Neutral Citation Number: [2019] EWHC 1809 (Admin)

Case No: CO/2470/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2019

Before :

MR JUSTICE GARNHAM

- -

Between :

Piotr Janusz MADEJ	**Appellant**
- and -	
District Court in Koszalin (POLAND)	**Respondent**

- -
- -

Saoirse Townshend (instructed by **JD Spicer ZEB**) for the **Appellant**
Amanda Bostock (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 20th June 2019
- -

Approved Judgment

Mr Justice Garnham :

Introduction

1. Piotr Janusz Madej appeals, pursuant to section 26 of the Extradition Act 2003, against the decision of District Judge Crane dated 18 June 2018 to order his extradition to Poland. He mounts that appeal, with permission granted by Ouseley J, on the grounds that the judge was wrong to find that extradition would be a proportionate interference with his article 8 ECHR rights and those of his family.

2. It is submitted by the Appellant that the District Judge's decision was wrong and that it cannot stand in light of significant and decisive fresh evidence concerning the serious and enduring mental health problems of the Appellant's partner, Marta and the special needs of the couple's young daughter, Sandra.

The DJ's Judgment

3. The case was listed before District Judge Rebecca Crane on 13 June 2018 and she produced her judgment on 18 June 2018. At the start of the judgment, the District Judge noted that the case had first been listed for hearing on 10 May 2018. On that date, the hearing was adjourned because the solicitors acting for the Requested Person ("RP") had withdrawn. Another solicitor assisted him that day. The judgement continued:

> "However since then no legal aid has been granted and no lawyer appeared to represent the RP at the final hearing on 13.06.18. On 10 May 2018, further directions were made for proof of evidence and for expert medical evidence to be heard. The RP was warned he would have to represent himself if there was no legal aid or solicitors are not in funds. The RP did not comply with the directions and filed no evidence…The RP was bailed to attend at 1.30pm on 13.06.18. The RP failed to attend the final hearing. The court rang his mobile telephone number twice and it went to voicemail."

4. The District Judge went on to explain that she had then granted permission to proceed in the Requested Person's absence.

5. The District Judge identified what she called "the evidence" filed and served on the Appellant's behalf. That consisted simply of the "Blue Form" submitted at the initial hearing. That Blue Form recorded that the Appellant lived with his partner and they had a four-year-old daughter who had developmental issues and cannot talk. His partner does not work and has mental health problems, namely severe depression. The Appellant came to the UK in 2011 to look for work. He has previously been employed as a painter-plasterer but had become unemployed three weeks previously. He attended his trial in Poland, was given a suspended sentence with community work and had to report to police. He said he complied with those requirements but did not tell the authorities he was leaving the country.

6. The DJ found that the Appellant was a fugitive, having been served personally with a summons to serve his sentence and having failed to notify the court of his change of residence. The Judge accepted that the Appellant had a partner and four-year-old child

but said she was unable to make findings as to their health. She said that "on the evidence before me there is no reason to suppose that the RP's partner will not be able to care for their daughter and herself".

7. In addressing article 8, the Judge carried out the balancing exercise provided for in *Celinski* [2015] EWHC 1274 (Admin). She noted the factors favouring the grant of extradition as follows:

> "(a) The public interest in this country complying with its international extradition treaty obligations and not being regarded as a haven for those seeking to avoid criminal proceedings in other countries.
>
> (b) The mutual confidence and respect that should be given to a request from the judicial authority of a Member State.
>
> (c) The RP has been convicted of 10 offences of criminal damage and theft/attempted theft of copper wire.
>
> (d) The RP has an outstanding sentence of 2 years, 5 months and 28 days imprisonment.
>
> (e) The RP is a fugitive."

8. The factors against the grant of extradition were identified as:

> "(a) The RP lives in the UK with his partner and their four-year-old daughter;
>
> (b) The RP has no previous convictions."

9. The District Judge concluded that the article 8 rights of the RP and his partner and his child are engaged but on the evidence before her "…there is nothing to suggest that the negative impact of the extradition of the RP on him and his family is of such a level that the Court ought not to uphold this country's extradition obligations."

Fresh Evidence

10. Relying on the decision of the Division Court in *Szombathley City Court v Fenyvesi* [2009] EWHC 231 (Admin), Ms Townshend asks me to admit fresh evidence. Applying the appropriate test, she asserts that the evidence in question "…either did not exist at the time of the extradition hearing or was not at the disposal of the party wishing to adduce it and which he could not without reasonable diligence have obtained". The application to admit fresh evidence is resisted by Ms Bostock for the Respondent who asserts that the evidence was available or could, with reasonable diligence, have been obtained.

11. Often, it is the case in extradition cases, where the Appellant seeks to rely on fresh evidence, that the Respondent agrees to have it considered by the court de bene esse, and then submits that the fresh evidence could not be regarded as having a decisive effect. Here, although she went on to make submissions on the assumption that the evidence might be admitted, Ms Bostock robustly maintained that it would be

inappropriate to admit the evidence. It is necessary therefore for me to decide that issue.

12. The fresh evidence, upon which the Appellant seeks to rely, includes proofs of evidence for the Appellant himself, witness statements of his partner, witness statements of a Ms Lesley Gray and a Ms Becky Murton, family support workers, a witness statement of Keely Platts, a school teacher of the Appellant's daughter Sandra, Home Office guidance on the status of EU citizens and their families and, most importantly, reports from a psychiatrist, Dr Suraj Shenoy, on the psychiatric condition of the Appellant's wife, and of Dr Levita into the psychological condition of the Appellant's child.

13. Ms Townshend accepted that this evidence could, with reasonable diligence, been obtained had the Appellant been legally represented. However, it is said that, since he was not represented and did not understand that he was entitled to legal representation, he did not provide the evidence required. It is said the Appellant did not appear at the extradition hearing on 8 June because of transport difficulties on the day.

14. Ms Bostock opposes that argument. She says first, that obtaining the proofs of evidence of the Appellant, his partner, from the family support workers, from his daughter's teacher and the Home Office guidance could all have been readily obtained without legal assistance. Second, as regards the reports of the psychiatrist and psychologist, she says that legal aid was available, had the Appellant gone about obtaining it promptly and properly. Initially, the Appellant had had legal assistance and, says Ms Bostock, it must have been through his own lack of diligence that that legal assistance was not provided subsequently.

15. Further, it is said, it was entirely the fault of the Appellant that he did not attend on the day of the hearing. He had been warned of the need to obtain legal assistance and to seek legal aid. He had been ordered to comply with the directions but had filed no evidence. It is said that the absence of legal assistance was entirely the fault of the Appellant and he should not now be able to escape the consequences of his failure to obtain legal assistance.

16. Ms Bostock further argues that the Appellant's conduct of the original proceedings, or more precisely his failure to conduct them, would serve to expose the Respondent to significant prejudice if he was now permitted to put in the fresh evidence. It is said that the failure of the Appellant to adduce this evidence before the District Judge means that the Respondent is unable to cross-examine his witnesses. It is said there is much upon which that cross-examination could be directed.

17. In reply, Ms Townshend argues that the fact that the material was not before the Judge, and so could not be tested in cross-examination, can only go to the weight to be attached to the evidence, not to its admissibility.

18. I accept Ms Bostock's submission. In my judgment, this is not an appropriate case for the admission of fresh evidence. This is not a case of admitting evidence simply to update the Court on matters of fact arising since the date of the District Judge's decision. Nor is it a case of admitting fresh expert evidence to address events which occurred after the date of the District Judge's hearing. Here, both the psychiatric

evidence on the applicant's partner and the psychologist's reports could and should have been commissioned in time for the District Judge's hearing. It is apparent from the District Judge's judgment that the Appellant had had legal advice, and clear directions had been given for expert medical evidence to be served. In those circumstances, it seems to me impossible to contend that with reasonable diligence, the fresh evidence could not have been obtained in advance of the hearing.

19. Furthermore, the failure to do so causes significant prejudice to the Respondent. They do not agree the contents of the expert evidence and would undoubtedly have wanted to cross-examine upon it. Much of the expert evidence precedes on the basis of what the experts were told by the Appellant and his wife, accounts which are not supported or corroborated, for example, by GP records or the like. There might well have been fertile ground for cross-examination.

20. It is said the expert evidence goes not only to the rights of the Appellant but also the article 8 rights of his partner and daughter. However, it does not seem to me that entitles me to disapply the *Fenyvesi* test of determining whether the fresh evidence might with reasonable due diligence have been obtained for the hearing.

21. In all those circumstances, I refuse the application for fresh evidence.

22. In the absence of fresh evidence, the challenge to the District Judge's conclusions is hopeless. The District Judge identified the relevant principles, referring to *Norris* [2010] UKSC 9, *HH* [2012] UKSC 25 and *Celinski* [2015] EWHC 1274 (Admin). She carried out the proper balancing exercise and on the limited material before her was plainly entitled to reach the conclusion she did that extradition was a proportionate interference with the article 8 rights of the Appellant and his family.

The Position if the fresh evidence has been admitted

23. In case I am wrong in respect of that decision, I go on to consider the merits of the Appellant's case on the assumption that the fresh evidence should be admitted. If that evidence is admitted, it fundamentally changes the nature of the case being advanced. For the reasons I have said, it is not possible to criticise the District Judge for her decision but if there had been admissible fresh evidence it would have fallen to me to retake the decision myself. In substance, that means I would have needed to conduct the *Celinski* balancing exercise afresh.

The Law

24. The legal principles applicable in a section 21 article 8 case are not in dispute and were accurately summarised by the District Judge. I remind myself what Lady Hale said in *HH*, in particular, to the effect that public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference of family life will be exceptionally severe; about the need to treat the rights of any child affected as a primary consideration; and about the significance of delay in an article 8 case. I remind myself what Lord Brown said in *Beoku-Betts* v Secretary of State for Home Department [2009] AC 115, about the need to consider the article 8 rights of each and every family member in assessing the interference that would be caused by extradition.

25. I have been reminded by Ms Townshend of what I said about delay in *Zimackis v Lithuania* [2017] EWHC 315 (Admin) and what other judges, at the first instance, said on the same subject. I also note, however, that the effect and significance of delay, in particular, is inevitability a fact-sensitive question.

The Request

26. The Appellant's request is sought by Poland pursuant to a European Arrest Warrant ("EAW") issued on 10 December 2013 and certified by the National Crime Agency ("NCA") on 5 May 2015. It seeks his return to serve the remaining two years, 5 months, 28 days of a sentence of two years, six months imprisonment imposed on 23 August 2011 and relating to the following ten offences, with a combined value of £23,150;

- 14th-15th October 2010 – Criminal damage to a power transformer and theft of copper wire therein at a commune causing total damage of 11,250PLN (£2350);
- 20th-21st October 2010 – As above at a second commune location to the value of 15,800PLN (£3300);
- 6th-7th November 2010 – As above at a third commune location to the value of 15,600PLN (£3260);
- 12th November 2010 – Attempt as above at a fourth commune causing damage of 200PLN (£40);
- 23-24th October 2010 – Effective criminal damage and theft at a fifth commune causing damage of 15,600PLN (£3260);
- 24th-25th October 2010 – Caused damage by the same means to the fifth commune for a second time to the value of 11,600PLN (£2420);
- 1st-2nd November 2010 – Attempt as above at a sixth commune interrupted by a third-party report. Damage caused 300PLN (£60);
- 1st-2nd November 2010 – Effective criminal damage to the fifth commune for a third time to the value of 11540PLN (£2400);
- 13th November 2010 – As above in relation to a seventh commune to the value of 15600PLN (£3260);
- 30th-31st November 2010 – As above in relation to the seventh commune for a second time to the value of 13500PLN (£2800).

27. It is to be noted that not only was considerable financial damage caused by the Appellant's offending, but it is implicit that the Appellant's action would have disrupted the power supply to a number of communes. For some of his victims, it appears, that must have happened on more than one occasion.

Submissions and discussion

28. Ms Townshend sets out her arguments in a detailed skeleton argument that has twice been amended and updated. In essence, she contends that the new evidence demonstrates that extradition would be a disproportionate interference with the Appellant's private and family life and those of his partner and daughter. She makes five particular points.

29. First, at an early stage, she described the offences involved, namely repeated theft of copper wire from an energy company, as "not particularly serious", especially given the Appellant's age at the time (he was 25), the short offending period and the Appellant's changed lifestyle since. Subsequently, she changed the description of his offending from "not particularly serious" to "quite serious". That seems to me a fairer description. It is certainly not the case that these were victimless offences. The theft of copper wire not only affects the energy company which owns the equipment but its customers too. These were repeat offences demonstrating a complete disregard of both the company's interest and those of its customers. It is apparent from the sentence that the Polish court plainly regarded it as serious.

30. The Appellant's age did not affect the seriousness of the offending although I accept it is a relevant factor to weight in the balance, as is his good character since. I also note he had served three months of that sentence so that what is outstanding is two years and two months.

31. Ms Townshend's second point concerns the Appellant's fugitive status. She does not dispute that status but points to the acknowledgement and explanation of his behaviour in his written statement. I note that explanation, but it remains the case that the Appellant was a fugitive as correctly found by the District Judge.

32. Ms Townshend's third point concerns delay. She says there is delay between 9 February 2012 when enforcement proceedings were suspended and 10 December 2013 when the EAW was issued, a period of 22 months. She said there is a second period of delay between the issue of the EAW and the certification by the NCA on 5 May 2015. She says there is a third period of delay from certification to the 25 April 2019 when the Appellant was arrested. She asserts that it would not have been difficult to find the Appellant and there is no evidence that proper efforts were made by the requesting state to do so. I cannot wholly accept that argument.

33. The District Judge found in paragraph 9 of her judgment that the Appellant was a fugitive. As such, he was not entitled to rely upon the passage of time for the purposes of section 14 of the 2003 Act. Nonetheless, as Lady Hale held at paragraph 46 of her judgment in HH "The overall length of the delay is relevant to the Article 8 question. Whatever the reasons, it does not suggest any urgency about bringing the Appellant to justice, it is also some indication of the importance attached to her offending".

34. There was a requirement on the Appellant to notify the authorities of his whereabouts and he left Poland without doing so. There was no reason for the Polish authorities to believe he was in the UK. An EAW was issued relatively quickly and was certified. He claims to have been living openly in the UK yet provided no evidence to establish he could have been readily found. As Ms Bostock puts it "Given he was aware of the

sentence imposed and that the authorities would be searching for him, it certainly cannot be assumed" that he could be readily found.

35. As noted above, the Appellant's return is sought pursuant to an EAW issued on 10 December 2013 and certified on 5 May 2015. The EAW relates to a sentence imposed on 23 August 2011. In my judgment, it is apparent on those dates alone, there has been some culpable delay in this case, although I do not attribute all of the delay to the tardiness of the Polish authorities. The modest delay for which they are responsible, however, provides some weight on the Appellant's side of the scales when I consider the article 8 balancing exercise.

36. Ms Townshend fourth point concerns Brexit. She says that the "Anxiety over the Appellant's absence from the family is heightened given the UK's impending exit from the European Union. The added worry and uncertainty facing requested persons and their families who are EU nationals is a permissible factor for this court to take into consideration…".

37. In my judgment that submission cannot survive the decision of Nicol J in *Sobczyk v Poland* [2017] EWHC 2353 (Admin), with which I would respectfully agree. He said:

> "…the argument has no merit. What may be the outcome of the Brexit process is highly uncertain. It would be quite wrong for this Court to speculate as to what transitional or final arrangements would apply to someone in the Appellant's position."

38. Finally, and most importantly, Ms Townshend submits the consequences of extradition would be "exceptionally severe" for the Appellant and his family. She says the Appellant's partner Marta, suffers from serious mental health problems following a very difficult childhood and early life. She says the Appellant has provided her with essential support ever since.

39. Ms Townshend points, in particular, to the expert evidence of Dr Shenoy and Dr Levita. Dr Shenoy has diagnosed Marta as suffering from depression. She had developed self-harming and suicidal thoughts. Marta told Dr Shenoy that three days before her assessment she attempted to hang herself but that the Appellant had stopped her. Dr Shenoy concluded that there is "a significant risk that Ms Pawlak will attempt suicide" if Mr Madej is extradited. Dr Shenoy referred to a "number of negative diagnostic indicators in Ms Pawlak's background and current circumstances" which "outweigh the positive indicators". Dr Shenoy said that "If Mr Madej is extradited to Poland to serve the remainder of his sentence, I am of the opinion this would have a significantly negative effect on Ms Pawlak's already fragile mental state. This could very easily tip her over into self-harming and suicidal behaviour".

40. Ms Townshend also relies upon the complex needs of the couple's daughter, Sandra, and the likely effect on her of her father's extradition. Sandra's school teacher, Keely Platts, describes her speech and language skills as those of a child less than half her age. Dr Levita, the child psychologist, assessed Sandra and found her to have a language disorder with "very low" verbal ability. She goes on "Since a language disorder is strongly associated with Autism Spectrum Disorder and with Social (Pragmatic Communication Disorder), it is important to monitor Sandra's social

functioning progress in therapy, school and home in order to evaluate if presentations can be excluded or not".

41. Ms Townshend says that the Appellant is concerned that his partner will not be able to cope with their daughter's behaviour and problems by herself. Sandra's school teacher explained the effect of the Appellant's imprisonment on Marta:

> "Our concerns have gone as far as fearing self-harm. In recent months we have noticed a deterioration in her mental health, undoubtedly caused by Piotr's extradition and now his absence. Because he has been in prison. She has become very depressed and withdrawn and is clearly suffering."

42. Dr Shenoy also commented on the potential effects of the Appellant's extradition on his partner and his child:

> "More than the hopelessness/depressive symptoms, I am more concerned about her level of dependence on Mr Madej in terms of social interaction, financial support and also with regards to caring appropriately for their daughter, Sandra…She has to care for her daughter who has significantly above average needs. She is homeless. She is in a difficult financial situation without any real resources to fall back on. She has attempted to hang herself recently. The only positivity in her life currently appears to be from Mr Madej. All these factors make me quite concerned about the high risk of self-harm/suicide that Ms Pawlak will post to herself if Mr Madej were to be extradited."

43. Dr Levita echos those concerns:

> "In those circumstances my opinion is that Sandra's care, health and wellbeing would suffer if Mr Pawlak is to be extradited. Sandra's language disorder and the associated difficulties mean that she depends almost exclusively on her parents for social interaction, social support, communication and provision for her special needs…Taking into account her mother's vulnerabilities it is extremely difficult that she would be able to provide the above needs without the support of her partner."

44. In response, Ms Bostock submits that whilst the new evidence demonstrates that the Appellant's partner has been diagnosed with moderate depression "it is wholly apparent that she loves her daughter very much and was able to care for her whilst the Appellant was in custody for four months…even with her mental health difficulties". She points out that the Appellant's partner was not taking medication at the time of the assessment but that her recent statements confirm she now has medication which is helping her to the point that she is now looking for work. She submits that the fresh evidence demonstrates that the threat of losing her partner has caused Ms Pawlak's depression to occur but "she has received support to cope from various agencies and would continue to do so in her partner's absence were his extradition to be ordered." Ms Bostock points out that the report of self-harm and attempted suicide have not been independently verified and would have been the subject of cross-examination had this evidence been called before the District Judge.

45. As to the Appellant's daughter, Ms Bostock submits that the Appellant cannot be described as the sole or primary carer for the child. Neither parent works, and when they are both at home both look after the child. Ms Bostock submits that social and medical services in the UK would assist if Sandra's condition continues or deteriorates.

46. Against the background of that new evidence and in the light of those submissions, it is my judgment that the extradition of the Appellant would be likely to have a significant adverse effect on both the Appellant's partner and his daughter. It is a factor of some weight to be placed on the Appellant's side of the *Celinski* scale.

47. Nonetheless, in my judgment, even taking into account the new evidence, I cannot say that the scales come down in the Appellant's favour.

48. The factors in favour of extradition are familiar but are no less weighty for that. As Lady Hale said in *HH* "There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial, that people convicted of crime should serve their sentences; that the UK should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back." That public interest will always carry great weight.

49. The weight to be attached to the public interest in extradition reflects the seriousness of the offending. Here the offending is neither of the greatest gravity, nor is it trivial. The weight on this side of the scales also reflects the fact that the Appellant has an outstanding sentence of more than two years and is a fugitive from justice.

50. On the other side of the scale, I have regard to the following factors which point against extradition being granted. The Appellant lives in the UK, with his partner and their young daughter. The Appellant has no previous convictions. The offences of which the Appellant has been convicted, whilst serious, were committed by a young man some years ago and he appears to have reformed since. There is some culpable delay on the part of the requesting state. As noted above, extradition would have a significant adverse effect on the Appellant's partner, emotionally, psychologically and financially. Extradition would adversely affect the Appellant's daughter.

51. In *Beoku-Betts* (Supra) Lord Brown said at paragraph 65;

> "Indeed, in trying to envisage a situation in which interference with article 8 might prevent extradition, I have included the effect of extradition on innocent members of the extraditee's family might well be a particular cogent consideration. If extradition for an offence of no great gravity was sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee…""

52. It is plain that Lord Brown was there simply giving an example of circumstances in which Article 8 considerations might lead to the refusal of extradition. But his remarks are illuminating as to the severity of the sort of consequences which would be required.

53. In my judgment, whilst on the fresh evidence the factors in the Appellant's favour are weighty, they fall a good way short of outweighing the factors which favour extradition.

54. It follows that even if I'd been persuaded to admit the fresh evidence, which I was not, I would still have dismissed this appeal.

Conclusions

55. For those reasons this appeal is dismissed.