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Case No: AC-2022-LON-003459
CO/4562/20222

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPEAL UNDER
SECTION 28 OF THE EXTRADITION ACT 2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 October 2024

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

DISTRICT COURT KOŠICE II, SLOVAK REPUBLIC

Appellant

- and -

ĽUBOMÍR MACKO

Respondent

- -
- -

Amanda Bostock (instructed by the **CPS Extradition Unit**) for the Appellant
Joshua Kern (instructed by **Kayders Solicitors**) for the Respondent

Hearing date: 1 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Murray:

1. This is an appeal by a judicial authority, the District Court Košice II in the Slovak Republic, under section 28(1) of the Extradition Act 2003 ("the 2003 Act") against the discharge of Mr Ľubomír Macko pursuant to section 21(2) of the 2003 Act by DJ Heptonstall for the reasons given in his decision dated 2 December 2022 ("the Judgment"). His decision was made following an extradition hearing before him at Westminster Magistrates' Court that took place on 8 August and 27 October 2022.

2. I note in passing that, in the case name on the first page of the Judgment, Mr Macko is referred to as "Marek" Macko. In all other documents in the appeal bundle, however, he is referred to as "Ľubomír" (or "Lubomir") Macko. I assume that this is a clerical error.

3. The judicial authority seeks Mr Macko's extradition pursuant to an arrest warrant dated 8 December 2020, which was certified by the National Crime Agency on 24 October 2021 ("the Arrest Warrant").

4. The judicial authority seeks Mr Macko's return to stand trial in relation to a single offence of theft of €24,655. The cash was contained in an iron box that Mr Macko allegedly stole from a closed safe in a room marked "Kasa" of a gaming establishment in a shopping centre in Košice. The theft is alleged to have occurred on 14 October 2011 between 10:40 am and 10:56 am. Mr Macko's defence is that he was not in the Slovak Republic at the time. He says that he is not a fugitive.

5. The maximum sentence that could be imposed for this offence is one of three years' imprisonment. A domestic warrant was issued in the Slovak Republic for the respondent's arrest on 30 May 2013.

6. Mr Macko was arrested on the Arrest Warrant on 10 November 2021 and appeared at Westminster Magistrates' Court for an initial hearing that day. Unfortunately, there was no interpreter available. The proceedings were opened the following day. Mr Macko was released on conditional bail, upon which he has remained.

7. On 27 December 2021, the judicial authority provided further information. On 29 April 2022, the District prosecutor provided additional further information.

8. Mr Macko has three convictions in the United Kingdom for driving offences and assault. In the Slovak Republic he has three previous convictions for theft, assault, and public order offences, and he has served a sentence of imprisonment there. Mr Macko also has a conviction for larceny in the Czech Republic.

9. At the hearing before the district judge, Mr Macko opposed extradition on three bases:

    i) under section 14 of the 2003 Act that it would be unjust or oppressive to extradite him by reason of the passage of time;

    ii) under section 21A(1)(a) of the 2003 Act that extradition would be incompatible with his rights and those of his family under Article 8 of the European Convention on Human Rights (ECHR); and

iii) under section 21A(1)(b) of the 2003 Act that extradition would be disproportionate.

10. At the extradition hearing, the district judge heard live evidence from Mr Macko and his partner, Ms Zuzana Tomcova. For reasons given in the Judgment, he accepted the factual evidence of Mr Macko and Ms Tomcova. He accepted that Mr Macko was not a fugitive.

11. The district judge found that it would not be unjust or oppressive by reason of the passage of time to extradite Mr Macko and that extradition would not be incompatible with the Article 8 rights of Mr Macko or his family. He also found, however, that extradition would be disproportionate having regard to the likely penalty that would be imposed for this offence, namely, a "non-custodial" sentence in the form of a suspended sentence. He therefore ordered Mr Macko's discharge pursuant to section 21A(4)(b) of the 2003 Act.

The grounds of appeal

12. The judicial authority appeals on the sole ground that the district judge was wrong to discharge Mr Macko under section 21A(4)(b) on the basis that extradition would be disproportionate. It advances two bases in support of this ground, namely, that:

i) the district judge, having determined that the likely penalty that would be imposed on Mr Macko in the event of his conviction was a suspended sentence, erred in categorising that penalty as a "non-custodial" sentence; and

ii) the district judge erred in finding that extradition would be disproportionate simply because a suspended sentence would be possible if Mr Macko were sentenced for the same offence in England.

13. On 6 July 2023, MacGowan J granted the judicial authority permission to appeal on the above ground and dismissed a purported cross-appeal by Mr Macko on the basis of a lack of jurisdiction to hear it.

Legal principles

14. In considering the question at issue on this appeal by the judicial authority, I must determine under section 29 of the 2003 Act whether the judge ought to have decided the question differently. If I determine that he should have done so, then I must decide whether, had he decided the question in the correct way, he would not have been required to discharge Mr Macko. If these conditions are satisfied in relation to the question, then I may allow the appeal. Otherwise, I must dismiss it.

15. In other words, I should decide whether the judge's answer to the question was "wrong" in light of the judge's approach but giving appropriate respect for the judge's factual and evaluative assessments: *Antochi v Germany* [2020] EWHC 3092 (Admin) (Fordham J) at [13].

16. The question at issue on this appeal is whether extradition of Mr Macko would be disproportionate for the purposes of section 21A(1)(b) of the 2003 Act. Section 21A(1)(b) reads in relevant part as follows:

> "(1) … the judge must decide … the following [question] in respect of the extradition of the person ("D") –
>
> …
>
> (b) whether extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality –
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
>
> (4) The judge must order D's discharge if the judge [decides]:
>
> …
>
> (b) that the extradition would be disproportionate.
>
> …
>
> (8) In this section 'relevant foreign authorities' means the authorities in the territory to which D would be extradited if the extradition went ahead."

17. Section 21A(1)(b) requires the judge considering an extradition request in respect of an accusation warrant to consider "whether the extradition would be disproportionate", having regard only to the three factors specified in section 21A(3) and only "so far as the judge thinks it appropriate" to have regard to them.

18. The leading authority on the proper interpretation of section 21A(1)(b) is the decision of the Divisional Court in *Miraszewski v Poland* [2014] EWHC 4261 (Admin), [2015] 1 WLR 3929 (DC). Giving the judgment of the court, Pitchford LJ considered, among other things, the relevance to the determination to be made under section 21A(1)(b) of the guidance issued by the Lord Chief Justice in *Practice Direction (Criminal Proceedings: Various Changes)* [2014] EWCA Crim 1569, [2014] 1 WLR 3001, which was issued under section 2(7A) of the 2003 Act ("the Guidance"). The

Guidance is now found in Part 12 (Extradition) of the *Criminal Practice Directions* 2023 at paragraph 12.2.

19. The Guidance sets out in a table various categories of offence where the seriousness of the offence is so low that, in the absence of exceptional circumstances, the judge should "generally" determine that extradition would be disproportionate. Examples given in the Guidance include:

    i) a minor theft of low monetary value (such as an item of food from a supermarket) and low impact on the victim or indirect harm to others; and

    ii) a minor road traffic offence where there is no injury, loss or damage to any person or property (such as driving while using a mobile phone).

20. The Guidance sets out a non-exhaustive list of exceptional circumstances, including where there is a previous offending history, that (by implication) is significant.

21. Pitchford LJ concluded at [28] that the Guidance identifies "a floor rather than a ceiling for the assessment of seriousness". In other words, the proportionality decision is not limited to the categories of offences in the Guidance. At [30]-[33], Pitchford LJ dealt with the legislative purpose of the proportionality assessment in section 21A. At [36]-[41], Pitchford LJ considered the proper approach that the court should take to consideration of each of the three factors set out in section 21A(3).

22. Swift J confirmed in *Vascenkovs v Latvia* [2023] EWHC 2830 (Admin) at [16]-[20] and [24]-[27] that *Miraszewski* remains good law in relation to the proper interpretation of the section 21A(1)(b) proportionality test, notwithstanding the departure of the United Kingdom from the European Union.

23. In *Vascenkovs* at [29], Swift J noted that the proper approach of this court considering an appeal from a district judge's conclusion on proportionality for the purposes of section 21A(1)(b) is the approach taken by the court on other proportionality issues, namely, that set out by Lord Neuberger in *Re B (A child) (Care proceedings: threshold criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 (SC) at [90]-[94].

Judge's reasons in the Judgment

24. The district judge gave his reasons for finding that extradition of Mr Macko to the Slovak Republic would be disproportionate at paragraphs 52-65 of the Judgment, having summarised the relevant legal background at paragraphs 11-19 of the Judgment.

25. The district judge considered the three factors in section 21A(3). It is not alleged that he impermissibly took any other matters into account.

26. In relation to factor (a), the seriousness of the conduct alleged, the district judge found that the alleged offence was a "high value dishonesty offence … of some seriousness". It was well beyond the examples of triviality referred to in the Guidance. It did not involve physical or psychological harm, which would have made it more serious. The district judge regarded it as "moderately serious". This conclusion is not disputed on this appeal.

27. In relation to factor (c), the possibility of less coercive measures, the district judge noted that this was the subject of significant contention at the hearing before him. At paragraph 63 of the Judgment, he found it to be a neutral factor in his assessment of proportionality. This conclusion is not disputed on this appeal.

28. The focus of the appeal, therefore, is on the district judge's analysis of factor (b), namely, the likely penalty that would be imposed if Mr Macko were to be found guilty of the extradition offence. In that regard, the district judge summarised the applicable legal principles in the Judgment at paragraphs 17-18 as follows:

> "17. As to the likely penalty on conviction, [in *Miraszewski*] at [37]: the principal focus of subsection (3)(b) [of section 21A of the 2003 Act] is on the question whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state; and [in *Miraszewski* at] [38] the broad terms of subsection (3)(b) permit the judge to make the assessment on the information provided and, when specific information from the requesting state is absent, he is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood.
>
> 18. In *Antochi v Germany* [2020] EWHC 3092 (Admin) at [21], Fordham J fully analysed the likelihood of a custodial sentence and concluded that a suspended sentence of imprisonment was not such a sentence."

29. At paragraphs 53-57 and 64 of the Judgment, the district judge reached, in summary, the following conclusions:

    i) The Arrest Warrant makes it clear that the value of the money taken places the offence in a category for which the likely penalty in the Slovak Republic would be a custodial sentence of between 6 months and 3 years.

    ii) Mr Macko has had previous custodial sentences in the Slovak Republic suspended (so the power to suspend a sentence is available there), but there was no information before the district judge as to the factors that a Slovak court would apply in determining whether to suspend the likely custodial sentence that he would receive for this offence. It was therefore appropriate to consider the likely sentencing approach in this country.

    iii) Having regard to the Sentencing Council guideline for theft (from a shop or stall), the offence involved some planning, so would be in culpability category B with a value very significantly exceeding the £1,000 indicative level for harm category 1. This indicates a sentence close to or above the upper limit of the category range of 26 weeks' custody. Mr Macko's previous convictions, including offences of dishonesty, would be an aggravating factor, justifying a further increase in the sentence. The sentence would therefore be a

short custodial sentence. It would not be "on the cusp between community [sentence] and custody, rather firmly in the custodial bracket".

iv) The sentencing court in this country would be required to consider whether the sentence could be suspended under the Sentencing Council guideline on the imposition of community and custodial sentences. The factors in favour of suspension would be that there was a realistic prospect of rehabilitation and strong personal mitigation. There was insufficient evidence to support a finding that immediate custody would result in a significant harmful impact on others. Factors indicating that it would not be appropriate to suspend the custodial sentence were effectively absent. There was no evidence that Mr Macko presented a risk or danger to the public and no history of poor compliance with court orders (just a single conviction of driving whilst disqualified). Despite the value of the money taken, this was not a case where appropriate punishment could only be achieved by immediate custody. The balance would therefore fall on the side of suspending the custodial sentence.

v) Applying *Antochi* at [21], it could not be said that the likely penalty was custodial. Weighing the moderate seriousness of the conduct with the likely non-custodial sentence, there was no "sufficiently weighty matter" to make extradition proportionate: see *Antochi* at [24]. Therefore, extradition would be disproportionate.

Submissions

30. Ms Amanda Bostock, counsel for the judicial authority, submitted that the district judge erred in deciding that extradition would be disproportionate. She noted that section 289 of the Sentencing Act 2020, which came into effect shortly after Fordham J handed down his judgment in *Antochi*, makes plain that a suspended sentence is a sentence of imprisonment, to be treated as such "for the purposes of all enactments and instruments made under enactments".

31. Ms Bostock submitted that the decision of Swift J in *Vascenkovs* at [24] makes clear that a district judge considering an extradition request should only have regard to domestic sentencing practice to obtain a "general idea of the seriousness of the allegation and the likely consequence of conviction". A district judge is not in a position to conduct the full sentencing exercise that would follow a trial. The "nuances" that would factor into a decision to suspend cannot be assessed at the time of extradition and could alter significantly after trial and/or when fuller facts are known. Accordingly, in this case, the district judge's conclusion should simply have been that a custodial sentence was the likely penalty, and he should not have gone on to consider whether it might be suspended.

32. Ms Bostock submitted that the district judge went further than Fordham J had gone in *Antochi*, which, in any event, could be distinguished from this case on its facts.

33. Ms Bostock criticised the district judge for failing to bear in mind Pitchford LJ's observation in *Miraszewski* at [39] that the likelihood of a non-custodial penalty did not preclude the judge from deciding that extradition would be proportionate. In this case, although the offence was to some extent opportunistic, there was a degree of pre-planning, and the theft was of a "very significant amount of money" from a safe

in a casino. This is far from the "trivial offending" that the Guidance is intended to exclude from the scope of extradition.

34. Finally, Ms Bostock considered that the judge's determination that Mr Macko's decision would likely be suspended failed to take into account the serious possibility that a Slovak court would not suspend his sentence given evidence that he was avoiding service of documents, evidence that he gave a false alibi when denying the offence (by reference to his wage slips in this country), and his previous offending history.

35. Mr Joshua Kern, counsel for Mr Macko, submitted that, in relation to factor (b) under section 21A(3), the proper distinction for purposes of the necessary proportionality determination is between a sentence of immediate custody and a sentence that is not of immediate custody (including a suspended sentence). It is irrelevant for this purpose that section 289 of the Sentencing Act 2020 requires a suspended sentence to be treated as a sentence of imprisonment for various statutory purposes.

36. Mr Kern submitted that this is clear having regard not only to the approach taken by Fordham J in *Antochi*, but also to the approach taken by the Supreme Court, when considering proportionality in an Article 8 ECHR context, in *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, [2013] 1 AC 338 (SC): see, for example, the judgment of Lord Judge CJ at [132], where he explicitly distinguishes between an "immediate custodial sentence" and a "non-custodial sentence (including a suspended sentence".

37. Mr Kern submitted that the district judge considered each of the matters that the judicial authority says he failed to take properly into account in his balancing exercise, including the seriousness of the alleged offence, the amount of money taken, Mr Macko's previous convictions, and so on. The district judge provided a reason for his conclusion that he should accept Mr Macko's evidence that he was not avoiding service of documents and that he only became aware of the Arrest Warrant when he went to the Slovak embassy to renew his passport. Overall, Mr Kern submitted, the district judge properly considered the relevant statutory questions raised by section 21A(1)(b), appropriately applied the relevant authorities, and reached a conclusion that was not wrong.

Discussion

38. During oral submissions at the hearing before me, there was some discussion as to whether the district judge had referred to the wrong Sentencing Council guideline when considering the facts of Mr Macko's offence. The district judge appears to have considered the guideline for theft from a shop or stall. Ms Bostock indicated that at the extradition hearing (where the judicial authority was represented by different counsel), the judicial authority's position had been that the appropriate domestic guideline would be that for "theft – general" (in other words, all categories of theft other than from a shop or stall). At the hearing before me, Ms Bostock suggested that arguably the commercial burglary guideline would be more relevant. Mr Kern objected to that submission on the ground that the matter was not pleaded that way, and the point was being raised for the first time.

39. It is fair to observe that the alleged theft does not fit neatly into the current Sentencing Guideline for theft from a shop or stall or into any of the other categories of theft covered in the "theft – general" guideline. In my view, it was reasonable for the judge, on the limited facts before him, to have regard to the theft from a shop or stall guideline. I do not, however, consider that he would have reached a different result had he considered the "theft – general" guideline, where this would, on parity of reasoning with his analysis under the other guideline, fall into category 2B, with a starting point of 1 year's custody and a category range of 26 weeks' to two years' custody. The question of suspension would still have arisen (as there are no exceptional facts that would justify taking this out of the category range), and given his analysis, it can be assumed that he would have reached the same conclusion on the proportionality question. In brief, I cannot say that he was wrong to use the theft from a shop or stall guideline, but had he used the general theft guideline it appears that he would have reached the same conclusion in any event.

40. Although there was some discussion at the hearing as to the relevance of the Guidance to this appeal, it is clear from *Miraszewski* at [28] that the Guidance is not a ceiling for the assessment of seriousness. The district judge concluded that the alleged offence was "moderately serious", and therefore well above the level of seriousness of the examples given in the Guidance. It was not necessary, therefore, to consider the exceptional circumstances referred to in the Guidance, but none of those apply in this case in any event.

41. I note, in relation to factor (a) of section 21A(3), the seriousness of the conduct alleged to constitute the extradition offence, that the judicial authority does not have permission to pursue a ground of appeal that the judge's assessment of the conduct as "moderately serious" was wrong. It appears to be the position of the judicial authority, reflected in Ms Bostock's submissions at the hearing, that the judge failed to assess the likely penalty as sufficiently serious to justify extradition at least partly because of a failure to recognise the seriousness of the alleged theft, given the amount of money involved, namely, €24,655. Be that as it may, the judge's assessment of the seriousness of the conduct as "moderately serious" is not challenged on this appeal.

42. As already noted, there is no dispute concerning the judge's determination in relation to factor (c) of section 21A(3) that it is a neutral factor.

43. The focus, therefore, is on the district judge's assessment in relation to factor (b). I reject Ms Bostock's submission that the district judge was in error when he assessed the likely penalty to be a suspended sentence and that this was a "non-custodial" sentence for purposes of the proportionality analysis.

44. As a preliminary point, section 289 of the Sentencing Act 2020 is not relevant to this analysis. Factor (c) requires the district judge to determine "the likely penalty that would be imposed". Having determined that the likely penalty would be a suspended sentence, the question is then whether that fact, taken together with the district judge's assessment of factors (a) and (c), but having regard to no other factors, means that extradition would be disproportionate. In relation to each factor, the judge needs to take it into account "so far as the judge thinks it appropriate to do so".

45. The fact that a suspended sentence actually imposed is treated under the Sentencing Act 2020 as a custodial sentence for purposes of all enactments does not and cannot,

of itself, change the proportionality analysis under section 21A of the 2003 Act. A suspended sentence can only be imposed when the custody threshold has been passed, as the district judge determined, uncontroversially, had occurred in this case. The seriousness of the penalty for proportionality purposes already reflects the passing of the custody threshold. Nonetheless, as *Antochi* and *H(H)* make clear, for the purposes of a proportionality analysis, there is a proper distinction in relative seriousness of penalties to be drawn between a sentence of immediate custody and a suspended sentence. It is in that limited sense that it is "non-custodial". Accordingly, the district judge made no error in this regard.

46. To the extent that the judicial authority was submitting that it was impermissible for the district judge to go beyond his determination, by reference to sentencing practice in this country, of the likely custodial sentence and consider whether the sentence could be suspended, I reject the submission. There is no such principle, as *Antochi* demonstrates.

47. The other basis put forward by the judicial authority that the judge was wrong to find that extradition would be disproportionate is that he did so "simply because" a suspended sentence would be possible. This submission, however, is not sustainable having a proper regard to the district judge's analysis. It is clear that he had considered all three factors, as he was required to do, and that he made an evaluative judgment having regard to all the factors and the evidence and information before him. In my view, the conclusion that he reached was open to him on the alleged facts and other information presented to him by the judicial authority.

48. In the absence of sufficient information from the judicial authority as to the factors that a Slovak court would take into account in considering whether to suspend the sentence, the district judge was entitled to consider the approach that would be taken by a sentencing court in this country, as noted by and subject to the caveats noted by Swift J in *Vascenkovs*. I do not accept Ms Bostock's submission that the judge undertook the sort of definitive sentencing exercise deprecated by Swift J in *Vascenkovs*. The judge was able to reach a view on each of the high-level factors for and against suspension of the sentence that are set out in the imposition guideline, and he gave reasons that were open to him for reaching each view. It was not necessary to enter into "nuances" in order to decide whether the sentence could be suspended, and it is pointless to speculate as to what the position on suspension of the sentence would be after an actual trial in the Slovak Republic.

49. The district judge was entitled to determine whether the sentence could be suspended on the basis of the evidence and information before him as part of his evaluation of the likely penalty. It was open to him to conclude, on that indicative exercise, that it is likely that a suspended sentence would be passed in these circumstances, notwithstanding Mr Macko's previous offending history, the amount allegedly stolen, and so on.

50. The district judge was aware of the allegation that Mr Macko had deliberately been avoiding the service of documents and gave a reason for concluding that it was not likely that he had done so. The fact that a Slovak court might have reached a different view on this question is speculative. It would depend on the course of any eventual trial, including what evidence emerged. The district judge was entitled to make his determination under section 21A on the limited evidence and information before him

and not to give particular weight to speculative considerations. That is the nature of the proportionality exercise.

51. I accept that another district judge considering the three factors in section 21A(3) and looking at the same evidence and information might have reached a different conclusion. But, having regard to the approach of Lord Neuberger in *Re B* to appellate consideration of a judge's evaluative assessment on a question of proportionality, I conclude that the district judge's decision was one that I cannot say was right or wrong. In other words, it falls into category (iv) of the categories set out by Lord Neuberger in *Re B* at [93]. On that basis, the appeal must be dismissed.

52. I will deal briefly with two other points raised by Ms Bostock at the hearing. The first is that the district judge should have taken into consideration, in deciding whether extradition would be disproportionate that, in the absence of extradition, Mr Macko will not be tried for a serious high value theft that he may have committed. The second is that the district judge should have given some weight in his decision-making to the fact that by issuing the Arrest Warrant the judicial authority has considered the question of proportionality and determined that extradition is proportionate. Neither of these, however, is a matter that the district judge was permitted to take into account, having regard to section 21A(2) of the 2003 Act.

Conclusion

53. For the reasons I have given, the judicial authority's appeal is dismissed.