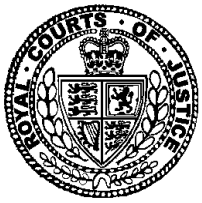

Neutral Citation Number: [2022] EWHC 3133 (Admin)

Case No: CO/5034/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2022

Before

MR JUSTICE SWIFT

- -

Between

MIROSLAW MISKO **Appellant**

- and -

REGIONAL COURT IN BYDGOSZCZ, POLAND **Respondent**

- -
- -

Alex Tinsley (Instructed by **Montague Solicitors**) for the **Appellant**
Stuart Allen (24 May 2022 only), **Alexander dos Santos** (20 October 2022 only)
(Instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 24 May 2022 and 20 October 2022

- -

Approved Judgment

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MR JUSTICE SWIFT

A. Introduction

1. This is an appeal against an extradition order made by District Judge Richard Blake on 20 December 2019. The Regional Court in Bydgoszcz, Poland ("the Requesting Judicial Authority") seeks surrender of Miroslaw Zbigniew Misko pursuant to a European Arrest Warrant issued on 27 August 2019 and certified by the National Crime Agency on 7 October 2019.

2. The warrant is an accusation warrant. The warrant identifies three charges: (1) that between 2008 and April 2015, initially in Poland and latterly in the United Kingdom, Mr Misko "acting in short successions with a premeditated intent … on numerous occasions subjected by force or threat [AG] … to sexual intercourse"; (2) that between 2007 and 2012, in Poland, Mr Misko physically and mentally abused a child, AB; and (3) that between June 2010 and December 2017, first in Poland and then in the United Kingdom, Mr Misko "… acting in short succession with a premeditated intent, used hidden cameras to secretly record naked images of children [J1] and [J2] and [AG]." AG is the daughter of Mr Misko's wife; AB is the son of Mr Misko's wife. J1 and J2 are Mr Misko's children.

3. The District Judge ordered extradition on the 3 offences save that he excluded any conduct occurring after 12 August 2012, the date when, with his wife and their two children (J1 and J2), Mr Misko came to the United Kingdom from Poland. At the extradition hearing extradition was opposed on the following grounds: (a) that the warrant did not meet the requirements for information at section 2(4) of the Extradition Act 2003 ("the 2003 Act"); (b) that offences within the warrant were not extradition offences (section 10(2) of the 2003 Act read with section 64 of the Act); (c) whether a bar to extradition arose under section 19B of the 2003 Act (the appropriate forum provision); (d) that extradition would be unjust or oppressive by reason of the passage of time since the offences alleged were set to have been committed (section 14 of the 2003 Act); (e) that extradition would be oppressive by reason of Mr Misko's health (section 25 of the 2003 Act); (f) that any trial in Poland on the third of the charges would be unfair (in breach of ECHR article 6) because evidence relevant to that charge was in England and not available to the Polish prosecutor; and (g) that extradition would be an unjustified interference with Mr Misko's article 8 rights. The District Judge found against Mr Misko on all these submissions.

4. The grounds of appeal repeated the submission that the EAW did not contain the information required by section 2(4) of the 2003 Act, and the submission on forum under section 19B of the 2003 Act. They also raised a new matter, not pursued before the District Judge, that a lack of specialty arrangements provided a bar to extradition (section 17 of the 2003 Act). The application for permission to appeal was considered on the papers by Steyn J on 3 March 2020. She granted permission to appeal on the section 2 ground but refused permission to appeal on the other grounds.

5. Since that decision, there has been a series of further applications and orders. On 10 March 2020 Mr Misko applied to amend the grounds of appeal to rely on section 12A of the 2003 Act – that there were grounds to believe that decisions to charge and to try had not been taken. The ground was to the effect that there had been no decision to try Mr Misko for the offences set out in the EAW and, that so far as concerns the matters

for which extradition was ordered (i.e., the versions of offences 1 and 3 limited to actions prior to 12 August 2020), there had been neither decisions to charge nor decisions to try. This application was allowed by Robin Knowles J on 22 May 2020.

6. The hearing of the appeal was then listed for 28 October 2020. On 19 October 2020 Mr Misko applied further to amend the grounds of appeal, this time to add the ground that by reason of the program of judicial reform in Poland, the Requesting Judicial Authority was no longer a judicial authority for the purposes of section 2 of the 2003 Act. This was the issue that was the subject of the *Wozniak* litigation (claim CO/2499/2019). On 27 October 2020, Fordham J allowed this application to amend and stayed this appeal behind *Wozniak*. Fordham J also granted permission to amend to add yet a further ground of appeal, based on section 10 of the 2003 Act, to the effect that offence 1 was not an extradition offence because it was an allegation concerning rape said to have occurred in the United Kingdom. Although presented as a further ground of appeal, in substance this contention is a variation on the section 2 ground of appeal, which is consequent on the decision of the District Judge to limit the extradition order to conduct occurring prior to 12 August 2012.

7. The judgment of the Divisional Court in *Wozniak* was handed down on 23 September 2021. The proceedings in *Wozniak* came to an end on 1 December 2021 when the Divisional Court refused an application to certify proposed grounds of appeal as grounds raising points of law of general importance.

8. This appeal was then listed for hearing, for a second time, on 24 May 2022. On 16 May 2022, Mr Misko made a further application, this time (a) for an extension of the representation order to permit preparation of a psychiatric report; and (b) for permission to amend (for a third time) to add a new section 2 argument which concerned offence 2, a new article 8 argument which would arise only if extradition were ordered only on offence 2, and a new article 6 submission based on the program of judicial reform in Poland. The application also requested that the hearing set for 24 May 2022 be vacated. I heard this application on 24 May 2022. I refused the application to extend the representation order to obtain a psychiatric report and refused the application to amend to add the new section 2 ground of appeal which related to offence 2. I allowed the application to amend to add the ground that extradition on offence 2 alone would be a disproportionate interference with Mr Misko's article 8 rights.

9. The hearing of the appeal commenced, but was then adjourned part-heard to give the Requesting Judicial Authority the opportunity to provide further information concerning the section 12A ground of appeal and to provide further information on whether it had obtained evidence relevant to offence 3 under a European Investigation Order ("the EIO"), and on whether in light of the decision of the District Judge, the Requesting Judicial Authority accepted that offences 1 and 3 could only concern events prior to 12 August 2012. At the same time, I adjourned consideration of Mr Misko's application to amend at the new article 6 ground. The hearing of the appeal was resumed and completed on 20 October 2022.

B. Decision

10. The matters to be decided now are as follows. *First*, does the EAW comply with section 2 of the 2003 Act? The submission on this ground was made with reference to offences 1 and 3 in the EAW. *Second*, whether offence 3 is an extradition offence. *Third*,

whether extradition is prevented by section 12A of the 2003 Act (have there been relevant decisions to charge and to try). *Fourth*, whether extradition on offence 2 alone would be disproportionate and/or a disproportionate interference with Mr Misko's article 8 rights. *Fifth*, the application to amend to add the new article 6 ground of appeal.

(1) Does the EAW comply with section 2 of the 2003 Act?

11. So far as material, section 2 of the 2003 Act provides as follows:

> "**2 Part 1 warrant and certificate**
>
> (1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.
>
> (2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—
>
> (a) the statement referred to in subsection (3) and the information referred to in subsection (4), or
>
> (b) the statement referred to in subsection (5) and the information referred to in subsection (6).
>
> (3) The statement is one that—
>
> (a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and
>
> (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.
>
> (4) The information is—
>
> (a) particulars of the person's identity;
>
> (b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;
>
> (c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;
>
> (d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it."

12. Section E of the EAW states as follows:

> "This warrant related in total to THREE (3) OFFENCES…
>
> I. Between 2008 and April 2015 in Stargard Szczecinski (now Stargard) and in the United Kingdom, acting in short successions with a premeditated intent, abusing the vulnerability of the victim, who, given her age, her dependence on him and the fact that she remained under this constant control was unable to stand up to him, on numerous occasions subjected, by force or threat, [AG] … to sexual intercourse – **offence contrary to Article 197(1) concurrently with Article 198 in conjunction with Article 12 and Article 11(2) of the Polish Criminal Code.**
>
> II. Between 2007 and 2012 in Stargard Szczecinski (now Stargard), abuse physically and mentally [AB] as he hit the child with his hand and with a bamboo stick, handled him roughly, called him vulgar names, humiliated him, forbade the boy to contact his grandparents or his mother, forbade him to use the available food, did not let him into the house, took him to an allotment and left the child there without any food – **offence contrary to Article 207(1) of the Polish Criminal Code.**
>
> III. Between June 2010 and November 2017, in Stargard Szczecinski (now Stargard) and in the United Kingdom acting in short successions with a premeditated intent, used hidden cameras to secretly record naked images of his children – [J1 and J2] and … [AG] – **offence contrary to Article 191a(1) in conjunction with Article 12 of the Polish Criminal Code.**"

In response to the request for information in the Order made following the hearing in May 2022, the Requesting Judicial Authority has confirmed that, taking account of the conclusions reached by the District Judge, the allegations of criminality against Mr Misko have been refined and are now as follows:

> "Whilst accepting fully the conditions applied by the District Judge, Blake, in the order of 20 December 2019, which limited extradition to the criminal offences committed only in the Republic of Poland, i.e. earlier than on 12 August 2012:
>
> I. We maintained the decisions to present charges on 14 January 2019, although in its modified version resulting from the condition applied by District Court in the United Kingdom, namely that:
>
> (1) In the period from 2008 to 11 August 2012, in Stargard Szczecinski (today: Stargard), at brief intervals and in the execution of a premeditated intent, using

helplessness of the victim who could not stand up to him because of her age and dependence, and being under his continuous control, he repeatedly bought [AG] … to sexual intercourses resorting to violence and unlawful threat, **which is the offence specified in section 197(1) of the Criminal Code in concurrence with section 198 of the Criminal Code in conjunction of section 12 of the Criminal Code and section 11(2) of the Criminal Code**,

(2) In the period from 2007 to 11 August 2012, in Stargard Szczecinski (today: Stargard), he abused physically and mentally [AB] … in such a way that he beat him with an open hand and a bamboo stick all over his body, tugged at him, offended him in vulgar language, debased him, forbade him to keep in touch with his grandparents and mother, forbade him to take food, would not let him into the flat, took him to the allotment and left him there with no food, **which is the offence specified in section 207 (1) of the Criminal Code,**

(3) In the period from June 2010 to 11 August 2012, in Stargard Szczecinski (today: Stargard), at brief intervals and in execution of a premeditated intent, he would surreptitiously record his naked children [J1 and J2] and [AG] … using concealed cameras, **which is the offence specified in section 191a(1) of the Criminal Code in conjunction with section 12 of the Criminal Code**."

13. The Requesting Judicial Authority has provided further information in response to the request, which is to the following effect.

(1) It is alleged that AG was first raped by Mr Misko when she was 19 years old. It is not possible to determine how many of the acts of rape alleged under offence 1 occurred in Poland and how many occurred in Poland and how many occurred in the United Kingdom.

(2) To the extent that the recordings alleged for the purposes of offence 3 were made in Poland they were made at Flat 82/7 Wojska Polskiego Street in Stargard. The recordings were made in the period from June 2010. The children involved were J1, J2 and AG.

14. The submission for Mr Misko is to this effect: that so far as concerns offence 1, there are no sufficient particulars of when the offending is alleged to have occurred or to how many occasions it is alleged rapes took place; and so far as concerns offence 3, no particulars are given that permit Mr Misko to know the extent of the offences alleged (for example how often is it alleged that filming occurred) or to know anything about the context alleged so as to know whether the filming amounted to some form of indecent conduct, or was merely harmless.

15. *Offence 1.* The submission focuses on the requirement at section 2(4)(c), and is that insufficient information has been provided on the particulars of the circumstances in which it is alleged the offence was committed. I do not accept this submission. What is alleged is rape of [AG]. On the information provided, the rape is alleged to have occurred when AG was 19 years old (i.e., between 7 May 2011 and 6 May 2012). The point that can be made is that, as formulated, offence 1 refers to rapes occurring "repeatedly" and it is known that the period of offending extends to 11 August 2012 (when Mr Misko left Poland). Thus, it can be said that Mr Misko does not know how many occasions he is alleged to have raped AG. I do not consider this is sufficient in this case to reach the conclusion that the warrant does not comply with section 2 of the 2003 Act. The purpose of the information required by section 2 is to permit the requested state, and the requested person also, to understand what is alleged so that each may consider whether any bar to extradition exists. This is the substance of the point made by Hickinbottom LJ at paragraph 54 in his judgment in *FK v Stuttgart State Prosecutor's Office* [2017] EWHC 2160 (Admin). In this case, there is sufficient information for that purpose. The nature of the offending alleged is sufficiently clear. Mr Misko knows that it is alleged that he raped AG, that the first rape occurred between May 2011 and May 2012, and that it is alleged he raped her on other occasions up to the time he left Poland for the United Kingdom in August 2012. In context, it is not fatal for the purposes of section 2, that neither the number of occasions he is alleged to have raped AG, nor the date of each such occasion is not stated. In this regard, it is relevant to note that the information in this part of the EAW is not out of keeping with what might be anticipated in criminal proceedings in England and Wales under rule 10.2 of the Criminal Procedure Rules and paragraphs 10A.11 – 10A.14 of the Practice Directions. For present purposes that is not decisive, but it lends support to the conclusion that the information provided in this case is sufficient to meet any reasonable interpretation of that which section 2 of the 2003 Act requires.

16. *Offence 3.* The EAW also meets the requirements of section 2 of the 2003 Act so far as concerns offence 3. The submission for Mr Misko is that since the number of occasions on which it is alleged filming took place is not stated he does not know the extent of the allegation made, and further that there is nothing in the particulars given to suggest that any filming that may have taken place was anything other than entirely innocent. As to the latter point, the warrant states that filming took place "surreptitiously" and "using concealed cameras". That is sufficient to indicate the quality of the conduct alleged and to identify that what is alleged is an extradition offence. This was the conclusion of the District Judge: see his judgment at paragraph 16 and 32. The answer to the former point is the same to answer above in relation to offence 1. Given the purpose that section 2 of the 2003 Act is intended to serve, the particulars that have been given are sufficient. The absence of particulars of the dates on which or the number of occasions on which the secret filming is alleged to have occurred does not go to the validity of this EAW.

(2) Is offence 3 an extradition offence?

17. Mr Tinsley, counsel for Mr Misko, accepted that the section 2 submission on offence 3 was very closely linked to this submission on the same offence made by reference to sections 10 and 64 of the 2003 Act. The point made by reference to sections 10 and 64 is that there is nothing in the information provided to suggest that what was alleged was anything other than either entirely innocent behaviour, or behaviour which was (as Mr Tinsley put it) "merely weird" rather than criminal. The submission made by the

Requesting Judicial Authority to the District Judge was that the conduct alleged if committed in the United Kingdom comprised the offence under section 67 of the Sexual Offences Act to 2003 (voyeurism) or the offence at section 1 of the Protection of Children Act 1978 (making indecent images of children). That submission does not appear to have been disputed at that stage. As stated above at paragraph 17, the particulars of the offending alleged (surreptitious filming of naked children, using hidden cameras) are sufficient to make it clear that what is alleged is not simply conduct that is "innocent" or otherwise not potentially criminal. The submission based on section 10 of the 2003 Act read with section 64 of the Act therefore fails.

(3) Section 12A

18. In light of the further information provided on 30 June 2022 Mr Misko now accepts that there has been a decision to charge him with offences 1 and 3, each of which is now limited to the period prior to 12 August 2012, in accordance with the conclusion reached by the District Judge. It is submitted, however, that there are reasonable grounds to believe: (a) there has been no decision to try Mr Misko on those charges; and (b) that his absence from Poland is not the sole reason for the failure to take that decision.

19. I do not accept that submission. The 30 June 2022 further information states

> "In the course of proceedings against Miroslaw Misko no indictment against him was lodged with the court, because with his being abroad it was impossible to perform the necessary procedural actions with him participating."

Mr Tinsley submitted this elides a decision to try and the procedural formality of an indictment. That is a significant over-reading of the answer the Requesting Judicial Authority has given. Fairly read, the answer given is that there has been no decision to try Mr Misko because he has been in the United Kingdom.

20. A further point is raised in respect of offence 3. It is submitted that, in addition to Mr Misko's absence from Poland, there must be a further reason why there has been no decision to try – that evidence relevant to offence 3 requested under the EIO has not been provided. The request under the EIO was made on 10 September 2018. The request was for access to computers, phones, recording devices and other things which belonged to Mr Misko, and which have been seized by the United Kingdom and are held at Acton Police Station. I assume either that those devices were used to make the recordings, or the recordings made are stored on those devices, or both. The EIO request was outstanding at the time of the extradition hearing, and at that time was the premise for a submission that any trial on offence 3 would be unfair and in breach of Mr Misko's article 6 rights. The District Judge addressed this submission at paragraphs 39 – 40 of his judgment.

> "39. I accept the contention of the RJA that there is little basis for saying that the UK will fail to honour its obligations and provide the material sought under the EIO request to the Polish Authorities. I am told, (and have no reason to doubt) that there is a clear expectation that the evidence will be handed over as the EIO as an order and "not a traditional MLA request". It is

> authorised in the requested state and there are limited grounds for non-execution.
>
> 40. In any event, and this seems to be the overriding consideration, I have mutual respect for the trial court in Poland to recognise and guarantee the rights of the requested person under Article 6 ECHR. If there is a denial of access to this material I am confident this will be dealt with appropriately in Poland. I am satisfied that no bar arises under Article 6 ECHR."

21. No article 6 submission is made in this appeal. The 30 June 2022 further information confirmed that the evidence requested under the EIO has not yet been obtained. The further information from the Requesting Judicial Authority does not indicate whether it is now believed that the information will still be provided or, whether pending a decision on the extradition request, the request under the EIO has simply been left in abeyance. Be that as it may, the submission for Mr Misko is that if there has been no decision to try Mr Misko on offence 3 that must be not only because his absence from the jurisdiction but also because the absence of evidence sought under the EIO. I do not accept this submission. *First*, it asks me to go behind what the Requesting Judicial Authority has said in the 30 June 2022 further information, and there is no reason that compels me to do that. *Second*, the submission elides the question raised under section 12A of the 2003 Act (has there been a decision to try) with separate questions: (a) whether the case is ready to try; and (b) whether at trial, the prosecution is likely to succeed. Whether or not there is sufficient evidence to support the prosecution is a matter for the Requesting Judicial Authority. Further, as Lord Thomas CJ said in his judgment in *Puceviciene v Lithuania* [2016] 1 WLR 4937 at paragraph 50(ii).

> "… it is necessary to respect, under the principles of mutual confidence which underpins the Framework Decision, the responsibilities of judiciaries in member states of EU to bring cases as expeditiously as possible to trial after the decision to charge and try has been made. It is not for the courts of England and Wales to supervise under guise of section 12A, the way in which such courts progress the cases before them."

In this case there is no necessary inference to be drawn that no decision has been taken to try Mr Misko on offence 3 simply because the EIO remains outstanding.

(4) Would extradition be disproportionate?

22. This submission was made on the premise that one or more of the other grounds of appeal would succeed, meaning that extradition would be possible only in relation to offence 2. Since the other grounds of appeal have failed, the premise for this submission does not exist. This ground of appeal therefore fails.

(5) The application for permission to amend to add a further article 6 ground of appeal

23. This application rests on two judgments of the European Court of Human Rights: *Astradsson v Iceland* (App No. 26374/18, judgment 1 December 2020), and *Advance Pharma v Poland* (App No. 1469/2020, judgment 3 February 2022). In each case the applicant contended he had been denied an article 6 compliant hearing in a domestic court because the court had been appointed by a process that was in breach of relevant national law. In *Astradsson* the complaint concerned one of the three judges in a Court of Appeal in Iceland; in *Advance Pharma* the complaint concerned the entire Civil Chamber of the Supreme Court in Poland. The European Court of Human Rights upheld each complaint.

24. The submission for Mr Misko is that these judgments show a different approach to the one taken, to date, in judgments of the Court of Justice of the European Union ("the CJEU") so far as concerns the effect of article 6 ECHR. Most recently, in cases C-562/21 and C-563/21, judgment given on 22 February 2022, the CJEU restated its previous conclusion that extradition to Poland would not be in breach of article 6 rights simply because there was a risk that (say, in the case of an accusation warrant) the requested person might then be dealt with by a judge appointed under procedures put in place through the program of judicial reform implemented in Poland. At paragraph 98 of its judgment in those cases, the CJEU put the matter in this way:

> "… it must nevertheless be stated … that information relating to the appointment, of an application of a body made up, for the most part, of members representing or chosen by the legislature of the executive, as is the case with the KRS since the entry into force of the Law of 8 December 2017, of one or more judges sitting in the competition court or, where it is known, in the relevant panel of judges, is not sufficient to establish that the person concerned, if surrendered, runs a real risk of breach of his or her fundamental rights to a fair trial before a tribunal previously established by law. Such a finding presupposes, in any event, a case-by-case assessment of the procedure for the appointment of the judge or judges concerned."

25. The submission in support of the application to amend is that there are cases pending before the European Court of Human Rights, and in those cases the court may directly address and dissent from the conclusions reached to date by the CJEU. That being so, and since the European Court of Human Rights is the court with primary responsibility for declaring the meaning and effect of Convention rights, it is submitted there is an arguable article 6 ground of appeal, and permission to amend to add that ground should be granted.

26. I do not accept this submission. The judgment in cases C-562/21 and C-563/21 was a judgment of the Grand Chamber of CJEU. In that judgment the court clearly sets its face against the conclusion that if a person whose extradition is sought may be dealt with by a judge appointed under the new Polish Law, that matter alone is sufficient to establish a real risk of treatment in breach of article 6: see the part of paragraph 98 set out above and see further, the judgment at paragraphs at 82 and 87. Further, a similar submission was made to the Divisional Court in *Wozniak v the Circuit Court in*

Gniezno, Poland [2021] EWHC 2557 (Admin), and was rejected by that court. The material passage is at paragraphs 211 – 214 of the judgment. There, the Divisional Court considered whether, for the purposes of article 6, the existence of a court that is not "established by law" necessarily requires the conclusion that a hearing before that court would entail a "flagrant denial of justice" (the standard relevant to determine whether extradition would amount to a breach of article 6). The Divisional Court concluded by reference to existing authority that it did not. This point further suggests that the judgments of the European Court of Human Rights that Mr Misko now relies on addressed a point that is different to the one addressed by the CJEU. The judgments in *Astradsson* and *Advance Pharma* only concerned the issue of whether the tribunal was "established by law". Neither considered the "flagrant denial of justice" criterion.

27. In any event, for my part, I should both follow the judgment of the Court in *Wozniak*, and attach significant weight to the consistent case law of the CJEU on this issue. In the premises, the application to amend is refused.

C. Disposal

28. For the reasons given above: (a) the application to amend is refused; and (b) the appeal against the extradition order made by the District Judge on 20 December 2019 is dismissed.