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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **19/01/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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WALDEMAR GORNY

Applicant:

v

REPUBLIC OF POLAND

Respondent:

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Before: Stephens LJ and Burgess J

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an application for leave to appeal an order of His Hon Judge Miller QC dated 13 October 2017, ordering the extradition of Waldermar Gorny ("the applicant"), to Poland pursuant to a European Arrest Warrant under the Extradition Act 2003. Leave to appeal was refused by Madam Justice McBride. Mr Devine appeared on behalf of the applicant and Ms Marie Claire McDermott appeared on behalf of the requesting State.

Procedure

[2] Order 61A rule 3(1) provides that an application for leave to appeal shall be supported by, amongst other documents, an affidavit verifying the facts relied upon. There is a requirement for an affidavit verifying the facts relied upon when, as here, the applicant renews his application for leave to appeal to this court, see Order 61A, rule 3(7). There purports to be an affidavit from the applicant but it has not been sworn. This means that there is no affidavit. In any event the document is extremely short, containing the bare assertions that the applicant has a child and a long-term partner in Northern Ireland but giving no details. Even if the document had been sworn it could hardly be said to amount to a verification of the facts relied

upon. We have considered whether on that ground alone, the application for leave to appeal should be dismissed but as the matter was not fully argued before us, we prefer to proceed on the basis that if we do grant leave or if we do allow the appeal that any such decision will be dependent on the applicant lodging an affidavit within a time-limited period.

[3] There was no affidavit from the applicant for the purposes of the proceedings in the county court nor was any oral evidence given. The only factual information about the applicant relied on in the county court was contained in various skeleton arguments prepared by his counsel. Submissions of counsel do not amount to evidence. The court was advised by counsel that the practice has apparently been established of the facts being addressed in skeleton arguments submitted by counsel. We deprecate that practice. The obligation is for the individual concerned to place on oath his assertions of fact and we would be grateful if this requirement was observed in future cases.

The factual background

[4] On 23 October 2006, the applicant a Polish national now 37, date of birth 21 July 1980, was convicted at the District Court in Gorzow, Poland of 2 offences of illegal trading in intoxicant and psychotropic substances that is drug dealing. The particulars grounding the first offence in time was that in July 2005 in Poznan, "acting with the pre-mediated intent in short intervals and with intent to gain material benefit," he supplied Jan Wichman with 5gms of marijuana for the amount of PLN 100 and 10 pills of ecstasy for the amount of PLN 50. The particulars grounding the second offence in time was that in August 2005 in Poznan, he "placed on the market a considerable quantity of narcotic drugs by suppling Jan Wichman with 100gms of amphetamine for the amount of PLN 750 in order for it to be further sold." In relation to these 2 offences, a sentence of 1 year, 8 months' imprisonment was imposed.

[5] Prior to his conviction and between 28 October 2005 and January 2006, the applicant had been subject to temporary arrest. It is clear from the European Arrest Warrant that that period of detention has to be deducted from the 1 year and 8 months so that the applicant had a further 1 year, 5 months, and 12 days, to serve of his sentence.

[6] The applicant appealed against his sentence and was at liberty prior to the hearing of the appeal. The sentence became final on 18 May 2007 as the Appeal Court in Poland maintained the sentence. The applicant was summonsed to appear voluntarily on 10 September 2007 in prison to serve his sentence. The applicant applied to the court for a postponement of the execution of the penalty of imprisonment. On 19 November 2007, the District Court in Miedzyrzecz rejected the postponement and the applicant appealed, which appeal was unsuccessful. This meant that the sentence again became final on 12 March 2008. The applicant did not appear voluntarily to serve his sentence and on 17 March 2008 the District Court in

Miedzyrzecz ordered a compulsory bringing of the applicant by the police to the prison.

[7] On 2 July 2008, the police informed the court that the applicant had not been brought to the prison as he had not been present at his address. On 11 July 2008, the District Court issued an arrest warrant in Poland. The information then given by the police was that the applicant was hiding in Poland.

[8] The Polish authorities state that searches for the applicant continued in Poland but that at the start of 2012 it was established that the applicant was in the United Kingdom. On 16 February 2012, the District Court requested the Circuit Court to issue a European Arrest Warrant – this was issued on 22 February 2012.

[9] The UK National Crime Agency received the European Arrest Warrant in March 2012 being then informed by the Polish authorities that the applicant was likely to visit the United Kingdom. The National Crime Agency carried out a location check within the United Kingdom at that time in 2012 but it did not establish that the applicant was in the United Kingdom.

[10] On 27 June 2017, the applicant was arrested by Banbridge police in relation to an alleged assault committed by the applicant on his partner, which assault was alleged to have occurred on 15 June 2017. This led the National Crime Agency to certify the European Arrest Warrant on 27 June 2017. The applicant has been in custody since that date. The period of detention in Northern Ireland is now approximately 7 months which has to be deducted from the outstanding sentence. The total sentence was 20 months and so the total deduction allowing for his temporary arrest in Poland is approximately 10 months meaning that he has approximately 10 months outstanding of his prison sentence.

[11] Information provided by the applicant as to his personal and family circumstances was described by His Hon Judge Miller as being sparse. We consider that to be, if anything, an understatement given that there was no affidavit and given that only information about the applicant was contained in various skeleton arguments prepared by his counsel. As we have indicated submissions of counsel do not amount to evidence. In those submissions it is asserted that Mr Gorny came to Ireland in 2007 having left Poland for work. It is also stated that he has been here since 2005 and that his entire social network is here. It is also asserted that he has a partner of some 15 years, (whom he named), and that they have a child who was born in Northern Ireland in 2011. The birth certificate has been admitted in evidence and that certificate is evidence in this case. The skeleton arguments also state that the applicant has a National Insurance Number, which number is given, and that he had previously been working in this jurisdiction for an agency doing various jobs, though he was unemployed for 3 weeks prior to his arrest. It is also stated that he has always worked since he has been in Ireland save for 3 weeks prior to his arrest.

[12] If the applicant's partnership started 15 years ago then it would have commenced in 2002 whilst in Poland. No details are given as to the nationality of the partner or as to her circle of family and friends in Poland. There is no evidence as to when she came to Northern Ireland or whether she lives with the applicant and if so at what address. There is no evidence from her as to what if any affect there will be on her of any separation from the applicant if he returned to Poland and she remained in Northern Ireland.

[13] The applicant's daughter is now 6 years old and there is no evidence as to whether the applicant lives in the same house as his daughter or whether he has any contact with her. There is no information as to what, if any, affect there will be on the daughter if the applicant is extradited. There is no information as to whether the daughter has been to Poland or what if any ties she has with extended family members in Poland.

[14] It is asserted in the submissions that the applicant came to Ireland in 2007 which could mean either Northern Ireland or the Republic of Ireland. It is then stated that the applicant came "here" by which we assume is meant Northern Ireland but the date then given is 2005. There is no evidence as to whether the move to Ireland or Northern Ireland was on a permanent basis, there is no corroborative evidence supporting his assertion that he came in 2005 or 2007, and no address is identified at which the applicant lived. There is no detail as to whether the applicant came to Northern Ireland or to Southern Ireland.

[15] In relation to the assertion that the applicant has worked in Northern Ireland, no employer is identified. The agency through which he is stated to obtain work is not identified, there is no corroborative evidence in the form of any pay slips or employment contracts or tax returns, there is no information as to when and in what circumstances the applicant obtained a National Insurance Number.

[16] In relation to the assertion that the applicant's entire social network is in Northern Ireland, there is no information as to the nature and extent of the social network or as to how it was formed. For instance, has the applicant lived in the same area for all the time he has been resident in Northern Ireland? There is no information as to what, if any, social network he has in Poland and as to whether he has close or extended family members in Poland.

[17] There is no affidavit and we consider that the only evidence in this case is the birth certificate of the applicant's daughter. We have given consideration to the question as to whether the appeal should be dismissed on that ground alone but without deciding that issue we consider that it is appropriate to proceed to consider what our decision would have been if the material contained in the skeleton arguments had been contained in an affidavit and accordingly we will proceed on that basis in determining this appeal. However we emphasise that given the lack of evidence there is not much by way of Article 8 rights to be weighed in the balance.

The judgment of His Hon Judge Miller QC

[18] The judge having set out the background facts and having identified the relevant authorities, carried out the balancing exercise in relation to interference with the applicant's Article 8 rights so as to determine whether the interference with Article 8 is necessary in a democratic society in the sense of being a proportionate response to the public interest in extradition.

[19] In carrying out that balancing exercise, the learned judge identified the following matters.

(a) The dates upon which the offences were committed and the date of the conviction.

(b) The passage of time between the applicant leaving Poland in 2007 and the issue of the European Arrest Warrant in February 2012 together with a period of time that elapsed since the sentence was imposed in 2006. The judge considered that the primary reason why that delay had occurred falls at the feet of the applicant who chose effectively to act as a fugitive.

(c) The public interest in seeing a person serve a sentence which has been imposed.

(d) The interests of the applicant's daughter.

(e) The interests of the applicant's partner.

(f) The aspects of the applicant's private life insofar as it was set out in the skeleton arguments.

(g) The public interest in honouring extradition arrangements.

(h) The public interest in discouraging the United Kingdom being viewed as a safe haven for fugitives.

(i) The applicant's serious criminal offences.

(j) The outstanding period to be served by the applicant.

[20] The judge having listed out the competing factors decided that the Article 8 rights should not prevail. The judge was satisfied that the applicant's extradition would not contravene the European Convention on Human Rights. He ordered the applicant be extradited.

Legal principles

[21] The applicable legal principles are set out in the following decisions, namely *Norris v The Government of the United States of America (No.2)* [2010] 2AC, 487 and *HH v Deputy Prosecutor of the Italian Republic Genoa* [2013[1AC, 338. In *HH* at paragraph 8, Lady Hale set out the conclusions that she drew from the earlier Supreme Court case of *Norris v The Government of the United States of America (No.2)* [2010] UKSC 25:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.
>
> (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.
>
> (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

Those are the principles which we seek to apply.

[22] In *Polish Judicial Authority v Celinski* [2016] 1 WLR 551, Lord Thomas giving the judgment of the court stated that there should be a balancing of considerations as follows:

> "15. As we have indicated, it is important in our view that judges hearing cases where reliance is placed on

> article 8 adopt an approach which clearly sets out an analysis of the facts as found and contains in succinct and clear terms adequate reasoning for the conclusion arrived at by balancing the necessary considerations.
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> 16. The approach should be one where the judge, after finding the facts, ordinarily sets out each of the "pros" and "cons" in what has aptly been described as a "balance sheet" in some of the cases concerning issues of article 8 which have arisen in the context of care order or adoption: see the cases cited at paras 30–44 of In re B-S (Children) (Adoption Order: Leave to Oppose) [2014] 1 WLR 563 . The judge should then, having set out the "pros" and "cons" in the "balance sheet" approach, set out his reasoned conclusions as to why extradition should be ordered or the defendant discharged.
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> 17. We would therefore hope that the judge would list the factors that favoured extradition and then the factors that militated against extradition. The judge would then, on the basis of the identification of the relevant factors, set out his/her conclusion as the result of balancing those factors with reasoning to support that conclusion. As appeals in these cases are, for the reasons we shall examine, common, such an approach is of the greatest assistance to an appellate court."

Again that is an approach which we seek to apply.

[23] We would emphasise another aspect of the decision in *Celinski* and that is:

> "Decisions of the Administrative Court in relation to article 8 are often cited to the court. It should, in our view, rarely, if ever, be necessary to cite to the court hearing the extradition proceedings or on an appeal decisions on article 8 which are made in other cases, as these are invariably fact specific and in individual cases judges of the Administrative Court are not laying down new principles. Many such cases were referred to in the skeleton arguments. We have referred to none of them in this judgment, as the principles to be applied are those set out in *Norris* and *HH*. If further guidance on the application of the principles is needed, such guidance will be given by a specially constituted Divisional Court or on appeal to the Supreme Court. It is not helpful to the proper conduct of extradition proceedings that the

> current practice of citation of authorities, other than *Norris* and *HH*, is continued either in the extradition hearing or on appeal."

We cannot over emphasise that there should not be citation of fact specific decisions made by judges in other cases. We deprecate the departure from it in this case in that the skeleton argument referred to many such cases. Any skeleton argument at first instance should set out the principles in *Norris* and *HH* and should address the check list. Any skeleton argument on appeal should not only identify the check list but should set on a reasoned basis why it is asserted that the first instance judge was wrong.

[24] The approach of this Court on an appeal was also considered in *Celinski* and we adopt the quotation as paragraph 24,

> "The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger PSC said, as set out above, that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in the light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

That quotation refers to the ways in which an appellate judge might consider a trial judge's conclusion on proportionality as adumbrated by Lord Neuberger at paragraphs 93-94 *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 W.L.R. 1911

> "93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the

> appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).
>
> 94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

Discussion

[25] There is a constant and weighty public interest in extradition. In arriving at our own view about proportionality that is a factor heavily in favour of extradition. We also agree that that factor has to be considered in the light of any passage of time that has occurred. Delay can diminish the weight to be attached to that particular public interest.

[26] The judge concluded, and we accept that he was entitled to conclude, that the primary cause of delay was the actions of the applicant who was a fugitive from justice.

[27] There is no direct evidence of the impact of any delay as increasing the impact on the applicant's private and family life or that of his wife or child. The applicant gives no information but rather asks the court to assume that the delay had that effect. We are not prepared to make such an assumption.

[28] We consider that though the offences could not be considered to be at the most serious end of the spectrum, they remain significant criminal offences. We note that there remains a period of time to be served in custody. There are approximately 10 months outstanding in relation to the applicant's present sentence which is a considerable period of time. The applicant submits that he has almost served 50% of the overall sentence which places him almost exactly at the point

where he would be eligible to apply for release in Poland. If, in fact, it had already been determined by the courts in Poland that he was not obliged to serve the remaining part of his sentence, then that obviously would be a strong, if not absolutely conclusive, point against extradition. However that is not this case and the courts in this jurisdiction should enable the courts in Poland to arrive at their own decision by extraditing the applicant to Poland. If upon the applicant's return to Poland the Polish courts release him then interference with the applicant's Article 8 rights will have been of extremely short duration. If the Polish courts do not release the applicant despite discretion to do so, then the criminal law in Poland would have been facilitated and upheld and the public interest in extradition would also have been upheld.

[29] We also consider that there is a strong public interest in the extradition process not being used to delay extradition so that a sentence is 50% served and then opposing extradition on the basis that a court in Poland is likely to release the requested person. We confine ourselves to a decision on the facts of this particular case and we consider that the outstanding sentence and the potential application that could be made in Poland are factors in favour of extradition.

[30] We consider that there remains a significant public interest in extradition of the applicant.

[31] We recognise that there may be some impact upon the applicant's family life and upon the family life of his partner and child though the information, as we have indicated, is entirely deficient. There is no information before us as to how the applicant's partner and the applicant's child have coped or will cope in the future. Against that background we do not consider that it could be said that extradition in this case would cause an interference with family life which would be exceptionally severe. On that basis we refuse the application for leave to appeal.

[32] We also refuse the application for leave to appeal on the basis that no issue was taken with the legal principles applied by the learned county court judge and no suggestion was made that he failed to take into account a relevant factor. The only issue was as to what weight he attributed to the various factors and the issue of proportionality. It was submitted on behalf of the applicant that this case fell within one of the higher categories set out by Lord Neuberger. However we consider that the judge's conclusions were either the only possible view or a view which we consider was right falling within category (i) or (ii) of Lord Neuberger's description of the categories.

Conclusion

[33] We refuse the application for leave to appeal.