

# **Regina v Ayoub Belkaid**

**[2018] EWCA Crim 2488**

Before: Lord Justice Green Mr Justice Nicol Recorder of Westminster (Her Honour Judge Deborah Taylor ) (Sitting as a Judge of the CACD)

Thursday, 25 October 2018

## **Representation**

Mr M Khoshdel appeared on behalf of the Appellant.  
Mr C Ward-Jackson appeared on behalf of the Crown.

## **Judgment**

Mr Justice Nicol:

- 1 This is an appeal against sentence with the permission of the single judge.
- 2 The appellant was charged with one count of conspiracy to make a false instrument, contrary to section 1(1) of the Criminal Law Act 1997 . At the Crown Court in Oxford on 27 October 2017 he pleaded guilty to that offence. He applied to vacate his plea and the application was listed for hearing on 9 November 2017 but on the day of the hearing the application was withdrawn. On 3 April 2018 he was sentenced by His Honour Judge Ross to 4 years' imprisonment.
- 3 The facts of the case were as follows. The case arose from an operation initiated by the Belgian police which involved investigation into the activities of an identity card factory, whereby a number of Belgian nationals, principally of North African origin, were creating forged Belgian identity cards for the use of a number of individuals throughout Europe. The principal operators of the factory had been prosecuted and convicted in Belgium.
- 4 The Belgian police notified the British police that a person who appeared to be connected to that factory was the appellant and that he was operating out of an address in Oxford.
- 5 On 25 March 2016 Thames Valley Police executed a search warrant at that address. The appellant was at home with his wife. Among the items seized by the police was an iPhone on which were found a large number of e-mails to and from the Belgian document factory. The appellant's role appeared to be that of a go-between between North African residents in this country and the identity card factory. The individuals in this country would send the appellant photographs of

themselves in passport format by e-mail. The appellant would then e-mail them on to Brussels. Sometimes Brussels would send back instructions that the photographs were incorrect or needed to be changed to make them more convincing. Eventually the photographs would be printed and put into forged Belgian identity cards and sent back to the appellant who would pass them onto the customers concerned.

6 The appellant admitted being involved with two individuals, a Mr Toudefete and a Mr Hajj. Toudefete was an Algerian national resident in Oxford. He had been traced and arrested by the police. At the time of arrest he was working in Oxford using a forged Belgian identity card that had been obtained with the appellant's assistance.

7 The police enquiries in Belgium showed that the appellant was known to the Belgian police through his fingerprints and he appeared to have a different identity in Belgium.

8 He was interviewed on the day of his arrest. He made no comment. He subsequently pleaded guilty on a written basis. That basis of plea appears to have been accepted by the prosecution. It said:

- "1. [The appellant] did not create or make any fraudulent document.
2. He communicated with Toudefete in relation to fraudulent documents.
3. He also communicated with Hajj in relation to fraudulent documents.
4. He knew that the identity cards came from Belgium but did not know the extent of the operation.
5. He understood the identity cards would be used by people in order to obtain employment and/or for travelling purposes but nothing more beyond these.
6. His involvement was to pass on the photographs and other information that they would be used for purposes of creating the fraudulent documents/identity cards."

9 The appellant is now aged 37. He had previous convictions on seven occasions for a total of 12 offences, between 2003 and 2005. Notably, in 2005 he was sentenced to 15 months' imprisonment for forging a document. He was also sentenced in 2005 to 28 days' imprisonment for theft, and he was fined on separate occasions in 2005 for theft and shoplifting. His other offences were for breach of the peace, further thefts and failing to surrender to bail.

10 The pre-sentence report provided further information about the appellant. He had been born and raised in Algeria. He fled to the UK in 2001 and claimed asylum, but his application was refused. He remained in the UK illegally. Follow-

ing his forgery conviction he was deported from the UK, but in 2011 he returned having married an EU citizen. The probation officer reported that the appellant was expecting to be deported after his present sentence, though whether that would be compatible with any rights which he has as the family member of an EU citizen will be for the Home Office to determine. In any event, the possibility of deportation can have no effect on our present task.

11 After his return to the United Kingdom in 2011 the appellant had initially been in work but in 2014 he was the victim of a workplace accident which left him with mobility issues and unable to work. He received some industrial injury benefit, but he told the probation officer that he had struggled financially. The probation officer understood that his involvement in the present offences was financially motivated.

12 He acknowledged to the probation officer that the present offence was a serious matter which could be linked to more serious incidents. But he said he was not responsible for what others did. He condemned those involved in more serious offences and denied holding any attitudes which supported their activities or causes.

13 He had a previous offence of forging a document and there was therefore an emerging pattern of behaviour according to the probation officer. He was assessed as posing a "low" risk of general re-offending and a "medium" risk of harm to the public. The author of the pre-sentence report was not able to propose any alternative to an immediate custodial sentence. The judge also had a psychiatric report. This recorded that since 2014, the appellant had been treated with anti-psychotic medication for psychosis. He had been periodically compliant with medication and reported that his psychiatric symptoms, namely speaking with a woman's voice and that this woman was a 'dijn' who lived in his body and controlled him, had reduced. He presented with features consistent with a psychotic mental disorder. However, they did not amount to a severe psychotic disorder such as paranoid schizophrenia. He did not appear to be severely debilitated or distressed by his abnormal beliefs. His psychotic symptoms would benefit from anti-psychotic medication.

14 At the material time of the offence, it was unlikely that he was experiencing significant features of psychosis, nor was he overwhelmed by its symptoms. He did not report experiencing features of psychosis which appeared to significantly contribute to his actions or thoughts in relation to his offence. A hospital order would not be appropriate.

15 In passing sentence, Judge Ross said that the appellant had connections with a significant identity document forgery operation based in Belgium. He had acted as the agent of that operation in this part of the UK. He had been described as a go-between but it was more their agent. The court could not ignore that he was known to the Belgium police, not because of his conviction but because he was registered as someone with an identity in Belgium, a different identity with a

different name and age than that which he had used in the UK. It was clear that he must have had a close connection with the Belgian operation as was evident by the tone of many of the exchanges between him and those operating the identity card factory in Belgium.

16 Judge Ross said that the appellant's previous conviction was a serious aggravating feature. While there was some evidence of him being paid for his part in the operation, in the court's view that was not the whole story. It was clear that there were other things going on in relation to the purpose of the creation of these documents and the Appellant accepted they were in part for the use in travel. Those involved in the creation of forged documents which enabled travel between countries within the European Union and within the Schengen area were involved in significant and important breaches of the securities, not only of the UK borders but of the borders of European neighbours.

17 He had pleaded guilty at the PTPH which would ordinarily have attracted a credit of 25%. He did not however maintain that position. He made an application which was not pursued to vacate that plea which reduced his credit to 20%. He would be dealt with for an offence of conspiracy. He was not as significant in the hierarchy as those in Belgium, but he did have a significant and trusted role bringing to bear expertise which had been demonstrated in his previous conviction.

18 Judge Ross said that looking at the case in the round and applying the principles from various case decisions and the Sentencing Guidelines, the starting point after trial would have been 5 years' imprisonment with a 20% credit for plea. That meant the sentence would be 4 years.

19 On the appellant's behalf Mr Khoshdel argues that the sentence of 4 years was manifestly excessive, since he argues that the judge impermissibly departed from the agreed basis of plea. To understand his submission, it is important to appreciate that it seems that the Belgium part of this conspiracy was unearthed as part of the Belgium police investigation into the terrorist attacks in Paris. In essence, Mr Khoshdel submits that the judge was influenced by this feature although, as already noted, the appellant had pleaded guilty on the basis that he understood that the identity cards would be "used by people in order to obtain employment and/or for travelling purposes but nothing beyond these".

20 In the course of his sentencing remarks the judge had said this:

"Whilst there is some evidence of you being paid for your part in this operation, that, in my view, is not the whole story. It is clear that there were other things going on in relation to the purpose of the creation of these documents and you accept they were, in part, for use in travel. Those who are involved in the creation of forged documents which enable travel between countries within the European Union, with the Schengen Area, are involved in a significant and important breaches of the securit-

ies, and security not just of the UK borders but of the borders of European neighbours."

21 In the course of the prosecution opening of the facts to Judge Ross, Mr Ward-Jackson, who then appeared as now on behalf of the prosecution, said this:

"I am bound to say I have not seen on the papers any mention of money changing hands, although one assumes that the defendant wasn't doing it out of the kindness of his heart, and there must have been some financial inducement. But I am...JUDGE ROSS: Or it was for other purposes.

MR WARD-JACKSON: Well, it may have been for ideological purposes.

JUDGE ROSS: Mmm."

22 Mr Khoshdel submits that the judge should have taken guidance from two other sources. The first referred to by Mr Khoshdel was the case of *R v Ovierakhi* [2009] EWCA Crim 452 , which was a case of possession of a false identity document, contrary to the Identity Cards Act 2005 section 25 (1)(a) . In that case the court drew a distinction between possession of a false identity card for employment purposes and possession to gain entry or travel. The latter was a more serious offence. However, with respect to Mr Khoshdel, offences regarding possession, whether it be for employment or travel, are significantly less serious than the offence with which the appellant was concerned, namely conspiracy to make false instruments.

23 The second source on which Mr Khoshdel relies is the Sentencing Council's Guideline on Fraud, Bribery and Money Laundering Offences. This includes a section on making or supplying articles for use in frauds, contrary to section 7 of the Fraud Act 2006 . As Mr Khoshdel rightly observes, this offence has the same maximum penalty as the offence which the appellant faced, namely 10 years. He submits that the appellant's offence would be regarded as one of medium culpability and, for the sake of argument, greater harm. For such an offence the Council recommends a starting point of 2 years and 6 months with a range of up to 5 years.

24 While the appellant's previous conviction for forgery would be an aggravating factor, Mr Khoshdel submits that it would not justify going to the top of the range particularly when regard is also had to the length of time since that conviction and the psychiatric report.

25 This guideline is of some assistance, but it still omits several features of the present case. In particular, this was an offence of conspiracy which, as Mr Khoshdel acknowledges, is an aggravating feature. Secondly, this was a conspir-

acy with an international dimension. Thirdly, the Council's guideline is mainly concerned with offences where the harm is largely assessed in financial terms. The judge was entitled to say that the harm in offences of the type with which he had to deal was less tangible. It subverted border controls which *could* (our emphasis) jeopardise security of this county or the security of other Member States.

26 Mr Ward-Jackson, to whom we are grateful, has referred in his respondent's notice to the case of *R v Velez* [2009] 1 Cr App R(S) 96 . That did concern a conspiracy to produce false identity documents and passports. Following guilty pleas to two such counts, for which full credit was given, a sentence of 6 years was upheld by this court. Silber J said at paragraph 18:

"...in cases of this sort...organisers can expect sentences of 9 years after a trial while those who are workers and lieutenants would receive sentences in the order of six-and-a-half years after a trial."

27 Mr Ward-Jackson fairly acknowledged that the scale of the conspiracy in *Velez* and the appellant's role in that case was much greater than the present case. *Velez* was cited in *R v Adam Mussa* [2012] 2 Cr App R(S) 99 , in which the court stressed that all cases are fact specific but:

"...the key considerations in sentencing are the role of the offender in the operation, its scale and the sophistication of its products, the type of false documents being manufactured, the damage caused in terms of the distribution of false documents and the income generated."

28 In this case, we do not have much information on these factors. It does seem that the Belgian operation was of some size. The appellant was a trusted operative as the nature of his communications with his Belgian counterparts apparently showed. The appellant's involvement, consistently with his basis of plea, was limited to two cases where false documents were to be used for employment and travel. The appellant's previous record was undoubtedly an aggravating factor and we also consider that the judge could properly take into account his use of a false identity in Belgium.

29 All of this said, we have some sympathy with Mr Khoshdel's submission that the judge was influenced by the terrorism connection with the wider conspiracy. His sentencing remarks and the exchange with Mr Ward-Jackson in the latter's opening leave a lingering suspicion to that effect. Mr Khoshdel is entitled to say that if this was the case, it was not consistent with the appellant's basis of plea.

30 Of course, a judge is not bound by a basis of plea even if the prosecution are prepared to accept it. But in those circumstances the judge should put the

defendant on notice and give him an opportunity to give evidence. That did not happen here.

31 Disregarding this element, after a trial, in our view, the proper sentence would have been one of 4 years. No issue is taken with the judge's allowance of 20% for the appellant's plea. Accordingly, we will quash the sentence passed by the judge and substitute one of 3 years and 2 months. To that extent this appeal succeeds.