



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued September 5, 2003 Decided February 17, 2004)

Docket No. 02-1628

UNITED STATES OF AMERICA,

Appellant,

v.

JOSE ARMANDO LEIVA-DERAS,

Defendant-Appellee.

Before:

NEWMAN, CARDAMONE, and SOTOMAYOR,
Circuit Judges.

The United States appeals from a judgment entered on September 13, 2002 in the United States District Court for the District of Connecticut (Dorsey, J.), insofar as it imposed sentence on defendant Jose Armando Leiva-Deras following his conviction for illegally reentering the United States after deportation. The government contends the district court erred as a matter of law when it departed downward by two levels from the Sentencing Guidelines.

Sentence remanded.

1
2
3
4 SHAWN J. CHEN, Assistant United States Attorney, New Haven,
5 Connecticut (Kevin J. O'Connor, United States Attorney,
6 District of Connecticut, New Haven, Connecticut, of
7 counsel), for Appellant.

8
9 ROGER H. SIGAL, Assistant Federal Public Defender, New Haven,
10 Connecticut (Thomas G. Dennis, Federal Public Defender, New
11 Haven, Connecticut, of counsel), for Defendant-Appellee.

12
13
14
15 CARDAMONE, Circuit Judge:

16 This appeal by the United States (United States or
17 government) requires us to review a sentence imposed on defendant
18 Jose Armando Leiva-Deras in the United States District Court for
19 the District of Connecticut (Dorsey, J.) in a judgment entered
20 September 13, 2002, following defendant's conviction for illegal
21 reentry into the United States after being deported. We think,
22 as the government contends, that the district court erred as a
23 matter of law when it granted defendant a downward departure from
24 the Sentencing Guidelines (U.S.S.G. or guidelines) based on the
25 nature of defendant's underlying aggravated felony conviction and
26 due to the fact that defendant's original sentence was for three
27 months and was only increased to four years when his probation
28 was revoked. Moreover, we agree with the government's contention
29 that the sentencing court failed to make sufficient findings upon
30 which to depart downward based on Leiva-Deras' unique motive for
31 not wanting to return to El Salvador on the grounds of personal
32 safety.

33 The district court's attempt to avoid a substantial increase
34 in a sentence for illegal reentry when that increase is based on

1 a prior felony conviction for two separate sales of \$10 worth of
2 marijuana is understandable. The 16-level increase at issue here
3 would impose a sentence of four to five years in prison (46-57
4 months recommended by the probation service), as opposed to a
5 sentence of one to two years in prison (12-21 months) if the
6 prior conviction was simply categorized as a regular felony. The
7 severity of this increase reminds us of those scenes familiar in
8 medieval times when a poor person steals a loaf of bread for his
9 family and is promptly clapped into prison for a lengthy term.
10 We think it was that sort of concern that prompted the district
11 court's reduction, since the consequences of the defendant's
12 prior conviction at first blush appear to lead to an offensive
13 disproportion between crime and punishment, which the trial court
14 thought was overlooked or unintended by the Sentencing
15 Commission. But closer analysis reveals more to the case before
16 us than appears initially.

17 BACKGROUND

18 A. Facts

19 Defendant Jose Armando Leiva-Deras, a citizen of El
20 Salvador, was born there in Suchitoto on September 5, 1963.
21 According to the Immigration and Naturalization Service (INS) he
22 illegally entered the United States for the first time in July
23 1980. He was arrested nine years later on May 31, 1989 in Los
24 Angeles, California for selling \$10 worth of marijuana, on two
25 separate occasions, to undercover police officers in violation of
26 § 11360(a) of the California Health and Safety Code. On June 16,

1 1989 Leiva-Deras pled guilty to these violations and was
2 sentenced to a three-year probationary period, with the first 180
3 days to be spent in jail. Defendant violated probation in
4 December 1989 and that status was revoked in March 1991,
5 resulting in a sentence of 4 years imprisonment.

6 While the revocation of his probation was pending, the INS
7 instituted deportation proceedings against Leiva-Deras predicated
8 on his conviction for violating a state law relating to a
9 controlled substance. 8 U.S.C. § 1227(a)(2)(B)(i) (2000)
10 (previously codified at 8 U.S.C. § 1251(a)(11) (1990)). On
11 February 15, 1990 prior to revocation of his probation, defendant
12 was deported to El Salvador. Subsequently, and before the
13 revocation in March 1991 of his probationary status, defendant
14 illegally entered the United States for the second time. While
15 defendant was incarcerated in California due to the March 1991
16 probation revocation, the INS in May 1991 again commenced
17 deportation proceedings and deported defendant back to El
18 Salvador on February 24, 1993.

19 Four-and-a-half years later in September 1997, Leiva-Deras
20 for the third time illegally entered the United States. On May
21 8, 2001 while in the custody of the Stamford, Connecticut police
22 department, the INS was informed of his return and, on June 27,
23 2001, defendant was charged with one count of illegal reentry
24 after deportation under 8 U.S.C. § 1326(a) (2000). In September
25 2001 the government filed a Notice of Enhanced Penalty, alleging
26 that Leiva-Deras had a prior California conviction for sale of a

1 controlled substance that constituted an aggravated felony under
2 8 U.S.C. § 1326(b)(2), and that he was therefore subject to up to
3 20 years imprisonment. On April 29, 2002 defendant pled guilty
4 to the indictment.

5 B. Sentencing

6 The presentence report (PSR) prepared by the U.S. Probation
7 Department recommended a base offense level of 8 for unlawfully
8 entering or remaining in the United States, U.S.S.G. § 2L1.2(a)
9 (2001); a 16-level enhancement for illegal reentry after
10 conviction for a felony drug trafficking offense for which the
11 sentence imposed was greater than 13 months, § 2L1.2(b)(1)(A)(i);
12 and a 3-level reduction for acceptance of responsibility,
13 § 3E1.1(a) & (b). These recommendations resulted in an adjusted
14 offense level of 21 which, in conjunction with defendant's
15 criminal history category of III, led to a range of 46 to 57
16 months imprisonment. Defendant's criminal history included prior
17 convictions for the sale of marijuana, possession of drug
18 paraphernalia and failure to appear, and pending state charges in
19 New York for attempted robbery and criminal possession of a
20 weapon, and for possession of burglary tools and stolen property;
21 and in Connecticut for possession of narcotics, drug
22 paraphernalia and breach of the peace.

23 On the eve of sentencing, Leiva-Deras filed a motion for
24 downward departure alleging that he originally came to the United
25 States, and continued to reenter, because of atrocities he had
26 witnessed and injuries he himself had suffered in El Salvador

1 during the 1960s and 1970s, and because of his fear that his life
2 would be in danger were he to return there. These allegations
3 were specifically outlined in a letter written by defense counsel
4 and signed by defendant. The allegations included vivid examples
5 of the human suffering he had witnessed in his home country and
6 statements regarding the loss of his family members and his
7 constant need to be on the run to escape capture. In its
8 response to this motion, the government presented prior sworn
9 affidavits of Leiva-Deras in which he stated he was in no danger
10 in El Salvador and that his reason for not wanting to remain
11 there was because there were no job opportunities.

12 At the sentencing hearing on September 12, 2002, the
13 district court departed downward by 2 levels, resulting in a
14 sentence of 30 months imprisonment. It ruled that: (1) the
15 Sentencing Commission had not adequately considered this type of
16 minor (in amount and moral turpitude) drug trafficking offense
17 when it drafted the 16-level aggravated felony enhancement
18 provision; (2) the original sentence imposed upon defendant was 6
19 months imprisonment, which does not reach the 13-month threshold
20 required under the guidelines for the 16-level enhancement; and
21 (3) the Sentencing Commission had not adequately considered a
22 person with a personal safety motive for reentry as opposed to
23 one that is purely economic when drafting the guidelines. The
24 government has appealed the sentence imposed on defendant,
25 challenging each of the district court's three rulings. We
26 address each in turn.

1 DISCUSSION

2 I Seriousness of the Underlying Aggravated Felony

3 During the sentencing hearing, the district court stated
4 that it believed treating all trafficking offenses equally and
5 applying a 16-level increase across the board to all of them
6 suggested that the Commission had not adequately considered an
7 appropriate differentiation related to the factual bases upon
8 which such a substantial increase would be applied. Despite
9 contrary advice from counsel for both parties, the sentencing
10 court insisted it would depart on this ground.

11 It rationalized its holding by saying that when Congress
12 acted illogically, unreasonably and unfairly, it would try to
13 "get around it, as long as it's legal to do so" because the \$10
14 worth of marijuana at issue in this case was not substantial
15 enough to justify a 16-level increase, and the sentence the PSR
16 recommended and the government supported was inconsistent "with
17 the purpose of offense level calculations being designed to
18 measure the moral turpitude that's involved [in the underlying
19 aggravated felony]." One of the grounds upon which the
20 sentencing court based its departure was the Sentencing
21 Commission's alleged failure adequately to take into account the
22 "proper sentencing considerations that would be involved . . . at
23 the extreme low end of drug trafficking conduct."

24 We begin analysis by noting that following the Supreme
25 Court's decision in Koon v. United States, 518 U.S. 81 (1996), we
26 adhered to an abuse of discretion standard when reviewing a

1 downward departure from the Sentencing Guidelines. United States
2 v. Bonnet-Grullon, 212 F.3d 692, 700 (2d Cir. 2000); United
3 States v. Galante, 111 F.3d 1029, 1034 (2d Cir. 1997). On April
4 30, 2003, the Prosecutorial Remedies and Other Tools to End the
5 Exploitation of Children Today Act of 2003 (PROTECT Act) became
6 effective. Pub. L. 108-21, 117 Stat. 650 (April 30, 2003)
7 (codified at 18 U.S.C. § 3742(e) (West, WESTLAW through P.L. 108-
8 152)). That Act directs us to review downward departures de
9 ново. PROTECT Act § 401(d); 18 U.S.C. § 3742(e). Because the
10 issue of whether the factor relied upon by the sentencing court
11 is a permissible ground for departure is one that has always been
12 reviewed de novo, we need not decide whether the PROTECT Act
13 applies to appeals pending before April 30, 2003. United States
14 v. Korman, 343 F.3d 628, 630 (2d Cir. 2003).

15 Recently, we addressed the exact issue now before us in the
16 instant case, namely, whether or not the district court erred
17 when it departed based on its conclusion that the Sentencing
18 Commission did not take into account the severity of an
19 underlying felony conviction when it drafted the graduated
20 enhancement provisions of § 2L1.2(b) of the guidelines. In
21 United States v. Stultz, No. 02-1625, 2004 WL 64958 (2d Cir. Jan.
22 15, 2004), argued on the same day as the argument in this case,
23 we held that the district court erred in its conclusion. In
24 Stultz, we ruled that the Sentencing Commission took the severity
25 of the underlying felony into account when creating the graduated
26 system of felonies in the 2001 amendments to U.S.S.G. § 2L1.2.

1 Stultz, 2004 WL 64958, at *4-*6. Thus, we concluded the
2 Commission intended the 16-level enhancement to apply to all
3 felony convictions for trafficking controlled substances that
4 resulted in imprisonment for a period of greater than 13 months.
5 Id. at *5.

6 In this appeal, as in Stultz, defendant's prior crime was a
7 felony drug trafficking offense for which the sentence imposed
8 ultimately turned out to be greater than 13 months. First, the
9 prior crime was a "federal, state or local offense punishable by
10 imprisonment for a term exceeding one year." § 2L1.2,
11 Application Note 1(B)(iv) (definition of felony). Under
12 § 11360(a) of the California Health and Safety Code, "every
13 person who transports, imports into this state, sells, furnishes,
14 administers, or gives away . . . marijuana shall be punished by
15 imprisonment . . . for a period of two, three or four years."
16 Cal. Health & Safety Code § 11360(a) (West, WESTLAW through 2003-
17 04 Reg. Sess.). Defendant's conviction for a state offense
18 punishable by at least two years imprisonment meets the criteria
19 for a felony conviction prescribed by the guidelines.

20 Second, defendant's prior crime was a drug trafficking
21 offense, defined in the guidelines as an offense under federal,
22 state, or local law forbidding the distribution of a controlled
23 substance with intent to manufacture, distribute or dispense it.
24 See U.S.S.G. § 2L1.2, Application Note 1(B)(iii). Defendant's
25 conviction was for the sale of marijuana, a controlled substance
26 under 21 U.S.C. §§ 802(6), 812(c), Sched.I(c)(10) (2000). Hence,

1 it meets the criteria for a "drug trafficking offense" prescribed
2 by the guidelines.

3 Finally, Leiva-Deras was originally sentenced to three years
4 of probation and 180 days in jail for the offense. Later, after
5 this probation was revoked, he was sentenced to 4 years
6 imprisonment. Whether the sentence exceeds 13 months and was
7 therefore sufficient to meet the requirements of
8 § 2L1.2(b)(1)(A)(i) will be discussed in Part II.

9 II Insufficiency of the Original Sentence

10 Discussion turns next to the trial court's determination
11 that the "sentence imposed" for purposes of the 16-level increase
12 mandated by U.S.S.G. § 2L1.2(b)(1)(A)(i) does not include a
13 prison sentence imposed after probation revocation. Section
14 2L1.2(b)(1)(A)(i) of the guidelines requires a 16-level increase
15 if the defendant reentered the United States after "a conviction
16 for a felony that is (i) a drug trafficking offense for which the
17 sentence imposed exceeded 13 months." At the sentencing hearing,
18 the trial court stated that defendant's original sentence was
19 less than 13 months and that the additional four-year period came
20 from a violation of probation. It concluded that since the
21 Sentencing Guidelines did not specifically identify a sentence
22 based on a violation of probation as a factor warranting an
23 upward adjustment in the offense level, it would not take the
24 sentence imposed following revocation of probation into account.
25 Under the original sentence defendant's offense level increase

1 would have been 12 instead of 16. § 2L1.2(b)(1)(B). The
2 district court decided to depart downward by two levels.

3 In a recent decision addressing an issue similar to that
4 raised in the case at hand, we held that "a probation revocation
5 sentence that, by itself, is longer than 13 months qualifies as a
6 'sentence imposed' for a 'drug trafficking offense' under
7 § 2L1.2(b)(1)(A)(i), when the original sentence was itself for a
8 drug trafficking offense." United States v. Huerta-Moran, 352
9 F.3d 766, 772 (2d Cir. 2003). Other circuits ruling on this
10 issue have reached the same result. United States v. Ruiz-Gea,
11 340 F.3d 1181, 1185-87 (10th Cir. 2003); United States v.
12 Compian-Torres, 320 F.3d 514, 516-17 (5th Cir. 2003); United
13 States v. Moreno-Cisneros, 319 F.3d 456, 458-59 (9th Cir. 2003).¹

14 In this case, the original sentence of 3 years probation
15 with the first 180 days to be spent in jail was imposed for the
16 sale of marijuana, which, under U.S.S.G. § 2L1.2, Application
17 Note 1(B)(iii) and 21 U.S.C. §§ 802(6), 812(c), Sched.I(c)(10),

¹ At oral argument, the defendant argued that this line of cases should not be followed. Instead, he maintains that the panel should rely on Judge William Fletcher's dissent in Moreno-Cisneros for the proposition that "sentence imposed," in the context of chapter two of the guidelines, applies to offense conduct, whereas "prior sentence of imprisonment," as used in chapter four of the guidelines, broadly refers "to a defendant's criminal history, and measures the seriousness of all of his prior bad acts." Moreno-Cisneros, 319 F.3d at 462 (Fletcher, J., dissenting). Judge Fletcher reasoned that the term "prior sentence of imprisonment" applies broadly to include all periods of incarceration, "including incarceration resulting from probation violations," whereas "sentence imposed" is limited to the instant offense. Id. We disagree. In our view, the distinction between these two phrases is immaterial, given the plain language of § 2L1.2(b)(1)(A)(i).

1 is a drug trafficking violation. The probation revoked was the
2 three years of probation imposed for that drug trafficking
3 conviction. Therefore, since the original sentence was for a
4 drug trafficking offense, the four-year term of imprisonment
5 imposed upon revocation of defendant's probation qualifies as a
6 sentence imposed for a drug trafficking offense under the
7 guidelines. It was error for the sentencing court to depart
8 downward by two levels in part upon this ground. When
9 resentencing defendant, the district court may not rely on this
10 ground for any downward departure it might grant.

11 In sum, defendant's conviction clearly falls under the plain
12 meaning of the guidelines, since it was a felony drug trafficking
13 offense that resulted in a period of imprisonment of over 13
14 months. Because Stultz held that the Sentencing Commission had
15 taken the seriousness of the felony -- including the type of
16 controlled substance at issue -- into account when drafting the
17 2001 amendments to the guidelines, the district court's departure
18 on the ground that this prior conviction was at the extreme low
19 level of felony conduct and, therefore, fell outside of the
20 heartland of reentry cases, must be held to be in error.

21 III Personal Safety Motive

22 A. Contentions At Hearing

23 The final issue for review is the sentencing court's
24 decision to depart downward based on Leiva-Deras' concerns for
25 his personal safety. At the beginning of the sentencing hearing,
26 the district court asked defense counsel if defendant's motion to

1 depart was based on the fact that he reentered the United States
2 illegally due to fear for his life and physical safety in El
3 Salvador, as opposed to the reason most defendants reenter, that
4 is, lack of work in their home country. Counsel stated that it
5 was fear and not lack of work that brought defendant to this
6 country. During the sentencing hearing, the defendant spoke on
7 his own behalf, repeating the allegations of human suffering and
8 physical and emotional injury made in his letter, and showing the
9 district court scars on his body that he declared resulted from
10 shots fired at him in El Salvador.

11 The district court declined to pass judgment on this issue
12 believing it was better addressed in an asylum proceeding,
13 stating that its goal was to try to keep Leiva-Deras in the
14 United States long enough to pursue such an asylum claim.² After
15 hearing from the parties and before handing down the sentence,
16 the district court conceded that the government was correct that
17 there was no independent corroboration of defendant's
18 allegations. However, it stated that, according to Leiva-Deras,
19 his original entry and reentry was motivated

20 to a very substantial degree, [by an] effort
21 to get away from the inhumane conditions in
22 which he was forced to live, and the safety

² On November 19, 2003, we were advised that defendant was released from custody and deported back to El Salvador despite specific instructions to the contrary from the government. The defendant's release and deportation does not, however, make the government's appeal of his sentence moot. United States v. Madrigal, 331 F.3d 258, 259 (2d Cir. 2003) (per curiam); United States v. Suleiman, 208 F.3d 32, 37-38 (2d Cir. 2000).

1 risks to which his letter suggest he was
2 subject.

3 Those are not contradicted in the record,
4 and from the Court's general knowledge of
5 conditions in El Salvador over the last
6 couple of decades, his recitations are not
7 without some reason and logic, and the marks
8 that he has on him, reflective of the
9 treatment that he did receive to some extent
10 personally, tends to corroborate his story.
11

12 After the district court imposed sentence, the government
13 objected to the court's statement that there was nothing in the
14 record to controvert defendant's allegations that he entered and
15 reentered the United States only for reasons of personal safety.
16 In challenging this statement, the government pointed out that
17 there were sworn affidavits, presented by the defendant in
18 Spanish, in which he averred that he came to the United States
19 because there was no work in El Salvador and that he was not
20 subject to personal harm there. In response, defense counsel
21 asked the court to make a credibility determination as to
22 defendant's statements.

23 The district court refused to do so, commenting that the
24 defendant left him with a "positive impression" but that since
25 there were some contradictions in his story, the judge thought it
26 inappropriate for him to resolve credibility issues for fear his
27 findings would have precedential effect in a subsequent asylum
28 hearing. It went on to state, "Obviously, by the sentence that
29 I've imposed, I've given him credit for the assertions that he's
30 made, albeit . . . I have not made a finding, in the final
31 analysis, that . . . the facts [are exactly] as he asserts them

1" After defense counsel asked for clarification in the
2 event of an appeal, the district court stated that

3 obviously from the appearance that he's made
4 and the comments that he's made, . . . [I]
5 gave him some credit for the assertions that
6 he ma[de], and I've indicated that he should
7 have an opportunity to be heard with respect
8 to them, particularly as they pertain to
9 immigration matters, in a forum that can
10 ultimately . . . pass judgment on the truth
11 . . . of what he has asserted.
12

13 B. Contentions On Appeal

14 The government insists these comments by the trial court
15 did not constitute sufficient findings upon which it could base a
16 downward departure for reentry motivated by personal safety
17 concerns. As stated in Part I, supra, we review de novo the
18 grounds relied on by a sentencing court for its departure. The
19 sentencing court may depart downward only if the circumstances of
20 the defendant's case are such that they cause it to fall outside
21 the heartland for the type of crime for which he was convicted.
22 Korman, 343 F.3d at 630-31.

23 As an initial matter, it is unclear whether a departure
24 based on the ground of personal safety is permissible as a matter
25 of law. We have stated that 8 U.S.C. § 1326 is "designed to
26 deter deported aliens from illegally reentering for any reason,"
27 and that as a result, the motive of a defendant convicted under
28 that statute perhaps may not be a relevant sentencing factor.
29 United States v. Carrasco, 313 F.3d 750, 755 (2d Cir. 2002)
30 (discussing 8 U.S.C. § 1326 in the context of a departure based
31 on the "lesser harm" provision in U.S.S.G. § 5K2.11).

1 The defense suggests that we interpret the district court's
2 decision in a broader fashion and categorize it as a departure
3 based on the persecution of the defendant in El Salvador as
4 opposed to his motive for reentering the United States. After
5 reviewing the present record, we decline to interpret the
6 district court's decision in this fashion. That court clearly
7 stated it was basing its downward departure in part on its
8 finding that the Sentencing Commission had not adequately
9 considered the underlying facts with respect to the offense of
10 reentry that might justify some differentiation between an
11 illegal entrant motivated by economic concerns from the person
12 with a motivation and background such as the defendant here
13 presents.

14 Even if we were to accept the broader interpretation of the
15 reason for departure urged by defendant, there is no case law
16 clearly stating that such circumstances would be enough, standing
17 alone, to support a downward departure. The few cases that have
18 addressed similar issues have analyzed situations where
19 defendants are being sentenced for their first substantive crime
20 -- rather than for reentry -- and where they have shown
21 themselves to have benefitted their community in some way. See
22 United States v. One Star, 9 F.3d 60, 61-62 (8th Cir. 1993)
23 (refusing to conclude that circumstances relied upon by the
24 district court for its downward departure, including the
25 difficult conditions of Indian reservation life, defendant's
26 strong family ties and good employment record -- factors not

1 ordinarily relevant in a downward departure -- were
2 insufficiently unusual to warrant a departure); United States v.
3 Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (upholding a
4 downward departure based on defendant's lack of prior criminal
5 record, excellent employment history, solid community ties and
6 consistent efforts to overcome adverse living conditions on an
7 Indian reservation because, taken together, these were mitigating
8 circumstances of a magnitude inadequately taken into account by
9 the Sentencing Commission); United States v. Somerstein, 20 F.
10 Supp. 2d 454, 463-64 (E.D.N.Y. 1998) (holding that presence of
11 three factors, which may not alone justify a downward departure
12 for fraud conviction, could be relied on when taken together:
13 defendant's charitable efforts, exceptional work history, and
14 experiences as a child victim of the Holocaust); United States v.
15 Vue, 865 F. Supp. 1353, 1359-62 (D. Neb. 1994) (granting downward
16 departures to Hmong war refugees legally admitted into the United
17 States from Laos who had fled their homeland to avoid persecution
18 for supporting the democratic interests of the United States
19 there).

20 The defendant, in contrast to the defendants who received
21 downward departures in the above cases, not only has admitted to
22 illegally reentering the United States more than once, but also
23 has a criminal record of notable extent. Leiva-Deras' first
24 arrest was in 1989 for the sale of marijuana and, after being
25 deported to El Salvador, he reentered the United States. He
26 remained incarcerated here until 1993 when he was once again

1 deported to El Salvador. Defendant illegally reentered the
2 United States again in 1997 and, since then, has been arrested a
3 number of times for, inter alia, possession of drug
4 paraphernalia, failure to appear, burglary, attempted robbery,
5 possession of a weapon and stolen property, drug possession, and
6 breach of the peace. His criminal record places him outside the
7 category of individuals who have received downward departures for
8 past persecution or difficult living conditions, since their
9 departures were based in part on the aberrant nature of their
10 crimes and their strong community ties.

11 Further, defendant raised his claims of past persecution for
12 the first time on the eve of sentencing. In contrast to the
13 defendants in Somerstein and Vue, both of whom were admitted to
14 the United States as refugees from persecution, defendant entered
15 this country illegally and, he concedes, has never made any
16 effort to apply for asylum. As a consequence, he cannot rely on
17 the United States government's conclusion -- as the defendants in
18 Somerstein and Vue can -- that he is a refugee from persecution.
19 Since Leiva-Deras does not have those characteristics relied upon
20 by other courts that have granted downward departures in similar
21 cases, we are doubtful whether a departure on this basis could be
22 sustained in defendant's case.

23 Nonetheless, because we hold that the district court
24 declined in the first place to make the necessary findings of
25 fact upon which to base its downward departure for defendant's
26 motivation for reentry, we choose not to reach the issue of

1 whether the circumstances, as they exist in the record before us,
2 were sufficient on which to base a downward departure.

3 When a sentencing court departs from the applicable
4 guidelines range, that departure must be based on specific,
5 permissible reasons. United States v. Thorn, 317 F.3d 107, 125
6 (2d Cir. 2003). The general presumption is that the defendant's
7 circumstances are not unusual enough to justify departure.
8 Hence, the defendant must provide evidence that shows his
9 situation is outside the heartland of the applicable guidelines.
10 United States v. Bryson, 163 F.3d 742, 748 (2d Cir. 1998); see
11 also United States v. Smith, 174 F.3d 52, 55-56 (2d Cir. 1999)
12 ("Generally, under the Sentencing Guidelines, a defendant who
13 seeks to take advantage of a sentencing adjustment carries the
14 burden of proof."). The facts relied on to depart must be
15 established by a preponderance of the evidence, United States v.
16 Jacobo, 934 F.2d 411, 418 (2d Cir. 1991), and those findings will
17 be reviewed for clear error. United States v. Abreu-Cabrera, 64
18 F.3d 67, 74 (2d Cir. 1995).

19 Moreover, when a district court proceeds to resolve a
20 disputed issue of fact during sentencing, there is the additional
21 requirement that it must declare its findings with sufficient
22 clarity that an appellate court can review them. Thorn, 317 F.3d
23 at 125; United States v. Reed, 49 F.3d 895, 900-01 (2d Cir.
24 1995). "Where the sentencing judge neither clearly resolves the
25 disputed issue nor explicitly relies on factual assertions made
26 in a PSR, we must remand for further findings." Id. at 901.

1 We agree with the government that the district court
2 abdicated its fact-finding responsibilities in this case. This
3 is clear from statements such as: "I'm not passing judgment on
4 the truth of what he claims [were] the circumstances down
5 there."; and "I'm not gonna decide, as a question of fact,
6 whether what he said in those affidavits is correct. I recognize
7 that he may very well be contriving to stay in the United
8 States."; and "I don't think it's appropriate for me to resolve
9 credibility issues at this juncture . . . I have not made a
10 finding, in the final analysis, that . . . the facts [are
11 exactly] as he asserts them"

12 It appears therefore that the district court was presented
13 with two opposing sets of statements from the defendant regarding
14 his motive for reentry into the United States. It had an
15 obligation to determine which statements were truthful before it
16 decided to depart downward based on Leiva-Deras' alleged personal
17 safety motive for reentering the United States. Only if the
18 trial court had determined that the facts as defendant had stated
19 them in his downward departure motion were true could it make the
20 necessary finding that Leiva-Deras showed mitigating
21 circumstances taking his case out of the heartland of a typical
22 illegal reentry case. While refusing to resolve a disputed issue
23 of fact, the sentencing court nevertheless took the controverted
24 issue into account when it granted the downward departure. For
25 this reason, we hold the district court erred in granting the
26 downward departure.

1 within 90 days of discovering that Leiva-Deras has reentered the
2 United States, to apply for resentencing in accordance with this
3 opinion. See Madrigal, 331 F.3d at 261.

4 Sentence remanded.