



MALTA

**QORTI TAL-APPELL
(Sede Inferjuri)**

**ONOR. IMHALLEF
LAWRENCE MINTOFF**

Seduta tal-15 ta' Novembru, 2023

Appell Inferjuri Numru 13/2022 LM

MD. Tufazzal Hoque Mizan (Karta tal-Identità numru 0226625A))
(‘l-appellat’)

vs.

Identity Malta Agency
(‘l-appellanta’)

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mill-intimata **Identity Malta Agency** [minn issa ‘I quddiem ‘l-appellanta’] mid-deċiżjoni tal-21 ta’ Frar, 2022, [minn issa ‘I quddiem ‘id-deċiżjoni appellata’] mogħtija mill-Bord tal-Appelli dwar l-Immigrazzjoni [minn issa ‘I quddiem ‘il-Bord’] fil-konfront tar-rikkorrent **MD. Tufazzal Hoque Mizan (K.I. nru. 0226625A)** [minn issa ‘I quddiem ‘l-appellat’],

fejn filwaqt li għamel riferiment għad-dispożizzjonijiet tal-Kap. 217 u dawk tal-L.S.217.17, irrevoka d-deċiżjoni tal-appellanta tat-18 ta' ġunju, 2021 u laqa' l-appell tal-appellat, bil-kundizzjoni li fi żmien ġimagħtejn mill-irċevuta tad-deċiżjoni tiegħu, il-principal prospettiv tal-appellat jipprovdi lil Jobsplus u lill-appellanta b'affidavit fejn jikkonferma, jekk dan kien il-każ, li huwa għad għandu bżonn is-servizzi tal-appellat.

Fatti

2. Il-fatti tal-appell odjern huma s-segwenti. L-appellat kienet inħarġitlu *visa* sabiex jidħol hawn Malta bħala ‘*Long Term Student*’ bejn it-13 ta’ Mejju, 2019 u s-26 ta’ Awwissu, 2019 abbaži li huwa kien applika u ġie aċċettat sabiex jagħmel kors ta’ studju mal-MCAST f’Malta.¹ Fil-frattemp huwa ngħata permess minn Jobsplus taħt is-subartikolu 11(3) tal-Kap. 217 sabiex jaħdem bħala ‘F&B Server’ ma’ Five Star Hotels Limited bejn is-17 ta’ Diċembru, 2019 u d-29 ta’ ġunju, 2020.² Sussegwentement l-appellat applika għal permess ta’ residenza temporanja *ai termini* tas-subregolament 22(1) tal-L.S. 217.22, fejn l-applikazzjoni tiegħu ġiet approvata mill-appellanta li ħarġitlu l-permess relattiv fl-14 ta’ Awwissu, 2020 b’data ta’ skadenza disa’ xħur wara, jiġifieri fit-30 ta’ Marzu, 2021³, u dan bil-għan li jsib xogħol hawn Malta. Huwa fil-fatt sab xogħol ma’ AMRAC Recruitment Ltd, fejn ġiet ippreżentata l-applikazzjoni relattiva bin-numru R96359776 u nħarġet ukoll l-‘Approval in Principle Letter’ fit-2 ta’ Frar, 2021.⁴ Din is-soċjetà madankollu qaltlu li kien sar żball fl-applikazzjoni billi ma

¹ Ara *screenshot* Dok. IMA 1 *a fol.* 6 u Dok. C anness mas-sottomissionijiet tiegħu tal-appell quddiem il-Bord.

² Ara kopja tal-licenzja relattiva annessa mal-istess sottomissionijiet li saru quddiem il-Bord.

³ Ara *screenshot* Dok. IMA2 *a fol.* 7.

⁴ Ara kopja Dok. F annessa mas-sottomissionijiet tal-appellant quddiem il-Bord.

tniżżilx l-isem tajjeb tal-prinċipal prospettiv, u għaldaqstant l-applikazzjoni kellha tiġi rtirata u ssir mill-ġdid. Għaddew diversi xhur fejn l-appellat baqa' jiġi mwiegħed li kienet ser issir l-applikazzjoni, u l-appellanta kienet saħansitra qaltlu li din kienet "Pending completion by employer".⁵ Meta mbagħad ġiet sottomessa l-applikazzjoni, l-appellat kien laħaq sab xogħol ieħor ma' Orange Management Services Limited, u għalhekk huwa avvża lis-soċjetà l-oħra sabiex tirtira l-ewwel applikazzjoni, li għalhekk ġiet irtirata fil-21 ta' Mejju, 2021. Ĝiet ippreżentata applikazzjoni għal permess uniku sabiex l-appellat jaħdem mas-soċjetà Orange Management Services Limited, liema applikazzjoni ġiet rifjutata permezz ta' *email* tat-18 ta' Ġunju, 2021, għaliex skont l-appellanta, l-appellat kien qiegħed jirrisjedi hawn Malta illegalment, u għalhekk il-kwistjoni kienet taqa' lil hinn mill-kompetenza tagħha.⁶

Mertu

3. L-appellat appella din id-deċiżjoni quddiem il-Bord fil-21 ta' Ġunju, 2021, fejn ippreżenta s-sottomissjonijiet tiegħu ulterjorment fl-14 ta' Lulju, 2021, u dan sabiex id-deċiżjoni tal-appellanta tat-18 ta' Ġunju, 2021 tiġi mħassra.

4. Id-Direttur għaċ-Ċittadinanza u Affarijiet Espatrijati wieġeb fit-3 ta' Settembru, 2021, fejn talab sabiex id-deċiżjoni tiegħu tiġi kkonfermata għal dawk ir-raġunijiet li spjega fit-tweġiba tiegħu.

⁵ Ara kopja Dok. G annessa mas-sottomissjonijiet tal-appellant quddiem il-Bord.

⁶ Ara kopja *a fol.* 13.

Id-deċiżjoni appellata

5. Il-Bord wasal għad-deċiżjoni appellata wara li għamel is-segwenti konsiderazzjonijiet:

"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.*

Following the Board's decree, the Agency explained:

- *That the appellant used to work for Five Star Hotels Limited but such employment was terminated on 29th June 2020;*
- *That the appellant only lodged a new Single Permit application on 17th June 2021 (just under one year after he stopped working for Five Star Hotels Limited);*
- *That in spite of termination of employment, the Agency usually grants a ten-day grace period within which one can rectify one's immigration position by finding alternative employment and submitting a new application;*
- *That the appellant failed to submit a fresh application within that timeframe and as a result was deemed to have lost legal status;*
- *That following the lapse of those ten days, the individual had to leave the Schengen Area and have a prospective employer lodge a Single Permit application on his behalf via the online portal on a still-abroad basis); and*
- *That in any case, regularisation of a person's immigration position could only be done by the Principal Immigration Officer (PIO).*

The appellant's appeal paints a different picture. He does not contest that his employment with Five Star Hotels Limited ended on 29th June 2020. He stated, however, that AMRAC Recruitment Limited had lodged a Single Permit application on his behalf and an approval-in-principle was issued by the Agency on 2nd February 2021 (application R96359776). On 22nd March 2021, Ms Kelly Zammit (at Identity Malty Agency) stated via e-mail that the application's status was "Pending completion by employer".

It seems that the prospective employer made some mistake in the sense that the prospective employer's name was supposed to be "Ta' Dettu/OSA Services Company Limited" not "AMRAC Recruitment Limited". The appellant was informed that the application had to be withdrawn and submitted anew.

Despite reassurances from his prospective employer, the appellant grew suspicious and was told by the Agency's customer care section that he could withdraw any pending application and submit a new application with another prospective employer. In view of this, the appellant withdrew the application. Then, he sought and secured alternative employment (with Orange Management Services Limited). It was only when the latter company applied for a Single Permit on his behalf that the decision forming the substance of this case was issued.

The appellant emphasised that whereas it was usual practice for the Agency to send a letter regarding revocation of a Single Permit once an individual no longer worked for a particular employer, he never received any such letter. The Board refers to paragraphs 5 and 6 of the Agency's reply and notes that although the Agency described its usual modus operandi in cases of termination of employment, there is no evidence that this modus operandi was followed in this particular case. There is no evidence that the Agency sent its usual letter informing the appellant that he had ten days within which to bring his immigration position in order. With respect, it is the Agency which must prove that it sent the usual letter, not the appellant who must prove that he did not (as it is very difficult to prove a negative).

In any case, the Agency is wrong to imply that the appellant did nothing for almost one year. The Board saw the relative approval-in-principle dated 2nd February 2021 and this document proves that at that point in time, the Agency saw nothing wrong with the appellant's position although far more than ten days had passed since he stopped working for Five Star Hotels Limited (on 29th June 2020).

Furthermore and in any case, for argument's sake, it would have made no sense for the Agency to grant a ten-day grace period in June and July 2020, as in the middle

of a pandemic, there were no flights to India! This means that the appellant could not have possibly left Malta."

L-Appell

6. L-appellanta pprezentat ir-rikors tal-appell tagħha quddiem din il-Qorti fit-3 ta' Marzu, 2022, fejn qiegħda titlob sabiex jogħġġobha tħassar u tirrevoka d-deċiżjoni appellata, filwaqt li tordna lill-Bord sabiex jiddeċiedi l-każ mill-ġdid skont il-konsiderazzjonijiet ta' din il-Qorti, bl-ispejjeż taż-żewġ istanzi kontra l-appellat. Tgħid li l-aggravju tagħha huwa li l-Bord għamel apprezzament żbaljat tal-para. (ċ) tas-subregolament 8(1) tal-L.S. 217.17.

7. L-appellat għażel li ma jweġibx.

Konsiderazzjonijiet ta' din il-Qorti

8. Il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravju tal-appellanta, u dan fid-dawl tal-argumenti miġjuba mill-Bord sabiex wasal għad-deċiżjoni tiegħi. L-appellanta tikkontendi li hija tħossha aggravata b'din id-deċiżjoni għaliex il-Bord ma qiesx li applikazzjoni ma tistax tiġi pprezentata lilha minn persuna li ma tkunx qiegħda legalment fit-territorju ta' Stat Membru skont kif firrikjedi l-para. (ċ) tas-subregolament 8(1) tal-L.S. 217.17. Tispjega li din il-liġi sussidjarja ttrasponiet fil-liġi Maltija d-Direttiva 2011/98/EU dwar proċedura ta' applikazzjoni unika għal permess uniku għal čittadini ta' pajjiżi terzi sabiex dawn ikunu jistgħu jirrisjedu u jaħdmu fit-territorju ta' Stat Membru u dwar ġabrab komuni ta' drittijiet għal haddiema ta' pajjiżi terzi residenti legalment fi Stat Membru. Hija tagħmel riferiment għas-sabartikolu 4(1) ta' dik id-Direttiva li

jitlob li sabiex issir applikazzjoni, l-applikant għandu jkun qiegħed jirrisjedi legalment fi Stat Membru. Tgħid li l-Bord ikkunsidra li fil-każ odjern hija kellha tagħti lill-applikant għaxart ijiem ‘grace period’ mill-iskadenza tal-permess preċedenti sabiex jirregola r-residenza tiegħu hawn Malta. Tirrileva li dan madankollu ma setax isir ġaladárba l-permess preċedenti tiegħu kien skada f'Marzu tal-2021, u l-applikazzjoni l-ġdida tiegħu saret tliet xhur wara f'Ġunju ta’ dik l-istess sena, fejn il-‘grace period’ ta’ għaxart ijiem kien ilu li skada. L-appellanta tispjega b'riferiment għall-konsiderazzjonijiet tal-Bord fir-rigward tal-*modus operandi* tagħha, li fil-każ odjern ma kienx hemm skadenza ta’ permess uniku abbaži ta’ terminazzjoni ta’ impjieg. Għalhekk tgħid li meta skada dan it-terminu ta’ għaxart ijiem mill-iskadenza tal-permess ta’ residenza temporanja, l-appellat ma kienx f’pożizzjoni li jintavola applikazzjoni għal permess uniku skont ir-regolamenti suriferiti, sakemm huwa ma kienx jagħmel dan minn pajjiż terz jew minn Stat Membru li huwa kien qiegħed jirrisjedi fih legalment. Tagħlaq billi tirrileva li kemm il-liġi Maltija u anki d-Direttiva msemmija, ma joffru l-ebda eżenzjoni minn din ir-regola, u għalhekk hija kienet imxiet sew meta m’acċettatx l-applikazzjoni tal-appellat.

9. Il-Qorti tikkunsidra li l-Bord kien korrett fid-deċiżjoni tiegħu. Ma jirriżultax li kif qiegħda tissuġgerixxi l-appellanta li l-Bord ma fehemx li l-‘grace period’ huwa marbut ma’ skadenza ta’ permess uniku fil-każ ta’ terminazzjoni ta’ mpjieg. Il-Bord għamilha čara li huwa kien qiegħed jikkunsidra s-sottomissjoni tal-appellat, fejn kien qiegħed jikkontendi li s-soltu l-appellanta tibgħat ittra lill-individwu partikolari li lilu jkun inħariġlu permess uniku f’każ fejn dan ma jibqax jaħdem mal-istess principal. Filwaqt li l-Bord aċċetta li l-imsemmi appellat qatt ma kien irċieva din l-ittra, il-Bord b'riferiment għall-

modus operandi tal-appellanta f'każ ta' terminazzjoni ta' mprieg kif spjegata fil-para. 5 u 6 tat-tweġiba tagħha, iddikjara li l-istess *modus operandi* hawnhekk ma kienx ġie segwit, u ma kien hemm l-ebda evidenza li s-soltu ittra ntbagħtet lill-appellat sabiex tinfurmah li kellu għaxart ijiem sabiex jirregola l-pożizzjoni tiegħu hawn Malta. Sostna li kienet l-appellanta li kellha turi li din l-ittra kienet saret, u mhux l-appellat li kellu juri li huwa ma rċeviex din il-komunikazzjoni mingħandha fejn tali prova negattiva kienet waħda diffiċli. Il-Qorti tgħid li tant kemm il-Bord fehem sew li l-'grace period' huwa marbut mal-iskadenza ta' permess uniku f'każ ta' terminazzjoni ta' mprieg, li għadda sabiex ikkunsidra li meta saret l-applikazzjoni in kwistjoni, l-appellant kien ilu ferm iktar minn għaxart ijiem li waqaf jaħdem ma' Five Star Hotels Limited fid-29 ta' Ġunju, 2020, u li l-'grace period' ma kien jagħmel l-ebda sens li jingħata f'nofs il-pandemija fejn saħansitra ma kien hemm l-ebda titjuriet lura lejn l-Indja, sabiex b'hekk l-appellat ma setax jitlaq minn Malta. Għalhekk, il-Qorti tikkunsidra li l-Bord kien korrett meta aċċetta l-argument tal-appellat fir-rigward tan-nuqqas tal-appellanta li tibgħat l-ittra solita fit-tmiem tal-impieg tiegħu, u dan sabiex tavżah ħalli jirregolarizza l-pożizzjoni tiegħu.

Għaldaqstant il-Qorti ssib li l-aggravju tal-appellanta mhux ġustifikat, u tiċħdu.

Decide

Għar-raġunijiet premessi, il-Qorti tiċħad l-appell tal-appellanta u tikkonferma d-deċiżjoni appellata.

L-ispejjeż tal-appell odjern u dawk tal-proċeduri quddiem il-Bord għandhom ikunu a karigu tal-appellanta.

Moqrija.

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

**Rosemarie Calleja
Deputat Registratur**