

Court of Appeal
(Inferior Jurisdiction)
Judge Anthony Ellul

Appeal number: 20/2018

Bojan Balaban (appellant)

vs

Director of the Department of Citizenship and Expatriate Affairs (appellee)

16th October, 2018.

1. By decision delivered on the 23rd February, 2018 the Immigration Appeals Board decided:

"By means of a decision of the Director dated 24th November, 2017, the appellant was informed of the following:

'The said application has been refused as the alleged referee failed to confirm the authenticity of the reference letters provided. The Department cannot confirm that you are suitable for the position you have applied for'.

Following careful examination of the relative appeal as well as of the supporting documentation, the Board noted that in order to successfully rebut the Director's decision, the appellant had to prove that the referee in question did in fact confirm the authenticity of the relative references.

The Board saw that the supporting documentation consisted of a photograph of a computer screen on which there was an e-mail allegedly written by a certain Ms Marija Antonijevic.

The Board also noted that evidence that such communication had in fact been sent to the pertinent Maltese authorities was submitted.

Therefore, the Director's decision has not been rebutted and as a result, the Board rejects the appeal".

2. On the 6th March 2018, appellant filed an appeal, and complained that the Tribunal:
 - i. Did not appoint the case for hearing, in breach of Chapter 217 of the Laws of Malta;
 - ii. Made a wrong application of the law and regulations.
3. On the 20th March 2018, the appellee filed a reply which includes a preliminary plea that the appeal is null since the decision of the Tribunal is final and not subject to appeal (Article 25A(8) of Chapter 217).

4. This judgment deals with the preliminary plea.

5. **Facts.**

- i. Appellant is a Bosnian resident. Therefore he is not a national of an EU member state.
- ii. On the 4th July, 2017 appellant applied for the grant of a single residence permit;
- iii. Appellant was given an acknowledgement for the application, wherein it is stated: *"You are authorised to reside in Malta until a decision is taken on your application. This interim authorisation shall lapse on 4/10/2017"*.
- iv. Appellant filed what he claimed to be a reference letter (doc. DS2) wherein it is claimed that appellant was employed by Rkomerc *"... as a shutterer in the period from 25.01.2013 until 23.03.2016"*.
- v. By letter dated 24th November, 2017 the appellant was informed by Identity Malta that his application was refused, *"as the alleged referee failed to confirm the authenticity of the reference letters. The Department cannot confirm that you are suitable for the position you have applied for"*.
- vi. Appellant contested the decision before the Immigration Appeals Board (ETC 1848/17). By a decision delivered on the 23rd February, 2018 the Board rejected the appeal.

6. In the preliminary plea, the appellee contends:

"Illi preliminarjament, l-esponent jirrileva illi ai termini tal-Artikolu 25A(8) tal-Att dwar l-Immigrazzjoni (Kap. 217 tal-Ligijiet ta' Malta) id-decizjoni tal-Bord tal-Appelli dwar l-Immigrazzjoni hija wahda finali u minnha ma hemmx appell bl-unika eccezzjoni tkun appell dwar punt ta' dritt relattivi ghall-decizjonijiet illi jaffettwaw persuni imsemmija fil-Parti III tal-istess Att".

7. The appellant referred to Council Regulation 539/2011 of the 15th March, 2011 that lists the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. In the Court's opinion this regulation is irrelevant for the purposes of the preliminary plea since:

- i. When in Malta, he applied for a single permit as regards residence and work (Legal Notice 106 of 2014 – Subsidiary Legislation 217.17);
- ii. This subsidiary legislation was introduced to implement EU Directive 98 of 2011 which provides for a single application procedure for a single

permit for third-country nationals to reside and work in the territory of a Member State.

iii. According to Article 8 of the said EU Directive:-

"2. A decision rejecting the application to issue, amend or renew or withdrawing a single permit shall be open to legal challenge in the Member State concerned, in accordance with national law. The written notification referred to in paragraph 1 shall specify the court or administrative authority where the person concerned may lodge an appeal and the time limit therefor".

iv. In terms of regulation 20(2) of the above-mentioned Subsidiary Legislation:

*"Where the Director has refused an application for the issue, amendment or renewal of a single permit or has withdrawn such permit, **the third country national shall have the right to appeal to the Board**".¹*

v. Therefore, according to Maltese law the right of appeal contemplated in article 8(2) of the EU Directive is to the Immigration Appeals Board.

vi. The Subsidiary Legislation 217.17 does not provide for a right of appeal to this Court from decisions of the Immigration Appeals Board.

8. However, Article 25A(8) of Chapter 217 provides that decisions of the Board are final except on points of law regarding "**decisions affecting persons as are mentioned in Part III**", which may be appealed to this Court.

9. Part III refers to a citizen of a Member State or his/her dependants, which is not the case under review. It also refers to a person who, "*is lawfully in the territory of any state which is bound by a Border Agreement*" (Article 4A(1)(c) of Chapter 217).

10. In terms of Article 2 of the Act, Border Agreement means:-

"... an agreement to which Malta is a party or any rule in or under the Treaty² providing for common border controls and free entry and exit of person lawfully with the territory, into and from each of the territories of the Member States or States parties to the agreement, and Border Agreement State and citizen of a Border Agreement State shall be construed as such".

11. On reading paragraph (c) of article 4(1) of Chapter 217, one might argue that it applies to cases where a non-EU national is in another territory that like Malta is bound by a Border Agreement. However, such an interpretation

¹ The Immigration Appeals Board.

² Treaty has the same meaning as in the European Union Act (Chapter 460 of the Laws of Malta).

would mean that a non-EU national legitimately present in the territory of another state bound by a Border Agreement has a right to appeal the decision of the Immigration Appeals Board whereas a non-EU national legitimately present in Malta does not have such a right. This notwithstanding that the law envisages the possibility that a third country national may submit the application form either from: "(a) *the territory of a third country*; (b) ***the territory of Malta***; or (c) *that of a Member State in which he is legally present*" (regulation 8). The court can find no reason why a third country national should get a different remedy according to whether he is legitimately present in a third country or another Member State with whom Malta has a Boarder Agreement, from a third country national who is legitimately present in Malta. Therefore, the court interprets paragraph (c) as applying also to third country nationals who are legitimately present in Malta.

12. It is a fact that EU Directive 98 of 2011 does not impose an obligation on Member States to provide an appeal from a decision of the Immigration Appeals Board. However article 13 provides for the possibility that Member States adopt measures that are more favourable to the persons to whom it applies.
13. The Boarder Agreement referred to in paragraph (c) of article 4 of Chapter 217 includes the *Schengen acquis*, to which Malta is a party to (vide Parliamentary Debates, sitting no. 761 of the 25th June, 2002 folio. 24).
14. During the sitting of the 18th June, 2018 Dunstan Camilleri, a legal advisor at the appelle's office, said "*8. I confirm that on date of application, appellant had a right to be in Malta. There is a 3 month period during which a non-EU citizen can stay in Malta*". The court understands this statement as meaning that when on the 4th July 2017 appellant applied for a single resident permit, he was legitimately present in Malta having arrived in Malta from a Member State.

On the basis of these considerations the court rejects the preliminary plea of the appellee and adjourns the appeal for submissions on the complaints of the appellant. Costs are at the charge of the appellee.

Anthony Ellul.