IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
NEUTRAL CITATION NUMBER: [2022] EWHC 815 (Admin)

No. CO/763/2021

Royal Courts of Justice

Tuesday, 22 March 2022

Before:

THE HONOURABLE MR JUSTICE HOLMAN
(sitting in public)

B E T W E E N :

JOLANTA ZALEWSKA — Appellant

- and -

DISTRICT COURT IN GDANSK (POLAND) — Respondent

MS F. IVESON (instructed by National Legal Service) appeared on behalf of the Appellant.

MR T. HOPKINS (instructed by the Crown Prosecution Service, Extradition) appeared on behalf of the Respondent.

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

MR JUSTICE HOLMAN:

1 This is an appeal from an order for extradition made in the Westminster Magistrates' Court by District Judge Rimmer on 24 February 2021. It is, thus, already over a year since the order for extradition was made, but part, at any rate, of the reason for that delay is that a ground of appeal was quite properly pursued which has since been abandoned in the light of a decision of the Divisional Court last autumn.

2 It is convenient that I first mention the required approach on an appeal such as this. In terms of the statute itself, section 27 of the Extradition Act 2003 provides that this court may only allow the appeal if the conditions in either subsection (3) or subsection (4) of section 27 are satisfied. So far as the conditions in subsection (3) are concerned, they are that the district judge ought to have decided a question before him differently and that, if he had decided the question in the way that he ought to have done, "he would have been required" to order the person's discharge. Subsection (4) relates to the situation where an issue is raised at the appeal and/or that evidence is available on the appeal that was not raised or available at the extradition hearing. In such a case, the conditions are that the issue or evidence would have resulted in the district judge deciding a question before him at the extradition hearing differently and that, if he had decided the question in that way, "he would have been required" to order the person's discharge.

3 In terms of authority, a very clear explanation of the effect of the conditions in subsection (3) is to be found in the observations of Lord Neuberger which are quoted in the well-known authority of *Celinski*. Lord Neuberger very clearly identified seven possible scenarios. It is only if the district judge was "wrong" or reached a decision which is

"unsupportable" that an appeal must be allowed. It is not enough, even, that the court on appeal "on balance" considers the district judge to have been wrong.

4 In my view, the present case is very clearly a case in which, to again quote Lord Neuberger, "… there is no right answer, in the sense that reasonable judges could differ in their conclusions". I personally consider that, on the facts and in the circumstances of this case, which I will shortly outline, experienced district judges could well have come to opposite views on the question whether or not to make an extradition order. It may very well be also that, if I, myself, had been considering this case as the judge at first instance, I would have reached a discretionary decision not to make an extradition order. That, however, is not the question that I have to decide nor the test that I am entitled to apply. The sole question for me is whether or not, in the end, I consider that this district judge was wrong in the decision which he reached.

5 The essential facts and circumstances are as follows. This appellant is now aged 59. She has lived in England with her husband and her now adult children since 2013. Whilst still in Poland, she committed three offences upon which she was convicted. On 28 November 2008, acting jointly with others, she obtained a loan from a bank in the equivalent sum at that time of about £5,561. She did so fraudulently, using a falsified certificate of employment designed to show that she, rather than another person, was in certain employment. The EAW describes the offence as one of "swindling".

6 On 10 October 2009, again acting with others (but not the same people as in 2008), she obtained from a store a laptop by obtaining a loan from the store in the equivalent, at that time, of about £960. A very similar technique was used of deceiving the store into thinking that she, rather than another person, was in certain employment. Again, the EAW uses the word "swindled".

7 Finally, about ten days later, on 20 October 2009, she fraudulently obtained from a different store a television by means of a loan from the store of the equivalent of just over £1,000.

8 The appellant has said in a witness statement, which has not been challenged in this regard, that, at the time of swindling the bank in 2008, she was living in circumstances of abject poverty. She agreed to act jointly with others in order to obtain a share of the total amount loaned. She claims that she hoped at the time to be able to repay at least her share, but she remained so impoverished that she was not able to do so. She says, in effect, that it was out of desperation in order to try to repay the first loan that she then embarked upon the two further offences on 10 and 20 October 2009.

9 As I understand it, neither the appellant nor the co-conspirators have repaid any part of the loans for the laptop or the television. She did long ago make some repayments towards the bank loan, the subject of the first offence, but until very recently that has been substantially unpaid.

10 These events resulted in the appellant being convicted of three offences. Initially, suspended sentences of imprisonment were imposed on terms that she cooperated with her probation officer and that she repaid the amounts in question. As I have said, in 2013 she travelled to England to join her husband here. That necessarily put her in breach of the terms of her probation and nothing more was paid toward the debts. As a result, in 2016, the Polish courts converted the earlier sentences into an aggregate sentence of three years actual imprisonment, none of which has been served. So the purpose of the European Arrest Warrant is to obtain her extradition now to serve that aggregate sentence of three years' imprisonment.

11 The essential case of the appellant before the district judge was that there had, by 2021, let alone 2022, been a very long period of delay. It had to be conceded that she was a fugitive, but it was submitted that the authorities had made little attempt to locate her in England

where she was living an open life. There was evidence, as there is also before me, that she is not in good physical or mental health. She suffers from anxiety, she has great difficulty sleeping, she is being treated by her GP with long-term medication, and she also has low back pain for which she is also being treated. She said to the district judge that after service of the warrant, she - assisted in particular by her son, then aged 19, and now I think aged 20 - had made strenuous efforts to make contact with the bank from whom the £5,500 had been fraudulently obtained in order to make further repayments. The district judge, in fact, indicated at the hearing that, if she had repaid that amount before he gave judgment, he would take that into account in his decision.

12 The judgment of the district judge is very thorough. It describes the background facts and circumstances in considerable length and detail. It very clearly sets out the relevant law. It deals with certain other defences that were raised, but are not now pursued, and it engaged with Article 8 and performed the well-known *Celinski* balance.

13 The district judge made some important findings of fact. These included that he accepted that the appellant and her family consider her to be at the centre of the family and family life. He clearly accepted her evidence that she committed these offences at a time when she and her family were in considerable financial difficulties in Poland. He accepted that she had initially made some repayments of the money borrowed, and he accepted that, since the extradition hearing, she had made "strenuous and difficult attempts to commence loan repayments". But he necessarily found that she was a fugitive, as she herself accepted. He found that she had not repaid the moneys owed before she left Poland, and that she had not kept in contact with her supervising court.

14 When he performed the *Celinski* balance, the district judge first set out a number of factors under a heading "Factors favouring extradition" and then a number of factors under a heading "Factors against extradition".

15 This is, of course, a very important exercise that district judges hearing extradition matters have to conduct day in day out. If there are significant errors in the way in which the district judge performs the balance, then that may, of course, lead to an appeal to this court succeeding. But it is important to stress that the exercise of the *Celinski* balance is not some sort of examination test of the technique or expertise of district judges. It is possible, in my view, to be over-picky about some of the ways in which district judges express themselves in these cases, and this court, on appeal, should not do so.

16 Under "Factors favouring extradition", the district judge referred first to "the non-trivial nature of the admitted and proven offending" and went on to say that, given that there are three separate offences and that they had been committed over a total period of ten months, he "could not accept that they can be regarded as at the bottom of the scale of gravity."

17 Today, Ms Florence Iveson has very eloquently said everything that could conceivably be said on behalf of her client. She submits that the use of the phrase "non-trivial nature" of the offending is unfair and misleading. She rightly submits that these offences, as a whole, are of relatively low seriousness and merely to describe them as "non-trivial" is not properly to identify where they fall on the overall scale of offending. But in my view, these offences cannot collectively be described as "trivial" and I cannot accept that there is any real force in the point that Ms Iveson makes in relation to the characterisation of the gravity of the offending.

18 The district judge then, factually correctly, set out that the appellant had been sentenced to three years' imprisonment, which he described as "a significant term". He followed that by saying

> "The RP has not repaid all the moneys obtained from her offending, despite the fact that her financial circumstances have considerably improved since

> she moved to the United Kingdom and that she and her husband said they moved here partly in order to repay those funds."

19 Ms Iveson submits, first, that the fact that the money has not been repaid should not properly be regarded as a factor "favouring extradition", but, rather, as the absence of a factor "against extradition". Additionally, she submits that there is an element of "double counting". The district judge has already taken into account that the sentence is one of three years, which, at the time it was passed, reflected that the money had not been repaid. She submits that by then referring, as a separate factor, to the fact that the money has not been repaid, the district judge was unfairly putting an extra factor in the scales.

20 To my mind, this is in the end a semantic point. It is a fact in the case that the appellant has not repaid all the money, and whether that is treated positively as a factor favouring extradition or as an absence of a factor against extradition is semantic.

21 Under the heading "Factors favouring extradition", the district judge then referred to the length of time it took for the Polish authorities to establish that the appellant was living in the United Kingdom, and he stated that that "was not entirely the fault of the judicial authority" as she had not provided her change of address details as she was obliged to do. Again, Ms Iveson submits that that should not appear as a positive "factor favouring extradition", but, in my view, it has not really gone into the balance in that way. It is simply a part of the facts of this case that she had not provided her address and so that tended to mitigate any fault on the part of the judicial authority in locating her.

22 The district judge then referred to his finding that the appellant is a fugitive and continued

> "the RP has chosen to build her life in the UK since 2013 in full knowledge that she regards herself as a fugitive from justice and no doubt mindful that she may one day be required to face the justice from which she fled."

Again, Ms Iveson submits that that is not properly characterised as a "factor favouring extradition" although it may be the absence of a factor in her favour.

23 The district judge then correctly referred to the public interest that those convicted of offences should serve their sentences and that there is a constant and weighty public interest in the United Kingdom complying with its international extradition treaty obligations.

24 He then turned to consider the "Factors against extradition". Some of these are clearly made and clearly do tell strongly against extradition. So far as delay was concerned, he said that the allegations in this case are (at the date he was considering the case) between 12 years and two months old and 11 years and four months old, and continued "they are, therefore, moderately old". Ms Iveson submits that to characterise them as "moderately old" is to understate the staleness of these proceedings for extradition in relation to offending in 2008 and 2009. I would agree with that criticism of Ms Iveson. In my view, it does understate the situation simply to describe these offences as "moderately old". The question is, however, whether they are so old as now to outweigh extradition. It is the case that many people do face extradition for offending even as long ago as 2008 and 2009. It is not possible to say in this case that these offences are simply so old as now to make extradition disproportionate.

25 The district judge then referred very clearly to the fact that the offences were committed at a time when the appellant and her family were in significant financial difficulties, sometimes struggling to find money for basic essentials such as food, hot water and heating. He referred to numerous other factors against extradition, including that she is otherwise of good character and that there is no evidence that she has offended since 2009. He referred to her generally poor health. He referred to the fact that she had apparently lived openly in the United Kingdom for over seven years and had been a contributor to society and the economy by engaging in gainful employment. He recognised that she was likely to have

made friends and social connections during her time here, and that those social bonds would be broken if she was extradited. He referred to the impact upon her son's university career, if she were to be extradited, and he referred to the possible impact of Brexit by saying

> "Brexit uncertainty means that the court may take into account both the RP's subjective anxiety and the objective risk that she may not be able to return to the UK if extradited, although I find it likely that her personal circumstances and her family's presence here would be considered in any such application."

26 Having listed the factors both ways, the district judge then made his "analysis". Ms Iveson is very critical in particular of paragraph 50 of the district judge's judgment. He there said,

> "The article 8 ECHR rights of the RP, her husband and their son are engaged by this extradition request. Financial, emotional and practical hardship may well be caused to all those affected by her extradition. However, these are common features of this process and there is no reason to suppose her position will be significantly different to that faced by many other persons facing extradition. The consequences of extradition for the RP may be serious but they are not, in my judgment, exceptionally severe …"

27 Ms Iveson has two main prongs of attack on that passage. First, she submits that, where the district judge says "these are common features of this process and there is no reason to suppose her position will be significantly different", that that is a sweeping generalisation and that it represents a failure by the district judge to focus on the specific facts and circumstances of this requested person, as both the authorities of *HH* and *Celinski* clearly require.

28 I accept that there is within that passage an element of "generalisation", but it does not detract from the fact that, immediately above the "analysis", the district judge had very clearly considered long lists of factors both in favour of and against extradition in a very fact-specific way.

29 Second, Ms Iveson also criticises the sentence "The consequences of extradition … are not … exceptionally severe …" She submits that, in saying that, the district judge fell into the trap of applying a test of exceptionality which the Supreme Court has made very clear in *HH* at paragraph 32 must not be done. In the judgment of Baroness Hale in that paragraph, she clearly said, "Exceptionality is a prediction … and not a test."

30 Nevertheless, in the same judgment, Baroness Hale had said at paragraph 8 that there is no test of exceptionality but that

> "it is likely that the public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

31 I am not persuaded by Ms Iveson that the district judge was really falling into a trap of applying a test of exceptional severity. Rather, he was making an assessment, which was relevant to his overall exercise of a discretion, as to the degree of severity.

32 As I said at the outset of this judgment, I do consider that this is a case in which different judges might, without error, have reached different decisions on the question whether or not to make an extradition order; and it may very well be that, if I had been deciding this case at first instance, I, myself, would not have made an order for extradition. The relatively long period of delay and the relative lack of seriousness of the offending might have had more prominence in the minds of some judges than in others. But the fact remains that these were three separate and discrete offences committed over a period of about ten months and committed in conjunction with others, and that there was an aggregate loss of around £7,500. There is an outstanding sentence of 3 years' imprisonment.

33 Applying section 27(3) of the Extradition Act, I am not able to say that the district judge ought to have decided a question before him differently or that, if he had done so, he would

have been required to order the appellant's discharge. I am not able to say, in the words of Lord Neuberger, that he was wrong.

34 As I have said, over a year has now elapsed since the hearing. The appellant is, of course, a year older. Further medical evidence has been adduced to show that her anxiety, her difficulty in sleeping and her low back pain have all intensified and, indeed, that she is currently not able to work.

35 Further, very recently, the appellant and her son appear to have made strenuous efforts to set up a repayment plan with the financial institution to whom the original bank appears to have factored the debt. The thrust of the further evidence in that regard appears to be that she has reached an agreement with the current owner of the debt to repay a total of about £10,000 to £11,000 over a period of a further two and a half years until August 2024. She asserts that to date she has paid the equivalent of £2,600 towards that debt. I have to say that this is very recent activity under the cloud both of the order for extradition that was made now over a year ago and of the imminence of the hearing of this appeal. Further, it does not make any provision at all for any repayment of the losses under offences two, the loan for the laptop, and three, the loan for the television.

36 Evidence is available to me that was not available at the extradition hearing, both in relation to the appellant's current state of health and those efforts at some repayment, but I am unable to say that that evidence "would have resulted in the district judge deciding a question before him at the extradition hearing differently", nor that, if he had decided the question in that way, "he would have been required to order the person's discharge". For these reasons, I am bound to dismiss this appeal and the order for extradition will stand.

CERTIFICATE

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