APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 37
HCA/2022/000006/XM

Lord Matthews
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LORD TYRE

in

Appeal under section 26 of the Extradition Act 2003

by

ADAM OSIPCZUK

Appellant

against

LORD ADVOCATE (on behalf of the Republic of Poland)

Respondent

Appellant: S Loosemore; Dunne Defence
Respondent: P Harvey; Crown Agent

5 October 2022

Introduction

[1] The appellant appeared at Edinburgh Sheriff Court on 6 March 2020 in response to a European Arrest Warrant issued by the District Court in Zamosc, Poland, on 24 April 2019. On 4 August 2022 the sheriff ordered the appellant's extradition to Poland.

[2] The application for extradition relates to the appellant's conviction for three robberies of mobile phones and one attempted robbery all on 5 December 2009, when

he was aged 17. He was sentenced on 24 May 2010 to 2 years' imprisonment. The sentence was suspended, with the suspension being continued on a number of occasions. By a court decision dated 22 December 2014, execution of the sentence was again conditionally suspended for a probation period of 5 years and the appellant was placed under the supervision of a probation officer for that period.

[3] On 12 March 2015 the appellant committed a drugs offence in Poland for which he received a further suspended sentence of imprisonment. As a consequence, his 2010 sentence of imprisonment became liable to be activated.

[4] In July 2015 the appellant came to Scotland for a month, having told his probation officer he was coming. He returned to Poland but in October 2015 he came to Scotland to live permanently. On 17 March 2016 his sentence for the 2010 conviction was activated. The appellant's mother attended the relevant court hearing and told the court that the appellant was living abroad. She informed the appellant that he was required to report to prison. Since then the appellant has made two visits to Poland but has not reported to prison.

[5] The appellant seeks leave to appeal against the order for his extradition. He contends that extradition ought to be refused on the grounds of (i) passage of time and (ii) breach of his rights under article 8 of the European Convention on Human Rights. At the hearing before us we heard arguments on the merits of the appeal as well as on the preliminary issue of whether leave to appeal should be granted.

The statutory framework

[6] Section 11(1) of the Extradition Act 2003 requires a judge hearing an application for extradition to decide whether the extradition is barred for any of 10 specified reasons. One of those reasons, in section 11(1)(c), is "the passage of time". In the case of a person who

has been convicted of an offence, section 14 provides that a person's extradition is barred by reason of the passage of time if and only if it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have become unlawfully at large. Although section 68A contains a definition of "unlawfully at large", that definition does not apply to section 14. In *Wisniewski* v *Poland* [2016] 1 WLR 3750, the Divisional Court held (paragraph 54) that a person is unlawfully at large for the purposes of section 14 if he is at large in contravention of a lawful sentence under the applicable legal system. This is an objective state of affairs, not dependent upon the person being aware that a suspended sentence has been activated.

[7] If the judge decides that the extradition is not barred for any of the reasons in section 11(1), he must then, under section 20(1), decide whether the person was convicted in his presence. If so (as is the case with the appellant), section 21 requires the judge to decide whether the person's extradition would be compatible with his Convention rights. If so, he must order the person's extradition. If not, he must order the person's discharge.

The sheriff's decision

[8] The sheriff was satisfied that the appellant was a fugitive, as that expression is defined in *Wisniewski*, and that he could not therefore claim that extradition was barred by the passage of time. In any event, even if he was not a fugitive, it would not be oppressive to return him to Poland. Accordingly the test for bar in sections 11(1)(c) and 14 was not met.

[9] It was therefore necessary to decide whether extradition was compatible with the appellant's Convention rights, and in particular his article 8 right to respect for private and family life, his home and his correspondence. When the appellant had settled in Scotland, he had done so in the knowledge, shortly after he came here, that he was wanted in Poland.

His connection to personal relationships here was not particularly strong when he still had family in Poland. Although it was to his credit that he had apparently turned his life around, he could not evade the unfinished business from his youth. Given the strong public interest in extradition from the United Kingdom and the policy against a "safe haven" in the United Kingdom, and the appellant's comparatively weak and largely economic links to this country, the sheriff concluded that extradition would be compatible with his Convention rights.

Submissions for the appellant

[10] On behalf of the appellant it was submitted that the sheriff had erred in finding that he was a fugitive. The circumstances of this case were not on all fours with those in *Wisniewski.* In that case the breach of conditions which activated the suspended sentence was not the commission of a further offence but the appellant's voluntary departure from Poland, and it was in that particular context that he was held to be a fugitive. The appellant in the present case had not fled from Poland to Scotland with a view to placing himself beyond the reach of a legal process. Although he was aware that he had breached the terms of his probation by committing a further offence, he had not moved to Scotland until 7 months later. It took a further 5 months for the Polish courts to activate his sentence. He had made two lengthy visits back to Poland using his own passport, which was inconsistent with him being a fugitive.

[11] It was accepted that the test of oppression in section 14 was a high bar. However, approximately 6½ years had passed since the appellant became unlawfully at large. Given that significant passage of time, he was justified in a "sense of security" (cf *Gomes* v *Trinidad and Tobago* [2009] 1 WLR 1038). His circumstances had changed very significantly. His

extradition to Poland now would result in more than mere hardship: it would be oppressive.

[12] In any event if the test for bar due to passage of time had not been met, the sheriff had erred in holding that extradition would be compatible with the appellant's article 8 right. The offences had been committed in 2010 when the appellant was 17 years old and were at the lower end of severity. He had turned his life around and was in gainful employment. Contrary to the sheriff's conclusion that his connections to the United Kingdom were largely economic, he had strong personal connections in Scotland. His brother and nephew lived in Edinburgh; he was his nephew's godfather and played a significant role in his nephew's life. He had been working in a restaurant since 2016 and had progressed from waiter to supervisor. He had been in a relationship with his employer's daughter, from whom he rented accommodation, for about 2 years. He had not mentioned this at the extradition hearing because he had not wanted to reveal the relationship to his employer in that setting. The appellant and his partner wished to have children. The sheriff had erred in failing to consider the impact of Brexit on the appellant's ability to return to Scotland after serving his sentence. Had the sheriff given proper weight to the factors in the appellant's favour, he would not have concluded that extradition was compatible with his Convention rights.

Submissions for the respondent

[13] On behalf of the Lord Advocate it was submitted that the sheriff had correctly applied both the test in sections 11 and 14 of the 2003 Act and well-established article 8 principles. Leave to appeal should be refused.

[14] As regards passage of time, the court in *Wisniewski* had held that a person subject to a suspended sentence who voluntarily left the jurisdiction and thereby knowingly placed himself beyond the reach of a legal process was a fugitive. The sheriff had correctly found that when the appellant left Poland he became a fugitive and was precluded from relying on the passage of time. The 12 month period between the breach of his probation and the activation of his sentence was not a significant passage of time. It did not matter that there was a period between his departure and the activation of his sentence; what mattered was that he left Poland without informing his probation officer and in the knowledge that his sentence was liable to be activated. There had been no appreciable delay between activation and the request for his extradition on 24 April 2019. The present case fell squarely within the principles enunciated in *Wisniewski*.

[15] In relation to oppression, the decision in *Gomes* did not assist the appellant. The House of Lords had held that a fugitive who deliberately fled the jurisdiction in which he had to appear was not entitled, save in the most exceptional circumstances, to claim that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some fault on its part. Here the delay was of the appellant's own making because he left Poland without telling his probation officer, and no sense of security could follow from such delay. The test for oppression was a high one. The appellant's change in circumstances since becoming unlawfully at large consisted only of evidence of a settled life in Scotland which, as this court held in *Łagunoinek* v *Lord Advocate* 2015 SC 300, was insufficient to justify the conclusion that extradition would be oppressive.

[16] So far as the appellant's Convention rights were concerned, the sheriff had been entitled to weigh the strong public interest in extradition and in ensuring that the United Kingdom did not become a "safe haven" against the applicant's comparatively weak and

largely economic links to this country, his lack of dependants here, and the fact that he had only two family members in the United Kingdom in contrast with the number he had in Poland. The sheriff had been entitled to conclude on the evidence before him that the impact of Brexit was not to the point in the appellant's personal circumstances. If the appellant now relied on a relationship and a desire to start a family, this ought to have been mentioned, at least to the sheriff, at the extradition hearing. In any event it did not tilt the balance in favour of refusing extradition.

Decision

Is the appellant's extradition barred by the passage of time?

[17] To address this question, it is necessary to consider (i) whether the appellant is a fugitive and consequently disqualified from relying on the passage of time and, if not, (ii) whether as a result of the passage of time it would be oppressive to extradite him.

[18] The term "fugitive" is not a statutory one. As Lloyd-Jones LJ observed in *Wisniewski*, it has been developed in the case law, notably *Kakis* v *Government of the Republic of Cyprus* [1978] 1 WLR 779 and *Gomes* v *Trinidad and Tobago* (above) to describe, in the context of extradition, a status which precludes reliance on the passage of time. Although Lloyd-Jones LJ did not regard it as fruitful to provide a comprehensive definition of a fugitive for this purpose, he did, at paragraph 59, state the general principle of which he regarded *Kakis* and *Gomes* as examples:

> "Where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition."

Applying this general principle, the court in *Wisnewski* rejected a submission that in *Kakis*, Lord Diplock was limiting the concept of a fugitive to cases where the person had fled the

country, concealing his whereabouts or evading arrest. On the contrary, the court held (at paragraph 60) that a person subject to a suspended sentence who voluntarily left the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence might as a result be implemented, fell squarely within the fugitive principle enunciated in *Kakis* and could not rely on passage of time resulting from his absence from the jurisdiction as a statutory bar to extradition if the sentence was, as a result, subsequently activated.

[19] Counsel for the appellant argued that *Wisniewski* was distinguishable because in the present case the appellant's sentence had not been activated *as a result of* his leaving Poland. This appears to us to be in essence the same argument as that which failed in *Wisniewski*. On the facts of that case it was the appellant's departure from the jurisdiction that caused his suspended sentence to be activated but the general principle, which we have set out above, is broader. There is no requirement in the general principle of a causal link between leaving the jurisdiction and activation of the sentence. At the time when the appellant in the present case left Poland, he had been convicted of a new offence and was aware that because of this his sentence for the 2010 offence was liable to be activated. By leaving Poland in such circumstances he knowingly placed himself beyond the reach of any process in Poland by which activation of the sentence could be implemented. We agree with the observation of Lloyd-Jones LJ in *Wisniewski* at paragraph 62 that

> "…It is not necessary, in order that a requested person be treated as a fugitive, that he knows that his sentence has been activated. It is enough that he knows that it is liable to be activated because of his breach of the terms of its suspension. Any other approach would be inconsistent with the principle in *Kakis's* and in *Gomes's* cases and would introduce considerable uncertainty into this area of the law."

In *Wisniewski* the action that rendered the sentence liable to activation was departure from the jurisdiction, but the principle is equally applicable where the action that rendered it so liable was the commission of an offence during the probationary period. We conclude that in the circumstances of this case the appellant falls within the concept of fugitive and cannot rely, in terms of sections 11(1)(c) and 14 of the Act, on the passage of time.

[20] Had we concluded that the appellant was not a fugitive for the purposes of reliance on the passage of time, we would not in any event have regarded his extradition as oppressive. The assessment of oppression is made with reference to the period during which the appellant has been "unlawfully at large" which, in the circumstances of this case, began on 17 March 2016 when his sentence was activated. As counsel for the appellant accepted, the bar is a high one. The fact that the appellant has a settled life in Scotland is not sufficient in itself to justify the conclusion that it would be oppressive to extradite him (*Łagunoinek* v *Lord Advocate*, above, at paragraph 24). The period of just over 3 years between the date when the appellant became unlawfully at large and the date when the Polish authorities sought and obtained a European Arrest Warrant was not an especially long one, and it is not suggested on behalf of the appellant that the authorities ever said anything to lead him to believe that he would not be required to serve the activated sentence. The appellant has accordingly failed to establish that extradition would be oppressive because of the passage of time. In terms of section 21, it is therefore necessary to determine whether extradition would be compatible with his Convention rights.

Is extradition compatible with the appellant's Convention rights?

[21] In *H (H)* v *Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338, Baroness Hale of Richmond set out (at paragraph 8) a number of conclusions drawn from previous case law, including the following:

- The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
- There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.
- Public interest will always carry great weight, but the weight to be attached to it in the particular case varies according to the nature and seriousness of the crime or crimes involved.
- The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
- It is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe.

[22] In *Polish Judicial Authority* v *Celinski* [2016] 1 WLR 551, the Divisional Court again emphasised that there is a high public interest in ensuring that extradition arrangements are honoured and in discouraging a perception of the UK as a state willing to accept fugitives

from justice. Delivering the judgment of the court, Lord Thomas of Cwmgiedd CJ observed at paragraph 13, in a passage of obvious relevance to the present appeal:

> "Each member state is entitled to set its own sentencing regime and levels of sentence… For example, if a state has a sentencing regime under which suspended sentences are passed on conditions such as regular reporting and such a regime results in such sentences being passed much more readily than the UK, then a court in the UK should respect the importance to courts in that state of seeking to enforce non-compliance with the terms of a suspended sentence."

[23] Counsel for the appellant placed emphasis on the fact that almost 13 years have passed since the appellant committed the offences in relation to which his extradition is sought. For our part we place greater weight on the considerably shorter period of time which passed between the date of the appellant's conviction and sentence for the 2009 offences and the date when he breached the conditions of his probation by committing another offence in 2015. From that time on, the appellant knew that his original sentence was liable to be activated and, in due course, that it had indeed been activated. We agree with the sheriff's observation that it is to his credit that he has turned his life around since then, but he has done so in the knowledge that so far as the Polish judicial authorities were concerned he still had a prison sentence to serve.

[24] As regards the nature of the appellant's private and family life in Scotland, we were presented with information regarding his relationship with his employer's daughter which was not presented to the sheriff. Under section 27 of the 2003 Act, the court may allow an appeal against an order for extradition only if certain conditions are satisfied. One of those conditions, in section 27(4), is that evidence is available that was not available at the extradition hearing and which would have resulted in the sheriff deciding a question before him at the extradition hearing differently, requiring him to order the person's discharge. In *Hungary* v *Fenyvesi* [2009] EWHC 231 (Admin), the Divisional Court held (at paragraph 32)

that evidence which was "not available at the extradition hearing" means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. The information regarding the appellant's relationship does not satisfy this requirement, with which we agree, and we are unable to take it into account.

[25] In any event, had it been competent for us to take account of this information, it would not have affected our decision. The other factors founded upon by the appellant were the presence of two family members in Scotland and his successful integration into the business where he works. Having regard to all of these factors together, we agree with the sheriff that they do not tilt the balance in favour of refusal of extradition. The public interest in complying with an extradition request is a strong one and the Polish judicial system utilising suspended sentences must be accorded appropriate respect. We conclude that extradition is compatible with the appellant's article 8 rights.

Disposal

[26] For these reasons we are satisfied that there is no merit in the arguments upon which the applicant seeks leave, and the application is refused.