IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/02112/A2
[2023] EWCA Crim 732

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 25th May 2023

**B e f o r e:**

**VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION**
**(Lord Justice Holroyde)**

**MR JUSTICE JEREMY BAKER**

**MRS JUSTICE COLLINS RICE**

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**R E X**

**- v -**

**ALEX DAVIES**

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**Mr B Newton KC** appeared on behalf of the Appellant

**Miss A Morgan KC** appeared on behalf of the Crown

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**J U D G M E N T**
**(Approved)**

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Thursday 25th May 2023

**LORD JUSTICE HOLROYDE:**

1. On 17th May 2022, following a trial at the Central Criminal Court before His Honour Judge Dennis KC and a jury, the appellant was convicted of an offence of membership of a proscribed organisation, contrary to section 11 of the Terrorism Act 2000. The particulars of the charge were that between 17th December 2016 and 27th September 2017 he belonged to the proscribed organisation National Action ("NA").

2. On 7th June 2022 he was sentenced to a special custodial sentence for an offender of particular concern, pursuant to section 278 of the Sentencing Act 2020, of nine years six months, comprising a custodial term of eight years six months and an extended licence period of one year.

3. The appellant now appeals against that sentence by leave of the single judge.

4. NA was founded by the appellant and another man, Raymond, in 2013. It was a UK-based neo-Nazi organisation, which was described as follows by this court in *R v Scothern* [2020] EWCA Crim 1540, [2021] 1 WLR 1735, [2021] 2 Cr App R (S) 4, at [5], when giving judgment on an appeal by another person convicted of membership of the proscribed organisation:

> "It was a revolutionary movement opposed to democracy and engaged in open incitement to racism and political violence. Its aims included the creation of an all-white state in Britain, ethnically cleansed of all religious and racial minorities. Its propaganda involved the proposition that Hitler was correct in his view of Aryan supremacy and was justified in murdering millions of Jews and other people in Europe because they were racially inferior. The organisation adopted the swastika and its logo was based upon that of the paramilitary arm of the Nazi

party. The organisation's Twitter account posted praise for the killer of the murdered MP, Jo Cox."

5. NA was proscribed as a terrorist organisation on 16th December 2016. The Home Secretary stated that it was "a racist, anti-Semitic and homophobic organisation which stirs up hatred, glorifies violence and promotes a vile ideology".

6. The appellant and others involved in the leadership of NA had anticipated that the organisation would be proscribed. They made contingency plans to enable it to continue its activities. Each of the regional groups would adopt a new name and symbols, but would continue NA's activities in a lower profile and less public manner. The appellant became the leader of the Wales and South-Western region, which was giving the new name of the National Socialist Network ("NSN"). It was later re-named "NS131" and came to incorporate also the London area. The appellant reassured a fellow member that proscription was nothing to get worked up about, saying that he was "sure we'll come up with some creative way to overcome the obstacles put in front of us". In January 2017 he painted street graffiti including the message: "Ban us? So what?"

7. The appellant was arrested on 27th September 2017. During the period covered by the indictment he had been active in a number of ways. He maintained contact with other leading figures within the organisation and organised regional meetings involving self-defence and combat training, as well as social meetings in public houses. He organised the creation of promotional videos which were posted on a national socialist website, and the production of 3,500 stickers with a printed "NS131" logo, which included an image of a lit Molotov cocktail. He had observed to another of the organisation's leaders that "if [the authorities] try and continue repressing us, then we'll simply give them the biggest game of Whack-a-Mole ever". He campaigned for far right candidates in local elections, spoke at a

gathering of far right activists known as "the Yorkshire Forum", and participated in the presentation of a far right online radio channel. He was also actively involved with a proposal to create a "white community" in Yorkshire, and he travelled throughout the country meeting up with members of the organisation to discuss his plan.

8. For about two months at the start of the indictment period, until 21st February 2017, the appellant was on police bail in relation to an allegation of a public order offence, which did not lead to any charge.

9. We should note that at the time of the offending the statutory maximum sentence for an offence contrary to section 11 of the 2000 Act was ten years' imprisonment. The subsequent increase in that maximum has no application to this case.

10. The appellant was aged 27 at the date of sentencing. He had no previous convictions. Both counsel had provided helpful sentencing notes, and made submissions as to the application of the Sentencing Council's definitive guideline for terrorism offences which was then in force. No pre-sentence report was thought to be necessary, and we are satisfied that none is necessary now.

11. In his sentencing remarks the judge referred to evidence given by an expert witness that NA was among the most extreme of the numerous neo-Nazi groups of recent years. He assessed the offence as falling within culpability category A of the guideline, which at that time gave a starting point of seven years' custody and a range from five to nine years. He observed that, in addition to the harm inherent in all such offences, the declared aim of NA, as described by the appellant himself, was the usurping of the state and the undermining of the democratic system. The judge said that the harm to individuals and society from the pursuit of such objectives "could not be higher".

12. The judge identified a number of aggravating factors: the offence was committed whilst the appellant was on bail; it continued for a period of more than nine months; and it only came to an end when the appellant was arrested. It was, said the judge, a well-orchestrated and determined effort to flout the ban on the activities of NA and to continue to promote and strive towards achieving the long-held objectives of the organisation, notwithstanding the lawful proscription which had been imposed for the protection of all the citizens of this country. He held that the aggravating features served to raise the sentence substantially above the starting point, and that the appellant's role in founding and developing NA was highly relevant to a consideration of his culpability in seeking to defy the banning of the organisation. He concluded that the appellant's conduct fell "at the top end of the range" in the guideline.

13. The judge also identified mitigating factors: the appellant had been aged only 22 or 23 at the time of his offending; he had no previous convictions; there had been a significant delay between arrest and trial, and the appellant had committed no further offence during that period; and there was evidence of both mental and physical ill-health. The judge also took into account character references provided by the appellant's father and partner.

14. On the issue of dangerousness, as that term is defined for sentencing purposes, the judge considered the circumstances of the offending and the fact that, in his evidence at trial, the appellant had continued to express support for Hitler and all he stood for. The judge found the appellant to be a dangerous offender. He concluded, however, that the public could sufficiently be protected by the imposition of the special custodial sentence of nine years six months, to which we have referred.

15. In his written and oral submissions Mr Newton KC, who represents the appellant in this

court as he did below, advances two grounds of appeal: first, that the judge was wrong to place the offence at the top of the category A range; and secondly, that insufficient reduction was made for the mitigating factors.

16. In support of the first ground, Mr Newton invites our attention to a schedule, which was also before the judge, showing the sentences imposed on others convicted of the same offence arising from their membership of NA. In most of those cases, as in the appellant's case, the period covered by the charge was 17th December 2016 to 27th September 2017. Mr Newton accepts that the appellant was a prominent member of the organisation and therefore in category A of the guideline. He submits, however, that the appellant was a less prominent member than others whose sentences after trial ranged between five years six months' imprisonment and eight years' imprisonment. Recognising the difficulty of advancing a specific disparity argument based on sentences imposed on other occasions by different judges, Mr Newton nonetheless argues that the appellant's sentence is "out of kilter" with the sentences imposed on others. He relies in particular on the following points.

17. First, the appellant was to be sentenced not for his action in founding NA, but for his actions during the period following its proscription. Unlike some others, he had not been prosecuted for any offences committed before NA was proscribed, nor had he been prosecuted for any substantive offences such as possession of terrorist material or possession of weapons.

18. Secondly, his activities were largely confined to the south-west, and he was not part of what Mr Newton refers to as "the core continuation of NA in the Midlands and North-West".

19. Thirdly, and again in contrast with some others who were convicted, he had not attended public demonstrations and had not joined others in celebrating the actions of certain

murderers.

20. In support of his second ground of appeal, Mr Newton emphasises the long period of time which elapsed between the appellant's arrest in September 2017 and his being charged. Others listed in the schedule had been tried in 2018 or 2019, but the appellant was not arrested until May 2021, and not tried until about four years eight months after his arrest. The reason for that delay was that the prosecution wished to conduct a sequence of trials of others, and thereby to seek to strengthen the case against the appellant if convictions of others were secured. The effect of that long period of delay, Mr Newton submits, is a very significant feature in the sentencing decision. During that period the appellant had committed no offences. He had, however, suffered a bereavement, namely the death by suicide of his sister on 1st December 2019, which had had a heavy impact on him and on other members of the family. The appellant had also suffered a serious decline in his health. In June 2021 he was diagnosed with Type 1 diabetes mellitus; in October 2021 he was diagnosed with diabetic retinopathy; and since December 2021 he had suffered anxiety and depression. By the time he was sentenced, the appellant required daily injections of insulin and was suffering a loss of vision which could lead to blindness.

21. Mr Newton submits that the judge failed to give sufficient weight to the combination of those important mitigating factors, and imposed a sentence which was too high in the category A range and was manifestly excessive.

22. On behalf of the respondent, Miss Morgan KC submits that the judge, who had presided over the trial, made a careful assessment of the appellant's offending in comparison with that of others referred to in the schedule and was entitled to conclude that the appellant was at the top end of the category range. It is submitted that the appellant was a core part of the continuation of the aims and objectives of NA and that his evidence at trial showed that he

maintained an extremist mindset.

23. It had initially been submitted in writing that the aggravating features of the case justified a sentence in excess of the category range and that the judge must therefore have made a significant reduction for the mitigating factors in order to arrive at his final sentence. That submission is no longer pursued. Miss Morgan, fairly and realistically, acknowledges that the long period of delay provides a significant feature of mitigation for the appellant.

24. We are grateful to both counsel for their very helpful submissions. This was on any view a serious offence of its kind. The aggravating features identified by the judge increased the seriousness of the offending and certainly justified an upwards adjustment from the guideline starting point before consideration of mitigation. The judge correctly identified the mitigating factors and took them into account in reaching his final sentence.

25. We hesitate to differ from the decision of an experienced judge who had the advantage of having presided over the trial and was therefore in the best position to assess the seriousness of the offending. We do, however, see merit in the grounds of appeal. We regard the following factors as important. First, the statutory maximum sentence for the offence was, as we have said, ten years' imprisonment. The top end of the offence range in the guideline was nine years' imprisonment. The effect of section 278 of the Sentencing Act 2020 was that the judge could not have imposed such a sentence with a custodial term in excess of nine years. Moreover, the judge's duty under section 59 of the 2020 Act was to follow the guideline and therefore to sentence within the offence range, unless satisfied that it would be interests of the interests of justice to do so. That is a high hurdle, and the judge said nothing to suggest that he felt it necessary to go outside the guideline. On the contrary, his reference to the top end of the range suggests that his notional sentence, before considering mitigating factors, was (or was near) nine years' imprisonment. It follows, with respect to counsel who drafted the initial

written submissions, that the proposition that the final sentence represents a significant reduction from the sentence in excess of nine years is, for two reasons, misconceived.

26. Secondly, whilst the judge was correct to say that the appellant's role in founding NA was a relevant factor in assessing his culpability, it was necessary to focus on his actions and his role during the indictment period. Applying that focus, and in all the circumstances of the case, a provisional sentence at or near the very top of the offence range was, in our view, excessive. A custodial term of around eight years, before considering mitigation, would in our view have been appropriate.

27. Thirdly, and with all respect to the judge, the mitigating factors were in our view significant. The appellant's comparatively young age when he committed the offence, his lack of previous convictions, and the fact that he had committed no crime during the long period between his arrest and his trial were important factors in assessing his criminality. The marked decline in his health during the long period of delay before he was charged – a period which was unexplained before the judge – meant that by the time he was sentenced the impact of imprisonment would be significantly heavier for him than it would be for most other prisoners. The collective weight of the mitigating factors required a greater reduction from the provisional sentence than the judge can have allowed.

28. These considerations taken together lead us to the conclusion that the custodial term imposed by the judge was manifestly excessive in length.

29. We therefore allow this appeal. We quash the special custodial sentence of nine years six months imposed below. We substitute for it a special custodial sentence, pursuant to section 278 of the Sentencing Act 2020 of eight years, comprising a custodial term of seven years and an extended licence period of one year.

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**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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