



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-12 ta' Jannar, 2022

Appell Inferjuri Numru 61/2021LM

Albertus Johannes Leonard Springer (Passaport Olandiż nru. NP304K2R6)
(‘l-appellat’)

vs.

The Director of the Department for Citizenship and Expatriate Affairs
(‘l-appellant’)

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mill-appellant **Director of the Department for Citizenship and Expatriate Affairs** [minn issa ‘l quddiem ‘id-Direttur appellat’] mid-deċiżjoni tal-4 ta’ Ġunju, 2021, [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' *in parte* l-appell tal-appellat **Albertus Johannus Leonard Springer** [minn issa 'l quddiem 'l-appellat'] fil-konfront tiegħu għar-raġunijiet hemm imfissra.

Fatti

2. Il-fatti tal-appell odjern jirrigwardaw id-deċiżjoni tal-Aġenzija Identity Malta kif komunikata lill-appellat permezz tal-ittra tagħha tat-2 ta' Ottubru, 2019, fejn id-drittijiet tiegħu ta' libertà ta' moviment ġew ristretti minħabba raġunijiet ta' *'public policy and public security' ai termini* tad-dispożizzjonijiet tal-artikolu 12 u tas-subartikolu 14(1) tal-*Free Movement of European Union Nationals and their Family Members Order (Subsidiary Legislation 460.17)*, u dan wara li ttieħdu in konsiderazzjoni l-kondotta kriminali tiegħu u s-sentenzi tal-Qrati Maltin fil-konfront tiegħu.

Mertu

3. L-appellat istitwixxa proċeduri ta' appell quddiem il-Bord fil-15 ta' Ottubru, 2019 għar-revoka tal-imsemmija deċiżjoni tad-Direttur, prinċipalment għaliex skont it-tagħlim li kien joħroġ mis-sentenzi tal-Qorti Kriminali kif ċitati minnu, ħati riabilitat għandu jiġi rintegrat fis-soċjetà.

Id-deċiżjoni appellata

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

“Preliminary

The Board:

Saw the decision issued by the Director on 2nd October 2019 which stated that the appellant’s freedom of movement was being restricted pursuant to Regulations 12 and 14(1) of S.L. 460.17 on ground of public policy and public security, particularly in view of the appellant’s criminal conduct as described in the relative judgments of the Maltese courts;

Saw that the relative appeal was filed on 15th October 2019;

Saw that the Director filed no reply and no submissions since 15th October 2019; and

Saw that the only submissions filed originated from the appellant.

Submissions filed

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 (Cap. 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. By affording both sides equal time to file all submissions and by not refusing to receive any submissions even after such timeframe has elapsed, the Board is doing justice to the cardinal principle of equality of arms.

The appellant filed an appeal containing four essential points:

- i. The Director’s decision is null and void as it failed to adhere to Regulation 14 of S.L. 460.17 which states that the person to whom the decision is addressed must be informed “precisely and in full, of the reasons for such restriction or of the ground for such removal”.*
- ii. The Director’s decision runs counter to the relative judgment in the sense that in one particular judgment, the competent court imposed a three-year*

probation order. How could the appellant adhere to the probation order and maintain contact with the Department for Probation Services if he left Malta?

- iii. The Director's decision runs counter to Regulations 12(2)(a) and 12(2)(b)(iii) as well as to Regulation 13 of S.L. 460.17 as no consideration was given to the factors or reasons set out in those dispositions.*
- iv. Throughout the period of incarceration, the appellant strove to reintegrate himself and was an exemplary inmate. Consequently, Malta would benefit from his reintegration into society.*

The Board refers to paragraph 11 of Fabio Vespa vs Id-Direttur tad-Dipartiment qħac-Ċittadinanza u l-Espatrijati in which the court held:

“Il-fatt li l-Bord ħa l-inizjattiva u għamel on line search fis-sentenzi li ngħataw kontra l-appellant, m’huwiex ser jiġi kkundannat minn din il-qorti. Il-Bord m’huwiex marbut bi proċedura partikolari.”

The Board carried out a search and discovered the following convictions:

- The Police vs Albertus Johannus Leonard Springer, decided by the Court of Magistrates (as a Court of Criminal Judicature) on 12th March 2008 in which Mr Springer admitted to five charges of aggravated theft, to committing offences during the operative period of a suspended sentence and to recidivism.*
- The Police vs Albertus Johannus Leonard Springer, decided by the Court of Magistrates (as a Court of Criminal Judicature) on 29th September 2018. Mr Springer admitted to two charges of aggravated theft as well as recidivism. The court placed Mr Springer under a three year probation order and a three year treatment order to address his drug addiction.*

The first ground of appeal

*The appellant contends that the relative decision is null and void as it did not inform the appellant in serious and sufficient detail upon which reasons the decision was based. The Board echoes the Vespa judgment and observes that Mr Springer was surely not surprised as he certainly knew that he had been convicted by the competent courts on a number of occasions. However, the Board does concede that the Director's decision could have and should have contained more detail. Accordingly, the Board **rejects** the first ground of appeal.*

The second ground of appeal

In its judgment of 26th September 2018, the Court of Magistrates placed Mr Springer under a three year probation order and a three year treatment order to address his drug addiction. The Board completely agrees with the appellant. How can Mr Springer make the best possible use of the probation order and the treatment order if he is being commanded to leave Malta? Se mai, the Director's decision should have been issued at the expiration of those orders, that is to say, at the end of 2021.

*Accordingly, the Board **upholds** this ground of appeal in part, subject to conditions which shall be described in the dispositive part of this decision.*

The third ground of appeal

The appellant's third ground of appeal deals with the principle of proportionality.

*The Board refers to the judgment of the Court of Appeal **Vladimir Repan vs. Id-Direttur tad-Dipartiment għaċ-Ċittadinanza u l-Espatrijati**, handed down on 16th October 2018, and observes that in that judgment, the court clearly stated that in cases as these, this Board must examine:*

- i. The legality of the action proposed by the Director;*
- ii. The facts and circumstances surrounding the proposed measure; and*
- iii. **Whether the decision complies with the principle of proportionality.***

*The Board is making ample reference to pages 7,8,9,10 and 11 of the **Repan** judgment.*

Subsidiary Legislation 460.17 is based on Directive 2004/38/EC. Article 27 of the Directive states (emphasis added by the Board):

- "1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on ground of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*
- 2. Measures taken on ground of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute ground for taking such measures.*

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the

particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.
4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.”

Article 28 of the Directive further states (emphasis added by the Board):

- “1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, **except on serious ground of public policy or public security.**
3. An expulsion decision may not be taken against Union citizens, **except if the decision is based on imperative grounds of public security,** as defined by Member States, if they:
 - a. have resided in the host Member State for the previous ten years;
 - or

- b. are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the rights of the Child of 20 November 1989.”

This Board must now examine whether any serious ground of public policy or public security exist. By way of example, in paragrah 23 of the Repan judgment, the Court of Appeal declared that an example of serious ground of public policy and public security was if the appellant were involved in criminal activity involving dealing in narcotics as part of an organised group.

In P.I. vs Oberbuergermeisterin der Stadt Remscheid, the Grand Chamber of the Court of Justice of the European Union reiterated that in order for a Member State to expel an EU national, the conduct of that person (hence, not only that person’s criminal convictions) must constitute a genuine, present threat affecting one of the fundamental interests of society.

Does the appellant constitute a genuine and present threat?

In the cases on freedom of movement upon which the Court of Appeal as well as this Board have had the occasion to express themselves, it was almost invariably the case that the appellants had a history of offences related to drugs or forgery or violence (such as grievous bodily harm). This was the case with Vladimir Repan, Damiano Calisti, Fabio Vespa and Biondy Clayd Raafenberg.

The Director’s decision is manifestly disproportionate when one considers that the same provisions of S.L. 460.17 are being indiscriminately applied to forgers and drug traffickers (see the Vespa and Repan cases) as well as to people who commit theft. The Board adds that compared to Mr Vespa and Mr Repan, the appellant’s infractions are certainly not serious.

Accordingly, the Board holds that Identity Malta Agency provided no evidence that Mr Springer constitutes a genuine and present threat which necessitates his removal from Malta. The Board also finds that the Director’s decision does not comply with the principle of proportionality.

The fourth ground of appeal

In the fourth ground of appeal, the appellant claimed that during incarceration, he behaved in an exemplary manner. The Board observed that this claim was not supported by evidence whatsoever and is therefore being rejected.

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. 460.17, the Board accepts the appellant's appeal in part and directs:

- i. That the appellant is to provide evidence that he is abiding by the treatment order as per the relative judgment/s of the Maltese courts;*
- ii. That the appellant has not been convicted of further offences during the probation period; and*
- iii. That he has not been convicted of any offence since 26th September 2018;*
- iv. That he provides or produces evidence that he is being followed by the probation services and is abiding by the directions of probation personnel as well as by the relative orders of the Maltese courts;*
- v. That the appellant must provide a copy of his full criminal record (fedina penali) and a police conduct certificate; and*
- vi. That the appellant's probation officer and/or other officer following him who is enforcing the treatment order must provide an affidavit in order to prove (if such is the case) that the appellant is obeying the treatment order.*

All of this documentation must be provided to Identity Malta Agency within three weeks from the date of this decision.

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

L-Appell

5. Id-Direttur appellant ipprezenta r-rikors tal-appell tiegħu quddiem din il-Qorti fid-9 ta' Ġunju, 2021 *ai termini* tas-subartikolu 25A(8) tal-Kap. 217 tal-Liġijiet ta' Malta, fejn talab lil din il-Qorti sabiex tħassar u tirrevoka d-deċiżjoni appellata, filwaqt li tordna lill-Bord sabiex jieħu deċiżjoni mill-ġdid, bl-ispejjeż taż-żewġ istanzi kontra l-appellat. Jgħid li huwa jhossu aggravat bil-fatt li l-Bord

ikkonsidra li huwa ma kienx intavola l-ebda risposta għall-appell tal-appellat mid-deċiżjoni tiegħu.

6. L-appellat għażel li ma jipprezenta l-ebda risposta.

Konsiderazzjonijiet ta' din il-Qorti

7. Il-Qorti ser tgħaddi sabiex tikkonsidra l-aggravju ewlieni tad-Direttur appellant fid-dawl ta' dak li gie deċiż mill-Bord.

8. Id-Direttur appellant filwaqt li jirrileva li l-Bord fid-deċiżjoni appellata kkonsidra li huwa ma kien ipprezenta l-ebda risposta għall-appell intavolat mill-appellat, u filwaqt li jgħid ukoll li din il-Qorti għandha ġurisdizzjoni li tisma' l-appell tiegħu *ai termini* tas-subartikolu 25A (5) tal-Kap. 217, jikkontendi li d-deċiżjoni tal-Bord hija żbaljata. Jispjega li l-Aġenzija Identity Malta kienet fil-fatt daħħlet risposta fis-27 ta' Ottubru, 2020, u hawn huwa jagħmel riferiment għal *email* li ntbagħtet fis-27 ta' Ottubru, 2020 u li kopja tagħha huwa jannetti mar-rikors tiegħu bħala Dok. IMA 3, u anki għar-risposta għall-istess *email* ukoll annessa bħala Dok. IMA 4. Id-Direttur appellant jgħid li r-risposta kienet giet ipprezentata in ottemporanza tat-terminu impost mill-Bord stess, u meħud in konsiderazzjoni l-fatt li l-appell tal-appellat mid-deċiżjoni tiegħu kien gie notifikat lilu fit-13 ta' Ottubru, 2020. Jgħid li l-Bord saħansitra osserva fid-deċiżjoni appellata li l-Aġenzija kienet naqset milli tagħmel is-sottomissjonijiet tagħha, izda jikkontendi li dan ma setax isir ġaladarba l-appell ma kienx gie notifikat. Jikkontendi li dan kollu wassal sabiex il-Bord ikkonsidra biss is-

sottomissjonijiet tal-appellat, u għalhekk id-deċiżjoni appellata hija nulla fid-dawl tal-prinċipju ta' *audi alteram partem*, fejn l-enti ġudikanti kienet dovuta tisma' liż-żewġ partijiet qabel tiddeċiedi. Jirrileva li l-Bord stess fid-deċiżjoni appellata jagħmel aċċenn fuq il-prinċipju tal-*equality of arms ai termini* tas-subartikolu 3(2) tal-Kap. 490, iżda ma kienx biżżejjed li wieħed isemmi dan il-prinċipju bażiku mingħajr ma jhaddmu kif xieraq.

9. Il-Qorti wara li ħadet konjizzjoni tal-*emails* li jaċċenna għalihom id-Direttur appellant fir-rikors tal-appell tiegħu, iżda anki r-risposta tiegħu stess kif inserita fl-inkartament tal-Bord fejn it-timbru tal-Bord jindika b'mod inekwivoku li din ir-risposta kienet ġiet intavolata fit-28 ta' Ottubru, 2020, tgħid li l-aggravju tad-Direttur appellant huwa ġustifikat u tilqgħu.

Decide

Għar-raġunijiet premissi, il-Qorti tilqa' l-appell odjern u filwaqt li tiddikjara li d-deċiżjoni appellata hija nulla stante li l-Bord naqas li jieħu konjizzjoni tar-risposta tad-Direttur appellant, tordna sabiex l-inkartament sħiħ tal-proċeduri quddiem il-Bord jintbagħat lura quddiem il-Bord għal deċiżjoni dwar il-mertu, bl-ispejjeż kollha kontra l-appellat.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Registratur