Juridical Interest Redefined?

TONIO BORG

In this article, Tonio Borg comments on two recent judgments that accepted a wider notion of juridical interest in public law actions, and what this may mean for the future.

TAGS: Juridical Interest; Public law; Constitutional law; Administrative law

Dr Tonio Borg is a resident senior lecturer in public law at the University of Malta. He is a former European Commissioner, and former Deputy Prime Minister and Cabinet Minister. He is the author of *A Commentary on the Constitution of Malta* (2016), *Leading cases in Maltese Constitutional Law* (2019), *Leading cases in Maltese Administrative Law* (2020), *Judicial Review of Administrative Action in Malta* (2020) and *Administrative Law* (2021).

gfhsl olj online law journal

1. Introduction

Two landmark judgments have been delivered by our courts which can change the legal landscape regarding the question of juridical interest or legal standing in public law actions.

Our Courts have consistently held that in any action, whether related to civil or public law, the plaintiff has to prove juridical interest which, according to the strict civil law notion, means actual, direct, and personal interest. This traditional interpretation of juridical interest, as applying also to public law actions, has meant that certain actions of the public administration, or public officers, could not be scrutinised by the court, or challenged by individuals or non-governmental organisations, owing to the absence of any person or entity which had a direct, personal interest in an administrative act performed by a public entity. The worst losers, in this respect, were always the non-governmental organisations (NGOs), for rarely do these have a personal and actual interest in any decision taken by the Government, or any one of its ramifications which they try to challenge.

2. Juridical Interest in Judicial Review

The only time an NGO succeeded in challenging a decision taken by a public authority was in the case of ***Ramblers Association vs Malta Environmental and Planning Authority***[1] where the plaintiff association was challenging the legality of a development permit issued within an outside development zone. In actual fact, the Association lost the case before the court of first instance on the basis that it did not enjoy juridical interest. The Court,[2] following the constant jurisprudence of our courts on the matter,[3] stated;

> *From the statute of the association it results to this court, from the nature of the association, that is so to say, an apolitical voluntary non-governmental organisation, and also the aims for which it was*

[1] 228/2010 *Is-Soċjetà The Ramblers Association of Malta vs L-Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar et*, Court of Appeal 27 May 2016.
[2] ibid Civil Court (First Hall) 6 March 2012 (Mr Justice J. Zammit Mckeon).
[3] 136/1997 *Socjetà Filarmonika La Stella vs Commissioner of Police*, Court of Appeal 19 July 1997 Vol LXXXI.II.625; 105/2006 *Alfred Grech vs Malta Environment and Development Authority*, Court of Magistrates (Gozo, Superior) 7 December 2011 (Magte. J. Demicoli); 54/2006 *Alfred Grech noe vs Alex Cassar et*, Court of Magistrates (Gozo, Superior) 17 January 2012 (Magte J. Demicoli); 276/2012 *Amadeo Barletta vs Malta Financial Services Authority*, Civil Court (First Hall) 23 April 2013 (Mr Justice JR Micallef); 502/2014 *George Felice et vs Keith Attard Portughes et*, Court of Appeal 30 September 2016; 1143/2015 *Zeynep Buhagiar vs Director Department of Citizenship and Expatriates*, Civil Court (First Hall) 11 May 2017 (Mr Justice M. Chetcuti; and, 923/2012 *Joseph Gheiti vs Authority for Transport in Malta*, Civil Court (First Hall) 24 May 2018 (Mr Justice JR Micallef).

> *constituted, that these aims and objectives, laudable in general though they are in their purpose, cannot be considered as constituting a right for the purposes of juridical interest. For the plaintiff association to have been able to propose the current action it had as a pre-requisite to prove that it was acting to protect itself against a breach of its own rights.*

On appeal the Court of Appeal reversed this judgement; it did not, however, jettison the juridical interest doctrine or give it a new interpretation. It merely applied an E.U. Directive[4] which, being superior to any Maltese law or practice, provides that an environmental organisation automatically enjoys legal standing in any action relating to the challenging of a development permit once it objects to it.

The novelty with the so-called second ***Ramblers*** case, namely ***Ramblers Association vs Lands Authority et***,[5] was that the Court did not rely on E.U. law to recognize that the Association enjoyed juridical interest in that case, but, while retaining the juridical interest doctrine, it gave it a new meaning. The case related to the challenging by an NGO of a decision taken by the Lands Authority to grant, by direct order, large tracts of land at Miżieb, limits of Mellieħa, to the Hunters and Trappers Association (FKNK). This was possible according to law provided that the granting of title over public land was made for '*a social purpose*'. Ramblers contested *inter alia* the social purpose of such grant. It filed an application before the Administrative Review Tribunal under Article 57(1)(a) of the Lands Authority Act[6] which provides that the Tribunal shall be competent to hear and determine '*any objections made by any person aggrieved by any decision of the Authority*'. The Tribunal ruled that the Association did not have any juridical interest in the matter since an appeal could only be filed by an aggrieved person. Indeed, the Tribunal remarked that the case before it was not one of judicial review but of an appeal and did not make any pronouncement on whether Ramblers possessed the necessary juridical interest to file a judicial review action.[7]

The Court of Appeal (Inferior Jurisdiction), while deciding that the action was not an appeal but one of judicial review before the Tribunal as authorised by the Lands Authority Act, boldly decided to venture into new pastures to redefine juridical interest. It stated:

> *This Court holds that appellant is right when she states that it satisfies all the elements required to be considered as having*

[4] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17.

[5] 92/2020 *The Ramblers' Association vs L-Awtorità tal-Artijiet*, Court of Appeal (Inferior) 14 July 2021 (Mr Justice L. Mintoff).

[6] Chapter 563 of the Laws of Malta.

[7] 92/2020 *The Ramblers' Association vs L-Awtorità tal-Artijiet*, Administrative Review Tribunal 21 January 2021 (Magte. C. Galea).

> *juridical interest to institute the current proceedings; this is being said because her interest is indeed actual, direct, legitimate, and juridical. Appellant explained that her organisation was established to promote walks in the Maltese countryside to its members with the aim of promoting the Maltese natural and social environment. Her interest in blocking the agreement which the defendant in appeal signed with the FKNK* [Hunters and Trappers' Federation] *stems from the fact that the members of the appellant organisation no longer have any access to the tracts of land in question for nine months of the year.*

Consequently, while affirming the right of Ramblers to file this action, it referred back the case to the Tribunal for a decision on the merits; namely, whether the grant by the Authority was lawful or not.

There is no doubt that this is a ground-breaking judgment in the interpretation of juridical interest, and it introduces, hopefully permanently, the right to legal standing of non-governmental organisations. It also puts our jurisprudence, in regard to public law actions, in line with the position in the United Kingdom, where, although there is no *actio popularis* in judicial review actions, one need only prove sufficient interest in the subject matter of litigation.

3. Juridical Interest in Constitutional Proceedings[8]

A more far-reaching judgment as to juridical interest in public law actions was delivered in ***Anna Mallia vs Judicial Appointments Committee et***.[9] In that case Dr Anna Mallia, a lawyer in private practice, challenged the new selection process for the appointment of members of the judiciary introduced in July 2020, and applied for the first time in April 2021. Applicant Mallia alleged that (a) the constitutional provisions themselves did not cater for transparency and were void; (b) that the Judicial Appointments Committee had not been regularly constituted when it conducted the selection process, since one of its members had abstained and was not substituted; and, (c) that the Committee had applied internal rules and guidelines regarding such selection which were in direct contrast with the provisions of the Constitution.

The State Advocate, as expected, pleaded that applicant Mallia did not have any juridical interest to institute such action for she had not applied for the post of judge in the April 2021 selection process.

The Court on 2 December 2021 delivered a preliminary judgment on this

[8] For further study see: Nicholas Debono, 'The Modern relevance of Juridical Interest in Constitutional Proceedings and Public Law Affairs' (LL.D. Thesis, University of Malta 2018); Tonio Borg, 'Juridical Interest in Constitutional Proceedings' (*Online Law Journal*, 17 February 2017); and, Giovanni Bonello, 'When Civil law trumps the Constitutional Court' [2019] 29 Id-Dritt 427.

[9] 234/2021, Civil Court (First Hall) 2 December 2021 (Mr Justice G. Mercieca).

point regarding juridical interest.

3.1 Juridical Interest Case-Law: Maltese Courts and European Court of Human Rights

Up till now, the Maltese courts of constitutional jurisdiction have imported, lock stock and barrel, the traditional strict civil law notion of juridical interest into constitutional proceedings. This jurisprudence is based on (a) a restrictive interpretation of the words 'in relation to him' as regards any contravention of the human rights chapter alleged by any individual under Article 46 of the Constitution, and (b) an *a contrario sensu* interpretation of Article 116 of the Constitution, which does not require personal interest for the plaintiff to institute a non-human rights case challenging the validity. Therefore, in human rights cases, or any other constitutional case which does not fall under Article 116, one needs to prove personal interest.

This argument was applied in a series of cases instituted by Maltese NGOs regarding the visit to Malta's Grand Harbour in June 1988 of Royal Navy Ships. These entities alleged that the visit was in breach of the neutrality provisions of the Maltese Constitution. The Court[10] dismissed their claims because the plaintiff NGOs did not possess juridical interest.

Similarly, following the 2013 general elections, two opposition members of Parliament alleged that they should have been declared elected to Parliament in the election proper and not through a corrective mechanism enshrined in the Constitution and that this was a result of an error committed by the counting agents of the Electoral Commission. The Constitutional Court[11] ruled that once the Opposition MPs had been co-opted as Members of Parliament through the corrective electoral mechanism, they did not have any juridical interest in proceeding with their action. This is in stark contrast with an important pre-war judgment[12] delivered by the Court of Appeal when Malta was still a colony to the effect that:

> *In the local legal system, actions relating to challenging the election of any deputy in any one of the Chambers of Parliament, and previously to the Council of Government belongs to any citizen*.

This pronouncement was made in spite of the fact that in the 1921 Constitution no mention or provision was made of an *actio popularis* in electoral cases.

3.2 Stricter than the European Court

The jurisprudence of the local courts, one must say, is more restrictive in

[10] See *Darryl Grima pro et noe vs Prime Minister et noe*, Civil Court (First Hall) 17 June 1988 (Mr Justice J. Filletti); *Saviour Balzan noe et vs Prime Minister*, Civil Court (First Hall) 23 June 1988 (Mr Justice S. Borg Cardona); and, *Dionisius Mintoff pro et noe*, Civil Court (First Hall) 24 June 1988 (Mr Justice V. Borg Costanzi).

[11] 525/2013 *Frederick Azzopardi vs Electoral Commission*, Constitutional Court 13 March 2013 and 526/2013 *Claudette Buttigieg vs Electoral Commission*, Constitutional Court 13 March 2013.

[12] *Peter Bugelli noe et vs Ugo Mifsud noe et*, Court of Appeal 12 October 1926 Vol XXVI.i.571).

its application of the juridical interest notion than that of the European Court of Human Rights. The European Convention on Human Rights does not allow an *actio popularis* in human rights actions. It limits such action in favour of any person who proves that he is a '*victim*' of a breach of any of the provisions of the Convention. However, in its application of this notion of 'victim' (a stronger word than the phrase '*in relation to him*' under Article 46 of the Maltese Constitution), the European Court has admitted as applicants a homosexual couple who challenged the provision in the United Kingdom treating consensual homosexual acts in private as a crime even though the law had never been applied in their regard,[13] or a women's rights NGO, in Ireland, which challenged an order by the Irish Supreme Court prohibiting publicity regarding where one could procure abortion outside Ireland, even though none of the applicants intended to perform an abortion,[14] or an applicant who challenged a German law regarding interception of communications, even though there was no evidence that such law had been applied in his regard.[15]

3.3 Micallef v Malta

The European Court in one case regarding Malta ruled that the victim criterion is not to be applied in a rigid, mechanical, and inflexible way. In that case the applicant was contesting the impartiality of a court in litigation. She passed away during the constitutional proceedings in Malta and her brother lodged the appeal to the European Court. In ***Micallef v Malta***[16] the Court ruled that:

> *45. This criterion is not to be applied in a rigid, mechanical and inflexible way (see Karner v. Austria, no. 40016/98, § 25, ECHR 2003-IX). The Court has acknowledged that human rights cases before it generally also have a moral dimension and persons near to an applicant may thus have a legitimate interest in seeing to it*

[13] *Dudgeon v United Kingdom* App No 7525/76 (ECtHR, 22 October 1981): '*In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution*'. See also *Norris v Ireland* App No 10581/83 (ECtHR, 26 October 1988: '*The Court has held that Article 25 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it*'.

[14] *Open Door and Dublin Well Women v Ireland* App No 64/1991 (ECtHR, 23 September 1992): '*In the present case the Supreme Court injunction restrained the corporate applicants and their servants and agents from providing certain information to pregnant women. Although it has not been asserted that Mrs X and Ms Geraghty are pregnant, it is not disputed that they belong to a class of women of child-bearing age which may be adversely affected by the restrictions imposed by the injunction. They are not seeking to challenge in abstracto the compatibility of Irish law with the Convention since they run a risk of being directly prejudiced by the measure complained of. They can thus claim to be "victims" within the meaning of Article 25 para. 1*'.

[15] *Klass v Germany* App No 5029/71 (ECtHR, 6 September 1978): '*An individual might claim to be the victim of a violation occasioned by the mere existence of secret measures without having to allege that they were applied to him, but each must be considered in the light of the right alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures*'.

[16] App No 17056/06 (ECtHR, 15 October 2009).

that justice is done even after the applicant's death. This holds true all the more if the leading issue raised by the case transcends the person and the interests of the applicant and his heirs in that it may affect other persons (see Malhous v. the Czech Republic (dec.) [GC], no. 33071/96, ECHR 2000-XII) […]. *The Court considers that the question of an alleged defect in the relevant law which made it impossible to challenge a judge on the basis that the lawyer appearing before him was his nephew or that the issue at stake in the case related to the conduct of his brother is a matter which raises issues concerning the fair administration of justice and thus an important question relating to the general interest*

Besides, the Grand Chamber of the European Court ruled that:

The Court interprets the concept of 'victim' autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act (see Sanles Sanles v. Spain (dec.), no. 48335/99, ECHR 2000-XI), even though the Court should have regard to the fact that an applicant had been a party to the domestic proceedings. Regarding complaints under Article 6, the Court has been prepared to recognise the standing of a relative either when the complaints were of a general interest and the applicants, as heirs, had a legitimate interest in pursuing the application.

3.4 The *Mallia* Judgment on Juridical Interest and Victim Status

In the ***Mallia*** case, for the first time, a Maltese Court detached itself from the traditional civil law notion of juridical interest, indicating that it would retain the juridical interest notion but apply a different interpretation to it in the light of the Strasbourg jurisprudence. It stated:

There are differences between juridical interest as defined in civil law and a victims status as recognized by the Strasbourg Court. A juridical interest has to be direct. A victim status may be both direct or indirect. Juridical interest has to be actual. Victim status can be potential.

It then added:

The Constitution does not expressly state that for one to allege a breach of a fundamental right, one must possess juridical interest. It only states that for one to challenge a law not on fundamental rights, one need not prove juridical interest. It is only through a contrario sensu *interpretation that one reaches the logical conclusion that in case of a law which breaches fundamental rights one needs to have juridical interest. However, there is a provision in the Constitution which states that one may allege a breach of a right which will probably occur. This widens the concept of actuality of the juridical interest notion. J.J. Cremona the* conditor

> *of the Independence Constitution comments that 'A striking feature of these provisions is that the right to seize the court is granted also to any person who alleges that any of his protected rights is "likely" to be contravened, which could cover also a reasonable probability that an apprehended action may take place. This is in a sense an interesting extension of the ordinary "victim" concept'.*

This line of reasoning seems to have been followed in the ***Cassola*** case.[17] On 7 March 2022, the Constitutional Court, reversing a judgment of the court of first instance,[18] ruled that an independent electoral candidate enjoyed juridical interest to challenge the constitutional validity of a gender-corrective electoral mechanism which added a maximum of twelve parliamentary seats to candidates of the under-represented sex in favour of the two parties represented in Parliament. The fact that such mechanism did not trigger off if a third political party was elected to Parliament was deemed to constitute sufficient juridical interest for applicant who as an independent electoral candidate, a voter, and a candidate who desired to associate for electoral purposes with other independent candidates had every right procedurally to institute such action as a potential victim. The Court ruled that there was no need for a general election to be held to gauge whether there was such interest.

3.5 A summary of European Court jurisprudence on Victim Status

The Court then went on to summarise the European jurisprudence which gave a liberal interpretation to victim status. It referred to cases where a law forced the applicant to change his conduct, or, as in the case of ***Klass***, where the Court allowed applicants to challenge the mere existence of secret surveillance measures without the need of proving that such measures were in actual fact applied vis-à-vis the applicant. The mere fact that there could be surveillance necessarily dents the trust of the applicant in freely using his phone (***Monnat v Switzerland***;[19] ***Gorraiz Lizarraga v Spain***;[20] ***Stukus v Poland***;[21] ***Zietal v Poland***;[22] ***Klass v Germany***[23]). The Court also referred to the ***Norris*** case[24] where a homosexual person was considered to be a victim of legislation in Ireland criminalizing private consensual homosexual relations, for the applicant was presented with a hard choice; either he obeys the law and controls his natural instincts, or else give vent to them and risk criminal prosecution. In the ***Michaud*** case,[25] the Court observed, the

[17] 329/2021 *Arnold Cassola vs State Advocate*, Constitutional Court 7 March 2022.
[18] 329/2021 *Arnold Cassola vs State Advocate*, Civil Court (First Hall) 11 January 2022 (Mr Justice F. Depasquale). See also Times of Malta Kevin Aqulina, Austin Bencini, Giovanni Bonello and Tonio Borg, 'Two steps forward, two back: Citizens should have right to contest validity of laws that apply to everyone' *The Times of Malta* (Malta, 5 February 2022) <https://timesofmalta.com/articles/view/two-steps-forward-two-back.932065>.
[19] App No 73604/01 (ECtHR, 21 December 2006).
[20] App No 62543/00 (ECtHR, 27 April 2004).
[21] App No 12534/03 (ECtHR, 1 April 2008).
[22] App No 64972/01 (ECtHR, 12 May 2009).
[23] App No 5029/71 (ECtHR, 6 September 1978).
[24] *Norris v Ireland* App No 10581/83 (ECtHR, 26 October 1988).
[25] *Michaud v France* App No 12323/11 (ECtHR, 6 December 2012).

applicant was a lawyer specialising in tax and financial matters. The National Bar Council passed a regulation and adopted a procedure binding all lawyers to report suspicious transactions in the context of money laundering. He complained that such provision breached the client-lawyer privilege. No proceedings had been instituted against him by the Bar Council and in this sense he was not directly affected by the measure. The Court still considered him to be a victim. The Court also observed that in the ***Sejdic*** case[26] applicants challenged their ineligibility to contest elections to the House of Peoples and the Presidency because of their Roma or Jewish origins since this amounted to racial discrimination. They did not actually apply to be candidates for the election. However, the Court accepted that they had victim status. It ruled that:

> *In the present case, given the applicants' active participation in public life, it would be entirely coherent that they would in fact consider running for the House of Peoples or the Presidency. The applicants could therefore claim to be victims of the alleged discrimination.*

In the ***Mallia*** case the Court also referred to the ***Kosiate-Cpriene v Lithuania***[27] case where four women complained of domestic legislation which did not allow them to seek professional assistance through the Lithuania Health Service when they give birth at home. The first and fourth applicants were not directly affected for they were not pregnant nor did they plan to give birth at home in the future at the time of their application to the Court. In spite of the lack of actuality of the interest the Court nonetheless considered them to be victims.

3.6 A Logical Step

The aforementioned reasoning of the Court, aligning the Maltese position on legal standing with the victim status as interpreted by the Strasbourg Court, made logical sense, for the simple reason that the Convention is part of Maltese law and furthermore any eventual reference of a human rights case from Malta to Strasbourg would be decided by the European Court in the light of its liberal construction of victim status. One might therefore just as well give such extensive interpretation to the juridical interest concept in domestic human rights cases.

3.7 The *Coup de Grace*

The Court, in a final *coup de grace*, therefore concluded that:

Applicant is not presenting a claim in abstracto *but is complaining*

[26] *Sejdic et v Bosnia and Herzegovina* App No 27996/06 and 34836/06 (ECtHR, 22 December 2009).
[27] App No 69489/12 (ECtHR, 4 June 2019).

of a law which directly affects those lawyers who are eligible candidates to be considered as candidates for the high post of member of the judiciary. As in the case of Kosaite-Cypiene and others v Lithuania aforementioned applicant belongs to a category of persons who are in danger of being directly affected by the challenged legislation. It is not necessary that she proves that she actually applied to be considered as a victim – the same as in the case of complainants in the Sejdic case, who had never applied to be election candidates and in the case of the fourth applicant in the Kosaite-Cypiene case who had borne birth already and the fourth applicant who did not intend to become pregnant and none of them intended to give birth at home.

Therefore this Court finds that applicant qualifies as a victim in this case.

4. Conclusion

What the Court did in the ***Anna Mallia*** case was to superimpose the footprint of 'victim status' on that of juridical interest, and apply the wider footprint to the case. In this respect, so long as it is eventually confirmed by a superior court, it remains a landmark judgment for it has opened an avenue for effective remedies, releasing local jurisprudence from the shackles of traditional restrictive civil law notions of juridical interest blindly applied to public law actions. The same applies to the ***Ramblers*** case. The Court gave a liberal correct interpretation as to who is to be considered as an 'aggrieved' person in a public law action, distancing itself from, though not completing severing, the traditional civil law interpretation.

All is not yet clear on the actual definition of juridical interest until a final decision is taken either by the Court of Appeal in judicial review cases or the Constitutional Court in constitutional proceedings.[28] However, the two cases have opened an avenue for the granting of remedies to be sought by individuals and non-governmental organisations, who rarely have a personal direct interest in the matters they campaign for, but who have sufficient interest to put forward a claim that a public authority is in breach of its constitutional or other legal duties and obligations.

[28] See for instance 494/2017 *Miriam Sciberras noe et vs Superintendent Public Health*, Civil Court (First Hall) 27 January 2022 (Mr Justice JR Micallef) where a pro-life non-governmental organization was deemed not to have sufficient juridical interest to challenge the validity of a decision by a public authority approving the release in the local market of the morning-after pill, which according to applicants caused the destruction of a fertilized human egg.


olj
online law journal