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Judgment: approved by the Court for handing down | *Delivered:* **08/09/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

THE REPUBLIC OF POLAND

Appellant;

-v-

RP

Respondent.

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal by the Requesting State from the decision of Her Honour Judge Smyth on 11 March 2014 in which she concluded that the extradition of the requested person was barred by section 21 of the Extradition Act 2003 (the 2003 Act) because the extradition of the respondent would disproportionately interfere with the Article 8 rights of his child, K.

Background

[2] The requested person was sought by the appellant by warrant dated 18 September 2006 in respect of a judgment which was imposed on 18 October 2004 and upheld on appeal on 21 June 2005 in which he was sentenced to 5 years' imprisonment. The respondent had been convicted of an offence described in the warrant as violating safety regulations in land traffic the particulars of which were that on 29 August 2001 he did not act with due caution while performing an overtaking manoeuvre and collided with an oncoming car killing 2 passengers and seriously injuring 4 others.

[3] He spent time in custody in Poland before trial for 2 periods lasting 4 months, 3 days and 1 month, 7 days. The warrant stated that the portion of the sentence to be served was 4 years, 6 months and 21 days. He left Poland after his appeal and has

lived in Northern Ireland since July 2005. It was accepted before the lower court that he had unlawfully absconded following his unsuccessful appeal. On 30 December 2011 he was arrested in Northern Ireland and on 31 December 2011 he was remanded in custody.

[4] On 15 March 2012 the application for extradition was listed for hearing. At that stage there was a medical report from Dr O'Kane indicating that K, the son of the requested person born in April 2004, suffered from speech and language delay and attended special schooling. K had developed behavioural problems as a result of the father's imprisonment although he benefitted from continuing contact within the prison. Dr O'Kane considered that the requested person's complete removal to Poland would have a deleterious impact on the family unit and in particular on K. The requested person's application to adjourn the extradition hearing pending the outcome of R. (on the application of HH) v Westminster City Magistrates' Court [2012] UKSC 25 which had just been heard in the Supreme Court and which addressed the relationship between extradition and the Article 8 rights of families was granted. Judgment in that case was given on 20 June 2012.

[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.

[8] In advance of the final hearing the judge wrote with the agreement of the parties to the Issuing Judicial Authority on 15 January 2014 referring to the time the requested person had already spent in custody. She stated that in domestic law a defendant would be released after having served approximately 50% of the 5 years sentence subject to him being of good behaviour in custody and asked the Polish court to confirm that similar arrangements existed in Poland. The response from the District Law Court, dated 17 January 2014, stated that pursuant to Article 78, Section 1 of the Criminal/Penal Code, a convicted prisoner may be conditionally released after serving at least half of the sentence. Article 78 provided formal circumstances and conditions when there could be conditional release from serving the full sentence. The letter further stated:

> "In the case of [the Requested Person] a conditional release from serving the full sentence may be applied in the said matter after his serving at least half of the sentence and so he may request for and enjoy the benefits of being granted a conditional release from serving the full sentence after he has served (at least) 2 years and 6 months of his sentence but the Circuit Law Court, Penitentiary Division, will be a competent court to consider his request for being granted the said conditional release from serving the full sentence."

[9] On 20 February 2014 a further letter was sent to the Polish District Law Court confirming the dates spent in custody and that the Requested Person had now served in the region of 50% of the 5 year sentence. The letter requested confirmation that the appellant still sought extradition in those circumstances, taking into account the medical evidence relating to the impact of extradition on the Requested Person's children. In its reply dated 26 February 2014 the Polish District Law Court stated:

> "… even if we assume that he has already served nearly half of the sentence, it does not mean, in principle, that he is not under obligation to serve the remaining portion of the sentence; the Court enforcing the judgement is

> obligated to take all kinds of action to cause that the sentence be executed in its entirety."

The letter also confirmed that the Circuit Law Court in Poland was the only authority that could make such decisions and that there was no legal basis for abandoning the request for extradition.

The learned trial judge's decision

[10] In addition to the report from Dr O'Kane the court was provided with a medical report from Dr Finnuala Leddy, Consultant Child and Adolescent Psychiatrist, and detailed records of prison visits and school reports. The Requested Person's son had difficulties with speech development and understanding of language and had been assessed as well below average in terms of literacy and numeracy. Both parents had been involved in the child's therapy and assessment. His school reported that his speech had improved a great deal during his time in special education but it appeared such provision would not be available to him in Poland, thus the family could not return there. The Requested Person was one of his primary attachment figures and the child had demonstrated signs of distress since the Requested Person had gone into custody. His relationship with his sister had deteriorated. The mother's parenting capacity was compromised to some extent because of absence of the father. The son was able to retain memories from one prison visit to the next but this would not be possible if the Requested Person was in Poland. Dr Leddy concluded that extradition of the Requested Person would have significant consequences for his son's social, emotional and academic functioning.

[11] An updated medical report dated 15 February 2014 was obtained from Dr Catherine Mangan, Consultant Child and Adolescent Psychiatrist. Dr Mangan confirmed that the Requested Person's son had made improvement but still required special education. In her opinion extradition would not be in the son's best interests because his family life and emotional development had been impacted by his father's imprisonment in Northern Ireland. Termination of weekly visits would exacerbate this. Dr Mangan also commented on emotional distress demonstrated by the daughter. The Requested Person's daughter and wife would be negatively affected by an extradition order and may be unable to contain the son's emotional distress. The Court also had a letter from the Northern Ireland Prison Service confirming that the Requested Person received weekly visits from his wife and children and also availed of child centred visits on a monthly basis.

[12] The judge considered that it was beyond doubt that the respondent's extradition would have a significant adverse effect on his son's social, emotional and academic functioning. This would add to the strain on his sister and mother. The

unavailability of suitable schooling in Poland meant that the family would not have the option of returning there in order to maintain the bond with the Requested Person should he be extradited. She considered that, had she determined the matter in January 2013, she would have concluded that whilst the decision was finely balanced, the public interest in extradition outweighed the Article 8 rights of the Requested Person's son because of the seriousness of the offence. However, the situation was now different. The Judge concluded:

> "The weight that should attach to the impact of his father's extradition on [the Requested Person's son] remains a primary consideration for the Court. …. the weight that should be attached to the public interest in extraditing the defendant is not as great as it was in January 2013, in light of the period that has now been spent in custody. The fact that the defendant is now eligible for release is a very significant factor in assessing the public interest in extradition. Weighing the Article 8 rights of [the Requested Person' son] against the public interest in extraditing this particular defendant I am satisfied that extradition is no longer appropriate".

The submissions of the parties

[13] The appellant submitted that the Appropriate Judge erred by taking into account the Requested Person's eligibility to apply for conditional release and by failing to give any or adequate weight to the fact that it was for the Polish court alone to determine whether and on what conditions the Requested Person should be released. The UK courts should not second-guess the Polish courts because the period after conditional release is akin to a probation period. The appellant referred to the following authorities in which extradition orders were made notwithstanding the Requested Persons having served a substantial period of their sentences, the courts taking the view that the question of conditional released would in most circumstances be one for the Polish courts: (Poland v Tomasz Jerzy Golebiewski (22.3.13 NIQB, unreported); The Queen on the Application of Kasprzak v Warsaw Regional Court [2010] EWHC 2966 (Admin); and Koska v Circuit Court in Katowice Poland [2011] EWCA 1647 (Admin)). The appellant submitted that the Requested Person's family circumstances were similar to those in January 2013 when extradition would not have been deemed to have been disproportionate.

[14] The respondent submitted that, upon consideration of the factual matrix of this case when set against the legal framework as clarified in HH, the court was wholly entitled to conclude that, on balance, it would be disproportionate to

extradite the Requested Person and therefore incompatible with Article 8 of the Convention and his rights pursuant to section 21 of the Extradition Act. It was submitted that the evidence before the Court was compelling, unchallenged and pointed overwhelmingly to the conclusion reached by the Appropriate Judge. The appellant could only succeed if the court below was wrong in principle to take into account the time served by the respondent on remand pending the hearing. However, the appellant had itself stopped short of this submission. While referring to certain cases in which the courts gave less weight to this particular factor, the appellant nevertheless conceded that the Appropriate Judge is entitled to take this factor into account. The argument that the Requested Person should be extradited because it is possible that he might not be released at the normal, half-way point of his sentence failed to recognise the centrality of the notion of proportionality to the case in general and the Court's decision in particular. There was no evidence to suggest that he would not be released by the Polish Court.

Consideration

[15] Recital 5 of Council Framework Decision 2002/584 records that the introduction of a new simplified system of surrender of sentenced persons for the purposes of execution of criminal sentences made it possible to remove the complexity and potential for delay inherent in the then extradition procedures. The issue of delay is then addressed directly in Article 17 which provides that a European arrest warrant shall be dealt with and executed as a matter of urgency. Where the requested person consents to surrender the execution of the warrant should occur within 10 days. In other cases the final decision on the execution of the warrant should be taken within a period of 60 days after the arrest of the requested person.

[16] The Framework Decision is not, of course, directly effective in domestic law but the interpretive obligation on the national court is to interpret national law so far as possible in light of the wording and purpose of the framework decision in order to attain the result which it pursues (See Criminal proceedings against Pupino Case-105/03). The 2003 Act itself contains various provisions indicating that delay should be avoided. By virtue of section 46 of the 2003 Act where a person consents to extradition the judge must order that persons extradition within 10 days. By virtue of section 8 (4) where a hearing is required the judge is required to fix a date not later than the end of the permitted period, which is 21 days starting with the date of arrest. Section 8 (5) provides that where a party to the proceedings applies before the date fixed for a later date and the judge believes it to be in the interests of justice to do so he may fix a later date.

[17] Where either party wishes to appeal the decision of the appropriate judge a notice of appeal must be lodged within seven days starting with the day on which the order was made. Section 31 (3) provides that the High Court must begin to hear the appeal before the end of the relevant period which is fixed by Order 61A Rule 4(1) RCJ as 40 days after the arrest of the requested person. That time limit can be extended where it is in the interests of justice to do so. An application to the High Court for leave to appeal to the Supreme Court must be made within 14 days starting with the day on which the court makes its decision on the appeal and any application for leave to appeal to the Supreme Court itself must be made within 14 days starting with the day on which the High Court refuses leave to appeal.

[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.

[19] An issue arose as to the approach of the court on appeal. This is an appeal under section 28 of the 2003 Act in which the appellant argued that the judge ought to have decided the relevant question differently and if she had decided the question in the way in which she ought to have done she would not have been required to order the person's discharge. An appeal under section 28 may be brought on questions of law and fact. Where the appropriate judge has made findings of fact the appeal court should hesitate before reaching a contrary conclusion, recognising the wide experience of those judges dealing with extradition cases (see Government of the United States v Tollman [2008] 3 All ER 350 at para 95). The striking of the balance between the Article 8 rights of the requested person and the public interest in extradition requires the court to form an overall judgment upon the facts of the particular case. The judgment of the lower court is entitled to respect but if after due consideration the appeal court forms a contrary view it is its duty to express that opinion as otherwise there would be little purpose in having an appeal (see Union of India v Narung [1978] AC 247 at 279).

[20] The central issue in this appeal is the striking of the balance between the public interest in honouring extradition arrangements under the Council Framework Directive and the 2003 Act and the proportionality of the consequent interference with the private and family life of the child, K. Lady Hale set out the legal principles to be applied in such cases in R (on the application of HH) v Westminster City Magistrates' Court [2012] UKSC 25. She set out the general approach in paragraph 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."

[21] The particular interests of children were identified in paragraph 33:

> "The family rights of children are of a different order from those of adults, for several reasons. In the first place, as Neulinger and ZH (Tanzania) have explained, article 8 has to be interpreted in such a way that their 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. Secondly, children need a family life in a way that adults do not. They have to be fed, clothed, washed, supervised, taught and above all loved if they are to grow up to be the properly functioning members of society which we all need them to be. Their physical and educational needs may be met outside the family, although usually not as well as they are met within it, but their emotional needs can only be fully met within a functioning family. Depriving a child of her family life is altogether more serious than

> depriving an adult of his. Careful attention will therefore have to be paid to what will happen to the child if her sole or primary carer is extradited. Extradition is different from other forms of expulsion in that it is unlikely that the child will be able to accompany the extraditee. Thirdly, as the Coram Children's Legal Centre point out, although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up. This can of course cut both ways: sometimes a parent may do a child more harm than good and it is in the child's best interests to find an alternative home for her. But sometimes the parents' past criminality may say nothing at all about their capacity to bring up their children properly. Fourthly, therefore, as the effect upon the child's interests is always likely to be more severe than the effect upon an adult's, the court may have to consider whether there is any way in which the public interest in extradition can be met without doing such harm to the child."

[22] The learned trial judge found that the extradition of the requested person would have a significant adverse effect on his son's social, emotional and academic functioning. Mr Ritchie accepted that the evidence justified that conclusion. His submission focussed on the judge's conclusion at paragraph 22 of her judgment that the weight to be given to the public interest in extraditing the defendant was not as great as it was in January 2013 in light of the additional period that had been spent in custody. We accept that the public interest in extraditing the defendant was not diminished by the fact that he had already been in custody for half his sentence period. The decision as to his release date was for the Polish courts to make and it was also for them to identify the conditions on which he was to be released. The public interest in honouring the capacity of the Polish courts to make those decisions remained significant.

[23] We consider, however, that in evaluating the impact on the private and family life of the child it was proper to take into account that the important relationship between the child and his father had been maintained in very difficult circumstances through prison visits and telephone calls to the child's benefit. That was an indication of the significant contribution by the respondent to this vulnerable child's welfare and reinforced concerns about the impact on the child should he be extradited. We agree that this was a difficult case. The offences were serious involving the deaths of 2 people and serious injuries to 4 others. Dr Leddy's

conclusion that the extradition would have significant consequences for K's social, emotional and academic functioning was not in dispute. The child had already had to adjust to the lengthy period during which the respondent had been in custody and any effect upon him had to be seen in the context that the father's extradition would present further significant challenges for him. In those circumstances we are not persuaded that the overall conclusion reached by the learned trial judge that extradition would be disproportionate was wrong.

Conclusion

[24] For the reasons given the appeal is dismissed.