Qorti tal-Appell

(Kompetenza Inferjuri)

Imhallef Anthony Ellul

Appell numru: 14/2016

Abdellah Ichenrahem, Souhayle Mohamed, Amensag Omar, Kartass Ali (appellati)

Vs

Ufficjal Principali tal-Immigrazzjoni (appellant)

28 ta' Marzu, 2017.

1. Fit-13 ta' Ottubru, 2014 l-Ufficjal Principali tal-Immigrazzjoni hareg ordni li r-rikorrenti kellhom jitilqu minn Malta. Ir-raguni li nghatat kienet:

   "(…..) you are a prohibited immigrant by virtue of Article 5 of the Immigration Act, Chapter 127, because you:

   Have been found working in Malta without the necessary work permit issued by the authorities of Malta (Cap 217 sec.5, 2e)".

2. L-appellati appellaw mid-decizjoni quddiem l-Immigration Appeals Board. Skont ma ddikjara l-appellant fir-rikors tal-appell, Omar Amensag kien telaq minn Malta u ghalhekk l-ordni ta' tnehhija giet ezegwita fil-konfront tieghu.

3. B'decizjoni tat-28 ta' Marzu, 2016 il-Bord iddecieda li:

   i. Kien l-appellant li kellu l-oneru tal-prova li l-appellati nqabdu jahdmu. Zied, "*The criminal law principal in dubio pro reo applies in that should there be a sliver of doubt or uncertainty in the reasoning behind the issuing of the removal orders, then such orders should not be confirmed"*. Qal ukoll, "In this regard, therefore, the prosecution must prove beyond reasonable doubt that the appellant were working and were doing so in contravention of Maltese law. *The respondent cannot expect the removal orders to be treated as untouchable truth and then try to shift the burden of proof upon the appellants"*.

   ii. Il-fatt li l-permess ta' xoghol kien *backdated*, ma jista jkun ta' ebda beneficcju ghall-appellati; *"If an application favourably considered (as in the current case) results in the issuing of a permit which is back-dated to the date of the application, the situation remains unchanged in that irrespective of the back-dating, the permit holders cannot*

possibly make use of the permit before the date on which they receive it and therefore, any back-dating on the permit serves no practical purpose. As this case makes clear, the practice of back-dating is one which makes it easy for a person to be misled".

4. Il-Bord laqa' l-appell u ordna r-revoka tal-ordnijiet ta' tnehhija minhabba li:

"From the above it is clear that the Principal Immigration Officer failed to prove the soundness and legality of the facts underpinning the issuing of the removal orders beyond reasonable doubt".

5. L-appellant appella mid-decizjoni. L-ilmenti huma li:

   i. Il-Bord interpreta b'mod skorrett fuq min jinkombi l-oneru tal-prova. L-appellant isostni li hu principju bazilari li min jallega jrid jipprova. L-appellati kienu jafu ghalfejn harget l-ordni ta' ritorn, gialadarba r-raguni tissemma fiha.
   ii. Mix-xhieda ta' PS 435 David Damato irrizulta li l-appellati nqabdu jahdmu. L-ebda xhud ma kkontradixxa dak li xehed Damato, u sahansitra gharaf lill-appellati bhala l-persuni li kienu qeghdin jahdmu minghajr permess. L-appellati nqabdu jahdmu *in flagrante* fuq il-lant tax-xoghol filwaqt li l-appellati ma ressqu l-ebda prova.
   iii. Il-Bord impona fuqu oneru ta' prova oghla minn dak rikjest fi procediment ta' natura amministrattiva. L-appellant isostni li ma kienx hemm htiega li l-prova tkun *beyond reasonable doubt*.

6. L-appellati wiegbu li:

   i. L-appell hu null ghaliex prezentat *fuori termine*.
   ii. L-appell jista' jsir biss fuq punt ta' ligi.
   iii. L-oneru tal-prova qieghed fuq l-appellant.
   iv. Il-proceduri huma minnhom infushom ta' natura kriminali. Tant hu hekk li l-appellati kienu arrestati u nghataw il-helsien mill-arrest.

7. Wara li l-qorti qrat l-atti tosserva:

   i. Il-qorti tibda biex tosserva li ma kellhiex access ghall-file tal-Immigration Appeals Board (ara l-verbal tas-seduta tal-31 ta' Ottubru, 2016). Fic-cirkostanzi l-qorti ordnat lill-partijiet sabiex jipprezentaw kopja ta' dokumenti li kellhom dwar il-kaz.

   ii. Ma jirrizultax li l-Bord ta d-decizjoni tieghu fil-miftuh. Ghalhekk it-terminu tal-appell jibda jiddekorri mid-data li l-partijiet ircevew kopja tad-decizjoni. L-appellant iddikjara li d-decizjoni tal-Bord waslet ghandu

fit-18 ta' April, 2016. Fatt li ma giex kontestat. Fis-26 ta' April 2016 ipprezenta l-appell, cjoe' entro t-terminu kontemplat mil-ligi.

iii. Skont l-artikolu 25A tal-Kap. 217, dritt ta' appell quddiem din il-qorti hu moghti fuq punt ta' ligi. Ghalhekk m'hemmx jedd ta' appell minn punti ta' fatt.

iv. Mill-provi rrizulta li fil-11 ta' Awissu, 2014 l-appellati applikaw ghar-residenza f'Malta. Dan wara li ma baqghux impjegati ma' T.G.S. Co Ltd. Fir-ricevuta li nghataw ghall-applikazzjoni, hemm dikjarat li huma awtorizzati jghixu f'Malta sas-27 ta' Novembru, 2014. Mill-atti jidher li kien fit-13 ta' Ottubru, 2014 li l-appellati nstabu ghand Vassallo Builders Limited. Fil-fatt dakinhar stess inharget l-ordni ta' tnehhija ta' kull wiehed minnhom. Jirrizulta wkoll li fil-mori tal-appell l-awtoritajiet tawhom permess ta' residenza b'effett mill-11 ta' Awissu, 2014, liema permess kien ghalhekk retroattiv. M'hemmx prova li dan il-permess gie revokat.

v. Skont artikolu 5(2) tal-Att dwar l-Immigrazzjoni (Kap. 217), persuna li tkun inghatat permess ghal residenza f'Malta, issir immigrant projbit jekk tikser xi disposizzjoni tal-Att jew regolamenti li jkunu saru tahtu. Imbaghad artikolu 11(2) tal-Att dwar l-Immigrazzjoni (Kap. 217), jipprovdi li hi kundizzjoni mifhuma li persuna li ghandha l-permess ta' residenza, *"(….) ma ghandhiex f'Malta tezercita xi professjoni jew xoghol jew ikollha kariga jew tkun impjegata minn xi persuna ohra minghajr licenza minghand il-Ministru"*. M'hemmx prova li fit-13 ta' Ottubru, 2014 l-appellati kellhom licenza sabiex jahdmu.

vi. Skont l-artikolu 33 tal-Kap. 217, l-oneru tal-prova li persuna hi persuna ezenti jew li persuna mhijiex immigrant projbit taht l-artikolu 5(2)(a), hu fuq il-persuna. M'hemmx provvediment simili fir-rigward tal-artikolu 5(2)(e), li hi d-disposizzjoni li a bazi taghha l-appellant hareg l-ordni ta' ritorn datata 13 ta' Ottubru 2014. Fin-nota ta' sottomissjonijiet li pprezenta quddiem il-Bord, l-appellant argumenta:-

"Illi, ***l-artikolu 5(2)(e) ighid 'jekk tikser xi wahda mid-disposizzjonijiet ta' dan l-Att jew ta' xi regolament maghmul bis-sahha tieghu****'. Mela wiehed mir-regolamenti li nkiser hu Artikolu 11(2), li jghid li hi kundizzjoni mifhuma ta' kull permess moghti lil xi persuna skont paragrafu 6(1)(b) u (c) li ma tistax tezercita xoghol"*.

Kien l-appellant li hareg l-ordni ta' ritorn u l-ordni ta' tnehhija, u ddikjara li r-raguni ghalfejn hareg l-ordni ta' tnehhija kienet minhabba li ma kellhomx *work permit*. Fic-cirkostanzi kien hu li kellu obbligu li

jissostanzja bi provi li l-appellati kienu mpjegati f'Malta minghajr permess ta' xoghol mahrug mill-awtoritajiet Maltin.

vii. Il-Bord iddikjara li, *"(.....) the prosecution must prove beyond reasonable doubt that the appellants were working and were doing so in contravention of Maltese Law. The criminal law principle in dubio pro reo applies in that should there be a sliver of doubt or uncertainty in the reasoning behind the issuing of the removal orders, then such orders should not be confirmed"*. Mid-decizjoni ma jirrizultax kif il-Bord wasal ghal konkluzjoni li l-appellant kellu jressaq prova *beyond reasonable doubt*. Fir-realta' dawn m'humiex proceduri kriminali, iżda proċeduri li fihom qieghed jigi mistharreg eghmil amministrattiv. Hu veru li l-appellati gew arrestati u kellhom jaghmlu talba sabiex jinhelsu mill-arrest, pero' dak kien sabiex tigi ezegwita l-ordni ta' tnehhija u mhux ghaliex ikkommettew reat.

viii. Il-qorti tikkonkludi li l-grad ta' prova hu dak ta' bilanc ta' probabiltajiet. Ghal dak li jikkoncerna l-espulsjoni ta' immigranti, l-artiklu 1 tal-Protokoll 7 tal-Konvenzjoni Ewropea dwar id-Drittijiet u Libertajiet tal-Bniedem, tipprovdi:

"An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,
(b) to have his case reviewed, and
(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority".

Il-qorti zzid li skond il-Qorti Ewropea tad-Drittijiet tal-Bniedem, proceduri dwar ordni ta' tkeccija ta' immigrant, m'humiex *criminal charge* ghal finijiet tal-artikolu 6(1) tal-Konvenzjoni. F'dan ir-rigward fis-sentenza **Maaouia v. Franza** (numru 39652/98), dik il-qorti qalet:

"35. The Court has not previously examined the issue of the applicability of Article 6 § 1 to procedures for the expulsion of aliens. The Commission has been called upon to do so, however, and has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention (see, for example, Uppal and Singh v. the United Kingdom, application no. 8244/78, Commission decision of 2 May 1979, Decisions and Reports (DR) 17, p. 149; Bozano v. France, application no. 9990/82, Commission decision of 15 May 1984, DR 39, p. 119; Urrutikoetxea v. France, application no. 31113/96, Commission decision of 5 December 1996, DR 87-B, p. 151; and Kareem v. Sweden, application no. 32025/96, Commission decision of 25 October 1996, DR 87-A, p.173)

36. The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection, the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...". Taken together, those provisions show that the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere. That construction is supported by the explanatory report on Protocol No. 7 in the section dealing with Article 1, the relevant passages of which read as follows:

> *"6. In line with the general remark made in the introduction ..., it is stressed that an alien lawfully in the territory of a member state of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the ... Convention ..., as interpreted by the European Commission and Court of Human Rights ...*
>
> *7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the ... Convention ... in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the ... Convention .....*
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> *16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6."*

37. The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.

38. In the light of the foregoing, ***the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a "civil right" for the purposes of Article 6 § 1****. The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention (see, mutatis mutandis, the Neigel v. France judgment of 17 March 1997, Reports 1997-II, pp. 410-11, §§ 43-44, and the Maillard v. France judgment of 9 June 1998, Reports 1998-III, pp. 1303-04, §§ 39-41).*

39. The Court further considers that orders excluding aliens from French territory do not concern the determination of a criminal charge either. In that connection, it notes that their characterisation within the domestic legal order is open to different interpretations. In any event, the domestic legal order's characterisation of a penalty cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature. Other factors, notably the nature of the penalty concerned, have to be taken into account (see Tyler v. the United Kingdom, application no. 21283/93, Commission decision of 5 April 1994, DR 77, pp. 81-86). On that subject, the Court notes that, in

general, exclusion orders are not classified as criminal within the member States of the Council of Europe. ***Such orders****, which in most States may also be made by the administrative authorities,* ***constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6 § 1****. The fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature. It follows that proceedings for rescission of such measures cannot be regarded as being in the criminal sphere either (see, mutatis mutandis, Renna v. France, application no.* 32809/96*, Commission's decision of 26 February 1997, unreported)".*

ix. **Maghmula dawn il-konsiderazzjonijiet, il-qorti ma tara l-ebda raguni ghalfejn il-grad tal-prova li ghandu japplika hu dak dikjarat mill-Bord.**

x. Peress li l-apprezzament tal-fatti jrid isir mill-Bord, l-atti ser jintbaghatu lura quddiem il-Bord sabiex jiddeciedi skont il-ligi.

Ghal dawn tiddeciedi l-appell billi:

1. **Tichad l-eccezzjoni preliminari tan-nullita tal-appell, spejjez a karigu tal-appellati.**
2. **Tichad l-aggravju tal-appellant li l-oneru tal-prova qieghed fuq l-appellati.**
3. **Tilqa' l-aggravju tal-appellant li l-grad ta' prova hu bilanc ta' probabiltajiet. Fic-cirkostanzi thassar id-decizjoni tal-Bord tat-28 ta' Marzu, 2016 u tibghat l-atti lura quddiemu.**

Spejjez jinqasmu nofs bin-nofs bejn il-partijiet.

Anthony Ellul.