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IN THE HIGH COURT OF JUSTICE

No. CO/4617/2018

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 1340 (Admin)

Royal Courts of Justice

Wednesday, 22nd May 2019

Before:

MR JUSTICE HOLMAN

B E T W E E N:

DANIEL CIEMNIAK

Appellant

- and -

REGIONAL COURT IN BYDGOSZCZ (POLAND)

Respondent

MR M. HAWKES (instructed by Kaim Todner) appeared on behalf of the appellant.

MR D. BALL (instructed by the Crown Prosecution Extradition Unit) appeared on behalf of the respondent.

J U D G M E N T

(As approved by the Judge)

MR JUSTICE HOLMAN:

- 1 This is an appeal pursuant to section 26 of the Extradition Act 2003 from an order for extradition made by District Judge Marie Mallon in the Westminster Magistrates' Court on 13 November 2018.
- 2 The case requires careful consideration of the history and chronology. The appellant, who is now aged 37, is Polish and formerly lived in Poland. In September 2002 he was sentenced in Poland to one year of imprisonment for supplying Class B drugs during 2000. In October 2005 he was sentenced in Poland to one year of imprisonment for other drugs and other offences committed in September 2004. On 19 June 2008 he committed the drugs offences to which the present extradition proceedings relate. On his own evidence to the district judge, he was arrested during June 2008 in relation to those offences.
- 3 On 15 August 2008 the appellant travelled to England and, save for his later period in prison in Poland to which I will shortly refer, he has lived here ever since. Not long after he arrived here, he met the woman who is now his wife, with whom (apart from his period in prison) he has lived continuously between then and now. He and his wife have one son, who was born on 27 February 2010 and so was aged eight at the time of the proceedings before the district judge, and is now aged nine.
- 4 On 23 May 2012 a court in Poland issued what I will call the first European Arrest Warrant. That warrant was certified in November 2012 and the appellant was arrested pursuant to it in January 2013. The first warrant was a mixed warrant. In part it was a conviction warrant seeking his extradition in order to serve the sentences of imprisonment that had been imposed upon him in 2002 and 2005 in relation to the offences committed in 2000 and 2004. It was also an accusation warrant in relation to what at that stage were alleged offences committed on 19 June 2008, which now, again, are the subject of the present warrant.

5 By a judgment given on 24 April 2013 in the Westminster Magistrates' Court, District Judge Nicholas Evans ordered the extradition of the appellant to Poland upon that first arrest warrant. There was a delay while appeal proceedings took place here, and the appellant was finally extradited to Poland in June 2014. Pausing there, it is important, therefore, to stress that when he was extradited to Poland in June 2014, the appellant was extradited both upon the conviction and the accusation elements of the first European Arrest Warrant. In other words, he was extradited both to serve the sentences of imprisonment which had already been imposed upon him, and also to face trial upon what at that stage were alleged offences committed on 19 June 2008.

6 The appellant was imprisoned in Poland between June 2014 and 10 September 2015, namely for about 15 months. That imprisonment was serving the sentences of imprisonment that had already been imposed upon him, from which in September 2015 he received conditional release. It is now quite clear (although this does not seem to have been known or made available to the district judge) that by a court order in Poland dated 5 October 2015, that is, shortly after he had been released from prison, the appellant was permitted to travel to England to reside at a specified address in Manchester. The formal court order of 5 October 2015 says in translation:

"[The court] ... decided to agree to the change of [the appellant's] permanent address to [the specified address in Manchester]. At the same time imposing on him the obligation to keep in touch with his Probation Officer in writing, by phone or in person during the probation period."

7 The appellant asserts that he did indeed keep in touch with his probation officer every month by 'phone or letter. Pursuant to, and with that permission of, the Polish court order the appellant returned to live in England in October 2015 and has lived here continuously ever since, although his actual address in Manchester appears to have changed.

- 8 On 13 March 2017, namely some 18 months after his release from prison in September 2015, the appellant was convicted in Poland of the offences committed on 19 June 2008. He was sentenced to two years and two months' imprisonment. He was not personally present at that trial, but was represented by an attorney appointed by him or on his behalf, and no point has been taken about the regularity of the conviction or sentence, both of which have indeed been upheld after subsequent appeals in Poland. So the position then became that the appellant was, once again, a convicted person in Poland, who, however, was present here in England.
- 9 On 26 July 2018 (as I understand it, after the appellate process had been concluded in Poland) the second European Arrest Warrant was issued and it was certified on 23 August 2018. That warrant is a conviction warrant which relies upon the conviction in March 2017 of the offences committed in June 2008. The appellant was arrested on that warrant on 20 September 2018. In due course, there was a substantive hearing of the extradition proceedings and, as I have said, his extradition was ordered on 13 November 2018.
- 10 The offences which the appellant committed in June 2008, and of which he was convicted in March 2017, were two drugs offences. One offence was supplying 19g of amphetamine to a woman. The other offence was possession of 139g of amphetamine, 90 MDMA (Ecstasy) pills and half a kilo of cannabis. In relation to the offence of possession of those drugs, there is, and was, no allegation of supply or intent to supply. So, the extent of supply of drugs was 19g of amphetamine, which he was said to have given (not sold) to a woman.
- 11 The district judge heard oral evidence and gave a relatively detailed written judgment. Mr Malcolm Hawkes, who did not appear before the district judge but now appears before me, submits that there are several significant errors in the judgment and reasoning of the district judge. In my view, that overall submission has been well made out by

Mr Hawkes and is correct. The first error relates to categorising the appellant as a fugitive.

At paragraph 14 of her judgment the district judge said:

"[The appellant] came to the UK in 2008, immediately after his arrest for these offences. I find that is no coincidence, but demonstrates his intention to avoid prosecution in Poland ... He is clearly a fugitive."

I stress the word "is" in that last sentence. At paragraph 26(e) of her judgment, under the heading "Factors favouring extradition being granted", the district judge again stated, "[The appellant] is a fugitive ..."

- 12 Mr Hawkes seeks to compare those findings by District Judge Mallon in 2018 with paragraph 6 of the judgment of District Judge Nicholas Evans in April 2013. In that judgment, District Judge Evans had said:

"I suspect the requested person is a classic fugitive; but, in the absence of definitive evidence, that is not a finding I make in this case."

- 13 However, Mr David Ball, who appears on behalf of the respondent prosecutor, has correctly pointed out that the evidence, as it was before District Judge Evans in 2013, was different from the evidence as it was before District Judge Mallon in 2018. Earlier in paragraph 6 of his judgment, District Judge Evans had said:

"The requested person is silent (as is the European Arrest Warrant) as to whether or not he had been arrested for the June 2008 offences ..."

- 14 It was in the context of that "silence" that District Judge Evans, whilst entertaining the suspicion that the requested person was a classic fugitive, felt unable to make a finding to that effect in 2013. However, during the course of the hearing in 2018, as described in paragraph 10 of the judgment of District Judge Mallon:

"Under cross-examination, [the appellant] confirmed that he came to the UK during the summer of 2008 in order to work. He accepted that in June 2008 he had been arrested for these drugs offences ..."

15 So, there was a significant shift in the evidence that was before District Judge Evans (namely "silence" on this point) and that which was before District Judge Mallon, namely evidence from the requested person himself that he had been arrested in June 2008 for the drugs offences. That being so, it seems to me that it was entirely open to District Judge Mallon, and not at all in conflict with the evidential basis of the decision of District Judge Evans, to find that at the point of coming here, and indeed for some years after he came here, the appellant was a fugitive.

16 Where I part company with District Judge Mallon, however, is in relation to the whole period after the appellant was arrested pursuant to the first European Arrest Warrant in January 2013. From that moment onwards, his whereabouts were known. He was, as I understand it, on bail until the time of his actual extradition in June 2014. He was then securely in prison in Poland until September 2015. He then returned to England with the express permission of the Polish court pursuant to the order of 5 October 2015, to which I have already referred. The appellant says, and it is not contradicted, that thereafter he remained in regular contact with his probation officer in Poland. Although he did not return to Poland for the trial in March 2017, he was engaged in that trial through an attorney, and it seems to me that there is simply no justification for characterising him as a fugitive at any point since his arrest in January 2013.

17 That leads on to consideration of the position with regard to delay and the second error of the district judge. At paragraph 26(e) of her judgment, the district judge said:

"[The appellant] is a fugitive. It is his conduct which has caused the delay, the fact that the offences are ten years old is a direct consequence of his behaviour. It is no coincidence that he first came to the UK in 2008, immediately after his arrest, to avoid prosecution in Poland."

18 In my view, that paragraph is both inaccurate and unfair to the appellant. On proper analysis, as I have explained, he was indeed a fugitive until January 2013. That was

a period of approximately four and a half years after he committed the offences in June 2008 and came to England in August 2008. But so far as the rest of the period of delay is concerned (which totalled a little over 10 years at the time the district judge was considering this matter), it seems to me that it is not at all a "direct consequence of his behaviour". Rather, it is a consequence of the fact that although the Polish authorities successfully obtained his extradition in June 2014, in part to face prosecution for these offences, they did not get on with the prosecution. I simply cannot understand, and no explanation has been given in evidence from Poland, how or why it is that, after the appellant had been extradited in June 2014 and while for no less than 15 months he was securely in prison in Poland, the prosecution did not get on with the prosecution for which he had been extradited.

19 Further, as the chronology shows, the appellant was expressly permitted by the Polish court to return to England in October 2015, and it was still a further 18 months before the prosecutor in Poland finally successfully prosecuted him. Whether the delay lay with the prosecutor or with the Polish legal system, I do not know; but it does not seem to me that it can in any way fairly be laid at the door of the appellant.

20 The third error of the district judge lay in her description and categorisation of the offending in paragraph 26(c) of her judgment. It is right and fair to say that at paragraph 3 at the outset of her judgment she correctly summarised the two offences and the quantities of drugs involved, and the fact that the offence of supply was limited to 19g of amphetamine. However, by the time she reached paragraph 26(c) of her judgment, under the heading "Factors favouring extradition being granted", the district judge was to say:

"The extremely serious nature of the allegations, possession and supply of a substantial quantity of drugs."

21 There she appears to have elided possession and supply, referring in the singular to "a" quantity of drugs, and not discriminating between the quantity which the appellant supplied

and the quantity which he possessed. In my view, it was certainly open to the district judge to characterise the total quantity of drugs possessed as "substantial", but it is less justifiable to describe 19g of amphetamine as "a substantial quantity of drugs." There are grounds for anxiety in this case that, by that important point of her judgment and analysis, the district judge had slipped into thinking that the entire quantity of drugs had been supplied and not merely possessed.

22 Further, at the beginning of paragraph 26(c) the district judge referred to "the extremely serious nature of the allegations." That does seem to me to have a degree of hyperbole. Clearly, the supply and possession of drugs, at any rate on this scale, may be said to be "serious", but to further describe it as "extremely serious" does lead one to wonder what adjective the district judge would reserve for really serious offending, including, for example, forms of homicide.

23 So, I accept the criticism of Mr Hawkes that the judge appears to have had in mind, at the point of analysis and performing the balance, a distorted and exaggerated view of the scale and gravity of the offending. That, in turn, fed into her overall "Conclusions on Article 8" at paragraph 28 of her judgment, where she said:

"I am satisfied that the Article 8 rights of the requested person and his family are engaged. On the evidence before me, there is nothing to suggest that the negative impact of his extradition is of such a level that the court ought not to uphold this country's extradition obligations, particular given the serious nature of the offences of which he stands convicted."

24 It follows from that, that at the point of forming her overall conclusion the district judge had in mind "the serious nature of the offences of which he stands convicted," which, on the previous page of her judgment, she had distorted and exaggerated in the way I have described. Having said that, it is important to note that the Polish court did consider that

the offending merited a sentence of two years and two months' imprisonment, which, as the district judge said at paragraph 26(d) of her judgment, "is substantial." Further, as I have mentioned, there were appeals in Poland, so that sentence remains the ultimate sentence after due consideration, not only at first instance, but at the appellate level in Poland. Clearly, a sentence of two years and two months' imprisonment does indicate serious underlying offending.

25 The fourth area of criticism by Mr Hawkes relates to the manner in which the district judge considered and weighed the interests of the appellant's family, and in particular his son. There was both written and oral evidence from both the appellant and his wife. In so far as it concerned their son, the gist of it was that he had been extremely negatively affected by the separation from his father during the 15 or 16 months that his father was away in Poland in the period June 2014 to October 2015. That was summarised by the district judge at paragraph 7 of her judgment where she referred to the evidence of the appellant:

"His son took his extradition in 2014 badly and did poorly at school. He suffers from ADHD. He improved on [the appellant's] return and is now doing really well. He fears a further extradition will cause a deterioration."

26 The district judge summarised the evidence of the wife at paragraph 12 where she said:

"[The wife] ... confirmed that she lives with her partner and eight-year-old son and they have been in the UK since 2008. She said that she and their son found [the appellant's] extradition in 2014 very difficult and she is sure if it were to happen again, it would affect the child's progress at school..."

27 On the basis of that evidence, the district judge said at paragraph 26(f) of her judgment under the heading "Factors favouring extradition being granted":

"There will be disruption to his family life as will always be the case, but nothing to establish that it would be exceptionally severe, particularly bearing in mind that his son was much younger when he was extradited for the first time and that he is not his primary carer."

28 As I have already quoted, that led on to the district judge concluding at paragraph 8 that:

"There is nothing to suggest that the negative impact of his extradition is of such a level that the court ought not to uphold this country's extradition obligations ... "

29 It seems that there are two very obvious errors in the approach and reasoning of the district judge in paragraph 26(f) where she said:

"...particularly bearing in mind that his son was much younger when he was extradited for the first time and that he is not his primary carer."

30 There was absolutely no basis at all for saying that the appellant "is not his primary carer." This was, and remains, a mother and father living together in one household with their son. Of course, if two parents are separated and a child spends the bulk of his time with one parent rather than the other, it may be possible and appropriate to describe the first parent as the "primary carer" and the other parent as "not the primary carer". But, frankly, that language and approach is utterly inappropriate in a situation where a child or children are living in a single household with both their parents, and the thrust of the evidence is that they are a united family. In such a scenario, the language of "primary carer" has no place, but if it is to be used at all, then both parents are primary carers. It seems to me that that was a very significant error by this district judge in her approach to this case and her reasoning.

31 Further, when the district judge said "particularly bearing in mind that his son was much younger when he was extradited for the first time", that seems to carry some implication that the effect upon a child of abrupt separation from a parent is worse when that occurs when

the child is aged about four (as he was in June 2014) than when the child is aged about nine (as he was at the time the district judge was dealing with this). It also completely ignores the cumulative effect upon a child of cumulative abrupt and enforced separations from a parent.

32 There is no psychological evidence in this case and I certainly do not intend to substitute any psychology of my own for that used by the district judge. But it seems to me that there was no evidential basis, and no justification, for either of the qualifications that the judge imported in the part of the sentence beginning with the words "particularly bearing in mind ...". So, I agree with Mr Hawkes that there is material in the judgment to suggest that the district judge inappropriately understated the potential effect upon this child of another abrupt separation from his father now.

33 For all these reasons, both individually but especially cumulatively, it does seem to me that there were significant errors in the approach of the district judge. That has the effect that section 27 of the Extradition Act 2003 is engaged. So far as it applies to the present case (which is not essentially based on any fresh evidence) the effect of section 27 is that "the court may allow the appeal only if the conditions in subsection (3) ... are satisfied."

34 Subsection (3) provides that:

"The conditions are that—

(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge."

35 I am quite satisfied that there are a number of questions in this case that the district judge "ought to have decided ... differently", namely: her decision as to the period of time during which the appellant was a fugitive; her consequential decision that "it is his conduct which

has caused the delay... "; her faulty characterisation of the nature and gravity of the offending in paragraph 26(c); and her approach to the likely effect upon the son in paragraph 26(f). None of that of itself means, however, that I may, let alone must, allow the appeal. By section 27 I may only allow the appeal if both the conditions in section 27(3) are satisfied.

36 I thus have to consider whether:

"if [the district judge] had decided the question in the way [she] ought to have done, [she] would have been required to order the person's discharge."

“Required” is a strong word and must be given its proper force.

37 I have found that question a relatively finely balanced and difficult matter to decide on the facts and in the circumstances of this case. Clearly, in the light of the errors of the district judge, it now falls to me to consider afresh the balancing exercise, adopting the *Celinski* approach; but it is only if I were to consider that the balance positively requires the court to order the appellant's discharge that I may allow the appeal.

38 I will address the factors in favour of, and against, extradition in the same order in which the district judge addressed them, but substituting what I consider to be more correct formulations of paragraph (c), (e) and (f) of paragraph 26. Where I use inverted commas, I am quoting and adapting the language used by the district judge. Where I do not, I am substituting my own words for those of the district judge. Adopting that approach, the factors favouring extradition being granted are:

(a) "The public interest in this country complying with its international extradition treaty obligations and not being regarded as a haven for those seeking to avoid criminal proceedings in other countries". The judge there correctly stated the public

interest which has been described by the Supreme Court as a "constant and weighty" interest.

(b) "The mutual confidence and respect that should be given to a request from the judicial authority of a member state."

(c) The serious nature of the allegations, namely the supply of 19g of amphetamine to a woman, and the possession of 139g of amphetamine, 90 Ecstasy pills and half a kilo of cannabis.

(d) "The length of the sentence imposed, two years and two months, which is substantial."

(e) The appellant was a fugitive in the period from June 2008 until January 2013. It is his conduct which caused the delay in that period. Since then he has not been a fugitive and his whereabouts have been well known. In the period from June 2014 until 5 October 2015 he was present in Poland (and in prison until 10 September 2015) and was directly available to the prosecuting authorities there.

(f) "There will be disruption to his family life, as will always be the case." On the evidence of the appellant and his wife, the period of disruption between June 2014 and October 2015 had a marked deleterious effect upon their son. There is no evidence or reason to suppose that that deleterious effect would not recur at least as severely if the appellant were now to be extradited again.

(g) "He may well have medical problems, but his evidence on the point was untruthful and there is nothing to suggest that any condition cannot be appropriately treated in Poland."

39 I then address the "Factors against extradition being granted". again using the order and wording used by the district judge:

(a) "Interference with [the appellant's] right to a private and family life and that of his partner and child. His son suffers from ADHD and there is a real concern his condition would deteriorate, as it did in 2014."

(b) "The age of the offences, now over 10 years old."

(c) "The fact that [the appellant] has no convictions or cautions in the UK".

(d) "The fact that he has turned his life around, is no longer involved with drugs, and is a successful businessman".

(e) "The fact that [the appellant] suffers from mental health problems which could well worsen were he to be extradited".

40 I now have to balance all these factors. After very careful consideration, it does seem to me that when the factors are correctly analysed the balance does clearly come down against, rather than in favour of, extradition. It seems to me that these offences are serious, but not of such gravity as to make extradition imperative, now ten years later. It seems to me that although the appellant was clearly a fugitive until January 2013, there was ample opportunity after that for the Polish authorities to prosecute him long before they did. It simply defies comprehension why, having successfully extradited him in 2014 on a mixed warrant, in part to face trial for these offences, they did not do so in the whole period of over 15 months whilst he was in Poland and readily available to face trial. Nor is it comprehensible why, after he was permitted to return to England in October 2015, a further 17 months elapsed before final conviction in March 2017.

41 It seems to me, therefore, that this is a case and a situation in which the Polish authorities, in effect, have had their opportunity back in 2014 and 2015. The appellant had been extradited for the very purpose. They did not take advantage of that opportunity. He was permitted by the Polish court to return here. He had now lived a law-abiding life here again for a further three years by the time the district judge was considering this matter. There is clearly a firmly established family life between him, his wife and their son. There is good evidence in this case, based upon the evidence of the effect upon the son of the separation in 2014 and 2015, that the son is likely to be seriously affected by a further enforced separation.

42 In all these circumstances and for all these reasons, it seems to me that in this particular case the Article 8 rights as they now are, not only of the appellant and his wife, but in particular of his son, which require special and discrete consideration, outweigh any public and international interest in the extradition now of this appellant to serve a sentence for these offences that were committed now almost 11 years ago. For all those reasons, this appeal will be allowed and, pursuant to section 27(5) of the Extradition Act 2003, I quash the order for the appellant's extradition and order his discharge.

Are there any matters which now arise?

MR HAWKES: No, thank you, my Lord.

MR BALL: No.

CERTIFICATE

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Official Court Reporters and Audio Transcribers

5 New Street Square, London EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

admin@opus2.digital

**** This transcript has been approved by the Judge (subject to Judge's approval) ****