MALTA

# COURT OF APPEAL
**(Inferior Jurisdiction)**

## HON. JUDGE LAWRENCE MINTOFF

Sitting of 8th February, 2023

Inferior Appeal number 37/2022LM

**Tayfun Rodoplu**
**(Maltese Identity Card No. 0209694A)**
*('the appealed party')*

***vs*.**

**Identity Malta Agency**
*('the appellant')*

**The Court,**

**<u>Preliminary</u>**

1. The present appeal has been filed by the respondent **Identity Malta Agency** [hereinafter 'the appellant Agency'] from the decision delivered on the 14th April, 2022, [hereinafter 'the appealed decision'] by the Immigration Appeals Board, whereby it upheld the appeal presented before it by the

applicant **Tayfun Rodoplu (Maltese Identity Card no. 0209694A)** [hereinafter 'the appealed party'] and thereby revoked the decision taken by the appellant Agency on the 3rd March, 2021 for those reasons explained in the said decision.

**Facts**

2. On the 3rd February, 2021, the appealed party had filed with the appellant Agency a Single Permit Application in accordance with S.L.217.17, which application was eventually refused due to the fact that in carrying out its' due diligence exercise, the said application was recommended for refusal by Jobsplus. It was explained that according to the MBR, it resulted that appealed party was both director and shareholder of the company Trihills Construction Ltd, whilst no evidence had been presented to show that the said appealed party was eligible under the investment criteria.

**Merits**

3. The appealed party therefore filed an appeal on the 22nd March, 2021 before the Board, asking it to declare the decision taken by the appellant Agency on the 3rd March, 2021 to be null and void and unenforceable, and to order that he should be issued with a single work permit. The appellant Agency replied and asked the said Board to confirm the decision of the Director for Citizenship and Expatriates Affairs.

## The appealed decision

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

*"1. **Preliminary***

*The Board:*

*Saw that in virtue of a decision dated 3rd March 2021, Identity Malta Agency stated that the relative application for a Single Permit, lodged on 3rd February 2021, had been rejected for the following reason: "...s*ince according to MBR records, Mr Rodoplu is featuring as a Director and Shareholder of this company. No evidence has been submitted with the application to suggest that this person is eligible under the investment criteria";

*Saw the appeal registered on 8th March 2021;*

*Saw the reply filed by Identity Malta Agency;*

*Saw its decree issued on 2nd July 2021; and*

*Saw the note filed by Identity Malta Agency on 15th July 2021 in response to the Board's decree.*

***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.*

*Through its decree of 2nd July 2021, the Board asked the Agency to explain in detail:*

*i. Which part of the investment criteria the appellant's application allegedly failed to fulfil; and*

*ii. Why, in the Agency's view, it was illegal or otherwise not permitted for the appellant to hold a Single Permit enabling him to work for a company in which he is a director and a shareholder.*

*Through a note filed on 15th July 2021, the Agency explained:*

"That the appellant's application was not recommended for approval as he is featuring as a director and shareholder of the same company and he failed to submit any evidence that he is eligible under the investment criteria. The investment criteria is enlisted in Section 3.2 of the aforementioned guidelines".

*The Board observed that the Agency failed to explain why, in its view, it was illegal or otherwise not permitted for the appellant to hold a Single Permit enabling him to work for a company of which he is a director and a shareholder.*

*The Board has stated on multiple occasions that to the best of its knowledge, there is no law currently in force which states that a director and/or a shareholder cannot be an employee of the company of which he is a director and/or a shareholder. As far as the Board is aware, Maltese law does not disallow this. There is nothing wrong with the appellant working for a company of which he is also a director and a shareholder.*

*The Board refers to a letter dated 16th March 2021 issued by Mr Raphael Abdilla, Executive Director of Infrastructure Malta, in which it was stated that the appellant was the project manager for the Marsa Junction Project Phase 3, a project owned by Infrastructure Malta. Mr. Abdilla stated in no uncertain terms that the appellant "wa*s responsible for management and coordination of the project, and all related works for the successful delivery of the project".

*It was further stated that the appellant "...* shared his extensive knowledge and experience in asphalt production and laying, both as a contribution to this particular project as well as the develpment of the technical specifications applicable for road networks which happened to be upgraded at the time. This experience proved to be crucical in modifying the project's asphalt concrete to a more durable material (Stone Mastic Asphalt), previously reserved for airport runways."

*Mr. Abdilla continued to state that the appellant* "... was involved in the coordination of all works related to road construction, buried services infrastructure, substructure construction, both concrete and steel superstructure construction management, as well as traffic management phasing plans. In regular progress meetings, he contributed towards satisfactory execution of the project, whilst in challenging

situations, he would also suggest alternative solutions outling the respective foreseeable benefits for the choices of the client."

*Lastly, "*...on behalf of IM, during his employment on the project, Mr Rodoplu proved to be a reliable asset, fulfilling his position's expections. Following this project, he has remained open to assist in matters relating to improvement of asphalt industry and road surfaces."

*The appellant also presented an affidavit in which he confirmed, inter alia, that he was a project manager within the project related to the construction of the Marsa flyover. He stated that after the project was completed, he set up a company called Trihills Construction Limited (C94163) with Mr Joseph Cassar and Mr Cassar's son. He further stated that following his application for a Single Permit, no one from Identity Malta Agency or from Jobsplus contacted him or anyone else at Trihills Construction Limited asking for any information or clarification.*

*He explained that the company had since entered into joint venture agreements, as follows:*

- *A joint venture with Schembri Infrastructures Limited and a Turkish company in the hope of being awarded the tender for the project at Malta International Airport (tender number MIA/08/20);*

- *A joint venture with Trihills Heavy Industries (C58892) and a Turkish company related to the Msida flyover project (tender number IM013/2020).*

*He added that moreover, Trihills Construction Limited had made offers for the tenders for other major infrastructural projects such as the Pembroke reverse osmosis project (project CT2331/2020)*

*He confirmed that he had the required skillset, knowledge and experience to oversee all these projects as well as other ongoing projects. He was the one capable of making the specific type of asphalt required. Acording to the appellant, Trihills Construction Limited had already invested directly in Malta's economy by purchasing three vehicles to be used by company employees in company operations. He confirmed that once the abovementioned projects were secured, the company would invest in machinery and equipment worth well over a million Euros. He undertook to provide this Board with the requisite proof of such investment once it was made.*

*Having seen the document issued by Mr Abdilla (Insfrastructure Malta's executive director), having seen the appellant's affidavit, and having observed that Mr Abdilla's letter and the appellant's affidavit are in agreement as to their content, the Board has no doubt that the appellant has already greatly contributed to Malta's infrastructure.*

*Insofar as the appellant's immigration status is concerned, the Board reiterates that as far as it is aware, there is no law which states that a company many not have a director and/or shareholder as an employee.*

*Furthermore, with reference to the investment criteria, the Board notes that these are an instrument of malleable policy and not an Act of Parliament. Therefore, they cannot and should not be applied in such a rigid manner, especially given the appellant's unique background."*

**L-Appell**

5. The appellant Agency filed an appeal before this Court on 25th April, 2022, where whilst it submits that this Court has jurisdiction to hear its' appeal in terms of subarticle 25A(5) of Cap. 217, it requests that the appealed decision be revoked, and it presents the following grievances: (i) the Board had no jurisdiction to determine the present case; and (ii) the Board decided *ultra vires* and *extra petita,* because it had no authority to act as a regulator of polices which fell within the ambit of appellant Agency's jurisdiction.

6. The appealed party replied on 12th July, 2022, where he is contending that the present appeal should be rejected for those reasons which he explains in his reply.

**Considerations**

7. The Court will first consider a procedural issue being raised by the appellant Agency, which if rejected will require the Court to abstain from hearing the present appeal, but if accepted to be correct it will pass on to decide the said appeal. The appellant Agency insists that the Court does have

jurisdiction to hear this appeal in accordance with the provisions of subarticle 25A(8) of Cap. 217, since the applicable regulations were issued under article 4A of the said law. The Court agrees. After having considered the provisions of subarticle 25A(8) of Cap. 217, as well as those of article 4A of Part III of the said law, it declares that it has jurisdiction to entertain the present appeal. The Court finds that the appealed party who is of Turkish nationality, is to be considered to be lawfully present in Malta which is one of those states bound by a Border Agreement. Therefore the appellant Agency is correct and the Court will entertain its appeal.

8. The first grievance of the appellant Agency is that the Board had no jurisdiction to hear the appeal filed before it by the appealed party. It cites the provisions of para. (c) of subarticle 25A(1) of Cap. 217 in its favour, with a special emphasis on the words *"...the provisions of this Act or regulations made thereunder or in virtue of any other law".* The appellant Agency explains that the present proceedings concern a policy implemented by *Jobsplus,* which it insists is not a dispostion of the law or of any regulation made under that same law or a disposition of any other law. It says that in terms of the legal principle *ubi lex voluit dixit, ubi noluit tacit,* the legislator did not wish the Board to have jurisdiction beyond that defined by para. (c) of subarticle 25A(1) of Cap. 217 cited earlier. The second grievance of the appellant Agency is that the Board's decision is *ultra vires* and *extra petita,* because it does not have the function to regulate policies which fall within its remit. It refers to and cites two judgments delivered by our Courts to sustain its argument. The appellant Agency insists that the Board does not have the function of creating, regulating and extending

the application of policies which are made by the said appellant Agency or by *stakeholders* who are involved in processing applications for residence permits. Therefore it cannot agree with the words of the Board regarding the application of the said policies. The appellant Agency argues that *Jobsplus* has been granted authority to regulate the job market, and therefore the said appellant Agency is responsible to liaise with it when processing single permits in terms of regulation 12 of S.L. 217.17. It must however respect the spirit of the law as well as that of the Directive in issuing permits, and it must keep in mind the requirements of the job market. The appellant Agency insists that although the judiciary has the power to investigate whether administrative policies were made and applied in accordance with the law and in accordance with the principles of natural justice, certainly it is not within the Courts' power to create and regulate policies. It contends that although the Board must investigate whether the appellant Agency acted within the parameters established by law, no doubt it does not have the remit to create policies. The appellant Agency submits that the Board has the authority to examine the merits of the case brought before it and to ensure that the decision was taken according to law. However it may not assume the responsibility of regulating the job market of our country. It argues that when the Board in respect of the policies in question considered that "these are an instrument of malleable policy and not an Act of Parliament", it was making contradictory statements because it was Parliament that empowered the Agencies to establish policies in their respective competencies. The appellant Agency continues to argue that the Court should not accept the Board's argument that in the case of a policy which is not an act emanating from Parliament directly, this should be interpreted in an arbitrary

manner or even completely set aside in order to allow a quasi-judicial body, similar to the Board, to establish another policy. It expresses its disagreement with the Board's opinion that the policies should not be applied *"in such a rigid manner",* since they are not Acts of Parliament, because otherwise the executive could afford different treatment to applicants in a discriminatory fashion. It was for this same reason that Jobsplus had published clear criteria to be applied across the board in respect of all applicants, whether shareholders or ultimate beneficial owners. For the said reason too, the criteria were published and accessible online in the English language on the Jobsplus website. The appellant Agency refers to the declaration made by the appealed party in respect of the investment made by the company Trihills Construction Limited, and insists that the criteria listed in section 3.2 of the guidelines issued by Jobsplus had not been adhered to. It expresses its view that the Board was therefore acting *ultra vires* and its decision must also be considered *extra petita* when it decided to widen the criteria of the policy established by Jobsplus.

9. The appealed party argues that this first grievance presented by the appellant Agency is unfounded, and it should have in any case been raised during proceedings before the Board, but not those before this Court. He contends that the Board has the authority to decide appeals from applications and the ensuing decisions upon them delivered by the appellant Agency. As to the second grievance, the appealed party insists that the Board in its decision had in no way created, regulated or extended the application of the policies of the appellant Agency or those of Jobsplus. He submits that the appellant Agency is resting its arguments on a policy of a separate entity, which policy offers a guideline only in respect of the labour market. He insists that Jobsplus

is only a *stakeholder* where single work permits are concerned, to assist in labour market testing. This was evidently clear from the Jobsplus website. However Jobsplus had no other involvement or authority to impose criteria upon the appellant Agency in order to ensure that only single work permits acceptable to them are issued. The appealed party submits that as he had already explained before the Board, the alleged 'investment critera' upon which the appellant Agency based its refusal, do not appear among the criteria published by the same said appellant Agency. This may be confirmed from Document 6 attached to his appeal application before the Board. He contends that it was therefore unfair that the said criteria was only brought to his attention in the appellant Agency's decision, whereby it refused his application. The appealed party submits that the said appellant Agency could have freely decided to clarify the issue with him and to ask for further information, perhaps even from the company which was to employ him. This was not unusual during the processing of applications, but the appellant Agency had failed to act accordingly. As was correctly stated in the appealed decision, there was no legal impediment to his employment with the company where he was both shareholder and director. He continues to argue that as the Board rightly pointed out, there is no law which prohibits this. Whilst referring to the financial statements of 2021 and the VAT returns for the months of January, February and March of last year as evidence of the company's commercial activities, on a final note he asks the court to authorise him to produce a witness who will explain the various tenders the said company was involved in.

10. The Court cannot agree with the position of the appellant Agency in respect of both grievances. The provisions of para. (c) of subarticle 25A(1) of Cap. 217 essentially empower the Board to hear and decide applications and appeals made under the provisions of that same law or under the regulations made thereunder, as well as any other law which may likewise grant it jurisdiction. Were the Court to accept the appellant Agency's argument in respect of the application of such policies by the Board, it would be condoning the avoidance of responsibility on its part for decisions taken in respect of individual applicants. It considers that what the appellant Agency is suggesting would certainly fail to respect the intention of the legislator, which with no uncertain doubt was to ensure accountability and to avert arbitrariness. The Court must also express that it would be completely illogical to accept that the appellant Agency, whilst having the power to decide upon applications brought before it in terms of Regulation 12 of S.L.217.17, can avoid shouldering responsibility for its decisions by claiming that it was not the author of the policy. If the ultimate decision is made by the appellant Agency in terms of the said Regulation 12, it must carry full responsibility for it, and therefore ensure that it respects the law upon all aspects. This Court therefore does not find this first grievance justified and rejects it.

11. The Court also finds the second grievance unjustified. The Court will declare from the outset that it will not consider any argument brought forward by the parties which touches upon the merits of the case. The terms of subarticle 25A(8) of Cap. 217 strictly prohibit it from entertaining such arguments, in limiting the right to appeal from the Board's decision to points of law. Therefore the Court can safely say that it will not investigate whether the

Board was correct in its interpretation of the policy which was referred to by the appellant Agency in its refusal of the appealed party's application for a single permit. It otherwise considers that the Board was correct in stating that a policy is not an Act of Parliament, because the former is made by an authority or other body to regulate its own activities and decisions in a rather informal manner, whilst the latter is made by Parliament and does not allow for any derogation whatsoever other than within the established parameters. The Board's comments were therefore correct and in the light of the above the Court considers that the appealed decision cannot be considered as *ultra petita* or *extra petita.*

**Decide**

**For these reasons, the Court declares that it is hereby abstaining from hearing the present appeal.**

**All costs shall be borne by appellant Agency.**

Read.

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

**Rosemarie Calleja**
**Deputy Registrar**