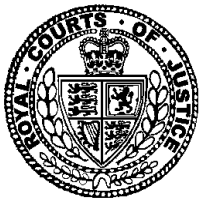

Neutral Citation Number: [2019] EWHC 279 (Admin)

Case No: CO/4389/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2019

Before :

LORD JUSTICE BEAN
LORD JUSTICE GREEN

- -

Between :

ARTUR KRZYSZTOF GORCZEWSKI	**Appellant**
- and -	
COURT OF SWIDNICA, POLAND	**Respondent**

- -
- -

Hugh Southey QC and **Florence Iveson** (instructed by **JD Spicer**) for the **Appellant**
Mark Summers QC and **Daniel Sternberg** (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 3 May 2018
Further written submissions 19 and 30 November 2018

- -

Approved Judgment

Lord Justice Bean :

1. The appellant was born on 19 July 1987. He and his partner Eveline Jaroszek have two children: Brian, born on 20 July 2012 and Lily, born on 23 October 2014.

2. On 13 November 2006, when he was 19 years old, the appellant broke into an allotment shed. He was convicted of an offence in respect of this incident on 6 March 2007. A suspended sentence of six months imprisonment was imposed.

3. In February 2008 the appellant stole three aluminium work platforms worth £425. Four months later he moved to the UK. In December 2008 he returned to Poland for the hearing in his theft case. He was provisionally arrested and pleaded guilty. On 8 January 2009 he was present in court when he was convicted of the theft offence and a sentence of one year's imprisonment, suspended, was imposed.

4. By an order of the Polish court dated 13 March 2009 the six month suspended sentence for breaking into the shed was activated. In the same month the Appellant returned to the UK and appears to have been here ever since. By a further order of the Polish court dated 8 December 2009 the one year suspended sentence for theft of the aluminium platforms was activated.

5. On 19 April 2012 the first of the two European arrest warrants in this case was issued, in respect of the one year sentence for theft. In the following month, the National Crime Agency was notified by the Polish authorities that the Appellant was wanted on an EAW. But it was not until 25 June 2017 that the Appellant was arrested in the UK. This was in respect of another alleged matter which resulted in no further action, but he was then arrested on the first EAW. A second EAW, in respect of the offence of breaking into the shed, was issued on 28 June 2017.

6. The appellant appeared for an initial hearing at Westminster Magistrates' Court on 26 June 2017. He did not consent to extradition. The final hearing took place before DJ Tempia on 31 August 2017. Her reserved judgment was issued on 19 September 2017. She ordered Mr Gorczewski's extradition.

7. There was no dispute that the warrants were compliant with section 2 of the Extradition Act and that the two offences concerned were extradition offences. There was also no dispute that the Appellant had been present in court in Poland when the suspended sentence for theft was imposed on 8 January 2009. He also accepted that he had been in court when the six month suspended sentence for breaking into the shed was activated. He also admitted that he had been required to tell the authorities of any change of address and that he was obliged to keep in touch with his probation officer in Poland. He did not do so because he wanted to start a new life. It was, therefore, inevitable that the Appellant conceded, and the District Judge found, that he was a fugitive.

8. It was submitted on his behalf that he had been a young man (aged 18 and 20 respectively) when the offences were committed. He was now the father of two young children, and also stepfather to a teenager. The young children had some medical problems and the impact of separation on them would be severe. His partner would struggle financially if he were extradited and she would have to claim benefits. It was

submitted that the public interest in his extradition was very low given that the offences were old and not of a serious nature.

9. The District Judge noted the constant and weighty public interest in extradition and the need for the UK to honour its treaty obligations, so that there should be no safe havens to which fugitive offenders can flee; and the need to have regard to the decisions of the judicial authorities of a State such as Poland which should be accorded a proper degree of mutual confidence and respect. The delay of five years in certifying the first EAW was explained by the fact that the authorities could not trace the appellant in the UK in 2012. The delay was in any event attributable to the appellant fleeing from Poland. She noted that this was not a sole carer case and that the appellant's partner was and would remain the primary carer. The appellant's mother, her partner and his single brother lived close to the family and could help with childcare or financially if necessary.

10. She noted the factors against extradition. During the five year period of delay in certifying the EAW the Appellant had turned his life around. He had lived in the UK since 2008 and has been in continuous work. He registered with the Home Office and has a National Insurance number. The offences were not the most serious in nature and were committed when he was a young man. He is of good character in the UK. His two young children have health problems although they are not severe. He has a close relationship and strong bond with the children.

11. The District Judge referred to *Polish Judicial Authority v Celinski* [2016] 1 WLR 551 in which Lord Thomas CJ, giving the judgment of a three judge Divisional Court, said at paragraph 39:-

> "… the important public interests in upholding extradition arrangements and in preventing the UK being a safe haven for a fugitive as Celinski was found to be would require very strong counter-balancing factors before extradition could be disproportionate."

12. The judge continued:

> "I do not find that the very strong counter-balancing factors are before me in this case. Mr Gorczweski is a fugitive, he was present when the sentence in EAW 2 was activated and his own application to postpone the activation of the sentence was refused on 25th June 2009. In relation to EAW 2 he knew that by failing to keep in touch with his probation officer he had breached the terms of the suspended sentence. He was aware both sentences were activated but left Poland to avoid serving them in order to start a new life. There has been a 5 year delay in certifying EA W 1 but this has been explained by the NCA, which I have accepted.
>
> I also accept the offences are not of the most serious kind but the sentence of 1 year 6 months to serve is substantial and, after initially both being suspended, the commission of a further offence and not complying with conditions has resulted in him facing a lengthy sentence.

> Delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life. In this case Mr Gorczweski has been working since being in the UK, is a father to two small children and a teenage step son and is a man of good character. The younger children have health issues but they are not life threatening. His partner works part life and he has family who live close by and could help the family if necessary, his mother already assists with childcare when she can.
>
> The impact of extradition on this family both financially and emotionally, including the children, is an unfortunate consequence in any extradition proceedings. The children will still have their mother, who is the primary carer, and she is working. She could either continue to work or rely on the State financially if necessary.
>
> In balancing the factors for and against extradition I accept that Mr Gorczweski's and his family's article 8 rights are engaged but, in my judgment, the high public interest outweighs the other factors in this case. Extradition would not be incompatible with the Convention and would not be disproportionate."

13. The judge therefore ordered Mr Gorczewski's extradition under section 21(3) of the 2003 Act. He applied for permission to appeal. The grounds of appeal, as amended, raised one ground, namely that the judge erred in finding that extradition was a proportionate interference with the appellant's Article 8 rights pursuant to section 21. Permission to appeal was refused on the papers by Nicol J in a decision promulgated on 6 December 2017. He held it was not reasonably arguable that the District Judge's decision was wrong. He wrote:

> "It may be, as the appellant submits, that certain of the factors listed in favour of extradition could more properly be described as factors neutralising or reducing what otherwise would be factors against extradition. But, however they should be strictly classified, they were legitimate matters for the DJ to take into account and her decision is not arguably wrong in consequence."

14. The appellant renewed the permission application to an oral hearing which came before Holman J on 22 January 2018. He granted permission to appeal on one ground only, namely:-

> "At paragraph 69 of her judgment, the DJ appears to have applied as a test a requirement for "very strong counter-balancing factors" which misapplies what was said in paragraph 39 in *Celinski v Poland* and is contrary to the authority of the Supreme Court in *HH v Deputy Prosecutor of the Italian Republic, Genoa*."

Did Celinski set down a new test for fugitives?

15. With respect to the arguments of Mr Southey QC, there was in my view nothing new or surprising about paragraph 39 of the judgment in *Celinski*. That case explained and followed the decisions of the Supreme Court in *Norris v USA* [2010] 2 AC 487 and *HH v Italy* [2013] 1 AC 338. Even a three member Divisional Court headed by the Lord Chief Justice had no authority to depart from a decision of the Supreme Court, and I do not think that they did so.

16. In her well known summary of the effect of the *Norris* case in *HH* at paragraph 8, Baroness Hale of Richmond JSC said:-

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom 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.
>
> (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.
>
> (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

17. The last point is an important one. A decision on extradition where Article 8 is prayed in aid requires a balancing exercise such as the one carried out by the District Judge in the present case. Lady Hale's terminology was that the public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe. Lord Thomas CJ, giving the judgment of the court in *Celinski*, said that the public interest in upholding extradition would require very strong counter-balancing factors before extradition could be disproportionate. These forms of words lay down essentially the same test. In the present case, the consequences for Mr Gorczewski's family, in particular his two young

children, will be serious, but in my judgment they do not come anywhere near the category of "exceptionally severe".

18. By a proposed amendment to the grounds of appeal the Appellant sought to argue that *Celinski* was wrongly decided with a view to seeking leave to appeal to the Supreme Court. I would not allow such an amendment to be made because *Celinski* is plainly to be treated as binding at the level of this court: and in any event, for the reasons I have given, I do not accept that it represents a departure from *HH*.

19. Counsel for Mr Gorczewski sought before the hearing on 3 May 2018 an adjournment to await the judgment of the Supreme Court on appeal from the decision of the Court of Appeal in *R(R) v Chief Constable of Greater Manchester Police* [2016] 1 WLR 4125. This was a case on the rather different topic of the contents of enhanced criminal record certificates. The claimant was seeking work as a private hire car driver. The ECRC that was issued contained the information that he had been acquitted on a charge of rape of a young woman passenger in his taxi. He alleged that the inclusion of this information infringed his rights under articles 6.2 and 8 of the ECHR. The point on which Mr Southey QC argues that the Supreme Court in that case might assist his client in this case is the question of whether an appellate court such as we are should determine proportionality for ourselves.

20. I did not consider that the issue in the case of *R* could make any difference in the present case (and the decision of the Supreme Court given on 30 July 2018, [2018] UKSC 47; [2018] 1 WLR 4079, confirms that it does not). Even if we were to decide proportionality ourselves on the facts as found by the DJ I would hold that it is proportionate to order Mr Gorczewski's extradition to Poland, essentially for the same reasons as were given by the DJ.

Fair trials in Poland

21. For these reasons I would reject the grounds of appeal raised in advance of the oral hearing of 3 May 2018; indeed we did not find it necessary to hear counsel for the Respondent to deal with them. But at that hearing Mr Southey QC and Ms Iveson drew to our attention that a Divisional Court presided over by Lord Burnett of Maldon CJ was due on 7 June 2018 to hear a group of appeals against extradition to Poland *(Lis and others v Poland)* in which it would be argued that there were now such serious and systemic threats to the rule of law and the independence of the judiciary in Poland as to constitute in every case a real risk of breaches of the right to a fair trial under Article 6 of the ECHR; and accordingly that any fugitive wanted by the Polish authorities pursuant to a European Arrest Warrant should be discharged. We were asked, and agreed, not to give judgment in the present case until judgment in *Lis* had been handed down. We gave directions for the filing of further submissions when that judgment had been published.

22. Judgment in *Lis* was handed down on 31 October 2018: [2018] EWHC 2848 (Admin). The court held that:-

> "… As matters stand at present, in our judgment there exists no general basis to decline extradition to Poland. However, by reason of the matters contained in the Commission's Reasoned Proposal and in the other material to which we have referred,

> there is sufficient concern about the independence of the Polish judiciary to mean that these Appellants and others in a similar position should have the opportunity to advance reasons why they might have an exceptional case requiring individual "specific and precise assessment" to see whether there are substantial grounds for believing they individually might run a real risk of a breach of their fundamental rights to a fair trial. We make it clear, following the approach of the Grand Chamber of the Luxembourg Court, that exceptional circumstances must be demonstrated. We indicate, on the basis of the limited material available to us, that these cases would appear unlikely to fulfil that test and that those sought to be extradited for ordinary criminal offences, with no political or other sensitive content, would seem unlikely to be able to establish the necessary risk."

At paragraph 69, dealing with the appeal in one case where the fugitive was sought to face allegations of fraud, the court said;-

> "… we see no basis for considering that these offences are in any way sensitive or political, or otherwise likely to be of interest to the authorities. We see no basis why any lack of independence or bias might be likely to arise in respect of such run-of-the-mill criminal allegations."

23. In written submissions dated 19 November 2018 Mr Southey QC and Ms Iveson seek funding to instruct an expert to provide evidence about the Walbrzych District Court, which will administer his prison sentence on his return to Poland. We reject this submission. Although the Divisional Court in *Lis* allowed the three appellants the opportunity to formulate applications based on a real risk of breaches of their human rights, they made it clear at paragraph 70 that they did so because the hearing before the three judge court on 7 June 2018 had been "structured to consider the general question of extradition to Poland in current circumstances". They were "sceptical that any further information will demonstrate such a risk to these individuals". Their conclusion was that Appellants should have the opportunity to advance reasons why their case might be an exceptional one requiring individual "specific and precise assessment" on the issue of a real risk of a breach of their fair trial rights. In my judgment no such exceptional case has been demonstrated on behalf of Mr Gorczewski. It would be wrong to allow an expert to be instructed at this stage to go on what would be a fishing expedition for evidence about the judges of an individual local court.

24. In the alternative, counsel seek permission to adopt the grounds of appeal relied on by the Appellants in *Lis* concerning the lack of independence of the Polish judiciary. They accept that this court would be bound to dismiss the appeal for the reasons given in *Lis* but ask us to certify the grounds relied on in *Lis* as points of law of general public importance. Again, I would decline to do so. I see no sign from the judgment in *Lis* that the three judge Divisional Court intends to certify a point of law for the Supreme Court, and in those circumstances it would be inappropriate for us to do so. For similar reasons I would reject counsel's further alternative submission, which is that this appeal should be stayed until the final determination of the appeals in *Lis* and the decision by that court as to whether to certify a point of law of general public importance.

25. As Mr Summers QC and Mr Sternberg rightly emphasise in further submissions of 30 November 2018, this is a conviction case in which the Appellant's surrender is sought to serve a one year sentence for theft on a European Arrest Warrant issued on 19 April 2012 and six months for attempted burglary on an EAW issued on 28 June 2017. Both EAWs were issued before the changes in the law concerning the judiciary in Poland came into force and, since this is a conviction case, there is no trial in prospect before any judge in Poland. The highest that this Appellant can put it is that he may apply for his sentence to be deferred or suspended and the Polish court may of its own volition postpone it. This is speculative and it is therefore unnecessary to decide whether these procedures for deferment, suspension or postponement would engage Article 6 of the ECHR or Article 47 of the Charter.

26. The present appeal has gone on for long enough and should now be brought to a conclusion. I would dismiss the appeal.

Lord Justice Green:

27. I agree.