Rinkevicius v Lithuania

IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION THE ADMINISTRATIVE COURT *[2018] EWHC 145 (Admin)*	CO/3164/2017

Royal Courts of Justice

Wednesday, 17th January, 2018

Before:

MR JUSTICE OUSELEY

B E T W E E N:

RINKEVICIUS Appellant

- and -

PROSECUTOR GENERAL'S OFFICE, LITHUANIA Respondent

J U D G M E N T

A P P E A R A N C E S

MR J SWAIN(instructed by Sonn MacMillan Walker Ltd) appeared on behalf of the Appellant.

MR R EVANS(instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

MR JUSTICE OUSELEY:

1. This is an appeal against the decision of District Judge Inyundo at Westminster Magistrates' Court ordering the extradition of the appellant to Lithuania to face trial on one charge of forging a document for the purposes of fraud. The sole issue is whether the District Judge ought to have ordered the appellant's discharge pursuant to s.21A of the Extradition Act 2003. The judge had to decide whether his extradition would be disproportionate taking into account - and only taking into account - the statutorily specified matters in s.21A(3). Those matters are:

> "(a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D."

If extradition would be disproportionate the individual must be discharged.

2. The Practice Direction to the Criminal Procedure Rules Part 50 offers general

guidance in relation to the operation of s.21A and the seriousness of the conduct. A number of offences are tabulated. One is "Minor financial offences (forgery, fraud and tax offences)". It says:

> "Where the sums involved are small and there is a low impact on the victim and/or low indirect harm to others, for example (...)
>
> (d) Obtaining a bank loan using a forged or falsified document."

3. Whilst that language does not precisely reflect what it is alleged that the appellant did, it is the nearest analogy and such analogous application of the provisions is not ruled out. A number of exceptional circumstances are referred to which mean that the table may be disapplied. Those include significant premeditation.

4. The guidance says that if an offence falls into one of the categories to which I have referred, the judge should generally determine that extradition would be disproportionate unless there are exceptional circumstances. The relevant part of the EAW was as follows, in box (e):

> "2. Furthermore, in February 2011 (...) in Lithuania (...) [the appellant], acting deliberately and being aware of the fact that UAB 'Litmosa' (...) had not taken over any property from the former director of UAB 'Litmosa', Valentina Radikiene, produced a false document, namely, Act of UAB 'Litmosa' Property Transfer-Acceptance wherein he specified that on the grounds of financial leasing contract (...) V. Radikiene transferred to him as the new director of UAB 'Litmosa' the property belonging to UAB 'Siauliu banko lizingas' and he also signed this act, thus confirming the information which did not correspond to true facts with his signature."

Thus he was charged with forgery of administrative documents and faced a maximum sentence of three years, although it could be punished by a fine or, it is said, by arrest.

5. That was not the only offence in the warrant. There was an earlier offence of failing to preserve accounting documents. The District Judge, however, discharged the appellant in respect of that offence, because it was not an extradition offence. Nothing in the description of the first offence has any useful information in relation to the second offence.

6. The question of s.21A was raised not, it appears, at the initial hearing but was certainly raised a couple of weeks before the final hearing on 9th June. Neither then nor subsequently has any further information been obtained about the second offence from the requesting judicial authority. Further information was, however, provided by the appellant. This arose because there had in fact been a conviction of him and his co-defendant, Valentina Radikiene, which had been appealed successfully and the success of that appeal led to the need for a trial in

relation to which the EAW that I am concerned with was issued.

7. The appellant gave evidence that he had been told by his solicitor some months after the hearing of the appeal that a fine had been imposed on him of approximately £12,500 and that he had been given nine months' probation. He was not aware of any of the details of the probation. He had not paid the fine. It appears that there was a fine and no custodial sentence, because he gave evidence that the Lithuanian police contacted his parents in Lithuania chasing payment of the fine. There was no evidence as to the value of the property transferred by virtue of the instrument forged, allegedly, by the appellant. The appellant has denied that he forged any document or this one.

8. When the District Judge came to consider s.21A , he said that he had already concluded that this offence was serious, attracted a significant maximum sentence and was an allegation of premeditated dishonesty for material gain. At para.45, he considered the specific issues and concluded that extradition would not be disproportionate.

9. The District Judge made no findings, because he was not in a position to do so, about the value of the property at stake in relation to the second offence. The appellant provided no information about it, but that is understandable because he denied any knowledge of the offence or participation in it. The judge did not comment on the implications of the evidence given by the appellant as to the sentence imposed when he had been convicted of both offences, although a lesser sentence could be anticipated in respect of offence 2 alone. Nor could he appraise their relative gravity.

10. The wording of s.21A provides no indication as to who bears the burden of demonstrating what the seriousness of the offence is or what the likely sentence is. Section 206 requires the burden of proof on extradition issues to be determined as if these were proceedings for an offence.

11. I conclude that it is for the requesting judicial authority, where an issue under s. 21A is raised, to show that the offence is not excluded by virtue of s.21A. This is no great burden; it is a commonplace for the EAW to contain details as to the value of the items alleged to have been stolen or the value of the fraud. Indeed, it seems to me to be clear that one cannot expect a person against whom an offence is alleged but not yet convicted, to have to say, for example what the value was of the items allegedly obtained dishonestly. His case may be, as the appellant says here, that he knows nothing about it. If not in the EAW itself, further information could have been requested and if not in time for the extradition hearing, it could have been made available for this appeal.

12. So far as the sentence is concerned, it is important to note that the language of the Act concerns the likely sentence and is not related to the maximum sentence in any direct way. Indeed, the table in the Practice Direction is concerned with likely sentence rather than with maximum, otherwise it simply makes no sense.

13. The District Judge made no findings about the evidence given by the appellant. After all, this was second-hand evidence provided by a lawyer who had shown that he was prepared, on the appellant's evidence, to lie to the Lithuanian courts about the reasons for the appellant's non-attendance. But if not accepting that evidence, there was no reason for him not to accept that there was a non-custodial sentence and then deal with it on that basis in the absence of any information from the requesting judicial authority specifying what had happened.

14. Mr Evans for the CPS says that a fine of £12,500 is a significant penalty, one that shows the seriousness of the offence even if the less serious offence of failing to keep proper accounting records formed part of the total for which the sentence of a fine of £12,500 and probation for nine months was passed. In my judgment, the court was not in a position to reach a view on the seriousness of the offence in a way unfavourable to the appellant in the absence of any information from the requesting judicial authority. I accept that there is bound to have been, as with all forgery and fraud cases, a degree of premeditated dishonesty but that cannot make it an offence that falls outside the scope of the tabulated provisions. I am not persuaded at all, nor did the District Judge suggest that he was either, that the exception in relation to significant premeditation applied. There is nothing in the description of the facts to show that there was any more premeditation than that required to produce a single forged document.

15. The District Judge ought, on the state of evidence before him, either to have accepted that he had no information at all about the likely sentence for forgery for an offence, the details of which he did not know enough of, which means that he would have been bound, as I see it, then to say that the extradition was disproportionate, or he ought to have assessed it on the basis that the likely sentence would not exceed the previously passed sentence and was more likely to be, to a modest degree, less than that. I have therefore to consider whether on that basis extradition could be disproportionate.

16. In my judgment it does not of itself matter that the sentence is likely to be non-custodial. That does not prevent extradition. A penalty of some thousands of pounds plus probation of some months does not, in my judgment, show that the likely penalty means extradition is disproportionate.

17. The final issue is whether less coercive measures are available. The District Judge sets out the history of the appellant's engagement with the proceedings. No doubt he has engaged to a considerable extent with them. The District Judge finds, and this is not in dispute, that he technically became a fugitive as from either July or October 2016; the only less coercive measure pointed to is that he should be allowed to return voluntarily rather than under an extradition warrant. But there has been nothing to stop him doing so at any stage. He even purchased tickets to go back to Lithuania. What stopped him doing so was not the warrant at all. What stopped him doing so was the refusal by the Lithuanian authorities to tell him that he would not be remanded in custody but would be remanded on

bail were he to return. He would only return if that were satisfied. In my judgment, it is not right for a person to say that he will return voluntarily, while imposing a condition as to how he is to be treated pending trial. One needs to be aware also of the reluctance of the appellant to return because he said he had nowhere to sleep in Lithuania and it was important to him to keep his job.

18. Accordingly, looking at the three issues, there is no evidence from the requesting authority, as in my judgment there should be and could have been, to show that the offence was not a minor one, falling as it does analogously within the table without more. The likely sentence is not, in my judgment, so trivial that extradition for forgery should be regarded of itself as disproportionate. I am not satisfied that there are any realistic less coercive measures. So the question is, putting all those factors together, is extradition overall a disproportionate consequence, disproportionate within s.21A?

19. I have put in particular (a) and (b), seriousness of the conduct and the likely penalty, together as they go hand in hand. The likely penalty, as to which there is the information, indicates the seriousness of the conduct alleged to constitute the extradition offence. I have come to the conclusion that, although extradition may be ordered for a non-custodial sentence or for measures that include a fine and probation, looking at what is alleged here and what is evidenced, it would be disproportionate for the appellant to be extradited. It may be that with other information the seriousness of the offence and the reasons for the sentence being imposed would have led the court to a different conclusion. But as I say, it is striking that on two important issues, the court was left with what may be regarded as limited or no information in circumstances where the better source of information by a very long way is the requesting judicial authority, which did not provide it. Accordingly, this appeal is allowed and the appellant is discharged.

20. I should add of course that does not mean that were he to return to Lithuania he could not be proceeded against by the Lithuanian authorities, or that if he went to another country he could not also be proceeded against the under the same warrant.

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This transcript has been approved by the Judge.