

Kopja Informali ta' Sentenza



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

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

Seduta tal-15 ta' Novembru, 2002

Appell Kriminali Numru. 249/2002

Appeal number 249/2002

The Principal Immigration Officer

v.

Aleksandar Jankovic

The Court:

Having seen the charge brought by Police Inspector Sandro Zarb in his capacity as Immigration Officer against Aleksandar Jankovic, to wit the charge of having, during the days immediately preceding the 3 July, 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 declare the said Jankovic a prohibited immigrant and to issue a removal

order against him in terms of Section 14 of Chapter 217 in addition to any punishment prescribed by law;

Having seen the judgement of the Court of Magistrates (Malta) of the 11 October, 2002, whereby that court found the accused not guilty of the charge as preferred against him;

Having seen the application of appeal filed by the Attorney General on the 28 October, 2002 whereby he requested that this Court revoke the judgement of the first court;

Having seen the record of the case; having heard counsel for appellant and for respondent; considers:

1. The facts of this case are quite simple. Respondent Aleksandar Jankovic is a citizen of the Federal Republic of Yugoslavia – his passport, exhibited at fol. 6 of the record of the proceedings, is *prima facie* evidence of this. On the 20 December of last year (2001), page 7 of the said passport was endorsed by the Principal Immigration Officer with the stamp indicating that the said Jankovic was an exempt person in terms of Section 4(1)(g)(h)¹ of the Immigration Act (Cap. 217).

2. On the 11 June of this year (2002), the said endorsement was cancelled by the Principal Immigration Officer indicating that the holder of that passport was no longer an exempt person in terms of the said Section 4(1). This state of facts, with its legal implications as far as the Immigration Act is concerned, appears to have been accepted by respondent, because on the 13 June, 2002 he applied for a permit or visa to actually remain in Malta (see the evidence of Inspector Sandro Zarb, fol. 11). The said application was turned down by the Principal Immigration Officer. Respondent was personally informed by Inspector Zarb, on the 22 June, that this application had been turned down and on he was also ordered to leave Malta by the 24 June or face prosecution. Jankovic

¹ Actually the stamp used refers to Section 4(g)(h), when the correct reference should have been to Section 4(1)(g)(h).

failed to leave as ordered by the Principal Immigration Officer, and he was therefore arraigned in court, charged as above indicated, on the 3 July, 2002.

3. The first court received the evidence of Marthese Jankovic nee` Grixti, the wife of respondent (see fol. 14 to 15) as a witness for the prosecution on the 7 October, 2002. This Court cannot understand how or why the first court allowed the said Marthese Jankovic to give evidence when the law clearly states that *“the wife or husband of the party charged or accused cannot be admitted to give evidence either in favour or against such party”* (S. 635(1) of the Criminal Code). None of the exceptions mentioned in paragraphs (a), (b) or (c) of subsection (1) of Section 635 apply in the case – the offence contemplated in Section 14(1) of the Immigration Act can by no stretch of the imagination be termed an offence against the witness (i.e. against Marthese Jankovic). Aleksandar Jankovic gave evidence² only on the 11 October, 2002, and did not thereafter request the evidence of his wife (Section 635(1)(c), Cap. 9). This Court is therefore going to ignore completely the evidence of Marthese Jankovic at fol. 14 and 15. At yesterday’s sitting before this Court (i.e. the Court of Criminal Appeal), respondent Jankovic elected not to give evidence.

4. The first court acquitted the accused Jankovic after stating the following:

Considered that after having examined the relevant legislation, it appears that the law does not distinguish between marriages of convenience and marriages that have been entered in good faith but had an unfortunate turn. The Court asks how one is to defend his personal and proprietary rights when faced with the situation where his or her marriage is no longer tenable and is³ a de facto separation he or

² Unlike the evidence of other witnesses, a transcript of the evidence of the accused is not to be found in the record of the case.

³ The word “is” appears to be a typing error; the hand written judgement at page 2 of the record would seem to indicate that the word used by the learned Magistrate was “on”.

she is duty bound to leave these Islands as the exempt person status is withdrawn.

In this case the Court is convinced that no criminal intent was present in the mind of the accused and in these circumstances acquits him of the charge.

5. The Attorney General, in his application of appeal, contends that the first court's acquittal is the result of a wrong interpretation of the law. This Court cannot but agree with appellant. First of all, the exempt person status is not "withdrawn" (nor is it "given" for that matter) by the immigration authorities, as is clearly implied in the judgement of the first court. A person is exempt from the provisions of Part III of the Immigration Act if, as a matter of fact, he satisfies any one of the conditions mentioned in paragraphs (a) to (h) of subsection (1) of Section 4 of the said Act. The fact that a person holds a non-Maltese passport is *prima facie* evidence that he or she is not a citizen of Malta; it is up to him or her to prove, at least on a balance of probabilities, either that notwithstanding that foreign passport he or she is a citizen of Malta or that he or she qualifies as an exempt person under any one or more of paragraphs (b) to (h) of the said provision. Paragraph (g), which appears to be particularly relevant in this case, states that a person is an exempt person if he or she "...is the spouse of any person referred to in any of the foregoing paragraphs⁴ and is still married to and living with that person". According to witnesses Sandro Zarb and Tonio Fenech respondent was (and, as far as this Court is aware, probably still is) married to a Maltese citizen – Marthese Jankovic nee` Gixti. As has already been indicated, it was up to respondent, in so far as he was the party charged before the first court, to prove (at least on a balance of probabilities) that in the days immediately preceding the 3 July, 2002, he was still living with his wife (a citizen of Malta). The issue raised by the first court in its judgement, that is the defence of one's "personal and proprietary rights" is totally irrelevant. The first court also seems to have implied that when a

⁴ E.g. a citizen of Malta.

marriage (between a Maltese citizen and a non-Maltese citizen) is not one of convenience, and this marriage breaks down, the fact that the non-Maltese party has a right “to defend his personal and proprietary rights” excludes criminal intent. Again this amounts to a wrong exposition of the law. As was stated by this Court in its judgement of the 25 October, 2002 in the names ***The Police v. Nikolay Petrov Kirilov*** the formal element of the offence contemplated in Section 14(1) of the Immigration Act 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. In the present case, respondent Jankovic was so aware that he did not have permission to be in Malta that on the 13 June, 2002 he applied for a visa, which application was, as already stated, turned down.

6. Learned counsel for respondent, in the course of his oral pleadings before this Court, argued that the procedure laid down in subsection (2) of Section 4 of Cap. 217 was not followed in this case. The Court, however, is of the opinion that this subsection was not applicable to the present case. Subsection (2) is clearly an overriding provision which gives the Minister responsible for immigration – not the Principal Immigration Officer – the power to remove the status of an exempt person in the public interest even when such person fully satisfies the requirements of paragraphs (g) or (h) of Section 4(1) of the Act.

7. For the above reasons the Court allows the Attorney General’s appeal, revokes the judgement of the first court and consequently finds respondent Aleksandar Jankovic guilty as charged (that is of the offence contemplated in Section 14(1) of the Immigration Act, Cap. 217), sentences him to two (2) days imprisonment and orders that he be removed from Malta according to law; and for the purpose of such removal the Court authorises the Principal Immigration Officer to detain in custody the said Aleksandar Jankovic so that he may be

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removed from these Islands under escort as provided in Chapter 217 of the Laws of Malta.

A. Testone
A./Registratur