Journal of Criminal Law

Case Comment

Polish Judicial Authorities v Celinski and others [2015] EWHC 1274 (Admin)

Balancing the interference with private and family life of the person whose extradition is sought with the public interest in extradition: Has the pendulum swung too far?

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**Keywords**: European Arrest Warrant; Extradition; European Convention on Human Rights; Article 8; right to private and family life.

This case combined six appeals of extradition hearings that had been held under Part 1 of the Extradition Act 2003. In all of the hearings the courts at first instance had heard Article 8 of the European Convention on Human Rights arguments, taken different factors into account, and made decisions based on proportionality. The issue on appeal was whether the district judge had correctly applied his or her discretion in each case. The facts of the cases were as follows:

***Polish Judicial Authority v Celinski***

Celinski was subject to two accusation European Arrest Warrants (EAWs) and one conviction EAW covering offending between 2008 and 2011, when he was between 16 and 19 years old. The two accusation EAWs were heard by a different judge to the conviction EAW. The first two EAWs were issued for the supply of a relatively small number of ecstasy pills. At the hearing the district judge heard evidence from the defendant and his mother to the effect that personal tragedies had led him to drugs and offending but that he had now turned his life around and was a hardworking member of society. The judge took into account Celinski’s age at the time of the offences and the effect that his imprisonment in Poland would have on him. The judge held that it would be disproportionate to order Celinski’s extradition in all the circumstances.

***Slovakian Judicial Authority v Cambal***

Cambal had been convicted in his absence of offences relating to the possession of drugs and theft and sentenced to 6 years and 4 months imprisonment in July 2006. He claimed to have been illegally trafficked in May 2005. The judge after hearing evidence found that he had not been trafficked despite a finding of the UK Human Trafficking Centre Competent Authority (UKHTC) that he was a victim of trafficking. However, taking into account the fact that Cambal’s rehabilitation from many years of addiction to class A drugs would likely be squandered if he were returned to Poland, and that he would have been unlikely to have received a custodial sentence if the offence had been committed in the UK, the extradition was barred and the order discharged.

***Polish Judicial Authority v Nida***

Nida was wanted in Poland to serve his sentence for an attempted street robbery. He was given a suspended sentence but left Poland during the suspension period. The district judge had come to the conclusion that Nida came nowhere near the high threshold required to satisfy an Article 8 argument.

***Polish Judicial Authority v Ciemiega***

A conviction EAW had been issued for theft of two mobile phones from a shop. Ciemiega was given a suspended sentence during which he absconded to the UK. After hearing evidence the district judge concluded that the defendant’s extradition would not be a disproportionate interference with his Article 8 rights, taking into account the fact that he was a deliberate fugitive, his partner could look after his children, the sentence to be served was relatively short, and there was a weighty public interest in extradition.

***R (Piotr Inglot) v Secretary of State for the Home Department and Westminster Magistrates Court***

Ingot was a Polish national who had been extradited from the Isle of Man (which is not part of the UK for the purposes of membership of the EU). He had been convicted of supplying small amounts of cannabis and had absconded during a suspended sentence. The district judge heard evidence that the defendant was a deliberate fugitive and that he had breached his suspended sentenced by committing another offence in Poland. The judge took into account the fact that the defendant had been convicted whilst in the Isle of Man of serious offending and factored in the importance of the UK honouring its extradition arrangements and that the UK should not be considered a safe haven for fugitives. Counterbalancing these arguments was the fact that the defendant was a family man with a wife and children and the offending was 17 years ago and was not serious. The judge had decided that it was proportionate to order his extradition.

***Polish Judicial Authority v Pawelec***

Pawelec was a Polish national who was sought under an accusation EAW accusing him of two offences of forging prescriptions and an offence of fraud. He had been bailed for the offences in Poland but subsequently fled to the UK. The district judge was satisfied that the defendant was a deliberate fugitive and that, although extradition would interfere with his Article 8 rights, the circumstances came nowhere near the high threshold required to establish that the interference with Pawelec’s right to a private and family life outweighed the public interest in extraditing him. However, the judge decided that extradition was not proportionate by applying the relatively recently enacted provisions found in section 21A of the Extradition Act 2003. Taking into account the nature of the offence and the likely penalty on conviction, the time spent in the UK, and the delay involved in bringing proceedings, the judge came to the conclusion that extradition would be disproportionate under section 21A(4)(b).

**HELD, ALLOWING THE TWO APPEALS BY PROSECUTING AUTHORITIES BUT DISMISSING THE FOUR DEFENCE APPEALS.**

The correct principles to be followed in relation to Article 8 applications in the context of extradition proceedings are set out in two decisions of the Supreme Court: *Norris v Government of the USA. (No 2)* [2010] UKSC 9 and *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25. It is clear from these cases that “the question raised under Article 8 was whether the interference with private and family life of the person whose extradition was sought was outweighed by the public interest in extradition” (at [6]). In reviewing the way in which the lower courts carried out this balancing exercise in each of the above cases, the Divisional Court ruled as follows:

***Polish Judicial Authority v Celinski***

The appeal of the Polish Judicial Authority was allowed. The judge’s decision “did not set out a proper balancing exercise and contained no proper reasons” (at [39]). The judge had erred in substituting his own view of how the Polish courts should deal with Celinski. A “balance sheet approach” had to be taken, but the counter-balancing factors relating to Celinski’s family life, age and personal circumstances were clearly insufficient to justify the conclusion that extradition would be disproportionate. Those were all matters for the Polish court to consider in its sentencing (at [39]).

***Slovakian Judicial Authority v Cambal***

The appeal of the Slovakian Judicial Authority was allowed. The judge misapplied the relevant principles. In carrying out the requisite balancing exercise, the judge had failed to take into account “the strong interest in upholding extradition arrangements” (at [48]), and the fact that the defendant was a fugitive should have significantly undermined any private or family life arguments. The judge had no information about why the Slovakian court passed the sentence that it did and, “[i]n the absence of very cogent evidence [the UK court] must assume that the sentence reflected the gravity of the offending in all the circumstances as legitimately seen through the eyes of the [convicting] court” (at [48]). The judge should not have considered how the courts of England and Wales would have sentenced for these offences even if there was a “high degree of variance”, as to do so undermined the principle of mutual confidence (at [48]). The judge’s decision highlighted the need for a balance sheet approach, which clearly sets out the pros and cons of each course. Finally the Divisional court stated that it is for the extradition judge to make a determination as to whether the requested person has been trafficked “having been assisted by the CPS and UKHTC” (at [52]). The fact that the UKHTC has made a determination does not alter the judge’s discretion in relation to extradition (at [53]).

***Polish Judicial Authority v Nida***

The district judge’s decision to extradite Nida was upheld. There is a strong public interest in upholding extradition arrangements (at [63]).

***Polish Judicial Authority v Ciemiega***

The defendant’s appeal was dismissed. The judge’s decision on proportionality under Article 8 was correct (at [69]).

***R (Piotr Inglot) v Secretary of State for the Home Department and Westminster Magistrates Court***

The order for the defendant’s extradition was upheld. The judge had followed correct principles regarding the “pros and cons” of extradition, using a balance sheet approach (at [78]).

***Polish Judicial Authority v Pawelec***

*Miraszewski v District Court in Torum* [2014] EWHC 4261 (Admin) was decided after the initial extradition hearing in Pawelec’s case. *Miraszewski* made it clear that a judge was *“only entitled to take into account the matters listed in section 21A(3) – the seriousness of the offence, the likely penalty if found guilty and the possibility of the foreign authorities taking measures less coercive than extradition”* (at [84]). In the instant case the judge should not have taken into account the delay other than for matters set out in subsection 21A(3). Accordingly, the appeal was upheld and the matter remitted to the lower court with a direction under section 29(5(c).

**Commentary**

The judgment in Celinski highlights the very heavy weight that should be given to the public interest in complying with extradition requests, along with the public interest in discouraging persons seeing the UK as a state willing to accept fugitives from justice. Whilst the public interest would always carry great weight, this would still vary according to the nature and seriousness of the crime involved. The judgment highlights the fact that the decision in *HH* must be understood in context. *HH* concerned three cases each of which involved the interests of children.

The judgment in the present case also reiterates that the judicial authority of Member States should be accorded a proper degree of mutual confidence and respect. The court recognised that, since 1 December 2014, the UK has been subject to the jurisdiction of the Court of Justice of the European Union (CJEU) and the courts should have regard to that court’s jurisprudence on the Framework Decision. The judgment highlights that decisions as to whether to prosecute an offender are matters for the requesting state and the “independence of prosecutorial decisions must be borne in mind when considering issues under Article 8” (at [11]). Factors that mitigate the culpability of the defendant will ordinarily be matters for the court of the requesting state to take into account. Linked to mutual confidence and respect, the judgment also makes it clear that each Member State will have its own sentencing regime and it is not for the UK to undermine the sentencing policies of other Member States. It will “rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been” (at [13]).

The judgment does not put forward any new principles to be considered but suggests that the basic principles set out by the Supreme Court were not always being taken properly into account, particularly in relation to the balancing of the factors to be considered under Article 8. The only factors that should be taken into account are those set out in the Supreme Court decisions of *Norris* and *HH*. Decisions of the administrative court should “rarely, if ever” (at [14]) be cited as they will be fact specific and will not lay down a new principle. The correct approach is to set out a balance sheet of pros and cons with reasoned conclusions as to why extradition should be ordered or the defendant discharged (at [15, 16, 17]).

The judgment cites numerous cases to support the position that extradition appeals should be treated as an appellate exercise and not a fresh determination. The Divisional Court will not interfere with a decision simply because it takes “a different view overall of the value-judgment that the district judge has made” (at [20]). “The single question … is whether or not the district judge made the wrong decision” (at [24])”. A challenge to an extradition decision will only succeed if it is demonstrated on review that the judge misapplied the established legal principles, or made a relevant finding of fact that no reasonable judge could have reached on the evidence, or failed to take in account a relevant factor, or took into account an irrelevant fact or factor.

The case of Celinski and others appears to be an attempt by the Divisional Court to hold back the tide of extradition appeals under Part 1 of the Extradition Act 2003, in which defendants seek to rely on Article 8 of the European Convention of Human Rights to resist their extradition to other European Union states. The judgment of Lord Thomas of Cwmgiedd, rather unusually, begins with an outline of the number of cases the Divisional Court is currently dealing with. In the three month period prior to the judgment 280 cases out of 461 extradition hearings involving extradition to another EU Member State involved Article 8 arguments.

Throughout the ten years of implementation of the EAW there has been a significant line of jurisprudence demonstrating that the threshold that has to be crossed in order for a defendant to establish that extradition should be barred on the basis that his human rights will be breached is very high. One of the Convention rights most commonly engaged is the right to private and family life guaranteed by Article 8 of the ECHR. But Article 8(2) permits state interference with this right when necessary for “the prevention of disorder or crime”, a phrase which is more than wide enough to cover extradition. Criminal proceedings are always disruptive of a person’s private and family life wherever they occur and UK courts have routinely rejected Article 8 arguments in the context of extradition. Only in the case of *HH* did the Supreme Court unanimously reach the opposite result in the appeal of FK, upholding the non-surrender of the mother of five children (the youngest of whom was 3-years-old), whom the Polish authorities wished to place on trial for fraud. Among the matters which persuaded the court were the relatively small scale of the alleged frauds, and the fact that the offences were of some age, the most recent incident being over ten-years-old.

*HH* involved three separate cases. All of the applicants had young children. The question in all three cases was whether extradition would be incompatible with the rights of the Appellants’ children to respect for their private and family lives under Article 8. The court recognised extradition was not a special category of case and Article 8 rights could not be disregarded in extradition hearings. The case also built upon the principles found in *ZH (Tanzania) v SSHD* [2011] UKSC 4 (which involved the removal of an asylum seeker with young children). In *ZH*  the Supreme Court stated that UK courts had to take account of their obligations under the United Nations Convention on the Rights of the Child, which requires that the best interests of the child shall be a primary, although not the only, consideration. In the case of *HH* Baroness Hale set out a formulation which listed the variety of factors to be taken into account when weighing up whether the public interest in extradition is proportionate to the interference with family life that extradition involves.

It is clear from the House of Lords Select Committee on Extradition Law’s report ‘Extradition: UK law and practice’ that *HH* was seen as a “sea change” in the courts’ application of Article 8 to extradition cases. It has led to Article 8 arguments being raised in almost all full extradition hearings and, as highlighted in the present case, many appeals to the Divisional Court. The present case highlights that district judges were making decisions based on erroneous principles. The judgment is an attempt by the Divisional Court to direct district judges’ minds to the correct principles to be applied, as outlined in *Norris* and *HH* and to attempt to re-establish the primacy of the public interest inherent in extradition over the right to private and family life.

As of July 2014, s. 11 of the Extradition Act 2003 states that a judge must decide not only whether the extradition would be compatible with the defendant’s Convention rights within the meaning of the Human Rights Act 1998, but also whether the extradition would be disproportionate. In deciding whether the extradition would be disproportionate, the judge must only take into account the seriousness of the conduct alleged to constitute the extradition offence, the likely penalty that would be imposed if the defendant was found guilty of the extradition offence, and the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the defendant. The proportionality test was enacted to alleviate the problems caused by a proportionality test not being properly applied by issuing states. At the point at which an extradition hearing commences, the question of proportionality has already been considered by the National Crime Agency which has made the decision to certify the EAW. The judgment in *Celinski* makes clear that, following the decision in *Miraszewski,* only the very limited factors set out in s. 21A should be taken into account. Whilst Article 8 arguments can cover a very wide number of considerations that must carefully be weighed in a check and balance approach, proportionality under s. 21A can only be very narrowly considered.