Neutral Citation Number: [2018] EWHC 2816 (Admin)

Case No. CO/1590/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice

Date: Tuesday, 9 October 2018

Before:

MR JUSTICE HOLMAN

B E T W E E N :

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DISTRICT COURT IN KIELCE, POLAND Appellant

- and -

KONRAD PAWEL ZAMOJSKI Respondent

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MR J. SWAIN (instructed by the Crown Prosecution Service) appeared on behalf of the Appellant.

MS F. IVESON (instructed by Lansbury Worthington) appeared on behalf of the Respondent.

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J U D G M E N T (As approved by the judge) **WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice**

MR JUSTICE HOLMAN:

1 This is an appeal by the prosecuting authorities from the decision of District Judge Gary Lucie, dated 13 April 2018, not to order the extradition of the requested person, who is now the respondent to the appeal.

2 When she granted permission to appeal, Mrs Justice Elisabeth Laing observed at paragraph 3 of her reasons that:

> "I nevertheless consider that it is arguable, just, that the decision is wrong …".

3 The question for me, of course, is not whether or not it is "arguable" but whether, in my judgment, the decision is actually wrong.

4 The essential facts are as follows. The requested person is Polish and in December 2007 and January 2008, on many occasions, he dealt with illegal drugs, namely marijuana and cannabis, and, on a specific date in January 2018, he had 66.43g of cannabis in his possession in forty-two packets of aluminium foil. So this was drug dealing on a significant scale. The requested person was, however, aged eighteen at the time and gave evidence to the district judge, which was accepted by the district judge, that he had been forced into drug dealing by a gang. That gang had not only threatened and, indeed, injured him, but had, indeed, earlier, in August 2007, murdered the requested person's own brother.

5 After conviction, he was sentenced altogether to three years of imprisonment suspended for a period of seven years with conditions, including a condition not to commit further offences. Regrettably, after about five years he did commit another offence, and so the suspended sentence was activated. However, before that happened he travelled to England and has lived here ever since.

6 There was evidence before the district judge, which he accepted, that the requested person

had lived a good and industrious life here in England. He had not committed any further offences. He was, indeed, highly prized and valued by his employer, for whom he had been working for some time.

7 At the time of the hearing before the district judge, it appeared that the date upon which the European Arrest Warrant was issued was 14 October 2013 and the date upon which it was certified by the National Crime Agency was 3 February 2018, some four and a half years later. No explanation was given to the district judge at the hearing for that apparent delay. As a result, the district judge referred, at paragraph 17(d) on internal page 9 of his decision and reasons, to "an unexplained delay in certifying the EAW of nearly 5 years." He returned to that in paragraph 19 of his reasons, where he said:

> "There has been an unexplained delay of almost 5 years in the certification of the warrant by the NCA. I have no evidence before me as to why it took so long … The cases cited above make it clear that a delay in these circumstances is capable of weighing heavily against extradition, particularly where an RP has had a settled life in the UK for an extended period and notwithstanding that the RP is a fugitive."

8 Mr Jonathan Swain, who has argued this case most cogently on behalf of the appellant prosecuting authorities (but who did not himself appear below), criticises the district judge's approach to delay. He says that in the passage that I have quoted from paragraph 19, the district judge erred in using the phrase "is capable of weighing heavily against extradition". By reference to an authority of the House of Lords in *Gomes*, he submits that the highest it can be put is that:

> "In borderline cases, where the accused himself is not to blame, culpable delay by the requesting state can tip the balance."

9 In relation to delay in certification, another issue has emerged on this appeal. Since the hearing before the district judge, a case officer of the National Crime Agency, Emily McEnnerney-Whittle, has made a statement dated 16 May 2018. In that she says that she has now researched the National Crime Agency's computer system and discovered that, in fact, this warrant was originally certified, not in February 2018, as the district judge was told, but on 1 May 2014. She explains that later, when the requested person came to the attention of the authorities, somebody, through unwitting human error, certified for a second time, when actually the certification originally generated in May 2014 should have been used for the arrest. Emily McEnnerney-Whittle further says within her statement that:

> "Following a lead of [the requested person's] whereabouts the certified EAW was disseminated to the Metropolitan Extradition Unit, who proactively tried to locate the subject in their area to no avail …".

There is no further elaboration or illumination as to what lies behind the words "proactively tried". It may be that they did a great deal, it may be that they did little but, nevertheless, something which is capable as being characterised as "proactive".

10 So the first submission of Mr Swain is that the district judge, in any event, erred in his approach to delay in certification in this case and, as can now be seen, was misled into thinking there had been appreciable delay in certification when, in fact, there had not been.

11 The second submission of Mr Swain is that the district judge dealt inappropriately with the

fact that the sentence had originally been suspended. The district judge said, at paragraph 20 of his reasons:

> "Whilst the original offences were serious it is worthy of note that they were not considered so serious that an immediate term of imprisonment was considered necessary. This may have been because of the age of the RP at the time and/or the circumstances of how he became involved in the offences. The period of suspension (7 yrs) was particularly long and the RP managed to comply with it for 5 yrs before committing the offence that triggered the activation of the sentence. That substantial period of compliance would, in the UK, be taken into account in deciding whether to activate the sentence and if so whether in part or in full. In the present case the sentence has been activated in full."

12 So far as the first part of that passage is concerned, viz it is "worthy of note that the offences were not considered so serious that an immediate term of imprisonment was considered necessary", it is speculative whether that was to do with the age of the requested person at the time (eighteen) and/or the circumstances of how he became involved in the offences, namely his being threatened and coerced by a gang in the circumstances that I have mentioned.

13 Mr Swain particularly fastens on the last two sentences of that quotation. The district judge said, whether rightly or wrongly:

> "That substantial period of compliance would, in the UK, be taken into account in deciding whether to activate the sentence and if so whether in

part or in full."

Mr Swain submits that that is a completely irrelevant matter. In extradition, high respect is paid to the sentencing approach and decision-making of the requesting court. It is irrelevant whether or not, and to what extent, an English court might have taken into account a period of compliance when deciding whether or not to activate the suspended sentence. What matters in the present case is that the Polish court, whose autonomy and decision-making requires to be respected, considered it appropriate to activate the suspended sentence in full. So, says Mr Swain, at that point the district judge took into account an irrelevant matter.

14 I agree with that submission so far as it goes, but the mere fact that a district judge takes into account an irrelevant factor does not necessarily mean that his ultimate decision is wrong.

15 The third main submission made by Mr Swain pertains to paragraph 17(a) of the district judge's reasons. He had already clearly stated, at paragraph 16(d) of his reasons, only a very few lines above, that:

> "The RP is a fugitive and it is important that the UK should not be seen as a safe haven for those seeking to escape justice."

About five lines further on, under a heading "Factors that militate against extradition", the district judge said:

> "The RP has moved to the UK to give himself a new start and to avoid going to prison and has lived here openly for 6 yrs. He has supported himself financially and has always been employed. He is clearly a highly

valued employee with this current employer who cannot speak highly enough of him."

Mr Swain submits that the first sentence of that quotation, where the district judge says: "The RP has moved to the UK to give himself a new start …", in some way detracts from, or qualifies, his earlier finding that the requested person is a fugitive.

16 In my view, paragraph 17(a) could have been more carefully and wisely phrased by the district judge, but it does not amount to a watering down of his earlier important finding that the requested person is a fugitive. Indeed, the very words "and to avoid going to prison" themselves underline that he had come here as a fugitive. It seems to me that the first sentence in paragraph 17(a) is merely narrative, viewed from the perspective of the requested person himself, namely that he wished to give himself a new start, and is the lead-in to the important point that the district judge then makes, that he had lived here openly for six years and had supported himself financially and always been employed and was a highly valued employee. It seems to me, therefore, that the district judge did not, in reality, qualify or water down the fundamental point that this case does concern somebody who was, and indeed remains, a fugitive.

17 Viewing the case as a whole, it seems to me that the reasons of the district judge are appropriately clear and thorough. In accordance with the guidance in the well-known authority of *Celinski*, he set out at paragraph 16 a number of factors that favoured extradition. He clearly recognised the continuing and high public interest in ensuring that extradition arrangements are honoured, and the importance that the United Kingdom should not be seen as a safe haven for those seeking to escape justice. At paragraph 17 he clearly set out a number of factors against extradition. It is true that within that passage he refers, at

17(d), to the "unexplained delay" in certifying the warrant; but that is, indeed, the situation as it was at the time of the hearing before the district judge. Under a heading "Discussion", at paragraphs 18-20, it seems to me that he perfectly fairly considers a number of the relevant considerations in this case. It may be that at paragraph 20 an irrelevant consideration crept in, namely the approach that a court in England might have adopted when activating the suspended sentence, but that does not, to my mind, undermine the overall balance of this district judge's approach. At paragraph 21, under a heading "Decision on Article 8", he clearly sets out, under five lettered sub-paragraphs, his overall reason for exercising the balance in favour of the requested person. I will not read the whole of that passage for the purposes of this judgment, but it seems to me that every proposition contained within that passage is, in fact, a correct proposition.

18 With regard to delay, he again referred at paragraph 21(c) to the unexplained delay and continued:

> "On the face of it, the only action taken by the NCA was to put the RP's name onto the police national computer. It appears to me that had basic checks been carried out then the RP would have been identified and arrested soon after his arrival in the UK and the balancing exercise may well have been different then."

When a district judge who is steeped in extradition work, such as District Judge Lucie, refers to "had basic checks been carried out then the RP would have been identified and arrested soon" it seems to me that he knows, from experience, what he was talking about. He must know that there were a number of basic checks as a result of which, if sufficiently resourced and prioritised, and if they had been done, this requested person would have been

found much sooner. That is not, to my mind, negated by Miss Emily McEnnerney-Whittle later saying that the police "proactively tried to locate the subject".

19 The essential point that the district judge was there making is that, in his view, if sufficient basic checks had been done promptly, this requested person would have been found much sooner and, if so, he might well at that point have been extradited. The fact is that those checks were not done, a period of several years' delay arose, and during that period this requested person has been able positively to demonstrate that he has matured, that he has a settled and productive life here, and that he has lived openly and lawfully in good employment.

20 Those factors clearly weigh in the balance and at the conclusion of this whole hearing I feel unable to say that the ultimate decision of the district judge was wrong. It may be that if I had been deciding this from scratch myself I might have decided it the other way, but that is not the question, nor the test. The question is whether I can say today that his decision was wrong. I cannot do so and, accordingly, this appeal is dismissed.

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Official Court Reporters and Audio Transcribers

5 New Street Square, London EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

admin@opus2.digital

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