

JERSEY / JUDGMENT

De Gouveia v AG [2009]

JCA 098 (16 May 2009)

[2009] JCA 098

COURT
COURT OF APPEAL

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COURT OF APPEAL

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May 2009

Before

:

J. P. C. Sumption, Esq., Q. C., President;

Sir John Nutting, Bt. Q. C.; and

M. S. Jones, Esq., Q. C.

Manuel Jorge Viveiros De Gouveia

v

Attorney General

Appeal against the deportation

recommendation made by the Inferior Number of the Royal Court on 19

th

August, 2008,

following a guilty plea to:

1 Count of:

Grave and

Criminal Assault.

1 Count of:

Supplying a

controlled drug, contrary to Article 5(b) of the

Misuse of Drugs (Jersey) Law 1978

.

1 Count of:

Being knowingly

concerned in the fraudulent evasion of the prohibition on the importation of

a controlled drug, contrary to Article 61(2)(b) of the

Customs and Excise

(Jersey) Law 1999

.

1 Count of:

Supplying a
controlled drug, contrary to Article 5(b) of the
Misuse of Drugs (Jersey) Law 1978

.
Advocate C. Fogarty for De Gouveia
The Attorney General
Leave granted by The Bailiff sitting as a
Single Judge on 3
rd
November, 2008

JUDGMENT

nutting ja :

INTRODUCTION

1. On 19 August 2008 the Appellant, Manuel De Gouveia, and others, appeared before Mr Commissioner Clyde Smith and Jurats. The Appellant was charged in two indictments. The relevant counts of the first indictment charged him with Grave and Criminal Assault (Count 1); supplying a controlled drug contrary to Article 5(b) of the Misuse of Drugs (Jersey) Law 1978 (Count 2); and being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999 (Count 4). The second indictment charged him in a single count with supplying a controlled drug contrary to Article 5(b) of the 1978 Law. 2. It is unnecessary to deal with the cases concerning the other defendants save and in so far as the allegations against them impact on the Appellant. 3. At a hearing on 11 July 2008 the Appellant pleaded guilty to the offences in the first indictment; and on 19 August 2008 he pleaded guilty to the offence contained in the second indictment. 4. In respect of the first indictment the Appellant was sentenced to 4 months' imprisonment on the assault count, 4 years' imprisonment on the supply count, and 7 years' imprisonment on the count charging him with importing a Class A drug, all sentences to run concurrently. On the second indictment he was sentenced to 4 years' imprisonment, also concurrent, making a total of 7 years' imprisonment in all. The Royal Court recommended that the Appellant should be deported at the end of his sentence. 5. In accordance with Section 3(6) of the Immigration Act 1971 ("the 1971 Act"), and Section 6(5)(a) of the Immigration (Jersey) Order 1993 ("the 1993 Order") the recommendation for deportation forms part of the sentencing process. The Appellant appeals to this Court only in respect of the recommendation. 6. The facts which gave rise to the first indictment were as follows. On 2 September 2007 the Appellant head butted a man in the St James Wine Bar. The victim was unable to say why he had been head butted, nor, when he was interviewed, did the Appellant throw any light on the matter. The injury received by the victim consisted of a cut on the nose. The Appellant was charged and released on bail. 7. On 21 February 2008 Police Officers were keeping observation on the Appellant and a man called Hilario. It was apparent that these men were anticipating the

arrival of a courier with drugs from abroad. The following day Police Officers continued their observations. At 8.00 am a woman called Da Silva arrived at Jersey Airport on a flight from Madeira. She was met at the airport by Hilario in a car. Both Miss Da Silva and Hilario were arrested as they prepared to drive away. A total of 227 grams of heroin were recovered from Miss Da Silva's person and from her clothing. The potential value of this consignment on the streets of Jersey was estimated to be approximately £227,000. 8. The Appellant was arrested later at his home address where he lived with his partner and 7 year old daughter. Two envelopes containing a total of £3,000 were recovered at the address. 9. A fourth defendant, Viveiros, linked by evidence to the Appellant, was also arrested at his home address where heroin and cash were also seized. 10. When she was interviewed by police, Miss Da Silva admitted receiving some of the heroin in Lisbon. From there she flew to Madeira. She was given more drugs in Madeira and was put on a flight to Jersey, where, she was told, she would be met by two Portuguese men who would look after her and who would pay her 2,000 Euros for her part in the importation. 11. Hilario admitted in interview that the Appellant had asked him to meet Miss Da Silva at the airport and had promised him 1,900 Euros to drive her from the airport to the place where the Appellant intended to meet her. When evidence relating to a previous supply of heroin by him to Viveiros was put to him, he also admitted that offence. 12. The Appellant at first insisted that the cash found at his flat was legitimate savings and denied any involvement in the importation. Later he conceded that he had known about the importation for some time, had been in touch with those in Lisbon who had supplied Miss Da Silva with heroin, had hoped to receive £5,000 for his part in the conspiracy and had provided funds to Hilario to pay to the courier: these admissions linked the Appellant to the importation offence, Count 4 in the first indictment. He also admitted supplying heroin to Viveiros in the month preceding his arrest: this offence formed the basis of the single count in the second indictment. Finally he acknowledged that the £3,000 found at his address was the proceeds of drug dealing: this admission provided the evidence for the supply count, Count 2, in the first indictment. 13. This was not the only amount of cash seized from this Appellant. Some days after his arrest, the police recovered £8,360 from a garage in Old St John's Road which he had recently rented. When the Appellant was sentenced, the Commissioner, with the consent of the Appellant's advocate, made a determination that all these sums should be confiscated since the amount by which the Appellant had benefited from drug trafficking exceeded the amount seized from him by the police.

PROCEDURAL HISTORY

14. Prior to the hearing on 19 August 2008 the Appellant was served with notices pursuant to the 1971 Act and the 1993 Order warning him of the intention of the Crown to invite the Royal Court to consider recommending him for deportation. 15. Up to the date of the sentencing hearing the Appellant had instructed his advocate not to oppose the making of a recommendation. However on the day of the hearing he changed his mind. As a result the Royal Court heard submissions on the issue, and, in the event, the Commissioner and Jurats

decided to recommend deportation, having weighed the undesirability of the Appellant remaining in Jersey with the impact of his deportation on his family. The balancing exercise performed by the Royal Court was in accordance with the recent decision of this Court in *Camacho v Attorney General*

[2007] JLR 462 . 16. On 19 August 2008 a defendant in an unrelated case, *Attorney General v Benyoucef*

[2008] JRC 157, was awaiting sentence at the Royal Court, the Crown having indicated that it would be requesting the Court to make a recommendation for deportation in his case. 17. Somewhat unusually, on 12 August 2008, Advocate Hanson had been appointed as guardian ad litem of two of Benyoucef's children for the purposes, inter alia, of applying to the Royal Court for leave to intervene to assert the Article 8 rights of Benyoucef's children in respect of the application by the Crown. The Deputy Bailiff heard Advocate Hanson's application and in a reserved judgment given on 19 September 2008 ruled that Advocate Hanson should be given leave. 18. When the Appellant's legal advisers learned of the Deputy Bailiff's ruling in *Benyoucef* they served notice of application for leave to appeal and for an extension of time within which to appeal. 19. On 3 November 2008 the Bailiff, sitting as a Single Judge of the Court of Appeal, granted both applications. THE NATURE OF THE APPEAL 20. There are three issues for our determination in this appeal. The first, raised by the Attorney General who represented the Crown, was whether *Camacho* was correctly decided. 21. The second arises at the instigation of the Appellant who submits that in the light of the Deputy Bailiff's ruling in *Benyoucef* we should quash the recommendation for deportation because the Royal Court heard no submissions on behalf of the Appellant's family. 22. The third matter, also raised by the Appellant, is that we should give guidance to the Courts of the Bailiwick to delay making recommendations for deportation until shortly before an offender has completed his or her sentence. 23. It is convenient to deal with these submissions in the order set out above. The *Camacho* point 24. Prior to the Human Rights Act 1998 (The 1998 Act) recommendations for deportation were considered on the mainland and in this jurisdiction in light of principles set out by Lawton LJ in *R v Nazari*

(1982) Cr. App. R. (S) p 84. Materially these principles were:- (i) Whether the continued presence of the offender was to the detriment of the United Kingdom; (ii) Whether the offence was serious enough to merit deportation; (iii) Whether there was a risk of re-offending; (iv) What effect such an order would have on others in particular the offender's family who might suffer if the offender was deported. Hardship to the offender himself was not a consideration which should influence the Court, *R v Bali*

- (2001) 2 Cr. App. R. (S) 464. 25. Thus, prior to the implementation of the 1998 Act in 2000, in deciding whether or not to make a recommendation, the sentencing court undertook the balancing exercise as did, later, the Home Secretary when he considered whether or not to implement the recommendation. Nazari was applied in this Bailiwick on a number of occasions. See *Monteiro v Attorney General* 2001/177; *Mendes v Attorney General*
- [2003] JLR N 25; *Ahmed v Attorney General*
- [2005] JLR N 37; *Attorney General v Rodrigues*
- [2006] JRC 009 ; *Mendonça v Attorney General*
- [2006] JRC 132 . 26. The article of the European Convention on Human Rights and Fundamental Freedoms which is relevant to this appeal is Article 8. It was incorporated into English law by the 1998 Act and is to the following effect:- "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." 27. In England the impact of Article 8 on the procedure to be adopted by a court when it is invited by a prosecuting authority to make a recommendation, and on the procedure to be adopted by the Home Secretary at the time when he considers whether or not the recommendation should be implemented, came before the Court of Appeal in *R v Carmona*
- (2006) EWCA Crim 508 . 28. The Court held that Article 8 and other Convention rights were not affected "by what is only a recommendation" and, accordingly, that the task of the sentencing court should in future be limited to an evaluation of the seriousness of the offence, leaving to the Home Secretary the balancing exercise between those rights and the public interest. 29. The Court justified this in part because Section 82(2)(j) of the Nationality Immigration and Asylum Act 2002 (as amended by the Asylum and Immigration (Treatment of Claimants etc) Act 2004) permitted a right of appeal of the Home Secretary's decision (see also *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment Transport and the Regions* etc
- (2001) UK HL 23). The appeal lies to a specialist independent tribunal. 30. The Court in *Carmona* concluded:- "In our judgment, it follows that there is now no need for a 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." 31. In this jurisdiction the law relating to deportation is to be found in the 1993 Order which provides, so far as is material, as follows:- "1. This

Order may be cited as the Immigration (Jersey) Order 1993 and shall come into force on 1st August, 1993 ...

3. (1) Sections 1 to 9, 11, 24 to 29, 32, 33 and 37 of the 1971 Act and Schedules 2 to 4 to that Act shall extend, with the modifications specified in Part 1 of Schedule 1 to this Order, to Jersey" The Immigration Act 1971 [reproduced in Schedule 2 of the Jersey Order] provides, as amended by the Jersey Order as follows: "3. (5) A person who is not <a British citizen> shall be liable to deportation from the [Bailiwick of Jersey] - ...
 - (b) if the [Lieutenant-Governor] deems his deportation to be conducive to the public good...
 - (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 Jersey] 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... Procedure for, and further provisions as to deportation
5. (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 Jersey]; and a deportation order against a person shall invalidate any leave to enter or remain in the [Bailiwick of Jersey] given him before the order is made or while it is in force...
6. (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) Where a court recommends or purports to recommend a person for deportation, the validity of the recommendation shall not be called in question except on an appeal against the recommendation or against the conviction on which it is made; but -
 - (a) ...the recommendation shall be treated as a sentence for the purpose of any enactment providing an appeal against sentence...
 - (6) A deportation order shall not be made on the recommendation of a court so long as an appeal or further appeal is pending against the recommendation or against the conviction on which it was made; and for this purpose an appeal or further appeal shall be treated as pending (where one is competent but has not been brought) until the expiration of the time for bringing that appeal..." 32. In March 2007 the issues decided in Carmona were considered by the Court of Appeal in Guernsey in O'Dette and O'Dette-v-Law Officers (2007-2008) GLR 16. That Court declined to follow the procedure recommended in Carmona and held that, in Guernsey, the time for a review of Article 8 rights should not be limited to the time when the order for deportation was considered by the Lieutenant Governor but that the sentencing court should also review those rights at the time when consideration was given to the recommendation. 33. Later that year this Court in Camacho was invited to decide in this

jurisdiction whether to follow Carmona or Odette . In the event, the Court concluded that in Jersey, as in Guernsey, Article 8 rights should be considered by the sentencing court at the time of the making of the recommendation for the following reasons:- (i) The judicial process has an advantage denied to the executive in "the ability to illuminate the issue by the forensic process with the assistance of counsel (in particular for the potential deportee) placing the fullest material before the Court." (ii) Adopting the conclusions in Odette , the Court pointed out that the Lieutenant Governor of Jersey is in a very different position to an English Home Secretary and has less resources of time and staff to carry out investigations. (iii) Offenders should have the advantage of the fullest procedural protection at every stage. The absence of an appeal from the Lieutenant Governor's order contrasts starkly with the appellate safeguards in place in respect of an order for deportation made by the Home Secretary. 34. In the instant case the Attorney General invited this Court to say that Camacho had been wrongly decided and that the procedure to be adopted in this jurisdiction should be as laid down in Carmona . 35. Although it would be open to this Court to overrule one of its previous decisions, the Court would only do so if the decision under consideration (in this case a very recent decision of the Court) was plainly wrong. Another obstacle in the Attorney's path is the decision in Odette . The Lieutenant Governors of both Bailiwicks occupy a similar jurisdiction and function. Their positions and the resources available to them are wholly different to the situation of the Home Secretary in the United Kingdom. 36. The Attorney General submitted, firstly, that although there was no right of appeal from the order of the Lieutenant Governor, the right to question his order by way of judicial review was an adequate safeguard for an offender against whom an order for deportation was made. 37. We do not accept that submission for the following reasons:- (i) The Lieutenant Governor makes the decision whether to order deportation in private and is not obliged to give reasons. This makes a challenge to his decision necessarily more difficult than a challenge to the decision to recommend deportation which is made by a Court which sits in public and which, see *R v Rodney*

(1996) 2 Cr. App. R. (S) 230, is obliged to give reasons for its decision. (ii) If the sentencing court is deprived of the opportunity of considering the Convention rights, the offender's opportunity of asserting those rights is limited to the time when the making of an order is considered by the Lieutenant Governor. (iii) If the forum in which the rights are considered is limited to the time when the Lieutenant Governor considers making an order, an appeal from that decision can only lie by way of judicial review. It is clear from an analysis of the judgment in Carmona that one of the main reasons why the Court of Appeal suggested, post 2000, that the sentencing court needed no longer to undertake the balancing exercise, was because the offender enjoyed a right of appeal from the Home Secretary's decision to the Asylum and Immigration Tribunal. In our judgment the unfettered right of review of such a decision is not to be equated with the right to bring judicial review proceedings against the Lieutenant Governor which can only be invoked on grounds of irrationality, illegality, or procedural irregularity. 38. The Attorney General also submitted, as per the reasoning of the Court in Carmona , that Convention rights are not

in fact engaged at the time of making the recommendation, but only at the time of making the order, because they have no practical effect until the order is made. This Court disposed of this point in *Camacho* :- "We disagree with equal respect with the English Court of Appeal if it is to be taken as suggesting that because there is no interference with the rights guaranteed by Article 8 until an order is actually made, a court is not required to take it into account in making its recommendation (

[2006] 1 WLR 2264 , at para. 17). The premise may be sound, but the conclusion does not follow from it. A recommendation for deportation which did not take account of the fact that, prior to its potential implementation, the evaluation exercise demanded by the Convention was engaged would, in our view, both lack utility and realism, not least if the practice, even if not the law, suggested that such recommendation would be followed. Any recommendation would, of course, have to make it clear that it was based on the facts as they were, or could fairly be predicted to be, before the Royal Court, and would be subject to reconsideration in the light of any intervening change of circumstance." 39. In the judgment of this Court the question of deportation is a developing process. If a court is asked to consider making a recommendation for deportation, it is being asked to give effect to a process which necessarily includes consideration of the offender's rights under Article 8. If a court has the power to make a recommendation, it has a duty to take into account all those factors which should inform that decision. 40. We cannot accept that it is open to the Royal Court or the Court of Appeal as public authorities under Article 7 of the Law to recommend a course, which, if pursued, might be contrary to the rights of an offender or his family, without considering whether it is. Any court has to consider whether, in its view, deportation would be the proper course and that must involve considering the implications for the Convention rights of the relevant parties. 41. With deference to the Court in *Carmona* we are not attracted by the idea that the court should take into account some factors but not others. In the performance of the balancing exercise which must take place, the court should weigh in the scales all relevant factors not limited to those which are relevant to the public interest. 42. Having concluded that the Royal Court was correct in undertaking the balancing exercise in the instant case, we turn to consider the way in which it performed that task. In sentencing, the Commissioner said on behalf of the Court:- "We are concerned in this case principally with offences involving the importation and supply of heroin. The most serious offence is that of *De Gouveia, Da Silva and Hilario* in which 277 grams of heroin with the potential street value of £227,000 and a wholesale value of £45,442 was imported into Jersey concealed on *Da Silva* who acted as the courier. ... The Crown submit that *De Gouveia* was involved in organising this importation and the subsequent distribution to small-time traders. One of those traders was *Viveiros*, who was on the next rung down the ladder and who supplied others to support his own habit. ... *De Gouveia*, you have played a pivotal role in the importation and supply of wholesale amounts of heroin to lesser street-level dealers. In terms of mitigation you have pleaded guilty, you have no previous convictions and you wrote your own indictment in relation to the supply of wholesale amounts. We

have considered the references supplied on your behalf and indeed your own letter, and the reports. It is to your credit that you have had a stable relationship and a good employment record and we note that this was, on your part, a sudden fall from grace. We accept that you are an unsophisticated trafficker in drugs and that you have expressed remorse and shame." 43. The Commissioner then sentenced most of the defendants, including the Appellant, to various terms of imprisonment. He continued:- "We now turn to the issue of deportation. The Crown invites the Court to recommend deportation ... These defendants do not hold British citizenship and all have been sentenced for serious offences. In each case we are required to consider first whether the defendants' continued presence in Jersey is to the Island's detriment, secondly, whether deportation would cause hardship to innocent persons and thirdly, the effect the deportation would have on the defendant himself. We have applied this test in each case. Turning to De Gouveia first, we have no doubt that his continued presence is detrimental to the interest of the Island because of his involvement in the importation of this large quantity of a Class A drug. We have considered carefully the position of his partner and his daughter. As and when he is deported, his partner can make a decision as to whether it is in her interest and that of her daughter, to move from the Island to join him and there will be much time to prepare for that decision. But in our view the interest of the Island must prevail and we are therefore going to recommend his deportation." 44. We see nothing to criticise in this approach. In our judgment, the Royal Court plainly gave separate consideration to the sentence of imprisonment and to the recommendation for deportation in accordance with the principles of *R v Edgehill* 47 Cr. App. R. 41; and gave adequate reasons for making the recommendation in accordance with *R v Rodney*. The Benyoucef point 45. In Benyoucef the Deputy Bailiff upheld the right of the offender's children to intervene to make separate submissions on the question of a recommendation for deportation. In a carefully reasoned judgment, he based his decision on the fact that the rights of the offender's children under Article 8 would be "greatly affected" by the decision of the Court to make a recommendation which, he concluded (notwithstanding the freedom of the Lieutenant Governor to ignore it) was likely to result, more often than not, in an order for deportation. 46. He also concluded that there was an appropriate analogy to be drawn between the making of a recommendation for deportation and a confiscation order in criminal proceedings. In the latter situation a person whose interests would be affected by the making of a confiscation order may be given leave to intervene in order to protect those interests, see *Attorney General v Smith*

[2004] JLR 346 . 47. The Deputy Bailiff added:- "I have to say that I have reached this conclusion with some reluctance. I am by no means convinced that intervention by the children or other members of the family will make any practical difference in most cases ... if the Court of Appeal were to hold that I was wrong in my ruling, I would certainly not be dismayed". 48. The difficulty with the ruling of the Deputy Bailiff lies in his conclusion that the Article 8 rights of an offender's family can only adequately be discharged by separate representation. Our reasons for disagreeing with his approach are as follows:- (i) In

criminal trials, the parties are usually limited to the Crown and the defendant/defendants. This applies as much to the sentencing process as it does to the issues raised prior to verdict. As Rose LJ said in *R (Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449 at para 21:- "A proper discharge of judicial functions in relation to sentencing requires that the judge takes into account (as Lord Woolf CJ said he did in this case) the impact of the offence and the sentence on the public generally and on individuals, including the victim and the victim's family and the defendant and the defendant's family. The nature of that impact is properly channelled by the prosecution or defence." (ii) In so far as the children or any other member of an offender's family wish to oppose the making of the recommendation, their interests will usually coincide with the interests of the offender in opposing the recommendation. There would be nothing to prevent, and everything to encourage, the offender's advocate from ensuring that the views of those individuals are placed before the court to bolster his submissions. If, on the contrary as was envisaged by Miss Fogarty in argument, the interests or wishes of the family did not coincide with those of the offender, it would not be appropriate for them to make representations on behalf of and separate from the Crown against the interests of the offender. (iii) In our judgment the analogy to confiscation proceedings is not apt. In *Smith*, as the Deputy Bailiff conceded, it was immaterial to the offender whether his assets were taken by way of confiscation or were returned to the victims. However in such cases if the victims wish to recover their property they can only assert their claims, in preference to confiscation, by making representations to the court. In deportation cases, on the contrary, there is likely to be a coincidence of interest between the offender and his family. (iv) If Article 8 rights in relation to recommendations for deportation can only be vindicated adequately by representations made by members of the offender's family, it is difficult to see why other aspects of the sentencing process, imprisonment for example, should not fall within the same ambit. In the case cited above, Rose LJ expressed the matter thus:- "... in criminal cases there is no need for a third party to seek to intervene to uphold the rule of law, nor, in my judgment, would such intervention generally be desirable. If the family of a victim challenge the sentencing process, why not the family of the defendant? Should the Official Solicitor be permitted to represent the interests of children adversely affected by the imprisonment of their mother? Should organisations representing victims or offenders be permitted to intervene? In my judgment, the answer in all these cases is that the Crown and the defendant are the only proper parties to criminal proceedings." 49. Occasionally there may be cases where separate representation is essential to do justice to the Article 8 rights of the offender's family or the offender's Convention rights generally. In such cases application for separate representation can be made. Whether the application succeeds will depend on its own circumstances and especially whether the family has an interest truly distinct from that of the offender and whether the family is in a position to put forward factual material not available to the offender himself. 50. In the present case no application on behalf of the family was ever made. The family had the same opportunity as the family in *Benyoucef*. The fact that at the relevant time judgment in *Benyoucef* had not been given did not mean that they did

not have such an opportunity. 51. The implication of the Deputy Bailiff's ruling is that the absence of such an application constitutes an irregularity which justifies setting aside the recommendation. Since no family can be required to make an application for separate representation and since, even if it did, the application would not necessarily succeed, we cannot accept that what happened, or rather did not happen, in this case constitutes any irregularity at all. 52. Accepting, as we do, that the Appellant gave instructions to oppose the making of the recommendation only on the day of the trial, he has no one to blame but himself for the fact that his advocate's opposition had to be pressed home without much preparation. Notwithstanding this fact, consideration of the transcript reveals that the Appellant's advocate addressed the Court persuasively on the question of deportation in a passage covering several pages in which he set out the law and the facts for the benefit of the Commissioner and Jurats. Nothing which Miss Fogarty has said has caused us to conclude that the Appellant was in any way disadvantaged by his abrupt change of mind nor indeed that separate representation for the Appellant's family would have made any difference to the conclusion reached by the Royal Court. 53. As we have pointed out, in the instant case no application was made to the Royal Court for leave to intervene on behalf of the Appellant's partner or child. We conclude that this was not an oversight but that it reflected the fact that there was no good reason why their views and their rights under Article 8 could not be put before the Royal Court by the Appellant's advocate. The timing of the recommendation for deportation 54. Miss Fogarty submitted that it was inappropriate for a Court to make a recommendation for deportation at the time of sentence and preferable to wait until near the time when the recommendation would be implemented, or not, by the Lieutenant Governor. She pointed out that since the question of deportation only arose in cases which merited substantial prison sentences, it was inevitable that family circumstances, so relevant to the balancing exercise, would almost certainly have changed during the period when the offender was serving the sentence. Certainly children would be older; the spouse might have become estranged from the offender as a result of the period of incarceration; other relevant family members might have fallen prey to illness or death. Thus, submitted Miss Fogarty, it would be sensible for the Court to decline to make the recommendation at the beginning of the sentence but rather to postpone it until the end. 55. Miss Fogarty's submission would have more force if the Lieutenant Governor's discretion was limited to a mere review of the basis on which the Court had made the recommendation. Indeed her submission appears to be predicated on the basis that he is debarred from taking into account changes in the offender's family circumstances at the time when he considers the recommendation. This is not so. The Court in *Camacho* made it clear that the Lieutenant Governor is obliged to take into account all the circumstances of the offender's family at the time when he considers making his order, including any changes which have occurred since the making of the recommendation. 56. Moreover, in adopting the editorial comment in the *Jersey and Guernsey Law Review* (11 *Jersey and Guernsey Law Review* at 150(207)), that "the Lieutenant Governor retained an unfettered discretion," the judgment of the Court continued:- "The Jersey law is modelled upon the English legislation and gives the

executive, not the judiciary, the last word. In our view, the Lieutenant Governor is entitled, if he thinks fit, having taken the court's recommendation into account, to depart from it because circumstances may have changed since it was made, but also because he differently evaluates the various competing factors. We are told that (prudently) he gives anyone liable to such order an opportunity to make timely representations." 57. But the primary objection to Miss Fogarty's submission is a statutory one. As set out above, section 3(6) of the 1971 Act as applied to Jersey by the 1993 Order, reads materially as follows:- "...a person who is not <a British citizen> shall also be liable to deportation from the [Bailiwick of Jersey] 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 . (Our emphasis)." 58. The reason why the law ties the making of the recommendation to the moment of conviction is plain. The Court which convicts and punishes is also the tribunal which is in the best position to perform the balancing exercise. There is a sound practical reason why the law should insist on a coincidence in time between these two activities. If some years were to elapse between the conviction (and sentencing) and the moment when the Court considered making the recommendation, it might well prove difficult, if not impossible, to convene the same Court. It is obviously desirable, particularly for example after a contested case during which the offender has given evidence, that the Court which has convicted the offender should be the same Court which makes the assessment whether the continued presence of the offender is to the detriment of Jersey, including of course an assessment of the seriousness of the offence and whether there was a risk of re-offending. 59. Miss Fogarty cited Edgehill , referred to above, in support of the desirability of separating the sentencing process and the recommendation for deportation. But an analysis of the judgment in that case shows that the English Court of Appeal was merely emphasising that it was important that courts of first instance should give separate consideration to sentence and to the recommendation, rather than advocating that there should be a separation in time between the two processes. 60. This appeal is dismissed. Authorities Misuse of Drugs (Jersey) Law 1978. Customs and Excise (Jersey) Law 1999. Immigration (Jersey) Order 1993. Immigration Act. Camacho v Attorney General

[2007] JLR 462 . Attorney General v Benyoucef

[2008] JRC 157. Human Rights Act 1998. R v Nazari (1982) Cr. App. R. (S) p 84. R v Bali

(2001) 2 Cr. App. R. (S) 464. Monteiro v Attorney General 2001/177. Mendes v Attorney General

[2003] JLR N 25. Ahmed v Attorney General

[2005] JLR N 37. Attorney General v Rodrigues

[2006] JRC 009 . Mendonça v Attorney General

[2006] JRC 132 . R v Carmona

- (2006) EWCA Crim 508 . Nationality Immigration and Asylum Act 2002 (as amended by the Asylum and Immigration (Treatment of Claimants etc Act) 2004. R (Alconbury Developments Ltd and others) v Secretary of State for the Environment Transport and the Regions etc
- (2001) UK HL 23 . O'Dette and O'Dette-v-Law Offices (2007-2008) GLR 16. R v Rodney (1996) 2 Cr. App. R. (S) 230. R v Edgehill 47 Cr. App. R. 41. Attorney General v Smith
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