IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION CO/3456/2017

DIVISIONAL COURT

[2018] EWHC 197 (Admin)

Royal Courts of Justice

Friday, 19th January 2018

Before:

LORD JUSTICE SINGH

and

MR JUSTICE JULIAN KNOWLES

B E T W E E N :

JK Appellant

- and -

DISTRICT COURT OF LUBLIN, POLAND Respondent

[ANONYMISATION APPLIES]

J U D G M E N T

APPEARANCES

MS M WESTCOTT (instructed by Dalton Holmes Gray) appeared on behalf of the Appellant.

MS A BOSTOCK (instructed by the Crown Prosecution Service Extradition Unit) appeared on behalf of the Respondent.

LORD JUSTICE SINGH:

Introduction

1 This is an appeal under s.26 of the Extradition Act 2003 ("the Act") against the decision of District Judge Rose dated 20th July 2017 by which the appellant's extradition was ordered to Poland pursuant to a European Arrest Warrant ("EAW"). There is also before the court an application made on behalf of the appellant to adduce fresh evidence.

2 This court has made an anonymity order so as to protect the identity of three young children, one of whom has only just turned three and has serious health issues. I will therefore refer to the appellant as "JK", his wife as "MK" and their children as "M", "A" and "P".

3 We have had the advantage of detailed written submissions and also oral submissions from Ms Mary Westcott on behalf of the appellant and from Ms Amanda Bostock on behalf of the respondent. We are grateful to them both.

Factual background

4 The appellant came to the United Kingdom in October 2012 with his wife. She returned to Poland to be with her children (the appellant's daughter and step-daughter) from February to June 2013. The appellant himself returned to Poland in June 2013 for his step-daughter's first communion in Poland. The whole family then came back to the UK in June 2013. Another child, P, was born in the UK in January 2015 and is now aged three.

5 The present EAW is a conviction warrant. It relates to one offence that was committed on 12th January 2010 in Leczna, Poland. The appellant forged an employment certificate for a man called Marek Lipiec. That certificate enabled Lipiec to "conclude the cash credit contract" that was signed on the same day and to "swindle money in the amount of 18,966 PLN" to the detriment of a bank. That has been calculated to be the equivalent of £3,785.

6 For present purposes, the relevant EAW was issued in the District Court in Lublin, Poland on 31st March 2017. It was certified by the National Crime Agency on 6th April 2017. It is a conviction warrant that is based on the judgment of the Provisional Court of Lublin-Wschod on 4th November 2015. The appellant was given a one-year sentence of imprisonment. The file reference is III K1119/12. It is common ground that the conduct occurred in a category 1 territory and that the offence is an extradition offence within the meaning of s.65(5) of the Act.

7 The factual position is complicated by the fact that there were two other sets of proceedings in Poland which form part of the background. One concerned another conviction against this appellant on 6th September 2012, when a sentence of two years was imposed and suspended for five years. There were conditions attached to that suspended sentence which the appellant has not always complied with. The reference number for that case was III K733/12. There was at one time an EAW which covered both that conviction and the present matter.

8 The other matter was a prosecution of a man called Marcin Herok, in which this appellant was to be a prosecution witness because the charge concerned threats which had been made against him and his family. That case had the reference number III K746/11.

9 While he was still in Poland, the appellant was interviewed as a suspect in relation to the present matter on 23rd August 2012. There is before this court a suspect interview report of that date which notes that the suspect said that he understood the allegations which had been read out to him on that day and that he confessed to committing the alleged offences. However, the note in the report goes on to state that he said that "the money from the loan was divided among Marek Lipiec, Robert Lipiec and Marcin Herok. I signed the certificate because I was scared of them". Although, therefore, the appellant appeared to admit the offence, he also raised an issue which might have provided a defence, or at least mitigation, because he said that he had been threatened and he was scared.

10 The appellant was first arrested on the original EAW on 9th January 2017. That warrant was discharged on 6th April, and he then appeared in court on the new EAW which covers only the matter with which we are now concerned. He was granted conditional bail. Further information was provided by the respondent authorities in documents dated 26th January 2017 and 20th March 2017.

11 The hearing before the district judge took place at Westminster Magistrates' Court on 15th June 2017. Judgment was reserved. There were three grounds raised in opposition to extradition: (1) under s.14 of the Act, that extradition should be barred because it would be oppressive by reason of the passage of time; (2) under s.20 of the Act that the appellant did not "deliberately absent himself from his trial," and would not be entitled to a retrial. It is common ground that he would not indeed be entitled to a retrial; (3) under s.21, that extradition would not be compatible with his right to respect for private and family life under Art.8 of the Convention rights as set out in sch.1 to the Human Rights Act 1998 ("HRA").

Material legislation

12 Sections 14, 20 and 21 of the Act are relevant to the substantive issues in this case. Section 14 provides that:

> "A person's extradition to a category 1 territory 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—
>
> [...]
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)."

13 Section 20 provides, so far as material:

> "(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> [...]
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21."

I should also note ss.(5) and (6) if the judge decides that question in the negative, because he must then decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial. If the judge decides that question in the affirmative, he must proceed under s.21 again.

14 Section 21, so far as material, provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the [HRA]."

15 This appeal, as I have mentioned, arises under s.26. It is unnecessary to set out the terms of that section, which are well known to the parties, but I would observe that under ss.(3) an appeal under s.26 may be brought on both a question of law and a question of fact.

16 Section 27 governs the court's powers on an appeal of that type and is also relevant to the application to adduce fresh evidence. Again, it is very familiar to the parties and need not be set out in detail here.

The judgment of the district judge

17 The district judge heard evidence from both the appellant and his wife. She had their statements before her. She also had a letter from the appellant's lawyer in Poland who had produced a number of documents from the court file there.

18 After setting out the factual background, the district judge noted that the appellant has been in employment in the UK and is currently self-employed. She noted that the two girls are at school in this country. It is unnecessary to set out the details of what is said at para.11 relating to the family's circumstances, including various medical problems; they are familiar to the parties. The appellant's mother is still living in the family home in Poland. His wife's parents are also still there. Sadly, the appellant's father died in October 2016.

19 The district judge dealt with the relevant proceedings at para.14 of her judgment under the reference number 1119/12. She also dealt with the suspended sentence proceedings (reference 733/12) at para.15, and his participation in proceedings as a witness (reference 746/11) at paras.16 to 18. The district judge outlined the suggested bars to extradition from para.19 of her judgment. She considered first the passage of time in s.14 of the Act (see paras.20 to 25). She concluded that the appellant is a "fugitive" and was thus not able to rely upon this bar "save in the most exceptional circumstances" by reference to the well-known decision in *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21 (see para.22 of the district judge's judgment). She noted that it is for the Judicial Authority to satisfy the court to the criminal standard that the requested person is indeed a fugitive. The critical part of her reasoning on this issue appears at para.23, where she said:

> "Mr [K] was interviewed about this matter. Whatever his understanding about the proceedings being delayed by the absence of a co-defendant, there is clear information that he was told that he must notify 'the proper organ about any change of address until the date of the prescription of punishment'. He did not do that. He told the authorities that he was moving to his parents' address in October 2012. He left for the UK the same month. In connection with these proceedings he never gave a UK address. I bear in mind the content of the final paragraph of the further information of 26th January 2017 - 'In relation to only III K1119/12 I would like to inform you that [JK] having been informed and aware of the ongoing penal

> proceedings against him and of consequences of not appointing his current registered address he went abroad - did not notify the court about it and did not appoint his dwelling address. It was his legal concern to determine the stage of the ongoing penal proceedings. Therefore he night have assumed that the case would be completed in force and that there would be a decision issued. Taking into consideration the fact that [JK] informed about his new address for delivering correspondence, then he left the country and did not collect the letters that had been sent to him it should be considered that he deliberately absented himself from the organs of justice in order to avoid liability for committed offences'."

It will be observed that that reasoning goes also to the second issue about whether the appellant had deliberately absented himself, as well as to the first issue of whether he was a fugitive.

20 At para.24, the district judge concluded that he was indeed a fugitive and was thus not able to rely upon the first bar. However, at para.25 she decided in the alternative that if she was not right about that, she would hold in any event that it would not be oppressive to extradite him. She noted in para.25 that the Polish authorities considered the appellant to have been unlawfully at large since the date of 28th December 2015, because that is the date when he failed to turn up at the prison to serve the sentence imposed in relation to the present matter. She set out the factors which she took into account in reaching her alternative conclusion that there would be no oppression in para.25.

21 The district judge turned to the second issue before her under s.20 of the Act at paras.26 to 39. Her conclusion was that the appellant was tried in his absence; that he had not received the summons and other court documents relating to that trial, but that he was aware that there were likely to be court proceedings since he had been interviewed in relation to this offence in 2012 and had been required to keep the authorities notified about any change of address. That is something which he failed to do. In particular, the appellant did not formally notify the authorities that he had left Poland, nor did he provide them with his address in the UK.

22 At para.39 of her judgment, the district judge said:

> "Mr [K] has been summoned in accordance with the Polish penal code. I am satisfied that the summons and the judgment were sent to the address that he last nominated in Poland for service of documents as set out in the EAW and the further

information. He did not receive them because they were not collected on his behalf and passed on to him and because he no longer resided at that address and had not kept the authorities informed of his current address in connection with these proceedings. An assumption that they would have cross-referenced information from a case at the Regional Court in which he was due to give evidence as a witness is unrealistic. Mr [K's] lawyer actually records on the second page of his letter - 'The court in case III K1119/12 had no knowledge of the case III K746/11'. I have concluded that Mr [K] was deliberately absent from his trial."

23 The district judge turned to the third issue under s.21 and Art.8 from para.40 of her judgment. Having set out the relevant authorities, including the well-known decision of the Supreme Court in *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 and the decision of this court in *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin), she set out the factors in favour of extradition and then the factors weighing against extradition. At para.43 she concluded that the balance fell in favour of extradition. In the result, therefore, the district judge was satisfied that extradition should be ordered in this case.

Application to adduce fresh evidence

24 There is an application before this court to adduce fresh evidence on this appeal which was not before the district judge. That evidence falls into two categories. The first category consists of various letters which provide an update on the medical position both of the appellant's wife, MK, and their son, P. No objection is taken to the court's looking at that evidence as it was not available at the time of the hearing before the district judge, but it is submitted by Ms Bostock that it is not decisive and therefore should not be admitted by this court.

25 The second category of fresh evidence consists of a report by Dr Tom Grange, a clinical psychologist specialising in children and families, dated 24th November 2017. Objection is taken to this evidence by Ms Bostock on the ground that this evidence could reasonably have been obtained at an earlier date, in time for the hearing before the district judge.

26 It is unnecessary for present purposes to set out in detail the contents of Dr Grange's report. A flavour of his opinion can be obtained both from the executive summary which appears in section 3 and from his response to his instructions which appears at section 7 of the report. I will note only a few passages at this juncture in order to give a flavour of his opinion. At para.3.02 he states:

> "Following the assessment, I was of the opinion that [P] was showing behaviours characteristic of autism and is likely to be diagnosed in the near future [...] P is clearly very attached to his father in particular and is a very vulnerable child more generally. As such he is likely to suffer devastating harm in the event of his father's extradition [...]"

At para.7.03 Dr Grange states:

> "[...] it is highly likely that [P] will be diagnosed with autism after his third birthday. The serious speech and language problems also indicate that he probably has a learning disability."

At para.7.06 he states, in the first sentence:

> "On the basis of my assessment, it is clear that were Mr [K] detained for a year in Poland the harm caused to P would be devastating [...]"

Finally for present purposes, it will suffice if I quote from para.7.07, where Dr Grange states:

> "I would also caution against assuming that the relatively short sentence will result in less harm. [P's] young age is within an extremely important stage in his development in the formation of his relationships, cognitive abilities and a range of other important abilities. His father's absence for a year will feel like a very long time for [P] as children experience the passage of time differently to adults and is more than enough time for serious difficulties to become entrenched."

27 It is common ground that the criteria for the admission of fresh evidence on an appeal such as this are set out in the decision of this court in *Hungarian Authorities v Fenyvesi* [2009] EWHC 231 (Admin), although that case on its facts concerned an appeal under s.28 of the Act and the criteria set out in s.29, which on this point is in materially the same terms as s.27 (see in particular the judgment of this court which was given by Sir Anthony May PQBD at paras.32 to 34). The criteria are well known to the parties and are common ground. They have been helpfully set out at para.46 of the respondent's skeleton argument, so it is unnecessary to set them out in full here.

28 On behalf of the respondent, it is accepted by Ms Bostock that the evidence relating to difficulties faced by MK, the appellant's wife, following her medical procedure in September 2017 can be considered by this court as it was not available at the time of the

extradition hearing. However, she submits that this evidence is not decisive and would not have resulted in the judge deciding the relevant question differently. On behalf of the respondent, she submits that the evidence relating to P, particularly the assessment by Dr Grange, could have been provided at the time of the extradition hearing. She takes no objection to updating medical evidence, but says that there is no justification for P only having been assessed after the extradition hearing. The issue of whether he suffers from autism, she submits, was a live one during the proceedings before the district judge, as that judge herself mentioned. Ms Bostock also reminds this court that there was no request for an adjournment at that time.

29 Ms Bostock further submits that the report by Dr Grange goes well beyond the opinions put forward by P's treating medical team and would have been challenged, or at least could have been if evidence had been given before the district judge. She also submits that the report of Dr Grange contains what she calls "a fishing expedition in relation to the mental health of Ms [MK]". It is said that there is no evidence that MK suffered from mental health difficulties as opposed to physical difficulties before the district judge. Accordingly, it is submitted that the report of Dr Grange is inadmissible.

30 Finally in relation to the updating medical evidence about P, it is submitted that the position has not changed as a matter of substance since the hearing before the district judge. While the court may consider the fresh evidence, it is submitted that ultimately this evidence is not decisive.

31 Ably though those submissions were made by Ms Bostock, I am unable to accept them. In the particular circumstances of this case, I have come to the conclusion that the fresh evidence should be admitted. The updating evidence will need to be considered by this court in any event. Whether it is decisive to a large extent overlaps with the issues under Art.8 to which I will come later in this judgment. Although it might be said that the issue of possible autism on the part of P was known about before the hearing in June 2017, this is a very young child. Autism is not usually diagnosed in a child under the age of three. At that age, even a few months can be materially significant.

32 The reason why the report of Dr Grange was not obtained earlier has been explained in the witness statement of Renata Pinta dated 15th January 2018 at para.4, where she informs the court that, although the possibility of P's autism was raised before the district judge, the appellant's representatives did not have the benefit of the clear medical evidence they now have about the extent of his difficulties: for example, from his consultant in a letter dated

3rd November 2017. She goes on to inform the court that if this evidence had been available at first instance, it is highly likely that they would have requested additional time in order to obtain either evidence from the local authority and/or a clinical psychologist. However, as the answer from the appellant during his cross-examination on 15th June 2017, as recorded by counsel for the respondent shows, matters were at a far earlier stage. The material passage of that note states:

> "Medical evidence not say severe autism? I am just repeating what health visitor said to me. I will have more detailed information after the doctor appointment. The health visitor said that after visiting child not doctor."

33 The reality is that this court now has before it a detailed report by Dr Grange which was not available to the district judge. In my view, that report should be considered by this court so that it has the fullest and most up-to-date information available to it, particularly as this case concerns the best interests of a very young and vulnerable child. In that context I bear in mind what this court said about the wider degree of latitude that may be appropriate in human rights cases at para.34 of its judgment in *Fenyvesi*. Again, the question of whether the report of Dr Grange is decisive overlaps with the issues which arise under Art.8, to which I will return later.

Grounds of appeal

34 On behalf of the appellant, Ms Westcott submits that:

(i) The district judge was wrong to find that the appellant is a fugitive and that the appellant had failed to prove that extradition would be oppressive because of the passage of time (see s.14 of the Act). At one time in her written submission, Ms Westcott also sought to argue that it would be unjust for the same reason, although that argument had not been advanced before the district judge by counsel who then appeared for the appellant. I should observe that that counsel was not Ms Westcott. However, after some discussion at the hearing before us, Ms Westcott made it clear that she was not pursuing that argument based on injustice before us.

(ii) The district judge was wrong to conclude that the appellant knowingly and unequivocally waived his right to a trial because he was deliberately absent from the trial which took place on 4th November 2015 (see s.20 of the Act).

(iii) The district judge was wrong to conclude that there would not be a breach of Art.8. In that context, Ms Westcott criticises specific elements of the district judge's reasoning, but

also submits that overall the balance struck by her was "wrong" in the circumstances of this case, particularly having regard to the fresh evidence which this court can take into account and which was not before the district judge. Ms Westcott further submits that this court should conduct its own assessment of the balance to be struck under Art.8 and should conclude that there would be a breach of that Article (see in particular the summary of her submission on this issue at paras.91 to 92 of her skeleton argument).

Respondent's submissions

35 On behalf of the respondent, Ms Bostock submits that the first two issues on this appeal in essence raise questions of fact which were determined by the district judge, having carefully considered all the evidence. She submits that those findings of fact should not be disturbed by this court on appeal. In relation to the third ground, Ms Bostock submits that the district judge went through the exercise that she was required to do under Art.8 in accordance with *Celinski* and that the conclusion which she reached on proportionality cannot be said to be "wrong" by this court on appeal.

36 On behalf of the respondent, Ms Bostock submits that this is not a case in which this court on appeal should reconsider the balancing exercise which was conducted by the district judge under Art.8.

Ground 1: section 14

37 As I understood the parties' submissions, the relevant principles of law which apply are common ground. In particular, they can be found in the decision of this court in *Wisniewski v Regional Court of Wroclaw, Poland* [2016] EWHC 386 (Admin); [2016] 1 WLR 3750 in the judgment of Lloyd Jones LJ, as he then was. It is helpful in particular to have regard to paras.51 to 54 on the concept of a person being "unlawfully at large". In particular, at para.54 it was said:

> "[...] Whether a person is unlawfully at large within this provision depends on whether he is at large in contravention of a lawful sentence under the applicable legal system. This is an objective state of affairs to which his knowledge and understanding are irrelevant. This was common ground before us on these appeals [...]"

38 The concept of a person being a "fugitive" was discussed from para.58 to para.59 in particular of the judgment. In this context it is important to observe that at para.59 it was said:

> "[...] Where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition [...]"

It is common ground that this issue raises a question of fact on which the burden of proof lies on the requesting state and that the standard of proof is the criminal standard.

39 Applying those principles to the facts of the present case, I do not consider that they were satisfied, and, in my judgment, the district judge ought to have decided this question differently. The appellant had put in place arrangements for his father to collect his correspondence for him. Furthermore, he was in touch with the Polish authorities in the context of the other two matters. It is unnecessary to go to those in detail – they are familiar to the parties – but we had drawn to our attention in particular notes made by a probation officer in Poland in relation to the other matters.

40 The district judge, in my view, placed undue emphasis on the fact that this appellant did not provide his address in the UK to the Polish authorities in the context of this particular matter, and viewed it in isolation from what else was going on. In my view, that was wrong because those other matters went to the appellant's state of mind.

41 Some people might say that the appellant did not act wisely or prudently. It was said and is said on behalf of the respondent that he did not perform his obligations, in particular by not informing the authorities that he was going to live and work in the UK and by not providing his address here. However, while that may provide some evidence of what a person's state of mind is, it is not necessarily the case that that was his state of mind. In the circumstances of this case, I have come to the conclusion that the evidence which the district judge summarised in her judgment, in particular at para.23 which I have quoted earlier, did not lead to the conclusion which she drew from it, namely that the appellant had knowingly placed himself beyond the reach of a legal process; in other words, that he was a fugitive.

42 It is true that the district judge decided against the appellant in the alternative at para.25. As was common ground before us, the subject of that paragraph overlaps with the issues that arise under Art.8. I will therefore deal with that in substance when I turn to ground 3 and consider Art.8 directly. However, the reason why the question of whether the appellant should properly be regarded as a fugitive may matter at the end of the day is that it feeds into the balancing exercise which needs to be done under Art.8. It was one of the factors that the district judge placed in the balance as weighing in favour of his extradition. In my

view, the district judge was wrong to consider that the appellant was a fugitive and so was wrong to weigh that factor in the balance against him in the proportionality exercise done under Art.8.

Ground 2: section 20

43 The legal background to s.20 of the Act is to be found in Council Framework Decision 2002/584/JHA, as amended by Framework Decision 2009/299. Material parts of the Framework Decision are set out in the judgment of the Court of Justice of the European Union ("CJEU") in case C-108/16 PPU *Dworzecki*, a request for a preliminary ruling made by the District Court of Amsterdam in the Netherlands.

44 As is noted by the CJEU in its judgment at para.5, Framework Decision 2009/299 sets out the grounds for refusing to execute a European Arrest Warrant where the person concerned did not appear in person at his trial. They then set out the terms of recitals 1, 2, 4 and 6 to 8. In particular, I would note that recital 1 cross-refers to the right to a fair trial in Art.6 of the European Convention on Human Rights, which of course is one of the Convention rights in our own HRA. The recital goes on to note that the European Court of Human Rights has declared that the right of the accused person to appear in person at the trial is not absolute, and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally waive that right.

45 Recital 8, which is also quoted in para.5 of the judgment of the CJEU, again cross-refers to the right to a fair trial in the Convention and goes on to state that:

> "In order to exercise this right, the person concerned needs to be aware of the scheduled trial. Under this Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that Convention. In accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her."

46 The Dutch court referred for the ruling of the CJEU two questions which are set out in para.17 of the judgment. The first related to the terms of Art.4a(1)(a) of Framework Decision 2002/584 and asked whether they were "autonomous concepts of EU law". The

second question was predicated on the basis that the answer to that question was yes, and asked some further questions which are set out in para.17 of the judgment.

47 That second question was the subject of consideration by the CJEU from para.33 of its judgment. It is unnecessary to rehearse that passage in detail. For present purposes it will suffice if I note in particular the terms of paras.42 and 51 of the judgment. At para.42, the court stated that it should be borne in mind that although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that requirement is not absolute:

> "The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so."

At para.51, the court stated:

> "In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him."

48 The EU legal context was considered also by this court in *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin); [2016] 1 WLR 3344 in which the judgment was given by Burnett LJ, as he then was. In particular, see paras.13 to 17 on the relationship between domestic law and EU law in this context and the principle of conforming interpretation; see also paras.29 to 32 in which reference is made to the background principles to be found in Art.6 of the Convention; and also reference is made at para.31 to the decision of the European Court of Human Rights in *Collozza v Italy* (1985) 7 EHRR 516, where, as Burnett LJ summarises it, it was held:

> "[...] that an accused had a right to be present and take part in criminal proceedings but that a trial *in absentia* could be acceptable if the state had diligently but

unsuccessfully given the accused notice of the hearing. The Strasbourg Court applies a principle that depends upon 'unequivocal waiver'. The question whether to proceed with a trial in the absence of an accused in the court of a Convention state would involve an inquiry which was heavily fact specific. So too, would any subsequent complaint to the Strasbourg Court of a breach of Art.6."

49 The position was recently and helpfully summarised by my Lord, Mr Justice Julian Knowles, in *Tyrakowski Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin): in particular see paras.19, 22, 25 and 34. In particular, I would note two points. First, the burden lies on the requesting state to prove to the criminal standard that the respondent person did deliberately absent himself from his trial. Secondly, what is required is ultimately an answer to the question whether the requested person has knowingly waived his right to a trial. Questions of manifest lack of diligence, for example, can be taken into account, but are evidential matters which go to answering that ultimate question.

50 Applying those principles to the facts of the present case, I do not consider that this had been established. In my judgment, the district judge ought to have decided this question differently. The district judge acknowledged that the summons was not served on the appellant, and I would observe, without repeating, what I have already quoted from para.39 of her judgment. The appellant had put in place an arrangement which he described as giving a power of attorney to his father to collect his correspondence and pass it on. In fact, the summons was not collected, but it is not clear why.

51 In those circumstances, I have come to the conclusion that it was not established to the requisite standard of proof that this appellant had knowingly waived his right to a trial. Some might say that what he had done was insufficient; others might say that what he had done was foolhardy. But at the end of the day it did not, in my judgment, amount to a conclusion that he had knowingly waived his right to a trial and therefore had deliberately absented himself from that trial for the purpose of s.20 of the Act.

52 As Ms Westcott acknowledged at the hearing before us, the answer to the s.20 question would in fact, certainly as circumstances presently stand, provide a complete answer in this case. However, not least in the light of the fact that we have heard full argument on the other grounds, I have dealt with ground 1 already and I will now turn to ground 3.

Ground 3: section 21 and Article 8

53 The principles of law which apply in this context again are familiar and are common ground. See in particular the decision of the Supreme Court in *HH* [2012] UKSC 25; [2013] 1 AC 338, in particular in the judgment of Lady Hale JSC at paras.32 to 33. I would note in particular that at para.32 she said that:

> "[...] The test is always whether the gravity of the interference with family life is justified by the gravity of the public interest pursued [...]"

She also emphasised in particular the rights of children. At para.33 she said:

> "[...] The family rights of children are of a different order from those of adults, for several reasons. In the first place [...] Art.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 [...]"

54 The decision of this court in *Celinski* is also very familiar to the parties, so it is unnecessary to set its terms out in detail (see [2015] EWHC 1274 (Admin)). The judgment was given by the then Lord Chief Justice, Lord Thomas of Cwmgiedd: see in particular paras.19 to 21 on the role of an appellate court and the citation from the decision of the Supreme Court in *Re B (A child)* [2013] UKSC 33, in particular at paras.93 to 94 which are set out at para.21 in this court's judgment.

55 The final authority to which reference should be made in this context is the recent decision of this court in *T v The Circuit Court in Tarnobrzeg, Poland* [2017] EWHC 1978 (Admin); [2017] 4 WLR 137, in which again the judgment was given by Burnett LJ, as he then was. In particular, I would draw attention to paras.32 to 35 on the need for evidence in appropriate cases; if need be, up-to-date evidence at the appeal stage before this court. As Burnett LJ observed at para.32:

> "[...] the question is whether a court which considers Art.8 has sufficient information to enable it to make an informed decision on the proportionality of extradition. The best interests of a child affected by the extradition of a parent are 'a primary consideration' for the purposes of Art.8 [reference is then made to the case of *HH*] [...]"

56 Although this court observed in the ensuing paragraphs that frequently that evidence will be before the extradition court itself, it went on to say that, where it is necessary to have it at the appeal stage, that may be justified (see para.35). It also observed that frequently the evidence will be obtainable from the local social services authority, but that there may be circumstances in which it is appropriate and necessary for it to be psychological expert evidence (see para.36 of the judgment).

57 I have already said that, in my judgment, the fresh evidence should be admitted in this appeal. In my view, that evidence is important and indeed decisive in the balancing exercise which needs to be performed under Art.8. First, there is evidence by way of update on the medical situation of both MK and P. The letters concerning P make it clear, without unnecessarily going into the detail at this stage, that there has been put in place a large team of specialists to deal with P's complex needs; for example, a paediatric consultant but also an audiologist. It is unrealistic, in my view, to expect that the whole family can now relocate to Poland given P's needs and the package that has been carefully put in place for those needs. In my view, it would not be in the best interests of this child to expect him to move to Poland at this time.

58 In that context, I note the very recent letter of 17th January 2018, which the court has before it in the supplementary bundle, from the relevant medical practice in relation to P's mother, MK. Again, it is unnecessary in the context of this judgment to set out its terms which are well known to the parties; suffice to say that it refers to a medical procedure which MK underwent on 14th September 2017 and the medical consequences which she, at least currently, is suffering.

59 The evidence before this court shows that MK's condition has worsened since the hearing before the district judge, so that it has become more difficult for her to cope with the children, and in particular P's needs, alone in this country. I would also observe that she does not work herself and that she does not drive.

60 The recent developments in this case inevitably affect one of the factors that were weighed in the balance by the district judge who proceeded on the assumption, implicit at least, that the family as a whole would relocate to Poland for the duration of the appellant's sentence, because she took into account the fact that family members live there and so would be able to help look after the children.

61 Even putting to one side for the moment Ms Westcott's criticisms of that reasoning on its merits, that assumption can no longer be made. Further, and decisively in my view, is the important evidence which this court now has and which the district judge did not have relating to P's up-to-date condition. In that context, I remind myself of what is said by Dr Grange in his report, without quoting from it again. I also bear in mind more recent information which has been placed before this court in the supplementary bundle in the form of a letter from the community health foundation trust, dated 14th December 2017, which refers to P's problems and notes that there are significant speech and language difficulties as well as social communication difficulties. On the final page of that letter, it is noted by the author that clinical observations included that when P's father helped him he was happy joining with his father, but he did not want his mother, for example, to take his bib off. In his summary, the author states that P:

> "Has got significant difficulties in social communication and significant delay in speech and language. As he has got some features suggestive of autism spectrum disorder (ASD) the following plan was agreed with the parents [...]."

62 I would not belittle the importance of the factors to be weighed in the balance in favour of extradition which were set out by the district judge in her judgment (see in particular pp.16 to 17). However, I have come to the conclusion that the appellant was not, in truth, a fugitive, for reasons I have already given in relation to ground 1. Further, the factors on the other side of the balance have to be given much greater weight, in my view, now, particularly in the light of the fresh evidence which this court has and which the district judge did not. I would hold that the balance comes down firmly against ordering extradition in the particular circumstances of this case, especially having regard to the impact on P, who is a very young and vulnerable child, particularly at a crucial stage in his life.

Conclusion

63 For the reasons I have given, I would allow this appeal.

MR JUSTICE JULIAN KNOWLES: I agree.

LORD JUSTICE SINGH: Now, is there anything else?

MS WESTCOTT: Your Lordships, no. Thank you very much. There was a draft order regarding the name submitted yesterday, and any consequential order from today's decision should be uncontroversial.

LORD JUSTICE SINGH: Yes.

MS WESTCOTT: We can provide it if that would assist.

LORD JUSTICE SINGH: Thank you, yes. I hope the message got through that I approved the terms of the draft order on anonymity and I've made reference to the fact that order was made at the beginning of my judgment. Do we have to say anything about costs?

MS WESTCOTT: No.

LORD JUSTICE SINGH: All right. Is there anything else, Ms Bostock?

MR JUSTICE JULIAN KNOWLES: You'll need detailed assessment, presumably?

LORD JUSTICE SINGH: Put that into the draft order and let us have it in the usual way for our consideration, and I hope approval. Of course, that needs to be agreed with the respondent's counsel.

MS WESTCOTT: Yes.

LORD JUSTICE SINGH: Can I thank you and those representing you once again for the considerable help that this court has been given.

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This transcript has been approved by the Judge.