

## U.S.A. v. N.B.L. *et al.*

### Facts

Defendants 1 and 2 (legal persons, which together form N.B.) conspired - with their employees Defendants 3 to 6 - to commit and cover up immigration violations during the hiring of migrants who worked in their packinghouse. From July to December 2000, the defendants willfully and knowingly conspired to hiring irregular migrants, providing false immigration documents, completing false immigration forms, and representing to the Nebraska United States Department of Labor that false social security numbers provided by irregular migrants were genuine. Defendants 7 to 9 (who managed to escape authorities) are alleged of having - in El Paso, Texas (U.S.A.) and elsewhere - recruited irregular migrants to work at N.B., transported them to Omaha, Nebraska (U.S.A.) via bus and supplied them with false documents. The defendants acted with the purpose of obtaining a financial or other material benefit.

In December 2000, the INS executed search warrants at N.B. It found and detained over 200 irregular migrants.

The defendants were charged with conspiring to commit and covering up immigration violations during the hiring of irregular migrants. Defendants 1 to 6 were then indicted with various substantive counts in furtherance of the conspiracy. Defendants 7 to 9 were charged with recruiting irregular migrants to work at N.B., transporting

them to Omaha, Nebraska (U.S.A.) via bus, and supplying them with false papers. Defendants 1 to 6 presented motions to dismiss the indictments.

### Elements of success

- Due process ensured
- State responsabilisation

### Challenges

- Sub-standard investigation
- Collection of evidence
- Rights of the accused

### Background

Apparently because it was costing the Government over 11 000 USD per day to hold the migrants, few days after their detention, approximately 152 migrants were removed from the United States. Other 19 migrants were held in custody and sent to Dallas, Texas (U.S.A.) to appear before immigration judges. Others – 30, according to INS estimation - were released on their own recognizance. Of those released on their own recognizance, at least 11 became fugitives. Ultimately, the INS admitted that at least 181 migrants were either deported or were "*voluntarily returned*". The whereabouts of the others remained unknown to the INS.

### Key issues

- ❖ Evidence
- ❖ Migrants as witnesses

## ❖ Rights of the accused

### Investigation

Authorities relied on testimonial and documentary evidence as well as undercover surveillance (INS) and the input of confidential informants.

The raid carried out to N.B. in December 2000 was different than a typical INS enforcement sweep whereas a specific criminal investigation is not the focus of the foray. Prior to the raid, a special briefing was held. The agents were instructed to interview migrants in great depth and look for and preserve both inculpatory and exculpatory information. The agents were ordered to record information on a specific form ("I-213") as well as to report potentially inculpatory or exculpatory information to supervisors. The I-213 form had been amended in order to effectively meet the purpose of the investigation. Notably, extra lines had been added, requiring the agents to ask: (i) who hired the migrant; (ii) who recruited the migrant; (iii) how the migrant traveled to the United States; (iv) who assisted in completing the relevant immigration forms; (v) from whom the migrant received his or her documents; and (vi) how much the migrant paid for the documents.

### Reasoning

Defendants 1 to 6 contested the indictments on grounds of loss of material and favorable evidence.

The critical question at stake was the following: *“When the government removed hundreds of (irregular) aliens from this country before their testimony could be preserved, did the government*

*act in bad faith and deny the defendants material and favorable evidence?”*

The Government seized all irregular migrants found at N.B., deported most of them, and did not now know where any of them were. Those migrants were unavailable to the defendants. Defense counsels were not given an opportunity to interview any irregular migrant.

The interviews carried out by INS were not conducted in accordance with the amended I-213 form and the instructions addressed to agents. Critical questions were never asked, e.g. re the person who recruited the irregular migrants. It was ascertained that some migrants were in position to provide exculpatory evidence. This information was brought to the attention of INS supervisors. No effort was done to detain those migrants as material witnesses, or take sworn statements to preserve the potentially exculpatory testimony.

The Sixth Amendment's assurance of compulsory process and the Fifth Amendment's guarantee of due process both prohibit the government from seizing irregular migrants and removing them from the country when the result of that action is to deny criminal defendants favorable and material testimony from those absent aliens.

The bad faith of the Government in removing the migrants from the country can be proven in one of two ways: show that the Government (i) departed from normal deportation procedures, or (ii) deported the irregular migrants to gain an unfair tactical advantage over the defendant at trial. *In casu*, the Government acted in bad faith when deporting the detained migrants. It did

not follow its own deportation procedures. The normal INS procedure in a case involving a sweep to obtain evidence of a targeted criminal prosecution was to faithfully search for and preserve exculpatory evidence, as well as to gather and preserve inculpatory evidence. This was undoubtedly not the standard of action in the instant case.

The irregular migrants were in the position of providing material evidence. Notably, (i) they had information relating directly to the defendants' knowledge of whether their workers were irregular, (ii) their exculpatory testimony would not have been cumulative and could not have been provided by anyone else. Witnesses' unavailability through no fault of the defendants "*may well support a relaxation of the specificity required in showing materiality*" and the defendants in this situation "*cannot be expected to render a detailed description of their lost testimony*". Likewise, the overt acts and substantive counts were much based on the input of confidential informants and an undercover INS agent. The testimony of migrants would have served to dilute the significance of evidence given by said informants and undercover agent.

The Government faced a delicate dilemma. On the one hand, it must enforce the criminal laws. On the other, it must enforce immigration laws. In so doing, it must also be sensitive to very real humanitarian concerns, which require it to act in a prompt fashion when dealing with the often poor and abused irregular migrants who become wards of the Government. Thus, "*It simply will not do, therefore, to minimize the Government's dilemma in cases like*

*this*". The Government must abide by its own procedures.

## **Verdict/Decision**

Indictments dismissed.

## **Opinion**

The case is illustrative of the pressing need in providing the necessary assistance and support to smuggled migrants, including to secure their cooperation with justice. Rigorous investigative methodologies are critical in migrant smuggling cases, especially with the purpose of collecting evidence in the pre-trial phase that might be admissible in trial. This is all more so the case given that migrant smuggling is a crime re which victims/witnesses often prefer, for different reasons, not to engage with authorities. By the same token, the rights of the accused may not be overlooked. The principle of contradictory and equality of arms must be abode by. Otherwise, the very legitimacy of migrant smuggling prosecutions will be undermined.