



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-15 ta' Diċembru, 2021

Appell Inferjuri Numru 85/2021 LM

Kamal Prasad Neupane (ID 0206128A)
(‘l-appellant’)

vs.

Identity Malta Agency
(‘l-appellata’)

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mir-rikorrent **Kamal Prasad Neupane (ID 0206128A)** [hawnhekk ‘l-appellant’], minn deċiżjoni tal-Bord tal-Appelli dwar l-Immigrazzjoni, [minn issa ‘l quddiem ‘il-Bord’], tat-13 ta’ Awwissu, 2021 [minn issa ‘l quddiem ‘id-deċiżjoni appellata’] li permezz tagħha l-Bord qajjem

ex officio in-nullità tal-appell għar-raġuni illi: “... *this was filed by the prospective employer, not by the appellant.*”.

Fatti

2. Fid-9 ta' Settembru, 2020, is-soċjetà OzoMalta Limited (C9023) issottomettiet applikazzjoni mal-aġenzija **Identity Malta** [hawnhekk 'l-appellata'] *ai termini* tal-Leġislazzjoni Sussidjarja 217.17 (Regolament dwar Proċedura ta' Applikazzjoni Waħda għal Permess Uniku fir-rigward ta' Residenza u Xogħol u Ġabra Komuni ta' Drittijiet għal dawk il-Ħaddiema ta' Pajjiżi Terzi li jirrisjedu legalment f'Malta) sabiex jinħareġ permess tax-xogħol u residenza lill-appellant stante illi huwa xtaq illi jibda jaħdem magħha. Fil-11 ta' Frar, 2021 kemm l-appellant kif ukoll is-soċjetà OzoMalta Ltd, ġew infurmati illi din l-applikazzjoni giet miċħuda għas-segwent i raġuni:

“Your request cannot be acceded to as when carrying out our due diligence process your application was not recommended for approval by Jobsplus because the declaration of posting has never been verified by third parties signing such document.”.

Mertu

3. Is-soċjetà OzoMalta Limited issottomettiet applikazzjoni mal-aġenzija Identity Malta sabiex jinħareġ permess tax-xogħol u residenza lir-rikorrent peress illi huwa xtaq illi jibda jaħdem magħha hawn Malta. Fil-11 ta' Frar, 2021 kemm l-appellant kif ukoll is-soċjetà OzoMalta Ltd ġew infurmati li l-imsemmija

applikazzjoni giet miċhuda għaliex ma kinitx giet rakkomandata minn Jobsplus billi id-dikjarazzjoni dwar il-*posting* qatt ma giet verifikata mit-terzi li ffirmaw dan id-dokument.

Id-Deciżjoni Appellata

5. Permezz tad-deciżjoni mogħtija fit-13 ta' Awwissu, 2021 il-Bord iddecieda li l-appell ipprezentat mir-rikorrent kien null peress li dan kien sar mill-kumpannija prospettiva li kienet ser tibda tħaddmu ossia OzoMalta Limited, u mhux minnu stess, u dan wara li għamel is-segwent i konsiderazzjonijiet:

"1 Preliminary

The Board:-

Saw that in virtue of a decision dated 11th February, 2021, Identity Malta Agency stated that the relative application for a Single Permit, had been rejected for the following reason: "... because the declaration of posting has never been verified by third parties signing such document";

Saw the appeal registered on 12th February, 2021; and

Saw that no reply from Identity Malta Agency was found in the file.

2 Submissions filed, evidence produced and considerations of the Board

*The Board observed that when the appeal was filed, the receipt issued instructed the parties to submit any further documentation within fifteen days. At the outset, the Board declares that although it is not legally bound to hold sittings, Art. 3(2) of the Administrative Justice Act (Chapter 490 of the Laws of Malta) stipulates that amongst the principle which this Board, amongst other bodies, is bound to uphold, is the principle of equality of arms. The Board refers to the judgment of the Court of Appeal **Edwin Zarb et vs Gilbert Spiteri et** (decided on 6th February, 2015) in which it was held that the principle *audi alteram partem* does not necessarily mean that the parties must be physically heard but that they must be given sufficient time to present the*

evidence they wish to present. It is up to the court (or in this case, the Board) to decide what should be done in the interest of justice.

The Board saw the letter submitted by Mary Grace Calleja on behalf of OZO Malta Limited (C9023), in which she claimed that usually, Jobsplus would inform her that the third parties did not confirm the declaration of posting and she would herself send Jobsplus a fresh declaration of posting confirming where the appellant would be posted. She claimed that the company would place the appellant at the premises of Methode Electronics.

The Board also saw the declaration of posting submitted before it. However, this was a darkened copy of a document and it is clear that this document has been electronically edited. Furthermore, the signatures and the names of the signatories are unclear. This is not a document of the quality the Board would expect.

The Board is raising ex officio the matter of the nullity of the appeal as this was filed by the prospective employer, not by the appellant. In this regard, the Board refers to the judgement of the Court of Appeal Dragana Stoilkovic vs. The Director of the Department for Citizenship and Expatriate Affairs (decided on 21st April, 2021) in which it was stated:

“Qabel ma tikkonsidra t-tliet aggravji mressqa mill-appellanta, din il-Qorti ser tgħaddi sabiex tqis jekk jiswewx l-ewwel żewġ sottomissjonijiet preliminari li tressqu mid-Direttur appellat. Id-Direttur appellat jilqa’ għall-appell interpost mill-appellanta, billi qabel xejn jirrileva li l-appell quddiem il-Bord kien sar minn Jeanne Borg għan-nom tas-soċjetà Intertax Services Limited bħala prinċipal. Dan filwaqt li skont is-subartiklu 20(2) tal-L.S. 217.17 kien jipprovdi li “the third country national shall have the right to appeal to the Board”, u l-ebda dritt ta’ appell ma jingħata lill-prinċipal. Id-Direttur appellat osserva li l-appell saħansitra lanqas ma kien redatt in rappreżentanza tal-appellanta, u għalhekk tali appell kien wieħed pależament irritwali. Din il-Qorti taqbel u tgħid li għalhekk l-appell li sar mis-soċjetà Intertax Services Limited quddiem il-Bord kien wieħed null. Huwa null ukoll l-appell li qiegħda tressaq l-appellanta quddiem din il-Qorti, għaliex għaladarba hija ddeċidiet li ma tressaq l-ebda appell mid-deċiżjoni tad-Direttur appellat li kienet tolqot l-applikazzjoni tagħha, b’hekk hija ma kellha l-ebda dritt li tintavola rikors tal-appell quddiem din il-Qorti. Il-proċedura li kellha tiġi addottata minnha tirriżulta b’mod ċar u inekwivoku mis-subartikolu 20(2) tal-L.S. 217.17 u tas-subartikolu 25A(8) tal-Kap. 217.”.

3. Decision

Therefore, after having read the relative submissions as well as after having seen the provisions of Chapter 217 of the Laws of Malta and of S.L. 217.17, the Board declares the appeal null and consequently declines to take further cognisance thereof.

The Board orders that this decision be served on the parties without delay.”

L-Appell

6. L-appellant ressaq l-appell tiegħu minn din id-deċiżjoni fis-17 ta' Awwissu, 2021, fejn talab lil din il-Qorti tħassar, tannulla u tirrevoka d-deċiżjoni appellata tal-Bord tal-Appelli dwar l-Immigrazzjoni tat-13 ta' Awwissu, 2021, u tiddikjara u tiddeċiedi illi l-appell tar-rikorrent quddiem il-Bord kien wieħed validu u konsegwentement tordna li l-atti jintbagħtu lura quddiem il-Bord sabiex jagħti rimedju skont il-liġi.

7. Fir-rikors tal-appell tiegħu, l-appellant għamel riferiment għall-okkju kif imnizzel fis-sentenza tal-Bord li testwalment jaqra 'Kamal Prasad Neupane vs. Identity Malta Agency', u jsostni illi l-okkju jirrifletti l-partijiet involuti fil-kawża, u dan skont kif jigu istitwiti l-proċeduri fir-Registru tal-Bord. L-appellant jgħid li fil-każ odjern l-persuna indikata illi ressqet l-appell mid-deċiżjoni tal-Aġenzija huwa fil-fatt l-appellant Kamal Prasad Neupane u mhux is-soċjetà OzoMalta Limited. L-appellant jgħid ukoll li kien hu illi fit-12 ta' Frar, 2021 mar personalment fir-Registru tal-Bord sabiex jappella mid-deċiżjoni tal-Aġenzija, u sussegwentement issottometta d-dokumentazzjoni li f'ha li kellu jressaq bħala prova fil-każ tiegħu.

8. L-appellant qal illi meta fit-12 ta' Frar, 2021 ippeżenta ruħhu fir-Registru tal-Bord, ingħata formola li giet mimlija minnu bid-dettalji kif mitlub, bl-intestatura ta' din il-formola li taqra: "PLEASE FILL IN THIS FORM IN ORDER TO LODGE THE APPEAL WITH THE IMMIGRATION APPEALS BOARD". L-appellant jgħid illi hekk kif mela d-dettalji tiegħu fuq din il-formola, gie maħruġ lilu dokument intestat f'ismu proprju u li inter alia jaqra; *"This is to confirm that the Immigration Appeals Board has today received and registered the appeal above quoted"*, u dan id-dokument jinkludi fih struzzjonijiet lill-appellant sabiex fi żmien ħmistax-il ġurnata jipprovdi dokumentazzjoni ulterjuri bħala prova li jkun irid iressaq. Jgħid l-appellant li għalhekk isegwi illi l-appell quddiem il-Bord gie validament istitwit hekk kif issottometta l-formola li giet ipprovdata lilu mir-Registru tal-Bord. L-appellant jgħid illi ma hemm l-ebda dubju illi kien l-appellant innifsu illi istitwixxa l-proċedura tal-appell quddiem il-Bord. Jgħid illi l-fatt illi l-appellant ippreżenta dikjarazzjoni maħruġa mid-Dipartiment tal-Human Resources tas-soċjetà OzoMalta Limited li kienet ser tibda tħaddmu, dan ċertament ma jfissirx illi kienet dik is-soċjetà illi qiegħda tistitwixxi l-appell. L-appellant jgħid illi għalhekk għandu jirrizulta illi l-appell quddiem il-Bord kien istitwit b'mod validu mill-appellant innifsu u ħadd ħliefu, u l-Bord kien żbaljat meta ddikjara illi tali appell kien null.

Ir-Risposta tal-Appell

9. L-appellat fir-risposta tiegħu wieġeb li d-deċiżjoni fil-mertu tal-11 ta' Frar, 2021 hija waħda ġusta u dak li qed jiġi kontestat hawnhekk hija n-nullità *ex officio* imqajma mill-Bord fir-rigward tal-parti illi ntavolat l-appell minn tali

deċiżjoni. F'dan is-sens l-appellat irrimetta ruħhu għad-deċiżjoni ta' din il-Qorti, għaliex *prima facie* jidher minn kopja tal-inkartament tal-file tal-Bord illi l-appell għie intavolat minn Kamal Parasad Neupane f'ismu, u l-*prospective employer* tah l-għajjnuna tiegħu sabiex iressaq il-provi in sostenn tal-appell tiegħu.

Konsiderazzjonijiet ta' din il-Qorti

10. Mill-atti (Dokument 'A' a fol. 5) jirriżulta li l-appell quddiem il-Bord sar mill-appellant innifsu u mill-ebda persuna oħra, u li għalhekk il-Bord evidentement kien żbaljat meta qajjem *ex officio* in-nullità tal-appell għar-raġuni illi dan għie ntavolat mill-*employer* prospettiv u mhux mill-appellant.

Decide

Għar-raġunijiet premissi, din il-Qorti qiegħda tilqa' l-appell tal-appellant, u tħassar u tirrevoka d-deċiżjoni appellata, u tibgħat l-atti lura lill-Bord sabiex wara li jisma' lill-partijiet, jgħaddi għad-deċiżjoni tiegħu fil-mertu.

Fic-ċirkostanzi tal-każ, l-ispejjeż għandhom jibqgħu bla taxxa bejn il-partijiet.

Moqrija.

**Onor. Dr Lawrence Mintoff LL.D.
Imħallef**

**Rosemarie Calleja
Deputat Registratur**