APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 19
HCA/2017-26/XM
HCA/2017-27/XM

Lord Justice Clerk
Lady Paton
Lord Turnbull

STATEMENT OF REASONS

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPLICATIONS FOR LEAVE TO APPEAL UNDER SECTION 26 OF THE EXTRADITION ACT 2003

by

JERZY TODRYK

Applicant

against

HER MAJESTY'S ADVOCATE

Respondent

Applicant: F Mackintosh; Dunne Defence
Respondent: D Dickson, Sol Adv for Lord Advocate on behalf of Polish Authorities; Crown Agent

7 February 2018

[1] This is an application for leave to appeal against the decision of the sheriff at Edinburgh to order the extradition of the applicant to Poland, in respect of two separate European Arrest Warrants (EAWs).

[2] One of the EAWs to which the application relates was a conviction warrant in respect of more than 200 offences of fraud arising from three separate cases and involving a total

sum of about £11,000. In each case the applicant had been given a suspended sentence with certain conditions, including probation. In each case he had failed to abide by the conditions and the court ordered that the suspended sentences be executed. In respect of this warrant the sheriff concluded that the applicant was a fugitive from justice.

[3] The second warrant was an accusation warrant, again in relation to offences of fraud (nine). The sums involved were greater than in the conviction warrant, perhaps in the region of £18,000. The applicant's wife also appeared on an accusation warrant dealing with the same nine charges, and eventually the sheriff heard both cases together. The only argument advanced in each case was that extradition would involve a breach of the article 8 rights of the individual involved, their spouse and their children. The sheriff accepted this argument in relation to the applicant's wife but rejected it in relation to the applicant.

[4] The sheriff heard evidence that the applicant (68) and his wife (46) have three children, a son then aged 24, and two daughters aged 15 and 6. The latter child was born in Scotland. The rest of the family came directly from Poland to Scotland in 2008 or 2009. Neither the applicant nor his wife were working, but had both worked in Poland and in Scotland until about 4 years ago. The only argument eventually insisted upon in support of the applicant's article 8 case was that he required to remain in Scotland to look after the two younger children of the marriage, his wife being unable to do so by reason of her state of health, and his son being unable or unwilling to do so because of the demands of his employment and the attitude of his fiancée towards his family.

[5] The sole ground upon which the application is based is stated in these terms:

> "The Sheriff erred in finding that extradition to the Republic of Poland was consistent with the rights of the Appellant, his wife and their children in terms of Article 8 of the European Convention on Human Rights."

[6] The sheriff rightly described the statement of grounds of appeal as "extremely brief". In the circumstances, before addressing the points advanced, it may be appropriate to comment upon the general level of specification which is to be expected in an appeal such as this. The test for an application is the same as that for an application for leave to appeal against conviction, namely the grounds of appeal are arguable. Of necessity, such a test requires that the grounds of appeal contain an adequate degree of specification to indicate wherein lies the arguability. It should be made clear whether the appeal is based on a question of law or of fact, or both (section 26(3) of the Extradition Act 2003). An appeal may only succeed if the conditions in either section 27(3) or 27(4) of the Act are satisfied, thus from the grounds one should be able to discern which of these is said to be engaged. The court is entitled to a certain degree of specification as to the alleged errors made by the sheriff, and the basis upon which the errors are said to vitiate the sheriff's decision and require discharge of the order for extradition. Where grounds are lacking in adequate specification, there may be a risk that the sheriff's report does not adequately address the issues which the appellant wishes to raise. Equally, the result may be that, as here, the sheriff feels required to address numerous matters which are not entirely pertinent to the actual arguments to be advanced, against the possibility that a wider argument lurks under such briefly stated grounds.

[7] Counsel submitted that in the circumstances there was sufficient specification of the issue, which was essentially that the sheriff had erred in the balancing exercise which he had to carry out. Although the Advocate Depute maintained that when making the order the sheriff had given a relatively detailed explanation of his decision and reasons therefor, counsel for the applicant submitted that this was not the understanding of his agents, who had not conducted the original hearing. It was therefore difficult for the grounds of appeal

to be formulated with greater specification. Although we allowed counsel to develop his arguments, we did not accept the submission that it would not have been possible to formulate the grounds with any greater specification. Apart from the process argument which we address below, the remaining points could all have been specified on the basis that in ordering extradition the sheriff had not given due or sufficient weight to these factors and had erred in the balancing exercise. Inquiries with the sheriff court have disclosed that, as would be appropriate, in cases where there is not a written decision, and the case is not continued, extradition sheriffs always give *ex tempore* statements of both their decision and the reasons therefor. Where the case is continued, the decision and the reasons therefor may be given orally, in a statement of reasons, or in a more detailed written opinion. In all cases reasons for the decision will be given at the time of making it. In the present case the sheriff gave *ex tempore* reasons which reflected in outline the reasons more fully set out in the sheriff's report. It is the duty of those advising those resisting extradition to listen carefully to the sheriff's reasons, and if an appeal is to follow to focus the grounds of appeal accordingly.

[8] Four arguments were advanced in support of the application. The first was a process argument, asserting that the sheriff should have made specific, formal findings in fact. We reject that argument entirely. This is not an appeal by stated case where such an approach is appropriate. The Scottish procedure in this type of appeal is that the nature of the case, the evidence, the conclusions from the evidence and the reasons therefor are submitted to the court in the form of a report from the first instance judge. The reasons will already have been given orally, or sometimes in writing, to the parties. There is no requirement for a formulaic approach such as counsel advocated, and which was based on comments made by the Court of Appeal in *Polish Judicial Authority* v *Celinski* [2016] 1 WLR 551, at paras 15-17.

However, the approach in that jurisdiction is entirely different, and does not proceed on the basis of a report such as is common in Scottish criminal procedure. No parallels can in our view be drawn.

[9] The remaining arguments were threefold: that the sheriff failed to give reasons for declining to extradite the wife, whilst at the same time ordering extradition of the applicant; that he had not made it clear whether he accepted that the applicant's wife had a mental condition which currently prevented her from looking after the children; and that he had not given attention to the article 8 rights which the children of the family enjoyed with the applicant, in relation to continued contact and society.

[10] In our view, it is appropriate to invert the order of the first two arguments, and look first at the question whether the sheriff accepted that the applicant's wife was suffering from a mental condition such as prevented her from being capable of looking after the children. The evidence on this matter came largely from the applicant and his wife. Two letters from the applicant's wife's GP were produced. One asserted a chronic anxiety disorder stretching back for 20 years, with a significant element of agoraphobia. The second was in similar terms, stating that the doctor understood that "she continues to find it difficult to leave her home for anything other than very short periods of time". She was on medication to treat her condition, and also received help from an organisation providing support to the Polish-speaking community in Scotland. However, in her own evidence, the applicant's wife repudiated the assertion in the first letter that her condition had been of such long duration, and said that she had only suffered any anxiety and depression on coming to Scotland. The sheriff noted also that it was maintained that whilst in Poland she had managed two types of employment, and that the evidence also suggested that she had worked in Scotland until 2013. This of course, reflected on the claim of agoraphobia.

[11] The sheriff also heard evidence from a psychologist, Dr Jack Boyle who had prepared a report for the court. That report is a somewhat remarkable document, since, whilst bearing to be a "Psychology report in respect of Mr Jerzy Todryk" it is in fact no such thing. There was no assessment made of the applicant, or, as might have been more relevant considering the arguments, of his wife. The report was little more than a narration of interviews with the applicant, his wife and their middle child, with conclusions drawn on the basis that the information he had been given was truthful. For example, he concluded that in the event of the applicant being extradited, his wife "is not capable of parenting the children adequately". It is clear that this opinion was based largely on what the applicant and his wife told him, that the applicant was the main carer who did the bulk of the parenting. He had also seen the two GP letters referred to above, but of course to a large extent these too relied on information provided by either the applicant or his wife. The middle child was specifically not asked by Dr Boyle as to the extent to which the applicant, as opposed to his wife, were involved in parenting.

[12] Given that the source of so much of the information on which the argument was based came from the applicant or his wife, their credibility was crucial. However, the sheriff was unable to accept their evidence at all, and was notably forthright in his criticism. He stated that the applicant was:

> "a wholly dishonest witness, who lied about a whole range of matters; in summary, he was a stranger to the truth. In addition to lying, he frequently avoided answering the question he was asked. His wife was a similarly dishonest, evasive witness."

[13] Both the applicant and his wife had sought to convey an impression to the court, and to a doctor who gave evidence, (a) that the son lived elsewhere, and (b) that his fiancée maintained poor relations with his family, whereas the evidence suggested that not only did the son live with the applicant and his wife, so did his fiancée. The sheriff considered that

the evidence of the applicant and his wife was designed to bolster the claim that he was the sole carer of the younger children.

[14] It is clear from the sheriff's report that he did not consider that the applicant's wife was suffering from a medical condition the extent of which prevented her from being capable of caring for the younger children of the marriage. He disbelieved the evidence of both the applicant and his wife; he was unable to place weight or reliance on the evidence of Dr Boyle, given that most of it was based on what these incredible witnesses had told him; the GP reports were directly contradicted by the subject thereof. It is implicit in his observation that social work help would be available should the family come to struggle after the applicant's extradition that he did not think this was likely. The fact that the sheriff considered that the children's interests would be safeguarded by his decision not to extradite the applicant's wife also makes it clear that he was satisfied that she could care for them.

[15] The argument that the sheriff failed to give reasons for extraditing one and not the other contains within it at least a hint of a suggestion that both cases should hang together. That is clearly not the case. The sheriff's reasons for deciding not to extradite the wife included the fact that she appeared only on an accusation warrant, that she had not been in trouble here, that such a decision would safeguard the interests of the children, one of whom was born here and the other of whom was well settled here, and maintain their article 8 rights with their mother.

[16] The sheriff recognised that in a case such as this he required to carry out a balancing exercise, with the interests of the two requested persons and their family on the one hand, and on the other the strong public interest in ensuring that extradition arrangements are honoured, and that the United Kingdom should not become a "safe haven." In respect of

the applicant, the only basis upon which extradition was resisted was that his wife was unable to look after the children, something which the sheriff was unable to accept. It was not suggested that there would be financial difficulties for the family were the applicant to be extradited; it was not suggested that their home would be at risk; and it was not suggested that there would be difficulties in maintaining contact with the applicant by letter, telephone or personal visits. On the other hand, there was a strong public interest in extradition in circumstances where the applicant faced serious charges, not only in an accusation warrant but in a conviction one, and where he was in respect of the latter a fugitive from justice. For all these reasons we are satisfied that there is no merit in the arguments upon which the applicant seeks leave, and the application must be refused.