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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 2840 (Admin)

No. CO/4182/2018

Royal Courts of Justice
Wednesday, 9 October 2019

Before:

MR JUSTICE HOLMAN

B E T W E E N:

SOBOLEWSKI

Appellant

- and -

POLISH JUDICIAL AUTHORITY

Respondent

MS LAURA STEPHENSON (instructed by Son Macmillan Walker) appeared on behalf of the appellant.

MISS CATHERINE BROWN (instructed by the Crown Prosecution Service Extradition Unit) appeared on behalf of the respondent.

J U D G M E N T

(As approved by the court)

MR JUSTICE HOLMAN:

- 1 This is a statutory appeal pursuant to section 26 of the Extradition Act 2003 from an order for extradition made on 17 October 2018 by District Judge (Magistrates' Court) Gareth Branston in the Westminster Magistrates' Court.
- 2 I intend to allow this appeal, but I wish to stress at once that I do not do so on the ground of any error of any kind in the approach or reasoning of the district judge in this case. Indeed, in my view, his judgment is a shining model of a meticulously careful and thorough judgment in this type of case. The sole reason why I allow this appeal is entirely based upon significant changes in the circumstances between the decision and order of the district judge on 17 October 2018 and today, effectively one year later.
- 3 The essential facts and background of this case are as follows. In June 2004 the appellant was convicted after a trial in Poland of a number of offences. These effectively fall into two groups. One is a specific offence of possession by him of a quantity of marijuana on 3 February 2004. The other group is a series of offences of the sale of marijuana to various people between June 2003 and February 2004. The European Arrest Warrant identifies that he was convicted of the sale of marijuana on at least 63 separate occasions. Some of that sale or supply was to people who are described as "a minor." In one case the warrant says that the appellant did not himself "have awareness of the age of" the person to whom he sold the marijuana.
- 4 Having been convicted of these offences, the appellant was sentenced to a total of three years' imprisonment. He had served a period in prison on remand but appears to have been released pending an appeal. The appeal was later dismissed and the upshot was that he

was required to serve (and is still required to serve) two years, seven months and 16 days of his outstanding sentence.

- 5 In 2005 the appellant was served with a notice requiring him to surrender to serve that imprisonment, but instead of doing so he travelled to England on 28 May 2005. He says that he has never returned to Poland since then. His wife appears to have travelled to England in about 2007 to join him, and they have lived here ever since. On those facts and in those circumstances, the district judge inevitably and correctly found that the appellant is a fugitive from Polish justice, and Ms Laura Stephenson, who appeared on his behalf before the district judge and appears on his behalf again today, has not suggested otherwise.
- 6 There was evidence before the district judge that both the appellant and his wife were even then suffering from ill-health. The appellant was born in June 1961 so he was aged 57 at the time of the hearing before the district judge and is aged 58 today. The evidence is clearly to the effect that he has had, and continues to have, a significant history of heart disease coupled with diabetes. He has required frequent periods of hospitalisation and takes a good deal of medication. The wife was born in August 1965, so she was aged 53 at the time of the hearing before the district judge and is aged 54 now. There was evidence before the district judge that she had suffered breast cancer for which she had been treated and was receiving treatment.
- 7 As I have said, the judgment of the district judge is one of great thoroughness and meticulous care. Having set out all the facts in a great more detail than I have done, and having correctly directed himself as to relevant principles of the law, he turned at paragraph 105 and paragraph 106 of his judgment to perform the well-known balance pursuant to the authority of *Celinski* of factors in favour of extradition and factors militating against extradition. His lists of the factors both ways are also very comprehensive. He then concluded at paragraph 107 that in his judgment:

"The counter balancing factors are not strong enough in this case to override the high public interest in extradition."

8 It may be possible to cavil at one or two phrases in the judgment of the district judge, but, wisely, Ms Stephenson has focused all her appeal today upon the significant changes in circumstances since the date of the hearing before, and decision by, the district judge. There are two significant changes in circumstances. The first is that already shortly before the hearing on 17 October 2018 the appellant had been remanded in custody. He has now been in custody continuously for effectively a year (the precise date upon which he was remanded in custody is not known to anybody present in the courtroom this morning). He still is in custody. The second significant change in circumstances is, tragically, a marked decline in the position of the appellant's wife with regard to her cancer and the prognosis.

9 At the time of the hearing in front of the district judge, the appellant had only actually served about five months towards his total sentence of three years' imprisonment and, as I have said, there was outstanding a period of just over two years and seven months. In a bullet point at paragraph 105 of his judgment, when listing factors in favour of extradition, the district judge said, "there is a substantial period of sentence remaining." In a bullet point at paragraph 106, when listing the factors militating against extradition, he said "Mr Sobolewski has served a period of imprisonment in relation to these offences." I am confident that if the district judge had been considering this case today, he would have placed more emphasis on the length of the period of imprisonment that the appellant has now actually served. It was then only about five months. It is now nearly 18 months, or half of the total sentence.

10 The second change of circumstances relates to the wife's health. The appellant and his wife have now been married for some 35 years, so in the case of the wife she married around the age of 20. There is no evidence to suggest that it is other than a happy and mutually supportive marriage, although it is the case that the wife has suffered in the past from

alcoholism and depression. At paragraph 79 of his judgment the district judge said, on the basis of the medical evidence as it was before him:

"In May 2017, she was diagnosed with malignant breast cancer. She has had a double mastectomy. She has undergone six cycles of chemotherapy. In July 2018, Mrs Sobolewski was due to have a scan to see if the cancer has spread. Fortunately, it appears that things are going as well as could be expected. Nevertheless, her oncologist notes that the median survival rate for this type of cancer is four to five years ..."

11 Pausing there, the conclusion of the district judge at that point was that "it appears that things are going as well as could be expected," albeit that there is a median survival rate of four to five years. No doubt on the basis of that evidence and description, the district judge went on to say in a bullet point at paragraph 106 under factors militating against extradition:

"Mrs Sobolewski has considerable health difficulties; her mental health difficulties are likely to be exacerbated by the loss of her husband; she is still subject to significant medical treatment which affects her physically and emotionally; her husband provides vital emotional and practical support in this regard."

12 There is then a perhaps slightly curious bullet point which reads:

"If Mrs Sobolewski returned to Poland at the same time as her husband, the level of her medical intervention may be reduced."

13 I am not quite sure what the district judge meant by that observation, but it may be a view that there would be less treatment available to her for her cancer in Poland than here.

14 So the district judge set out comprehensively the full range of relevant factors in this case and performed the balance that he did. I would find it quite impossible to say on the evidence as it was at the time of the hearing before the district judge that "he would have been required to order the person's discharge." Today, however, there is clearly evidence that was not available at the time of the extradition hearing. Section 27 of the Extradition

Act 2003 contemplates that a court may admit fresh evidence in suitable cases. It provides that the court may allow an appeal only if, amongst other matters, "the conditions in subsection (4) are satisfied." Section 27(4) provides as follows:

"The conditions are that—

- (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
- (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
- (c) if he had decided the question in that way, he would have been required to order the person's discharge."

15 It is a fact which speaks for itself that the appellant has been continuously in custody now for more or less a year. There has been an application, which was not resisted by the respondent, to admit two pieces of evidence in relation to the current state of health and prognosis of the wife. These are, first, a statement from the wife herself dated 4 October 2019; and, second, a letter or report by her consultant in medical oncology Dr J.R. Cliff based in Cheshire. The letter is dated 7 October 2019. I will deal with the letter first, since it is the professional evidence in the case. I have absolutely no reason to doubt the reliability of what Dr Cliff says. He writes in part as follows:

"As you are aware, Mrs Sobolewski remains under my care for metastatic breast cancer. I wrote in January with an update and since then, unfortunately, we have again had to switch Mrs Sobolewski's therapy as on a CT scan performed on 25 August, there was a further increase in the size of her known liver metastases associated with her breast cancer. This was despite second line therapy with ... Kadcyła. Prior to this, Mrs Sobolewski had developed some abdominal distention which was making her feel uncomfortable and she continues to have ongoing fatigue although this has not worsened significantly. We have

now had to switch on to Capecitabine chemotherapy in order to try and gain control of her metastatic cancer.

As you are aware, Mrs Sobolewski's cancer is incurable and in previous letters we have talked about the average prognosis for someone with such a cancer being measured in a small number of years. Obviously, Mrs Sobolewski has now had her cancer since 2017 and it is of some concern that second-line therapy did not really offer very much in the way of disease control.

She is in the very early stages of receiving Capecitabine chemotherapy. If this works to control her cancer, her prognosis still could be a year or possibly slightly more. However, if she does not respond as we would wish, sadly it could be shorter than this. Mrs Sobolewski is aware that her prognosis does remain uncertain."

16 Pausing there, at the time of the hearing in front of the district judge, he was able to say, as I have already quoted, that "it appears that things are going as well as could be expected," and that, "the median survival rate for this type of cancer is four to five years." Tragically, it now seems clear that things are not going as well as could be expected. The patient has not responded well to treatment to date. Her cancer is clearly incurable. On the best scenario, her prognosis could still be a year or possibly slightly more, but on a less good scenario, it could be shorter than that.

17 Mrs Sobolewski herself frankly accepts in her statement that her cancer is terminal and that the treatment that is now provided "is just to try and control my pain and prolong my life for as long as they can." She knows that the cancer is spreading. She describes how she is constantly fatigued and weak, whether as a result of the cancer or the treatment, or both. She describes rather pathetically how she now has to attend her treatments alone since her husband is in prison and that she is not always able even to get out for the treatment. She concludes her statement by saying:

"I last saw my husband at the start of December 2018. This was when he was at a prison in Liverpool, so it was a manageable distance."

18 Since then he has been transferred to HMP Wandsworth in London. She continues:

"I can no longer travel to see him as I am too weak to make such a long journey so I do not know when I will next see him. If he is extradited to Poland, I do not think we will ever see each other again."

19 On the basis of Dr Cliff's prognosis, that gloomy prediction by her would seem to be correct. Clearly, the district judge would, if he was considering this case now, have expressed himself differently in relation to the period of imprisonment already served and the amount outstanding, and I am confident that he would have expressed himself very differently in relation to the current up-to-date health position of the wife and her prognosis. I have already quoted section 27(4)(c) of the Extradition Act 2003 which makes it a condition before an appeal is allowed that "if [the judge below] had decided the question in that way, he would have been required to order the person's discharge." The judge would clearly have decided questions in relation to the period of imprisonment already served, and as to the health and prognosis of the wife, differently from the way in which he did decide them a year ago.

20 The difficult question for me is whether, having done so, "he would have been required to order the person's discharge". "Required" is a strong word. However, I am firmly of the view that if this district judge had known the facts and circumstances as they now are, he not only would have been required to order the appellant's discharge, but would indeed have done so. His judgment as a whole is very balanced and very fair, and I am firmly of the view that if he had appreciated then the current prognosis of the wife, and coupled it with the amount of imprisonment now already served, he himself would have ordered the discharge of the requested person.

- 21 Of course, all the factors in favour of extradition remain. He said "these offences are serious, including as they do, the supply of drugs to children." They are serious offences, but they are not of the most serious kind. The appellant alone is responsible for the very long delay, since, as the district judge found, he was and is a fugitive. That said, it is now over 15 years since these offences were committed and the sentence of imprisonment imposed. For nearly all that time this appellant and his wife have lived here in England. They have both obtained and held down good jobs. Neither of them has any known criminal record, or indeed any conduct to their discredit, in all the 15 years that they have been living here. In those circumstances, it seems to me that the current plight of the wife does outweigh the normal, constant and weighty public interest in extradition.
- 22 For those reasons, I allow this appeal. I quash the order for extradition and I order the immediate discharge of the appellant from prison.
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CERTIFICATE

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**** This transcript has been approved by the Judge (subject to Judge's approval) ****