



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-17 ta' Gunju, 2015

Appell Civili Numru. 8/2015

Frankie Calleja

vs

L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Frankie Calleja tas-16 ta' Marzu 2015 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-26 ta' Frar 2015 rigward applikazzjoni PA 1221/05;

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Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

Rat l-atti kollha u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra

Ra l-aggravji tal-appell prezentati fis-sottomissjoni tas-6 ta' Dicembru 2013 hekk kif gejj:

“On behalf of my client, Mr. Frankie Calleja, I am appealing against the first imposed condition of the full development permission dated 26 August 2013. This condition should have been deleted as per previous appeal decision of P AB 245/08 and as confirmed by the Court of Appeal on 20 June 2013. The Directorate's decision to include this condition goes against the spirit of both the previous sentences.

In 2003 my client, a full time farmer tilling over 50 tumoli of land, applied to construct a swimming pool in his garden. It took the Directorate some 2 years before we were informed that he had to prove that his residence had a building permit otherwise his application would be refused. The applicant, now in his 40's, has been living in his house since he was 13 years old. Fortunately his father had kept a copy of the building permit and plans of the house that he himself had built. The Directorate insisted that Mr. Frank Calleja had to apply to sanction the minor differences, which he did in 2005 (PA 1221/05) and is the subject application of this appeal.

Mr. Calleja was asked by MEPA, in intermittent breaks, to produce his ID card details proving he resides in the house, copies of electoral registers, water and electricity bills, notarial contracts, pitkali returns, land registry plans showing the fields he tilled amongst other documents. In short this process took another 3 years to complete and his application, for the sanctioning of the house and not of the swimming pool, was approved 6-0 by the DCC. The only 2 conditions imposed by the DCC were:

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1. Payment of a fine of €2329.37 which was paid (even though applicant had nothing to do with the construction of the house).
2. The submission of a list of agricultural properties and glasshouses which was also sent.

No other conditions were imposed; so much so that minute 75 of the MEP A file states that the conditions were satisfied and that "the permit could be issued". This was dated 9 April 2008 and signed by the Chairperson of the DCC.

Minute 76 stated that the fine was settled and minute 77 confirmed the issue of the approved drawings.

On 13 June 2008 the applicant was sent a letter from MEP A requesting him to comply with condition 2 which was basically the deed restricting his ownership rights. On 20th June 2008 the undersigned replied to this letter and eventually appealed (PAB 245/08). The appeal, which was upheld, was made against the legality of this procedure and against the condition itself.

The appeal was decided in his favour four years later in 2012; however, the legal office at MEPA appealed this Appeals Board decision in the Courts of Law, and lost the case again on 20 June 2013.

The Directorate issued the permit on 26th August 2013 but incorporated the same condition (1) that the residence could only be used by a farmer, widow or widower or a resident dependent thereby by-passing the notarial deed but effectively imposing the same condition in spirit as the previously appealed one. This treatment of my client's application by the Directorate can best be described as oppressive, arrogant and, in the light of eight years of procedures, also unkindly bureaucratic.

It is this same condition 1 that forms the subject of this appeal.

The main documents that are referred to above are attached in duplicate."

Ra r-risposta tal-Awtorita' prezentata lil dan it-Tribunal fl-20 ta' Frar 2014 u li taqra hekk kif gej:

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“On a preliminary issue this appeal is invalid since it is not permissible to appeal from a decision of the Environment and Planning Review Tribunal to the same Tribunal; even though this Tribunal is constituted by different members. The only remedy that the appellant had was to appeal to the Court of Appeal, if appellant was not satisfied with the decision i.e. that while the tribunal had substituted the condition appealed from:

“...l-obbligazzjonijiet li l-Awtorita tista timponi skond l-att principali ma jinkludux limiti ghad-dritt ta' bejgh ta' propjeta. Ghalhekk Policy 2.2A tindika li “ the applicant will be required to enter into a planning obligation to tie the ownership and occupation of the dwelling to that of the farm so that the residential building is only sold/leased or transferred to a registered full time farmer in conjunction with the cultivated arable land as identified at the time of the issue of the permit for such dwelling and, in that case the farm continues in operation” hija ultra vires ghax tmur oltre dak li l-artikli fuq imsemmija tal-Kap. 356 u Kap 504 jipprovdu ...”

It ordered the issue of the permit with the conditions as imposed by the directorate in blue 78 – and blue 78 specifically includes the condition which is now the merits of this appeal –

Condition 1 states the following:

The residential occupation of the property shall be limited to:

- an arable farmer, registered with the Department of Agriculture, working, or last working before retirement, in the locality, or
- a widow or widower of such a person, and to any resident dependants.

Without prejudice to the above this permit was issued exactly as ordered by the Environment and Planning Review Tribunal i.e. removal of condition 2 in first permit and all other conditions listed in document blue 78 to remain the same. Consequently the permit was issued exactly in accordance with the Tribunal's decision.

Moreover, it is to be noted that while the authority had appealed to the Court of Appeal from this decision on the basis that the Tribunal did not have jurisdiction to declare whether certain policies were ultra vires or unconstitutional, the Court of

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Appeal while agreeing completely with the submissions made by the Authority, declared that the decision was just, in that it did not allow the inclusion of the condition as specified in Policy 2.2A, but only to the conditions as specified in document blue 78 i.e. without imposing any transfer on property; the decision simply specified that such permit can only be utilised by a full time farmer, the widow or widower and dependants.

Consequently this appeal should be dismissed both procedurally and on the merits, which merits were in fact upheld by the Court of the Appeal itself and the permit issued both in terms of the Tribunal decision and in terms of the Court of Appeal decision.”

It-Tribunal ra l-Atti kollha ta' dan l-Appell, l-Atti tal-Appell numru 245/08, kif ukoll il-PA file numru 1221/05;

Ikkunsidra ulterjorment:

Illi dan l-appell jirrigwarda kundizzjoni numru 1 fil-permess PA 1221/05 datat 26 t'Awissu 2013 mahrug wara li l-Bord tal-Appell b'decizjoni tas-16 ta' Marzu 2012 laqgħa l-appell kontra kundizzjoni ohra dwar impozizzjoni ta' Planning Obligation li giet komunikata lill-appellant b'ittra tas-26 ta' Settembru 2008.

Illi f'din id-decizjoni, il-Bord tal-Appell ordna li jinhareg il-permess numru PA 1221/05 skont “il-pjanti għa approvati mill-Kummissjoni (u cioe Site Plan a folia Red 1C, Block plan a folio Red 53K u pjanti a folio 1E) u dan biss bil-kundizzjonijiet elenkati fid-dokument li jinsab a folio Blue 78 tal-inkartament tal-applikazzjoni PA 1221/05.” (emfasi mizjuda)

Illi dan l-appell gie intavolat wara li l-appellant ircieva l-permess, hekk kif l-istess decizjoni tal-Bord tal-Appell giet konfermata mill-Qorti tal-Appell b'decizjoni tal-20 ta' Gunju 2013. L-appell huwa kontra l-impozizzjoni ta' kundizzjoni numru 1 li tgħid hekk:

“The residential occupation of the property shall be limited to:

- a) An arable farmer, registered with the Department of Agriculture, working, or last working before retirement, in the locality, or
- b) A widow or widower of such a person, and to any resident dependents.”

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Illi qabel ma jidhol fl-aggravji fuq il-mertu mressqa mill-appellant, dan it-Tribunal ser jistharreg il-kwistjoni preliminari sollevata mill-Awtorita' jekk dan l-appell giex intavolat korrettement quddiem dan it-Tribunal.

Illi il-kwistjoni mqajma mill-Awtorita' hija semplici: wara li jkun inhareg permess mill-Awtorita' fuq l-iskorta ta' decizjoni ta' dan it-Tribunal, jew f'dan il-kaz mill-Bord tal-Appell dwar l-ippjanar, jista jerga jsir Appell?

Illi dan it-Tribunal gja kellu okkazjoni li jikkunsidra eccezzjoni simili bhal fil-kaz ta' Clive Tonna kontra l-Awtorita', fejn f'decizjoni preliminari tas-16 ta' Settembru 2014, dan it-Tribunal spjega illi:

“Minghajr ma wiehed jidhol fil-mertu ta' dak deciz mit-Tribunal diversament Kompost fl-appell numru 409/11, dan it-Tribunal irid jezamina, prima facie, l-ilment tal-Appellanti odjern. F'dan l-Appell dak li dwaru qed jilmenta l-Appellanti huwa li l-pjanti li gew eventwalment accettati sabiex jiffurmaw parti mill-Permess 2146/07 ma jikkonformawx mad-decizjoni mehuda mit-Tribunal stess. Dan ifisser, skond l-Appellanti, li, stante din in-non konformita', huwa ghandu dritt li jaccedi ghal dan it-Tribunal sabiex jikkoregi dak il-hazin li sar (hazin naturalment b'mod soggettiv ghall-Appellanti).

L-Awtorita' semplicement tghid li dan ma jstax isir. Id-dilemma legali hija semplici. Il-ligi tispecifica li minn decizjoni moghtija mit-Tribunal hemm biss Appell lil Qorti tal-Appell. Dwar dan ma hemm ebda dubju. Izda l-ilment tal-Appellanti huwa kemm xejn differenti. L-Appellanti jaqbel mad-decizjoni moghtija mit-Tribunal IZDA ma jaqblix mal-pjanti li finalment gew firmati bhala dawk li jiffurmaw il-Permess 2146/07.

ANZI l-Appellanti jghid li dawn il-pjanti ma jirrispekkjawx dak deciz mit-Tribunal. Dan huwa l-punt. Fejn ikun hemm sitwazzjoni ta' decizjoni tat-Tribunal u pjanti li huwa allegat li ma jaqblux mad-decizjoni moghtija, il-ligi x'taghti bhala rimedju.

L-uniku rimedju miftuh lill-Appellanti kien propjru li jaghmel dan l-Appell fis-sens li huwa hekk biss li l-Permess mahrug jista jigi evalwat. Huwa minnu li l-Pjanti lmentati kienu ffirmati mic-Chairman tat-Tribunal li jkun ha d-decizjoni izda, din il-firma hija bizzejjed biex tnaqqas mid-dritt li jista talvolta jkollu l-Appellanti.

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Il-punt irid ikun car: It-Tribunal mhux ser jidhol fid-decizjoni per se. Id-decizjoni hi li hi u t-Tribunal ma ghandu ebda dritt li jissindika jew ibiddel din id-decizjoni. Jista biss, fil-kuntest tal-Appell odjern jara fejn l-Appellanti jghid li l-pjanti ma jaqblux mad-decizjoni fl-Appell u jikkonferma jekk dan huwa minnu jew le.”

Fid-decizjoni fl-ismijiet Avukat Dottor John Bonello et kontra l-Awtorita' tal-14 ta' Novembru 2013, dan it-Tribunal laqa' l-aggravju tal-appellant li l-Awtorita' imponiet kundizzjoni li ma kienetx kontemplata fid-decizjoni tat-Tribunal fuq l-istess applikazzjoni. F'dan il-kaz it-Tribunal ghamilha cara li 'mhux ser jidhol fil-mertu tad-decizjoni billi dak il-mertu jinsab gja deciz. Dan it-Tribunal irid jezamina id-decide ta' dik id-decizjoni u jara jekk fil-permess li effettivamente inhareg dik id-decizjoni gietx riflessa sewwa.'

Illi prima facie il-kaz huwa simili ghal dawk citati supra fejn l-appellant qed jilmenta l-kundizzjonijiet fil-permess ma jirriflettux dak deciz mil-Bord tal-Appell, u ghaldaqstant qed jichad l-eccezzjoni preliminari tal-Awtorita'.

Illi rigward il-kundizzjoni numru 1, l-appellant qed jinsisti li din ukoll kellha tigi mhassra bhal ma gie deciz fid-decizjoni tal-Bord tal-Appell hekk kif konfermata mill-Qorti tal-Appell, peress li din il-kundizzjoni ma tohrogx mid-decizjoni tal-Kummissjoni tal-Kontroll tal-Izvilupp tas-6 ta' Marzu 2008.

Illi l-Awtorita' qed tinsisti li din il-kundizzjoni mertu ta' dan l-appell tohrog mid-dokument a fol 78 fl-inkartament tal-PA 1221/05 hekk kif ordnat lilha mill-Bord tal-Appell.

Minn ezami tad-decizjoni tal-Bord tal-Appell, johrog evidenti li l-permess kellu johrog skont il-kundizzjonijiet elenkati fid-dokument a fol 78 fl-inkartament tal-PA 1221/05, li tinkludi l-kundizzjoni numru 1 li hija l-mertu ta' dan l-appell.

Illi l-Bord tal-Appell ezamina sew dan id-dokument fejn fl-istess decizjoni gie spjegat dan li gej:

“Dan il-Bord wara li ra bir-reqqa l-inkartamenti tal-appell u tal-applikazzjoni wasal ghal konkluzjoni li bhala stat ta' fatt illi minkejja dak li ssottomettiet l-Awtorita, meta il-Kummissjoni kienet ddecidiet li tilqa' l-appell u specifikatament imponiet iz-zewg kundizzjonijiet fuq imsemmija hija ma kienetx qed tikkunsidra li timponi dik il-kundizzjoni li eventwalment giet avzata lill-appellant bl-ittra tat-13 ta' Gunju, 2008 u

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eventwalment notifikata lilu bl-ittra tas-26 ta' Settembru, 2008. Di fatti l-ewwel abbozz tal-permess li jinsab a folio Blue 78 tal-inkartament tal-applikazzjoni ma fihex tali kundizzjoni. Qari tal-minuti fl-inkartament tal-applikazzjoni bhal per eżempju minute 79 juri bic-car illi l-Area Manager involut, li originarjament kien irediga l-abbozz tal-permess a folio Blue 78 minghajr il-kundizzjoni in kwistjoni, issa kien qiegħed jiddubita x'kienet iddecidiet il-Kummissjoni u jagħti zewg eventwalitajiet. Kien f'minute 80 li hemm riportat li l-Kummissjoni ddecidiet li ddahhal din il-kundizzjoni għida. Għalhekk dan il-Bord hu konvint illi f'dawn ic-cirkostanzi meta l-Kummissjoni ddecidiet li jinħareg il-permess fis-6 ta' Marzu, 2008 hija ma kinitx la b'mod esplicitu u lanqas implicitu qed timponi tali kundizzjoni."

Illi hawnhekk johrog evidenti li l-Awtorita' segwiet tajjeb l-ordnijiet magħmula minnha mill-Bord tal-Appell, u l-kundizzjoni numru 1 hija l-istess kundizzjoni li hija mnizzla fid-dokument a fol 78 imsemmi fid-decizjoni tal-Bord tal-Appell.

Illi b'differenza tal-kazijiet ta' Clive Tonna, u f' tal-Avukat Dottor John Bonello et, f'dan il-kaz l-appellant ma jistax jargumenta li b'xi mod qed ihossu sorpriz b'tali kundizzjoni, meta l-istess kundizzjoni tohrog minn dokument, ossia dokument a fol 78 fl-inkartament tal-PA 1221/05, li kien jinsab fl-atti tal-istess appell li issa qed jerga jsir appell minnhu.

F'dan il-kaz, dak li qed jitlob l-appellant huwa ezami mill-gdid tad-decizjoni tal-Bord tal-Appell li certament dan it-Tribunal m'għandhux tali kompetenza, meta skont il-ligi l-decizjoni tal-appell hija wahda finali, bi dritt tal-appell fuq punt ta' ligi fil-Qorti tal-Appell.

Għal dawn il-motivi, dan it-Tribunal jiddikjara dan l-appell bhala wieħed irritu u null u konsegwentament jichad l-istess.

Ikkunsidrat

L-aggravji tal-appellant hu s-segwenti:

1. It-Tribunal iddecieda hazin meta sostna li dan kien appell quddiem l-istess Tribunal mid-decizjoni tiegħu stess meta hemm biss appell quddiem il-Qorti tal-Appell minn decizjonijiet tat-Tribunal. Bhala principju t-Tribunal kien korrett izda dan ma hux appell mid-decizjoni tat-Tribunal izda mill-agir tal-Awtorita fil-hrug tal-permess biex it-Tribunal jiddetermina jekk il-

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kundizzjoni imposta mill-Awtorita kinitx tirrifletti dak deciz mit-Tribunal. Permess mahrug mill-Awtorita hu applikabbli quddiem it-Tribunal u ghalhekk hemm appell bhal kaz in kwistjoni quddiem it-Tribunal. F'dan il-kaz l-Awtorita regghet imponiet kundizzjoni fil-hrug ta' permess li kien fil-fatt is-soggett ta' appell quddiem it-Tribunal li iddecieda li ma kellhiex tigi imposta. L-appellant ma jistax jithalla bla rimedju u hi diskriminatorja.

Hi l-fehma tal-Qorti li dan l-appell ma jimmeritax jigi milqugh. Fl-ewwel lok l-appellant lanqas biss jirreferi ghal kundizzjoni li fuqha qed isir l-ilment, pero qari tal-appell quddiem it-Tribunal juri illi l-appellant kien qed jilmenta mill-kundizzjoni numru 1 imposta mill-Awtorita fil-hrug tal-permess in segwitu ghas-sentenza tal-Qorti tal-Appell fil-proceduri relattivi ghall-istess premessi deciza finalment fl-20 ta' Gunju 2013.

Dik is-sentenza li fil-fehma tal-Qorti tpoggi dan l-appell fil-perspettiva gusta tieghu kienet dwar appell maghmul mill-Awtorita mid-decizjoni tal-Bord tal-Appell tas-16 ta' Marzu 2012 fejn kienet cahdet l-appell tal-Awtorita u ikkonfermat id-decizjoni tal-Bord tal-Appell. Dik is-sentenza cahdet l-aggravju tal-Awtorita li l-kundizzjoni numru 2 ma kellhiex tigi imposta kif fil-fatt kien iddecieda l-Bord tal-Appell fuq appell ta' Frankie Calleja. Pero ikkonfermat ukoll id-decizjoni tal-Bord tal-Appell tas-16 ta' Marzu 2012 li biha approvat il-hrug tal-permess PA 1221/05 bil-kundizzjonijiet kif imsemmija mill-istess Bord tal-Appell fid-decizjoni tieghu.

Il-kundizzjoni numru 1 qatt ma kienet kontestata fl-ebda stadju tant li meta inhareg il-permess originarjament fit-12 ta' Gunju 2008 din il-kundizzjoni cioe numru 1 kienet gia imnizzla u l-applikant ma accennax ghal din il-kundizzjoni fl-appell tieghu quddiem il-Bord tal-Appell izda biss appella ghal kondizzjoni numru 2.

Il-kwistjoni giet trattata bir-reqqa mit-Tribunal fejn ikkunsidra li f'kazijiet simili t-Tribunal ghandu obbligu li jisma appell meta l-ilment hu li l-permess mahrug mill-Awtorita ma jirrispekkjax id-decizjoni tat-Tribunal. Pero l-obbligu tat-Tribunal hu biss li jivverifika d-decizjoni tat-Tribunal mhux li jerga' jezaminaha mill-gdid fuq il-mertu taghha. Din il-Qorti taqbel perfettament ma' dan l-insenjament u t-Tribunal ikkunsidra l-appell maghmul mill-lenti legali gusta u korretta. It-Tribunal sab li l-kundizzjoni numru 1 qatt ma ifformat xi punt ta' disputa jew dibattitu minn ebda parti u d-decizjoni tal-Bord tal-Appell tal-2012 ikkonfermat

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dan. Din il-Qorti hi perfettament in sintonra mad-decizjoni tat-Tribunal u tqis illi t-Tribunal fehem sew l-appell interpost u l-intenzjoni warajh u ikkonkluda gustament li l-kundizzjoni numru 1 kienet u baqghet inkontestata fil-proceduri mehuda wara l-hrug inizjali tal-permess fl-2008.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Frankie Calleja u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-26 ta' Frar 2015, bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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