

JERSEY / JUDGMENT

Gomes -v- AG [2008] JRC 223 (22 December 2008)

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JUDGMENT

THE BAILIFF: 1. This is an application by Fabio Rafael De Jesus Gomes for leave to appeal against part of the sentence imposed by the Inferior Number on 26 th September, 2008, in as much as the Court recommended that he should be deported at the end of his 18 months' prison term imposed for various drugs offences. 2. Gomes pleaded guilty to three offences relating to the possession of cannabis, possession of heroin and being concerned in the supply of heroin. The Police found nearly £1000 in cash and 17 wraps of heroin in a motor car belonging to the girlfriend of Gomes. The Crown accepted that Gomes was acting as a minder and looking after the heroin for his co-accused, a man called de Freitas. The Crown accepted that it was a spur of the moment decision on the applicant's behalf. Gomes was not of good character. In particular he had a conviction for importing drugs into France and had been sentenced to 10 months' imprisonment of which 4 months were suspended. Gomes is a heroin addict. The report of the Director of the Alcohol and Drugs Service contained the following concluding opinion:- "(i) In summary Mr Gomes is a 21 year old man of Madeiran descent who reports a history of heroin dependence over the past year. (ii) Notwithstanding his young age, Mr Gomes emerges as an experienced drug user who is immersed in the local drug scene. (iii) He is adept at playing the system, saying different things to different people according to the situation in which he finds himself. (iv) My view is that Mr Gomes is unlikely to comply with the conditions of a Treatment Order given that he continues to use illicit drugs. Moreover his motivation to seek treatment is largely driven by the involvement with Social Services.

(v) Taken overall, I do not consider a Community Treatment Order is warranted in respect of this case." 3. The Social Enquiry Report prepared by the Probation Service indicated that Gomes was at medium risk of re-offending. So far as his personal circumstances are concerned, the applicant was born in Madeira where he spent his early years. His parents separated when he was aged one and he experienced violence at the hands of his step-father. At the age of 8 he came to Jersey with his mother and step-father. His educational experiences in Jersey were not happy and he apparently suffered from racist taunts. He began truanting and misbehaving. After committing various offences he was remanded to Les Chenes and eventually he was bound over to leave the Island. He returned to Madeira in 2002 where he was looked after by his grandmother for 2 years until his grandfather died. He

then returned to Jersey. He formed a relationship with a school friend who has a child by him, now aged 2. That relationship broke down and the applicant formed another relationship with a local girl by whom he has a daughter now aged 7 months. They were not living together when Gomes was sentenced to imprisonment but the girl was content that Gomes should visit in order to see the baby. The other material circumstance known to the sentencing Court was that after being convicted of the drugs offence in France, Gomes received a letter written on behalf of the Lieutenant-Governor, dated 26 th June, 2007, warning him that if he re-offended in any way he would be liable to deportation. Those were the background circumstances against which the sentencing Court determined that a recommendation for deportation should be made. 4. Both counsel have agreed that the test for this Court in considering this application for leave to appeal is that set out in the Judgment of the Court of Appeal in *Simao v AG*

[2005] JLR 374 . The Court stated :- "We have to consider whether the recommendation was manifestly excessive in all the circumstances including the current mental health diagnosis and whether the discretion of the Court was wrongly exercised. It is not for the Court to decide merely whether we would have come to a different view". 5. Counsel for the applicant, who put the applicant's case with commendable thoroughness, submitted that the sentencing court did not correctly apply the guidelines set out in the English case of *R v Nazari*

[1980] 2 Cr. App. R. (s) 84 which she encapsulated in her skeleton argument as follows:- "The sentencing court should:-

- (a) Consider whether the offender's continued presence would be detrimental to the country and, if satisfied that is the case;
- (b) take into consideration the effect a deportation order would have on innocent persons such as the offender's family. The court must then balance these considerations." 6. The Nazari guidelines must now however be reframed in the light of the decision of the Court of Appeal in *Camacho v AG*

[2007] JLR 462 where the Court indicated that the second limb of the *Nazar i* test should be examined through the prism of the European Convention on Human Rights 2000 of which Article 8 will usually be the relevant provision. Article 8 provides:- "1. Everyone has the right to respect for his private and family life,

- 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." Beloff JA added at paragraph 27 of the *Camacho* Judgment:- "In our view it is the family rights of the offender as well as those of his family which must be considered even if ex hypothesi less weight is given in the balancing exercise of those of the former i.e.: the offender, as to whether this is justification for

severing a family. The Article 8(2) factors must be considered always informed by the doctrine of proportionality." 7. The Inferior Number did not specifically refer to Article 8 of the Convention but Birt, Deputy Bailiff stated on behalf of the Court:- "However turning to your family life, you came to Jersey when you were 8 but you were then bound over to leave the Island and you were away from August 2002 until 2004, when you returned early in breach of the binding-over order, you have been in Jersey since then, you have a two year old son by a previous relationship and now you have a very young daughter by your current relationship with your Jersey-born girlfriend. Your mother also lives here. If this had been your first offence then for the same reasons as in relation to Mr de Freitas, we would not have made a recommendation but the distinguishing factor in your case is that you have been warned before, you were written to after your French conviction on behalf of the Lieutenant-Governor. This was as recently as the end of June of last year and you are expressly told that should you re-offend in any way you would be liable to be deported. You have now re-offended, warnings mean what they say and therefore we are going to recommend deportation. We do not regard it as being disproportionate in your case given the previous warning that you had". 8. It is clear from the reference to proportionality that the Court had clearly in mind the provisions of the European Convention on Human Rights which have to be balanced in the equation. By a majority, the Court cannot find that the sentencing Court wrongly exercised its discretion nor that the decision to recommend deportation was manifestly excessive or disproportionate in any way. The application is accordingly refused. Authorities *Simao v AG*

[2005] JLR 374 . R v Nazri

[1980] 2 Cr. App. R. (s) 84. *Camacho v AG*

[2007] JLR 462 . European Convention on Human Rights 2000. Page Last Updated: 22 Jul 2016
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