



MALTA

COURT OF APPEAL
(Inferior Competence)

HON. JUDGE
LAWRENCE MINTOFF

Sitting of the 26th July, 2023

Inferior Appeal no. 80/2022 LM

Andrii Storozhyshyn
(Maltese Identity Card No. 0227194A)
(‘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 17th June, 2022, [hereinafter ‘the appealed decision’] by the Immigration Appeals Board, whereby it upheld the appeal presented before it by the

applicant **Andrii Storozhyshyn (Maltese Identity Card No. 0227194A)** [hereinafter ‘the appellee’], and thereby revoked the decision taken by the appellant Agency, and ordered that the application procedure should resume according to law and on its merits, for those reasons explained in the said decision.

Facts

2. On the 11th November, 2021, the appellee had filed with the appellant Agency a Single Permit Application in accordance with S.L.217.17, which application was eventually refused because his position was deemed irregular in terms of the Immigration Act after the visa-free period had expired and the said position was not regularised by the Principal Immigration Officer.

Merits

3. The appellee therefore filed an appeal on the 7th December, 2021 before the Board. 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 issued by Identity Malta Agency on 6th December 2021, the appellant's application for a Single Permit was rejected for the following reason: "...in view that it appears that at the time of submitting this application, your position in Malta was irregular...";

Saw the appeal registered on 7th December 2021;

Saw Identity Malta Agency's reply filed on 26th January 2022.

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 disagrees with the Agency's decision in the sense that the wording used 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. This is not acceptable. When rejecting an application, the Agency must be certain, not uncertain.

In its reply, the Agency stated that the appellant submitted the relative application for a Single Permit on 11th November 2021, which was more than seven months after his employment with Ariaco Limited had ended. Such employment ended on 31st March 2021, according to a screenshot from Jobsplus' internal systems.

The Agency then argued that the appellant's case was brought before the Principal Immigration Officer, who assessed the case and decided not to regularise the irregularity. It stated that this would be confirmed should the Principal Immigration Officer be summoned to testify.

However, if it is true that the Principal Immigration Officer was consulted on the matter, the Agency should have provided evidence of what it alleged. It is up to each party to produce evidence in support of what it alleges.

Consequently, the Agency's decision is insufficiently informative as it failed to describe how the Agency came to its conclusions.

The Board notes that it disagrees with the appellant's first grievance in the sense that the Agency's decision indicates the appellant's postal address. Therefore, he was, in fact, validly served with the Agency's decision. In any case, however, the appellant filed an appeal a day after the Agency's decision was issued. Therefore, any shortcoming which there may have been on the Agency's part caused him no harm.

The Board cannot understand why the Agency is stating that the relative application was lodged on 11th November 2021 when the extract from its internal systems (document B) indicates that the Single Permit application process started on 12th October 2021. In fact, for example, the entry for 15th October 2021 (Audit Log number 28) seems to be an instruction to the appellant to change the application context to "change employer following termination". In that instance, the appellant was told to resubmit the same application from the online portal and attached the relevant documentation by 18th October 2021.

The Board also disagrees with this reasoning. An application is deemed submitted at the moment of initial contact (in this case, on 12th October 2021).

The Board now refers to paragraphs 3 and 4 of the appellant's appeal and notes that he did not explain the gap between April 2021 and October 2021. What was the appellant doing during those six months?

The appellant is wrong to contend that the appellant's residence card was valid until 23rd December 2021. A residence card is only valid for as long as the purpose for which it was issued still holds. If a residence card is issued on the basis of employment and that employment is terminated prior to the card's natural expiry date, then the card is deemed expired as it would no longer be serving a purpose and its content would no longer be true.

*The Board notes that it has paid particular attention to the judgment of the Court of Appeal of 9th March 2022 **Tufale Ahmed vs Id-Direttur tad-Dipartiment taċ-Cittadinanza u l-Espatrijati**, wherein it was stated:*

"Id-deċiżjoni li wieħed japplika sabiex jingħata permess għax-xogħol f'pajjiż terz, mhijjex deċiżjoni faċli u tħalli impatt kbir fuq il-ħajja ta' dak li jkun..."

The Board accordingly understands that the intervening time period must have been used by the appellant in an effort to secure alternative employment. Given that third-country nations are often at the mercy of prospective employers, the Board would not be surprised to learn that a prospective employer submitted a Single Permit

application for an individual at a late stage, with the consequence that by the time it is submitted, the Agency would end up considering the appellant illegally present.”

The Appeal

5. The appellant Agency filed an appeal before this Court on 23rd June 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, whilst contending that the Board appreciated the law incorrectly, particularly para. (c) of subregulation 8(1) of S.L. 217.17 and the date of application.

6. The appellee replied on the 4th April, 2023 where he is contending that appealed decision should be confirmed for those reasons which he explains in his reply.

Considerations

7. 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.

8. The Court does not agree. 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 the appellant Agency cannot on the one hand insist that the appellee was residing in Malta illegally at the time he submitted his Single Permit Application, and on the other declare that it is legally empowered in

terms of the said subarticle to file this present appeal. The said provisions are sufficiently clear and they allow an appeal only in those cases which concern the categories of persons indicated under article 4A. With particular reference to para. (c) of subarticle 4A(1) of Cap. 217, the Court acknowledges that appellee who is of Ukrainian nationality and who was illegally residing in Malta at the time of filing his application as stated by the appellant Agency itself, does not fall within any one of the categories listed in article 4A.

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**