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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

[2018] EWHC 124 (Admin)

CO/1314/2017

Royal Courts of Justice

Monday, 15th January 2018

Before:

MR JUSTICE EDIS

B E T W E E N:

BIESEK Appellant

- and -

J U D G M E N T

A P P E A R A N C E S

MS A NICE(instructed by HP Gower) appeared on behalf of the Appellant.

MS L COLLINS(instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

MR JUSTICE EDIS:

1. This is an appeal against the order of District Judge McPhee made on 10th March 2017 when he ordered the extradition of the appellant further to a European Arrest Warrant issued by the Judicial Authority in Poland on 26th October 2016 and certified by the National Crime Agency in the United Kingdom on 7th November 2016.
2. As Ouseley J pointed out when granting permission to appeal, the district judge appears to have fallen into error in two respects, each of which is of some potential significance. The first relates to the offences for which the sentence of imprisonment which this warrant seeks to enforce was imposed. In fact, the offences were possession of cannabis and supplying of cannabis in 2011 when this appellant was 18 years old. The supply was non-commercial sharing within, I think, the family. The district judge understood that there had been in addition an offence of affray. Later in his judgment, he referred to the seriousness of the offences as a factor counting against the appellant. In my judgment, that is an indication of a factual error of sufficient importance to require this court on appeal to consider the proportionality balance afresh, and on the basis of the facts as I hope I have accurately reported them.
3. It appears also that the district judge fell into error in his assessment of a decision in the Polish court on an application for clemency, but, given what I have said in

relation to the nature of the offences, it is unnecessary for me to go further into that.

4. This is, therefore, a case in which I on appeal am retaking the extradition decision afresh. I do so well knowing the critical decisions of the higher courts in relation to the issues which arise in this case. In particular, I have in mind *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 and *Celinski v Polish Judicial Authorities* [2015] EWHC 1274 (Admin) . It is unnecessary for me to quote from either of those decisions or any other; this is a factual decision specific to this case in which I do not seek to establish or apply any novel legal principle at all.
5. The district judge followed the appropriate practice as established in those decisions of creating a checklist of factors in favour and against the requested person. There is nothing wrong with those lists, except for his erroneous classification of the seriousness of the offences which I have already described.
6. Matters have moved on since the case was before the district judge, in that the child of the appellant has been born and his family life in England enhanced to that extent. The district judge's checklist identified the following matters in favour of the requested person. First, the hardship he would suffer were he to be extradited. He is settled in England; he has work and a home and those things would be threatened by extradition, even if the period of time that he was required to remain in Poland in consequence of it was quite short. Second, the importance of the family life now established in England, where he has worked openly and legally, remains true and is of somewhat greater force in view of the birth of the child than it was when things stood before the district judge. Thirdly, the time since the commission of the offences and his age (18) at that time. Fourthly, the fact that he has no convictions in the United Kingdom. Fifthly, the district judge referred to the child who was then expected. Sixthly, the district judge referred to some evidence about the health of the appellant and that of his partner, to which ultimately he accorded relatively little weight for reasons with which I agree. Finally in this part of his checklist, he referred to his family in the United Kingdom, which includes not only his partner and child but also two brothers who now live here.
7. In favour of extradition, the district judge referred to five factors. Firstly, the seriousness of the offence with which I have already dealt. He concluded that the seriousness of the offences was such that it would likely lead in this jurisdiction to return to prison even in the family circumstances outlined. That is a conclusion which is far less potent in the light of the facts of the offending as now understood. Secondly, the district judge referred to a very important consideration, namely the obligations on the United Kingdom to comply with Treaty obligations. Thirdly, the need to avoid the United Kingdom becoming a safe haven for fleeing criminals. Fourthly, the public interest in extradition. Finally, the determination of the judge in Poland that he should serve a sentence, relying in particular on para.

13(2) of the judgment of Lord Thomas LCJ in *Celinski*. The United Kingdom courts should respect the importance of foreign courts being able to enforce the terms of a previously suspended sentence. Effectively, this sentence of eight months was suspended on various terms which the appellant entirely failed to honour because he left the jurisdiction of Poland.

8. That balance, adjusted for the facts as I have indicated, now falls to be considered by me. I adjourned the case in November in order to seek some further information from the Judicial Authority about the state of the proceedings in Poland. I had some information from the appellant's Polish lawyer, but because the lawyer had predicted the outcome of proceedings with some confidence but wrongly, it seemed to me that I should accord the Judicial Authority the opportunity to inform the court about how things actually stand there. I am very grateful to the Judicial Authority for the assistance which it has provided to me.
9. The position appears to be that the application to revoke the sentence has failed and did not involve any consideration of the appellant's family life or personal circumstances. An application to defer the imposition of the prison sentence also failed. That would have involved consideration of the personal circumstances of the appellant, although the court was not informed about the birth of the child.
10. If returned to Poland, it will be open to the appellant to apply for conditional release and also to seek an order that he should serve his sentence by electronic tagging in the community. That is subject to certain conditions, but it would be an application that he could make. I do not have sufficient information to know with confidence what the outcome of those applications would be, but the evidence shows that it is likely that if the appellant is returned to Poland he would serve a short period of time in prison prior to being released. Exactly how long that would be is difficult to estimate because he has been subject to a degree of restraint upon his liberty in these proceedings in the United Kingdom: he was arrested almost exactly 12 months ago and has been subject to a curfew ever since. The Polish court would take that into account, but precisely how it would be reflected in any order that it might make is not known.
11. In all those circumstances, I have to consider whether, having regard to the public interests in extradition which I have firmly in mind, it would be proportionate to order the extradition of this appellant now. It appears to me that the offences for which he was sentenced were not on any view and in any jurisdiction of great gravity within the calendar of criminal offences. Non-commercial sharing of cannabis is very much at the lower end of seriousness of criminal offending. When it happened the appellant was 18 years old. He has not offended again in the seven years or so which has elapsed since. His personal circumstances have changed entirely since then, in that he is now established in this country with a family and a young child.
12. In all of those circumstances, it appears to me that on the specific facts of this case, applying the *Celinski* balance as I do, it would be disproportionate now to

order his extradition, the effect of which would probably be a short period of incarceration followed by release. This would enable him to return to the United Kingdom at some point in the relatively near future to resume his family life, but it would have been significantly harmed in the meantime.

13. For those reasons, and principally because of the age of the offence and its true gravity, and because of the way in which the appellant has conducted himself since and because of his family life and because of the interests of his child, I propose to allow this appeal and order his discharge.

14. Thank you both very much indeed.

MISS NICE: Thank you very much, my Lord. There will be one application and that is for the appellant's reasonable travel expenses. That is something the court can order under s.61 of the Act.

MR JUSTICE EDIS: Who pays them?

MISS NICE: It comes out of central funds. I can put in a schedule with the relevant law, if that would assist the court, after I've taken instructions about the full cost of travel. It will be a very modest sum.

MR JUSTICE EDIS: Where does he live? I can't just remember at the moment.

MISS NICE: Rugby.

MR JUSTICE EDIS: And he has had to come to the magistrates' court and twice to this court.

MISS NICE: Yes. But the practice of the lower court is often to have a schedule put in with those expenses and for the judge to make a decision thereafter.

MR JUSTICE EDIS: I mean, if I just say £30 for three day-returns from Rugby to London, it's probably about right, isn't it? I don't want to incur lots of expense or trouble for anyone.

MISS NICE: Very grateful. Thank you very much.

MR JUSTICE EDIS: All right. Well, I will allow travel expenses assessed in the sum of £30 for each journey.

MISS NICE: Thank you very much, my Lord.

MR JUSTICE EDIS: Thank you very much.

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This transcript has been approved by the Judge.

