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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 25th October 2007

B e f o r e:

MR JUSTICE KING

HIS HONOUR JUDGE WARWICK MCKINNON
(Sitting as a judge of the Court of Appeal Criminal Division)

R E G I N A

v

KHAMES ALBARHAMI

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Mr S Kemp appeared on behalf of the **Appellant**

J U D G M E N T
(As approved by the Court)

1. JUDGE MCKINNON: On 14th August 2006, at the Crown Court at Liverpool, the appellant pleaded guilty to seeking leave to remain in the United Kingdom by deception contrary to section 24A of the Immigration Act 1971 (count 1). On 11th June 2007 he pleaded guilty on re-arraignment to an offence of obtaining property by deception (count 2). On 12th July 2007 he was sentenced to a total of 12 months' imprisonment, that is to say on each count concurrent, and with a direction under section 240 of the Criminal Justice Act 2003 that 43 days spent on remand must count towards sentence. He was in addition recommended for deportation. It is that last order, the recommendation for deportation, that he now appeals by leave of the single judge.

2. The facts of the case may be summarised as follows. On 25th April 2000 the appellant, using the name of Khames Benhammedi, obtained a visa to enter the United Kingdom as a visitor. He arrived in the United Kingdom the next day, gave his name as Khames Benhammedi and said that Benhammedi was his family name. He said he intended to stay with his brother, whom he had not seen for a number of years. He had £1,000 on him and a return ticket to Malta dated a few months later. On the basis of the information provided by the appellant he was permitted to enter the United Kingdom. He later applied to extend his visa, but withdrew that application and in the event he left the United Kingdom towards the end of September of that year.

3. On 13th February 2001 the appellant applied to the British Embassy in Tripoli for a visa in the name of Khames Benhammedi, stating that he wanted to study English. He used the same passport that he had used in April 2000. The supporting documentation included receipts for medical treatment that he had received in the United Kingdom in the earlier visit and a letter confirming that he had completed a basis English training case, again during that earlier visit. He told immigration offices in Tripoli that he left the United Kingdom on 19th September 2000, having arrived as a visitor but decided to take an English language course. He said he discovered he could not study English on a visitor's visa and had been advised to return to Libya and apply for a student visa before returning to the United Kingdom. The application for a visa was refused because the immigration officer was not satisfied that the assertions made by the appellant were genuine.

4. We then move to just over a year later when, on 29th April 2002, a firm of solicitors in Birmingham submitted an application for political asylum on behalf of this appellant, at this stage now calling himself Khames Al Barhami and giving an address in Birmingham. The appellant used this new identity, as it were, although that was a genuine name, from this moment onwards.

5. On 9th May 2002 he attended a Home Office asylum screening interview. He claimed that he had entered the United Kingdom via Egypt and Malta using an Italian passport -- obviously a false passport. He said he had never previously obtained a visa to enter the United Kingdom, which was untrue. As a result he was permitted to remain in the United Kingdom.

6. It was the Crown's case that this entirely new identity had been constructed to obtain leave to remain in the United Kingdom given the earlier refusal.

7. When interviewed by an immigration officer on 20th May, the appellant claimed that he had left Libya due to his involvement in a political group following the discovery that his brother had been arrested.

8. On 8th July 2002 the appellant's application for asylum was refused, but he was granted exceptional leave to remain in the United Kingdom due to the political situation in Libya at that time. He was also permitted to obtain work.

9. On 15th July 2002 he lodged an appeal, which was dismissed on 4th March 2003, but a later appeal to the Immigration Appeals Tribunal was allowed on 7th January 2004, and that enabled him, on 10th March 2004, to apply to the Home Office for a travel document, which was issued again using the new identity in count 2, as we have said.

10. As a result of the two names given by the appellant, the Home Office had in fact created two quite separate files, unaware at that stage that it was dealing with the same individual. But later checks revealed that the two names related to the same person, and on 9th February 2006 the appellant was interviewed. After some prevarication, he indicated that he had previously entered the United Kingdom under the name of Benhammedi. He said that he had deliberately chosen not to inform immigration officials of the previous visit to the United Kingdom because he said he was afraid to be returned to Libya.

11. He pleaded guilty on the following basis to count 1, which is not without importance given the narrow nature of the appeal: firstly, that the names of Khames Al Barhami bathroom and Khames Benhammedi are both genuine names of the defendant; secondly, that the substance of the appellant's claim for political asylum was truthful and accurate; and, thirdly, that the deception deployed was done out of a fear that the genuine asylum application must be jeopardised by using his Benhammedi name, and there was a similar basis of plea for count 2.

12. The appellant was born on 5th January 1978. He is a Libyan national with no previous convictions. No appeal is directed to the sentence of imprisonment passed, which was entirely within the bracket for sentencing in this class of case. In relation to the recommendation for deportation, the learned judge below simply stated as follows:

> "As far as the recommendation to the Home Secretary for deportation is concerned, I do make that recommendation. You are not a British citizen, you are over 18. The offence is punishable with imprisonment and the correct notice in writing has been given. I am satisfied your continued presence in this country would be contrary to the public interest. It is a matter for the Home Office and Immigration Authorities to consider, taking into account all relevant matters including my recommendation."

13. In the grounds of appeal, and further in the course of his submissions today, Mr Kemp submits, firstly, that the judge had failed to give any reasons for making the recommendation, although the Court of Appeal has stressed the importance of doing so in a number of cases in fairness to the appellant and to assist the Secretary of State in his ultimate decision whether the appellant should be deported; and, secondly, the

appellant's claim for asylum will have to be reassessed by the Secretary of State, and that would not be assisted by any complication arising out of such a recommendation for deportation, particularly when the reasons were never given and accordingly would not be known to the Secretary of State.

14. In the case of Nazari 71 Cr App R 87, the Court of Appeal considered the principles that should apply when making a recommendation for deportation. In doing so, Lawton LJ quoted with approval a passage from the leading authority of Caird [1970] 54 Cr App R 499, when the court quashed a recommendation for deportation in that case:

> "It desires to emphasise that the Courts, when considering a recommendation for deportation are normally concerned simply with the crime committed and the individual past record and the question as to what is their effect and the question of potential detriment just mentioned. It does not embark, and indeed is in no position to embark, upon the issue as to what is likely to be his life if he goes back to the country of origin. That is a matter for the Home Secretary."

He went on to say:

> "The more serious the crime and the longer the record the more obvious it is that there should be an order recommending deportation. On the other hand, a minor offence would not merit an order recommending deportation."

15. Turning back to the present case, this is an appellant who has, rightly or wrongly, been living in this country since approximately April 2002. He has no other criminal convictions beyond those in this case; he has no other allegations pending against him, and prior to his arrival in the United Kingdom in 2002 he had entered the United Kingdom as a visitor. We are told that he met about three years ago and married a woman with whom he shares a loving and supportive relationship. His time has been spent mainly on his business activities here and spending time with his wife.

16. The pre-sentence report prepared for the sentencing hearing suggests that there was little to suggest that Mr Al Barhami has any pro-criminal or anti-social attitudes. Since he has been living in the United Kingdom he has worked, initially for his brother, then more recently he has been self-employed.

17. Mr Kemp submits that there is nothing, other than the offences themselves, which could lead to the conclusion that the appellant's presence in this country is to its detriment, the criteria which would have to be satisfied for a recommendation to be made.

18. In the case of R v Benabbas [2005] 1 Cr App R 94, the early authorities as to the principles to be applied when considering the making of a recommendation for deportation were considered, and in the context of the present case Rix LJ, at paragraph 41 of the judgment, said as follows:

> "... we do not think that the *Kandhari* approach applies at all to the category where the essential gravamen of the offence for which the

> defendant is being sentenced is itself an abuse of this country's immigration laws. While we would be reluctant ourselves to go as far as Lawton LJ did in *Nazari* in suggesting that a recommendation for deportation should be automatic in the case of every overstayer – and the case of *Akan* supports us in that view – we do think that the public interest in preventing the fraudulent use of passports to gain entry or support residence is of considerable importance and deserves protection. Moreover, in such a case the issue of *Nazari* detriment is intimately bound up with the protection of public order afforded by confidence in a system of passports. We think that the sentencing judge was correct to say that the use of stolen and forged passports undermine the good order of society. In our judgment, such a view is consistent with what the ECJ has said in *Bouchereau*, which subsequent English authorities have said to be the same as the detriment principle ...
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> 42. We therefore think that Current Sentencing Practice is correct to distinguish at K1-5D and K1-5E between the case of a person who enters the United Kingdom by fraudulent means and the case of a person who is in the country unlawfully and is convicted of an offence unconnected with his status and the circumstances in which he entered the country. It may be that *Thoseby* and *Krawczyk* lies across this distinction, but that was an unusual case; it precedes *Nazari*; and ultimately these are cases concerning the exercise of a discretion which cannot run in tramlines."

19. The case of Benabbas was considered by this court recently in the case of R v Ahaiwe [2007] EWCA Crim 1018, and at paragraph 17 of the judgment of the court Tugendhat J said as follows:

> "There are also a number of personal factors relating to the appellant in this case which we do not need to set out in this judgment but which, in our view, are factors which the sentencing judge was less well placed to assess than the Home Secretary. Using false documents to cover up her unlawful entry into this country is undoubtedly a detriment to society. It undermines the system of immigration control, and this is a relevant feature in deciding whether or not to make a recommendation. But like the court in Benabbas we do not go so far as Lawton LJ did in Nazari in suggesting that a recommendation for deportation should be automatic in a case such as this. It is relevant but not dispositive.
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> 18 ... In our judgment, the offence in the present case did not itself automatically call for a recommendation for deportation from the court. There is nothing on the facts of this case that a judge, in our judgment, could usefully add to the material which will in any event be before the Home Secretary. The question of deportation should, in our judgment in this case, be left to the Home Secretary and a recommendation should not, therefore, have been made."

20. The appellant of course admitted entering the country using a false Italian passport, although the offences for which he was being dealt, like false passports, were such that they similarly struck at the heart of the immigration laws and regime operated here in the United Kingdom. Nevertheless, as in the case of Ahaiwe, so in the present case there is nothing in the facts of the case that a judge could usefully add to the material which will in any event be placed before the Home Secretary. This is a case where, having entered the country, albeit illegally, the appellant claimed asylum almost immediately, albeit in a different name to his earlier entry, but which asylum claim has been upheld and, apart from the difference in names, on grounds as per the basis of plea which were truthful and accurate.

21. Going back to the case of Benabbas, Rix LJ continued at paragraph 3 to refer to the case of R v Bei Bei Wang, to which extract of the judgment Mr Kemp has referred to us today:

> "That case differed from the present case in at least two respects. First, the defendant there was not charged with the use of a forged passport: her offence was that of entering without a passport. Secondly, she entered solely for the purpose of claiming asylum, which she did immediately. That was the context in which Fulford J there applied the Kandhari test. In our judgment, for the reasons set out above, the balance of authority as well as the reason of the thing suggest that the Kandhari approach is inappropriate in connection with the offence of entering without a passport, but may well, for entirely different reasons, nevertheless be necessary in a case where the entrant immediately claims asylum. In such a situation, the claim for asylum can only be assessed by the Secretary of State, and he is probably best left to consider it without any possible complication arising from a recommendation for deportation."

22. In those circumstances, and in a case not wholly dissimilar to Bei Bei Wang, in the judgment of this court the recommendation for deportation should not have been made in this case, and in particular without any reasons at all given, and is accordingly quashed. To that extent the appeal is allowed.