Neutral Citation Number: [2019] EWHC 3187 (Admin)

Case No: CO/1513/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
In the matter of an appeal against extradition pursuant to s.26 of the Extradition Act 2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

GRZEGORZ JASIENIEWICZ	**Appellant**
- and -	
DISTRICT COURT IN WROCLAW-FABRYCZNA, POLAND	**Respondent**

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- -

Kathryn Howarth (instructed by **Lawrence & Co.**) for the **Appellant**
Tom Hoskins (instructed by **CPS**) for the **Respondent**

Hearing date: 13 November 2019

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Appellant appeals against the decision of District Judge Zani ("the DJ") made on 8 April 2019 ("the Decision") to order his extradition to Poland to serve a sentence of imprisonment of 2 years and 6 months in respect of convictions for the offences set out in the European Arrest Warrant ("EAW"), issued by the Respondent on 17 October 2018 and certified by the National Crime Agency on 4 December 2018.

2. The EAW relates to convictions for two offences, namely:

    i) On 29 May 2007 in Poznan the Appellant, acting jointly with others, committed theft of 1,800PLN (£320 at the time of the offence) from a company called Domar S.A. during the commission of which violence was used by pushing and hitting an employee in the face;

    ii) On 31 May 2007 in Poznan the Appellant, acting jointly with others, committed theft of 3,780PLN (£670 at the time of the offence) from a toy warehouse during the commission of which violence was used by pushing an employee to the ground and kicking him in his kidneys and threatening him with a weapon.

3. Whipple J granted the Appellant permission to appeal on two grounds:

    i) First, the DJ ought to have decided differently the question under s.20 of the Extradition Act 2003 ("EA 2003") of whether he was deliberately absent from his trial and whether his right to a re-trial was adequately protected (**Ground 1**).

    ii) Second, the DJ ought to have decided differently the question of whether extradition would be compatible with his rights under Article 8 ECHR and s.21 EA 2003 (**Ground 2**).

4. Ms Kathryn Howarth, for the Appellant, submits that significant to both grounds of appeal is the DJ's finding that the Appellant was a "fugitive" (Decision, para 42). She submits that in making this finding the judge did not, as he should have, make a factual finding about the Appellant's state of mind when he left Poland for the UK.

Ground 1: deliberate absence and re-trial rights (s.20)

The European Arrest Warrant

5. Box D of the EAW states that the Appellant "did not appear in person at the hearing, as a result of which ruling was made". It highlights that pro-forma exception "b" applies, namely that:

> "…the person concerned was not summoned in person but was otherwise officially informed of the date and place of the hearing, which led to rendering of a decision, which explicitly allows to assume that he/she was notified of the appointed

> hearing, and was also informed that a decision may be rendered in absentia, should he/she fail to appear at a hearing."

The following explanation is then provided about how this exception is said to be satisfied:

> "The mentioned person was not present at the main hearing as a result of which the above judgment was rendered. However, he had been notified appropriately of its date and informed that a judgment may be rendered by means of correspondence sent to the address provided in the preparatory proceedings. The accused did not collect the consignment. On the grounds of art.133 of the Code of Penal Procedure and art.139 of the Code of Penal Procedure the consignments are regarded as delivered. On the grounds of art.377§3 of the Code of Penal Procedure the court decided to conduct the hearing in the absence of the accused who had been appropriately notified of the date of the hearing and failed to appear without any justification of his absence, his presence was not an obligation but stemmed only from his right.
>
> The convict is eligible to lodge a motion for reopening of the above mentioned proceedings, on the grounds of a regulation of article 540b of the Code of Penal Procedure. The convict is also eligible to make an application for reinstatement of the term to lodge a motion for justification of the judgment and an appeal, pursuant to art.126 of the Code of Penal Procedure."

6. The DJ in the Decision (at para 3) summarised the relevant further information supplied by the judicial authority on 11 January 2019:

   i) The Appellant was not arrested for this matter, but gave explanations during the course of "preliminary proceedings".

   ii) He pleaded guilty during the preliminary proceedings on 12 November 2008.

   iii) The bill of indictment was filed on 11 December 2008 with the Lodz District Court and on 24 November 2010 the case was transferred to the Wroclaw-Fabryczna District Court. The proceedings were stayed because the Appellant was "in hiding". The Court's judgment was delivered on 14 March 2017.

   iv) Notification of the proceedings before the Wroclaw-Fabryczna Court were sent to the Appellant at all his known addresses with the assistance of the postal service employees and the police. A Wanted Notice was issued on 15 January 2014.

   v) The Appellant failed to surrender to the Polish prison authorities to serve his sentence, as a result of which a search for him was ordered on 14 September 2017 and the "executory proceedings" were stayed.

vi) The Appellant had been properly notified about all his rights and obligations. He was aware of the ongoing proceedings and of his obligation to notify the authorities of any change of registered address for longer than 7 days. He failed to comply with this obligation and furthermore, he failed to notify the court of his decision to leave the country/provide details of his whereabouts abroad.

The Decision

7. The DJ made a finding that the Appellant was unlawfully at large after conviction. At paragraph 42(iii) of the Decision the DJ stated: "The reasons for this finding are that I am satisfied that he had been made aware of his obligations to notify the Polish authorities of any changes of address but that he failed to comply with this requirement when he came to the UK" (see also Decision, para 46).

8. The DJ stated (at para 47):

> "The Polish authorities state, in the body of the EAW, that GJ [the Appellant] had been properly notified of the date of the '*main hearing*' and that a '*judgment may be rendered by means of correspondence sent to the address provided in the preparatory hearing*'. GJ is said to have failed to collect the notification of the trial result. The case thus proceeded and he was convicted and sentenced."

9. The Decision continues:

> "48. The EAW adds that 'the convict is eligible to lodge a motion for reopening of the above-mentioned proceedings, on the ground of a regulation of Article 540b of the Polish Code of Penal Procedure. The convict is also eligible to make application for reinstatement of the term to lodge a motion for justification of the judgment and an appeal pursuant to Article 126 of the Code of Penal Procedure'.
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> 49. Article 540 states, inter alia, that a '*valid judgment may be re-opened with a motion of the defendant*' (to be lodged within strict time limits) when (i) the date of the sitting or trial was '*not delivered*' to him or (ii) if it was delivered in a way '*other than in person*' and he is able to prove that he was unaware of the trial date or the possibility of the Judgment being rendered in his absence.
>
> 50. I am satisfied that the Polish authorities are providing GJ with the opportunity of making application for a re-trial or a review that is equivalent to a re-trial. It will be for him to demonstrate that he falls to be able to avail himself of the protection afforded by Article 540 aforesaid (per paragraph 49 above). That decision will, of course, be a matter for the Polish court to decide upon hearing all the facts brought to its attention."

10. Ms Howarth submits that the DJ erred in his analysis of the s.20 issues in this case. First, he reached the wrong decision in relation to deliberate absence. Second, he reached the wrong decision in relation to the adequacy of the re-trial rights articulated in the EAW.

Deliberate absence

11. In his proof of evidence the Appellant said that in 2007 or 2008 he was arrested in relation to the offences described in the EAW; he spent approximately two weeks in custody; he hired a lawyer and provided explanations at the Prosecutor's Office in Lodz. He said that he had not committed the offences. After he was released from custody he needed to report to a police station in Lodz. A few months later when he was attending to sign on as usual an officer told him that he did not need to carry on reporting. When he was released he was told that he needed to inform the authorities of any change of address. He said he remained at the address given in the EAW in Lodz, until he left the country in August 2013. He said he did not know why the further information stated that he pleaded guilty to the offences (see para 6 above). He did not know what the court proceedings involved exactly but as far as he knew he had provided an explanation to the Prosecutor's Office saying that he was not guilty.

12. In his evidence he denied hiding from the Polish authorities or being a fugitive from Polish justice. He added that he was not barred from leaving Poland at any stage and he had been allowed to retain his identity documents, which he later used to travel abroad.

The Law

13. In *Cretu v Romania* [2016] EWHC 353 (Admin) the Divisional Court held that s.20 EA 2003 should be interpreted in the light of Article 4a of the Framework Decision, which sets out four exceptions whereby an executing judicial authority may refuse to execute an EAW where the person did not appear at the trial resulting in the decision.

14. Article 4a(1) of the Framework Decision provides that:

> "1 The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
>
> (a) In due time:
>
> (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

> and
>
> (ii) was informed that a decision may be handed down if he or she does not appear for the trial…"

15. In *Cretu* Burnett LJ, as he then was, stated at para 34, so far as is material:

> "In my judgment, when read in the light of artlcle 4a s.20 of the 2003 Act… should be interpreted as follows:
>
> i. 'Trial' in section 20(3) of the 2003 Act must be read as meaning 'trial which resulted in the decision' in conformity with article 4a paragraph 1(a)(i). That suggests an event with a 'scheduled date and place' and is not referring to a general prosecution process…
>
> ii. An accused must be taken to be deliberately absent from his trial if he has been summonsed as envisaged by article 4a paragraph 1 (a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate Article 6 ECHR."

16. Burnett LJ continues (at para 35):

> "It will not be appropriate for requesting judicial authorities to be pressed for further information relating to the statements made in an EAW pursuant to article 4a save in cases of ambiguity, confusion or possibly in connection with an argument that the warrant is an abuse of process. The issue at the extradition hearing will be whether the EAW contains the necessary statement. Article 4a is drafted to require surrender if the European arrest warrant states that the person, in accordance with the procedural law of the issuing Member State, falls within one of the four exceptions. It does not contemplate that the executing state will conduct an independent investigation into those matters. That is not surprising. The EAW system is based on mutual trust and confidence. …"

17. In *Dziel v Poland* [2019] EWHC 351 (Admin), Ouseley J stated at paragraph 28:

> "The upshot of the authorities is quite clear. The relationship between the proper interpretation or application of 'deliberate absence' and the fair trial rights in Article 6 ECHR… is intended to ensure that a person whose extradition is sought to serve a sentence after a conviction in his absence has the right to a re-trial unless he has already been present at his trial or was properly notified of it and deliberately absented himself. Its purpose is to ensure that no-one is surrendered where that would mean a breach of their fair trial rights. A person will be taken to have deliberately absented himself from his own trial

> where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him. This includes breaching his duty to notify them of his changes of address, deliberately ignoring the court process. In such circumstances there is no need for the further questions in s.20(4) and onwards of the Extradition Act to be considered. Extradition follows."

The parties' submissions and discussion

18. Ms Howarth notes that the DJ referred to the case of *Dziel*, but she submits the circumstances in that case are very different to this case. By contrast with *Dziel* where the judge undertook a thorough analysis of the facts, she submits, with respect to the judge, that the factual analysis in the present case is relatively perfunctory in relation to both the information provided in the EAW about the relevant hearing and the summons or summonses sent to the Appellant's addresses, the actions of the Appellant and whether or not in all the circumstances it was proven to the criminal standard that he was deliberately absent from the relevant hearing. She submits that significantly Box D of the EAW does not set out any information about the date and place of the relevant hearing. The EAW is silent, or at least ambiguous about when and where the trial or hearings which resulted in his conviction took place; and the EAW does not set out any information about when the summons or summonses were sent to the Appellant, or to which address they were sent.

19. In relation to whether or not the Appellant was deliberately absent, Ms Howarth criticises the DJ for not make a finding of fact about the Appellant's state of mind when he left Poland for the UK. Ms Howarth submits that the ECJ (see *Openbaar Ministerie v Dworzecki*, C-108/16/PPU) and domestic (see *Romania v Zagrean* [2016] EWHC 2786 (Admin)) case law requires that the accused has sought to avoid service of the information and that through a "manifest lack of diligence" it is his own fault, which has resulted in him being unaware of the time and place of trial. Ms Howarth suggests that potentially the DJ has applied a strict liability test, that the accused was informed of the obligation to provide details of his change of address but failed to do so.

20. Ms Howarth submits that the undisputed evidence suggests that despite being in breach of his obligation to provide details of his change of address, the Appellant was not deliberately absent and did not exercise a "manifest lack of diligence". According to the further information he was only informed of the obligation to provide the authorities with his change of address during the preliminary hearings which are likely to have taken place in 2007 or 2008. He did not leave Poland until some five or six years later, in August 2013 after he had formed the view that he was no longer required because he had heard nothing from the authorities since he was examined by a court appointed medical practitioner in relation to his fitness to attend court following an accident whilst the proceedings were still at the court in Lodz. Further there was no suggestion that when he left Poland for the UK he was doing so to deliberately avoid criminal proceedings. The Appellant explains that he thought proceedings were no longer ongoing, and that he came to the UK to "improve their standards of living and offer better prospects to their daughter".

21. Further, whilst the DJ referred to *Dziel*, Ms Howarth criticises him for not referring to other relevant cases, including *Cretu.* As I understand it, Ms Howarth contends that if the DJ had done so he would have appreciated that he should not have left the assessment to the Polish Court as to whether the Appellant had demonstrated a "manifest lack of diligence" (see Decision, para 51), but he would have appreciated that that was an assessment that he himself should have done (see *Tyrakowski v Regional Court in Poznan, Poland)* [2017] EWHC 2675 (Admin), per Knowles J).

22. I do not find these criticisms made of the DJ's judgment to be persuasive. In particular, I am satisfied that it is implicit in the DJ's findings regarding fugitive status that he did address the Appellant's state of mind. The Appellant knew of his obligations to act with diligence in keeping the authorities appraised of his whereabouts and failed to do so.

23. The DJ's central finding is that the Appellant had deliberately absented himself from the trial. I agree with Mr Tom Hoskins, who appears for the Respondent, that this finding is supported by the following seven factors:

    i) the Appellant was aware of the allegations and pre-trial proceedings.

    ii) he was represented in the pre-trial proceedings;

    iii) he concedes he had an obligation to inform the court of changes of address;

    iv) the address on the EAW is the same as that given by him during pre-trial proceedings;

    v) he concedes he received notification from the court in relation to this case;

    vi) he does not assert that anyone informed him the proceedings had concluded; he merely assumed they had with no apparent basis for doing so since the last he claims to have heard was that a court hearing was taking place; and

    vii) he concedes that he did not keep the Polish authorities informed of his address. He accepts he never notified them of any change of address.

24. There was no need to press the judicial authority for further information as there was no ambiguity in the EAW (see para 16 above).

25. Mr Hoskins correctly emphasises that the ECJ authorities on which Ms Howarth relies in relation to the need to establish "manifest lack of diligence" focussed on the conduct of the person concerned, not that person's state of mind. In *Dworzecki* the court stated:

> "50. Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.

> 51. In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him."

In *Zagrean* the court stated at paragraph 81:

> "… Thus the approach in *Cretu* in interpreting s.20 remains good: a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial."

26. I consider it was open to the judge to find that the Appellant had deliberately absented himself from his trial and that he was a fugitive. In *Dziel* Ouseley J said (at para 28, and see para 17 above): "A person will be taken to have deliberately absented himself from his own trial where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him". That is, as Mr Hoskins observes, precisely this case.

27. I agree with Mr Hoskins that Ms Howarth's submission that the DJ left the assessment of manifest lack of diligence to the Polish Court rather than addressing this himself, fails to have sufficient regard to the fact that the DJ did make this decision for himself when addressing the issue of fugitive status and he did decide this fact against the Appellant. The relevance of paragraph 51 of the Decision is in relation to the issue of retrial and an indication the DJ was aware that there could be circumstances (which were for the Polish Courts to decide) which could prevent a retrial.

28. The further information makes clear that the proceedings had to be suspended because the Appellant was regarded as "in-hiding" (see para 6 above). There was no power to proceed in his absence until July 2015. The decision was rendered on 14 March 2017. The Appellant came to the UK in 2013. I am satisfied that at all material times (and by his own failure to inform the Polish authorities of his whereabouts) he would not have received the summons for the trial. The specification of these matters in the EAW or in further information would not, therefore, have made any material difference.

Retrial rights

29. In relation to retrial rights Ms Howarth submits that the statement in Box D of the EAW (and the further information) (see para 5 above) does not satisfy the requirements of sections 20(5) and 20(8) of EA 2003 which contain the more exacting requirements that the right of an accused to a retrial or review must guarantee first, the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required; and second, the right to examine or have examined

witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

30. I agree with Mr Hoskins that the consideration by the DJ in s.20(5) was unnecessary since he had correctly concluded that the Appellant had voluntarily absented himself from his trial.

31. Mr Hoskins fairly acknowledged that there was nothing in the EAW or before the DJ that appeared to guarantee the retrial rights Ms Howarth contends are lacking.

Ground 2: Article 8 ECHR, s.21 EA 2003

32. The Appellant submits had the DJ erred in carrying out the Article 8 ECHR balancing exercise in that he failed properly to consider several significant factors.

33. Most importantly Ms Howarth submits that the DJ's error in finding that the Appellant was a fugitive impacts on the balancing exercise he carried out. For the reasons I have given, I do not consider that the DJ was wrong in finding that the Appellant was a fugitive. However, I agree with Ms Howarth that the overall length of delay is a relevant factor in the balancing exercise.

34. Ms Howarth submits the DJ erred because he failed to list the significant time that had passed since the alleged offending, some 12 years, and he failed to take into account the delay by the judicial authority in pursuing the Appellant who lived openly in the UK since 2013. This submission, in my view, does not pay adequate regard to the statements in the EAW and the further information that the Appellant was "in-hiding" and evaded justice. Moreover, the DJ did have regard to the date of the Appellant's arrival in the UK in 2013 and the extent to which he and his family have accrued Article 8 rights since then (see Decision, para 41). Specifically, the DJ referred as factors in favour of refusing extradition that the Appellant had been settled in the UK with his close family since August 2013; and he is in regular full-time employment, has fixed accommodation and provides financial support for his family.

35. Further, Ms Howarth submits the DJ failed to take into account the best interests of the Appellant's child, Wiktoria, who is 16 years old. It is, she submits, plainly in Wiktoria's best interests for extradition not to take place and for her to continue to receive emotional and financial support of both of her parents, particularly as she goes through an important period of examinations in her bid to read law at university. I am satisfied that the Decision makes clear (at paras 15-16 and 42(iv)) that the DJ did have proper regard to Wiktoria's interests.

36. Whilst the DJ noted that the Appellant had no convictions in the UK he is criticised for failing to have regard to the fact that he also had no convictions in Poland. This submission is, however, now undermined by the evidence, which I have admitted at this hearing, that the Appellant does have a conviction in Germany on 22 November 2011 for organised, aggravated theft in respect of which he was sentenced to two years and three months imprisonment.

37. Finally, the Appellant seeks to put in evidence a second witness statement from his partner dated 18 September 2019. The Respondent does not oppose the admission of this evidence. In it the Appellant's partner states that she is no longer working full-

time because of shoulder and neck pain which she has experienced for the last few months, as a result of which since August 2019 her employer has agreed that her working hours be reduced. As a consequence, she earns some £200 per month less than before. She says that she would not be able to maintain her family without the Appellant's salary. At paragraph 10 of her statement she concludes:

> "I have not been able to check if I would be entitled to any benefits in the event of [the Appellant's] extradition. As I said before, I would need to submit a form with my current income to find out. At the moment our joint income means we do not qualify for any support, except for child benefit."

38. Mr Hoskins asks if this has been the position since July/August, what has stopped her from making the necessary enquiries whether she would be entitled to any support. There is no information before the court as to whether or not she would be entitled to benefits. At the very least, as she appears to accept, she would be entitled to child benefit if the Appellant's income no longer forms part of the family income.

39. In any event, in my view if the second witness statement of the Appellant's partner had been before the DJ it would have made no difference to the outcome of the case.

40. At paragraphs 40 and 41 of the ruling the DJ sets out the factors in favour of granting extradition and the factors in favour of refusing extradition, and at paragraph 42 he sets out his reasons for finding that it would not be a disproportionate interference with the Article 8 rights of the Appellant for extradition to be ordered. In my view the DJ applied the correct legal principles and conducted an appropriate balancing exercise.

Conclusion

41. In my judgment neither ground of challenge is made out. Accordingly, this appeal is dismissed.