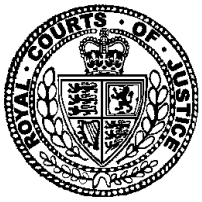

Neutral Citation Number: [2020] EWHC 3316 (Admin)

Case No: CO/999/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2020

Before :

MR JUSTICE JOHNSON

- -

Between :

ALEKSANDRA SIUDA

Appellant

- and –

SAD OKREGOWY, KIELCE, POLAND

Respondent

- -
- -

Malcolm Hawkes (instructed by JD Spicer Zeb solicitors) for the Appellant
Jonathan Swain (instructed by CPS) for the Respondent

Hearing date: 26 November 2020

- -

Approved Judgment

Mr Justice Johnson:

1. The Appellant had a troubled upbringing. She committed a string of offences when on the threshold of adulthood. Now, she is almost 26 years old. She has led a settled law-abiding life in the UK since her arrival in 2016. She has a 6 year old son. She appeals against an order for her extradition to Poland to serve a custodial term in respect of a sentence imposed in 2013. Her case is that extradition would be a disproportionate interference with her family's right to respect for private and family life. She also says that one of the convictions is not an extradition offence.

Background

2. The background is not materially in dispute. In part, it emerges from further information provided by the Respondent. The Appellant complained that the Respondent had not disclosed the questions that resulted in the provision of the further information. In the event, it does not appear that anything in the further information is materially contested: rather, it is materially consistent with the Appellant's own account, as set out in her proof of evidence.

3. The Appellant's parents divorced when she was 3. She was brought up by her mother who was an alcoholic. Her childhood was chaotic. She started drinking when she was 15, and stole to pay for alcohol. The six offences for which her extradition is sought were committed on 3 occasions. In August 2012 she committed offences of assault occasioning actual bodily harm, assaulting a police officer (referenced as "offence 3" in the EAW), and verbally abusing and spitting at a police officer (referenced as "offence 4"). In April 2013 she committed an offence of robbery in which she, with another person, stole a purse. In June 2013 she committed offences of assault occasioning actual bodily harm and threats to kill.

4. Offences 3 and 4 are described in the EAW as follows:

> 3. On 25 August 2012 in Kielce, she used violence against [2] police officers… to force them to abandon their legal duties by scratching their hands, hitting them with her hands and kicking their bodies, as a result of which [one officer] suffered injuries in the form of skin abrasion on both forearms resulting in the violation of his body organ functions for a period not longer than 7 days, and she violated their physical inviolability during the performance of their duties;
>
> 4. On 25 August 2012 in Kielce, she abused [three police officers] with the words considered widely to be abusive and by spitting at [the 2 officers specified in offence 3] during the performance of their duties;

5. In March 2014 the Appellant's son, "A", was born. In June 2015 the Appellant was sentenced to a term of 2 years' custody for the offences set out above. She was ordered to pay compensation to two victims of her conduct, in the sums of PLN 5,000 and PLN 1,500. Of the custodial sentence, 1 year 9 months and 28 days remains to be served. The Appellant has, recently (and since the order for extradition), ensured that the PLN 5,000 has been paid so as to discharge one of the compensation orders. She

has not paid the remaining sum because she has not been given the necessary account details, but would otherwise have done so.

6. The Appellant remained at liberty whilst seeking to appeal (and then to postpone the execution of) the sentence. She was required to surrender to prison on 26 October 2016. She did not do so. Instead, she had come to the United Kingdom in early 2016. She says that her "only mistake" was not to apply to further postpone the execution of her sentence. The fact is that she did not do so. She did not tell the Polish authorities that she was coming to the UK, she did not provide the Polish authorities with her new address, and she did not surrender to prison when required to do so. She is therefore, as the District Judge found, a fugitive. Since early 2016 she has been living in the UK with her fiancé, Mr Gagos, and her son, A. A attends a local school. The Appellant was, at the time of the extradition hearing, working for Sainsbury's for 4-5 days a week on rotating shifts. Mr Gagos worked as a chef in a restaurant, but has been furloughed as a result of the covid pandemic.

7. A European Arrest Warrant was issued on 14 November 2018 and certified by the National Crime Agency on 17 January 2018. The Appellant was arrested on 3 January 2019.

District Judge Griffiths' judgment

8. The Appellant represented herself in the extradition proceedings. District Judge Griffiths considered that all of the offences listed in the EAW would constitute offences in the UK if the conduct occurred in the UK. In respect of offence 4 she said "Offence 4 is an offence of assault on police officers or a public order act offence." The Judge considered whether extradition was compatible with Article 8 of the European Convention of Human Rights. She heard evidence from the Appellant and her partner. She "remind[ed] [herself] of dicta of the Lord Chief Justice" in *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin) at [39] that:

> "The important public interests in upholding extradition arrangements, and in preventing the UK being a safe haven for a fugitive as Celinski was found to be, would require very strong counter-balancing factors before extradition could be disproportionate."

9. She considered that there would be emotional distress to the Appellant's partner and son if the Appellant was extradited to Poland, and that there would be financial difficulties:

> "The RP has been resident in the UK since 2015 or 2016. She lived with her fiancé and son, who attends school in the UK. The family have a close emotional bond with one another. They have settled into life in the UK. There will be emotional distress, particularly to the RP's fiancé and son, should she be extradited. There will also be some financial difficulties.
>
> The RP has a settled intention to remain in the UK.

> The RP works for Sainsburys. She will no doubt lose this employment if her extradition is granted, however, I have no reason to believe that the RP would not be able to find employment or that she would not be able to re-establish herself once this matter has been resolved.
>
> The RP was aged 17 and 18 years old when these offences were committed. That said, they were relatively serious offences involving violence where injuries were caused to the victims.
>
> There has been a delay in these proceedings… because the RP left Poland and did not inform the authorities of her address as she was required to do….
>
> …
>
> I bear in mind the interests of RP's fiancé and son and to the emotional distress and financial difficulties that they will suffer if the RP is extradited. Sadly, this is not an unusual consequence in extradition cases. I bear in mind however, that her fiancé works and that he has lived separately from the RP before. His employers are flexible in relation to his shifts and I have no reason to believe that this will not continue. At present, his shifts are such that he can take [A] to school every day. He may not be able to collect [A] from school eevery day or be with him every weekend. I am satisfied that his employers will be as flexible as they can be so that he can provide the necessary care for [A]. The RP and her fiancé have had to rely on friends and Mr Gajos's brother and wife in the past to help out. It may be that Mr Gajos's brother has been reluctant to help in the past with [A] but he has done so, such as when the RP had to return to Poland for a funeral… I am confident that family and friends will rally around and help out where they can and that Mr Gajos's employers will continue to be as flexible as they can over his working arrangements. It may be that Mr Gajos will need to pay for some childcare… I am satisfied, that whilst it may be more difficult than the present situation, Mr Gajos will cope and that [A] will be well cared for."

10. The District Judge accepted that rights to respect for private and family life were engaged, and that extradition would interfere with those rights. However, she considered that the negative impact was not "of such a level that the court ought not to uphold this country's extradition obligations."

Further evidence

11. Further evidence has been filed since the decision of the District Judge. I have considered the impact of the evidence on the assumption (rather than making a finding) that it would satisfy the test for it to be adduced on appeal.

12. The Appellant has provided a detailed proof of evidence (in circumstances where she had represented herself at the hearing before the District Judge, and had only had a limited period of time to provide a written note of her evidence). A statement has been obtained from a Polish lawyer dealing with the payment of compensation by the Appellant. Reports of a Polish probation officer made in January and October 2014 have been obtained. They provide some biographical background and record some of the childhood difficulties endured by the Appellant.

13. An order was made, at the time that permission to appeal was granted, that Bedford Social Services should, pursuant to section 7 Children Act 1989, assess the impact on "A" of his mother being extradited to Poland. A detailed and helpful report was provided on 10 June 2020. The author of the report made the following assessment:

> "There is a high likelihood that [A] will be negatively impacted by his mother being extradited to Poland for a period of nearly two years. Some of the negative aspects can be minimised with preparation, support and continuity of care from his father but there will be undoubtedly a significant change to his current family unit and what makes him feel safe. [A] would lose the significant support of one parent.
>
> …
>
> The ability for [A] to sustain a relationship with his mother during the period of her sentence if likely to be challenging. A barrier to regular and frequent contact will be the distance, finance and practicality of being able to travel to Poland… There is concern about how he would cope with limited emotional support and the need for Mr Gajos to fulfil both parenting roles.
>
> …There is potential that [A] would not see his Mother during the time she is away, and this will alter their relationship and impact upon his wellbeing….
>
> Research indicates that children visiting parents in prison are unlikely to describe it as a positive experience and the incarceration of a household member is considered in mental health and psychiatry as one of ten adverse childhood experiences (ACEs). This means there is a high likelihood of a significant negative impact on children's long-term health and wellbeing, their school attainment and later life experiences. Maternal imprisonment can be particularly devastating for children and the impact the loss of the maternal attachment upon [A] needs to be considered. [A] is close to his mother and spends every evening with her. Hr absence will be a significant loss to [A].
>
> On balance with no contact an absence of nearly two years without contact will change the dynamics of their relationship. [A] may begin to question whi his mother is away and again

> impact upon his emotional wellbeing. It is hard to determine whether this will be reparable at this time. Both vising his other in prison and not seeing her for the whole duration of the sentence could be said to be highly likely to create instability and upset for [A] which will impact upon his wellbeing both in the immediate [period] after extradition and in the longer term. There is a risk that [A] will suffer emotional harm through the separation from his mother."

14. Reliance was also placed on a paper "The effects of parental imprisonment on children" written by Joseph Murray and David Farrington in 2008 and published in "Crime and Justice" (University of Chicago Press) Volume 37 page 136. The paper indicates that parental imprisonment is a risk factor for child antisocial behaviour, offending, mental health problems, drug abuse, school failure and unemployment, and that children may have worse reactions to parental imprisonment if their mother is imprisoned, or if imprisonment is for longer periods of time.

Appeal on ground that offence 4 is not an extradition offence

15. Section 10 Extradition Act 2003 states:

> "**10 Initial stage of extradition hearing**
>
> (1) This section applies if a person in respect of whom a Part 1 warrant is issued appears or is brought before the appropriate judge for the extradition hearing.
>
> (2) The judge must decide whether the offence specified in the Part 1 warrant is an extradition offence.
>
> (3) If the judge decides the question in subsection (2) in the negative he must order the person's discharge.
>
> …"

16. Section 27(2) of the 2003 Act provides that the Court may allow an appeal if the conditions in subsections (3) or (4) are satisfied. Those subsections provide:

> "(3) 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.
>
> (4) The conditions are that—

> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

17. So far as this case is concerned, by section 65(3)(b) of the Act, the conduct of the Appellant specified in the EAW as amounting to an offence does not constitute an extradition offence unless the conduct would, if committed here, constitute an offence under the law of England and Wales.

18. In *Norris v Government of the United States of America and others* [2008] UKHL 16; [2008] AC 920 the House of Lords decided that the relevant conduct to be considered for these purposes is the conduct as described in the extradition request, rather than the any more narrow component of the conduct which, in itself, would be sufficient to amount to the offence charged by the requesting state – see the opinion of the Appellate Committee at [87]-[91]:

> "87…Whether the conduct consists solely of those acts or omissions necessary to establish the foreign offence, or the accused's conduct as it may have been more widely described in the request, both the foreign offence and the corresponding English offence would still be "constituted" by it (as required respectively by s 137(1)(a) and 137(2)(b)). Which construction, therefore, should it be given?
>
> 88. As noted in para 70 above, really nothing "startling" follows from adopting the wider construction. On the contrary, it accords entirely with the underlying rationale of the double criminality rule: that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state…
>
> 89. The wider construction furthermore avoids the need always to investigate the legal ingredients of the foreign offence, a problem long since identified as complicating and delaying the extradition process…
>
> 90. In addition, the wider construction would place the United Kingdom's extradition law on the same footing as the law in most of the rest of the common law world. The broad conduct approach – the examination of all the conduct on which the requesting state relies - is that almost universally followed…

> 91. The committee has reached the conclusion that the wider construction should prevail. In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Pt 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Pt 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence…"

19. The conduct in relation to offence 4 comprised the use of verbal abuse and spitting at a police officer. Mr Hawkes rightly accepts that spitting at a police officer amounts to an offence of common assault. However, he says that offence 3 alleged assault of the same officer on the same occasion, and thus the "spitting" element of offence 4 does not materially add to offence 3: it could appropriately be seen as part of that offence. The remaining element of offence 4 (the verbal abuse) does not (at least not necessarily) amount to an offence in England and Wales. Accordingly, in the particular circumstances of this case, offence 4 does not amount to a separate extradition offence.

20. I do not accept this argument. It impermissibly introduces an unwarranted level of complexity into the question of whether conduct amounts to an extradition offence. It does so by splitting up the individual elements of the offences that are charged and redistributing those elements between the charges, before then applying the statutory test. The assessment that is required by section 10(2) read with section 65(3)(b) is altogether more straightforward. It is an assessment of whether the conduct specified as an extradition offence would amount to an offence in England and Wales. Here, the conduct specified is verbal abuse and spitting at a police officer. If a person engages in verbal abuse and spitting at a police officer in England then that person would thereby commit an offence of common assault. The fact that verbal abuse might not, in itself, amount to an offence does not matter. It is (as is clear from *Norris*) the entirety of the conduct that falls to be considered, not an individual component. Mr Hakes may or may not be right that it would have been open to the prosecuting authorities in Poland to include the act of spitting within offence 3. Even if he is right about that, it is irrelevant. The fact is that distinct conduct has been charged as offence 3 and offence 4. The determination of whether offence 4 constitutes an extradition offence is not affected by the fact that part of the conduct could have been included within the particulars of offence 3.

21. Accordingly, offence 4 is an extradition offence. I dismiss this ground of appeal.

Appeal on ground that extradition a breach of Article 8 ECHR

22. Section 21 Extradition Act 2003, read with Article 8 ECHR, required the District Judge to discharge the Appellant if she considered that her extradition would not be compatible with the right to respect for private and family life.

23. In *Celinski* the Divisional Court explained that a judge determining this issue should list the factors that favour extradition and those that militate against extradition, "[t]he judge should then, on the basis of the identification of the relevant factors, set out his/her conclusion as the result of balancing those factors with reasoning to support

that conclusion." It approved the following statement as to the approach that should be taken on appeal:

> "If, as we believe, the correct approach on appeal is one of review, then we think this court should not interfere simply because it takes a different view overall of the value-judgment that the District Judge has made or even the weight that he has attached to one or more individual factors which he took into account in reaching that overall value-judgment. In our judgment, generally speaking and in cases where no question of "fresh evidence" arises on an appeal on "proportionality", a successful challenge can only be mounted if it is demonstrated, on review, that the judge below; (i) misapplied the well established legal principles, or (ii) made a relevant finding of fact that no reasonable judge could have reached on the evidence, which had a material effect on the value-judgment, or (iii) failed to take into account a relevant fact or factor, or took into account an irrelevant fact or factor, or (iv) reached a conclusion overall that was irrational or perverse."

24. The Appellant argues that the District Judge erred in the following respects:

(1) Conflating all the offences together to describe them as "relatively serious offences involving violence".

(2) Citing an observation in *Poland v Celinski* [2016] 1 WLR 551 at [39] to the effect that it required "very strong counter-balancing factors before extradition could be disproportionate".

(3) Failing to consider the question of delay and young offenders.

(4) Failing to appreciate the practical impact of the Appellant's extradition having regard to the family finances.

(5) Failing to consider the impact on "A" of total severance from his mother for 22 months.

25. The Appellant argues that the District Judge was wrong to conclude that extradition was a proportionate interference with Article 8 rights. She relies on the following factors:

(1) The age of the conduct;

(2) The Appellant's age at the material time (17-18);

(3) The Appellant's generally chaotic life at that time, and the very positive steps she has since taken to rehabilitate herself and transfer her life away from alcohol abuse and offending;

(4) The payment of compensation to one of the victims; payment to the other being thwarted only by the lack of information provided to the Polish court;

(5) The clear evidence of the serious impact upon "A" and the essential role the Appellant plays in his life; this includes the prospect of complete severance in his relationship with his mother for the duration of her prison sentence which could lead to lasting and irreparable harm;

(6) The procedural delays in the case, including the detention and release of the Appellant in Poland on more than one occasion and the failure in Poland to deal with a youth offender timeously;

(7) The lengthy delays in these extradition proceedings, which have lasted for almost 2 years.

Discussion

26. The District Judge clearly and accurately set out the relevant chronology. She was well aware that the offences had taken place in 2012-2013, that the Appellant had been aged 17-18, and that she was "from a broken family and was abused mentally and physically at home", whereas she was now "settled into life in the UK" in a family that had "a close emotional bond with one another." She expressly took into account, as factors weighing against extradition, that the offences had been committed when the Appellant was aged 17-18, and the Appellant's settled life in the UK. The Judge accurately set out the extradition offences, and correctly observed that they "include offences of violence where significant injuries were caused to some of the victims." She correctly identified the sentence that had been imposed. I do not consider that her qualitative assessment that the offences were "relatively serious" can be said to be erroneous.

27. The Judge accurately cited the observation in *Celinski* that it would require "very strong counter-balancing factors before extradition could be disproportionate". Mr Hawkes points out that this observation was made in the context of the particular facts of that case, where the underlying offending was more serious. The Lord Chief Justice was not, he says, there setting out the legal test for assessing whether extradition is incompatible with Article 8. Rather, he was making an observation as to the factors that would be required before (in the context of that case) the legal test would be satisfied. I do not, however, consider that the District Judge's reference to *Celinski* was in any way inapposite or that it was indicative of an erroneous approach. She applied the correct legal test, mandated by *Norris v Government of USA (No 2)* [2010] UKSC 9; [2010] 2 AC 487 and *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25. The Judge made findings about the seriousness of the offences, the fact that the Appellant was a fugitive and the public interest in the UK complying with its international extradition treaty obligations. In the light of those findings, she was entitled to conclude that the observation of the Lord Chief Justice in the context of *Celinski* was apt.

28. The Judge had regard to the practical effect of extradition on the family finances, and she had regard to the impact on "A". That latter factor was an important part of her analysis. She did not simply reject the Appellant's arguments in the "simple way" that was deprecated by Lady Hale in *HH* at [34] (ie "by accepting that… children's interests will always be harmed by [parental separation, but the] public interest in extradition is almost always strong enough to outweigh it"). Rather, she did that which was required to do by *HH* and *Norris*: she undertook a careful examination of

the way in which extradition would interfere with the rights to respect for private and family life that were engaged.

29. There were, here, significant factors that weighed against extradition. Principal amongst these was the likely impact on the child. The District Judge fully recognised that and took it into account. However, she also rightly took into account that the Appellant is not the child's sole carer, and she found that family and friends would "rally around and help out where they can".

30. I do not consider that the District Judge made any of the errors that are suggested. Nor do I consider that she was bound to conclude that extradition amount to a disproportionate with the Article 8 rights. Rather, having undertaken the analysis that is required by *Norris* and *HH* and *Celinski*, the District Judge was entitled to conclude, for the reasons that she gave, that notwithstanding the powerful factors that weighed against extradition, the interference with Article 8 rights was proportionate to the legitimate aims that extradition seeks to achieve.

31. The Appellant relies on the guidelines of the Sentencing Council in relation to the overarching principles to be applied to the sentencing of children and young people. She points out that a custodial sentence should always be a measure of last resort for children and young people, and that the importance of rehabilitation is at the centre of domestic sentencing policy for those under the age of 18. I do not, however, consider that this is of material assistance to the Article 8 balancing exercise that is here to be conducted. The Appellant was an adult at the time she was sentenced, and at the time of the commission of the later offences. There is no reason to consider that her age was not taken into account at the time she was sentenced. Domestic sentencing policy is not, in any event, directly relevant to the proportionality balancing assessment that falls to be conducted – see *Celinski* at [13].

32. The further evidence relied upon by the Appellant does not materially impact on the analysis that was undertaken by the District Judge. It certainly does demonstrate that parental separation can be harmful to children. It also shows that in the circumstances of this particular case there is a risk of harm to "A" as a result of being separated from his mother. That evidence was not before the Judge in the form that is now presented. It is, however, not remotely surprising or controversial evidence. Nor is it inconsistent with any of the findings made by the Judge: the Judge made a finding that both the Appellant's fiancé and her son would be caused hardship, emotional distress and financial difficulties. The further evidence would not, if had been before the Judge, resulted in any different findings being made.

33. At the appeal hearing the Appellant relied on the impact of uncertainty over the legal landscape that will be in place following Brexit, and the prospect that the Appellant, if extradited, would not then be permitted to return to the United Kingdom. The Appellant relied on *Antochi v Richterin Am Amstegericht of the Amstgericht Munchen (Munich), Germany* [2020] EWHC 3092 (Admin). In that case the appellant, who was not a fugitive, and had not been convicted of any criminal offences, was sought on an accusation EAW relating to a series of supermarket distraction thefts and cashpoint withdrawals that had taken place in 2009. Since then, she had married and come to the UK and had given birth, in the UK, to a daughter. The issue of the impact of Brexit uncertainty had been addressed at first instance and had been identified by the judge as being a factor against extradition. On appeal, Fordham J held that it was a relevant

factor in the Article 8 balancing exercise, both in terms of the subjective "anguish" that might be occasioned by uncertainty, and in terms of the objective prospect that the appellant might not be able to return to the UK.

34. In *Antochi* the factors in favour of extradition were significantly less potent than in the present case: the offences were less serious, the appellant was not a fugitive, and there had been significant culpable delay on the part of the respondent. The factors against extradition were more potent than in the present case: the appellant's child was younger (and closer to the bracket where parental separation is recognised as being particularly harmful), and the child's father did not live with her. The issue of Brexit uncertainty had been raised and considered at first instance.

35. Here, the question of Brexit uncertainty was not raised at first instance. There was no evidence from the Appellant that she had any subjective concern about the impact of Brexit. Not is it mentioned in her subsequent proof of evidence. Nor was it raised in the grounds of appeal. Nor in the Skeleton Arguments. In any event, in the light of the particular facts of the present case, I do not, in any event, consider that it is capable of being a sufficiently significant factor to alter the outcome of the Article 8 balancing exercise.

36. For these reasons I do not consider that the District Judge was wrong to find that extradition was compatible with Article 8 ECHR.

Proposed additional ground of appeal

37. The Appellant seeks permission to amend her grounds of appeal, out of time, to add a new ground of appeal pursuant to sections 2 and 21 Extradition Act 2003, read with Article 6 ECHR, in respect of the independence and impartiality of the Polish courts. That issue is likely to be determined in a forthcoming appeal, due to be heard in early 2021. I consider that the appropriate course is to stay the application to amend the grounds of appeal until that point. The application to amend the grounds of appeal can, at that point, then be determined.

Outcome

38. The appeal on the grounds that (1) offence 4 is not an extradition offence, and (2) extradition would be disproportionate, is dismissed. The application to add further ground of appeal is stayed.