IN THE COURT OF APPEAL OF NEW ZEALAND

CA420/2008
[2008] NZCA 402

THE QUEEN

v

BASHIRE HASSAN

Hearing: 25 September 2008

Court: Glazebrook, Rodney Hansen and Ronald Young JJ

Counsel: M B Meyrick for Appellant
S J Mount for Crown

Judgment: 1 October 2008 at 4.00 pm

JUDGMENT OF THE COURT

A Leave to appeal out of time is granted.

B The appeal is allowed.

C The sentence of 2 years imprisonment is quashed.

D A sentence of 15 months imprisonment is imposed.

REASONS OF THE COURT

(Given by Ronald Young J)

[1] Mr Hassan is a Swedish citizen. After he arrived in New Zealand in 2004, he applied for refugee status under an assumed name. Eventually the Refugee Status Appeal Authority granted him refugee status. He then claimed various benefits from Work and Income New Zealand.

[2] In late February 2008 he pleaded guilty to: using a forged document (s 257(1)(b) Crimes Act 1961, the use of a false birth certificate); making a false declaration (s 111 Crimes Act, his false declarations in support of his application for refugee status); and attempting to pervert the course of justice (s 117(e) Crimes Act, his provision of the false declarations to the Refugee Status Appeals Authority).

[3] Judge Harland sentenced the appellant to 2 years imprisonment on the charges of forgery and attempting to pervert the course of justice, and 18 months imprisonment on the false declaration charge (all concurrent sentences).

[4] The appellant says the sentence was manifestly excessive. He seeks leave to appeal, being 1 month and 12 days out of time. The Crown do not oppose the application and a reasonable excuse for the delay has been provided. Leave is therefore granted.

[5] In support of the appeal the appellant says that the Judge:

(a) adopted a starting sentence beyond that of similar cases;

(b) failed to give proper weight to the appellant's age;

(c) failed to give proper weight to the appellant's frank admission of his offending;

(d) failed to take into account that his offending was motivated by altruistic and not commercial reasons.

Background facts

[6] The appellant was born in Somalia but when he was very young his family came to Sweden and he became a Swedish citizen. In 2004, when he was 17 years, he came to New Zealand. He entered lawfully using his Swedish passport and was given a 3 month visitors permit. Before the permit expired, in August 2004, he claimed refugee status in New Zealand. His application contained a false name, birth date, country of origin and method of entry into New Zealand.

[7] The appellant supplied a false birth certificate and later made a statutory declaration declaring this information was true. In January and May 2005 he was interviewed by immigration officers and again confirmed the information he had supplied in support of his application for refugee status was true.

[8] Initially the appellant was refused refugee status, but on appeal the Refugee Status Appeal Authority allowed the appeal and granted him such status from October 2005. As a result, the appellant obtained a work permit and was able to claim various benefits from the state.

[9] The appellant was interviewed in August 2007 and admitted the allegations. He said that he was trying to bring an aunt, who lived in Somalia, to New Zealand because he was unable to obtain her entry into Sweden.

District Court Sentencing

[10] The Judge took the charge of attempting to pervert the course of justice as the lead charge. She considered three and a half years imprisonment was the appropriate starting point based on Potter J's remarks in *R* v *Dutt* (2 April 2004, Potter J, HC Auckland, T02554).

[11] The Judge in the District Court said she viewed this as serious offending and that was why she reached her starting point of three and a half years. She deducted 18 months (40%) for the appellant's youth, remorse, guilty plea, good character and that the offending arose from a genuine concern about his aunt in Somalia.

This Appeal

[12] The appellant submits that the High Court in similar or more serious offending has imposed significantly lower sentences. Thus the appellant says a starting point of three and a half years, whatever the exact nature of the charges the appellant faced, was too high.

[13] The respondent accepted that the Judge's starting point was higher than some similar cases. However, it submitted that the sentence was not manifestly excessive. Mr Mount identified five points which he said supported the sentence:

(a) the offending involved considerable planning;

(b) the offending was persistent with false information provided to both immigration officers and the Refugee Status Appeals Authority;

(c) the offending occurred over an extended period (12 months);

(d) the sentencing Judge was entitled to be sceptical about the appellant's purpose in obtaining the false documents. However, the Crown accepted that, other than the appellant's unlawful residence in New Zealand, no use was made of his refugee status; and

(e) the importance of deterrent sentences in this area and the effect of immigration fraud on the integrity of New Zealand's immigration system and on legitimate refugees.

[14] A sentencing appeal involving immigration fraud (to use a general description) has not come before this Court previously, but the Crown accepted that there was insufficient information before the Court to set a tariff for such offending. Nor would it have been appropriate for a divisional court to do so. This judgment therefore is not to be treated as a tariff judgment.

[15] In this case we are satisfied that the Judge, in relying upon *R* v *Dutt*, took the wrong approach. The facts of *Dutt* involved an attempt by Mr Dutt to have a private investigator provide a report in Family Court proceedings which was to falsely describe sexual and physical abuse. In that context, Potter J suggested, after a review of authorities, a starting point of 18 months to two years imprisonment for less serious such offending and three years or more for more serious offending.

[16] However the facts of this case essentially involve immigration fraud. The appellant provided false information to obtain refugee status. When these false declarations were provided to the Refugee Status Appeal Authority (a quasi-judicial body) they became an attempt to pervert the cause of justice. The correct approach to sentencing therefore was to consider similar immigration fraud cases and to take into account the appellant's provision of the false declaration to the Appeal Authority as an aggravating feature.

[17] We turn, therefore, to consider sentencing levels for immigration fraud on appeal in the High Court.

[18] William Young J dismissed an appeal against a sentence of 21 months imprisonment after ten guilty pleas to using a passport application to defraud and forgery (*R* v *Lillandt* (HC Christchurch, 9 August 2001, A69/01)). This was a sophisticated scheme to obtain false passports for commercial gain. The District Court Judge considered a starting sentence of two and a half years was appropriate.

[19] Priestley J considered deterrence was the primary factor when he gave judgment on an appeal from the District Court in *Markevich* v *R* (2004) 21 CRNZ 41. The appellant, a Ukrainian man, along with 11 others had purchased a false passport and drivers licence which he used to enter New Zealand. The Judge considered a proper starting point for offending involving false passports was 2 years imprisonment (see also *R* v *Zanzoul* (2006) CA 297/06).

[20] In *Department of Labour* v *Liao* (HC Auckland, 14 April 2005, CRI 2004 404-499, Keane J) Mr Liao pleaded guilty to 14 charges of supplying false information to an immigration officer and three of forgery. The appellant falsified

applications for students to study in New Zealand and in three cases forged their signatures. There was a modest commercial advantage to him. The sentence of 300 hours community work was challenged by the informant. The Judge concluded a starting sentence of 2 years imprisonment and a final sentence of 1 year or slightly less would have been appropriate.

[21] In *Asamoah* v *Department of Labour* (HC Auckland, 10 June 2005, CRI 2004-004-6892, Frater J) the appellant was convicted after trial of using a document with intent to defraud. In a successful application for New Zealand residency he failed to reveal he was HIV positive. Had he revealed this information he would probably have been refused residency. His New Zealand residence provided him with significant health benefits. A sentence of 6 months imprisonment with leave to apply for home detention was upheld on appeal.

[22] Allan J in *Hassan* v *Department of Labour* (HC Auckland, 20 November 2005, CRI 2005-404-356) applied a starting point of two and a half years imprisonment with respect to eight charges of knowingly providing false information and 12 of knowingly procuring unlawful entry into New Zealand. The offending involved the unlawful entry into New Zealand by the appellant and a false claim for refugee status in New Zealand for the purpose of bringing his mother and 11 siblings into New Zealand as refugees.

[23] Mr Sharma was convicted of 3 offences under the Immigration Act of supplying false information to an immigration officer. He had lied to the officers about his marriage which was a marriage of convenience. His marriage enabled him to obtain residency in New Zealand unlawfully. The Crown did not challenge a sentence of 200 hours community work. *Sharma* v *Police* (HC Auckland, 23 November 2006, CRI 2006-404-173, Simon France J).

[24] The appellant, Mr Lee, falsely claimed he had never been removed from New Zealand by the immigration service when making a successful application for a visitors permit, a student visa and a renewal of visa. He unsuccessfully appealed against a starting point sentence of 21 months imprisonment and a final sentence of

12 months imprisonment. *Lee* v *Department of Labour* (HC Auckland, 9 July 2007, CRI 2007-404-216, Stevens J).

[25] In *Department of Labour* v *Ioasa* (HC Auckland, 11 August 2008, CRI 2008-404-145) Priestley J considered a starting sentence of 2 years imprisonment was appropriate for 5 charges of offending under the Immigration Act. The appellant was originally in New Zealand lawfully but overstayed his visitor's permit by 5 years. He then left New Zealand but returned again using a false name and again overstayed his permit although only for a short period. He then successfully applied for a work permit in New Zealand under a further false name and then successfully for residency in New Zealand. The offending occurred over a period of almost 10 years.

[26] In cases involving smuggling of migrants for commercial gain this Court has approved starting sentences of 5 years or longer (see *R* v *Chechelnitski* (2004) CA 160/04).

[27] We also wish to add our voice to those judges who have stressed deterrence as an important sentencing principle in this area. The integrity of the country's immigration system is a vital part of its integrity as a state in deciding who may live within its borders. Those who dishonestly challenge the immigration system can expect deterrent sentences and can expect to be sent to prison.

[28] To return to the facts of this case. The appellant's deceit was in the form of a series of declarations to obtain refugee status. He was persistent for over a year in doing so even in the face of challenge by immigration officers.

[29] There was an aggravating feature that the false declarations were used to support his case before the Appeal Authority, a judicial body. Refugee status enabled him to remain in New Zealand for two years beyond his visitor's permit.

[30] On the other hand, he lawfully entered New Zealand (a minor matter), there was no evidence of any other associated immigration fraud and he did not attempt to bring anyone else into New Zealand using his refugee status.

[31] For broadly similar offending the highest starting point in these cases is the two and a half years in *Hassan*. The offending in *Hassan* was arguably less serious than in this case, as there was no false evidence given before any judicial body. However, *Hassan* appears to be somewhat out of line with earlier cases. There have been starting points around 2 years for cases involving commercial gain (*Lillandt* and *Liao*).

[32] We consider that the appellant should be sentenced in accordance with the earlier cases and that we should not apply *Hassan* to this case. Thus a proper starting point in this case, taking into account the aggravating features in the charge of attempting to pervert the course of justice, is two years imprisonment.

[33] We see no reason to depart from the Judge's discount of approximately 40% for the appellant's guilty plea, his youth and his crime free record. We, therefore, deduct nine months from the two years to reach a final sentence of 15 months imprisonment.

[34] There can be no question of this sentence being served by way of home detention. The appellant is not entitled to be resident in New Zealand and can expect to be deported immediately upon the completion of the sentence.

[35] Finally, we observe that, to deter others, starting sentences in the range identified in *Hassan* may be appropriate in the future with significant uplifts where other persons are brought into New Zealand, where there is a commercial aspect to the fraud, or where other aggravating features are present.

[36] The appeal is allowed. The sentence of two years imprisonment is quashed. A sentence of 15 months imprisonment is imposed instead.

Solicitors:
Berman and Burton, Auckland for Appellant
Crown Law Office, Wellington