IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
[2018] EWHC 2667 (Admin)

CO/5544/2017

Royal Courts of Justice
Wednesday, 26 September 2018

Before:

SIR ROSS CRANSTON
(Sitting as a Judge of the High Court)

B E T W E E N :

H — Appellant

- and -

MATESZALKA DISTRICT COURT, HUNGARY — Respondent

MISS M WESTCOTT (instructed by JFH Law) appeared on behalf of the Appellant.
MISS A BOSTOCK (instructed by the Crown Prosecution Service Extradition Unit) appeared on behalf of the Respondent.

J U D G M E N T

SIR ROSS CRANSTON:

1 This is an appeal with permission of Ouseley J against the decision of District Judge Blake made on 23 November 2017 to order the appellant's extradition to Hungary. That decision was pursuant to an accusation European Arrest Warrant, "EAW", issued by a judge of a court in Mateszalka on 30 January 2017 and certified by the National Crime Agency on 21 February 2017.

2 The EAW was in relation to a single offence of using false information to obtain a Hungarian passport. Unfortunately, the case has been delayed, the main reason being that it was stayed behind the lead case of *Fuzesi & Balasz v Budapest-Capital Regional Court, Hungary* [2018] EWHC 1885 (Admin), which considered extradition in the light of prison conditions in Hungary.

The EAW and further information.

3 The appellant is in her mid-40s and from Ukraine. The EAW seeks her return to stand trial, in relation to an offence of obtaining a Hungarian passport on 21 April 2015, with the assistance of a clerk in a Government office in Hungary.

4 The appellant is said to have used the personal details of a Hungarian citizen called Hanna Pak, alongside her own picture, to obtain the false passport, as box (e) of the warrant puts it, "in order to use the right of free movement within the territory of the European Union".

5 The maximum sentence which can be imposed is stated as 5 years' imprisonment. The conduct has been designated as "forgery of administrative documents" by the marking of the framework list. The domestic warrant for the appellant's arrest was issued on 22 December 2016.

6 Following the appellant's arrest under the EAW, as is not unusual in extradition cases the Crown Prosecution Service asked certain questions of the judicial authority. The CPS seems to have mentioned the appellant's angina and heart condition in the course of its request.

7 In response, the judicial authority provided further information via three letters. The first, dated 8 June 2017, stated that the appellant was not arrested or questioned about the allegation. It began on 21 November 2016 and she could not be found throughout it. The letter added that no prosecution had yet been made.

8 The second letter, of 4 July 2017, stated that the indictment had not been filed but the investigation was in progress. It explained that an indictment could not be filed until the appellant was interrogated, even though there was a well-founded suspicion and there was evidence that she had committed the offence. The appellant, "will be held in a penitentiary institute where her heart condition is going to be properly treated."

9 The third letter, dated 16 August, rejected a suggestion that the appellant could be questioned or interrogated by a video link while still in this country.

10 In addition to these three letters, there is an email dated 9 July this year where the judicial authority has guaranteed that the appellant, if convicted, will be detained in conditions that guarantee at least three square metres of personal space.

The evidence before the District Judge.

11 Before the District Judge, the appellant's evidence was that she had lived in the UK since November 2007. Prior to that, she was a teacher in Ukraine. Between 1994 and 2001 two of her young children had died, and she had had a late-term miscarriage.

12 Her evidence continued that in early 2014, with others at her church, she began sending parcels of clothing, boots and sleeping bags to support the Ukrainian Army in the civil war in the eastern part of the country. On her account, she started receiving threatening messages later that year.

13 In 2015, she travelled to Hungary to obtain the passport. Her evidence was that she understood that she was to receive a legitimate Hungarian passport. It was during the process that it became clear to her that the passport was to be in a different name. She stated that she no choice but to co-operate due to threats from the people accompanying her.

14 Late in 2015, the appellant was in Ukraine. On her account, she was stopped. She was then accused of supporting separatist fighters. On her account, she was interrogated, assaulted and ultimately raped.

15 The following year, in July 2016, her account was that she travelled to Ukraine for approximately three weeks to seek treatment for gynaecological problems and her trauma symptoms following her kidnap and rape the previous summer. There is a Ukrainian medical letter stating that she was in hospital for about a week in August 2016. On her account she was attacked while in the Ukraine as a result of what were said to be her activities in assisting the fighters.

16 When the appellant returned to the United Kingdom from Ukraine on 19 August 2016, she was stopped at Luton Airport (due to her Hungarian passport). She was released and asked to return for an interview. She did that on 27 August. At that point she was detained at Yarl's Wood Immigration Centre with a view to her removal to Ukraine. Her claim for asylum was refused in October 2016 but attempts to remove her to the Ukraine in February and April of 2017 failed. It seems that that was because of her medical condition.

17 When she was still detained at Yarl's Wood, on 10 May 2017 she was arrested under the European Arrest Warrant. There was an initial extradition hearing the following day and from that point on until 30 January 2018 she was detained in HMP Bronzefield. At that point, as I shall explain in a moment, she was released on immigration bail.

The District Judge's judgment.

18 The hearing before the District Judge took place on 10 November 2017. After considering the background to the case, the District Judge turned in his judgment to the medical evidence of (i) Dr Walters; (ii) Mr Balasz Toth from the Hungarian Helsinki Committee; and (iii) the appellant herself.

19 Dr Pamela Walters is a consultant in forensic and addiction psychiatry. Her report is dated 21 September 2017. It concluded that the appellant was not malingering. It recounted the appellant's cardiac issues. It then diagnosed her with post-traumatic stress disorder of moderate severity and with moderately severe depression.

20 Dr Walters concluded that there was likely to be a medium to high suicide risk because extradition to Hungary was seen by the appellant as likely to lead to her return to Ukraine. That was particularly upsetting to the appellant. In cross-examination by Miss Bostock,

Dr Walters conceded that she had not considered that the appellant was, in any event, subject to removal to Ukraine because of her immigration status.

21 I should add that the conclusions of Dr Walters about the appellant's mental health were supported by a report by a forensic psychologist, Dr Sanya Krljes, dated 6 November 2017.

22 The evidence from Mr Toth was that the likely penalty in Hungary for the appellant's alleged offending would not be immediate custody. Mr Toth said that, as to a possible sentence, she would receive a criminal fine or suspended imprisonment. In his report, he explained that he had contacted some criminal lawyers who had similar cases. All of them had informed him that the typical sanction in such cases was a fine or a sentence of suspended imprisonment:

> "If the perpetrator was not a recidivist and the only crime she committed was forgery of official documents, in the light of the sentencing practice it is unlikely that the appellant would be sentenced to effective imprisonment."

"Effective imprisonment" in that context meant immediate imprisonment as opposed to a suspended sentence.

23 In a supplementary report, Mr Toth incorporated official statistics between the years 2012 and 2014, obtained as a result of a freedom of information request, to support his earlier conclusion, in other words, that the vast majority of punishments imposed for this type of offence were not of immediate imprisonment. In oral evidence before the District Judge, Mr Toth stated that if imprisonment were to be imposed, the average period was in the region of 6 months.

24 In his judgment, the District Judge firstly addressed a challenge (which is no longer pursued) relating to whether the Hungarian authorities had made a decision to prosecute the appellant. That was a challenge under s.12(A) of the 2003 Act.

25 Regarding Art.8 of the European Convention on Human Rights, the District Judge conducted the balancing exercise required by *Polish Judicial Authorities v Celinski & Ors* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551. He concluded that it came down firmly in favour of the appellant's rights not acting as a bar against extradition.

26 The factors the District Judge identified in favour of extradition were the public interest considerations, coupled with the fact that the offence was of some gravity and would likely be dealt with by custody. He added that there were no children affected by the application, that the appellant was awaiting removal to Ukraine and that her son, ex-husband and sister all lived in Ukraine.

27 Militating against extradition were the appellant's wish to remain in this country, the fact she suffered from PTSD and was at risk of suicide and her concerns about being removed to Ukraine.

28 The District Judge then addressed the Art.3 ECHR argument about prison conditions in Hungary and rejected it. He then turned to s.25 of the 2003 Act, oppression, and rejected the appellant's case, citing *Polish Judicial Authority v Wolkowicz (Alias Del Ponti)* [2013] EWHC 102 (Admin).

29 The District Judge stated that while the appellant had presented a profoundly sad account of her personal history and current circumstances, for which he had "great sympathy", he had

confidence in the Hungarian authorities to manage her issues. He therefore ordered extradition.

30 After his judgment, on 29 January 2018, there was an application for conditional bail. The matter came before District Judge Blake, on the basis that he was the most appropriate person to deal with the matter having conducted the extradition hearing. District Judge Blake granted conditional bail. In the course of that hearing he observed that the reality was that the appellant had probably served a likely penalty that would be imposed in Hungary.

31 In late 2017 the appellant had made an asylum application. She was granted immigration bail on 31 May 2018. Under immigration bail, she has monthly reporting.

The issues

32 The first issue to be addressed logically is proportionality under s.21(A)(1)(b) of the 2003 Act. While this was raised by Miss Westcott on the appellant's behalf before the District Judge, it is unfortunately not specifically addressed by him. Under that section in the case of an accusation EAW, in addition to whether extradition will be compatible with ECHR rights, a court must decide whether extradition will be disproportionate.

33 Section 21(A)(3) contains the three specified matters to be taken into account in deciding this:

(a) The seriousness of the conduct alleged to constitute the extradition offence.

(b) The likely penalty that would be imposed if the requested person was found guilty of the extradition offence.

(c) The possibility of the foreign authority taking less coercive measures than extradition.

34 The Criminal Procedure Rules contain guidance on the application of s.21(A)(1)(b). Practice Direction 50(A)(5) sets out a number of what would be regarded as minor offences where unless there are exceptional circumstances the judge should generally determine that extradition would be disproportionate. The type of offending in this case is not covered by that list.

35 In *Miraszewski & Ors v District Court In Torun & Anor* [2014] EWHC 4261 (Admin), [2015] WLR 3929, the Divisional Court held that the Practice Direction guidance represented a "floor" not a "ceiling", para.28; that the specified matters in s.21(A)(3) are neither conjunctive nor in order of importance, para.32; that in the first instance, seriousness is to be assessed against “domestic standards”, para.36; that where specific information about sentencing is absent from a requesting authority, the judge is entitled to “draw inferences” from the EAW and apply domestic sentencing practice as a measure of likelihood, para.38; and that "it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate", para.39.

36 For the judicial authority, Miss Bostock submits that is not a case where extradition should be barred as disproportionate under this provision. Paragraph 39 of *Miraszewski* means that even if the appellant's offending is likely to attract a non-custodial sentence, extradition can still be proportionate. She submitted that this type of offending would be highly likely to receive a sentence of imprisonment in the United Kingdom. It was a serious offence i.e., obtaining a false passport, and the relevant provision of the Hungarian Criminal Code provided for a penalty of up to 5 years' imprisonment. In this case, the likely penalty in

Hungary was imprisonment, given the weighty public interest likely to operate because of the abuse of the system.

37 As to Mr Toth's information about the type of sanctions imposed, Miss Bostock pointed out that it was apparent that his opinion on penalties was not especially specific on passport offences, except for the reliance on hearsay evidence from third parties. Miss Bostock highlighted the serious implications of the forgery of international travel documents. In sum, the evidence was far from conclusive that the likely penalty would not be imprisonment; to the contrary, the evidence was that it was likely to be a substantial sentence of imprisonment.

38 As far as the appellant having already served eight and a half months at HMP Bronzefield, Miss Bostock submitted that its implications for what would happen in Hungary were highly speculative. This court was unable to guess what sentence the Hungarian Court would impose and therefore it may well be that the eight and a half months would go nowhere near meeting the sentence which the Hungarian Court would regard as appropriate for this offending. It was a matter for the Hungarian Courts to determine whether the period of detention in this country was equivalent to the sentence which they would fix for this offending deserved.

39 In my view, and contrary to Miss Westcott's submissions, s.21(A)(3)(a) has no purchase here. The District Judge found that the allegation was of some gravity. That cannot be wrong. The appellant, a foreign national, is accused of falsely obtaining a passport. All EU countries would treat that as a serious offence. Although the list of offences in Practice Direction 50(A)(5) is a "floor, not a ceiling", the type of offending identified there is quite removed from that in this EAW. Those offences are some pointer to the assessment of seriousness in this case.

40 Where, in my view, the District Judge ought to have determined that extradition would be disproportionate was because of section 21(A)(3)(b), the likely penalty that would be imposed if the appellant is found guilty of the extradition offence.

41 Under Art.26 of the Framework Directive, an issuing Member State of an EAW:

> "shall deduct all periods potentially arising from the execution of a European Arrest Warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention being passed."

42 In this case, the appellant has spent eight and a half months not in immigration detention at Yarl's Wood but in HMP Bronzefield, that period running from 10 May 2017, when she was arrested under the EAW, until when conditional bail was granted on 29 January 2018. We do not know whether the Secretary of State for the Home Office regarded any of this as immigration detention. Since it followed her arrest under the EAW, we can therefore presume that the whole period potentially arises from the execution under it, as specified by Art.26 of the Framework Directive.

43 The upshot is that Hungary must deduct that eight and a half months period and not for immigration detention from any penalty imposed. It is speculation as to the sentence the Hungarian Court would impose, and what their provisions are for early release (for example, whether halfway through a sentence). Nonetheless, it is more than likely that any period of detention in Hungary would be accounted for by this eight and a half months which the appellant has served in prison in this country. In that case it would be disproportionate to extradite her.

44 I am comforted in this conclusion by the comment of the District Judge at the bail hearing, where he acknowledged that the reality was that the appellant had probably served the term of any sentence she was likely to receive in Hungary.

45 Since the appeal will be allowed under s.21(A)(1) of the 2003 Act, there is no need to consider the other challenges made to the District Judge's ruling. It is sufficient to say that, at first blush, the points which Miss Bostock has made so forcefully in her written submissions would seem otherwise to have carried the day. In other words, there seem to be no errors in the District Judge's conclusions as regards Art.3 ECHR prison conditions in Hungary; the Art.8 ECHR/*Celinski* balance; and oppression under s.25 of the 2003 Act.

CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

Transcribed by ***Opus 2 International Ltd.***
(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital

This transcript has been approved by the Judge.