Neutral Citation Number: [2019] EWHC 2033 (Admin)

Case No: CO/11/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2019

Before:

THE RT HON THE LORD BURNETT OF MALDON
(LORD CHIEF JUSTICE OF ENGLAND AND WALES)
THE HON MR JUSTICE WILLIAM DAVIS

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Between:

DONNA FRANCIS	**Appellant**
- and -	
GOVERNMENT FOR THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

Mr Ben Cooper (instructed by **ACA Law)** for the **Appellant**
Miss Catherine Brown (instructed by **CPS Extraditions Unit**) for the **Respondent**

Hearing dates: 26 June 2019

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Approved Judgment

The Lord Burnett of Maldon and Mr Justice William Davis:

Introduction

1. This is an appeal pursuant to Section 103 of the Extradition Act 2003 ("the 2003 Act") against the order of District Judge (Magistrates' Court) McPhee of 25 October 2018 to send the case of Donna Francis to the Secretary of State for the Home Department. On 12 December 2018 the Secretary of State ordered her extradition to the United States.

2. The charges in respect of which the Government of the United States ("US Government") sought the extradition of the appellant were:

   (i) Criminally negligent homicide on 30 May 2015;

   (ii) Unauthorised practice of a profession on 30 May 2015;

   (iii) Unauthorised practice of a profession on 20 April 2013.

3. Only two issues were raised before the judge in opposition to the application made by the US Government. First, that the prison conditions in which the appellant would be likely to find herself fell short of the standard required by article 3 of the European Convention on Human Rights with the consequence that her extradition would violate her article 3 rights; and (b) that extradition would give rise to a disproportionate interference with the article 8 rights of the appellant and her young child. The judge resolved each issue against her. She submits that he was wrong to do so.

The background

4. From 2009 to the end of May 2015 the appellant lived in New York. Her main occupation was as a hairdresser. She also worked as a shop assistant in a DIY shop. She has no medical training. The case against her is that she twice carried out a cosmetic procedure on a young woman named Kelly Mayhew by injecting silicone into her buttocks. The first occasion was on 20 April 2013. On the second occasion in May 2015 Ms Mayhew suffered a seizure whilst the procedure was being undertaken. An ambulance was called but Ms Mayhew was pronounced dead on arrival at hospital. She had died as a result of a systemic silicon emboli. This was said to have been due directly to the injection of silicone by the appellant.

5. The appellant left the scene in a car whilst the emergency services were still tending to Ms Mayhew. The next day she fled from the United States. She flew via Iceland to London. She has not returned to the United States.

6. In June 2016 a grand jury in Queens County, New York returned an indictment against the appellant charging her with the offences in respect of which extradition is sought. The following month a warrant for her arrest was issued in the United States. In March 2017 the Secretary of State issued a certificate pursuant to Section 70 of the 2003 Act and a warrant for her arrest was issued in this jurisdiction. She was arrested on 11 May 2017.

7. The extradition hearing was originally listed for September 2017. It was adjourned more than once because of delays in obtaining evidence about prison conditions in

New York. There was a full hearing on 16 and 17 July 2018. A witness named Zachary Katznelson was unavailable on those two days. The hearing was adjourned part heard for his attendance. The adjourned hearing was on 4 September 2018 and the decision of 25 October was handed down in writing.

8. The case proceeded before the judge on the assumption that the appellant would be remanded in custody in the United States in the event of her extradition. When the extradition hearing was first listed, the information from the authorities in the United States was that she would be held pending trial at the Rose Singer Center on Rikers Island and that any sentence would be served on Rikers Island. Evidence was assembled by those representing the appellant dealing with conditions on Rikers Island. By the time of the hearing in July 2018 the position in relation to her detention had changed.

9. On 24 May 2018 Judge Kenneth Holder, the judge of the State Court in New York with the conduct of the appellant's case, ordered that she should be processed on arrival at Manhattan House of Detention or Brooklyn House of Detention. She would be taken from there within 24 hours to the Suffolk County Jail for Women. In the event that the appellant required psychiatric care whilst at Suffolk County Jail, she would be taken to Elmhurst General Hospital for all treatment. Judge Holder also noted that, in the event of conviction, the district attorney had agreed to seek a sentence of no more than one year's detention which would result in any custodial sentence also being served at Suffolk County Jail.

District Judge McPhee's decision

10. After setting out the conduct alleged by the US Government and the charges laid against the appellant, the judge rehearsed the oral evidence. The witnesses were: Dr Forrester, a consultant forensic psychiatrist; Joshua Dratzel, a defence attorney in New York; Zachary Katznelson, a New York attorney with the Prisoners' Rights Project in New York. That is an organisation involved in campaigning for prison reform and in bringing class actions on behalf of prisoners.

11. Dr Forrester practises in the United Kingdom. He examined the appellant on 16 April 2018. He noted that she had a documented history of depressive illness dating from November 2017. His examination provided evidence "confirming the presence of a depressive illness". His first written report was concerned with the effect on the appellant's mental health were she to be detained in conditions said to exist at Rikers Island. Dr Forrester relied on the reports of the witnesses based in the United States. Dr Forrester reported further once it was apparent that she would be detained in Suffolk County Jail. He accepted that the concerns he had in relation to Rikers Island did not apply to Suffolk County Jail though he was still concerned about what would happen if the appellant's condition deteriorated but not sufficiently to require transfer to hospital. He raised a series of questions about the level of mental health care available within the prison. Dr Forrester remained concerned about the effect on the appellant's mental health were she to be detained in the kind of conditions reported to exist in Manhattan House of Detention and Brooklyn House of Detention.

12. The judge accepted the diagnosis of a depressive illness. He also acknowledged the risk that the appellant might lapse into a chronic condition in the event of extradition and consequent incarceration. But the judge did not accept the conclusions reached

by Dr Forrester in relation to the potential effects of detention for a day and a night at the reception facility in alleged poor conditions. The judge was not impressed by the fact that Dr Forrester's opinion that risks to the appellant's mental health were unaffected by the significant change in the circumstances in which she was expected to be detained.

13. Joshua Dratel gave evidence in relation to three matters. First, the lack of non-acute mental health care in prisons; second, the problems with the infrastructure of Suffolk County Jail as apparent from the pleadings in litigation concerning that institution; and third, the risk that the proposals for a quick passage through the reception facility in Manhattan or Brooklyn would not be feasible in practice.

14. The judge noted that Mr Dratel had no personal experience of Suffolk County Jail. Thus, he had no direct knowledge of the infrastructure or of medical provision there. The judge accepted that he could explain processing procedures in Rikers Island but that Mr Dratel had "little else of substance" to contribute. Given that the appellant would not be processed at Rikers Island, this conclusion meant that Mr Dratel had no useful contribution to make.

15. Mr Katznelson produced the pleadings in group litigation between male prisoners and Suffolk County in relation to the prisons there. The class action concerned prison conditions between 2009 and 2013 with reference principally to the physical state of the prisons, in particular the plumbing system. The allegations in the litigation were of intermittent flooding in cells, blockage and backing up of toilets and failure of drainage systems. However, Mr Katznelson had never visited the prisons in Suffolk County himself. He said that the nature of the transfer to Suffolk County Jail as set out in the order of Judge Holder was not an arrangement Judge Holder was entitled to make. Moreover, his evidence was that the proposed arrangement was not in line with normal practice and that, in consequence, he could not see how it could be put into effect. He said that the New York Department of Corrections "consistently flout the law and the constitution" so as reduce or remove the value of any undertaking given by the authorities in the United States.

16. The judge concluded that Mr Katznelson was largely providing a personal opinion rather than evidence properly so called. The judge did not accept that Mr Katznelson could give expert evidence as to the conditions in Suffolk County Jail or as to the value of the assurances and undertakings given by the New York authorities.

17. The judge noted that to succeed in respect of a breach of her rights under article 3 of the Convention the burden was on the appellant to show substantial grounds for believing that there was a real risk of her being subject to inhuman or degrading treatment or punishment. The judge concluded that, in the light of the assurances provided in July 2018 about where the appellant would be held, there were no grounds for such a belief. He did not accept that the order of Judge Holder would be ignored or that the relevant US authorities would not proceed in respect of this appellant as they suggested that they would.

18. He applied the principles applicable to assurances summarised in *Giese v The Government of the United States of America* [2018] EWHC 1480 (Admin), in particular at paras [37] to [39], themselves drawn from *Othman v UK* (2012) EHRR 1 at [188] and [189]. At [38] the court noted:

> "That requires an assessment of the practical as well as the legal effect of the assurance in the context of the nature and reliability of the officials and country giving it. Whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept. The principles identified in Othman, which are not a check list, have been applied to assurances in extradition cases in this jurisdiction. A court is ordinarily entitled to assume that the state concerned is acting in good faith in providing an assurance and that the relevant authorities will make every effort to comply with the undertakings, see *Dean (Zain Taj) v Lord Advocate* [2017] UKSC 44; [2017] 1 WLR 2721 at [36]."

Applying those principles, the judge found that he had no doubt about the good faith of the agencies providing assurances in this case. The result was that he was satisfied that the appellant would be processed in conditions that did not violate article 3; she would then be detained in conditions which were satisfactory; and that should her relatively mild psychiatric condition deteriorate, adequate treatment and care would be made available. In short, the appellant could not demonstrate that there were substantial grounds for believing that there was a real risk that she would be exposed to conditions which fell short of the standard required by article 3 ECHR.

19. The judge then considered whether extradition would constitute a disproportionate interference with the article 8 rights of Donna Francis and her young child. The child is now aged five. The judge had evidence from Dr Pettle, a consultant clinical psychologist with expertise in child mental health. Dr Pettle reported that, for the child, the loss of her mother would be a significant upheaval and that it would cause the child a high level of emotional distress. Dr Pettle agreed that the alternative arrangements, namely for the child to live with her maternal grandmother, were likely to be successful in retaining normal development of the child should the appellant be extradited. The judge also considered the appellant's mental health in the context of her article 8 rights.

20. The judge carried out the appropriate balancing exercise as required by *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin). He gave "some significant weight" to the appellant's mental health and the emotional harm likely to be suffered by her child. However, he concluded that these factors were outweighed by the public interest in meeting the treaty obligations of the United Kingdom.

The Appeal

21. For the appeal to succeed the appellant must demonstrate that the judge was wrong either in his conclusion in relation to article 3 or in the balancing exercise in respect of article 8 or both.

22. It is not said that the judge misapplied any legal principle.

23. The real complaint with regard to the assertion that the appellant was at real risk of inhuman or degrading treatment is that the judge failed to pay proper regard to the evidence of the witnesses from the United States, in particular Mr Katznelson, about the conditions in which she would be detained. It is argued that the evidence of Mr Katznelson demonstrated quite clearly that the transfer from the reception facility to Suffolk County Jail would not occur as suggested by the United States authorities and that the conditions at Suffolk County Jail would mean that detention at that prison would involve a clear breach of the appellant's article 3 rights. We are unable to accept this argument. The US government had filed extensive evidence setting out the circumstances which the appellant would encounter on her return to New York. The judge was entitled to conclude as he did. The evidence of Mr Katznelson on this aspect of the case, which sets out the wide-ranging doubts and concerns of a committed campaigner, were not determinative. Moreover, he was not in a position to give expert evidence on conditions in Suffolk County Jail. He had never visited the prison. His evidence about conditions largely relied on pleadings in an extant and unresolved civil action relating to male prisoners over a period ending in 2013. Insofar as he gave evidence about the medical facilities at the prison, he did so on the basis of assumptions unsupported by any independent material.

24. We were invited in the course of the hearing of the appeal to consider the pleaded case and the pleaded response (including admissions) of the prison authorities in the class action. This exercise took us nowhere. Even taken at their highest the alleged conditions – based on individual complaints on different days spread over a period of years in the past – would not establish that a person detained at Suffolk County Jail would be at real risk of inhuman and degrading treatment.

25. We are satisfied that the decision of the judge on the article 3 issue was not only open to him but was also inevitable on the basis of the evidence he heard. The detention regime initially in contemplation gave rise to article 3 concerns which the US government met not by engaging in an evidential debate concerning Rikers Island, but by making prospective arrangements, supported by the court in New York, that would avoid the issue. The attempt thereafter to quarrel with every aspect of the regimes that the appellant would experience was not at all convincing. It is striking that the appellant's mental health problems are very much at the lower end of the scale experienced not only in the context of extradition but also routinely in the domestic criminal jurisdiction. Strong evidence is required to suggest that the lack of support and treatment of those with relatively mild mental health conditions would violate article 3 standards. The evidence in this case came nowhere close.

26. By the time of the hearing before us the argument in relation to the article 8 rights of the appellant and her child amounted to this: there is a bond between mother and daughter; separation of mother from daughter will have a devastating effect; extradition should not be ordered unless and until the United States gives an undertaking that Ms Francis will be repatriated to serve any sentence.

27. The applicable legal principles governing a suggested violation of the article 8 rights of the requested person and family were comprehensively explained in *HH v Deputy Prosecutor of the Italian Republic Genoa* [2013] 1 AC 338 following *Norris v Government of the United States (No 2)* [2010] 2 AC 487. The court must examine the way in which extradition will interfere with family life with the question being whether the interference was outweighed by the public interest in extradition. There

is a constant and strong public interest in extradition and that the United Kingdom should honour its treaty obligations. Those accused of crime should be brought to trial (and those convicted should serve their sentences). There should be no "safe havens" for fugitives. The weight of these interests might vary according to the seriousness of the crimes in question. The public interest in extradition would outweigh the article 8 rights of the family unless the consequences of the interference were exceptionally severe, albeit that the interests of a child were a primary consideration.

28. We have no difficulty in accepting that there is a bond as suggested. But there is no sufficient evidence to support the argument that separating mother and daughter will have a severe effect of the sort contemplated by the Supreme Court. The child will remain in the care of close family members and contact with her mother will be possible remotely whether or not visits are arranged. It is not clear how long the criminal process will take but there is a clear understanding that if convicted (whether on her plea of after trial) the appellant will receive a sentence that does not exceed a year. Repatriation to serve any sentence in the United Kingdom would be a possibility under arrangements which exist with the United States but whether that would provide any practical assistance would depend on how long the appellant had been in custody on remand.

29. A successful challenge to a judge's conclusion in relation to an article 8 balancing exercise involves demonstrating that the judge's conclusion was wrong. The judge did not go wrong. Indeed, the nature of the impact on the child in this case, in our view, fell far short of that needed to resist extradition. We are doubtful whether the expert evidence on this issue added anything of value to the obvious impact on a child of separation from a parent. It should not be thought necessary in cases other than those with an unusual feature to commission expert evidence of this sort.

Conclusion

30. This case involves no point of principle or new issue of law. It illustrates the need for challenges based on prison conditions to be properly evidenced. The test articulated by the Strasbourg Court (substantial grounds for believing there is a real risk of treatment contrary to article 3) calls for clear evidence relating to the specific circumstances that a requested person will face. That might include direct evidence of inspection and independent reports themselves evidentially based. The evidence available in this case fell short; and there was nothing beyond doubts (genuinely held, we accept) about whether the assurances given regarding the detention conditions the appellant would encounter would be honoured. Equally, evidence about the general and unexceptional adverse impact on a child of separation from a parent will not carry an article 8 based resistance to extradition very far.

31. There is no basis for impugning the conclusions of the judge. The appeal is dismissed.