IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 3698 (Admin)

CO/1783/2019

Royal Courts of Justice
Thursday, 28 November 2019

Before:

MRS JUSTICE FARBEY

B E T W E E N :

ZAWILA — Appellant

- and -

POLISH JUDICIAL AUTHORITY — Respondent

MR GEORGE HEPBURNE SCOTT (instructed by Montague Solicitors) appeared on behalf of the Appellant.

MS LOUISA COLLINS (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE FARBEY:

Introduction

1. This is an appeal under section 26 of the Extradition Act 2003 ("the 2003 Act") against the decision of District Judge Gozée on 26 April 2019 to order the appellant's extradition to Poland pursuant to an "accusation" European Arrest Warrant ("EAW") issued on 6 December 2012 and certified on 6 October 2018. The perfected grounds of appeal are threefold. First, it is submitted that the district judge erred when he concluded that the appellant's extradition would not be unjust and/or oppressive under section 14 of the 2003 Act. Secondly, the district judge erred when he concluded that the extradition would be compatible with the appellant's and his family's rights under Article 8 of the European Convention on Human Rights. Thirdly, the district judge erred when he concluded that extradition was proportionate under section 21A of the 2003 Act.

2. The EAW seeks the surrender of the appellant for the purpose of prosecution for fraudulently "submitting contracts with forged signatures of subscribers" for satellite television systems between 8 November 2000 and 8 December 2000, causing loss of at least PLN 5550, which is calculated as £1,096. The maximum sentence would be eight years for fraud and five years for an offence relating to false documents.

3. In granting permission to appeal, Sir Wyn Williams observed that: "There are some very long delays in this case."

4. I have had the benefit of submissions from Mr George Hepburne Scott on behalf of the appellant and Ms Louisa Collins on behalf of the respondent. I am grateful to counsel for their helpful submissions.

New evidence

5. The appellant was not represented before the district judge, though he had the assistance of a paralegal as a McKenzie friend. The district judge had, however, the benefit of a proof of evidence. That proof has not been provided to me. The appellant has instead produced a new proof of evidence dated 22 November 2019. This new statement gives a description of his life in the United Kingdom and asserts that he is now too ill to be extradited. On 25 October 2019, he underwent aortic valve replacement surgery which he had cancelled several times in the past for family, work or other reasons. He has an outpatient appointment on 19 December 2019 at St Thomas' Hospital. He has been prescribed appropriate medication.

6. This new evidence makes a number of assertions about the appellant's state of health. Those assertions are not supported by medical evidence, which the appellant has had ample opportunity to obtain.

7. The appellant has now also submitted a proof of evidence from his partner, Aneta Krawiec. She did not give evidence to the district judge and her statement adds little to the overall case.

8. Under section 27(4)(b) of the 2003 Act, I must consider whether the evidence would have resulted in the district judge deciding a question before him at the extradition hearing differently. In my judgment, the fact that the appellant has had recent heart surgery is insufficient to satisfy this statutory test; nor is there anything else in the new evidence that is capable of affecting the outcome either on its own or when read in the context of the evidence overall. It is right to record that Mr Hepburne Scott recognised these difficulties and did not press me to consider the new evidence. I have given it no weight.

Factual background

9. The appellant was born on 5 June 1971 and is a Polish national. The alleged offence took place, as I have said, between 8 November 2000 and 8 December 2000 in the province of Dolny Slask, Swidnica, Poland. The framework list has been checked for "forgery of administrative documents and trafficking therein" and "swindling."

10. Further information (supplementing the EAW and dated 13 March 2019) was received from the Polish district prosecutor. It provided confirmation of a number of matters. The applicable limitation period for the offence expires on 8 December 2025. The appellant has never been arrested or questioned in respect of the offence in the EAW.

11. Proceedings were initiated on 3 April 2004 after a complaint was made by someone. This led to establishing that the appellant had committed other fraudulent acts which, after investigation, led to the basis of the single offence in the EAW.

12. A decision to suspend the investigation was issued when the appellant could not be found in 2004. A nationwide search was initiated on that same day. A preventative measure in the form of a detention order was issued by the Swidnica District Court on 3 March 2011. A search by wanted notice was issued on 16 March 2011.

13. The decision of the prosecution to pursue an EAW was made when the national measures failed and information was received that the appellant was in Ireland. An application for an EAW to be issued was made on 23 August 2012 and it was issued on 6 September 2012.

14. Owing to the fact that the appellant could not be located, he was never informed of an obligation to notify the Polish authorities of his whereabouts. Before coming to the UK, the appellant had sold his flat and left his place of residence because, according to the Polish authorities, he was being looked for by the owners of the defrauded companies. He was wanted in connection with another set of proceedings. Therefore, it is the judicial authority's position that he was aware of proceedings against him.

15. The appellant has a previous conviction for fraud in Poland in 2001. He pleaded guilty to that offence and received a suspended sentence in 2003.

The district judge's judgment

16. The appellant gave oral evidence to the district judge, who rejected significant parts of what he said. In a key passage of the judgment, he held (at paragraph 42):

> "The further information from the district prosecutor concedes he was never cautioned by the authorities about any obligation to inform them of his whereabouts or the fact he was not permitted to leave Poland. However, I do find that the RP had some awareness of the offences for which he is now wanted for prosecution at the time he left Poland in 2011. Despite his evidence that he was not hiding from the authorities after 2004 when the investigation started, he had already moved to Wroclaw, he had been convicted by the District Court in Swidnica of fraud for which he was on a suspended sentence under supervision and the further information from the JA states he was wanted by the District Court in Swidnica. I find the RP's own evidence in relation to his recollection of events unreliable. He seemed to have an awareness of the details of the incident for which he was wanted for prosecution and I place greater weight on the information provided by the JA about the RP's knowledge

> of the criminal conduct alleged and in particular that he was wanted by the Court in connection with another case."

17. The district judge went on to observe that 19 years have passed since the alleged offence was committed. He found that there was nevertheless no evidence of culpable delay by the judicial authority. The offence was not reported to the authorities until 2004. The further information clearly sets out that an investigation was immediately started and a decision to charge was made by July 2004. A nationwide search was made, which continued until 2011 when the court issued the domestic warrant of preventative detention. In 2012, the judicial authority had information which suggested that the appellant was living in Ireland and a prompt application was made for the EAW.

18. Turning to section 14 of the 2003 Act, the judge found that the appellant had adduced no evidence to establish that due to the passage of time, it would be unjust to extradite him. He found that there was no evidence of risk of prejudice in the conduct of the trial in Poland and that the appellant seemed to have "sufficient knowledge of the circumstances of the offence" for which he is wanted for prosecution.

19. As for oppression under section 14, the district judge accepted that the appellant's circumstances had changed in the period since the date of the alleged offence. Noting his previous conviction, he nevertheless found that he had "put that behind him, moved to the UK in 2011 and started a new life with his partner and children where he had lived lawfully and been successfully self-employed."

20. Nevertheless, despite the change in personal circumstances and the passage of time, the district judge concluded that it had not been established that it would be oppressive to return the appellant to stand trial.

21. The district judge went on to find that the offence would not fall within the category of "minor financial offences" within Part 50A.5 of the Criminal Practice Direction. He found that:

> "Albeit the value of the fraud is relatively small, there was financial loss caused to five individuals and the satellite company."

22. The judgment sets out the balancing exercise which is required under *Polish Judicial Authorities v Celinski* [2015] EWHC 1274. In support of extradition, the district judge mentioned the following factors. Firstly, the public interest in ensuring that extradition arrangements are honoured is very high and carries great weight. Secondly, the appellant is accused of a fraud where five individuals and a satellite company have been caused financial loss. Thirdly, the judicial authority has acted expeditiously and there is no element of culpable delay. Fourthly, the decisions of a judicial authority should be accorded a proper degree of mutual confidence and respect. There is a clear public interest in the United Kingdom complying with its Treaty obligations to other countries. Although the appellant is not a fugitive, he had "some awareness of the criminal conduct" and the United Kingdom should not be regarded as a safe haven. The district judge also put into the balance on this side of the scales the previous conviction that I have mentioned.

23. The factors militating against extradition were that the appellant had settled in the United Kingdom; had been successfully and gainfully employed; and that he has put his naive offending history behind him. He has no criminal convictions in the United Kingdom and his personal circumstances have changed "considerably". The value of the fraud is relatively low, the financial loss standing, as I have said, at £1,096.

24. Weighing the factors for and against extradition, the district judge found that the factors in favour far outweighed those against extradition.

Legal framework

25. Section 11 of the 2003 Act requires the court to consider whether extradition is barred by one of certain specified statutory provisions. Those provisions include section 14 of the Act, which provides that:

> "A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have -
>
> (a) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)."

26. Section 21A concerns the approach to be taken to the human rights of a person not convicted of the extradition offence. It provides, insofar as relevant:

> "(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ('D') -
>
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b) whether the 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 makes one or both of these decisions -
>
> (a) that the extradition would not be compatible with the Convention rights;

(b) that the extradition would be disproportionate."

27. Article 8 concerns the right to respect for family life:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The parties' submissions

28. On behalf of the appellant, Mr Hepburne Scott emphasises that almost 19 years have elapsed since the offence which forms the subject of the EAW. The appellant was found by the district judge not to be a fugitive. He now for the first time has to face charges relating to very old events such that he would be seriously prejudiced by the passage of time in any future trial. It would be unjust and oppressive to extradite him under section 14.

29. Mr Hepburne Scott submits that the appellant's extradition would constitute a disproportionate interference with the appellant's and his family's right to respect for private and family life under Article 8. The offence involves minor, low-level frauds which are nearly two decades old. The appellant has lived a settled life since 2011. He has not committed any offences since 2001.The offence for which he stands to be extradited would almost certainly not have attracted an immediate custodial sentence in the UK. The appellant lives with his wife, 8 year old son and 17 year old daughter. The impact of losing a father at a formative age will have a long-lasting impact on the son, contrary to the conclusions of the district judge.

30. Mr Hepburne Scott submits under section 21A of the Act that the district judge was bound to have considered the proportionality of extradition in light of the low level of the fraud for which extradition is sought and its age. The district judge erred in concluding that extradition in this case would be proportionate in section 21A terms.

31. On behalf of the respondent, Ms Collins submits that even in cases where there has been considerable delay by the judicial authority, it is clear that the focus must remain on whether the result of the delay is oppressive, which is a separate question. The district judge found that the delay between the date of the offences and the EAW has been explained by the respondent. It is brought about by the Polish authorities' inability to locate the appellant. The district judge was correct to find that this is not, therefore, a case concerning culpable or unexplained delay.

32. With regards to injustice, the court will require proof of the facts of any prejudice which is asserted. Plausible assertions do not suffice. The hypothetical risk of prejudice to the defendant, depending on what his defence might be, is insufficient. The appellant has failed to discharge his burden of showing that injustice would result.

33. Ms Collins submits that the district judge took into account the appellant's circumstances, including the change in his life since the date of the offence. That change had to be considered against the background of the appellant's previous conviction in 2003 for similar conduct and that he had some awareness of the criminal conduct set out in the EAW, as evidenced by him

selling his house and moving away when he was searched for. The district judge was entitled to consider these elements in his assessment of whether any oppression would result.

34. In relation to the proportionality exercise under Article 8, Ms Collins submits that the appellant does no more than invite this court to conduct the balancing exercise again, which is not the purpose of an appeal. The district judge considered the appellant's personal circumstances and conducted the balancing exercise as he was required to do before concluding that the balance fell in favour of extradition in considering whether any disruption to family life would be exceptionally severe. It is plain from considering the judgment as a whole that the district judge's approach revealed no material misdirection.

35. In relation to the question of proportionality under section 21A, the main components are the seriousness of the conduct and the nature and the quality of the acts alleged. Ms Collins directed me to the district judge's consideration of whether the offence fell within the category of minor financial offences within the Criminal Practice Direction. The district judge was correct in his analysis of the evidence and made appropriate findings of fact.

Discussion

36. In my judgment, there are three particular features of this case that are significant. First, the judicial authority conceded that it cannot be established to the criminal standard that the appellant is a fugitive in the sense of the word developed by the case law for the purposes of the application of section 14 of the 2003 Act: see *Wisniewski v Regional Court of Wroclaw, Poland* [2016] EWHC 386 (Admin).

37. The concession that the appellant is not a fugitive means that it would be wrong to treat him as a person who has knowingly placed himself beyond the reach of a legal process. That is a relevant consideration not only in relation to section 14, but also in relation to the proportionality exercise under Article 8.

38. The district judge found that the appellant had "some awareness of the offences for which he is now wanted for prosecution" when he left Poland in 2011. He weighed this as a factor in favour of extradition but, in my judgment, made no proper allowance for the judicial authority's concession. At the hearing before me, time was spent trying to ascertain how paragraph 42 of the judgment, which refers to the appellant's awareness of his own criminal activity, is consistent with the judicial authority's concession that the appellant is not a fugitive.

39. Ms Collins relied on the further information, which sets out the judicial authority's view that his move to Wroclaw and then again to the UK proved that the appellant was hiding from the Polish authorities in relation to the extradition offence. That is not, however, what the district judge says. The district judge does not, in my judgment, make a clear finding that the appellant decided to move within Poland and then onwards to the UK because he knew that he would face prosecution in Poland for the extradition offence.

40. The requesting state's information reaches this conclusion, but it is hard to say what the district judge made of the further information in which the judicial authority deals with this. The appellant is not a fugitive and the judgment's references to awareness or knowledge of the alleged criminal conduct are, in my judgment, confusing.

41. Secondly, the appellant pleaded guilty to falsifying paperwork for a loan. That crime took place in 2001 and he received a suspended sentence in 2003. The district judge refers to this offence as a previous conviction. It is, however, plain that the conviction relates to the appellant's conduct after the offence for which his extradition is sought.

42. In considering the seriousness of the extradition offence in paragraph 47 of his judgment, the district judge says that the appellant has "previous offending of a similar nature in Poland". However, it is not clear from the district judge's reasoning how the seriousness of the extradition offence was or could be aggravated by the subsequent offence. The appellant is not sought in the EAW in relation to any matter arising from the suspended sentence, which was revoked in 2004. The offence for which he is sought could not mark an escalation in his offending.

43. Thirdly, the offence for which the appellant's extradition is sought took place 19 years ago. On its own, this very lengthy period cannot be determinative under section 14 (*Brzeski v Regional Court in Gdansk Poland* [2012] EWHC 1138 (Admin), para 18). Nor could it be determinative under Article 8: the proportionality exercise is always fact-sensitive. It is, however, a powerful factor and ought, in my judgment, to be given considerable weight.

44. Respecting as I must the district judge's factual findings and his advantage over this court in hearing the appellant give evidence, I have reached the view that the district judge failed to give adequate weight to the period since the offence is alleged to have been committed. It is hard to understand how the public interest in extradition has not been appreciably diminished by the passage of time, given the nature and circumstances of the offence. The district judge accepted that the appellant has, since his 2001 offence, put criminality behind him. He has started a new life in the UK for him, his partner and his children. He has been lawfully and successfully self-employed.

45. In light of these factors, I have concluded that it is necessary to carry out the Article 8 balancing exercise afresh. I have applied the well-established principles in *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 and *Celinski* [2015] EWHC 1274 (Admin). The question for this court is whether or not the district judge made the wrong decision (*Celinski*, para 24).

46. I consider first the factors in favour of extradition. On one side of the scales, as Baroness Hale held in *HH* (at para 8) there is a consistent and weighty public interest in extradition, which includes that the UK should not provide a safe haven for those accused of crimes. That public interest will always carry great weight. The district judge found that the appellant had some awareness that he had committed the offence.

47. On the other side of the scales, the weight to be attached to the public interest in the particular case varies according to the nature and seriousness of the crime involved. The delay since the crime was committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life. There is no doubt that it did both of those things in this case. The appellant's offence appears to have been a breach of trust against his former employer and there were a number of victims. It should not be belittled. Nevertheless, the documents show that it took place over a limited period. Its value is low. It is now 16 years, by my calculation, since the appellant's criminal conviction for the other fraud.

48. In circumstances where the appellant is not a fugitive, where the offence for which he would be extradited is low level and where it took place nearly two decades ago, the interference with the appellant's and his family's right to respect for private and family life would be disproportionate. These factors ought, in my judgment, to have led the district judge to conclude that extradition should not take place.

49. For these reasons, this appeal is allowed on Article 8 grounds. For similar reasons, I would have found that extradition for a low-level offence after such a long delay would have been oppressive under section 14 and disproportionate under section 21A.

50. I do not accept that it would have been unjust under section 14. With regards to injustice, the appellant contended that the starting point must be that memories fade over this period of time. I accept Ms Collins' submission that that proposition is not supported by the applicable authorities.

51. The court will require clear proof of the fact of any prejudice which is asserted. Plausible assertions do not suffice: *Andrew Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin), para 62. Similarly, a hypothetical risk of prejudice to the defendant dependent upon what his defence might turn out to be is insufficient: *Norris v The Government of United States of America* [2007] EWHC 71 (Admin).

52. I also accept Ms Collins' submission that Council of Europe countries are all subject to Article 6 of the European Convention on Human Rights and should be "readily assumed" to be capable of protecting an accused against an unjust trial: *Gomes v Government of Trinidad and Tobago; Goodyer v Government of Trinidad and Tobago* [2009] UKHL 21.In light of these authorities and the burden on the appellant to demonstrate that injustice would result, I see no flaw or error which this court should correct in the decision of the district judge below.

53. However, for the reasons I have stated, this appeal will be allowed.

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CERTIFICATE

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