Neutral Citation Number: [2019] EWHC 3486 (Admin)

Case No: CO/1747/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2019

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

GRZEGORZ PILARCZYK

Appellant

- and -

(1) REGIONAL COURT IN POZNAN, POLAND

and

(2) REGIONAL COURT IN KIELCE, POLAND

Respondents

- -
- -

Danielle Barden (instructed by **BSB Solicitors**) for the **Appellant**
Catherine Brown (instructed by **CPS Extradition Unit**) for the **Respondents**

Hearing date: 21st November 2019

- -

Judgment Approved by the court for handing down

THE HONOURABLE MR JUSTICE LEWIS:

INTRODUCTION

1. This is an appeal against the order of District Judge McGarva sitting in the Westminster Magistrates' Court on 23 April 2019 that the appellant, Mr Grzegorz Pilarczyk, be extradited to Poland. There is one ground of appeal, namely that extradition is barred by reason of section 14 of the Extradition Act 2003 ("the 2003 Act") as it would be unjust or oppressive by reason of the passage of time since he is alleged to have committed the extradition offences of which he is accused.

FACTS

2. The appellant is a Polish national who came to the United Kingdom in July 2007. The judicial authorities in Poland have issued three European Arrest Warrants ("EAW"s) seeking the return of the appellant to Poland to stand trial for various offences.

The EAWs

3. One EAW, KOP 4/12, was issued by the Regional Court of Kalisz in Poland on 27 February 2012. It was certified by the National Crime Agency ("NCA") on 14 January 2016. That sought the extradition of the appellant to face trial on six offences of fraud allegedly committed in the period 18 November 2005 to 18 September 2006. The judicial authorities provided further information explaining the reasons for the delay between charges being laid against the appellant and the issuing of the first EAW.

4. The second EAW, KOP 174/12, was issued by the Regional Court in Poznan, on 30 July 2012 and certified on 14 January 2016. It sought the return of the appellant to face trial on three offences. They involve alleged frauds committed on 13, 22 and 23 March 2006 whereby the appellant is said to have obtained goods from particular companies by false pretences as he did not intend to pay for the products. The total costs of the goods was said to be approximately 58,000 zlotys. The maximum sentence, if convicted, would be eight years' imprisonment.

5. The third EAW, KOP 186/12, was issued by the Regional Court in Kielce, Poland on 18 January 2013 and was certified by the NCA on 11 December 2018. That sought the extradition of the appellant to face one charge of fraud, allegedly committed on 12 April 2006, where it is alleged that the appellant obtained goods worth 32,203 zlotys by false pretences. The maximum sentence, if convicted, is eight years' imprisonment.

Westminster Magistrates' Court

6. The appellant was arrested in respect of the first EAW on the morning of 11 December 2018. He was arrested in respect of the second and third EAWs on the evening of 11 December 2018. He was brought before the Magistrates' Court on 12 December 2018.

7. The appellant was discharged in respect of the matters contained in the first EAW warrant as he had not been brought before the court as soon as practicable after his

arrest as required by section 4 of the 2003 Act. The proceedings continued in respect of the second and third EAWs.

8. A hearing was held at which the appellant represented himself and did not have lawyers acting for him. He gave evidence. The judgment of the district judge was given on 23 April 2019. The judge recorded the evidence given by the appellant as follows:

> "7. Mr Pilarczyk gave evidence. He told me he has been living in the United Kingdom since 17th July 2007. He has no criminal record in the UK. He says he has been honest, has been working and has tried to do his best for the country. He has had to take only temporary jobs because his identification card has expired. Mr Pilarczyk has worked in warehouses, packing chicken and fruit. Currently he is decorating or renovating some flats. He has a brother who lives in the United Kingdom who he is close to. He also has his sister in law. He is particularly close to his niece who is aged 10 years and who he helps bring up. Mr Pilarczyk feels safe and happy in the UK; he says he cannot expect that in Poland. If he is extradited to Poland he says he will be treated unlawfully. He says he is not guilty of the offences he has been accused of. He does not want to be extradited to Poland he wants the EAW to be discharged."

9. The district judge also recorded answers given in cross-examination about the circumstances in which the appellant came to the UK and, in particular, whether he knew of and had signed the summons for the offences that were the subject of the first EAW (which had been discharged in December 2018). The district judge also records that the appellant was asked why he considered that a trial in Poland would be illegal. He is recorded as saying that the Polish legal system was unfair as they give very high sentences for minor offences. He said he was concerned about the judiciary in Poland and he had concerns that he would be discriminated against because of his family name. The district judge records that the appellant was pressed as to whether there was anything specific which would lead to him not being given a fair trial but the appellant was unable to point to anything specific.

10. The district judge found as a fact that the appellant was aware of the proceedings comprising the first EAW when he left Poland in July 2007. The district judge therefore found that he was a fugitive, that is someone who left Poland in order to avoid justice.

11. The district judge then dealt with the question of whether extraditing the appellant would be unjust or oppressive by reason of the passage of time. The district judge observed that it would only be in exceptional circumstances that a fugitive would be able to rely on the passage of time since the commission of the offences. He concluded that:

> "23. In this case the Requested person was aware of the proceedings, the timing of his departure is striking and the summons was actually served and signed for using his second name. Although the offences were committed around 13 years ago they are relatively serious, carrying up to 8 years in prison each and a total loss of about £16000 to the victims. In these circumstances I cannot conclude it would be unjust or oppressive to extradite the requested person to Poland to stand trial."

12. The district judge then considered other issues and concluded that extradition would be compatible with the Appellant's rights under Articles 6 and 3 of the European

Convention on Human Rights ("ECHR"). As extradition would not be unjust or oppressive and would be compatible with the ECHR the district judge ordered that the appellant be extradited to Poland.

THE RELEVANT LEGAL FRAMEWORK

13. Poland is a category 1 territory within the meaning of the 2003 Act. Section 14 of the 2003 Act provides that:

> "14 Passage of time
>
> A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–
>
> (a) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)."

14. Section 26 of the 2003 Act provides for a right of appeal with permission to the High Court. The powers of the High Court of Appeal are set out in section 27 which provides:

> "27 Court's powers on appeal under section 26
>
> (1) On an appeal under section 26 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—

(a) order the person's discharge;

(b) quash the order for his extradition"

THE APPEAL

15. Permission to appeal was granted on one ground, namely whether the appellant's extradition would be unjust or oppressive by reason of the passage of time since the commission of the alleged offences.

16. The district judge had found that the appellant was a fugitive. He considered that it would only be in exceptional circumstances that a person could rely on injustice or oppression arising from the passage of time when the appellant was a fugitive.

17. It is agreed between the parties that the district judge erred in approaching the question of whether the appellant should be extradited for the offences in the second and third EAWs on the basis that he was a fugitive. The evidence before the district judge showed only that the appellant had avoided trial in respect of the offences contained in the first EAW. That warrant had, however, been discharged on 12 December 2018. Similarly, the further information related to the passage of time between the commission of the alleged offences in the first EAW and the issuing of that EAW. There was no evidence to demonstrate that he was a fugitive seeking to avoid justice in respect of the matters in the second and third EAWs. In considering whether to order extradition in respect of the second and third EAWs, the judge ought, therefore, to have decided the question of whether the appellant was a fugitive differently.

18. The first issue then is whether the district judge would have been required to order the appellant's discharge if he had approached the question of section 14 of the 2003 Act on the basis that the appellant was not a fugitive: see section 27(2)(3) of the Act.

19. Secondly, the appellant seeks to rely on new evidence which he submits was not available before the district judge and which he says would have led the district judge to reach a different conclusion on the question of whether extradition would be unjust or oppressive: see section 27(4) of the 2003 Act.

20. The first piece of new evidence is a letter from an official in the Citizens' Affairs Department of the Kalisz Town Hall dated 7 November 2019. That letter confirms that the appellant was on the register of business activities run by the Mayor of Kalisz. The business commenced on 1 February 2012. The business was struck off the register on 1 June 2006 following notification of a judgment of the District Court of Kalisz that the appellant had been sentenced on 5 April 2006 to a ban on service and trade activity for 3 years.

21. The rest of the new evidence consists of a proof of evidence of the appellant himself and statements from his brother, his sister-in-law, and his son. In fact, that evidence largely reflects matters already referred to by the appellant when he gave evidence himself to the district judge and recorded by him, as is set out at paragraph 8 above. In essence, he explains that he came to the United Kingdom after he lost the right to trade in Poland. He came to find work and start a new life. He has worked throughout his time in the United Kingdom in a variety of jobs. He came with his brother and sister-in-law. They live very close to each other (200 metres away). The appellant spends a good deal of time with his brother and sister-in-law and their two children. He is particularly close to his ten-year old niece. When his brother-in-law is away with work, he helps out if needed with the family. The appellant's son says that he came to the United Kingdom and lived with his father for a year and was supported financially by him. He then lived independently and now lives with his girlfriend. He sees his father every weekend.

22. The appellant also gives further evidence in his proof of evidence said to be relevant to whether he could have committed the offences in the EAWs. The appellant says that he was a self-employed director of a company that traded in animal food. He says that the documents authorising him to trade (which he says is also known as entry on to the business register) were seized by the police in 2005-2006. He says that he subsequently lost the right to trade. He says that this means that he would not have been able to carry out the alleged frauds as no company in Poland would enter a trade agreement with a person without seeing a copy of the relevant trade paperwork with the trading number. He also says he believes that he was in custody in connection with the events leading to the removal of his permission to trade at the time that the alleged frauds were said to be carried out.

SUBMISSIONS

23. Ms Barden for the appellant submitted that it would be unjust or oppressive to extradite the appellant to Poland. In terms of injustice, she submitted that the appellant may have been in custody at the time of the alleged offences and his paperwork authorising him to trade, and his business records for 2005-2006, had already been seized by the time of the alleged offences. She submitted that, given the passage of time, there is a risk that the records confirming the dates when he was remanded in custody and when his paperwork and business records was seized may have been lost. That, it was submitted, may hinder the appellant's ability defend himself at trial in Poland. Ms Barden submits that the district judge would have reached a different decision, and discharged the appellant, if he had not wrongly considered that he was a fugitive or if the new evidence had been available and the risk of injustice because of the passage of time had been appreciated.

24. In relation to oppression, Ms Barden submitted that the appellant moved to the United Kingdom in 2007. He has built a life here over 12 years, and has worked throughout that time. A number of his family members live in the United Kingdom (namely his brother, sister-in-law, niece and nephew, and his son). They live close by. He sees his brother's family every day and regularly looks after his niece and nephew and has a particularly close bond with his niece. He is in regular contact with his son. There will be an effect on him and his family members if he is extradited. The appellant left Poland unaware that the offences were outstanding. The offences are not the most serious type of offences. They do not allege offences of violence or a sexual

nature. Further, there has been delay in issuing the warrants. The second EAW was not issued until 6 years after the offences to which it relates and the third EAW was not issued for almost 7 years. The NCA also did not certify the second EAW for 3 and ½ years and the third EAW for almost 6 years. The offences were committed 13 years ago. The delay has been substantial. It is unexplained. Ms Barden invited me to infer that the delay was culpable (relying on the decision in *Oreszczynski v Krakow District Court* [2014] EWHC 4346) and, if so, to treat that as an additional relevant factor in considering the question of oppression. In all the circumstances, Ms Barden submits that if the district judge had not wrongly regarded the appellant as a fugitive, or if he had had the new evidence before him, he would have decided that it would be oppressive to extradite the appellant to Poland given the passage of time and he would have discharged the appellant.

25. Ms Brown for the respondents submits that, in considering the question of injustice, regard must be had to the safeguards available in the requesting state to ensure a fair trial. Where, as here, the state is a signatory to the European Convention on Human Rights, and so is obliged to ensure a fair trial in accordance with Article 6, there is no risk of the appellant being subjected to an unfair trial. The Polish courts will deal with the question of whether records are available and, if not, whether that would render any trial unfair. Furthermore, there is at present no evidence as to whether records of the seizure of business documents and business records or the dates when the appellant was in custody would be unavailable. It would not therefore be unjust to extradite the appellant.

26. Ms Brown submitted that the fact that the appellant has established a life in the United Kingdom and the effect on him and his family who live here would not render extradition oppressive. There had been a substantial passage of time between the commission of the offences and the issuing of the EAWs and their certification by the NCA. However, she submitted that the court should not draw any inference that there had been culpable delay; rather the position was simply that the court did not have any information on the reasons time had elapsed before the EAWs were issued or before they were certified by the NCA. She accepted that the offences here were not the most serious of criminal offences but they are not trivial or insignificant offences.

DISCUSSION

27. Section 14 of the 2003 Act bars extradition if it would be unjust or oppressive to extradite the person by reason of the passage of time since he is alleged to have committed the offences. The offences here were alleged to have been committed in March and April 2006, that is over 13 years ago.

28. As Lord Diplock observed in *Kakis v Government of the Republic of Cyprus* [2978] 1 W.L.R. 779 at pages 7782H-783A

> "Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."

Injustice

29. For convenience, it is sensible to deal with the questions of injustice and oppression separately although, in some cases, those concepts may overlap. Dealing with the question of injustice, the essential point made on behalf of the appellant is that, by reason of the passage of time, records that show that he had ceased to be authorised to trade, and his business records for 2005-2006, and the dates he was remanded in custody may no longer be available. He may, therefore, not be able to defend himself adequately at a trial in Poland.

30. First, the question for this court is whether it would be unjust to extradite the appellant to Poland not whether it would be unjust to try him: see *Woodcock v Government of New Zealand* [2004] 1 W.L.R. 1979, paragraph 20, *Knowles v Government of the United States of America* [2007] 1 W.L.R. 47.

31. Secondly, this court must have regard to the safeguards which exist under the domestic law of the requesting state to protect an accused person from an unfair or unjust trial. See *Woodcock* at paragraph 21 and *Knowles* at paragraph 37.

32. Thirdly, states such as Poland which are members of the Council of Europe and are signatories of the European Convention on Human Rights can "readily be assumed to be capable of protecting an accused against an unjust trial – whether by an abuse of process jurisdiction like ours or in some other way": see *Gomes v Government of Trinidad* [2009] 1 W.L.R. 1038 at paragraph 35.

33. In the present case, the Polish courts can be relied upon to ensure that the appellant has a fair trial. They will be able to assess whether or not relevant documentation is available and, if not, whether a trial without those documents would be unjust and, if so, take the appropriate action. Even if the district judge had correctly decided that the appellant was not a fugitive in relation to the second and third EAWs, he would still have concluded that the passage of time did not make it unjust to extradite the appellant to Poland.

Oppression

34. Dealing with oppression, I recognise that the appellant has established a life in the United Kingdom over the last 12 years. I recognise the importance of his ties with his family who live here and the practical support he gives his family. I recognise that the period of time since the alleged commission of the offences is considerable and the reason why it has taken such a long time to issue and act upon the EAWs is unexplained.

35. I would not, on the facts, of this case infer that the time taken by the Polish authorities in issuing the EAWs was the result of culpable delay on their part. Nor would I infer that the time taken by the NCA to certify and deal with the EAWs was the result of culpable failures on their part. As Laws L.J. observed in *La Torre v The Republic of Italy* [2007] EWHC 1370 (Admin):

> "…. the words of the Act do not justify a conclusion that any delay not explained by the requesting State must necessarily be taken to show fault on the State's part such as to entitle the putative extradite to discharged….. All the circumstances must be considered in order to judge whether the unjust/oppressive test is met. Culpable delay on the part of the State may

> certainly colour that judgment and may sometimes be decisive, not least in what is otherwise a marginal case …"

36. Similarly, as Blake J. observed in *Oreszcynski* at paragraph 8:

> "8. I recognise that there is a difference between the passage of time and culpable delay by a public authority. Culpable delay can only arise when something ought to have been done quicker than it was and there is no good explanation for why it was not. It will not be easy to draw the inference of culpable delay from the mere passage of time for a number of reasons, many of which were identified in Jabcysnki :
>
> > i. where the appellant is a fugitive from a requesting state there is no purpose of issuing an EAW in a particular language unless there is some reason to believe that the fugitive is in the relevant country;
> >
> > ii. there are resource issues for any public authority dealing with a large number of applications and the court will be in no position to know what priority should be given to the particular case;
> >
> > iii. there is no duty on the requesting state or its agents to spend potentially fruitless time and effort in making inquiries as to the whereabouts of the fugitive if there is no good information available likely to inform. "

37. In that case, Blake J. adjourned the case during the hearing to allow the NCA to file a supplementary witness statement dealing with specific questions concerning the action taken by the NCA. As a result of the evidence provided, he concluded that there had been culpable delay by the NCA on the facts of that case.

38. In the present case, there is no basis upon which it would be fair or just to draw any inferences as to the reasons for the passage of time before the Polish authorities issued the EAWs. The court simply does not know why that was the case. By way of example, there is no evidence to indicate that the Polish authorities knew (or did not know) that the appellant was in the United Kingdom during that period. It would not be right to draw any inferences as to culpability on the part of the Polish authorities. The period of time taken by the NCA to certify the EAWs is also considerable. It amounts to 3 and ½ years in relation to the second EAW and almost 6 years in relation to the second. Again, there is no evidence as to the reasons why it took that time for the NCA to deal with the EAWs. In all the circumstances, there is no basis upon which I could properly infer that the passage of time was the result of culpable delay.

39. In all the circumstances of this case, it would not be oppressive to extradite the appellant to Poland. As the House of Lords observed in *Gomes* at paragraph 31:

> "… the test of oppression will not easily be satisfied; hardship, a comparatively commonplace consequence of an order for extradition, is not enough".

40. Here the appellant has established a life in the United Kingdom over the last 12 years. He has family members here. He has close ties with and visits his brother's family every day and, on occasions, provides practical assistance to his sister-in-law and looks after his niece and nephew. He is close to his son who lives here. That state of

affairs has continued over many years as the period of time (13 years) that has passed since the offences were allegedly committed is considerable. The offences are relatively serious, as the district judge noted, as they involve allegations of multiple frauds and can be punished by a custodial sentence. But they are not the most serious of offences. There will be a degree of hardship for the appellant and his family in the United Kingdom if he is extradited. But I do not consider that his extradition would be oppressive. In all the circumstances, I do not consider that the district judge would have reached a different conclusion if he had approached the question of oppressiveness on the correct basis, that is that the appellant was not a fugitive from justice. The condition for allowing the appeal in section 27(3) of the 2003 is not satisfied.

41. For completeness, I note that even if there had been culpable delay in the present case, that would not, ultimately have caused me to reach a different conclusion. The facts, although giving rise to hardship, fall far short of establishing that it would be oppressive to extradite the appellant. Even culpable delay on the part of either or both of the Polish or British authorities in progressing the EAWs would not have tipped the balance and would not have led to a different conclusion.

THE NEW EVIDENCE

42. I have read all the new evidence and heard full submissions on it at the hearing of the appeal. I have taken it fully into account when considering the appeal. In the event, the new evidence would not have led to the conclusion that the district judge would have decided the question of whether the appellant should be extradited and, in particular, whether extradition is barred because it would be unjust or oppressive to extradite him by reason of the passage of time differently for the reasons given above. For that reason, the condition for allowing an appeal in section 27(4) of the 2003 Act is not satisfied.

43. In those circumstances, it is not necessary to decide if all or part of the new evidence was not reasonably available at the time of the extradition hearing. For completeness, I accept that the appellant could not realistically have obtained the evidence from the Kalisz Town Hall in advance of the extradition hearing before district judge. In terms of the other evidence from himself and his family members, I doubt whether that could properly be described as evidence that could not have been available before the district judge (see *The Szombathely City Court and others v Fenyvesi*. [2009] EWHC 231 (Admin). The appellant has said that he did not have legal representation at that hearing, that he was not familiar with extradition proceedings and did not know what he had to do. He had time to prepare for the extradition hearing. That hearing was to determine whether he should be extradited and he should have realised that he needed to call any of his family if he wanted to rely on their evidence and to give any evidence himself on particular issues to show why he should not be extradited. In the event, it is not strictly necessary to decide that issue and, as I have indicated, I did consider and took into account all the new evidence.

CONCLUSION

45 Even though the district judge should not have held that the appellant was a fugitive from justice in respect of the second and third EAWs, he would not have reached a different conclusion on the applicability of section 14 of the 2003 Act. He would not

have reached a different conclusion on that question even if he had had the new evidence before him. The district judge would still have concluded that extradition of the appellant to Poland would not be unjust or oppressive. This appeal is dismissed.

ORDER

UPON hearing from Ms Danielle Barden, Counsel for the Appellant; and Ms Catherine Brown, Counsel for the Respondent

IT IS ORDERED that:

1. The appeal is dismissed.
2. There be no order for costs, save for a detailed assessment of the Appellant's publicly funded costs.

BY THE COURT