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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 2874 (Admin)

No. CO/1188/2019

Royal Courts of Justice

Thursday, 10 October 2019

Before:

MR JUSTICE HOLMAN

B E T W E E N:

BEBEN

Applicant

- and -

DISTRICT COURT IN GLIWICE (POLAND)

Respondent

MISS DANIELLE BARDEN (instructed by BSB Solicitors) appeared on behalf of the applicant.

MR STUART ALLEN (instructed by the Crown Prosecution Office) appeared on behalf of the respondent.

J U D G M E N T

(As approved by the judge)

- 1 MR JUSTICE HOLMAN: This is a substantive appeal pursuant to section 26 of the Extradition Act 2003 from the decision of District Judge (Magistrates' Courts) N. Tempia made on 18 March 2019 to order the extradition of the appellant to Poland. There were originally two European extradition warrants, which I will call "EAW1" and "EAW2". They were both conviction warrants.
- 2 EAW1 related to an offence committed on 12 February 2012. According to section E of the warrant itself, the facts of the offence were as follows:
- "On 12 February 2012 ... in an apartment ... acting jointly and in concert with undetermined men, by hitting with his hands and kicking all over the bodies, he committed an assault and battery on [three named victims] exposing them to a direct threat of life or health loss ..."
- 3 At paragraph E(2) of the same warrant, on the next page, the offence is described as:
- "Participation in a brawl or a beating in which a human being is exposed to the immediate danger of the loss of life or the consequence ... (i.e a grievous bodily injury or impairment to health)."
- 4 I am not able to discern from the warrant, or from any other material which has been drawn to my attention, to what extent any of the victims actually suffered bodily injury in contrast to being exposed to "a direct threat" of it. In relation to that offence, the appellant was sentenced to one year of imprisonment.
- 5 There was a separate warrant, EAW2. This related to what is described as trafficking narcotics, namely, amphetamine, marijuana and Ecstasy, in periods between January 2003 until November 2004, and January 2006 until January 2009. In relation to those matters, the appellant was sentenced to three years and six months' imprisonment. Clearly, therefore,

the courts of Poland considered the trafficking in narcotics offences under EAW2 to be significantly more serious than the assault and battery, which was the subject of EAW1.

6 During the course of the hearing, a submission was made to the district judge that EAW2 was incurably defective such that it was not, and is not, valid. Eventually, when one reaches paragraph 81 of her judgment on internal page 14, one reads that the district judge herself concluded that EAW2 is not valid. At the very end at paragraph 107 of her judgment the district judge discharged EAW2 under section 2 of the Act.

7 It is unfortunate that, despite that decision in relation to EAW2, the district judge does seem to have allowed the facts which were the subject of EAW2 and the unexpired portion of the sentence under EAW2 (namely, two years and six months) to pervade her reasoning in relation to consideration of Article 8 and the overall proportionality of extradition. Thus, when considering "The factors in favour of extradition", she said at paragraph 89, "He has a sentence of one year to serve on EAW1 and two years, six months on EAW2." At paragraph 90 she said:

"Both offences are serious. Three assaults on three people in a flat in 2012 which was carried out with others and, thereafter, supplying Class A and B drugs in 2003 and 2006 to 2007."

8 Pausing there, although the district judge correctly recited the essential dates in relation to the different offences, the use of the word "thereafter" is, to say the least, curious, given that the drugs offences preceded the assault by several years. In that part of her judgment headed "Factors against extradition", the district judge addressed in some detail the issue of delay and analysed that in relation to both EAW1 and EAW2. Under a heading "Decision" at paragraph 100 she said:

"Mr Beben has to serve the total sentence of one year's imprisonment for the offences of assault committed in 2012 in EAW1 and two years and six months to serve for offences of supplying Class A and B drugs in 2003 and 2006 to 2007 ..."

9 Finally, and possibly most significantly, at paragraph 105, which is the apogee of her consideration of discretion, the district judge said:

"Mr Beben's private and family life and those of his wife, children and brother do not outweigh the strong public interest in extradition and therefore I find it would not be disproportionate to extradite him to Poland to serve his sentences."

10 I note the clear use of the plural in the word "sentences", which cannot have been an oversight or typing error in view of the several other parts of her judgment, which I have quoted, in which the district judge was clearly continuing to focus not only on the subject matter of EAW1, but also the subject matter of EAW2, despite her earlier conclusion that EAW2 was invalid. So, it seems to me, with respect to her, that some muddle crept into the reasoning process of the district judge. It is entirely speculative, but possible, as Miss Danielle Barden, who appeared then, as now, on behalf of the requested person, suggests, that the section of the judgment which deals with the invalidity of EAW2 was in fact drafted and inserted at a later stage after certain further enquiries had been made in Poland. But that is entirely speculative, and in the end a judgment has to be read as is coherent whole; and I regret that this judgment does lack coherence in that regard.

11 However, and in any event, time has moved on. The appellant was arrested on 28 December 2018 and has remained continuously in custody ever since. That has the effect that by today he has served just under 41 weeks of an overall sentence of one year or 52 weeks' imprisonment. On an appeal such as this, one clearly has to look at the situation and circumstances as they are at the time of the appeal hearing. That clearly follows from the language of section 27 of the Extradition Act 2003 and subsection (4). That refers to a condition for allowing the appeal that:

"an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing."

12 Evidence is available today, which of course was not available in March 2019, that this appellant has now served 41 weeks. This necessitates that I review and consider again the whole issue of proportionality. I do not intend to elaborate this judgment by referring to the details of this appellant's case under Article 8. He does in fact present a very strong case in relation to the Article 8 rights not only of himself, but also of his wife, to whom he has been married since 2006, and also his children now aged 17 and 6, and also in relation to his brother who suffers considerable ill-health and has, historically, had a high degree of dependency upon the appellant. There was a strong Article 8 case at the time of the hearing in front of the district judge, and in the ensuing year that case has, if anything, become more strong.

13 In my view, if this district judge had been hearing this case now, and in the knowledge that the requested person had already served 41 weeks towards an overall sentence of one year under EAW1, she would have decided the issue of proportionality differently and, in my view, she would have been required to order, and would indeed have ordered, the discharge of this requested person. So, for those reasons, which recognise errors in the reasoning and approach of the district judge, but, ultimately, are based on the short point that this appellant has now served 41 weeks of a 52-week sentence, I propose to allow this appeal, order the discharge of the appellant, and quash the order for his extradition.

Will the two of you be able to draw up a suitable form of words?

MISS BARDEN: Yes, my Lord.

MR JUSTICE HOLMAN: If you do that and lodge it, I will sign it off.

Is there anything else you wish to raise or say, Miss Barden?

MISS BARDEN: No, thank you, my Lord.

MR JUSTICE HOLMAN: Anything else, Mr Allen?

MR ALLEN: No, thank you, my Lord.

THE JUDGE: Thank you both very much indeed.

CERTIFICATE

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