

JERSEY / JUDGMENT

Miszewski -v- AG [2011]

JRC 038 (11 February 2011)

[2011] JRC 038

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

JUDGMENT

THE Commissioner: 1. On 25th January, 2011, the Court dismissed an appeal by Andrej Marek Miszewski ("the appellant") who is aged 24 against the decision of Shaw, Assistant Magistrate, on 11 th August, 2010, that a recommendation be made to H M Lieutenant Governor for his deportation from the Island on the completion of his sentence of imprisonment. We now set out our reasons. 2. The appellant had pleaded guilty to three counts of grave and criminal assault and two counts of common assault upon Miss X over a period of some 13 months when they were living together. They have one child at the time of the hearing. 3. In sentencing the appellant to 12 months' imprisonment, the Assistant Magistrate summarised his offending as follows:- "You have been convicted of five violent assaults taking place over a period of thirteen months, the most recent offence was a sustained, calculated and premeditated assault, it was not a loss of control, it was the opposite. You were very much in control of what you did on that night and you have been in control of her life during your relationship. You have terrorised this woman for a period of a year and during that time she was particularly vulnerable as she became pregnant and gave birth to your son, you isolated her from her family and her friends, you crushed her self esteem. The most recent offence was a calculated and vicious beating. You told her to choose where she would be beaten and you chose a night where the neighbours would not be in to hear her cries. You ensured that she put knives away in case you did lose control and you realised what you were capable of. You made very credible threats to her life. During this particular assault you even stopped for a cigarette and told her that worse was to come and that she would leave in an ambulance. Her physical injuries were extensive bruising, this was the culmination of a year of physical assaults on this woman. You abused the position of trust that exists between partners, you abused a position of control over her." 4. In the social enquiry report of 16 th July, 2010, Mr James Lynch, probation officer, said this at paragraphs 12-14:- "12. The LSI-R risk of reconviction assessment tool indicates offenders matching Mr Miszewski's profile have a low risk of reconviction within twelve months. While I would support this assessment in terms of general offending, I would highlight that the LSI-R tool is not considered an accurate measure of risk in domestic violence cases. 13. The Spousal Assault Risk Assessment (SARA) tool identifies a number of features of this case indicating a risk of harm. The bulk of these features are drawn from the account of the index offences and include:-the use of weapons and credible threats of

death, extreme minimisation of violence, recent escalation in severity of assault and evidence of sexual jealousy. These features lead me to assess Mr Miszewski as posing an imminent risk of serious harm to his partner. I would stress that this is an assessment of serious harm and includes a credible risk of death. 14. The risk of harm Mr Miszewski is assessed as posing appears limited to that posed to his partner with no indication he poses a risk to others in any other setting." 5. It was agreed by counsel that making a recommendation for deportation forms part of the sentence and the test to be applied therefore on an appeal from the decision of the Assistant Magistrate is that this Court should not interfere with the sentence imposed unless that sentence was wrong in principle or manifestly excessive or, in the context of convention rights, disproportionate. 6. The transcripts show that the Assistant Magistrate gave Mr Blakeley notice that she was considering whether or not to recommend deportation and adjourned sentencing to enable him to take instructions. She referred expressly to weighing in the balance the human rights issues as the appellant had a child. 7. At the adjourned hearing, Mr Blakeley addressed the Assistant Magistrate on deportation, raising in particular the effect of deportation on innocent people, namely Miss X and the child. A letter from Miss X was submitted to the Assistant Magistrate, in which she stressed the unfairness of the child growing up without the child's father and how deportation would prevent them living as a family. In that context, Mr Lynch said this at paragraph 15 of the social enquiry report:- "In light of the prosecution documents, including the original victim statement and [the Police Force Medical Examiner's] evidence, I am forced to conclude that Mr Miszewski's account of the index offences carries virtually no credibility. I am equally concerned that it appears [Miss X] has moderated her account in line with Mr Miszewski's possibly in an attempt to assist his situation but also raising the possibility that he continues to exercise a degree of control over her. As a result of the defendant's offending behaviour, [Miss X] is in a position of vulnerability which may serve to place both herself and her child in further danger." 8. In giving her decision on whether deportation should be recommended, the Assistant Magistrate said that she had considered the relevant authorities, namely R-v-Nazari

(1983) All ER 880, Camacho-v-AG

[2007] JLR 462 and De Gouveia-v-AG

[2009] JCA 098 , and in her conclusions said this:- "It is a question as to whether I should recommend to the Lieutenant Governor that he deports you at the end of your sentence. I would recommend that if your deportation would be conducive to the public good and I have to balance that against your rights to family life under Article 8 of the European Convention. Those who commit serious crime in this Island should know that deportation is a potential consequence. You have committed serious crime in this Island, you remain a serious risk to your partner, domestic violence also is well known to cause emotional harm to children if they are brought up in those circumstances. Even if you don't physically harm your child, you risk causing emotional harm to a child brought up in such circumstances. The risk to your partner in this case is assessed by the social enquiry report and even taking into account what's said in the psychological report, my view is that risk is so great that that outweighs your right under Article 8 and that it is reasonable

and proportionate to interfere with that right and to recommend your deportation to the Lieutenant Governor and I so recommend." 9. The test to be applied when considering the recommendation of deportation is set out in *Camacho*, namely the Court is required to find first that an offender's continued presence in the Island is detrimental to the public good and secondly, that his deportation would not be disproportionate having regard to the relevant convention rights of the applicant and others not before the Court, in particular, the right of the applicant and his family to respect for family life under Article 8. In his written skeleton argument, Mr Blakeley conceded that the Assistant Magistrate had applied the correct test in law. 10. The basis of the appeal was that the Assistant Magistrate failed to properly take into account the effect that a deportation order would have on the appellant and/or Miss X and the child. In addition, the Assistant Magistrate erred in concluding that the appellant's continued presence in the Island would not be "conducive to the public good". Detrimental to the public good 11. Mr Blakeley submitted that there was insufficient material before the Assistant Magistrate for her to properly conclude that the appellant's presence in the Island was detrimental to the public good. The social enquiry report made it clear, he said, that the appellant posed a risk to no one other than Miss X. It was inappropriate of the Assistant Magistrate to have relied on the social enquiry report when there was a psychological report before the Court, dated 27th July, 2010, which made no reference to any such risk. Furthermore, the appellant had no previous convictions and any risk of harm to Miss X could be mitigated with appropriate assistance, of which the appellant was taking advantage, and by the fact that, on the advice of the Children's Service, he would be living apart from Miss X when released, certainly initially. 12. In our view, the risk of serious domestic violence is a matter of public concern. There can be no distinction between criminal acts committed in public or in private. In this case, the risk included a credible risk of death. It was wholly appropriate for the Assistant Magistrate to have placed reliance on the advice given by the probation officer in the social enquiry report in assessing that risk. As to the psychological report, which the transcripts cited above show the Assistant Magistrate did consider, that had been commissioned to assess the appellant's psychological make-up and not to assess the risk that he may have posed to others. 13. It is the case that the appellant has no previous convictions and was seeking assistance to address his anger management issues, but this has to be set against the sustained level of serious offending over a 13 month period as summarised by the Assistant Magistrate in the passage we have quoted above. 14. We could see no grounds upon which we could interfere with the decision of the Assistant Magistrate under the first limb of the *Camacho* test. Convention Rights 15. In essence, Mr Blakeley submitted that if the Assistant Magistrate had properly weighed the convention rights of the appellant and his family against the risk he posed, she could not have reached the conclusion that she did. In particular, he submitted that the Assistant Magistrate should have had regard to the fact that Miss X was not intending to travel to Poland to set up life with the appellant if he was deported and, accordingly, the deportation order would separate them. Neither of them wished for such a separation. Further, it would result in the appellant being deprived of contact with his soon, again

something which neither of them wished. The overall effect of deportation therefore would be to break up the family unit against the wishes of that family. Mr Blakeley also argued that the Assistant Magistrate should have flagged her concern as to the risk to the child upon which he said he had not been given an opportunity to address her. 16. The transcripts at page 5 of the hearing on 5th August, 2010, make it clear that Mr Blakeley did address the Assistant Magistrate on the risk to the child in that he asserted that at no point in any of the reports had there been any suggestion of any risk of harm to the child. That submission was inaccurate in that paragraph 15 of the social enquiry report quoted above does refer to the danger faced by the child. In any event, the danger to a child being brought up in a home in which violence of this kind prevails is obvious and the Assistant Magistrate was, in our view, perfectly entitled to take that into account. In doing so, she referred specifically to "emotional" harm to the child being brought up in these circumstances as opposed to direct physical harm. 17. The Assistant Magistrate had given Mr Blakeley every opportunity to address her in full on the issue of deportation and there was no obligation upon her to come back, as he suggested, after he had completed his submissions, if she disagreed with those submissions, in order to give him the chance of addressing her yet further. 18. We accept that in her conclusions the Assistant Magistrate referred to balancing the appellant's rights under Article 8 against the risk and in so doing did not refer expressly to the rights of Miss X and of the child. However, it is clear from the transcripts as a whole that the Assistant Magistrate did apply the correct test (as conceded by Mr Blakeley) and that she did have their rights in mind. 19. It was inherent in her decision that as a consequence of recommending deportation, the public authorities would be interfering (if a deportation was subsequently ordered by H M Lieutenant Governor) in the appellant's convention right to respect for his family life and those of Miss X and the child, i.e. as Mr Blakeley put it, that the family would be broken up. The effect of such an order was very clearly in the forefront of the Assistant Magistrate's mind. 20. Mr Blakeley drew our attention to paragraph 38 of Camacho in which the Court of Appeal took into account further updated information presented by the appellant in that case. Mr Blakeley asked us to do the same, and in that respect drew our attention to the following:- (i) An affidavit from Miss X dated 20th December, 2010, in which she expanded upon the serious impact upon the family if the appellant were to be deported. (ii) The fact that the appellant was taking medication and working with Dr Emsley and Mr Lynch in order to assist with his anger management issues. (iii) That the appellant had approached the Drugs & Alcohol Service who had indicated that they would assist although he did not himself have an issue with either drugs or alcohol. (iv) That he was reading a great deal of literature in relation to anger management issues. (v) That he was in regular contact with Miss X, who came to see him once a month (without the child). 21. Bearing in mind the time that had elapsed since the decision of the Assistant Magistrate, we thought it appropriate to ask Mr Lynch for an updated social enquiry report addressing the issue of risk. Whilst that updated report shows that the appellant had engaged well with the work that was being undertaken, and had consistently presented as motivated to address his behaviour and had been meticulous in completing assigned work between contact

sessions, it concluded that on release he would continue to pose a high risk of harm to Miss X and the child. 22. We took all of this into account and the submissions of Mr Blakeley, but we concluded that we had no grounds to interfere in the decision of the Assistant Magistrate under the second limb of the Camacho test. In our view, she had correctly balanced the competing interests in this case on the basis of the law as she had applied it. 23. We therefore dismissed the appeal and the recommendation of deportation made by the Assistant Magistrate therefore stands. 24. In announcing our decision, we made the point to the appellant that the decision whether or not to deport the appellant is made by H M Lieutenant Governor and it is open to the appellant and Miss X to draw to the Governor's attention all of the factors which they say should inform his decision and in particular the steps being taken by the appellant whilst in custody as outlined in the updated social enquiry report. Authorities R-v-Nazari (1983) All ER 880. Camacho-v-AG

[2007] JLR 462 . De Gouveia-v-AG

[2009] JCA 098 . Page Last Updated: 07 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2011/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/miszewski-v-ag-2011-jrc-038-11-february-2011>

Prepared on 26 October 2026 · Esheria