Neutral Citation Number: [2024] EWCA Crim 1012

IN THE COURT OF APPEAL
CRIMINAL DIVISION

On appeal from the Crown Court at Leeds
(Mr Recorder Simon Jackson KC)

Case No: 2024/01864/A4

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 25th July 2024

B e f o r e:

LORD JUSTICE SINGH

MRS JUSTICE CUTTS DBE

HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

AFEWERKI MUSSE

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr M Moore-Taylor appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Thursday 25th July 2024

LORD JUSTICE SINGH:

1. This is an appeal against sentence brought with the leave of the single judge.

2. On 29 January 2024, the appellant pleaded guilty at Leeds Magistrates' Court in respect of an immigration offence. He was committed for sentence to the Crown Court, pursuant to section 14 of the Sentencing Act 2020.

3. On 16 April 2024, in the Crown Court at Leeds, the appellant was sentenced by Mr Recorder Simon Jackson KC to 20 months' imprisonment. An appropriate statutory surcharge was imposed.

4. For present purposes the facts can be summarised as follows. The appellant is an Eritrean national. On 30 September 2023, he was travelling in a rigid hull inflatable boat in the English Channel. The vessel was intercepted within UK territorial waters by a Border Force vessel. The appellant was conveyed to the Immigration Reception Centre in Dover before being taken to an immigration triage centre. He was then housed in a hotel in Bradford. He was arrested at that hotel on 20 November 2023, following confirmation that he had made no application for a visa or entry clearance, nor had such clearance been granted to him.

5. During interview, the appellant made full admissions. He accepted that he knew that he had not been permitted to enter the UK without valid clearance, and explained that he had not been forced to travel and had undertaken the journey of his own free will. He told officers that he did not perceive himself to be in any danger in the UK. He explained further that he had travelled to Belgium in 2014 via Libya, France and Italy. He had made an application for

asylum in Belgium before receiving two custodial sentences there, which led to his asylum application being revoked upon his release and therefore his being required to leave Belgium. He then travelled through France before embarking on the boat journey to the UK.

6. Before this court Mr Moore-Taylor, who appears on his behalf, has told us that the appellant was rendered street homeless in Belgium but was unable to return to his home country of Eritrea. He had left in 2014 owing to what Mr Moore-Taylor submits were a well founded fear of persecution, in particular associated with compulsory conscription in Eritrea.

7. The maximum penalty for an offence of this type is four years' imprisonment. The offence arises under an amendment made to the Immigration Act 1971 and is now to be found in section 24(D1) and (F1). Also, because this was an attempt, there was a contravention of section 1(1) of the Criminal Attempts Act 1981. The offence was therefore attempting to arrive in the UK without a valid entry clearance.

8. There is no offence specific definitive guideline for this type of offence, but guidance has been given by this court in *R v Ginar* [2023] EWCA Crim 1121; [2024] 1 WLR 1264, in which the judgment of the court was given by Holroyde LJ, the Vice President of the Court of Appeal Criminal Division: see [17] to [27]. At [21] the court said:

> "… the predominant purpose of sentencing in cases of this nature will generally be the protection of the public. Deterrence can … carry only limited weight as a distinct aim in the sentencing of those who have travelled as passengers in a crossing such as that upon which the applicant embarked. The circumstances of those who commit offences of that kind, as opposed to those who organise them, will usually be such that they are unlikely to be deterred by the prospect of a custodial sentence if caught. …
>
> 22. … the following considerations are relevant as to culpability and harm. There is legitimate public concern about breaches or attempted breaches of border control, and this type

of offence, which is prevalent, will usually result in significant profit to organised criminals engaged in people smuggling. A key feature of culpability inherent in the offence, save in very exceptional circumstances, is that the offender will know that he is trying to arrive in the UK in an unlawful manner: if it were otherwise, he would take the cheaper and safer alternative route which would be available to him. The harm inherent in this type of offence is not simply the undermining of border control but also, and importantly, the risk of death or serious injury to the offender himself and to others involved in the attempted arrival, the risk and cost to those who intercept or rescue them, and the potential for disruption of legitimate travel in a busy shipping lane.

23. Those considerations lead to the conclusion that the seriousness of this type of offence is such that the custody threshold will generally be crossed and that an appropriate sentence, taking into account the inherent features which we have mentioned but before considering any additional culpability or harm features, any aggravating and mitigating factors and any credit for a guilty plea, will be of the order of 12 months' imprisonment.

24. Culpability will be increased if the offender plays some part in the provision or operation of the means by which he seeks to arrive in the United Kingdom, for example by piloting a vessel rather than being a mere passenger; or if he involves others in the offence, particularly children; or if he is seeking to enter in order to engage in criminal activity (for example by joining a group engaged in modern slavery or trafficking). Culpability will be reduced if the offender genuinely intends to apply for asylum on grounds which are arguable."

9. Finally, for present purposes, at [25] the court stated:

"25. Consideration of aggravating and mitigating factors must of course be a case-specific matter, but the following may commonly arise and will call for either an upwards or downwards adjustment of the provisional sentence. The offence will be aggravated by relevant previous convictions, by a high level of planning going beyond that which is inherent in the attempt to arrive in the United Kingdom from another country, and by a history of unsuccessful applications for leave to enter or remain or for asylum. Even if the previous attempts did not involve any criminal offence, the history of previous failure makes it more serious that the offender has now resorted to an attempt to arrive without valid entry clearance."

The court again stressed that the weight to be given to that factor will of course depend on the circumstances of each case.

10. Finally, we should observe that at [26] and [27] the court noted that the offence will be mitigated by an absence of recent or relevant convictions, and that there may often be powerful features of personal mitigation, to which appropriate weight should be given on a fact-specific basis.

11. In the present case the appellant was born on 1 February 1992. He was aged 32 at the date of sentence. He had four previous convictions for five offences, spanning the period from 28 Jue 2017 to 15 September 2021. These offences were all committed and dealt with in Belgium. They included production of drugs with intent to supply, attempted manslaughter, trafficking of a prohibited weapon and two offences of the illegal transportation of drugs.

12. We note that the sentencing court did not have a pre-sentence report. Nevertheless, we confirm, pursuant to section 33 of the Sentencing Act 2020 that in our judgment it was unnecessary and is now unnecessary.

13. In his sentencing remarks, after referring to the facts and the decision of this court in *Ginar*, the Recorder said that he was satisfied to the required standard that the appellant posed a serious risk to the public safety in the UK. He summarised the appellant's antecedents in Belgium. He was satisfied that that pattern of aggressive and sustained offending was such that the appellant presented a serious risk of committing serious criminal offences, both of drug dealing and violence. Against that background, the Recorder took the view that a custodial sentence was inevitable and appropriate.

14. The Recorder observed that, although deterrence is rarely a relevant issue, as this court had said in *Ginar*, an additional factor in the Recorder's view was the deterrent effect for criminally motivated migrants such as the appellant, who he was satisfied would be likely to continue a criminal lifestyle within the UK.

15. On behalf of the appellant, Mr Moore-Taylor submits, we think with some force, that there was no evidence before the sentencing court to substantiate that view.

16. Returning to the sentencing remarks, the Recorder concluded that the starting point for this offence would be 30 months' imprisonment. Giving full credit for the early guilty plea, that reduced the sentence to 20 months' imprisonment, to which we have already referred.

17. In the written Grounds of Appeal, Mr Moore-Taylor submitted that the Recorder imposed a sentence which was manifestly excessive, particularly for two reasons: first, that he erred in attaching too much weight to the appellant's antecedent record in Belgium; and secondly, that he erred in attaching too little weight to the appellant's mitigation.

18. We have been assisted by helpful written and oral submissions by Mr Moore-Taylor on the appellant's behalf. In his skeleton argument, Mr Moore-Taylor submits that the sentence was manifestly excessive for three essential reasons, each of which can be taken either individually or cumulatively. He submits: first, that the increase in culpability envisaged by this court in *Ginar* at [23] does not apply to the facts of this case; secondly, that the appellant's antecedent record in Belgium did not warrant an uplift to the 12 month starting point envisaged by this court in *Ginar* by as much as 18 months. He observes that that is a 250 per cent increase. Thirdly, he submits that too little weight was afforded to the appellant's mitigation.

19. Mr Moore-Taylor realistically concedes that the offence does – and had to – cross the custody threshold. He further realistically concedes that the sentence would inevitably have been one of immediate custody. Nevertheless, in his oral submissions before us he emphasises two points in particular. First, he submits that in so far as the Recorder appears to have taken into account that the appellant knew that he was entering the UK illegally, that would have been an error of approach, because this court had already explained in *Ginar* at [22] that that aspect of such cases is an inherent feature in the commission of the underlying offence in the first place. Secondly – and this has received prominence in Mr Moore-Taylor's submissions before us – he submits that at the end of the day the Recorder erred by simply giving too much weight to the previous convictions which the appellant had committed in Belgium. That resulted, accordingly, in a sentence which was manifestly excessive.

20. We see force in Mr Moore-Taylor's essential submissions. In our judgment, while an increase from the 12 months recommended in *Ginar* was warranted in this case – in particular having regard to the appellant's poor criminal record, an increase of the order of 250 per cent was not justified. In our judgment, the appropriate sentence after trial would have been one of 18 months' imprisonment. In view of the early guilty plea, the appellant is entitled to full credit of one third. That results in a sentence of 12 months' imprisonment.

21. For the reasons we have given, we quash the sentence of 20 months' imprisonment and substitute one of 12 months' imprisonment. To that extent this appeal is allowed.

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk