jissottometti applikazzjoni mal-Awtorita` huwa għandu kull opportuntita` li jagħmel is-sottomissjonijiet tiegħu mal-istess applikazzjoni u l-Awtorita` ma għandha ebda obbligu li tagħti xi smiegħ ulterjuri lill-applikanti. Madanakollu l-każ preżenti huwa differenti minn meta wieħed jissottometti applikazzjoni biex pereżempju jitlob li jpoġġi mwejjed u siġġijiet fuq barra ta' xi stabbiliment jew inkella fejn wieħed jitlob li art pubblika toħroġ b'sejħa għall-offerti.

Fil-każ odjern għandek Kunsill Lokali li jgawdi minn kirja favur tiegħu ta' ġnien pubbliku. Fil-waqt li hu minnu li skont klawsola 2 tal-kuntratt ta' kiri, il-Gvern jista' jieħu lura l-istess art jew parti minnha jekk ikollu bżonnha, dan ma jfissirx li jista' jagħmlu mingħajr ma jinforma b'mod adegwat favur min tkun ingħatat l-istess konċessjoni. Filwaqt li l-Awtorita` tisħaq illi l-Kunsill kien ilu jaf li l-pompa tal-petrol kienet se tiġi rilokata, ma jirriżultax illi l-istess Awtorita` qatt daħlet f'xi diskussjoni mal-Kunsill dwar dan il-fatt. It-Tribunal huwa tal-fehma illi l-Kunsill kien jaf li kien hemm proposta din ir-rilokazzjoni anke għaliex mill-minuti tal-Kunsill tat-3 ta' Ġunju 2021 jirriżulta li ġie rilevat is-segwenti:

[9] Enfasi tat-Tribunal

31.2.4 Is-Sindku kompla jispjeġa kif il-Kunsill għandu Kuntratt tad-Devoluzzjoni tal-Ġnien, li sar fis-sena 2000, li jgħid il-Lands jista' jieħu lura parti jew il-ġnien kollu fuq notifika ta' tlett xhur. Dan bħal ma jista jiġri fil-kas tal-pompa, fejn tista' tittieħed area ta' madwar disa' mija u tletin metru kwadru (930m2). Is-Sindku spjega li skond il-kuntratt il-Lands tista tieħu lura l-Ġnien jew partijiet minnu u tgħaddieħ skond il-proċedura lil ħaddieħor.[10]

Illi għalhekk jirriżulta ċar illi l-Kunsill kien konxju tal-possibilita` li dak komunikat lilu fid-deċiżjoni appellata seta' jsir. Pero` l-kwistjoni hija oħra. Il-kwistjoni hija jekk l-Awtorita` kellhiex tal-inqas tagħti opportunita` lill-Kunsill jagħmel is-sottomissjonijiet tiegħu qabel ma tasal għad-deċiżjoni tagħha. Fil-fehma tat-Tribunal dan kellu jsir anke sabiex l-Awtorita` tkun f'posizzjoni aħjar li taqdi d-doveri legali tagħha. Dan ma jfissirx illi l-Kunsill neċessarjament irid jingħata smigħ fiżiku imma jistgħu isiru anke sottomissjonijiet bil-miktub. Imma tal-inqas, tenut kont, tal-materja in eżami, l-Kunsill, li f'idejh hija afdata l-amministrazzjoni tal-istess ġnien kellu dritt isemma' leħnu mal-Awtorita`. Illi għaldaqstant it-Tribunal iqis li l-Awtorita` naqset milli tħares il-prinċipju tal-*audi alteram partem* qabel ma waslet għad-deċiżjoni tagħha.

Illi permezz tal-ewwel aggravju l-Kunsill jisħaq ukoll li huwa ma ngħatax opportunita` tad-dritt tal-ewwel rifjut sabiex jagħmel offerta għall-kirja tal-ġnien kollu. Illi t-Tribunal iqis li dan l-aggravju huwa wieħed fieragħ stante li d-dritt tal-ewwel rifjut jiskatta wara li l-Awtorita` toħroġ art pubblika b'sejħa għall-offerti. Lit-Tribunal ma jirriżultalux illi l-Awtorita` ħarġet xi sejħa għall-offerti u kwindi ma skatta ebda dritt tal-ewwel rifjut.

Illi permezz tat-tieni aggravju l-Kunsill jilmenta illi d-deċiżjoni appellata mhix motivata u dan imur kontra l-prinċipju ta' ġustizzja naturali tad-*duty to give reasons*. Min-naħa tagħha l-Awtorita` intimata saħqet illi d-deċiżjoni appellata kienet motivata u dan stante li ġiet ċitata klawsola 2 tal-kuntratt ta' kiri bejn il-partijiet.

Illi għal darb'oħra t-Tribunal isib li l-Kunsill għandu raġun f'dan l-aggravju. Illi filwaqt li kif ingħad hawn fuq, klawsola 2 tal-kuntratt bejn il-partijiet jagħmilha ċara illi l-Gvern jista' jxolji l-kirja jew parti mill-kirja jekk ikollu bżonn l-art in kwistjoni, dan ma jfissirx illi m'għandu ebda obbligu jagħti raġuni xierqa għal tali terminazzjoni.

It-Tribunal jagħmel referenza għal dak espost mill-awturi Wade & Forsyth fil-ktieb **Administrative Law**, u li fil-fehma tat-Tribunal jgħodd ukoll għad-Dritt Amministrattiv nostrali, u ċioe`: *the principles of natural justice do not, as yet,*

[10] A fol. 554

include any general rule that reasons should be given for decisions.[11] *Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others. "No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions.*[12]

…

Notwithstanding that there is no general rule requiring the giving of reasons,[13] *it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully. The House of Lords has recognised "a perceptible trend towards an insistence on greater openness … or transparency in the making of administrative decisions"*[14] *and consequently has held that where, in the context of the case, it is unfair not to give reasons, they must be given.*[15]

…an important consideration underlying the extension of the duty to give reasons, referred to in many cases, is that in the absence of reasons the person affected may be unable to judge whether there has been "a justiciable flaw in the [decision making] process";[16] *and thus whether an appeal, if available, should be instituted or an application for judicial review made. Since today there are few exercises of governmental power which are not subject to judicial review, it*

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[11] *R.v. Home Secretary ex p. Doody [1994] 1 AC 531 at 564E (`the law does not at present recognise a general duty to give reasons for administrative decisions' (emphasis added). No general duty has developed since ex p. Doody: R.v. Minister of Defence ex p. Murray [1998] COD 134.*

[12] *Administration under Law (a JUSTICE booklet), 23.*

[13] *The suggestion, in R. v. Lambeth LBC ex p. Walters [1994] 26 HLR 170, that there was such a duty has been disapproved twice by the Court of Appeal (R. v. Kensington and Chelsea Royal LBC ex p. Grillo (1996) 28 HLR 94 and R. v. Home Secretary ex p. Duggan [1994] 3 All ER 277). Judges, but not magistrates, are under a general duty to give reasons. Flannery v. Halifax Estate Agencies Ltd [2000) 1 WLR 377 at 381.*

[14] *Ex p. Doody (above)*

[15] *Moreover, the authority seeking not to give reasons must show that that procedure is not unfair: ex p. Doody at 561A*

[16] *Ex p. Institute of Dental Surgery at 256 approved in ex p. Matson at 776 and ex p. Murray at 136. And in ex p. Doody (above) Lord Mustill said (at 565) `To mount an effective attack on the decision…[the person affected] has [in the absence of reasons] virtually no means of ascertaijing whether…the decision-making process has gone astray`. See also R. v. Inland Revenue Commissioners ex p. Coombe & Co. (1989) 2 Admn. LR 1 (order quashed since Court cannot perform its review function in absence of reasons).*

will be rare that a person affected by a decision – for which reasons were not given – will not be able to say that the absence of reasons has denied him effective recourse to judicial review. A general duty to give reasons is latent in this argument; and the courts seem willing to see sufficient weight given to it to enable such a duty to develop.[17]

…

The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise. Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them[18] .

F'dan il-kuntest it-Tribunal jagħmel referenza għal deċiżjoni tal-Qorti Suprema tar-Repubblika tal-Irlanda fil-każ fl-ismijiet **Ghandi Nawaf Mallak vs The Minister For Justice, Equality and Law Reform** deċiża fis-6 ta' Diċembru 2012, fejn ġie rilevat is-segwenti:

40. The Minister refused to give any reason for refusing the application for a certificate of naturalisation in this case. The reports record many judicial statements to the effect that there is no general or universal rule of natural justice requiring the makers of administrative decisions to give their reasons. On the other hand, there is no shortage of cases in which decisions have been held to be defective for failure to give them. This is the problem here.

41. Before grappling with that issue, I would like to address two points which are at the forefront of the Minister's submissions and which have recurred in several of the High Court decisions including that in the present case, as grounds for dispensing with the need to give reasons. Firstly, it is said that, where a decision is to be made in the absolute discretion of the decision-maker, it follows necessarily, meaning that it is a simple corollary of that fact, that no reason need be given for it. Secondly, it is argued that the same result flows from the fact that the grant to a non-national of a certificate of naturalisation is a matter of benefit or privilege rather than of right.

42. Where the decision being made is one which depends on the exercise of the "absolute discretion," of the decision maker, according to the first argument, it follows automatically from the very language used that no reason need be given. As it was put by the learned High Court judge in the present case, "quite literally……the Minister does not need to have or to give any reason for refusing an application for a certificate." But there is a difference between having a reason and disclosing it.

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[17] *Significantly, Lord Neill, for long a proponent of a general statutory duty to give reasons, now favours continued judicial development (in `Duty to Give Reasons` in Forsyth and Hare (eds.), The Glden Metwand and the Crooked Cord (1998) , 183)*

[18] Administrative Law, H.W.R. Wade & C.F. Forsyth, 10th Edition, pg. 436 sa' 439

43. It cannot be correct to say that the "absolute discretion" conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power. Leaving aside entirely the question of the17 disclosure of reasons to an affected person, it seems to me axiomatic that the rule of law requires all decision-makers to act fairly and rationally, meaning that they must not make decisions without reasons. As Henchy J. put it, in a celebrated passage in his judgment in State (Keegan) v Stardust Victims' Compensation Tribunal [1986] I.R. 642 at page 658, "the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

44. In similar vein but with slightly different emphasis, Walsh J., in his judgment in East Donegal Co-operative Mart v Attorney General [1970] I.R. 317 at 343-4 said of the powers conferred on a Minister, under consideration in that case, which were exercisable "at his discretion" or "as he shall think proper" or "if he so thinks fit" are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will."

45. The fact that a power is to be exercised in the "absolute discretion" of the decision-maker may well be relevant to the extent of the power of the court to review it. In that sense, it would appear potentially relevant principally to questions of the reasonableness of decisions. It could scarcely ever justify a decision-maker in exceeding the limits of his powers under the legislation, in particular, by taking account of a legally irrelevant consideration. It does not follow from the fact that a decision is made at the absolute discretion of the decision-maker, here the Minister, that he has no reason for making it, since that would be to permit him to exercise it arbitrarily or capriciously. Once it is accepted that there must be a reason for a decision, the characterisation of the Minister's discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply. In this connection I agree with the following remarks of of Hogan J., regarding the provision under consideration in this case, in his judgment in Hussain v. Minister for Justice [2011] IEHC 171; "This description nevertheless cannot mean, for example, that the Minister is freed from the obligations of adherence to the rule of law, which is the very "cornerstone of the Irish legal system": Maguire v. Ardagh [2002] 1 I.R. 385 at 567, per Hardiman J. Nor can these words mean that the Minister is free to act in an autocratic and arbitrary fashion, since this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution."

46. So far as the second issue is concerned, it can be accepted that the grant or refusal of a certificate of naturalisation is, at least in one sense, a matter of privilege rather than of right. The appellant is not a person who, by reason of birth in Ireland or by reference to his parentage is entitled, as a matter of right, to Irish citizenship. In the words of s. 14 of the Act, he is a non-national and the grant of the status of citizen upon him is within the discretion of the State. Costello J. said in Pok Sun Shum v. Ireland, cited above, regarding the applicant in that case, that it was relevant to bear in mind that "the Minister was conferring a benefit or privilege on the applicant…" That was undoubtedly a major reason for his conclusion that there was no obligation to give reasons. On the other hand, that learned judge was quite clear in stating that the applicant had a right to apply to the court for judicial review. Bearing in mind that the

appellant is a non-national, it is instructive to recall the remarks of Keane C.J. concerning the rights of access to the courts of non-citizens, when delivering the opinion of this Court In the Matter of Article 26 of the Constitution and in the Matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360 at page 385: "It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights…… It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens. However, where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such decisions must be taken in accordance with the law and the Constitution. It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective."

47. The mere fact that a person in the position of the appellant is seeking access to a privilege does not affect the extent of his right to have his application considered in accordance with law or to apply to the courts for redress. The Act of 1956 establishes a legal procedure permitting non-nationals, subject to compliance with a number of conditions, to apply for certificates of naturalisation. The appellant enjoys the status of a refugee, because he has been so declared by the Minister. By virtue of s. 3 of the Refugee Act 1996, he enjoys a number of specific legal rights, including the right to reside in and travel to and from the State. Specifically, he has the right of "access to the courts in the like manner and to the like extent in all respects as an Irish citizen.." (s. 3(2)(v)). Relevantly, for the purposes of this case, he enjoys the legal right to apply for a certificate of naturalisation. Article 34 of the Geneva Convention (see par. 16 above) would appear to encourage contracting states to grant naturalisation to those to whom the have granted refugee status. It is not contested that the Minister is obliged, in processing such applications, to act in accordance with the law. The Minister accepts that, in principle, his decisions are open to review and, in certain circumstances, applications for review have been successful in the High Court. A distinction has been made in some of the cases, so far as the power of review is concerned, between cases where the Minister finds that an applicant has failed to comply with one of the statutory conditions in s. 15(1) and what might be called his more general "absolute discretion."

Illi dan it-Tribunal jagħmel referenza wkoll għas-sentenza ***Rita Vella vs Tabib Prinċipali tal-Gvern et*** deċiża mill-Prim'Awla tal-Qorti Ċivili *per* Onor. Imħallef Joseph R. Micallef u kif ikkonfermata mill-Qorti ta' l-Appell fis-26 ta' Jannar 2022:

Illi llum il-ġurnata huwa stabbilit li biex jitqies li awtorita' tkun qdiet il-funzjoni tagħha tajjeb, huwa mistenni illi dik l-awtorita' tgħid lill-persuna mhux biss x'kienu r-raġunijiet li wasslu għad-deċiżjoni li l-istess awtorita' tkun ħadet fil-konfront tagħha[19], iżda wkoll li l-persuna tingħata lopportunita' illi ssemma' leħenha[20], u f'każ fejn il-persuna ma tkunx taf x'inhuma r-raġunijiet li wasslu lill-awtorita' toħroġ l-ordni fil-konfront tagħha, l-awtorita' għandha tagħti lil dik il-persuna l-opportunita' xierqa li tagħmel l-osservazzjonijiet tagħha[21];

[19] T.R.A. GV 24.1.2013 fil-kawża fl-ismijiet Anthony Camilleri vs Kummissarju tat-Taxxi Interni
[20] P.A. 29.11.2011 JZM fil-kawża fl-ismijiet Carmel D'Amato et vs L-Awtorita' tat-Turiżmu ta' Malta
[21] App. Ċiv. 28.6.2013fil-kawża fl-ismijiet Boris Arcidiacono et vs Salvu Schembri et

Illi wara li t-Tribunal ħa dan kollu in konsiderazzjoni huwa tal-fehma illi l-Awtorita` ma tatx raġunijiet suffiċjenti għad-deċiżjoni meħuda minnha. Illi kif ġie sottomess fit-trattazzjoni orali, u anke ġie ppruvat bil-minuti esebiti, il-Kunsill kien ġie rinfaċċjat b'rikjesta oħra għat-teħid ta' biċċa mill-ġnien għall-proġett ieħor apparti dak tal-pompa tal-petrol. Kwindi l-Kunsill kellu dritt ikun jaf ir-raġuni wara t-terminazzjoni ta' parti mill-kirja. Kwindi t-tieni aggravju qiegħed jiġi milqugħ.

Illi jonqos li jiġi trattat it-tielet aggravju, u ċioe li l-Awtorita` naqset mill-obbligi tagħha li tamministra l-proprjeta` pubblika bl-aħjar mod u waslet għad-deċiżjoni tagħha a bażi ta' kunsiderazzjonijiet irrilevanti, arbitrarji u mhux xierqa. Illi l-Kunsill isostni li l-Awtorita` ma ħaditx in konsiderazzjoni li l-ġnien in kwisjtoni huwa l-uniku post miftuħ fil-lokalita` tal-Gżira. Di piu`, is-Sindku Conrad Borg Manche ippreżenta studju li kkummissjona l-Kunsill fejn sar assessjar tal-*benzene concentrations* fil-viċinanza ta' *Manuel Island Fuel Station.*

Illi f'dan l-istadju t-Tribunal iħoss li dan l-aħħar aggravju huwa wieħed intempestiv. Dana għaliex jikkonfliġġi mal-ewwel żewġ aggravji stante li ladarba l-Kunsill sostna li ma ngħatax smiegħ u ma kienx jaf ir-raġunijiet wara d-deċiżjoni appellata, allura ma jistax iħossu aggravat mir-raġunijiet li sawwru d-deċiżjoni appellata, u dan sempliċement għaliex ma setax *a priori* kien jaf x'kienu l-kunsiderazzjonijiet li l-Awtorita` ħadet qabel waslet għad-deċiżjoni appellata. Kien biss fil-kors ta' dawn il-proċeduri li ntefa' dawl dwar kif l-Awtorita` waslet għad-deċiżjoni tagħha. Siccome` dan it-Tribunal se jiddikjara d-deċiżjoni tal-Awtorita` bħala waħda irrita u nulla, iħoss li jkun għaqli li jħalli impreġudikata l-materja dwar jekk l-istess deċiżjoni kinitx waħda bażata fuq kunsiderazzjonijiet irrilevanti, arbitrarji u/jew mhux xierqa. Għaldaqstant dan l-aggravju qiegħed jiġi miċħud.

Illi fl-aħħar nett dan it-Tribunal jagħmel referenza għas-sentenza ġia ċitata iktar 'il fuq ***Midi plc (C 15836) vs Awtorita` Dwar it-Trasport ta' Malta*** fejn intqal hekk:

40. Irid ukoll jiġi rilevat li l-prinċipji ta' Ġustizzja Naturali huma imprexxendibbli fis-sens, li l-Qorti l-anqas ma tista' tidħol fl-argument jekk xorta kienx jintlaħaq l-istess riżultat anke kieku ma ġewx osservati dawn il-prinċipji. ***Lord Wright*** *fil-kawża Ingliża,* ***General Medical Council v. Spackman, deċiża mill-House of Lords fl-1943,*** *osserva hekk dwar dan il-punt:- "If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."*

DECIDE

Għaldaqstant it-Tribunal, għar-raġunijiet hawn fuq premessi, qiegħed jilqa' l-ewwel żewġ aggravji tal-Kunsill rikorrent filwaqt li jiċħad it-tielet aggravju u konsegwentement jiċħad l-eċċezzjonijiet tal-Awtorita` intimata sa fejn dawn huma kompatibbli ma' dak hawn fuq deċiż. Kwindi t-Tribunal qiegħed jannulla d-deċiżjoni tal-Awtorita` intimata datata 11 ta' April, 2022, annessa bħala Dokument 2 mar-rikors promutur.

Spejjeż a karigu tal-Awtorita` intimata.

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

_____

Diane Gatt
Deputat Reġistratur