

ARTICLE 469A

from a
PLANNING LAW
PERSPECTIVE

Robert Musumeci

Contents

- 1 Preamble
- 2 Article 469A
- 3 What if a '*rimedju effikaći*' is possible elsewhere?
- 4 Scenarios of judicial review dealt with by the court in the context of planning legislation
- 5 The court's approach
- 6 Summary of principles enshrined in court judgements
- 7 Recommended action
- 8 Conclusive remarks

Biography



Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled '*Judicial Interpretation of Maltese development planning law. Eliciting the added value*' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled '*The Development Planning Act 2016 – A critical Appraisal*'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a *perit* in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is a senior lecturer in planning law and administrative law at the University of Malta. He also authored the book '*Selected Principles of Maltese Planning Law*' (Kite Publications, 2021). Dr Musumeci is the first to hold warrants to practice both as a lawyer and a *perit* in Malta.

1 Preamble

Review of the legality of administrative action is aimed at submitting public authorities to the rule of law and at protecting the rights of individuals in the process. In a demand for judicial review, the Courts seek to establish whether the public Authority in question exercised its powers within the limits set out by Parliament.¹ Differently from cases under appeal, the Courts do not review both the legality and the merits of a case. In fact when it comes to judicial review, the courts are precluded from '*substituting their own discretion for that of an authority in which the discretion has been confided*'.² In other words, judicial review merely focuses on the legality of the particular administrative act without entering into the substantive merits.

This principle was upheld in a number of domestic judgments amongst which, in the relatively recent judgment in the names of **Nazzareno Scerri et. vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.**³, decided by the First Hall, Civil Court wherein the said court specifically noted that:

'L-ghan wara kawza ta' din ix-xorta m'huwiex biex id-diskrezzjoni li jkollha l-awtorita' pubblika jigi sostitwit b'dik tal-qorti.'

Interestingly, there was no written legislation regulating judicial review up until the 1980's, and yet, the Maltese Courts had held to have the power to review administrative acts⁴, particularly so when such acts were thought to be in violation of human rights.⁵ At the time, the general rule was to supplement the legislative deficiencies using common law principles.⁶ This notion was highlighted in the seminal case in the names **Cassar Desain James vs James Louis Forbes**⁷ presided by the late Chief Justice Sir Arturo Mercieca and was subsequently echoed in a string of other judgments.

¹ I. Loveland: *Constitutional law, administrative law, and human rights: a critical introduction* (Oxford University Press, 2012)

² De Smith & Evans: *Judicial Review of Administrative Action* (4th Edition. London: Stevens and Sons Ltd., 1980)

³ **Nazzareno Scerri et. vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.** decided on 30th January 2015 by the First Hall, Civil Court - [470/06]

⁴ Natalino Caruana De Brincat: *A Critical Analysis of the Available Mechanisms of Review of Administrative Acts at Local Government Level* A thesis submitted in partial fulfilment of the degree of Doctor of Laws. Faculty of Laws University of Malta. April 2016

⁵ See for example **Anton Buttigieg vs l-Onorevoli Paul Borg Olivier** decided by the Court of Appeal - [1/62]

⁶ Ian Refalo: *Cases in Administrative Law* (2012)

⁷ **James Cassar Desain vs James Louis Forbes** decided by the Court of Appeal - [538/72]

The first piece of written legislation dealing with judicial review of the legality of administrative actions was eventually promulgated in 1981⁸, ironically in a subtle attempt to curtail the Court's powers. Former Justice Minister Tonio Borg had argued in Parliament that the introduction of **Act VIII of Parliament** came in response to the Blue Sisters judgment⁹ which had annulled the Minister's decision to impose a set of 'arbitrary' conditions, describing his actions as 'unreasonable'.

As a reaction, the Mintoff government sought to reposition itself by introducing **Article 742** in the **Code of Organization and Civil Procedure** and from that point onwards, the Minister appeared to enjoy greater immunity from the Courts because as long his actions were not '*in violation of an explicit provision of a written law*', there was nothing to suggest that '*the due form or procedure has not been followed in a material respect*' as a result of which '*substantial prejudice ensued from such non observance.*'

Fourteen years on, the subsequent Nationalist administration made it a point to revisit **Article 742** and the new **Article 469A** of **Chapter 12** was introduced by way of **Act XXIV of 1995**. The said **Article 469A** provided the judiciary with a new set of parameters, beyond which an administrative act would be declared null and without effect. This was not to say that the situation reverted back as it was prior to 1981 in the sense that the Courts had a '*cart blanche*' to develop their own jurisprudence.

2 Article 469A

Article 469A(1) of **Chapter 12** of the **Laws of Malta** reads as follows:

'Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:

- (a) where the administrative act is in violation of the Constitution;*
- (b) when the administrative act is ultra vires on any of the following grounds:*

⁸ **Act VIII of Parliament**

⁹ **Prim Ministru, Ministru tal-Ġustizzja, Artijiet, Djar u Affarijiet tal-Parlament u tal-Kummissarju ta` I-Art vs Sister Luigi Dunkin bħala Superjura tal-Kongregazzjoni 'Little Company of Mary' (Blue Sisters)** decided on 26th June 1980 by the First Hall, Civil Court - [675/80]

- (i) when such act emanates from a public authority that is not authorized to perform it; or
- (ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or
- (iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or
- (iv) when the administrative act is otherwise contrary to law.'

For the purpose of **Article 469A**, an 'administrative act' is defined as 'any act' involving:

'...the issuing by a public authority of any order, license, permit, warrant, decision, or a refusal to any demand of a claimant' provided that such act 'does not include any measure intended for internal organization or administration within the said authority'.

From the above, it follows that the 'administrative act' should necessarily concern a public authority acting in its decision-making capacity. This was confirmed in **J. Galea vs Kmandant tat-Task Force et.**¹⁰ wherein it was stated that:

'...ghandu jkun ovvju, fl-ewwel lok, illi ghemil amministrattiv jista' jkun biss sindakabbli mill-Qrati jekk dan ikun jirrigwarda att decizjonali ta' awtorita' pubblika li jinvolti l-hrug jew ir-rifjut f'dan il-kaz, tal-licenzja mitluba.'

Meanwhile, a 'public authority' is taken to mean:

'... the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law.'

This means that 'a body corporate established by law', namely public corporations established by an Act of Parliament or an agency established by virtue of the **Public Administration Act**¹¹, falls within the definition of a 'public authority'. By exclusion, those government entities that are established under a law, such as commercial partnerships registered under the Companies Act where the majority shareholder is the government¹², should fall outside the definition of

¹⁰ **J. Galea vs Kmandant tat-Task Force et** decided on 5th October 1998 by the Court of Appeal

¹¹ An example would be Infrastructure Malta

¹² An example would be Gozo Channel Company Limited

public authority within the meaning of **Article 469A**. Having said this, the Courts are not necessarily always in agreement with this rationale.¹³

Either way, the Planning Authority was established by means of **Chapter 552** of the **Laws of Malta**¹⁴, hence an Act of Parliament, and therefore qualifies as ‘a body corporate established by law’ (as opposed to ‘under a law’). Consequently, there is no doubt that the Planning Authority qualifies as a ‘public authority’ in terms of **Article 469A**.

Finally, it must be kept in mind that, with the exception of acts in breach of the constitution, ‘an action to impugn an administrative act’ under **Article 469A** is possible on condition that action is instituted ‘within a period of six months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier’.¹⁵

Before delving further, the individual provisions enshrined in **Article 469A** shall be examined.

2.1 Acts in violation of the Constitution

Sub-article (1)(a) of **Article 469A** provides the possibility for aggrieved individuals to institute actions against a public authority where an administrative act ‘...is in violation of the Constitution’. *Prima facie*, this provision appears superfluous due to the fact that **sub-article (1)(b)(iv)** of the same **Article 469A** provides an umbrella remedy as to when ‘the administrative act is otherwise contrary to law’.

It is worth mentioning that **sub-article (1)(a)** was initially governed by a six-month statutory period within which one could potentially challenge an administrative act in breach of the Constitution. A year later, Parliament, however, had removed the said time limits¹⁶ on the pretext that constitutional violations should not be time barred.

Nevertheless, over the years, the Courts have held different interpretations with

¹³ For example, in **Kaptan Mario Grech Vs Gozo Channel Company Limited u Dr Joseph Grech fil-kwalita’ tieghu ta’ Chairman tal-kumpannija Gozo Channel Company Limited** decided on 27th April, 2010 [90/2009], the Court of Magistrates (Gozo) held that ‘*Il-fatt li l-Gvern ikun ghazel li jopera permezz ta’ kumpannija u mhux korp kostitwit b’ligi, ma ghandux ifisser li b’daqshekk dik il-kumpannija li tkun qeghda taqdi funzjoni pubblika m’ghandix tkun soggetta ghal stharrig taht l-Artikolu 469A tal-Kap. 12 fejn twettaq “eghmil amministrattiv”*’

¹⁴ **The Development Planning Act, 2016**

¹⁵ **Article 3(1)(b)** of **Article 469A**

¹⁶ **Act IV of 1996**

regard to the provision ‘*in violation of the Constitution*’ taken in the context of **Article 469A**.

For example, the conclusions reached by the First Hall, Civil Court in **Raymond Farrugia vs Kummissarju tal-Pulizija**¹⁷ clearly indicate that reference to the Constitution includes a reference to all acts of public administration in breach of the Maltese Constitution, not least fundamental human rights. This judgement specifically states that:

‘meta l-eghmil amministrattiv jikser il-Kostituzzjoni’ ifisser illi eghmil amministrattiv jista’ jigi dikjarat null, invalidu u minghajr effett meta dak l-eghmil jikser il- Kostituzzjoni inkluz b’hekk anke d-disposizzjonijiet dwar drittijiet fundamentali tal-bniedem.’

The Constitutional Court however took a diametrically opposite approach in **Christopher Hall et. vs Direttur tad-Dipartiment ghall-Akkomodazzjoni Socjali et.**¹⁸ when in its conclusions it held that **sub-article (1)(a)** of **Article 469A** refers to acts in violation of the Constitution with the exception of those acts linked to fundamental human rights. The honorable court in this case held that:

‘...is-subartikolu 1(a) ta’ l-Artikolu 469A tal-Kap. 12... jirreferi ghal ksur tal-Kostituzzjoni minn ghemil amministrattiv li ... ma jkunx jammonta ghall-ksur, ossia allegat ksur, tad-drittijiet fundamentali kif protetti bl-Artikoli 33 sa 45 tal-istess Kostituzzjoni’

The author has his reservations with regard to the Court’s assessment in the Hall Judgment quoted above since there is nothing to suggest that fundamental human rights and freedoms are excluded *a priori* from **Article 469A(1)(a)**. It is a well established legal principle that *ubi lex voluit lex dixit, ubi noluit tacuit* and since in this particular instance no reference has been made at all to the exclusion of fundamental human rights and freedoms from the ambit of the constitution, the conclusion arrived at by the Constitutional Court is, at best, perplexing and at worse incorrect.

One would have understood the Court’s position better had it argued that plaintiff had an alternative remedy through **Article 46(2)** of the Constitution, which

¹⁷ **Raymond Farrugia vs Kummissarju tal-Pulizija** decided on 12th November 2001 by the First Hall, Civil Court (Constitutional Jurisdiction)

¹⁸ **Christopher Hall u b’digriet tat-23 ta’ Gunju 2003 l-atti gew trasfuzi f’isem Josephine Hall, Alexander Hall u Stephen Hall vs Direttur tad-Dipartiment ghall-Akkomodazzjoni Socjali, l-Onorevoli Prim Ministru u l-Avukat Generali** decided on 18th September 2009 by the Constitutional Court - [1/2003/1]

specifically grants a right of action to any person who alleges that any one of the fundamental rights and freedoms has been or is likely to be violated. **Article 46(2)** can be taken as being one that absorbs the right of redress capable of being sought through **Article 469A** given that **Article 469A(4)** makes it clear that recourse to this article should be as a last resort if redress cannot be obtained through other specific laws.

2.2 Administrative Acts that are *ultra vires*

The legal doctrine of *ultra vires*, as used with reference to administrative acts, implies that discretionary powers must not be used for any other purpose except for those for which they were granted by the legislative. As Barnett rightly opines, '*the ultra vires principle is consistent with the principle of Parliamentary Sovereignty.*'¹⁹

As illustrated above, **sub-article (1)(b)** of **Article 469A** lists four instances when an administrative act is deemed to be considered 'ultra vires'. The following sub sections shall deal with these four grounds in more detail.

2.2.1 'Not authorized to perform it'

This ground refers to those instances when a public Authority acts beyond its jurisdictional remit provided in the enabling Parliamentary Act. Essentially, this provision is aimed at ensuring that public authorities have not acted beyond the parameters set out in the Parent Act. Despite enjoying a considerable degree of discretion, administrative authorities are therefore not empowered to do what 'they like' simply because they are '*minded to do so*'.²⁰ For example, a Local Council would be in breach of this sub-article were it to issue a development planning permit for the simple reason that such powers are vested with the Planning Authority.

2.2.2 'Non observance of Natural Justice or Mandatory Procedural Requirements'

The second ground for judicial review concerns 'natural justice' and 'mandatory procedural requirements', such considerations being held distinct from each other. In other words, the procedural rules that are expressly laid down in the

¹⁹ Hilaire Barnett: *Constitutional & Administrative Law* (10th Edition, Routledge, 2013)

²⁰ H.W.R. Wade: *Administrative Law* (Clarendon Press, Oxford, 1982, Fifth Edition)

legislative instrument should be pursued even where the objective of such procedures does not involve any denial of natural justice.

Let us take planning applications as an example. Were a decision on a planning application had to be taken in the absence of a development application report prepared by a case officer, the Planning Authority would commit a mandatory procedural requirement dictated by the Development Planning Act. This is different from not following an established procedural practice which is not expressly required by law. For example, as of recent, the Planning Authority has decided to inform neighbouring residents of any prospective development in their vicinity by sending a written notification notwithstanding there is no such obligation at law. Should the Authority decide to refrain from such practice, it may not be held into account on the basis of breaching a mandatory procedural requirement.

As to the 'the principles of natural justice', the notions of '*audi alteram partem*', '*nemo iudex in causa propria*' and the 'duty to give reasons' immediately come to mind. If we had to take planning legislation as an example, '*audi alteram partem*' translates to having all parties to a planning application, namely applicants and objectors, being afforded 'a fair hearing'. In practice, this means that both applicants and objectors in a planning application should be informed of all developments and given an opportunity to make adequate representations. Incidentally, these obligations are clearly set out in the **Development Planning Act**.

Likewise, the '*nemo iudex in causa propria*' principle is equally enshrined in the Development Planning Act which imposes an obligation on '*any member of the Authority, or a member of the staff of the Authority, or a consultant, advisor or other person engaged by the Authority*' who has '*any interest in any matter which falls to be considered by the Authority*' to disclose his or her interest to the Executive Council or the Planning Board immediately upon becoming aware of such conflict. **The Development Planning Act** further provides that such member must ensure not to influence the application and the decision process by not taking part 'in any consideration of such matter', nor attending or participating on such matters.²¹

In addition, the **Development Planning Act** specifically an obligation on the Authority to 'give reasons' for any of its decisions following planning applications, so much so that **Article 72(1)** of the **Development Planning Act** provides that '*the*

²¹ **Article 13(1)** of **Chapter 552** of the **Laws of Malta**.

*Planning Board shall give specific reasons for any refusal or for any particular conditions that may have been imposed.*²²

2.2.3 Abuse of public authority's power

The third subsection under which the Court may also undertake judicial review concerns abuse resulting from the authority's abuse of power 'done for improper purposes on the basis of irrelevant considerations'. In this case, the Court assumes a more subjective role due to the fact that there is no single definition as to what amounts to 'improper purpose' and 'unreasonableness'.

In the context of planning legislation, the Planning Authority may, in theory, order an applicant to install platinum apertures since '*in the granting of a development permission, the Planning Board shall be entitled to impose such conditions which it may deem appropriate.*'²³ But would such a condition be deemed reasonable? To take another example, the Planning Authority may impose an administrative fine up to two thousand euro (€2,000) each day, in the case where an infringement persists.²⁴ Would it be reasonable for the Authority were it to impose such a hefty administrative fine if the infringement is of a minor range?

2.2.4 'Otherwise contrary to the law'

The fourth and last ground is a '*clausola lenzuolo*' – the legislator wanted to ensure that public authorities do not resort to any behaviour which is prohibited by statute, though not being in breach of the first three grounds.

3 What if a '*rimedju effikaci*' is possible elsewhere?

Now that we have briefly covered the grounds of judicial review, it is important to stress that action in terms of **Article 469A** is not always admissible. Indeed, recourse under **Article 469A** is only possible when '*the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is not provided for in any other law.*'²⁵ Having said that, a number of Court judgments maintained that the said proviso should not be given a restrictive interpretation, highlighting that jurisdiction should only be declined if the Court is

²² Proviso to **Article 72(1)** of **Chapter 552** of the **Laws of Malta**

²³ **Article 72(1)** of **Chapter 552** of the **Laws of Malta**

²⁴ **Article 106(3)(b)** of **Chapter 552** of the **Laws of Malta**

²⁵ **Article 469A(4)** of **Chapter 12** of the **Laws of Malta**

satisfied that a practical and effective remedy is available before another Court or Tribunal. This principle was clearly highlighted in **Bunker Fuel Oil Company Limited et vs Paul Gauci et**²⁶ and in a string of later judgments.²⁷ In the **Bunker Fuel Oil** judgment, the Court's conclusions were as follows:

'Fil-fehma tal-Qorti, dan is-subartikolu (4) ta' l-Artikolu 469 A, biex jigi interpretat gustament, m'ghandhux jinghata interpretazzjoni restrittiva. L-eskluzjoni tal-gurisdizzjoni tal-Qorti, biex tistharreg l-ghemil amministrattiv, tkun gustifikata biss jekk il-Qorti tkun sodisfatta li, fil-prattika, persuna kellha rimedju effikaci u adegwat verament disponibbli ghaliha u hija irragonevolment ma utilizzatx tali proceduri disponibbli'

With regard to planning legislation, a *'rimedju effikaci'* is *prima facie* available through the Environment and Planning Review Tribunal (previously, the Planning Appeals Board), which was specifically set up under **Chapter 551** of the **Laws of Malta**²⁸ to hear and determine appeals (in terms of law and fact) from Planning Authority decisions concerning the instances listed under **Article 11** of the **EPRT Act**. It is relevant to note that with the introduction of **Chapter 551** of the **Laws of Malta**, an appellant may no longer dispute *'any matter of development control'* before the Tribunal as previously contemplated under **Article 41(1)(a)** of **Chapter 504** of the **Laws of Malta** because the contested *'matter'* must now be found under **Article 11** of the said **Chapter 551**.

Having said all this, what one has to keep in mind is that, when it comes to decisions of the Planning Authority, an aggrieved third party may pursue judicial review under **Article 469A** when a *'rimedju effikaci'* is not available under **Chapter 551**.

4 Scenarios of judicial review dealt with by the Court in the context of planning legislation

Since 1992, the Courts have had occasion to deal with several situations involving judicial review and acts of the Planning Authority. The Court's line of reasoning which was adopted in the following scenarios shall be focused upon in the next sections:

²⁶ **Bunker Fuel Oil Company Limited et vs Paul Gauci u Planning Authority** decided on 6th May 1998 by the First Hall

²⁷ **Joseph Muscat et vs Chairman tal-Awtorita tad-Djar** decided partially on 28th January 2004 by the Court of Appeal and **Dr. Philip Galea et vs Tigne` Development Co. Ltd. et** decided on 28th January 2004 by the First Hall, Civil Court - [1682/99]

²⁸ **Environment and Planning Review Tribunal Act**

- Whether a letter is considered to be an administrative act and thus subject to judicial review;
- Whether a Local Council can institute an action of judicial review against the Planning Authority;
- Whether an appeal before the Tribunal and judicial review can be sought simultaneously;
- Whether a complainant who fails to register an objection with the Planning Authority may seek redress under judicial review;
- Whether the Tribunal is authorized to conduct a judicial review;
- Whether allegations of 'different treatment' may be sought under Article 469A;
- Whether the Authority may be sued for damages under Article 469A;
- Whether decisions of the Tribunal may be subjected to judicial review under Article 469A;
- To what extent may a subsidiary plan be contested under Article 469A;
- Whether judicial review of a Local Plan is time barred;
- Whether a breach of fundamental human rights may be challenged via a request for judicial review.

5 The Court's approach

An account of the Court's reasoning in each of the above-mentioned scenarios is given in this section.

Is a clarification letter tantamount to an 'administrative act' as contemplated in **Article 469A**? This issue was dealt with in **Jupiter Co. Ltd. et. vs Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**.²⁹ In this case, the plaintiff company submitted that they had received a letter from the Authority stating that a full development application was required in order to sanction the alleged illegalities. In its submissions, plaintiff contended that the issuance of the said letter was tantamount to an 'administrative act' and therefore eligible to be considered for judicial review. The Court however concluded that the contents of the letter were not conducive to a 'final decision' and could thus not be seen as being encapsulated in the definition of 'administrative act' as intended by **Article 469A(2)**.

Against this background, the Court rejected plaintiff's application, stating that:

²⁹ **Jupiter Co. Ltd. u Veronica Gauci ghal kull interess li jista' jkollha vs Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar** decided on 3rd April 2009 by the Court of Appeal - [112/2004/1]

'Dik l-ittra ma dderimietx il-kwistjoni jew xi kwistjoni, tant li lill-perit intqal li jekk ried aktar informazzjoni jew xi kjarifikazzjoni ulterjuri, "please do not hesitate to contact the undersigned". Dik l-ittra kellha aktar forma ta' parir jew informazzjoni, izda ma kienetx tekwivali ghal ordni jew decizjoni.'

In other words, one should see whether the letter contains a decision which may be eventually superseded by another since *"a decision may be part of a two-tier process, so that an initial determination is superseded by a later one with the effect that the first decision may no longer be challenged"*³⁰.

In this case, however, the Court did not need to consider whether such letter was an intermediate decision or otherwise since it concluded that it was not a decision of any sort *ab initio*.

Who can institute an application in terms of **Article 469A** against the Planning Authority? The issue arose in **Kunsill Lokali Marsaskala et. vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.**³¹ In this case, the issue arose as to whether a local council, which is technically part of the longer arm of central government, albeit once removed through decentralization of power, can institute such proceedings. This in light of the fact that the Court in **Kunsill Lokali Marsaskala vs Avukat Generali** decided by the Constitutional Court on the 28th of June, 2012 had reasoned that under the Act of the European Convention, Chapter 319, a local council was precluded from doing so as it was not a non-governmental organization. The reason behind this decision was that had governmental organizations had a *locus standi* before the Constitutional Court, on human rights issues, it would have lead to the absurd conclusion that the state would be giving protection to itself against itself!

The Court, in the formerly mentioned judgement however reasoned that since this was not a matter of constitutional import but merely an administrative one, one could not use the same reasoning as that used by the Constitutional Court for human rights violations. What had to be analysed was whether the said local council had the right to sue the authority for procedural or substantive breaches,

³⁰ De Smith, Stanley A., and J. M. Evans: *Judicial Review of Administrative Action* (4th Edition. London: Stevens and Sons Ltd., 1980)

³¹ **Kunsill Lokali Marsaskala, Joseph George Sant, Paul Cutajar, Lawrence sive Lorry De Raffaele u b'digriet tal-14 ta' Marzu 2012 l-atti tal-kawza gew trasfuzi f'isem Peter De Raffaele, Stephen De Raffaele u martu Evelyn De Raffaele, u dan wara l-mewt tal-attur Lawrence sive Lorry De Raffaele fil-mori tal-kawza vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, L-Avukat Generali** decided on 29th November 2012 by the Court of Appeal - [336/2007]

something that according to the **Development Planning Act, Chapter 356**, in force at the time, it was considered as having given that a local council was held to be an interested third party in virtue of **Article 15(1)(d)(iii)**. Therefore, any person, including a local council, who enjoys a *locus standi* before the Planning Appeals Board, today, the Environment and Planning Review Tribunal, should be declared suited to proceed before a Court on **Article 469A** matters:

'...illi l-Kunsill ghandu d-drittijiet kollha bhal kull persuna ohra intitolata taghmel rapprezentazzjonijiet quddiem il-Bord tal-Appelli li ghandha funzjoni quasi gudizjarja u li tinghata d-drittijiet bazici li ghandhom jigu segwiti fil-konfront tieghu fosthom il-principju ta' gustizja naturali, u li ghalhekk jikkonsegwi b'mod naturali illi jekk dawn id-drittijiet jonqsu jew kif inhu qed jigi allegat f'dan il-kaz, il-proceduri ma gewx segwiti, l-istess Kunsill ikollu dritt shih li jitlob lil Qorti biex tinvestiga n-nuqqas tal-Gustizzja amministrattiva taht l-artikolu 469A(i)(b)(iii) kif qed jigi mitlub mill-Kunsill Lokali f'din l-istanza.'

In effect, this means that any person who has *'reasoned grounds based on environmental and, or planning considerations to justify the appeal'*³² should be declared equally suited since **Article 22(1)** of the **Environment and Planning Review Tribunal Act** specifically states that the doctrine of juridical interest is not applicable for appeals lodged under the said Act. Should there be no remedy before the Planning Tribunal all government authorities are thus eligible to challenge the Planning Authority in terms of **Article 469A**, despite being in an unusual position in that **Article 469A** actions can be instituted against them.³³

Should the Courts be prevented from assessing a demand for judicial review if an appeal could be lodged before the Environment and Planning Review Tribunal? In this regard, the Court's approach appears to have been consistent in keeping with **Article 469A(4)**. In **John Cauchi vs Chairman Awtorita` tal-Ippjanar**³⁴ the Court of Appeal held that judicial review could be sought if no remedy was available elsewhere. In its conclusions, the Court of Appeal reminded the parties that in this case, redress could be sought before a *'bord specjali'* (namely, the Planning Appeals Board) which had jurisdiction to delve into the matter under

³² **Article 22(1)** of **Chapter 551** of the **Laws of Malta** provides as follows: *'When an appeal has been lodged by an interested third party in terms of this Act, such a person need not prove that he has an interest in that appeal in terms of the doctrine of juridical interest, which doctrine shall not apply to such proceedings, but such a person shall submit reasoned grounds based on environmental and, or planning considerations to justify his appeal.'*

³³ **Attard Piju u Antida v Kunsill Lokali Munxar** decided on 29th February 2008 by the Court of Magistrates (Gozo) - [113/2001/1]

³⁴ **John Cauchi vs Chairman Awtorita` tal-Ippjanar** decided on 5th October 2001 by the Court of Appeal

examination:

'...galadarba l-ligi specjali kkrejat makkinarju u proceduri ad hoc biex wiehed ikun jista' appozitament jikkontesta xi decizjoni u/jew xi ghemil amministrattiv tal-Awtorita` tal-Ippjanar li bihom ihossu aggravat, allura l- Qorti ordinarja hi svestita, ex-Artikolu 469A(4), milli tistharreg gudizzjarjament id-decizjoni amministrattiva, billi dak l-istharrig hu rizervat ex-lege lill-Bord specjali.'

The same reasoning had likewise been adopted in **Soap and Sponge Limited vs Awtorita` ta' l-Ippjanar et**³⁵ where the court held:

*'hemm ostakolu sabiex l-azzjoni odjerna bbazzata fuq l-**artikolu 469A** tista' tigi proposta u dan peress skond l-**artikolu 469A (4)**, tali azzjoni ma hijjex proponibbli "meta il-mod ta' kontestazzjoni jew ta' ksib ta' rimedju dwar xi att amministrattiv partikolari quddiem qorti jew tribunal, jigi provdut b'xi ligi ohra'*

In **Richard Zammit vs Chairman ta' l-Awtorita` ta' l-Ippjanar**³⁶, the Court of Appeal again rejected plaintiff's application for judicial review over a decision of the Planning Appeals Board since **Article 469A** prohibited a 'second review':

'kemm-il draba l-ilmenti dwar l-ghemil ta' l-Awtorita` ta' l-Ippjanar setghu facilment jitressqu, (kif fil-fatt sar f'dan il-kaz) quddiem l-organi ta' listess Awtorita`, bhala Bord ta' l-Appell dwar l-Ippjanar, u wkoll il-Qorti ta' l-Appell, mela allura ghandha tapplika ddisposizzjoni ta' l-artikolu 469A tal-Kap 12.'

What if plaintiff simultaneously files a case before the Tribunal and the Court? The issue was raised in **Pietru Pawl Borg et vs l-Awtorita` ta' l-Ippjanar u l-Kummissarju tal-Pulizija**.³⁷ Appellant felt aggrieved by a decision of the Planning Authority, following which he simultaneously filed an appeal before the Planning Appeals Board and an application for judicial review before the First Hall, Civil Court. The Court presiding over the judicial review rejected plaintiff's application once *'the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal'* was clearly provided for in *'any other law'*.

³⁵ **Sponge Limited vs Awtorita` ta' l-Ippjanar et** decided on 18th May 2000 by the First Hall, Civil Court

³⁶ **Richard Zammit vs Chairman ta' l-Awtorita` ta' l-Ippjanar** decided on 31st May 2002 by the Court of Appeal

³⁷ **Pietru Pawl Borg et vs l- Awtorita` ta' l-Ippjanar u l-Kummissarju tal-Pulizija** decided on 8th May 2003 by the Court of Appeal- [255/1997/2]

In **James Calleja u Carmelo Borg vs Awtorita` tal-Ippjanar**³⁸ the Court had similarly held that an appeal and an application for judicial review cannot proceed simultaneously:

'...sakemm ghadu miexi dak il-process tal-appell, ma jistax jinghad li dak l-ghamil gie kompletat. U ghalhekk, sakemm il-Bord ma jkunx iddispona mill-appell, il-gurisdizzjoni tal-Qorti li tissindikah ma tistax tigi invokata.'

What is the legal position of a complainant who fails to register his interest at the onset of the planning application process, as a result of which he loses his right to appeal before the Tribunal? Is he still entitled to demand judicial review before the Courts once redress before the Tribunal is, in practice, not available? In such situations, complainants seem to be prevented from seeking recourse under **Article 469A**. In **Kunsill Lokali Birzebbuga vs Awtorita` ta' Malta dwar l-Ambjent**³⁹, the Council failed to lodge any objection in response to a planning application within the time frames stipulated in the **Development Planning Act**. Eventually, applicants were given a full development planning permission and the Council filed an application for judicial review in terms of **Article 469A** before the First Hall, Civil Court. The Court maintained that the Council had failed to avail itself of the remedies under the **Development Planning Act**, on which basis, the Court rejected the Council's application:

'L-ilmenti li qed iressqu l-appellanti f'dawn il-proceduri kienu lmenti li tqeghdu jew setghu tqeghdu ghall-konsiderazzjonijiet tal-Bord tal-Awtorita` u, wara, tal-Bord tal-Appell. Il-fatt li r-rikorrenti naqsu milli jsegwu l-procedura stabbilita biex ikunu jistghu jsemmu lehinhom fil-process, ma jaghtihomx dritt li jinvokaw il-gurisdizzjoni generali ta' dawn il-qrati'

The Civil Court, First Hall in some of its deliberations has argued that these principles also apply to those complainants who failed to lodge an appeal against enforcement notices issued by the Authority within the required time frame.⁴⁰

Is the Environment and Planning Review Tribunal authorised to investigate

³⁸ **James Calleja u Carmelo Borg vs Awtorita` tal-Ippjanar** decided on 7th March 2002 by the First Hall, Civil Court - [1328/00]

³⁹ **Kunsill Lokali Birzebbuga vs Awtorita` ta' Malta dwar l-Ambjent** decided on 7th July 2004 by the First Hall, Civil Court

⁴⁰ **George Catania (95963 M) u martu Marie Louise Catania (618064 M) ghal kull interess li jista' jkollha u Tarcam Company Ltd. (C 16852). vs L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar** decided 27th June 2007 by the First Hall, Civil Court – [451/2004]

whether the Planning Authority followed the correct procedures in the exercise of its functions? As held by the Court in a 1996 judgment in the names **Il-Perit Austin Attard Montaldo nomine vs Chairman ta' l-Awtorita` ta' l- Ippjanar et.**⁴¹, appeals before the Tribunal, previously, the Planning Appeals Board, should also serve as a forum for judicial review:

'l-appelli statutorji quddiem il-Bord minn decizjonijiet ta' l-Awtorita` jservu ta' "judicial review" ta' decizjonijiet amministrattivi, "intiz biex jipprovdi rimedju lic-cittadin minn decizjonijiet amministrattivi li jolqtuhom avversament"'

In **Richard Zammit vs Chairman ta' l-Awtorita` ta' l-Ippjanar**⁴², the Court reiterated the principle that the Tribunal is not prevented from assessing whether the Authority has, in its conduct, observed the principles of natural justice and mandatory procedural requirements, whilst ensuring that the Authority's acts were not done in abuse of its powers:

'Ma hemm xejn li jzomm il-Bord tal-Appell dwar l-Ippjanar meta jkun qieghed jirrevedi xi decizjoni tal-Awtorita` ta' l-Ippjanar li jara li l-istess Awtorita` tkun agixxiet intra vires, li hija tkun segwiet il-principji tal-gustizzja naturali, li hija tkun osservat il-htigijiet procedurali mandatorji imposti mil-ligi, u li hija ma tkunx abbuzat mis-setghat li l-ligi kkonferiet fuqha, billi, per ezempju, hadet id-decizjoni ghall-ghanijiet mhux xierqa jew ibbazat l-istess decizjoni fuq konsiderazzjonijiet li ma kienux rilevanti ghall-kaz'

The conclusions in the **Richard Zammit** case seem to suggest that the Environment and Planning Review Tribunal has the power to investigate whether the Authority acts '*ultra vires*' insofar as the grounds listed in **Article 469A(1)(b)** are concerned. This matter was formally crystallised into law through the promulgation of the **Environment and Planning Review Tribunal Act**, in which a provision was introduced to ensure that an appeal to the Tribunal may also be filed '*on any ground including: (a) that a material error as to the facts has been made, (b) that there was a material procedural error and (c) that an error of law has been made*'.⁴³ It should be noted that the aforesaid provision makes specific reference to '*material procedural errors*' and '*errors of law*'. Through a reading of **Article 469A** it can be safely assumed that '*an error of law*' includes '*violations of the Constitution*' as provided in **sub-article (1)(a)** of the same article. On the other

⁴¹ **Il-Perit Austin Attard Montaldo nomine vs Chairman ta' l-Awtorita` ta' l- Ippjanar in rappreżentanza ta' l-istess** decided on 19th August 1996 by the Court of Appeal

⁴² **Richard Zammit vs Chairman ta' l-Awtorita` ta' l-Ippjanar** decided on 31st May 2002 by the Court of Appeal

⁴³ **Article 11(3)** of **Chapter 551** of the **Laws of Malta**

hand, it is not as clear whether the phrase ‘*material procedural errors*’ refers to those instances mentioned in **sub-article (1)(b)** of the said article.

Where should allegations of ‘different treatment’ be directed if they are to be entertained at all? In **Pietru Pawl Borg u martu Nancy Borg vs L-Awtorita` ta’ I-Ippjanar u I-Kummissarju tal-Pulizija**⁴⁴ plaintiff explained that his boathouse was built together with other boathouses before the Planning Authority was set up in 1992. Plaintiff alleged that the Authority had ordered to demolish his structure whereas no similar orders were directed to the other owners. Plaintiff contended that he was being treated differently and insisted that the ‘*the Planning Authority has the moral duty to act in the same manner with other owners of boat-houses....*’ and that:

‘kemm-il darba tohog xi ordni mill-Awtorita` tal-Ippjanar ghat-twaqqiegh tal-kostruzzjoni tal-appellant, u din tigi nferzata ikun hemm ghemil amministrattiv li jikkostitwixxi abbuz tas-setgha tal-awtorita` pubblika billi dan ikun qed isir ghal ghanijiet mhux xierqa jew jissejjes fuq kunsiderazzjonijiet mhux rilevanti...’

The honourable court of first instance was of the opinion that the Planning Appeals Board decision in question was capable of being taken cognisance of before the ordinary civil courts even though the matter had been seen to by the said board after having been met by an almost identical plea, citing jurisprudence which it believed showed a widening of the criteria when such instances were permissible. The Court of Appeal was of a completely different opinion holding that the court of first instance had misinterpreted the relevant jurisprudence completely. It therefore decided that the Civil Court, First Hall should have never claimed it had jurisdiction to decide the matter.

The Court of Appeals, however, did not brush the matter aside and held that cases of ‘different treatment’ were indeed entertainable before the Planning Appeals Board, adding that it had already pronounced itself on a similar matter in the case of **Alex Montanaro nomine vs il-Kummissjoni ghall-Kontroll ta’ I-Izvilupp**⁴⁵ handed down on the 9th of February, 2001. The case in question concerned allegations that development in the area already existed thus giving weight to considerations not strictly within the ambit of one’s application or contested decision. The court stated that this was something to be taken into

⁴⁴ **Pietru Pawl Borg u martu Nancy Borg vs L-Awtorita` ta’ I-Ippjanar u I-Kummissarju tal-Pulizija** decided on 8th May 2003 by the Court of Appeal - [255/1997/2]

⁴⁵ **Alex Montanaro nomine vs il-Kummissjoni ghall-Kontroll ta’ I-Izvilupp** decided on the 9th of February, 2001 by the Court of Appeal (as cited in *op.cit.* at footnote 33)

consideration albeit *'unikament fl-ambitu ta' konsiderazzjonijiet tal-ippjanar, u cioe'*, *biex jaraw jekk, tenut kont tal-izvilupp attwali fl-inhawi tas-sit in kwistjoni, ikunx gust u sewwa li l-permess mitlub jig[i] akkordat'*.

From the aforesaid conclusions, it was held to be within the Tribunal's legal remit to look into allegations of *'different treatment'*, which the Court seemed to evaluate under the notion of abuse of power in **Article 469A(4)**, that is, an administrative act constituting *'an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations'*.

Is it possible to seek the Authority for financial compensation under **Article 469A**? In **Albert u Maria Dolores sive Doris Satariano vs Awtorita` tal-Ippjanar**⁴⁶, plaintiffs instituted a case of judicial review alleging that the Authority had acted unreasonably and was thus responsible for having damaged parts of their Dingli property during a direct action. After going through the evidence, the Court found in favour of the plaintiffs. After highlighting that public Authorities are not immune to tortuous responsibility, the Court ordered the Authority to compensate the plaintiffs for the damages that had been caused:

'Dwar dan lanqas kien hemm bżonn l- Artikolu 469(A) tal-Kap. 12 biex irendi l-Awtorita' responsabbli għaliex hija ma għandha ebda immunita mill-artikoli tal-Kodiċi Ċivili li jirrigwardjaw ir-responsabbilita' għad-danni ta' min jaġixxi oltre d-drittijiet tiegħu.'

Is a decision of the Planning Tribunal an *'administrative act'* issued by a public Authority as required under **Article 469A**? The Court had the opportunity to delve into such matter in a number of judgements both at first instance as well as at appeals stage. The recurrent line of thought throughout most of the said judgements was that although it made much sense to consider **Article 469A(4)** as applicable in cases where the Planning Appeals Board had jurisdiction, the same could not be argued when the administrative action complained of emanated from the administrative procedures adopted by the Planning Appeals Board itself, more specifically when the principles of natural justice were considered as not having been adhered to. This for the obvious reason that the said board would not have been in a position to assess its own wrongdoing. The previously mentioned case of **Kunsill Lokali Marsaskala et. vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.**⁴⁷ is one of the more recent judgements which went up

⁴⁶ **Albert u Maria Dolores sive Doris Satariano vs Awtorita` tal-Ippjanar** decided on 28th March 2014 by the Court of Appeal - [1721/2001/1]

⁴⁷ **Kunsill Lokali Marsaskala, Joseph George Sant, Paul Cutajar, Lawrence sive Lorry De Raffaele u b'digriet tal-14 ta' Marzu 2012 l-atti tal-kawza gew trasfuzi f'isem Peter De Raffaele, Stephen De Raffaele u martu Evelyn De Raffaele, u dan wara l-mewt tal-attur Lawrence sive Lorry De Raffaele**

to appeals stage, according to which it was held that a decision of the Tribunal may also be subjected to judicial review in terms of **Article 469A** before the First Hall, Civil Court.

In **Richard Zammit vs Chairman ta' l-Awtorita' ta' l-Ippjanar**⁴⁸, the Court reiterated the above reasoning and came to the conclusion that the Planning Appeals Board was not immune to judicial review before the Courts:

'Fil-fehma tal-Qorti, anke l-istess Bord tal-Appell dwar l-Ippjanar hu soggett li josserva huwa stess fis-smiegh tal-appelli quddiemu, n-nozzjonijiet li janimaw limsemmi subartikolu (1) tal-artikolu 469A. Ghalhekk, jekk jirrizulta li l-Bord, fid-decizjoni tieghi jew fis-smiegh tal-appell ma jkunx osserva dawk in-nozzjonijiet xorta wahda l-Qrati ordinarji jibqaghlhom il-gurisdizzjoni li jistharrgu gudizzjarjament l-ghemil ta' dak il-Bord tal-Appell dwar l-Ippjanar fit-termini tal-artiklu 469A tal-Kap.12. Fi kliem iehor, l-ghemil u/jew id-decizjonijiet tal-Bord imsemmi, fil-kazijiet kongruwi, jstghu jkunu soggetti ghall-"judicial review"'

Likewise, in **James Calleja u Carmelo Borg vs Awtorita' tal-Ippjanar**⁴⁹, the Court had been of exactly the same opinion but had gone one step further in making its argument, stating that:

'Jekk dan il-principju japplika wkoll fejn il-ligi specjali tiprovdi li ma jkunx hemm appell minn decizjoni ta' tali korp, kemm ghandu ghaliex japplika izjed meta f'dan il-kaz il-ligi taghti jedd ta' appell lill-Qrati ordinarji minn decizjoni tal-Bord'

The conclusions reached in these judgments raise more questions than answers. First and foremost, it is questionable whether the Tribunal which is a *quasi-judicial* body, falls within the ambit of **Article 469A** given that it is not technically part of the *'Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law.*⁵⁰ Indeed, the members of the Tribunal are independent from the Government of Malta, so much so that in the exercise of their functions, *'the Chairperson and the members of the Tribunal shall not be subject to the control or direction of any other person or*

fil-mori tal-kawza vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, L-Avukat Generali decided on 29th November 2012 by the Court of Appeal - [336/2007]

⁴⁸ **Richard Zammit vs Chairman ta' l-Awtorita' ta' l-Ippjanar** decided on 31st May 2002 by the Court of Appeal

⁴⁹ **James Calleja u Carmelo Borg vs Awtorita' tal-Ippjanar** decided on 7th March 2002 by the First Hall, Civil Court - [1328/00]

⁵⁰ This is the definition of 'public Authority' provided in **Article 469A**

authority'.⁵¹ Secondly, even under previous legislations, both the appellant and the Authority could appeal the decision of the Tribunal before the Court of Appeal (Inferior Jurisdiction) if they felt '*dissatisfied with any point of law decided by the Tribunal*'.⁵² This means that a remedy to seek judicial review over a Tribunal decision has always existed.

Is it possible for an individual to demand the Court to subject a subsidiary plan to 'judicial review'? It is undisputed that a planning policy may not be appealed before the Tribunal since the Tribunal Act makes no provision to such effect. It follows that no remedy to contest a planning policy is elsewhere available. But, is a 'subsidiary plan'⁵³ considered to be an 'administrative act' within the ambit of **Article 469A**?

In **Mario Cuomo et vs Ic-"Chairman" in rappresentanza ta' l-Awtorità ta' l-Ippjanar et.**⁵⁴ the plaintiffs felt aggrieved by the fact that a site in their neighbourhood which was located outside the development zone was included for development as part of a rationalization process initiated by Cabinet. The amended boundaries were approved by Parliament following a public consultation process conducted by the Authority. Plaintiffs instituted a case for judicial review against the Planning Authority, alleging that there was no sufficient physical commitment to justify the inclusion. Plaintiffs asked the First Hall, Civil Court to declare the actions of the Authority as '*agir arbitrarju, abbużiv u illegali*' and nullify the approved scheme. Following a preliminary plea raised by the Authority, the First Hall, Civil Court noted that the Planning Authority was deemed to have no legitimate interest since the revised development boundary scheme was approved by Parliament. The Authority was thus declared non-suited and the application was rejected:

'Din il-Qorti tqis li l-mozzjoni approvata mill-Kamra tad-Deputati ghar-Revizjoni Parzjali tal-Pjan ta' Struttura ghall-Gzejjer Maltin ma tistax titiqes li taqa' taht il-parametri li ghalihom jipprovdi l-Art. 469A tal-Kap. 12 tal-Ligijiet ta' Malta. Inoltre, galadarba l-Awtorità ta' l-Ippjanar fil-kuntest, minkejja s-sehem taghha fit-tfassil tal-proposti bidliet, ma tiehu ebda decizjoni ahharija u finalment tesegwixxi biss dak li fil-fatt

⁵¹ **Article 4(8)** of **Chapter 551** of the **Laws of Malta**. This right has been retained in **Article 39** of **Chapter 551** of the **Laws of Malta** which states that '*The decisions of the Tribunal shall be final and no appeal shall lie therefrom, except on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.*'

⁵² **Article 41** of **Chapter 504** of the **Laws of Malta**

⁵³ Definition of 'subsidiary plans' includes subject plans, local plans, action plans or management plans and development briefs

⁵⁴ **Mario Cuomo et. vs Ic-"Chairman" in rappresentanza ta' l-Awtorità ta' l-Ippjanar et.** decided on 8th January 2015 by the First Hall, Civil Court - [937/06]

japprova l-legislatur f'dan il-kuntest, ghandha tintlaqa' l-eccezzjoni taghha li m'hijiex legittimu kontradittur fil-kawza.'

Following the same reasoning, the situation was held to be different when the Planning Authority was held to have been the one taking a decision that effected plaintiff. In **Falcon Investments Limited vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar et.**⁵⁵ the plaintiff company alleged that the allowable building height limitation relative to their property was reduced to the equivalent of two floors and a semi-basement without prior warning. During court proceedings, an Authority official testified that the approved changes were not shown in the draft Local Plan that was open for public consultation. In this case, the Court held that, in the formulation of a subsidiary plan, the Authority was legally obliged to “*make known to the public the matters it intends to take into consideration and shall provide opportunities for individual and organisations to make representations to the Authority*”.⁵⁶ In this case, it was evident that the changes were effected without the public's prior knowledge. Although the Court expressed that it had a ‘*dubju serju*’ whether a ‘*pjan lokali jaqa' fid-definizzjoni ta' “eghmil amministrattiv” (Artikolu 469A tal-Kap. 12)*’, it concluded that it had jurisdiction to investigate whether the Authority had followed the correct procedures prior to the eventual publication of the Local Plan:

'... l-uniku rimedju li ghandha l-attrici huma dawn il-proceduri, jekk ma tiithajjarx toqghod tistenna sakemm l-Awtorita' konvenuta tirrevedi l-pjan lokali ghaz-zona fejn hemm il-proprijeta tal-kumpannija attrici.... Certament li l-qrati tal-gustizzja ghandhom gursidizzjoni li jistharrgu jekk fit-thejjija tal-pjan lokali l-Awtorita' segwitx il-procedura kontemplata mil-ligi.'

In **Malcolm Mallia et. vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar et.**⁵⁷ plaintiff alleged that the Authority had initiated a planning control application to amend the Local Plan, as a result of which he would be in no position to develop his property. Plaintiff requested the Court to declare that such actions were abusive and illegal. In reply, the Authority raised a preliminary plea to the effect that the Court had no jurisdiction to interfere in the administrative process surrounding the preparation of subsidiary plans. The plea was however rejected after the Court observed that it held jurisdiction to investigate whether, in the preparation of a subsidiary plan, the Authority had followed the correct

⁵⁵ **Falcon Investments Limited vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u Avukat Generali** decided on 17th June 2013 by the First Hall, Civil Court - [1198/11]

⁵⁶ **Article 27** of **Chapter 356** of the **Laws of Malta**

⁵⁷ **Malcolm Mallia et. vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar et.** decided on 6th July 2012 by the First Hall, Civil Court - [562/10]

procedures:

'Hu veru li dan l-ezercizzju jehtieg l-approvazzjoni finali tal-Ministru kkoncernat, u l-ahhar kelma hi tieghu. Madankollu, fil-fehma tal-qorti dan ma jfissirx li f'dan il-process l-Awtorita ma tkunx qeghda tiehu posizzjoni li fiha nnifisha hi decizjoni u li biex tasal ghalha trid fl-ewwel lok issegwi l-procedura kontemplata mil-ligi, fosthom il-konsultazzjoni pubblika.'

In spite of the court's declaration that the authority is indeed taking a decision, one here questions whether such decision can be taken to be a final one or otherwise, the difference being a significant one and one which the court here seems to ignore. Should the issue be whether the authority followed procedure if the final say is the Minister's? Is the relevant question really this or whether the decision taken here has repercussions on its own merits independent of the Minister's consent? If the Minister, for instance, is given advice on which to base his final decision, which advice would have been differently given had the right procedure been followed, which decision is the most relevant one to the outcome, the decision by the Planning Authority which for all intents and purposes seems to be the intermediate one, or the Minister's which is held to be the final decision?

In **Joseph Sciriha et. vs Awtorita' ta' Malta ghall-Ambjent u l-Ippjanar et.**⁵⁸ plaintiff complained that the prospects of his redeveloping the property were made impossible following the publication of the Local Plan. Plaintiff alleged that his property was scheduled within the Urban Conservation Area without prior warning and asked the Court to annul the Local Plan. In reply, the Authority countered that it had strictly followed the relative procedures and made sure that the final revisions following a wide public consultation. In its assessment, the Court clarified that the Authority was actively involved in the preparation of the Plan. The Court noted that:

'il-fatt li l-Pjan jigi approvat permezz ta' rizoluzzjoni tal-Kamra tar-Rappreżentanti ma jikkonvertihx f'xi proċess leġislattiv.'

Against this background, the Court said that it had jurisdiction to oversee whether the Authority had observed the principles of natural justice antecedent to the approval of the Plan. Notwithstanding there being no imposed legal obligation for the Authority to engage in a second public consultation following publication

⁵⁸ **Joseph Sciriha et. vs Awtorita' ta' Malta ghall- Ambjent u l- Ippjanar et.** decided on 28th January 2016 by the First Hall, Civil Court - [127/07]

of the first draft⁵⁹, the Court highlighted that:

' I-Awtorita` naqset mill-obbligu statutorju tagħha li tinforma lill-pubbliku sewwasew x'kien bi ħsiebha tagħmel fir-rigward, u għalhekk ċaħditu mill-opportunita` li jressaq il-fehmiet tiegħu, kif irid il-leġislatur. L-atturi nqabdu f'din il-morsa bla ma setgħu jkunu jafu x'gej għalihom.'

Incidentally, the law was eventually amended so that today if any changes are made to the draft of the Plan following the public consultation process, the Executive Council is now bound to publish such changes and *'invite representations on the amendments within a specified period of not less than six weeks'*⁶⁰.

It is interesting to note that the Cuomo judgment concerns a Structure Plan Review which requires Parliament's endorsement whereas the Falcon, Mallia and Schirihha judgments concern a subsidiary policy (a Local Plan) which is approved by the Minister.⁶¹ Regardless of whether a subsidiary plan is, at the end of the day, endorsed by Parliament or the Minister, the author opines that the Courts should have no qualms about pronouncing judgment on the conduct of the Authority prior to the final publication. For this reason, in the Cuomo case, it would have made more sense for the Court to declare that the Authority was a suited party since its officials were, after all, responsible for the processing of the draft documentation.

Should judicial review of a plan be time barred? An answer to this question was also provided in **Falcon Investments Limited vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar et.**⁶² The plaintiffs had alleged that the approved changes were tantamount to a deprivation of the enjoyment of their property, this in breach of their fundamental human rights. For its part, the Authority noted that the Local Plan was promulgated in 2006 whereas the plaintiffs brought their action in 2011. The Authority insisted that the action was time barred in terms of **Article 469A(3)**. The Court however considered that a Local Plan is conducive to a law which applies to all citizens alike, rejecting the idea that a Local Plan was equivalent to an 'administrative act'. Consequently, the Court concluded that the plaintiffs had a right of action for a declaration that the local Plan is invalid on grounds

⁵⁹ **Article 27** of **Chapter 356** of the **Laws of Malta**

⁶⁰ **Article 53(2)(e)** of **Chapter 552** of the **Laws of Malta**

⁶¹ Even though, in the **Scirihha** judgment, the Court was wrong to observe that Local Plans are endorsed by Parliament

⁶² **Falcon Investments Limited vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u Avukat Generali** decided on 17th June 2013 by the First Hall, Civil Court - [1198/11]

inconsistent with the Constitution: ⁶³

'...pjan lokali iktar jikkwalifika bhala ligi sussidjara milli att amministrattiv, li wara kollox ma japplikax għall-persuna wahda imma japplika fil-konfront taċ-cittadin in general. Il-qorti temmen li l-Legislatur ta l-poter lill-Awtorita' sabiex taghmel il-pjani sussidjarji meqjus ukoll id-dettall li wiehed irid jidhol fih u wkoll l-aspett tekniku. Taht dan l-aspett il-qorti tqies li l-pjan lokali jista' jigi kkontestat taht l-Artikolu 116 tal-Kostituzzjoni'

According to the reasoning adopted in the above judgment, it follows that a right of action for a declaration that a Local Plan is invalid on any grounds other than inconsistency with the provisions of **Articles 33 to 45** of this Constitution shall not only appertain to all persons without distinction without the need for that person to show any personal interest in support of his action but also that such action is not time barred.

Is it possible for a complainant to challenge the Authority on alleged violations of human rights through Article 469A? The issue was dealt in **Nazzareno Scerri et. vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.**⁶⁴ In this case, the plaintiffs alleged that the Authority's decision to modify the road alignment through a planning control application had devalued their property, thus amounting to a violation of their fundamental human rights as set out in **Article 37** of the Constitution and **Article 4 of Chapter 319 of the Laws of Malta**. The Court followed the principles highlighted in the **Christopher Hall** case and went on to conclude that:

'hemm giurisprudenza kostanti li taht l-Artikolu 469A(1)(a) l-attur ma jistax iqajjem ilment ta' ksur ta' dritt fundamentali', adding that 'l-Artikolu 469A tal-Kap. 12 m'huwiex jikkontempla l-possibilita' ta' azzjoni għal stharrig ta' ghemil amministrattiv minhabba allegat ksur ta' drittijiet fundamentali, dan l-ilment hu nsostenibbli.'

In **James Calleja u Carmelo Borg vs Awtorita' tal-Ippjanar**⁶⁵ plaintiffs alleged that the Authority had 'acted' without good reason after it decided to subject their

⁶³ **Article 116** of the Constitution provides as follows: 'A right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of articles 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.'

⁶⁴ **Nazzareno Scerri et. vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.** decided on 30th January 2015 by the First Hall, Civil Court - [470/06]

⁶⁵ **James Calleja u Carmelo Borg vs Awtorita' tal-Ippjanar** decided on 7th March 2002 by the First Hall, Civil Court - [1328/00]

property to a second emergency conservation. Plaintiffs maintained that the Authority had acted in violation of their rights as set out in **Article 37** of the Maltese Constitution and **Article 1** of **Protocol 1** of the **European Convention** since their property could no longer be developed. The Court was then asked to find the Authority responsible for acting '*in violation of the Constitution*' in terms of **Article 469A(1)(a)**. The Court nonetheless concluded the following:

'Il-Qorti tqis li kontra l-Awtorita' mharrka l-atturi ghandhom kemm rimedju ordinarju (bl-appell quddiem il-Qorti tal-Appell) u kif ukoll dak specjali tal-procedura kostituzzjonali fejn jista' jinghata rimedju.'

6 Summary of principles enshrined in Court Judgments

From the above quoted judgments, the following legal principles were singled out:

- A document issued by the Authority, the contents of which can be eventually superseded, is not susceptible to judicial review since it is not considered to be a 'final act';
- Once the plaintiff has potential juridical interest before the Environment and Planning Review Tribunal, he should likewise enjoy a *locus standi* in terms of **Article 469A** before the Courts;
- An application for judicial review cannot be filed simultaneously with an appeal before the Tribunal;
- Complainant should not be entitled to judicial review under **Article 469A** if a remedy is available before the Environment and Planning Review Tribunal;
- Access to judicial review under **Article 469A** should be denied to a plaintiff once it is possible to register a formal objection with the Planning Authority within the statutory period established in the **Development Planning Act**;
- The Tribunal has jurisdiction to investigate the administrative conduct of the Authority;
- Allegations of 'different treatment' concerning a decision following a planning application can be dealt with before the Tribunal;
- The decisions of the Environment and Planning Review Tribunal may be subject to judicial review under **Article 469A** on matters of procedure and principles of natural justice;
- The Authority may be challenged with regards to its conduct pertaining to the preparation of a policy or a subsidiary plan;

- Planning policies that are inconsistent with the Constitution may be challenged before the Courts, which action is not time barred;
- An action against the Authority for an alleged violation of human rights may be instituted under **Article 46** of the Constitution and not through a judicial review;

7 Recommended Action

Although the above legal principles should provide a sound backdrop for decision makers, there are a number of legal gaps that should be addressed.

7.1 A level playing field for all development permissions

The author is of the opinion that a level playing field should be created for all types of development permissions⁶⁶ whereby applicants and interested third parties would be entitled to lodge an appeal before the Tribunal regardless of the nature of the development planning application. For example, this would avoid the need for third party objectors in regularization applications to seek a remedy before the Courts since, in such cases, an appeal is not available to third parties before the Tribunal.⁶⁷

7.2 Judicial review of planning policies

With the exception of the recent **Mario Cuomo** case, the Courts have constantly held that they are vested with jurisdiction to enquire the legal validity surrounding administrative processes underpinning the formulation of subsidiary plans. The author agrees with this line of reasoning since the Authority's administrative conduct should under no circumstance be held immune to judicial review, notwithstanding there being no general consensus as to whether a subsidiary plan qualifies as an administrative act. In other words, the public should be in a well suited position to annul a planning policy, should the legality of the adopted procedure be questioned and found to be lacking.

⁶⁶ According to the definitions of **Chapter 552** of the **Laws of Malta**, "development permission" means a permission to carry out or retain development granted by the Planning Board or the Planning Commission either in consequence of an application or of a development order

⁶⁷ **George Said vs L-Awtorita' tal-Ippjanar** decided on 2nd March 2021 by the Environment and Planning Review Tribunal [250/2019]

To counter the current situation and avoid doubts as to what extent, if any, should planning policies be subject to reassessment, the author opines that the Tribunal should be also empowered to review the procedural conduct adopted by the Authority in the formulation of a planning policy. In practice, any request to declare a planning policy invalid and without effect due to the Authority's failing to observe the legal rules would be directly dealt with by the Tribunal instead of the Courts. It is therefore recommended to introduce **sub-article 11(e)** to **Chapter 551** of the **Laws of Malta** to read thus:

'hear and determine all appeals made by the any interested party on matters of procedural legality surrounding the formulation of a subsidiary plan or policy'

This with the aim of rendering planning policies equally eligible to judicial review before the Tribunal insofar as procedural legality surrounding their formulation is concerned.

7.3 Re appraisal of Article 11(3) of the Tribunal Act

As already seen, **Article 11(3)** of the Tribunal Act provides that the Planning Tribunal has jurisdiction to look into procedural errors since it has been formally vested with the power to decide on an appeal to the Tribunal that may be filed on any ground 'including' a material error as to the facts has been made, a material procedural error as well as an error of law. Although the word 'including' in the said **Article 11 (3)** seems to imply that any matter connected with 'bad procedure' should fall within the remit of this Article, the author opines that the legislator should, elaborate upon what 'bad procedure' is all about by making specific reference to those acts performed by the Authority and which it not authorised to perform, instances not in keeping with the principles of natural justice or mandatory procedural requirements as well as action which is done for improper purposes or on the basis of irrelevant considerations.

8 Conclusive Remarks

There is no doubt that **Article 469A** has proved to have gone a long way in providing judicial redress to those aggrieved with planning decisions which the Environment and Planning Review Tribunal and, before that, the Planning Appeals Board, had held themselves incompetent to seize.

Still, it is the firm opinion of the author that the Environment and Planning Review Tribunal remains in the best of positions to offer a '*rimedju effikaci*' even in those exceptional instances where, until this day, the said Tribunal has no *vires* to hear and decide an appeal following a decision of the Planning Authority.

In that way, a person who feels aggrieved by a planning decision does not risk the possibility of having the Tribunal holding itself to be incompetent to hear a case down the line, by which time the six month period to file action in terms of **Article 469A** would have been lapsed.

Moreover, the fact that the Tribunal, unlike a Court of judicial review that is not concerned about the merits but solely about the legality of proceedings, has jurisdiction over both issues of fact and law makes things easier for all.

Even more so, the Tribunal is bound by strict time frames within which it is obliged to deliver judgment⁶⁸ whereas a court of judicial review is not.

Finally, it can be said that the Tribunal has the added advantage that two of its members (the chairman and one of its members who must be in possession of a warrant to practice as a perit) have the technical expertise.

⁶⁸ **Articles 35, 36(5) of Chapter 551 of the Laws of Malta**



ROBERT MUSUMECI
avukat - perit