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

No.CO/862/2022

[2022] EWHC 645 (Admin)

Royal Courts of Justice

Thursday, 3 March 2022

Before:

MR JUSTICE KERR

B E T W E E N :

KATARZYNA SZYJEWSKA — Appellant

- and -

POLISH JUDICIAL AUTHORITY — Respondent

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MR MARTIN HENLEY (instructed by Montague Solicitors) appeared for the Appellant.

MS AMANDA BOSTOCK (instructed by Crown Prosecution Service) for the Respondent.

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**J U D G M E N T**

MR JUSTICE KERR:

Introduction

1 The appellant, Ms Szyjewska, appeals with leave of Thornton J against the decision of Senior District Judge Goldspring ("the SDJ") given on 3 March 2021 to extradite her to Poland to serve a sentence of imprisonment totalling seven and a half years, less about 18 months spent remanded in custody in this country since 9 September 2019.

2 The respondent judicial authority seeks the return of Ms Szyjewska ("the requested person" or "RP") on the basis of three conviction warrants. The matter has a long history. The RP was convicted of 14 offences in all, committed from 2005 to 2011. The offences mainly involved dishonesty: fraud, theft, forgery and, in one case, extortion and threats of violence.

3 The first of the three warrants was issued by Poland following discharge of the RP in 2017 on an earlier accusation warrant (issued in 2013) covering some of the offences in the first of the three conviction warrants. District Judge Blake ordered the RP's extradition on the accusation warrant on 14 August 2014. The RP then appealed and later withdrew her appeal.

4 The RP's appeal was then dismissed and an extension of time for her removal was granted until 14 October 2014. However, she was not removed by that deadline or at all. At the hearing before the SDJ, it was not clear (as he said in his judgment) why she was not removed. The RP was formally discharged on 22 February 2017 under section 42 of the Extradition Act 2003 ("the 2003 Act").

5 Permission was initially refused on the papers by Murray J. After some delay, the grounds were amended in October 2021 and Thornton J granted limited permission to advance three grounds in her order made on 17 November 20221. The three remaining grounds are: in absentia trial; abuse of process; and article 8 of the European Convention on Human Rights ("ECHR").

Facts

6 The RP was born in 1975. She is married with adult children. Her husband is also in this country. The offences of which she has been convicted in Poland suggest she has had a career that includes involvement in business and finance.

7 The first of the three warrants with which this appeal is concerned ("EAW 1") is a conviction warrant, issued on 16 January 2017 and certified by the National Crime Agency ("NCA") on 23 February 2017. The EAW 1 seeks the RP's return to serve a total sentence of four and a half years' imprisonment arising out of consecutive sentences imposed for four separate groups of convictions for a total of 11 offences:

8 The first group of convictions arises from proceedings numbered III K 864/06. A custodial sentence of two years was imposed for:

> (1) attempted fraud; a fraudulent employment certificate submitted in order to secure a 15,000 PLN bank loan on 28 April 2006;
>
> (2) fraudulently obtaining a bank loan with a false employment certificate to the value 3,703 PLN on 26 April 2006;
>
> (3) attempted fraud: a fraudulent employment certificate was submitted in order to secure a 8,000 PLN bank loan on 13 March 2006; and

(4) fraudulently obtaining a mobile phone contract with a false employment certificate, valued at 3,169 PLN on 5 October 2005.

9 The second set of proceedings covered by EAW 1 bore the case reference number III K 898/07. A custodial sentence of one year was imposed for:

(5) fraudulently obtaining a bank loan to finance the purchase of a car with a loss 84,457 PLN in June 2005.

10 The next part of EAW 1 arose from the proceedings with the case reference number II K 1057/11. In those proceedings, a custodial sentence of one year was imposed on the RP for:

(6) theft of a company car: failing to return the car after a lease contract (signed on 3 December 2009) had been terminated. The value was 33,500 PLN. The period of the offending was 1 July 2010 to 12 April 2011;

(7) theft of a company car: failing to return a car after a lease contract (signed on 22 December 2009) had been terminated; with a value of 100,000 PLN; from 12 July 2010 to 18 March 2011.

11 Also in EAW 1, in the proceedings with the case number II K 535/11, a custodial sentence of six months was passed for the following offences:

(8) theft of pension funds from the company of which the RP was vice president, to the value 15,607 PLN. The monies were paid by employees under a compulsory pension scheme and she failed to pay the contributions to the National Insurance Agency in the period from October 2009 up to May 2010;

(9) failure to pay national insurance contributions for three employees when under a duty to do so as company vice president, and failing to notify the National Insurance Agency of a period of sick leave for one employee in the period from October 2009 up to May 2010;

(10) theft of pension funds from the company where the RP was vice president to the value of 11,975 PLN. The monies were paid by employees under a compulsory scheme and she failed to pay the contributions to the National Insurance Agency. That was during the period April to August 2010; and

(11) failing to pay national insurance contributions for seven employees when under a duty to do so as company vice president from April 2010 to August 2010.

12 The next of the three warrants relevant in this appeal I will call "EAW 2". It is a conviction warrant issued by the Regional Court of Piotrkow Trybunalski on 2 July 2018 and certified by the NCA on 9 September 2019.

13 In the proceedings covered by EAW 2, a sentence of one year's imprisonment was imposed in respect of two offences, with the sentences to be served consecutively to those covered by EAW 1. The offences are as follows:

(12) on 1 October 2009, issuing a false employment certificate in her capacity as proprietor of the Polish Financial Group Sp. z.o.o for one Jolanta Kumor, and then instructing Ms Kumor to obtain loan agreements of 14,440 PLN and 1,800 PLN. Once those funds were obtained, the RP took the funds for herself with no intention to repay them; and

(13) on 1 October 2009, issuing a false employment certificate in her capacity as proprietor of the Polish Financial Group Sp. z.o.o. for Ms Jolanta Kumor, and then instructing Ms

> Kumor to obtain a loan agreement of 21,052 PLN. Once those funds were obtained, the RP took them for herself with no intention to repay.

14 The third and final warrant in this appeal I will call "EAW 3". It is a conviction warrant issued by the District Court in Bielsko-Biala on 23 October 2018 and certified by the NCA on 9 September 2019 (also the date of the RP's arrest). It sought the RP's return to serve a sentence of two years' imprisonment, again to be served consecutively to the other sentences I have mentioned.

15 That two year prison sentence under EAW 3 arises by way of activation of a suspended sentence. That sentence was imposed in respect of a single offence as follows:

> (14) on 10 November 2005, giving instructions over the telephone to perpetrators recommending the use of violence and unlawful threats towards the victim in order to force him to repay a debt owed to the RP.

16 The second warrant, EAW 2, recited that the RP had been summoned to appear at the court for a hearing on 17 April 2017. Notices to collect the summons had twice been left at her address in Poland and she was deemed served. She was, however, in the UK and in email contact with the court. She was aware of the hearing date but did not attend.

17 Further information was later sought in relation to the hearing in April 2017. That information was sought in October 2019. Among the questions asked were whether the RP was considered to be deliberately absent from a hearing on 17 April 2017. If not, the further question was asked whether she was entitled to a retrial on appeal or review amounting to a retrial, in the terms of what in this country is section 20 of the 2003 Act.

18 The answers given in response to that request for further information explained that the proceedings had been opened on 10 March 2017. The RP was absent but had been sent an "advice notice" of that hearing. She had a court appointed defence counsel. The court adjourned the hearing until 17 April 2017. However, the RP did not want the court appointed lawyer to represent her. On 31 March 2017 the RP submitted a written request for her defence counsel to be changed.

19 It is then said that on 7 April 2017 (which may be an error for 17 April 2017; no point is taken in that regard) she requested an adjournment as she had, she said, no appropriate defence counsel. On 7 April 2017 the court appointed a different defence counsel for her, in her absence. It was evident from the correspondence, according to the further information given, that she was aware of the court date and not obliged to attend in person. The court was well aware that the RP was out of the country.

20 In answer to the question about retrial rights, the judicial authority stated that:

> "[t]here is a possibility for the case to be re-examined under Article 521. The Attorney General and also the Commissioner for Citizen Rights may bring a cassation appeal from the valid and final judgment passed on this case for the benefit of the accused person, and once it is granted by the Supreme Court, the case may be re-examined".

21 In the decision below, the SDJ stated at paragraph 186:

> "... it is conceded that the [judicial authority] cannot establish that she was 'deliberately absent' from the trial that took place on 7th April 2017".

22 At paragraph 187, however, he added that "there is a right to appeal amounting to a retrial" since article 521 of the relevant code:

> "... permits a cassation appeal against the valid and final judgment and, once granted by the Supreme Court, the case may be re-tried".

23 After the RP had appealed against her extradition and permission had initially been refused on the papers, the permission application was orally renewed and came before Dove J on 14 October 2021, without the judicial authority being present or represented. In his order, Dove J noted that the RP was seeking to raise a new issue not raised in the grounds of appeal. He directed that an application to amend the grounds be made and served on the judicial authority, to which the latter could then respond; and he adjourned the permission application for that purpose.

24 Among the grounds pursued in Mr Henley's amended grounds of appeal was a complaint of abuse of process in relation to EAW 1 because, it was contended, the judicial authority had failed to secure the removal of the RP in 2014 after she had withdrawn her appeal against extradition at that time. It was said to be "not clear why" she had not then been removed, but it was argued in the amended grounds that the judicial authority "failed to extradite her … when they had the opportunity".

25 Mr Henley asserted that the EAW 1 amounted to an abuse of the *Henderson v. Henderson* kind, relying on the Divisional Court's decision in *Jasvins v. Latvia* [2020] EWHC 602 (Admin). The EAW 1 was said to be a "collateral attack" on the earlier decision to extradite which had not been acted upon. For good measure, Mr Henley also relied more broadly on what is called *Tollman* abuse of process; but that broader attack is no longer maintained.

26 The judicial authority, through Ms Bostock, exercised its right to respond in a written response dated 27 October 2021. In it, she explained that with regard to the new allegation being raised on appeal for the first time, an enquiry had been made about why the RP's previous extradition had not been effective. The response continued:

> "The NCA have confirmed by email dated 27 October 2021 (served alongside this skeleton) that the Applicant failed to surrender to her flight on 30th October 2014 and a UK domestic warrant was therefore issued for her arrest (also provided) on 4th November 2014.
>
> As the further information explains, a change in law meant that proceedings could occur without the Applicant attending and thus further hearings took place in the EAW1 cases after the first set of extradition proceedings. The outcomes of the same necessitated and were reflected in the updated re-issued EAW1.
>
> The fact that the Applicant avoided extradition previously through breaching her bail (rather than some speculative error having been to blame for her not being removed within the standard timeframe) makes plain that a re-issue to update on the processes which occurred in the interim period, could not possibly amount to an abuse of process."

27 The permission application was then considered by Thornton J on 17 November 2021. Again, the judicial authority was not present or represented. She granted limited permission. One condition was that the RP would not seek to rely on fresh evidence "on the *Henderson v. Henderson* abuse of process ground" unless the judicial authority did so first, in which case the RP could serve evidence in rebuttal.

28 When the matter came before Thornton J, the state of the evidence in relation to the failure to extradite in 2014 was, therefore, that the judicial authority's explanation was before the judge and was known to the RP. The email correspondence was available to the RP and the warrant for her arrest dated 4 November 2014, following her failure to surrender in October 2014, was produced. No further evidence has since been adduced by either party on that issue.

The first issue: section 20 of the Extradition Act 2003

29 The first issue relates to EAW 2, which carries a prison sentence of one year for two offences of issuing false employment certificates, committed in 2009. Mr Henley submits that the SDJ was clearly justified in accepting that the RP had not deliberately absented herself from her trial. The judicial authority, through counsel (not Ms Bostock) had conceded as much, as the SDJ recorded at paragraph 186 of his judgment.

30 Mr Henley then points out that, having accepted the concession, the SDJ was obliged by section 20(3) and (5) of the 2003 Act to consider "whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial" (section 20(5)). The rights thereby conferred would have to measure up to the standards set by section 20(8), which I will not set out as they are well-known.

31 The SDJ then erred, Mr Henley submits. Implicitly, at paragraph 187, he wrongly allowed that the supposed retrial right under article 521 of the relevant Code met the exacting standards of section 20(5) and (8) when, in fact, it is clear from the formulation of the article 521 right that it is more limited and at best is a right to lobby the Attorney or (more likely) the Commissioner for Citizen Rights to attempt to secure re-examination of the case with permission from the Supreme Court.

32 Mr Henley disputed the suggestion that expert evidence of Polish law was needed to make good that proposition; he said it was plain from the words used in the further information. He contrasted the facts in *Nastase v. Italy* [2012] EWHC 3671 (Admin) and *BP v. Romania* [2015] EWHC 3417 (Admin) where, subject only to normal procedural and case management processes, the accused had a right to have the case reopened and the court had no discretion to deny that right.

33 Mr Henley pointed to the judgment of Burnett LJ (as he then was) in *Cretu v. Romania* [2016] 1 WLR 3344, at [34], where he said that the issue of entitlement to a retrial or review should be determined by reference to article 4a(1)(d) of the Framework Decision 2002/584/JHA. That required the accused to be informed of the right to a retrial or appeal and the time limit. The accused must have:

> "the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined [sic], and which may lead to the original decision being reversed."

34 Ms Bostock, for the judicial authority, began by reminding me that I can only overturn the SDJ's decision in accordance with section 27 of the 2003 Act. That means I must conclude that the judge "ought to have decided a question before him … differently" (section 27(3)(a)) and further that if he had decided that question as he ought, "he would have been required to order the person's discharge" (section 27(3)(b)).

35 Ms Bostock submitted that it was unclear why counsel then instructed had made the concession. It was obvious from the further information that the RP was aware of the court date on 17 April 2017 and not obliged to attend in person. She was aware that the hearing could proceed in her absence. The RP had been in "email contact" with the court, as EAW 2 made clear.

36 She contended that, even though the issue had been conceded, I should find that the SDJ ought not to have accepted the concession since deliberate absence was clearly established by the EAW 2 and the further information. Therefore, though he decided that issue wrongly, the error in the RP's favour does not mean she should be discharged.

37 Ms Bostock went on to submit that, in any case, the SDJ's conclusion that article 521 conferred a right of appeal amounting to a retrial was unimpeachable and correct. Expert evidence would be required to displace that conclusion and none was called. The authorities clearly establish that the court must trust an assurance from a requesting state that its procedures are compliant with article 6 of the ECHR and the Framework Decision.

38 Turning to my reasoning and conclusions on this issue, I agree with Ms Bostock that the concession made below is difficult to understand. There was very clear evidence before the SDJ that the RP was voluntarily absent from court on 17 April 2017 and aware that if she did not attend, the hearing could proceed in her absence. If the concession had not been made, I would have little difficulty in deciding that the judge "ought to have decided … [that] question … differently" (section 27(3)(a)).

39 That issue would not be determinative of EAW 2, however, unless the further conclusion that article 521 conferred a right of appeal amounting to a retrial was wrong. The difficulty is that in my judgment, it was wrong. I do not accept Ms Bostock's submission that expert evidence on interpretation of article 521 needed to be called. The judicial authority might well have opposed such evidence on the basis that the words used mean what they say.

40 In my judgment, the court should take the words used at face value. The account of article 521 must, as Ms Bostock rightly says, be trusted and accepted, but it is not an assertion by Poland that its procedures comply with article 6. It is a statement of the circumstances in which a case may be re-examined in a cassation appeal. The words used state that the two persons who may "bring a cassation appeal" are the two public officials mentioned. The class of persons entitled to bring such an appeal plainly does not include the accused herself.

41 The appeal is brought not by the accused person but "for the benefit of the accused person", in the words used in the further information. That is not a mere procedural or case management condition, such as was considered in *BP v. Romania* and *Nastase v. Italy.* In those cases, there was no discretion in the court to refuse to entertain an appeal.

42 Here, by contrast, there is not just a discretion in the Supreme Court to grant or refuse a request to reopen the case, there is a discretion in the two public officials whether to make such a request to the Supreme Court in the first place. It seems to me unsustainable to say in those circumstances that the accused was "entitled" to a retrial or review on appeal within section 20(5), irrespective of whether the minimum requirements of such a retrial or review under section 20(8) are met.

43 I have therefore had to reflect carefully on whether the SDJ "ought" to have decided the issue of deliberate absence from trial differently. In my judgment, he ought to have done so. In the light of the concession, I do not say that in any spirit of criticism. It is wholly understandable that a busy judge in a complex case should accept a concession made

without having to test it. Judges have quite enough to do without checking every point made by lawyers and need not normally go behind a concession made.

44 In my judgment, the reason why the SDJ "ought" to have decided the issue differently is that the concession ought not to have been made and, if it had not been, the judge would have decided the issue differently and would have found that deliberate absence from trial on 17 April 2017 was made out on the basis of the facts provided in EAW 2 and the further information.

45 I therefore think it is clear that the SDJ reached the right result, albeit for the wrong reasons. Accordingly, I decline to overturn his decision because if the judge had decided the article 521 issue correctly, he would not "have been required to order the person's discharge" (see section 27(3)(b) of the 2003 Act).

The second issue: abuse of process

46 The RP, through Mr Henley, argues that the judicial authority's issue of EAW 1 was an abuse of the process of the court. EAW 1 carries a total sentence of 4 years 6 months' imprisonment for the 11 offences of fraud, theft and non-payment of national insurance contributions from 2005 to 2011.

47 In accordance with the permission to appeal granted by Thornton J, the abuse of process relied on is of the *Henderson v. Henderson* variety, i.e. re-litigation of that which ought to have been litigated in the earlier proceedings. The broader allegation of "*Tollman*" abuse of process, originally advanced in respect of all three warrants, is no longer pursued.

48 Mr Henley's simple contention is that the judicial authority failed to extradite the RP when it had the opportunity to do so in 2014. Realistically, though, he accepted in oral argument that if the reason she could not be extradited then was that she had failed to surrender to her bail and had absconded, then the issue of EAW 1 would not be an abuse of process.

49 His contention was that it had not been shown to the criminal standard that the RP had deliberately absconded in 2014 to avoid being removed to Poland in October that year. He did not press any opposition to the court receiving the evidence from the judicial authority stating that a warrant had been issued on 4 November 2014 following the RP's non-appearance to board her flight to Poland.

50 His response to that evidence was that issue of the warrant does not prove deliberate absconding. No charge was ever brought for breach of bail conditions or failure to surrender. The issue of the warrant proved no more than that there were reasonable grounds for believing that she had failed to surrender.

51 The explanation now relied on should have been adduced before the SDJ, Mr Henley argued; and the evidence supporting that explanation is too weak to justify the issue of EAW 1, which covered much of the same ground as the earlier accusation warrant dating from 2013.

52 Ms Bostock counters that the judicial authority could not be expected to explain the failure to extradite the RP in 2014 until that became a relevant issue in the proceedings, which was not until about the time the matter came before Dove J, in October 2021. Thereafter, the explanation given is that the RP absconded. It is supported by an email from the National Crime Agency so stating, and by the issue of the warrant for the RP's arrest by Westminster Magistrates' Court on 4 November 2014.

53 The judicial authority submits that an updated EAW was needed after the 2013 EAW had failed to result in extradition. By the time EAW 1 was issued, it was possible for it to cover cases that had been tried in the RP's absence. It made sense for EAW 1 to cover, as convictions, offences previously included as accusation matters in the old 2013 EAW.

54 There was nothing abusive about that and it was not re-litigation or a collateral attack on the decision of District Judge Blake to extradite the RP. On the contrary, the issue of EAW 1 helped to support implementation of District Judge Blake's decision and to prevent the RP evading its impact by disappearing and remaining on the run for nearly five years until her arrest in September 2019.

55 In my judgment, the judicial authority's submissions are correct and those of the RP are, with respect, unrealistic. It is obvious that the raising of the abuse argument in respect of EAW 1 at a late stage before Dove J would prompt an explanation of the full circumstances in which EAW 1 came to be issued. There was no need to provide that explanation to the SDJ in this case below because the issue of abuse had yet to be raised.

56 Once the issue was raised and the explanation was provided, it became equally obvious that if the RP was going to deny that she actually had absconded, she would need to put in evidence to that effect. If necessary, an application to vary Thornton J's order to permit that might need to be made. None was made. Instead, the RP chose to meet the judicial authority's explanation with silence. The obvious inference from that silence is that she is unable to dispute the judicial authority's explanation.

57 In my judgment, therefore, the issue of EAW 1 was not in any way an abuse of the court's process. On the contrary, it was intended to produce a vindication of the court's process and the decision of District Judge Blake that the RP should return to Poland. I am quite satisfied, to the criminal standard, from the evidence I have just recited and the absence of any rebutting evidence from the RP that the judicial authority's explanation is the correct one.

58 The RP then sought to thwart the decision by failing to surrender when she was required to board an aeroplane bound for Poland and disappeared from view for nearly five years until she was caught by chance when a vigilant police officer spotted certain suspicious circumstances at a property in London SW5 where the RP and her husband were present. For those reasons, I reject the abuse of process ground of appeal.

The third issue: article 8 of the ECHR

59 Mr Henley accepted that he could only raise an arguable case in relation to the RP's article 8 rights if he were successful on at least one if not both his other grounds of appeal.

60 As neither of them has succeeded, there is no possibility that the article 8 balancing exercise would produce a different result from that reached by the judge. I therefore reject that ground of appeal based on the right to respect for the RP's family life.

Conclusion

61 It follows that none of the remaining grounds of appeal succeed and the appeal must be dismissed.

**CERTIFICATE**

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

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