Neutral Citation Number: [2019] EWHC 1387 (Admin)

Case No: CO/3639/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2019

Before :

MRS JUSTICE YIP DBE

- -

Between :

LUKASZ SWIERCZ	**Appellant**
- and -	
THE REGIONAL COURT IN POZNAN, POLAND	**Respondent**

- -
- -

Ms Florence Iveson (instructed by **Lawrence & Co Solicitors LLP**) for the **Appellant**
Mr David Ball (instructed by **Crown Prosecution Service Extradition**) for the **Respondent**

Hearing dates: 14th May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE YIP DBE

Mrs Justice Yip :

1. This is an appeal pursuant to section 26 of the Extradition Act 2003 against the decision of District Judge Tempia on 10 September 2018 ordering the Appellant's extradition to Poland to face an accusation of fraud by false representation.

2. The Appellant's surrender was sought by way of a European Arrest Warrant ("EAW") issued on 14 May 2018 and certified by the National Crime Agency on 19 June 2018. The allegation against the Appellant, as set out in the EAW, is that he defrauded women in Poland by advertising a non-existent job in Germany requiring them to pay an administration fee, equivalent to £152.67. Two women paid the fee. The Appellant attempted to obtain the same sum from a third woman, but she did not make the payment. The offending occurred on 17 July 2014 and was charged as a single offence. All transactions were conducted over the internet while the Appellant was physically in the United Kingdom. The total loss to the complainants (and gain to the Appellant) was £305.34.

3. The Appellant has never been arrested or interviewed by the Polish authorities and was not under any obligation to inform them of his whereabouts. He was arrested in this country under the EAW on 4 July 2018. His first appearance before the Westminster Magistrates' Court was the following day. He was granted bail until the extradition hearing which took place on 9 August 2018. The Appellant was not represented. It appears that he had not been granted legal aid as he had not provided necessary paperwork. He sought an adjournment to obtain representation, but this was refused.

4. The Appellant told the District Judge that he had been fighting heroin addiction all his life. He was currently prescribed methadone from "Turning Point" in Wakefield, which he occasionally supplemented with heroin. He had been told by friends that it was difficult to get methadone in Poland and he was worried about the impact if he was extradited. He was working and living in rented accommodation. He provided financial support to his mother. If extradited, he would lose his job and his mother would lose that support.

5. The District Judge found that the Appellant was not a fugitive. She rejected challenges on Article 6 grounds and under section 25 of the 2003 Act (such grounds do not remain live). Pursuant to section 21A, the District Judge considered whether extradition would be compatible with the Appellant's Article 8 rights and whether it would be disproportionate. She found that extradition was not disproportionate.

6. The Appellant brought his appeal in time, raising five grounds of appeal in total, including an argument not raised in the court below that pursuant to section 19B of the 2003 Act extradition would not be in the interests of justice given a substantial measure of the offending activity was performed in the United Kingdom (the forum argument).

7. Permission to appeal was granted by Sir Stephen Silber on 4 February 2019 on two grounds, namely:

    i) Extradition would not be proportionate within the meaning of section 21A(1)(b) of the 2003 Act;

ii) Extradition would present a real risk to the Appellant's Article 8 rights.

8. Permission was refused in relation to two other grounds challenging extradition under section 2 of the 2003 Act and Article 6 of the European Convention on Human Rights following the Divisional Court's decision in *Lis and others v Poland* [2018} EWHC 2848 (Admin). The Appellant has not renewed his application for permission is relation to those grounds and they are not maintained.

9. Sir Stephen Silber did not expressly deal with the forum argument in his permission decision. There was some disagreement between the parties as to whether, in the circumstances, it was necessary for the Appellant to apply to renew his application for permission to appeal on this ground. However, a renewal application was made (albeit out of time) and the Respondent, sensibly, did not object to the court considering this additional ground. The parties agreed that I should hear substantive submissions on it and deal with permission in relation to this ground when giving judgment on the appeal generally.

10. The Appellant also seeks to rely on fresh evidence which was not before the court below. This comprises evidence from the Appellant, his mother, step-father and brother, together with a letter from Turning Point dealing with his methadone treatment. The Respondent contends that the fresh evidence is far from "decisive" as required by *Hungary v Fenyvesi* [2009] EWHC 231 (Admin) and therefore should not be admitted. The parties again took a sensible approach and agreed I should consider the fresh evidence *de bene esse* and hear the substantive submissions before resolving the application to admit it.

11. I am grateful to both Counsel for their pragmatic approach and well-focused submissions.

12. The grounds of appeal overlap to a significant degree. Ms Iveson succinctly summarised the Appellant's case at paragraph 9 of her skeleton argument as follows:

> "The Appellant submits that his appeal should be allowed on each ground raised in light of (i) the fact that offence is at the lower end of the scale in terms of seriousness such that it would not attract a custodial sentence in England and Wales; (ii) the fact that the offence is of some age and there has been no explanation of why an EAW was not issued immediately given the alleged offending all took place in the United Kingdom; and (iii) because all the alleged offending was perpetrated from the UK and the Appellant is a recovering drug addict such that a return to Poland would risk him relapsing into heroin usage."

13. It is well established that the approach on appeal is one of review. This court should not interfere simply because it takes a different view overall of the value-judgment the District Judge has made or the weight she has attached to one or more factors in reaching that judgment. Lord Thomas CJ summarised the approach on appeal in *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin) at [24]:

> "The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if

> the court concludes that the decision was wrong … that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in the light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

14. The starting point in considering the Appellant's arguments on human rights and proportionality is section 21A of the 2003 Act which provides:

> "**Person not convicted: human rights and proportionality**
>
> (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 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 he 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."

15. Underpinning the Appellant's submissions on proportionality is the argument that the offence was not serious and would be unlikely to attract a custodial sentence applying domestic standards.

16. Guidance on the application of section 21A(3) was given by the Divisional Court in *Miraszewski v Poland* [2014] EWHC 4261 (Admin). Pitchford LJ said [at 31]:

> "There are in subsection (3) three factors capable of affecting proportionality of which "seriousness" is just one. … The test is identified in straightforward terms but the exercise of the judge's task is not further constrained by any particular standards of "triviality" … The Court may, depending on its evaluation of factors, conclude that "extradition would be disproportionate" if (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances."

17. At [36], Pitchford LJ said that the seriousness of the offence was to be judged, in the first instance, against domestic standards, although the court would respect the views of the requesting state if offered. He continued:

> "In my view, the main components of the seriousness of conduct are the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim."

18. He then turned to subsection (b) [37]:

> "… I consider that the principal focus of subsection (3)(b) is on the question whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state."

This was qualified at [39]:

> "While the focus of subsection (3)(b) is upon the likelihood of a custodial penalty it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate. If an offence is serious the court will recognise and give effect to the public interest in prosecution."

19. In considering proportionality, the District Judge found [at 57] that:

> "The conduct is of some seriousness because Mr Swiercz was in the UK committing the offence over the internet and targeting Polish people asking for administration fees to find them jobs in Germany. In the UK a custodial sentence would be a possible sentence."

It is argued on behalf of the Appellant that she fell into error in focusing on the possibility of a custodial sentence rather than the likelihood of one.

20. In the absence of any views from the requesting state, seriousness must be viewed according to domestic standards. The parties refer to the Sentencing Council Guidelines for fraud and related offences. They agreed that this would be regarded as a category 5 case (the lowest category) and one of medium culpability. The starting point suggested for such an offence is a medium level community order with a range of a fine up to 26 weeks' custody. Mr Ball highlights that the guidelines specifically refer to the fact that an offence is committed across borders as an aggravating factor.

21. This was certainly not a trivial matter. In my view it was nasty offending. The Appellant had deliberately targeted people in Poland preying on their hopes and aspirations of finding a better standard of living elsewhere, as he himself had done. While the sums involved fall at the bottom of the bracket within the sentencing guidelines, the loss will have been very significant to the victims. It is unlikely that those seeking factory work in Germany will have had much money to spare. I do not consider the District Judge to have been wrong in describing the conduct as being of "some seriousness" or to say that a custodial sentence would be possible in this country. However, the Appellant was apparently a man of good character at the time of the offending and it seems to me that the strong likelihood is that a custodial sentence would not be imposed.

22. The issue of proportionality is therefore to be addressed on the basis that the offending was of moderate seriousness and unlikely to attract a custodial penalty.

23. Had the District Judge acknowledged that a custodial sentence was unlikely but nevertheless concluded that there were public interest reasons favouring extradition, it may be that this would have been viewed as a conclusion reasonably open to her. I recognise, of course, that the issue of proportionality must always be decided with reference to the public interest in extradition and that there is a public interest in Poland in prosecuting someone who has targeted his compatriots in this way. However, the District Judge appears to have overstated the seriousness of the offence and not to have recognised that a custodial sentence would not be likely by domestic standards. I find that this is a material error.

24. It is also necessary to go on to consider the Appellant's other grounds, which are closely interrelated.

25. The legal principles governing consideration of the question of whether extradition would be compatible with the requested person's Article 8 rights are well-known. See *Norris v United States of America* [2008] UKHL 16, [2008] AC 92; *HH v Deputy prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2012] 3 WLR 90 and *Celinski* (supra).

26. In *HH,* Baroness Hale made it clear that there is no test of exceptionality but that it is likely that the public interest in extradition will outweigh the Article 8 rights of the requested person and his family unless the consequences of the interference with family life will be exceptionally severe. Baroness Hale stressed [at 8] that the question is always whether the interference with the private and family life of the extraditee and his family is outweighed by extradition. There is a constant and

weighty public interest in extradition which will always carry great weight but "the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved." Further, delay since the crimes were committed "may both diminish the weight to be attached to the public interest and increase the impact upon private and family life."

27. The District Judge approached the task of weighing the public interest in extradition on the one side, and the effect that extradition would have on the Appellant's Article 8 rights on the other applying the "balance sheet" approach, following *Celinski*. At paragraph 55, she concluded:

> "In respect of the test of proportionality, the court has to consider the seriousness of the alleged criminal conduct, the likely penalty and the possibility that Poland would take less coercive measures than extradition."

28. The Appellant contends that the District Judge misdirected herself by referring to the need for "strong counter-balancing factors". That phrase was used in *Celinski* in considering the factors that might outweigh the strong public interest in extradition in the case of a fugitive. Here, it is accepted that the Appellant was not a fugitive. The Appellant relies on what Lord Mance JSC said in *Norris* [108] rejecting the notion that there is a threshold of constant height or a legal onus on the requested person to overcome that threshold:

> "… whereas in fact what are in play are two competing interests, the public and the private, which have to be weighed against each other …"

29. Looking at the balance sheet exercise, the Appellant argues that the District Judge misdescribed the offending as "a serious offence of fraud and attempted fraud" and in saying that there had been no delay. In fact, the offence had occurred four years previously and, while that would not be sufficient to give rise to a bar in itself, the delay was a factor to be taken into account in the balancing exercise.

30. The evidence as to the Appellant's private life was relatively limited. The Appellant had sought an adjournment to obtain legal representation. Had he been represented, it is likely that his lawyers would have sought the evidence which they now seek to admit before this court. No challenge is made to the decision not to adjourn and it is accepted that the evidence was available before the hearing in the court below. While I think some allowance might be made for the fact that the case came on relatively quickly and that the unrepresented Appellant would not know what evidence to produce, I do not believe that the fresh evidence adds significantly to the evidence that the Appellant gave to the District Judge.

31. It is true that it confirms that the Appellant is undergoing methadone treatment, but the District Judge accepted that. The fresh evidence contains greater detail as to the situation the Appellant would face in Poland. If he were to live with his parents, he would have to share a room with his stepbrother, who is also a recovering heroin addict. The stepbrother provides evidence that he had to wait for six months to obtain methadone in Poland and he expresses concern that the Appellant would begin to use

heroin again if unable to access methadone and would influence him, putting his own rehabilitation at risk.

32. I do not consider that this additional evidence can be viewed as "decisive" as required by *Fenyvesi*. The District Judge accepted that the Appellant was receiving treatment with methadone, which on his own admission he sometimes supplemented with heroin. She accepted that he was holding down a full-time job. The District Judge found that no cogent evidence had been advanced that it would be difficult for the Appellant to obtain methadone in Poland. She rejected his assertion as being based on what friends have told him. The evidence of the Appellant's stepbrother does not add significantly to this. I therefore conclude that this appeal should be determined by reference to the evidence before the District Judge.

33. The Respondent contends that it is "nit-picking" criticism of the sort *Celinski* warns appeal courts to guard against to say that there are errors in the reasoning of the District Judge. She has conducted the balancing exercise required and the outcome cannot be characterised as wrong.

34. It is clear from the District Judge's findings of fact that, despite his long-standing drug addiction, the Appellant has been able to live a relatively stable, trouble-free life in this country. He has been here for 10 years. He has been taking methadone since 2012. In that context, he has managed to hold down a full-time job, which has enabled him to provide financial support to his mother. He has no children. While he will no doubt have built a private life in this country, his family remain in Poland. Until recently, he had no convictions, although he had been convicted of theft sometime prior to the hearing before the District Judge. The Appellant will lose his job if extradited. Even ignoring the fresh evidence, it is likely that his methadone programme would be interfered with, causing the risk of destabilising the Appellant. However, it is fair to say that many people who are extradited will face significantly greater interference with their private and family life.

35. The real complaint here lies in treating this offending as "serious" and giving weight to that in the balancing exercise. In my judgment, the District Judge was wrong to say that this was "a serious offence of fraud and attempted fraud". While the offending was far from trivial, she ought to have acknowledged that it was not particularly serious and would be unlikely to attract a custodial sentence, having regard to the sentencing guidelines. Further, rather than saying there was no delay and treating that as a factor in favour of extradition, she ought to have acknowledged that the offending had taken place four years earlier and that the Appellant's private life in this country had remained stable since.

36. I conclude that the District Judge did err in the way in which she conducted the balancing exercise to the extent that she arrived at an outcome that was "wrong" so justifying this court interfering.

37. It is true that the strong public interest in extradition must be put into the balance, but it must be remembered that the weight to be attached to that varies according to the nature and seriousness of the offence(s). The offence was not trivial and there is a public interest in prosecuting for this sort of offending which goes into the balance, but it was not a "serious case of fraud". Further, it cannot be said that there was "no

delay". This was the proper basis on which to balance the Appellant's Article 8 rights.

38. Once the fundamental point that this offending was of a nature that was no more than moderately serious and was unlikely to attract a custodial sentence according to domestic standards is put into the balance together with acknowledging that there has been some delay, it seems to me that the balance sheet would look significantly different from that set out in the District Judge's judgment and that the Appellant's challenge under section 21A of the 2003 Act should succeed.

39. I would therefore allow the Appellant's appeal on that basis.

40. It follows that it is unnecessary to consider the argument under section 19B. For completeness, I would have granted permission in relation to this ground. It seems to me that section 19B ought to have been considered. It is understandable that an unrepresented party would not have known to raise the forum bar in the court below.

41. There can be no doubt that, pursuant to section 19B(2)(a), "a substantial measure of D's relevant activity was performed in the United Kingdom". The offending was committed over the internet. The Appellant remained in the United Kingdom at all relevant times. Therefore, the factors under section 19B(3) would fall for consideration.

42. I shall deal with this briefly, given my finding in relation to section 21A. The factors under sub-paragraphs (a) and (b) relating to the place where the loss occurred and the interests of the victim plainly act in favour of extradition. It is likely to be easier for the victims to give evidence in their own country, although arrangements could be made for them to give evidence in this country by videolink. It seems likely that other evidence, including electronic evidence as to the Appellant's internet use, could be made available to allow his prosecution in this country. Although Mr Ball suggested that a prosecution was likely to take place quicker in Poland than here, I am not sure that can be asserted given the current situation in Poland and the apparent delay in bringing charges. There is no doubt though that the interests of the victims would point towards prosecution in Poland.

43. Consideration of sub-paragraph (g) (the Appellant's connections in the United Kingdom) essentially leads back to consideration of the same issues as have been dealt with above. Had I concluded that the challenge under section 21A failed, it seems to me that the reality would be that the argument under section 19B would also have failed. Had I found that it was not disproportionate to extradite the Appellant having balanced his private life in this country against the seriousness of the offence and the likely sentence, I think the interests of the victims would have weighed in favour of extradition such that the forum would not apply. Mr Ball also makes a fair point in arguing that there is a certain irony in arguing that it would be disproportionate to extradite the Appellant given the nature and seriousness of the offence but reasonable to expect an international transfer with the need for arrangements to be made for the victims to give evidence here.

44. Therefore, I find that the forum bar does arise on the facts of this case. The reality is that this case turns, as it always did, on consideration of the Appellant's Article 8 rights and proportionality pursuant to section 21A.

45. For the reasons I have given, I find that the District Judge erred in her application of the balancing exercise required under section 21A. She looked for "very strong counter-balancing factors" and did not approach the exercise by recognising that the offence was not sufficiently serious as to be likely to attract a custodial sentence. Had she done so, she would not have given such weight to the interest in extradition, which remained strong but had to be viewed in the context of the nature and seriousness of the crime involved. This appeal will therefore be allowed.