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Case No: CO/2622/2019

Neutral Citation Number: [2020] EWHC 1634 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 23rd June 2020

**Before** :

**THE HONOURABLE MR JUSTICE LEWIS**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**TOMASZ OSTRZYCKI** — **Appellant**

**- and -**

**Respondent**

**REGIONAL COURT OF SUWALKI, POLAND**

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- - - - - - - - - - - - - - - - - - - - -

**Martin Henley** (instructed by **AM International Solicitors**) for the **Appellant**
**Tom Doble** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 4 June 2020

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# APPROVED JUDGMENT

**The Honourable Mr Justice Lewis:**

INTRODUCTION

1. This is an appeal against a decision of 1 July 2019 of District Judge Goldspring sitting in the Westminster Magistrates' Court. By that decision, the district judge ordered that the appellant, Tomasz Ostrzycki, be extradited to Poland pursuant to a European Arrest Warrant ("EAW") seeking his return to serve a sentence of 18 months' imprisonment for an offence of assault.

2. In brief, the district judge found that the appellant had been convicted in his absence and was not entitled to a retrial. The district judge held that the appellant had deliberately absented himself from the trial. Extradition was not, therefore barred by section 20 of the Extradition Act 2003 ("the 2003 Act"). Further, the district judge held that extradition would be compatible with the appellant's right to respect for his private and family life as guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Extradition was not barred by section 21 of the 2003 Act.

3. The appellant appeals against the order for extradition on the grounds that the district judge erred in respect of both of those conclusions. He further seeks permission to adduce fresh evidence in the form of a second witness statement from his partner, Magdalena Krusnic, witness statements from his solicitor, Ms Matelska, and his medical records.

THE FACTS

4. The Appellant is a Polish national. An EAW was issued on 20 February 2018 by the relevant Polish judicial authorities, namely the Regional Court of Suwalki. That EAW was certified by the National Crime Agency on 29 March 2018.

5. The EAW sought the extradition of the appellant to serve a sentence of 1 year and 6 months' custody imposed by the District Court of Elk on 15 February 2017. The appellant was convicted in his absence of an assault causing severe impairment to the health of another. The details given in the EAW are that, on 16 October 2014, the Appellant, acting jointly with another, took part in beating up the victim. The victim had been invited to a bar in Elk on the pretext of having a drink. The appellant punched the victim to the face and chest. He prevented the victim leaving the premises and his co-accused then punched the victim to the head, neck and torso. The

victim sustained injuries to his left eye and suffered a permanent disability in that he lost the sight in his left eye.

6. The circumstances by which the conviction came about are set out in the judgment of the district judge. On 28 January 2015, the district prosecutor in Elk presented charges against the appellant in relation to the assault. The appellant attended hearings before the District Court in Elk on two occasions, on 27 April 2105 and 22 June 2015, but he did not appear on the next three dates. On 16 November 2015, the appellant was acquitted by the District Court.

7. The District Prosecutor in Elk appealed against the acquittal and the appellant "personally collected the copy of the appeal" (which I take to be the notice of appeal). The appellant did not appear at the appeal hearing.

8. The decision of the district court was reversed by the Regional Court in Suwalki and the case was referred to the District Court in Elk for reconsideration. The appellant did not collect a copy of the decision of the Regional Court.

9. There was a re-trial in the District Court at Elk. The appellant did not attend that trial. On 17 February 2017 the District Court in Elk convicted the appellant. By that date, he was living in the United Kingdom.

10. The information about the appellant's non-attendance at the trial is contained in box D of the EAW. That is not in the standard form normally used. It says the following:

> "no the person did not appear in court in II.K352/16 case that ended in issuing the judgment (undelivered notification about the date and of the hearing was filed with court records with the effect of being delivered under Article 139 para. 1 of the Criminal Procedure Code)".

11. On the EAW the box stating "The person was notified of the appointed date and time of the court hearing which ended in the court decision" is ticked. The explanation given is that:

> "**Article 139 para. 1 of the Criminal Procedure Code** Whoever changes their address of residence without providing a new address, or does not reside under the address previously provided also because of serving a prison sentence in another case, the writ was sent to the address previously provided and is deemed to have been delivered."

12. The EAW also records that:

> "Before issuing the judgement the District Court of Elk undertook several actions to establish Tomas Piotr Ostrzycki's whereabouts including conducting police interviews in the known place of residence of the above-mentioned man and enquiring family members."

13. The district judge noted that the appellant, in his evidence, accepted that once he had been informed of the existence of the appeal to the Regional Court, he was under a duty to notify the authorities of any change of address. The conclusions of the district judge on the issue of whether the appellant had deliberately absented himself from the trial appear in paragraphs 54 to 58 of his judgment where he said:

> "54. It is not in dispute that Mr Ostrzycki was convicted in his absence and that he does not have the right to a retrial or a review as defined in section 20(8). The issue for this Court is therefore whether it can be sure that Mr Ostrzycki deliberately absented himself from his trial.
>
> 55. I have found that I am satisfied so that that I am sure that the RP deliberately absented himself.
>
> 56 Further it is clear that the Polish authorities took the steps that would acquaint a non-evasive accused with the time and place of trial, by serving notifications of the proceedings at the address which they had for Mr Ostrzycki, and by informing his mother of the proceedings.
>
> 57. Mr Henley submits, forcibly, that the information provided at Box D of the EAW does not follow the precise language of the Framework Decision, and therefore undermines any finding of deliberate absenteeism.
>
> 58. I do not agree, the failure to follow verbatim the wording of Article 4A simply means that the EAW cannot be regarded as conclusively determining the issue (per *Cretu* at para 35), such that the Court should have regard to the further evidence provided by the requesting state, which when taken together satisfies me so that I am sure of his deliberate absence".

14. In relation to whether extradition would be compatible with the appellant and his family's rights under Article 8 of the Convention, the district judge summarised the relevant case law. He set out the factors for extradition. These included the public interest in honouring extradition arrangements. He also referred to the fact that the appellant had been convicted of a serious offence resulting in life-changing injuries to his victim and he had made a deliberate decision to come to the UK with his family whilst the Polish proceedings were continuing.

15. The district judge was satisfied that the appellant had an established private and family life with his partner and daughter and considered the compatibility of extradition with Article 8 of the Convention. He noted, as factors against extradition, that the appellant had been in the United Kingdom for five years and his partner and daughter had joined him in June 2014. The appellant's wife was HIV positive and relied on daily anti retro viral treatment. The district judge stated that the extradition of the appellant would have some harm to his family in terms of emotional and financial harm as well as practical harm in that his partner relied quite heavily on him.

16. The district judge analysed the factors at paragraphs 70 to 74 of his judgment where he said this:

> "70. The factors in favour of surrender are significant, the offence was serious, a relatively long sentence was imposed and he chose to deliberately absent himself from the proceedings and cannot now rely on any delay that would have caused or militation of the public interest thereafter.
>
> "71. His partner and daughter are Polish, have been in the UK approximately 3 years and have family in Poland with whom they previously lived. They will if necessary return to Poland.

> "72. His wife gave evidence that she is well and can and would cope on her own if necessary. It was not suggested that Ms Kruznis cannot obtain adequate medical care in Poland.
>
> "73. Although I am acutely aware of the limited harm that will be caused as described above I am also satisfied that neither individually nor collectively would any factor amount to compelling reasons to outweigh the public interest.
>
> "74. This request is a proportionate interference with his right to a family and private life and I therefore reject his challenge under article 8 ECHR."

17. The district judge therefore ordered that the appellant be extradited to Poland.

## THE APPEAL AND THE ISSUES

18. The appellant appeals on two grounds. They are that the district judge

    (1) erred in finding that the appellant had deliberately absented himself from the trial so that extradition was not barred by section 20 of the 2003 Act; and

    (2) erred in finding that extradition would be compatible with Article 8 of the Convention given that the appellant had built up a family life in the United Kingdom before 14 April 2017 when the domestic warrant seeking his arrest was issued.

19. The appellant also seeks permission to adduce further evidence. This comprises a second witness statement of his partner, Ms Kruznis who states that the appellant is suffering from pains in his back and his leg and gives details. It also comprises a statement form his solicitor, Ms Matelska, stating that she had been contacted by the appellant, who is in Her Majesty's Prison Wandsworth, and he has told her that he is in severe pain. The appellant also seeks to rely on his medical records whilst at HMP Wandsworth exhibited to a further witness statement of Ms Matelska.

## THE FIRST ISSUE – SECTION 20 OF THE 2003 ACT

20. Mr Henley submitted that the district judge erred in treating the fact that the appellant received the notice of appeal to the Regional Court at Suwalki as meaning that the appellant had notice of the subsequent trial before the District Court at Elk. He submitted that the fact that there had been an appeal would not necessarily mean that the appeal would be successful and lead to a retrial. There was no evidence to show what the contents of the appeal notice were. The appellant had to be sent notice of the time and date of the trial (that is, the retrial before the District Court at Elk) and there was no evidence that this had occurred. So far as there was a reference to the appellant's mother telling him about the trial, she had in fact had a stroke and had died. She was unable to give evidence before the district judge. Mr Henley emphasised that the appellant was unrepresented at that trial and no counsel was appointed by the court.

21. Mr Doble for the respondent submitted that an appellant may be taken to have deliberately absented himself from the trial for the purpose of section 20(3) of the 2003 Act, even where he did not know of the date and place of the trial, where that was due to his own evasion. Here the appellant had been served with the notice of the

trial at his last address and knew that he was under a duty to notify the authorities of any change of address.

*Discussion*

22. Section 20 of the 2003 Act provides:

> "20 Case where person has been convicted
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed undersection 21.
>
> (7) If the judge decides that question in the negative he must order the person's discharge.
>
> (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—
>
> > (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
> >
> > (b) 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."

23. The question of extradition in relation to trials where the accused was absent is also dealt with in article 4a of the European Council Framework Decision 2005/584/JHA as amended ("the Framework Decision"). That provides that:

> "Decisions rendered following a trial at which the person did not appear in person
>
> 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;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant."

24. The Divisional Court in *Cretu v Local Court of Suceava* [2016] 1 W.L.R. considered that section 20 of the 2003 Act had to be interpreted in the light of the Framework Decision. Burnett L.J., as he then was, with whom Irwin L.J. agreed, held in paragraph 34 of his judgment, that, so far as material to this case that:

"(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(1)(a)(i). That suggests an event with a "scheduled date and place" and is not referring to a general prosecution process, Mitting J was right to foreshadow this in *Bicioc*'s case.
(ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(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 of the Convention."

25. Earlier, at paragraph 31 of his judgment, Burnett L.J. had observed that a trial in absentia could be acceptable, and comply with Article 6 of the Convention, if the state had diligently but unsuccessfully given the accused notice of the hearing.

26. The Divisional Court in *Romania v Zagrean* [2016] EWHC 2786 (Admin) confirmed that the overall objective of Article 4a(1) of the Framework Decision was to ensure a fair trial by a person summonsed to appear before a criminal court by requiring that he be informed in such a way as to allow him to organise his defence effectively (paragraph 77 of the judgment of Cranston J., with whom Sharp L.J., as she then was, agreed). Even if the circumstances dealing with informing the appellant set out in article 4a of the Framework Decision are not satisfied, a court may still take into account other circumstances that enable it to be sure that the surrender would not result in a breach of the right to a fair trial. Moreover, the Divisional Court recognised that the conduct of the accused and, in particular, whether he sought to avoid service of the information sent by the court can be taken into account so that, as it was put by Cranston J. at paragraph 81 of his judgment:

> "a requested person will be taken to have deliberately absented himself from the trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial."

27. As a minimum, it will be sufficient if the state has taken the steps that would normally be sufficient under its law to inform a person of the time and place of trial and the accused has by his own conduct prevented the information being served on him (see the observations of Kerr J. at paragraphs 27 of his judgment in *Bialkowski v Poland* [2019] EWHC 1253 (Admin). That conduct includes breaching a duty to notify the relevant authorities of a change of address (see per Ouseley J. in *Dziel v Poland* [2019] EWHC 351 (Admin) at paragraph 28).

28. The district judge was entitled to find that those requirements were met in the present case. The Polish authorities did serve the relevant information on him at his last known place of address. The appellant was under a duty to inform the relevant authorities of any change of address (and admitted in evidence that he knew that). He did not inform the authorities that he was no longer at the previous address and was living in the United Kingdom. He therefore prevented the information being served on him by his own conduct. The district judge was correct, therefore, to conclude that extradition was not barred by section 20 the 2003 Act.

## THE SECOND ISSUE – THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER ARTICLE 8 OF THE CONVENTION

29. Mr Henley submitted that the decision of the district judge that extradition was a proportionate interference with the appellant's right to respect for private and family life under Article 8 of the Convention was wrong for a number of reasons. First, he submitted that the district judge failed to have regard to the fact that the appellant was not unlawfully at large until 14 April 2017 and had built up a family life in the United Kingdom before conviction. Secondly, the appellant had served 14 months of an 18 months' sentence of imprisonment and, relying on the decision in *Kasprzak v Warsaw*

*Regional Court* [2010] EWHC 2966 (Admin), the fact that he only had four months left to serve in custody was relevant to proportionality. Further, given that flights to Poland are suspended at present, it may be that the appellant could not be extradited before he served his sentence in full. Thirdly he submitted that the family circumstances, particularly having regard to the new medical evidence, demonstrated that the district judge was wrong to say that extradition would not be disproportionate. Fourthly, he submitted that the fact that the appellant had not had the opportunity to convince the court on his retrial that he was innocent (having been acquitted at the first trial) reduced the public interest in extradition.

30. Mr Doble submitted that the district judge was entitled to come to the conclusion he did for the reasons set out in his judgment. The district judge was aware that the appellant had established a private and family life in this country but made a deliberate decision to come to this country knowing that the Polish proceedings were continuing. The fact that the appellant had served 14 months of an 18 months sentence did not make extradition disproportionate. The appellant had been convicted of a serious offence and had a period of time to serve. The possibility that flights may, or may not, resume before the end of the sentence did not affect matters and could not make the district judge's decision wrong. The district judge was well aware of the position of the appellant, his partner and daughter, and the impact on them if he was extradited. The medical evidence fell far short of establishing that extradition would be disproportionate.

*Discussion*

31. Section 21 of the 2003 Act required the district judge to determine whether the person's extradition would be compatible with Convention rights. The relevant Convention right is Article 8 which provides:

> **"Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well--being of the country, for the prevention of disorder or crime, or for the protection of the rights of others."

32. The relevant principles are well-established and set out in cases such as *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, *Norris v USA* [2010] UKSC, and *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin). The district judge referred to these cases and summarised the relevant principles. So far as this court is concerned, the question is whether the decision of the district judge was wrong: see *Celinski* at paragraph 24.

33. In general terms, the district judge set out clearly the factors for and against extradition. He analysed the factors. He concluded that extradition would not be disproportionate for the reasons he gave which are set out above. There is nothing to indicate that the approach of the district judge was wrong or that his assessment was wrong.

34. So far as the specific criticisms made are concerned, the position is this. The appellant had been convicted of a serious offence and sentenced to a significant custodial sentence of 18 months. The fact that the appellant had served 14 months of that sentence, and that there were only four months remaining, does not undermine the public interest in extradition. In *Kasprazak,* McCombe J., as he then was, accepted that "in certain circumstances the fact that a very short period of time remains to be served may be a circumstance to be taken into account" (see paragraph 21). That, however, was emphasised to be one factor alone. McCombe J. emphasised that other factors had to be borne in mind. They included the fact that it was not for the courts of this country to second guess the sentences passed by other states and also the seriousness of the offence. In that case, the sentence imposed was 1 year and three months and the period already spent in custody was 11 months leaving four months left to serve in custody. McCombe J. held that the length of the sentence left to be served did not affect the balance of proportionality. In my judgment, the same applies in this case. The appellant was convicted of a serious offence and was sentenced to 18 months' imprisonment. The fact is that four months remains to be served. There is a high public interest in honouring extradition arrangements and that public interest is not diminished by reason of the length of time left to be served in custody.

35. This case can be contrasted with the decision of Lloyd Jones J., as he then was, in *Wysocki v Polish Judicial Authority* [2010] EWHC 3430 to which Mr Doble referred. There the sentence would have been served in full the day after the hearing of the appeal (or, at most depending on the calculation, four days' time). Lloyd Jones J. noted that as the appellant would have served all of his sentence (and probably spent more time in custody) the only purpose of extradition would be to allow the machinery of extradition to run its course and to permit the Polish authorities to discharge the appellant. Extradition was, therefore, sought for technical reasons. In those very specific circumstances, it was appropriate to take the length of the sentence (one, or at most four, days) to be served into account. That is a very different situation from the present.

36. The fact that the period for bringing about extradition may be lengthened because of the difficulties of arranging transport and flights given the current pandemic arising from coronavirus, also does not render extradition disproportionate. Extradition is to be effected within 10 days of the decision of this court becoming final, unless this court and the judicial authorities agree a later starting date for the 10 day extradition period. See section 36 of the 2003 Act. Whether flights are resumed, and whether it would be appropriate to agree a later starting date for the extradition period are matters that will need to be considered as time unfolds. They do not make the decision of the district judge to order extradition wrong.

37. Thirdly, the district judge carefully considered the impact of extradition on the appellant and his family members. He knew that the appellant had established a family life in the United Kingdom with his partner and daughter. He knew that the appellant was not convicted until April 2017. However, as he found, the appellant came to the United Kingdom and established a private and family life at a time when he knew that the Polish proceedings were continuing. That is a factor that he was able to take into account when assessing proportionately for the purposes of Article 8 of the Convention. He was entitled to reach the conclusion that extradition would not be disproportionate on the material before him.

38. In relation to the further medical evidence, section 27(4) of the 2003 Act provides that the court may allow an appeal where there is evidence which was not available before the district judge and that evidence "would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently". The correct approach to new evidence is set out in the Divisional Court judgment in *Szombathely City Court v Fennyvesi* [2009] EWHC 231 (Admin).

39. I proceed on the basis that the second witness statement of Ms Krusnic and the statements of Ms Matelska, and the medical records, were not available before the district judge. I proceed on the basis that, since the hearing and whilst in prison, the appellant has complained of severe pains to his back and legs. I have read and carefully considered all the material. There is no formal medical opinion from a doctor. There is no diagnosis, prognosis, treatment indicated or any real assessment of the impact of the condition on the appellant. On any analysis, there is no realistic or conceivable basis upon which a district judge, if this evidence had been before him, would have reached a different conclusion on the issue of the proportionality of extradition. The decision of the district judge would, inevitably, have been the same. He would still have found that extradition was a proportionate interference with the appellant's and his family members' Article 8 Convention rights. The material would not justify allowing the appeal and there is no purpose served in formally admitting the material although, as indicated, I have considered and assessed the new material.

40. Fourthly, I do not consider that the fact that the trial was conducted in absentia undermines the public interest in extradition. The reason why the appellant was absent was because he deliberately absented himself from the trial in the way described above. There is no basis for concluding that holding the trial in absentia in these circumstances would involve a breach of the right to a fair trial conferred by Article 6 of the Convention.

41. For all those reasons, the district judge was entitled to conclude that the extradition of the appellant to Poland was compatible with Article 8 of the Convention and, consequently, that extradition was not barred by section 21 of the Act.

## CONCLUSION

42. The district judge was entitled to find that extradition was not barred by section 20 of the 2003 Act because the appellant was not present at his trial. In the circumstances of this case, the appellant had deliberately absented himself from the trial. Further, the district judge was entitled to conclude that extradition would be compatible with Article 8 of the Convention. Neither the period of time still left to serve in custody, nor the new evidence, nor any other matter, casts doubt on the district judge's conclusion. For those reasons, this appeal is dismissed.

**IN THE HIGH COURT OF JUSTICE** CO/2622/2019
**QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)**

**TOMASZ OSTRZYCKI**

**-v-**

**REGIONAL COURT OF SUWALKI, POLAND**

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**ORDER**

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*Upon hearing counsel for the Appellant and Counsel for the Respondent*

*It is ORDERED that:*

1. The Respondent is granted permission to serve the Respondent's Notice out of time;

2. The Appeal is dismissed.

**BY ORDER OF THE COURT**

**DATED,** this 23 day of June 2020
#