Neutral Citation Number: [2019] EWHC 2096 (Admin)

Case No: CO/3903/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 August 2019

Before :

MR JUSTICE DINGEMANS

- -

Between :

Jalena Palioniene	**Appellant**
- and -	
Prosecutor General's Office, Lithuania	**Respondent**

- -
- -

Malcolm Hawkes (instructed by **GBJ Crime**) for the **Appellant**
Hannah Hinton (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 23 July 2019

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dingemans:

Introduction

1. The Appellant, Jelena Palioniene ("Ms Palioniene"), appealed against the decision of District Judge (Magistrates' Court) Rebecca Crane ("the Judge") dated 1 October 2018 to order Ms Palioniene's extradition to Lithuania.

2. Ms Palioniene appealed on the ground, among other grounds, that extradition would infringe her rights protected by article 8 of the European Convention on Human Rights ("ECHR"). Ms Palioniene relied in particular on the fact that she is the sole carer for her son who was born in June 2017. The Prosecutor General's Office contended that extradition was a permissible interference with Ms Palioniene's article 8 ECHR rights, relying on the facts that one of the offences involved a supply of heroin to prison and that Ms Palioniene deliberately left Lithuania in breach of her bail conditions and was a fugitive.

The judgment dated 12 April 2019

3. For the detailed reasons set out in a judgment dated 12 April 2019 [2019] EWHC 944 (Admin), I found, among other matters, that the Judge was right to find that the offending was serious, and that the finding that Ms Palioniene was a fugitive was properly made. I found that the Judge's analysis of the evidence and materials before the court had been correct so far as it went but that the evidence showed that the best interests of Ms Palioniene's son were served by remaining with her, and that in order to discharge the obligations of the court to determine whether the public interest in extradition could be met without causing serious harm to Ms Palioniene's son, the Judge should have sought assurances about whether Ms Palioniene's son could be held with her in pre-trial detention or if not whether the pre-trial detention could be restricted to a period of 6 months. I therefore directed that Lithuania should be given a period of 42 days to provide such assurances as they think fit, and after expiry of that period the parties will have an opportunity to make further submissions in relation to the article 8 ECHR issue. I had given Lithuania an opportunity, if it considered it appropriate, to provide an assurance: (1) that Ms Palioniene will not be held in detention before any trial; or (2) that Ms Palioniene can be held in detention pre-trial with her son; or (3) that Ms Palioniene will not be held in pre-trial detention without her son for a period longer than 6 months. I noted that it would be for Lithuania to decide whether to give any assurance and that I would allow a period of 42 days from the signing of the order consequential on this judgment for any assurance to be provided. I made provision for the parties to make short further written submissions in relation to any assurance which was provided.

Relevant factual background from the first judgment

4. The relevant factual background was set out in my first judgment dated 12 April 2019 and I have therefore only set out some of the material facts in this judgment. The extradition offences related to heroin. The first offence alleged that on a date no later than 18 June 2012 Ms Palioniene put 0.025g of heroin under a postage stamp on an envelope which was sent to a prisoner in Marijampole prison. The second and third offences related to 5 November 2012. Ms Palioniene was alleged to have purchased a white powder from a named person which was "not less than 1.2106g of powder

containing 0.230g of heroin" of which she consumed part and sold part to others and "the remaining quantity – not less than 1.2106 g containing 0.230g of heroin was given" to Tatjana Rungo.

5. Ms Palioniene was in detention from 6 to 8 November 2012 and she was served with the notification of suspicion on 7 November 2012 and 23 October 2013. Ms Palioniene was interviewed on 7 and 8 November 2012 and 25 October 2013 by the pre-trial officer or Judge.

6. Ms Palioniene worked after her arrival in the UK. She formed a relationship with Mr Beker and became pregnant with her son and was on maternity leave. Her son was born in the summer of 2017. Ms Palioniene is now on universal credit. She is a single parent who is not in a relationship. Mr Beker had been removed from the United Kingdom and was abroad but it appears from the latest information from the social services that he has returned to the United Kingdom.

7. Ms Palioniene has previous convictions in Lithuania for theft and possession and supply of drugs on dates between June 2005 and July 2007. Ms Palioniene has convictions in the UK for 9 offences of shoplifting and an offence of going equipped for theft committed between October 2014 and April 2016. Ms Palioniene was convicted in December 2017 of failing to comply with a community order which was then revoked.

8. Ms Palioniene gave evidence at the extradition hearing denying any involvement with the EAW offences. Ms Palioniene also gave evidence that she had made admissions to the offences in Lithuania only because she had been beaten when she was being interviewed and because threats had been made that her sister would become involved in criminal proceedings. When asked if that had had any influence on her decision to leave the country Ms Palioniene replied "immediately, I left immediately but it also had an impact on my decision, there was [no] jobs in Lithuania".

9. There was a welfare report to the Court from West Sussex County Council produced pursuant to section 7 of the Children Act 1989. This shows that social services had become involved because of earlier concerns in relation to Ms Palioniene's accommodation and Mr Beker's arrest on drugs charges. Mr Beker was in custody for part of the period and removed to Poland. Ms Palioniene had appeared to care well for her son. She had never appeared to be under the influence of drugs when seeing social services. There were some matters which social services wanted to question Ms Palioniene about, relating to a man who stayed for a while and disappeared, the relationship with the partner of a friend, and why Ms Palioniene had refused assistance with housing, but it was noted that there may be innocuous answers to those questions.

10. Social Services considered that the accommodation for Ms Palioniene and her son was far from ideal. However her son had consistently presented as well cared for and having a warm and trusting relationship with his mother. Her son was gaining a strong sense of identity and was achieving many of his milestones. It was felt that removing her son would cause him significant harm, and the level of distress would inevitably affect his development in many ways. The local authority was obtaining legal advice about its responsibilities to care for Ms Palioniene's son but if Lithuania had responsibility the relevant local authority would take the son into care until

negotiations with Lithuania had concluded. If the local authority had responsibility her son would be placed in long term foster care. The report noted the difficulties with either Mr Beker or Ms Palioniene exercising parental responsibility for their son from Lithuania. It was noted that negotiations about the son's care were likely to be difficult and protracted which was likely to affect the son. The report noted "either way he will become a looked after child (LAC) and be cared for and protected by the LAC protocols of the county".

The assurance from Lithuania

11. Lithuania did provide an assurance after the first judgment. It was in the following terms: "in the view that [Ms Palioniene] is a single mother and raises a minor child … also in the view of the child's interests, the judge grants one of the assurances that could be granted based on the valid laws of the Republic of Lithuania, i.e. if the courts finds that there are grounds and conditions set forth in the law for imposing detention on [Ms Palioniene] and if the court makes a decision to impose a coercive measure – detention on [Ms Palioniene], then the detention will be applied to her not longer than for the period of six months".

Written submissions and application to adduce further evidence

12. The parties put in further written submissions and a witness statement in the form of a letter from Dr Tom Grange, a clinical psychologist, dated 24 May 2019 and verified by a statement of truth was adduced on behalf of Ms Palioniene.

13. A written application was made to obtain expert evidence from a child psychologist on behalf of Ms Palioniene to give evidence of the particularly close bond between Ms Palioniene and her child and the effect of separation of up to 6 months. By an order dated 10 July 2019 I refused the application because the issue of Ms Palioniene's rights under article 8 of the ECHR and the best interests of her son were issues before the Court in the hearing on 28 March 2019 and the issues were addressed without a child psychologist report. The provision of the assurances had not raised new issues for the expert to address and the decided cases showed that the removal of a care giver would be devastating for young children. I did record that if Ms Palioniene wished to rely on any further materials from Social Services an application to adduce those materials should be made in the usual way.

14. Ms Palioniene obtained a letter from Social Services dated 17 July 2019 and a further witness statement from Ms Palioniene. Further written submissions were put in on behalf of Ms Palioniene seeking to rely on the fresh evidence of the letter and statement. The submissions emphasised Ms Palioniene's son's dependence on her, the lack of other carers for her son, and the fact that there is "every risk that [her son] would suffer serious and long-term psychological harm through being separated from his mother". It was noted that Courts needed to obtain information and there was no information to allay fears for her son's welfare, and that her son was a victim in these circumstances.

Relevant principles relating to article 8 of the ECHR

15. There was no dispute about the relevant principles of law. Section 21 of the Extradition Act 2003 ("the 2003 Act") requires the Court to determine whether the

extradition of the Appellant would be proportionate and compatible with rights protected by the ECHR. Article 8 of the ECHR provides a right to a private and family life, which is qualified. The relevant principles governing the approach to this issue have been established, see *Norris v USA* [2010] UKSC 9, [2010] 2 AC 487; *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, [2013] 1 AC 338; and *Poland v Celinksi* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551. Delay is a relevant factor for any article 8 assessment, see *Konecny v Czech Republic* [2019] UKSC 8; [2019] 1 WLR 1586.

16. In *H(H)* the Supreme Court reviewed the approach set out in *Norris v USA* in the light of the decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, and in the light of the way the guidance in *Norris v USA* had been applied in practice, see *H(H)* at paragraphs 2 and 22. It was acknowledged in *H(H)* at paragraph 1 that the impact on younger children of the removal of their primary carers and attachment figures would be devastating. It was noted that the interests of the children were a primary consideration, as set out in article 3.1 of the United Nations Convention on the Rights of the Child but "a primary consideration" is not the same as "the primary consideration" let alone "the paramount consideration" (emphasis added), see *H(H)* at paragraph 11. The importance of paying careful attention to what will happen to the child if the sole or primary care giver is extradited was emphasised, as was the need for a court to consider whether the public interest in extradition could be met without doing serious harm to a child, see *H(H)* at paragraph 33.

17. The question before the District Judge was whether interference with the article 8 right is outweighed by the public interest in extradition. There is no test of exceptionality. In the balance there is a constant and weighty public interest in extradition, people should have their trials, the UK should honour treaty obligations, and the UK should not become a safe haven for fugitives. The best interests of the children are a primary consideration, and Courts need to obtain the information necessary to make the necessary determinations relating to children. Delay since commission of the crime may diminish weight to be attached to the public interest and increase the impact on private life and likely future delay is a relevant feature to be taken into account.

Relevant principles relating to the admission of fresh evidence

18. Section 27 of the 2003 Act deals with the court's powers on appeal and refers to evidence which was not available at the hearing and the requirement for that fresh evidence to have been decisive on a question. In *Hungary v Fenyvesi* [2009] EWHC 321 (Admin); [2009] 4 All ER 324 at paragraph 32 the Court defined evidence that was 'not available at the extradition hearing' for the purposes of the Act as: …evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained … In addition, the court needs to decide that, if the evidence had been adduced, the result would have been different resulting in the person's discharge." An appellant who intends to rely on fresh evidence must comply with the requirements of rule 50.20(6) of the Criminal Procedure Rules.

The further evidence at this hearing

19. The letter and statement from Dr Grange dated 24 May 2019 addressed the questions posed to him about whether an infant's separation for a period of up to 6 months would cause harm to a well bonded infant and if so how severe and long term would be the harm. Dr Grange noted that such separation was best avoided at any point during childhood, and that even a short period in an incubator could cause harm. Separation was likely to contribute to insecure attachment style and separation was only positive when parents were harming their children and would be particularly harmful between the ages of six months and five years. Separations could be ameliorated by the security and stability provided by carers, the quality of the relationship between infant and person from whom they are being separated, and the support available. Dr Grange noted complexities in the process of reunification after a period of separation. He referred to an article from Murray and Farrington in 2008 on the effects of parental imprisonment on children ("the 2008 article"). This concluded that parental imprisonment was a strong risk factor for a range of adverse outcomes for children, including antisocial behaviour, offending, mental health problems, drug abuse, school failure and unemployment. However it was noted that the possible cause of these adverse outcomes might be trauma of child-parent separation but also being made aware of parents' criminality and the stigma that involved. The 2008 article noted the absence of high quality evidence on the topics.

20. The letter dated 17 July 2019 from Social Services reported that Ms Palioniene's son had been an open case since November 2017, and the continued involvement was mainly because of the extradition proceedings. It was noted that the father of her child was deported in 2018 but was reported to be back in the UK and continued to be involved in high risk activities and Ms Palioniene admitted they were seeing one another again. It was also said "currently Ms Palioniene claims she is no longer in contact with [the father] and does not know his whereabouts". Ms Palioniene's relationship with her son continued to be positive and affectionate. She is the sole carer and he is highly dependent upon her. He had just had his second birthday. He was not yet speaking but the health visitor had advised that children with more than one language were usually later in speaking.

21. It was noted that children's services did not have parental responsibility for Ms Palioniene's son and the expectation would be that he would be cared for by a family member or would accompany Ms Palioniene to Lithuania. There was no other carer identified for her son in the United Kingdom, and Ms Palioniene said that her mother and sister would not care for her son. If Ms Palioniene were to be extradited and her son was left in the United Kingdom, the local authority would be left with an abandoned child and Social Services would make the relevant application to court in order to safeguard her son. Making arrangements for his care would need to be made with parental consent and such consent would be very difficult to obtain if Ms Palioniene was in prison, either in the United Kingdom or elsewhere. It was not known if the child's father had parental responsibility, but in any event his whereabouts were unknown.

22. The social services letter noted that the child was used to being spoken to in Russian and would be likely to experience distress in an English speaking household. Reuniting after any separation would be difficult, leading to the child testing his

mother. Ms Palioniene was likely to suffer from depression as a result of serving a prison sentence and being separated from her son.

23. In her "further addendum proof of evidence" statement signed on 22 July 2019 Ms Palioniene confirmed that there was no one else available to look after her son. Ms Palioniene said that she would refuse to the placing of her son in a children's home or orphanage in Lithuania because of the terrible stories in the media about conditions. Ms Palioniene confirmed that she was very close to her son and could not bear to be separated from him.

Issues for this hearing

24. The issues were further refined at the hearing by Mr Hawkes on behalf of Ms Palioniene and Ms Hinton on behalf of the Prosecutor General's Office and I am grateful to them for their excellent and helpful oral submissions, which were by made by video link from London to the Liverpool Civil and Family Court where I was sitting.

25. The issues for me are: (1) whether the further evidence ought to be admitted; and (2) whether Ms Palioniene's extradition would involve a disproportionate or impermissible interference with Ms Palioniene's article 8 rights in the light of the assurance now provided by Lithuania, having regard to the best interests of Ms Palioniene's son as a paramount consideration.

Fresh evidence

26. In my judgment the evidence from Dr Grange, the social services, and Ms Palioniene should be admitted for the purposes of this hearing. So far as the evidence from Dr Grange is concerned it is further evidence of the harm that is caused by the separation of children from sole carers, albeit this has been known and acknowledged by courts without such evidence, as appears from the judgment in *H(H)*. So far as the evidence from the social services is concerned it provides the latest information about Ms Palioniene's son and his best interests are a paramount consideration. So far as Ms Palioniene's statement is concerned it provides some further details about her son and her position. None of this evidence was available at the hearing because it post-dated the hearing.

27. The formal admissibility of the further evidence will depend on whether the fresh evidence has caused the Court to allow the appeal. If the appeal is allowed the evidence will be formally admitted, but if it is not allowed it will not be admitted.

Extradition is proportionate and a permissible interference with article 8 rights

28. Mr Hawkes and Ms Hinton made submissions about whether, in the event that Ms Palioniene were to be extradited, Ms Palioniene would be granted bail and whether she would be forced to plead guilty so that Ms Palioniene would not be separated from her son. Mr Hawkes submitted that there was insufficient evidence about what would happen to Ms Palioniene's son. Further it was likely that Ms Palioniene would be denied bail, and there would be repeated separations of mother and son. The law did not require extradition at any cost, let alone at all costs, particularly for an old case involving very small amounts of drugs. Ms Hinton submitted that bail was still a

realistic outcome but that if bail was not granted the period of separation would not exceed 6 months. If convicted Ms Palioniene's son would be accommodated with her and there was a public interest in extradition, in upholding treaty obligations and in returning fugitives.

29. As to whether bail would be granted Mr Hawkes is right to point to the facts that these are serious charges and that Ms Palioniene was a fugitive, which might suggest that bail was not likely to be granted. On the other hand, Ms Hinton was right to point out that Ms Palioniene does seem to have turned her life around since the birth of her son, and she has complied with conditions imposed on her since her arrest on these extradition matters, and that any court considering bail was likely to have regard to the desirability of keeping Ms Palioniene and her son together. The assessment of Ms Palioniene's bail pending any trial is a matter for a Lithuanian court, which is why an assurance about that matter was not provided, and I am not in a position to say what the decision on bail will be.

30. As to whether Ms Palioniene would plead guilty Mr Hawkes pointed to the fact that Ms Palioniene denied that she was guilty of the offences but would have a very strong incentive to plead guilty so that she could remain with her son. Ms Hinton noted that I did not have any evidence of the offences, consistent with the scheme of the Framework Decision, and some of Ms Palioniene's statements about the timing of police beatings and her departure for the United Kingdom do not appear to fit with the information provided from Lithuania. It is not known what advice Ms Palioniene will be given about the prospects of conviction in the light of the evidence available to the prosecution, and I am not able to say on the evidence that Ms Palioniene will be forced to plead guilty if she is not guilty.

31. Mr Hawkes submitted that if Ms Palioniene is denied bail there will be a 6 month period of separation, if Ms Palioniene is convicted her son will be reunited with her in a mother and young child unit for a period of 6 months from age 2 ½ years to 3 years, and then her son will be removed again because the earlier information from Lithuania had referred to children staying in the mother and young child unit until children were aged 3 or 4 years. This would mean that Ms Palioniene's son would be subjected to repeated separations of the type noted to cause such harm in *M v Circuit Court, Poland* [2019] EWHC 1342 (Admin). Ms Hinton noted that the evidence showed that young children could stay with mothers up to 4 years, and that there was nothing to suggest that there would be more than a 6 months separation in this case at the most.

32. The evidence shows that if Ms Palioniene is extradited she will be removed from the United Kingdom. In my judgment it is clear from all of the evidence from the social services, including the original letter from social services, that if Ms Palioniene were to be extradited there would be a short period of separation from her son and Ms Palioniene's son would, in accordance with her wishes in a situation where she retains parental responsibility, be taken to Lithuania.

33. Thereafter the evidence shows that one of three things will happen. The first scenario is that Ms Palioniene would be refused bail and her son would remain in the care of the Lithuanian state for the 6 month pre-trial period so there would be a 6 month separation from her son. There is no evidence suggesting that the state would not be

able to care adequately for Ms Palioniene's son, whatever Ms Palioniene's subjective concerns about the care might be.

34. The second scenario is that Ms Palioniene would be granted bail with conditions to remain in Lithuania and would be able to be with her son. In such a situation there would not be a separation of the Ms Palioniene and her son. Details of what accommodation would be available has not been provided, but it might be noted that the social services have commented on the limited nature of the accommodation currently occupied by Ms Palioniene and her son in the United Kingdom.

35. The third scenario is that Ms Palioniene pleads guilty to the offences. For the reasons given by the Judge when assessing seriousness for the purposes of proportionality under section 21A of the 2003 Act Ms Palioniene would be given a custodial sentence when the evidence shows that her son would be accommodated with her and there would be no separation from her son.

36. In my judgment the evidence does not support Mr Hawkes' suggestion that there will be repeated separations where Ms Palioniene will have a 6 month separation during the trial, and then be reunited for 6 months, and then removed. This is because it was common ground that the test for me to apply when assessing whether extradition would be disproportionate or infringe rights under article 8 ECHR was not whether there was "a real risk" of something occurring (compare article 3 ECHR jurisprudence) but whether extradition would be disproportionate or infringe article 8 rights, taking into account Ms Palioniene's son's interests as a paramount consideration. The evidence shows that young children are accommodated with mothers up to the age of 3 years and that this may be prolonged in some cases until a child turns 4 years, so in my judgment it is speculative to suggest that there would be repeated separations.

37. I will need to assess whether given these scenarios the extradition of Ms Palioniene is proportionate and compatible with the rights engaged under article 8 of the ECHR.

38. I accept that in every case there will be at the least a short period of separation from Ms Palioniene. This will be devastating for her son who is innocent in all of this, and may lead to Ms Palioniene being depressed. Although Ms Palioniene will be reunited with her son in the event that she is either granted bail or pleads guilty I will assess the case on the scenario which shows that there will be a separation of up to 6 months in pre-trial detention because all of the scenarios are equally likely outcomes. The evidence showed that any separation, even for the period that a baby is in an incubator can cause harm, and a separation of over 2 months can cause significant long term harm.

39. I note that the Judge undertook the balancing exercise required by *Poland v Celinski* and found that the extradition of Ms Palioniene would not infringe article 8 rights and was not disproportionate. For the reasons given in my first judgment there was a requirement to obtain further information about what would happen to Ms Palioniene's son and an assurance that Ms Palioniene would not be detained separately from her son for a period longer than 6 months. That assurance has been provided, and supports the assessment made by the Judge.

40. The Judge carried out the relevant balancing exercise required by *Poland v Celinski*. Relevant factors in favour of extradition were: (1) the strong public interest in extradition; (2) upholding treaty obligations; (3) preventing the UK from becoming a safe haven for fugitives; (4) the serious nature of the offences being the supply of drugs to prison, albeit in a very small amount, and street dealing in drugs; (5) Ms Palioniene's previous convictions in Lithuania and the United Kingdom.

41. The factors against extradition included: (1) the fact that there will be a separation from her son, for whom she is a sole carer and with whom there is an intense bond, which will cause significant emotional harm to the son and Ms Palioniene; (2) Ms Palioniene's son is innocent in all of this; (3) the offending took place about 7 years ago, not all the delay was caused by the fact that Ms Palioniene was a fugitive, and Ms Palioniene has become a responsible mother since the offences were alleged to have been committed.

42. In my judgment the assessment carried out by the Judge is now supported by the assurance provided by Lithuania, and was not wrong. Further I can confirm that in my judgment, balancing the factors in favour and against extradition and taking the best interests of Ms Palioniene's son as a paramount consideration, the extradition of Ms Palioniene is compatible with the article 8 rights engaged, and this is in particular because of the serious nature of the alleged offences, albeit that the amount of drugs involved is small, and the fact that Ms Palioniene is a fugitive. The extradition remains proportionate taking account of the matters set out in paragraph 21A(3) of the 2003 Act for the reasons given by the Judge at paragraph 29 of the Judge's judgment.

Conclusion

43. For the detailed reasons given above in my judgment: (1) the fresh evidence ought to be admitted for the purposes of the appeal but it does not have the affect of causing me to allow the appeal and will therefore not be formally admitted; and (2) and taking the best interests of Ms Palioniene's son as a paramount consideration, the extradition of Ms Palioniene is proportionate and compatible with the article 8 rights engaged in this case.