IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 2751 (Admin)

No. CO/840/2021

Royal Courts of Justice

Wednesday, 12 October 2022

Before:

MR JUSTICE LANE

B E T W E E N :

THE KING
on the Application of
MUIZARAJS — Appellant

- and -

THE PROSECUTOR GENERAL
OF THE REPUBLIC OF LATVIA — Respondent

MR M HAWKES appeared on behalf of the appellant.

MR J SWAIN appeared on behalf of the respondent.

J U D G M E N T

MR JUSTICE LANE:

1 This is an appeal against the decision of a district judge at Westminster Magistrates' Court, given on 1 March 2021, to order the appellant's extradition to Latvia. Permission to appeal was granted by Dove J on 20 October 2021.

2 There are two European Arrest Warrants ("EAW"). EAW1 concerns accusations. EAW1 was issued on 6 April 2020 and contains what is described as two offences of equivalent conduct to possession of controlled drugs with intent to supply, and the non-criminal conduct of having consumed a controlled drug.

3 Offence 1 is that on 17 January 2018, the appellant bought just over 2 grams of cannabis, which is designated in Latvia as a prohibited especially dangerous narcotic substance, which he kept for the purpose of onward supply, and then sold to another. The 2 grams weight of the drug is said to "exceed the quantity up to which it can be qualified as small". This was an offence contrary to section 2531 of the Criminal Law. It is punishable by a minimum sentence of two years' imprisonment, with a range of up to eight years.

4 Offence 2 is as follows. Despite being warned on 27 June 2017 about the consequences of using controlled drugs, on 13 February 2018 the appellant tested positive for cannabis and "MDMA/Ecstasy". The use of these drugs is an offence contrary to section 2531 of the Criminal law. It is punishable by temporary depravation of liberty of up to three months' community service or a fine.

5 EAW2 concerns convictions. Offence 1 is that on 27 March 2017 the appellant, who was then a student at Jelgava Technical School, bought 8.452 grams of cannabis for €110. The following day at the school he sold 2.8029 grams to one Renes Pleetz for €40. On 28 May 2017 he again sold 2.4984 grams to Mr Pleetz for €40, again on the school premises. The remaining 3.1507 grams were seized by police from the appellant's room in his school dormitory. As before, this amount exceeds the volume which is considered in Latvia to be "small"; and the cannabis was also treated as "an especially dangerous" substance. The conduct was contrary to section 2533 of the Criminal Law, which addresses supplying drugs to minors, or on the premises of educational establishments. On 30 January 2018, the appellant was sentenced to five years' imprisonment suspended for five years.

6 Offence 2 is as follows. On a date in April 2018, the appellant smoked some cannabis and consumed one pill of Ecstasy and MDA. As the appellant was warned on 27 June 2017 not to consume these drugs, when police discovered him in his dormitory on 12 April "under the influence of narcotic and psychotropic substances," he was arrested. On 29 June 2018 the appellant was convicted of an offence contrary to section 2531 of the Criminal Law, of having used these drugs, and sentenced to one month imprisonment. Also, and importantly, on 29 June 2018, the court activated the five-year suspended sentence and aggregated the two sentences so as to comprise five years and 15 days' of imprisonment with one year of probation.

7 The district judge discharged the appellant in respect of offence 2 in EAW1 owing to the length of the maximum sentence, namely three months. He ordered extradition in respect of the other matters in the EAWs.

8 Mr Hawkes brings the appeal to this court on the basis that the district judge was wrong to conclude that, in all the circumstances, extradition would be compatible with the appellant's

right to respect for his private life under Article 8 of the ECHR. Although Mr Hawkes makes a number of criticisms of the way in which the district judge undertook the Article 8 balancing exercise, the main thrust concerns offence 2 of EAW2. Relying on the judgment of the Divisional Court in *Hambleton v Callinan* [1968] 2 QB 427, Mr Hawkes says that the information from the Latvian authorities fails to show that the appellant's conduct in using cannabis and amphetamine would be a criminal offence if committed in England and Wales. In *Hambleton* Lord Parker CJ said:

> "Now what happened was this, that on October 20, the defendants were arrested by the police on suspicion of being in unlawful possession of drugs. They were asked for and gave urine samples, and on analysis it was found that the urine samples contained traces of this amphetamine powder. It was also found that the durophet tablets were in the amphetamine group and quite clearly the prosecution case was that the amphetamine powder, traces of which were found in the urine, had come from consuming durophet tablets.
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> It is to be observed that so far as this case stated is concerned, the prosecution contention was that when there is found in a man's urine traces of amphetamine powder, he is in possession of that powder, contrary to the Drugs (Prevention and Misuse) Act 1964. That Act provides: '. . . it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act . . .'; and it goes on to give exceptions, and there is: 'unless – (a) it is in his possession by virtue of the issue of a prescription . . . for its administration by way of treatment to him, or to a person under his care.' It was contended by the prosecution, and it has been contended here, that a man can be in possession of a prohibited substance within the meaning of section 1 of this Act if he has traces of it in his urine, in his intestines or any other part of his body in which can be found.
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> The justices felt that that was a wholly artificial conception and that once you have consumed something and its whole character had altered and no further use could be made of it, as in this case, a man could not be said to be in possession of the prohibited substance.
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> For my part, there is little I think that can be said in the matter. I am quite satisfied that the justices were right. Mr Tucker has said that there may be cases where a man, as it were, consumes something, puts it in his mouth or swallows it, such as a diamond or a gold ring, in order to conceal it, when nevertheless he may well be in possession of it. I entirely agree but when, as here, something is literally consumed and changed in character, it seems to me impossible to say that a man is in possession of it within the meaning of this Act, and accordingly I would dismiss this appeal."

9 Immediately thereafter, however, Lord Parker said this:

> "But before leaving the matter, I confess that I myself can see no reason why in another case the time when the possession is said to have taken place should not be a time prior to the consumption, because as it seems to me the traces of, in this case, amphetamine powder in the urine is at any rate prima facie evidence - which is all

the prosecution need - that the man concerned must have had it in his possession, if only in his hand prior to raising his hand to his mouth and consuming it. Accordingly, it seems to me that the possible difficulty that the decision in this case raises for the police does not arise in practice because the date of his possession can always be laid prior to the consumption."

10 *Hambledon* was followed by Lloyd Jones J in *Spitans v Riga Regional Court* [2012] EWHC 472:

"17. In the context of the present case, the question for consideration therefore is whether the conduct alleged in the warrant would necessarily constitute an offence contrary to the laws in force in this jurisdiction if committed here.

18. On behalf of the appellant, Mr Jesurum accepts that it is possible to infer from the conduct described in charge 2 in the warrant that there was a prior possession but he says that that is not a necessary inference and it is not possible therefore to conclude that the conduct in question would constitute the offence of possession of prohibited drugs if committed here. He gives examples of situations in which such an inference could not be drawn, for example the administration of drugs by another, which would not involve prior possession. For present purposes, it is enough for me to say that I consider that that is not a entirely fanciful example.

19. In response, Mr Sternberg submits that in the circumstances of the present case it is appropriate for the court to look at the conduct described in charge 2 in the context of the warrant as a whole and in particular in the light of the conduct alleged in charge 1. He says that when it is read in that context it becomes a necessary inference from the conduct described in charge 2 that the appellant was in possession of the drugs.

20. Charge 1 is set out in very specific terms. It alleges that in a time and place not precisely established, the appellant illicitly acquired from an unidentified person quantities of drugs, it describes the containers in which they were wrapped and it says that he had them in his possession at the sentence execution place of Matisa prison. It then goes on to allege that whilst he was there on 4 January 2008 at about 00.15 am, for the purpose of surrendering those drugs to another person, namely to distribute them, he packed them into an empty cigarette packet with the cell number on it for whom it was meant and lowered it with a string through the cell window, with the intention that it should be collected one floor down, trying to surrender it to a person not identified but whose nickname was identified and whose cell number was identified. It appears from the description in charge 1 that he was unsuccessful in that intention.

21. Mr Sternberg says that when the second charge is read in the light of the first charge it becomes a necessary inference that he was in possession of the drugs described in the second charge and indeed he draws attention to the fact that the drugs were of the same type.

> 22. The difficulty with Mr Sternberg's argument is that count 2 alleges the place where the offence was committed – that is the same place that is identified in count 1 – but the period of time during which the offence is said to have been committed is, on my reading of charge 2, a period between 25 June 2007 and 4 January 2008. Therefore, whilst it may well be a possible inference from the description of the conduct set out in charge 2 that it occurred at the same time as the offence described in charge 1, that is not a necessary inference.
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> 23. I have come to the conclusion that there are insufficient particulars in the warrant to conclude that it is necessary to draw the inference for which Mr Sternberg contends, even when one considers charge 2 in conjunction with charge 1. The outcome for which he contends is one possible inference, it may be a likely one but it is not an inevitable one. Furthermore, I do not consider that in the particular circumstances of this case it is appropriate to interpolate other conduct which is not particularised in the warrant in order to satisfy the requirements of the statute."

11 With these cases in mind, I turn to the description provided by the requesting authority in respect of offence 2 in EAW2:

> "In April 2018 a date, time and place that was not exactly identified during the criminal procedure, while being in the dormitory of Jelgava Technical School in Jelgava, the appellant, being warned about the criminal liability for illegal use of the narcotic and psychotropic substances by smoking of cigarette illegally used the narcotic substance cannabis (marijuana) as well as used the psychotropic substance amphetamine, namely 1 pill of Ecstasy and MDA.
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> On 12 April 2018 at about 09.50 o'clock in Jelgava, in the dormitory of Jelgava Technical School, the appellant, who was under the influence of narcotic and psychotropic substances, was detained by the police officers."

Is it a "necessary inference", (to use the phrase employed by Lloyd Jones J) from this description, that the appellant was in possession of the cannabis and the amphetamine. Mr Swain submits that it is. He places particular reliance on the appellant being described as "smoking of cigarette illegally". I respectfully disagree.

12 In my view, it is noteworthy that the date, time and place, are all said to be "not exactly identified". This is understandable where the offence is one of "using" a drug, and where it is presumably sufficient for the accused to have been observed by police after consuming the drug to be "under influence of a narcotic and psychotropic substances" as the description has it. But, as the case law makes plain, a different matrix is required for the offence of possession. It is unclear at best whether the "smoking" was observed by the police or, indeed, by anybody else. In any event, there is nothing in the description which begins to show in what way the appellant may have had the amphetamine in his possession.

13 The result is that the district judge should have discharged the appellant in respect of offence 2 in the EAW2. As a result, his Article 8 analysis was flawed because it failed to take account of this fact.

14 Mr Hawkes says that removing offence 2 has important consequences for the determination of this appeal. It was the appellant's conviction for offence 2 that led to the activation of the five year sentence in respect of offence 1; that is, the supply of two amounts of about 2 to 3 grams of cannabis to fellow students at the technical school at which the appellant was studying. The appellant was then 17 years old. As a result of this activation, the appellant now faces a minimum of five years imprisonment for what Mr Hawkes submits is, in reality, not a serious offence. The appellant was a minor at the time. It was his first offence. He was not, as is plain, dealing for profit. He was not, as Mr Swain would have it, a "street trader".

15 Mr Swain says that whether or not offence 2 in EAW 2 is extraditable, it still was an offence under the laws of Latvia and so, the activation of the suspended sentence in respect of offence 1 was, therefore, lawful. All that is, of course, true; but to stop there, in my view, misses an important point. The fact that the suspended sentence was activated in these circumstances is a relevant factor in the overall proportionality exercise that is demanded by Article 8(2). It is part of the broader point made by Mr Hawkes, that if one steps back and considers matters overall, the appellant is facing extradition to serve at least five years immediate imprisonment, for an offence which would not attract a custodial sentence if committed in England and Wales, certainly not one of five years in the circumstances, and which is not of "great gravity" when compared with the general range of criminal offending irrespective of the sentencing regime in this jurisdiction.

16 In that regard, Mr Hawkes relies upon the observations of Lady Hale in *H(H) v The Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, and the judgment of Fordham J in *Lipski v Regional Court in Poland & Anor* [2020] EWHC 1257 (Admin). At paragraphs of 43 and 44 of that case, Fordham J said as follows:

> "43. The fact that the court in the UK does not 'second-guess' the decisions of the requesting judicial authority, so far as sentencing and activation are concerned, restricts the contentions that can be made by an appellant as to his conduct and as to how it is to be viewed. But Lady Hale's observation remains intact. It remains appropriate, without 'second-guessing' the authorities of the requesting state, to weigh in the balance 'the nature and seriousness of the crime or crimes involved', in evaluating the weight to be attached to the public interest in extradition in the particular case. In the event, before me, both counsel were agreed as to the way in which that exercise is appropriately performed. The appropriate comparison to be conducted is not between (a) the way in which the Polish authorities have characterised and responded to criminal conduct and (b) the way in which the UK authorities would do so. The appropriate comparison, rather, is between: (i) the conduct in the present case, including the way in which it has been characterised by the Polish authorities; and (ii) other conduct on the spectrum of criminal behaviour. That is an entirely appropriate, indeed necessary, exercise for the UK court to conduct.
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> 44. Again, the point is well illustrated by considering the H (H) case. In the individual case which succeeded before the Supreme Court Lady Hale was considering that issue when she described the theft and fraud offences as 'by no means trivial… But… offences of dishonesty which can properly be described as 'of no great gravity'.' (paragraph 45) She returned to the same issue when (paragraph 71) contrasting

> the "comparatively routine crimes of dishonesty" in that case, with the "major drug smuggling conspiracy, persisted in over many months" in the individual case which failed. Lord Hope was considering the same issue when (paragraph 95) he referred to the offences of dishonesty in the first case as 'not trivial,… Relatively minor and certainly not of the kind that could be described as seriously criminal', and went on to consider (paragraph 92) the case of "serious professional cross-border crime involving trading in narcotic drugs". They were not comparing what the requesting state's sentencing court would do about criminal conduct with what a UK sentencing court would do with that same conduct. They were comparing crimes with other crimes. That is the relevant exercise. It is the way in which 'weight' is 'attached … in the particular case', to the public interest in extradition, to 'vary according to the nature and seriousness of the crime or crimes involved'."

17 I accept that there is no international consensus on the harmfulness of cannabis and on whether, and to what extent, its use or possession should be criminalised. But it is, in my view, appropriate to recognise what the appellant did in committing offence 1 in EAW2 was, on any view, not on a par with commercial drug dealing. The appellant says, and it is not disputed, that those to whom he supplied the cannabis were friends and fellow students. There is no evidence that they suffered harm as a result of what the appellant did. It was his first offence. It occurred when he was a minor. There is no evidence that he was required to go on any rehabilitation course, as one might find in other jurisdictions.

18 For the accusation matter, (offence 1 in EAW1), section 21A of the Extradition Act 2003 ("the 2003 Act") requires me to consider not only the seriousness of the alleged conduct but also the likely penalty that the appellant might receive in Latvia. The appellant seeks to rely upon an expert report of a Latvian lawyer, which was filed after the district judge's decision had been handed down. Mr Swain, rightly in my view, submits that the requirements of section 27(4)(a) of the 2003 Act are not satisfied as regards that part of the report. Nevertheless, this court is required by statute to reach a view on likely penalty. Given that the offence carries a two-year minimum penalty, there is, regardless of the report, a strong likelihood that, if extradited, the appellant will face a sentence of at least two years, in addition to the five year sentence in respect of offence 1 in EAW2. I agree with Mr Hawkes that the general guidance given under section 2(7A) of the 2003 Act in respect of section 21A is a "floor" rather than a "ceiling". In other words, it is open to a court to find that extradition in respect of an accusation warrant would, in all the circumstances, be disproportionate, even if extradition for the accusation offence is not *per se* to be categorised as disproportionate in terms of that guidance. This is unsurprising, since the Article 8 balancing exercise is holistic in nature.

19 The appellant invokes delay on the part of the authorities in dealing with him in respect of the offences when the appellant returned to Latvia from the United Kingdom, as he did on a number of occasions. Mr Swain very fairly acknowledges some fault on their part in this regard, albeit that he points out the appellant is a fugitive. I should say here that the evidence on returns to Latvia that I have considered does not include the recently filed travel documentation, as this cannot be admitted because it does not satisfy the test in section 27(4) of the 2003 Act.

20 There is also, importantly, the evidence concerning the electronically monitored curfew which has been imposed upon the appellant as a condition of his bail. The appellant has been subject of bail conditions, which include residence, and an electronically monitored

curfew between 10 p.m. and 5 a.m., that is to say seven hours. This condition has been in force for over two years and two months, since his arrest on 6 August 2020.

21 The expert report in this regard, which I do consider satisfies the requirements of section 27, and to which I therefore have regard, states that it is only a possibility that this period would be taken into account in part or at all at any sentencing hearing in Latvia. It is axiomatic that a tag curfew of nine hours duration must be then taken into account in the case of most UK imposed sentences. That does not, of course, have direct application in terms of the present case, given that the number of hours is fewer than nine. However, the courts have accepted that a restriction on a requested person's liberty, as part of their extradition bail conditions, is a legitimate factor to take into account as part of any Article 8 balancing exercise: see *Einikis v Lithuania* [2014] EWHC 2325 (Admin). In that case Ouseley J, dealing with a curfew of less than nine hours, held that it was material to the Article 8 question, saying at paragraph 14:

> "I have to bear in mind that the appellant has undergone a degree of deprivation of liberty through the curfew between 21.00 hours and 05.00 hours over the period of one year seven months, even though not itself qualifying as a period to be deducted from sentence, and I have to take into account the element of restriction imposed by the reporting three days a week over a similarly extended period. The disruption to the well-being of the child and to the family circumstances will be very significant."

It is significant to note that that case involved domestic and commercial burglary and an activated sentence of 19 months' imprisonment. A similar approach was recently endorsed by Fordham J in *Prusiano v Romania* [2022] EWHC 1929 (Admin).

22 I agree with Mr Hawkes that the factor of the curfew goes to answering the impunity question, given the low level of gravity with which we are concerned in the present case. It amounts to an issue or evidence which is now available, and therefore satisfies section 27(4) of the 2003 Act. It is a matter to which I have regard in the overall balancing exercise.

23 The appellant's evidence is that he reacted badly when he was in detention for a short period of time in Latvia, and when he was also briefly held in His Majesty's Prison Wandsworth. That is far from being evidence that the appellant has a condition of mind or body that would make prison disproportionately harsh for him. What this unchallenged evidence does, however, go to show in my view is that the appellant has been left in no doubt of the future that he may face if he were to continue using drugs. It is of a piece with the evidence that, since coming to the United Kingdom the appellant has broken with drugs and is now a young man with a spotless record in this country. He is in steady employment here.

24 In striking the Article 8 balance, I have regard to the importance of maintaining this country's international obligations as regards extradition and in ensuring that this country is not seen as a safe haven for fugitives. Indeed, I have regard to all the matters listed by the district judge at paragraph 30 of his judgment in the present case.

25 For the reasons that I have articulated, however, I find that, even bearing in mind that the appellant is relying on his private rather than any family life, his extradition in respect of offence 1 in both EAWs 1 and 2, would be a disproportionate interference with the appellant’s Article 8 ECHR rights. Besides the factors weighing on the appellant’s side of the balance, the remarkably lengthy sentence of imprisonment for the offences is strikingly disproportionate. I therefore find myself in agreement with Mr Hawkes' submissions, and

must disagree with the submissions of Mr Swain, albeit that they were most forcefully and elegantly put. Therefore, the appellant is entitled to be discharged in respect of all matters.

26 This appeal is accordingly allowed.

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