Neutral Citation Number: [2018] EWHC 2618 (Admin)

Case No: CO/827/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2018

Before :

MRS JUSTICE WHIPPLE DBE

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Between :

Robert Ulaszonek — **Appellant**

- and –

Polish Judicial Authority — **Respondent**

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- -

Mr Jo Sidhu QC (instructed by **Direct Access**) for the **Appellant**
Mr Jonathan Swain (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 18 September

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Judgment Approved

Mrs Justice Whipple:

INTRODUCTION

1. This is an appeal against the extradition order granted by DJ Baraitser sitting in the Westminster Magistrates' Court on 20 February 2018. Permission was granted by Cheema-Grubb J on 25 July 2018 on a single ground based on s.2(6)(e) of the Act. Regrettably, that single ground has never been formally set out in any (amended) grounds of appeal. It was in general terms addressed and argued in the Appellant's skeleton argument for this hearing and in the papers which were put before Cheema-Grubb J.

2. DJ Baraitser ordered extradition to Poland on the basis of a mixed European Arrest Warrant issued on 24 January 2006 by the Regional Court in Bialysok III Penal Division under reference number III Kop 114/05 (the "original EAW"). The file reference for the original EAW was III Kop 114/05. The original EAW was signed by Judge Halina Nowakowska.

3. The original EAW sought the Appellant's extradition for the following matters:

i) One accusation matter, Case number III K 279/03, relating to an allegation that the Appellant, acting with others, had assaulted the complainant using a baseball bat; the complainant was struck repeatedly with the weapon and as a result he suffered multiple injuries. The enforceable decision was a temporary arrest warrant issued on 19 March 2003 and the maximum sentence was 8 years imprisonment.

ii) Five conviction matters with sentences imposed, as follows:

a) Case number III K 1566/99 (1 year imprisonment)

b) Case number III K 1894/99 (1 year imprisonment)

c) Case number III K 1001/00 (1 year and 6 months imprisonment)

d) Case number III K 1918/00 (4 years and 6 months imprisonment)

e) Case number III K 1374/01 (3 years and 6 months imprisonment). This related to two offences of domestic burglary.

4. The sentences under a) to d) remained to be served in full. Of the sentence under e), 3 years and 31 days remain to be served.

5. DJ Baraitser recorded at [33] of her decision that there was no challenge under s.2 and that she was satisfied that the warrant was properly issued and certified. Further, she confirmed at [36] that all the offences specified were extradition offences. She concluded that there were no bars to extradition and that extradition would be proportionate under Article 8 ([40]-[80]) and ordered the Appellant's extradition.

6. In grounds of appeal perfected on 26 March 2018, the Appellant sought to appeal to this Court (these are the "Perfected Grounds"). Broadly, the Perfected Grounds reiterated the grounds which were advanced before DJ Baraitser (passage of time and Article 8), but the Appellant expanded his challenge under s 14 (passage of time) to include the proposition that the Appellant would not receive a fair trial if returned to Poland, based on the Irish case of *MoJ v Celmer* [2018] IEHC 119.

7. On 30 April 2018, the Polish authorities aggregated the offences at a) to d) into a cumulative sentence. (I was not told the length of that cumulative sentence or given any other details about it.)

8. On 9 May 2018, Sir Wynn Williams listed the matter for a rolled-up hearing.

9. On 15 June 2018, the Polish authorities produced another document. It was an altered version of the original EAW and I shall refer to it as the "altered EAW". Its status lies at the heart of this appeal. It too bore the file reference III Kop 114/05. It was signed by Judge Marzenna Roleder. Box B of the altered EAW listed only two matters:

i) The accusation matter, Case number III K 279/03;

ii) The conviction matter, formerly listed at e), namely Case number III K 1374/01.

10. Correspondence passed between the Judicial Authority and the CPS about the altered EAW. In an email dated 19 June 2018, the CPS (by Louise Wyatt, officer) reported that "Poland have replaced the EAW". On 25 June 2018, the CPS (by Dawn Chatfield, officer) stated that the Polish authorities had advised "that they did not intend for the original EAW to be withdrawn only amended". This appears to draw on an email from the Judicial Authority (undated) which I was shown which says:

> "[the EAW] has been partly amended (there were five enforceable judgments, four were removed, one is still valid – Case ref no III K 1374/01) and then reissued with a new date. However the number remains the same ie III Kop 114/05. Therefore the EAW in SIS ref no III Kop 114/05 issued on 15/06/2018 and signed by Judge Marzenna Roleder is the only one valid".

11. Judge Roleder wrote a letter on 22 June 2018 which stated as follows (original emphasis):

> "In reference to your letter of 21 June 2018, the Regional Court [*Sąd Okręgowy]* III Criminal Division in Bialystok kindly informs that the Polish authority did not issue a new European arrest warrant with regard to Robert Ulaszonek; the Polish authorities only modified the arrest warrant of 24 January 2006 by eliminating the following cases: III K 1566/00, III K 1894/99, III K 1001/00 and III K 1918/00 from the arrest warrant with regard to Robert Ulaszonek, these cases were covered by a new cumulative judgment, therefore the arrest warrant of 24 January 2006 is still valid with regard to the cases of the District Public Prosecutor's Office Bialystok-Północ in Bialystok *[Prokuratura Rejonowa Bialystok-Północ w Bialymstoku]*, case Ds. 752/03 and the District Court in Bialystok *[Sąd Rejonowy w Bialymstoku]*, case III K 1374/01.
>
> Considering the above, there is no need to withdraw the European arrest warrant and have the subject arrested under the arrest warrant of 15 June 2018 because it is not a new arrest warrant, it has been modified and limited with regard to the version of 24 January 2006."

12. On 28 June 2018, the matter came before Holgate J on a rolled-up hearing. By now, the Appellant was represented by Mr Sidhu QC who has appeared before me on this appeal but who was not instructed at the hearing below. On 22 June 2018, an application for permission to amend the grounds was submitted in the name of Mr Sidhu. I understand that this was before Holgate J. He adjourned the matter, giving directions for further information to be filed by the Respondent.

13. The matter then came before Cheema-Grubb J on 31 July 2018, on the adjourned rolled up hearing. Cheema-Grubb J refused permission on Mr Sidhu's first amended ground which related to s.2(4)(c) of the Act. She granted permission on his second amended ground which related to s.2(6)(e). This is the "Amended Ground" (I shall come back to it). She gave directions for the substantive hearing of the appeal on that single ground.

APPELLANT'S CASE

14. Thus, the Appellant has permission to rely on a single ground of appeal, namely his Amended Ground. All other grounds have either been abandoned (ie the grounds advanced in the Perfected Grounds, on which permission was not in the end sought) or permission has been refused (ie the first of the two amended grounds advanced by Mr Sidhu).

15. In the skeleton for the hearing on 31 July 2018 (in large part replicated in the skeleton before me), Mr Sidhu explained the Amended Ground as follows: "*there is a deficiency in the particulars of the sentence in consequence of the cumulative sentence issued on 30 April 2018*" [40]; that the "*amended EAW issued by the IJA on 15th June 2018 excluded those sentences contained within the cumulative sentence on 30 April 2018*" [43] and that "*the extradition order of 20th February 2018 was based upon the four (cumulative) sentences subsequently revoked by the amended EAW of 15th June 2018. It follows that execution of that defective warrant would be impermissible*" [45].

16. In oral argument, he refined the argument to concentrate on the following two propositions:

    i) There is no such thing as an amended warrant; the "altered warrant" is in fact and law a new warrant.

    ii) As a matter of fairness and/or as a matter of procedure, the Appellant is entitled to have his challenge to the new (altered) warrant heard afresh. The Court has no power to allow an appeal "in part". The Court can only dismiss or allow an appeal, there is a binary choice open to the Court. The right answer here is to allow the appeal and quash the extradition order. The Polish authorities can then recommence the extradition process by seeking extradition on the basis of the altered warrant (as, in effect, a new warrant).

17. Mr Sidhu did not suggest that, this appeal on the single Amended Ground apart, there would be any bar to extradition. He accepted that his arguments were technical. Without conceding the point, he did not challenge my suggestion that any new extradition process on the basis of the altered warrant, starting afresh in the Magistrates' Court, would lead to his client's lawful extradition. He said that the safety of the extradition was not the issue; rather this is a matter to be determined according to a statutory procedure.

18. In his skeleton for this hearing, Mr Sidhu relied on two authorities: *FK v Stuttgart State Prosecutor's Office* [2017] EWHC 2160 (Admin) and *M v Preliminary Investigation Tribunal of Napoli* [2018] EWHC 1808 (Admin), the latter in support of the proposition that where there has been a wholesale failure to provide necessary particulars, the appropriate remedy is to allow the appeal and allow the Judicial Authority to recommence proceedings based on an accurate EAW (see [75] in particular). This is what he says should happen here.

RESPONDENT'S ARGUMENT

19. The Respondent, by Mr Swain, resisted this appeal, and sought to uphold the decision of DJ Baraitser. He argued that:

    i) The decision of DJ Baraitser is not wrong because the original EAW remains valid. The subsequent alteration did not affect the validity of the document which still contains the correct particulars. (In this connection, he relied on *Zakrzewski v Poland* [2013] UKSC 2.) Accordingly, the extradition order, based on that EAW, remained valid and enforceable.

    ii) Alternatively, the altered EAW of 15 June 2018 should be seen as additional information which should be admitted under the principle in *Goluchowski v Poland* [2016] UKSC 36, relying in particular on *Budai v Hungary Judicial Authority* [2017] EWHC 229 (Admin).

    iii) Further and in any event, the Extradition Act (Multiple Offences) Order 2003 (SI 2003/3150) (the "2003 Order") applied. The 2003 Order provides at article 1 that any reference in the Act to an offence is to be construed as a reference to "offences" in the plural. The effect is that a judge ordering extradition does so separately and severally for every offence specified in the EAW. Therefore, it was open to this Court on an appeal to allow the appeal in relation to those parts of the original EAW which were no longer proceeded with but otherwise to dismiss the appeal, leaving the extradition order in place on the basis of the accusation and conviction offences specified in the altered EAW. This was the approach adopted in analogous circumstances by the Court in *Lewicki v Preliminary Investigation Tribunal of Napoli, Italy* [2018] EWHC 1160 (Admin) and it was open to the Court here.

DISCUSSION

20. In light of the correspondence between the Issuing Judicial Authority ("IJA") and the CPS to which I have referred, it seems to be clear that the IJA did not intend to replace the EAW, but rather to amend it. The IJA has asserted that there has only ever been one EAW which has at any time existed, that is the EAW under reference III Kop 114/05, originally issued on 24 January 2006, and amended on 15 June 2018. Thus, the Judicial Authority says that this is an amended EAW, not a new or replacement EAW.

21. Mr Sidhu argues that the IJA is not permitted to amend an EAW in this way. Mr Swain disagreed and argued that amendment is permitted in principle, and showed me *Budai* to support his case on this point. I agree with Mr Swain and conclude that a judicial authority can, in principle, amend an EAW. On the facts in *Budai,* that was precisely what occurred (noting [11] where the Court recorded that the judicial authority had provided "another version of the EAW which was identical to the original except in Box B …"). At [18] the Court allowed the Judicial Authority to adduce the further information in this way, concluding that this was "further information" provided pursuant to Article 15 of the Framework Decision.

22. But those preliminary conclusions do not confront the central issue in this case which is not whether the IJA is permitted to amend the EAW (I conclude that it plainly is) but whether the extradition order dated 20 February 2018 can still be relied on to extradite this Appellant, even though some of the convictions in the original EAW –

on which that order was predicated - have been excised by amendment of the EAW. In this case, four out of five of the convictions have been excised, leaving the single accusation and one remaining conviction; this is a substantial amendment, on any view. It is the extent of that amendment, and the fact that it takes out some of the matters originally relied as particulars in the original (and does not merely supplement missing information) which I understand to the be the central plank of Mr Sidhu's Amended Ground.

23. There may be different ways of looking at and answering that problem. I am persuaded that my own solution should reflect the route adopted by the Divisional Court in *Lewicki* where a similar issue arose. In that case, the EAW initially referred to ten accusations, but by the time of the appeal the applicant only stood accused of a single offence, having been acquitted of the remaining nine on grounds that they were time-barred (see [76(vii)(a)]). The Court referred to the Supreme Court's judgment in *Zakrzewski,* and recorded (per Sweeney J):

> "[41] Lord Sumption went on to conclude that it did not follow that nothing could be done if the prescribed particulars in the warrant were, or had become, incorrect – but that the remedy had to be found at the stage when the judge was considering whether to extradite. He identified two. The first and main one (at [10]) being the mutual trust between states party to the Framework Decision, and their ability to withdraw a warrant, or to forward, or to request, further information to correct the position. The second (at [11] – [13]) being the inherent right of an English Court to ensure that its process is not abused – but limited to circumstances in which:
>
> i) The statements in the warrant comprise statutory particulars that are wrong or incomplete in some respect.
>
> ii) The true facts required to correct the error or omission are clear and beyond legitimate dispute (and the application is not being used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant – that being a matter for the requesting court).
>
> iii) The error or omission is material to the operation of the statutory scheme – which, in some instances, will depend upon its impact on the decision whether or not to order extradition."

24. The Court noted that nine out of ten of the original offences had fallen away. Sweeney J granted permission to appeal on that issue (Ground 2 in that case), saying this:

> "[84] … it is, in my view, reasonably arguable, in accordance with *Spain v Murua* as interpreted by *Zakrzewski,* that it would be an abuse of process to extradite the Applicant for the nine substantive offences of which he was acquitted as being time-barred".

25. On the facts in that case, he said that the outcome should be to allow the appeal against those parts of the extradition order which reflected the nine offences of which

the Appellant had now been acquitted (relying on the 2003 Order), but otherwise to dismiss the appeal and so allow extradition to proceed on the basis of the remaining offences. He had already (at [43]) referred to the effect of the 2003 Order, and then by way of disposal he said this:

> "[132] … it seems to me that, in the particular circumstances of this case, which include the undoubted acquittal of the Applicant by a competent court in relation to the nine substantive offences, and the absence of any undertaking on instructions, or other viable guarantee, as to the non-resurrection of those offences (which creates a risk of prejudice or unfairness), the *Zakrzewski* criteria (see [41] above) are met. Accordingly, in my view, in the terms of s.27 (4) of the EA , had this issue been raised before the DJ it would have resulted in him deciding a question before him (namely what offences to order extradition for) differently - in that he would have ordered the Applicant's discharge in relation to each of the nine substantive offences.
>
> [133] In the result, I would allow the appeal on the limited aspect of Ground 2 that I have indicated, and would quash the order for the Applicant's extradition in relation to the nine substantive offences. However, the order for the Applicant's extradition in relation to the offence of participation in a criminal association stands, and (I underline again) that offence covers the period from December 2005 until the issue of the EAW on 25 February 2010 and, whilst it includes (as is accepted) the conduct underlying the nine substantive offences, it is not confined to that conduct.

26. There are of course differences of fact between *Lewicki* and this case, notably that in *Lewicki* the EAW had not been amended to reflect the acquittals whereas in this case, the EAW has been amended to reflect the narrower basis on which extradition is now sought.

27. But still I consider *Lewicki* to be a helpful precedent. It shows that in cases like this the appeal court can permit extradition on the basis of fewer matters than were originally proceeded with, relying on the effect of the 2003 Order. It would of course be open to an appellant to argue on appeal in such a case that the extradition should not proceed for other reasons, such as Article 8 – but no such argument is advanced here.

28. The judgment in *Lewicki*, read with the 2003 Order, show that the Court can, in effect, allow an appeal "in part" and I reject Mr Sidhu's contrary submission that this Court only has a binary choice open to it to allow or dismiss the appeal in its totality.

29. I therefore adopt the route suggested in Mr Swain's third submission. I accept that in this case, the Polish authorities no longer seek extradition on the same basis as they did before; the basis has narrowed. But that narrowing does not render the EAW invalid. By operation of the 2003 Order the Court *is* at liberty to allow this appeal in part (in effect), in relation to those offences specified in the original EAW which have now been excised by amendment, to quash the extradition order and order release in relation to those offences only – see s.27(5) of the Act as amended by the 2003 Order,

and see [43] of *Lewicki* - but to dismiss the appeal in all other aspects. The effect of this disposal is to trim the extradition order to the remaining accusation and conviction on which extradition is now, in fact, sought (reflected in this case in the altered EAW).

30. If the District Judge had known that four of the convictions in the original EAW were not relied on by the IJA, she would doubtless have allowed the appeal to that extent. Therefore, this Court can allow the appeal to that extent: see s. 27(4) of the Act.

31. In specific answer to the Appellant's arguments before me: on the first point, I can see no reason why such a change of circumstances should not be communicated by means of an amended EAW – that is one way of providing further information to the domestic authorities (see *Budai,* again). I cannot accept that the nature and significance of this further information means that it cannot be communicated in that way. In answer to the second point, I do not accept that the Appellant is entitled as of right to have his appeal allowed and the extradition order quashed in its entirety. That submission proceeds from the (incorrect) assertion that the EAW cannot be amended; it also ignores the existence of the 2003 Order which has the effect of applying the extradition order to each of the offences separately and severably.

CONCLUSION

32. I reject the Appellant's argument that the EAW cannot lawfully be amended.

33. I further reject the argument that the Appellant has a right to have his appeal allowed in full and for the extradition proceedings to be recommenced.

34. To reflect the narrower basis on which extradition is now, in fact, sought, I allow the appeal to the limited extent that the original EAW included offences which no longer form the basis for extradition (ie in relation to convictions a) to d) listed above), but otherwise I dismiss this appeal.

35. I invite Counsel to agree an order which reflects this judgment. I thank both of them for their helpful submissions.