Agostinho Dos Santos De Sousa
v Law Officers of the Crown

JUDGMENT
27/2014

Court of Appeal
27th June, 2014

Application for leave to appeal against sentence (recommendation for deportation).

Approved Judgment
27.06.2014

IN THE COURT OF APPEAL OF GUERNSEY

(Criminal Division)

Appeal No. 457

27th June 2014

AGOSTINHO DOS SANTOS DE SOUSA

Applicant

-v-

THE LAW OFFICERS OF THE CROWN

Respondent

Before: James Walker McNeill QC, President
John Vandeleur Martin QC
& Robert Logan Martin QC

Advocate Cobb for the Applicant

Crown Advocate Dunford for the Respondent

JUDGMENT

LOGAN MARTIN JA

Introduction

1. This is the judgment of the Court.

2. The applicant was convicted by the Royal Court on 18 November 2013 after trial before Judge Finch and Jurats of four counts of possessing indecent images of children contrary to section 3A(1) of the Protection of Children (Bailiwick of Guernsey) Law 1985 as amended. The applicant was sentenced by the Judge and Jurats on 7 February 2014 to fifteen months

imprisonment in respect of each count to be served concurrently and orders for confiscation and destruction of the images and a camera were made.

3. The applicant is a Portuguese national who was born on Madeira. Following conviction, the Judge and Jurats recommended the deportation of the applicant under the provisions of the Immigration Act 1971 ("the 1971 Act") as extended to the Bailiwick by the Immigration (Guernsey) Order 1993 ("the 1993 Order"). By a Notice of Application for Leave to Appeal dated 16 June 2014, the applicant has sought leave to appeal against "sentence (recommendation for deportation)".

The statutory framework

4. The following provisions of the 1971 Act as modified by the 1993 Order are relevant. Section 3 states for present purposes:

> "(5) A person who is not a British citizen is liable to deportation from the Bailiwick of Guernsey if—
>
> (a) the Lieutenant-Governor deems his deportation to be conducive to the public good;…
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> (6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the Bailiwick of Guernsey if, after he has attained the age of seventeen, 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 states in part:

> "(1) 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 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 states in part:

> "(1) 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."

5. In terms of its effect, it is agreed by the applicant and the respondent that a deportation order which is made in Guernsey has effect in Jersey by reference to Schedule 4, paragraph 3(1) as modified for Jersey by the Immigration (Jersey) Order 1993, and the Court has proceeded upon the basis of that agreement. In contrast, a deportation order made in Guernsey does not have effect in the United Kingdom where the person who is the subject of the order is a citizen of the EEA (which includes all countries of the European Union such as Portugal): Schedule 4, paragraph 3(1) and (2)(b) (although the Secretary of State may direct in a particular case that sub-paragraph (2) is not to apply: paragraph 3(4)). In relation to an EU national such as the applicant, the practical consequence is that if a deportation order were to be made by the Lieutenant Governor, the applicant would be deported from both Guernsey and Jersey, although not (on present information) from the UK.

6. The procedure for deportation is dealt with in Part 13 of the Immigration (Bailiwick of Guernsey) Rules 2008 ("the 2008 Immigration Rules") which includes the following:

> "362 A deportation order requires the subject to leave the Bailiwick of Guernsey

> and authorises his detention until he is removed. It also prevents him from re-entering the Bailiwick of Guernsey for as long as it is in force…
>
> 363 The circumstances in which a person, including an EEA national… is liable to deportation include:
> (i) where the Lieutenant Governor deems the person's deportation to be conducive to the public good;
> (ii) …
> (iii) where the court recommends deportation in the case of a person… who has been convicted of an offence punishable with imprisonment.
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> 364 While each case will be considered on its own merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation … it will only be in the most exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees."

7. It may be observed that the predecessor of rule 364 of the 2008 Immigration Rules which was rule 364 of the Immigration (Guernsey) Rules 1999 ("the 1999 Immigration Rules") was in similar form but included a list of "relevant factors" to be taken into account by the Lieutenant Governor. These included matters such as age, the strength of connections with Guernsey, personal history and employment record, criminal record and any representations made on behalf of the person concerned. Rule 364 of the 1999 Immigration Rules also did not refer to the European Convention on Human Rights ("ECHR") nor to the Convention and Protocol relating to the Status of Refugees both of which are referred to in rule 364 of the 2008 Immigration Rules. We do not regard these differences as significant in the circumstances of the application before us because the specific factors formerly referred to are matters which His Excellency the Lieutenant Governor is likely to take into account in any event, and because the Conventions referred to in the current rule 364 are innovations since the making of the earlier Rules.

8. The "Convention rights" contained in the ECHR are secured in Guernsey by the Human Rights (Bailiwick of Guernsey) Law 2000 ("the 2000 Law"). The Articles of the ECHR which must be given effect to are set out in Schedule 1 and they are well known and need not be quoted. Article 2 relates to the protection of the right to life and Article 8 relates to the right to respect for private and family life.

The recommendation for deportation

9. The offences for which the applicant was convicted concern the possession of indecent images of children. These appeared to have been taken in Madeira which meant that the offence for which the applicant could be convicted in Guernsey was possession only although it was apparent that he had been involved in the taking of the photographs and he was pictured in them. There were ten images in total, four of which were referred to by the learned Judge as Category 1, being erotic posing with no sexual activity, and six as Category 3, being non-penetrative sexual activity between adults and children. The Royal Court had before it printouts of the applicant's record of convictions in Guernsey and Jersey, a Social Enquiry Report prepared by the Guernsey Probation Service, details from the States Housing Department, and a report by Mr Phil Taylor, an officer of the Immigration & Nationality Division of the Guernsey Border Agency. The Royal Court identified a total of 61 offences on the Islands since 1992. These include convictions for assault, malicious damage and possession of an offensive weapon, as well as a number of motoring offences including driving whilst under the influence of alcohol. The most recent convictions are for motoring offences in August and September 2012 in Jersey and Guernsey respectively. The Social Enquiry Report narrated that the applicant had failed to explain how the images had come to be created and it

concluded that the fact that he was in the images suggested that he had been involved in contact offences which indicated a high likelihood of further offending of this nature. The details from the States Housing Department revealed that the applicant had been issued with a series of Short Term Housing Licences and Temporary Exemption Certificates often related to temporary employment but that no permission had been issued to him for residence in Guernsey since November 2004. At the time of arrest he was sleeping in his car.

10. In his sentencing remarks on the topic of deportation, the learned Judge said:

> "The Court has considered a helpful report from the Chief Immigration Officer, Mr. Taylor. Before making any recommendation for deportation to his Excellency the Lieutenant Governor, who makes the final decision, we are obliged to follow what the Court of Appeal set out in the case of *O'Dette* [*Law Officers of the Crown* v *O'Dette and O'Dette* [2007-08 GLR 16]]. We can set out our conclusions fairly shortly. Your connections with the island are small. You were as stated living in your car. Your sister is here and married but you have, we understand, no other family here and no Right to Work document has been issued. You should not have been working. Your ex-wife and children live in Jersey. We balance these considerations with the deplorable offences you have been convicted of and are left in no doubt that the public interest requires your exclusion from Guernsey.
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> Any offence of this nature is undesirable and sufficiently serious to warrant our recommendation for deportation being made. If released from your sentence we order your detention pending the decision of His Excellency. Guernsey is a better place without offenders of this type. Although it is the Lieutenant Governor's decision we would hope that should deportation follow it takes place as soon as reasonably practicable."

The grounds of appeal

11. The applicant seeks leave to appeal on the grounds that he Royal Court (i) failed to consider adequately the applicant's convention rights when imposing the recommendation for deportation and (ii) that it was wrong in principle and the decision to recommend deportation "was one which no reasonable tribunal properly directed should have reached".

12. In support of these grounds as set out in her Skeleton Argument, Advocate Cobb submitted that the Royal Court had not adequately considered the applicant's convention rights. The applicant had sworn an affidavit for this Court which detailed his personal circumstances. The applicant has been primarily resident in Guernsey for the past 27 years and he regards Guernsey as his home. He has ties to this Island and to Jersey which were not given adequate weight by the Royal Court. She referred to the decision of the Court of Appeal in *O'Dette* which identified the standard against which a decision to recommend deportation should be made. The learned Judge had erroneously stated that the applicant had only a sister in Guernsey whereas he also had three nephews, one niece, four cousins and three second cousins on the Island, as well as a son and daughter, two grandchildren, six nephews and one niece in Jersey. He is particularly close to his sister because all six of their siblings had died. He has three aunts and one uncle in Madeira who are elderly and not in contact with the applicant. His other son resides in Madeira and by reference to the applicant's affidavit there is some contact with him. Advocate Cobb referred to the decisions of the European Court of Human Rights in *Üner* v *The Netherlands* [2006] ECHR 873 and *AW Khan* v *The United Kingdom* [2010] ECHR 27. The applicant had established not only a family life in Guernsey but also social ties each of which was protected by Article 8. The Royal Court had failed to give adequate weight to the convention right of the applicant under Article 8. His convention rights under Article 2 would also be prejudiced. He would struggle to find employment and his son had informed him of a possible threat to his life if he returned to Madeira. With reference to his connections in Madeira, the applicant informed the Court that he had been there last for a few months in 2011 and 2012. As for the applicant's

housing record, and although he had received no permission since 2004, the authorities had allowed the applicant to remain in Guernsey. As to his antecedents, Advocate Cobb submitted that the applicant had no analogous previous conviction. Although the Crown had suggested that the applicant was wanted by the criminal authorities in Madeira, the applicant originally had no knowledge of this.

13. The decision to recommend deportation was wrong in principle or was a decision which no reasonable court could have recommended. The Royal Court failed to give sufficient consideration to his personal circumstances. Had sufficient consideration been given, the result of the balancing exercise would have been different and deportation would not have been recommended.

14. For the respondent, Crown Advocate Dunford submitted in his Skeleton Argument and before us that the test for an appeal against sentence is whether the sentence passed is manifestly excessive or wrong in principle. This is the standard customarily adopted in Guernsey although it is not derived from statute nor from particular authority. Although a decision to recommend deportation was not part of the punishment for an offence, that standard was appropriate where the Court was dealing with an application or appeal in respect of sentence. The introduction of what is, as set out by the applicant, the standard for judicial review would be a significant step: it might imply the incorporation of all of the jurisprudence on judicial review into criminal appeals and it is a separate standard which applies to the Royal Court in its supervisory role. By way of analogy, he referred to *Taylor* v *Law Officers of the Crown* [2011-12 GLR Note 2] where the Lieutenant Bailiff (de Vic Carey) refused an application for judicial review and held that the Royal Court sitting as the Ordinary Court has no jurisdiction to review its own decisions made when sitting as a Full Court.

15. The Royal Court had carried out a balancing exercise which could be said to be between the presumption referred to in rule 364 of the 2008 Immigration Rules and the convention rights of the applicant. Crown Advocate Dunford submitted that he did not need to address the question as to whether the decision to recommend deportation was manifestly excessive. The decision was not part of the process of punishment and there had been no appeal against the sentence of fifteen months. As to whether the decision was wrong in principle, Crown Advocate Dunford referred to *O'Dette* and to *Üner*, and also to *Khan* which demonstrated that the right to family life related only to situations where children were young or dependent. He referred to the Social Enquiry Report where it was not actually said that the only relative of the applicant in Guernsey is his sister, although he did accept that what had been said by the Royal Court was incorrect and that this Court should proceed upon the full information. He also accepted that although the applicant had received no housing permission since 2004, and this meant that he could not have been working lawfully, it did not mean that a person such as the applicant would be living unlawfully as he could be residing in a boat or a car, the latter of which the applicant was doing. The Social Enquiry Report had identified the applicant as at high risk or re-offending and, although the Royal Court could convict him only of possession, his presence in the photographs suggested a higher degree of criminality. The applicant appeared to be wanted in Madeira and this might account for the more recent contact with family members in Guernsey. Crown Advocate Dunford relied upon the approach of this Court in *Pinto, Loreto and Almeida* v *Law Officers of the Court*, Judgment 12/2013, unreported. The balance which was struck by the Royal Court was the correct one.

The merits

16. The first issue for determination is the standard against which the decision of the Royal Court to recommend deportation should be assessed. In the second part of the grounds of appeal it is implied that this should be the standard of "Wednesbury unreasonableness" which is derived from the seminal decision in *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223 and all that has flown from it. Crown Advocate Dunford resisted this and submitted that the standard should be the standard customary in appeals against sentence which

is whether a sentence is manifestly excessive or wrong in principle. The standard of Wednesbury unreasonableness would apply to an application for judicial review in the event that the Lieutenant Governor were to make a deportation order but that relates to a further stage of the deportation process with which this Court is not concerned.

17. We have no hesitation in accepting the submissions of Crown Advocate Dunford in this respect. No authority was cited to us to justify the contention that Wednesbury unreasonableness would be the appropriate standard in considering an appeal against sentence in respect of a recommendation for deportation. The applicant has initiated these proceedings by a Notice of Application for Leave to Appeal against sentence and the recommendation was made as part of the imposing of sentence by the Royal Court. In the cases of *O'Dette* and *Pinto*, this Court dealt with an application and an appeal against recommendations for deportation as part of an application and an appeal against sentence. We are not certain as to how the standard of Wednesbury unreasonableness would affect the outcome when compared to the standard of manifestly excessive or wrong in principle. The standard of Wednesbury unreasonableness which applies in applications for judicial review is a high one and in that situation the reviewing court quashes the decision in question which then requires to be re-made by the decision maker. That is not the situation in an appeal against sentence where the Court of Appeal can if satisfied allow the appeal and substitute its own sentence for that imposed by the Royal Court. Whilst these are essentially procedural matters, nevertheless they suggest to us that the approach of treating an appeal against a recommendation for deportation as an appeal against sentence is a justifiable one. We also consider that Crown Advocate Dunford's submission that the adoption of the judicial review standard could require the importation of all of the judicial review jurisprudence has some force and it suggests that this would be a step which this Court would take only after the fullest consideration.

18. We have therefore considered whether the decision to recommend the deportation of the applicant was one which was manifestly excessive or wrong in principle. In the judgment of the Court of Appeal in *O'Dette*, Nutting JA considered the approach to recommendations for deportation which had been explained by Burnton J as the law of England in *R* v *Carmona* [2006] Criminal Law Review 657 following the incorporation of the ECHR into UK law by the Human Rights Act 1998. Nutting JA noted that it had been held in *Carmona* that there was no need for a sentencing court to consider the convention rights of an offender because that was an exercise which would be undertaken by the Home Secretary. Nutting JA considered the different practical circumstances which apply in this jurisdiction where it is the Lieutenant Governor who has the power to make a deportation order following a recommendation, and he concluded:

> "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.
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> 72. We have decided not to follow *Carmona* and we have declined to do so for the following reasons:-
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> (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.
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> (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… uphold or reject the recommendation."

It may be noted that the Court of Appeal considered the issues raised in *O'Dette* by reference to the 1999 Immigration Rules as applied in light of the subsequent incorporation of the ECHR by the 2000 Law. As already explained, we do not consider that the changes consequent upon the making of the 2008 Immigration Rules are of any significance.

19. In *Pinto*, one of the issues was a complaint that the Royal Court had paid insufficient attention to the impact of deportation on the appellant and his daughter and their right to family life under Article 8. The Court of Appeal rejected the contention that the Court should have performed an inquisitorial role, and in the judgment of the Court of Appeal, Montgomery JA said:

"50. … Where, as here, the detail of the relationship was a matter that lay peculiarly within the knowledge of the Appellant, we do not think it can lie in the mouth of the Appellant to complain about the failure of the Royal Court to avert in detail to the interests of his daughter when it was given no specific information about her relationship with the Appellant or the likely impact of any order for his deportation. In all cases where the defence wish the Royal Court to take into account rights to family life, they must ensure that the court is provided with any information about the domestic circumstances of the defendant and his (or her) family that may be relevant.

51. The Article 8 rights to family life of the Appellant and his daughter were clearly engaged by the sentencing process in this case. By definition, imprisonment and a recommendation for deportation, was bound to interfere with the family life not only of the Appellant but of those with whom the Appellant normally lived and especially his daughter. The authorities however demonstrate that, while there is no rule of exceptionality requiring that the impact on the family life will be exceptionally severe if it is to succeed, they also show that the more pressing the public interest in imprisonment or deportation, the stronger must be the claim under Article 8 if

it is to prevail."

20. Applying these principles to the approach which was taken by the Royal Court in this case, we are satisfied that the grounds of appeal are not made out. The Royal Court had substantial information on the family connections of the applicant in Guernsey and in Jersey and the applicant had the opportunity to present information at the sentencing hearing. We are satisfied that the information available was sufficient to allow the Royal Court to carry out the balancing exercise identified in paragraph 73 of the judgment in *O'Dette* and in accordance with rule 364 of the 2008 Immigration Rules. The learned Judge referred in his sentencing remarks to *O'Dette* and the Royal Court was entitled to reach the conclusion that a recommendation for deportation was justified and in doing so to take into account the circumstances of the applicant, including his family and social ties, on the one side, and the seriousness of the offences for which he had been convicted and his record of convictions in both Guernsey and Jersey on the other. It does not appear to this Court that in carrying out that balancing exercise the Royal Court can be said either to have reached a decision which was manifestly excessive or wrong in principle. In a situation where the Royal Court had the information which was required, the making of a decision to recommend deportation could not in our judgment be said to be manifestly excessive or wrong in principle unless there was some clear information which suggested either that the Court had left out of account a material factor which was in support of a person's convention rights or had taken into account a significant factor in favour of deportation for which there was no justification. We do not find either of these to be demonstrated in this case.

21. The only particular factor in respect of which the Royal Court may be said to have been in error relates to their reference to the fact that the applicant had only a sister in Guernsey. Whilst this was said in the sentencing remarks, the Court did have all of the information provided in the Social Enquiry Report and the report from Mr Taylor of the Guernsey Border Agency, as well as the information provided on behalf of the applicant at the sentencing hearing, although it did not have the advantage of the affidavit which has been produced by the applicant for this Court. The absence of an equivalent affidavit and the information provided within it at the time of sentencing is not something for which the Royal Court can be criticised because, by reference to what was said in *Pinto,* that was something for which the applicant was responsible. In our opinion, and taking into account all of the information provided in the affidavit, a recommendation for deportation is justified. Although the applicant has lived primarily in Guernsey for 27 years, the Royal Court was made aware that he has maintained connections with Madeira, not least by visiting there regularly. Whilst he has a number of family connections in Guernsey and Jersey, he does not have any dependent children. We refer to the judgment of the European Court of Human Rights in *Khan* at paragraph 32 where it is said that "In immigration cases, the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence". The Court does accept that Article 8 will apply to the family and social ties which constitute the private life which the applicant has in Guernsey and Jersey but the absence of dependency between the applicant and his children does suggest that in the balancing exercise less weight may be attached to his Article 8 convention rights than would otherwise be the case. In this regard, we refer to the judgment in *Üner* at paragraph 59 both to demonstrate that social ties may be an aspect of private life and to show that the significance of family life and private life will depend upon the circumstances of each individual case. Taking all of these factors into account, we are satisfied that a recommendation for deportation is justified when the applicant's family and social connections are balanced against the seriousness of the offences of which he was convicted and his criminal record.

22. In the case of the applicant's Article 2 rights, these were not the subject of significant submission. Whilst the applicant has received information from his son in Madeira that his life might be in danger, there has been no further detail provided and this suggestion may be balanced against the fact that the applicant has returned regularly to Madeira and, as suggested by Crown Advocate Dunford, may not have done so in 2013 only because he was then in

custody. There is no suggestion that the Royal Court was not made aware of this factor as it is referred to in the Social Enquiry Report where it was said that "He maintains that he is likely to be harmed if and when he returns to Madeira". A threat to life is a most serious one, which were it to be established would be likely to have significant effect on the balancing of convention rights against the other circumstances. Nevertheless we do not consider that based upon both the information available to the Royal Court and to this Court, it can said to have been established in this case. The submissions made by Advocate Cobb to the effect that the applicant might find it difficult to obtain employment in Madeira do not appear to us to be relevant to Article 2 and no authority was presented to substantiate that.

23. This Court is therefore satisfied that the decision of the Royal Court to recommend the deportation of the applicant was one which the Court was entitled to make and it has not been demonstrated that it was manifestly excessive or wrong in principle. The application for leave to appeal by the applicant is refused.

