IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 535 (Admin)

No. CO/2925/2022

Royal Courts of Justice

Tuesday, 14 February 2023

Before:

MRS JUSTICE STEYN

B E T W E E N :

DARIUSZ ANDRZEJ ONISZK — Appellant

- and -

POLISH JUDICIAL AUTHORITY — Respondent

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

MR G DOLAN (instructed by CPS Extradition Unit) appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared without the aid of documentation)

MRS JUSTICE STEYN:

1 This is an appeal against the decision of District Judge Sternberg ("the Judge") sitting in Westminster Magistrates' Court on 5 August 2022, ordering the appellant's extradition to Poland.

2 Leave to appeal was granted by Julian Knowles J on 12 October 2022 in respect of two grounds, namely whether the Judge was wrong not to uphold the submission that extradition was barred by section 14 of the Extradition Act 2003 on the ground it would be oppressive; and whether the Judge was wrong to conclude that the appellant's extradition would not constitute a disproportionate interference with his right to respect for his private and family life, contrary to Article 8 of the European Convention on Human Rights.

3 The question for the appellate court in relation to both grounds is whether the Judge's determination was wrong in the sense explained in *Love v USA* [2018] 1 WLR 2889 and *Polish Judicial Authority v Celinski* [2016] 1 WLR 551: see *Surico v Italy* [2018] EWHC 401 (Admin) Julian Knowles J, [31].

The Arrest Warrant.

4 The warrant in this case is an accusation warrant. It was issued on 13 August 2020 and certified on 19 May 2021. The appellant was arrested pursuant to the warrant on 4 March 2022. The appellant's extradition is sought in relation to four alleged offences:

(i) The first alleged offence is said to have occurred between 17 September 2003 and 22 September 2003 in Bielany Wroclawskie. The appellant is accused of fraudulently obtaining computer hardware from a company called Incom S.A. by misrepresenting his ability to pay invoices. The value of the computer hardware is given as PLN 23,683.33, that is about £3,789.33.

(ii) The second offence is said to have occurred between 2 August 2004 and 25 March 2005 in Krakow. The appellant is alleged to have made false statements in 113 VAT invoices and so aided and abetted those to whom he issued the invoices in defrauding the State Treasury of PLN 673,496.08, that is about £114,494.33.

(iii) The third offence is said to have occurred between 4 March 2004 and 30 September 2005 in Krakow. The appellant is alleged to have made false statements in 242 VAT invoices, and so aided and abetted those to whom he issued the invoices in defrauding the State Treasury of PLN 1,923,634.94, that is about £327,017.94.

(iv) The fourth offence is said to have occurred between 25 September 2004 and 25 April 2005 in Krakow. The appellant is accused of making false statements in seven VAT returns for a total amount of PLN 1,186,923, that is about £189,907.68.

The values in Sterling have been calculated by reference to the exchange rates on the last day of each alleged offence. The total value of the alleged offending is about £635,209.28. The maximum sentences are eight years' imprisonment for offences (i) and (iv), and ten years' imprisonment for offences (ii) and (iii).

5 It can be seen that the period of alleged offending begins on 17 September 2003 and ends on 30 September 2005.

The Facts.

6 The respondent provided further information. The appellant gave a written statement and oral evidence. His former partner, Ms Borawska, with whom he has a young daughter, gave a statement which was not challenged.

7 Taking the facts from the judgment, the following matters are clear:

(i) The appellant was questioned about the alleged offences as a witness on 9 October 2006, and 3 April 2007. At no time prior to his arrest last year pursuant to the warrant was the appellant arrested or interviewed as a suspect in respect of any of the alleged offences.

(ii) The appellant came to the UK in March 2008. On his own account, his departure from Poland was connected with the alleged offending: he said he feared the people he had become involved with, however he was not subject to any restrictions on leaving the jurisdiction of Poland when he did so.

(iii) The appellant is not a fugitive from justice. That is what the Judge found, and it is not disputed.

(iv) The appellant has lived and worked openly in the UK, paying tax, since he relocated here, and he has held a variety of different jobs.

(v) The appellant's relationship with Ms Borawska began in the UK in 2013. Their daughter, N, was born in November 2014. She was seven years old at the time of the extradition hearing and is now eight. She lives, and lived prior to the appellant's arrest, with her mother. She has a good, close relationship with her father. Before his arrest the appellant would look after his daughter on Sundays while Ms Borawska was working. Prior to his arrest he also paid for his daughter to attend Polish Saturday school, as well as paying for some other items for her occasionally.

A decision to prosecute the appellant was made by the Polish Authorities on 25 November 2016, and varied and supplemented on 30 August 2017.

(vi) On 13 December 2016 the police informed the Prosecutor's Office that the appellant was outside Poland, and his family did not know where he was. The appellant's mother told him someone was looking for him, but not that it was the police and: “this did not lead him to understand that he was wanted by the Polish Authorities for the purposes of criminal proceedings or prosecution.”

(vii) On 21 December 2016, a decision to arrest him was issued. On 17 January 2017, the police informed the prosecutor's office that the appellant was away from his address and that he might be in the Netherlands or Italy. After the police could not locate him a domestic arrest warrant was issued on 21 September 2017 by the Circuit Prosecutor.

(viii) As I have said, warrant seeking the appellant's extradition was issued on 13 August 2020.

8 Further information from the respondent explained, in relation to the delay:

> "Before the decision to prosecute was made, it was necessary to gather relevant evidence that [the appellant] had committed the offences alleged . . .
>
> Delay resulted from the need to gather both personal and documentary evidence to corroborate the offences alleged against Mr Oniszk and from a waiting time before expert witnesses prepared their reports. The case had multiple threads and involved multiple persons and a few dozen people were prosecuted as part of it. The evidence was contained in more than 100 case folders . . .
>
> After the issue of the decision to prosecute him Mr Oniszk was sought by the police in Poland, including by a decision of the Circuit Prosecutor to issue a domestic arrest warrant. His whereabouts could not be established in the search."

The Judgment.

9 In relation to the section 14 issue, the Judge cited Lord Brown at [19], [31] and [35] in *Gomes v Trinidad and Tobago* [2009] UKHL 21, [2009] 1 WLR 1038, endorsing and considering Lord Diplock's opinion in *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 at 782 to 783. At [29], the Judge said:

> "In light of my findings set out at 23 above, I can set out my conclusions on this issue relatively succinctly:
>
> (i) Mr Oniszk can rely on the bar of the passage of time as he is not a fugitive.
>
> (ii) I must focus on the changes in his life rather than conducting an inquiry into responsibility for delay in his case.
>
> (iii) The entire period to be considered runs from the commission of the offences from 2003 to the date of the extradition hearing in 2022.
>
> (iv) Since 2008 Mr Oniszk has lived openly in the UK and has worked and paid tax. He has established a life in this jurisdiction with his ex-partner and his daughter, who is now seven years old. His time in the UK has not been free from criminality including a number of convictions for driving offences and for failing to comply with court orders between 2008 to 2012 and a gap of eight years before his most recent conviction for driving with excess alcohol in 2020.
>
> (v) Whilst it took some time for the Polish authorities to make a decision to prosecute Mr Oniszk and further time to issue an EAW, I am unable to find that that delay is culpable. It is apparent that the case was not limited to an investigation of Mr Oniszk, there were a number of other defendants and at least two other trials have been completed in this matter. It is apparent from the nature of the allegations themselves that they are charges of some complexity and it does take a

substantial period of time for that investigation to progress and for Mr Oniszk to be identified as a suspect rather than as a witness which was his original status. The Polish Authorities did not act with great expedition since 2016 to 2017 once they were aware that he had left Poland.

(vi) Mr Oniszk, Ms Borawska and N are in good health.

(vii) In the event of his extradition to Poland, Ms Borawska would lose the financial support that Mr Oniszk provided before his imprisonment. N would lose that financial support and would suffer from separation from her father. She would remain living with Ms Borawska. Ms Borawska would have to continue to make alternative arrangements for N's care at the weekend when she is working. They would each have the emotional and physical of the other if this happened. I accept that they would suffer hardship in those circumstances.

(viii) However, bearing in mind the high level of seriousness of the offences alleged against Mr Oniszk being involved in four separate offences of dishonesty, including substantial fraud on the Polish Tax Authority, I do not find that his extradition would be oppressive taking into account the gravity of the offences alleged against him in Poland and without minimising the life that he has established here his extradition would not be oppressive.

(ix) Nor would Mr Oniszk's extradition be unjust. He is not able to point to any particular evidence or defence that has been lost as a result of the passage of time. There is nothing to show any lack of protection against an unfair or unjust trial in Poland which would give rise to injustice under this bar. Accordingly, I do not find the bar of the passage of time made out in this case."

10 In relation to Article 8, the Judge applied *Norris v USA* [2010] UKSC 9, *HH v Italy* [2012] UKSC 25, and adopted the "balance sheet" approach required following *Celinski v Polish Judicial Authority* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551.

11 Having summarised the parties' submissions he held, at [36] to [37]:

"36. So far as the Article 8 balancing exercise is concerned, I find that the following factors weigh in favour of extradition:

(i) The constant and weighty public interest in extradition that those accused of crimes should be brought to trial and that the UK should honour its international obligations. The public interest in ensuring that extradition arrangements are honoured is very high.

(ii) The offences for which Mr Oniszk is sought are undoubtedly serious. The total value of the frauds exceeds £600,000.

(iii) The likely sentence for a person convicted of such an offence is a custodial term of several years. A person convicted of such an offence in this jurisdiction would expect to receive a custodial term of many years, even if they performed a lesser role. Given the value involved exceeds £500,000 in this jurisdiction the person convicted of such an offence would expect to receive at least 18 months' imprisonment. In this case, the frauds were carried out over a long period of time, and therefore it is likely that a person convicted of such offences here would face imprisonment measured as a term of years, for although there has been delay in pursuing the matters contained in the warrant in Poland, an explanation for the delay is provided by the further information of 8 April 2022. It is clear that this case concerns a complex series of frauds which took quite some time to investigate and prosecute.

37. The key factors against extradition are as follows:

(i) Mr Oniszk is not a fugitive from justice.

(ii) Extradition will undoubtedly have an impact on his ex-partner. She will lose his financial support and the care he provides at weekends to their daughter N.

(iii) Extradition will have an impact on N. She relies on him for emotional and practical support and although I do not accept his extradition will be devastating for her, it is likely that she will suffer as a result of his return to Poland.

(iv) He has offered to be interviewed in the UK by the Polish Authorities.

(v) There has been delay in the prosecution of this case and in any efforts to locate and arrest him on the EAW."

12 At [38] to [43] the Judge identified the factors he considered to be of particular importance, namely, (i) the substantial public interest in those accused of crimes being brought to trial and the UK's fulfilment of its international obligations; (ii) the seriousness of the offences for which the appellant is sought to stand trial; (iii) the hardship and distress that would be caused to his former partner and daughter, albeit they had not been living together as a family unit before his arrest; (iv) his finding that the delay on the part of the Polish authorities was not culpable, although during that period the appellant had relocated to the UK and enjoyed a relationship with Ms Borawska and family life with his daughter; and (v) the appellant has a number of convictions in this jurisdiction which, while not the most serious, go to the quality of the life that he has lived in the UK. The Judge observed that

having carefully balanced the factors in favour and against extradition the requested person's extradition is a proportionate interference in his and his family's Article 8 rights.

Ground 1: The Law.

13 Section 14 of the 2003 Act provides:

> "A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time [F1 since he is alleged to have—
>
> (a) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)]"

14 As the warrant is an accusation warrant, section 14(a) applies. As the Judge recognised, the focus was on the passage of time since the alleged offending in 2003 to 2005 to the date of the extradition hearing.

15 Although there is room for them to overlap, the term "unjust" is directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, whereas the term "oppressive", which the appellant relies on in this case, is directed at hardship to the accused resulting from changes in circumstances that have occurred during the period to be taken into consideration: *Kakis* Lord Diplock, pages 782H to 783A). In other words, delay must have operated as the "cradle of events" giving rise to injustice or oppression in order for section 14 to be engaged: *Kakis* Lord Scarman page 790).

16 The test will not be easily satisfied. Something more than hardship, a comparatively commonplace consequence of extradition must be shown: *Gomes* [31]. In deciding whether extradition would be oppressive the court can take in to account the gravity of the charges on which the requesting State wishes to try the requested person: *Gomes* [31]. The impact of extradition on other family members may also be a relevant consideration.

17 The requested person can rely on the passage of time (unless he has caused it) irrespective of any blameworthiness on the part of the requesting State. So, ordinarily, it is unnecessary to consider whether the requesting State is at fault. But in a borderline case culpable delay on the part of the requesting State may tip the balance: *Gomes* [27] to [28].

18 Whether the passage of time engendered in the defendant a false sense of security is a relevant and potentially important consideration: *Kakas*, Lord Scarman page 790; *Pillar-Neumann v Public Prosecutor's Office of Klagenfurt* [2017] EWHC 3371 (Admin), Hamblen LJ [75], [88] (describing it as an "important consideration"); *Eason v Government of The United States of America* [2020] EWHC 604 (Admin) Leggatt LJ, [39] (describing it as a "powerful consideration" on the facts of that case). If the actions of the requesting State have led the appellant to believe that he will not be extradited then it may be oppressive if the government then proceeds to do so: *Kakis* page 790) An overall judgment on the merits is required.

Ground 1: **The Parties' Submissions**.

19 Mr George Hepburne Scott, counsel for the appellant, submits that the Judge was incorrect in his decision on the section 14 issue. He submits it would very clearly be oppressive for

the appellant to now face extradition so long after the alleged offending. He emphasises that the prosecutor took more than 13 years to decide to prosecute him in respect of the earliest offence, and more than 11 years from the latest offence, and even when the decision to prosecute was made, nearly four more years elapsed before the accusation warrant was issued, despite the prosecutor learning very early on that the appellant was not in Poland.

20 Mr Hepburne Scott contends that the appellant, who has lived in the UK since March 2008, clearly had a completely false sense of security for more than a decade. Such a false sense of security goes "considerably beyond mere hardship" and leads, in and of itself, in his submission, to a finding of "oppression . . . consequent on the passage of time": *Obert v Public Prosecutor's Office of Appeal of Ioannina, Greece* [2017] EWHC 303 (Admin), Nicol J, [36] to [39]; *Eason* Leggatt LJ [35] to [39]. These highly relevant principles were not considered by the Judge in reaching his conclusion on section 14.

21 Although the appellant acknowledges that the case was of some complexity, nonetheless, he submits that taking more than a decade to charge is hugely excessive, and once they had done so and quickly discovered he had left Poland, the Polish Authorities allowed several more years to elapse before issuing the accusation warrant. Mr Hepburne Scott relies on this culpable delay to tip the balance, if necessary. The very lengthy overall delay, and the very clear false sense of security experienced by the appellant over many years are such as to make it oppressive, the appellant submits, to extradite him.

22 Counsel for the respondent, Mr Gary Dolan, contends that the Judge directed himself appropriately, made findings that were open to him, and reached conclusions that are sustainable. He was not wrong to find that the appellant's extradition would not be oppressive.

23 Mr Dolan emphasises that the gravity of the alleged offences is relevant in considering whether any change in the circumstances caused by the passage of time would render extradition oppressive. The emotional and financial support the respondent provides to his daughter goes no further, Mr Dolan submits, than that which would ordinarily be expected. The Judge considered the effect on the appellant's daughter and his former partner, acknowledging that they would suffer hardship. He was not wrong in his conclusion that the degree of hardship would not be oppressive having regard to the nature and seriousness of the alleged offending.

24 Mr Dolan submits the Judge was entitled to find that the complexity of the allegations and the number of other defendants involved provided a satisfactory explanation for the delay such that it was not culpable delay on the part of the requesting State. The appellant has not, he submits, pointed to any consequence of extradition that could properly be described as oppressive.

25 The appellant also sought to rely for the first time in his skeleton argument on the immigration position, submitting that considering the wording of rule 9.4.1 of the Immigration Rules were he to be extradited and convicted and imprisoned for more than 12 months it would be almost certain he would not be given leave to re-enter. This, he submits, is an additional strong factor against extradition. The respondent points to the fact that the appellant did not refer in his proof of evidence to his immigration status, nor to any concern about the consequences of extradition. No submissions were made on that issue at the extradition hearing and no evidence was adduced as to his status in relation to the EU Settlement Scheme. The perfected grounds of appeal are also silent on the point. In any event, the respondent submits it is not a factor that should tip the balance. I agree with the respondent that the appellant has not laid the ground work that would be necessary to enable

him to rely on his immigration status in terms of evidence or in his perfected grounds of appeal and so I leave that point out of account.

Ground 1: Analysis and Decision.

26 It follows from section 14(a) of the Extradition Act 2003 that the relevant "passage of time " is from the date of the alleged offending which, in this case, ended on 30 September 2005 until today. That is more than 17 years, a very long period indeed. However, the focus has to be on the effect of that passage of time and the circumstances of this case.

27 In my judgment, although the Judge carefully considered the circumstances, I agree with the appellant that he made no determination as to whether the passage of time engendered a false sense of security in the appellant. It can readily be inferred that the appellant was lulled into a false sense of security by the inaction of the Polish Authorities. The appellant had voluntarily attended interviews as a witness in October 2006 and April 2007. He was unaware that he was under investigation until he was arrested in March 2022, just short of 15 years after he was last questioned as a witness about the offences. In the intervening period he was not contacted and received no notice that he was under investigation.

28 It is an important feature of this case that none of the delay can be laid at the door of the appellant. In circumstances where he had co-operated with the investigation by attending two interviews, the very long passage of time during which he heard nothing more about those matters is bound to have given rise to a reasonable expectation that no proceedings would be taken against him arising out of the matters about which he had been questioned. As more and more years passed he was reasonably entitled to grow in confidence that there was no intention to prosecute him.

29 It is of particular importance, in my view, that by the time the appellant's relationship with Ms Borawska began in 2013, and they had a daughter together in 2014, the passage of time since those interviews, and the alleged offending, had already been such that the obvious inference is that the appellant would have developed a strong sense of security. I accept that the strength of the appellant's emotional bond with his daughter, and the financial support that he provided before he was taken into custody, although strong, is no more than would be expected. But the very long period of inaction on the part of the Polish Authorities, at least from the appellant's perspective, was the cradle in which the appellant's life in the UK was born and developed.

30 This is a case in which the alleged offending is serious, even if the appellant, who was then in his early 20s, may have played a lesser role in the VAT frauds than those whom he is alleged to have aided and abetted. Although the appellant's evidence was that he had been advised by a Polish lawyer that he would be likely to receive a suspended sentence if convicted, the Judge was entitled to find that the likely sentence would be a custodial term measured in years, and in this jurisdiction would be at least 18 months' imprisonment. The period of nearly a year that the appellant has spent in custody, pursuant to the warrant, would, of course, have to be taken into account.

31 It is also relevant as the Judge observed, in considering the quality of the life the appellant has cultivated in the UK, that he has committed several driving offences and breaches of orders, albeit none have resulted in the revocation of an order. However, the quality of the family life that he has developed is not markedly reduced given that in the past 10 years during which his child was born, he has committed a single offence of driving with excess alcohol, for which he was fined and disqualified from driving.

32 The Judge was entitled to accept that the investigation and charges of were of "some complexity". Even so, it is striking that the decision to prosecute was taken 11 years after the end of the alleged offending, and 13 years after the first offence is alleged to have been committed. There is no suggestion in this case that it took any significant time to *discover* the alleged offending. The only explanation for the delay prior to the decision to prosecute is that it was of some complexity involving numerous people and multiple threads. In my judgment, by the time the appellant's family life developed in the UK, the delay was clearly culpable, and it was then exacerbated by the failure to act expeditiously once the decision to prosecute had been made.

33 I am satisfied that the false sense of security engendered by the passage of time was a powerful consideration that the Judge omitted to take into account. I would find that the appellant's false sense of security did go considerably beyond mere hardship and, in the circumstances of this case, did amount to oppression which was consequent on the passage of time. In my judgment, the Judge was wrong to conclude that the appellant's extradition was not barred by section 14 of the Extradition Act 2003.

34 In those circumstances it is unnecessary to address the alternative ground on which extradition was opposed, that is to say, the argument based on Article 8.

35 For those reasons I would allow the appeal and order Mr Oniszk's discharge.

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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