

Neutral Citation No: [2016] NICty 2

Ref:

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

Delivered 26 May 2016

In the County Court for the Division of Belfast

In the matter of the Extradition Act 2003

Between

REPUBLIC OF POLAND

Applicant

V

ZBIGNIEW MALACHOWSKI

Defendant

Her Honour Judge Smyth

Introduction

1. This is an application by the requesting state Poland (RS) for extradition of the requested person, Zbigniew Malachowski (RP) pursuant to the Extradition Act 2003 (the Act). I am grateful to both counsel for their very helpful submissions and authorities.
2. The application relates to a European Arrest Warrant (EAW), issued on 7th June 2013 for an offence of theft in the sum of approximately £550 allegedly committed between 30th June 2005 - 30th August 2005. The complainant is the RP's former employer, a company known as *Master Bot*. The offence carries a maximum sentence of three years' imprisonment.

3. The warrant is an accusation warrant. By letter dated 28th March 2014, the regional prosecutor's office in Lomza, set out the following chronology:

- On 12th December 2005, the "aggrieved person" reported an offence to the Police
- On 21st December 2005, the investigation was started
- On 1st February 2006, a decision was made to present charges against the RP
- On 16th February 2006, the prosecution issued an arrest warrant after it was discovered that the RP was not at his place of permanent residence
- On 29th June 2007, the charge was changed as a result of evidence gathered in the investigation
- On 18th March 2008, as a result of the change of charge, the Lomza district court passed a new decision on the temporary detention of the RP
- Searches conducted by the Polish Police revealed that the RP might be staying in the USA or [Ireland]
- On 11th April 2013 the city police in Lomza informed the prosecutor that the RP was staying in Northern Ireland
- On 29th May 2013, the prosecutor drew up a motion to issue an EAW
- On 7th June 2013, Lomza District Court issued the EAW

The Extradition Proceedings

4. The EAW was executed on 13th March 2014. The court was told that the RP had lived and worked in Northern Ireland since 2005 and released him on bail without objection. After further review, a timetable was set down for final hearing on 26th September 2014.

5. At that hearing, the RP indicated that he wished to consider making an application under Section 21B of the Act which came into force on 21st July 2014. Section 21B enables either the RS or the RP to apply to the court for the RP's return to the RS temporarily or for communication to take place between the parties and their representatives. This section was inserted into the Act by Article 159 of the Anti-Social Behaviour, Crime and Policing Act 2004. The court acceded to an adjournment application.
6. On 4th November 2014, the RP formally requested that arrangements be made to enable him to speak with representatives of an authority in the RS *responsible for investigating, prosecuting or trying the offence specified in the warrant* , pursuant to section 21B (3) of the Act, on the following grounds:
 - This is an accusation case
 - There has been a significant passage of time since the date of the alleged extradition offence
 - The alleged offence is relatively minor and would not necessarily attract a custodial sentence upon conviction
 - The RP has a clear criminal record in Poland
 - The RP has no convictions in Northern Ireland for similar offences
 - The RP has been living and working in Northern Ireland since 2005
7. On 31st November 2014, the RS confirmed that the Polish prosecutor was willing to speak with the RP on the grounds set out in the application. The case was adjourned to enable discussions to take place. After several unsuccessful attempts to arrange a video conference, this finally took place on 30th December 2014.
8. On 12th January 2015, the regional prosecutor's office confirmed that the RS continued to seek the extradition of the RP for the purposes of investigation.

However, the court was told that discussions were ongoing and a final hearing was listed for 1st May 2015.

The grounds on which extradition is resisted

9. The RP resists the extradition request on three grounds, namely:

- (a) section 14 of the Act (*passage of time*),
- (b) section 21A(1)(a) of the Act and Article 8 ECHR (*right to family life*).
- (c) section 21A(1)(b) of the Act (*proportionality*)

10. The following facts are not in dispute:

- The RP, who is now 46, left Poland on 2nd September 2005 and came to Northern Ireland
- The RP used his Polish passport to travel to Northern Ireland which was issued on 28th October 1997 by the Consulate of Poland in New York
- On arrival in Northern Ireland, the RP made an application to the Home Office for registration with the Worker Registration Scheme. This was a legal requirement under the Accession (Immigration and Worker's Registration) Regulations 2004 for Polish and other A8 nationals who wished to work in the UK for longer than one month
- Information relating to the operation of the Scheme confirms that "*on receipt of the registration form, UKBA will carry out checks to ensure that an employee is a genuine A8 national and that the employer is also genuine. Once the employee is accepted onto the scheme he or she receives a registration card ...*"
- On 29th September 2005, the RP's application for registration was approved. He was issued with a worker registration card authorising him to work for Kerry Foods at an address in Enniskillen

- The RP was registered for tax with HM Revenue and Customs in 2005. His correct name, address and National Insurance number was used for correspondence
 - The complaint giving rise to the alleged offence was not received by the Polish authorities until 12 December 2005, *3 months after the RP had left Poland*. There is no evidence that the RP had any knowledge of the complaint prior to his arrest in May 2014
 - Prior to leaving Poland, the RP and his wife had given evidence in the course of a trial against a number of defendants who were convicted of extortion and criminal damage of his wife's property. Each defendant was sentenced to imprisonment
 - The RP has no criminal record in Poland. He was convicted in Northern Ireland on 7th September 2011 of four road traffic and related offences, and subsequently on 28th January 2013 of further road traffic offences
11. The RP denies that he is guilty of the alleged extradition offence or of any wrongdoing. He accepts that prior to coming to Northern Ireland he worked for a company called *Master Fot*. His job entailed collecting camera film rolls and delivering them by bus to their destination. He was paid a modest wage. He denies that his job allowed him access to any significant quantities of money such as the amount (approximately £550) he is accused of stealing.
12. The RP asserts that he and his wife left Poland firstly, because they felt under threat having given evidence in a high profile criminal trial in 2004 and, secondly, because they wanted a better life. The RS accepts that the RP and his wife did give evidence in this trial, although it asserts that it did not involve organised crime or the mafia. The RP denies any knowledge of the allegations until his arrest in 2014. He has been in

continuous employment since 2005, has paid his taxes and he and his wife regard Northern Ireland as their home.

13. The RP submits that extradition would be unjust because there is a real possibility that he would be unable to have a fair trial due to the passage of time. He has little or no recollection of his work routine prior to him leaving the RS. He is now unable to identify potential witnesses or exculpatory evidence.
14. He further submits that there has been culpable delay on the part of the RS. He was registered with the Home Office in 2005 and with HM Revenue and Taxes since then. He has lived openly, without concealing his identity or his whereabouts. He had no reason to believe that he was not free to forge a new life in Northern Ireland.
15. In view of the delay in issuing the EAW and the passage of time since the alleged offence was committed, the court sought further information from the RS and the Home Office. By letter dated 15th May 2015, the RS was asked to confirm:
 - what enquiries were made regarding the RP's whereabouts from the date of the new charge in 2007 until the EAW was issued in 2013,
 - the date the international search commenced, and
 - whether any contact was made with the Home Office or the Polish Ministry of Foreign Affairs
16. On 27th May 2015, the RS confirmed that *"in the period between 2007 and 2013, the Polish authorities did not make any contact with the United Kingdom Home Office or other EU Member States. Nor did they make any inquiries at the Polish Ministry of Foreign Affairs"*.
17. On 15th May 2015, the Home Office was asked to confirm:

- what cooperation, if any, existed between the Home Office and the Polish Ministry of Foreign Affairs regarding registration in accordance with The Accession (Immigration and Worker Registration) Regulations 2004,
- what documentation was required for registration, and
- whether the worker's identity was verified with the Polish Ministry of Foreign Affairs or other Polish Government Department.

A copy of the RP's Worker Registration Certificate and Card were enclosed in order to assist with the enquiries along with documentation from HM Revenue and Customs.

18. No response has ever been received from the Home Office. The Crown Solicitors' Office made informal enquiries in order to expedite the matter. It appears that there were difficulties identifying the appropriate person to deal with the matter because the Worker Registration Scheme ceased to exist in May 2011. The case was adjourned until September while efforts were made to obtain a response to the court's correspondence.
19. In the meantime, the RS was asked to clarify the information which led to the location of the RP and when that information was received. By letter dated 28th August 2015, the RS replied that *"the police investigation revealed that [the RP] was staying in the Northern Ireland, is well known to the local police, of which the police informed the prosecutor in the letter of 11th April 2013. Based on these findings, on 29th May 2013, the prosecutor applied to the regional Court in Lomza for the EAW to be issued. The police have no duty to reveal the sources of information obtained through investigative operations."*
20. On 4th September 2015, counsel for the RS confirmed that a senior Home Office civil servant in the Worker Registration Agency at the relevant time had been identified and requested further time to provide the information to the court.

21. On 9th October, the court was told that the RP had been charged with domestic offences and the extradition hearing could not proceed until the conclusion of those matters.
22. The case concluded on 31th March 2016 in the absence of any reply from the Home Office, or explanation for the failure to respond to the court's request for information.

The Law

Passage of Time

23. Section 14 of the Act states that extradition is barred by reason of the passage of time *if (and only if)* it appears that it would be *unjust or oppressive* to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence (where he is accused of its commission) or become unlawfully at large (where he is alleged to have been convicted of it).
24. In *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779,782-783, Lord Diplock said:

"Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration: but there is room for overlapping, and between them they would cover all cases where to return him would not be fair.
25. The approach the court should take is explained at paras 5.52-5.64 of *The Law of Extradition and Mutual Assistance, Second Edition*. Paragraph 5.53 on page 78 states that *"the relevant period runs from the date of the alleged offence to the date of challenge. The court is required to ascertain facts relied upon by the defendant as giving rise to injustice or oppression. The standard of proof is the balance of probabilities and the burden lies on the defendant. Where necessary,*

the court is entitled to look at any evidence given by the defendant and to form a view whether, in reality, it lacks any real credibility. Where the issue of delay under section 14 is raised, even if it is unsupported by evidence, then the appropriate judge should decide the issue”.

26. Paragraph 5.57, states that *“if the requesting government can be shown to have been inexcusably dilatory in taking steps to bring the defendant to justice, then this may serve to establish the necessary injustice and oppressiveness, whereas the issue may be left in some doubt if the only known fact relates to the passage of time. A sense of false security engendered in the defendant is also a relevant consideration. If the actions of the government have led him to believe that he will not be extradited then it may be oppressive if the government then proceeds to try to do so.”*
27. It is clear from the authorities that section 14 requires a fact-specific enquiry and the test for injustice is a high one. The court must consider how and to what extent the passage of time caused injustice or oppression in the circumstances of the particular case (*Kakis v Government of Cyprus* [1978]779, 785). In determining whether extradition would be unjust, there must be more than a mere risk of prejudice. The court must assume that the court processes within member states are capable of safeguarding an accused’s interests. The issue is whether a fair trial is impossible and where loss of evidence is alleged due to the passage of time, an analysis must be carried out of the extent to which the RP is likely to be prejudiced. The RS may also be prejudiced by loss of evidence and a balancing exercise has to be undertaken. (*Government of the United States of America v Tollman* [2008] EWHC 184 (Admin), paras 47-50, para 68.).
28. The question of whether extradition would be oppressive must be considered in light of the totality of the circumstances. In *Italy v Merico* [2011] EWHC 1857 Mitting J explained that whilst, individually, the reasons identified by the RP may not suffice, taken together they may be

capable of meeting the test.

29. The gravity of the offence is a significant factor to be considered. The more serious the offence, the greater the burden will be on a RP to show oppression (see *Tappin v United States* [2012] EWHC 22 (Admin) per Cranston J at paragraph 25).

Right to family life

30. Section 21A of the Act states as follows:

“21A Person not convicted: human rights and proportionality

(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person (“D”) -

(a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;

(b) whether the extradition would be disproportionate.

31. In *Norris v Government of the United States of America* (No 2) [2010] 2 AC 487 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.
32. In *HH v Westminster City Magistrate’s Court* [2012] UKSC 25 Lady Hale explained the correct approach to article 8 rights in an extradition case. At paragraph 30 she stated *“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.”

33. In Slawonir Oreszczynsi v Krakow District Court Poland delivered 19th December 2014, Blake J considered the issue of culpable delay in the context of Article 8 rights. At paragraph 10 he said that *“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”*.

Proportionality

34. Section 21A(1)(b) requires the court to consider whether extradition would be disproportionate. The court must take into account the specified matters in sub-paragraph (3) (so far as the judge thinks it appropriate to do so), but must not take into account any other matters.
35. The specified matters are:
- (a) the seriousness of the conduct alleged to constitute the extradition offence;
 - (b) the likely penalty that would be imposed if [the RP] was found guilty of the extradition offence
 - (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of [the RP]

Discussion

36. This is an unusual case. There is no suggestion that the RP fled the RS to evade the authorities. The complaint giving rise to the alleged extradition offence was made three months after he had come to Northern Ireland. Nor is there any evidence that he knew he was sought for investigation at any time prior to his arrest in 2014. Nine years has now elapsed, during which the RP has lived in Northern Ireland with his wife.
37. The central issue for the court is the effect of the passage of time on the particular circumstances of this case, and whether it would now be unjust or oppressive to extradite him. This includes an examination of the reasons for the delay and if there is no satisfactory explanation, what weight should be attached to that factor in balancing the public interest in extradition with the RP's Article 8 rights. Since this is an accusation warrant, the court must also consider separately the free standing test of proportionality in Section 21A(1)(b) of the Act.
38. The RP asserts that extradition would be "unjust" because he can no longer receive a fair trial due to the passage of time. I accept that after such a long period of time it is unlikely that the RP will be able to recall important information about the work routine, or identify reliable defence witnesses, particularly when he had no reason to do so until his arrest in 2014.
39. However, the court is required to approach this issue on the basis that the requesting state is bound by Article 6 requirements, and assume that safeguards similar to the abuse of process jurisdiction are available to protect the RP in such circumstances. This court has limited knowledge of the evidential basis for the charge and the judge in the RS is in a better position to identify whether a fair trial can now take

place, taking into account the prejudice to both parties caused by loss of evidence.

40. The RP also submits that extradition would cause “hardship” because of the changes to his circumstances in the nine years that have elapsed since he left the RS. There is no doubt that extradition always involves difficulties and distress to those involved and their families. Hardship has to be considered in the context of the strong public interest that the UK should honour its Treaty obligations.
41. In this case the RP does not have any dependent children, which would require the court to pay particular attention to the effect of removal of the RP upon them. However, the RP and his wife constitute a family unit, which is entitled to the protection of Article 8 ECHR also. It is well recognized that the longer the period which has elapsed before extradition is sought, the more likely it is that the RP will have developed closer personal and social ties, and will have established deeper roots within the community (*Oreszczynsi v Krakow District Court Poland* [2014] EWHC 42339 Admin). The delay in this case, to which I will turn in a moment, has strengthened the RP’s Article 8 claim.
42. The fact that the RP did not flee the requesting state in order to evade prosecution is a very significant factor in this case. He did not come to live in Northern Ireland under the shadow of the threat of removal at any time. He had no reason to believe that he was not free to make a new life in Northern Ireland permanently. This is relevant to the effect upon him of extradition. He has settled with his family in a way which he may not have done had he known of the possibility of extradition.
43. The RS did not issue an EAW until June 2013, seven and a half years after the complaint giving rise to the alleged extradition offence. The RS accepts that between 2007- 2013 it made no contact with the Home Office, other EU states, nor did it make any enquiries with the Polish

Ministry of Foreign Affairs. The RS has not explained how, or in what circumstances police became aware in 2013 that the RP was living in Northern Ireland.

44. The Home Office has declined the opportunity to provide the court with any information regarding the co-operation, if any, between the Home Office or the Polish Ministry of Affairs regarding the Worker Registration Scheme. In particular, the Home Office has not taken issue with the information provided by the RP that the UKBA carried out checks to ensure that an applicant for registration was a genuine A8 national, and that the employer was also genuine. In those circumstances, it is reasonable to infer that shortly after the RP left the RS, the UKBA was in contact with the RS specifically to confirm the RP's details.
45. This is a case where, in all likelihood, the RS was given the information about the RP's whereabouts very shortly before the complaint giving rise to the alleged extradition offence was made. In the tax year 2005-2006 the RP was registered for tax purposes with the employer who had been approved by the Home Office. He has lived openly using his correct details since then. I am satisfied that the failure to issue the warrant until 2013 was due to a failure on the part of the RS to act reasonably and competently and that there has been culpable delay. In *Oreszczyński*, Blake J described culpable delay when "*something ought to have been done quicker than it was and there is no good explanation for why it was not*".
46. The offence itself involves an allegation of theft from the RP's employer. Such offences always involve a breach of trust. However, given the amount involved, (approximately £550) it is accepted that the offence may be considered at the lower end of the scale. The fact that the RP had a clear criminal record in Poland is also a factor which mitigates the seriousness of the offence.

47. Whilst none of these factors by themselves would be sufficient to meet the test of oppression within Section 14, I consider that the accumulation of the circumstances crosses the line between the hardship caused in many extradition cases and that which is sufficient to bar extradition.
48. Section 21A(1)(a) of the Act and Article 8 ECHR are engaged in this case. It is clear that the court must weigh the nature and gravity of the interference with the RP's rights against the importance of the aims pursued by extradition. Only in the gravest of cases will individual Article 8 rights outweigh the public interest in extradition.
49. It is clear from the authorities that I am entitled to take into account the culpable delay which has occurred in this case and the effect that has had on the RP's life. The seriousness of the offence is also of considerable importance. Whilst in normal circumstances this RP's personal circumstances could never be considered sufficiently important to justify a refusal to order extradition, the exceptional period of culpable delay which has occurred in this case, along with the fact that the RP did not flee the RS, means that his Article 8 rights and those of his wife should be afforded increased weight. In the particular circumstances of this case, bearing in mind that this is an accusation warrant, I consider that the balance should be struck in favour of the RP.
50. I have separately considered section 21A(1)(b) as a freestanding bar to extradition. I am required to take into account only the specified matters in section 21A(3), insofar as I consider it appropriate to do so. In relation to the matter specified at (a), I have already found as a fact that whilst the alleged extradition offence is not trivial, it is at the lower end of the scale in terms of seriousness. The issue for further consideration in this case is that specified at (b), "*the likely penalty that would be imposed if the RP was found guilty of the extradition offence*". The

question is whether the RP is likely to receive a custodial sentence in the RS and if not, whether it would be proportionate to extradite him. It is right to say that in cases involving breach of trust a court may impose a custodial sentence when otherwise it might not do so. However, a custodial sentence is certainly not inevitable in view of the sum involved and the fact that the RP had a previously clear record. In relation to the matter specified at (c), the RP did engage in discussions with the RS as already set out, but no agreement was reached.

51. In this case a number of the factors which fall to be considered under each potential bar are overlapping. Ultimately, the court is required to form an overall judgment on the facts of a particular case about where the balance should be struck between the private interests of the RP and the public interest in extradition. This is a case where the RP was free to leave the RS and make a new life in Northern Ireland. He took all necessary steps to work legitimately and did not conceal his identity or his whereabouts. To extradite him on an accusation warrant, for an offence at the lower end of the scale of seriousness, after almost nine years has elapsed would, in my view be oppressive and disproportionate. I refuse the application.