



MALTA

**COURT OF APPEAL**  
**(Inferior Competence)**

**HON. JUDGE**  
**LAWRENCE MINTOFF**

Sitting of the 16<sup>th</sup> December, 2022

Inferior Appeal no. 103/2022 LM

**Zoran Ducic (Serb Passport no. 014181221)**  
*(‘the appealed party’)*

**vs.**

**Identity Malta Agency**  
*(‘the appellant’)*

**The Court,**

**Preliminary**

1. The present appeal has been filed by the respondent **Identity Malta Agency** [hereinafter ‘the appellant’] from the decision delivered on the 25 July, 2022, [hereinafter ‘the appealed decision’] by the Immigration Appeals Board, whereby it upheld the appeal presented before it by the applicant **Zoran Ducic (Serb Passport no. 014181221)** [hereinafter ‘the appealed party’], and thereby

revoked the decision taken by the appellant on the 20<sup>th</sup> January 2022, and ordered the latter to resume the processing of the application number R96998797 without delay.

### **Facts**

2. On the 9<sup>th</sup> November, 2021, the appealed party had filed with the appellant a Single Permit Application in accordance with S.L.217.17, which application was eventually refused on the 20<sup>th</sup> January 2022, due to the fact that at the time of its presentation, the appealed party had not been residing in Malta legally and was therefore considered as a prohibited immigrant in terms of para. (e) of subarticle 5(2) of Cap. 217.

### **Merits**

3. The appealed party therefore filed an appeal on the 25<sup>th</sup> July, 2022 before the Board, asking it to revoke the decision taken by the appellant, and to order that he should be issued with a residence permit in terms of S.L. 217.17. The appellant did not reply to the said appeal.

### **The Appealed Judgment**

5. The Board made the following considerations pertinent to the present appeal:

“ **1. Preliminary**

*The Board:*

*Saw that in virtue of a decision dated 20th January 2022, Identity Malta Agency stated that the appeal at the time it was submitted, the appellant was not legally present in Malta or legally present elsewhere in the European Union, and consequently fell foul of Regulation 8 of S.L. 217.17;*

*Saw that an appeal was registered on 24th February 2022; and*

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

*At the outset, the Board observes that in his appeal, the appellant stated that he was served with the Agency's decision on 24th February 2022 even though the decision was dated 20th January 2022. Consequently, the appeal is not deemed fuori termine.*

*The Board states that it disagrees with the appellant's first grievance and notes that the Agency's competence to issue such decisions stems from S.L. 595.07, as confirmed by the judgment of the Court of Appeal **Fabio Vespa vs . Id-Direttur tad-Dipartiment qħaċ-Ċittadinanza u l-Espatrijati**, handed down in July 2019.*

*Consequently, the appellant's first grievance is rejected.*

*As the Board can find no reply from the Agency in the relative file, the Board does not know on what grounds the appellant was deemed illegally present.*

*On his part, the appellant claimed that he submitted the relative application on 9th November 2021 and that at that time, he was within the ninety-day time window (within one hundred and eighty days) according to the Schengen Borders Code.*

*The Board observes that in this case, the Agency has not even mentioned the merits of the application. It has not even started to discuss whether the appellant's Single Permit application could succeed on its merits. Its decision is simply on admissibility. Frankly, the Board cannot understand why the Agency took between 9th November 2021 and 20th January 2022 simply to decide on the matter of admissibility. If the appellant's application was inadmissible, the Agency should have said so within one or two days.*

*Evidence provided by the appellant indicates that on 18th January 2022, Ms Kelly Zammit (an Agency employee) informed the prospective employer (**not the appellant personally**) that "in view of the circumstances of your case, the Principal Immigration Officer has agreed that a one-time concession is given so that the single permit application can continue to be processed by Identity Malta Agency."*

*Then, only two days after Ms Zammit's communication, the appellant's application was deemed inadmissible through the Agency's decision of 20th January 2022. Truly, this is a case of the right hand not knowing what the left hand is doing.*

***It is pertinent to note that the reference number assigned to the appellant's application (R96998797) is the same reference number quoted in Ms Zammit's communication of 18th January 2022. Therefore, Ms Zammit could not possibly have been referring to some other application.***

*Given that on 18th January 2022, the Agency declared unequivocally that the appellant's immigration position had been regularised by the Principal Immigration Officer, the decision of 20th January 2022 should not have been issued."*

## **The Appeal**

6. The appellant filed an appeal before this Court on the 29<sup>th</sup> July, 2022, where whilst it submitted that this Court has jurisdiction to hear its appeal in terms of subarticle 25A(8) of Cap. 217, it requests that the appealed decision be revoked, and that the Board should be ordered to decide the case afresh after

serving it with the acts of the appeal and allowing the appellant to file its reply and evidence and to make its submissions on the said case, with all costs against the appealed party. The appellant submits that it feels aggrieved by the decision taken by the appellant because it was never notified with the appeal, and it was therefore not in a position to file a reply.

7. The appealed party presented his reply on the 9th November, 2022 whereby he is opposing the requests put forward by the appellant. He insists that the appealed decision should be confirmed for those reasons which he explains in the said reply, with costs against the appellant.

### **This Court's considerations**

8. This Court shall now proceed to consider the grievance of the appellant, taking into consideration the appealed party's submissions.

9. The said grievance concerns a procedural issue where the appellant argues that the lack of service of appealed party's appeal before the Board has prevented it from filing a reply. It submits that the Board actually stated that it had not filed its submissions, but asks how this could be possible once it was never notified with the appealed party's appeal. The appellant contends that the Board itself put an emphasis on the principle of *equality of arms* in terms of subarticle 3(2) of Cap. 490, however the Board did not go far enough as it had not applied the said principle appropriately by ordering the service of the appeal application, and by consequently taking cognizance of its reply in reaching a final decision. The Board had therefore only considered the appealed party's

submissions and this through no fault of the appellant, but because the said Board had failed to notify it with the appeal application. The appellant argues that the Board's failure renders its decision null because the principle of *audi alteram partem* requires an adjudicating body to hear both sides before deciding the dispute before it. The appellant contends that however this principle may be respected if this Court decides to annul the appealed decision and to return the acts of the present proceedings to the Board for it to decide the case afresh. The appellant here refers to this Court's judgment of the 12<sup>th</sup> January, 2022 in the names **Albertus Johannus Leonard Springer vs The Director of the Department for Citizenship and Expatriate Affairs**, Appeal App. No. 61/2021LM in defence of its argument.

10. In his reply, the appealed party contends that the present appeal is inadmissible because subsection of 25A(8) of Cap. 217 states clearly that "*the decisions of the Board shall be final except with respect to points of law decided by the Board regarding decisions affecting persons as are mentioned in Part III...*". He explains that he does not fall in any category listed under Part III, with particular reference to article 4A thereof, and therefore both parties do not have a right to appeal from the Board's decision. The appealed party lists the different categories of persons listed under article 4A, and explains that he is not a citizen of a Member State of the European Union and neither a dependent of a citizen of the European Union. As to the third category, he insists that he does not qualify as a person who is legitimately in the territory of a state bound by a Border Agreement, because he entered Malta directly from Serbia which is his country of birth. In defence of his argument, the appealed party refers to

the previous judgments of this Court, presided by different judges, as well as to the parliamentary debate of the sitting of the 25<sup>th</sup> June, 2002, and argues that he does not qualify as a person in respect of whom an appeal can be filed, and consequently the present appeal is null and void and should be declared inadmissible by the Court. As to the issue raised by the appellant, the appealed party contends that he should not be held responsible for the service of acts and that it was the Board which was responsible for the procedure.

11. The Court considers that the appealed party's first plea intended to quash the present appeal, is justified. It is clear that subarticle 25A(8) of Cap. 217 does not allow appeals to be brought before this Court in all instances, except those affecting individuals referred to in Part III of that law. As the appealed party rightly contends, he does not fall in any of the categories defined by article 4A, which are intended as exceptions, and consequentially there is no appeal from the Board's decision.

12. The Court therefore finds appealed party's plea justified, and hereby abstains from taking cognizance of the present appeal filed by the appellant.

### **Decide**

**For the above reasons, the Court abstains from taking cognizance of the present appeal, whilst declaring it to be inadmissible.**

**All expenses in respect of the present proceedings shall be borne by the appellant.**

Read.

**Hon. Dr Lawrence Mintoff LL.D.  
Judge**

**Rosemarie Calleja  
Deputy Registrar**