MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-14 ta' Settembru, 2022

Appell Inferjuri Numru 73/2021 LM

Abdul Hannan
(K.I. nru. 75508A)
('L-appellat')

***vs*.**

Identity Malta Agency
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mill-appellanta **Identity Malta Agency** [minn issa 'l quddiem 'l-Aġenzija appellanta'] mid-deċiżjoni tat-2 ta' Lulju, 2021, [minn issa 'l quddiem 'id-deċiżjoni appellata'] mogħtija mill-Bord tal-Appelli dwar l-Immigrazzjoni [minn issa 'l quddiem 'il-Bord'], li permezz tagħha laqa' l-appell

tal-appellat **Abdul Hannan (K.I. nru. 75508A)** [minn issa 'l quddiem 'l-appellat'] fil-konfront tagħha għar-raġunijiet hemm imfissra.

Fatti

2. L-appellat kien fil-pussess ta' *Specific Residence Authorisation* [minn issa 'l quddiem 'SRA'], u meta talab għat-tiġdid tagħha fit-30 ta' Diċembru, 2020, it-talba tiegħu ġiet irrifjutata mill-Aġenzija appellanta fid-19 ta' Jannar, 2021.

Mertu

3. Għalhekk l-appellat istitwixxa proċeduri ta' appell quddiem il-Bord fil-5 ta' Frar, 2021, għar-revoka ta' din id-deċiżjoni tal-Aġenzija appellanta, u sabiex jingħata d-dritt li iġedded il-SRA u jkompli jirrisjedi hawn Malta taħt dawk il-kundizzjonijiet indikati f'din il-*policy*. L-Aġenzija appellanta ma ressqet l-ebda tweġiba għall-appell tiegħu.

Id-deċiżjoni appellata

4. Il-Bord wasal għad-deċiżjoni appellata wara li għamel is-segwenti konsiderazzjonijiet:

> ***"1. Preliminary***
>
> *The Board:*
>
> *Saw that in virtue of a decision dated 19th January 2021, Identity Malta Agency informed the appellant that the relative application for Specific Residence Authorisation (SRA) status, lodged on 30th December 2020, had been rejected as he had been convicted of a criminal offence in the past;*

Saw the appeal registered on 5th February 2021; and

Saw that Identity Malta Agency filed no reply.

2. <u>Submissions filed, evidence produced and considerations of the Board</u>

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 ***<u>Edwin Zarb et vs Gilbert Spiteri et</u>*** *(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 appellant filed an appeal in which he argued, inter alia, *that:*

- *He had previously enjoyed SRA status under the policy issued by the Agency in 2018;*
- *Although the policy changed in 2020, the eligibility criteria for SRA status remained the same;*
- *According to a police conduct certificate dated 20th January 2021, the appellant was deemed a person of good conduct;*
- *According to the relative conviction sheet (document "I"), the appellant was condemned to two years imprisonment suspended for four years following a judgment of the Court of Magistrates;*
- *The period mentioned in the relative judgment had elapsed and the appellant ought not to be penalised further;*
- *Had the appellant really posed a threat to public security, his SRA status would not have been renewed in 2020 as after all, good conduct was an integral part of the eligibility criteria as they stood in 2018;*
- *The Maltese criminal law system emphasises rehabilitation and that past convictions cannot be used to penalise previously convicted persons; and*

- *The 2020 policy did not distinguish between effective incarceration and suspended sentences and such lack of distinction meant that the element of doubt ought to favour the affected party.*

The Board saw the 2018 version of the policy and noted that the section titled "Disqualification Criteria" *disqualifies* "Persons who have been convicted of serious crimes, or are otherwise considered to be a threat to national security, public order and/or the public interest shall not be granted a Specific Residence Authorisation."

The Board noted that the Agency's decision ***did not*** *claim that the appellant was considered a threat to national security and/or public order and/or public interest. Therefore, the only remaining criterion under which disqualification could be assessed was the element of "serious crimes". One must therefore examine whether the appellant was convicted of a serious crime.*

The Board refers to the judgment of the Court of Appeal ***Fabio Vespa vs. Id-Direttur tad-Dipartiment għaċ-Ċittadinanza u l-Espatrijati*** *and notes that that judgment made it clear that the Agency was at least bound to provide the Board with a copy of the judgment through which the appellant was convicted of an offence.*

*In this case, it was the appellant himself who provided not a copy of the judgment, but a copy of his criminal record sheet (*fedina penali). *In line with the pronouncements of the Court of Appeal in* ***Vespa****, the Board can say that the online checks which it conducted did not turn up any convictions in the appellant's name.*

The appellant's criminal record sheet indicates that he was found guilty of the following offences:

- Mingħajr il-ħsieb li joqtlu jew li jqiegħdu l-ħajja ta' ħaddieħor f'periklu ċar, ikkaġuna ferita ta' natura gravi fuq il-persuna ta' Wadea Al Maghrbi;
- Talli fl-istess data, ħin, lok u ċirkostanza qajjem rewwixta jew ġlieda bil-ħsieb li jagħmlu offiċa fuq il-persuna ta' Wadea Al Maghrbi; and
- U aktar talli fl-istess data, ħin, lok u ċirkostanza volontarjament kisru l-bon ordni u l-paċi pubblika b'għajjat u ġlied.

The Court of Magistrates imposed a two years imprisonment suspended for four years and a three-year protection order in favour of the victim.

The criminal record sheet makes it clear that the offences described therein took place on 27th April 2015. The Board must note, however, that it has not been provided with the date of the judgment. It is clear that the suspended sentence and the protection order start to run from the date of the judgment, not from the date on which the

offences took place. However, the Board considers it reasonable to assume that in the six years since the commission of the offences, the suspended sentence and the protection order have run their course and have now elapsed.

The Board also notes that the appellant correctly observes that his SRA status was renewed in 2019 (document "A") and that at that time, the issuing authority was aware, should have been aware or could have been aware of the appellant's previous conviction (if that was indeed a legitimate obstacle to SRA status).

The Board also notes that the appellant's conduct certificate (document "H"), issued on 20th January 2021, states that he is a person of good conduct. In the Board's view, such a certificate satisfies the "good conduct" requirement of the policy.

Furthermore, having regard to Articles 6, 7 and 7A of the Conduct Certificates Ordinance (Chapter 77 of the Laws of Malta), it is evidence that the appellant satisfies the criteria for his suspended sentence to not be recorded in his conduct certificate.

The Board then asks how it is possible for the appellant to benefit from the provisions of Article 6, 7 and 7A of the Conduct Certificates Ordinance but still have his application for SRA status denied. This effectively means that the benefits offered by the Conduct Certificates Ordinance are being nullified by a decision of the Agency.

The Board refers to the judgment of the Court of Magistrates **Il-Pulizija vs. Robert Omo** *of 17th November 2020 which quoted the judgment of the Court of Justice of the European Union (CJEU)* **H.T. vs. Land Baden-Wuerttemberg** *of 24th June 2015. The CJEU held:*

"However, the Court has already had an opportunity to interpret the concepts of 'public security' and 'public order' contained in Articles 27 and 28 of Directive 2004/38. While that directive pursues different objectives to those pursued by Directive 2004/83 and Member States retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another (judgment in I., C-348/09, EU:C:2012:300, paragraph 23 and the case-law cited), the extent of the protection a company intends to afford to its fundamental interests cannot vary depending on the legal status of the person that undermines those interests.

Therefore, in order to interpret the concept of 'compelling reasons of national security or public order' contained in Article 24(1) of Directive 2004/83, it should first be taken into account that it has already been held that the concept of 'public security' contained in Article 28(3) of Directive 2004/38 covers both a Member

State's internal and external security (see, inter alia, judgment in Tsakouridis, C-145/09, EU:C:2010:708, paragrafph 43 and the case-law cited) and that, consequently, a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (judgment in Tsakouridis, C-145/09, EU:C:2010:708, paragraf 44). In addition, the Court has also held, in that context, that the concept of 'imperative grounds of public security' contained in Article 28(3) presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons' (judgment in Tsakouridis, C-145/09, EU:C:2010:708, paragraph 41).

Next, it is important to note that the concept of 'public order' contained in Directive 2004/38, in particular in Articles 27 and 28 thereof, has been interpreted in the case-law of the Court as meaning that recourse to that concept presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (see, that that effect, judgment in Byankov, C-249/11, EU:C:2012:608, paragraph 40 and the case-law cited)."

The Board also refers to the CJEU's judgment **H.F. vs. Belgische Staat** *of 2nd May 2018 in which it was held:*

"Accordingly, the concept of 'public policy', in Articles 27 and 28 of Directive 2004/38 has been interpreted in the Court's case-law as meaning that recourse to that concept presupposes, in any event, the existence, in addition to the social disturbance which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (judgment of 24 June 2015, H.T. C-373/13, EU:C:2015:413, paragraph 79 and the case-law cited).

As regards the concept of 'public security', it is clear from the Court's case-law that this concept covers both the internal and external security of a Member State (judgment of 23 November 2010, Tsakouridis, C-145/09, EU:C:2010:708, paragraph 43). Internal security may be affected by, inter alia, a direct threat to the peace of mind and physical security of the population of the Member State concerned (see, to that effect, judgment of 22 May 2012, I., C-348/09, EU:C:2012:300, paragraph 28).

Moreover, while, in general, the finding of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of

the second subparagraph of Article 27(2) of Directive 2004/38, implies the existence in the individual concerned of a propensity to repeat the conduct constituting such a threat in the future, it is also possible that past conduct alone may constitute such a threat to the requirements of Public Policy (judgment of 27 October 1977, Bouchereau, 30/77, EU:C:1977:172, paragrah 29)."

*Given that the appellant's conviction (in the singular) does not even appear on his conduct certificate, the Board finds it hard to believe that there is reason to conclude that the appellant constitutes a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*" (to use the wording of the CJEU in both cases cited hereinabove).*

Due to this, the Board does not believe that the appellant's previous conviction should be a bar to renewal of his SRA status."

L-Appell

5. L-Aġenzija appellanta ippreżentat ir-rikors tal-appell tagħha quddiem din il-Qorti fit-12 ta' Lulju, 2021, fejn filwaqt li kkontendiet li din il-Qorti għandha ġurisdizzjoni tisma' l-appell odjern *ai termini* tas-subartikolu 25A(5) tal-Kap. 217, talbet lil din il-Qorti sabiex jogħġobha tħassar u tirrevoka d-deċiżjoni appellata, filwaqt li tordna lill-Bord sabiex jieħu deċiżjoni mill-ġdid skont il-konsiderazzjonijiet ta' din l-istess Qorti, bl-ispejjeż taż-żewġ istanzi kontra l-appellat. Tgħid li l-aggravji tagħha huma s-segwenti: (i) hija ma kinitx ippreżentat risposta quddiem il-Bord għaliex ma kinitx ġiet notifikata bl-appell; (ii) il-Bord għamel konsiderazzjoni manifestament żbaljata fir-rigward tal-applikazzjoni tal-appellat tal-2019 għal SRA; u (iii) il-Bord applika l-*policy* li ma kinitx viġenti fiż-żmien li saret l-applikazzjoni minflok li applika l-SRA *policy* il-ġdida li kienet viġenti dak iż-żmien.

6. L-appellat wieġeb fit-30 ta' Novembru, 2021, fejn għar-raġunijiet imfissra fir-risposta tiegħu, huwa ssottometta li l-appell tal-Aġenzija appellanta għandu jiġi miċħud fl-intier tiegħu.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

7. L-ewwel aggravju tal-Aġenzija appellata jirrigwarda punt ta' proċedura fejn hija qegħda tirrileva n-nuqqas tan-notifika tagħha bl-appell tal-appellat quddiem il-Bord, li sussegwentement wassal sabiex hija tonqos milli tippreżenta risposta, kif ikkonstatat saħansitra mill-imsemmi Bord fid-deċiżjoni appellata. Tgħid li n-nuqqas tan-notifika tagħha kien iwassal għan-nullità ta' dik id-deċiżjoni, għaliex il-prinċipju *audi alteram partem* jirrikjedi li l-ġudikant jisma' iż-żewġ partijiet qabel ma jgħaddi sabiex jiddeċiedi l-vertenza quddiemu. Tikkontendi li dan il-prinċipju jista' biss jiġi rispettat fil-każ odjern, jekk din il-Qorti tannulla d-deċiżjoni appellata u tibgħat l-atti lura quddiem il-Bord sabiex dan jiddeċiedi l-kawża mill-ġdid, u dan tgħidu filwaqt li ssostni l-argument tagħha b'riferiment għas-sentenza ta' din il-Qorti fl-ismijiet **Albert Beliard *vs.* Director tad-Dipartiment taċ-Ċittadinanza u tal-Expatriate Affairs**.[1] Matul it-trattazzjoni tal-appell odjern, l-Aġenzija appellanta ppreżentat rikors b'talba sabiex din il-Qorti tawtorizzaha tressaq rappreżentant tagħha sabiex jixhed dwar in-nuqqas tan-notifika tagħha bl-appell tal-appellat quddiem il-Bord u anki ta' dik l-istess proċedura. Sussegwenti għal din it-talba, xehdet waqt l-udjenza tat-2 ta' Frar, 2022 **l-Avukat Chanel Bantick**, prodotta mill-imsemmija l-Aġenzija appellanta, fejn irrilevat li huma kienu saru jafu bl-appell quddiem il-Bord hekk

[1] App.Inf.89/19GM.

kif huma ġew notifikati bid-deċiżjoni appellata. Spjegat li s-soltu l-Bord kien jikkomunika magħhom permezz ta' *email* hekk kif jiġi ntavolat appell, fejn huma jingħataw terminu għar-risposta tagħhom. Qalet li din id-darba, anki wara tfittxija li hija stess eżegwiet, ma kien hemm l-ebda notifika.

8. Wara li l-Qorti kkonfermat li fl-atti tal-Bord ma tirriżulta l-ebda prova tan-notifika tal-Aġenzija appellanta bl-appell ittrattat minnu, tgħid li l-imsemmija Aġenzija appellanta għalhekk għandha raġun tilmenta minn dan il-fatt, u tinsisti fuq in-nullità tad-deċiżjoni appellata fid-dawl tal-fatt li l-Bord naqas li jirrispetta l-prinċipju ta' *audi alteram partem*.

9. Għaldaqstant il-Qorti ssib l-ewwel aggravju tal-Aġenzija appellanta ġustifikat u tilqgħu, u stante li dan iwassal għal deċiżjoni ta' nullità tad-deċiżjoni appellata, il-Qorti ser tastjeni milli tieħu konjizzjoni tal-aggravji l-oħra.

<u>Decide</u>

Għar-raġunijiet premessi, il-Qorti tilqa' *in parte* l-appell intavolat mill-Aġenzija appellanta, filwaqt li tiddikjara li d-deċiżjoni appellata hija nulla, tordna sabiex l-inkartament sħiħ tal-proċeduri quddiem il-Bord, jintbagħat lura quddiemu għal deċiżjoni.

Fiċ-ċirkostanzi ta' dan l-appell, l-ispejjeż għandhom jibqgħu bla taxxa bejn il-partijiet.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur