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

No. CO/1604/2019

Royal Courts of Justice

Wednesday, 19 February 2020

Neutral Citation Number: [2020] EWHC 442 (Admin)

Before:

MR JUSTICE LANE

B E T W E E N :

BM — Applicant

- and -

REPUBLIC OF IRELAND — Respondent

ANONYMISATION APPLIES

MS F. IVESON appeared on behalf of the Claimant.

MR B. JOYES appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE LANE:

1 This is an appeal against the decision of the District Judge to order the appellant's extradition to Ireland pursuant to the Extradition Act 2003 ("2003 Act"). Permission to appeal was granted by the High Court on all of the grounds, to which I shall come in a moment. Two preliminary points, however, need to be mentioned first.

2 I have made an anonymity order in this case, given the nature of the family's circumstances; in particular, the health of the appellant's daughter. Secondly, Ms Iveson, who appears on behalf of the appellant, has applied to adduce further evidence that updates the position regarding the daughter and the appellant's baby who was born following the District Judge's decision. No objection has been taken by Mr Joyes, on behalf of the authority, to the admission of this material, and I have therefore allowed it into evidence. I do not, however, consider that it materially effects the issues which I must determine.

3 Those issues are circumscribed by ss.26 and 27 of the 2003 Act. In particular, for these purposes, I note s.27(3), which permits the High Court to allow an appeal only if certain conditions are met; namely, that the Judge ought to have decided the question before him at the extradition hearing differently and that, if he had decided the question in the way that he ought to have done, he would have been required to order the person's discharge.

4 Case law reveals that what this means in practice is that it is not for this court to take its own view of the Art.8 position in an appeal under s.21, by reference to Art.8. What this court must do is to consider, on the basis of what was in front of the District Judge, whether that Judge has made an error, such that his decision can be described as wrong. Whether the balance would have been struck differently by me or any other High Court Judge on appeal is not the point.

5 The facts of this case are essentially as follows. I take them, for this purpose, from the appellant's skeleton argument. The appellant is sought by the Republic of Ireland on a single

European Arrest Warrant ("EAW") issued in 2017. The EAW is a conviction warrant. It is based on an arrest warrant issued by a judge in 2015. The appellant pleaded guilty to no fewer than 77 offences before the Dublin Circuit Criminal Court in respect of benefit fraud. She was due to be sentenced on 13 January 2015, but failed to attend. No sentence was handed down on that occasion. Instead, a bench warrant was issued and later the EAW was issued.

6 The offences are serious ones. There were multiple claims in false identities. The relevant Irish statutes provide that, in respect of two of the matters dealt with under the 2005 Social Welfare Consolidation Act, the maximum penalty is three years' imprisonment and, in respect of the counts of theft contrary to the Criminal Justice Theft and Fraud Offences Act 2001, the maximum penalty would be 10 years. The financial benefit obtained by the appellant is considerable. It amounts to some €70,605.

7 The family background to the appellant and the context of her offending are both of great significance in this case. The appellant is 32 years old. She grew up in England, living here until 2006. Both of her brothers were born with merosin-negative congenital muscular dystrophy. This is a progressive muscle weakening disease for which there is no cure or, indeed, effective treatment. The appellant assisted her mother with the care of her brothers and was in fact the primary carer, owing to mental health difficulties experienced by her mother. She particularly cared for one of her brothers whilst her mother tried to look after the other one.

8 At the age of 18, the appellant married the father of her children. That relationship is described as being "on and off". Shortly after the marriage, the appellant's father committed suicide. It was at that time in 2006 that the appellant moved to Ireland with her mother and her siblings. The father, however, at this point struggled and this resulted in a temporary separation of the appellant and him. The appellant gave birth to her first child, M, in 2007. Her relationship with the father then resumed, and she also continued to help to care for her

own brothers. There were considerable difficulties encountered by the family in Ireland at the time, including financial difficulties. The appellant says that she committed the offences as a result of and, by reference to, those difficulties. She describes doing so "out of desperation". She nevertheless freely admitted to the offences when they were put to her by the Garda.

9 The appellant's second child, T, was born in August 2008. She is now 11 years old. She was diagnosed with merosin-negative congenital muscular dystrophy some six months after her birth. There is evidence from Amanda Breen, a social worker in Ireland, who describes her contact with the family and with T. She describes the appellant as "a fantastic mother". She also describes attempts to help the appellant and her family at or around the time when the offences were carried out.

10 In 2009, the appellant and the father of the children separated, as he was at that time drinking heavily and not regarded as mature enough to deal with what was happening to the family. In 2011, the appellant's brother died at the age of 11 from the disease. The appellant was arrested for the offences in 2011. Her first appearance in court was in January 2014. There were subsequent appearances in that year. The appellant pleaded guilty on 27 June 2014. Her case was then adjourned for sentencing in January 2015.

11 She did not, however, appear to be sentenced. Her family had in fact shortly beforehand come to the United Kingdom for a wedding of the appellant's sister. They had not intended to stay in the United Kingdom but, according to the appellant, they missed the court date because T became very unwell with a chest infection and had to go into hospital. It is one of the aspects of her condition that she is prone to problems of that kind.

12 The family were, at the beginning, living a caravan. However, T's school identified that this was not suitable accommodation. It seems partly as a result of the efforts made by the school, the family were able to rent property from a council in the United Kingdom. They

moved into this property in 2016. It has been specifically adapted to meet T's needs. This adaptation includes widening of doors to allow for T's wheelchair and a manual hoist to assist with daily care needs. T is regrettably incontinent. She has grown larger as time has gone on, such that she now needs a hoist in order to be moved for various purposes. Otherwise, she uses a wheelchair.

13 T's illness requires a great deal of intervention on the part of the appellant. It is the appellant who looks after T's private personal needs. Although T is assisted at school in many respects, she refuses to defecate there, which causes particular problems. It is basically to the appellant alone that T looks for assistance in that regard and more generally. The father is regarded by the expert reports as being generally either unable to cope or certainly much less able to cope than the appellant.

14 The school has been supportive of the family. The school has raised concerns that if T were to attend a different school, then that school may not be able to meet her needs as well as the school in question has done. This is largely because the parents, i.e. the appellant and her husband, are described as not being as challenging as they might be in order to obtain what T needs.

15 The Judge's decision set out a great deal of the evidence, largely in verbatim form. It included the matters to which I have made reference. The "decision" part of the Judge's document begins at para.47. The Judge there set out on the relevant approach to Art.8 in extradition cases. He did so by reference to case law, including *Norris v Government of the United States* [2010] UKSC 9 and *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25.

16 The Judge also referred to the case of *Polish Judicial Authority v Celinski* [2015] EWHC 1274. That noted, amongst other things, that each Member State was entitled to set its own sentencing regime and levels of sentence, provided these were in accordance with the

European Convention on Human Rights. It was not for a UK judge to second-guess that policy. The Judge also observed from *Celinski* the strong suggestion, if that is how it can be described, of the Lord Chief Justice that judges in extradition proceedings adopt what may be described as a "balance sheet approach" to the Art.8 proportionality exercise; and that is precisely what the Judge did.

17 At para.52, he set out the factors against extradition. He noted the appellant was the main current carer for both of her children. He noted that the daughter, T, has merosin-deficient [sic] congenital muscular dystrophy. He observed that that not only requires a high level of care, but also that the condition is life-limiting. That is right. There is evidence to this effect in the materials that were before the judge. Precisely what time remains to T is unclear. There is no medical evidence on that precise matter. Suffice it to say it is common ground that T's life expectancy must be far less than someone who does not suffer from this disease.

18 Continuing with the factors against extradition, the Judge noted the s.7 report that had been prepared which set out care options for the children, if extradition took place. This would involve the father providing care to what were then both the children, and support from the local authority; or, if the father was unable or unwilling to do any of this, then the local authority would be likely to institute care proceedings.

19 There would, accordingly, be a severe practical impact on the care of T and a severe emotional impact on both children. The Judge then noted that the appellant had explained why she committed the offences and that she was at the time in financial need, and that life was difficult for her in Ireland, not only because she was looking after her own children but also because both of her brothers suffered from that disease.

20 At para.53, the Judge turned to the factors in favour of extradition. The Judge noted the significant public interest in honouring the United Kingdom's extradition arrangements, such that this country is not to be regarded as a safe haven for fugitives. The Judge noted the

principle of mutual confidence and respect to be shown to decisions of the requesting State. He found that the appellant is:

> "… an admitted fugitive, who has already pleaded guilty to fraud and knew the date she was bailed to, for sentence, but came to the UK instead, and failed returned to Ireland, choosing to make her life in the UK."

21 The Judge noted the significant amount of money involved in the frauds committed by the appellant and that these involved the use of false identities. He observed at least one of the maximum sentences as being three years' imprisonment. He noted that the "local authority has set out the viable care options for the children in the UK, in the alternative, the family could return to Ireland, where support was provided by social services in the past."

22 The Judge then set out various further points. The primary one he regarded as being the serious nature of the admitted offending. He was confident that mitigating factors, including the family's circumstances, would be taken into account by the Dublin Criminal Court when imposing a sentence. The Judge, however, said nothing further about that matter. He also noted that the appellant had deliberately decided to stay in the United Kingdom, breaching her bail conditions. She had made no attempt to contact the Irish authorities or surrender voluntarily to them:

> "Any delay is entirely the fault of [the appellant]."

23 The Judge considered that the family life the appellant had continued to acquire in the United Kingdom was in the knowledge that one day it was highly likely she would have to return to face justice in Ireland. Her offer to repay the fraudulently obtained benefit over time the Judge regarded as "plainly an inadequate gesture".

24 At para.56, the Judge noted that children are of primary importance in this type of case: "I have set out in detail above the position [the appellant] and her children". The Judge considered there was no doubt that the appellant was a devoted and caring mother. There was no doubt she had provided a high standard of care to her daughter and that the house had been adapted to meet the daughter's needs.

25 A thorough assessment by the social worker, Mr Hazell, made clear that there would be an assessment to see if the father could manage both children's needs with specialist support. If that was not possible, the authority would have to consider public law proceedings. The Judge considered that there was an "alternative scenario", which was that:

> "… the family return to Ireland, and I have seen evidence that the Irish children's services provided extensive assistance before the family came to the UK."

26 At para.57, the Judge considered the emotional impact upon both children to be significant. It would be extremely difficult for them. The Judge only said that any separation was "likely to be temporary".

27 Balancing all these factors for and against extradition, the Judge came to the conclusion that the public interest in extradition outweighed the Art.8 rights of the appellant and her family. There was then a further addendum report regarding the consequences of extradition. The Judge had regard to that and, in a supplementary judgment, stated that he did not consider that the addendum report required a different striking of the balance.

28 The relevant case law on this matter includes the case of *HH*, to which I have already made reference. At para.15 of the judgments in that case, the Supreme Court, per Lady Hale, made it clear that, pursuant to the earlier judgment of the court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, the best interests of the child must be a primary consideration. That was touched on by the Judge at para.56 of his decision in this

case. One of the issues is whether the Judge, having noted that matter, actually went on to apply it.

29 At para.34 of the judgments, again per Lady Hale, we find this:

> "One thing is clear. It is not enough to dismiss these cases in a simple way – by accepting that the children's interests will always be harmed by separation from their sole or primary carer but also accepting that the public interest in extradition is almost always strong enough to outweigh it. There is no substitute for the careful examination envisaged by Lord Hope in *Norris*. How the court is to go about investigating the situation of the children is a question to which I shall return. In each of the cases before the court, the interests of the children have been fully investigated."

The appellant effectively contends that, in the present case, the Judge did not do what Lady Hale at para.34 enjoined him and other judges to do.

30 The final passage in *HH*, to which reference needs to be made, occurs in the judgment of Lord Judge, Lord Chief Justice. At para.132, he said this:

> "The extradition process involves the proper fulfilment of our international obligations rather than domestic sentencing principles. So far as the interests of dependent children are concerned, perhaps the crucial difference between extradition and imprisonment in our own sentencing structures is that extradition involves the removal of a parent or parents out of the jurisdiction and the service of any sentence abroad, whereas, to the extent that with prison overcrowding the prison authorities can manage it, the family links of the defendants are firmly in mind when decisions are made about the establishment where the

sentence should be served. Nevertheless for the reasons explained in *Norris* the fulfilment of our international obligations remains an imperative. *ZH (Tanzania)* did not diminish that imperative. When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the Article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence."

31 What Lord Chief Justice meant by the last part of para.132 can, in my view, be seen from the paragraph that follows where, considering the case of *FK v Polish Judicial Authority,* Lord Judge made reference to the dilatory nature of the prosecution and also that the extradition process:

> "… began without reference to the new life the appellant and her husband have made for themselves in this country, and in particular the birth to them of two further children, one of whom is very young, and the other who is only just past the toddler stage."

32 Lord Judge then said:

> "Given the interests of the two youngest children in the context of the current long established family arrangements in this country, and not least the uncertain health of their father, it can safely be said that an immediate custodial sentence would not be in contemplation. In agreement with Lady Hale I agree that the damage to the interests of the two youngest children would be wholly disproportionate to the public interest in the extradition of the appellant on the two European Arrest Warrants."

33 The challenge to the Judge's decision is brought on a number of fronts. The first relates to the way in which the Judge dealt with the matter of delay. As we have seen, he attributed that entirely to the fault of the appellant.

34 So far as the chronology is concerned, I have been taken to this in detail by counsel. I accept what Mr Joyes has to say in this regard about the delay. In all the circumstances, there were a number of delays but, standing back and looking at matters overall, I do not consider that the delays materially reduce the importance to be given to the principle of extradition. The weight, therefore, on the side of authority, remains great. However, importantly, in saying what the Judge did about delay, I do not consider that he has fulfilled the tasks that are required of him by the judgments in *HH* in particular, and more generally under the 2003 Act itself.

35 I note what Mr Joyes has said about the nature of my task. I reiterate that it is not for me to re-strike the balance; it is for me to do so only if I find that the Judge has erred. I do find that the Judge has erred in a number of respects. So far as delay is concerned, the Judge, despite what he says about the interests of the children being primary, has not, it seems to me, brought to bear any consideration of what the delay has meant to the children; in particular to T. Time has gone by since the appellant arrived in the United Kingdom. The appellant is at fault for not going back to Ireland, that much is plain. The public interest in requiring her to return remains very strong. It is not materially diminished by reason of any fault on the part of the Irish authorities. But what is important and what has been, in my view, effectively ignored, or at least impermissibly diminished in the Judge's decision, is the effect on T.

36 T has grown over the years into a spirited young lady, as described in the reports. However, she has faced increasing difficulties as a result of her illness. Her weight has increased to the point where she needs hoists in order to be moved. She is also aware now, not least by reference to the knowledge of what happened to her uncle, that her life will not get better and that her life expectancy is very likely to be short. She is entering puberty. That is a difficult time for any child, but particularly for a young lady with the difficulties that T has.

37 The evidence shows quite clearly that the appellant's husband is not able to deal with T's needs. This is partly because of the fact that, compared with the appellant, he lacks the energy, commitment and resilience to do what the appellant does. But it is also because the appellant is T's mother and it is quite plain that T will not countenance any help of an intimate nature being offered by her father.

38 All of that should, in my view, have been taken into account by the Judge in considering the effects of delay. Also relevant is the reduced life expectancy of T. Obviously, the longer she lives, the more one hopes that she may continue to enjoy, in some ways, a reasonable life.

But the experience of her uncle will always be before her, as will the medical evidence to which I have made reference.

39 The Judge noted that, at the time of the hearing, the appellant was pregnant. That baby has happily been delivered. The baby suffers from some relatively minor difficulties, as we see from the new evidence. All in all, I do not consider that the District Judge's treatment of the baby on its own represents any error.

40 The Judge observed that the entire family could go to Ireland. That is a stark proposition which, in my view, is insufficiently supported by reasoning. The evidence from Ms Breen, the social worker in Ireland, indicates, as do the other letters to which my attention was drawn by Mr Joyes, that the Irish social services were engaged with the appellant and her family, prior to her move to the United Kingdom. They were also engaged specifically with T.

41 The Judge was, in my view, right not to draw any comparison between the relative availability of services of a social nature in Ireland and the United Kingdom. But what the Judge has failed to do in my view is to appreciate that a move of the family to Ireland is bound to have, of its very nature, serious effects upon the family, especially given T's condition, which also includes epilepsy and frequent fits that are, it seems, in part aggravated by stress.

42 Any move to Ireland, even if there were to be in place at the point of reception the same sort of facilities as are available now to the family in the United Kingdom, would be fraught with difficulty. But the fact is that, with the best will in the world, no social services system could, at a stroke, replicate what is available to the appellant and her family at present.

43 The house in which the appellant and T live together with the other children and the husband has, as I have said, been adapted for T's needs. It seems from the more recent evidence that further adaptations will be carried out by the local authority soon. T is

relatively settled at school. The school clearly has made great efforts to accommodate T. She seems, by and large, happy there, although there are the difficulties regarding intimate bodily functions which I have mentioned. But any move to a new school, in what for T would be by and large a new country, is bound to have very significant problems.

44 Those matters lead on to the final error which I find the Judge committed. This was not to look at the likely sentence that the appellant would receive, if returned to Ireland. I have already set out what Lord Judge said at paras.132 and 133 of *HH*. It is common ground that the District Judge did not, except perhaps in one passage where he talks about the separation being temporary, give any indication as to whether he thought the appellant's sentence in Ireland would be custodial or not. Even the reference in that passage to temporary separation might suggest the Judge was considering immediate imprisonment as a likely possibility. But, just as in *HH*, when looking at the case of *FK*, it is frankly not remotely possible that the appellant would receive an immediate custodial sentence in Ireland, given the nature of the circumstances of her family that I have described. That is notwithstanding the fact that the offence is of course a serious one.

45 This is, therefore, a case where it was not only appropriate but, in my view, necessary to take a realistic view o the likely nature of the sentence awaiting the appellant in Ireland and then to stand back and ask, if that were to be the situation, would extradition of the appellant to Ireland be proportionate? Put in those terms, there can only be one answer, which is that it would not. I have already described the problems facing the appellant and her family if all were to return to that country. The more likely scenario, if the appellant were to return, would be that the remainder of the family, perhaps including the baby, would remain in the United Kingdom.

46 The Judge had regard to the evidence as to what that might entail. The Judge accepted that it could result in the children having to go into care, if the husband was unable to cope, which it seems would be highly likely. It is, however, one thing to assume that a child can go into

care for a short period if that child is fit and well, but quite another, if one is looking at the situation of a young lady such as T. It does not seem to me to be necessary to reiterate, by reference to the evidence, the difficulties that T would face if that were to have to happen. Would all that be proportionate? I find firmly it would not. The Judge could not properly hold otherwise.

47 It therefore falls to me to retake the Art.8 proportionality balancing exercise myself. In doing so, I bear in mind all of the factors tending in favour of deportation that Mr Joyes, in his helpful skeleton argument, has set out in para.45.

48 I accept the seriousness of the offence, the period of time over which was committed, the sophisticated nature of the use of false identities, and the fact that the appellant is a fugitive. I also accept, for the reasons I have given, that the delay in this case on the part of both the Irish authorities and indeed the authorities the United Kingdom does not materially diminish the importance of the principle of extradition.

49 But, where I part company with the submissions in para.45, is in relation to the weight tending in favour of the Art.8 rights of the appellant and her family; in particular, of course, T. We are enjoined by the higher courts in cases of this kind never to use a test of exceptionality as determinator of how to strike an Art.8 balance. It is nevertheless the case that, as the authorities point out, it will be rare, in a case where the balance by reason of delay or other factors in favour of extradition is not materially weakened, to find that the factors on the other side outweigh those factors. This is, however, without doubt a case that falls into that unusual or, if I dare say, exceptional category.

50 The decision of the District Judge is accordingly quashed, and I order the appellant's discharge.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

** This transcript has been approved by the Judge (subject to Judge's approval) **