

Kopja Informali ta' Sentenza



MALTA

**QORTI TAL-APPELLI KRIMINALI (INFERJURI)  
MALTA**

**S.T.O. PRIM IMHALLEF  
DE GAETANO VINCENT**

Seduta ta' 25 ta' Ottubru, 2002

Appell Kriminali Numru. 157/2002

**The Police  
[recte: The Principal Immigration Officer]<sup>1</sup>**

**v.**

**Nikolay Petrov Kirilov**

The Court:

Having seen the charge brought by Police Inspector Sandro Zarb in his capacity as Immigration Officer against Nikolay Petrov Kirilov, to wit the charge of having, during the months preceding the 27 March, 2002, without having been granted a residence permit, landed or been in Malta without leave from the Principal Immigration Officer; the first court was requested to issue a removal order in addition to any punishment prescribed by law;

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<sup>1</sup> See pages 1 and 3 of the record of the proceedings.

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Having seen the judgement of the Court of Magistrates (Malta) of the 18 June, 2002, whereby that court found the accused not guilty of the charge as preferred against him;

Having seen the application of appeal by the Attorney General whereby the said appellant requested that this Court revoke the judgement of the 18 June, 2002 and instead find respondent guilty as charged and inflict upon him the punishment according to law;

Having seen the record of the case; having heard counsel for the appellant and counsel for the respondent at today's sitting; considers:

The appellant Attorney General is claiming that the judgement of the first court contains a wrong interpretation of the law in so far as the intentional or formal element of the offence contemplated in Section 14(1) of the Immigration Act is concerned. In the said judgement the first court stated as follows:

**...the accused is charged with having committed a crime and in this regard the Court is of the opinion that the Prosecution has to prove the intentional element which was not expressly or tacitly excluded by the law applicable to this case...from the evidence produced it does not result that the accused acted maliciously. In fact it appears that the accused acted without any criminal intent and applied for an extension to his visa through the member of the committee above mentioned. For these reasons the Court finds the accused not guilty and sets him free.**

The court agrees with appellant that the above quotation contains a wrong interpretation of the law. The offence contemplated in Section 14(1) of Cap. 217 does not require that the accused should have acted "maliciously" which, in the circumstances, can only mean "deliberately in violation of the law" or "deliberately in order to evade the prohibitions of the law". The formal element of the offence consists simply in the knowledge that one does not have leave (i.e. permission) from the Principal

Immigration Officer to land or to be in Malta or, inversely, in the absence of positive knowledge that one has such leave.

From the evidence it is clear that respondent knew that his visa was due to expire on the 6 October, 2001. In fact ten days before the expiry date he filled in the necessary application form for renewal of the visa, and handed it to a member of the committee of Hamrun Spartans Football Club, with which club he was employed. For reasons which this Court need not go into, the application was not handed to the Police by the said club before some time in February of this year. It is patently obvious, therefore, that on the 6 October, 2001 or, at most, on the 7 October, 2001 he had not been approached by the competent authority – in this case, the Central Immigration Office at Police Headquarters – and informed that his visa had been extended. Consequently, respondent can in no way claim that he knew that his visa had been extended beyond the 6<sup>th</sup>.

Neither can respondent claim, or rely upon, the defence of mistake of fact on the ground that he had been told by the administrator of the Club, Antoine Attard, that “*everything is O.K.*” (see evidence of respondent before the first court, fol. 17). As was rightly pointed out by appellant, for such a defence to succeed the mistake must be essential (which in this case it would have been) and inevitable, that is such that could not have been avoided by respondent by the use on his part of ordinary diligence (see in this respect the judgement of this court of the 12 February, 1999 in the names ***Il-Pulizija v. Adel Abdullah Mohammed Ghsies***). It was incumbent upon respondent, as the applicant for the extension of the visa, to ensure that the application reach the competent authority in due time prior to the expiry of the visa, and to follow up the said application to find out whether such extension had been granted or not. The mistake of fact was, in the circumstances, evitable and not inevitable.

For these reasons the Court allows the appeal by the Attorney General, revokes the judgement of the first court,

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and consequently finds respondent Nikolay Petrov Kirilov guilty as charged in terms of Section 14(1) of the Immigration Act; the Court sentences him to a fine (*multa*) of fifty liri (Lm50), orders that he be removed from Malta according to law, and for this purpose authorises the Principal Immigration Officer to detain in custody the said Nikolay Petrov Kirilov so that he may be removed from these Islands under escort as provided in Chapter 217 of the Laws of Malta.

Aldo Testone  
Asst. Registratur