



MALTA

**COURT OF APPEAL**  
**(Inferior competence)**

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

Sitting of the 25th January, 2023

Inferior Appeal no. 77/2022 LM

**Ivan Polishchuk (Ukraine Passport no. ES756615)**  
*(‘the appellee’)*

**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 Agency’] from the decision delivered on the 17<sup>th</sup> June, 2022, [hereinafter ‘the appealed decision’] by the Immigration Appeals Board [hereinafter ‘the Board’], whereby it upheld the appeal presented before

it by the applicant **Ivan Polishchuk (Ukraine Passport no. ES756615)** [hereinafter ‘the appellee’], and thereby revoked the decision taken by the appellant Agency communicated by email dated 8<sup>th</sup> November, 2021, and directed the appellant Agency to process his application on its merits according to law.

### **Facts**

2. From the appeal application filed by the appellee before the Board, it results that on the 2<sup>nd</sup> November, 2021, the appellee’s employer Daniel Marine Ltd had filed an online Single Permit Application with the appellant Agency on behalf of the said appellee, in accordance with S.L.217.17. According to an email of the appellant Agency dated 8<sup>th</sup> November, 2021, the application was to be refused unless the appellee could present “...a valid Polish residence card based on employment is presented, or another valid stamp or Type C visa are presented, the application will not be accepted. Kindly be guided accordingly”.

### **Merits**

3. The appellee filed an appeal before the Board on the 11<sup>th</sup> November, 2021 asking it to:

- “i. Order the Director of Identity Malta Agency to accept the application for the Single Permit of the appellant in terms of law without further delay, or*
- ii. Alternatively, to decide on the admissibility of the application for the Single Permit and order the Director to process the said application, and this without prejudice to the right of the appellant to appeal the decision related to the*

*subsequent decision on his application should the appellant feel aggrieved with the final decision”.*

4. It does not appear that the appellant Agency filed a reply.

### **The Appealed Decision**

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

**“1. Preliminary**

*The Board:*

*Saw that although no copy of a formal decision issued by Identity Malta Agency was provided, it was understood that the appellant is appealing the Agency’s refusal to continue to process his application on its merits as it considers that there is no evidence that he fulfils the criteria in Regulation 8 of S.L. 217.17;*

*Saw the appeal registered on 11<sup>th</sup> November 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 6<sup>th</sup> 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 disagrees with the wording used as it is one which expresses uncertainty. The Agency rejected the appellant’s application because “it appears” that the*

*appellant was illegally present in Malta at the time the application was submitted. However, when rejecting an application, the Agency must be certain not uncertain.*

*The appellant stated, inter alia:*

- *That on 2<sup>nd</sup> November 2021, the prospective employer lodged a Single Permit application in his name;*
- *That the applicable fees were paid;*
- *That later that same day, the Agency informed the prospective employer that the appellant lacked an entry stamp in his passport and requested evidence of a valid Polish residence permit;*
- *That on 3<sup>rd</sup> November 2021, the Agency requested a scanned copy of the appellant's Polish visa;*
- *That on 3<sup>rd</sup> November 2021, he provided a copy fo a Polish visa which was valid until 14<sup>th</sup> November 2021;*
- *That on 4<sup>th</sup> November 2021, the Agency stated that the application could not be considered submitted as the appellant's Polish visa was not valid for entry into Malta.*

*The Board, referring to the Agency's e-mail of 4<sup>th</sup> November, 2021, notes that a copy of such e-mail was attached to the appeal as document "E2". In that e-mail, an unidentified Agency official stated that the appellant could not submit a Single Permit application unless he had a visa which was valid to enter Malta or "valid for Schengen".*

*The Board disagrees with this. Regulation 8(1)(c) of S.L. 217.17 states that in order for the appellant to submit an application, he had to be legally present in the Member State from which the application is submitted. In this case, the Agency (judging by the e-mails exchanged, especially Ms Kelly Zammit's e-mail of 4<sup>th</sup> November 2021) did not contest that the appellant was not legally present in Poland. Therefore, he **could** submit the application from Polish territory. What is necessary is the appellant's legal presence in the place from which he submits the application, not that the appellant's visa or residence permit allows him to travel within the Schengen Area."*

## **The Appeal**

6. The appellant Agency filed an appeal before this Court on the 23<sup>rd</sup> June, 2022, and whilst it submits 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 its decision of the 6<sup>th</sup> December, 2021 confirmed, with costs against the appellee. The appellant Agency submits that it feels aggrieved by the decision taken by the Board because the latter interpreted the law wrongly, with particular reference to para. (c) of subregulation 8(1) of L.S. 217.17.

7. The Appellee chose not to file a written reply.

## **Considerations of this Court**

8. This Court shall now proceed to consider the grievance of the appellant Agency in the light of the Board's decision.

9. After explaining the facts that gave rise to the present proceedings, the Board in its decision stated that this Court has jurisdiction in terms of subarticle 25A(8) of Cap. 217 to hear the said proceedings, since the applicable regulations had been made in accordance with the powers conferred by article 4A of the said law. The appellant Agency submits that it could not entertain an application filed by the appellee because of the dispositions of para. (c) of subregulation 8(1) of L.S. 217.17, which transposed into local legislation Directive 2011/98/EU where subarticle 4(1) stated that the applicant must reside legally in the Member State when filing an application. In the present case, the appellant Agency says that the Board had considered that the appellee was legally present in Poland and he

could therefore file his application from that country. The appellant Agency agrees with this view, but declares that the application under review was filed in Malta and it was not a *'still abroad application'*. It had therefore been necessary to establish whether the appellee was legally resident in Malta or otherwise at the time he filed his application. The appellant Agency said that it had resulted that the appellee could legally enter Malta with the visa issued to him in Poland, and in fact he came to Malta on the 17<sup>th</sup> May, 2021 as evidenced by his passport. Then on the 2<sup>nd</sup> November, 2021, the appellee had filed his application but this was well over two months after the said visa had expired. The appellant Agency declared that it does not have any power to regularise irregular positions of applicants, and in this case it had communicated with the Principal Immigration Officer before a decision on applicant's case had been taken. However the Principal Immigration Officer decided not to regularise the position of the appellee, and it was prepared to prove this by means of the testimony of the Principal Immigration Officer or his representative/s. Therefore once the applicant was residing in Malta illegally and the local legislation as well as the European Directive 2011/98/EU offered no exemption, the appellant Agency rightly refused to accept the application filed by the appellee. The said appellant Agency also submits that it does not agree with the Board's statements wherein it cast doubt as to the wording in its decision. It explains that the reason for refusal was clear and the phrase *"it appears"* was another way of stating *"it appears that"*, whereby it is being stated that it is an evident fact. The appellant Agency refers to the electronic site 'Dictionary.com' for the definition of this phrase, and states that the Board was incorrect in its consideration.

10. The Court must firstly confirm that it does have jurisdiction to consider the present appeal, and this in accordance with the provisions of subarticle 25A(8) of Cap. 217 of the Laws of Malta, since it transpires that the appellee must be considered as a person falling under the category described in para. (c) of subarticle 4A(1) of that same law.

11. As to the appellant Agency's grievance that the Board interpreted the law incorrectly, particularly the provisions of para. (c) of subregulation 8(1) of S.L. 217.17, the Court agrees with the Board's interpretation of such provisions. It considers that the terms of this particular subregulation together with those of para (c) thereof, are clear enough and do not leave any doubt as to what was required from the appellee, i.e. he must be legally residing in the Member State where he is present and wherefrom he submits the Single Permit Application. Contrary to what was communicated to the appellee by the Administrative Officer of the appellant Agency on the 8<sup>th</sup> November, 2021, the law does not require valid entry documents in respect of any other Schengen country. As the Board rightly observes in its email of the 4<sup>th</sup> November, 2021, the appellant Agency did not contest the validity of the visa issued in Poland to the appellee, but it only argues that this "*...has been issued as valid only in Poland*", which argument has no significance in terms of para. (c) of subregulation 8(1) of S.L. 217.17. According to the email of appellee's legal counsel of the 3<sup>rd</sup> November, 2021, his visa which was issued on 10<sup>th</sup> March, 2021 was valid through to 14<sup>th</sup> November, 2021, and therefore no issue of its expiry or otherwise could have been raised, and the appellee's *Single Permit Application* should have been considered, even taking into consideration that the appellee was present in

Malta as declared in his application. It is clear that the appellant Agency was made aware and accepted that the appellee's presence in Malta was not illegal. This is evidenced by the email of the 3<sup>rd</sup> November, 2021 sent to the appellant Agency by the appellee's legal counsel, as well as by the email of the 8<sup>th</sup> November, 2021 forwarded to the latter by the appellant Agency in reply to a later email of his.

12. The Court therefore declares the appellant Agency's grievance as unfounded and rejects it.

### **Decide**

**For the above reasons, the Court rejects the appellant Agency's appeal and confirms the appealed decision.**

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

Read.

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

**Rosemarie Calleja  
Deputy Registrar**