Neutral Citation No: [2020] NIQB 19 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **TRE11215** *Delivered:* **03/03/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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BEFORE A DIVISIONAL COURT

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IN THE MATTER OF THE EXTRADITION ACT 2003

BETWEEN:

REPUBLIC OF POLAND

Requesting State/Respondent

v

PIOTR KAIM

Requested Person/Appellant

_____

Before: Stephens LJ, Treacy LJ, Sir Paul Girvan

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TREACY LJ (delivering the Judgment of the Court)

Introduction

[1] On 22 November 2019 the Appropriate Judge, HHJ McFarland, Recorder of Belfast, pursuant to a conviction warrant ordered the extradition of the Requested Person.

[2] Pursuant to section 26 of the Extradition Act 2003 ("the 2003 Act") the Requested Person sought the leave of the High Court to appeal the decision to extradite him. Leave to appeal was refused by the Single Judge, Madam J McBride, in her written ruling dated 11 December 2019.

[3] Pursuant to Order 61A Rule 3 of the Rules of the Court of Judicature the applicant renews his application for leave to appeal before us.

Background Facts

[4] On 5 September 2012 the applicant was convicted of committing two offences of robbery in June 2012. These offences were both committed against women and during both incidents items of jewellery were stolen or attempted to be stolen and violence was used which included holding the victim's face, blocking her nose and mouth with his hand. The applicant was sentenced to a custodial sentence of 2 years. On 31 January 2014 he was convicted of two further offences of robbery which again were committed against women and during which items of jewellery and similar items were stolen or attempted to be stolen and violence was used which included grabbing the ladies around the neck and threatening them. These offences occurred in March and April 2013 and the applicant was sentenced to 2 years and 6 months. It is unclear whether the two sentences were consecutive or concurrent.

[5] The applicant came to Northern Ireland on 30 August 2014. On 20 December 2018 the District Court in Radom, Poland issued the European Arrest Warrant ("EAW") for his arrest and extradition in respect of all these offences. The EAW specifies that the applicant has 1 year 11 months and 26 days remaining to be served. On 15 February 2019 the National Crime Agency ("the NCA") issued a certificate and the applicant was arrested on18 October 2019 and remanded in custody.

[6] On 18 November 2019, days before his extradition hearing which was listed for 22 November, the applicant made an application to the Department of Justice to serve the rest of his sentence in Northern Ireland.

[7] On 22 November 2019 the applicant's previous legal representatives applied to adjourn the extradition hearing to allow his request to serve the rest of his sentence in Northern Ireland to be finalised. The Appropriate Judge refused to adjourn the application, the case proceeded and he ordered the applicant to be extradited to Poland.

Grounds of Appeal

[8] The applicant's new legal representatives accept that it is not arguable that the Appropriate Judge erred in ordering extradition on the basis of the grounds advanced before him namely that it was in breach of section 14 (passage of time) and the applicant's Article 8 rights (section 21).The applicant now seeks to appeal on grounds not advanced before the Appropriate Judge. It is now contended that the learned trial judge erred in failing to:

(i) Allow the applicant to exercise his right to apply to serve his sentence in this jurisdiction; and

(ii) Determine that it was disproportionate to return him to Poland before allowing him to have his application to serve his sentence in this jurisdiction determined by the relevant authorities.

[9] In his Skeleton Argument the Applicant submitted that the UK should not:

(i) Fail to transpose a key feature of the Framework Decision on extradition;
(ii) Then, through its courts, refuse (despite the opinions of Advocate Generals) to make a preliminary reference on the legality of such failure (and partly reliant on Brexit for not doing so);
(iii) In doing so, point to the fact that a domestic mechanism exists (the Repatriation of Prisoners Act 1984);
(iv) Then, not allow the requested person the opportunity to make such representations.

Consideration

[10] The first ground set out at para 8 above is factually flawed. The Appropriate Judge did not fail to allow the applicant to exercise his right to apply to serve his sentence in this jurisdiction. As noted above the applicant lodged an application with the DOJ a matter of days before the scheduled extradition hearing. Following the court's directions the Crown Solicitors Office sought clarification from the Cross Border Transfers Unit ("CBTU") at the DOJ in relation to where the application to transfer his sentence from Poland currently stands along with information on the process involved in those applications. In a letter from the CSO to the Court of Appeal office dated 12 February the CSO noted that they were advised that the usual process begins with the relevant Authority in the country which imposed the custodial sentence sending a completed Certificate to NI which requests that the foreign sentence be transferred and enforced in this jurisdiction. This request will also include any relevant court decisions made in the requesting country. In a case such as this one where the applicant has already provided certain information, the CBTU can carry out the necessary checks to confirm that the applicant meets the "necessary criteria". This includes checks with the PSNI, PBNI and obtaining legal advice on the sentencing legislation in NI. Once the completed Certificate is received and all of the checks completed if the evidence proves that the RP is either "a national of NI" or can prove residence in NI then as long as the offences are recognised offences in NI an agreement can be provided to the requesting country that NI is prepared to accept transfer and enforcement of the sentence in this jurisdiction. If the criteria are met the requesting country is then provided with the NIPS's consent and advice on how the sentence will be enforced in NI with a hypothetical sentence calculation. If the requesting country is content with this information then the warrant can be issued and the prisoner becomes a Northern Ireland sentence prisoner. Any custodial time spent in the requesting country along with any remand time spent in this jurisdiction will be deducted from the sentence and the prisoner will serve the balance in an NI prison. The letter of 12 February also recorded that as no application had yet been received from the Polish authorities it was not possible at that stage to advise on the likely timescale for a decision. The letter also noted that a request for further information ("RFFI") was

sent to the Issuing Judicial Authority to obtain further information on where the application currently stands in Poland. This was sent to the NCA on 13 February for onward transmission to the Judicial Authority. By email dated 18 February 2020 the response from the Polish Judicial Authority to the recent RFFI was that the "Regional Court in Radom II Criminal Division inform, that nobody has made an application in Poland to transfer [the applicant's] sentence of imprisonment from Poland to the UK". The applicant however at the last court hearing handed in a short document in Polish from his Polish lawyer which we were informed indicated that an application had been made. This application has not yet been heard or determined.

[11] The second ground of challenge relates to the asserted disproportionality in returning the applicant to Poland while his application to serve his sentence in this jurisdiction remains undetermined by the relevant authorities.

[12] In this context we note the following:

(i) The important public interest in upholding extradition arrangements, and in preventing the UK as being a safe haven for a fugitive [which, we interpose this applicant is], would require very strong counter-balancing reasons before extradition could be disproportionate."[see Polish Judicial Authorities v Celinski & Ors [2015] EWHC 1274 (Admin) [para 13]

(ii) The appellant's skeleton argument accepts at para 9 that the Appropriate Judge had "little option" but to order extradition given the arguments that were presented to him.

(iii) One of the arguments relied upon and accepted by the Appropriate Judge as a factor *against* surrender was the pending transfer application which he, however, did not regard as a significant factor to be weighed in the balance. This is clear from the transcript.

(iv) In considering the second ground relating to Article 8 ECHR, the Appropriate Judge stated the court was required to consider whether or not the applicant's surrender back to Poland would be proportionate. In the balancing exercise of weighing up factors in favour of and against surrender of the applicant, one of the factors against surrender was that the applicant had made an application to serve the rest of his sentence in Northern Ireland:

> "And finally, I take into account the fact that an application has belatedly been made to the Department of Justice. I understand it was made about three weeks ago and I accept that the court making the surrender order now will essentially stop that process. However, I do take into account

> the merits of that particular application. I question why it has been made so late, clearly in response to these proceedings and I do not regard that as a significant factor to be weighed up in the balance."
>
> The Appropriate Judge proceeded to state that the consequences of surrender have to be exceptionally severe to tip the balance in favour of any requested person. Having considered all the issues individually and collectively, the Appropriate Judge did not consider that there was any evidence of exceptional severity. Having considered all the issues he decided it was proportionate and appropriate that the applicant be surrendered and, accordingly, made the extradition order.

(v) Thus (a) the transfer argument was made before the Appropriate Judge; (b) that argument was taken into account by him as a factor against surrender; (c) he took into account all the material factors individually and collectively; (d) his identification of the factors is not challenged and (e) the appellant accepted in his skeleton argument that the Appropriate Judge had "little option" but to extradite.

[13] We see no basis whatsoever for concluding that the Judge was wrong in his assessment. On the contrary, we agree with his assessment. It may even be thought that the Appropriate Judge was generous in concluding that the making of the surrender order would essentially stop the transfer process.

[14] We do not understand why the Appropriate Judge said making the surrender now would essentially stop the process. It has not been explained to us why the process cannot continue whether he is extradited or not. In any event we agree that it is proportionate and appropriate that the applicant be surrendered.

[15] As noted earlier the important public interest in upholding extradition arrangements and in preventing the UK as being seen as a safe haven for fugitives requires very strong counter-balancing reasons before extradition could be disproportionate. There are none in this case.

[16] The extant application to serve his sentence here does not, in our view, constitute on any rational view a very strong compelling factor which could tip an otherwise acknowledged inevitable extradition into disproportionality. Moreover the lengthy delay that would result from adjournment of the extradition proceedings to await the result of the belated application for transfer is difficult to reconcile with the need for compelling urgency in hearing extradition cases, subject to the interests of justice, as explained in the passage from *Poland v RP* set out at para 25 of this judgment.

Failure to transpose Art 4(6) of the Framework Decision

[17] In effect the sole ground now relied upon by the applicant centres on the asserted failure to transpose Art 4(6) of the Council Framework decision of 13 June 2002. This provides:

> **"Grounds for optional non-execution of the European arrest warrant**
> **The executing judicial authority may refuse to execute the European arrest warrant:**
> **…**
>
> 6. If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law."

[18] As can be seen Article 4(6) provides a discretionary ground for refusal of extradition where the requested person was staying in, or was a national or a resident of, the executing Member State *and* that State undertook to execute the sentence in accordance with its domestic law. As noted in para 10 above the usual process begins with the relevant Authority in the country which imposed the sentence sending a completed Certificate to NI requesting that the foreign sentence be transferred and enforced in this jurisdiction. The CBTU has received no such request and we do not know if any such Certificate will issue. There is no indicative timescale for a decision. Furthermore there is some uncertainty as to whether the applicant has even taken the appropriate steps to trigger the relevant process in Poland. As the email quoted in para 10 notes the Polish Judicial Authority in response to the recent RFFI states that no application to transfer the applicant's sentence has been made. Notwithstanding the foregoing the applicant seeks to call Art 4(6) in aid, requests this court to make a Preliminary Reference to the CJEU as to whether as a matter of EU law the UK is obliged to implement this provision in domestic law, and relatedly seeks the adjournment of this appeal until the response to any Reference is received. We consider any alleged failure of the UK to implement Article 4(6) is of no assistance to the applicant as previous decisions in this jurisdiction recognise that the UK is not obliged to implement 4(6) and that there is no basis upon which to make a preliminary reference to the ECJ as the position is viewed as not requiring clarification (see *Kociolek v Poland* [2017] NIQB 82 at para [20]; *Riordan v RoI* [2017] NIQB 103 at paras [7] and [25] and *Poland v RP* [2014] NIQB 59 at paras [5]-[7] and paras [15]-[18] and in particular para [18].

[19] At paragraph [20] of *Kociolek*, the Divisional Court concluded:

> "…We conclude that the clearly preferable view here is … that the United Kingdom was indeed not obliged to implement 4(6). Given the decision of this Court there is no basis upon which to make a Preliminary Reference to the ECJ as we view the position as not requiring clarification."

We agree.

[20] In addition, at paragraph [23] it was stated that:

> "…It is quite unrealistic to think that Parliament could enact new primary legislation, which would be required, to transpose Article 4(6), if the ECJ so found to be necessary before that decision to leave the EU took effect. It is, of course, most unlikely that the political will to introduce such legislation would be present in any event. We therefore endorse the view of the learned Recorder that such a reference to the ECJ at this time would indeed be largely academic. We remind ourselves of the dictum of Lord MacDermott in McPherson v The Department of Education, NIJB 22 June 1973, that an order of the court "does not usually issue if it will beat the air and confer no benefit on the person seeking it". That is apposite here."

[21] The decision to leave the EU has now taken effect with the UK no longer being a member but in a transition period. However, it is our obligation to apply the law as presently formulated. This is reinforced by the UK Withdrawal Agreement particularly in Art 62 and 86.

[22] In *Riordan v Republic of Ireland* [2017] NIQB 103, one of the grounds was that a failure of the United Kingdom to transpose Articles 4(6) and 5(3) of the European Council Framework Decision of 16 June 2002 on the European Arrest Warrants and Surrender Procedures between Member States into United Kingdom law deprived the requested person of certain rights to serve a prison sentence in Northern Ireland. *Riordan* involved an accusatory warrant whereas Article 4(6) refers to where a requested person has been convicted and a period of imprisonment imposed. Also, paragraph [7] stated:

> "…Secondly, the Court today has decided in the case of *Kociolek v Poland* [2017] that, for the reasons set out in the judgment of the court, it is not mandatory for the United Kingdom to transpose this Article into United Kingdom law, but rather is a matter of discretion, which the United Kingdom has decided not to exercise."

[23] Also, paragraph [25] provides:

> "Finally, in submission during the hearing counsel for the appellant suggested that if the court decided to order the extradition of the appellant one possible course was to submit a relevant question on the issues raised by Articles 4(6) and 5(3) to the ECJ for a preliminary ruling. On further reflection, we are advised that they accept that such a course is not possible or proper, and we agree with that view."

[24] In *Poland v RP* [2014] NICA16 5917 the issue relating to Article 4(6) was discussed by the court but it was not pursued as the requested person subsequently withdrew the judicial review challenge to the failure to implement Article 4(6) of the Framework Decision and, in any case, the court was not persuaded that the overall conclusion reached by the judge that extradition would be disproportionate was wrong:

> "[5] In a submission filed on 14 September 2012 it was argued on behalf of the respondent that the failure of the United Kingdom to transpose Article 4(6) of Council Framework Decision 2002/584 (Article 4(6)) which provided a discretionary ground for refusal of extradition where the requested person was staying in, or was a national or a resident of, the executing Member State and that State undertook to execute the sentence or detention order in accordance with its domestic law was unlawful. The respondent then applied to adjourn the proceedings pending an application to the High Court for judicial review of the failure to implement Article 4(6).
>
> [6] The basis for the proposed challenge was the assertion by the Advocate General at paragraph 33 of his opinion in Criminal proceedings against *Lopes Da Silva Jorge* (Case C-42/11) delivered on 20 March 2012 that the implementation of Article 4(6) was required. This view had also been taken by the AG in *Wolzenburg* (Case C-128/08). *The judgment of the Grand Chamber in Lopes Da Silva Jorge was delivered on 5 September 2012 and did not support the proposition that there was an obligation to implement Article 4(6) but referred at paragraph 30 to the possibility that member states may make provision for the serving of sentences in the requested state.* That suggested that the decision to implement Article 4(6) was a discretionary decision for each member state. The United Kingdom has not made any such provision."

> [7] The learned trial judge accepted the submission that the failure of the UK to transpose Article 4(6) deprived the court of an alternative means of ensuring that the legitimate aim pursued by extradition of sentences being executed on the basis of mutual recognition was achieved. She adjourned the proceedings on 22 January 2013 to allow the requested person to issue judicial review proceedings challenging the alleged failure to implement. The requested person subsequently withdrew the judicial review challenge to the failure to implement Article 4(6). The case was then relisted before the county court judge."

[25] See also, paragraphs [15]–[18] of the judgment, which refers to Article 17 of the Framework Decision and various provisions of the 2003 Act which indicate that delay should be avoided. In particular, paragraph [18] refers to adjournments of an extradition application:

> "[18] It is apparent, therefore, that both under the Council Framework Directive and the 2003 Act there is a compelling urgency about the need to ensure a hearing for such applications with extremely demanding time limits. The statute provides that these time limits can be extended in the interests of justice. That does, however, impose a considerable obligation on the court to monitor the period of any delay taking into account the object and purpose of the Council Framework Directive. In this case the application was listed for hearing in March 2012 but was not in fact dealt with until March 2014. A delay of that period is not consonant with the legislative scheme. In our view where it is considered appropriate in the interests of justice to adjourn an extradition application the adjournment period should be for a fixed time set by the court. In that way the court can consider whether it remains in the interests of justice, having regard to the object and purpose of the Council Framework Directive, to adjourn the case further."

[26] In light of the foregoing we consider, in line with the earlier decisions, that the UK is not obliged to implement Art 4(6) of the Council Framework decision of 13 June 2002 and that there is no basis upon which to make a Preliminary Reference to the ECJ as we consider that the position does not require clarification.

[27] Further as noted in *Kociolek* the Repatriation of Prisoners Act 1984 ("the 1984 Act"), which allows the Secretary of State to agree with an equivalent Minister in another state to take on or give up responsibility for a prisoner, and upon which this

applicant relies, may have addressed the issue. The 2002 Framework Decision needs to be read in the light of the 2008 Framework Decision and section 4(A) of the 1984 Act. The 2008 Framework Decision constitutes a bespoke self-contained set of principles which establish a framework of mutual recognition for the execution of sentences by requesting and executing states. It makes provision for an elaborate and complex process. The 2008 Framework Decision taken together with section 4(A) of the 1984 may constitute, in effect, a transposition of Article 4(6) of the 2002 Framework Decision.

[28] The reliance on Article 4(6) in these proceedings is misconceived given the court's powers on appeal under section 26 of the 2003 Act. Section 27(1) provides that on an appeal under section 26 the High Court may (a) allow the appeal (b) dismiss the appeal. The court may allow the appeal only if the conditions in 27(3) or 27(4) are satisfied. Section 27(4) is the provision relevant to this appeal. The conditions are that (a) an issue is raised that was not raised at the extradition hearing; (b)the issue would have resulted in the Appropriate Judge deciding a question before him at the extradition hearing differently; (c) if he had decided the question in that way, he would have been required to order the person's discharge.

[29] The grounds of appeal in this case are concerned with the alleged error of the Appropriate Judge in refusing to adjourn the case and in ordering his return when he had an undetermined application to be permitted to serve his sentence in this jurisdiction. As noted in para 28 this court can only allow the appeal if the decision on the question would have required the judge to order the person's discharge. Neither the failure to adjourn nor delaying extradition of the applicant until the extant application was decided would have led to the applicant's discharge. A decision not to extradite is not in this instance a decision to discharge. If his extant application was refused he would be extradited and if it was successful he would be serving his prison sentence in this jurisdiction. Neither eventuality is a discharge. Accordingly the test for appeal is not met.

[30] For the above reasons we reject the appeal, affirm the decision of the Appropriate Judge and decline to make a Preliminary Reference.