



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-15 ta' Settembru, 2023

Appell Inferjuri Numru 131/2022LM

Vijesh Choloth (K.I. nru. 0223358(A))
(l-appellat')

vs.

Identity Malta Agency
(l-appellanta')

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mill-intimata **Identity Malta Agency** [minn issa 'l quddiem 'l-Aġenzija appellanta'] mid-deċiżjoni tas-7 ta' Ottubru, 2022, [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 tar-rikorrent **Vijesh Choloth (K.I. nru. 0223358(A))** [minn issa 'l quddiem 'l-appellat'] bil-kundizzjoni li dan tal-aħħar kellu jintavola mill-ġdid l-applikazzjoni tal-impjieg tiegħu fi żmien għaxart ijiem min-notifika tad-deċiżjoni appellata, filwaqt li l-Aġenzija appellanta giet ordnata sabiex tipproċessa l-imsemmija applikazzjoni u tagħti d-deċiżjoni tagħha fir-rigward.

Fatti

2. Il-fatti tal-appell odjern jirrigwarda l-permess ta' residenza tal-appellat li gie revokat mill-Aġenzija appellanta fit-12 ta' Jannar, 2022, hekk kif il-prinċipal tiegħu nnotifikaha li huwa kien ittermina l-impjieg tal-appellat miegħu. Skont l-appellat, huwa kien ilu sentejn jaħdem f'dan l-impjieg mingħajr ma jingħata permess sabiex jieħu l-leave. Izda fl-aħħar dan kien ingħatalu, u huwa kien ibbukkja u ħallas għal vjaġġ lejn l-Indja sabiex iżur il-familja tiegħu. Meta gie lura fid-9 ta' April, 2022, l-appellat sab l-ittra tar-revoka tal-permess ta' residenza li kienet intbagħtet lilu mill-Aġenzija appellanta kważi erba' xhur qabel, wara li l-prinċipal tiegħu kien infurmaha li l-impjieg tiegħu kien gie tterminat fit-30 ta' Novembru, 2021.

Mertu

3. Għalhekk fid-19 ta' April, 2022, l-appellat ntavola proċeduri ta' appell quddiem il-Bord għar-revoka ta' din id-deċiżjoni tal-Aġenzija appellanta, u wara li permezz tal-ittra tal-avukat difensur tiegħu tat-30 ta' Mejju, 2022 huwa ppreżenta s-sottomissjonijiet tiegħu bil-miktub, il-Bord għadda sabiex iddeċieda l-każ fis-7 ta' Ottubru, 2022.

Id-deċiżjoni appellata

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

“1. Preliminary

The Board:

Saw that in virtue of a decision on 12th January 2022, Identity Malta Agency stated that the appellant’s permit to reside in Malta had been refused in view that the appellant’s employer had submitted a termination of his employment, hence nullifying his work residence permit from the date of termination.

Saw the initial letter of appeal, emailed on 19th April 2022, and the official letter of appeal, dated 30th May 2022;

Saw the appeal registered on 19th April 2022; and

Identity Malta Agency did not file a reply.

1. 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 the 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.*

Dr. Maria Karlsson, legal counsel to the appellant, lodged a letter of appeal on his behalf, whereby she stated that:

- *The appellant had been working for Electrique Co Limited for two years since 2019, without being given any vacation leave or being paid for it. Instead, the appellant accumulated the leave with an understanding from his employer;*
- *In November 2021, the leave was approved verbally by his employers;*

- *The day before he was due to leave, that is on 3rd December 2021, he was told that he was needed at his place of work and that he must not travel and take his vacation leave, whilst not being given an option of a replacement ticket;*
- *The appellant had already paid for his ticket and informed his employers that he was going on vacation, as had been approved in the previous month;*
- *Within 24 hours that the appellant left Malta, the company terminated his employment, stating that the reason for termination was that the employee had resigned and went abroad;*
- *Whilst in India, it so happened that his country was placed on the dark red list due to Omicron, and he was not able to return to Malta as had been planned;*
- *Another reason which made it impossible for the appellant to leave his country was that his wife was not well. The appellant stated that he had advised his employers about this;*
- *Whilst being abroad, just a week prior to coming back to Malta, the appellant received a letter at his Maltese address, from Identity Malta, informing him of the revocation of the residence permit;*
- *In the circumstances, the appellant has had a new prospective employer, by the name of Ray Aquilina Installations Company Limited, who requested the appellant's employment with immediate effect.*

The legal counsel stated that his was another non-EU migrant worker being short changed by abusive local employers. She requested that this appeal would be processed swiftly, and given this unprecedented situation, it would be greatly appreciated that the appellant would be issued with a temporary permit until his new documentation would be issued afresh.

The Board observed the following documents in the appellant's file:

- *Revocation of Residence permit letter;*
- *The letter of appeal;*
- *The Board's registered receipt of the appeal;*
- *A copy of the appellant's Maltese residence card;*
- *Flight Itinerary;*
- *JobsPlus Termination of Employment form receipt;*
- *Contract of Employment with the new prospective company;*
- *Personal Data Protection Employee Notice document;*
- *A copy of the appellant's visa card; and*
- *Emailed correspondence pertaining to the appellant's case.*

The Board observes that whilst the appellant has presented a letter of appeal, as well as the contract of employment with the new prospective employer, he has not presented the JobsPlus Application for new employment document. Furthermore, the Board cannot understand how the letter of appeal was actually filed three months later than the revocation of residence permit notice, especially with the appellant's precarious state in Malta.

The Board, although observes that this case as well 'fuori termine', understands the series of events indicated in the appeal, and is informed that the appellant is in Malta and has a new job offer.

Decision

Therefore after having read the relative submissions as well as due to the circumstances of this case, the Board accepts the appeal on condition that the appellant submits his new application for employment within 10 days from the notification of this decision and directs Identity Malta to process and decide upon the new application”.

L-Appell

5. L-Aġenzija appellanta pprezentat ir-rikors tal-appell tagħha quddiem din il-Qorti fl-14 ta' Ottubru, 2022, fejn qegħda titlobha sabiex tħassar u tirrevoka d-deċiżjoni appellata, filwaqt li tikkonferma d-deċiżjoni tagħha tat-12 ta' Jannar, 2022, bl-ispejjeż taż-żewġ istanzi kontra l-appellat. Tgħid li l-aggravju tagħha huwa li l-Bord ma kellux jikkunsidra l-mertu tal-appell intavolat quddiemha mill-appellat stante li dan kien sar tardivament.

6. L-appellat wieġeb fis-7 ta' Frar, 2023 fejn għar-raġunijiet imfissra fir-risposta tiegħu, issottometta li l-appell tal-Aġenzija appellanta għandu jiġi miċħud u d-deċiżjoni appellata għandha tiġi kkonfermata.

Konsiderazzjonijiet ta' din il-Qorti

7. Il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravju tal-Aġenzija appellanta fid-dawl ta' dak li ddecieda l-Bord permezz tad-deciżjoni appellata, iżda meħudin in konsiderazzjoni wkoll is-sottomissjonijiet tal- appellat.

8. L-Aġenzija appellanta wara li tikkontendi li din il-Qorti għandha ġurisdizzjoni sabiex tisma' l-appell odjern a tenur tad-disposizzjonijiet tas-subartikolu 25A(8) tal-Kap. 217, tgħid li hija tinstab aggravata għaliex il-Bord ma kellux jidhol fil-mertu tal-appell intavolat quddiemu mill-appellat, għadarba dan kien sar tardivament. Hawnhekk hija tagħmel riferiment għal dak li jipprovdi s-subartikolu 25A(7) tal-Kap. 217, u tgħid li fil-każ odjern kif osserva l-Bord stess, l-appell gie ntavolat fid-19 ta' April, 2022, iżda l-appell ufficjali sar fit-30 ta' Mejju, 2022. B'hekk tgħid li huwa tassew ċar li t-tliet ijiem tax-xogħol mogħtija sabiex isir appell, kienu skadew għaliex saħansitra kienu għaddew tliet xhur jew anki erba' xhur u nofs. L-Aġenzija appellanta tirrileva li l-appellat ma kien allega jew saħanistra ressaq l-ebda prova sabiex juri d-data li fiha huwa kien gie notifikat bid-deciżjoni tagħha. Wara li tagħmel riferiment għas-sentenza ta' din il-Qorti fl-ismijiet **Dhakar Prakash vs. DCEA** tas-16 ta' Frar, 2022, tissottometti li l-eċċezzjoni ta' preskrizzjoni hija waħda perentorja, u għalhekk tista' wkoll issir fl-istadju tal-appell kif kienet qegħda tagħmel hija stess. Tirrileva li l-Bord naqas milli jispjega r-raġunijiet tiegħu li wasluh sabiex jiskuża lill-appellat, u saħansitra ddikjara li *“the Board cannot understand how the letter of appeal was actually filed three months later than the revocation of residence permit notice, especially with the appellant’s precarious state in Malta”*. L-Aġenzija appellanta tgħid li fit-tieni lok, terminu għall-prezentata ta' appell huwa wieħed perentorju

u ma jista' jiġi estiż għall-ebda raġuni a tenur tal-artikolu 106 tal-Kap. 12. Wara li tagħmel riferiment għal żewġ sentenzi ta' din il-Qorti¹, tagħlaq billi ssostni li għaladarba l-appell ġie ntavolat wara t-terminu ta' tliet ijiem skont il-liġi, dan għandu jiġi ddikjarat null u bla effett.

9. L-appellat jibda billi jispjega s-sekwenza tal-prezentata tal-appell tiegħu fid-19 ta' April, 2022 permezz ta' *email* skont il-prassi ta' dak iż-żmien, segwit permezz tas-sottomissjonijiet tiegħu fit-30 ta' Mejju, 2022. Jikkontendi li jekk il-Bord iddeċieda li huwa kellu jammetti appell tardiv, huwa kien qiegħed jimxi skont id-diskrezzjoni tiegħu. L-appellat jirrileva li fis-sottomissjonijiet tiegħu, huwa kien spjega għaliex l-appell intavolat minnu kien wieħed tardiv. Jgħid li skont l-ittra ta' *acknowledgement* tar-Registratur tal-Bord tad-19 ta' April, 2022, huwa kien ingħata l-opportunità li jipprezenta d-dokumentazzjoni rilevanti fi żmien ħmistax-il jum, u jekk dan il-perijodu ġie estiż, dan sar fid-diskrezzjoni tal-Bord, u ma setax jitqies bħala wieħed perentorju. Filwaqt li jilmenta mill-mod kif tmexxew il-proċeduri quddiem il-Bord, u jgħid li l-Aġenzija appellanta ma tistax tilmenta mit-tardività tal-appell tiegħu mingħajr ma jiġu kkunsidrati dawn in-nuqqasijiet, jikkontendi li atti pprezentati tardivament għandhom iwasslu għal kontumċja iżda mhux għal preskrizzjoni. Għall-allegazzjoni ta' nuqqas ta' prova tad-data tan-notifika tal-ittra tar-revoka li kienet qegħda tagħmel l-Aġenzija appellanta, huwa jaċċenna għas-sottomissjonijiet li kienu saru quddiem il-Bord, u anki għad-diversi dokumenti esebiti quddiemu bħal ma huma l-biljett tal-ajru, u li huwa kien ingħata *leave* ta' tnax-il ġimgħa biex imur lura l-Indja. L-appellat jispjega wkoll iċ-ċirkostanzi eżistenti fix-xitwa tal-2021

¹ Polly Sant vs. Direttur tas-Sigurtà Soċjali, Appell Ċivili, 21.03.1997; Gu Zhiting vs. Direttur taċ-Ċittadinanzau tal-Expatriates u l-Avukat Ġenerali, Rik. Nru. 80/2016AE.

riżultanti mill-varjant tal-pandemija, meta l-Indja tqegħdet fuq id-*dark red list*, u t-titjiriet kollha twaqqfu sar-rebbiegħa. Jikkontendi li l-*paid leave* ta' tnax-il ġimgħa kien ġie ġarantit lilu mill-imgħallem tiegħu, iżda minflok dan itterminalu l-impjieg tiegħu meta huwa kien mar iżur il-familja tiegħu fl-Indja. Jissottometti li l-bordijiet għandhom is-setgħa li jiddeċiedu l-każ skont l-ekwità, u fejn jidhrilhom xieraq u opportun, huma jibgħatu lura l-każ għal azzjoni ulterjuri, u jekk ma jithallewx jagħmlu dan, kien ser iwassal għal ksur tad-drittijiet u tal-liġijiet tal-UE. L-appellant jikkontendi li qed ikun hemm sitwazzjonijiet bħal dik odjerna, fejn min iħaddem jabbuża minn ħaddiema li mhumiex mill-UE. Jirrileva li huwa qatt ma kien ġie mgħarraf mill-imgħallem tiegħu dwar it-tmiem tal-impjieg tiegħu, u li dan sar jaf bih meta wasal lura Malta. Fil-frattemp waqt li kien l-Indja, kienet mardet serjament il-mara tiegħu, u huwa kien baqa' magħha sakemm bdew jinfethu lura t-titjiriet mill-Asja. Jirrileva li n-nies ta' pajjiżi terzi jieħdu self qawwi sabiex jaslu hawn Malta bil-għan li jaqilgħu biżżejjed flus sabiex imantnu lill-familja tagħhom ġewwa pajjiżhom.

10. Il-Qorti tibda billi tikkunsidra s-sottomissjoni tal-Aġenzija appellanta li hija għandha ġurisdizzjoni sabiex tisma' u tiddeċiedi l-appell tagħha stante dak li jipprovdi għalih is-subartikolu 25A(8) tal-Kap. 217. Tirrileva li huwa daqstant ċar li mid-data li fiha l-Aġenzija appellanta, jiġifieri t-12 ta' Jannar, 2022 bagħtet tgħarraf lill-appellat li kien qiegħed jiġi revokat il-permess tiegħu sabiex jirrisjedi f'Malta, huwa ma setax jiġi kkunsidrat iktar bħala residenti b'mod legittimu hawn Malta. Għaldaqstant kuntrarjament għal dak li qegħda ssostni l-Aġenzija appellanta, din il-Qorti m'għandhiex ġurisdizzjoni sabiex tiddeċiedi l-appell odjern.

Decide

Għar-raġunijiet premessi, il-Qorti tiddikjara l-appell odjern irritu u null, filwaqt li tastjeni milli tiegħu konjizzjoni tiegħu.

L-ispejjeż ta' din l-istanza għandhom ikunu a karigu tal-Aġenzija appellanta.

Moqrija.

**Onor. Dr Lawrence Mintoff LL.D.
Imħallef**

**Rosemarie Calleja
Deputat Registratur**