NCN: [2021] EWCA Crim 1281

IN THE COURT OF APPEAL

CRIMINAL DIVISION

No. 202100117 A1

Royal Courts of Justice

Friday, 30 July 2021

Before:

LADY JUSTICE CARR
MR JUSTICE SPENCER
HIS HONOUR JUDGE MICHAEL CHAMBERS QC

REGINA
V
KHADIDJA BENMOUKHEMIS

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MS. S. WRIGHT appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1 The applicant is a 43-year-old Algerian mother of two with mental health difficulties. She has lived in the United Kingdom since 2001. She has been married four times in Islamic ceremonies; her children are the product of her first marriage, which lasted between 2005 and 2013.

2 On 17 September 2020 in the Crown Court at Kingston Upon Thames in front of HHJ Lodder QC ("the Judge") the applicant pleaded guilty to two counts of disseminating a terrorist publication contrary to s.2 (1) of the Terrorism Act 2006. On 15 December 2020 she was sentenced to an immediate custodial term of two years and a further one-year period of licence under s.236A of the Criminal Justice Act 2003 ("s.236A") (now s.265 of the Sentencing Act 2020) on each count, such sentences to run concurrently. Having been convicted of offences to which ss.41 and s.44 to 45 of the Counterterrorism Act 2008 apply, the appellant was required also to comply with the notification requirements set out therein for a period of 10 years.

3 This is her renewed application for leave to appeal against sentence, for which purpose she has had the benefit of representation by Ms Wright acting pro bono. We record our gratitude for her helpful submissions.

The Facts

4 On 30 May 2016 the applicant sent a message on WhatsApp with a link to a “Nasheed”, a terrorist publication, to a person of Syrian extraction residing at the time in Lebanon. The applicant told the recipient, whom she knew shared her own Islamic State mind-set, to "listen to the Nasheed." This was an explicit encouragement to support the Islamic State.

The “Nasheed” contained such phrases as "rise up oh supporters" and "we have come to attack and kill you" along with "we will respond to you with blood."

5 On 17 December 2017 the applicant sent a message on "Telegram" with an electronic link to a terrorist video entitled "Flames of War 2" to the same recipient. As the applicant knew, Telegram was a very secure way of communicating. It was the prosecution case that throughout these communications the applicant demonstrated a fear of detection and that the authorities were watching her.

6 The "Flames of War 2" video had been released by the Islamic State Al Hayat Media and lasted around an hour. It contained images of violence and brutality of the most extreme nature, including graphic recordings of beheadings, execution by victims being set on fire, the desecration of dead bodies of Islamic State opponents and the filming of the mutilated bodies of children killed in the Syrian war. There were also recordings of the glorification of Islamic State fighters and encouragement to join the radical Islamic cause.

7 Both the applicant and the recipient were sympathetic to Isis at the relevant time. There were separate messages from the recipient indicating extremist views.

8 The applicant was arrested on 21 May 2019. She was interviewed on a number of occasions when she answered "no comment."

Newton Hearing

9 In due course, the applicant pleaded guilty on the basis of “recklessness” for the purpose of culpability in Category B in the Sentencing Council Guideline for Terrorism Offences ("the Terrorism Guideline"). That basis was not accepted by the prosecution and a Newton hearing took place on 14 and 15 October 2020. In addition to the messages the subject of the indictment, the prosecution relied, amongst other things, on the fact that the applicant had been married previously to two prominent members of ANE, a proscribed terrorist

organisation, and on other chats, for example where the applicant was seen to request details of the best way of migrating to Islamic State with children, and on pro-Islamic State and pro-terrorist images found on her mobile telephones.

10 The material relied upon by the prosecution raised a strong case as to the applicant's intention, an aspect on which, as the Judge put it, she was "pre-eminently" in a position to give evidence. However, she declined to do so. The Judge held that it was appropriate to draw the inference that she had failed to do so because she felt unable to explain the material in a manner consistent with recklessness. This was not decisive in his judgment, but it did add weight to the other evidence on intention.

11 The Judge concluded that he was sure that the applicant intended that the effect of disseminating the two publications was to encourage, either directly or indirectly, the commission, preparation or instigation of acts of terrorism. This would place the applicant's culpability for the purpose of the Terrorism Guideline in Category A. Sentencing was then adjourned for the preparation of a Pre-Sentence Report.

Pre-Sentence Report

12 The author of the Pre-Sentence Report noted that the applicant continued to deny that there had been intent in the commission of the offences. The applicant was assessed as a low risk of reoffending. Having considered all of the information available, the author concluded that there was not sufficient information to show that the applicant posed a significant risk to members of the public of serious harm occasioned by the commission by her of further offences. It was clear that the custody threshold had been crossed in this case. The applicant was concerned as to the effect of such a sentence on her children. The author opined that the applicant's risk of serious harm could be managed in the community and, if the court was not minded to pass an immediate custodial sentence, a two-year suspended sentence order could be imposed with a Rehabilitation Activity Requirement, a financial

penalty, a Programme Requirement, a Residence Requirement and a Prohibited Activity Requirement.

Psychiatric Report

13 The court had the benefit of a psychiatric report from Dr Maryura Deshpande. The applicant had previously experienced depressive episodes, which had been treated by antidepressants and counselling. She experienced severe distress when reminded of previous traumatic experiences and her symptoms met the criteria for Post-Traumatic Stress Disorder.

14 Dr Deshpande did not find evidence of other mental illnesses, such as psychosis, and there was no mental health condition that would have affected the applicant's cognitive ability to understand what would amount to an act of terrorism or what would amount to encouragement or inducement to commit such an act. However, it was reasonable to conclude that the applicant's psychological and emotional state was affected sufficiently by her experience of trauma to impact on her understanding of what would constitute an act of terrorism.

15 Dr Deshpande concluded that the applicant's past experiences would explain why she found herself drawn to online groups or forums despite not having any extremist beliefs herself.

Sentence

16 The Judge, having outlined the facts of the case, remarked that this had been highly provocative and shocking material which the applicant had sent intending to encourage acts of terrorism. He rejected a contention that she was merely seeking the recipient's opinion or that the material on her devices was for research purposes. The applicant had told the probation officer that she lived a double life: during the day being a mother and a volunteer and then at night becoming increasingly immersed in an online world of rhetoric and

discussion around Islam. However, the Judge noted that the timing of the offending links (at around 8.00 and 9.00 in the morning) undermined this suggestion.

17 He noted that the applicant had attempted to blame her second and third husbands for her involvement in radical Islam. Other comments that the applicant had made to the probation officer were implausible, including that she did not know that her third husband had been in custody for violating travel restrictions. It was clear, in the Judge's view, that the applicant had not been open and honest with the probation officer.

18 The applicant had a previous conviction for fraud and possession of false identity documents and had received a custodial sentence. She had told the psychiatrist that that offending had been the fault of her first husband, just as she had stated that the index offending had been the fault of her second and third. It might be that the applicant had been guided into the radical world by one or both of her second and third husbands, but it was clear to the Judge that the applicant had quickly become an enthusiastic and committed Islamic State supporter. She had sought to minimise her role and her culpability. Only gradually had she come even close to admitting culpability, but she was still unable to be fully honest about what she had done, possibly because of the fear of the impact upon her children.

19 The Judge noted the mitigation contained in the pre-sentence report, the psychiatric report and the character references. He noted however that the psychiatric report had not been prepared with the benefit of his findings at the Newton Hearing. The applicant was intelligent and articulate and had no cognitive defect. She had been aware of what she had been doing.

20 It had been submitted, recorded the Judge, that the offending had been diminished by the fact that no one saw any signs of radicalisation and that the applicant had not attempted to radicalise her children, but the Judge did not agree with that analysis. He also rejected the

assertion that the applicant's responsibility was diminished by mental disorder, since there was no evidence to support that conclusion.

21 It had been a long time since the commission of the offences and the Judge acknowledged that life had not been easy for the applicant since then and there had been an effect on the applicant's general health. He took account of the letter from the applicant and a sad poem from her children, although the applicant, he said, must have realised the risk to which she had been exposing them. The Judge was prepared to accept that the applicant was now beginning to appreciate how wrong it had been to act as she had done and, although reduced in effect as there had been a Newton Hearing, the Judge gave the applicant credit for her guilty plea.

22 The Judge was satisfied that it was not necessary to find the applicant dangerous, but he was required to follow s.236A which required the addition of an extra year to the applicant's sentence. He took a starting point of three years, which he reduced to reflect the applicant's guilty plea and other mitigation to two years' imprisonment. The total sentence, therefore, was a special custodial sentence of three years and a s.236A comprising custodial term of two years and an extended licence period of one.

Updating material

23 For the purposes of this appeal, we have two pieces of updating material. First, a letter from the applicant's prison offender manager confirming that she has engaged well with the professionals, including a psychology team, throughout her time in custody. She has undertaken an Extremism Risk Guidance Assessment; Mr Moorhouse, the prison offender manager, records that being away from her children has been the most difficult aspect of her incarceration.

24 The Extremism Risk Guidance Assessment is dated 10 June 2021. The applicant is assessed at the time of the offences as having had a medium level of engagement in an extremist

group, cause or ideology and a medium level of intent to carry out an extremist offence. She had some capabilities to carry out an extremist offence. In terms of progress, it was assessed that the engagement factors of identity, meaning and belonging, the need to address injustice and express grievance and presence of mental illness are strongly present currently. Partly present are susceptibility to indoctrination, family and/or friends support extremist offending, the need to defend against threats and transitional period. For intent factors, attitudes that justify offending are still strongly present and her capability to carry out an offence remains. Currently, reflecting her location in prison, the applicant is assessed as having a low level of engagement, a low level of intent and some capabilities to carry out an offence.

Grounds of Appeal

25 Ms Wright advances three grounds of appeal.

26 First, it is argued that the Judge misapplied the authorities dealing with the sentencing of sole carers. It is hard, submits Ms Wright, to overstate the negative impact of an immediate custodial sentence on the applicant's children. The Judge erred in misapplying the authorities by considering the impact of custody from the perspective of the carer rather than for those being cared for. In essence, he looked at the question through the wrong end of the telescope.

27 Secondly, it is said that the Judge failed to consider the impact of a custodial sentence during the time of COVID-19. As Mr Moorhouse informs the court, the applicant has not been able to see her children face to face until April of 2021. Even then she had no physical contact with them and was unable to comfort them.

28 Thirdly, it said that the Judge erred in passing an immediate custodial sentence when it would have been appropriate to suspend the sentence. Ms Wright submits that, given the applicant's engagement and her positive entries, together with the fact that she has now been

in custody for some time, it would be appropriate for this court to quash the immediate custodial sentence and replace it with a Community Order.

Discussion

29 S. 236A, which was introduced into the Criminal Justice Act 2003 by s.6 and schedule 1 of the Criminal Justice and Courts Act 2015, provides for a new form of custodial sentence. It acknowledges the possibility of some offenders convicted of offences falling within schedule18A of the Criminal Justice Act 2003 ("schedule 18A"), including certain terrorist offences such as the present, not being released until the expiry of the custodial term, having failed on public safety grounds to persuade the Parole Board that they could properly be released. S. 236A is intended to ensure that such offenders could be subject to licence for a period after release even though, by definition, they have not been found to be dangerous.

30 S. 236A does not confine the court to imposing a custodial sentence whenever a schedule 18A offence is committed. It does not prevent the court from passing a non-custodial sentence such as a Community Order. Further, "in theory" there appears to be no barrier to a s.236A sentence being suspended. However, as Treacy LJ said in *R v LF & Ano*r [2016] EWCA Crim 561 at [13]:

> "In practical terms, however, such a result is counter-intuitive given the terms of section 236A. Moreover, a variety of practical complications would arise from implementation (and also possible later breach), and render making such an order wholly undesirable. Courts should not suspend a sentence under section 236A. Ordinarily the court will be considering an immediate custodial sentence: in the unusual event that the court might have considered suspending the sentence, it should consider making a community order instead."

31 As the Single Judge commented when refusing leave:

> "This approach is not altered by the Definitive Guideline on the Imposition of Community and Custodial Sentences."

32 When considering suspension, a balancing exercise has to be carried out: see *R v Tharmaratnam* [2017] EWCA Crim 887 ("*Tharmaratnam*") at [14]. Thus, even if a judge takes the view that appropriate punishment would only be achievable by immediate custody, he or she still has a discretion to suspend if there are sufficient factors militating against immediate custody. There is no presumption in favour of suspension if all the factors identified in the Guideline on the Imposition of Community and Custodial Sentences as pointing to suspension are present. Decisions to suspend or not are always fact specific. The Guideline requires the sentencing judge to weigh the factors identified, but even then does not purport to provide an exhaustive list of what may be relevant considerations in any given case.

33 This court will be slow to interfere with an exercise of judgment as to whether or not to suspend where it is clear that all relevant considerations have been taken into account, including by reference to the Guideline on the Imposition of Community and Custodial Sentences. As was said in *Tharmaratnam* at [14], it will only do so where the decision is plainly wrong in principle or results in a sentence which is manifestly excessive.

34 Here the Judge was very well placed to carry out the sentencing exercise, having conducted a lengthy and thorough Newton Hearing. He knew the case inside out. It is clear from his sentencing remarks that he used that advantage to material effect. He had a firm grasp of the facts and formed a clear and adverse view of the applicant and her culpability. He pointed out in the course of submissions, for example. that the author of the pre-sentence report had proceeded on several false premises, including that she did not seek to blame anyone else and that she had moved away from terrorist discussion forums since early 2019 up to her arrest. The Judge regarded the applicant's accounts as implausible for reasons which he gave. He concluded that the applicant had sought at all stages to minimise her role and culpability. Her behaviour showed her to be surveillance aware and careful not to

expose herself. These are in our judgment highly material matters when sentencing someone for offences of this nature.

35 It is accepted that the Judge correctly categorised harm in this case as falling within Category 2 of the Terrorism Guideline. There is no prospect of appellate interference with the Judge's finding that the applicant had acted with intent to encourage others to engage in terrorist activity, nor is it suggested that there should be. The starting point for Category 2A offending is four year's custody with a range of three to five.

36 There were aggravating factors to justify an upward increase, namely, communication with a known extremist over a period of 18 months and deliberate use of technology to avoid detection.

37 It cannot be said that the Judge failed to pay due regard to the mitigation available to the applicant. He had considered the detailed 97 paragraph sentencing note from Ms Wright. That set out the applicant's personal circumstances and mitigation in full, alongside eight character references. The Judge was fully aware of the applicant's personal history, including her history of trauma and her resulting mental health issues. He was also fully aware of his sentencing options.

38 We do not consider that there is any arguable error of approach in terms of sentencing someone who was the sole carer of children. The fact that a defendant has dependent children is of course a relevant fact for sentencing. The Article 8 rights of the defendant and any dependent child are engaged. The court must ask whether the sentence contemplated is or is not a proportionate way of balancing the effect on the defendant and his or her children with the legitimate aims that sentencing must serve (see the well-known approach identified in *R v Petherick* [2012] EWCA Crim 214; [2013] 1 WLR 1102 at [17] to [25]). The Judge was reminded of the relevant principles at [69] to [77] of Ms Wright's sentencing note. At the time of sentence, the applicant's children were aged 11 and 14. Both were healthy, happy

and thriving at school. Whilst it is right that in his sentencing remarks the Judge referred to the fact that the applicant could have foreseen the risk of separation to which her criminal activity was exposing them, he also expressly recognised and accepted "the strong and affectionate bond" between the applicant and her children. It is inconceivable that the Judge did not consider the effect of incarceration on the children (who are now living with a friend of the applicant in London). The answer to the question of proportionality was clear: interference with the Article 8 rights of both mother and children was proportionate.

39 To take account of the mitigation of the applicant's guilty plea, for which no more than 20% could have been afforded, the Judge arrived at a custodial sentence of only two years. This was outside the range of three to five years' custody for Category 2A offending. Whilst the Judge did not refer expressly to the impact of the pandemic on prison conditions, Ms Wright again had drawn his attention to the relevant authorities at [91] to [93] of her sentencing note. The Judge would have had them well in mind in reaching his final term of two years' custody before the addition of a further year under s.236A.

40 As for suspension, it is unarguable that the imposition of an immediate post-custodial sentence was manifestly excessive or wrong in principle. The Sentencing Council Guideline on the Imposition of Community and Custodial Sentences required him to weigh the various factors. The Judge clearly took the view that appropriate punishment could only be achieved by immediate custody. In any event, as indicated, suspension of a custodial sentence under s.236A is neither realistic no practicable.

41 Against that background, Ms Wright submits that we can take the unusual course of imposing instead a Community Order. That alternative would produce an outcome which in our judgment would come nowhere near to reflecting the gravity of what was serious terrorist offending.

42 Like the Single Judge, we do not consider that there are arguable grounds for appeal against sentence. The application is dismissed, but not without again repeating our thanks to Ms Wright for her assistance. We do not make a loss of time order.

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