

Administrative Acts and Measures of Internal Organization or Administration: A Legal Analysis

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In this article, **Prof Tonio Borg** examines the significance of the exception contained in the definition of administrative act under article 469A of the Code of Organization and Civil Procedure, namely internal organizational matters. The author underlines the different and conflicting judgments interpreting this exception and calls for a legislative intervention to ensure legal certainty.

TAGS: Administrative Law, Article 469A, Acts of Internal Organization, Judicial Review

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Judicial review of administrative action under article 469A of the Code of Organization and Civil Procedure depends on two conditions, namely that an act has to be classified as administrative and that said act must be performed by a public authority. Article 469A provides a definition of the term administrative act:

“Administrative act” includes the issuing by a public authority of any order, license, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority.¹

Two rules have been laid down in the jurisprudence of our courts regarding this definition. Firstly, for an act to be administrative, it has to be the act of decision by a public authority on the matter. Consequently, a recommendation to proceed with disciplinary action by the Police Board to the Commissioner of Police was not deemed to be an administrative act even though the Commissioner acted upon such recommendation. This was laid down by the Court of Appeal in *Elton Taliana*,² reversing several decisions by the First Hall of the Civil Court which had ruled that, insofar as an organ of the Executive made a recommendation, the latter was reviewable. The other rule laid down by our courts is that article 469A does not apply to ordinary civil acts, even though this principle has not always been followed and actions under this article have been pursued in purely civil matters such as recognition of a personal right over government property.³

The main problem which has, however, arisen is the exception in the definition relating to acts of internal organization or administration. The wording of the law is clear, in that, if an act of a public authority is merely one of internal organization, then such act is not an administrative one and therefore cannot be subject to court review.

This provision was culled from French Administrative law.⁴ It is the only clear instance where our law on judicial review, which is usually based solely on English common law and practice, was influenced by a law from the continent. But what is a measure of pure internal organization? Invariably, public authorities have tried to avoid court review by pleading that an act is one of internal organization and therefore not subject to review. To compound matters, the courts have not been consistent in interpreting what amounts to such internal organization matters. In fact, the conflicting

¹ Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469A.

² 177/2014/1 *Elton Taliana vs Onorevoli Ministru għall-Intern u Sigurta' Nazzjonali et*, Court of Appeal 20 July 2020.

³ 877/2008 *Karina Fenech vs Awtorita' tad-Djar et*, Civil Court (First Hall) 12 December 2011.

⁴ See L Neville Brown and John S Bell, *French Administrative Law* (5th edn, Oxford University Press 1998) 159 *et seq.*

judgments relate to two matters:

- (a) what is included in such wording, and
- (b) whether such measure remains to be considered of an internal organizational nature when challenged for, say, abuse of power or breach of the rules of natural justice.

Initially, the courts were very restrictive in interpreting what is an internal organizational matter rather than an administrative act. For instance, in *Falzon*,⁵ a transfer of a member of the Police force was initially considered to be an unreviewable act of internal organization but later transfers within the public service were deemed to be administrative acts subject to review. A brief overview of the jurisprudence of Maltese courts of law reveals interesting facts, issues, and unresolved problems.

In *Borda*,⁶ a part time university lecturer alleged that his application for recruitment as a full-time lecturer in the Faculty of Economics had been rejected owing to his age, an irrelevant consideration in terms of article 469A. The University pleaded that the recruitment exercise was a matter of internal organization and thus, not subject to review. The Court of First Instance begged to differ since the call for applications had been open to any interested person whether in employment with the University or not, and therefore, could not be considered as merely internal. Arguing, *a contrario sensu*, did that mean that had the call been limited to university employees, such matter would have been classified as an internal organization matter not subject to court scrutiny?

In *Falzon*,⁷ the Court ruled that a promotion within the Police Force was an unreviewable internal matter; but in other judgments⁸, promotions and indeed transfers within the same public service were considered to be reviewable administrative acts. Indeed, in one case relating to the transfer of a public officer, the Court ruled that the norms of good governance required that such officer be allowed to make representations before being transferred, though in that case the transfer entailed disadvantaged economic consequences for the officer.

In recent times, a pronouncement on the meaning of the phrase ‘internal organization’ was made in the *Buhagiar* case.⁹ In that case, the plaintiff, a consultant and public officer at the State Hospitals, alleged that a request relating to his designation within the public service had been unjustly

⁵ 2459/1999/1 *Edward Falzon vs Kummissarju tal-Pulizija*, Civil Court (First Hall) 22 October 2002.

⁶ 1908/2001/1 *Dr Emmanuel Borda vs Prof Roger Ellul Micallef noe et*, Court of Appeal 29 May 2009.

⁷ *Edward Falzon vs Kummissarju tal-Pulizija* (n 5).

⁸ 875/2006 *Carmel D’Amato et vs L-Awtorita’ tat-Turiżmu ta’ Malta (M. T. A.)*, Civil Court (First Hall) 29 November 2011.

⁹ 463/2005/1 *Dr Louis Buhagiar vs Il-Prim Ministru et*, Court of Appeal 27 May 2016.

disallowed. The Court ruled that such matter was purely internal.

The plaintiff had been assigned an extra administrative duty along with those he already had as a consultant at the State Hospital. This was assigned together with a small allowance, more out of recognition of his services to the Department of Medicine than for the work performed. The plaintiff sued the health authorities claiming that following that assignment, he had to be referred to as 'senior consultant' even though this grade did not exist within the public service and no procedure for such post had been commenced by the Public Service Commission. The assignment of duties was done verbally and was temporary in nature and duration. The Court of First Instance declared that:

If the complaint is one relating to unreasonable exercise of a discretion, or a breach of one of the principles of natural justice or even abuse of power or excess of authority (ultra vires behaviour), the duty falls upon the Court to examine that case for the issue does not remain one of mere internal organization or management but one which strikes at the heart of the raison d'être of the action of judicial review of administrative act.¹⁰

Surprisingly, on appeal, even though the plaintiff had alleged abuse of power and breach of natural justice principles, the Court concluded that the behaviour of the health authorities did not amount to an administrative act. Therefore, in spite of the nature of the legal action proposed, the defendants' actions were not reviewable.

One can argue that a proper interpretation of the case law on this point is that if abuse of power is not only alleged but proven, then the caveat of non-reviewability of an internal organization matter kicks off and thus, mere allegations are not enough. However, this point has not been made clear at all, and different interpretations can be made on the Courts' pronouncements on this point.

There is no doubt that there is a contradiction between what the court first stated regarding its power to review an action of the public administration even if consisting of an internal organisation matter when the request for review is based on abuse of power and breach of natural justice norms, and the conclusion of the court that once the case related to internal organization, there is no judicial review.

Indeed in the *Borda* case, the Court, in deciding that the lack of recruitment of the plaintiff as a full time lecturer was not an internal organizational matter, did not decide anything on the fact that the plaintiff was alleging abuse of power by the University authorities.¹¹ It would have been simpler

¹⁰ ibid translation of paragraph found on pg 14.

¹¹ *Dr Emmanuel Borda vs Prof Roger Ellul Micallef noe et (n 6)*.

for the Court to state that, once the plaintiff was alleging abusive behaviour in his regard, the core of his complaint could not be considered as just an internal organizational matter. Instead, the Court went the full hog and dealt with the plea raised by University that the matter was purely organizational issue, a plea which was subsequently rejected.

The Court first remarked that if the exception applies, then even if there are indications that the act was an abuse of power or in breach of the natural justice norms, it would not be able to review:

If a decision is taken with the aim of internal organization or administration within the same authority, then the Courts are prevented by law from reviewing such decision even when at the moment of such decision there occurred a breach of some principle of natural justice or any other breach envisaged in article 469A(1) of Chapter 12; this is because there would be missing a constituent element of the administrative act.¹²

Therefore, it first had to consider whether the action blocking recruitment of the plaintiff was a mere organizational matter within the University. It ruled that since the call was open for any person even if not employed at the University, it was not merely internal, an argument which was endorsed by the Court of Appeal:

It does not result that that who was selected to fill the post for which plaintiff had applied had to be a University employee. It does not appear that the call for applications was only an internal one or open only to persons already lecturing at University, or that persons who were not members of the University staff could not apply. The Court understands that the third plea raised by defendants would have been acceptable had it been proven (and here the burden of proof would have been on who raised the plea) that the call for applications was only internal or if it was shown that the decision was one of re-organization of the Department concerned.¹³

The matter of definition of internal organization matter remains one which, to put it mildly, is not clear. In *Falzon*,¹⁴ the plaintiff alleged that he was excluded from a promotion exercise within the Police Corps. The Court ruled that:

The right of defendant to grant or refuse a promotion in particular circumstances amounts to an act done for purposes of internal organisation or administration and thus, the exercise of such right should be left within the discretion of defendant. To reach his decision, the defendant has to take into consideration all the relevant factors in the interests of the public service and

¹² *ibid* translation of paragraph found on pg 6.

¹³ *ibid* translation of paragraph found on pg 7.

¹⁴ *Edward Falzon vs Kummissarju tal-Pulizija* (n 5).

*the country in general.*¹⁵ *In the exercise of such right, it must be ascertained that there is no distinction, exclusion or preference owing to political opinion of the person concerned, in which case this Court would have jurisdiction, something which is not being alleged in the current case.*¹⁶

This conclusion is half-way between accepting that an internal organization exercise is not subject to court review and allowing court scrutiny when there is political discrimination. This reasoning is akin to such other developed by our courts, even though sometimes in contradictory judgments, the exception in favour of merely organizational matters no longer applies when there is abuse of power. However in this case, the pronouncement by the court was limited to political discrimination and not on other matters such as unreasonableness, breaches of norms of natural justice, and excess of authority.

At this point, the issue inevitably arises: does the reasoning that the derogation and exception in favour of organizational internal matters does not apply when the grievance relates to one or more of the grounds of review found in article 469A amount to a legal tautology or *petitio principii*? For if court scrutiny based on the grounds of review do not apply when the act of the public authority is one of internal organization, how come one argues that if there is an allegation based on one of the grounds of review, the exception does not apply? This is begging the question.

In *Rita Vella*,¹⁷ the Court of Appeal ruled that:

*The Court considers that insofar as the complaint relates to an unlawful exercise of discretion by appellant, it cannot be said that such behaviour enjoys immunity from judicial review. Public authorities are always bound by law to perform their duties and exercise their powers strictly within parameters set by law. Consequently, the Courts are only precluded from reviewing the merits of measures which result to have been effectively executed with the aim of internal administration or organization.*¹⁸

In *Denis Tanti*,¹⁹ the Court of Appeal observed that:

Certainly, it was not the intention of the legislator to exclude jurisdiction of the Court to review administrative acts even in the eventuality that a public authority arbitrarily chooses to describe a particular act as a measure of internal organization or administration to evade court review. Consequently,

¹⁵ Constitution, Article 110(2).

¹⁶ *Edward Falzon vs Kummissarju tal-Pulizija* (n 5) translation of paragraph found on pg 7; See also 1040/16 *Carmen Grech vs il-Prim Ministru*, Civil Court (First Hall) 6 July 2017 which ruled that ‘if a measure reaches a level where it touches on the rights of persons, then such measure enters into the realm of administrative acts which a Court has the power to review’.

¹⁷ 140/2012/1 *Rita Vella vs Tabib Principali tal-Gvern et*, Court of Appeal 26 January 2022.

¹⁸ *ibid* translation of paragraph found on pg 10.

¹⁹ 1164/1995/1 *Denis Tanti vs Prim Ministru et*, Court of Appeal 16 November 2004.

the ordinary courts enjoy jurisdiction to examine whether the transfer as the one given to respondent in appeal was truly a measure of internal organization or administration; if however it results that in fact such transfer did not constitute such measure but was only a cover-up, they can exercise their functions in terms of article 469A.²⁰

In *Haroun*,²¹ the Court observed that in order to decide on a plea that the act was merely an internal one:

This Court must necessarily conduct an investigation. This therefore, implies that it has the power that is to say, the jurisdiction to take such decision by hearing evidence and through any other means allowed by law. Therefore, in the view of the Court the defendants' argument does not in any way remove the power of the court to examine plaintiff's complaint; on the contrary, the necessity arises to exercise such power.²²

This means that only if abuse of power is proven does the plea of non-reviewability of organizational matters fall. Consequently, once the plea has been raised that the act is one of internal management and therefore not reviewable, the Court still has to hear evidence to see whether there has been abuse of power, or, according to some other judgments, breach of natural justice or excess of authority so that one decides whether the exception or court review prevails. In direct conflict with this position is *Rita Vella*.²³ In that case, the Court of First Instance ruled that the mere fact that abuse of power had been alleged regarding a transfer within the public service automatically divested the act of any immunity from judicial scrutiny as an internal organizational matter:

Not every act or measure of internal organization or administration precludes the power of a court to review such action. In no way is the Court adjudicating the issue at this stage regarding plaintiff's case and this because the case is still in the early stage of mere allegation.²⁴

Therefore, the Court of First Instance rejected the plea of non-reviewability raised by the public authority on the basis of a mere allegation by the plaintiff of abuse of power.

An attempt to define the difference between administrative acts and ones of internal organization was made by the Court of Appeal in *Peter Gatt case No 1*.²⁵ Gatt, the plaintiff, had been detailed from the Office of the Prime Minister to the Malta College of Arts Science and Technology (MCAST) as a

²⁰ *ibid* translation of paragraph found on pg 12.

²¹ 772/2000/1 *Aaron Haroun vs Onor Prim Ministru et*, Civil Court (First Hall) 15 March 2001.

²² *ibid* translation of paragraph found on pg 15.

²³ 140/2012 *Rita Vella vs It-Tabib Principali tal-Gvern et*, Civil Court (First Hall) 31 October 2012.

²⁴ *ibid* translation of paragraph found on pg 9.

²⁵ 1250/2021/1 *Dr Peter Gatt vs Is-Segretarju Permanenti Dr Francis Fabri et*, Court of Appeal 17 June 2025.

lecturer which detail was then arbitrarily revoked, prompting him to allege abuse of power. The subject of the first of the two cases filed by Gatt alleged that the work he was given when the detail was revoked amounted to abusive behaviour, prompting the issue of internal organization. The Court of Appeal stated that:

What needs to be examined by this Court is whether a) the decision is to be considered one of organization and internal administration and if it is, b) whether it strikes at the heart of the action regarding judicial review of administrative action. In case the decision fails any one of these tests, then such decision is not covered by the definition of administrative act envisaged in article 469A(2).²⁶

In this case, the Court ruled that once the detailing had been revoked, the question of where the plaintiff as public officer was to be assigned to perform his duties was merely an internal organizational matter. It stated:

This Court is of the opinion that once plaintiff was again considered to be an employee of the Education Ministry his transfer to any post within such Ministry constitutes prima facie a measure considered for purposes of internal organization or administration within the said authority, once it effectively consists of a transfer of a public officer from one department to another or a decision regarding the post to which the public officer is assigned. Consequently, the first criterion for the decision...to be considered as excluded from the definition of administrative act, is fulfilled.²⁷

Again, in *Consiglio*,²⁸ the same Court remarked that when such plea relating to internal organization is raised:

It would be wise for the Court to consider the action not only in its appearance at first glance, but also the complaint regarding such act. This is being said because if the complaint relates to an unreasonable exercise of a discretion or a breach of one of the principles of natural justice or even abuse of power or excess of authority that is to say an ultra vires action, the duty falls upon the Court to review the case for the issue does not remain one of mere internal organization or administration, but one which strikes at the heart of an action for judicial review of administrative action.²⁹

Besides, the Court ruled that the second test, namely whether the action affected the core of judicial review of administrative action, was not satisfied, and therefore, the exception applied.

²⁶ *ibid* translation of para 42 found on page 8.

²⁷ *ibid* translation of para 44 found on page 9.

²⁸ 446/2008 *Magġur Ivan Consiglio vs L-Onorevoli Prim Ministru et*, Civil Court (First Hall) 18 February 2010; See also: 1087/2009 *Raymond Camilleri et vs Il-Kap Kmandant tal-Forzi Armati et*, Civil Court (First Hall) 26 October 2010 and 44/2008 *Magġur Claudio Terribile vs Prim Ministru et*, Court of Magistrates (Gozo, Superior) 4 November 2009.

²⁹ *Magġur Ivan Consiglio vs L-Onorevoli Prim Ministru et* (n 28) translation of paragraph found on pg 7.

In spite of certain judgments of the *Conseil d'Etat* which limited review in internal organization of public authorities, in French administrative law, the tendency has been for the courts to delve deeper into such actions. When a State school near Paris introduced new rules forbidding the wearing of any distinctive insignia, religious, political or otherwise aimed to prevent Muslim girls from wearing the traditional headscarf, the *Conseil* ruled that such prohibition was too general in nature and since it affected human rights could not be classified as merely internal.³⁰ L. Neville Brown and John S. Bell in their work *French Administrative Law*, stated that:

The French draw a distinction between 'actes administratifs' and those measures which may be regarded as no more than the administration putting its own house in order. Such domestic 'house-rules' are described as measures of purely internal organisation within the administration (mesures d'ordre interieur administratives) and are not normally open to judicial review at all. Thus one cannot challenge a departmental circular giving advice (as distinct from directives) on the interpretation of a statute; nor an instruction about school uniform or curricula... A similar attitude is taken towards disciplinary measures in the armed forces... But above a certain point the administrative measure may become, because of its gravity, an acte administrative within the cognizance of the administrative judge (see CE 26 January 1966 Davin, where the peremptory expulsion of a pupil from a state school was adjudged so grave a sanction as to fall outside the category of such 'measure', and to be an acte administrative open to judicial review).³¹

The issue regarding when to make an exception to the exception and allow court review in internal organization matters remains far from clear in the Maltese Courts' jurisprudence. In *Gafa*,³² the Court ruled that a refusal of a promotion to the plaintiff within the State-owned Malta Drydocks owing to the fact that he was an elected member of the Drydocks Council was an internal matter. So was a non-renewal of a contract of employment for a definite period.³³ The same applied to a withdrawal of detailing of a public officer from one area to another area of the public administration.³⁴ In *Paul Borg*,³⁵ the withdrawal of a tag by the transport authorities created so much economic disadvantage to the plaintiff that it was classified as a reviewable administrative act. In *Denis Tanti*,³⁶ the Court of Appeal rejected the internal organization plea because it resulted that applicant's transfer within the public service had been an unreasonable act of abuse of power. Similarly, in

³⁰ *Kherouaa* case Conseil d'Etat 2 November 1992.

³¹ *French Administrative Law* (n 3) 154 -155.

³² 1512/2001/1 *Anthony Gafa vs Malta Drydocks*, Civil Court (First Hall) 26 November 2009.

³³ 63/2015 *Alan Fiott vs Direttur Ġenerali Servizzi Edukattivi*, Civil Court (First Hall) 26 February 2019.

³⁴ *Carmen Grech vs il-Prim Ministru* (n 11).

³⁵ 821/2008 *Paul Borg vs Awtorita' Dwar it-Trasport Pubbliku et*, Civil Court (First Hall) 21 May 2009.

³⁶ *Denis Tanti vs Prim Ministru* (n 13).

George Azzopardi,³⁷ the Court ruled that an internal promotion exercise within the Heritage Malta agency, once it was not flawed by any finding of abuse of power or unreasonableness, was an internal organization matter.

In *Nikola Borg*,³⁸ the Court of Appeal remarked that promotions usually entail financial consequences and cannot be downgraded to mere acts of internal organization. It ruled that promotion matters:

*relate to financial and retributive aspects which plaintiff is aiming to acquire if retrospective recognition is given to the public service scale which he claims was not awarded to him at the right moment. Such question was one which primarily affected plaintiff and which did not per se relate to internal administration. Besides the financial aspects relation to the awarding of a promotion or lack of such award are of a certain importance to the public officer concerned.*³⁹

Conclusion

One can draw two conclusions relating to the proper interpretation of the derogation regarding internal organization matters. One is that the moment the facts of the case in a judicial review case indicate that the matter is merely an internal organizational matter, then court scrutiny is blocked, irrespective of the grounds of review on which the case is based. This seems to be the most logical interpretation. However, the majority of case law tilts in favour of the second conclusion, namely that once it is merely alleged that there exists one of the grounds of review mentioned in article 469A, then the derogation automatically does not apply. The danger of this conclusion is that the derogation itself becomes superfluous entangled in a legal tautology. If it is internal there is no judicial review but if you claim breach based on one of the grounds of judicial review, then the exception does not apply and review becomes possible.

An authoritative judgment by the highest court of the land or a legislative intervention is needed to clarify this legal anomaly and give a final interpretation of this derogation.

³⁷ 28/2017/3 *George Azzopardi vs Heritage Malta Agency et*, Court of Appeal 29 October 2014.

³⁸ 1829/2000/1 *Nikol Borg vs Segretarju Permanenti*, Court of Appeal 27 January 2006.

³⁹ *ibid* translation of paragraph found on pages 9-10.



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