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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1625



No. 202201904 A1

Royal Courts of Justice

Thursday, 24 November 2022

Before:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE MURRAY

HIS HONOUR MENARY KC

(Recorder of Liverpool)

REX

V

DAVID MUSINS

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MS L BALD appeared on behalf of the Applicant.

MR T WILLIAMS appeared on behalf of the Crown.

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**J U D G M E N T**

LORD JUSTICE WILLIAM DAVIS:

- 1 David Musins is now aged 36. Prior to the offending with which we are concerned, he had no convictions. On 14 March 2022 in the Central Criminal Court he pleaded guilty to membership of a proscribed organisation contrary to section 11 of the Terrorism Act 2000. On 27 May 2022 at the same court he was made the subject of a special custodial sentence for an offender of particular concern. The custodial term was 3 years, with a further licence period of 1 year. There were ancillary orders made, with which we are not concerned.
- 2 He renews his application for leave to appeal against sentence after refusal by the single judge.
- 3 He has been represented today, as he was represented below, by Miss Bald, who appears before us *pro bono*. We are extremely grateful to her for the forceful and cogent fashion in which she has put her arguments. She is to be highly commended for the effort she has put into this case. No-one could have done or said more to assist the applicant and the court. Mr Williams appeared on behalf of the respondent, having put in written submissions.
- 4 The applicant was a member of a proscribed organisation to which we shall refer as "NS131". The period of membership was between 17 December 2016 and the end of August 2017. In 2013 a neo-Nazi group called National Action had been set up. It developed an active online presence. It engaged in public demonstrations and used encrypted messaging to communicate. That was proscribed in December 2016. After proscription, a group calling itself NS131 emerged. In reality, it was simply a continuation of National Action. It posted promotional footage on YouTube. It promoted national socialism through street art and graffiti and banners in various parts of the country.
- 5 The membership of MS131 was very similar to that of National Action in terms of the people involved. The evidence before the court indicated that the applicant had at some point early in 2016 joined some form of Neo-Nazi web forum. He, thereafter, had attended a National Action meeting. He had gone to a camp run by National Action, the camp's purpose being to teach people to fight. He was on a list of members of National Action dating from April 2016. He attended a National Action march in the North East in October 2016. As we have indicated, that organisation was then proscribed. Plainly, the applicant would have understood why. Thereafter, he continued his activity, now with NS131. He attended a number of what were called graffiti and training events, principally with the same group of people with whom he had already been involved. In January 2017 he went to a meeting at a public house in Swindon. On 26 February 2017 there was an event in a community centre in Swindon which he attended. On 27 May 2017 he went to an outdoor survival event. In due course, pictures emerged with the applicant taking part in martial arts and combat training. He went to a graffiti event in July 2017 in Swindon. About that time a video was filmed in which the applicant appeared. That was posted on 17 July 2017. The last event that he could be identified as attending was in August 2017 in Swindon. There was a photograph in which he appeared with others giving a Hitler salute, together with a NS131 banner.
- 6 By the end of August 2017 the applicant was no longer involved in NS131. He was only properly identified by the police in March 2021 during the trial of another man who had been involved in the organisation. Between 2017 and 2021 the applicant had given up any association with Neo-Nazi organisations. He had resiled from the beliefs he had expressed and he had become a working man in a respectable job. By the time of his arrest in November 2021 he had a partner. He made no comment when interviewed. On his arrest

he still was found to have some of the clothing that he had been seen wearing in photographs and videos.

- 7 The judge in sentencing, set out the course of conduct in which the applicant had engaged as we have already rehearsed. Having done so, he described the applicant as being fully immersed in the ideology of the group. He worked to expand its reach. The judge referred to the Pre-sentence Report in which the applicant had explained that he had gone into far right politics because he had not found an identity elsewhere. The judge did not understand from that why it was that the applicant chose to retreat into a neo-Nazi organisation. However, he referred to the letter that the applicant had written, a letter which we have seen and which the judge described as well written. We would describe it as exceptionally well written. It referred to the applicant having become racist in a separatist sense as a defensive response to external threats to people of his white British ethnicity and cultural background. The judge concluded that the beliefs which the applicant then held could very easily have led to racial conflict, which is why the courts took the offence so seriously.
- 8 The judge turned to the Sentencing Council definitive guideline. This case fell to be sentenced under the guideline that was relevant prior to the increase in sentence for these offences. The original guideline applied without any adjustment. It was clear that this applicant fell into culpability B, namely an active but not prominent member of the organisation. That provided a starting point of five years. The judge concluded that the applicant was: "[...] a very active member of the group, someone who in terms of age other potential members would have looked up to." It is the fact that, in general, membership of the organisation consisted of people rather younger than the applicant.
- 9 The judge also found that the applicant had sought by his actions to expand the reach of the organisation. For those reasons, he said that the offending should be marked by a starting point of 6 years rather than 5.
- 10 The judge took into account apparent lack of maturity on the part of the applicant. The judge considered mitigation. He observed that the applicant had no previous convictions, but, as the judge rightly noted, that is a factor that applies to very many people charged with this sort of offending. He also noted the delay prior to arrest because the material implicating the applicant only became available at a late stage. The much more significant feature was the fact that the applicant had stopped associating with the group long before his arrest. He had held a responsible job as an operations manager for four years. He had ended the contact with any form of neo-Nazi organisation voluntarily. He had changed his perspective. He had taken steps since his arrest to get help from a therapist. The judge concluded the applicant genuinely understood how wrong it was to have involved himself with the neo-Nazi organisation that he had. He described this as strong mitigation.
- 11 He also noted the domestic life of the applicant and the fact that his family was supportive, as indeed, was the management of the company for which he worked. The judge said this:

"That you left the group voluntarily is particularly significant, but it cannot expunge your earlier behaviour which was so abhorrent."
- 12 The judge then applied a 25 per cent reduction to take account of all of that mitigation. The sentence that then resulted of four and a half years was discounted by one third because the plea of guilty had been indicated at the earliest opportunity. So it was that the judge reached a custodial term of three years.

- 13 The first argument put on behalf of the applicant is that the starting point should not have been raised beyond five years. There was nothing to suggest that this applicant was more culpable than any other ordinary member of the organisation.
- 14 The grounds invite four conclusions. There was no evidence that other members of the organisation looked up to the applicant because of his age. Expanding the reach of the organisation, however it might be done, was simply part of being an active member. There was nothing unusual about the applicant's activity. The number and type of events he attended was in itself not exceptional. The fact that the applicant had extreme views which might lead to racial conflict was inherent in the offence. Thus, none of those matters justified any uplift from the starting point. Orally, today Miss Bald has argued that there is a very clear and significant distinction between the lowest level of culpability identified in the guideline, which gives a starting point of two years, as opposed to the culpability level appropriate for this applicant, which gives a starting point of five years. She argues that the this starting point should capture all but the very unusual offender within that category of culpability.
- 15 She further argued that the uplift applied to the applicant was at odds with sentences imposed on other members of the organisation. She referred, in particular, to a man who had been sentenced to a custodial term of five and a half years after a trial. That man was a regional organiser who organised the kind of camps which the applicant attended. Thus, it is argued, the judge went wrong in setting a starting point after trial of 6 years.
- 16 We do not accept that the judge was not entitled to take into account the factors he identified. We further consider that having done so, he was entitled to elevate that sentence after trial but before mitigation beyond the starting point. He was entitled to draw an inference about the effect of the applicant's age. He had evidence that at the relevant time the membership of the organisation was generally much younger than the applicant. He knew what sort of man the applicant was from the letter he himself had written and what his employer had said. Whatever might be said about this man's maturity, he was clearly intelligent and he was aged around 30 at the relevant time.
- 17 The judge was entitled to say that, although publicizing the organisation was likely to be what any active member would do, the applicant was one of a small number who had engaged in street art and graffiti, as well as participating in a video. Others attended a number of events and meetings, but the applicant on the evidence attended what appeared to be a significant number of the organisation's events in different parts of the country.
- 18 Finally, the applicant's views at the time of his membership were specific and extreme. The judge concluded, as do we, that a person may be a member of a neo-Nazi group without holding such views to quite the same degree.
- 19 When considering the case, the single judge concluded that the sentence imposed on others is of very limited value. In writing, no disparity in the strict sense was asserted. In her oral submissions, Miss Bald used the expression that right thinking members of the public would think that something had gone wrong, which is to assert disparity. We consider that there is quite insufficient for us to come to that conclusion. The sentences on others were fact specific in their cases. One of the sentences was actually imposed by the same judge who imposed this sentence. We cannot reach any conclusion favourable to the applicant simply by looking at other sentences that were imposed.
- 20 The second ground which formed a substantial part of the oral submissions today was that the applicant's change of mindset between 2017 and the date of sentence was profound and

provided exceptional mitigation. He was certainly not the same man as the one who had been the member of NS131. It is argued that his change of mindset, certainly in the context of NS131, was unique. Miss Bald pointed to the fact that on any view it is likely to be unusual, and it is important, therefore, to incentivise people to change their outlook and behaviour, as this man did, quite voluntarily.

- 21 The judge, principally on the basis of the change of mindset, reduced the sentence that he otherwise would have imposed by 25 per cent. The submission before us today is that that should have been more in the region of 50 per cent. We observe that one of the mitigating factors in the guideline is "[...] clear evidence of a change of mindset prior to arrest." The fact that it is a mitigating factor within the guideline demonstrates that it is a feature of this kind of case, albeit not one that is found very regularly. The reduction in sentence to take account of any mitigating factor is a matter of judgment in each individual case. For us to depart from the judge's assessment of the appropriate reduction here, we would have to be satisfied that the judge went wrong. As the single judge observed, the reduction was significant. The reduction that is proposed in submissions to us today is akin to the reduction that would be given to somebody who had not only resiled from his or her membership of and views about an organisation of this kind, but also who gave active assistance to the police in undermining it and leading to the arrest of those who had been involved. A reduction of 50% will be reserved for that kind of case. That is not to underestimate the significance of what this appellant did, but it is to indicate that significant though the mitigation was, it did not, with great respect to Miss Bald, fall into that sort of category. The judge was sentencing in the context of very serious offending where deterrence is an important consideration.
- 22 This judge has very substantial experience in sentencing this kind of case. We cannot say that this judge was wrong when he reflected the mitigation by a reduction of 25 per cent. It may be that other judges would have given a slightly greater discount. Equally, other judges would not. This was an exercise of judgment exercised which did not amount to an error.
- 23 It follows from all of that, that notwithstanding everything said by Miss Bald, we must refuse this renewed application.

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**CERTIFICATE**

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This transcript has been approved by the Judge.