

Neutral Citation Number: [2011] EWHC 791 (Admin)

CO/11794/2010

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

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 22nd February 2011

B e f o r e:
LORD JUSTICE JACKSON

Between:

THE QUEEN ON THE APPLICATION OF KULIG
Appellant

- v -

REGIONAL COURT IN TARNOW POLAND
Respondent

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Mr B Keith appeared on behalf of the **Claimant**
Miss G Lindfield appeared on behalf of the **Defendant**

J U D G M E N T (As Approved)

LORD JUSTICE JACKSON:

1. This is an appeal against an order for extradition to Poland. The facts giving rise to this appeal are as follows. On 24 November 2009 the Regional Court in Tarnow, Poland, issued a European Arrest Warrant. That European Arrest Warrant was issued against the appellant and was certified by the Serious Organised Crime Agency on 26 June 2010. The subject matter of the European Arrest Warrant is that the appellant has been convicted before the court in Poland of an offence of or similar to theft and sentenced to a term of 6 months imprisonment.
2. The matter came before District Judge Riddle on 9 October 2010. It was argued on behalf of the appellant that the requirements of double criminality were not satisfied, because the offence described in the European Arrest Warrant did not constitute theft under English law.
3. The description of the offence as set out in the European Arrest Warrant reads as follows:

"On 29 October 1997 in Tarnow, with the purpose of gaining material benefit, after previous misleading about the intent of paying the loan, he swindled a loan amounting at 1,000 (one thousand) Polish Zlotys, and in this way caused Universal Savings Bank of Poland SA branch in Tarnow (in Polish: Powszechna Kasa Oszczednosci Bank Polski SA in Tarnow) to disadvantageously dispose the bank property."
4. The District Judge concluded that the matters set out in the European Arrest Warrant satisfied the test of double criminality because those facts would amount to theft under English law. The Alternative argument was advanced on the behalf of the Polish judicial authority that even if those facts did not constitute theft, nevertheless they constituted the offence of obtaining services by deception under section 1 of the Theft Act 1978. The District Judge concluded that he did not need to consider that argument because he was satisfied that the facts set out constituted the extradition offence of theft. The District Judge went on to say that the other requirements for extradition were satisfied and that removal of the appellant to Poland would not infringe his human rights.
5. The appellant appeals to the Administrative Court by an appellant's notice dated 10 January 2010. Mr Keith, who appears for the appellant in this court today, submits that non-payment of a loan is the way to characterise the appellant's conduct in the instant case and such conduct does not amount to theft under section 1 of the Theft Act 1978. He originally submitted that one could not consider whether the conduct would amount to obtaining services by deception contrary to section 1 of the Theft Act 1978 because that was not dealt with by the District Judge and the present proceedings are an appeal from the District Judge.
6. On this initial point I prefer the submissions of Miss Lindfield for the respondent. She argued that section 27(3) of the Extradition Act 1973 required the court not merely to consider whether the District Judge was right in saying that the matters in the Arrest Warrant would constitute theft in England, but also required this court to consider whether in the alternative the double criminality test could be satisfied in any other way. Miss Lindfield pinned her colours primarily to the submission that the conduct related to obtaining a product by deception.

7. On this preliminary aspect of the case I agree with Miss Lindfield that the offence of obtaining services by deception contrary to section 1 of the Theft Act 1978 is more pertinent than the offence of theft under the Theft Act 1968. Under section 1 of the Theft Act 1978 (which was in force at the relevant time but is no longer in force) services include the provision of a loan. Therefore I accept the submission of Miss Lindfield that what I must focus on now is whether or not the conduct set out in the European Arrest Warrant would indeed constitute an offence under the 1978 Act.
8. This leads on to the second aspect of the appeal. Mr Keith submits that when one reads the language of the European Arrest Warrant in a realistic way, what is really being asserted against the appellant is taking out a loan and subsequently failing to pay it off. He points out that there was a long gap between the taking out of the loan and the matter being reported by the bank as a criminal offence. Mr Keith submits that here we have a case of the bank using criminal proceedings in order to enforce a civil debt.
9. I am not persuaded by this argument. The Polish court has convicted the appellant of the offence in question and it is not open to this court to go behind the conviction or to speculate that criminal proceedings had been misused to achieve a civil remedy. The offence as described in the European Arrest Warrant uses language which conveys dishonesty. The phrase "after previous misleading" and the verb "swindled" both indicate that the appellant was being dishonest at the time when he took out the loan. Mr Keith quite rightly says that mens rea and actus reus must coincide in order to give rise to an offence of obtaining services by deception.
10. When one construes the warrant it is helpful to do so bearing in mind the decision of this court in *Zak v the Regional Court of Bydgoszcz Poland* [2008] EWHC 470 (Admin). In giving his judgment in that case, Richards LJ, with whom Swift J agreed, said:

"16. Thus I would reject the submission that the requesting authority has to identify or specify in terms the relevant *mens rea* of the English offence. In my view it is sufficient if it can be inferred by the court from the conduct that is spelled out in the warrant and further information. That seems to me to accord fully with the reasoning in *Norris* (the essential part of which I have quoted) and the decision in that case."
11. In the present case, I must see what can be inferred from the conduct spelt out in the European Arrest Warrant and it is quite clear that dishonestly obtaining the loan is conduct that can readily be spelt out from that language.
12. Let me now draw the threads together. I am quite satisfied that the conduct set out in the European Arrest Warrant constitutes a crime both in Poland and in the United Kingdom. The sentence imposed by the Polish court exceeds four months. In the circumstances the offence in question is an extradition offence. The District Judge was entirely correct to order that the appellant be extradited and this appeal is dismissed. Thank you both very much.

MR KEITH: My Lord, can I ask for a detailed assessment of legal aid?

LORD JUSTICE JACKSON: Yes.