Appell lil-Leġiżlatur

L-artikolu 460 tal-Kapitolu 12
tal-Liġijiet ta' Malta

GHSL
Ghaqda Studenti tal-Liġi

Appell lil-Leġiżlatur

L-artikolu 460 tal-Kapitolu 12 tal-Liġijiet ta' Malta

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L-Artikolu 460 tal-Kapitolu 12 tal-Liġijiet ta' Malta jgħid:

> ***l-ebda att ġudizzjarju li bih jinbdew xi proċedimenti ma jista' jiġi ppreżentat, u ebda proċedimenti ma jistgħu jittieħdu jew jinbdew, u ebda mandat ma jista' jiġi mitlub, kontra l-Gvern****, jew kontra xi awtorità mwaqqfa bil-Kostituzzjoni, barra mill-Kummissjoni Elettorali, jew kontra xi persuna li jkollha kariga pubblika fil-kwalità uffiċjali tagħha,* ***ħlief wara li jgħaddu għaxart ijiem min-notifika kontra l-Gvern jew dik l-awtorità jew persuna kif intqal qabel, ta' ittra uffiċjali jew ta' protest li fih il-pretensjoni jew it-talba tiġi mfissra b'mod ċar.***[1]

Apparti l-eċċezzjonijiet provduti mil-liġi, dan l-obbligu proċedurali fuq il-privat huwa mandatorju fl-estrem illi kull att inizjat kontra l-gvern, awtorità kostituzzjonali, jew persuna f'kariga pubblika huwa null *ab ovo* jekk mhux preċedut b'notifika fejn ikunu mfissra l-pretensjonijiet tal-parti.[2] Il-Qrati applikaw dan il-jedd proċedurali favur il-gvern b'riġidità u b'inflessibilità li toħnoq il-kapaċità tal-individwu li jeżawrixxi r-rimedji kollha disponibbli kontra l-istat u titfgħu fi żvantaġġ sproporzjonat.

Din il-kitba ser tkun qed tesponi żewġ sentenzi li għandhom jiġbdu l-apprezzament tal-leġiżlatur Malti biex jemenda jew iwarrab din il-liġi.

1. Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe[3]

Fil-bidu ta' Diċembru tal-2017, E & G Properties Limited irċevew żewġ ittri mingħand is-Sovrintendent tal-Patrimonju Kulturali, fejn ġew ordnati permezz ta' Conservation and Protection Order sabiex iwaqqfu t-twaqqigħ tal-Villa St Ignatius. Aggravata b'dan l-aġir, il-kumpanija rrikorriet biex tissielet din l-ordni taħt l-Artikolu 469A tal-Kap. 12 u talbet lill-Prim Awla tal-Qorti Ċivili biex tiddikjara ż-żewġ protection orders nulli.[4] Il-konvenut Sovrintendent, minkejja li baqa' kontumaċi għar-rikors tal-atturi, ippreżenta rikors fejn fih issottometta li r-rikorrent ma nnotifikahx permezz ta' ittra uffiċjali.

Fl-ewwel lok, l-atturi argumentaw li din l-eċċezzjoni ma tistax titqajjem mil-Qorti *marte proprio* għajr li tkun awtorizzata espressament mil-liġi jew tkun meħtieġa għall-ordni pubbliku. Dan l-argument ma ntlaħaqx abbażi li:

> *l-iskop tal-leġiżlatur kien li jagħti l-opportunità lill-amministrazzjoni pubblika biex terġa' taħsibha jekk tkun ħadet deċiżjoni żbaljata fil-konfront taċ-ċittadin; u b'hekk*

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[1] Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, Kapitolu 12 tal-Liġijiet ta' Malta, Artikolu 460(1). Enfasi miżjuda

[2] *Joseph Mizzi vs Avukat Ġenerali*, Qorti Ċivili (Prim'Awla) 5 ta' Frar 1999 (mhux ippublikata), fejn ingħad illi: *'Il-liġi titfa l-oneru fuq ir-Reġistratur tal-Qorti li ma jaċċettax il-preżentata ta' kawżi kontra l-amministrazzjoni pubblika jekk mhux akkumpanjati mill-prova tal-interpellazzjoni uffiċjali debitament notifikata. Il-fatt li r-Reġistratur tal-Qorti jħalli, konxjament jew le, li tiġi ppreżentata kawża ta' din ix-xorta mingħajr ma jkun sodisfatt li kien hemm tali interpellazzjoni uffiċjali debitament notifikata, ma jissanax dak li hu null ab ovo*'.

[3] 573 /2018 *Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe*, Qorti Ċivili (Prim'Awla) 8 ta' Lulju 2019.

[4] Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, Kapitolu 12 tal-Liġijiet ta' Malta, Artikolu 469A.

> *tiġi evitata li ssir kawża* […] *Għalhekk ma jistax ma jitqiesx bħala norma ta' ordni pubbliku*.[5]

Fuq dan l-aspett, il-qorti diversament ippresjeduta d-deċiżjoni fil-kawża *Dominic Savio Spiteri vs Onor. Prim Ministru***,**[6] qieset l-Artikolu 460 bħala regola ta' ordni pubbliku u konsegwentament, *a contrario* n-norma ċivili, jista' jitqajjem *ex officio*. *F'Corinne Ward vs Foundation for Medical Services et*,[7] il-Qorti stqarret li din ir-regola proċedurali għandha:

> *tingħata interpretazzjoni restrittiva sabiex ma toħnoqx bla bżonn l-azzjoni ġudizzjarja kontra l-awtorita' pubblika fejn iċ-ċittadin ifittex id-drittijiet tiegħu quddiem il-qrati. Fl-istess ħin pero' huwa miżmum li dan il-privileġġ proċedurali mogħti lill-amministrazzjoni pubblika huwa wieħed ta' ordni pubbliku u ma hux rinunzjabbli.*

Il-Qorti fil-kawża ta' *E & G Properties Limited*, avvolja allinjat mal-ġurisprudenza nostrana, stqarret li kienet sfortuna illi din ir-regola proċedurali tintuża bħala arma għan-nullità tal-atti, u li dan ma jirriflettix l-għan aħħari tal-legiżlatur li joħloq iċ-ċans għal rimedju mingħajr il-ftuħ ta' kawża. Madanakollu, fil-każ in diżamina, l-Qorti ssollevat illi l-Artikolu 460 ma japplikax għall-istħarriġ ġudizzjarju ta' għemil amministrattiv minħabba l-fatt li l-Artikolu 469A jipprovdi ż-żmien ta' sitt xhur biex tinfetaħ il-kawża. B'hekk il-Qorti qieset illi l-Artikolu 469A għandu jitqies bħala 'proċedura speċjali' fit-termini tal-Artikolu 460(2), li jipprovdi illi:

> *meta skont id-disposizzjonijiet ta' xi liġi għandha tiġi mħarsa proċedura partikolari, magħdud terminu jew żmien ieħor, iddisposizzjonijiet tas-subartikolu (1) m'għandhomx japplikaw u l-imsemmija proċedura, magħdud kull terminu jew żmien ieħor, għandha tapplika u tiġi mħarsa minflokhom.*

Fuq din il-konsiderazzjoni, din is-sentenza ħallet l-argumenti prevalenti magħmula mill-Qrati preċedenti li qiesu l-Artikolu 460 applikabli fil-kawżi 469A.[8]

2. Mark Formosa vs Segretarju Permanenti fi ħdan il-Ministeru għal Għawdex et[9]

F'waħda mill-kawżi f'sensiela ta' proċedimenti ċivili (iter proċedurali li mhux ser ikun diskuss f'din il-kitba), il-Qorti tal-Magistrati f'Għawdex laqgħet it-talba tar-rikorrenti li jintbagħatu l-atti tal-kawża lill-qorti Kostituzzjonali sabiex jiġi eżaminat il-potenzjal ksur tad-drittijiet fundamentali tal-attur, partikolarment in kwantu għall-prinċipju tal-equality of arms u d-dritt għal aċċess għall-Qrati li jeminaw mill-Artikolu 39 tal-Kostituzzjoni ta' Malta u mill-Artikolu 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem.

Il-prinċipju tal-equality of arms huwa inerenti għad-dritt għal aċċess għall-Qrati u jrid illi kull persuna titpoġġa f'pożizzjoni ugwali fil-procedimenti u li l-ebda parti m'għandha titqiegħed f'pożizzjoni żvantaġġjata vis-à-vis l-avversajru tagħha.[10] Id-dritt għal aċċess għall-Qrati

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[5] Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe (n3).
[6] 1692/1996/1, *Dominic Savio Spiteri vs Prim Ministru et*, Qorti tal-Appell 27 ta' Frar 2004.
[7] 266/2013 *Corinne Ward vs Foundation For Medical Services et*, Qorti Ċivili (Prim'Awla) 18 Marzu 2013.
[8] Ara 210/2009 *S & D Yachts Limited vs Direttur Tal-Uffiċċju Tal-Kompetizzjoni Ġusta et*, Qorti Ċivili (Prim'Awla) 20 ta' April 2010 u 26/2010 *Grace Sacco vs Supritendent Mediku fl-Isptar Ġenerali t'Għawdex et*, Qorti Ċivili (Prim'Awla) 16 Marzu 2010.
[9] 8/2019 *Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et*, Qorti Kostituzzjonali 20 ta' Lulju 2020.
[10] *Kress v France* App Nru 39594/9 (QEDB, 7 ta' Ġunju 2001).

jimponi illi kull persuna għandha jkollha opportunità effettiva sabiex tippreżenta l-kawża tagħha u rimedju adegwat għal-lamenteli tagħha: 'a clear practical and effective opportunity to go to court'.[11] F'*Ashingdane v. The United Kingdom*,[12] ġie spjegat illi d-dritt għal aċċess għall-Qrati mhuwiex assolut fis-sens illi l-aċċess huwa neċessarjament regolarizzat mil-Istat u b'hekk l-Istat jirriserva element ta' diskrezzjoni. Madanakollu, il-Qorti f'*Berger v France*[13] aċċennat illi kull limitazzjoni fuq dan id-dritt hija leżiva jekk ma jkollhiex għanijiet legittimi u ma jkollhiex relazzjoni proporzjonata bejn il-mezzi użati u l-għan aħħari ta' dik il-limitazzjoni.

Fin-noti tas-sottomissjonijiet tal-intimat fil-kawża in diżamina, hekk ukoll kif ġie prodott fil-kawża *E&G Properties Ltd*[14], intqal illi l-iskop tal-Artikolu 460 huwa '*sabiex il-gvern ikollu żmien joffri rimedju jew soluzzjoni għal vertenza li tkun inqalegħet mal-privat*'.[15] Il-Qorti kellha teżamina jekk dan l-għan huwa wieħed raġjonevoli jew ibbilanċjat fit-termini tal-jeddijiet kostituzzjonali u Konvenzjonali fuq spjegata, u waslet għall-konklużjoni illi:

> *Għall-Qorti ma hemm ebda ġustifikazzjoni leġittima u proporzjonata għall-fatt li l-Gvern ikkonċeda arbitrarjament, unilateralment u gratuwitament lilu nnifsu dan il-privileġġ proċedurali bl-iskuża, kif jargumenta l-Avukat Ġenerali, li l-Gvern ikollu żmien biex joffri rimedju jew soluzzjoni għall-kwistjoni li tkun inqalgħet. L-istess argument se mai seta' jgħodd ukoll a favur kwistjonijiet li jinqalgħu bejn ċittadini privati fis-sens illi li kieku ċittadin ikun avżat minn qabel b'ittra uffiċjali jew protest anke huwa jkollu l-opportunita' li jasal għal soluzzjoni jew joffri rimedju lill-kontro-parti. Għalhekk il-Qorti ma tara ebda loġika u ġustifikazzjoni f'dan ir-raison d'etre tal-vantaġġ proċedurali mogħti mill-leġislatur lill-Gvern biss mill-punto di vista ta' equality of arms.*

Il-Qorti kompliet tisħaq illi aktar inkwetanti, kemm għall-qafas ġuridiku Malti kif ukoll għaċ-ċittadin, huwa l-fatt li l-atti tal-kawża jiġu stronkati *ab initio* mingħajr opportunità li tiġi avvanzata l-kawża. Il-Qorti mewtet l-Artikolu 460 bl-istqarijja illi dan l-Artikolu jista' jwassal għall-'*ksur pależi tal-aċċess effettiv tiegħu għall-Qorti peress li minħabba f'hekk ikun ser jitlef iċ-ċans li jipproċedi ulterjorment bil-provi tiegħu dwar il-lamenteli li ressaq fil-kawża ċivili*'.

Il-Qorti tal-appell Kostituzzjonali ikkonfermat din is-sentenza, pero mhux fuq ir-raġunijiet kollha kkunsidrati mill-ewwel qorti. Il-qorti stqarret illi:

> *il-fatt waħdu illi persuna li trid tiftaħ kawża kontra l-Gvern trid l-ewwel nett tippreżenta ittra uffiċjali jew protest ġudizzjarju u tagħti għaxart ijiem żmien lill-Gvern mill-preżentata tal-ittra qabel ma tintavola proċeduri ġudizzjarji m'huwiex leżiv tad-drittijiet fundamentali tal bniedem* [...] *Illi madanakollu fil-fehma ta' din il-Qorti il-leġiżlatur naqas milli jikseb il-bilanċ rikjest fejn si tratta tal-*

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[11] David J Harris, Michael O'Boyle, Edward P Bates, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 238.

[12] *Ashingdane v The United Kingdom* App Nru 8225/78 (QEDB, 28 ta' Mejju 1985).

[13] *Berger v France* App Nru 48221/99 (QEDB, 3 ta' Diċembru 2002): '*limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 § if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*'.

[14] 573 /2018 *Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe*, Qorti Ċivili (Prim'Awla) 8 ta' Lulju 2019.

[15] 8/2019 *Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et*, Qorti Ċivili (Prim'Awla) 15 ta' Novembru 2019.

> *konsegwenzi għan-nuqqas ta' aderenza mar-rekwiżiti imposti f'dan l-artikolu. Għalkemm huwa minnu illi l-formalitajiet imposti f'dan l-artikolu m'humiex partikolarment oneruż, u lanqas ma huma l-uniċi każijiet fejn il-liġi timponi dawn it-tip ta' formalitajiet qabel l-intavolar ta' kawża, il-konsegwenza tan-nuqqas da parti tal-individwu illi josservahom, u cioè n-nullità tal-att, hija devastanti* [...] *l-Qorti taċċetta illi l-għan li għalih huwa maħsub dan l-artikolu huwa wieħed neċessarju u fl-interess pubbliku, però ssibha diffiċli tifhem kif sanzjoni tant severa u odjuża hija wkoll neċessarja u fl-interess pubbliku, u filfatt l-ebda ġustfikazzjoni għaliha ma tressqet mill-appellanti.*

B'hekk il-Qorti Kostituzzjonali qieset li l-Artikolu 460 huwa leżiv kontra l-Kostituzzjoni u l-Konvenzjoni minħabba l-konsegwenza tan-nullità u mhux għax huwa obbligu li japplika biss favur il-gvern.[16]

Illum il-ġurisprudenza tinsab mifruda. Fis-sentenzi *Avv. Cardinali Michele proprio et nomine vs Il-Kummissarju tal-Pulizija et*[17], u *Fenech Yorgen vs Avukat Ġenerali et*[18], il-qrati ma qiesux is-sentenza ta' *Mark Formosa*[19], filwaqt li fil kawżi *Topcat Holdings Limited vs Eurostyle Limited et*[20] u *Oliver Ruggier vs Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar*[21], il-qrati ma laqgħux l-eċċezzjoni tal-artikolu 460 abbażi tas-sentenza ta' *Mark Formosa***.**[22]

Konklużjonijiet

Ir-regola antikostituzzjonali tal-Artikolu 460 għadha sal-lum eċċezzjoni preliminarja utilizzata rigorożament.[23] Fil-kawża *Hasan Tunç and Others v Turkey*[24] il-Qorti Ewropea għad-Drittijiet tal-Bniedem saħqet illi:

> *in applying procedural rules the courts must avoid excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the procedural requirements laid down in statutes.*

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[16] Il-konsegwenza ta' nullità prevista mill-liġi, meħuda flimkien mal-formaliżmu esaġerat li bosta drabi jiġi adoperat mill-qrati, iwassal għar-riskju mhux biss ta' multipliċità tal-kawżi, li suppost qed jiġu evitati permezz ta' dan l-Artikolu, iżda wkoll it-telfien permanenti ta' jedd sostantiv da parti taċ-ċittadin li kif jirriżulta mill-ġurisprudenza ċitata aktar 'il fuq huwa impermissibbli għaliex limitazzjonijiet għad-dritt ta' aċċess għall-qorti ma jistgħux ifixxklu l-essenza innifisha ta' dan id-dritt.

[17] 563/19, Avv. Cardinali Michele proprio et nomine vs Il-Kummissarju tal-Pulizija et, Qorti Ċivili (Prim'Awla) 30 ta' Jannar 2020 u 1142/2019 Fenech Yorgen vs Avukat Ġenerali et, Qorti Ċivili (Prim'Awla) 15 ta' Lulju 2020.

[18] 1142/2019 Fenech Yorgen vs Avukat Ġenerali et, Qorti Ċivili (Prim'Awla) 15 ta' Lulju 2020

[19] 8/2019 Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et, Qorti Kostituzzjonali 20 ta' Lulju 2020 ta' Lulju 2020.

[19] 8/2019 Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et, Qorti Kostituzzjonali 20 ta' Lulju 2020.

[20] 1195/2019, Topcat Holdings Limited vs Eurostyle Limited et, Qorti Ċivili (Prim' Awla), 23 ta' Frar 2022

[21] 419/2014/1, Oliver Ruggier vs Awtorità ta' Malta dwar l-Ambjent u l-ippjanar, Qorti Ċivili (Prim' Awla), 1 ta' Diċembru 2021.

[22] 8/2019 Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et, Qorti Kostituzzjonali 20 ta' Lulju 2020.

[23] 158/2022 Maria Theresa Chan vs Is-Segretarju Permanenti tal-Ministeru tas-Saħħa, Qorti Ċivili (Prim'Awla) 7 ta' Lulju 2022 u 1254/2007/1 Philip Bartolo et vs Tarcisio Caruana et, Qorti tal-Appell 31 ta' Awwissu 2021.

[24] *Hasan Tunç and Others v Turkey* App Nru 19074/05 (QEDB, 31 ta' Jannar 2017).

Il-Qorti qieset li id-dettami tal-Artikolu 460 huma inflessibli tant illi tinsab b'idejha marbuta u m'hemmx lok għal interpretazzjoni iktar wiesa' għat-termini ta' din ir-regola.[25]

Fil-każ ta *Sotiris and Nikos Koutras Attee v Greece*[26], il-qorti aċċenat li:

> *Litigants should expect the existing rules to be applied. However, the rules in question, or the application thereof, should not prevent persons amenable to the law from availing themselves of an available remedy.*

Barra minn dan, l-awtur ta' din il-kitba jargumenta illi l-Artikolu 460 ma jaddix mil-eżami imfassal mill-Qorti Ewropea *f'Zubac v Croatia*,[27] fejn intqal illi:

> *The right of access to court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his/her case determined on the merits by the competent court.*

L-Artikolu 460 ħoloq kemm inċertezza legali, b'diversi sentenzi konflinġenti, kif ukoll 'barrier' biex jimblokka l-kawżi preliminarjament. L-iskop oriġinali tal-leġiżlatur, dak li jinħoloq rimedju barra mill-Qorti, għalkemm huwa għan leġittimu, mhuwiex miksub minn dan l-arikolu, u b'hekk din ir-raġuni m'hi xejn iktar ħlief pretenzjoni għan-nullità tal-atti; konsegwenza irraġonevoli li timblokka id-dritt tal-aċċess għal-Qrati. Għal dawn ir-raġunijiet, l-Għaqda Studenti tal-Liġi qiegħda tagħmel l-istess appell li sar fl-1993 mil-Permanent Law Reform Commission[28] sabiex jitneħħa dan l-Artikolu mil-Kodiċi ta' Organizzazjoni u Proċedura Ċivili u fuq kollox tiġi onorata s-sentenza ta' *Mark Formosa vs Segreterju Permanenti fi ħdan il-Ministeru għal Għawdex et*.[29]

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[25] 8/2019 *Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et*, Qorti Ċivili (Prim'Awla) 15 ta' Novembru 2019: '*Huwa minnu li l-Qrati tagħna, konxji mill-effetti tan-nuqqas t'osservanza ta' dan l-artikolu fuq il-jeddijiet taċ-ċittadini, ifittxu li jagħtu nterpretazzjoni restrittiva lil dan l-artikolu tal-liġi. Iżda dan ma jneħħi xejn mill-fatt li fl-istess waqt il-Qrati tagħna għandhom ukoll idejhom marbutin*'.

[26] *Sotiris and Nikos Koutras Attee v Greece* App Nru 39442/98 (QEDB, 16 ta' Novembru 2000).

[27] *Zubac v Croatia* App Nru 40160/12 (QEDB, 5 ta' April 2018).

[28] Permanent Law Reform Commission, Final Report On Human Rights And The Code Of Organization And Civil Procedure, Valletta, 9 February 1993.

[29] 8/2019 *Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et*, Qorti Kostituzzjonali 20 ta' Lulju 2020.

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- 419/2014/1, Oliver Ruggier vs Awtorità ta' Malta dwar l-Ambjent u l-ippjanar, Qort Ċivili (Prim' Awla), 1 ta' Diċembru 2021
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- 26/2010 Grace Sacco vs Supritendent Mediku fl-Isptar Ġenerali t'Għawdex et, Qorti Ċivili (Prim'Awla) 16 Marzu 2010.
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Sentenzi tal-Qorti Ewropea tad-Drittijiet tal-Bniedem

- Hasan Tunç and Others v Turkey App Nru 19074/05 (QEDB, 31 ta' Jannar 2017).
- Sotiris and Nikos Koutras Attee v Greece App Nru 39442/98 (QEDB, 16 ta' Novembru 2000).
- Zubac v Croatia App Nru 40160/12 (QEDB, 5 ta' April 2018).
- Ashingdane v The United Kingdom App Nru 8225/78 (QEDB, 28 ta' Mejju 1985).
- Berger v France App Nru 48221/99 (QEDB, 3 ta' Diċembru 2002)
- Kress v France App Nru 39594/9 (QEDB, 7 ta' Ġunju 2001).

GHSL
Għaqda Studenti tal-Liġi

A Note to the Legislator

Article 460 of Chapter 12 of the Laws of Malta

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17th October 2022

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Article 460 of Chapter 12 of the Laws of Malta states that:

> ***no judicial act commencing any proceedings may be filed, and no proceedings may be taken or instituted, and no warrant may be demanded, against the Government****, or against any authority established by the Constitution, other than the Electoral Commission, or against any person holding a public office in his official capacity,* ***except after the expiration of ten days from the service against the Government or such authority or person as aforesaid, of a judicial letter or of a protest in which the right claimed or the demand sought is clearly stated.***[1]

Apart from the exceptions provided for by law, this procedural obligation is mandatory to the extent that any act initiated against the government, a constitutional authority or a person in public office is null *ab ovo* if not preceded by a notification in which the party's claims are defined. [2] The Courts applied this procedural right in favour of the government with inflexibility that stifles the individual from exhausting all remedies available against the State. This writing will set out two judgements which should draw the appreciation of the Maltese legislator to amend or overturn this law.

1 Paul Gauci pro et noe vs Superintendent of Cultural Heritage noe[3]

In early December 2017, E & G Properties Limited received two letters from the Superintendent of Cultural Heritage, ordering them through a Conservation and Protection Order to stop the demolition of villa St Ignatius. Aggravated by this behaviour, the company challenged this order under Article 469A of Chapter 12 and asked the First Hall of the Civil Court to declare both *protection orders* void[4]. The defendant Superintendent, although remaining contumacious, filed an application in which it was submitted that the applicant had not been notified by means of a judicial letter.

The plaintiffs argued that this exception could only be raised by the Court *marte proprio* if it is expressly authorised by law or is necessary for public order. The Court stated that:

> *the purpose of the legislator was to give the public administration the opportunity to rethink it if it had taken an incorrect decision against the citizen; thus avoiding litigation... It cannot therefore be disregarded as a public policy norm.*[5]

In this respect, the Court in *Dominic Savio Spiteri vs Hon. Prime Minister*[6], considered Article 460 as a rule of public order and consequently, *a contrario* to the civil norm, that it can be raised ex *officio.* In *Corinne Ward vs Foundation For Medical Services and Others*[7], the Court stated that this procedural rule should be given:

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[1] Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 460(1) Emphasis added.
[2] (unpublished) *Joseph Mizzi vs Advocate General*, Civil Court (First Hall), 5 February 1999, where it was said that:
'Il-liġi titfa l-oneru fuq ir-Reġistratur tal-Qorti li ma jaċċettax il-preżentata ta' kawżi kontra l-amministrazzjoni pubblika jekk mhux akkumpanjati mill-prova tal-interpellazzjoni uffiċjali debitament notifikata. Il-fatt li r-Reġistratur tal-Qorti jħalli, konxjament jew le, li tiġi ppreżentata kawża ta' din ix-xorta mingħajr ma jkun sodisfatt li kien hemm tali interpellazzjoni uffiċjali debitament notifikata, ma jissanax dak li hu null ab ovo'
[3] 573 /2018 *Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe*, Civil Court (First Hall) 8 July 2019.
[4] Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469A.
[5] Gauci vs Sovrintendent tal-Patrimonju Kulturali (n 3).
[6] 1692/1996/1, *Dominic Savio Spiteri Vs Hon Prime Minister et*, Court of Appeal, 27 February 2004.
[7] 266 / 2013, *Corinne Ward vs Foundation for Medical Services et*, First Hall (Civil), 18 March 2013.

a restrictive interpretation so as not to unnecessarily stifle judicial action against the public authority where the citizen seeks his or her rights before the courts. At the same time, however, it is held that this procedural privilege granted to the public administration is one of public policy and is not renounceable.

The Court in the *E & G Properties Limited* case, although aligning with the jurisprudence, stated that it was unfortunate that this procedural rule is used as a weapon for the nullity of acts, and that this does not reflect the aim of the legislature to create a chance for an acceptable remedy. However, the court held that article 460 does not apply to the judicial review of administrative deeds for the fact that article 469A provides for a period of six months to initiate proceedings. Thus, the Court considered that article 469A should be regarded as a 'special procedure' within the terms of Article 460(2), which stresses that:

where in accordance with the provisions of any law a particular procedure including a time-limit or other term is to be observed, the provisions of sub-article (1) shall not apply and the procedure aforesaid, including any time-limit or other term, shall apply and be observed in lieu thereof.

On this consideration, this judgment loosened the prevailing arguments made by the previous courts which considered Article 460 applicable in the 469A cases.[8]

2 Mark Formosa vs Permanent Secretary within the Ministry for Gozo and the Public Service Commission[9]

In one of the cases in a series of civil proceedings (a procedural iter which will not be discussed in this writing), the Court of Magistrates in Gozo granted the applicants' request for a constitutional reference to examine the potential violation of the fundamental rights of the plaintiff, in particular with regards to the principle of *equality of arms* and the right of access to a court emanating from article 39 of the Constitution of Malta and Article 6 of the European Convention on Human Rights.

The principle of equality of arms is inherent in the right of access to a Court and demands that every person ought to be placed in an equal position, and consequently that no party should be placed in a disadvantageous position vis- à-vis it's adversary.[10] The right of access to a Court requires that every person should have an effective opportunity to present his or her case and an adequate remedy for his or her aggravations; 'a clear practical and effective opportunity to go to Court'[11]. In *Ashingdane v. The United Kingdom* [12] the court explained that the right of access is not absolute in the sense that access is necessarily regularised by the State and thus the State reserves an element of discretion. However, in *Berger v. France*[13] it was stressed that

[8] Refer to: 210/2009 *S & D Yachts Limited vs Direttur Tal-Uffiċċju Tal-Kompetizzjoni Ġusta et*, Civil Court (First Hall) 20 April 2010, and 26/2010 *Grace Sacco vs Supritendent Mediku fl-Isptar Ġenerali t'Għawdex et*, Civil Court (First Hall) 16 March 2010.

[9] 8/2019 *Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et,* Constitutional Court, 20 July 2020.

[10] *Kress v. France*, App No. 39594/9, (ECtHR, 7 of June 2001).

[11] David J Harris, O'Boyl, Edward P Bates & Warbrick, Law of the European Convention on Human Rights (2nd Edition, Oxford University Press, 2009), 238.

[12] *Ashingdane v. The United Kingdom, App no.* 8225/78 (ECtHR, 28 May 1985).

[13] *Berger v France*, App no. 48221/99 (ECtHR, 3 December 2002)- '*limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 § if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'*

any limitation on that right would be excessive if it did not pursue legitimate objectives and did not have a proportionate relationship between the means employed and the aims pursued.

In the submissions of the respondent in the discussed case, as was argued in the *E&G properties*[14] case, it was stated that the purpose of Article 460 is 'so that the government may have time to offer redress or a solution to a dispute that has arisen with private parties'[15]. The Court had to examine whether this objective is reasonable or balanced in terms of constitutional and conventional rights above explained, and concluded that:

> *there is no legitimate and proportionate justification for the fact that the Government has arbitrarily, unilaterally and gratuitously granted itself this procedural privilege under the pretext, as the Attorney General argues, that the Government will have time to offer redress or a solution to the issue that has arisen. The same argument could be given in favour of issues arising between private citizens in the sense that if a citizen were informed in advance by an official letter or protest, even he would have the opportunity to reach a solution or offer redress to the counter-part. The Court therefore sees no logic and justification in this raison d'etre of the procedural advantage granted by the legislator to Government from the point of view of equality of arms.*

The Court went on to stress that even more worrying, both for the Maltese legal framework and for the citizen is the fact that the acts of the case are struck *ab initio* without the opportunity to advance the case. The Court ruled that this Article could lead to a 'clear breach of his effective access to a court as he would lose the chance to proceed further'.

The Constitutional Court upheld this judgment, but not on all the grounds considered by the Court of first instance. The Court stated that:

> *the mere fact that a person who wants to bring a case against the Government must first present an official letter or a judicial protest and wait ten days from the filing of the letter before judicial proceedings does not breach human rights... However in the opinion of this Court the legislator failed to obtain the required balance dealt with the consequences for the non-adherence to the requirements imposed in this article. Although it is true, that the formalities imposed in this article are not particularly onerous, the consequence of the failure on the part of the individual to observe them, namely the nullity of the act, is devastating ... the Court accepts that the purpose for which this article is intended is necessary and in the public interest, but finds it difficult to understand how such a severe and odious sanction is also necessary and in the public interest, and in fact no justification for it has been put forward by the appellants.*

Thus, the Constitutional Court considered that Aticle 460 is unconstitutional due to the nullification of the act and not because it is an obligation which applies only in favour of the government.[16]

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[14] 573 /2018 *Paul Gauci pro et noe vs Sovrintendent tal-Patrimonju Kulturali noe*, Civil Court (First Hall) 8 July 2019.

[15] 8/2019 *Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et*, Civil Court (First Hall), 15 November 2019.

[16] 'Il-konsegwenza ta' nullità prevista mill-liġi, meħuda flimkien mal-formaliżmu esaġerat li bosta drabi jiġi adoperat mill-qrati, iwassal għar-riskju mhux biss ta' multipliċità tal-kawżi, li suppost qed jiġu evitati permezz ta' dan l-Artikolu, iżda wkoll it-telfien permanenti ta' jedd sostantiv da parti taċ-ċittadin li kif jirriżulta mill-ġurisprudenza ċitata aktar 'il fuq huwa

Preceding this judgement there is a rift in jurisprudence. In the judgements; *Avv. Cardinali Michele proprio et nomine vs Il-Kummissarju tal-Pulizija et*[17], and *Fenech Yorgen vs Avukat Ġenerali et*[18], the courts did no regard the *Mark Formosa*[19] judgement, while in *Topcat Holdings Limited vs Eurostyle Limited et*[20] and *Oliver Ruggier vs Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar*[21], the courts rejected the preliminary plea of article 460 on the basis of the *Mark Formosa*[22] judgement.

Conclusions

The unconstitutional rule of Article 460 is still to this day a rigorously utilised preliminary plea which has often terminated cases before they begin[23]. In *Hasan Tunc and others v. Turkey*[24] the European Court of Human Rights stated that:

in applying procedural rules the courts must avoid excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the procedural requirements laid down in statutes

Article 460 is inflexible to the extent that the courts have no room for a broader interpretation of the terms of this rule.[25]

In *Sotiris and Nikos Koutras Attee v. Greece*[26], the Court stated that:

> *Litigants should expect the existing rules to be applied. However, the rules in question, or the application thereof, should not prevent persons amenable to the law from availing themselves of an available remedy.*

Furthermore, Article 460 does not pass the test drawn up by the Court in *Zubac v Croatia*[27], where it was held that:

> *The right of access to court is impaired when the rules cease to serve the aims of legal certainty and the proper adminstration of justice and form a sort of barrier preventing the litigant from having his/her case determined on the merits by the competent court*

Article 460 creates legal uncertainties, with several conflicting judgements, and acts as a barrier to block cases on a preliminary basis. The *ratio legis* of providing a remedy outside of court

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impermissibbli għaliex limitazzjonijiet għad-dritt ta' aċċess għall-qorti ma jistgħux ifixxklu l-essenza innifisha ta' dan id-dritt.'

[17] 563/19JZM, Avv. Cardinali Michele proprio et nomine vs Il-Kummissarju tal-Pulizija et, Civil Court (First Hall) 30 January 2020.

[18] 1142/2019 Fenech Yorgen vs Avukat Ġenerali et, Civil Court (First Hall) 15 July 2020.

[19] 8/2019 Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et, Constitutional Court, 20 July 2020.

[20] 1195/2019, Topcat Holdings Limited vs Eurostyle Limited et, Civil Court (First Hall), 23 February 2022.

[21] 419/2014/1, Oliver Ruggier vs Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar, Civil Court (First Hall) 1 December 2021.

[22] 8/2019 Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et, Constitutional Court, 20 July 2020.

[23] 158/2022, Maria Theresa Chan vs Is-Segretarju Permanenti tal-Ministeru tas-Saħħa, Civil Court (First Hall) 7 July 2022. and 1254/2007/1 Philip Bartolo et vs Tarcisio Caruana et, Court of Appeal, 31 August 2021. Also refer to: 563/19, Avv. Cardinali Michele proprio et nomine vs Il-Kummissarju tal-Pulizija et, Civil Court (First Hall) 30 January 2020 and 1142/2019, Fenech Yorgen vs Avukat Ġenerali et, Civil Court (First Hall) 15 July 2020.

[24] *Hasan Tunç and Others v. Turkey,* App no.19074/05 (ECtHR, 31 January 2017).

[25] 8/2019 *Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru għal Għawdex et*, Civil Court (First Hall) 15 November 2019: 'Huwa minnu li l-Qrati tagħna, konxji mill-effetti tan-nuqqas t'osservanza ta' dan l-artikolu fuq il-jeddijiet taċ-ċittadini, ifittxu li jagħtu nterpretazzjoni restrittiva lil dan l-artikolu tal-liġi. Iżda dan ma jneħħi xejn mill-fatt li fl-istess waqt il-Qrati tagħna għandhom ukoll idejhom marbutin'.

[26] *Sotiris and Nikos Koutras Attee v. Greece,* App no. 39442/98 (ECtHR, 16 November 2000).

[27] *Zubac v. Croatia*, App no. 40160/12 (ECtHR 5 April 2018).

has not been achieved and thus it cannot be considered more than a pretence for the nullification of acts; an unreasonable consequence which unnecessarily restricts the right of access to a Court. For this reason GħSL is making the same appeal made in 1993 by the *Permanent Law Reform Commission*[28] to remove this article from the Code of Organisation and Civil Procedure and above all to honour the judgement of *Mark Formosa vs Permanent Secretary within the Ministry for Gozo et*.[29]

[28] Permanent Law Reform Commission, Final Report On Human Rights and the Code of Organization and Civil Procedure, Valletta, Permanent Law Reform Commission, 9 February 1993.
[29] 8/2019 *Mark Formosa vs Segretarju Permanenti fi ħdan il-Ministeru għal Għawdex et*, Constitutional Court, 20 July 2020.

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