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CASE NOTES

OFFICE OF THE **OMBUDSMAN** MALTA

Ombudsman

CASE NOTES

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Foreword

Most of the work done by my Office and the demand on its time and resources in response to its core function to investigate complaints on alleged cases of maladministration and unfair treatment in service provision by government bodies would go to waste unless these experiences are brought on a regular basis to the attention of citizens and the providers of state services as the main stakeholders of the ombudsman institution.

Clearly not all cases reaching this Office that are considered worthy of scrutiny are given, or indeed deserve, the same type of response by the Ombudsman. Some grievances are dealt with by means of referral to the public authorities that are directly involved with a view to a quick, informal solution while other instances warrant a full-scale investigation. In these latter cases, acting independently and autonomously of both individual complainants and government, my Office takes a close look at the laments and expectations of citizens and at explanations by the public bodies that are under scrutiny and passes on to submit recommendations that are fair to the parties concerned and that are underpinned by the right of citizens to good administration.

Regardless of whether an admissible complaint is upheld, fully or partly, or considered as unsubstantiated by my Office, we consider it important that some of the true stories of complainants are presented to other citizens and shared with them as case studies that contribute towards a wider appreciation of the need for improved governance. In recounting these true stories of ordinary citizens in their quest for administrative justice, we select especially cases with a human touch and present the concerns of citizens and their hassles with government authorities in a factual manner. We also provide a step-by-step account of this institution's objective evaluation of their concerns and narrate how these issues are resolved in one way or another to showcase our unrelenting drive in favour of citizen rights and to promote administrative actions and decisions that are justified and transparent.

As examples of the day-to-day work of my Office, these cases not only provide an insight into the route that our investigative process would normally follow

but also demonstrate our staunch commitment to the values of a dignified approach towards citizens in their contacts with public authorities and fair, accountable service provision to the public.

I would also at this stage like to point out to an interesting innovation in this twenty-eighth edition of *Case Notes*. Since his association as from November 2008 with my Office, the University Ombudsman – while maintaining full autonomy of action and functional independence – has made great strides forward and is handling an unprecedented number of complaints generally about issues that are linked to the University of Malta even though his mandate was widened to include the Malta College of Arts, Science and Technology and the Institute for Tourism Studies.

This edition of *Case Notes* pays tribute to the sterling work that is being done by the Office of the University Ombudsman by the inclusion of an *ad hoc* section that narrates two cases that were dealt by the University Ombudsman in the last few months. This feature is being included in recognition of the new vigour that now characterizes this Office and the efforts of the University Ombudsman to promote student rights in the wider context of due process and good governance in the field of further and higher education. It is planned that subsequent issues of this publication will give coverage to other cases that are referred to the University Ombudsman and investigated by his Office as a means of providing publicity to his interesting and useful work.

Joseph Said Pullicino
Ombudsman **October 2009**

Note

The names that appear in some of the case studies are fictitious and are meant to preserve the identity of complainants.

Cases No H 57 and H 127

EDUCATION DIVISION

Waiting for a warrant

The complaint

Igor Vitali sent his first complaint to the Office of the Ombudsman in February 2007. He claimed that although he applied for a permanent teacher's warrant in November 2005 on the basis of his masters degree from the University of Sheffield, he was left in the lurch by the Education Division and was unable to apply for a permanent teacher position.

Complainant was upset by this situation especially because he was aware of a colleague who applied for a permanent teacher's warrant at the same time as he did but was only granted this warrant after she had instituted a judicial protest.

In a subsequent complaint Vitali stated that in what he considered as a reprisal for having approached the Office of the Ombudsman, the Education Division transferred him to two different schools in the short span of three months at a time when he was recovering from a serious medical condition. He also alleged that the Education Division had consistently ignored his application for a higher salary by virtue of his masters degree.

Facts and findings

The Ombudsman's investigation found that Vitali joined the Education Division in February 2003 as a Supply Teacher (Special Schools) in salary scale 12. In November 2005 he was awarded the degree of Master of Arts (MA) from the University of Sheffield and applied for a permanent teacher's warrant and for a revision of his salary scale. However, after more than two and a half years he still awaited a reply from the Education Division and

this meant that during this period he was only in possession of a temporary warrant.

Soon after the Ombudsman's intervention got under way the Education Division informed Vitali in writing in March 2007 that his application for a permanent teacher's warrant had been accepted and even gave him the number of his warrant while also informing him that his warrant would be sent to him in due course. It came, therefore, as a big surprise when the Division again approached complainant early in April 2007 to tell him that this letter had been sent by mistake and that there were indications that the Teachers' Warrants Board was not observing properly the provisions of the Education Act with regard to the issue of permanent warrants to teachers. Following this muddle Vitali continued to hold only a temporary warrant.

In July 2007 the Office of the Ombudsman again approached the Education Division to find whether the issue had been resolved and drew its attention to the provisions of paragraph (c) of subarticle 11(3) of the Education Act as was in force at that time and which provided for consideration of qualifications that were equivalent to those listed in this Act as needed for the grant of a permanent teacher's warrant. The Ombudsman also pointed out that it was possible for the Division to consider the possibility of applying the provisions of the relevant EU Directives in case of a shortfall in complainant's foreign qualifications.

Despite several reminders to the Education Division and various promises of action, it was only in mid-December 2007 that the Office of the Ombudsman received a terse reply that merely stated that all pending applications for a permanent warrant were being further evaluated and that a decision whether Vitali was entitled to the issue of a permanent warrant on the basis of his qualifications would be taken by the Teachers' Warrants Board in due course. At the same time the Office understood that it was planned to settle all outstanding applications for the award of a permanent warrant in January 2008.

Sub-article 11(3) of the Education Act as in force at the time that this complaint was being investigated by the Ombudsman listed the requirements that were necessary for an applicant to qualify for a warrant. Besides being in possession of relevant academic/professional qualifications from the

University of Malta or from other local institutions, an applicant could also have followed a course at a University or at a recognized institution outside Malta which in the opinion of the Minister responsible for education is equivalent to any of the courses in Malta referred to in this section. It was in fact on the strength of this provision whereby applicants could have been awarded their qualifications outside Malta that the Office of the Ombudsman had requested the Education Division to deal with complainant's application and to establish whether he was qualified to hold a permanent warrant.

Act No XIII of 2006 amending the Education Act changed the requirements in respect of the award of a teacher's warrant as well as in respect of the appeal facility (which is no longer the Scholastic Tribunal) but, through a saving provision under a new article 41, retained the eligibility requirements for those who qualified under the provisions as in force prior to the coming into effect of the amending Act. Under the new provisions of the Act the grant of a teacher's warrant became the responsibility of the Minister of Education acting on the advice of the newly established Council for the Teaching Profession. Furthermore, any appeal on the award of a teacher's warrant needs to be addressed to the Court of Appeal in its inferior jurisdiction in terms of the (new) article 32 of the Education Act.

With regard to Vitali's complaint about his several transfers in a short period of time the Education Division stated that these transfers had been dictated by the exigencies of the service and by no other considerations. It was explained that when complainant's first post with the Division became redundant, instead of having his employment terminated – something that could easily have been done since he was a Supply Kindergarten Assistant – Vitali was transferred to another Special School in September 2006. However, since he soon reported sick and there were indications that his absence would take a long time, the Division took steps to replace him immediately by another Supply Teacher so that his students would not remain unattended for several months. The Division reiterated that it was only for humanitarian reasons that complainant's employment had not been terminated and made it clear that since there was no class waiting for complainant when he reported back for work, he was sent to teach in another school when a vacancy arose in January 2007.

Insofar as complainant's request for a revision of his salary was concerned it

was noted that after repeated requests from the Office of the Ombudsman the Education Division finally addressed this issue and informed complainant in January 2008 that his request could not be met. The Division explained that after approaching the Malta Qualifications Recognition Information Centre which under the Mutual Recognition of Qualifications Act is authorised to recognize qualifications, it was established that the qualification which Vitali had obtained from a London college in June 1996 and which had served as the basis of his request for a revision of his salary was a UK Level 3 qualification which is equivalent to Level 4 in Malta (i.e. an Advanced level); and on this basis complainant's request for recognition of this qualification was turned down. Complainant, however, emphatically denied that he had applied for a permanent teacher's warrant on the strength of this qualification from a London college but on the basis of his masters degree from the University of Sheffield in 2005.

Considerations and comments

In his Final Opinion the Ombudsman declared that it is not his function to intervene in the work or to take over the functions of an authority expressly established by law to determine applications for the award of a permanent teacher's warrant. This competence is in terms of the Education Act vested in the Minister responsible for education acting on the advice of the Teachers' Warrants Board. The duty of the Office of the Ombudsman in these circumstances is to examine whether there were any valid reasons behind the exaggerated delay by the Education Division before it reached a decision on complainant's application especially when *prima facie* this seemed a straightforward issue.

The Ombudsman ruled that regardless of the reason why complainant's application was left pending for more than two years, this delay was unacceptable and unjust. In fairness to officials at the Education Division he pointed out, however, that he found indications that they were inclined to refuse complainant's application even though they did not communicate this decision to him. In this connection to put matters in their proper perspective it had to be stated that if they had passed on this decision to him, at that time this communication would only have served to land complainant in a legal limbo since there would not have been any other means left for Vitali to

appeal to the Scholastic Tribunal as laid down by law since this Tribunal was in the process of being abolished in terms of the law as amended but at that time not yet in force.

The Ombudsman admitted that at that stage it would not have made sense to reconstitute the Scholastic Tribunal. This was an elaborate procedure that needed elections to be held to appoint members at a time when, according to the Education Division, it was the government's intention to bring into force in the short term amendments to the Education Act that had already been approved by Parliament. Indeed this took place while the issue was under review by the Office of the Ombudsman. This meant in turn that the way was open for the constitution of the Council for the Teaching Profession that is charged with the responsibility to determine applications for the issue of a teacher's warrant, a step that was meant to facilitate the smoother processing of applications than was the case in recent years.

Despite these considerations the Ombudsman was of the view that the Education Division could not be absolved of the delay that occurred in order to communicate its decision to complainant albeit this would have been a negative one. This delay was in fact admitted by the Education Division that assured the Ombudsman that steps were in hand for an immediate review of all pending applications.

The Ombudsman, on the other hand, was satisfied by explanations by the Education Division regarding complainant's transfers although in any event he made it clear that his Office considers the allocation of duties as a prerogative of management and does not intervene unless there is evidence that a transfer was vindictive or that new duties entrusted to an employee are degrading and not compatible with his grade or status. There was no such evidence in complainant's case.

The Ombudsman considered complainant's request in November 2005 for a revision of his salary from scale 12 to scale 10 and after having ascertained that the Education Division had persistently ignored this request and only gave Vitali a negative reply after no less than 26 months, he stated unequivocally that this delay was unacceptable and attracted serious criticism from his Office.

Conclusion and recommendations

The Ombudsman concluded that for more than two years the Education Division failed to give a definite reply to complainant's application for the issue of a permanent teacher's warrant. He added that even if there were mitigating legal circumstances in that procedures for the award of a warrant were amended by Parliament and bringing these changes into force meant lengthy administrative procedures, there was no justification why the Division failed to communicate its decision to Vitali.

The Ombudsman understood that the Education Division was reviewing the possibility whereby complainant and others in his position would be able to qualify for a warrant. If necessary and applicable in this case, the authorities could have applied the relevant EU provisions if the curriculum that complainant had followed for his masters programme fell short of the academic requirements of the law. The Ombudsman recommended that any such exercise should be done immediately and should be concluded in the shortest possible time.

The Ombudsman took this opportunity to point out that the authorities should examine the allegation by Vitali that a colleague who was in possession of the same qualifications that he had, was granted a permanent warrant without facing the hassle that he had undergone and that she was also given a permanent post as a Teacher. In the event that this different treatment was justified, the Ombudsman exhorted the Education Division to provide an explanation to complainant why this was so.

The Ombudsman commented that if the decision by the Education Division on complainant's request to be awarded a teacher's warrant was unfavourable, his attention ought to be drawn to the fact that after the coming into force of amendments to the Education Act, he could request the Council for the Teaching Profession to review his case as a new application following which, if his request would still not be approved, he could then appeal to the Court of Appeal in terms of the law.

Finally the Ombudsman concluded that Vitali's allegation regarding his transfers was not justified since the allocation of responsibilities and the deployment of staff is the prerogative of management and there was no

evidence that these transfers were the result of vindictiveness or that his new duties were degrading. At the same time he ruled that the excessive delay by the Education Division in addressing complainant's request for a revision of his salary constituted serious maladministration and attracted criticism from his Office.

Case No H 211

WATER SERVICES CORPORATION

The premises where water and electricity meter readings were not taken for eight years

The complaint

A consumer from Bkara lodged a complaint with the Office of the Ombudsman against the Water Services Corporation (WSC) regarding long outstanding bills for water and electricity consumption covering her residence in Bkara that, in her view, were time-barred[1]. As a result of her unwillingness to settle these bills, the Corporation refused to change the name of the account holder for her household that still referred to her late husband even though he had been deceased for several years.

Facts and findings

In 1991 complainant's family moved into premises in Bkara formerly used by the Public Works Department as a district office. Although complainant's husband asked the Water Services Corporation to take water and electricity meter readings as soon as his family moved to its new household and time and again asked the WSC to issue bills on a regular basis, his pleas went unheeded. At long last readings of the water and electricity meters in the premises were taken on 15 November 1997.

It was only in April 1999, however, that a first bill of Lm1,270 for these premises was delivered at complainant's residence even though it was wrongly issued in the name of the Public Works Department. This led complainant's husband to write to the WSC that since this amount must have covered also

[1] The Water Services Corporation also undertakes the reading of electricity meters in households as well as billing on behalf of Enemalta Corporation.

arrears due by the Public Works Department before his family moved in and since in the previous eight years no other bill was ever issued to him by the Corporation, he was steadfast in his resolve not to settle arrears that were in effect time-barred and would only settle bills due by his household for current consumption.

In subsequent correspondence complainant's husband repeatedly asked the WSC to resolve the issue and at one time he even stated that should he receive a bill with a reasonable amount for arrears due by his family, he would be prepared to settle this bill.

Following the death of her husband, complainant continued to maintain that these amounts were time-barred because the Corporation failed to send the relative bills or claim the amounts for several years and refused to settle arrears while she only accepted to pay current bills. She also requested on several occasions that the name of her late husband as the account holder be removed and that invoices be issued in her own name.

When approached by the Office of the Ombudsman the WSC refused to accept that arrears and dues related to complainant's household could be considered as having been interrupted by prescription. On her part complainant pleaded that payments made by her family could not be interpreted and construed by the Corporation as having interrupted prescription because these payments were never meant to settle arrears.

The Ombudsman also understood that unless a bill is fully settled, the Corporation would not agree to change the name of an account holder.

Points at issue

The Ombudsman declared that taking 26 January 2005 – the date of the Corporation's final warning for the payment of complainant's outstanding water and electricity consumption bills – as the cut-off point, the amount of Lm690 was due up to end-2004.

He went on to point out that it appeared that although complainant's family began to reside in this house in 1991, the first bill for water and electricity

consumption covering the period March 1991-March 1998 showed the accumulated consumption in this building during all these years. This tallied with insistence by complainant's late husband that after moving in, the first known reading of his family's Bkara residence was taken late in 1997 and to some extent matched the official record sheet provided by the WSC to the Office of the Ombudsman showing meter readings for water and electricity consumption in these premises. When in subsequent years meter readings were carried out on a regular basis, it was noticed that consumption in the household was generally stable and at a reasonable level and this pattern seemed to belie the abnormal consumption levels implied by two bills issued by the Corporation in 1997 for Lm233 and Lm872 respectively.

The Ombudsman found in his investigation that although at that time complainant's husband sought clarification about these erratic consumption levels, the Corporation did not give a plausible explanation. However, following further representations the Corporation had agreed to reduce both invoices by a considerable amount without providing the basis on which it had arrived at this reduced figure although it was likely that the Corporation had estimated an amount that, in its opinion, had to be debited to the Public Works Department for consumption prior to 1991. It was not, however, possible to ascertain whether the WSC had requested the Public Works Department to pay these outstanding dues.

At this point the Ombudsman stated that all evidence pointed towards one conclusion: that for a very long time records by the WSC for electricity and water consumption in complainant's residence were "*in one big mess*" for reasons which he could not fathom. Not only had no readings been taken for years by the Corporation for electricity and water consumption in this household but also, when they were ultimately taken, they were billed to the Public Works Department even though complainant's family had resided there since 1991.

The Ombudsman found that after seeking legal advice on their predicament, complainant and her husband consistently maintained that they were only prepared to pay for consumption as from 15 November 1997 and excluded claims for the period March 1991-November 1997 since these amounts were time-barred in terms of article 2149 of the Civil Code; that all payments made

by them were always made without prejudice and, perhaps more importantly, with a specific declaration that they were not accepting any liability for amounts claimed by the Corporation which were covered by the prescriptive period that they invoked; and that time and again they paid their current dues while always putting their objection on record.

To a large extent the Water Services Corporation rested its case on legal grounds, namely that complainant acknowledged that her family moved in these premises in 1991 and so the cost of consumption from that year onwards had to be debited to her family; and that this admission, coupled with the fact that as a consumer she had already settled bills issued by the Corporation, amounted to an acknowledgement of her debt which interrupted the period of prescription and which had to be interpreted and construed in terms of articles 2133 and 2134 of the Civil Code. On its part, however, the Corporation recognized that complainant's late husband consistently maintained that debts incurred between March 1991-November 1997 were time-barred because he never received the relative bills in time and had never acknowledged this debt.

Further considerations by the Ombudsman

The Ombudsman pointed out that his function is to investigate allegations of maladministration by government departments and public authorities and bodies in which the Government has a controlling interest and not to establish civil rights and obligations that ought to be determined by competent Courts and Tribunals. He can, however, identify instances of maladministration and advise the responsible authorities to revisit these cases in the light of his considerations to establish whether complaints on these issues were justified at law while these authorities should consider the possibility of avoiding unnecessary litigation.

The Ombudsman stated that in his opinion this case showed unmistakeably a lack of proper administration by the Water Services Corporation of the accounts in respect of water and electricity consumption in the residence of complainant and her family. Although it is the Corporation's duty to conduct proper and regular readings of water and electricity meters in all households, it obviously had failed to do so in this case.

It is also the duty of the Corporation to bill consumers with the correct amount due by them for consumption at regular intervals and to follow up invoices for payment. These duties are an integral part of the code of good governance that the Corporation is bound to follow to ensure not only the provision of a good and reliable service that consumers have a right to demand but also the efficient collection of revenues that are due for services rendered to them. The Ombudsman pointed out that these duties are even more onerous in cases where the consumer not only insists on his rights but repeatedly requests to be informed of his dues on a regular basis and is prepared to settle them without much ado.

The Ombudsman observed that there can be no justification for the Corporation's failure to take readings of consumption meters in a house located in an inhabited area for no less than eight years and, possibly, for a longer period when the property belonged to Public Works Department. Nor can the Corporation be justified for suddenly billing complainant with a hefty amount for arrears without a detailed explanation and a breakdown of this sum. Indeed, it was likely that the Corporation itself realized that this was no way to treat consumers and revised this bill by a significant amount since it was obvious that the consumption level in this household could not all be debited to complainant's family.

The Ombudsman observed that even if complainant's late husband might have been firmer in demanding the Corporation to issue bills for water and electricity consumption by his household between 1991-1997, this did not justify the Corporation's gross inaction and its failure to give a proper service to customers. He stated that he could not but censure the attitude shown by the WSC.

On the other hand the Ombudsman noted that since the issue had been narrowed down to the plea of prescription raised by complainant as long ago as 1997 and to the Corporation's stand that complainant had, through her action, acknowledged the debt and consequently interrupted the prescriptive period, the problem that had to be resolved was considered strictly speaking a legal issue which, in the absence of an amicable settlement between the parties involved, had to be determined judicially.

In this regard the Ombudsman appreciated that the WSC could not renounce

its claim to the collection of monies that it considered its due unless it had a sound legal basis on which to justify any such concession. However, the Corporation left it to his Office to advise what course of action it should pursue while suggesting that with complainant's agreement, recourse could be had to an independent arbitrator.

At this stage the Ombudsman recalled that it was fair to point out that from the very start of this saga complainant's late husband showed his willingness to abide by the Court's decision in the event that the WSC proceeded judicially against him. He had, however, also consistently maintained that he should not be penalised for the Corporation's mistakes and that until the bill in respect of arrears was cleared he should be allowed to pay for current consumption levels that he never contested.

A further twist to this lengthy story developed when complainant insisted that this problem with the WSC should not prejudice her right for an exemption from surcharge to which she was entitled as a result of her financial situation and personal circumstances. She stated, however, that the Department of Social Security was not prepared to register her on the new voucher system unless the account of her household showed her name instead of the name of her late husband and submitted that she had been unwittingly caught between the policies of two government entities and was being subjected to victimization.

Conclusion and recommendations

Taking everything into account the Ombudsman recommended that the WSC should revisit its claim for the amount of arrears being demanded from complainant and considered as pending on her residence.

The Ombudsman pointed out that in his view the issue was a complex legal matter that fell outside the parameters of his remit and suggested that the Corporation should seek legal advice to investigate the facts as they result also from his Final Opinion and their legal implications. This advice should take note of the considerable time lag and the lethargy shown by the Corporation to claim what was, certainly in part, due to it as well as the express declaration by complainant's husband that payments were to be credited to current bills

and not to arrears. Legal advice should also be sought whether payments with such a specific reservation, if accepted by the Corporation, could at law amount to an interruption of the prescriptive period.

The Ombudsman pointed out that if the WSC felt that it was unable to arrive at an amicable solution with complainant, he would recommend that the Corporation and complainant refer the matter to arbitration. This course of action should be limited to the legal issue of interruption of prescription since there seemed to be no question on the amount being claimed although the Corporation should provide a detailed, itemised breakdown of arrears and the period to which this amount referred.

The Ombudsman recommended that the two parties should agree to go to arbitration without prejudice to complainant's right to be recognised as the nominee of the account in respect of her residence. This should enable her to be entitled to exemption from surcharge under the new voucher system with immediate effect and, possibly, retroactively.

The Ombudsman saw no reason why the transfer of the account from the name of complainant's late husband to her name should be conditional to payment of outstanding bills and commented that it should be evident that the wife is the co-possessor of the account which entitled her and her late husband to the enjoyment of a service that falls within the community of acquests. This was more than evident from the WSC's insistence that complainant should shoulder responsibility for the payment of all arrears accumulated before her husband's demise.

Although at this stage the Ombudsman was of the view that his Office should not involve itself any further in this complaint, he recommended that the two parties should engage in further discussions to solve their remaining differences in the spirit of his considerations. In the event of failure to reach agreement the WSC should consider whether it was opportune to proceed for the recovery of the amount on the basis of a judicial claim after obtaining an exhaustive legal opinion on the pleas put forward by complainant and the merits and circumstances of the case.

Case No H 600

EDUCATION DIVISON

Oh, to teach in Gozo
Now that Design and Technology is there

The complaint

Elaine Muir, a Home Economics teacher hailing from Gozo lodged a complaint with the Office of the Ombudsman that the Education Division arbitrarily turned down her application to fill one of two vacancies in Design and Technology (Food and Textiles) in the secondary sector in Gozo. She stated that both posts were assigned to teachers with the same qualifications that she had in Home Economics but maintained that her claim was stronger because in April 2007 she started to attend a teachers' course in Design and Technology organized by the Education Division that was discontinued soon after it got under way.

She also pointed out that despite the policy of the Division that teachers who do not follow this course could not teach the subject, the chosen candidates who were sent to Gozo at the start of the scholastic year in September 2007 had showed no interest to join the course.

Complainant was critical of the choice of Ms da Costa, the first candidate, following the issue of an external call for applications because it is the practice to fill vacancies in the public sector from internal sources and to resort to external calls only if no internal candidates are eligible. With regard to Ms Diaz, the second candidate, she admitted that this person was her senior but insisted that this seniority applied only in Home Economics.

Complainant emphasized that her request to be transferred to Gozo was also justified on the grounds of her childrearing duties. Since she was not transferred to Gozo it was difficult for her to see to these duties and her only alternative was to give up her employment on parental leave. She pleaded to

be allowed to remain in Gozo at least until her child was weaned.

Facts of the case

Soon after she graduated in Home Economics at the University of Malta, Ms Muir joined the Education Division for the 2006/2007 scholastic year and was sent to teach Home Economics in Malta. On the same occasion she also applied to teach Design and Technology (Food and Textiles) but was considered ineligible since her degree did not include this subject and did not meet one of the conditions in the call for applications issued by the Public Service Commission (PSC) in April 2006.

A few weeks after she took up her duties in Malta complainant informed the Education Division that she was pregnant and in line with its policy in similar circumstances, the Division transferred Ms Muir to Gozo. After she availed herself of her maternity leave, she was again told to report for work in Malta at the start of the 2007/2008 scholastic year.

It was at this time that the Education Division finalised plans to launch courses in Design and Technology in Gozo and searched for two teachers for this new workload. However, when complainant's request to teach this subject in Gozo went unheeded and in mid-October she found that these duties were assigned to other staff, Ms Muir went out on sick leave. When she eventually resumed work she was again posted to Malta to teach Home Economics but was soon back again on sick leave.

When questioned about this issue, the Education Division explained that after an external call for applications in May 2007 by the Public Service Commission for Teachers in Design and Technology (Food and Textiles) and after interviews were held, the only successful candidate with the necessary qualifications to teach this subject was Ms da Costa. This was confirmed by the result sheet issued by the Commission. The Division added that since this candidate resided in Gozo, it was only fair to deploy her there and went on to explain that she was eligible to teach Design and Technology because as from the 2007 call for applications graduate teachers in Home Economics or Textiles were considered eligible to teach this subject. This was not possible when Ms Muir submitted her application in 2006.

The Division told the Ombudsman that Ms Diaz, the second candidate chosen for the Gozo assignment, was selected in view of her seniority in Home Economics and that she was given some lessons in this subject to make up a full teaching load. The Division stated that a result sheet issued by the PSC in 2003 confirmed that she was qualified to teach Home Economics and Technology Education as the subject was then known.

The Education Division clarified that in order to be qualified to teach Design and Technology, teachers need to undergo a retraining course and that the course in 2007 mentioned by complainant was stopped when it was found that several teachers who were willing to attend were unaware that it had started and that this activity did not have official authorisation by the Division. It was for this reason that before the course was re-started, the Division ensured that all interested teachers were made aware that it was being organized anew.

Ms Muir insisted, however, that this explanation did not hold ground because participants had been authorised to leave their place of work during school hours in order to attend while an official from the Education Division had conducted the course. She alleged that there was reason to believe that the Division stopped this course in its tracks to enable the two selected candidates to join the new course in October 2007 and that their school timetabling featured a soft workload in mid-week to allow them to attend these lessons while she was withheld permission to attend during school hours. Complainant showed her disappointment that she was unable to attend even though the course was supposed to be open to all those who had showed interest.

Complainant disagreed with the Education Division that it was fair that Ms da Costa was the first to be sent to Gozo because she hailed from there. She held that an internal call for applications should have been issued before the external call and that she was unable to apply as an external candidate because she was already in the public service and would forego the seniority she had accumulated if she were to do so.

Ms Muir criticized the decision by the Education Division to select Ms Diaz on grounds of her seniority in Home Economics when she was allocated

only four lessons per week in Home Economics and eighteen in Design and Technology.

Complainant pointed out that the Education Division had also sought to justify its choice of Ms Diaz first by stating that she was a graduate in Design and Technology and then by claiming that she was eligible to be chosen after selection criteria were changed in 2007 and graduates in Home Economics were allowed to apply. She maintained that since Ms Diaz was not a graduate in the subject and was selected merely on the strength of an interview, she should have been interviewed as well to test her aptitude to teach Design and Technology. According to Ms Muir the fact that she was not allowed to sit for an interview put her at a disadvantage.

Complainant held that the change in the criteria under the May 2007 call for applications was abusive and insisted that by virtue of her qualifications and as a graduate in this area, she could teach this subject as of right. She also observed that although according to the Education Division teachers can only teach Design and Technology after having completed the retraining course, this was contradicted by the fact that the selected candidates were chosen on condition that they would travel to Malta once a week to attend and successfully complete this course.

Ms Muir pointed out that the Public Service Management Code states that results of examinations for the recruitment of public officers remain valid up to one year from publication of the final results. This meant that the PSC result sheet of 2003 that was used by the Education Division to justify its choice of Ms Diaz had expired.

The Education Division rebutted the issues raised by complainant and insisted that rules for staff transfers are based on considerations such as length of service, the subject/s that a teacher can cover and the exigencies of the service. The Division explained that whenever the need arises for a few lessons in a particular subject, it is standard practice for the Head of School to identify a teacher who is qualified in this area and whose timetable would allow the employee to give extra lessons. This system was resorted to in the case of Ms Diaz who was assigned four lessons in Home Economics while the bulk of her teaching duties were in Design and Technology.

The Education Division countered that although results of interviews are valid for only one year after their publication for the purpose of employee recruitment, nevertheless whenever the need arises, it is customary to assign employees to teach subsidiary subjects that they would be qualified to teach instead of their main subjects.

The Education Division also stated that since it is the Public Service Commission that appoints interviewing boards, Ms Muir should have complained with the Commission in accordance with the Public Service Management Code if she felt that she was unjustly declared ineligible for the interview.

Considerations by the Ombudsman

The Ombudsman observed that complainant felt aggrieved that she was not considered qualified to teach Design and Technology even though she started to undergo a course for this purpose. At the same time two other employees in possession of the same degree in Home Economics were deployed to teach this subject in Gozo although they had not followed this course.

When considering complainant's allegation on the selection of the first candidate, the Ombudsman found that Ms da Costa had completed her university course and was successful under a call for applications issued in May 2007 and regulated by the PSC. In this call eligibility for Design and Technology (Food and Textiles) was extended to applicants with a set of academic qualifications out of several options that were listed in the call; and Ms da Costa was found eligible to apply under these new criteria by the selection board appointed by the PSC which went on to interview her and to recommend her selection for the post of Teacher in Design and Technology. This meant that the Division had not acted in an irregular manner when it assigned this candidate to fill one of the two vacancies in Gozo in this subject area and had merely followed the recommendation of the selection board set up by the PSC.

In view of these circumstances, the Ombudsman ruled that under the Ombudsman Act, 1995 this decision by the selection board fell outside his jurisdiction. His Office cannot investigate a similar decision unless all

available means of redress have already been exhausted; and since in this case procedures established by the Public Service Management Code on petitions to the Public Service Commission were not followed, his Office could not consider this aspect of Ms Muir's complaint.

The Ombudsman went on to consider complainant's claim that before the external call was issued she had applied under an internal call for applications to teach Design and Technology and also started to attend a course on this subject and that on these grounds she ought to have been given the same opportunity as external applicants and should at least have been interviewed. The Ombudsman, however, ruled that once complainant was reluctant to lose her seniority in the Education Division by applying as an external candidate, she could not have competed with Ms da Costa on an equal footing under this call. Nor did it make sense for her to expect to be called for an interview under this call when she had not even sent an application.

The Ombudsman also ruled that Ms Muir could not be considered senior to Ms da Costa in Design and Technology because documents issued by the PSC showed that in the 2006 selection process complainant was only considered qualified to teach Home Economics whereas in 2007 Ms da Costa was found eligible to teach Design and Technology although in this regard it had to be recalled that complainant was found ineligible when she applied to teach this subject in 2006 under the old selection criteria. Furthermore, under the Public Service Management Code complainant had a right to contest the decision that she was ineligible to teach Design and Technology and could have approached the Ombudsman as a last resort if she was not convinced that her petition had been given a fair hearing. However, since she had failed to do so, the Ombudsman ruled out any investigation on his part on this aspect of the grievance.

Referring to complainant's grievance that changes in the selection criteria between 2006 and 2007 were abusive, the Ombudsman observed that it is unreasonable to expect selection criteria in calls for applications not to be reviewed from time to time. As a result he was of the opinion that changes in criteria for the eligibility of applicants did not in any way undermine the credibility or the validity of the process by means of which Ms da Costa was recommended to teach Design and Technology.

The Ombudsman considered next Ms Muir's view that the call for applications should not have been issued before internal applications were considered. However, he accepted the explanation that external calls for applications need to be issued every year by the Division since it would not be in a position to know in advance the number of teachers needed for subjects in the forthcoming scholastic year until the selection of subject areas by students is finalised.

The Ombudsman stated that it appeared that complainant's request in 2007 to teach Design and Technology was turned down because she was not considered qualified to teach this subject by the PSC selection board in 2006 and because she had been employed by the Education Division to teach Home Economics as her main subject. Besides, she had not finished the Design and Technology course.

The Ombudsman's investigation found that in 2007 the Education Division changed the eligibility criteria for external applications for teachers in Design and Technology; and since this change also affected the way in which requests for internal transfers in the Education Division for teachers in this subject were handled, the Ombudsman recommended that the Division should clarify this issue and inform teachers interested in teaching this subject about the new eligibility criteria for graduate teachers in Home Economics to teach Design and Technology.

The Ombudsman turned down complainant's claim that she was more qualified to teach the subject than the two selected candidates because she started to attend a course on Design and Technology since this course was spread over two years and she had only attended a few lectures by the time that it was stopped. The Ombudsman made it clear that a candidate must complete the course in order to be qualified to teach this subject and it is useless for a person to claim to be qualified unless the full programme is successfully concluded. He insisted that it is unacceptable to allocate marks for qualifications that an applicant is still in the process of acquiring or to award marks to a candidate who would not have successfully concluded a study programme by the closing date for the submission of applications.

From employee records the Ombudsman ascertained that Ms Diaz was at the top of a seniority list of Home Economics teachers in Gozo while complainant

was fifth. He observed, however, that the Education Division did not provide a consistent explanation why the vacancy in Design and Technology was assigned to this candidate. At one point the Division explained that she was sent to Gozo to teach Home Economics on the strength of her seniority and was given a few lessons in Design and Technology to make up her teaching load but this explanation was not plausible since she only had four lessons in Home Economics and eighteen in Design and Technology.

At a later stage the Education Division changed its version and stated that the posting of Ms Diaz to Gozo was justified because she was qualified to teach this subject after an interview by a selection board appointed by the PSC in 2003 when she joined the Division. This was confirmed by a result sheet issued by the PSC following the 2003 interviews showing that she was qualified to teach Technology Education (Design and Technology) – as the subject was known at that time – in addition to Home Economics.

The Ombudsman declared that he attached considerable importance to this result sheet by the Public Service Commission which is responsible to issue calls for applications and to appoint selection boards and reiterated that he cannot be expected to substitute the views of a board that is appointed in this manner by his own views. His Office could not investigate complainant's misgivings about the eligibility of Ms Diaz to be interviewed for the post of Teacher in Technology Education in 2003 since this process fell under the jurisdiction of the Commission that is set up under the Constitution of Malta. The Office of the Ombudsman is only allowed by its founding legislation to review whether in a grievance lodged with the PSC the Commission gave adequate consideration to the points listed in the petition or if in a selection process against which a protest is raised, there was something that was against the law, wrong, improperly discriminatory or unjust in the way that it was conducted.

The Ombudsman, however, gave due consideration to complainant's argument that the 2003 result sheet should be rejected because according to the Public Service Management Code the result of an examination for recruitment in the public service is valid for one year from the date of publication of the final result. Nonetheless, he did not share this view since the provisions of the Code mentioned by complainant do not refer to the recruitment of employees by means of an interview as happens in the case of teachers but

apply to candidates who are required to sit for a written examination to join particular grades in the public service.

The Ombudsman went on to point out that although complainant was correct to state that results of interviews for posts in the public service are valid for a set period, this period only refers to the right of persons who were interviewed to be employed in that grade in accordance with the final order of merit should the need arise to employ persons in that grade while the result is still valid. This point was further clarified by the Education Division which explained that in the selection of staff to fill vacancies, it adopts the policy that whenever a person who is interviewed by the PSC is found to be qualified to teach more than one subject, this result is valid for the purpose of assessing a teacher's competence in the subject area/s which the employee could teach. While admitting that this policy is reasonable and is based on the deployment of staff according to the need for teachers in different subjects that may vary from time to time, the Ombudsman subscribed to the view by the Education Division that teachers who are engaged for a particular subject can still be asked to teach other subjects in which they are qualified if the exigencies of the Division require any such arrangements.

At this point the Ombudsman explained that the function of his Office is to investigate administrative acts to determine whether injustice, unlawful action or a bad policy decision has been taken by the administration. In this regard it is important to distinguish between maladministration that is a source of injustice or discrimination or that curbs the rights of an individual and legitimate administrative action that might give rise to discontent or to conflict but which should finally be respected because the decision would have been taken by a competent authority.

The Ombudsman found that the course in Design and Technology was stopped when it emerged that most teachers were not aware of this activity and also established that it was true that complainant's timetable did not allow her to attend the new course. Since the intention of the Education Division when it launched this course was to ensure that all interested teachers would be given the chance to join, it was important that all those who wished to participate should have been given the opportunity to attend. In view of this the Ombudsman recommended that the authorities should do their utmost to find a solution so that complainant would be able to rejoin this course.

The Ombudsman urged the Education Division to be transparent and consistent in its decisions. Since policies for the selection and deployment of teaching staff to Gozo were unwritten and could not be subjected to scrutiny, he urged that these criteria be put in writing to provide clear guidance to employees. Similar procedures should apply in issues related to academic qualifications that are necessary so that teachers are considered qualified to teach a particular subject.

The Ombudsman finally considered complainant's claim that the fact that she had not been transferred to Gozo to be able to breastfeed her child caused disturbance to her family even though she informed the Education Division that she intended to breastfeed her child. Referring to Legal Notice 439 of 2003[1] the Ombudsman observed that although complainant had to travel to Malta on every workday and this was no doubt a source of inconvenience, the Education Division is not legally obliged to transfer to Gozo a working mother who is resident in this island on the grounds that she has to breastfeed her child. Regulations introduced under this legal notice to implement Council Directive 92/85[2] apply for up to twenty-six weeks after childbirth and so they were not applicable to complainant who had given birth earlier than that. At the same time the PSMC makes no provision for a similar situation.

The Ombudsman commented that it is unfair that a working mother who hails from Gozo finds herself in a situation where she must decide whether to continue or to stop breastfeeding her child because she has to cross to Malta on a regular basis. He stated that while it is proper for female workers who breastfeed their children to find adequate facilities and that employers should deploy staff in a way to encourage working mothers to continue breastfeeding their children for as long as necessary, it is also proper that the legislator included some limitations in these regulations. The Ombudsman expressed the view that while the Education Division has to strike a balance

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[1] The *Protection of Maternity (Employment) Regulations, 2003* refer to measures designed to safeguard the employment rights of workers who have recently given birth and breastfeeding employees including the temporary adjustment of the working environment, the hours of work of the employees concerned or the assignment to these employees of suitable alternative work.

[2] Council Directive 92/85 of 19 October 1992 is entitled *On the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*.

between the deployment of teachers and the interests of students, in instances where it is not possible to make arrangements for a temporary transfer, there should be more tangible forms of assistance to working mothers including the possibility to work more flexible hours.

Conclusion

Taking everything into account the Ombudsman was of the opinion that although the Education Division was not consistent in its explanations on the transfer of Ms Diaz to Gozo, it had not acted in an abusive manner. Its decision to fill vacancies in Gozo by Ms da Costa and Ms Diaz was not taken lightly, arbitrarily or in a discriminatory manner and was in line with its rules and policies. Neither were the two vacancies filled in a way that was contrary to law or government policy because both teachers were qualified to teach this subject on the back of a regular selection process that was sanctioned by the PSC.

The Ombudsman therefore recommended that the Education Division should bring to the attention of teachers in writing the policies and criteria that it normally applies for the recruitment and for the transfer and deployment of teaching staff to Gozo. He recommended that the Division should apply with complainant the concession that appears in the Public Service Management Code that whenever it is feasible to do so, employees who travel daily from Gozo to work in Malta should be posted in a locality that is near or on the route to Ċirkewwa.

The Ombudsman also encouraged the Education Division to take steps so that complainant would be able to attend the retraining course in Design and Technology as from the point where she had stopped this programme when the Division had discontinued this course.

Soon after the release of the Ombudsman's Final Opinion, the Directorate for Educational Services which in the meantime had assumed overall responsibility for the management side of the Education Division assured the Ombudsman that it would seek to do its best to implement his recommendations.

Case No H 618

EXAMINATIONS DEPARTMENT

The candidate who thought too highly of his own examination script

The complaint

A candidate who sat for an internal competitive examination to fill vacancies in the post of Customs Officers that was held by the Examinations Department under the auspices of the Board of Local Public Examinations filed a written complaint with the Office of the Ombudsman where he alleged that the assessment of his examination script in Maltese was unfair and that the marks that he had been awarded in this paper did not reflect his merit. As a result he had failed to meet the pass mark of this examination by just six marks.

Claiming that he is proficient both in Maltese grammar and orthography, complainant was confident that the examiners could find little fault in this regard. He also claimed that since the essay that he wrote during the examination was on customs and related EU matters, a topic with which he is well versed since it is highly relevant to his actual range of duties, it was odds on that the written material that he presented was on the whole a creditable effort.

Complainant explained to the Ombudsman that feeling aggrieved at the marks that he was given for this examination paper, he immediately asked for a revision of his script and in line with regulations that apply in cases where candidates fail any part of an examination, he called at the Examinations Division in the company of a person of his trust to verify his script with the report that was drawn by the Board of Examiners that had re-checked his paper. According to complainant, this adviser expressed disagreement with the examiners' report that his essay was not to the point. On the contrary he was of the opinion that the theme that complainant had developed in his

script was well written and quite relevant to the subject under discussion. This appraisal in fact led his adviser to conclude that his essay was highly informative and that he deserved at least 80% of the marks that were allocated to this particular section of the test.

Complainant added that following his request for a second revision of his paper in Maltese, the Examinations Department failed to send a reply and it was only after he phoned the department that he was informed that the results had already been published and would not be changed.

At this stage complainant sought the Ombudsman's intervention for a proper assessment of his paper since he alleged that the Examinations Department had not observed the procedures that it is bound to follow in the case of students who are dissatisfied with their result and request a revision of their script. As a consequence, he had remained without any satisfactory explanation regarding his performance in his examination in Maltese.

Facts of the case

During his investigation on this complaint the Ombudsman was informed that according to its records the Examinations Department had in fact sent an official reply to complainant with regard to the outcome of the second revision of his examination script soon after this check had been concluded. In this reply it was made clear that the Board of Examiners had confirmed its previous decision. However, when complainant steadfastly denied that he had ever received any such letter, the Ombudsman made arrangements with the Examinations Department to forward a copy of this document to complainant.

At this stage the investigation of complainant's grievance by this Office was stopped since under the department's regulations for the administration of local examinations, a second decision by the Board of Examiners on a complaint by a candidate is final and conclusive. This case, however, was re-opened some time later following new verbal representations by complainant who continued to express his strong doubts and reservations on the extent to which the marks that he was awarded were correct. He also expressed misgivings as to whether the second revision of papers was in fact made in

a fair, honest and lawful manner and bemoaned what he considered to be a lack of transparency in the process.

In view of these fresh charges the Office of the Ombudsman requested the Examinations Department to seek further clarification from the Board of Examiners and especially with regard to its decision that complainant's essay in Maltese was out of point. This request led the members of the Board of Examiners to meet again and to prepare a more detailed report where they again confirmed the unanimous decision that they had reached earlier and gave a comprehensive explanation of the reasons that led them to come to this conclusion.

Considerations by the Ombudsman

The Ombudsman commented in his Final Opinion on this case that the grievance arose as a result of complainant's disagreement with the Board's evaluation of his script and the mark that he was awarded, spurred as he was by his conviction – probably fuelled in no small way by what he was told by the adviser who assisted him during the review of his script – that his writing was commendable. This tribute to his essay writing skills must have led him to believe that the marks that he had been awarded were less than he actually deserved, unfair and failed to do justice to his efforts.

As is his wont the Ombudsman pointed out to complainant that it is not his function to review the results of an examination that, by all accounts, appeared to have been valid and to have been conducted fairly. He emphasized that complainant should not expect him to usurp the functions of a competent board duly appointed by the authorities to oversee the organization and conduct of an examination for the recruitment of public officials and to ensure that the integrity of the whole examination process is maintained.

The Ombudsman stressed that in instances where candidates complain about a decision based on the subjective judgement of a Board of Examiners or an interviewing panel, he cannot be expected to reverse or to comment on any such decision. Nor should he be expected to question, raise doubts or substitute the judgement reached by a panel composed of members who would normally possess years of experience in their respective fields or seek

to modify their assessment. In such cases the Ombudsman would expressly limit his investigation to a review of the application of the procedures that were followed by the Board and to a scrutiny of whether these procedures were followed properly and in a correct manner but would not expressly delve on the merits of the case.

The Ombudsman told complainant that from what he had seen it resulted that both the Examinations Department as well as the members of the Board of Examiners had handled the case properly. Complainant's request for information had been dealt with in a fair manner and was given the utmost consideration.

The Ombudsman noted that the same treatment was also given at all times to his Office by the Examinations Department. As a matter of fact when he asked for additional information on the issues raised by complainant, the Board of Examiners found no objection to meet again and to review complainant's script in even greater detail even though the department's regulations regarding the conduct of an examination do not envisage a third verification of a candidate's script. According to the Ombudsman this third review confirmed without the slightest shadow of doubt that the Board was dependable and had done its work in a fair manner and he had no hesitation whatsoever to accept its judgement and that its decision was final and conclusive.

The Ombudsman remarked finally that it is obvious that the contents of a candidate's script have to convince and to satisfy the examiners and not the candidate himself. It is clearly the overall evaluation given by members of a Board of Examiners that determines the final mark and although a candidate may be free to believe that his performance was fine and that he had presented relevant and good work, it is obvious that these convictions bear no direct influence on the final outcome of an evaluation that is made by examiners of the true quality and worth of a candidate's efforts and his merit.

Conclusion

In view of the above considerations the Ombudsman felt that there were no grounds to sustain this complaint.

Case No I 88

MINISTRY FOR RESOURCES AND INFRASTRUCTURE

Thumbs up for a selection process that was consistent and fair all along

The complaint

In a complaint lodged with the Office of the Ombudsman a Senior Tradesman in the Vehicles and Plant Section of the Manufacturing and Services Department of the Ministry for Resources and Infrastructure (as the Ministry was known at that time) alleged that he was the victim of an unjust act. He said that following interviews that were held soon after the issue in November 2007 of a call for applications for the post of Assistant Technical Officer in the Section, he was classified third despite his firm conviction that he deserved better.

Feeling aggrieved at this outcome complainant, as required by law, submitted a petition to the Public Service Commission (PSC) in February 2008 on doubts that he harboured about this selection process. However, after investigating his petition the PSC validated the decision reached earlier by members of the selection board whose nomination had been approved by the Commission itself in order to evaluate applications and make recommendations. This in turn led complainant to seek the intervention of the Office of the Ombudsman because he felt that the members of the selection board who were officials who had themselves served in the Manufacturing and Services Department for several years should have given better advice with regard to the selection of the best and most appropriate candidate.

Complainant was particularly upset at the result of the selection process because he had worked in the Section for thirty years as a panel beater and sprayer while the candidate who was placed first had worked there for only ten years and his tasks were limited to the removal, repair and replacement

of vehicle tyres. Since this employee never carried out any vehicle body repair work, panel beating and spraying which in his opinion were the most important tasks in the Section, he felt that it was fairly obvious that his technical knowledge was superior to that of the successful candidate and that his technical skills and experience would undoubtedly have served him in good stead if he had been selected for the position that had been advertised.

Facts of the case

The Vehicles and Plant Section where complainant was employed for several years is responsible for the servicing and repair of vehicles and plant used by the Ministry for Resources and Infrastructure and is manned by a range of employees with different skills, trades and abilities including skilled mechanics and technicians for car body repairs, panel beaters, sprayers, tyre repairers and upholsterers for vehicle interior trim.

Complainant claimed that throughout his years in this Section he had prepared several technical reports including estimates of costs for the repair of vehicles belonging to the department that were involved in traffic accidents and collisions. On other occasions he was asked to give his views on the repair on cars belonging to other departments and was at times involved in the day-to-day running and organization of the Section.

Complainant explained that he had in his possession a certificate for panel beating and spraying issued to him by the owner of a private garage where he had previously worked for three years and a Certificate of Achievement by the Employment and Training Corporation which attested his competence as a panel beater and which was recognized by the Vocational Credentials Evaluation Board of the Malta Qualification Recognition Information Centre as falling within Level 3 of the national qualifications and competence levels. Convinced that the first-placed candidate could not provide similar certificates to show his proficiency, complainant was in no doubt that he was better qualified to fill the post of Assistant Technical Officer.

The Ombudsman noted that the arguments that complainant raised in his petition to the Prime Minister about this issue were to a large extent the same ones that he presented to his Office. The Ombudsman also found that in its

reply to complainant the Management and Personnel Office of the Office of the Prime Minister explained that after the Prime Minister had, in line with section 1.1.10.1 of the Public Service Management Code, approved that his petition be submitted to the Public Service Commission for its consideration, the PSC had responded that after a careful review of all the issues raised by complainant and after an evaluation of the way in which the selection process unfolded, it was decided that no valid reasons emerged that could justify a reversal of the board's original decision and a change of the order of merit of applicants for the post in question.

In its reply the Public Service Commission insisted that the selection process was above board and had followed strictly the criteria that were established and approved even before the selection process got under way. The Commission found that in the assessment of candidates all these criteria were applied in a uniform manner and concluded that every effort was made by the selection board to ensure that its choice would be objective and fair and based on a proper evaluation of the respective merits and aptitudes of all the applicants.

In its response to the petition the Public Service Commission observed that it is the responsibility of the selection board to assess the respective merits of each applicant and to determine the final order of merit in the light of its assessment of eligible candidates. It was explained that the selection process under scrutiny not only took due account of the qualifications of each applicant but was also based on the judgement by each member of the board, using the criteria that were set earlier, regarding the merits and capabilities of each applicant in relation to the abilities and aptitudes of the other contestants. Candidates had not been evaluated in isolation but the merit of each one of them was weighed by reference to the merits of other applicants. In this respect the Commission drew attention to the fact that experience and qualifications were only two of the criteria on which applicants were judged and that three other criteria had been used to rank candidates in an objective, just and equitable manner.

The Ombudsman understood that the PSC came to this conclusion in its consideration of complainant's grievance following the submission of a detailed report by the selection board on the way in which it conducted the whole exercise and a meeting between the Commission and members of the

selection board where additional information was given and all the necessary clarifications were provided.

Considerations and comments by the Ombudsman

The Ombudsman remarked in his Final Opinion on this complaint that the selection process which gave rise to complainant's concerns was conducted and managed by the Public Service Commission which is set up under the Constitution of Malta specifically to give recommendations to the Prime Minister on the appointment of public officers and on the exercise of disciplinary control over persons holding or acting in any such office. The work of the PSC is not generally subject to scrutiny and the Commission is protected from legal proceedings except in certain particular circumstances that may be contested in court.

On the other hand the Ombudsman's role and functions vis-à-vis the Commission are circumscribed by the provisions of the Ombudsman Act that allow him to investigate whether due consideration was given to issues raised in petitions that reach the Commission from aggrieved persons and whether the process by the Commission to examine any such petition was vitiated by an action or decision that was contrary to law, wrong, based wholly or partly on mistake of law or fact, improperly discriminatory or in any way unreasonable or unjust.

Before proceeding to examine the selection procedures and the marks that were allocated to complainant during this process the Ombudsman made it clear that complainant was completely wrong to claim that in its evaluation of applicants the selection board should have attached greater importance to trades such as panel beating and spray painting to the detriment of other skills. The Vehicles and Plant Section undertook a wide range of tasks such as panel beating and spraying, tyre vulcanizing and rethreading and car upholstery services and this meant that contrary to complainant's opinion, the experience of other applicants in other skills could not be discarded or considered irrelevant by the selection board. Indeed, the board had rightly agreed that these skills were as relevant and as important as complainant's own skills base and deserved to be given consideration in the same way that his aptitude and abilities had been recognised.

The Ombudsman commented that it would have been a travesty of justice if the board allocated marks to complainant for his proficiency in his own trade but failed to do likewise to other applicants with different skills especially when it was clear that the call for applications made no mention whatsoever that preference would be given in the final selection to any particular skill or other. The original call for applications made no distinction between the different skills of employees in the Manufacturing and Services Department and complainant had no right to expect a favoured treatment at the expense of his colleagues. The selection board would have erred to consider that any particular trade was more important than other skills or to ignore the individual capabilities of other applicants in the skill in which they were specialized.

The Ombudsman ascertained in the course of his investigation that the selection process was based on several criteria including *Related knowledge* (30 marks); *Relevant experience* (25); *Abilities required in the job* (20); *Level of education* (15); and *Personal qualities* (10). Complainant was awarded 58% of the total marks by the selection board.

The Ombudsman commented that in any selection process marks allocated to candidates under *Related knowledge*, *Abilities required in the job* and *Personal qualities* are to a large extent dependent on the subjective judgement by members of the selection board and are generally influenced by the way in which a candidate reacts during an interview and a candidate's overall response to issues raised during the interview. As is his wont in similar occasions the Ombudsman pointed out that it is not the function of his Office, or indeed of the PSC, to alter the subjective judgement and evaluation by members of a selection board of candidates that appear in front of them in an interview. Neither can the Ombudsman be expected to pass an opinion on the marks that were awarded or that ought to have been awarded to candidates under these criteria. This is surely not his task or his function.

The Ombudsman, however, could not fail to observe that complainant's overall mark enabled him to be classified third – and of this mark he had obtained 17 for *Related technical knowledge;* 14 for *Abilities required in the job*; and 8 for *Personal qualities*. In this regard the Ombudsman felt that it was opportune to point out that despite complainant's observations about the way in which the selection board evaluated his qualities and abilities

under these three criteria, his misgivings were largely misplaced and there was evidence from documents placed at the disposal of his Office that the board evaluated his merits under these headings strictly in accordance with the sub-criteria for the allocation of marks as agreed upon even before this process got under way.

The Ombudsman proceeded to review the allocation of marks by the board under the two other criteria, namely *Level of education* and *Relevant experience*. Given that candidates' educational level was allocated 30 marks by the board and that this yardstick is easily measurable and verifiable, the Ombudsman checked whether these marks were in fact allocated fairly. In this connection he took due note of the certificates that were presented by complainant and of his claim that the first-placed candidate had no similar qualifications in the trades that, in his view, represented the most important activity in the Section namely, panel beating and spraying but was quick to disagree with complainant on this score and insisted that the call for applications made no reference at all to qualifications in panel beating and spraying.

Having ascertained that the selection board carefully evaluated the range of skills and qualifications of each candidate as well as the certificates submitted by each applicant, the Ombudsman confirmed that marks allocated to complainant and to the other candidates were fair and consistent and reflected the qualifications and credentials that each applicant submitted to the board. He was also able to verify that these marks were allocated in accordance with a schedule that was established by the board before the selection task was taken in hand and that the marks were allocated in a fair, credible and consistent manner.

With regard to work experience that was related to the position in question, it resulted to the Ombudsman that complainant scored 16 marks under *Relevant experience* and it turned out that this was the highest mark awarded by the board. The Ombudsman also found that on the basis of criteria set by the selection board before it commenced its task, 10 out of the 25 marks under this yardstick were directly linked to each applicant's years of experience in his particular field – and as a matter of fact complainant was awarded 9 marks for his work experience. This was the highest mark awarded to any

applicant and duly reflected the fact that the first two in the final classification had a lesser work experience than complainant.

With the remaining 15 marks allocated to "*problem solving*" this meant that the evaluation of candidates' respective merits under the yardstick of relevant work experience was no longer an objective evaluation that could be backed by reference to credentials and certificates but became to a large extent a subjective assessment that depended on the performance of candidates in front of the selection board during their interview. In similar circumstances the Office of the Ombudsman is clearly unable to intervene since it is the prerogative of board members to evaluate the performance of candidates who appear in front of them and the Ombudsman has no right to comment on events that happen in the absence of his representatives or where his Office has no right to be present or to pass any judgment.

The Ombudsman, however, took this opportunity to point out that, in line with a principle that he holds closely to his heart, in this selection process members of the board had established the criteria that were to guide their deliberations and their assessment of each candidate even before the process got under way and before they were aware of the identity of the candidates whom they were due to judge. This approach was commendable and ensured added credibility and consistency to the whole selection exercise. This positive approach was enhanced by the Ombudsman's verification of the way in which the process to allocate marks to candidates had unfolded – a process that was characterized all along by consistency, fairness and uniformity and without the least shadow of discrimination or unfairness.

Conclusion

Having taken into account the documentation that was made available in connection with this selection process as well as the merits of the case, the Ombudsman concluded that the PSC had given the utmost consideration to all the issues raised by complainant in his petition to the Commission. The PSC had dealt with this petition fairly while there was no evidence that it had been handled in a manner that was contrary to law. As a result the Ombudsman turned down complainant's submission.

Case No I 133

HOUSING AUTHORITY

The property owner who would not take no for an answer

The complaint

The owner of several premises that were expropriated by the Housing Authority alleged in a complaint with the Office of the Ombudsman that the Authority acted illegally and in a discriminatory manner in his regard.

In his grievance complainant referred to a major project that was embarked upon by the Housing Authority to regenerate and develop land in Msida by the demolition of properties that were deemed to be substandard and the building of new dwellings with a view to meeting the needs of people living in the area. According to complainant, although the properties that he owned in this area were not substandard and were in a good state of repair and maintenance and even leased to third parties, yet since they fell within the limits of the planned development, they were expropriated by the Government to make way for the new housing project.

Complainant based his charge of illegality on the grounds that the apartments due to be built by the Authority on expropriated property that had belonged to him would be offered to the public under shared ownership arrangements which would allow the owners at a later stage the possibility to resell the property acquired under this scheme subject to certain conditions. He argued that since in this way the occupiers of these apartments could enrich themselves at the expense of the former owners of this property, its expropriation could not be considered as having been done for "*a public purpose*" which allows the Government to acquire property from individual landowners in terms of the law. He also pointed out that since the project incorporated several commercial outlets, this too indicated that the expropriation was not motivated by the public interest.

Complainant's second charge of discrimination arose from his allegation that a property that stood in the middle of the planned development had been spared expropriation and the owner was even granted development permission by the Malta Environment and Planning Authority to add another floor to this property.

Complainant explained to the Ombudsman that this project by the Housing Authority consisted of five phases and that his property was located in the area that was earmarked for the fourth phase of the scheme. For several years while the first three phases of the project were under construction, he tried to reach an amicable settlement with the authorities but all his efforts were unsuccessful. At one time he had even suggested that instead of financial compensation, the authorities would make up for this expropriation by allocating to his family one of the properties in the new development but discussions on this compromise solution had stalled and led nowhere.

Facts and findings

By means of Government Notice No. 684 dated 22 October 1996 the President of the Republic declared that the competent authority required several premises in Msida "*for a public purpose*" in accordance with the provisions of the Land Acquisition (Public Purposes) Ordinance (Chapter 88 of the Laws of Malta). The Notice also stated that the acquisition of these premises in connection with slum clearance and urban renewal was to be done by means of absolute purchase. A number of these premises belonged to complainant's family.

Upon being made aware of this declaration, complainant sought legal advice and made representations in writing and by means of meetings with various government officials who were directly involved in this housing regeneration project including the Housing Authority. He insisted that the expropriation in question was not being carried out for a public purpose as defined in the Land Acquisition (Public Purposes) Ordinance since only private individuals and families participating in the shared ownership initiative and not the public in general would eventually benefit and have the opportunity to acquire this property. Complainant pointed out that his property was being taken away from him forcefully to his detriment and others would be allowed to make a

gain at his expense while his right to enjoy his property was being violated.

In the meantime complainant's proposal to be allocated an apartment in the proposed new housing development instead of financial compensation that he deemed inadequate continued to face a brick wall.

Among the considerable amount of documents spanning a ten-year period that were exchanged with the government authorities on this issue and that were submitted by complainant to his Office, the Ombudsman caught sight of a letter that was sent directly by the Minister for Social Policy in October 2000 to complainant. In this letter he was told fairly and squarely that the Government was determined to implement this housing project in accordance with plans that had been approved by the Malta Environment and Planning Authority. The Minister went on to state that despite various efforts to find a mutually acceptable solution to this impasse it proved impossible to do so and he had no other option but to confirm his instructions that all the necessary steps were to be taken so that this housing project would be implemented as soon as possible. This letter put paid to complainant's proposal and ruled out the possibility of finding a solution on the lines that he had put forward.

Undaunted, complainant continued to press his demand and in 2002 he presented a judicial protest where he challenged "*the public purpose*" of the acquisition although, for reasons of his own, he never followed this action by instituting court proceedings against the Government.

Still undeterred, complainant continued to press his proposal for alternative accommodation in the new apartment block planned by the Housing Authority but this suggestion was again turned down in another letter sent to him by the Minister for Social Policy in November 2002. In this letter the Minister declared that although in terms of the law in cases of expropriation the Government was obliged to pay adequate compensation to owners, it had no obligation to provide compensation in the form of alternative premises.

In February 2004 complainant presented a judicial letter in the First Hall of the Civil Courts and requested the Housing Authority to reach a final agreement on the matter.

In May 2006 the Housing Authority explained to complainant in writing

that whereas the Authority offers alterative accommodation to residents of premises that are demolished to make way for new projects, it is then up to the Lands Department to offer compensation to owners of these premises. It was suggested that complainant should take up the matter directly with the Commissioner of Lands.

In September 2006 complainant presented another judicial protest against the Minister responsible for housing, the Housing Authority and the Director of the Housing Construction and Maintenance Department of the Ministry for the Family and Social Solidarity in respect of the seven premises that he owned and that had been acquired by the Government. This judicial protest made reference to his earlier submissions to the Government and to the variations that were made to original plans for the Msida regeneration project that enabled various residents and owners to be provided with alternative accommodation whereas in other instances the area of the property that was expropriated was reduced to allow for representations that were made by the owners of these properties. Complainant demanded that he should receive the same treatment and held that since the possibility of alternative accommodation in fact existed, this meant that he was the subject of discrimination. However, this protest too was not followed by the institution of legal proceedings.

Considerations by the Ombudsman

The Ombudsman considered first complainant's request to his Office to declare the acquisition of premises belonging to him as an illegal action since the way in which the housing scheme in question had developed did not satisfy the requirement of a public purpose as defined by law.

The Ombudsman observed straightaway that it is not the function of his Office to define the law or to determine the legality or otherwise of an acquisition process done by the Government since this function pertains exclusively to the Courts of Justice and there are several cases of this nature that had been decided by the Maltese Courts. He declared that complainant might therefore wish to be guided by judgements that were made in the First Hall of the Civil Court and the Constitutional Court in similar instances.

The Ombudsman then passed on to consider the allegation that complainant was subject to discrimination when the government authorities refused his plea for alternative accommodation instead of financial compensation despite his clear preference for this solution.

The Ombudsman noted that section 14 of Act XXI of 1995 precludes him from examining a complaint "*unless it is made not later than six months from the day on which the complainant first had knowledge of the matters complained about; but the Ombudsman may conduct an investigation pursuant to a complaint not made within that period if he considers that there are special circumstances which make it proper to do so*." He pointed out that from correspondence that was presented by complainant there were indications that he received negative replies to his request way back in 2002 while in May 2006 the Housing Authority gave him further clarification regarding its policy to provide alternative accommodation.

In his Final Opinion on this grievance the Ombudsman observed that complainant had been engaged with the authorities on this issue for around ten years. Six years after he received a negative reply from the Minister and two years after the Housing Authority clarified its policy in similar instances, complainant continued to contest the authorities' decision while after two more years from these decisions, he sought recourse to the Office of the Ombudsman.

The Ombudsman ruled that clearly this element of complainant's case was prescribed in terms of subsection 14(2) of the Ombudsman Act, 1995. He also ruled that considering the situation as it resulted from documents submitted by complainant, he did not consider that there were any special circumstances that warranted his investigation.

In view of this, the Ombudsman decided at this stage that his Office should not entertain this complaint any further.

Case No I 146

VETERINARY SURGEONS' COUNCIL

The Council that took fifteen months to perform a statutory duty that should by law have been concluded in four months

The complaint

A veterinary surgeon complained with the Office of the Ombudsman in April 2008 about excessive delay in the issue of a warrant to enable him to practise his profession. Although fifteen months earlier, in February 2007, he applied to the Veterinary Surgeons' Council for a warrant to practise as a veterinary surgeon and by law it should have been issued within four months, the warrant was still pending

Complainant alleged that the Veterinary Surgeons' Council lacked a proper administrative set up and that the Veterinary Surgeons' Register had not been updated as required by law. He was also dismayed that this situation made him lose several opportunities to practise his profession in Malta and in the EU while owing to the delay for which the Council was responsible, he paid a higher registration fee to the Royal College of Veterinary Surgeons of the UK because by the time that the problem was solved this fee rose from £stg70 to £stg285.

Facts of the case

Complainant graduated in Veterinary Medicine and Surgery from an Italian university in July 2006 and applied to the Veterinary Surgeons' Council in February 2007 for a warrant under subarticle 43(2) of the Veterinary Services Act[1]. However, eight months later he was only granted by the Council what he referred to as a "*letter of tolerance*" and as a temporary warrant and still could not, in terms of the law, practise his profession privately or in the public service.

In December 2006 complainant was employed on a definite contract as Junior Veterinary Officer with the Ministry for Rural Affairs and the Environment while in October 2007 he was appointed Junior Veterinary Officer in the same ministry on an indefinite contract. Although the call for applications obliged successful candidates to apply on condition that they would attain their warrant by the Veterinary Surgeons' Council by end 2007, his appointment made no reference to this requirement.

Complainant explained that he was interested in finding work in the UK but needed first to be registered with the Royal College of Veterinary Surgeons of the UK. To this end he submitted a letter of Good Professional Conduct issued to him by the Veterinary Surgeons' Council in January 2008. This letter of good professional standing was, however, rejected since it was not on formal headed paper and devoid of an official stamp and had no seal or crest of the Maltese registration authority embossed on it while neither did it include his registration number. The issue was resolved some time later following an exchange of emails between the Council and the Royal College of Veterinary Surgeons.

For years registration and processing of applications for the grant of a warrant to practice as a veterinary surgeon was a function pertaining to the Medical Council which also issued certificates of registration with its own stamp and seal. However, with the coming into force of the Veterinary Services Act in February 2002 it became the duty of the Veterinary Surgeons' Council that was set up under article 39 to "*advise and make recommendations to the President of Malta concerning the grant of warrants to veterinary surgeons to practise their profession*" and to "*keep a Register in respect of such profession and professions and trades supplementary to the veterinary profession*".

Subarticle 43(3) of the Veterinary Services Act provides that a warrant shall be granted to an applicant who produces a certificate issued by the Council showing that it is satisfied that the applicant is a graduate in veterinary

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[1] *"No person shall practise as a veterinary surgeon unless –*
(a) he holds a warrant to practise from the President of Malta; and
(b) his name is registered in the Veterinary Surgeons' Register." (subarticle 43(2) of the Veterinary Services Act, 2002).

medicine and surgery or in possession of a degree or formal qualification recognized by the Council. Subarticle 43(5) requires the Council to keep the Veterinary Surgeons' Register with the name of every veterinary surgeon to whom a warrant has been granted by the President of Malta.

When drawn into the matter by the Ombudsman, the Chairman of the Council gave complainant's registration number and said that documents prepared by the Council regarding complainant's licence had been endorsed by the Minister for Rural Affairs and the Environment and his warrant was signed by the President on 11 June 2008.

Considerations by the Ombudsman

Complainant felt aggrieved because although in terms of the law following his application in February 2007 his licence to practise his profession as a Veterinary Surgeon had to be issued within four months[2], the Council failed to meet this deadline.

This meant that complainant was engaged to practise as a Veterinary Surgeon in the public service despite the fact that the law states that it is illegal to practise this profession without a licence from the President of Malta. It also meant that he was effectively in breach of the law when carrying out his duties since, according to the Ombudsman, the "*letter of tolerance*" issued to him by the Veterinary Surgeons' Council could not be validly considered as a substitute for the warrant from the President since the law makes no such provision.

The Ombudsman observed that although the Veterinary Surgeons' Council is obliged by law to conclude within four months the process in respect of an application for the issue of a licence, it was only in early December 2007 that the Chairman of the Council informed him that after having examined his application for the issue of a warrant by the President, the Council was

[2] "*A designated authority for a regulated profession shall consider an application as soon as it is reasonably practicable, and shall notify the applicant of its decision together with the reasons upon which it is based within four months of receipt of all the relevant documents*." (article 4 of the Mutual Recognition of Qualifications Act).

satisfied that he fulfilled all the obligations and nominated him on 27 October 2007 for the issue of a warrant by the President. The Chairman went on to inform him, however, that *" … until such time as the official paperwork, duly signed by the President of the Republic of Malta, is finalised, you may consider this communication as an authorisation to practise the veterinary profession in Malta*."

This was in fact the "*letter of tolerance*" referred to by complainant – a document which was not valid at law since only the President of the Republic can authorise an applicant to practise the profession and the Council has no right to authorise such practice. The Ombudsman pointed out that since in terms of the Veterinary Services Act the Council's function is to recommend to the President to issue warrants to eligible applicants and to register their names after the President had signed their warrants, complainant's registration and, possibly, that of others in his situation, would appear to be invalid at law.

The Ombudsman pointed out that the Council as constituted at the time that he reviewed this grievance was not at fault in respect of the delay between the time when complainant submitted his application in February 2007 and when the newly constituted Council first discussed his application in October 2007. He noted that although the Ministry for Rural Affairs and the Environment wrote in June 2007 that the Council had been reconstituted, its formation was at a standstill for a long time because problems arose regarding the appointment and election of some members and as a result no decisions could be taken in the absence of a properly constituted Council.

The Ombudsman commented that the newly constituted Council found that the previous Council left several applications for warrants pending and that it did not have its own stamp, seal or letterhead to attest its authority or even a template for its certificates of registration. However, although the previous Council left a backlog of applications and utter confusion on the procedures to be followed – a situation which the Ombudsman termed "*deplorable*" – he still concluded that the new Council did not show the required diligence to expedite the action that was necessary to remedy immediately the situation which it inherited in respect of the practice of the profession.

The Ombudsman commented that when the Veterinary Surgeons' Council

started to look at pending matters, including complainant's case, it appeared to have been satisfied that, at least in this case, it was enough to correct this situation by an email sent in December 2007 and aimed at reassuring complainant that he could practise his profession even though this document was legally invalid. The Ombudsman noted that after complainant resorted to his Office the Council started to take appropriate action and that it was only in May 2008 that it prepared the necessary warrant for the President's signature.

The Ombudsman pointed out that while he recognized that the present Council was seriously hampered in its work by the unjustifiable delay and the inaction of the previous Council, it was a fact that it took this Council fifteen months to perform a statutory duty that it was bound by law to conclude in four months. This lack of urgency by the Council when the livelihood of complainant (and, possibly, others) was at stake attracted criticism from this Office and it was only following the Ombudsman's nudge that complainant's application to practise his profession was at long last resolved.

Since the Veterinary Surgeons' Council did not challenge complainant's claim that he paid a higher registration fee to the Royal College of Veterinary Surgeons because the certification sent by the Council lacked the necessary authentication, the Ombudsman considered this as further proof that the Council still lacked the basic administrative infrastructure and the tools that were necessary to issue its own official documents.

The Ombudsman commented that the Veterinary Services Act, unlike the Health Care Professions Act, does not provide for a non-judiciary appeals board where decisions or failures of the Council can be reviewed. He therefore recommended that the authorities might wish to consider reviewing the Act on the lines of the Health Care Professions Act.

The Ombudsman observed that this case revealed a negative aspect in the practice of public administration that was disturbing when an institution set up by law and a government ministry favoured a state of illegality by allowing complainant to practise the veterinary profession and the provisions of the Veterinary Services Act regarding practice of this profession were ignored. He insisted that there could be no compromise on the basic principles of

good governance that no one is above the law and that laws and regulations approved by Parliament bind the government just as and to the same extent that they bind ordinary citizens. Indeed, the public administration in its various manifestations is in duty bound to set an example not only by abiding by all existing laws, rules and regulations but also by being seen to be doing so. All statutory bodies, including those set up under the Constitution, should act as guardians of the rule of law and adhere to these principles.

The Ombudsman insisted that the public administration has no right to act as if a law or regulation does not exist. Nor can it act in defiance of them or avoid them by devious means. Rather than issuing a letter of tolerance and allowing a state of illegality to persist, the authorities ought to have ensured compliance with the law, especially if lack of action by the Council, as in this case, could have exposed the administration to justified claims for damages by injured parties.

While the brunt of his censure in respect of the situation that he found in the regulation of the veterinary profession should be borne by the previous Veterinary Surgeons' Council and, to a lesser extent by the present one, the Ombudsman felt that he could not but criticise the authorities that had acquiesced for a long time to this state of illegality.

The Ombudsman commented that when complainant was allowed to practise professional veterinary activity in the public service on the strength of a letter of tolerance, this took place in defiance of an express provision of the Veterinary Services Act. Responsibility for this action must rest upon the Council that granted such authorisation and effectively usurped the powers of the President who alone is the depository of the right to issue warrants to veterinary surgeons. Responsibility also rested upon the authorities who sanctioned the use of complainant's professional services when they could not at law do so.

The Ombudsman insisted that the public administration would do well to keep these basic principles of good governance in mind.

Conclusion

On the basis of the above considerations the Ombudsman sustained the

complaint because of failure by the Veterinary Surgeons' Council to ensure timely action to finalise the issue of a licence to complainant in terms of the law. This failure had caused him serious inconvenience. However, since the issue of a licence to complainant on the lines required by law had in the meantime been resolved, the Ombudsman stated that there was no further action to be taken on this aspect of the grievance.

While appreciating the fact that the new Council was doing its best to rectify a situation that was allowed to degenerate for several years to the detriment of qualified veterinary surgeons, the Ombudsman hoped that correct and transparent procedures being adopted by this Council would raise the standards of regulation in this profession to the high level found in other kindred professions.

Case No I 209

MALTA COUNCIL FOR CULTURE AND THE ARTS

The Christmas lights competition that gave rise to discord

The complaint

The committee of a musical society submitted a complaint to the Office of the Ombudsman and asked for an investigation on the results of a street lighting competition organized by the *Kummissjoni Nazzjonali Folklor* for commercial streets during Christmastime in 2007.

Having placed third but firmly believing that their efforts deserved better, the committee members of this society alleged that they were victims of discrimination. They claimed that the adjudication process was vitiated by an utter lack of transparency and was undermined by the fact that a member of the *Kummissjoni Nazzjonali Folklor* and of the Malta Council for Culture and the Arts was at the same time a member of the musical society which had participated in this competition for several years and managed to carry off the top awards in the last three years.

It was alleged that the competition was also beset by various other shortcomings. It was claimed, for instance, that although photos of some of the streets that took part were not delivered in time to the *Kummissjoni Nazzjonali Folklor* as stipulated in the rules that governed this competition, these streets had not been disqualified. This was confirmed by the fact that the electronic site of the *Kummissjoni* continued to show photos that were taken of these streets in the previous year until they were eventually replaced by photos that showed the decorative lights for 2007.

Furthermore it was maintained that the Christmas lights in one of these streets were not switched on during most evenings in the last ten days of December and that on several other days various lighting effects on these outdoor decorations failed to work properly and were not even repaired.

Facts of the case

Before proceeding to investigate the complaint the Ombudsman sought to establish the identity of the person against whom this allegation had been made and to find the role that this person occupied in the *Kummissjoni* and in the Council as well as the period when he occupied this position. From details that he gathered, however, it emerged clearly that this individual had no connection at all both in the organization of the 2007 Christmastime street lighting competition as well as in the adjudication of displays that were set up by entrants. The Ombudsman understood that these issues had also featured in a request by the musical society for an investigation by the Malta Council for Culture and the Arts that reached the same conclusions.

The Ombudsman's investigation regarding this complaint and the review of documentation presented by the parties involved in the dispute revealed that no specific procedures were in place regarding the appointment of members of the adjudicating committee while there were also no hard and fast rules on the manner in which members would select the best decorated street. The secretary of the *Kummissjoni* explained to the Ombudsman that whereas some members of this adjudication board were replaced every year, others retained their position year in, year out. The secretary also admitted that the *Kummissjoni* was inadequately manned and that its work was not organized properly.

Faced with these findings the Ombudsman declared that he believed that the whole system should be reviewed critically and overhauled in a serious manner to ensure the introduction of an element of transparency that is crucial to any selection process. He pointed out that in putting forward this recommendation he was aware that most members in societies and organizations that participate in these activities do so in their own free time and that sometimes entrants even go through personal sacrifice and no small expense in order to design, install and erect these street illuminations and to build these displays.

The Ombudsman stated that in all aspects of public administration, even in issues that might seem rather unimportant and mundane when compared to other more significant issues, it is important to observe the basic principles

of good governance. Not only is it essential to ensure that the principles that should underline a just and fair administration are always observed but it is also important to ensure that this is seen to be so at all times.

The Ombudsman declared that the manner in which participants in this competition were judged had revealed a lack of proper organization while it also emerged clearly that the administrative set up that was supposed to be responsible for this competition lacked the ability to organize and coordinate this activity. The secretary of the *Kummissjoni* was in fact the first to admit these weaknesses and confirmed that the *Kummissjoni* repeatedly ignored and failed to investigate reports and complaints that reached it by participating organizations and to look into allegations on failure to observe regulations.

In this regard the Ombudsman referred to rules that were supposed to apply for the competition for the best festive lights during the Christmas festivities in commercial areas. Although these rules laid down that each member of the adjudication board was expected to use his own judgment to allocate points according to a set of published criteria such as the originality of the design and of the overall layout, the colour scheme of the decorations, the quality of materials used and the way in which displays conveyed the message of the Christmas period and the spirit of the occasions as well as the general effects of the illuminations and the street decorations both during night and during daytime, there were indications that these criteria had been largely ignored.

The Ombudsman found, for instance, that the individual members of the selection board simply indicated their preferences on a sheet that they handed to the *Kummissjoni* without backing their choice by reference to a points system on the various guidelines that were supposed to guide their verdict. This meant that judges merely gave their first three preferences without providing any details on the criteria on which they had based their selection of the winners of the competition.

The Ombudsman also found that although participants were expected to observe several conditions that were laid down by the *Kummissjoni Nazzjonali Folklor* such as, for instance, that the displays of lighting in streets and on the facades of participating organizations had to be illuminated between 5pm and 8 30pm from 15 December 2007 to 1 January 2008 and that each participant had to send to the *Kummissjoni* by 17 December 2007 a CD containing two

photos of their illuminations, one taken during daytime and the other during night time, no sanctions or penalties were attached to these obligations in the case of participants who failed to comply. In fact the complaint that was submitted to the Ombudsman centred round these two conditions that were allegedly ignored with impunity by the winning organization.

The Ombudsman pointed out that even representatives of the Malta Council for Culture and the Arts agreed during his investigation that a formal administrative set up needed to be established that would coordinate better the activities of the *Kummissjoni* and introduce a greater element of transparency in its operations. The Ombudsman also found that work was under way by the Council to establish new rules for these activities while action was in hand to ensure that the *Kummissjoni Nazzjonali Folklor* would only be reconstituted after it had been properly restructured. In this regard the Ombudsman noted that at the same time that the results of the Christmas 2007 competition were announced, the *Kummissjoni* itself took this opportunity to invite participants to submit their own proposals with a view to improving the organization of this activity and further promote the spirit of Christmastide – which was after all the main purpose behind the organization of this competition.

While insisting that the work of the *Kummissjoni* should be backed by a serious and transparent administration, the Ombudsman was of the opinion, however, that the streets that were mentioned in the complaint should not be automatically disqualified because the regulations made no reference to consequences participants would face when, for some reason or other, they failed to observe rules and regulations.

The Ombudsman therefore ruled that in view of these reasons the request to eliminate the participating streets that had not observed the rules should not be accepted. At the same time he recommended that the Malta Council for Culture and the Arts should lay down a new set of regulations for the street lighting competition and ensure that the organization of this activity would be more credible and serious. In this way similar embarrassing situations would in future be avoided. The Ombudsman also recommended that changes be introduced as a matter of urgency so that the next Christmastide competition will be better organized and not give rise to further controversy.

Conclusion

The Ombudsman concluded that the basic principles of good administration and proper governance should be observed in all spheres of public administration including areas of activity which to some people might seem unimportant and perhaps not deserving of much attention. He insisted that all public competitions should be organized under clear and transparent rules that not only ensure that participants will observe them but will also make it clear that sanctions will be imposed whenever rules and regulations are flouted.

The Ombudsman stated that the system whereby the competition was run under a set of rules that are flexible and that could be manipulated according to circumstances for the *Kummissjoni*'s own expedience should stop forthwith. This approach not only showed a singular lack of seriousness in the way in which the *Kummissjoni* carried out its functions but also served to generate a sense of mistrust in the institution and in its operations.

The Ombudsman concluded by recommending that the regulations in question should be revised as a matter of urgency and a new set of rules should be introduced and applied fairly so that decisions by the *Kummissjoni* will be based in future on impartial and objective criteria that will nip any contestation in the bud.

Case No I 324

HEALTH DIVISION

The casual employee who lost on both counts

The complaint

A young employee approached the Office of the Ombudsman to complain that after three years, her definite back-to-back contract as a Casual Substitute Clerk with the Health Division was unjustly terminated with effect from 8 August 2008. She was deeply upset because the termination of her job happened despite the fact that a few months earlier, in mid-December 2007, she had been told in writing of her prospects to join the public service on a permanent basis after she had completed four years of uninterrupted service even if the person whom she was replacing would return back to work.

She further alleged that the Health Division failed its duty when she had not been informed that an open call for applications for the post of Clerk in the public service had been published and as a result she was unaware of this opportunity and missed her chance to apply.

Facts of the case

On 4 July 2005 complainant entered into a one-year contract with the Health Division as a Casual Substitute Clerk. Paragraph 3 of her contract stated that her engagement was effective "*during the absence on unpaid leave of Ms N.N., a Clerk in the Ministry, and it may be terminated …..… prior to the expiry of the period of engagement …..… upon the return to work of the public officer being substituted*." Paragraph 8 of the contract reiterated that the Division was free to terminate this agreement without any reference to the Public Service Commission upon the return to work of the public officer with whom she had been twinned or when the contract period expired. Complainant's contract was, however, subsequently extended for another

year on two occasions in July 2006 and July 2007 and she continued to work at the Health Division under the terms of her original contract.

During his investigation the Ombudsman found that in a letter dated 14 December 2007 in connection with complainant's definite contract of employment to which she had referred in the first part of her grievance, the Permanent Secretary at the Ministry of Health, the Elderly and Community Care had informed her that for the purpose of Legal Notice 51 of 2007 under the Employment and Industrial Relations Act[1] there was an objective reason why her contract should remain a contract of service for a fixed term, namely that it was essentially a back-to-back contract of service whereby she stood in replacement of a Clerk who was availing herself of her parental leave. He hastened to assure her, however, that this should not be taken to mean that in this way her contract was being brought to an end and added that if the current situation continued to prevail, her definite contract of service could even be extended for a further period.

The letter went on to state that although the law gave them no automatic right to indefinite employment, the Government had decided that Casual Substitute Clerks who remain in their post for an uninterrupted term of four years would be offered assimilation in the public service for an indefinite term in a scale with a rate of pay that would be comparable to their current basic pay. Complainant was assured that in this event, as soon as the employee whom she was replacing would report back for work, she would be detailed by the Management and Personnel Office (MPO) to carry out comparable duties in any other government ministry or department where her services would be required.

The letter went on to inform complainant that even if she benefited from these new arrangements she would be entitled to submit her application for a post in the public service under any call for applications issued by the Public Service Commission and to which she was eligible as if she were already on the government's permanent establishment.
However, much to her disappointment, seven months later on 10 July 2008 complainant received a letter where she was told that in terms of para 8(1)

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[1] *Contracts of Service for a Fixed Term Regulations, 2007.*

of her contract, her employment as a Casual Substitute Clerk was being terminated with effect from 8 August 2008.

Regulation 5 of the *Contracts of Service for a Fixed Term Regulations, 2007* published on 13 March 2007 and also applicable to the public service, states as follows:

"*(1) It shall be the duty of the employer to inform employees on a contract of service for a fixed term about vacancies which become available in the place of work and to give such employees the same opportunity as other employees to secure work on a contract of service for an indefinite time within the place of work.*

(2) The employer may inform the employees by way of a general announcement to be posted up at a suitable place in the place of work."

On 3 April 2007 the Examinations Department and the Board of Local Public Examinations had notified in the *Government Gazette* that a competitive public examination was due to be held for admission to the post of Clerk in the Malta public service with 4 May 2007 as the closing date for the receipt of applications.

Considerations and comments

When the Ombudsman had a look at the contract that was signed by complainant in July 2005 it emerged beyond doubt that complainant had been engaged specifically to substitute Ms N.N. and that her contract could be terminated whenever this employee reported back for work; and this was in fact what happened when Ms N.N. resumed her duties.

At the same time the Ombudsman confirmed that in the letter sent to her on 14 December 2007 by the Permanent Secretary at the Ministry complainant had been told that she would be engaged on a permanent basis if and when she would have given continuous service for a full period of four years. Given that Ms N.N. reported back for work before complainant had worked for an uninterrupted stretch of four years, it was obvious that she had no right for permanent employment and that the letter of termination of her employment

dated 10 July 2008 was in no way in conflict with the letter of 14 December 2007. On these grounds the Ombudsman felt that complainant's allegation of unjust dismissal from her place of work was unjustified.

In her grievance, however, complainant had gone on to allege that at no point in time while she was working as a Casual Substitute Clerk was she ever informed of the open call for applications that appeared in the *Government Gazette* in April 2007 in connection with an examination for the selection of Clerks for permanent employment in the public service.

Upon making further inquiries the Office of the Ombudsman found that whenever a call for applications appears in the *Government Gazette* it is not the practice of the Management and Personnel Office of the Office of the Prime Minister to issue an internal circular to draw the attention of employees who might be eligible and who might be interested in submitting their application.

At this stage the Ombudsman made it clear that his investigation on this aspect of the complaint was limited to an opinion as to whether the authorities responsible for the management of the public service had failed their duty when they did not notify complainant and other employees on a fixed term contract of the issue of a call for applications for the recruitment of Clerks in accordance with the provisions of the Employment and Industrial Relations Act. The Ombudsman clarified that this observation had to be viewed in the light of the fact that in the long run the announcement of this examination was merely the first step in a long process that would in turn eventually lead to an appointment in the public service – and clearly any such appointment fell ultimately under the exclusive competence of the Public Service Commission.

When the Office of the Ombudsman referred the Health Division to the provisions of regulation 5 of the *Contracts of Service for a Fixed Term Regulations, 2007* the Division countered by pointing out that the call for applications for the post of Clerk had been published for general information in the *Government Gazette* and also appeared on the local media. The Health Division declared that it is not even the practice for the MPO to issue internal circulars to inform employees about any such vacancies.

In a bid to defend its position the Health Division further countered that sub-regulation 5(1) of Legal Notice 51 of 2007 was not even applicable in this instance because it refers to "*vacancies which become available in the place of work*" whereas the call for applications that was mentioned by complainant to fill the posts of Clerk had referred to the filling of vacancies on a service-wide basis.

The Ombudsman was, however, of the opinion that the place of work as specified in these Regulations should not be given a narrow interpretation such as that given by the Health Division because in the event that complainant would submit her application and be successful, there was always a distinct possibility that she would be confirmed in the same position where she had been employed if the person whom she substituted would not resume her employment. The Ombudsman pointed out that he understood that in the circumstances, given that the call for applications was service-wide, the primary responsibility to allocate successful candidates would fall upon the Management and Personnel Office.

The Ombudsman observed that the policy by the authorities responsible for the management of the civil service not to issue internal circulars to employees in the case of the call for applications for Clerks that appeared in the *Government Gazette*, as had happened in this instance, had been in force for a considerable time before regulations under Legal Notice 51 of 2007 were published. This Legal Notice, however, placed new additional responsibilities upon the Management and Personnel Office in the sense that it now became incumbent upon this Office to inform public employees on a definite contract about the possibility to apply for permanent positions in the civil service and to compete on an equal footing with other applicants.

The Ombudsman stated that unfortunately it appeared that in the short space of a few days between the publication of this Legal Notice on 13 March 2007 and the issue of the call for applications for the post of Clerk on 3 April 2007 it had not been possible for the MPO to review its policy on this issue in the light of the new obligations imposed upon employers by the *Contracts of Service for a Fixed Term Regulations, 2007*. This meant that when the call for applications was issued, the MPO failed to issue an internal circular to alert employees who might have been interested in this call and who were eligible to apply.

This shortcoming on the part of the MPO contributed to make complainant miss her chance to apply for this examination and possibly take up employment on a permanent basis in the event that she was successful. The Ombudsman observed, however, that he understood that at the time that he was investigating this complaint, the authorities had already processed the applications that were submitted in connection with this call.

Conclusions and recommendations

In the light of his evaluation of this grievance, the Ombudsman concluded that complainant's allegation on the unjust termination of her employment was not sustained because her occupation was terminated strictly in accordance with the provisions of her contract with the Health Division.

The Ombudsman also concluded that the MPO was guilty of an administrative shortcoming when it failed to update its policy with regard to open calls for applications for employment in the public service after the coming into force of Legal Notice 51 of 2007 and when it failed to issue a circular to alert employees on a definite work contract about the vacancies which became available in the public service and that could have enabled them to become full-time permanent employees. The Ombudsman was of the opinion that it was this shortcoming by the MPO that made complainant miss the opportunity to compete with other applicants to join the public service on a permanent basis when the call for applications was issued.

Taking everything into account the Ombudsman recommended that as a matter of urgency the MPO should revise its policy on this issue in the light of the new obligations that were placed upon employers by the publication and the coming into force of the *Contracts of Service for a Fixed Term Regulations, 2007* under the Employment and Industrial Relations Act. He also recommended that the MPO should draw the attention of all the sections in the public service dealing with personnel matters to their newly arising obligations.

The Ombudsman went on to state that once the examination under the call for applications in question had already taken place by the time that he issued his Final Opinion, he was not in a position to put forward any proposal that

could serve to remedy this unfortunate lapse by the MPO. However, in view of the fact that jurisdiction over recommendations for appointments in the public service finally rests with the Public Service Commission, the Ombudsman recommended that complainant should submit her case to this Commission.

The sequel

In its reaction to the Ombudsman's Final Opinion the Management and Personnel Office clarified that although Legal Notice 51 of 2007 was published in March 2007, it only came into effect on 15 June 2007. According to the MPO this meant that since the call for applications that had been referred to by complainant was issued early in April 2007, it was not guilty of any administrative shortcoming as the Ombudsman had ruled since at that time the provisions of the *Contracts of Service for a Fixed Term Regulations, 2007* were not yet applicable.

The Management and Personnel Office also argued that nonetheless it had still observed the overall thrust of regulation 5 of this Legal Notice because all the calls for applications for posts in the public service are published in the *Government Gazette* or on the intranet. The MPO clarified that in the case of employees who have no access to calls for applications that appear on the intranet, these calls appear in internal circulars that are distributed among all these employees and each employee is required to sign on an accompanying sheet to indicate that the employee's attention has been drawn to these openings.

In his reply to the MPO the Ombudsman emphasized that Legal Notice 51 of 2007 is meant explicitly to protect the interests of employees who are "*on a contract of service for a fixed term*", including employees in the public service. Besides, it is an undisputed fact that this Legal Notice makes provision for special treatment in similar cases so that these employees will be given every opportunity to improve their position whenever any such occasion arises to convert their temporary employment into permanent employment. The Ombudsman observed, therefore, that strictly speaking reference by the MPO to its standard procedure to draw the attention of all employees to all the calls for applications that are advertised for posts in the public service

was irrelevant to the issue that was at stake since the government's action was meant to safeguard the interests of a particular category of employees.

The Ombudsman further stressed that although this was the main point of departure of the Legal Notice in question, an equally important aspect that deserved the utmost consideration by the authorities responsible for the management of the public service centred around the obligation of the administration to implement the provisions of this Legal Notice both in terms of their letter and of their spirit. While admittedly the provisions of Legal Notice 51 of 2007 came into force in June 2007, the MPO, however, had already been given adequate prior notice of the government's intention in this regard and should therefore have taken all the necessary steps to align itself with this new provision even before there was a statutory requirement to do so.

On the other hand, after considering complainant's submission regarding her case, the Public Service Commission remained of the view that the Health Division had no other option but to observe the stipulation in her original contract that her engagement was effective only during the absence on unpaid leave of Ms N.N. At the same time the Commission informed the Ombudsman that it believed that a fine-tuning of the method of drawing the attention of the existence of suitable vacancies to what would in effect normally comprise a relatively limited number of employees in the public service on fixed term contracts would respect the requirements of the law and would represent a positive development.

Case No I 544

EMPLOYMENT AND TRAINING CORPORATION

The six apprentices who had qualms about their apprenticeship scheme

The complaint

The Office of the Ombudsman received a multiple grievance from six complainants who alleged that they had followed a course under the Technician Apprenticeship Scheme (TAS) that should have led to the award of a Journeyman's Certificate but were let down by the incompetence of the Employment and Training Corporation (ETC) which administered this scheme. They claimed that although the ETC should have monitored their performance throughout their apprenticeship on a regular basis and ensured that their training was appropriate to their final testing, the Corporation failed to do so with the result that they were not awarded the Journeyman's Certificate at the end of their course and lost an opportunity to qualify as plant maintenance fitters and join Malta Shipyards which had sponsored their apprenticeships.

Complainants stated that prior to the commencement of their second year in the Technician Apprenticeship Scheme in 2004, the Institute of Mechanical Engineering of the Malta College of Arts, Science and Technology (MCAST) advised them to follow a course leading to the BTEC National Certificate in Mechanical Engineering[1] instead of continuing with their City and Guilds course on the grounds that C&G courses were due to be discontinued. They alleged that they were virtually compelled to opt to move to the BTEC course but as things turned out, they had been given the wrong advice.

Complainants told the Ombudsman that upon completion of their

[1] BTEC stands for Business and Technology Education Council of the UK.

apprenticeship they were awarded a Certificate of Competence instead of a Journeyman's Certificate. However, apprentices at the Malta Shipyards needed a Journeyman's Certificate in order to be employed after completing their apprenticeship and their failure to acquire this certificate led the shipyard management to reject their application for employment.

According to complainants they failed the written examination in their first trade test because they had not covered Thermodynamics during their course and were unable to answer questions on this subject. Furthermore even in an interview and in the practical tests that also formed part of their trade test they were asked questions on other topics that were not covered by their course. They pointed out that although they were given the chance of a resit and the ETC organized additional sessions on Thermodynamics for them, they failed again and attributed their failure this time to the fact that in the resit they were not tested on this topic.

Complainants were aggrieved that the ETC did not provide them with the syllabus for the BTEC National Certificate. While admitting that they did not ask for this information because they took it for granted that the BTEC course syllabus corresponded to the City and Guilds syllabus for the Journeyman's Certificate, they were critical of the ETC's failure to establish whether the syllabi of the two courses were in fact identical.

Complainants stated that after they were judged to have failed to reach a standard that would have enabled them to be awarded a Journeyman's Certificate at Technician level but had only reached a Craftsman level in the resit for their final trade test by the Trade Testing Board, the ETC decided to award them instead a Certificate of Competence at Craftsman level even though the Technician Apprenticeship Scheme that they followed does not lead to a certificate at this level. In fact a Craftsman certificate is only issued under the Extended Skill Training Scheme (ESTS) that complainants had not followed.

Complainants refused to accept this Certificate of Competence despite the Corporation's claim that it was equivalent to a Journeyman's Certificate and requested the Ombudsman to recommend to the ETC to issue a Journeyman's Certificate for a Technician at Ordinary Technician Diploma (OTD) level. They explained that when they applied to the ETC to join an apprenticeship

scheme in 2003 they had indicated their wish to qualify as plant maintenance fitters at the end of their apprenticeships and so it was the Corporation's responsibility to place them in the ESTS instead of the TAS because only the ESTS callings made reference to plant maintenance fitters among its common core skills.

Complainants were also adamant that they deserved compensation since the allegedly wrong advice by the ETC led them to lose employment openings in the shipyard sector.

Background information

The ETC is responsible for the organization and monitoring of the Technician Apprenticeship Scheme and the Extended Skills Training Scheme which involve theoretical off-the-job as well as practical on-the-job training. At the end of their apprenticeship, participants in mechanical engineering courses undertake a trade test that is administered by the Trade Testing Board and consists of four parts – a written examination; an interview; a practical examination; and an assessment of their Logbooks which contain an account of the practical experiences of their apprenticeship. Students who are successful in the trade test receive a Journeyman's Certificate – at technician level for students in the TAS stream and at craftsman level for those in the ESTS option.

MCAST became further involved in the organization of vocational courses in 2003 when its Institute of Mechanical Engineering took over responsibility for training programmes in mechanical engineering that are linked to apprenticeship schemes. At that time these courses were based on the City and Guilds and students willing to join an apprenticeship for Mechanical Engineering Technicians were required to follow the first year as full-time students (as happened in complainants' case) and then to follow three more years as part-time students.

When as from the 2004/2005 scholastic year MCAST started to offer BTEC training programmes in addition to City and Guilds programmes, the 2003 student intake under the City and Guilds stream was given the opportunity to choose between continuing to follow the City and Guilds course for three

more years or to join the new BTEC option which would last two years.

Facts and relevant considerations by the Ombudsman

At the onset of his investigation the Ombudsman found that before their apprenticeship got under way in October 2003 complainants signed a contract with the ETC and the Education Division which stated, among other things, that "*There is no guarantee that an apprentice under this scheme will be employed by his sponsor after having successfully completed his apprenticeship*."[2] He also found that at the end of their first year complainants entered into a contract with Malta Shipyards as their sponsor for the subsequent years of their apprenticeship.

The Ombudsman also found that subsequent to plans to phase out City and Guilds courses, the Institute of Mechanical Engineering at MCAST in 2004 launched a range of new vocational courses in mechanical engineering. As a result complainants, who had already acquired a Technician Certificate in Mechanical Engineering of the City and Guilds after attending a one-year course on a full-time basis, were given a choice between continuing their C&G course and following a new course leading to BTEC qualifications. Following meetings between the Director of the Institute of Mechanical Engineering and complainants where they were assured that the Institute would continue to run the C&G programme which they had already started if they chose to continue their apprenticeship under this system, complainants decided to follow a new route and in September 2004 moved to a part-time apprenticeship lasting two years and leading to a BTEC National Certificate in Maintenance and Operations. The ETC maintained that complainants could still have qualified for a Journeyman's Certificate on the strength of this choice.

There were mixed results when complainants had their trade test at the end of their apprenticeships. They were successful in their written examination but failed in their interview, their practical test and in the assessment of their Logbook entries. An evaluation by the ETC of the reasons that led

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[2] *"M'hemm l-ebda garanzija li l-apprendist taħt din l-iskema jiġi mpjegat minn min qed jisponsorjah wara li jtemm b'suċċess l-apprendistat."*

to these results revealed that complainants received no instruction in Thermodynamics during their course and also failed to show the knowledge and practical awareness of the skills that are normally expected of persons wishing to pursue a career as Maintenance Fitters.

While the ETC made arrangements with MCAST to make up for lessons in Thermodynamics that were left out, the Trade Testing Board agreed to interview complainants a second time and to assess again their practical knowledge and their logbook entries. However, at the end of this resit the Board remained of the view that complainants had not reached an acceptable level to qualify for a Journeyman's Certificate at Technician level and recommended that instead they should be awarded a Certificate of Competence as Craftsmen.

With regard to complainants' claim that they were left without a copy of their syllabus throughout their BTEC course, the Corporation retorted that this information was made available to them when they signed an agreement with MCAST to follow this course and that it was also posted on its internet site.

The Ombudsman found that an ETC representative regularly monitored complainants' performance during their apprenticeship. This person spoke to them on several occasions at their workplace and at MCAST and during these visits the progress shown by complainants during their apprenticeship was kept under review while they were given advice about how to improve various aspects of their performance.

The ETC submitted to the Ombudsman several *On-the-job Monitoring Visit Reports* on each complainant that contained information on their performance such as apprentices' observations and employer comments, the range of apprentices' experiences, the relationship between practical and theoretical training provided and the list of skills achieved. In these documents the Ombudsman also noted several unfavourable comments about the way that complainants kept their logbooks.

The Ombudsman found that on their part complainants were as a rule satisfied with the instruction that they received at the Institute of Mechanical Engineering and with their practical on-the-job assignments. At the same

time the ETC was given to understand that their experience at their workplace was well geared to the theoretical aspect of their course and that their work experience was related to a large extent to plant room operations.

In the course of discussions with the Ombudsman, the Director of MCAST's Institute of Mechanical Engineering who was responsible for the theoretical aspect of complainants' course, insisted that he never exerted any pressure to sway complainants' decision in favour of the BTEC option. It was also pointed out that complainants' difficulties arose not because they were weak in the theoretical aspect of their studies but stemmed from their limited practical experience at their workplace at the Malta Shipyards. This lack of exposure to a wider work environment could be coupled to the fact that complainants' trade testing took place at the level of the Higher Technician Diploma that is higher than the City and Guilds level and the BTEC National Certificate level. Furthermore, the Institute insisted that it was unacceptable for complainants to expect that the questions in their resits should have been limited to the supplementary training that they had undergone.

The Ombudsman also gave due consideration to comments in the report by the Trade Testing Board regarding the generally low level shown by complainants in their practical test. It emerged that this test took place in a modern plant room in a leading hotel and that complainants, not being familiar with machinery of this type, failed to get to grips with principles associated with this equipment. This performance led members of the Board to agree that apprentices had reached the skill level of Plant Operators instead of well-trained Plant Maintenance Fitters.

The Ombudsman also found that the Board had generally unfavourable comments on the way in which complainants kept their logbooks and that on the whole their entries were poor. Members of the Board were critical of the quality and quantity of these entries regarding complainants' work assignments and noted that there was evidence that complainants had not improved the quality of their logbook entries although they were advised to do so throughout their course. In the light of these adverse comments it was no surprise that complainants failed this section of their test.

The Ombudsman found that following complainants' protests on the failure by MCAST to provide lessons in Thermodynamics, the marks for the written

examination were adjusted to take this factor into account. However, complainants still failed the other sections of their test including their practical examination where passes were obligatory.

The Ombudsman also noted that although complainants' resit for their practical test was held at Malta Shipyards, their home venue, they failed to benefit from the fact that they were familiar with the shipyard installations and their overall performance was termed "*abysmal*" by the Trade Testing Board.

In its final comments the Trade Testing Board confirmed that with the exception of the written examination, complainants' standard was generally poor and even after giving due consideration to the limited practical work experience throughout their apprenticeships, the Board was unanimous that even after their resit, complainants failed to reach a level that is associated with a Technician level and their standard was more at par with that of a Craftsman. Although on these grounds the Board recommended that complainants be awarded a Journeyman's Certificate at Craftsman level, the ETC turned down this recommendation because complainants had not followed an apprenticeship that was designed for Craftsmen and was in favour of issuing instead a Certificate of Competence at Craftsman level.

Considerations by the Ombudsman

The Ombudsman considered the allegations raised by complainants in the following sequence:

- firstly, MCAST staff had exerted undue pressure on them to select the BTEC option instead of the City and Guilds stream;
- secondly, the ETC did not give them adequate information on the syllabus of the BTEC course that they chose; and
- thirdly, the Corporation failed its duty when it did not review the syllabus for this course but assumed that it was identical to the City and Guilds syllabus and also failed to ensure that their training was appropriate to enable them to qualify as plant maintenance fitters at the end of their apprenticeship.

As a result of these shortcomings complainants lost the opportunity to join Malta Shipyards as Plant Maintenance Fitters.

The Ombudsman noted that MCAST management vigorously turned down complainants' allegations that they were pushed to select the BTEC stream instead of the City and Guilds option and insisted that before complainants took this decision they were aware that they were free to continue to follow the C&G course even if this course was in the process of being phased out. Since the Ombudsman confirmed that after September 2004 there were still various ongoing City and Guilds courses at MCAST, he concluded that complainants' choice to follow the BTEC option was completely theirs and that they were given all the necessary information to enable them to reach an informed decision.

The Ombudsman turned down complainants' grievance that they were left without a copy of the syllabus for the BTEC course while admitting that they had not asked for a copy because they were under the impression that this syllabus was identical to that of the course leading to a Journeyman's Certificate. According to the Ombudsman it was clear that this information was readily available and could easily have been downloaded from the ETC's website.

At this stage complainants' charge was reduced to one allegation, namely that they were led to believe that the BTEC course would lead them to a Journeyman's Certificate at Technician level when this was not so.

Recalling that the role of the ETC in the monitoring of apprenticeship schemes included a regular review of the theoretical and practical aspects of these schemes to ensure that the practical work exposure and training of apprentices would serve them in good stead in their future careers, the Ombudsman commented that when the Corporation became aware of changes in the apprenticeship system and of complainants' choice in favour of a BTEC course instead of the traditional City and Guilds course leading to the award of a Journeyman's certificate, the ETC immediately sought assurances on the options that were being made available to apprentices. Furthermore the ETC made inquiries with MCAST about several aspects of this new system and was assured that despite these changes the best interest of students and apprentices would be safeguarded. The Ombudsman also

found that the difference between the two options was adequately presented and explained to complainants.

In addition it was established that an ETC representative monitored on a regular basis the progress shown by apprentices at MCAST and during their work placements at Malta Shipyards. This continuous assessment of apprentices' performance was well documented on forms that were filled regularly by the ETC representative.

Although in the Ombudsman's opinion there was room for improvement in the monitoring system generally to ensure that training undertaken by apprentices followed course curriculum, it appeared that on the whole complainants were satisfied with the training that they received notwithstanding the occasions when they were urged to improve their performance and the negative comments by the ETC supervisor about the way in which they registered their work experience and their training schedules on their logbooks.

Regardless of these issues, however, it resulted to the Ombudsman that the reason why complainants did not attain the Journeyman's Certificate at Technician level could not be ascribed to the change from the City and Guilds to the BTEC programme since his investigation established that apprentices received training at level 3 of the qualifications throughout their BTEC course which was of the same level as the City and Guilds course leading to a Journeyman's Certificate. The problem was not therefore related to the choice between a BTEC and a C&G course.

The Ombudsman's review established that complainants' failure was attributable to the fact that while they were given training at level 3, the Trade Testing Board had examined them at level 4 of the course qualifications. Members of this Board had indicated that a technician's qualification, even according to EU norms, is at level 4 and despite their detailed evaluation of the level of training which complainants had undergone, they could not go against the level established by the EU.

Although members of the Board appreciated the situation in which complainants found themselves and were flexible in their assessment as to whether complainants could be classified as having qualified as Technicians, however, their hands were tied. At the end they had no other choice but to

recommend to the ETC to issue complainants a qualification that was at a level lower than that of a Technician; and it was the award of a Craftsman certificate that gave rise to the grievance.

Conclusions

Taking everything into account the Ombudsman concluded that there were shortcomings in the monitoring of the teaching content of complainants' apprenticeship which, to some extent, influenced their performance in their first written examination although this situation was corrected and did not influence their resit. Nonetheless, this shortcoming by the Corporation attracted the Ombudsman's criticism.

At the same time the Ombudsman observed that despite this failure by the ETC, complainants were unsuccessful in all the other sections of their trade test. There were unfavourable comments throughout their apprenticeship on the way in which they kept their logbooks and even after their resit, examiners commented that they failed to improve the quality of their work even though a pass was compulsory in the assessment of their logbooks. In addition although even in the practical session of their test apprentices needed to register a pass mark to be awarded a Journeyman's Certificate and this resit took place at Malta Shipyards where complainants ought to have been familiar with the facilities and equipment, they still failed this test.

The Ombudsman declared that complainants' allegation that MCAST staff encouraged them to follow the BTEC course instead of the City and Guilds was unfounded and was not sustained. MCAST management had strongly denied this allegation and facts showed that at the time of the Ombudsman's review City and Guilds courses were still available to students who chose to follow this option.

The Ombudsman turned down complainants' grievance that they were not asked any questions on Thermodynamics in their resit on the grounds that examiners are not obliged to ask questions on any particular subject.

With regard to the allegation that complainants were not given a copy of the syllabus for the BTEC course, the Ombudsman observed that complainants

had every opportunity to acquire this information by other means. In any event they could have asked for a copy but failed to do so.

In the circumstances the Ombudsman ruled that although there was an element of truth in complainants' allegation of a lack of monitoring by the ETC on course standards which might have contributed towards their failure to attain a technician's level, he was of the opinion that in other compulsory sections of the trade test complainants were given every opportunity to reach the required standard and their failure to reach this level could not be put at the door of the ETC.

The Ombudsman ruled that in his view there was absolutely no way that complainants deserved any compensation for the loss of employment openings since they had entered into a contract with the ETC and the Education Division at the start of their apprenticeship which made it clear that there was no assurance that every apprentice under this scheme would be given permanent employment by his sponsor upon the successful conclusion of his apprenticeship.

University Ombudsman

Case No I 115

UNIVERSITY OF MALTA

The mature student who made heavy weather with his dissertation for a Masters' degree programme

The complaint

A mature student who registered in October 2005 for a two-year part-time course at the University of Malta leading to a Masters' degree in Communication Studies and was due to submit his dissertation by June 2007 lodged a complaint with the University Ombudsman that he had been treated unfairly by the Centre for Communication Technology (CCT) during his studies.

Among several allegations he claimed that his supervisor had misguided him by directing him to pursue a line of research that was already being followed by another student at the Centre with the result that he wasted years of hard work and had to re-write his dissertation in only two months; that his supervisor harassed him and unjustly accused him of gross plagiarism; and that the University had turned down his request to change his supervisor. Complainant was also flustered by the University's refusal to guarantee that his research findings would not in future be plagiarized by others students.

Facts of the case

The University Ombudsman found that in line with normal procedures at the Centre for Communication Technology, complainant had been left entirely free to choose the research topic for his dissertation while the Centre assigned him a supervisor to monitor this research project and also provided a dissertation guide. Together with his cohort complainant was advised that it was his responsibility to build a coherent proposal in his work and to contact his supervisor for one-to-one tutoring sessions.

The University Ombudsman also found that when it became clear in April 2007 that complainant was having difficulties to catch up with his study programme, he was advised to concentrate on his synoptic examinations and to take a one-year extension to fulfil his dissertation requirements. In the circumstances the management of the CCT found no objection to complainant's request to extend the deadline for the submission of his dissertation by one year to June 2008.

Complainant narrated to the University Ombudsman, however, that only two months before this new deadline he discovered that another student who was following the Bachelor stream in the Centre had just completed his research in an area that was similar to his own. Without seeking the advice of his supervisor, complainant changed the orientation of his research project and concentrated the thrust of his work on a different aspect of communication studies in Malta while opting to work on his own without much supervision. However, when he started to submit sections of his writing, his supervisor was extremely critical of this work and suggested substantial changes and the re-writing of the work that had been done so far. He also claimed that large sections of complainant's work had been plagiarised.

Complainant told the University Ombudsman that on 25 June 2008 he submitted a draft version of his dissertation in electronic format and that a few days later he presented a hard copy of his work.

The version of events given to the University Ombudsman by complainant's supervisor was, however, different. While maintaining that complainant had in fact submitted his final version on that date, he went on to state that upon examination of this document it transpired that his work had major difficulties. He explained, for instance, that when he noted that large sections of the work that complainant had submitted were plagiarized, he advised him in confidence to withdraw from the course before the dissertation would be officially examined and to transfer the study-units that he had already been awarded to another study programme that would accept them. He also explained to him that once the dissertation reached the official assessment stage and it would be established that the document was heavily plagiarized, he would be brought before an academic disciplinary board and charged with gross plagiarism and if found guilty, would be barred from any further studies at the University.

Early in November 2008 this supervisor wrote a report on complainant's dissertation where he outlined its merits as well as its defects and pointed out the sections that in his view had been plagiarized. He also recommended that this case be bought to the attention of the appropriate university authorities for the necessary disciplinary action although by the time that the University Ombudsman was reviewing this complaint, the examinations board had not yet assessed the dissertation.

In his defence complainant rejected his supervisor's criticism and regarded his advice to resign as another blatant instance of bias and harassment against him. He also presented to the University Ombudsman an electronically generated note dated 11 December 2008 from the University Registrar where he was told that his registration was being extended to June 2009 and claimed that this note confirmed that even the university management considered his dissertation as still being in draft form and that he was in time to submit the final version.

Other documentary evidence seen by the University Ombudsman showed that on 22 January 2009 complainant requested the University to change his supervisor and that the University had turned down this request on the grounds that once he had submitted his dissertation, any such change would be superfluous. He also found that complainant's academic transcript showed that both his work and his progress throughout the course were erratic and that apart from problems with his dissertation, he still needed to obtain sixteen other credits under the European Credit Transfer and Accumulation System (ECTS).

Observations and recommendations

The University Ombudsman pointed out in his Final Opinion that this complaint hinged mainly on two issues: firstly, whether the dissertation submitted by complainant at the end of June 2008 was in draft form or a final version; and, secondly, whether his work was plagiarized.

With regard to the first issue the University Ombudsman noted that in an email to his tutor on 25 June 2008 and entitled *Final proof read copy of my thesis*, complainant wrote as follows:

"*Attached kindly find the final copy of my thesis as promised. A hard copy will be handed tomorrow because I ran out of printer ink … I will be passing over tomorrow morning to hand the hard copy and collect a copy of the regulations to make the format compliant, because I'm afraid I lost mine*."

When faced with this document complainant told the University Ombudsman that instead he meant to write: "*Attached kindly find the final draft copy of my thesis as promised*."

On the other hand when approached by the University Ombudsman the supervisor of complainant's work maintained that he took this email to signify clearly that complainant's work had been submitted for a final assessment. He explained that as is customary, students in the CCT present a hard copy of their work in a soft bound format so that if they are asked to review some of their writing following the assessment of their work, they can do so before presenting a hard bound version of the material for library preservation.

Before proceeding to issue his recommendations on this grievance the University Ombudsman pointed out straightaway in his Final Opinion that it was rather unfortunate that when this case occurred, the Centre for Communication Technology did not keep a system to track and record information regarding the date when dissertations are handed in by students although he understood that subsequently a new system was introduced whereby these details started to be recorded.

The University Ombudsman then went on to write in his Final Opinion that after duly weighing the evidence that he gathered during two lengthy interviews with complainant and from a detailed report by the supervisor, there was no reason for him to doubt that complainant had in fact submitted a final electronic copy of his dissertation on 25 June 2008 and a hard copy of his work a few days later. He recalled that the submission deadline was 30 June 2008 and it would have been well nigh impossible in the intervening period for the supervisor to go through a draft version and provide any feedback to complainant to enable him to carry out any modifications that were needed in time for the 30 June 2008 deadline.

This evidence gave further credence to the assertion by complainant's supervisor that complainant submitted the final version of his dissertation

at the end of June 2008 not only because complainant himself had explicitly said so in his email of 25 June 2008 but also because corroboratory evidence pointed to this conclusion without any reasonable shadow of doubt.

The University Ombudsman also noted that in line with normal procedures the University could not accede to complainant's request for a change of supervisor once the supervisor had completed his work and the dissertation had been presented.

The University Ombudsman observed that the note by the University Registrar to extend complainant's registration to June 2009 did not alter the fact that complainant had already submitted a final copy of his dissertation in June 2008 and pointed out that this computer-generated note had been sent because the mark for his dissertation was not recorded once it had not yet been assessed. Furthermore, the fact that complainant had several credits still missing rendered his course progress incomplete. The University Ombudsman noted that in similar situations students generally request and are granted an automatic extension.

The University Ombudsman also pointed out that in any event the Board of Studies of the CCT had not endorsed this computer-generated note and consequently it was invalid. To avoid any such misunderstandings he suggested that in future the University should take appropriate administrative measures to modify the automatic course extension regimen.

With regard to complainant's second grievance that he was unjustly accused of plagiarism, the University Ombudsman stated that it is not his function to assess the quality of complainant's work or to judge whether he was involved in plagiarism. The evaluation of academic work is completely outside his jurisdiction and any such judgment should be left entirely in the hands of the mandated university officials and bodies. He stated, however, that at the same time he is competent to evaluate the process that leads the university authorities to conclude whether a student had or had not plagiarized his work.

The investigation by the University Ombudsman revealed that in his Memorandum dated 1 November 2008 complainant's tutor had clearly

considered his work to be of an extremely weak standard, based on a convoluted approach and exhibiting logical as well as methodological deficiencies. The supervisor had also expressed his deep concern at the high amount of plagiarism that he detected in this work and had commented as follows in his report to the Chairperson of the Dissertation Committee:

"*What is really most disturbing about the study is that section B (pages xx-xx) representing the methodology of the work, is lifted practically word-for-word from another article by W…T…published in 1997 ……. Other small excerpts of the work appear to be similar to disparate writings available on internet sites …… where people's reviews are available online*."

The supervisor concluded his report by stating that "*In view of the above I have no option but to propose that the student be reported to the University administration for due process on plagiarism*."

The University Ombudsman pointed out, however, that despite complainant's weak academic record, only his supervisor had raised the charges of very poor dissertation work and plagiarism. He went on to say that without doubting the competence and the integrity of the academic concerned, he was of the opinion that these accusations should be investigated and decided upon by the appropriate university authorities as required by the institution's regulations.

He also observed that since the grade for complainant's dissertation was not yet published and he had not been formally accused of plagiarism, if after due process complainant would be found to have been at fault, he should be made to face the consequences. In any event, however, he should not be allowed to remain in the present state of uncertainty.

The University Ombudsman wrote in his Final Opinion that he found no evidence at all to support complainant's claim that his supervisor harassed him or discriminated against him. On the contrary, in two earlier communications to his supervisor complainant thanked him for his guidance even if he did not relish the somewhat harsh criticism levelled at his work.

The University Ombudsman observed that complainant seemed to have worked on his dissertation without bothering to seek much guidance. He

had decided on the topic of his dissertation on his own and even changed it without consulting his supervisor. He also chose not to seek anyone's advice when he decided to embark on the near impossible task of writing a new dissertation in two months. Complainant was of course perfectly entitled to do so since the regulations of the Centre for Communication Technology for the Masters' degree programme allow such an approach. Clearly, however, this line of action is not recommended to students who want proper feedback on their research work.

In addition the University Ombudsman declared that there was no substance to complainant's claim that his supervisor had advised him to research a topic that was being pursued by another student since the choice of subject belonged entirely to complainant.

In view of the controversy that this complaint gave rise to, the University Ombudsman recommended that the CCT might wish to consider the introduction of a comprehensive database on research topics completed by its past students as well as other topics being researched by its current students and which students may be able to consult before embarking on any research project. Such a database is likely to avoid duplication.

Since the University Ombudsman understood that course regulations for the award of a Masters' degree do not require students to seek the approval of their supervisor before submitting their dissertation for evaluation, he recommended that the CCT as well as the University of Malta might wish to consider the introduction of procedures whereby students cannot submit the final version of their dissertation without the specific approval of their supervisor.

In another section of his grievance complainant requested an assurance from the university authorities that other researchers would not plagiarise his work. The University Ombudsman, however, immediately turned down this request which he deemed unreasonable since no university can ever give any such guarantee. All that the University could do if these circumstances were to arise would be to take disciplinary action against any student found to have plagiarised other people's work.

Conclusions

The University Ombudsman concluded his Final Opinion on this case by expressing sympathy with complainant's predicament upon discovering that despite the considerable effort in his study and research for a Masters' degree, there was a strong possibility that he would not be awarded this degree.

He pointed out, however, that complainant should realize that the University of Malta must at all times insist upon academic rigour so as to safeguard the trustworthiness of the institution as well as the credibility of its courses and its degrees. Plagiarism, according to the University Ombudsman, is one of the most, if not the most, serious offence in the academic realm and cannot be tolerated under any circumstances. It appeared, unfortunately, that complainant had failed to grasp this fact.

Complainant had, for reasons of his own, preferred to work on his dissertation under self-guidance without seeking or heeding the advice of those who could have helped him with the ensuing adverse results for which he was solely responsible.

The University Ombudsman concluded that there was no evidence that complainant's supervisor or any other university authorities had treated him unfairly or discriminated against him. His complaints were consequently turned down and considered as not being justified.

Case No J 133

THE UNIVERSITY OF MALTA

The long-serving professor who received less than half his earlier remuneration for identical duties on reaching retirement age

The complaint

A person who retired from the Bench complained with the University Ombudsman of discriminatory treatment when the University of Malta had arbitrarily reduced his remuneration on reaching sixty-five years of age by an excessive amount even though he continued to give the same academic service to the Faculty of Laws as he did before he had reached retirement age.

Facts of the case

Records made available to the University Ombudsman by the university authorities showed that complainant was employed as Part-Time Lecturer in the Faculty of Laws in the mid-60s and that this appointment was thereafter renewed on an annual basis for several years. In August 1988 complainant was appointed Regular Part-Time Professor in the Faculty of Laws.

Under the terms set down in a letter sent to him on 25 August 1989 by the Rector of the University, this appointment by the University Council was up to retirement age while his remuneration amounted to half the salary of a Regular Full-Time Professor and his academic commitment to the Faculty was equivalent to half the academic input of a Regular Full-Time Professor. Since university practice endorsed by the University of Malta and the union representing the institution's academic staff requires regular full-time and part-time members of the academic staff to devote one-third of their commitment to teaching, another third to research and the final one-third to academic administration, in his case complainant was expected to devote an

average amount of six hours per week to lecturing, research and academic administration respectively.

The University Ombudsman found that complainant's lecturing duties varied considerably throughout the years when he formed part of the academic staff complement of the Faculty of Laws. At the time of his appointment to Regular Part-Time Professor in the 1988-89 academic year when the legal course by the Faculty was offered every other year, complainant's lecturing commitment consisted of two hours per week while his teaching load doubled in 1996 when courses began to be offered annually. His remuneration throughout all these years remained pegged to half that of a Regular Full-Time Professor.

Upon reaching sixty-one years of age in 1991 complainant's appointment started being renewed annually as also happened in the case of other university academic staff who reached this age. These extensions were, however, contested by members of the University's academic staff who contended that their original appointments set their retirement age at 65 years. The University Ombudsman in fact found that when in June 1994 the Dean of the Faculty of Laws recommended the continuation of complainant's appointment and that of another academic staff member by another year up to the end of September 1995, he wrote to the university authorities that "*I fully recommend the extension and this apart from the contention that the original appointments were to last until the attainment of the age of 65 years*."

The Council of the University accepted the Dean's recommendation and extended complainant's appointment till the end of the 1994/95 academic year when he was due to reach sixty-five years. Throughout the year covered by this extension complainant's academic commitment to the Faculty as well as his remuneration remained unchanged.

The University Ombudsman found that on 19 July 1995 the University Council decided that "… *the appointment of members of staff beyond the age of 65 be not extended, but they may be invited to give courses at per study-unit rates; they could also be invited to contribute in other ways such as preparing didactic material and to serve as Senior Fellows of the University*."

In view of this decision, as from the beginning of the 1995/96 academic year the University paid complainant on a per study-unit basis. These new arrangements, however, led complainant to protest with the university authorities in February 1996 that his remuneration had been reduced drastically and arbitrarily. He argued that his conditions of service at the University were changed unilaterally without any notice or information and that on his part he had not consented to any of these changes before the onset of the 1995/96 academic year.

Complainant insisted that when he was invited to continue lecturing at the University of Malta without being given any notice of any changes with regard to his remuneration, his contract of service was in this way to all intents and purposes "*tacitly renewed by both parties*" and in his view this was the correct legal position for the 1995/1996 academic year between the two parties. Consequently, he felt that the previous agreement was still valid and that both parties were bound to observe it.

Subsequent to this protest, the Director of Finance of the University of Malta wrote to complainant on 12 March 1996 to reiterate that the University was bound to abide by the Council's decision on 19 July 1995 not to retain academic staff in full employment beyond the age of 65 years and to remunerate staff employed beyond 65 years of age according to the number of study-units that they taught. It was also made clear in this letter that complainant's appointment with the University had come to an end in September 1995.

The letter by the University's Director of Finance acknowledged that at the end of his appointment complainant ought to have been thanked for the services that he rendered and that he should have been invited in writing to continue providing service to the Faculty of Laws under the new conditions if these proposals were agreeable to him. The university authorities also made it clear that any future invitations for him to continue lecturing would be based on these new conditions and that in order to make up for their failure to inform him of changes in the conditions of service of academic staff members beyond the age of 65, his remuneration for the academic year 1995-1996 would remain as that of 1994-95, the year in which he reached the age of 65 years.

The University Ombudsman found that the university authorities abided by these arrangements when on 21 October 1996 the Director of Finance informed complainant that his regular part-time appointment was changed to that of Temporary Part-Time Professor and that henceforth he would be remunerated according to the number of study-units that he would teach. This revised appointment came into effect at the start of the 1997/1998 academic year when complainant's remuneration corresponded to a teaching requirement of three study-units per semester.

On 29 January 1998, at the request of the Faculty of Laws for the continued engagement of complainant to provide service to the Faculty, the Council of the University agreed to adjust complainant's temporary part-time appointment – together with those of two other professors in the same faculty who were in similar circumstances – to a T4 level. Under these new conditions complainant was required to lecture 112 hours per academic year on the basis of the University's scale of remuneration for academic staff at this level.

In his letter of protest to the University Ombudsman, complainant claimed that subsequent to this adjustment his lecturing commitment stood at between 35 and 42 hours per annum and this amounted to the same level of commitment that he had before he reached 65 years. He pointed out that in addition to his teaching duties he carried out research that culminated in the publication of material that was used as a standard textbook by fifth-year law students.

When in November 2008 complainant's T4 appointment was extended up to September 2009, for a short while he stopped teaching in protest although he soon resumed his lectures when he realised that students, through no fault of their own, were being deprived of lectures in his subject area. Complainant made it clear that he had been teaching under protest ever since.

Observations by the University Ombudsman

The University Ombudsman noted that complainant's part-time engagement throughout his long years of service at the University of Malta followed the exigencies in the Faculty of Laws where the majority of academic staff members practise law on a full-time basis and lecture to university students

under *ad hoc* arrangements that are sanctioned by the institution's academic system.

The University Ombudsman also noted that complainant was appointed Regular Part-Time Professor well before the introduction of the study-unit/credit system at the University of Malta. This system brought radical changes to the administration of academic courses including a closer alignment between lecturers' academic endeavours and their remuneration.

The University Ombudsman observed that there was evidence to suggest that complainant was not fully conversant with these changes in the institution's academic management and their implications on academic staff. Records seen by the University Ombudsman showed that in May 2001 complainant asked the authorities responsible for the university's financial management for an explanation on the way in which his remuneration was set and how it fitted within the system of payment to university staff for their academic duties at the institution. In his letter complainant wrote that he was under the impression that his remuneration was not based on the extent of his academic inputs in terms of lecturing hours or of the number of lectures that he would deliver since he always understood his academic duty to consist in giving lectures to students in his areas of specialization and in covering this whole programme within the period covered by an academic year, from the first week of October to the last week of the following May. This meant, according to him, that if for some reason or other he would be unable to lecture on the dates set at the beginning of the academic year, it would be up to him to give supplementary lectures so as to complete the academic cycle.

The University Ombudsman remarked that contrary to complainant's understanding, his appointments in October 1997 and January 1998 linked his remuneration to the number of lectures that he delivered: first to three study-units per semester and later to four hours per week. He pointed out that complainant's lack of knowledge on the workings of the study-unit/credit system was common among many other members of the academic staff at the University of Malta who were not affected initially by its introduction. The Ombudsman observed that those mostly affected by these arrangements were newly appointed academic members and those who, like complainant, were re-engaged on reaching retirement age.

At this stage the University Ombudsman recalled that regardless of complainant's contact hours, the University had agreed to retain his salary as laid down in the Rector's letter to him dated 25 August 1989 up to retirement age and beyond. In his case the University even postponed for two years the implementation of the Council's decision not to extend the appointment of staff beyond age 65 years when he insisted, rightly, that he should have been given due notice before his conditions of work were changed.

The University Ombudsman also noted that complainant had written to the Rector on 28 February 1996 to express his willingness to consider a new contract of services and had stated that "… … *if the University is of the opinion that my services will still be required when this annual renewal comes to an end, I will be prepared to consider any offer or proposal which the University will deem it proper to advance*."

The University Ombudsman observed that while he was reviewing this grievance, complainant was in fact receiving the remuneration due to an academic with T4 status for giving 35 to 42 contact hours per annum when other academics with a congruent appointment are required to deliver 112 contact hours annually. The University Ombudsman stated that undoubtedly – and, in his view, rightly so – the University of Malta was in this way acknowledging complainant's long and loyal service and exercising the discretion accorded to it by the Council's decision of 19 July 1995 whereby academics over the age of 65 years can, in addition to lecturing, "*also be invited to contribute in other ways such as preparing didactic material and to serve as Senior Fellows of the University*."

Conclusion

The University Ombudsman concluded that admittedly it seemed incongruous that now that complainant was over 65 years, he received less than half the remuneration that he received earlier for carrying out identical academic duties. He pointed out, however, that an objective analysis of all the facts confirmed that there was no evidence that the university authorities treated complainant unfairly or showed any discrimination against him.

Complainant's appointment as a Regular Part-Time Professor and the

remuneration linked with this post ended on the last day of the academic year when he reached retirement age – in other words, on 30 September 1995. However, as he rightly insisted, he continued to receive the agreed remuneration up to two years later since it was only at that time that the University notified him in writing that his original appointment had expired and that thereafter he would be engaged under new conditions and remunerated accordingly. The University Ombudsman noted that subsequent to this development, the University of Malta applied in complainant's case the same remuneration procedures that it applies to other academics who, regardless of whether they are under or over 65 years of age, provide services at T4 level.

The University Ombudsman concluded that it is not his duty to evaluate the academic value or the economic benefit of service given to the University by a professor and that such a task is best left to the management of the institution and to the individual himself. The function of the University Ombudsman is to ascertain whether methods used to establish the value of any such contribution to the institution are applied without discrimination.

The University Ombudsman therefore ruled that until complainant reached 65 years of age, the University of Malta had acted according to the terms of his original appointment. He also ruled that after complainant reached 65 years, he was engaged in conformity with a decision of Council which is the University's highest mandated body and taken in agreement with the union that represents the institution's academic body.

The University Ombudsman stated that when viewed against this background, the decision whether complainant wished to continue to provide service to the University of Malta under the new conditions was his alone and belonged to nobody else.

Taking all the facts of this case into account, the University Ombudsman found that complainant had neither been treated unfairly nor had he been discriminated against. In these circumstances his complaint was not sustained.

From the Ombudsman's Caseload

Case 11 (August 2009)

The right of immigrants to marry

FINAL REPORT BY THE OMBUDSMAN ON CASE No I 466

Complaint lodged by Mons. Philip Calleja on behalf of the Emigrants' Commission

The complaint

Refusal by the Marriage Registrar of applications for the publication of banns to marry lodged by 'rejected' persons and the consequent denial of the fundamental human right to marry.

Facts of the case

1. Complainant informed that:

i. Persons whose applications for refugee status are rejected, encounter particular difficulties when they lodge a request at the Marriage Registry for the publication of banns. This scenario has been experienced by persons in the following situations:

a. a rejected person desiring to marry somebody enjoying subsidiary humanitarian protection;

b. a rejected person desiring to marry another rejected person;

c. a rejected person desiring to marry a foreign person living abroad, thus denied of the right to go and reside in another country with that person;

d. a rejected person desiring to marry a local;

e. a rejected person of Roman Catholic faith desiring to celebrate marriage according to its rite but denied this due to the existing Church – State agreement.

ii. On the other hand, persons granted refugee status or subsidiary humanitarian protection, applying to marry but who are unable to produce the documents required by law, are allowed to present a copy of the application form issued by the Refugee Commissioner, known as a PQ, confirmed on oath. The PQ contains the personal details of the individual including name, surname, parents' names and surnames, etc.

iii. Rejected persons who are unable to present their birth certificate, should also be allowed to present the PQ to the Marriage Registry instead.

iv. Marriage is a natural right which rejected persons should not be denied of.

2. In reply, the Director General, Land & Public Registry Division, informed that:

i. whether certain persons are being denied the possibility of undergoing a Catholic Marriage is not a government concern, since Catholic Marriages are regulated by the Curia;

ii. marriages may only occur between 'identifiable' persons. Persons granted refugee status, or subsidiary humanitarian status, or are regarded as 'persons of concern' are legally in Malta and are also identifiable by the Refugee Commission. They are presumed to have been identified during the process of granting the status. The same cannot be said of other persons who are either clandestinely in Malta or have been denied such status.

3. The Refugee Commissioner's reaction to the above was sought. It was explained that:

"The Office of the Refugee Commissioner initially receives a preliminary questionnaire, a form filled by persons who intend to apply for asylum. The

Preliminary Questionnaire contains basic details about the person, however because such form is usually filled by the persons themselves, and not in the presence of a public officer, this Office does not consider this information as final and conclusive.

The Office of the Refugee Commissioner would then fill in an Application Form, where the asylum seeker, in the presence of an interpreter, will give his / her personal details and asked to sign the Application Form in the presence of the public officer. In most cases, this Office does not receive documents which prove or confirm the true identity of the asylum seeker, however for this Office, the signed Application Form is a declaration made by the asylum seeker. Experience shows, that there have been cases where asylum seekers hide their true identity, however, in most cases this Office does not have the means to establish the asylum seekers' true identities.

This Office of the Refugee Commissioner would then issue a recommendation to the Minister, after the case is studied and evaluated. This Office can recommend a person for refugee status, subsidiary protection or otherwise rejected. In the first two cases, i.e. refugee status and subsidiary protection the person is provided with a certificate, bearing the details that the applicant has declared during this asylum determination process. In the case of rejected asylum seekers, this Office does not issue any further documents.

All third country nationals, who entered Malta irregularly, and applied for asylum, are provided with a CIO document, which is issued by the immigration police. The information on this document also contains the declarations made by the persons.

As regards to the reply of the Director General, Land and Public Registry Division, in which he stated that persons with a positive outcome to their application to the Refugee Commission, are considered as identifiable persons, it should be pointed out that by no means this Office can declare that persons who have been granted protection, are identifiable. This Office processes cases, on the declarations made by the applicants themselves, who at times insist that they are not in position to get documents, however because their asylum claim is found credible, this Office will grant protection."

The investigation

4. Complainant was requested during the investigation to illustrate practical situations encountered by the Emigrants' Commission of alleged violations of the right to marry that could be considered within the limits of his complaint. Mons. Calleja provided information on different situations of couples involving rejected immigrants refused permission to marry. Some of the rejected immigrants have been in Malta for up to seven years. They have a residence/visa permit renewable every six months and they have also been given official Identity Cards with visas to allow them freedom of movement within Malta and the right to work regularly. Samples of these documents were submitted to the Investigating Officer. Complainant insists that during their stay on the strength of such a visa, the status of these rejected persons in Malta was a legal one. While agreeing that every effort should be made and measures taken to avoid marriages of convenience, he submitted that hardships and alleged violations of the fundamental right to marry and found a family should be avoided at all costs.

5. Complainant was required to provide specific examples illustrating the complaint. The following examples were provided:

a) Rejected immigrants who wished to marry a person enjoying subsidiary humanitarian protection. For example, an Ethiopian widow whose husband was killed in 2005, was received in Malta on 27 July 2007 and had her application for asylum rejected. She wanted to marry an Eritrean who was received in Malta on 29 July 2006 and who enjoyed a humanitarian status. They declared that they wanted to get married civilly in Malta and that they had already married here by Moslem rite in mosque. They are being required to provide the Registrar of Marriages with official documents from Ethiopia and Eritrea proving their identity.

b) Rejected immigrants who wanted to marry with other persons who were also rejected. A Christian Orthodox Ethiopian who was received in Malta in September 2005 and whose application for asylum was rejected, wished to marry civilly in Malta with another Ethiopian of the same religion, who also had a rejected status and who had come to Malta at the same time. They declared that they had already been married *the family way* in Ethiopia in June

2004. They had a child born in Malta in July 2006 that was duly registered in their name. They wanted to get married in Malta. This couple was being required by the Registrar of Marriages to produce official documentation from Ethiopia regarding their identity.

c) Rejected immigrants who wished to marry a foreign person, not an immigrant, residing abroad. They claimed that the fact that they were being refused marriage in Malta meant that they were consequently being denied the possibility to go and live with their partner abroad. An Ethiopian, who had been brought to Malta in June 2007 and whose application for asylum was rejected, wished to marry another Ethiopian who was a permanent resident in the United States and who claimed that she had come to Malta specifically to marry her partner. The immigrant produced a baptism certificate issued by the Ethiopian church together with a sworn statement in the Attorney General's Office in Malta. The irregular rejected migrant was refused the right to marry because he failed to produce an official birth certificate of Ethiopia. His girlfriend had subsequently to return to America and the marriage was called off.

d) Rejected immigrants who wished to marry with Maltese citizens were being denied the right to marry and consequently often became parents of illegitimate children. For example a Maltese girl who wished to marry an immigrant from the Congo who had come to Malta in 2004 and whose application for asylum was rejected were finally married in 2007. Other similar cases have not been so fortunate.

e) Rejected immigrants who professed the Roman Catholic religion and who wished to celebrate their marriage by that rite were being denied this as a result of the Concordat existing between Church and State governing marriages. Thus for example a Catholic Ethiopian girl, who came to Malta in 2006 and whose application for asylum was rejected, wished to marry an Eritrean citizen born in Sudan who was also Catholic and who came to Malta in 2004 and enjoyed humanitarian status. They were being denied the right to marry civilly because she produced only a marriage certificate and not an official birth certificate. They have a child born in Malta, who was baptised in a Catholic church but they were still being refused marriage in church before they were able to marry civilly. A solution to this case seems to have been found recently.

Another example was that of an Ethiopian girl, who was a Christian Orthodox whose application for asylum was also rejected, and who arrived in Malta in August 2006. She wished to marry another Ethiopian who arrived in Malta on the same date who was also a Christian Orthodox and who like her had his asylum application rejected. They declared that they were already married *the family way*. They also had a child born in Malta whom they acknowledged. They wished to have a religious marriage. In this case a solution seems possible.

In both cases however they were being required by the Registry for Marriages to produce official birth certificates from their country of origin, Ethiopia, as well as certificates that they were not previously married. Though in both cases *marriage the family way* is considered as a civil marriage, they cannot however celebrate a religious Catholic marriage in Malta without serious difficulty.

Fundamental right to marry

6. These examples illustrate well the extent and complexity of the problem. They also confirm that the complaint raises issues that go beyond the immediate facts of the case under review and should therefore be viewed in the wider perspective of the exercise of the fundamental right to marry and found a family. I shall therefore proceed to consider the laws applicable to these facts and the interpretation that should be given to them as well as the principles of good administration that should guide the competent authorities in their deliberations when deciding legitimate requests by irregular immigrants to marry. I propose to structure my Final Opinion in four distinct sections:

A. The law, regulations and norms of good governance applicable
B. Interpretative jurisprudence
C. Considerations
D. Conclusions and recommendations

A. The law, regulations and norms of good governance applicable

Laws and regulations

7. The Marriage Act (Cap. 255 of the Laws of Malta), article 7(5) states:

"*A request for the publication of banns shall not be entertained… unless and until, in addition to all other relevant information, there are delivered to the Registrar-*

(a) the certificate of birth of each of the persons to be married;
(b) a declaration on oath made and signed by each of the persons to be married stating that to the best of his or her knowledge and belief there is no legal impediment to the marriage or other lawful cause why it should not take place:

Provided that if it is shown to the satisfaction of the Registrar that it is impracticable to obtain a certificate of birth required to be delivered by this sub-article, the Registrar may accept instead such other document or evidence as he may deem adequate for the purpose of this article."

8. Articles 38 (1) and (2) of the same Marriage Act state:

"***(1)*** *Any person who contracts a marriage with the sole purpose of obtaining*

(a) Maltese citizenship; or
(b) freedom of movement in Malta; or
(c) a work or residence permit in Malta; or
(d) the right to enter Malta; or
(e) the right to obtain medical care in Malta,

shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding two years.

(2) *Any right or benefit obtained by a person convicted of an offence under subarticle (1) on the basis of the marriage referred to in subarticle*

(1) may be rescinded or annulled by the public authority from which it was obtained."

9. The *Procedural Standards in Examining Applications for Refugee Status* (S.L. 420.07), Regulation 12(2), states:

*"**(2)** An applicant for asylum shall*

(a) not seek to enter employment or carry on business unless with the consent of the Minister;
(b) unless he is in custody, reside and remain in the places which may be indicated by the Minister;
(c) report at specified intervals to the immigration authorities as indicated by the Minister;
(d) hand over all documents in his possession;
(e) be subject to search and his oral statements may be recorded …
(f) be photographed and have his fingerprints taken…"

10. S.L. 420.7 further states:

*"**14 (1)(a)**… a person declared to be a refugee shall be entitled-*

(i) … to remain in Malta with freedom of movement, and to be granted, as soon as possible, personal documents, including a residence permit for a period of three years, which shall be renewable…
(ii) unless he is in custody awaiting judicial proceedings for the commission of a criminal offence, or is serving a term of imprisonment, to be given a Convention Travel Document entitling him to leave and return to Malta without the need of a visa;
(iii) to have access to employment, social welfare, appropriate accommodation, integration programmes, State education and training, and to receive State medical care…

***(b)** A person enjoying subsidiary protection shall be entitled-*

(i) … to remain in Malta with freedom of movement, and to be granted, as soon as possible, personal documents, including a residence

permit for a period of three years, which shall be renewable…

(ii) to be provided with documents which enable him to travel especially when serious humanitarian reasons arise that require his presence in another State…

(iii) to have access to employment, subject to labour market considerations, core social welfare benefits, appropriate accommodation, integration programmes, State education and training, and to receive core State medical care, especially in the case of vulnerable groups of persons."

11. The Immigration Act (Cap. 217 of the Laws of Malta) caters for the issuing, by the Principal Immigration Officer, of 'removal orders' and 'deportation orders' (articles 14 & 22).

12. Article 12 of the European Convention for Human Rights (Cap 319 of the Laws of Malta) states:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

13. Article 14 of the same Convention states that-

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Norms of good governance

14. It is appropriate to highlight the following norms of good governance applicable, among others, to the consideration of this complaint.

a) It is the primary duty of all public authorities to uphold the Constitution in its various manifestations and international conventions wherever applicable.

b) They should favour the protection of fundamental human rights and pre-empt their violation.

c) Administrative discretion can only be exercised if it is empowered by a legislative instrument that allows it.

d) It has to be exercised within the established parameters laid down by the relative legislation.

e) Public authorities should not act in a way that unlawfully discriminates against or unjustifiably favours particular individuals or interests.

B. Interpretative jurisprudence

Basic rules of interpretation

15. When applying these legal provisions and norms to the facts resulting from the investigation, one should be very careful not to lose sight of the crucial and essential issue that what is being alleged by complainant is the actual or potential violation of a fundamental human right. It is relevant to point out that the Constitution of Malta does not enumerate the right to marry and found a family in Chapter 4 which specifically identifies and sets out the fundamental rights and freedoms of the individual that deserve constitutional protection. Malta only formally recognised and bound itself to protect this right as a fundamental right when it ratified the European Convention and its Article 12. Within this context the jurisprudence of the European Court of Human Rights interpreting Article 12 is even more relevant. It is accepted that a judgement of the European Court is not a binding precedent which necessarily has to be followed by domestic courts. However, it would be very difficult for any Tribunal or Court of a country that has subscribed to the Convention to disregard such a judgement.

16. Having established that the right to marry and found a family is a fundamental right, it is pertinent to point out some basic rules of interpretation that have to be followed:

a) Fundamental human rights are those laid down by statute. In Malta's case these are primarily to be found in the 1964 Malta Constitution and in

the European Convention. The parameters of those rights have to be found within the words and spirit of these provisions as interpreted by Case Law.

b) Within those parameters, fundamental rights can neither be approximate nor relative. They are therefore only subject to their limitations expressly laid down by law.

c) The interpretation of legal provisions protecting human rights should always favour their exercise.

d) This protection should be applicable and extended to all persons within the national jurisdiction, except in those cases where the statute viz the Constitution expressly limits such protection to the citizens of Malta. Eg: the protection of freedom of movement in Article 44. Article 12 of the Convention expressly and univocally applies to all men and women of marriageable age within a territory that subscribes to it.

e) It is also an established principle that Articles in the Convention affording protection of specific fundamental rights have to be read in conjunction with Article 14 that prohibits discrimination in the enjoyment of these rights. This Article states "*the enjoyment of the rights and freedoms that fall within this Convention should be secured without discrimination on the ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association to a national minority, property, birth or other status*".

This means that all men and women of marriageable age in Malta whatever their condition and whatever the reason for their being here have the fundamental right to marry and found a family so long as they can do so "*according to the national laws governing the exercise of this right*". Moreover, the national laws cannot discriminate when laying down rules regulating the exercise of this right.

17. Care should be taken in this respect to ensure that national laws do not fall foul of Article 14 of the Convention. Essentially this means:

a) that the State is bound to ensure and guarantee the exercise of the fundamental right of every man and woman of marriageable age to marry

and found a family. In doing so the State is not allowed to impose limitations that discriminate between one class of persons and another;

b) the State has the right to legislate to establish rules governing the exercise of this right. Such legislation cannot however allow for administrative discretion that lays down rules for the exercise of this right by some persons or a category of persons, who would otherwise satisfy all the requirements at law, that were more burdensome on them than on others.

The nature of the complaint

18. It is important at this stage to stress that the complaint by the Emigrants' Commission refers to difficulties that are being encountered by immigrants who apply for refugee status and whose request has been rejected, commonly referred to as rejected irregular immigrants, when applying to get married. As worded, the complaint concerns the fundamental right to marry. It does not concern, at least directly, their right to found a family. My investigation has to be limited within the parameters of the complaint. It is not the function of my Office to engage in academic debate which, though undoubtedly interesting, is strictly speaking irrelevant to the facts at issue. This is being said because while the right to marry and the right to found a family are ostensibly two separate rights, Article 12 speaks only of one right.

19. Founding a family in the context of Article 12 would seem to be a natural consequence of the exercise of the fundamental human right to marry which the State was bound to protect. It is obvious however that the degree of protection given to the right to found a family is not coextensive with that given to the right to marry. Furthermore the right to found a family is not to be confused with the right to cohabit or to take up residence in the country where a couple marry or where either of them lives. Similarly, while a person in detention cannot reasonably be denied the right to marry or found a family, he has no right to be freed of detention to fully enjoy the exercise of the latter right before he is entitled at law to be released. Even less can a spouse automatically acquire the right to reside in the country in which his or her partner resides merely on the strength of his/her being married to him/her unless such a right is expressly given by law.

20. Different considerations therefore apply to the two facets of this

fundamental right protected by Article 12. I have cursorily referred to issues that could be raised regarding the effects of founding a family following marriage because of the real concerns raised if rejected immigrants claim to have a right to reside in Malta if and when they marry within its jurisdiction, especially to a person who is not himself/herself a rejected immigrant or a person who has no right to reside in Malta.

The nature of the right to marry

21. It is today established jurisprudence of the European Court of Human Rights that Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is only subject to the national laws of the contracting states but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (Judgement of 17 October 1986 (Series A No 106 Page 19 Para 50) Case F v Switzerland Application No 11329/85 of the 18 December 1987).

22. This fundamental right is not absolute in the sense that anyone within the jurisdiction is free to marry any other person. The State has the right to regulate its exercise by laying down rules on the capacity of persons of marriageable age to marry. However, in contrast with Articles 8, 9, 10 and 11 of the Convention, Article 12 does not contain a paragraph permitting interference with or limitations of the right in question, which are prescribed by law and necessary in a democratic society for one or other of a number of specified purposes. The right is subject only to national laws governing its exercise.

Case Law

23. However, as Lord Bingham says in his opinion in the judgement on the Application of Baiai and others on 30 July 2008:

"*The Strasbourg case law reveals a restrictive approach towards national laws. Thus it has been accepted that national laws may lay down rules of substance based on generally recognised considerations of public interest, of which rules concerning capacity, consent, prohibited degrees of consanguinity*

and prevention of bigamy are examples (Hamer v United Kingdom (1979) 24 DR 72, para 62; Draper v United Kingom (1980) 24 DR 72, para 49; F v Switzerland (1987) 10 EHRR 411, para 32; Sanders v France (1996) 87 B-DR 160, 163; Klip and Krüger v Netherlands (1997) 91 A-DR 66, 71). But from early days the right to marry has been described as "fundamental", it has been made clear that the scope afforded to national law is not unlimited and it has been emphasised that national laws governing the exercise of the right to marry must never injure or impair the substance of the right and must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right (Hamer, above, paras 60, 62; Draper, above, paras 47-49; F v Switzerland, above, para 32; Sanders v France, above, 162-163; Klip and Krüger, above, 71; R and F v United Kingdom, Appon no 35748/05 unreported, 28 November 2006, p 14). In practice the Strasbourg authorities have been firm in upholding the right to marry, finding in favour of applicants denied the exercise of that right because they were serving prisoners (Hamer, above; Draper, above) or because of a mandatory delay imposed before entering into a fourth marriage (F v Switzerland, above), or because one applicant was the father-in-law of the other and they could only exercise their right if they obtained a private Act of Parliament (B v United Kingdom (2005) 42 EHRR 195)."

24. In this case the House of Lords stated that "*A national authority may properly impose reasonable conditions on the right of a third country national to marry in order to ascertain whether a proposed marriage is one of convenience and if it is to prevent it. This is because Article 12 exists to protect the right to enter into a general marriage not to grant a right to secure an adventitious advantage by going through a form of marriage for ulterior reasons*".

25. On the other hand ECHR judgements, such as the B&L v United Kingdom and F v Switzerland, make it clear that absolute prohibition of the right to marry is not acceptable.[1]

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[1] [2008] UKHL 53. The merits of the case concerned a scheme, imposed in 2005, which required immigrants to obtain permission from the Home Office if they wished to be married in the UK. The House of Lords considered the legislation to be acceptable, with the exception

The Strasbourg jurisprudence therefore requires the right to marry to be treated as a strong right which may be regulated by national law both as to procedure and substance but may not be subjected to conditions which impair the essence of the right. Moreover, regulation by national law cannot be discriminatory and incompatible with Article 14 of the Convention. It cannot target individuals with measures that interfere with their fundamental right to marry and that go beyond the regulation that Article 12 allows for the enjoyment of this right by all men and women of marriageable age.

C. Considerations

Application of these legal norms to the facts at issue

26. In applying these legal principles to the facts of the case one can make the following relevant considerations among others:

a) The distinction made by the Director General, Land and Public Registry Division that every marriage has to be celebrated between persons who were or who enter Malta legally and that this rule applies without distinction, to every person who wishes to marry in Malta is clearly unacceptable at law. Article 12 does not allow for such a distinction. Indeed it would consider such a distinction to run counter to the very essence of a fundamental human right which seeks to protect the right of every person to establish formal legal relationships with the partners of their choice. Article 12 declares the right to marry and found a family to appertain to every man and woman of marriageable age irrespective of whether they found themselves legally or illegally, regularly or irregularly within the national territory.

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[1] of 1. the exemption of Anglican weddings from the scheme, as this discriminated against other religions; and 2. the cost of the applications. The problem in the particular case was not the legislation, but the internal guidance: instead of simply providing an opportunity for the Home Office to make checks as to whether a proposed marriage was one of convenience or genuine, the internal guidance provided for specific circumstances in which permission to marry would be refused. Under that guidance permission to marry was to be refused if one of the parties to the proposed marriage a. did not have current permission to be in the UK; or b. had current permission to be in the UK, but that permission had been granted for a period of no more than six months; or c. had current permission to be in the UK, but that permission had no more than three months left to run. According to the House of Lords, none of these specific circumstances was of itself relevant to whether or not the proposed marriage was one of convenience or genuine.

b) Moreover, even if one had to concede, simply for argument's sake, that such a distinction could be made within the context of national laws governing the exercise of this right, it is a fact that no such legal provision exists in Malta. Indeed, if it did so exist, there is no doubt that it would be considered to be in contrast with Article 12 in so far as it would injure or impair the substance of the right to marry and definitely deprive a category of persons of full capacity, of the right to marry or at least substantially interfere with their exercise of this right.

c) I cannot accept the Director General's submission that civil marriages can only be celebrated between persons who are identified or identifiable in the sense that such identification has to be absolutely ascertained. This position of the Director General in fact attempts to reflect the substance of Article 7(5) of the Marriage Act, quoted above, that imposes on him the duty to ascertain not only the identity of the person requesting the publication of banns for marriage but also his status and the fact that there is no legal impediment to the marriage or lawful cause why it should not take place.

The law however provides that these essential facts establishing that a person was free to marry could be proved by a sworn declaration made and signed by each of the persons to be married. The Registrar was neither required nor indeed is he empowered to demand any proof beyond that expressly stated by law. Clearly rejected irregular immigrants could be required and be bound to make such a sworn statement just like any other person in similar circumstances.

d) The real issue remains therefore the identification of the person requesting the publication of banns who is, for any reason whatsoever, not in a position to produce his Certificate of Birth. The law wisely provides for such an eventuality since it is not a rare occurrence that a person is not in a position to produce an official copy of his Birth Certificate, often through no fault of his own. It is only in this area that the Registrar is given, and rightly so, a measure of discretion. This only in those cases where it is shown to his satisfaction that it is impracticable to obtain a certificate of birth as required. It is accepted, and also conceded by the Registrar himself, that it is not only not practicable but outrightly impossible for some irregular immigrants to produce a copy of their birth certificate. Indeed in some instances their birth

might not even have been registered in a public registry in their country of origin. In some countries there is not even a public registry, while in others, torn by years of war and civil strife, the network of public administration has completely broken down. Faced with such an impossibility, the Registrar is bound to accept such other document or evidence "*as he may deem adequate for the purposes of this Article*".

e) In the exercise of this limited discretion, the Registrar is therefore in duty bound to apply criteria which were uniform and that satisfy the rigid test of non-discrimination set out by Article 14 of the Convention. He could not therefore discriminate between one category of irregular immigrants and another. Indeed he cannot even discriminate between irregular immigrants and other persons in Malta, including Maltese citizens.

f) By his own admission, the Registrar accepts that he has no problem with regard to irregular immigrants who apply to get married and who have been given the status of refugees or subsidiary humanitarian status or persons of concern. He maintains that because they are in Malta legally and because they have been identified by a competent authority - which is the Refugee Commission - it was presumed that these persons have been identified in the process of establishing their status.

g) It is more than clear that the Marriage Registry opted for the solution of relying on the refugee's own declaration in an effort to satisfy the fundamental right of persons who were in Malta for the long term, and whose stay had acquired legitimacy. Such a move was undoubtedly made out of recognition of the fact that such persons have the right to get on with their lives including getting married and starting a family. A practical way had to be found to accommodate them. In reality, however, these irregular immigrants who were granted asylum or humanitarian protection have not had their identity established. They have been granted Maltese identification papers that more often than not reflect their own declarations and are not based on any other corroborative evidence available to the Refugee Commissioner. Such evidence is in most cases impossible to produce.

h) In truth the problem with the practical solution is that the identity or history of these irregular immigrants, as declared in the referred documents,

is not known to be absolutely, or even remotely, true. The authorities have no more than the word of the individual to go by. The Refugee Commission has no way of confirming the statements made. Therefore, these refugees are not as 'identifiable' as was made out to this Office. They are, in fact, no more identifiable than 'rejected' persons, who go through the same process of identification, but whose applications are not successful – obviously taking exception to cases where applications are rejected on the basis of identity, but for other reasons e.g. paragraph 35 of the PQ *'Basic Reasons for Requesting Asylum'*. The reaction of the Refugee Commission quoted extensively in Para 3 of this Opinion is clear and univocal. It directly contradicts the position taken by the Director General.

Limits of discretion

27. On the other hand it is my opinion that in these cases the Marriage Registrar rightly exercises his discretion when he accepts the Immigration Certificate issued by the Republic of Malta, authorising the holder to reside and remain in Malta for the period indicated in it by the Immigration Officer. That document indicates the name and surname of the holder, the date and place of birth, his occupation and nationality. These details, certified by the signature of the holder of the document, can certainly be accepted as *prima facie* proof of the holder's identity as established in Malta even if, in most cases, the information registered is the result of the holder's own sworn declaration.

28. The Registrar rightly exercises his discretion in terms of Article 7(5) of the Marriage Act both on the strength of the official document in the possession of the applicant for the publication of banns as well as on the strength of his sworn statement. He considers this to be sufficient evidence which, in the circumstances, should be deemed to be adequate for the purposes of establishing his identity. The question is whether the Marriage Registrar is justified in otherwise exercising his discretion in the case of rejected immigrants who produce similar identification documents and sworn declarations.

29. The answer to this question is in the negative. It has been established that rejected immigrants, as a rule released from Detention Centres on the expiry of the eighteen-month period, are given a temporary visa/residence

permit renewable every six months. They are therefore in possession of an official identity card. This allows them freedom of movement and the right to work regularly, even though they are liable to be repatriated to their country of origin at any moment. It is also a fact that a number of these rejected immigrants have been here for some years and the Government is finding it difficult for a number of reasons to find ways and means of sending them back to the country from which they migrated, not least because that country refuses to accept them back.

30. On the other hand, international conventions preclude the Government from giving these rejected immigrants a travelling visa that would allow them to move on to other countries if they so wish. As a result, it was inevitable that in some cases rejected migrants form relationships that would lead to applications for permission to marry persons enjoying different and better status. While it cannot be excluded that some might attempt to enter into a marriage of convenience solely to avoid their rejected status, there is no doubt that other cases were genuine, especially where the relationship was stable and children were born out of it. The truth is that if a rejected immigrant is allowed to remain in the country he/she cannot be denied the right to marry and found a family. I can see no reason why rejected immigrants, who for whatever reason cannot be expelled from the country, are rightly given the enjoyment of other fundamental rights like freedom of movement and freedom to work, albeit restricted to the national territory and temporarily, are then denied the fundamental right to marry and found a family.

31. The Marriage Registrar cannot, in my opinion, justify his refusal merely on the pretext that a rejected immigrant is in Malta illegally. The Emigrants' Commission maintains that, during the time that a rejected immigrant is residing in Malta outside the detention centre on the strength of a temporary visa/residence permit, his stay could be considered to be legal. One can contest that statement, but certainly one cannot validly doubt the stand that illegality in itself cannot suspend the enjoyment of fundamental human rights, unless expressly sanctioned by constitutional or conventional provisions. By insisting on distinguishing between irregular rejected immigrants and irregular immigrants who enjoy asylum status or subsidiary humanitarian protection, when the former have gone through the same procedure of identification as the latter (when this could have led to their

identity and personal details being accepted if they had not been rejected), the Government is risking finding itself accused of unjust and improper discrimination and consequently of being in breach of the individual's fundamental right to marry and found a family.

Limits of national law

32. This right is qualified only by the proviso that it is exercised "*according to the national laws governing the exercise of this right*". As stated by Jacobs and White[2] "*Article 12 imposes an obligation to recognise both in principle and in practice the right to marry and to found a family. This obligation implies that the restrictions placed on these rights by national law are to be imposed for a legitimate purpose for example to prevent polygamy or incest and must not go beyond a reasonable limit to attain that purpose*".

Abuse of right

33. Essentially in the context of this complaint, national laws can only justify a restriction on the exercise of the fundamental right to marry to ensure that this right is not abused by those who intend to acquire an unjust advantage through marriage to which they would otherwise not be entitled.

34. In this respect Article 38 of the Marriage Act (Cap 255) correctly reflects this jurisprudence and is scrupulously in line with Article 12 of the Convention as interpreted by case law. That Article in fact makes it an offence for any person to contract a marriage with the sole purpose of obtaining a) Maltese citizenship or b) freedom of movement in Malta or c) a work or resident permit in Malta or d) the right to enter Malta or e) the right to obtain medical care in Malta.

35. This sanction is applicable to all persons irrespective of whether they are Maltese citizens, persons of foreign nationality legally residing in Malta, irregular immigrants or not, whether they are rejected or not and irrespective of whether the marriage is eventually declared to be null or not. This Article decrees that any right or benefit obtained when a person is convicted of an

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[2] *'The European Convention on Human Rights'* - Third Edition, page 225.

offence under this sub-article may be rescinded or annulled by the public authority from which it was obtained. Moreover any person who contracts a marriage with another person knowing that the sole purpose of such other person in contracting the marriage is one or more of these purposes can also be guilty of the same offence and liable to the same punishment.

Marriage of convenience

36. The Marriage Act therefore, adequately safeguards the State against marriages of convenience by a provision applicable to all indiscriminately. The question that arises is whether the Marriage Registrar has the right or indeed the duty to ascertain himself/herself of the intention of the parties about to marry and whether therefore he/she should act to pre-empt a violation of the Marriage Act. It does not result from a reading of the Marriage Act, that it is within the purview of the Marriage Registrar to inquire into the intention of the persons asking for the publication of marriage banns.

37. The functions of the Marriage Registrar seem to be limited to ascertaining that the persons proposing to contract marriage satisfy the material elements laid down by law, that they provide the documentation specifically required and, where this was impracticable, to provide alternative evidence as well as ascertain that all the procedures relative to the publication of banns and to the actual celebration of marriage are scrupulously followed.

38. It therefore appears that the decision of the Marriage Registrar to treat applications by rejected immigrants for the publication of banns differently from applications made by immigrants who have been given asylum status or subsidiary humanitarian protection, would not stand the test of Article 12 of the Convention read in conjunction with Article 14 even if this treatment was motivated by policy to prevent marriages of convenience by rejected immigrants seeking to shed their negative status which precludes them from remaining in Malta.

39. It does not appear that the Marriage Registrar is empowered by national law to conduct such an investigation or to limit the exercise of the fundamental right to marry according to the results of his inquiry. It is not excluded that a national authority may properly impose, by law, reasonable conditions on the right to marry in order to ascertain whether a proposed marriage is one

of convenience and, if it is, to prevent it. Such legislation however has to be applicable across the board and cannot be improperly discriminatory.

40. The preoccupation of the Marriage Registrar to create barriers against the possibility on marriages of convenience is understandable. Similar situations existed in a number of countries facing problems of irregular migration. In the UK there was for some years a growing problem with what was referred to as 'bogus' or 'sham' marriages or 'marriages of convenience'. These are defined as marriages concluded between persons in the United Kingdom, who are subject to immigration control, and other persons already present and settled in the United Kingdom for the purpose of securing an immigration advantage including the right to remain in the United Kingdom. Many such marriages had been detected as shams by Registrars officiating in them through obvious signs that easily qualified them as marriages of convenience since the parties might not have known each other at all, they might not speak the same language or gave inconsistent personal histories and circumstances. These were situations that could give a strong indication to the Marriage Registrar that the proposed marriage was by no means genuine. They were however circumstances that could occur in any marriage and were not limited to marriages in which persons subject to immigration control were involved.

41. It is interesting to note for the purposes of this opinion, that the British Government attempted to solve this problem by an amendment to the Immigration and Asylum Act 1999 – the Asylum and Immigration Act 2004. This amendment sought to tackle the problem by imposing a duty on Superintendent Registrars and others to report to the Home Office any proposed marriage of which they had received notice, which they had reasonable grounds to suspect as sham and provided further that persons subject to immigration control had to be given entry clearance specifically for the purpose of enabling him/her to marry in the UK or had the written permission of the Secretary of State to marry.

42. This scheme was considered to be arbitrary and unjust interference with the right to marry and not in conformity with Article 12 that, while envisaging that national laws could govern capacity to marry, provided that such legislation obviously had to be non discriminatory and consistent with the fundamental principles of dignity, equality and freedom which

underlies the European Convention of Human Rights. This UK legislation was considered to be disproportionate to the aim it was intended to achieve as well as discriminatory and in violation of Article 14 of the ECHR.

43. This does not mean however that a State cannot legislate to limit Article 12 of the Convention by measures intended to prevent sham marriages. It was open to the State which is a signatory of the Convention to seek to prevent marriages of convenience. This has however to be done in a way that was consistent with Article 12, respecting the principle that national laws must not be aimed at depriving a person or a category of persons of full legal capacity of the right to marry or substantially interfere with the exercise of that right. It is therefore open to the State to legislate. It is not however, open to the Marriage Registrar to devise administrative measures indirectly aimed to curb the possibility of marriages of convenience without an enabling legislation. Nor was it legitimate for him to treat a group or category of persons, in this case rejected immigrants, differently from other persons, practically imposing a blanket prohibition on the exercise of the right to marry to a specified category, irrespective of whether the proposed marriage was one of convenience or not.

44. The whole issue has therefore to be revisited and, if the government so wishes, regulated in an appropriate manner consonant with constitutional and conventional provisions. At this point it is not my province to suggest appropriate, legislative measures. It is up to the legislator to identify how this problem needs to be regulated. I have limited myself to trace the guiding principles that should inspire and motivate legislative measures in this area.

45. Finally, it is noted that Article 8 of Chapter 225 provides a remedy in those cases where the Registrar is of the opinion that he cannot proceed to the publication of the banns or that he cannot issue a certificate for such publication. In any such case either of the persons to be married may apply to the competent court of voluntary jurisdiction to issue an order directing the Registrar to publish the banns or to issue a certificate of the publication as the case may require. The court may, after hearing the applicant and the Registrar give such directions as it may deem appropriate in the circumstances and the Registrar shall act in accordance with any such directions.

46. It can be opined that rejected migrants who are refused their request for the publication of banns on the ground that they were not identified or identifiable could presumably make use of this remedy.

47. I do not concur with this opinion because:

a) the reason why the Registrar is deciding not to exercise his/her discretion and treat applications by rejected migrants in the same way as he/she deals with those of persons enjoying asylum status or subsidiary humanitarian protection is motivated by an arbitrary rule applicable generally to a whole category of persons. It is not a decision on the merits of a particular application;

b) it is therefore the duty of the State to examine the correctness, validity and legality of this rule/policy which was in my view *prima facie ultra vires*. If my assessment is correct, it is the duty of the State to regularise their position and ensure full respect of conventional and constitutional provisions;

c) this legislative remedy is similar to that under United Kingdom law which in analogous circumstances allows for a Parliamentary procedure to investigate appeals from the Registrars' decision to ensure that no harm will ensue to the individual. The European Court of Human Rights, in the case B&L v United Kingdom, decided on 13 December 2005 (Application No 36536/02) held that parliamentary procedure was inadequate and "*that in any event, a cumbersome and expensive vetting process of this kind would not appear to offer a practically accessible or effective mechanism to individuals to vindicate their rights"*. The same can be said in the case of rejected immigrants who can hardly be expected to be in a position to involve themselves in court proceedings to vindicate their fundamental right to marry by conclusively proving their identity in impossible situations when evidence was not and could not be forthcoming. Moreover, the cost and time factors are negative elements that neutralise the efficacy of this remedy.

D. Conclusions and recommendations

48. These considerations lead me to the following conclusions:

a) The present policy of the Marriage Registrar and the Public Registry to refuse applications for the publication of banns by rejected immigrants on the basis that they are not identified or identifiable persons could be considered to be a breach or at least a threat to their fundamental right to marry. The policy is, in my opinion, in violation of Article 12 of the European Convention of Human Rights in that it imposes a restriction, limitation or prohibition that is not in pursuit of a legitimate aim and is not proportionate. In my view the policy reduces the right to marry in such a way and to such an extent that the very essence of the right for this category of persons is impaired. It substantially interferes with their exercise of this right.

b) It is also my opinion that the policy, as formulated and implemented, is improperly discriminatory and therefore in violation of Article 14 of the Convention.

c) The policy is also vitiated in that it appears that the Marriage Registrar is exercising administrative discretion which is not empowered by a national law that governs the exercise of the fundamental right to marry as laid down by Article 12.

d) The Government has the right to legislate to lay down uniform, reasonable and proportionate rules to ascertain that the request for the publication of banns does not refer to a marriage of convenience aimed at achieving an ulterior aim and the acquisition of rights which the applicants or one of them would not otherwise be entitled to. These rules should however be sanctioned by *ad hoc* legislation. They should be applicable to all civil marriages to be celebrated in the national territory.

e) Care should be taken when establishing such rules not to interfere or impair with the essence of the fundamental right to marry and found a family.

f) I see no reason why the Marriage Registrar should not accept as *prima facie* evidence an authentic copy of baptismal records, proving the facts stated in it relative to the identity of its holder, if he is in the impossibility of providing an official birth certificate.

49. It is my view that such a document can certainly be a valuable added

proof of identity especially if accompanied by a sworn declaration of the applicant.

50. I recommend that the Marriage Registrar should take note of my considerations and conclusions and act accordingly to ensure conformity both with the Constitution and the Convention in the exercise of this fundamental right.

51. In view of the merits of the case and its wider implications I am notifying a copy of this opinion also to the Attorney General and the Minister of Justice and Home Affairs.

J Said Pullicino
Ombudsman
11 May 2009

LETTER BY ACTING DIRECTOR, PUBLIC REGISTRY TO OMBUDSMAN ON 6 JULY 2009

430 31/07

DIVIŻJONI TAR-REĠISTRU PUBBLIKU U TA' L-ARTIJIET

REĠISTRU PUBBLIKU

LAND AND PUBLIC REGISTRY DIVISION

PUBLIC REGISTRY

MALTA

Our Ref: CRO/121/08

6th July 2009

Chief Justice Emeritus
Dr J Said Pullicino
The Ombudsman
The Office of the Ombudsman
11 St Paul Street
Valletta
VLT 1210

RECEIVED 10 JUL 2009 OMBUDSMAN

LETTER 10 JUL 2009 ACKNOWLEDGED

Re: CASE No I 0465

Thank you for your report regarding the above mentioned case.

Further to your observations, this office would like to make the following submissions:

(i) Article 4 of the Immigration Act (Cap 217 – Laws of Malta) stipulates clearly who 'exempt persons' in Malta are. It emerges clearly that rejected asylum seekers do not fall within any of the mentioned categories and thus unless they have a valid immigration document in hand stating otherwise, their presence in Malta is illegal and only temporary. From a practical point of view, such persons are often only in Malta because the Immigration Police loose track of their whereabouts and the Police find themselves in the physical impossibility of deporting them.

(ii) Every person who intends to contract marriage in Malta is obliged to observe the provisions of the Marriage Act (Cap 255 – Laws of Malta) irrespective of the nationality of the applicant concerned.

(iii) We find the argument that anyone in Malta whether legally or illegally has a right to marry in **Malta** unacceptable since this would in practice circumvent the Marriage Act and effectively deny the right and duty of the State to regulate marriage.

(iv) Further to the argument that no one may be denied the right to marry, we would like to point out that a person whose application for asylum has been rejected by the Refugee Commissioner does not lose the right to marry as such. Indeed that person is free to marry in any country where he or she may enjoy legal status. We consider that the right to marry, like the right to private and family life can be enjoyed by any person who enjoys legal status. The fact that a person has had his or her application for asylum rejected renders that person's entry and presence in Malta illegal and therefore does not give that person any advantage over other illegal migrants and therefore does not necessarily imply the right to enter or stay in a country in order benefit from its legal and social support structures including that to marry or the right to marry in any particular country despite its immigration laws.

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(v) In our opinion, the suggestion made by your goodself that such 'rejected' asylum seekers should be allowed to produce a baptismal certificate in lieu of a birth certificate is not permissible and would in effect mean that we would be accepting as proof of a person's identity a 'certificate of name' issued by any recognised faith which would clearly not suffice to address the need to formally and legally establish one's identity according to Civil law.

You will no doubt appreciate that we may not discriminate between one faith and another and a baptismal certificate which may be issued by any sect or religion worldwide can in no manner ever provide the safeguards and reassurance of probable correctness that an official Birth Certificate gives. We may however use the certificate issued by the Police Authorities on the presumption that it is that which is most likely to reflect the accuracy of a person's identity.

(vi) Whilst we fully understand that a person has a fundamental right to marry, it must also be understood that it is our legal duty to safeguard the interests of the Marriage Registry and Maltese law. We must ensure that any person who intends to contract marriage in Maltese territory adheres to the provisions of the Laws of Malta, irrespective of whether the person concerned is Maltese or foreign and consequently a person who is here illegally should not enjoy the benefits of Malta's legal or social support structures until such time as that person's legal status is regularised.

Carmel Abela
Acting Director
Public Registry

CC: Dr S Pappalardo, Director General, Land and Public Registry Division
Mr. Noel Borg, Policy Manager, MITC

LETTER BY THE OMBUDSMAN TO ACTING DIRECTOR, PUBLIC REGISTRY DATED 28 JULY 2009

Case No I 0466

28 July 2009

Mr Carmel Abela
Acting Director
Public Registry
Evans Buildings
Merchants Street
Valletta

Sir

I thank you for your letter of 6 July 2009 the contents of which have been noted. I have received further submissions by the complainant which I am copying to you.

My final opinion remains that the complainant rightly identifies that the fundamental human right to marry and found a family is being violated or threatened by the administrative decision of your Department.

Unfortunately you fail to understand the reasoning behind my opinion even though I intentionally avoided intricate legalistic arguments. Your submissions add nothing new for my consideration and the issues raised have already been considered and rejected in my report. I shall therefore limit my reaction to three essential points that your department is requested to digest:

1. Your submissions repeatedly imply that a person who has no legal status to be in Malta does not enjoy fundamental human rights. Such statements are extremely dangerous and completely unacceptable. They are even more

alarming when made by a Government Department that has the duty to ensure that fundamental human rights are fully respected and protected.

2. Your statement that you consider that "*the right to marry like the right to private and family life can be enjoyed by any person who enjoys legal status*" is fallacious. You fail to distinguish that the right to marry and found a family is enshrined in Article 12 of the Convention while the right to the protection of private and family life is enshrined in Article 8. These two Articles have different limitative provisions that are not to be confused. The only limitation to Article 12 is that stated in the *proviso* that man and women of marriageable age whatever their legal status in the national territory "*have the right to marry and found a family according to the national laws governing the exercise of this right*". I have amply illustrated this Article in my Final Opinion and I again refer to my considerations in this respect.

Your Department appears to be completely ignorant of the fact that fundamental human rights, including those under review, are to be enjoyed by every human being whether legally or illegally in Malta or elsewhere. Their enjoyment can only be restricted within the limitations set out in every Article protecting distinct fundamental rights in the Convention. It is true that Article 8 is one of the most open-ended provisions of the Convention. Even so, however, the principle remains that "*there shall be no interference from a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of a national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others*".

The State therefore cannot impose as a limitation the added qualification of "*legality of presence*" in the national territory. As thoroughly explained in my Final Opinion, the limitation to Article 12 is much more stringent and precise. It allows no room for a margin of appreciation or for the application of the rule of proportionality. This means that while it is clear that the State has every right to deport rejected irregular immigrants it is equally clear that, so long as these are allowed to remain in Malta for whatever reason, they are to enjoy their fundamental human rights within the limits set out by the Constitution and the Convention.

3. Your statement that a rejected immigrant who marries in Malta would if allowed to marry "*enjoy the benefits of Malta's legal* (sic) *or social support structures*" is completely false. A person exercising his fundamental right to marry does not, automatically by doing so, acquire any right or benefit under ordinary law to which he would otherwise not have been entitled. This is stating the obvious.

Your Department should notice that the services that it is by law enjoined and empowered to provide to all persons in Malta should not be relegated by it to the mere provision of a "*legal and social structure*". On the contrary your Department should be aware and indeed be proud to have been called to a much nobler function - that of assisting human beings to exercise their fundamental human right to marry and found a family. Your Department is bound to favour the exercise of this right and not hinder it. It can only limit its exercise within the strict parameters to which I referred in my Final Opinion.

Considering the gravity of your submissions and their implications I am requesting the Minister of Justice and Home Affairs to inform me whether the stand taken by your Department accurately reflects Government's policy and its reading of the relevant constitutional and conventional provisions. I shall then act in terms of Act XXI of 1995.

Yours sincerely

J Said Pullicino
Ombudsman

LETTER BY THE OMBUDSMAN TO MINISTER OF JUSTICE AND HOME AFFAIRS

Case No I 0466

29 July 2009

Hon C Mifsud Bonnici
Minister of Justice and Home Affairs
Auberge d'Aragon
Independence Square
Valletta VLT 2000

I refer to my Final Opinion on the case mentioned above following a complaint filed by Mons Philip Calleja on behalf of the Malta Emigrants' Commission after the refusal by the Director of Public Registry to allow rejected irregular immigrants to marry in Malta. This Opinion has been communicated to you on 11 May 2009.

The Acting Director has not accepted my Opinion. He bases his objection on a number of questionable, and to my mind unacceptable, principles.

I am enclosing for your consideration a copy of the correspondence that followed its publication.

Could you kindly confirm whether the Acting Director's letter of 6 July 2009 accurately reflects Government's policy on the issues raised and its reading of the relevant constitutional and conventional provisions.

In view of the fact that complainant is making representations on behalf of persons who are requesting to be allowed to marry in Malta, I would be grateful if I could have your reaction as soon as possible.

Yours sincerely

J Said Pullicino
Ombudsman

OFFICE OF THE OMBUDSMAN

PUBLICATIONS

Annual Report 1995/1996	*Rapport Annwali 1995/1996*
Annual Report 1997	*Rapport Annwali 1997 (fil-qosor)*
Annual Report 1998	*Rapport Annwali 1998 (fil-qosor)*
Annual Report 1999	*Rapport Annwali 1999 (fil-qosor)*
Annual Report 2000	*Rapport Annwali 2000 (fil-qosor)*
Annual Report 2001	*Rapport Annwali 2001 (fil-qosor)*
Annual Report 2002	*Rapport Annwali 2002 (fil-qosor)*
Annual Report 2003	*Rapport Annwali 2003 (fil-qosor)*
Annual Report 2004	*Rapport Annwali 2004 (fil-qosor)*
Annual Report 2005	*Rapport Annwali 2005 (fil-qosor)*
Annual Report 2006	*Rapport Annwali 2006 (fil-qosor)*
Annual Report 2007	*Rapport Annwali 2007 (fil-qosor)*
Annual Report 2008	*Rapport Annwali 2008 (fil-qosor)*

Case Notes No.

1 (April 1996)	15 (April 2003)
2 (October 1996)	16 (October 2003)
3 (April 1997)	17 (April 2004)
4 (October 1997)	18 (October 2004)
5 (April 1998)	19 (April 2005)
6 (October 1998)	20 (October 2005)
7 (April 1999)	21 (April 2006)
8 (October 1999)	22 (October 2006)
9 (April 2000)	23 (April 2007)
10 (October 2000)	24 (October 2007)
11 (April 2001)	25 (April 2008)
12 (October 2001)	26 (October 2008)
13 (April 2002)	27 (April 2009)
14 (October 2002)	

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June – September	8.30am - 12.30pm