Neutral Citation No. [2015] NICty 1

Ref:

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **20/03/2015**

In the County Court for the Division of Belfast

In the matter of the Extradition Act 2003

Between

COURT IN SAD OKREGOWY, POLAND

Applicant

V

SEBASTIAN GORSKI

Defendant

Her Honour Judge Smyth

1. This is an application by the requesting state Poland (RS) for extradition of the requested person Sebastian Gorski (RP) pursuant to the Extradition Act 2003 (the Act). The application relates to two European Arrest Warrants (EAWs) which were issued on 16th July 2008 and 22nd September 2009. The first EAW relates to an offence against property which was allegedly committed on 23rd February 2006, and an offence of assault in respect of which the RP was convicted on 20th September 2004. The second EAW relates to three offences, of assault, attempted theft and escaping from custody in respect of which the RP was convicted in March and July 2006.

2. The convictions were originally the subject of suspended sentences which were activated following the RP's failure to comply with attached conditions. The RP concedes that he is unlawfully at large. Correspondence from the RS has confirmed that the RP will be required to serve each sentence

consecutively and accordingly, the totality of the custodial term is approximately 3 years and 5 months.

3. The issues in this case are firstly, whether the offence described in the warrant dated 16th July 2008 as "acting to obtain the property benefits he led the bank…to the unbeneficial management of property at the amount…by misleading the person who signed the loan agreement…in terms of paying it back" satisfies the test of dual criminality contained in sections 2 and 64 of the Act. Secondly, whether extradition is barred by s21 of the Act because it would be in breach of the Article 8 rights of the defendant and members of his family. Although the defendant concedes that he cannot rely on the passage of time as a discrete bar to extradition in view of the fact that he is unlawfully at large, he submits that there has been culpable delay in the execution of the warrants which has significantly impacted on the Article 8 rights of his family.

Dual Criminality

4. In respect of the first issue, the RS submits that despite the imperfect translation, the alleged offence is an extradition offence because it is clear that it is one of fraud, in that he is alleged to have obtained the money from the bank by deception. The RS submits that the three conditions set out at s64(3) of the Act, which deals with dual criminality, are met.

Article 8

5. The defendant submits that he left Poland and came to Northern Ireland on 30th July 2008. His wife came to Northern Ireland in May or June 2008, and the defendant waited until he was granted an identity card from the Polish authorities to enable him to travel lawfully within the EU. A copy of the identity card was produced to the court which contains the defendant's photograph and confirmation of the expiry date of 23rd June 2018. The RP says that it was issued for a ten year period on 23rd June 2008.

6. The defendant submits that when he applied for his identity card he was unaware that the suspended sentences had been activated in March and May 2007, or that he was sought for investigation in respect of the alleged property offence. He submits that he did not flee Poland in order to evade serving the prison sentences, although he accepts that he did not comply with the conditions attached to the suspended sentences, and that he ought not to have left Poland without the express permission of the authorities.

7. The defendant and his wife have lived in Northern Ireland since July 2008. Their first child, F, was born in September 2008 and a second child, D, was born in February 2012. The family has not returned to Poland since 2008 and considers Northern Ireland to be their home.

8. The defendant's wife, Mrs Gorska, has a history of depression, and has been prescribed anti-depressant medication intermittently by her GP since 2013. A letter from the GP states that she has not been referred to psychiatric services, partly due to the lack of community Polish speaking services. Although initially Mrs Gorska reported depression due to social issues, the GP has opined that the defendant's arrest has contributed to a worsening of her mental state. Having heard evidence from Mrs Gorska, I am satisfied from her emotional presentation that she is currently in a depressed state.

9. Mrs Gorska was employed in Northern Ireland as a cleaner until she was made redundant in December 2012 following the closure of the company. During the period of her employment, she was required to travel throughout Northern Ireland and outside the jurisdiction. On the occasions that she worked away from home, the defendant was F's primary carer.

10. Following her redundancy, the landlord for the family home terminated the tenancy due to concern that rental payments would fall into arrears. The family was required to obtain hostel accommodation, which has contributed to Mrs Gorska's emotional distress.

11. The defendant has worked for agencies periodically since coming to Northern Ireland. Documentation from Industrial Temps Ltd, and Tech Trade Recruiting was produced to the court confirming that the defendant used his correct name, national insurance number and address in Northern Ireland. Wage slips for the period 17th September - 5th November 2008 were provided, and for the period 6th September 2009 - 21st February 2010. Documentation from HM Revenue and Customs dated May and September 2012, for the tax year 2011-2012 also confirms that the defendant used his correct name, national insurance number, and address in Northern Ireland. Correspondence from the Social Security Agency confirms that he lawfully claimed benefits during the periods that he was unemployed from 4th December 2012 to 14th February 2014 using his correct details.

12. Apart from road traffic convictions arising out of an incident on 10th October 2008 which were punished by way of a fine and penalty points in May 2012, the defendant has not come to the attention of the PSNI since living in Northern Ireland.

13. The RP was arrested on foot of the warrants on 15th February 2014. The RS submits that although the warrants were issued in 2008 and 2009, they were not sent to the relevant authorities in the UK until 19th August 2010 when information was received about his whereabouts. The 2008 warrant received was defective and an amended version was not received until 15th October 2012. The RS submits that "*police were looking for him until his arrest*".

14. Dr Bownes Consultant Psychiatrist provided a report in relation to the defendant. The report confirms prison records dated 1st May and 7th May 2014 wherein the defendant threatened to commit suicide if he is returned to Poland, because his family is in Northern Ireland and he has nothing in Poland. The defendant told a prison medical officer that he had previously tried to commit suicide at the age of 12 following his mother's death, and that he was subjected to a serious sexual assault during a previous period of incarceration in Poland.

15. On 9th May 2014 the defendant was prescribed anxiolytic mood stabilising and anti-depressant medication. The decision was taken to monitor the defendant's mental well-being in accordance with the Supporting Prisoners At Risk Protocol. On 19th May 2014, it was considered that the defendant no longer posed a risk of harm to himself and monitoring was discontinued. However, on 24th May 2014, the defendant deliberately self-harmed by cutting his neck, which is said to have been related to on-going concern that he was liable to be extradited to Poland. This coincided with a break in contact with the defendant's family caused by the financial cost of travelling to the prison. Prison notes confirm that the defendant continues to be monitored by the mental health team.

16. Dr Bownes opined that there was no indication of confused or delusional thinking or of any clinically significant intellectual impairment. However, he concluded from the prison medical records and the information disclosed at interview, that since the defendant's committal to prison on the extradition offences he has shown significant levels of psychologically distressing symptomatology. In his opinion, the defendant is currently suffering from an adjustment reaction which he described as a state of subjective distress and emotional disturbance which arises in the period of adaptation to a stressful life event.

17. Dr Bownes explained that when such stressors persist, an individual can experience a broadening and deepening of the presenting symptomatology resulting in a discrete depressive episode. Factors associated with his

extradition could render him liable to increasing levels of emotional distress. Dr Bownes considered that the risk of a further suicide attempt in this case in the event of extradition must be viewed as a strong possibility.

18. Dr Leddy Consultant Child and Adolescent Psychiatrist also provided a report in respect of the defendant's son F who is now aged six. F's mother told Dr Leddy that his presentation has changed significantly since his father was incarcerated. She described his behaviour as being more difficult to manage and said that he cries more often. F is aware of his mother's distress, but he has been told that his father is working away from home and she has appropriately reassured him.

19. Both F and D were born in Northern Ireland; they have never visited Poland and it would not be feasible for the family to move to Poland in the event of extradition. It would be difficult for the family to visit the defendant in Poland because of financial difficulties. In Northern Ireland, the defendant is able to speak to his children by telephone every day but if he is returned to Poland he would only be permitted to speak to his children once a week. Telephone and visiting records produced to the court confirm regular contact between the RP and his family.

20. Dr Leddy described F as well settled in school and having a close relationship with his mother. She opined that he misses his father and that the loss of direct contact would make it harder for F to remember him. The current separation between father and son has caused F grief and extradition to Poland is likely to cause more persistent grief and loss. She concluded that there is a risk that this will result in depression which could impact upon his ability to concentrate in school and that he would become more socially withdrawn and isolated, particularly if his mother's mental health deteriorates and he becomes worried about her wellbeing.

21. On the 14th January 2015 Dr Leddy provided an additional comment in light of the report from Mrs Gorska's GP, dated the 7th January 2015. Dr Leddy stated 'I can confirm my opinion as stated in my report of 20.6.14, that a deterioration in the mental health of F's mother may impact upon F's social function. If Mrs Gorska is depressed, this may reduce her ability to respond supportively to and to nurture F. This will make it more difficult for F to adjust to any loss of contact with his father, and could potentially affect his ability to engage fully with his school work and other relationships for a period.'

The Law

Dual Criminality

22. Section 64 of the Act sets out the test for determining whether a person's conduct constitutes an "extradition offence" in a case where the person is either accused or convicted of an offence in a category 1 territory. Poland is a category 1 territory for the purposes of the Act. Section 64(3) states that the relevant conditions necessary to constitute an "extradition offence" are –

(a) The conduct occurs in the category 1 territory;

(b) The conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;

(c) The conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment…"

Article 8

22. Section 21 of the Act states that an extradition order must be refused if it would be incompatible with the Convention rights within the meaning of the Human Rights Act 1998. In Norris v Government of the United States of America (No 2) [2010] 2 AC 487 the principal issue was whether a person seeking to resist extradition was required to demonstrate exceptional circumstances. In dismissing the appeal, Lord Phillips said that it would only be the gravest effects of interference with family life that would render extradition to stand trial for serious offences disproportionate to the public interest in the prevention of crime. Lord Hope agreed that interference with article 8 rights resulting from extradition would only be disproportionate if some *exceptionally compelling feature* was present.

23. In HH v Westminster City Magistrates' Court [2012] UKSC 25 Lady Hale, referring to Norris, criticised the failure of some courts to carefully examine the nature and extent of the interference in family life. At paragraph 109, she said that in focussing on "*some quite exceptionally compelling feature*", they have fallen into the trap…. tending to divert attention from consideration of the potential impact of extradition on the particular persons involved …towards a search for factors (particularly external factors) which can be regarded as out of the run of the mill": paragraph 109

24. At paragraph 30 of the judgment Lady Hale explained the correct approach to article 8 rights in an extradition case. She stated that in determining

whether the person's extradition would be compatible with the Convention rights -

> *"30*….the court would be well advised to adopt the same structured approach to an article 8 case as would be applied by the Strasbourg court. First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate aims within those listed in article 8.2. Third, it asks whether the interference is "necessary in a democratic society" in the sense of being a proportionate response to that legitimate aim. In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale…."

25. The importance to be attached to the interests of children in the balancing exercise was explained at para 33:

> "Article 8 has to be interpreted in such a way that [children's] best interests are a primary consideration, although not always the only primary consideration and not necessarily the paramount consideration. This gives them an importance which the family rights of other people (and in particular the extraditee) may not have".

26. At para 34 she said:

> "One thing is clear, it is not enough to dismiss these cases in a simple way – by accepting that the children's interests will always be harmed by separation from their sole or primary carer but also accepting that the public interest in extradition is almost always strong enough to outweigh it. There is no substitute for the careful examination envisaged by Lord Hope DPSC in Norris…."

27. In Slawonir Oreszczynsi v Krakow District Court Poland delivered 19th December 2014, Blake J considered the issue of culpable delay in the issuing and execution of extradition warrants in the context of Article 8 rights. Referring to HH, he said, at paragraph 10 "a delay in taking reasonable steps to execute an EAW engages issues of human rights. It is now plain, if it was ever in doubt, that extradition procedure has to meet standards set by human rights law, and the law on article 8 attaches weight to periods of delay where interferences with private and family life are concerned."

28. He also cited passages from the judgment of Lord Bingham in EB Kosovo [2008] UKHL 41, an immigration case where, although the context is different, similar views are expressed to those of the Supreme Court in HH. Lord Bingham said:

> "It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

Delay may be relevant in a second, less obvious way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see Boultif v Switzerland (2001) 33 EHRR 50, para 48; Mokrani v France (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it

took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone), heard by the Court of Appeal at the same as the present case, there was somewhat similar pattern of facts. JL escaped from Sierra Leone with her half-brother in 1999 and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half-brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwarth LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575, para 25:

> "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal.

29. In Bizunowicz v District Court in Koszalin (Poland) [2014] EWHC 3238, the relevance of lapse of time as a factor when balancing article 8 considerations was also discussed. Although the court recognised the heavy weight to be given to the public interest in extradition, extradition was refused because of the RP's family circumstances considered in the light of the delay that had ensued.

30. It has always been accepted that the consequences of culpable delay may be relevant to the decision whether it would be unjust or oppressive to extradite a person. In Kakis v Government of the Republic of Cyprus [1978] 1 W.L.R. 779, a judgment of the House of Lords prior to the 2003 Act, Lord Diplock explained that whilst delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself fleeing the country, concealing his whereabouts, or evading arrest cannot be relied upon as a ground for refusing extradition except in the most exceptional circumstances, delay which is not brought about by the acts of the person himself, is relevant in terms of its effect.

31. While the RP accepts that he cannot make the case that extradition is barred by section 14 because of the decision in Kakis, he submits that delay which is not attributable to his acts can be considered in the context of the article 8 issue. This approach was considered appropriate by Higgins LJ, delivering the judgment in Poland v KS [2014] NIQB 86.

Discussion

Dual Criminality

32. I accept the submission of the RS that despite the poor translation of the property offence contained in the EAW, the equivalent offence is one of fraud namely obtaining property by deception and that all three conditions are satisfied to reach the conclusion that it is an extradition offence.

Article 8

33. Approaching the issue in the manner suggested by Lady Hale in HH, it is clear that the central issue is whether it is necessary in the interests of the prevention of crime to extradite the RP to Poland. In considering that issue, it is clear that the public interest in ensuring that there are no safe havens to which fugitives from justice can flee in accordance with international Treaty obligations carries huge weight.

34. What must be put in the balance in this case is the effect of culpable delay in the issuing and execution of the warrants on the RP and the individual members of his family, if the court finds that it has occurred.

35. The RS does not challenge the RP's evidence that he applied for and was granted an identity card in June 2008 which enabled him to lawfully leave Poland and travel within the EU. According to the chronology prepared by the RS, this identity card was therefore issued a matter of weeks before the EAW was issued on 16th July 2008.

36. The significance of the date of the identity card is that it does not support the submission of the RS that Polish police were searching for the RP since 2007 when the suspended sentences were put into operation, or that his actions in leaving Poland "*show a blatant disregard and contempt for the orders of the sentencing court*". It is reasonable to infer that the Polish authorities were aware of the RP's whereabouts when he applied for the identity card. I accept the RP's evidence that having obtained a valid identity card, he travelled to Northern Ireland from a Polish airport, without any intervention from the authorities, to join his wife who had travelled two months previously.

37. In determining whether there has been culpable delay in executing the warrant between the date the earliest valid warrant was received by the U.K. authorities (SOCA) - 19th August 2010, and the date of execution - 15th February 14, it is necessary to consider the actions of the RP. It is clear from

the wage slips produced that the RP was legally employed periodically since 2008 and that his details were available to the authorities. Her Majesty's Revenue and Customs corresponded directly with the RP in relation to the tax year 2011-2012 in May 2012 and a P45 was sent to that authority in September 2012. Similarly, the RP claimed job seekers allowance from 4th December 2012 until 14th February 2014.

38. The RP was prosecuted in the Magistrates Court in May 2012 for offences committed in 2008, and thus was in actual contact with the PSNI during that period. In those circumstances, I reject the submission of the RS that "*the police were looking for him until his arrest*" in February 2014.

39. No information has been provided by the U.K. authorities regarding checks made to locate the RP from 5th October 2010, when according to the chronology prepared by the RS a possible U.K. address was provided by Poland until his arrest in February 14. The RS asserts that police checked two addresses without success. Clearly however, if checks had been made with Her Majesty's Revenue and Customs and with the Social Security Agency, the RP's whereabouts could have been ascertained and the warrant executed expeditiously.

40. In Oreszczynsi v Krakow District Court Poland, Blake J concluded that a failure on the part of the body responsible for executing a warrant to make enquiries for four years, in circumstances where the RP was registered with the Home Office amounted to culpable delay. He described culpable delay as arising when "something ought to have been done quicker than it was and there is no good explanation for why it was not". He also explained the difference between culpable delay and mere passage of time. In recognising the pressures on the resources of public bodies, and the difficulties in progressing such applications when there may be no good information regarding the whereabouts of a fugitive, he considered that the failure to make *any* enquiries in the circumstances justified the conclusion that the relevant body was either not acting reasonably or was not competent to make enquiries or both.

41. In Oreszczynsi Blake J rejected the submission that the National Crime Agency (NCA) which is responsible for issuing a Certificate pursuant to section 2(7) of the Act was not under a statutory duty to investigate the possible whereabouts of a fugitive. He said that "on that submission an EAW could gather dust over the decades unless and until the happenstance of a police encounter were to incur". In this case, despite the police encounter

arising out of the road traffic offences, and his court appearance in May 2012, no steps were taken to execute the warrant until February 2014.

42. I am satisfied that the RP was living and working openly in Northern Ireland from 2008, and PSNI records would also have revealed his whereabouts. In those circumstances, I infer that the failure to execute the warrant was not due to any act of the RP but was due to a failure on the part of the authorities to act reasonably and competently. I have therefore concluded that there has been culpable delay.

43. However, the central issue to be determined is the extent to which that delay has impacted on the Article 8 rights of each family member, and what weight should be attached to it in the balancing exercise that the court must carry out in this case.

44. Even if the RP was aware that his suspended sentences had been activated in 2007, which he denies, I accept that the circumstances in which he travelled from Poland to Northern Ireland may have given rise to a reasonable expectation on his part and that of his wife that the RS did not intend to seek his removal back to Poland. Certainly, if that were not true initially, as the months and years passed during which the RP was working and claiming benefits legally, such an expectation was likely to grow. I do of course recognise that the RP is a fugitive and regardless of the circumstances in which he left Poland, he is primarily responsible for his being at large.

45. The RP and his wife have now been living in Northern Ireland for more than six years. Two children have been born to them, and apart from the RP's road traffic offences in 2008, they appear to have led blameless lives. The delay in issuing and executing the warrants has resulted in this family establishing deeper roots in the community than would have been the case if delay had not occurred.

46. This is especially true for F and to a lesser extent D. F is now six years old and has never known any home other than Northern Ireland. He is well settled in school and is described by his teachers as eager to learn English. He has a strong bond with his father despite his imprisonment awaiting extradition and Dr Leddy has described the impact separation as a consequence of extradition is likely to have on him.

47. In respect of Mrs Gorska, she has a history of employment in Northern Ireland and has made her home here. I accept that the extradition of her husband is likely to exacerbate her depressive illness which in turn is likely

to impact on her ability to care for and support her children following the loss of their father. With the passage of time, and the births of her children, there is no question of her uprooting her family to Poland. Her financial difficulties mean that there will be little direct contact with the RP if he is returned to Poland.

48. The medical evidence provided to the court by Dr Bownes confirms the RP's current mental state and the impact that a return to Poland in circumstances where he "has nothing in Poland" is likely to have on his prognosis. I accept that the delay in executing the warrant has contributed to the RP's psychological distress because with the passage of time he has founded a family here.

49. Into the balance must also be placed the seriousness of the offences which form the basis of the EAWs. Whilst not trivial, the RS concedes that "*they may not be considered particularly serious*". Certainly, none of them were considered sufficiently serious to warrant immediate custodial sentences, and were activated because of a failure on the part of the RP to comply with probation conditions.

50. I accept that had it not been for the culpable delay in this case, the family circumstances of the RP would be insufficient to justify a refusal to return him to Poland when weighed against the important public interest that the U.K. should honour its Treaty obligations. However, the period of culpable delay is such that the Article 8 rights of each of the family members should be afforded increased weight, against the public interest in returning the RP.

51. It is likely that the warrant could have been executed in 2010, four and a half years ago, before F began his education and before D was born. Their mother is now responsible for two children whose welfare will be affected by the removal of their father to Poland, in circumstances where she is suffering from depression. The RP, who has demonstrated concerning psychological symptomatology since his arrest, was granted an identity card by the RS which enabled him to travel to Northern Ireland more than a year after the suspended sentences were activated. The family has now lived in Northern Ireland for six and a half years. The RS accepts that the offences "*may not be considered particularly serious*" and apart from the road traffic convictions in 2008 the RP appears to have changed his lifestyle and lived a blameless life in Northern Ireland, working and paying taxes. In all of the circumstances, I am satisfied that it would now be disproportionate to order extradition and I refuse the application.