IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 498 (Admin)

No. CO/604/2021

Royal Courts of Justice

Thursday, 10 February 2022

Before:

MR JUSTICE LANE

B E T W E E N :

KULIGA — Appellant

- and -

POLISH JUDICIAL AUTHORITIES — Respondent

MR G. HEPBURN SCOTT (instructed by Bark & Co) appeared on behalf of the Appellant.

MS J. FARRANT (instructed by CPS Extradition) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE LANE:

1 This is an appeal against the judgment of 17 February 2021 of District Judge Bristow to order the appellant's extradition to Poland. Permission to appeal was granted by Holman J on 8 July 2021

2 The background to the matter is essentially as follows. The EAW arises from two convictions for four separate offences.

3 The first offence was the appellant's physical and mental abuse of his mother from 2012 to 2014. That involved verbal abuse, threats to kill and to cause injury to her, as well as physical assault by punching her in the face, destroying her property, forcing her to give him money, and, finally, an assault on 15 January 2014 which caused a sub-conjunctival haemorrhage of her right eye.

4 The second offence was threatening to assault and kill the appellant's mother on 26 and 27 December 2013 in order to rob her of a sum of money.

5 The third offence was failure to pay child maintenance between 11 May 2010 and 9 May 2011, and then on subsequent occasions up to and including May 2014.

6 The fourth offence was driving with excess alcohol. The appellant committed that on 19 August 2016. He received a separate sentence of six months' imprisonment in respect of it. It is of common ground that the appellant's time spent in custody in the United Kingdom in connection with extradition means that it would be disproportionate to extradite him now in respect of that fourth offence, if that were considered alone. He has spent a period in custody here that exceeds six months.

7 I return to offences 1 to 3. The appellant has one year, one month and 24 days to serve in relation to the two year sentence. The EAW provides that this is a cumulative judgment which aggregates sentences imposed in individual judgments of the District Court. The original convictions dated from 23 June 2014, concerning the offence of violence towards his mother, and 17 November 2014, the last point of the appellant’s failure to pay child maintenance.

8 The Crown Prosecution Service asked the Polish authorities to explain what the effect would be on the cumulative sentence of two years imprisonment if extradition was not ordered in respect of the offence of failing to pay child maintenance. That was, of course, a relevant question because failure to pay child maintenance is not a criminal offence known to the law of England and Wales.

9 The Polish authorities replied as follows:

> "If the extradition is not ordered in respect of the offence of failing to pay child maintenance, then according to the District Court the cumulative sentence of two years of deprivation of liberty imposed under the cumulative judgment of the District Court in Krosno, of 12 March 2014 (File Reference 2K93614) cannot be enforced."

10 The judgment of the district judge can be summarised as follows. He concluded that the appellant was a fugitive from justice. Mr Hepburn Scott makes no complaint about that

finding. The judge then went on to make findings about the appellant's personal circumstances, concluding that the appellant was a father to 14 year old twins who have lived in Scotland since 2014. The appellant plays an active role in their lives. The appellant has been in the United Kingdom since March 2013. He has been in a relationship since 2017. He and his partner are not married. His partner suffers from depression and anxiety, as does the appellant as a result of the extradition proceedings.

11 The district judge discharged the appellant in respect of his conviction for failure to pay child maintenance. Indeed, it was agreed between the parties before the judge that this was not an "extradition offence" for the purposes of section 10 of the Extradition Act 2003, for the reason just given.

12 The district judge then turned to the argument regarding specialty. The district judge was satisfied that there were speciality arrangements with Poland by virtue of Article 14 of the European Convention on Extradition, 1957: "Rule of Speciality". This provides:

> "A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited..."

13 The district judge referred to what he described as compelling evidence which would be required in order to demonstrate, against this background, that there were not in fact adequate specialty arrangements with Poland as regards the extradition of the appellant.

14 The district judge found that there was no such evidence. I set out the judge's finding at para.56 of his judgment:

> "There is no compelling evidence that Poland would breach its obligations under the 1957 European Convention on Extradition. Moreover the answer provided by the Judicial Authorities confirms in my judgment that it will comply with its obligations. The reply is that if the requested person is not extradited in respect of the child maintenance offence, then the two year deprivation of liberty sentence 'cannot be enforced'. The reply is that it cannot enforce the sentence. The reply is not that it will proceed and require the requested person to serve all that remains of the sentence, including any part of it imposed for the child maintenance offence."

15 So far as concerned the submission that extradition would be a disproportionate interference with the appellant's rights under Article 8 of the ECHR, the district judge conducted the appropriate balancing exercise. Having done so, the judge found that the balance fell "decisively" in favour of extradition. He then went on to consider the position in respect of conviction 2 alone - the offence of drunk driving - finding that the extradition to serve a sentence of six months' imprisonment for that offence would be proportionate in all the circumstances. The judge so concluded, by reference to the position as it was at the date of the hearing before him.

16 I turn to the challenge brought by the appellant to the district judge's finding regarding specialty. Section 17 of the 2003 Act provides for a bar to extradition in certain circumstances:

"17 (1) A person's extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory.

(2) There are speciality arrangements with a category 1 territory if, under the law of that territory or arrangements made between it and the United Kingdom, a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if -

(a) the offence is one falling within subsection (3), or

(b) the condition in subsection (4) is satisfied.

(3) The offence are -

(a) the offence in respect of which the person is extradited;

(b) an extradition offence disclosed by the same facts as that offence;

(c) an extradition offence in respect of which the appropriate judge gives his consent under section 55 to the person being dealt with;

(d) an offence which is not punishable with imprisonment or another form of detention;

(e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;

(f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

(4) The condition is that the person is given an opportunity to leave the category 1 territory and -

(a) he does not do so before the end of the permitted period, or

(b) if he does so before the end of the permitted period, he returns there.

(5) The permitted period is 45 days starting with the day on which the person arrives in the category 1 territory.

(6) Arrangements made with a category 1 territory which is a Commonwealth country or a British overseas territory may be made for a particular case or more generally.

> (7) A certificate issued by or under the authorities of the Secretary of State confirming the existence of arrangements with a category 1 territory which is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters."

17 Article 27 of the Council Framework Decision 2002 provides that subject to exceptions reflected by those in section 17 of the Act:

> "... a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered."

18 There is significant case law on Article 27 and section 17.

19 In *Ruiz v Central Court of Criminal Proceedings No.5 of the National Court, Madrid* [2008] 1 WLR 2798, the Divisional Court rejected the appellant's submissions regarding section 17 in the following terms:

> "66. I cannot accept these submissions for the reasons given by Mr Perry. First, I would endorse the approach adopted by Scott Baker LJ in *Hilali* at para.52,
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> > It seems to us a surprising submission that Spain is likely to act in breach of the international obligations to which it has signed up. There is no evidence before us that it has done so in the past and in these circumstances we would need compelling evidence that it is likely to do so in the future. By Article 34 of the Framework Decision Member States were requested to take the necessary measures to comply with its provisions by 31 December 2003. It is not suggested that Spain has failed to meet this implementation provision. It seems to us therefore that it is to be inferred that the specialty arrangements referred to in s.17(2) of the 2003 Act are in place."
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> 67. It is to be presumed that the Spanish authorities will act in good faith in the absence of compelling evidence to the contrary. They are trusted extradition partners and parties to the Framework Decision. They have incorporated the specialty rule into their domestic law, so that the appellants have a remedy under their domestic law in the unlikely event of a breach of specialty.
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> 68. Secondly, there is no compelling evidence that the Spanish authorities will act in breach of their specialty rule and article 27 of the Framework Decision."

20 Although *Riaz* concerned the position in Spain, it is clearly relevant to other countries in Europe, including Poland.

21 In *Brodziak v Circuit Court in Warsaw, Poland* [2013] EWHC 3394 Admin, the issue to be determined was analogous to that in the instant case. The question was whether extradition

could take place in circumstances where the appellants had been sentenced to an aggregate sentence in respect of two or more offences, including one or more extradition offences, but also one or more non-extradition offences. It was submitted that if extradition were ordered, the appellants would be required to serve sentences imposed in part for non-extradition offences. That would, they said, infringe the rule on specialty. The court in *Brodziak* observed that the burden is on the requested person to show on the balance of probabilities that appropriate specialty arrangements are not in place in Poland. It noted that the United Kingdom has specialty arrangements with Poland by virtue of Article 27(2) of the Framework Decision. The court found that "compelling evidence" was required to displace what it described as "the strong presumption that the Polish authorities will act in accordance with their international obligations in respect of speciality". Expert evidence in favour of the appellants was before the court in *Brodziak*, but the court concluded that this evidence was not sufficiently compelling.

22 Ms Farrant submits that in *Brodziak*, as in the present case, the evidence obtained from the judicial authorities did not explain in detail how the aggregate sentence would be affected, following discharge for the non-extraditable offences. That is unsurprising, given the strength of the presumption. Indeed, in *Brodziak*, the Divisional Court found that the actual process was to be regarded as "a matter of internal procedure for the Polish courts", rather than one that called for analysis by the courts of England and Wales.

23 With those observations, I turn to the challenge advanced by the appellant. Mr Hepburn Scott focuses on the reply from the judicial authorities and the statement that the cumulative sentence of two years “cannot be enforced”, on the assumptions that child maintenance offence was not regarded by the English court as extraditable.

24 Mr Hepburn Scott puts forward two submissions, the second of which was deployed only at the hearing before me, although it is rooted in the ground upon which permission to appeal was granted by Holman J. I shall begin with the initial submission.

25 The original submission is that the phrase “cannot be enforced” means that the sentences for offences 1 to 3 have become inextricably merged. They cannot now be disaggregated. No indication was provided by the Polish authorities as to what the composite parts of those sentences were. Therefore, Mr Hepburn Scott submits, given that the district judge discharged the appellant in respect of offence 3, the statement that the sentence for offences 1 and 2 cannot be enforced means that this is because the sentences cannot be disaggregated. This constitutes, Mr Hepburn Scott says, the requisite compelling evidence that the speciality arrangement simply cannot be honoured in this particular case. He accepts that compelling evidence is necessary in this regard.

26 In *Kucera v District Court of Karvina, Czech Republic* [2009] 1 WLR 806, the court had before it a statement from a judge of the Czech court that some form or re-sentencing exercise would take place following extradition. On that basis, the court held that speciality was not a bar. However, Mr Hepburn Scot emphasises that was because the court was informed that a re-sentencing exercise disaggregating the relevant sentences would take place. Mr Hepburn Scott says precisely the opposite is the position here.

27 Indeed, Mr Hepburn Scott submits that not only is there no information as to how, if at all, the relevant sentences could be disaggregated; there is no information as to quantum for the individual sentencing. Most importantly, there is direct information from the authorities to the effect that the sentences cannot be disaggregated. This, Mr Hepburn Scott says, is a very different situation from the one considered in *Brodziak.* It is more akin to the situation in

Cokaj v secretary of State for the Home Department, Government of Albania [2007] EWHC 238 (Admin).

28 Mr Hepburn Scott therefore says the district judge was wrong to conclude as he did about the information emanating from Poland. The information did not mean that Poland would comply with its speciality obligations. On the contrary, the message was to the opposite effect. This is because the only reasonable meaning given to the reply from the Polish authorities is that the sentences cannot now be disaggregated.

29 Thus, the appellant would be required to serve a sentence, part of which relates to offence 3, in respect of which he had been discharged by the district judge.

30 Before me, Mr Hepburn Scott also advances an alternative interpretation of the response from the Polish authorities. He submits that the nature of the dispute can be re-framed, so that the underlying issue is as follows. The judicial authorities have said that the merged sentence "cannot be enforced"; but the authorities did not say, for example, that the portion of the sentence corresponding to offence 3 cannot be enforced. The CPS, on behalf of the requesting authorities, did not make any further enquiries to clarify exactly what the authorities meant. At present, therefore, this court has before it a clear statement to the effect that the merged sentence cannot be enforced.

31 On the evidence available the Polish court will not require the appellant to serve a sentence relating to anything for which he has not been extradited. The Polish court therefore can be interpreted as saying that it will achieve its obligations in respect of specialty by not enforcing anything relating to the other two offences. That must, Mr Hepburn Scott says, be compatible with Poland honouring its obligations under Article 27.

32 Accordingly, the appellant's case is that even if the respondent is correct in assuming that Article 27 will be complied with, the information from the Polish authorities does not establish that this will be achieved by disaggregation, as opposed to the Polish court not enforcing the whole of the sentence. That means there is now only the six months sentence in respect of the drink driving offence to serve; but, as we know, the appellant has already spent longer than six months in detention in the United Kingdom. Therefore, he should be discharged.

33 I deal first with the original stance taken by the appellant in respect of district judge's judgment. In my view, the district judge was correct to reject the submission that extradition was barred by reason of specialty. The United Kingdom has specialty arrangements with Poland by virtue of Article 27. There is, accordingly, the strong presumption that the Polish court will abide by those obligations.

34 That presumption can be displaced by compelling evidence to the contrary. There is, in my view, no such evidence in this case. Indeed, I agree with Ms Farrant that the statement from the Polish authorities serves only to confirm that proper arrangements are in place to ensure that the appellant does not serve a sentence in respect of any offence for which he was not extradited. That seems to me to be the obvious meaning of the phrase "cannot be enforced".

35 The case law makes it plain that there is no obligation on the respondent to provide evidence as to precisely how the two year sentence would be disaggregated. I do not consider that this is a case where it can be said that the response gives rise to any significant ambiguity. I approach the interpretation issue in the same way as the district judge did.

36 What, then, of the more recent articulation of the challenge to the district judge's judgment, based on a reading of the response that indicates Poland would not enforce any part of the punishment for offences 1 and 2? The first and obvious response is to ask why the Polish authorities would nevertheless be seeking, as they plainly are, the appellant's return to Poland in respect of those offences, if they were not intending to imprison the appellant for any of them.

37 Mr Hepburn Scott says one must be careful of inferring too much thought on the part of the Polish authorities on this issue. It is possible that, given the pressure of work, insufficient thought has been given by them to the matter. With respect, I do not accept that submission. It seems to me that, barring evidence to the contrary, one must assume the Polish authorities would behave at all material times in a rational and coherent manner.

38 In my view, the correct reading of the response is that the Polish authorities are saying that if the appellant is discharged in respect of offence 3, then the two year sentence could not be enforced. They are saying no more, but certainly no less, than that. I do not consider that the response contains such a degree of ambiguity as to displace the normal presumption; nor do I consider that the response is such that it could be reasonably be inferred no action would be taken in respect of imprisonment for offences 1 and 2.

39 As Ms Farrant says, the response is in substance telling the authorities in England and Wales that the Polish authorities will not enforce the sentence in respect of which the appellant has been discharged. The implication therefore remains, strongly, that Poland will impose some other form of custodial sentence in respect of offences 1 and 2. It will, in other words, disaggregate them from offence 3.

40 Accordingly, despite Mr Hepburn Scott's energetic submissions, I do not consider that there is any error in the district judge's judgment concerning speciality. This means that the Article 8 ground falls away. Mr Hepburn Scott points out that that ground was permitted to proceed on a limited basis by Holman J, in so far as if the specialty ground succeeded, then for the reasons I have given, extradition in respect of the fourth offence of drunk driving would, in all the circumstances as they now are, be disproportionate.

41 For these reasons this appeal is dismissed.