Judgment 7/2007 **Robert Edward O'Dette and Franklin Delano O'Dette – Court of Appeal (Criminal Appeals 361, 362) – 28th March 2007**

Importation of Class A drugs - conspiracy to import Class A drug - appeals against sentence and against recommendation for deportation –– on analysis the substance subject of the conspiracy charge proved not to be a controlled drug – relevance of the Richards guidelines (Court of Appeal 18th April 2002) – sentence should to some extent reflect the fact that the substance imported proved not to be a controlled drug – Immigration Act 1971 and the Immigration (Guernsey) Order 1993 – effect of a deportation order made in Guernsey against a non–British national – position contrasted with that in the United Kingdom – R v Carmona (2006) Criminal Law Review p.657 not followed – enquiries to be made by the Royal Court before recommending deportation – sentences reduced and orders recommending deportation quashed.

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

No. 361 & 362

Criminal

The 28th day of March, 2007 before Sir John Nutting Bt, QC presiding, Sir de Vic Carey and Sir Philip Bailhache

THE LAW OFFICERS OF THE CROWN

v

ROBERT EDWARD O'DETTE

(The First Appellant)

and

FRANKLIN DELANO O'DETTE

(The Second Appellant)

In the matter of the appeals by each of the above Appellants from the sentences imposed upon them by the Royal Court on 4th October 2006;

THE COURT, having heard Advocates D R F Domaille and A J Ayres for the respective Appellants, and Crown Advocate F Russell, thereon, this day GAVE JUDGMENT in the terms attached hereto and ALLOWED the appeals to the following extent: -

i) As respects the First Appellant the sentences were REDUCED as follows: -

Second Count:	From seven years and six months' imprisonment to six years and six months' imprisonment
First Count:	From five years' imprisonment to three and a half years' imprisonment
Third Count	From two years' imprisonment to one years' imprisonment

ii) As respect to the Second Applicant the sentences were REDUCED as follows: -

Second Count	From nine years' imprisonment to eight years' imprisonment
First Count	From six years' imprisonment to four and a half years' imprisonment
Third Count	From three years' imprisonment to one years' imprisonment

iii) As respects both Appellants, the sentences on the First and Third Counts were ordered to be served concurrently with the sentence on the Second Count and the sentences were to take effect from 29th April 2006

iv) As respects both Appellants, the recommendation for deportation was QUASHED.

K H TOUGH
Registrar of the Court of Appeal

Finalised per SJN 2.5.07

IN THE COURT OF APPEAL GUERNSEY

Wednesday 28th March 2007

Before

Sir John Nutting QC; presiding
Sir de Vic Carey
Sir Philip Bailhache

Robert Edward O'Dette and Franklin Delano O'Dette
(Criminal Appeal Nos. 361 and 362)

Judgment delivered by Nutting, JA.

NUTTING, JA:

The Indictment

1. On 4th October 2006, the Appellants appeared before the Lieutenant Bailiff Finch and Jurats for sentence on an Indictment containing three Counts. The first Count alleged conspiracy fraudulently to evade the prohibition on the importation of a Class A drug, contrary to Section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended. The second Count alleged that the Appellants were knowingly concerned in the fraudulent evasion of the prohibition on the importation of cocaine, a Class A drug, contrary to Section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended. The third Count alleged that they were knowingly concerned in the fraudulent evasion of the prohibition on the importation of Diamorphine (heroin) a Class A drug, contrary to Section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended.

2. Both Appellants pleaded guilty to the offences on 3rd August 2006.

3. Having heard details supporting the charges and pleas in mitigation, having considered Social Enquiry Reports and, in respect of the Appellant Robert O'Dette, a Psychiatric Court Report, the Royal Court sentenced the Appellants to imprisonment.

4. The Appellant Franklin O'Dette, was sentenced as follows:

In respect of the first Count	-	6 years imprisonment concurrent.
In respect of the second Count	-	9 years imprisonment.
In respect of the third Count	-	3 years imprisonment concurrent.

The Court also recommended that the Appellant should be deported at the end of his sentence.

5. The Appellant Robert O'Dette, was sentenced as follows:

In respect of the first Count - 5 years imprisonment concurrent.
In respect of the second Count - 7 years and 6 months imprisonment.
In respect of the third Count - 2 years imprisonment concurrent.

In respect of this Appellant, too, the Court recommended that he should be deported.

6. Both Appellants filed Notices of Application for Leave to Appeal against Sentence on 6th October, 2006. Leave was granted by a single Judge of this Court on 25th January 2007.

The Facts:

7. The Appellants are brothers who at the time of the offences, although US Nationals, were resident in Liverpool. At 5.50 p.m. on Saturday 29th April 2006, they arrived in Guernsey on a flight from Gatwick Airport. They were stopped by Customs and Police Officers.

8. The Appellants told the Officers they were coming to Guernsey for a short visit. They were asked if they had anything to declare, including controlled drugs, and said that they had not. A search of the Appellants' baggage revealed several lose condoms and a tube of Vaseline. Whilst their bags were being searched the Appellants were asked if they had taken illegal drugs. Both admitted taking cocaine the previous day. They consented to provide urine samples and the Appellant Franklin O'Dette provided a sample which tested positive for cocaine and opiates. Both Appellants were arrested and taken to the Detection Branch Headquarters.

9. During the next few days six condom packages were produced by Franklin O'Dette and seven packages were produced by Robert O'Dette. Each package contained a quantity of tablets and powder.

10. They were interviewed during the course of which they made full admissions. The Appellant Franklin O'Dette stated that he had originally planned to come to Guernsey to go fishing and that someone had asked him if he would *"take something and drop it off."* He agreed to do so as he needed funds to pay off a drug debt. He assumed that he would be taking *"speed, cocaine, or ecstasy tablets"*, for which he would be paid about £1,000. He had planned to split this sum with his brother.

11. Robert O'Dette had initially been reluctant to take part in the enterprise but had been persuaded to do so by Franklin. Franklin had collected the drugs from a wheelie bin near his home and the brothers had then concealed the packages internally at Gatwick. In addition to those packages Robert O'Dette, with his brother's knowledge, had concealed a small amount of heroin for their personal use. Both Appellants expressed remorse for their conduct.

12. Analysis established that the Appellants had been carrying 404 tablets divided between them. The tablets were not ecstasy, as the Appellants believed, but were either caffeine or a mixture of caffeine and benzyl piperazine (BZP). BZP is a synthetic drug which is not controlled in the United Kingdom or Guernsey. If the tablets had been ecstasy they would have been worth between £4,040.00 and £6,060.00. This offence was reflected in Count 1.

13. The Appellants were also carrying 89.9 grams of cocaine at a level of purity varying from 11 to 19%. This was valued at between £8,300.00 and £12,900.00 (Count 2).

14. Robert O'Dette was carrying 1.1 grams of heroin at 40% purity, with a resale value of between £230.00 and £340.00 (Count 3).

15. Franklin O'Dette had three previous convictions, two of which were drugs related. His most recent conviction was in November 2002, for supplying two kilograms of heroin for which he had received a sentence of 4 years imprisonment. Robert O'Dette also had previous convictions but none were for similar matters and all were spent.

Submissions to the Royal Court:

16. On behalf of the Appellants it was submitted to the Royal Court that it was appropriate to apply the guidelines set out in *Richards and Others v The Law Officers C of A 17th April 2002,* only in relation to the second and third Counts. *Richards* emphasised that *"any importation adds to the stock of drugs available in the island."* Regarding the first Count it was argued that since the tablets were not, in fact, ecstasy tablets it would not be appropriate to apply the guidelines because the stock of illegal drugs in the island would not have been increased by the importation.

17. The Royal Court's attention was drawn to the personal circumstances of each Appellant. Both had drug abuse problems which, it was submitted, they were taking steps to address. Further, there was a Psychiatric Report before the Court which stated that Robert O'Dette was suffering from a moderate depressive illness and an emotionally unstable personality disorder.

Basis of Sentence:

18. In sentencing the Appellants on Count 1, the Lieutenant Bailiff stated:-

> *"It is our view that the conspiracy charge, based as it is on what you thought you were doing and the illegal agreement, should be sentenced as if your beliefs were true."*

The Lieutenant Bailiff stated that the Court had adopted a combined starting point, in accordance with the guidelines in paragraph 12 of *Richards*, of 12 years imprisonment.

19. The individual starting points were 8 years imprisonment for Count 1; 11 years imprisonment for Count 2; and 7 years imprisonment for Count 3.

20. Referring to the Appellant's mitigation the Lieutenant Bailiff stated that the Court had taken into account all the information provided on the Appellant's behalf but that there was no practical alternative to guilty pleas in the circumstances. The discount for the Appellant's pleas was limited to around *"one quarter."*

21. Finally, the Lieutenant Bailiff stated that it was necessary for the Court to emphasise that *"severe punishment will be inflicted on those who seek to import Class A drugs into Guernsey."*

Grounds of Appeal:

22. The Appellants now appeal against their sentences on the grounds that the Court erred:-

    (i) by setting the starting point for the conspiracy charge by reference to the *Richards* guidelines;

    (ii) by sentencing the Appellants on the basis that their belief that the tablets were ecstasy tablets was true;

    (iii) by selecting a total starting point of 12 years imprisonment, which figure was too high;

    (iv) by failing to treat the Appellants' guilty pleas as a separate matter from mitigation;

    (v) by failing to specify the precise discount given for the Appellants' guilty pleas.

23. Furthermore, although the question of the validity of the Deportation Order had not been raised in the grounds of appeal by either Appellant, nonetheless the Single Judge in granting leave in this case, suggested that this Court might *"wish to look at whether such recommendations are justified in the circumstances of this case and also whether the Court below understood the effect of the order that it was making."*

Discussion:

24. As explained above, the Lieutenant Bailiff took a combined starting point of 12 years for each Appellant. The Royal Court increased the starting point because of the combined impact of all three Counts in accordance with paragraph 12 of *Richards* which is to the following effect:-

> *"It is a feature of some cases that two different drugs are imported at the same time, both in significant quantities. It may be two different Class A drugs or a Class A drug and a Class B drug. In such cases the combined quantity is a relevant factor in determining the extent of the criminal conduct which must be greater than if only one drug was imported.*
>
> *In such cases the Court should assess the appropriate starting point in respect of each of the drugs and then determine a total starting point taking into account the overall quantity. Thereafter the mitigation will be applied to arrive at the actual sentences to be imposed. The Court then provides for the total length of sentence by imposing a greater term of imprisonment than would otherwise have been imposed for the more serious of the two offences, if such can be identified, to run concurrently with the other sentence imposed.*
>
> *Consecutive sentences should not normally be imposed in such cases since that may create a misleading impression that each offence is being sentenced more leniently than it is. The Court must clearly state in any*

such case both what the Court considers to be the appropriate total starting point and how it is arrived at."

25. The Royal Court clearly felt in accordance with the principles rehearsed in *Richards* that such a situation called for an increase in starting points. The Appellants submit that this was not a proper approach. This submission was linked to other specific submissions on Count 1 itself to which we now turn.

26. We are urged to reduce the sentences of 6 years (Franklin O'Dette) and 5 years (Robert O'Dette) in respect of the offence of conspiracy fraudulently to evade the prohibition of just over 400 tablets of ecstasy. The essence of the submission is, firstly, that since the tablets turned out to be caffeine or a mixture of caffeine and a drug which was not controlled, the Royal Court fell into error in applying the *Richards* guidelines at all.

27. Secondly, that the Royal Court was wrong to sentence on the basis that the only determining feature of the offence was what the Appellants believed the drug to be rather than to reflect in addition what the substance actually was.

28. The Royal Court clearly approached Count 1 on the basis that the mischief in the Count consisted, and consisted solely, in what the Appellants believed they were importing. In sentencing the Lieutenant Bailiff emphasised the passage which we have quoted in paragraph 18.

29. There are, therefore, two questions for this Court. The first is whether the guidelines in *Richards* are relevant and, second, whether the Royal Court was right to treat Count 1 as if it had involved the actual importation of over 400 ecstasy tablets.

30. In answer to the first question we conclude that the *Richards* guidelines are relevant. Since the essence of conspiracy is the agreement, the immediate mischief inherent in the Appellants' conduct was an illegal plan to import a quantity of ecstasy tablets into Guernsey worth at street prices between around £4,000 and £6,000. In such circumstances the sentencing brackets in *Richards* provide a useful guide to the starting point. We reject the argument that the guidelines provide no guide at all to the appropriate sentence for Count 1.

31. The approach of the Royal Court to the second question may well have been influenced by the case of *David Thomas Snell*, a first instance decision in this jurisdiction of 14th September 2006. In passing sentence for an offence of conspiracy to import what the offender believed to be amphetamine sulphate, a prohibited Class B drug, but which upon analysis turned out to be an inert and uncontrolled substance, the trial Judge said:-

> *"In relation to the conspiracy charge, your own account makes it clear that you believed that you were importing 'speed' in return for a payment of £2,000.00. Your view is that you were set-up and used as a decoy for others. The essence of this offence is your guilty mind and genuine belief you were internally concealing and unlawfully importing amphetamine- that is why you face a conspiracy charge. The mischief is your unlawful agreement with others to do a criminal act. The fact the substance was inert was not known to you and you were, on your own submission, importing drugs to Guernsey for reward as far as you were concerned." … "We seek to apply in these cases the binding guidance from the Court of Appeal in the case of Richards. There it was said that 'any importation*

> *adds to the stock of drugs available in the island"… "You should be punished on the conspiracy charge for what you believed you were doing."*

32. It is apparent that the Royal Court in the instant case, and following ***Snell***, made no allowance for the fact that the substance which the Appellants agreed to import was harmless. Was the Royal Court correct in so doing?

33. We approach the question on the basis that drug related offences of this kind have an immediate mischief, namely the importation, and a potential consequential mischief, namely an increase in the stock of drugs available in the island. If the substance imported is for onward transportation and is seized in transit here as was the case in ***Rooke*** *3 GLJ 20 (7.1.1986)* or if a courier with drugs travelling to Jersey by air is diverted to Guernsey and the drugs are recovered here, the stock of drugs in this island will not have been increased. In these examples the drugs were not destined for this jurisdiction.

34. However, such an argument would surely avail an offender nothing in such circumstances. The comity of nations and jurisdictions demands that no reduction in sentence should be allowed merely because the inhabitants of the "in transit" or "diverted" jurisdiction were not intended to be those who would "benefit" from the importation.

35. But as it seems to this Court, different considerations apply in a case where the imported substance turns out to be either uncontrolled or harmless. Such a situation is not fanciful. The ingenuity and turpitude of those who supply drugs has few limits and such criminals are quite capable of cheating couriers or consumers into believing that what they are carrying or purchasing is a prohibited substance when in fact it is nothing of the kind. The object of the supplier is to make money and he has few scruples in the achievement of that objective.

36. But in our view it is wrong for a Court to ignore the fact that in cases where the drug imported turns out to be harmless or not prohibited, part of the mischief identified in ***Richards*** is clearly absent and we conclude that the absence of that factor should be reflected to some extent in sentence. Whether such a factor influences the starting point or serves to reduce the sentence once the starting point has been defined, as a factor additional to a plea of guilty (in appropriate cases), or to mitigation (if applicable), will be unlikely to matter at all.

37. What is plain, in the view of this Court, is that some allowance should be made for the fact that the consequence or result of the importation, albeit unknown to the offender and albeit undesired by him, will not be the same as if the substance was a controlled drug because it will not add to the stock of drugs available in this jurisdiction in accordance with the principles of ***Richards***.

38. We are fortified in this approach by authority from the English Court of Appeal. In the case of the ***R. v. Afzal and Arshad*** *(1992) 13 Cr. App. R. (S), p. 145,* the Court was concerned to assess the impact of the fact that the heroin which the two Appellants in that case had imported was not as they believed of average purity but was only of 1% purity and therefore unsellable.

39. The Court considered how this fact should be reflected in sentence:

> *'The question then arises what did these men think they were doing. In our view it is clear that they must have thought that they were importing heroin of average saleable purity.'*

The judgment then proceeds to analyse the evidence in the case supporting that proposition. Lloyd L.J. (as he then was) continues:

> *'The explanation must therefore be, if the analysis is correct (as we must assume), that the Appellants were themselves being deceived by their sellers. How then does that affect the sentencing exercise? It seems to us that we should approach the problem by looking at two factors, both at what the Appellants have in fact done and also at what they thought they were doing. In other words we must take account of the actus reus and its consequences as well as their mens rea. On that view some reduction from the 12 years and 8 years passed by the Learned Judge is required because the actus reus here, though amply sufficient to support the conviction, would not have had such devastating consequences as would have been the case if the same quantity of heroin had been of average strength."*

40. The reasoning adopted in *Afzal and Arshad* was followed in *R. v. Ishmeal Patel and Prem Shanker (1995) 16 Cr. App. R. (S) p. 267* and in *R. v. Wolin (2006) 1 Cr. App. R. (S) p. 133.*

Conclusion:

41. It follows, in the view of this Court, that the Royal Court erred by failing to take into account what the Appellants actually imported in assessing the mischief of this offence and the sentences to be served for Count 1. Accordingly, we also conclude, that the Royal Court was mistaken in treating this case as one involving the actual importation of significant quantities of two Class A drugs.

42. How then should the Royal Court have approached the sentence for Count 1 and, in particular, how should the Court have reflected in sentence the effect of the combination of the offences albeit that the mischief did not involve the importation of two different drugs?

43. We add in parenthesis and for clarity that we do not consider it right to include for this purpose consideration of Count 3 because the heroin in that Count constituted a very small amount and was for personal consumption rather than sale. In relation to Count 3 we bear in mind what this Court said in paragraph 14 of *Richards.* But we are not contemplating reducing the overall sentence because of the fact that the heroin was for personal consumption as contemplated in that paragraph. The question in this context is whether to increase the sentence because of Count 3 and we do not consider it appropriate to do so.

44. We emphasise that, in the view of this Court, it cannot be said in the sense contemplated by *Richards* that the substance concerned in Count 1 added to the stock of drugs available in the Island. But Count 1 and Count 2 were serious offences and some reflection in sentence is plainly warranted by the fact that Count 2, the most serious, is aggravated by the existence of Count 1.

45. The combination of the two Counts increases the overall gravity of this case just as that overall gravity would have been increased if the circumstances surrounding Count 2 had been accompanied by a serious assault on the arresting Officer. We recognise that in practical terms it may not matter very much in a case such as this whether the increase in sentence, which is called for, is justified on the basis, where appropriate, that the stock of drugs has been increased by not one but two Class A drugs, or whether the increase is justified on the basis that

the commission of two serious offences necessarily warrants a longer sentence than the commission of only one offence, arguments about totality accepted.

46. However it is important to identify the correct reasoning process to which that increase is due. Taking Count 2 as the more serious offence and applying the

sentencing brackets of ***Richards*** to that Count, we consider that the appropriate starting point if that Count had stood alone, would have been 10 years. In this we differ from the Royal Court.

47. The sentence for Count 1 could, of course, then be made consecutive to that sentence but the principles of totality would necessarily render the resulting sentence for that Count too short to reflect its mischief as the passage in ***Richards***, to which we have referred in paragraph 24, makes plain.

48. In our view the better course, and the course we adopt, would be to increase the starting point for Count 2 to reflect the fact that the Court is concerned to sentence for two serious offences. Accordingly we consider that the starting point should be increased by one year to reflect the aggravation of two offences committed in combination, and then to pass a sentence on Count 1 concurrent to the sentence for Count 2.

49. It is clear from the sentencing remarks that the Royal Court considered that the Appellants had *'no practical alternative than to plead guilty'* and accordingly that the Appellants should be entitled to no more than *'around one quarter deduction for their guilty pleas'*. We cannot fault the validity of this approach in the light of the facts.

50. It has been submitted on behalf of the Appellant Franklin O'Dette that in sentencing the Appellant on Count 2 the Royal Court can have made very little, if any, further allowance for mitigation beyond the reduction given for the guilty plea. The matters canvassed for him in mitigation in the Royal Court, and before us, constitute variations on the theme of his guilty plea and include his admissions in interview, his remorse for these offences, and his willingness to avail himself of drug counselling while serving his sentence.

51. The Royal Court indicated that it had taken the guilty plea, and therefore these other matters, into account in reducing the sentence from the starting point by a total of three years. In our view no other matter urged on behalf of this Appellant below or to this Court would justify any meaningful further reduction in sentence; and we conclude that the amount for plea and mitigation in his case should be varied by this Court in much the same proportion as that allowed by the Royal Court.

52. For the Appellant Franklin O'Dette therefore in relation to Count 2, having started at 11 years, we reduce the sentence to one of 8 years imprisonment and so far as Count 1 is concerned for the reasons canvassed above we reduce the sentence to one of 4½ years imprisonment concurrent.

53. We now turn to deal with the Appellant Robert O'Dette in respect of Counts 1 and 2. The Royal Court, having selected a 12 year starting point, reduced it by approximately 3 years to reflect the guilty plea and a further 1½ years to reflect the mitigation. That mitigation included his lesser role, the fact that he participated in these offences out of loyalty to his brother, the absence of any drug related convictions in his record, and the relatively minor nature of the

matters to which he had previously been before the Courts and in relation to which he had been fined a total of £40.00 in the one case and cautioned in the other.

54. In the view of this Court the allowances made in respect of both plea and mitigation by the Royal Court in respect of this Appellant were correct and accordingly, and proportionately, we make due allowance for these matters in reducing the sentence from the 11 year starting point we have defined. The sentence for this Appellant on Count 2 is varied to one of 6½ years imprisonment and for Count 1 we reduce the sentence in approximately the same proportion and for the same reasons for which we reduced the Appellant Franklin O'Dette's sentence. The sentence on Robert O'Dette in respect of this Count is therefore 3½ years imprisonment concurrent.

55. We turn to Count 3. As we have observed this Count concerned approximately 1 gram of heroin and was to be shared between the two Appellants for their own consumption to satisfy their own addictions. In the view of this Court the proper sentence on this Count is 1 year imprisonment concurrent in respect of each Appellant.

Deportation:

56. We turn to the question of deportation. At the end of his sentencing remarks and addressing the Appellant the Lieutenant Bailiff said:

> *'under the provisions of the Immigration Act 1971 as extended to Guernsey, you have been served with the relevant notices on our part to recommend deportation from Guernsey. In view of the seriousness of these offences we are satisfied you both represent a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society that is the need to protect the Guernsey public from the consequences of serious drug addiction. Hence we make a recommendation to His Excellency the Lieutenant-Governor that you are both deported when you have served your sentences. He will make his decision based on our recommendations and other relevant considerations'.*

57. Deportation is the process by which a non-British citizen is compulsorily removed from British territory and prevented from returning unless the Deportation Order is revoked. Mrs Russell has assisted us on how English law should be applied to Guernsey.

58. Statutory authority for deportation for the British Isles is contained in the Immigration Act 1971. That Act is extended to the Bailiwick of Guernsey by the Immigration (Guernsey) Order 1993. Sections 3(5) and 3(6) of the 1971 Act set out the situations where deportation may occur,

Section 3(5) states that *'a person who is not a British citizen is liable to deportation from the United Kingdom if:-*

> *(a) The Secretary of State deems his deportation to be conducive to the public good; or*
>
> *(b) Another person to whose family he belongs is or has been ordered to be deported'.*

Section 3(6) states:

> *'Without prejudice to the operation of sub-section (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of 17, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a Court empowered by this Act to do so."*

Section 5(1) of the extended 1971 Act states:-

> *'Where a person is under section 3(5) or (6) above liable to deportation then subject to the following provisions of this Act the Lieutenant-Governor may make a Deportation Order against him, that is to say such an order requiring him to leave and prohibiting him from entering the Bailiwick of Guernsey; and a Deportation Order against a person shall invalidate any leave to enter or remain in the Bailiwick of Guernsey given him before the Order is made or while it is in force'.*

Section 6 of the Act deals with recommendations by a Court for deportation. Section 6(1) states:-

> *'Where under Section 3(6) above a person convicted of an offence is liable to deportation on the recommendation of a Court, he may be recommended for deportation by any Court having power to sentence him for the offence.'*

Section 6(5) provides for a Court recommendation to be treated as a sentence for the purposes of any enactment providing an appeal against sentence.

59. Schedule 4 of the 1971 Act deals with the integration of the United Kingdom and Islands Immigration law and the effect on Deportation Orders made in the Bailiwick of Guernsey. The general rule is that an Island's Deportation Order takes effect automatically in the United Kingdom. As amended by the Immigration and Asylum Act of 1991, paragraph 3(1) of Schedule 4 of the 1971 Act states that:-

> *' ... this Act has effect in relation to a person who is subject to an Island's Deportation Order as if the Order were a Deportation Order made against him under this Act...'*

However, an Island's Deportation Order will not have effect in the United Kingdom in the circumstances set out in paragraphs 3(2) of Schedule 4:

> *'Sub paragraph (1) does not apply if the person concerned is:-*
>
> *(a) a British citizen;*
>
> *(b) an EEA National;*
>
> *(c) a member of the family of an EEA National; or*
>
> *(d) a member of the family of a British citizen who is neither such a citizen or an EEA National.'*

60. The Home Secretary in the United Kingdom does not have power to revoke or suspend a Deportation Order made in this Island, see paragraphs 3(3) of Schedule 4; but he may overrule the exceptions contained in paragraphs 3(2) and direct that an Island Order take effect anyway. Paragraph 3(4) of Schedule 4 states that in any particular case the Secretary of State may direct that paragraph (b), (c) or (d) of sub paragraph 2 is not to apply in relation to an Island Deportation Order.

61. The practical effect, therefore, of the legislative provisions, as they apply to Deportation Orders made in Guernsey against non-British nationals, is that the Order will automatically take effect in mainland United Kingdom unless one of the circumstances set out in paragraph 3(2) exists. Even in these situations the Island Order may still take effect if the Home Secretary directs that the individual should nonetheless be deported.

62. Whilst the sentencing court may make a recommendation for deportation the making of the Order falls in Guernsey to His Excellency the Lieutenant-Governor under the provisions of Section 5(1) of the Immigration Act 1971 as extended.

63. The Lieutenant-Governor will consider whether deportation is the correct course taking into account relevant factors which are set out in paragraph 364 of the Immigration Rules. These include:-

(1) age;

(2) length of residence in the Bailiwick of Guernsey;

(3) strength of connections with the Bailiwick of Guernsey;

(4) personal history including character, conduct and employment record;

(5) domestic circumstances;

(6) previous criminal record and the nature of any offence of which the person has been convicted;

(7) compassionate circumstances;

(8) any representations received on the persons behalf."

64. It does not, of course, necessarily follow that a recommendation of a Court for deportation from Guernsey will result in an Order being made by the Lieutenant-Governor. But since the Appellants in this case are American citizens, the proviso relating to EEA nationals does not apply and subject to any of the other conditions being met, an Order made in Guernsey would automatically apply in the United Kingdom.

65. Mr P. J. Taylor, the Assistant Chief Officer, Head of Immigration and Nationality, has helpfully provided us with a summary of the position of these two Appellants having made enquiries into their backgrounds and in particular their connections with the United Kingdom, neither of them having any connection whatsoever with the Bailiwick.

66. Unsurprisingly in view of the applicability of a Deportation Order made by the Lieutenant-Governor to the UK as a whole, the Lieutenant-Governor, according to Mr. Taylor, will necessarily take into account in a case such as this the length and strength of the connection which the prospective deportee has with the United Kingdom.

67. The operation of deportation procedures in the United Kingdom is undertaken under the precepts outlined in *R. v. Carmona (2006) Criminal Law Review p. 657*. We have had the benefit of a transcript of the judgment of Stanley Burnton, J. The judgment helpfully summarises the law in England regarding the topic pre and post the implementation of the Human Rights Act of 1998 and indeed was designed to provide guidance to Crown Court Judges called upon to consider making recommendations for deportation to the Home Secretary in the light of the legislative incorporation of the European Convention on Human Rights into English law.

68. The judgment contrasts the position pre 1998 when the Courts were assisted by the seminal case of the *R. v.Nazari (1982) Cr. App. R. (S) p. 84*. The judgment of Lord Justice Lawton in that case suggested that the trial Judge should be influenced by a number of principles including:-

    (1) whether the continued presence of the offender was to the detriment of the United Kingdom;

    (2) whether the offence was serious enough to merit deportation;

    (3) whether there was a risk of re-offending;

    (4) what effect such an Order would have on others, in particular the offender's family who might suffer if the offender was deported.

    Lord Justice Lawton emphasised that hardship to the offender personally was not a matter which a Court should take into account in making a recommendation, and encouraged Courts also to ignore the political situation in the country to which the offender was to be returned.

69. The Court in *Carmona* emphasised however that since 1998 consideration of the impact on the offenders family would necessarily need to have regard to Article 6 rights, Article 8 rights respecting family life (not only of the family but also of the offender himself), as well as, if applicable, Article 5 rights restricting deportation, and also, in cases where deportation might involve a risk of physical harm or death, possible breaches of Articles 2 and 3.

70. The Court in *Carmona* insisted that consideration of the operation of these rights should not be undertaken by the sentencing or recommending Court; and since these rights or some of them are linked, potentially inextricably, to the offender's family, the Court suggested, contrary to *Nazari*, that the sentencing Court should no longer consider the impact of deportation on the offender's family. At paragraph 22 Stanley Burnton, J. explains:-

> *'In our judgment it follows that there is now no need for the sentencing court to consider the convention rights of an offender whose offence justifies a recommendation for deportation. It is moreover undesirable that the sentencing court should undertake an assessment for which it is not qualified or equipped and which will in any event be undertaken*

by the Home Secretary and the Tribunal. His convention rights will be considered if the Home Secretary makes a Deportation Order against which the offender appeals to the Tribunal. In the case of non-EU citizens sentencing courts should consider only whether the offence committed by the offender, in the light of the information before the Court, justifies the conclusion that his continued presence in this country is contrary to the public interest.'

71. The question for this Court is whether we should follow *Carmona* and limit the issue which Courts here have to consider to the seriousness of the offence alone, and vest the whole responsibility in the hands of the Lieutenant-Governor for the much more difficult questions relating to the offender's Convention and other rights.

72. We have decided not to follow *Carmona* and we have declined to do so for the following reasons:-

(1) The Lieutenant-Governor in this jurisdiction is in a very different position to that of the Home Secretary in the United Kingdom. He has few of the resources available to the latter in making relevant enquiries since the latter has a large number of agencies, officials and advisors to whom he can refer.

(2) A recommendation to deport is not to be equated with a mere suggestion that the Lieutenant-Governor should consider deportation. A recommendation imports the conclusion that the Court believes the deportation is the proper course for the Lieutenant-Governor to adopt. Such a recommendation made by a Court in this jurisdiction might put the Lieutenant-Governor in a potentially invidious position viz a viz the public, if, in the event, he refused to accept the recommendation.

(3) If a recommendation to deport is made by a Court in this jurisdiction there should be a reasonable expectation that it will be acted upon.

(4) There is no appeal from the decision of the Lieutenant-Governor to deport in this jurisdiction, unlike the position in the United Kingdom. Section 8(2)(j) of the Nationality Immigration and Asylum Act 2002 as amended by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 provides for an appellate mechanism for any decision of the Home Secretary to a specialist and independent asylum and immigration Tribunal. In the absence of any appellate mechanism from the Lieutenant-Governor's decision, an offender's only recourse in this jurisdiction would be to challenge the Order by way of judicial review.

73. It is our view that within the Bailiwick the recommendation and the decision to deport should not be compartmentalised but should be more inclusive, and should involve preliminary enquiries by the Court on all matters relevant to the question of deportation including the engagement of the offender's Convention rights. Based on such information the Court can and should then determine whether to make a recommendation or not. If the Court makes the recommendation the Lieutenant-Governor, having made such additional enquiries as he deems relevant, must then (or towards the end of the expiry of the offender's sentence) uphold or reject the recommendation.

74. It is not of course impossible, as suggested in *Carmona*, that the offender's circumstances may have changed between the time when he is sentenced and the time when he finishes his sentence. However we do not regard the possibility of such change as being a factor which would prevent the Court from making the decision whether to recommend or not at the earlier time.

75. We return to the facts of the instant case. Our own enquiries and Mr. Taylor's helpful report reveal in Mr. Taylor's words that both men *'appear to have strong ties with the United Kingdom and have lived the majority of their lives there'*. Although they are United States nationals they have both been given indefinite leave to remain in the United Kingdom.

76. The Appellant Franklin O'Dette was born in Ohio in 1956 but came to Liverpool to live with his grandparents at an early age, and although he lived for a time in Germany and served for two years in the US Army, he has lived in the United Kingdom since July 1977. He married a British subject in 1980. Although now divorced, he has a son born in 1982 who was raised in the United Kingdom. For the last twenty years or so he has had a relationship with Marlene Evans, also British, by whom he has had two more children, one born in 1990 and the other in 1994. Apart from his nationality this Appellant has no ties with the United States. Moreover the two sisters of the Appellants also live in the United Kingdom.

77. The Appellant Robert O'Dette is three years younger than his brother and led a similar early life. He, too, married a British subject. He, too, is now divorced. There is one child of the marriage, a daughter, born in 1985 who was raised in the United Kingdom.

78. Mr. Taylor says in his report:

> *'given the length and strength of their connection with the United Kingdom I do not consider that it would be appropriate to recommend to His Excellency that he make a Deportation Order against either Franklin or Robert O'Dette. If he was to do so it is almost inevitable that a challenge would be made under the European Convention of Homan Rights'.*

79. We accept, of course, that this information was not before the Royal Court, which did not therefore have the opportunity of considering it. Moreover the Royal Court clearly felt bound to follow *Carmona* in any event.

80. However in the light of the information we have described above we do not believe that it would be appropriate for this Court to confirm the recommendation to the Lieutenant-Governor in respect of the deportation of either Appellant. Accordingly the Deportation Orders are quashed.

…… Suzanne M. O'Neill
Wednesday 2nd May 2007

