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Judgment: approved by the Court for handing down | *Delivered:* **04/10/2007**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WANG HUAN

Before Kerr LCJ, Campbell LJ and Morgan J

Ex tempore judgment

KERR LCJ

[1] This is an application for leave to appeal against sentence. The applicant was sentenced to five years' imprisonment for manslaughter and the trial judge, Mr Justice Deeny, made a recommendation that he should be deported upon serving that sentence.

[2] The applicant had been returned for trial on an indictment charging him with the murder of Li Wang. He was arraigned on 6 January 2006 and pleaded not guilty. On 21 November 2006 he was re-arraigned at which time he pleaded not guilty to murder, but guilty to manslaughter and in light of that plea a further count of manslaughter, contrary to Section 5 of the Offences Against the Person Act 1861 and common law, was added to the indictment and the applicant pleaded guilty to that charge. On 20 December 2006 Mr Justice Deeny, as I have said, sentenced the applicant to five years' imprisonment and recommended that he be deported after having served that sentence, that recommendation being made pursuant to Section 6 of the Immigration Act 1971.

[3] The facts grounding the charge can be summarised very briefly. The applicant and his victim, Li Wang, also known as Wang Joon, were both Chinese citizens and both were living unlawfully in Northern Ireland at the time of the offence. On the evening of 14 March 2005 both men were socialising and both

consumed a considerable quantity of alcohol. A disagreement arose between them because of the victim's view that a friend whom he had introduced to the company had been treated discourteously. There was a series of aggressive attacks on the defendant by the victim which culminated in the applicant picking up a knife, which was lying on the floor, and stabbing the victim four times in the chest and abdomen.

[4] The learned trial judge stated that he accepted the submission of senior counsel that this was a spontaneous act without prior intent and that it could not be disputed that there was a high degree of provocation on the part of the deceased. In deciding to recommend that the applicant be deported the learned judge relied on the decision in *The Queen v Nazari & Ors* and also *The Queen v Ukoh* and he quoted Lord Justice Lawton in *Nazari* as saying:

> "The courts are not concerned with the political systems which operate in other countries. The court has no knowledge of those matters over and above that which is common knowledge and that may be wrong. It is for the Home Secretary to decide in each case whether an offender's return to his country of origin would have consequences which would make his compulsory return unduly harsh."

That decision was followed in the case of *Ukoh*.

[5] In this application Mr O'Donoghue QC, who appears with Mr Farrell for the applicant, submits that, whereas the sentence of imprisonment of 5 years was correct in principle, the learned trial judge was wrong in law to make a recommendation for the deportation of the applicant in the absence of an ability on the part of the court to take into account the risk of life to the applicant if deported to his homeland, and that, therefore, the recommendation of deportation constituted a breach of Article 2 of the European Convention on Human Rights.

[6] This morning Mr O'Donoghue applied to this court to amend the grounds of appeal to include the averment that the recommendation also breaches the applicant's Article 3 rights and we accede to that application.

[7] Section 6(5) of the Immigration Act 1971 provides that a recommendation for deportation shall be treated as a sentence of the court for the purpose of any appeal against sentence.

[8] In the case of *Nazari* the applicant was an Iranian student who pleaded guilty to smuggling opium into the United Kingdom. He was sentenced to four years' imprisonment and it was recommended that he be deported. He applied for leave to appeal against the recommendation on the ground that if he was sent back to Iran he faced the possibility of being executed. Lawton LJ, giving the judgment of the court, stated:

> "First the court must consider whether the accused's continued presence in the United Kingdom is to its detriment. Second, the courts are not concerned with the political systems which operate in other countries."

There then follows the passage which the learned trial judge in this case quoted.

[9] Following that decision, the Court of Appeal in *Ukoh* stated that it was for the Home Secretary to decide in each case whether an offender's return to his/her country of origin would have consequences which would make compulsory return unduly harsh.

[10] Mr O'Donoghue has invited this court not to follow the reasoning in those cases on the basis that Section 6 of the Human Rights Act imposes on the court an obligation not to act in a way that is incompatible with the Convention rights of the applicant. In particular, he submits that it would be a violation of the duty imposed on the court by Section 6 for it to fail to acquaint itself with the information that would allow it to conclude whether the applicant's Convention rights are likely to be violated if the deportation order is made.

[11] Arguments of a similar kind were made to the Court of Appeal in England and Wales in the case of *Carmona* which was decided, as Lord Justice Campbell has pointed out, in March 2006. The court in that case specifically addressed the effect of the Human Rights Act 1998 on the exercise of the power to make a recommendation for deportation.

[12] The facts of that case were that the appellant had been sentenced to fifteen months' imprisonment for dishonesty offences and was recommended for deportation. The court observed that the political situation in an offender's country of nationality might be such that his return would risk subjecting him to treatment that was not merely harsh, but would contravene Article 3 of the European Convention and might even involve a risk of a violation of Article 2. It pointed to the anomaly that had emerged from the decision in *Nazari* that such matters could not be taken into account in reviewing the propriety of a recommendation for deportation but that an applicant's rights under Article 8 could be taken into account.

[13] The Court of Appeal in *Carmona* stated that this anomalous position should not be allowed to endure and it said that there was now no need for a sentencing court to consider the Convention rights of an offender where his offence justifies a recommendation for deportation. The court said that it was undesirable that the sentencing court should undertake an assessment for which it was not qualified or equipped and which would in any event be undertaken by the Home Secretary and the Tribunal that hears appeals from the Home Secretary's decision. His Convention rights will be considered if the Home Secretary makes a deportation order against

which the offender appeals to the Tribunal. We have concluded that although the decision in *Carmona* is not binding on this court, the persuasive authority that it provides should be followed in this jurisdiction.

[14] Underpinning the decision in *Carmona* was the conclusion of the Court of Appeal that the applicant's rights under the Convention were not engaged at the stage that a recommendation for deportation was made. Those rights will become engaged if it is established that the actual deportation of the applicant will expose him to the risk of violation of his Articles 2 or 3 rights, but the short answer to Mr O'Donoghue's submission lies in the statement that the applicant's rights have not crystallised to the point where they are engaged at this stage. It is only where the step of deportation is to be taken that they will become engaged. In those circumstances the application for leave to appeal is not viable and it is hereby dismissed.