Neutral Citation Number: [2019] EWHC 2637 (Admin)

Case No: CO/5152/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2019

Before:

LADY JUSTICE RAFFERTY
MR JUSTICE JAY

- -

Between:

BY **Appellant**

- and –

THE DISTRICT COURT IN PAPHOS, CYPRUS **Respondent**

- -
- -

Cathryn McGahey QC and Benjamin Seifert (instructed by **DPP Law Ltd**) for the **Appellant**
Jonathan Swain (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 3rd October 2019

- -

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.

.....

MR JUSTICE JAY

LADY JUSTICE RAFFERTY and MR JUSTICE JAY:

Introduction

1. This is an appeal brought with the permission of Garnham J pursuant to s.26 of the Extradition Act 2003 ("the 2003 Act") against the judgment of District Judge Mallon ("the District Judge") given on 20th December 2018 ordering the extradition of BY ("the Appellant") to Cyprus. There are three grounds of appeal and an application to adduce fresh evidence.

2. The extradition of the Appellant is sought under a European Arrest Warrant ("EAW") issued by the Cypriot Judicial Authorities on 1st February 2018 and certified by the National Crime Agency on 3rd April 2018. It is alleged that the Appellant obtained credit from a Cypriot national by false pretences contrary to Article 301, Chapter 154 of the Penal Code.

3. The grounds of appeal are, first, that the District Judge erred in not finding a forum bar pursuant to s.19B of the 2003 Act; secondly, that she erred in finding that extradition would not breach the Appellant's Article 8 rights; and, thirdly, that police cell and prison conditions in Cyprus are such that there is a real risk that the Appellant's Article 3 rights would be violated.

4. Given that this case raises issues bearing on the mental health of the Appellant's ex-partner and the medical conditions of their five children, an anonymity order is both appropriate and requisite in this case. Nothing may be reported which might lead to the identification of the Appellant, his ex-partner or his children.

The Allegation against the Appellant

5. The circumstances of the offence must be drawn exclusively from the terms of the EAW, and the Appellant's witness statement addressing this topic cannot be considered. We note in passing that both the EAW and, for what it is worth the Appellant's witness statement, lack precision on matters of location.

6. Essentially, it is said that in June 2015 the Appellant, acting through a company "3 The Soul", agreed to collaborate with Mr Neophytos Neophytou, the manager of a hotel in Paphos, in relation to accommodating British clients who were attending "various events" on the island, described by the Appellant as "club parties" typically involving soul music. During the winter of 2016 (this must have been in early 2016, not in 2015) it was orally agreed between them that 120 of the Appellant's customers would be accommodated at the hotel between 15th and 21st June that year. Mr Neophytou made it clear that he would require payment in advance for the entire amount, namely Euro 25,151.80, and the reservations were concluded.

7. On 13th June 2016, after many attempts made by the hotel to obtain payment, the Appellant sent by email a copy of a bank transaction showing a remittance for Euro 17,855.75. It is alleged that this was fraudulent. On 15th June the Appellant arrived at the hotel with his customers. They left between 20th and 22nd June and the Appellant himself left on 24th June. It is alleged that during the course of his stay the Appellant

gave oral assurances to the effect that everything was in order, and that he also promised that the balance of Euro 7,296.05 would be paid before his departure. When the Appellant left the hotel he told Mr Neophytou that he would pay the balance on his return to England, but he did not do so.

8. The EAW alleges the following offence:

> "Obtaining credit under false pretenses (the wanted person at the time of incurring a debt, he obtained a credit of Euro 17,855.05 by Neophytos Neophytou, manager of the hotel, …, under false pretenses. The false pretense consists of the fact that the wanted person sent a remittance certificate of the said monetary amount to the account of the complainant's company, which was not real)." [The EAW has been translated from the original Greek at the instance of the judicial authority and we are using the latter's translation uncorrected]

9. By letter dated 20th November 2018 the Ministry of Justice and Public Order in Nicosia stated, without giving further details, that the offence in fact extended to the entire amount of Euro 25,151.80.

10. Having considered the papers very carefully before the hearing started, we invited Ms Cathryn McGahey QC to develop her submissions on the second ground. In the end, oral argument was not received on the first and third grounds because it is unnecessary to rule upon them. All that it is appropriate to say is that the Appellant would have struggled to persuade us on these grounds.

11. We therefore move directly to the key issue in this appeal.

Article 8: the Evidence Before the District Judge

12. The Appellant lived with E between 2006 and June 2017, and they have five children, now aged between 3 and 12. The children suffer from various genetic, developmental and behavioural conditions which we will not describe. As at the date of the Appellant's first witness statement, which was May 2018, the Appellant was living in the same house as E and was heavily involved in the care of the children.

13. The District Judge received written and oral evidence from Dr Tom Grange, a chartered psychologist and registered clinical psychologist with specialist experience in the field of children and families. It is clear from his *cv* that he also has expertise and experience in adult mental health.

14. By way of summary of his June 2018 report, the Appellant was clinically assessed to be suffering from moderate depression and anxiety (see para 7.17, read in conjunction with the psychometric tests at paras 6.138-6.143), which disorders would likely significantly worsen in the event of extradition. As for E, she was clinically assessed to be moderately depressed and it was Dr Grange's opinion that she might also be suffering from other disorders and conditions (see para 7.20 read in conjunction with the psychometric tests at paras 6.145-6.152). In Dr Grange's view, her depression would probably deteriorate in the event of the Appellant's extradition, and this would impact on her ability to meet the children's needs. We should add that Dr Grange

fairly qualified his opinion in relation to the other disorders and conditions by saying that a detailed view about them would require further assessment by a psychiatrist specialising with adults (see para 3.02). As for the children, whose individual cases it is unnecessary to set out here:

> "In my extensive experience of assessing families within extradition proceedings, the [family] have by far the most complex needs I have encountered. Subsequently [sic], it is likely that nearly all the children will suffer devastating harm in the event of their father's extradition. This harm will be caused by the trauma of separation from a primary carer and also exposure to [E's] mental health. This is likely to deteriorate post-extradition and undermine the mother's ability to meet the needs of the five children even with the support she claimed to have access to."

15. At the request of another District Judge, Ms Andrea Parker, a social worker, was tasked to assess the needs of the children, and her report is dated 24th August 2018. The Appellant is highly critical of this report and what he said about it when cross-examined before the District Judge is noted; but it was material which the latter was entitled to take into account. It transpires that in May 2018 (we note that the Appellant himself says that it was in June) the Appellant left the family home and moved to a flat nearby to live with a new partner, Sarah. This was contrary to Dr Grange's understanding of the arrangements: see para 6.57 of his report. Ms Parker stated that the children have complex and diverse medical needs. She also noted that the Appellant's asthma was deteriorating and that he relied on inhalers "considerably". As for E's mental health:

> "E disclosed that she has suffered with anxiety and depression since a teenager. … She tells me that OCD, depression and post-natal depression have featured in her life but she regularly seeks relevant assistance from services and has a good relationship with her GP. She is currently prescribed anti-depressants and has been referred to Inclusion Matters who have listed her for counselling services. The stressful events occurring this year have had an impact, however, E does feel much more positive about life now that she is no longer residing with [the Appellant]. She disclosed that suicidal ideation was an issue in her younger life, but insists that although there may be occasions when this will be revisited, she would never take action due to her responsibilities and love for her children."

Further:

> "She describes how [the Appellant] plays a key part in the day to day life of the children and he 'never fails' to attend the home every day and help out with the children. However, she feels that there needs to be mutually agreed boundaries and improved reliability, particularly related to timeframes."

16. E told Ms Parker that in the event that the Appellant were extradited her best option would be to relocate to Scotland where she has a network of extended family members who could provide support.

17. Ms Parker concluded that the Appellant was a supportive father to his children. In the event that the Appellant were extradited, she believed that E would be able to cope with the children but there would be "significant challenges" and obvious practical and logistical difficulties. Ms Parker clearly thought that relocation to Scotland was a possible option although she recognised that that it would cause upheaval in the context of housing, schooling and medical appointments. In the event that a move to Scotland did not occur (the unspoken premise of the fourth bullet-point in section 11 of the report, dealing with Conclusions and Recommendations), there would be logistical difficulties in getting the children to school and E might have to rely on the support of good friends. It was unclear whether E's mother, who lived in Scotland, would be available to assist. Ms Parker also accepted E's statement that she might have to modify or cease her employment.

18. Moreover, in Ms Parker's opinion:

> "In light of the complexity of the children's individual needs and the fragility of the family structure at this time, I would recommend that the children be subject to a Team around the Family arrangement. This would enable all relevant professionals involved with the children in education, health and other services, to meet with E on a regular basis to determine what support may be necessary, whilst monitoring the changing needs of the family. This would be led by one of the children's schools."

19. According to the Appellant's addendum statement dated 10th December 2018, he moved out of the family home at E's request in June 2018 after he had begun a new relationship. In late September 2018 "E stopped our children from continuing their daily contact with me", although no details were given as to the terms of the court orders that must have been made to achieve this. It is clear from para 6 of this witness statement that E had made three allegations of assault and harassment against him, the last of these being on 11th September. In the Appellant's opinion, E's mother would return to Scotland shortly and his assistance as carer would be essential. Between 22nd September and 1st December 2018 it appears that the Appellant had no contact with his children; thereafter, it was taking place on a supervised basis.

The Oral Evidence Below

20. The Appellant told the District Judge that Ms Parker's report was biased and inaccurate, and that E's account to the social worker to the effect that their separation was a change for the good was untrue. The Appellant confirmed that he no longer had daily contact with his children but did not agree that his involvement in their lives had been significantly reduced. The Appellant said that he had either contact or communication with the children on a daily basis although all contact was supervised. The Appellant told the District Judge that E had changed her mind about going to Scotland because the children were all settled at school. He claimed that E and the family needed him financially although when asked for money, which was on a

regular basis (the addendum witness statement said on a weekly basis), he gave her a sum in the region of £50-80. The Appellant was also dismissive of E's evidence as to her intentions (this being in the nature of hearsay because no witness statement from her was available) because she was incapable of telling the truth.

21. In his oral evidence Dr Grange told the District Judge that E evinced concern to him about the children being removed from her care. Dr Grange described the relationship of the Appellant and E as "fluid" with the former providing a lot of support. Under cross-examination Dr Grange agreed that there had been a significant reduction in the level of contact, although after a two-month hiatus it had now restarted. Although the Appellant was no longer a primary carer, the impact of separation on account of extradition would be "devastating" in the light of the children's high vulnerabilities.

22. In relation to E's mental health, Dr Grange accepted that he had seen no documentary evidence supporting a formal diagnosis of any of the conditions he had mentioned. He reiterated the view that he had expressed in writing that E's mental health would probably deteriorate in the event of the Appellant's extradition.

The District Judge's Conclusions on the Article 8 Issue

23. The District Judge accepted as accurate Dr Grange's description of the children's individual conditions, and that extradition would have a harmful effect on them, "as it would on any children of similar age" (para 44). The District Judge was surprised by Dr Grange's view that the impact on the children would still be "devastating" notwithstanding the Appellant's altered role in respect of their care (para 45). The District Judge rejected Dr Grange's prognosis that E's mental health would deteriorate in the event of extradition pointing out that E had not given evidence, there was no recent medical evidence to support it, and that E herself was now more positive (para 46).

24. The District Judge further concluded that the Appellant no longer played a major role in caring for the children and that the reduction since September 2018 had been significant (para 47).

25. As for E, the District Judge found that the Appellant's evidence about her was not credible particularly in his attempt to downplay the positive assessments others had made of her and the genuineness of E's wish to move to Scotland.

26. Finally:

> "In short, [the Appellant] sought to paint the worst possible picture of his ex-partner and the best of himself, often contradicting himself, and exaggerating his contribution, for example asserting that she was financially dependent upon him when he gave her between £50 and £80 per week, towards the upkeep of 5 children. I do not criticise the amount based on his level of income, but this is simply one example of the nature of his evidence, he was not credible. I find that the positive assessment of his ex-partner in the section 7 report, combined with the family and state support which she and the children receive, mean that she will be able to care for them adequately

> in the event of his extradition. I find that his current role in the lives of the children has vastly changed from that which it was only a few months ago." (para 50)

27. The District Judge's conclusion on Article 8 was that the negative impact of extradition on the Appellant and his family would not be at such a level that the court ought not to uphold the UK's extradition obligations. She accepted that the children had additional vulnerabilities. Even so, the Appellant was not a primary carer and the children would be adequately cared for in the event of extradition (para 53). Furthermore, extradition in these circumstances would not be disproportionate in the light of s.21A(3) of the 2003 Act (para 54).

The Application to Adduce Fresh Evidence

28. Ms McGahey applied to adduce evidence which was not before the District Judge. At the start of the hearing we indicated that it would be considered *de bene esse*.

29. According to the Appellant's further witness statement dated 14th May 2019, he has been under the care of the Respiratory Clinic at Arrow Park Hospital since September 2017 for his chronic asthma. In the opinion of Dr Monika Raths of that clinic, the Appellant's asthma was poorly controlled (as at 6th February 2019) and she increased his dose of steroid inhaler. She also considered that he was unfit to fly. We have not been given any more recent evidence. The District Judge was either fully aware of the position in relation to the Appellant's asthma or could have been properly appraised of it. The only matter which is arguably new, assuming that it remains the case, is that the Appellant's asthma was poorly controlled; but the fact remains that a report or clinic letter from the Arrow Park Hospital could have been placed before the District Judge. In these circumstances, we say nothing more about this aspect of the matter.

30. Paragraphs 4-10 of the same witness statement provide further details of the Appellant's level of involvement in the care of his children. It is clear that he was more actively involved than he was at the end of 2018, and on occasion his children stay overnight. This witness statement offers no further insight into the "custody battle" referred to in Dr Raths' clinic letter. However, on this important topic we did obtain with Ms McGahey's assistance further information about the Appellant's contact with his children. On 19th February 2019 a Child Arrangements Order was made (it is still in force) affording the Appellant contact with the children at least three times a week to include two sleep-overs a week and with all the children being together for one weekend a month. This contact was to be at dates and times to be arranged between the parents. The Family Court also noted that contact had been taking place on an informal basis.

31. On the same theme, reliance is placed on the Appellant's witness statement dated 24th September 2019. Appended to this statement are numerous recent WhatsApp messages between the Appellant and E which illuminate his level of involvement in his children's ongoing care and the extent to which E is reliant on her ex-partner. We accept Ms McGahey's submission that the overall tone and content of these messages demonstrates that there has been a degree of reconciliation between the parties, and that it cannot be inferred that they were written with an eye to this litigation.

The Submissions on Article 8

32. In her elegant and understated submissions Ms McGahey contended that the District Judge made three mistakes in relation to the *Celinski* balancing exercise.

33. First, it is said that the District Judge erred in concluding that Dr Grange's prognosis was unsupported by the evidence. She failed to consider properly the obvious practical difficulties that E would face if required to care for the children independently, and placed too much emphasis on the social worker's positive assessment which was naturally predicated on E wishing to present a positive image of herself to obviate the real risk that the children would be removed from her.

34. Secondly, it is submitted that the District Judge allowed herself to be actuated by an irrelevant consideration, namely that the Appellant had sought to present himself in the best and E in the worst possible light. Issues of credibility were irrelevant to the Article 8 balancing exercise. The key question was the degree of impact extradition would have on these particularly if not uniquely vulnerable children, the level of which vulnerability the District Judge underplayed.

35. Thirdly, it is argued that the District Judge placed undue reliance on the prospect of E moving to Scotland. This was a fanciful suggestion, given the extent to which E and the children were dependent on schooling and medical care where they were currently; and, in any case, a move to Scotland would be enormously disruptive. Ms McGahey emphasised that it would not be feasible for the child that attends Great Ormond Street and Alder Hey hospitals to travel there from Scotland.

36. In oral argument Ms McGahey candidly explained that a forensic decision was taken not to obtain a witness statement from E, and we therefore say nothing more about it. She emphasised, in harmony with Dr Grange's view, that this was a highly exceptional case involving five children with complex problems and vulnerabilities who really needed the emotional, psychological, physical and practical support of their father. Her headline submission was that the District Judge did not address this issue properly, and in any case the fresh evidence demonstrates how the position has moved on, in the Appellant's favour, since December 2018.

37. On behalf of the Respondent Mr Jonathan Swain submitted that the District Judge's conclusion on the Article 8 balancing and proportionality exercise was well within the margin of appreciation and decision-making accorded to her as the first instance tribunal.

38. Mr Swain fairly accepted that the family circumstances here are clearly very difficult but he pointed out that the District Judge, in accepting Dr Grange's evidence relating to the children, plainly had this in mind. Mr Swain submitted that the District Judge was right to place weight on the Appellant's failure to obtain a witness statement from E, and she was also entitled to accord "great weight" to the social worker's report.

39. Mr Swain contended that the District Judge had fairly assessed a move by E to Scotland as being no more than a possible option, and one which would eventuate only if it was necessary, presumably because E could no longer cope in her current whereabouts.

40. Finally, Mr Swain fully supported the District Judge's evaluation of Dr Grange's evidence in relation to E, and submitted that the fresh evidence made no material difference to the outcome.

Conclusions on Article 8/the Second Ground of Appeal

41. The legal principles governing the balancing and/or proportionality exercise in a case of this nature engaging Article 8 of the ECHR are the familiar ones enunciated by the Supreme Court in *Norris v Government of the United States of America (No 2)* [2010] 2 AC 487 and *H (H) v Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338, and by this court in *Polish Judicial Authority v Celinski* [2016] 1 WLR 551 (see paras 5-12 in particular). Given that the instant case involves the rights and interests of children, the citations from *H (H)* collected at para 8 of *Celinski* are especially germane. The District Judge was well aware of these principles: see paras 35-38 of her judgment, in particular para 35(vii) and the proposition that, although there is no test of exceptionality, it is likely that the public interest in favour of extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe.

42. For an appeal to be allowed it is unnecessary for an appellate court to go so far as to find "a judicial review type error": see para 25 of this court's judgment in *Love v United States of America* [2018] EWHC 172 (Admin). The correct approach to s.27(3) of the 2003 Act is as follows:

> "26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong … The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, and the appeal in consequence should be allowed."

43. In *Celinski* Lord Thomas CJ giving the judgment of the court reiterated that the correct focus is on the outcome, namely whether the decision on proportionality itself was wrong, rather than on any errors or omissions in the lower court's reasoning: see para 24.

44. In our judgment, this is a highly unusual case concerning the interests of five children with complex personal, emotional, behavioural and psychological needs. We entirely endorse Dr Grange's assessment, although we would make the point in our own way, that it would be difficult to imagine a case involving children who are more vulnerable and needy.

45. We admit the fresh evidence relied on by Ms McGahey. The requirements of s.27(4) of the 2003 Act are fully satisfied, including the requirement that this fresh evidence is dispositive in the Appellant's favour. Our reasons for this conclusion are set out compendiously below. These include our assessment of the Appellant's case based on his attack on the District Judge's decision founded as it was on the evidence then available.

46. Matters have clearly moved on since December 2018. The Appellant and E are not of course fully reconciled, but what is clear from the WhatsApp messages in particular is that they are now working together in the best interests of their children. Contact is no longer supervised, and the Appellant now has frequent contact often responding quickly and responsibly to late changes of plan created by E's work commitments. The Appellant may not be a primary carer but he undoubtedly has an important and proactive role which goes far beyond the limited role he was playing last winter. An important plank of the District Judge's reasoning was that the Appellant's parental role had "vastly changed" since May 2018, and – without finding that he is now as much involved as he was then – that plank has been removed.

47. There is force in Ms McGahey's first submission that the District Judge was wrong to reject Dr Grange's prognosis in relation to E. This was a prognosis which he was clearly qualified to proffer in the light of his *cv*, and as we have pointed out he carried out a reasonably detailed clinical assessment of her. E's account of her depression and OCD (see para 6.25 of his report) was detailed and compelling. Whereas it is true that there was some indication that E was feeling more settled and positive in herself following the end of her relationship with the Appellant, this was in the immediate aftermath of their break-up. As matters currently stand, it is clear that E is both dependent on all the assistance the Appellant can give and reasonably appreciative of it. Dr Grange's assessment that E's mental health would likely deteriorate in the event of the Appellant's extradition accords both with common sense and the expert evidence. Whether or not the District Judge's conclusion was wrong as at December 2018, we find on the basis of all the evidence now available to us that E would probably suffer a depressive episode should the Appellant be extradited.

48. The District Judge's view that the Appellant was seeking to paint himself in the best possible and E in the worst possible light, and her damming assessment of his credibility, were in our judgment justified, or at least within her proper evaluative remit, in view of the evidence overall including the matters specifically referred to at paras 47-50 of her judgment. There is no merit in the contention that the Appellant's credibility was an irrelevant consideration in this case, although it was a factor which should not be overstated. The point that the District Judge was making was that the Appellant had been intent on undermining E ("[she] is incapable of telling the truth") in the context in particular of the social worker's report that E was evincing a positive response to the ending of the relationship and her proposed move to Scotland.

49. The District Judge clearly recognised that a move to Scotland was only a possible option. To that extent, this was a point of limited weight and significance. In any event, E's account to the social worker was that a move to Scotland would be contemplated only in the event of the Appellant's extradition. Moreover, there is force in Ms McGahey's submission that the District Judge did not appear to address all the ramifications of such a move. The reality is that E would only move to Scotland if there were no other option. This predicates that she would not be coping in her current location and circumstances. Yet in that eventuality, there would, as Ms McGahey points out, be obvious practical difficulties consequent on such a relocation which the District Judge does not expressly address, although they are recognised in the social worker's report.

50. More generally, Ms McGahey submitted that the District Judge underplayed the impact of extradition of their father on these highly vulnerable children. Para 44 of

her judgment ("I accept that extradition would have a harmful effect on them, as it would on any children of a similar age") could have been more sensitively worded, but the District Judge did accept Dr Grange's evidence as to their individual conditions, she did list these at para 39, and para 53, addressing her conclusions on Article 8, refers to their "additional vulnerabilities". Even so, a textual analysis of this sort only travels a certain distance, and ultimately we are persuaded that the District Judge did not properly address all the practical difficulties that would face E if the Appellant were removed from the scene.

51. Section 11 of the social worker's report asserted that E, then apparently of a more positive cast of mind, "would have the ability to cope". The "significant challenges" that E would face in the event of extradition are then fairly set out by Ms Parker, but she does not really explain how E would in fact address them in practice. Nor, in our view, does the District Judge properly engage with this issue save to agree with the social worker's overall conclusion about E's ability to cope and to mention the possibility of a move to Scotland, the obstacles in relation to which we have already acknowledged.

52. Our conclusion that the District Judge was wrong to reject Dr Grange's pessimistic prognosis for E in the event of extradition feeds into our analysis at this stage. We have indicated our level of concern as to E's ability to cope in practical terms even on the premise that Ms Parker, who is not a qualified psychologist, is right about her more positive frame of mind. Our concerns are deepened in the probable circumstance that E's mental state should deteriorate.

53. It is artificial to express any conclusion about this case without considering the fresh evidence. In other words, whether or not the District Judge's decision should stand on the basis of the material available to her in December 2018 is an academic question. We must, as we have said, consider the merits of this appeal compendiously, having regard to the fresh evidence as part and parcel of that exercise. The balancing and proportionality exercise which we must undertake in the light of this full picture also reflects the matters enumerated in s.21A(3) of the 2003 Act.

54. Given the exceptional needs of these five children, the support now provided by the Appellant, the immense practical difficulties that would ensue in the event of his extradition, and the likely consequences for E's mental state, we are driven to conclude that the public interest in favour of extradition is outweighed by the Article 8 rights of the Appellant and his family. We do not find it necessary to hold that the Appellant's extradition would have a devastating effect on this family: it is sufficient to say that it would be highly deleterious. The conditions set forth in s.27(4) are fulfilled. The fresh evidence has been admitted because it is determinative of this appeal.

Disposal

55. This appeal is allowed and the Appellant must be discharged.