IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
[2020] EWHC 3723 (Admin)

CO/1954/2020

Royal Courts of Justice

Tuesday, 8 December 2020

Before:

THE HONOURABLE MR JUSTICE HOLMAN

B E T W E E N :

CIRCUIT OF LODZ (POLAND) — Appellant/respondent

- and -

MENDAL — Respondent/appellant

MISS H. BURTON (instructed by CPS Extradition) appeared on behalf of the appellant/respondent

MISS M. WESTCOTT appeared on behalf of the respondent/appellant

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J U D G M E N T
(A s a p p r o v e d b y t h e j u d g e)

MR JUSTICE HOLMAN:

1 This is a substantive appeal by a judicial authority in extradition proceedings. It is, frankly, hard to imagine a shorter or more discrete point than that which arises on this particular appeal, but nevertheless I must narrate the facts and context to some degree in order to set the scene.

2 The requested person is Polish and formerly lived in Poland. In December 2019 he was arrested under a conviction European Arrest Warrant. The warrant stated that he had been convicted of two offences. The first (which I will call "offence 1") was an offence described as "racketeering", in which he had threatened a victim with a nine-millimetre calibre air pistol in order to induce the victim to pay a sum of money. Nothing in the present appeal pertains to that offence, for which he was sentenced to one year of imprisonment. The second offence (which I will call "offence 2") was described in paragraph E of the warrant as "possession of a firearm without licence".

3 The circumstances of offence 2 were that, after the arrest of the requested person in relation to offence 1 (the racketeering), the police searched his flat. There are within the European Arrest Warrant two differing descriptions of what they found there, which is said to have constituted the factual basis of offence 2. Within paragraph E of the EAW, as translated into English, is stated,

> "The police searched that flat, but did not find the weapon he had used before, nor any other weapon, only a cartridge case of a round for calibre 9 (nine) millimetres pepper-spray airgun."

Within paragraph E (2) of the English translation of the EAW is stated,

> "Detailed description of act or acts not covered by item E1: Offence 2:

> On 27 May 2014 possessed ammunition without licence, i.e. a calibre 9 (nine) millimetres pepper-spray round."

4 It is upon the differences in the precise wording used in paragraph E and that used in paragraph E2 of the warrant that this appeal turns.

5 It was, and is, necessary to satisfy the requirement of dual criminality and, specifically for the purposes of section 65(3) of the Extradition Act 2003, 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."

Section 1(1)(b) of the Firearms Act 1968 establishes that it is an offence to possess

> "any ammunition to which this section applies without holding a firearms certificate in force at the time …"

Section 1(4)(c) of the same Act makes clear that section 1(1)(b) of the Act applies to any ammunition for a firearm except, amongst other matters,

> "blank cartridges not more than one inch in diameter measured immediately in front of the rim or cannelure of the base of the cartridge."

6 As I have mentioned, the item found in the present case is stated to have had a calibre, which I take to be a diameter measurement, of 9 millimetres, which is, of course, considerably less than one inch.

7 In short, if the item that was found at the flat was a cartridge, which had not been exploded or discharged, then the facts would amount, if they had occurred here, to an offence under section 1 of the Firearms Act 1968. But if the item was merely the residual cartridge case of

a cartridge, which had already been exploded or discharged, then no offence would have occurred here, because the residual cartridge case would amount to a "blank cartridge" of a diameter of not more than one inch.

8 It was common ground before the district judge that he had to be sure, to the criminal standard, that the facts disclosed by the European Arrest Warrant did amount to an offence here, if they had occurred here. By his judgment dated 27 March 2020, District Judge (Magistrates' Court) Fanning considered that, between the two statements of fact in box E and box E2 respectively, there was an ambiguity such that he could not be sure that the facts of the specified offence 2 did amount to an offence under English law.

9 On behalf of the judicial authority, Miss Hannah Burton, who appeared before the district judge as she does before me today, focused, in particular, on the word "of" where it appears in the phrase "a cartridge case of around …" in box or paragraph E. She submitted, and submits to me, that if the words had been "a cartridge case for a round …", then that might, indeed, have connoted a used or blank cartridge case. But she submits that the use of the word "of" clearly imports that the item did constitute "a round" or, in other words, still live ammunition.

10 The district judge dealt with this whole argument in a passage from paragraphs 28 to 33 of his judgment, where he said,

> "… I have to be certain that the item was ammunition. I would be satisfied of that if, as Miss Burton suggests, it was a round which if discharged would have an explosive effect and would discharge something other than nothing - i.e. it could not be ammunition … if it was merely a blank. The Firearms Act 1968 specifically excludes small blank firing rounds. But a firearm which discharges a noxious thing is prohibited … pepper spray is such a thing. So any ammunition capable of being activated by a firearm and which discharges pepper spray is prohibited …"

11 At paragraph 29 the district judge then quoted the "two descriptions of the item" in box E and box E2, which I have already quoted. He continued at paragraph 30,

> "I do see these as mutually exclusive. A round is a complete, unfired cartridge. That appears to be what is described in box E2. A cartridge case is the remnants of a round after it has been fired.
>
> 31. … The applicable standard of proof (the burden being upon the judicial authority) is, by default, beyond reasonable doubt. Applying that standard, I cannot be sure that the item in question was an unfired round - which would have been an extradition offence, or the cartridge case only - which would indicate a round which had been fired and which could no longer be capable of discharging a noxious thing. There are two descriptions of the items which contradict each other. They cannot both be correct. …
>
> 33. Accordingly, I am not sure that the second offence specified in the EAW is an extradition offence, because I cannot be sure it was a 'live' pepper-spray round as opposed to merely a cartridge from which such a round was previously discharged. I must discharge the requested person in respect of that matter."

12 The judicial authority promptly applied for permission to appeal from that part of the decision and ruling of the district judge and from the discharge of the requested person under offence 2. Permission to appeal was granted by Johnson J on 24 July 2020. He said in his reasons,

> "I do consider that the appeal has a real prospect of success. It is arguable that it was not open to the judge to conclude that 'a cartridge case of a round', read in context (including the description of the offence as possession of a … pepper-spray round) signified an empty cartridge case, as opposed to a cartridge case containing a round."

13 I have read and re-read that short reason most carefully. It seems to me, with respect to Johnson J, that, in that reason, he in fact reversed the burden of proof. When I put that to Miss Burton, she agreed with me. The question was not whether it was "open to the judge to conclude" that the words used "signified an empty cartridge case as opposed to a cartridge case containing a round". The question was, as the district judge had correctly directed himself, whether he, the district judge, was sure that the words used signified "a cartridge case containing a round" and not, possibly, an empty cartridge case. However, the fact is

that permission has been granted and so, of course, Miss Burton has been entitled to develop her appeal today.

14 Before me, as before the district judge, she, very understandably and appropriately, focused on the use of the word "of" where it appears in paragraph or box E. She submits that reference to the words used in paragraph or box E2 "resolves the ambiguity". To my mind, however, and with respect to Miss Burton and the cogency of her argument, the words used in paragraph or box E2 do not "resolve" the ambiguity. Rather, it is the contrast between the words used in paragraph or box E and those used in paragraph or box E2 which *creates* the ambiguity. I quite agree with Miss Burton that if the words used in paragraph or box E2 had stood alone, then there would be no ambiguity. That simply refers to "possessed ammunition without licence, i.e. a calibre 9 (nine) millimetres pepper-spray round". Standing alone, those words appear to be absolutely clear. There was "ammunition" and it was a "round". The problem is the different words that had appeared and been used earlier in paragraph or box E. There the words clearly refer to "a cartridge case".

15 To my mind, there is, at least arguably, a clear difference and distinction between a "cartridge" and a "cartridge case". Certainly, in ordinary English usage, one would not use the words "cartridge case" to refer to an undischarged or unexploded "cartridge". The addition of the word "case" in some way qualifies the word "cartridge", and to my mind, at least arguably, is clearly describing the residue of a cartridge which has already been exploded or discharged.

16 So, despite the cogency and valiance of Miss Burton and despite the fact that Johnson J granted permission to appeal, in my view District Judge Fanning was not wrong, but was right in his conclusion in this case, that he could not be sure that the second offence

specified in the EAW is an extradition offence. He was, therefore, obliged to discharge the requested person in respect of offence 2 and I, in turn, dismiss this appeal.

17 Quite separately, there is an application for permission to appeal by the requested person on a ground or grounds connected with the independence of the Polish judiciary and section 2 of the Extradition Act 2003. Consideration of permission on that ground has already been stayed to await the judgments of the Divisional Court in the linked cases of *Wozniak* and *Shlavicz*. The Divisional Court is now expected to hear those appeals in early March 2021.

18 The requested person additionally seeks permission to appeal on Article 8 grounds. That was refused by Johnson J, who stated that

> "I do not consider that the appeal on Article 8 grounds has any real prospect of success. The judge took account of all relevant factors and reached a balanced view on proportionality which was not arguably wrong …"

19 The requested person has now renewed to me his application for permission to appeal on Article 8 grounds.

20 In any event, the requested person cannot now be extradited until after the judgments of the Divisional Court in *Wozniak* and *Schlavicz* are available. It seems to me, with the agreement of both counsel today, that the most economical and expeditious course now is to adjourn to a so-called rolled-up hearing, both the requested person's application for permission to appeal on section 2 grounds, and also his renewed application for permission to appeal on Article 8 grounds, after the judgments of the Divisional Court in *Wozniak* and *Schlavicz* are available. It is likely that the decision and judgments of the Divisional Court will be determinative of the section 2 ground one way or another. The Article 8 factors will, inevitably, appear differently by then than they did before the district judge last July or than they may appear even before me here today. So it would not be appropriate for me today either to grant or refuse permission on Article 8 grounds. But, frankly, the decision on

Article 8 will not detain the court for very long when it finally falls to be considered. It seems to me that it is wasteful of the time of the court and public funds to have a yet further intermediate stage of a permission hearing and, unusually for me, I direct that all these remaining issues now be considered at a single rolled-up hearing once and for all, once a decision in *Wozniak* and *Schalvicz* is known.

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