

## **SAID V COMMISSIONER OF POLICE AND THE ROLE OF THE ADMINISTRATIVE REVIEW TRIBUNAL AS A FORUM FOR REVIEW OF ADMINISTRATIVE ACTION**

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### **1. Introduction**

Under Maltese law, judicial review of administrative action is carried out by the First Hall of the Civil Court. Such an action for judicial review is regulated by Article 469A of the Code of Organisation and Civil Procedure (hereinafter 'COCP').<sup>1</sup> Where a right of appeal from an administrative decision exists, an action under Article 469A COCP is excluded, because the appeal amounts to a 'review' in itself. Where specifically stated in the law, such an appeal is to be lodged before the Administrative Review Tribunal (hereinafter 'ART'), set up under the Administrative Justice Act.<sup>2</sup> Thus, for example, if Transport Malta<sup>3</sup> refuses an application for a licence, the applicant has a right of appeal to the ART, granted by Article 40 of the Authority for Transport in Malta Act.<sup>4</sup>

In *Johann Said v Commissioner of Police*,<sup>5</sup> the Court of Appeal held that the ART enjoys a general right of review of administrative action. The Commissioner of Police's pleas to the contrary proved unsuccessful. In the author's opinion, the Commissioner of Police was right to contest the jurisdiction of the ART, because contrary to what was stated and subsequently confirmed by the Court of Appeal, the ART does **not** enjoy a general right of review of administrative acts, but only enjoys a right to review by way of appeal, where the law specifically and explicitly states as much.

### **2. The facts of *Johann Said v Commissioner of Police***

Johann Said requested a licence from the Commissioner of Police to set up a circus in the car park next to the Granaries in Floriana, Malta, between 12 December 2012 and 6 January 2013. By means of a letter dated 18 October 2012, the Commissioner of Police informed Mr Said that his application was being refused on the basis of an objection from Transport Malta. This Government entity claimed that this circus would negatively impact parking facilities in the area.

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<sup>1</sup>Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure. Art 469A COCP is not being cited because of its length. However, it is available online at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1>.

<sup>2</sup>Chapter 490 of the Laws of Malta, Administrative Justice Act.

<sup>3</sup>The regulator of air, sea and land transport in Malta.

<sup>4</sup>Chapter 499 of the Laws of Malta, Authority for Transport in Malta Act.

<sup>5</sup> [2012] COA 325/2012/1.

The issue was referred to the Police Licence Appeals Tribunal (hereinafter 'PLAT'), which on 14 November 2012 expressed disagreement with the claimed negative effect on parking. The Commissioner of Police went on to communicate to Johann Said the PLAT's position, but still refused the application on the basis of parking considerations, in addition referring to a Government of Malta Cabinet decision which proclaimed that circuses are not to occupy open spaces in Floriana.

Mr Said appealed from the Commissioner of Police's decision to the ART by means of an application lodged on 23 November 2012. The ART found in his favour in a ruling delivered on 10 December 2012. It dismissed a preliminary plea submitted by the Commissioner of Police that the ART lacked jurisdiction because the applicant had the opportunity to appeal to the PLAT. The ART considered the appeal to the PLAT to be a weak and ineffective means of contesting the Commissioner of Police's decision:

*[...] is-sempliċi eżistenza ta' tribunal [...]mhux neċessarjament teskludi l-kompetenza ta' dan it-tribunal milli jisma' u jittratta dik il-vertenza kemm-il darba jirriżulta li fil-każ partikolari l-applikant ikun ġie imcaħħad mid-dritt li jkollu rimedju effettiv għar-reviżjoni amministrattiva ta' decizjoni li ttieħdet fil-konfront tiegħu.<sup>6</sup>*

On the merits,<sup>7</sup> the ART ruled that the Commissioner of Police's decision to refuse the licence notwithstanding the PLAT's advice to be abusive and unreasonable.

The Commissioner of Police appealed from the ruling of the ART to the Court of Appeal in its Superior jurisdiction.<sup>8</sup> While the Commissioner of Police queried whether the ART was competent to consider Mr Said's appeal in the first place, Mr Said raised the question of whether the appeal should have been lodged before the Inferior or the Superior Court of Appeal. The Court of Appeal cited Article 22 of the Administrative Justice Act, which among other things determines the competence of the Court of Appeal to be as stated in the Second Schedule to the same Act.<sup>9</sup> The Second Schedule literally spells out to which Court of Appeal one may resort, depending on the subject of the appeal. For example, according to this Second Schedule, if an individual has appealed to the ART from a decision involving the Lepers' Ordinance,<sup>10</sup> such person enjoys a further right of appeal to the Court of Appeal (Inferior jurisdiction). This Schedule makes no

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<sup>6</sup> Translation: 'The mere existence of a tribunal [...] does not necessarily exclude the competence of this tribunal from hearing and considering the case, if it results that in the particular case the applicant was denied of the right to an effective remedy for revision of an administrative decision taken in his regard.'

<sup>7</sup> Not the subject of this case comment.

<sup>8</sup>This appeal was lodged in accordance with art 22 of the Administrative Justice Act.

<sup>9</sup>22. (1) Any party to the proceedings before the Administrative Review Tribunal who feels aggrieved by a decision of the said Tribunal, may appeal to the Court of Appeal sitting either in its superior or in its inferior jurisdiction.'

<sup>10</sup>Chapter 45 of the Laws of Malta, Lepers' Ordinance.

mention of appeals from police licences under the Police Licences Act,<sup>11</sup> but the Court of Appeal ruled that the absence of the inclusion of appeals from police licences under the latter Act should not be interpreted as implying that no appeals from this Act to the ART were permitted.

The Court of Appeal pointed out that the COCP, in Article 41<sup>12</sup> does not distinguish between ‘Superior’ and ‘Inferior’ Courts of Appeal. It then went on to state that this appeal was permitted because Article 22(1) of the Administrative Justice Act gives a general right of appeal from decisions of the Tribunal. According to the Court of Appeal, the fact that there was no mention of Chapter 128 of the Laws of Malta in the Administrative Justice Act does not detract from the general legal provision:

*13. Din il-Qorti hija tal-fehma illi l-konsegwenza tan-nuqqas li jissemma l-Kap. 128 fit-Tieni Skeda ma hijiex illi ma jistax isir appell dwar deċiżjoni taħt dik il-liġi – għax l-art[ikolu] 22(1) jagħti dritt ġenerali ta’ appell mid-deċiżjonijiet tat-Tribunal – iżda l-unika kwistjoni li johloq dan in-nuqqas hija dwar liema sede ta’ din il-qorti għandha tisma l-appell. Iżda din il-kwistjoni hi ormai waħda akkademika u sorpassata bl-eventi għaliex l-appell sar quddiem il-Qorti tal-Appell u ngieb u jinsab quddiem din il-Qorti fil-kompetenza hekk msejja ‘superjuri’ tagħha kif previst fl-artikolu 22(1) imsemmi.<sup>13</sup>*

On the question of jurisdiction, the Commissioner of Police pleaded that there is no appeal to the ART, because Chapter 128 of the Laws of Malta does not grant such a facility, apart from the fact that it is not mentioned in the Second Schedule of Chapter 490.

The Commissioner of Police also seems to have reiterated the claim that the right of review rested with the PLAT. The Court of Appeal dismissed these arguments, citing Article 7 of the Administrative Justice Act:

7. The Administrative Review Tribunal shall be competent to review administrative acts of the public administration on points of law and points

<sup>11</sup>Chapter 128 of the Laws of Malta, Police Licences Act.

<sup>12</sup>Art 41 COCP is not being cited, because of its length. However, it may be accessed at <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1>>.

<sup>13</sup>Translation:

13. This Court is of the opinion that the consequence of failing to list Chapter 128 in the Second Schedule is not that there cannot be appeals from such decisions under this law – because art 22(1) allows a general right of appeal from decisions of that Tribunal – the only question resulting from this omission is whether the court is to be presided by one judge, or three. But this question is now only of an academic nature and superseded by events, because the appeal was lodged before the Court of Appeal and was brought before this Court in its so-called ‘superior’ competence as foreseen in the said art 22(1).

of fact. It shall also be competent to decide disputes referred to it unless any court or other administrative tribunal is already seized with such dispute.

The ART had already dismissed the PLAT as an advisory board, which therefore could not be considered as a 'tribunal already seized with such dispute' as contemplated in Article 7.

### 3. Relevant considerations: the roles of the PLAT and ART

The Licences Procedures Regulations<sup>14</sup> read as follows:

3. (1) All applications for the grant, renewal and transfer of licences are to be determined by the Commissioner who may approve, refuse or impose particular conditions for such licences.

[...]

4. (1) There shall be constituted a Police Licences Appeals Tribunal to hear and determine the final advice to be given to the Commissioner in respect of any previous decision made by the same Commissioner in respect of the grant, renewal, transfer or cancellation of licences.

[...]

5. An appeal from a decision of the Commissioner may be entered before the Tribunal by means of a letter addressed to the president thereof at Police Headquarters, Floriana, within twenty-one days from the service of the decision of the Commissioner to an applicant or to an interested party, as the case may be.

6. (1) The Tribunal shall have power, exercisable through its president  
(a) To summon witnesses who shall be heard on oath;  
(b) To administer an oath to any witness and to any person concerned in the case, and require them to give evidence.

Readers will recall that the Commissioner of Police in his response to the appellant before the ART, challenged the jurisdiction of the ART on the basis of Article 7.<sup>15</sup> The Commissioner of Police argued that since the applicant had a remedy before the PLAT, he could not resort to the ART. The ART disagreed, deeming the PLAT remedy ineffective because the Commissioner of Police ignored the advice of the PLAT:

*[...] l-Intimat, b'mod għal kollox abbusiv u arbitrarju [...] injora r-rakkomandazzjoni favur ir-Rikorrent da parte tat-Tribunal ta' Appelli dwar Licenzji tal-Pulizija, anke għaliex skont [hu] hija biss rakkomandazzjoni u*

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<sup>14</sup>Subsidiary Legislation 128.02.

<sup>15</sup>(n 6).

*għalhekk mhux vinkolanti, u pproċeda biex jikkonferma r-rifjut għal dik it-talba.*<sup>16</sup>

The ART depicted the PLAT as an advisory body. The ART was correct on this point, recognising the PLAT as it really is, in spite of the undesirable nomenclature. According to Subsidiary Legislation 128 of 2002,<sup>17</sup> the PLAT can summon witnesses and administer oaths as is to be expected from a tribunal. However, at the end of the day, it can only give advice and is therefore not a tribunal after all, but an advisory body.<sup>18</sup> It studies the case brought before it and gives its opinion on what the outcome should be. This opinion is relayed to the Commissioner of Police, who may endorse this advice or reject it. The author is informed that this advice is usually accepted by the Commissioner of Police unless there are strong reasons for which to reject it.

On the other hand, to be technically correct, Johann Said should have instituted an action for judicial review under Article 469A of the COCP<sup>19</sup> when the Commissioner of Police refused his licence notwithstanding the PLAT's advice. Instead he appealed to the ART, with success. The author opines that in actual fact, the ART did **not** have any jurisdiction to hear this case at all. The ART and the Court of Appeal deduced that the ART has a general power to review administrative acts, which general power emerges from Articles 5 and 7 of the Administrative Justice Act and which read as follows:

5. (1) There shall be set up [...] an independent and impartial tribunal, to be known as the Administrative Review Tribunal, for the purpose of reviewing administrative acts referred to it in accordance with this Act or any other law, and for the purpose of exercising any other jurisdiction conferred on the Administrative Review Tribunal by or under this or any other law [...]

(2) The Administrative Review Tribunal shall have jurisdiction to review administrative acts.

7. The Administrative Review Tribunal shall be competent to review administrative acts of the public administration on points of law and points

<sup>16</sup> Translation: '[...] the Defendant, in the most abusive and arbitrary manner [...] ignored the recommendation in favour of the Plaintiff on the part of the Police Licences Appeals Tribunal, even because according to him it is only a recommendation and therefore is not binding, and proceeded to confirm the refusal of the request.'

<sup>17</sup>(n 14).

<sup>18</sup>The present incumbents, five in all plus the secretary, were appointed on 25 November 2011 for a period of two years (Government Notice No 1085, Malta Government Gazette 13221 – 13222). The members of the PLAT are referred to in the same Government Notice, as 'Chairman' and 'Assessors'. This is precisely because they are appointed to make assessments and give advice, not to pass judgment. One also notes the absence of at least one member hailing from the legal profession as is usually the norm on a tribunal.

<sup>19</sup>(n 1). In art 469A (2) COCP 'administrative act' includes the issuing of a licence.

of fact. It shall also be competent to decide disputes referred to it unless any court or other administrative tribunal is already seized with such dispute.

Chapter 490 of the Laws of Malta was the brainchild of the Honourable Dr Carmelo Mifsud Bonnici, who in 2007 was Parliamentary Secretary within the Ministry for Justice and Home Affairs. The actual law was drafted by Professor Kevin Aquilina, and discussed by a panel of persons over a number of meetings. The author was included among this panel of persons and therefore witnessed the whole process. The idea behind the Administrative Justice Act was to gradually eliminate the plethora of appeals tribunals which exist under different laws. The law-maker wanted to move away from the Anglo Saxon system of having *ad hoc* appeals to scores of different tribunals, and in certain cases to the Minister himself. The existence of a plethora of appeals bodies also posed some problems due to a number of reasons. Firstly, they were expensive with regard to the payment of members as well as the administrative set up required by each body, depending on individual workloads attributed to each appeals body.

Secondly, there was the problem of whether these entities were in actual fact constituted at all. In certain scenarios, they were not constituted because appeals therefrom were so few and far between it was simply not worth constituting an appeals body when there were practically no appeals to be heard. Problems of course arose when a case or a small number of cases did come along, because there would be no tribunal to hear them and decide them. Also, having a 'one-stop-shop' instead of a vast range of appeals bodies with their own rules and procedures is more user-friendly because one knows immediately where to go to lodge an appeal.

There was also the problem of not all appeals bodies setting their own rules of procedure, in the process sometimes failing to give the deserved importance to certain basic principles such as the principles of natural justice. To eliminate these shortcomings, the law-maker passed Article 3 of the Administrative Justice Act,<sup>20</sup> which lists a number of principles that administrative tribunals must follow. The message of the law-maker was that, for so long as the *ad hoc* appeals bodies continue to exist, they must abide by certain minimum standards, these being the principles listed in Article 3.

In the case under discussion, neither the ART nor the Court of Appeal seem to have given consideration to Article 25 (2) of Chapter 490: 'The Administrative Review Tribunal shall henceforth have jurisdiction in lieu of the persons, bodies and administrative tribunals mentioned in the laws listed in the Third Schedule prior to the entry into force of this article.'

Said Third Schedule is no longer included in Chapter 490 as reproduced on the official website of the Ministry of Justice.<sup>21</sup> The Third Schedule has not been repealed and

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<sup>20</sup>(n 2).

<sup>21</sup><<http://justiceservices.gov.mt>>. An asterisked note to art 25(2) reads 'Omitted under the Statute Law Revision Act, 1980. Amendments therein have been inserted in the relative legislation.'

therefore must be given consideration. This Schedule as originally enacted can be viewed via the Department of Information website.<sup>22</sup> In time, it became longer as the ART's jurisdiction grew. The law-maker back in 2007 started to amend various laws, providing specific appeals within stipulated time limits to the ART. Thus, for example, according to the Third Schedule, Article 6 of the Spirits Ordinance<sup>23</sup> was amended thus granting an appeal from a refusal of the Comptroller of Customs to the ART within fourteen days. Thus the appeal to the Minister was eliminated from the Spirits Ordinance.

The law-maker had in mind to start off slowly, eliminating the smaller appeals entities with the lighter workloads. There was concern that overloading the ART would amount to an overburden. It was felt that it would be better to set up the tribunal and give it time to establish itself. The idea was to gradually lengthen the Third Schedule of the Administrative Justice Act, thus adding to the ART's competence, eliminating more of the *ad hoc* appeals entities. This procedure took off, and has reached a stage whereby at time of writing of this case comment,<sup>24</sup> an appeal to the ART is to be found in no less than sixty-four laws and regulations.

The ART was not endowed with a general power of judicial review. Article 7 of the Administrative Justice Act,<sup>25</sup> read in isolation, implies that there is a general right of appeal to the ART from administrative acts. Article 5 of the same Act on the other hand states that the jurisdiction must be a reference 'in accordance with this Act or any other law'. The reference to 'in accordance with this Act' emerges from the seemingly overlooked Article 25<sup>26</sup> and the Third Schedule<sup>27</sup> which regrettably is no longer reproduced in the law, but which lists the rights of appeal to the ART from the different laws. The sixty-four laws wherein rights to appeal to the ART are contained, are the 'other law(s)' listed in Article 5 of the Act mentioned above.

Had the ART been endowed with the original jurisdiction which it now enjoys, the law-maker would have deleted Article 469A COCP and incorporated it into the new law. It does not make sense to have a tribunal with general powers of review of administrative acts, existing in parallel with Article 469A COCP. Article 469A COCP was allowed to co-exist with Chapter 490 precisely because the latter was not intended as a substitute. The ART was only intended to substitute as many as possible of the *ad hoc* tribunals and appeals facilities existing under different laws. Since Chapter 128 of the Laws of Malta is not included neither in the Second nor in the Third Schedule of Chapter 490, and does not itself (i.e. Chapter 128) provide a right of appeal to the ART, then the question of

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<sup>22</sup>Available at <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=18429&l=1>>.

<sup>23</sup>Chapter 41 of the Laws of Malta.

<sup>24</sup> 30 December 2012.

<sup>25</sup>(n 2).

<sup>26</sup>*ibid.*

<sup>27</sup>*ibid.*

whether to appeal to the 'Inferior' or to the 'Superior' Court of Appeal is not 'merely academic' as the Court of Appeal stated in the *Johann Said* case, but is glaring evidence of the fact that there is no recourse to the ART from decisions of the Commissioner of Police, insofar as licences are concerned.

#### **4. Concluding remarks**

The manner in which the ART has evolved is not necessarily unwelcome. It all depends on what role the law-maker wishes the ART to take. To absorb Article 469A COCP, the ART's very nature must be changed: it must be upgraded from a tribunal<sup>28</sup> to a proper Court of Justice on the same level as the First Hall of the Civil Court. The ART could possibly become Malta's Administrative Court. Here one risks forfeiting the advantages of the ART as a quasi-judicial body, namely specialised expertise in the matters dealt with, less formal proceedings than a normal court, and speed in decision-taking. The matter requires serious thought and analysis of what purpose the ART is desired to serve, and whether more is wanted from it now than what was contemplated by the law-maker back in 2007.

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<sup>28</sup>A quasi-judicial body which can even be chaired by a former Judge or Magistrate ((n 1) art 8 (3)).