MALTA

QORTI TA' L-APPELL KRIMINALI

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

Seduta ta' l-24 ta' Frar, 2003

Appell Kriminali Numru. 10/2003

The Principal Immigration Officer

v.

Atabek-Sandzhari Zakhraberinika
(sive Zahraberenika Rabia Atabek-Sanjari)[1] and
Atabek-Sandzhari Asanarakhima
(sive Asanarahima Yalubal Atabek-Sanjari)

The Court:

Having seen the charges preferred by Police Inspector Neville Xuereb in his capacity as Immigration Officer against Atabek-Sandzhari Zakhraberinika and Atabek-Sandzhari Asanarakhima, to wit the charge (**1**) of having, during the months before the 27 June, 2002, as persons who had left Malta under a removal order or a deportation

[1] See note filed in the record of the proccedings during the sitting of the 17th Fenruary, 2003.

order, when seeking leave to land or leave to land and remain in Malta or seeking to obtain a residence permit, failed to expressly declare in writing to the principal Immigration Officer such circumstance, thus rendering any such leave or any residence permit granted to them null and void; (**2**) of having on the 21 January, 2002 and in previous months, without having been granted a residence permit, landed or been in Malta without leave from the Principal Immigration Officer; (**3**) of having in the days before the 27 June, 2002 in relation to any information to be given under or for purposes of the Immigration Act, made or caused to be made a false return, false statement or false representation; and, finally, (**4**) they were charged with being unable to show that they have the means to sustain themselves and therefore likely to become a charge on public funds; the first court was requested, besides awarding the punishment according to law, to declare Atabek-Sandzhari Zakhraberinika and Atabek-Sandzhari Asanarakhima prohibited immigrants and to issue a removal order against them;

Having seen the judgement of the Court of Magistrates (Malta) of the 13 January, 2003 whereby that court found the accused Atabek-Sandzhari Zakhraberinika and Atabek-Sandzhari Asanarakhima guilty of all the charges preferred against them, conditionally discharged them in terms of Section 9 of Chapter 152 for a period of one year, declared them to be prohibited immigrants, and issued a Removal Order against both of them;

Having seen the application of appeal filed by Atabek-Sandzhari Zakhraberinika and Atabek-Sandzhari Asanarakhima on the 23 January, 2003 whereby appellants requested this Court to revoke the judgement of the first court;

Having seen the records of the case; having heard counsel for appellants Dr. Leon Bencini and counsel for the respondent Attorney General Dr. Mark Said during the sitting of the 17 February, 2003; considers:

Appellants, who are holders of Russian Federation passports (see passports exhibited at page 5 of the record of the proceedings) but who also claim to be Turkish nationals (see the evidence of Atabek-Sandzhari Zakhraberinika at page 44 *et seq.*) are in effect charged with the offences contemplated in Sections 24 (first charge), 14(1) (the second charge) and 32(1)(c) (the third charge) of the Immigration Act, Cap. 217. As regards the fourth charge, the applicable provisions are Section 5(2)(a) and Section 15(1) of the same said Act.

According to the evidence produced by the prosecution, appellants were declared prohibited immigrants and a removal order was issued in their regard by the Court of Magistrates (Malta) on the 12 December, 1997. At that time they were in Malta under the names of Alexandra Barinova and Berenika Barinova. Appellants subsequently changed their names – they claim that this was legally done under Russian law – and on the 21 January of last year they turned up at Malta International Airport with a one month visa allegedly issued by consular officers in Istanbul. In applying to enter Malta neither of them expressly declared in writing to the Principal Immigration Officer that they had previously been the subject of a removal order. The one month visa was subsequently extended to the 18 May, 2002 (see pages 6 and 10 of the passports). On the 17 May 2002 they filed another application for a further extension. In submitting this application they failed to declare on the appropriate form the dates of their previous visits to Malta including, of course, the date of the visit prior to their removal in 1997.

In their appeal application appellants put forward two grievances. The first is that their failure to declare their previous removal and their failure to supply the requested information when applying for an extension was based on, or amounts to, a “mistake of fact” which exonerates them from criminal responsibility. This grievance is utterly frivolous. Section 24 of the Immigration Act makes it mandatory for any person who has been the subject of a removal order and who subsequently seeks leave to land or leave to land and remain in Malta to *“…expressly*

declare in writing to the Principal Immigration Officer" the circumstance of the previous removal order, and *"…and, if he fails to do so, any such leave…granted to him shall be null and void and he shall, moreover, by reason only of such omission be guilty of an offence…"* There is nothing in the evidence which can even remotely be relied upon by appellants to substantiate their plea of a mistake of fact. The fact of the matter is that they simply did not declare in writing to the Principal Immigration Officer that they had previously been removed from Malta. They may have been unaware that they had to make such a declaration, but that amounts, as the first court quite rightly pointed out in its judgement, to a mistake of law and not a mistake of fact. As to their failure to indicate their previous visits to Malta – thus giving the impression that this was their first visit – appellants claim that they were "confused" by the form they were presented with because their was no question in the said form as to the possibility of their having changed their name! Apart from the fact that even if this were true (that is that they were confused) it would not amount to a mistake of fact – at best it could be a circumstance to be taken into account for the purpose of determining whether the formal element of the offence contemplated in Section 32(1)(c) could be said to exist – this Court is convinced that appellants deliberately omitted to give this information so as to ensure that the authorities would be kept unaware of their brush with the law in 1997.

The second grievance is to the effect that the prosecution failed to prove that they do not have sufficient means to support themselves. As counsel for the prosecution, however, quite rightly pointed out, the first part of paragraph (a) of subsection (2) of Section 5[2] clearly shifts the burden of proof upon the accused. Appellants did not in any way prove, not even on a balance of probabilities, what means they had or were likely to have in order to support themselves here in Malta.

[2] "if he is unable to show that he has the means of supporting himself and his dependants (if any) or if he or any of his dependants is likely to become a charge on the public funds" (emphasis added).

For these reasons the Court dismisses the appeal filed by Atabek-Sandzhari Zakhraberinika and Atabek-Sandzhari Asanarakhima and confirms the judgement of the first court, including the relative removal orders; and for the purposes of such removal authorises the Principal Immigration Officer to detain in custody the said Atabek-Sandzhari Zakhraberinika and Atabek-Sandzhari Asanarakhima so that they may be removed from these Islands under escort as provided in Chapter 217 of the Laws of Malta.

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