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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Flaneurs' (Siegnerella Elaine and Siegnette Elaine) Application
[2010] NIQB 101

IN THE MATTER OF AN APPLICATION BY
SIEGNERELLA ELAINE FLANEUR FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY
SIEGNETTE ELAINE FLANEUR FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] These two applications for judicial review were heard together of decisions of the Secretary of State for the Home Department ("the respondent") to deport two Dutch nationals. The first applicant, Siegnerella Flaneur, seeks to challenge the deportation decision of 23 June 2009 and the deportation order made on 30 June 2009; her sister, the second applicant, Siegnette Flaneur, seeks to challenge the decision to deport her made on 3 August 2009.

[2] The applicants challenge the decisions to deport them following their release from prison on the basis that it contravenes Art18 of the EC Treaty[1] guaranteeing them freedom to travel within the European Union, Council

[1] Since the date of the decision, the Treaty of Lisbon has been ratified and came into force on 1st December 2009. The relevant provision now is contained in Article 21 of the Treaty on the Function of the European Union.

Directive 2004/38/EC and Part 5 of the Immigration (European Economic Area) Regulations 2006.

Background

[3] On 12 April 2008, the two applicants were apprehended at Belfast International Airport in connection with the attempted importation into the UK of 136 grammes of a class A controlled drug, namely cocaine. They were prosecuted and pleaded guilty at Antrim Crown Court on 17 November 2008. Siegnerella was sentenced to 2½ years imprisonment. Siegnette was sentenced to 3 years imprisonment. The sentencing judge, HHJ Smyth Q.C. did not make any recommendation for deportation. Both served their sentence.

[4] Prior to sentence the Crown Court obtained a pre-sentence report in the case of both applicants. The report in **Siegnerella's** case dealt with her personal circumstances, including her education and the effect on her of her separation from her son and family. She acknowledged the serious nature of the offence. On the risk of harm to the public and likelihood of re-offending, the Probation Board of Northern Ireland ("PBNI") assessment was that she was within the low range of risk of re-offending. She had no previous convictions, was not involved in the drug culture in her home town, and the experience of the criminal justice system and separation from her son and family had had a salutary impact on her. The officer concluded that "I do not feel that her behaviour in general presents any risk of harm to others".

[5] The pre-sentence report for **Siegnette** noted that she had achieved well within the education system and was in higher education at the time of her arrest. On the risk of harm to the public and likelihood of re-offending, the PBNI assessment was that Siegnette would be within the low range. She had no previous convictions and her experiences of the criminal justice system had a salutary effect on her. The writer concludes "she does not present any *direct* risk of harm to others".

[6] In his sentencing remarks the Judge stated as follows:

> ***"This is a Class A drug. The offence is one of importation, and therefore both because of its Class and also because of the manner of it being brought in, its importation, this is a serious offence*** **... The Court looks first of all at the quantity of drug and the nature of the problem. It's in total 136gms at 100% purity. ... This is a particular problem in Northern Ireland. Northern Ireland has principally**

> **two main airports. One that does these cross country flights and no doubt the rate of protection, the scale of problem and the inevitably of prison sentences are all matters to be taken into account ... You have pleaded guilty. You ultimately were helpful. One of you certainly wasn't at the point of apprehension.** *The value of the drug was not very considerable. The quantity was 136gms. It however is a Class A drug. Both of you were willingly used. Your backgrounds are very similar because you are sisters. No distinction really is made between the two of you except for this.* **That it is acknowledged that the elder sister, who is Siegnette, persuaded you, Siegnerella, to join in and I think that is certainly a reason for some differentiation between you, otherwise there's none. As to probation, obviously it's not available as you're from Holland and I accept that these drugs were intended for somebody else.** *The financial reward to you was not great. Nonetheless, the problem has to be met with custodial sentences that are long enough to make sure that the risks involved are brought home to people who are in vulnerable situations.* **In your case, Siegnette, the sentence will be one of three years imprisonment … In your case, Siegnerella, it'll be two and a half years imprisonment. I'm taking into account that you pleaded guilty. You were ultimately helpful to the Police insofar as you could be, and also that you have clear records, and that based with your plea, means that you are unlikely to re-offend.** *I regard these sentences as sufficient to make it clear to anybody who is using this means of importation that there are serious risks and prison sentences are inevitable. ..."*
> [Emphasis added]

[7] Prior to completing their sentences, the respondent informed the applicants that both were being considered for deportation. The respondent had access to the sentencing remarks. He also obtained a National Offenders Management Service ("NOMS") assessment. In each case, the applicant was assessed as posing a low risk of harm to the public and a low risk of re-offending.

[8] The respondent decided to deport the applicants and the reasons are given in the letter of 23 June 2009 (for Siegnerella) (**B1/52-56**) and 3 August 2009 (for Siegnette) (**B2/34-38**). So far as material the letter of 23 June 2009 states:

> **"... Residence Consideration**
>
> **At the time of your arrest on 12 April 2008, aged 21, your status was that of an EEA national exercising the right to freedom of movement. You did not have any formal permanent residence in the United Kingdom at that stage. You have remained in custody since that date. Accordingly, you have not obtained a permanent right to reside in the UK under the 2006 Regulations. You do not benefit from the serious or imperative grounds of public policy or public security test. Consequently, the appropriate test to apply that your removal is justified on the basis of public policy or public security (sic) is still ... .**
>
> **Consideration of Propensity to Reoffend**
>
> **You have been convicted of an extremely serious offence namely importation of Class A controlled drug. It is considered that whichever test applies, the nature of your offence is such as to be a sufficiently serious threat to public policy or public security in accordance with the Secretary of State's current guidance on the application of these tests.**
>
> **In reaching the decision in your case consideration has been given to the question whether you represent a genuine, present and sufficiently serious threat to the public in light of either the seriousness of your offence or a demonstrated propensity to reoffend, subject to the consideration of proportionality under Reg21(5)(a) and the factors set out in Reg21(6).**
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> **In completing your NOMS 1 assessment the offender manager found that you posed a low risk of harm to the public and you posed a low risk of reoffending. In reaching this conclusion your offender manager has taken into consideration**

those factors which originally led to your offending behaviour and whether those same factors continue to exist. Should you have been successful in the importation of Class A drugs this would most certainly have had a negative effect on society, not only on the drug users but on their families as well. This is a process causing misery and sometimes death to the many thousands of people who are unfortunate enough to become addicted to them. This addiction drives many of them to commit crimes sometimes serious crimes in order to finance their addiction. Therefore, actions by those involved in the importation and supply of drugs have widespread, detrimental and damaging effect on drug users, their families and friends and society in general. You were fully aware of the risk you were taking and that it is illegal to import or supply drugs into the United Kingdom. It is assumed that you were fully aware of your actions and the consequences should you be caught. Therefore it is considered that the harm you could have caused to the public would have had a profound effect on the public at large.

Accordingly, the professional assessment is indicative of the *continued* threat it is considered that you pose to the public.

It is concluded that your offence was so serious that you represent a genuine, present and sufficiently serious threat to the public to, in principle, justify your deportation. In the terminology of the 2006 Regulations, it is considered that there are sufficient grounds for deporting you on public policy grounds.

Notwithstanding this, consideration has been given to whether you have demonstrated a propensity to reoffend and whether you represent a genuine present and sufficiently serious threat to the public to justify your deportation (subject to the consideration of proportionality under Reg21(5)(a) and the factors set out in Reg21(6).

> **In completing your NOMS 1 assessment the offender manager found that you posed a low risk of reoffending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. However, the overall score given on your report is in conflict with the written comments of the offender manager, in particular the following issues have been highlighted within the NOMS 1 report. You stated that you lived in Amsterdam with your mother, siblings and son. You *left school at an early age* as you became pregnant at the age of 18 years old and were *unemployed*. You further stated that your family was in substantial financial debt which led you to committing this offence for money. *Whilst the risk of you reoffending is viewed as low, the serious harm which would be caused as a result is such that it is not considered reasonable to leave the public vulnerable to the effects of your reoffending.***
>
> ***It is considered that in view of your circumstances, unemployed, lack of education, parental responsibilities, debt, should you find yourself in similar circumstances you would choose to reoffend. It is concluded that you committed the crime for financial gain and that you would reoffend for the same reason.***
> [My Emphasis]

[The letter then sets out a portion of the sentencing Judge's remark, namely that portion which is italicised in the remarks which are quoted at para 6 above. They did *not* cite the Judge's comment that she was "unlikely to reoffend" and did not refer to the pre-sentence reports. After having quoted from the sentencing remarks the letter continued:]

> **"It is concluded that you have demonstrated a propensity to reoffend and that you represent a genuine, present and sufficiently serious threat to the public to, in principle, justify your deportation."**

[9] The letter of 3 August 2009 in the case of Siegnette was in identical terms save for the fact that it recorded her age at the time of arrest as 25 and stated:

> **"In completing your NOMS 1 assessment the offender manager found that you posed a low risk of reoffending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. Whilst the risk of you reoffending is viewed as low the serious harm which would be caused as a result is such that it is not considered reasonable to leave the public vulnerable to the effects of your reoffending.**
>
> **It is considered that in view of your circumstances, unemployment, lack of education, should you find yourself in similar circumstances, you would chose to reoffend. It is concluded that you committed the crime for financial gain and that you would reoffend for the same reason".**

As in the letter to her sister, the sentencing remarks of the Judge are set out in identical terms omitting the Judge's reference to the fact that she was unlikely to reoffend.

The Affidavit Evidence

[10] Arun Thathy Srikantharajah, the EO Caseworker who took the decision to make the deportation order in the case of Siegnerella swore an affidavit in which, at para 8, she sets out, inter alia, the correct test including that the applicant's criminal conviction did not in itself justify the decision and that her personal circumstances were taken into account in line with the provisions of Reg 21(6). She also averred at para 9 that she considered the applicant's propensity to reoffend and in particular considered the impact of the applicant's offence on public security concluding that her offence was so serious that it represented a genuine, present and sufficiently serious threat to the public to justify deportation.

[11] Michael Hegarty, SEO Operation Manager at para 4 of his affidavit averred that in consultation with senior casework colleagues that it was clear that Siegnerella met the criteria to consider her deportation and that whilst the respondent's (offender manager) indicated a low risk of reoffending "there was little substantive evidence provided by the offender manager to support this

assertion". It was therefore felt that there were sufficient grounds to pursue her deportation on public policy grounds.

[12] No affidavit evidence was filed in the case of Siegnette.

Legal Framework

EU Law

[13] Article 17 of the EC Treaty provides that every person holding the nationality of a Member State shall be a citizen of the European Union. Article 18(1) of the EC Treaty provides that:

> **"Every citizen of the Union shall have the right to move and reside freely within the territory of the Member State, subject to the limitations laid down in this Treaty and by the measures adopted to give it effect."**

[14] Specific provisions are also contained in the EC Treaty dealing with free movement of workers, freedom to provide services and receive services and freedom of establishment. Those freedoms may also be subject to restrictions.

[15] The relevant measures governing restrictions on freedom of movement for EU nationals are now contained in Directive 2004/38/EC[2]. Articles 27.1 and 27.2 of the Directive provide:

> **"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.**
>
> **"2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in**

[2] The European Parliament and of the Council of 29 April 2004

> **themselves constitute grounds for taking such measures.**
>
> **"The personal conduct of the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."**

[16] That provision is implemented by Reg 21(5) of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") which provides:

> **"(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles-**
>
> **(a) The decision must comply with the principle of proportionality;**
> **(b) The decision must be based exclusively on the personal conduct of the person concerned;**
> **(c) The personal conduct of the person concerned must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society;**
> **(d) Matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;**
> **(e) A person's previous criminal convictions do not in themselves justify the decision."**

[17] The case law of the ECJ[3] established the following limitations on the ability of Member States to deport persons who have committed a criminal

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[3] *Orfanopoulos* [2004] ECR I-5257 at paras 64-68; *Calfa* [1999] ECR 1-11 at paras 21-25; *Nazli* [2000] ECR I-957 at paras 57-64; *Bouchereau* [1977] ECR 1999 at paras 25-37.

offence. These principles are reflected in the terms of the Regulations set out above. They can be summarised as follows:

(i) Derogations from free movement must be interpreted restrictively, particularly in the case of citizens of the EU.

(ii) Such measures must be based exclusively on the personal conduct of the person concerned. Previous convictions cannot *in themselves* justify deportation.

(iii) There must be a *genuine, present* ***and*** *sufficiently serious* threat to the requirements of public policy.

(iv) Such a (present) threat exists only where the personal conduct "indicates a specific risk of new and serious prejudice to the requirements of public policy"[4] which must, as a general rule, be satisfied at the time of the expulsion[5].

(v) EU law prevents the deportation of an EU citizen for general preventative reasons aimed at deterring other foreign nationals.

[18] In ***Bouchereau* [1977] ECR 1999** the European Court of Justice said:

> **"27. The terms of Art3(2) of the Directive, which states that 'previous criminal convictions shall not in themselves constitute grounds for the taking of such measures' must be understood as requiring the national authorities to carry out a *specific appraisal* from the point of view of the interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction.**
>
> **28. The existence of a previous criminal conviction can, therefore, only be taken into account insofar as the circumstances which gave rise to that conviction are evidence of personal**

[4] Case C-340/97 *Nazli* [2000] ECR I at para 61
[5] *Orfanopoulos* [2004] ECR I-5257 at paras 79

conduct constituting a present threat to the requirements of public policy.

29. Although, in general, a finding that such a threat exists implies the existence in the individual concern of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.

30. It is for the authorities and, where appropriate, for the national Courts, to consider that question in each individual case in the light of the particular legal position of persons subject to Community law and with the fundamental nature of the principle of the free movement of persons."

[19] In ***Orfanopoulous*** **[2004] ECR 1-5257** the ECJ stated:

"64. ... derogations from that principle [ie freedom of movement for workers] must be interpreted strictly.

65. ... A particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union. As the Court has held, that status is destined to be the fundamental status of nationals of the Member States.

66. Concerning measures of public policy ..., in order to be justified, they must be based exclusively on the personal conduct of the individual concerned. ... Previous criminal convictions cannot in themselves justify those measures. As the Court has held, particularly in *Bouchereau*, the concept of public policy pre-supposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

> **67. While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, the public police exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion *only* insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a *present* threat to the requirements of public policy.**
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> **68. ... Community law precludes the deportation of a national of a Member State based on reasons of a general preventative nature, that is one which has been ordered for the purpose of deterring other aliens, in particular, where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy.**
>
> **...**
>
> **79. ... And thus the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion."**

The Applicants Submissions

[20] The applicants submitted that on the material available to the respondent, there was no evidence at all that either of the applicants posed a present threat – i.e. at the time of their release they posed a real risk of re-offending or risk of harm to the others. They had been sentenced on the basis that they were *unlikely* to re-offend. The NOMS assessment at the time of their release from custody was that they posed a low risk of re-offending and a low risk of harm to the public. On that material, there was no basis upon which they could, as EU nationals benefitting from Article 18 of the EC Treaty, have been lawfully deported.

[21] They further submitted that the deportation decisions were based on the view taken of the seriousness of the offence that they had committed in April

2008 and not the risk that they posed on their release in the Summer of 2009. The existence of a previous criminal offence, even one as serious as importation of Class A controlled drug, does not of itself, it was submitted, justify deportation of an EU citizen.

[22] The decisions are also attacked on the basis that they proceeded on incorrect assumptions and failed to have regard to a relevant consideration, namely the basis upon which the applicants were sentenced with the deportation letters conspicuously omitting the sentence where the Judge expressly finds in each of their cases "you are unlikely to reoffend".

Discussion

[23] I do not accept the applicants contention that there was *no evidence* that the applicants posed a present threat or that the decisions were based solely on the view of the seriousness of the offence. The seriousness of the offence to which the applicants pleaded guilty was of course manifestly relevant to any assessment by the decision maker – no-one suggested otherwise. The error, it was asserted, was that the decision maker, in breach of EU law, regarded the seriousness of the conviction in itself as justifying the deportations. If that were so the decisions would inevitably be condemned as unjustified and therefore unlawful.

[24] The applicants accepted that in the decision letter the legal test that had to be applied was correctly formulated in the opening paragraphs of the letter which I have not set out. The submission is that having set out the correct legal test they failed to apply them. In my view the decision maker was plainly conscious of and, as is accepted, accurately stated the correct legal test. Importantly the respondent conducted *a specific appraisal by reference to the conduct of the applicants.* This is clear from the terms of the letter set out at para 8 above which emphasise not solely the seriousness of the offence but also that the applicants were fully aware of the risks they were taking by their actions and of the consequences should they be caught.

[25] The operative part of the letters identified the "continued" threat they were said to pose. This arose from the fact that *for financial gain* and *fully aware* of the risks they were taking both for themselves and for others as a consequence of importing Class A drugs they nevertheless committed the offences. It was thus considered that should they find themselves in similar circumstances they would reoffend for the same reason. Whilst the risk of reoffending may have been assessed as low the harm that would arise, if the threat crystallised, was so serious it was not considered reasonable to leave the public vulnerable to the effects of their reoffending. Given the pernicious effects of the importation and use of class A drugs which devastate individuals and communities the

assessment that the public should not be left vulnerable to the consequences of their reoffending was plainly justified in the public interest. That judgment, in my view, is unimpeachable. It is clear that the decision maker was aware of the need for there to be a genuine, present and sufficiently serious threat and that is the analysis to which the operative part of the letter was directed. It was the indication of continued threat and the nature of that threat which enabled the decision maker to come to the judgment that each of the applicants posed a genuine, present and sufficiently serious threat to the public to, in principle, justify their deportation. Nor do I accept that the evidence indicates that the decision was based on general policy grounds rather than the personal conduct of the applicants. If this were so the earlier analysis in the letters of their personal conduct would have been superfluous.

[26] The decision is also attacked on the basis that the decision maker had proceeded on assumptions that were incorrect and could not therefore amount to circumstances relating to personal conduct for the purposes of EU law. In Siegnette's case, for example, they drew attention to the fact that two circumstances cited in the decision letter were "unemployment and a lack of education". As appears from the pre-sentence report Siegnette is well educated (up to and including the early years of higher education) and has worked. Similarly, in relation to Siegnerella the decision maker refers to her being unemployed, her lack of education, parental responsibilities and debt. But, Siegnerella, (as is clear from the NOMS report) "did well at school. Went to college to study social work". Aside from the fact that these matters do not appear in the Order 53 Statement I consider that the submissions are in any event misconceived since it is plain that the point that the decision maker was making was that should either the applicants find themselves in similar circumstances that they would chose to reoffend. The fact that Siegnette was better educated than the decision letter might indicate is hardly a point in her favour.

[27] Criticism is also made of the reference to parental responsibilities on the basis that the natural inference is that a mother is less likely to commit an offence which would result in her being separated from her child. But of course this is exactly what this applicant did. Notwithstanding the risks of which she was fully aware and her parental responsibilities she committed this very serious offence. To commit such offences for financial gain, despite the seriousness of the offences and its consequences, was material which the decision maker was plainly entitled to take into account in informing its assessment of the personal conduct and threat posed by the applicant.

[28] Accordingly, in my view, if and insofar as the decision letters inaccurately summarised their personal circumstances I do not consider it was adversely material to the outcome.

[29] It was also asserted that the decision maker had failed to have regard a relevant consideration namely the basis upon which the applicants were sentenced and specifically the Judge's conclusion that the applicants were "unlikely to reoffend". That comment of the Trial Judge reflected the assessment contained in the pre-sentence reports confirmed in the NOMS 1 assessment that they both posed a low risk of harm to the public and a low risk of reoffending. There is no question that the decision maker was fully aware of and expressly referred to those considerations. The decision maker found that although the risk of reoffending was low, both applicants posed the relevant threat and given the gravity and seriousness arising from a crystallised threat of further importation of Class A drugs the decision maker decided that the public interest required their deportation.

Conclusion

[30] Accordingly for the above reasons the applications are dismissed.