



MALTA

**Court of Appeal
(Inferior Jurisdiction)**

**Hon. Judge
LAWRENCE MINTOFF**

Sitting of the 18th January, 2023

Inferior Appeal No. 84/2022 LM

Cristina Catagatan
(‘the Appellee’)

vs.

Identity Malta Agency
(‘the Appellant Agency’)

The Court,

Preliminary

1. This appeal was filed by the respondent, **Identity Malta Agency**, [hereinafter ‘the appellant’], from the decision delivered on the 20th June, 2022, [hereinafter referred to as ‘the appealed decision’] by the Immigration Appeals Board, [hereinafter referred to as ‘the Board’], by means of which the Board revoked the decision given by the Agency previously, and upheld the appeal filed by the plaintiff **Cristina Catagatan** [hereinafter ‘the appellee’].

The facts

2. The plaintiff had been living in Malta after being issued with a Single Permit, on account of her employment with a certain Josephine (Josette) Grech. This Single Permit was valid for the period starting the 30th December, 2020, up until the 9th January, 2022. It so happened that plaintiff's employment with Grech was terminated on the 28th February, 2021, following which, the said Single Permit was no longer valid. The plaintiff remained in Malta, and on the 29th December, 2021, around ten months after the termination of her employment with Grech, she filed another application with the Agency for the issue of another Single Permit, since by this time the plaintiff was offered employment with Corner Foodstore Company Limited. The defendant Agency started due diligence proceedings, where it was established that at the moment in which the plaintiff filed her application, she was residing in Malta illegally, since her previous employment had been terminated around ten months before. The defendant Agency explained that it is not within its remit to regularise the illegal position of migrants in Malta, however it had decided of its own accord, to refer the matter to the Principal Immigration Officer for further direction from his end. The Agency explained that at the moment in which the plaintiff filed her appeal in front of the Board, the Agency was still waiting for a reply from the Principal Immigration Officer regarding whether the legal position of the plaintiff could be regularised.

The merits of the case

3. The plaintiff filed an appeal before the Board, in which she explained that her prospective employer had been notified, by means of an email dated the 17th December, 2021, that the application of the plaintiff for the issue of a Single Permit could not be processed since at the time of filing of her application, the plaintiff was residing in Malta illegally. The plaintiff explained that she is married to a certain Michael Ramirez Catagatan, and that they have together a daughter born in Malta on the 9th of June, 2021. Furthermore, the plaintiff explained that she had arrived in Malta in March 2019, where as her husband had arrived in Malta in July of the same year. She also explained that her husband is employed as a carer with Care Malta, and that while she was employed as a carer with Josephine Grech, she had to quit her job in view of the numerous health problems she faced while pregnant. In fact the plaintiff produced various medical certificates and other documents attesting to the fact that she had been hospitalised during her pregnancy as well as following the birth of her daughter. The plaintiff explained that she started looking for alternative employment soon after she gave birth, and that eventually she was offered the position of accounts clerk with the Corner Foodstore in Swieqi. The plaintiff explained that this initial application filed with the Agency had to be withdrawn in view of the lack of feedback received from the Agency, as well as due to the fact that the prospective employer needed to fill his vacancy with urgency. The plaintiff further added that since the Agency did not issue her with a permit, she could no longer fill the position she was offered, and this was the reason why she had to withdraw her application. The plaintiff also added that in the

meantime, she signed a contract of employment with Golden Care Malta Limited, and this was when she filed a new application for the issue of a Single Permit on the basis of this new employment offer made to her. The plaintiff further stated that on the 17th December, 2021, the prospective employer received an email from Identity Malta in which he was informed that the application of the plaintiff could no longer be processed, since she was deemed to be living in Malta illegally.

4. The plaintiff contended that the Agency failed to explain how it had reached the conclusion that she was residing in Malta irregularly. She further stated that Subsidiary Legislation 217.12 establishes that when the application of a third country national is being considered by any authority within Malta, due consideration has to be given to the fact that proceedings have to run their course. The plaintiff held further that she had arrived in Malta legally, and that the only reason she had ended up without employment was because of the complications she suffered during her pregnancy. She also claimed that her original Single Permit was valid until the 9th January, 2022, and that she had remained convinced that she had a right to remain in Malta up until that date. Furthermore, the plaintiff held that she had never been informed by any authority within Malta that her permit was being revoked by virtue of the fact that she was unemployed. The plaintiff said that it is customary for Identity Malta Agency to send a letter to applicants whose permits are being revoked in order to inform them about this, and that it is also customary for Identity Malta to concede an *ex gratia* period of ten days to allow these applicants enough

time to find alternative employment. The plaintiff said that this did not happen in this case.

5. The plaintiff explained that she lives in Malta together with her family, composed of her husband and daughter, and that her husband is regularly employed in Malta, and that he has been living in Malta for a number of years. She also stated that hers is a genuine case and that she had done all that she could in order to regularise her position. The plaintiff also stated that she never received any letter informing her that her permit or her application were being revoked, and that the customary ten day period usually granted to such applicants should start lapsing from the day she receives such a letter. The plaintiff also held that the Agency is mistaken in concluding that she is residing in Malta illegally, since it transpired that she has never received such a letter. The plaintiff also said that when an authority has to exercise a measure of discretion, such discretion has to be exercised in an informed and just manner, so that the outcome of the decision is equitable, logical and foreseeable. The plaintiff said that the manner in which the facts of this case unfolded, gives her no comfort that the principles of natural justice and of the rule of law were observed by the defendant, and furthermore claimed that the Agency could not reach the conclusion that she was living in Malta illegally.

6. The plaintiff also stated that the Agency has a duty to ensure that applicants are given a real opportunity to defend their applications, before deciding that a particular decision is to be refused. She also said that she was never given the opportunity to reply or to explain her position, and therefore the Agency's decision is based on a number of assumptions. The plaintiff said

that the Agency never gave any reasons as to why it had reached the conclusion that the plaintiff was living in Malta illegally, and therefore she cannot have the peace of mind that the Agency had exercised its discretion in a correct manner. The plaintiff also stated that she had been completely left out of the process carried out by the defendant Agency, which had in turn taken its decision based on the documentation and the correspondence filed by the prospective employer. The plaintiff said that this runs counter to Legal Notice 160/2014, which specifies that the communication of any decision has to take place with the applicant and not with the prospective employer. It is for this reason, the plaintiff held, that the decision given by the Agency is both irregular and *ultra vires*. Finally the plaintiff claimed that the Agency does not have the necessary authority to declare that the position of any person within Malta is irregular or illegal, and that the Agency usually needs to confer with other authorities prior to reaching a decision on the legality or otherwise of the status of an applicant.

7. The plaintiff further held that since she did not receive the letter informing her that the Single Permit was being revoked, and by means of which applicants are usually granted a period of ten days in order to file a new application, she was denied the right to ensure that her application is dealt with within the period prescribed. She also held that this was surprising and confusing, since the Agency had always held that a letter of refusal has to be notified to the applicant, in which the applicant is informed of his rights, and of her right to file a new application within ten working days.

8. The defendant Agency replied that on the 30th November, 2021, it had informed the plaintiff that her application could no longer be processed since

the plaintiff was found to be residing in Malta illegally, and this in line with the provisions of article 8(1)(c) of Subsidiary Legislation 217.17. The Agency further explained that the plaintiff had been granted a Single Permit on the basis of her employment with Josephine sive Josette Grech, and that this employment had been terminated on the 28th of February, 2021. It further explained that the plaintiff had filed a new application on the 29th December, 2021, nine months after her employment had been terminated. She also stated that despite the termination of the plaintiff's employment, as an Agency it grants a period of ten working days within which an applicant may correct his/her position at law by finding alternative employment and submitting a new application, something which was not done in this case, and hence it could safely be concluded that the plaintiff was residing in Malta illegally. The defendant Agency explained that the only way in which the plaintiff could regularise her position following the lapse of the said ten days, was by leaving the Schengen Zone, and having a prospective employer file a new application in her name. In case the new application is upheld, the Agency may then issue a new letter to the applicant through the prospective employer. It further held that in view of this, it had informed the plaintiff that her application could no longer be processed, since she was not found to be residing in Malta legally. The Agency further claimed that since it was established that the plaintiff was not residing in Malta legally, there is nothing further which can be done by the Agency, and that the plaintiff's case had to be referred to the Principal Immigration Officer for his review. The Agency said that instead of refuting the applicant's application outright, it had referred the matter to the Principal Immigration Officer, and that the plaintiff's case was being further investigated by this Office.

The appealed decision

9. The Board made the following considerations in its judgment:

1. Preliminary

The Board:

*Saw that in virtue of a decision issued by Identity Malta Agency on an unknown date and sent to the prospective employer, Golden Care Malta Limited, the appellant's application for a Single Permit (bearing reference number **R97756718**) was rejected as she was deemed to not be in a position of conformity with the dictates of Regulation 8 of S.L. 217.17;*

Saw the appeal registered on 20th December, 2021; and

Saw that no reply from Identity Malta Agency was found in the relative file.

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 interests of justice.*

*The Board observes that the e-mail through which the Agency communicated the appealed decision was sent **only** to the prospective employer, Golden Care Malta Limited. This was also confirmed by the appellant, through her advocate. This violates Regulation 15 of S.L. 217.17, which requires that decisions be sent to the applicant personally.*

*Consequently, the decision is being annulled (see **Tufale Ahmed vs. Id-Direttur tad-Dipartiment għaċ-Ċittadinanza u l-Espatrijati**, decided by the Court of Appeal on 9th March, 2022).*

2. Decision

*Therefore, after having read the relative submissions as well as after having seen the provisions of Chapter 217 of the Laws of Malta and of S.L. 217.17, the Board annuls the Agency's decision and directs the Agency to process the application bearing reference number **R97756718** on its merits and according to law, after considering carefully what has been stated hereinabove.*

The Board orders that this decision be served on the parties without delay."

The Appeal

10. The appellant Agency filed her application on the 30th June, 2022, whereby it requested this Court to annul and revoke the decision given by the Board on the 20th June, 2022.

11. The Agency's grievance is that the Board ignored the fact that upon receiving an application, the Agency has to make sure that this was filed in terms of Regulation 8(1)(c) of Subsidiary Legislation 217.17, which was enacted to transpose Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member state. It held that this Directive makes it imperative for an applicant to be legally residing in the Member State where the application is filed.

12. The appellant further held that it grants a period of ten days 'grace period' from the expiry of the previous permit, so that the applicant may file a new application, in order for his position in Malta to remain regular. It said that upon the lapse of the said ten days, it will no longer have the remit to regularise

the position of the applicant, and that in those cases, the matter is referred to the Principal Immigration Officer. The Agency further held that prior to deciding that an application is to be refused on account of the applicant being in Malta illegally, it passes the relevant information on to the Principal Immigration Officer so that he may decide on whether the position of the applicant may be regularised. The appellant further held that this process had not been completed in the present proceedings, and therefore that it had not sent its final decision to the applicant. It further stated that it is not true that it had failed to notify the applicant of its decision, and that such a decision had been sent to the prospective employer, and moreover that there was no final decision from which an appeal could be filed. The appellant concluded by saying that the appeal filed by the appellee is null, since it was filed before a final decision was given by the Principal Immigration Officer. During submissions heard by this Court it was established that in the meantime a final decision was given by the Principal Immigration Officer, who advised against the issue of a Single Permit in favour of the applicant.

The appellees' reply

13. The appellee stated in her reply, that the Board had decided to annul the Agency's decision after taking due consideration of the case and of the evidence and documentation produced. She further claimed that she had never been notified with the appeal application, but had only been notified with a note filed in the acts of the appeal, and which did not include any document referred to in the application. The appellee held that the Agency's grievances can be

summarised as the Agency's understanding that the Board had made an erroneous interpretation of the facts. She further held that the appellant should not expect this Court to disturb the discretion exercised by the Board in reaching its decision, and that the Board had reached a decision based on the evidence and documentation presented by the parties to the case. Such discretion, held the appellee, should not be disturbed lightly. She also held that in order for such a discretion to be disturbed, there has to be a manifest injustice, and that such an injustice may only be remedied by a substitution of the evaluation of the facts as carried out by the Board.

14. The appellee further held that upon reading the appealed decision, one can see that the Board was rational, logical, and foreseeable in its conclusion, and that the decision given was consequential to the evidence brought forward by the parties. The appellee said that there is no manifest injustice in this case, and that the Court may not lightly disturb the evaluation and interpretation of facts carried out by the Board. She further claimed that she was the one who suffered a manifest injustice, and that she had been completely excluded and alienated from the process exercised by the Agency, even if such proceedings concerned her. The appellee stated that in her opinion, there are other reasons why the appeal of the appellant should not be upheld.

15. The appellee made reference to article 25A(8) of Chapter 217, and said that the decisions of the Board should be final, save for points of law decided by the Board regarding decisions affecting persons as are mentioned in Part III, from which an appeal should be filed within ten days to the Court of Appeal. She further held that she does not fall under any of the categories of the persons

listed in article 4A of Chapter 217, and that this appeal is null and void in terms of law. The appellee further claimed that this appeal is not based on a point of law, because the appellant is merely requesting this Court to review the facts as presented to the Board, in an attempt to have the discretion of the Board substituted. The appellee further claimed that one cannot ignore the fact that the appellant Agency had filed a reply in front of the Board, and that neither in its reply, nor at any other point in these proceedings, did it bring forward the grievance being mentioned in its appeal. The appellee held that this means that the Agency had agreed to succumb to the jurisdiction and competence of the Board, and that the Agency had contested the appeal brought forward by the plaintiff, without ever raising the claim that it had not yet given a final decision on the application filed.

16. The appellee held further that the Agency is incorrect, imprecise, and is manipulating the facts, as the Agency had failed to notify her with its final decision. The appellee referred to article 25A of Chapter 217 of the Laws of Malta, and held that one cannot argue that the decision subject to these proceedings was not a final decision in her respect, because if this were the case, this would not have the effect of stopping the plaintiff's application abruptly, and the Agency would not have felt the need to communicate its decision to the prospective employer of the appellee.

17. The appellee said that for some reason, the Agency had failed to represent the facts correctly, and had erroneously stated that when the appellee had been granted a Single Permit to work with Josephine Grech, this permit was valid from the 30th December, 2020, whereas from documentation

submitted it results that this permit was valid with effect from the 18th November, 2019, when she started her employment with Grech. The appellee held further that the Agency is manifestly incorrect in the exposition of facts in front of the Board as well as in front of the Court, and whereas it did say that an application was filed by the appellee on the 29th December, 2021, it failed to say that the applicant had filed a previous application, about which the appellee heard nothing, with the result that she had to withdraw her application. The appellee stated that the Agency is incorrect in stating that ten months had lapsed from the last day of employment of the appellee, as though nothing had been done by her in the meantime.

18. The appellee claimed further that the appealed decision centers around the claim that she is residing in Malta irregularly, and this notwithstanding the fact that the Agency has no authority to decide whether a person is residing in Malta legally or otherwise. The appellee said that the appellant usually feels the need to consult with other authorities to determine whether a person is residing in Malta legally, and that although the Agency itself claims that it has no function or jurisdiction to regularise the position of migrants in Malta, it can also be held that the Agency has no jurisdiction to decide on the legality or otherwise of a person's stay in Malta. The appellee held that therefore the Agency's decision is unfounded, illegal and *ultra vires*.

19. The appellee held that even in the appeal application filed, the Agency held that the appellee had been living in Malta on the basis of a Single Permit which was valid until the 9th January, 2022, and that therefore the Agency was recognising the validity of this permit. She further held that she had never

received any communication from the Agency informing her that her permit was being revoked, and therefore the Agency cannot conclude that the appellee is living in Malta illegally. She held that if this were the case, the Agency should have sent the necessary documentation informing her that her permit is being revoked or withdrawn. She said that this was not done in this case, and that therefore she has a vested right to remain in Malta, particularly considering the very turbulent times she was passing through on a personal level. The appellee said that she should have not be left completely out of the proceedings carried out by the Agency, and that she had not been included in the correspondence, in a clear sign that she had been considered as alien to her own application process. She further held that this was in breach of Regulation 15 of Legal Notice 160/2014. The appellee also held that the Agency has a duty to ensure that an applicant is given a real opportunity to defend his or her position, before any decision is taken which may prejudice the applicant in some way.

20. The appellee finally held that the facts exposed by the Agency are not correct, and therefore that any information the Agency may have passed on to the Principal Immigration Officer is incorrect and imprecise, so much so that it is not possible that the latter may reach a correct and equitable decision. She claimed again that she had been kept out of the exchange of correspondence, and therefore she could not intervene in a timely manner to ensure that any information divulged about her is correct prior to being considered by the Principal Immigration Officer. The appellee said that there is also a conflict in the declarations made in the application of appeal, because at one point the Agency said that it was granting a ten day grace period to applicants, and in

another instance it claimed that it does not have the function to regularise the position of applicants. The appellee held that if this were the case, the appellant would be deciding *a priori* which irregular applications to accept and which to discard, which would mean that the Agency is exercising its discretion in an arbitrary and unpredictable manner, and that therefore she was justified in acting to safeguard her rights by appealing the Agency's decision.

Considerations of this Court

21. This Court shall now proceed to consider the grievance raised by the appellant Agency, namely that in this case the Board failed to consider that whereas the applicant had submitted her application during a period of time when she was considered to be in Malta illegally, the Agency had referred the matter to the Principal Immigration Officer, and that the latter authority had not yet given a decision on this outstanding application. The Agency expressed its belief that the appeal filed by the appellee before the Board had to be considered as null and void, since it was filed at a time when no final decision had been given on the legal status of the applicant.

22. This Court is of the opinion that there should be no contestation that the Agency's position, which was made known to the prospective employer of the appellee, amounts to a final decision in its own right. This Court also declares outright that the nature of the grievance is such that the appeal may be considered to be based on a point of law, since what the Agency is effectively contesting is whether the refusal notified to the prospective employer of the applicant amounted to a final decision. The Agency took the position that since

the application submitted by the appellee was filed during a period of time when the applicant's status was not regularised by means of a valid permit, then the applicant was in breach of Regulation 8(1)(c) of Subsidiary Legislation 217.17, and the Agency had no option but to reject the application outright. This, in fact, is what the Agency did. This Court observes moreover, that the Agency never raised the issue that the appeal filed by the applicant was to be considered null and void because there was no final decision to be appealed, prior to raising this particular grievance in the acts of this appeal, and this despite the fact that the Agency took an active part in the proceedings held in front of the Board, and had also filed its own reply to the applicant's appeal.

23. The Agency argued that of its volition, it usually affords applicants such as the appellee, a grace period of ten days within which to regularise their position according to law, following which it passes the matter on to the Principal Immigration Officer as the matter would then no longer be within the Agency's remit. It was the direction needed by this latter authority that had not yet been given at the time when the applicant filed her appeal with the Board. This notwithstanding, the Agency had already pronounced itself on the matter, by refusing to acknowledge the applicant's position further. It is pertinent to point out that during submissions heard by this Court, it was established that the Principal Immigration Officer rejected the applicant's application and refused to regularise her position.

24. The Board, in its decision, considered the fact that the applicant in this case was never made aware of the Agency's decision, and that in what is clearly a breach of Regulations, the Agency chose instead to notify its decision to the

prospective employer of the applicant and not to the applicant personally. This Court has already observed on a number of occasions that the State agencies dealing with such applications have to be mindful of the fact that many third country nationals seek to leave their country of origin and their families, and travel to Malta in the hope of finding a better future for themselves and their families. It is not commendable on the part of the Agency that the entire process in this case was carried without regard to the applicant's position, to the fact that she has her immediate family residing in Malta, and to the fact that she herself had been living and working in Malta for a number of years before she lost her job abruptly. It is also not reasonable to expect a person who had just suffered a traumatic birth, with all the complications which ensued after giving birth, as evidenced by the documentation in the acts of the proceedings, to travel back to her country of origin, presumably with her newborn, because she had suddenly lost her job. Neither is it reasonable in such circumstances, to expect the applicant to find new employment in the ten-day period conceded by the Agency in such situations. The Court observes that the Agency said nothing of the allegation made by the applicant, that she had filed another application in the meantime following the job offer by the Corner Foodstore Company Limited, but this application was not duly processed, thus costing the applicant her job, and that therefore she had to wait a number of months until she received a new job offer in order to be able to submit a fresh application for a Single Permit. The Agency's reasoning and insistence that the applicant filed her application for a Single Permit when she had already been living in Malta illegally for a number of months, is rather arbitrary as it is not based on reasonable expectations of what a person in the applicant's position can do to

regularise her position, especially in the face of circumstances which do not enable the person to work or to travel out of the country due to the state of her health, as has been made amply clear by the evidence brought forward in this case. The Court raises this point precisely because a lot of emphasis is being put by the Agency on the fact that it does effectively concede a grace period, which is not founded in the wording of the law, but in reality the grace period conceded fails to take account of the particular circumstances of each case, which further compounds the injustice suffered by applicants such as the appellee.

Decide

For the above reasons, the Courts decides to reject the appellant Agency's appeal, and confirms the appealed decision in its entirety.

All expenses in respect of the present proceedings shall be borne by the said appellant Agency.

Read.

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

**Rosemarie Calleja
Deputy Registrar**