IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 818 (Admin)

No. CO/1315/2021

Royal Courts of Justice

Tuesday, 22 March 2022

Before:

THE HONOURABLE MR JUSTICE HOLMAN
(sitting in public)

B E T W E E N :

ADRIAN LUCKI — Appellant

- and -

REGIONAL COURT IN BYDGOSCZ (POLAND) — Respondent

MRS A. GRUDZINSKA (instructed by Hollingsworth Edwards Solicitors) appeared on behalf of the Appellant.

MS M. SMITH (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 against an order for extradition made by District Judge Griffiths in the Westminster Magistrates' Court on 6 April 2021. I wish to stress at the very outset of this judgment that I do not in any way whatsoever criticise anything that the district judge said or did in her judgment and her decision as at the time she made it, namely, almost one year ago. This is, however, a case in which the circumstances, as they are today, are now radically different from what they were at the time that the district judge dealt with this case, as I will shortly describe. It is, accordingly, a case to which the provisions of section 27(4) of the Extradition Act 2003 apply.

2 The appellant is now aged 38. He has lived here in England since April 2012, namely, now for ten years. The warrant was issued in September 2020 and the appellant was arrested on 26 December 2020. The warrant is a mixed conviction and accusation warrant. So far as the conviction matters are concerned, there were four convictions on serious offences of making threats to kill various different people, and on one of the occasions presenting a knife, and on another of the occasions presenting a knife and a board spiked with nails. Those offences had been committed in a period between 18 April and 13 July 2011. The appellant was prosecuted and convicted and sentenced to a total sentence of eight months' imprisonment, which was initially suspended but later activated. At the time of the hearing before the district judge, several weeks of that sentence of eight months' imprisonment remained to be served, even after taking account of the time that the appellant had spent remanded in custody following his arrest in December 2020.

3 The accusation element of the warrant related, and relates, to an alleged offence committed on 25 February 2011. It is important to stress that the appellant never had the slightest

knowledge of that allegation until he was arrested on the European Arrest Warrant and he does deny that he committed the offence alleged. It is alleged that he obtained a cash loan, having an equivalent value at the date of the extradition hearing of about £6,500, by using a forged certificate of employment and of his earnings. In essence, he fraudulently represented to the lender that he was in certain employment and earning a certain level of income when, in truth, he was not.

4 The district judge decided, compendiously, that she should make an order for extradition. In relation to the conviction element of the warrant, she was very clear that the appellant was a fugitive from justice. In relation to the accusation element of the warrant, she was equally clear that he was not a fugitive, as he had never been arrested nor ever even been informed of the investigation in Poland into the alleged fraud.

5 One of the defences raised against extradition in relation to the accusation offence was that of proportionality under section 21A of the Extradition Act 2003. That section requires the court to consider certain specified matters and none other in relation to proportionality. They are the seriousness of the conduct alleged, the likely penalty that would be imposed if the requested person was found guilty of the extradition offence, and the possibility of the relevant foreign authorities taking measures that would be less coercive than extradition.

6 The district judge duly and conscientiously considered, in turn, those specified matters. So far as the seriousness of the alleged conduct was concerned she said that "the offence is not insignificant" and that "I do not find the offence is a trivial offence". So far as the likely penalty is concerned, she said as follows,

> "I do not know what the likely penalty or sentence would be should the RP be convicted of this offence. The offence carries a maximum sentence of eight years' imprisonment. The offence is not insignificant and the RP has previous convictions from Poland, including an offence of dishonesty. The RP has received sentences of imprisonment for other offences in Poland. In this jurisdiction, the conduct, namely, fraud, I find would fall into Category 4B of the Sentencing Council Guidelines. The offence is not one of lesser

> culpability as I do not find any of those factors are present. The RP is said to have obtained two documents, which were false, to support the application for loan which clearly identifies a degree of planning. The starting point for the offence in Category 4B is 26 weeks' imprisonment. Whilst the starting point is based on £12,500 and this offence is towards the lower end of that category, the RP has previous convictions, including that of dishonesty. I am satisfied that a custodial sentence is the likely penalty in this matter, should he be convicted."

Pausing there, I absolutely agree with the assessment of the district judge that a custodial sentence is the likely penalty in this matter should he be convicted.

7 As I have stated, by the time of the hearing in front of the district judge the appellant had not even served the whole of the custodial term that had been imposed in relation to the conviction offences, so he had not, of course, served any time at all towards the accusation offence. The situation now is, however, that, as of 8 May 2021, this appellant had fully served the whole of the eight months' imprisonment in relation to the conviction matters. He has remained remanded in custody continuously since that date and it has been calculated that, as of today, he has served an additional 318 days of qualifying remand, or about ten months and 14 days.

8 A very real question, therefore, now arises as to the likely penalty that would be imposed if the appellant was found guilty in Poland of this accusation offence. No information has been supplied by the judicial authority in Poland as to the likely penalty. I note from the passage of her judgment that I have recently quoted that the district judge considered that the starting point for this offence, if convicted here, would be of the order of 26 weeks' imprisonment. As she herself said, that would be likely to be increased to reflect that this appellant was not of previous good character and that, in particular, he already had a conviction in Poland in 2007 for an offence of theft for which he was ultimately sentenced to 135 days' deprivation of liberty. There is no information as to the circumstances of that theft nor of the value of the item or items stolen. But, even if that starting point of 26 weeks

was considerably aggravated and increased, it would be unlikely, domestically, to exceed the ten months and 14 days that he has already actually served.

9 Ms Miriam Smith, who appears on behalf of the respondent judicial authority and has been extremely cogent in both her written and oral submissions, says that in the end it is not the domestic tariff that is in point but what the requesting court would be likely to impose. I agree with that submission. If there was evidence before me as to the likely penalty, then I would be likely to attach very considerable weight to that evidence, depending, of course, on its source and how convincingly it was supported. But there simply is no evidence at all from Poland, and yet section 21A requires the court to come to some view as to the likely penalty. I know that for a theft in 2007 he received 135 days' imprisonment. I know that for these four very serious convictions, he received, in aggregate, eight months' imprisonment. I know that the starting point here would be about 26 weeks' imprisonment. Doing the best I can, pulling together all those strands of information, it seems to me that the likely penalty that would be imposed for this particular fraud committed in 2011, and involving the equivalent of about £6,500, would not exceed about ten months and 14 days, which this appellant has already served on qualifying remand. It seems to me, therefore, that it is likely that he has already now served in full any penalty that would be likely to be imposed in Poland in relation to the accusation offence.

10 Ms Smith quite properly draws my attention to paragraph 39 of the authority of *Miraszewski v. Poland* [2014] EWHC 4261 (Admin.) in which, at paragraph 39, the Divisional Court pointed out that there may be importance in the very fact of prosecution and conviction. They said there,

> "While the focus of subsection (3)(b) is upon the likelihood of a custodial penalty it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate. If an offence is serious the court will recognise and give effect to the public interest in prosecution. While, for example, an offence against the environment might be unlikely to attract a sentence of immediate custody the

> public interest in prosecution and the imposition of a fine may be a weighty consideration …"

I fully understand and accept that point, but it does not seem to me that the facts and circumstances of the present case require an abstract prosecution independent of the likely sentence on conviction. The offence is, of course, of some seriousness, but not the utmost seriousness. It was allegedly committed now 11 years ago.

11 In my view, the circumstances as they now are in this case do, in the language of section 27(4) of the Extradition Act, raise an issue and involve evidence (namely as to the continuing period in remand) that was not available at the extradition hearing. In my view, the issue and evidence would necessarily have resulted in the district judge deciding a question before her at the extradition hearing differently. She would have to have decided that this appellant has now served the full amount of the likely penalty. In my view, if the district judge had decided the question in that way, she would have been required to order the person's discharge. So I stress again that I make no criticism whatsoever of the manner in which the district judge decided this case in April 2021, but now, today, I allow the appeal. I order the appellant's discharge and I quash the order for his extradition.

CERTIFICATE

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