

JERSEY / JUDGMENT

de Jesus v AG [2003] JCA 110 (03 July 2003)

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 15 th February 2002 the applicant was sentenced to three years imprisonment on one count of grave and criminal assault and two months' imprisonment concurrent for a count of possessing an offensive weapon. The Court also recommended that he be deported at the end of his sentence. 2. On 7 th February 2003 the applicant applied for leave to appeal against the deportation recommendation; he does not seek to appeal against the prison sentence. Given that the notice of appeal was only filed approximately one year after sentence was passed the applicant also seeks leave to appeal out of time. 3. In the case of AG -v- Fossey

(1982) JJ223 the Court made it clear that an extension of time is not given as a mere matter of form. Substantial grounds must be shown for the delay before the Court will exercise its discretion in favour of the applicant. The longer the delay the more onerous is the duty of the applicant to show that there are substantial grounds to justify the grant of an extension of time. 4. What is the reason put forward for the delay in this case? In his application for leave to appeal out of time the applicant stated that he was advised by the advocate who represented him before the Royal Court that there was no point in appealing until a deportation order was actually made. He says that as soon as an order was made by the Lieutenant Governor he applied for legal aid. The deportation order was made on 9 th December and he was granted legal aid thereafter once an opinion had been received. It seems clear that there are no grounds for criticising any delay between 9 th December and 7 th February when the notice of the application was filed. 5. In essence therefore the applicant is saying that he did not appeal earlier because he was advised that he should not appeal against the recommendation, but should only appeal after the actual deportation order had been made. If such advice was indeed given, it would clearly have been wholly erroneous. There is no right of appeal against a deportation order made by the Lieutenant Governor. There is only a right of appeal against a recommendation for deportation made by the Royal Court and this has to be brought within the normal period of ten days allowed for appealing. Accordingly, the grounds for applying to appeal out of time depend upon a criticism of the advocate who represented the applicant before the Royal Court. 6. The difficulty the Court faces today is that the applicant has failed to follow the appropriate procedure in such cases. The Court is therefore simply not in a position to decide whether the criticism of the former advocate is well-founded. Indeed, the former advocate has not even been told about these criticisms by Mr Tremoceiro. 7. The Court has already had

occasion earlier this week in the appeal of Mendes -v- AG (30 th June 2003) Jersey Unreported; [2003]JCA106 to remind counsel that they must follow the procedure laid down in the case of R -v- Docherty

- (1997) 2Cr. App. R 218, where the grounds of appeal turn upon criticisms of the advocate who represented the accused in the court below. In particular, where, as in this case, the matter turns on advice allegedly given outside the Court, so that it will not appear in the transcript of the proceedings below, the applicant has to swear an affidavit setting out the factual basis upon which he relies. That affidavit must be supplied to the advocate below, together with a waiver of privilege, so that the advocate can, in turn, file a response by way of affidavit. This may well be along the lines that the appellant's affidavit is absolutely correct. Alternatively, it may dispute the accuracy of what is said in which event the Court will have to hear evidence in order to resolve where the truth lies. 8. It follows that we are not in a position to consider whether to grant leave to appeal out of time. However, without prejudice to that issue, the Court has today heard Mr Tremoceiro's submissions on the merits of the appeal. Unfortunately, it has transpired that this too depends upon a criticism of what occurred in the court below in circumstances in which the Court is unable to ascertain whether those criticisms are well-founded or not. 9. First, it is said that the Probation Officer misunderstood the applicant when reporting, in paragraph 4 of the Social Enquiry Report, that the applicant had told the Probation Officer that he and his girlfriend had been considering returning to Madeira to live with his parents before he was arrested. 10. Secondly, although this is not entirely clear, it seems that it may be said that the applicant was also misunderstood by an immigration officer who in a report of an interview dated 4 th January 2002 said this: "Mr de Jesus stated that his intention at the end of any sentence handed out would be to return to Madeira with his girlfriend and daughter and he has already spoken to his parents informing them that he intends to return home. He is clearly naturally unhappy being in prison and wishes it to be over as soon as practicable. He understands the concept of the deportation procedure and would be willing to be deported should that decision be made." As we say, we are not entirely clear about the applicant's submissions because it also seemed to be suggested that perhaps he had said this but was under stress and in turmoil at the time. 11. Thirdly, it is said that neither the advocate who represented the applicant, nor the advocate's assistant who had visited the applicant in prison prior to the hearing, took specific instructions on whether the applicant accepted the contents of paragraph 4 of the Social Enquiry Report and whether the applicant opposed the deportation recommendation. It is said that the advocate was therefore wrong to inform the Royal Court that in effect the applicant did not dispute the contents of paragraph 4 of the Social Enquiry Report. 12. In the absence of any evidence or of any notification to any of the other parties that these points were to be raised, it is of course impossible for this Court to know whether these criticisms are well-founded or not. They are not something which the Court can resolve from the transcript of the hearing below. 13. The Court is clear therefore that this application will have to be adjourned so that the necessary evidence can be prepared. The Court will then sit to

consider it. We will need to have an affidavit from the applicant. We will also need to receive an affidavit from the advocate and the Probation Officer and possibly other witnesses such as the legal assistant and the Immigration Officer. Accordingly, the matter is adjourned in order for the applicant to get his tackle in order and to prepare the necessary evidence; he will of course also need to make an application for leave to call evidence on an appeal. We are not happy that this matter should be delayed unduly; accordingly, the applicant must file any such application together with an affidavit from the applicant and the advocate within seven days of today's date; the Crown must file any affidavits which it wishes to put in response within seven days thereafter and the matter must then be relisted. Authorities AG -v- Fossey (1982) JJ223. Mendes -v- AG (30 th June 2003) Jersey Unreported; [2003]JCA106. R -v- Docherty (1997) 2Cr. App. R 218. Nazari et ors (1980) 71 Cr. App. R 87. Page Last Updated: 18 Jun 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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