APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 2
HCA/2023/21/XM

Lord Justice General
Lord Pentland
Lord Tyre

OPINION OF THE COURT
delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the application for leave to appeal under section 26 of the Extradition Act 2003

by

VINCENT RAYNOUARD

Appellant

against

HIS MAJESTY'S ADVOCATE (representing the French Republic)

Respondent

Appellant: Mackintosh KC; Dunne Defence
Respondent: Harvey AD, Stephen; the Crown Agent

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26 January 2024

Introduction

[1] This is an appeal concerning a person who is accused in France of denying the occurrence of the Holocaust against the Jewish people during the Second World War and of inciting hatred on the grounds of, *inter alia*, race. The judicial authorities in France seek extradition of the appellant in order to try him for three such offences. The two primary

questions are: (first) whether the conduct complained of constitutes an extradition offence, in terms of section 64 of the Extradition Act 2003; and, (secondly) if it does, whether it would be disproportionate to extradite the appellant in terms of section 21A of the Act. There is a subsidiary issue about the competence of what is said to be a cross-appeal.

Statutory provisions

[2] Section 64(2) of the Extradition Act 2003 provides that conduct constitutes an "extradition offence" if the conditions in sub-section (3) are satisfied. One of these conditions is that:

> "(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom; …"

[3] Section 21A of the Act provides that a judge, who is required to make a decision concerning extradition, must consider:

> "(1) … (b) whether the extradition would be disproportionate".

In deciding this question, the judge has to take into account:

> "(3) … (a) the seriousness of the conduct alleged to constitute the extradition offence; [and]
> (b) the likely penalty that would be imposed if [the person] was found guilty of the extradition offence; …".

The judge must not take any other matters into account (s 21A(2)).

[4] Section 26 allows an appeal against an extradition order, with leave of the court. It can allow an appeal, in terms of section 27, only if the judge at first instance ought to have decided a question differently and, if he had done, the person would have been discharged. In that event, the order for extradition would be quashed and discharge ordered. In the converse situation of the judge at first instance ordering a discharge, the extraditing state can

appeal, again with leave, under section 28. In terms of section 29, an appeal will only be allowed on a similar basis to that permitted under section 27, in which event the order for discharge is quashed and the case remitted to the first instance judge with directions on what to do, had he decided the question correctly.

[5] Section 127(1) of the Communications Act 2003 is headed "Improper use of public electronic communications network". It makes it an offence for a person to send:

> "by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character".

Procedure

[6] On 17 June 2015, at the Court of Appeal in Caen, the appellant was convicted of the offence of disputing the existence of a crime against humanity by posting online two videos, which were intended to cast doubt on the existence of the Holocaust generally and in particular the gas chambers at Auschwitz. The appellant was arrested on an extradition warrant and appeared at Edinburgh Sheriff Court on 10 November 2022. He has been in custody since then. A hearing took place on 21 September 2023. By this time France had withdrawn the warrant, having regard to the time which the appellant had already spent in custody. The proceedings, in that respect, were discharged.

[7] Meantime, on 22 November 2022, another warrant for the appellant's arrest was issued by an investigating judge in France libelling three offences. These related to seven videos, which were posted online during the period September 2019 to April 2020, in which it was said that the appellant had belittled or trivialised a war crime, challenged the occurrence of crimes against humanity during the Second World War and incited the public to hatred or violence because of origin, nation, race or religion. At the extradition hearing, there were two questions which fell to be answered after a debate. These were: (first)

whether the conduct alleged in the warrant constituted an extradition offence; and (secondly) if it did, whether the respondent's extradition would be disproportionate.

The videos

[8] The sheriff considered particular passages in the seven videos. In the first, the appellant denied the occurrence of a massacre at Oradour, which is in central France; in particular, the burning alive of women and children in the village church. He asserted that the bodies of the women and children had been reduced to ashes because they had been killed in an explosion, rather than a massacre. The massacre was described by the appellant as the "official thesis". He used that same terminology to describe the use of gas chambers at Auschwitz and went on to deny the existence of these chambers. He justified this denial under reference to the absence of openings in the roofs of the chambers, which would have been necessary to introduce the lethal gas. There were, he maintained, insufficient levels of cyanide residue in the walls and an absence of predicted consequential blue staining. In the second video, the appellant again denied the use of the gas chambers, notably those in the crematorium. He gave reasons why the "official thesis" collapsed. He used the mantra "No Holes, no Holocaust". This was again a reference to the absence of holes in the roofs and, in addition, to the doors of the chambers being capable of opening both ways. The word "FAKE" was applied on screen. In the third video, the appellant referred to the Holocaust as a construction of multiple lies, errors or half-truths. He suggested that the finding of dead bodies was attributable not to genocide, but to the deaths of hundreds of "cripples" who had not withstood the rigours of transport. The finding of large clusters of hair in the concentration camps was "the most blatant deception".

[9] In the fourth video, the appellant stated that "There is a Jewish problem. A problem that Hitler saw clearly …". He argued that the Jewish people exploited flaws in society and commented that "It is true that the Jews exploit the situation to dominate us, even to enslave us". He said that removing the Jewish people would be "pointless". In the fifth video, the appellant stated that the homicidal gas chambers could not have existed. His revisionism exposed "the great lie from which [the Jews] profited". Hitler was "the most slandered man". The appellant denounced these slanders. He wished to "rehabilitate" National Socialism. The sixth video saw the appellant describing the Nazi atrocities as "crude slanders". The "victors" did not believe in the existence of homicidal gas chambers. In the seventh video, the appellant stated that the victors knew that all the accounts about mass gassing were lies; propaganda. A false confession had been forced from the Auschwitz commandant, namely Rudolf Höss.

The sheriff's reasoning

[10] The sheriff issued his judgment on 12 October 2023. He first considered whether the conduct, if it had occurred in Scotland, would have amounted to an offence (see *Cleveland* v *United States* [2019] 1 WLR 4392 at para 21). This involved a consideration of whether, in terms of *Smith* v *Donnelly* 2002 JC 65 (at para [13]) and *Harris* v *HM Advocate* 2010 JC 245 (at paras 13 to 15), it amounted to a breach of the peace because it was severe enough to cause alarm to ordinary people and to threaten serious disturbance to the community. It was not disputed that the conduct was severe enough to cause alarm. The question was whether it threatened serious disturbance to the community. The sheriff decided that the videos were not, in their context, capable of threatening such disturbance. They did not involve provocative remarks before large crowds going to, or from, a football match (cf *Duffield* v

Skeen 1981 SCCR 66; *Alexander* v *Smith* 1984 SLT 176). They did not amount to a call for action, albeit on social media (*Divin* v *HM Advocate* 2013 JC 259 and *Kilpatrick* v *HM Advocate* 2014 SCCR 509). The viewing of the videos would have happened sometime after they had been uploaded, and long after the appellant's conduct had ended. There was no realistic prospect of the appellant's conduct being discovered at the time of uploading or in its immediate aftermath. Accordingly, the libelled behaviour could not constitute a breach of the peace.

[11] The sheriff went on to consider whether, in terms of section 127(1) of the Communications Act 2003, the videos contained material which was "grossly offensive". He cited *dicta* from *DPP* v *Collins* [2006] 1 WLR 2223 (at para 9) and reasoned (judgment para [40]) that the statements in the videos were, taken as a whole, "(i) beyond the pale of what is tolerable in our society; and (ii) grossly offensive and that any reasonable person in an open and just multiracial society would find them to be so". He founded in particular on the contents of the fourth video, excerpts from which are quoted above, but looked at the totality of the statements in deciding whether the test in *Collins* had been met. The statements were derogatory of the Jewish people. On this basis, the appellant's conduct, as set out in the extradition warrant, constituted an extradition offence.

[12] On proportionality, the sheriff first considered the seriousness of the alleged offending. He determined that it did not fall into the category of a minor public order offence which, in terms of the Lord Chief Justice's *Criminal Practice Directions 2015* (Division XI para 50A.3) (made with the Lord Justice General's concurrence), would not normally be extraditable. Ultimately, the sheriff held that the offence was "relatively serious". He turned to the likely penalty. He was able to have regard to the 12 month sentence which the court in Caen had previously imposed for similar offending. He held,

adopting *Miraszewski* v *Poland* [2015] 1 WLR 3929 (at paras 37-39), that the likely penalty was a reasonably lengthy custodial sentence; up to the maximum of 12 months imprisonment. He added that there was a public interest in prosecuting the appellant for the alleged offending. He accordingly ordered extradition.

Submissions

Appellant

[13] The respondent sought to introduce (see below) what was said to be a cross-appeal on whether the alleged offending constituted a breach of the peace. This was not competent. There was no provision for a cross-appeal (*Romania* v *Gurua* [2023] 1 WLR 2813 at para 52). The only avenue, in the event of a discharge, was an appeal by the extraditing authority under section 28. If that appeal were allowed, the discharge would be quashed and the case remitted to the sheriff with any appropriate direction (s 29). If a cross-appeal against an extradition order were available, a person might be able to re-raise rejected Convention points in reply (see *Turkey* v *Tanis* [2021] EWHC 1675 (Admin) at paras 84, 93 and 95; cf *R (Kulig)* v *Poland* [2011] EWHC 791 (Admin) at para 6). Allowing a cross-appeal would create a procedural slippery slope.

[14] The sheriff had been entitled to find that the conduct was offensive. In determining that it was grossly offensive, he correctly applied the standards of an "open and just multiracial society" (*DPP* v *Collins* [2006] 1 WLR 2223, at para 9). For a particular communication to be "grossly offensive", rather than simply offensive, it had to go beyond a Holocaust denial, since such a denial was not *per se* a crime in the United Kingdom (*Perinçek* v *Switzerland* (2016) 63 EHRR 6 at paras 99 and 259; *Chabolz* v *Director of Public Prosecutions* [2020] 1 Cr App R 17). Thirteen members, or former members, of the European Union had

no crime of denial or trivialisation of either genocide, crimes against humanity or war crimes (Report of the European Commission, dated 27 January 2014, *on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of the criminal law* (para 3.1.3)). The report referred to the United Kingdom insisting that the conduct of stirring up hatred was dependent on it being threatening, abusive or insulting (para 3.1.5).

[15] The videos did not threaten serious disturbance to the community, such as occurred with the football cases (*Duffield* v *Skeen*; *Alexander* v *Smith*). They did not constitute a call to action (*Divin* v *HM Advocate*; *Kilpatrick* v *HM Advocate*). They did not involve any threats.

[16] The sheriff's extract from the fourth video ignored a sentence which stated: "I am thinking of the loss in genuine spirituality and its natural consequences, namely disorderly ideas; materialism; hedonism." The appellant had made it clear that the extermination of the Jewish people would be an evil. The videos were, taken at their highest, racist denials of the existence of the Holocaust and other war crimes. The length and repetitive nature of the videos did not add anything derogatory towards the Jewish people other than that denial. The sheriff had not found anything that made that denial more offensive than its essential essence.

[17] Extradition would be disproportionate. This was a speech offence which would probably not be prosecuted in Scotland (cf *Meechan* v *Procurator Fiscal (Airdrie)* 2019 SLT 441) or, if it were, it would not attract a custodial sentence. It was not of the highest order of criminality. It might attract a custodial sentence in France but, by the time of the discharge of the conviction and sentence warrant proceedings, the appellant had already been in custody for more than 9 months and he had now served about a further four months. France had given no indication of the likely sentence. France had said that the appellant

would not be remanded pending trial. The sheriff erred in taking into account the public interest in prosecuting the appellant. This was not one of the relevant factors in section 21A(3).

Crown

[18] The only question before the sheriff in relation to section 127 was whether, applying *DPP* v *Collins*, the videos were grossly offensive. The fact that in Scotland there was no specific crime of Holocaust denial was irrelevant. The sheriff had recognised this. He had correctly applied the test in *Collins*. Nothing turned on the failure to include the sentence, which was referred to by the appellant, in the fourth video. The sheriff had set out the passages from the video that were grossly offensive. That was sufficient.

[19] The Crown were entitled to raise the question of breach of the peace as a form of cross-appeal (*Romania* v *Gurau*; *R (Kulig)* v *Poland*). The sheriff had erred in failing to find that the videos amounted to a breach of the peace. They did threaten serious disturbance in the community, particularly since they continued to be publicly accessible; the appellant having posted them on YouTube.

[20] On proportionality, the court should recognise the differences in European democracies on the criminalisation of speech. Identifying what might be done in Scotland was the wrong approach. The Crown had lodged fresh evidence in the form of emails from the French judicial authority to the effect that, although no definitive indication of likely sentence was given, the appellant's previous convictions for a similar offence was a consideration. The more there were previous convictions, the more likely it was that the sentence would approach the 12 month maximum. The fact that the appellant would not be remanded pending trial did not preclude a custodial sentence. Any time served in Scotland

would be taken into account. The sheriff's reference to the public interest was taken from *Miraszewski* v *Poland* (at para 39). If an offence was serious, the court would give effect to the public interest in prosecution.

Decision

"Cross-Appeal"

[21] A cross-appeal occurs when a respondent to an existing appeal wishes to challenge the first instance decision as expressed in the relevant interlocutor or other court order. It is not a cross-appeal if all that the respondent is doing is revisiting points, which may not have found favour with the first instance tribunal, with a view to persuading the appellate tribunal to affirm the first instance decision.

[22] The question before the sheriff was whether the conduct libelled in the warrant amounted to an extradition offence. The appellant challenges this on the basis that section 127 of the Communications Act 2003 was not applicable; but that basis was not the whole question before the sheriff. In resisting the appellant's challenge, the respondent is entitled to argue that, whatever the merits of the section 127 argument, the sheriff ought to have found that the conduct amounted to an extradition offence because it constituted a breach of the peace. This is simply part of the resistance to the appellant's challenge to the sheriff's determination on extradition offence. In that respect, the court agrees with *R (Kulig)* v *Poland* [2011] EWHC 791 (Admin) (Jackson LJ at para 6); see also *Turkey* v *Tanis* [2021] EWHC 1675 (Admin), (Johnson J at paras 90-92). The approach taken in *Romania* v *Gurua* [2023] 1 WLR 2813 (Holroyde J at paras 52 and 55) may be correct on the facts of that case, where the question which was appealed was a discrete one of speciality, but it does involve, as was acknowledged, a duplication of effort in that a second appeal would become

competent, this time, by the person, on the other questions following a remit to the first instance tribunal.

[23] There is no practical difficulty in permitting the alternative argument. The appellant was aware of its existence both at first instance and in the written Note of Argument which the respondent lodged in advance of the appeal hearing.

Communications Act 2003

[24] Section 127 of the 2003 Act creates a criminal offence of posting on line material which is "grossly offensive or of an indecent, obscene or menacing character". It is not necessarily a crime to communicate grossly offensive material otherwise, although it may be depending on the context. Whether something is grossly offensive is a question of fact. The court agrees with *DPP* v *Collins* [2006] 1 WLR 2223 (Lord Bingham at para 9) that the test is whether the material is "couched in terms liable to cause gross offence", although there would appear to be no need to confine that offence "to those to whom it relates", at least in the context of this case. The test is objective (*ibid* para 13).

[25] The assessment of the level of offensiveness is also primarily a matter for the court of first instance and successfully reviewable only upon the conventional grounds of the decision being plainly wrong in the sense that it cannot reasonably be explained or justified. That said, the sheriff was not in any more advantageous a position to assess the matter than this court, given that the material was all contained in the videos.

[26] The material can be divided into three broad categories. First, there is the denial of the massacre at Oradour. Putting this into context, this atrocity took place on 10 June 1944, shortly after the Normandy landings. It involved the destruction by the Waffen SS of a small village in central France with the deaths of 642 men, women and children; the latter

two categories being forced into the village church and killed by grenades, burning or by being shot if attempting to escape. Some, although only one woman, survived the massacre and were able to recount what had happened. The village is today preserved as it stood in the aftermath.

[27] Secondly, the material covers the events in the concentration camps at Auschwitz and Birkenau. It is estimated that, between 1941 and 1944, 1.1 million people were killed in these camps, including hundreds of thousands of Jewish people, many of whom went to the gas chambers upon arrival. A very small number either escaped or survived and were able to document their experiences. The camp commandant, Rudolf Höss, was tried and executed. The horrific circumstances of the camps are well researched and widely known. Thirdly, the appellant's videos deal with what he describes as the "Jewish problem", in relation to which he supports the approach adopted by the Nazi regime.

[28] The court has no hesitation in describing the appellant's treatment of all three matters as grossly offensive. The phenomenon of "fake news", in the context of the internet and social media, is well-known, as are its damaging effects. In this case, it is not so much the patent falsehood of the appellant's material that causes offence but the fact that, as it was put in similar circumstances in *Perinçek* v *Switzerland* (2016) 63 EHRR 6 (at para 209), the statements, as described by the European Commission, were:

> "attacks on the Jewish community and intrinsically linked to Nazi ideology, which was antidemocratic and inimical to human rights … [and] as inciting to racial hatred, anti-Semitism and xenophobia …
>
> Hence, prohibitions on such statements were, in terms of Article 17 of the European Convention, necessary in a democratic society".

[29] The denial of the holocaust is a gross insult to the members of the Jewish and other communities whose members perished at Auschwitz and Birkenau. The same applies to

those living with the memory of Oradour. It is not necessary to be a member of the relevant communities to be grossly offended by such statements; any reasonable person would be. The other statements by the appellant about the Jewish community are anti-Semitic racism. Although it is not an offence to hold these views and, in certain contexts, to express them, it is a breach of section 127 of the 2007 Act to communicate them to the public on the internet. The omission in the sheriff's reasoning of a sentence about his thinking is of no moment. The appeal against extradition on this ground fails.

Breach of the Peace

[30] Given the court's reasoning on section 127 of the 2003 Act, it is not necessary to determine whether the conduct also amounted to a breach of the peace. The court expressly reserves its opinion on that issue. As with the assessment of what is grossly offensive, whether conduct threatens serious disturbance to the community is primarily a matter of fact for the determination of the court of first instance and reviewable only on conventional grounds. There is substance in the appellant's submission that the videos did not involve a call to arms, as was present in the incitement to riot in Dundee (*Divin* v *HM Advocate* 2013 JC 259), or to send bullets or bombs to those connected with Celtic (*Kilpatrick* v *HM Advocate* 2014 SCCR 509). The statements which appeared on the videos were not made in the midst of a volatile, or even relatively docile, football crowd (*Duffield* v *Skeen* 1981 SCCR 66; *Alexander* v *Smith* 1984 SLT 17). That, however, is hardly an end of the matter. It is not a prerequisite of a breach of the peace that the perpetrator is at the scene of the predicted disturbance or that those who might take up arms be in physical proximity to the perpetrator. This is the modern world in which posting videos on YouTube or social medial can have a significant practical and enduring consequence relative to the behaviour of

others. It is not too difficult, especially in the present climate of tension in several parts of the world, to envisage that a repeated publication of anti-Semitic, or other racist, material could provoke serious disturbance by certain sections of society.

Proportionality

[31] In gauging proportionality, the court is to look only at the seriousness of the alleged conduct and the likely penalty. The court agrees with *Miraszewski* v *Poland* [2015] 1 WLR 3929 (Pitchford LJ at para 39) that the likelihood of a custodial sentence in the extraditing jurisdiction is not determinative of, although it is important to, proportionality. It agrees also (*ibid* at para 36) that seriousness is to be judged, initially, against domestic standards, but that the views of the requesting state should be taken into account. Although the "public interest" is not expressly mentioned as a factor in section 21A, it is the umbrella covering the whole process of reciprocation and comity in extradition proceedings. The sheriff was entitled to hold, for the reasons given in relation to the section 127 analysis, that the seven videos do not amount to a minor offence but one of relative seriousness judged by Scottish standards. He was equally entitled to have regard to the penalty of 12 months imprisonment, which was imposed upon the appellant on his last conviction and hence to consider that the likely penalty in France would be a reasonably lengthy custodial sentence of up to 12 months. In such circumstances, the appellant's extradition cannot be regarded as disproportionate.

Outcome

[32] The court will refuse the application for leave to appeal.