

Case No.22-3143

Judge Y.Y. Beketova

DECISION

Moscow, April 2, 2003

On April 2, 2003, Ms. Y.N. Mitina, a judge of the Moscow City Court, considered at a court session a case concerning a cassation appeal lodged by Mr K.G. Nersisyan, a lawyer, against the decision of the Zyuzinsk District Court, Moscow, of February 28, 2003, according to which Mr. AKHMAD SUKHAILMOKHAMMAD SARVAR SAKHA, an Afghan national born on March 25, 1977, pursuant to Articles 3.10 and 18.8 of the RF Code on Administrative Offences, incurred a penalty in the form of an administrative fine to the total amount of 5 minimum wages (RuR 500) in favour of the state to be followed by his expulsion from the RF. His expulsion was to be preceded by detention and temporary custody at the UVD YUZAO detention centre in Moscow.

Having listened to Judge Y.N. Mitina's report and accounts of lawyers Mr Narsesyan and Ms Zababurina, who sustained the cassation appeal and requested the court decision be overruled, the Judge

HAS ESTABLISHED THE FOLLOWING:

According to the court decision of February 28, 2003, administrative proceedings were instituted against Mr. Akhmad S.M.S.S, an Afghan national, as per Article 18.8 of the RF Code of Administrative Offences in the form of an administrative fine to the total amount of 5 minimum wages (RuR 500) in favour of the state to be followed by his expulsion from the RF. His expulsion was to be preceded by detention and temporary custody at the UVD YUZAO detention centre in Moscow.

Mr. Akhmad S.M.S.S has committed the offence in Moscow under the circumstances set forth in the court decision.

Lawyer K.G. Narsesyan, acting on behalf of Mr. Akhmad S.M.S.S, does not agree to the said court decision. In his cassation appeal, he requested the court decision should be overruled and the case forwarded for court review. To substantiate his claim, he pointed out that in the course of the administrative proceedings, Mr. Akhmad S.M.S.S's right to protection was violated, namely: he was denied the opportunity to familiarise himself with the materials on the administrative case, provide clarifications in court, submit evidence, file applications and estop, resort to legal assistance of an advocate. Moreover, the court session was actually a closed one, and the applicant's relatives were not allowed to attend the court session. The judge did not read out the court decision in full. She failed to read out the part of the decision that is related to the applicant's expulsion from Russia, which was not

translated into Mr. Akhmad S.M.S.S's native language. Neither was he given a copy of the court decision translated into his native language.

In addition to Mr. Narsesyan's cassation appeal, Lawyer Ms. T.V. Zababurina also requested the court decision be overruled, arguing that, in her opinion, there was no transgression in Mr. Akhmad's actions envisaged under Article 18.8 of the RF Code of Administrative Offences, as upon his arrival in Russia, he approached the Moscow GUV D Department for Migration with an application for temporary asylum, and case No.1146-02-000431 was opened on his application. It was not his fault that the Moscow GUV D Department for Migration failed to consider his application in due time and issue him an Attestation on Consideration of a Temporary Asylum Application. Thus, Mr. Akhmad was denied the opportunity to officially register his sojourn in Russia according to the duly established procedure.

Having listened to the accounts made by lawyers K.G. Narsesyan and T.V. Zababurina, who sustained the cassation appeal and additions to it; having checked the materials related to the administrative case; having discussed the cassation appeal and additions to it, the Court has found the decision of the district court subject to cancellation on the following grounds:

As per Article 29.7-1-5 of the RF Code of Administrative Offences, when a case concerning an administrative offence is tried in court, there is to be established the fact of appearance in court of a person against whom administrative proceedings have been instituted, as well as of other persons participating in the case-related proceedings, and their rights and duties are to be explained to them.

As it follows from the materials on the administrative case in question, when considering the case materials, Mr. Akhmad, against whom administrative proceedings have been instituted, was not given any clarification of his rights as per Article 25.1 of the RF Code on Administrative Offences and the availability of any claims with him was not established.

Moreover, as it follows from the court decision, Mr. R.M. Mehripur, an interpreter, participated in the administrative proceedings. However, there is no information in the materials on the administrative case concerning the court's approval of this person in the capacity of an interpreter as per Article 25.10-2 of the RF Code on Administrative Offences. Neither has the identity of the person in question been established nor any information provided to the effect that his duties, as per Article 25.10-3 of the RF Code on Administrative Offences, were explained to him. Neither was he notified of administrative liability in the event of manifestly erroneous interpretation as per as per Article 25.10-4 of the RF Code on Administrative Offences.

In addition, there is no information in the administrative materials to the effect that Mr. Akhmad was duly forwarded a copy of the court decision in his native language or that the court decision was duly interpreted into his native language when the Judge was reading it out.

Proceeding from the above, the Judge agrees to Mr. Nersesyan's cassation appeal and maintains that in the course of administrative proceedings with regard to

Mr. Akhmad, Articles 25.1, 25.10 and 29.11 of the RF Code on Administrative Offences were violated, which is a serious breach of legal proceedings set forth in the RF Code on Administrative Offences. The above facts prevented a comprehensive and objective consideration of the case. The Judge finds the decision of the Zyuzinsky District Court of 28.02.2003 subject to cancellation and the case subject to a review at the Zyuzinsky District Court.

The Judge also observes that the court decision of 28.02.2003 is not in keeping with Article 29.10 of the RF Code on Administrative Offences: based on the results of the examination of an administrative case, the judge is to pronounce his judgement, with no reference in the document's title to the merits of the decision taken being envisaged in Article 20.10 of the RF Code on Administrative Offences. In violation of Part 1, Clause 3, the court decision lacks full data on the person with respect to whom the case has been considered. In violation of Part 1, Clause 5, the narrative part of the court decision sets out data obtained from Mr. Akhmad's clarifications concerning his sojourn in Russia, rather than describing factual circumstances of the offence committed by Mr. Akhmad and established in the course of the consideration of the case. However, the circumstances set forth in the court decision, do not conform to the nature of the offence as per Article 18.8 of the RF Code on Administrative Offences, as well as the nature of the offence set forth in the protocol on the administrative offence with regard to Mr. Akhmad drawn up by an OVD "Zyuzino" custody inspector on 27.02.2003. In violation of Part 1, Clause 6, the decision on the case, namely recovery of penalty and imposition of additional penalty in the form of Mr. Akhmad's expulsion from the RF, preceded by detention and temporary custody at the UVD YUZA O detention centre in Moscow, is not motivated. There is no indication in the operative part of the court decision to the effect that administrative proceedings were instituted against Mr. Akhmad.

Besides, the Judge observes that the protocol on the administrative offence with regard to Mr. Akhmad of February 27, 2003 was drawn up in violation of Article 28.2 of the RF Code on Administrative Offences, namely: the nature of the offence which Mr. Akhmad is charged with does not conform to the nature of the offence as per Article 18.8 of the RF Code on Administrative Offences,

Moreover, the Judge further observes that when considering the administrative materials, the Court, in violation of Article 26.1 of the RF Code on Administrative Offences, failed to check properly into the circumstances that were of significant relevance for consideration of the administrative material on the merits and taking a relevant decision, such as presence of the event of an administrative offence; the identity of person who has committed unlawful actions (inaction), for which he is to be held administratively liable; the person's administrative guilt; circumstances either aggravating or mitigating the administrative liability, as well as other circumstances which are relevant to the correct disposition of the case.

Having regard to the particular circumstances of the case, the Judge can not recognise the decision of the Zyuzinsk District Court of February 28, 2003 with regard to Mr. Akhmad as being lawful and well-founded. The Judge considers it should be revoked and the administrative material forwarded for a review to the same court of different composition. During the review proceedings, the Judge is to eliminate the above-mentioned procedural violations set forth in the RF Code of

Administrative Offences and violations of procedural requirements as per Article 28.2 of the RF Code on Administrative Offences.

For these reasons and being guided by Articles 30.6, 30.7 of the RF Code of Administrative Offences, the Court

HAS AWARDED THE FOLLOWING JUDGEMENT:

The decision of the Zyuzinsk District Court of February 28, 2003 with regard to Mr. AKHMAD SUKHAILMOKHAMMAD SARVAR SAKHA shall be revoked, and the administrative material shall be forwarded for a review to the same court of different composition. The cassation appeal lodged by Mr. Nersesyan, a lawyer, and additions to it by Ms. T.V. Zababurina, a lawyer, shall be found subject to just satisfaction.

Judge