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

CO/4398/2017

[2018] EWHC 704 (Admin)

Royal Courts of Justice
Thursday, 8th March 2018

Before:

MRS JUSTICE MAY

B E T W E E N :

PAVEL CHMIELEWSKI — Applicant

- and -

REGIONAL COURT IN RADOM, POLAND — Respondent

MR B SEIFERT appeared on behalf of the Applicant.
MS S TOWNSHEND appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE MAY:

1 This is an appeal against the decision of District Judge Baraitser ordering extradition of the claimant, Mr Pavel Chmielewski, made in September last year. Leave was refused on the papers by Mr Justice Jay but allowed in respect of two grounds at the oral renewal hearing before Mr Justice Holman in January this year.

The background

2 I can take the background facts shortly. The EAW in this case was issued on 6th April 2016 and certified by the NCA on 15th February 2017. It is an accusation EAW, giving details of three fraud offences in connection with car hire agreements in which Mr Chmielewski is said to have been involved with two others in 2013. On 11th April 2017, Mr Chmielewski was arrested and brought before Westminster Magistrates' Court. He was remanded on conditional bail and has remained on bail since. An Article 8 objection was the only one raised at that stage but he returned to court on 25th May 2017, at which time Mr Chmielewski applied to adjourn in order to make a s.21B application and to provide evidence on a s.12A issue.

3 The hearing was adjourned to 5th July, when the case was again adjourned for the s.21B request to be received and sent. There had been no response by the time of the final hearing on 5th September 2017, but the District Judge then refused an application to adjourn further. The District Judge also declined to admit evidence from Ms Dabrowska, a Polish lawyer providing a statement about the prosecution process in Poland. The hearing went ahead. The District Judge heard evidence from Mr Chmielewski and submissions from counsel after which, on 20th September, she handed down judgment ordering extradition.

4 As a preliminary issue, Mr Seifert, for Mr Chmielewski, drew my attention to para.3 of the order of Mr Justice Holman requesting a response from the Regional Court in Radom, Poland to Mr Chmielewski's request that he be interviewed either in Poland or by video link in the UK. Mr Seifert submitted that the recent response from the court in Radom had not addressed the question of whether Mr Chmielewski could be interviewed in Poland by going over there on temporary transfer and that an answer to this question was needed before the appeal could properly be heard.

5 Ms Townshend submitted that an answer was not required as (a), the question had never been asked by Mr Chmielewski or his representatives prior to the hearing in September last year, and (b), in any event, it must be assumed that the judicial authority had fully considered whether less coercive measures were appropriate before they issued the EAW in this case.

6 It appeared to me initially that as Mr Justice Holman in giving leave had clearly considered an answer to the question of whether Mr Chmielewski could be interviewed in Poland on temporary transfer relevant to the issues he had in mind for this appeal and since he had gone ahead and ordered it perhaps this appeal ought to wait for an answer. But I then looked more closely at Mr Justice Holman's reasons for including that in his order as appeared from his comments made at the time, as noted in Mr Seifert's very helpful skeleton argument. Those notes show that Mr Justice Holman was clearly under the impression that the question as to whether Mr Chmielewski could be interviewed in Poland under temporary transfer had already been asked and that the DJ was potentially at fault in not having taken that possibility into account in making her decision on proportionality under s.21(a).

7 I do not at all criticise Mr Seifert for this misapprehension on the part of judge at the renewal hearing but it explains the order that he made at that time. However, since my task at this hearing is to determine whether the DJ's conclusion on proportionality was wrong or not I am concerned only with the position as it stood at that time. The position then was that Mr Chmielewski had only requested information on whether he could be interviewed here in the UK either by police coming over from Poland for the purpose or by setting up a video link. It was that request to which the Radom court had provided no response. There had been no question then asked about the possibility of Mr Chmielewski going to Poland on what is termed 'an iron letter'. That question was only asked after the renewal hearing before Mr Justice Holman in January, long after the extradition hearing before the District Judge.

8 Ms Townshend drew my attention in this respect to the provisions of s.21B of the Extradition Act 2003, the relevant parts of which provide as follows:

> "**21B Request for Temporary Transfer etc**
>
> "(1) This section applies if-
>
> (a) a Part 1 warrant is issued which contains the statement referred to in s.2(3) (Warrant Issued for Purposes of Prosecution for Offence in Category 1 Territory), and
>
> (b) (b), at any time before or in the extradition hearing the appropriate judge is informed that a request under sub section (2) or (3) has been made."
>
> …
>
> (3) A request under this section is a request by the person in respect of whom the warrant is issued-
>
> (a) to be temporarily transferred to the requesting territory, or
>
> (b) that arrangements be made to enable the person to speak with representatives of an authority in the requesting territory responsible for investigating, prosecuting or trying the offence specified in the warrant.
>
> (4) The judge must order further proceedings in respect of the extradition to be adjourned if the judge thinks it necessary to do so to enable the person in the case of a request under sub section (2), or the authority by which the warrant is issued, in the case of a request under sub section (3), to consider whether to consent to the request. An adjournment under this sub section must not be for more than 7 days."

9 Ms Townshend pointed out that the regime for making requests as to less coercive measures is very strict. Requests must be made before or in the hearing which may as a result be adjourned but for no longer than 7 days. In this case, Mr Chmielewski had made a request for interview by Polish police here, or by video link here, prior to the hearing but he had not made a request for temporary transfer to be interviewed in Poland. The non-response by the court in Radom at the time of the extradition hearing last year was to the first questions only.

10 Mr Seifert was anxious to impress on me that an answer to that remaining single question - could Mr Chmielewski go over and be interviewed on an iron letter? - might very well dispose of, or at least considerably shorten, this appeal. In these busy courts that is always

an attractive submission for counsel to make but today was the day appointed for hearing the appeal and since the answer to the question would not bear upon the correctness or otherwise of the DJ's decision back in September last year, I refused his request to adjourn and proceeded hear the appeal.

11 Mr Justice Holman gave permission on s.12A and s.21A grounds but not in relation to Article 8. Section 12A provides as follows:

> "(1) A person's extradition to a Category 1 territory is barred by reason of absence of prosecution decision if, and only if-
>
> (a) it appears to the appropriate judge that there are reasonable grounds for believing that-
>
> (i) The competent authorities in the Category 1 territory have not made a decision to charge or have not made a decision to try or have made neither of those decisions.
>
> (ii) The person's absence from the Category 1 territory is not the sole reason for that failure.
>
> and
>
> (b) Those representing the Category 1 territory do not prove that-
>
> (i) The competent authorities in the Category 1 territory have made a decision to charge and a decision to try, or:
>
> (ii) In a case where one of those decisions has not been made or neither of them has been made the person's absence from the Category 1 territory is the sole reason for that failure."

12 This appeal really only concerns sub-section (1), namely whether or not there were reasonable grounds for believing that there was no decision to charge or try Mr Chmielewski and that his absence from Poland was not the sole reason for such failure. At the hearing before the DJ last year there was no information before her of the kind that is now available in information received from the court in Radom dated 2nd March 2018. The District Judge reached her decision by reference to the contents of the EAW. She concluded that there were no reasonable grounds for believing that there had been no decision to charge and no decision to try Mr Chmielewski.

13 At the renewal hearing, Mr Justice Holman was clearly concerned about this bearing in mind the evidence of Ms Dabrowska, the Polish lawyer. He observed that although, following the Lord Chief Justice's observations in the case of *Puceviciene v. Lithuania* [2016] EWHC 1862 (Admin), expert evidence should only be ordered in very rare circumstances, given that the District Judge had made directions for such evidence it was a matter of concern that she had decided to ignore it in arriving at her decision.

14 I understand and share the concerns of Mr Justice Holman. However, the position is now made much clearer following the provision, very recently, of further information from the Radom court. The information now available reads as follows:

> "(1) The decision to present charges against Piotr Pavel Chmielewski was issued on November 8th 2013 by the District Prosecutor's Office (East) in Radom but it was not announced to him as he had left Poland.

(2) The decision to file an indictment against the accused may be taken after the execution of the European Arrest Warrant and interrogation of the suspect in the Polish Prosecutor's office.

(3) The decision to prosecute Piotr Chmielewski with the European Arrest Warrant was caused by the fact that he had left Poland which has also prevented us from presenting the indictment against him until now.

(4) We cannot consent to his interrogation in the form of video conferences or by phone because the applicable provisions of the Polish Code of Criminal Procedure do not provide for such a form of interrogation of suspects. In addition, Poland stipulated under Art.9 para.9 of the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters, concluded in Strasbourg on November 8th 2001, that Polish judiciary authorities cannot use the opportunity to interrogate suspects and accused in the manner described."

15 Mr Seifert accepts that this information makes it clear that a decision to charge has been made. He points out, however, that the position as set out by Ms Dabrowska in her statement last year which the judge chose to ignore has now been confirmed, namely, that there has been no decision to indict. Mr Seifert submitted that the absence of any decision to indict is the equivalent of no decision to try for the purposes of s.12A(1)(a)(i).

16 Ms Townshend in response pointed to the discussion by the Divisional Court at para.48 of its decision in the case of *Fox v Public Prosecutor's Office of Frankfurt am Main Germany* [2017] EWHC 3396 (Admin), arguing that the absence of an indictment is not at all to be equated with an absence of a decision to try, that it could equally well be consistent with a conditional decision to try.

17 Had my decision on this appeal turned on this point, I might have decided that Mr Seifert was right and that the recent information confirming, as it does, Ms Dabrowska's evidence was sufficient to raise reasonable grounds for believing that a decision to try had not been made. But a claimant seeking to argue for an extradition bar under s.12A has to go further and show reasonable grounds that his or her absence from the territory, in this case, Poland, is not the sole reason for the failure to charge or try as the case may be, see s.12A(1)(a)(ii).

18 Mr Seifert tried to suggest that the absence of a very clear statement on the face of the latest information from the court in Radom to the effect that: "The sole reason for the absence of an indictment is that Mr Chmielewski is not in the country" (or similar) constituted reasonable grounds for the purposes of sub-section(1)(a)(ii). He relied also on use of the word "may" in para.2 of the recent information. It was a valiant effort but it is quite clear to me reading this information that the court in Radom is waiting to interrogate Mr Chmielewski before deciding whether or not to file an indictment against him. Once they have interviewed him about events in 2013, they may or may not do so but without him there to be interviewed, the process cannot be progressed.

19 Had it been necessary for me to go on to consider proof under s.12A(2), I would have found it proved beyond reasonable doubt that the sole reason for the failure to make a decision to try, if indeed there has been such a failure, was the absence of Mr Chmielewski from Poland. For these reasons, even if the DJ's conclusion on the first part of s.12A was wrong, her rejection of the bar, overall, was not.

20 I move to the second ground of challenge on this appeal: the issue of proportionality, under s.21A. The relevant provisions of that section are as follows:

"(1): If the judge is required to proceed under this section by virtue of s.11, he must decide both of the following questions in respect of the person:

(a) Whether the extradition would be compatible with the convention rights within the meaning of the Human Rights Act 1998.

(b) Whether the extradition would be disproportionate.

(2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality so far as the judge thinks it appropriate to do so but the judge must not take any other matters into account.

(3) These are the specified matters relating to proportionality-

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

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

(c) The possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D."

21 Mr Seifert recognised that the recent information from Poland has ruled out the possibility of less coercive measures in the form of interview here in the UK, whether by Polish police coming over or by video link. He said, however, referring back to the order of Mr Justice Holman, that there was no unequivocal refusal to consider temporary transfer under an iron letter. Although accepting that it was very rare for such a letter to be issued, Mr Seifert contended that the particular circumstances of this case could justify it. Mr Chmielewski was not a fugitive, having left Poland before being sought for interview. He has always been prepared to assist the authorities in Poland and he is a man of good character here.

22 In these respects, he is very different, Mr Seifert argued, from the claimant in the case of *Duncan v Presiding Magistrate, Malaga, Spain* [2015] EWHC 3466 (Admin) relied upon by Ms Townshend. In that case, the Divisional Court considered the decision of the District Judge that extradition was proportionate where no answer had been received to questions concerning less coercive measures.

23 I take the point that the request was made very late in *Duncan*. However, the points made by the Divisional Court arising from the case of *Miraszewski v. Poland* [2014] EWHC 4261 (Admin) concerning the burden being on a requested person to make requests for less coercive measures are, in my view, equally applicable here. In this case there had been no request prior to the extradition hearing before the District Judge concerning the provision of an iron letter.

24 In those circumstances, bearing in mind what we now know as to the impossibility of video link or other interview here in the UK, the District Judge's decision on proportionality cannot be said to have been wrong. For these reasons, this appeal is dismissed.

MRS JUSTICE MAY: Does there need to be any other order?

MR SEIFERT: No, my Lady.

MRS JUSTICE MAY: Good.

MR SEIFERT: There is normally, we made an application for costs but that is not (inaudible) on an order for this court.

MRS JUSTICE MAY: Good, all right, thank you very much. I am going to leave the papers here.

(The papers were left with the court staff).

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This transcript has been approved by the Judge.