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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

BEFORE A DIVISIONAL COURT

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2017/007609

IN THE MATTER OF AN APPLICATION UNDER THE EXTRADITION ACT 2003

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BETWEEN:

MARCIN KOCIOLEK

Requested Person/Appellant;

-and-

THE POLISH JUDICIAL AUTHORITIES

Requesting State/Respondent.

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Before: Deeny LJ and Burgess J

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DEENY LJ (delivering the judgment of the Court)

[1] Marcin Kociolek appeals against the judgment and order of HHJ McFarland, Recorder of Belfast, the Appropriate Judge, of 2 June 2017 ordering that the appellant be extradited to Poland to serve the remainder of sentences imposed and be remanded in custody to await his extradition.

[2] Kociolek appeals with the leave of Keegan J. It is clear on reading her reasons that in arriving at her decision she did not have the benefit before her of the able and learned skeleton argument of Ms Marie Claire McDermott, of counsel, who appears for the Requesting State. Not only did it draw attention to relevant legal arguments

but it set out the offences of this man more fully than had been set out in the skeleton argument on his behalf. His first conviction related to deceitfully obtaining a mobile phone on 2 April 2005. It appears that the sentence of eight months imprisonment was at that time suspended.

[3] The second group of offences can be summarised as follows. On 6 March 2007 he stole a mobile phone from a female and when her underage friend intervened threatened him with violence. He was arrested by the police on 9 March 2007 and found in possession of a small quantity of marijuana. On 23 June 2006 in Krakow he stole some chewing gum and when detected "he made a violent assault on the victim by head-butting him and kicking him in the buttocks". He was sentenced to two years, six months imprisonment for these offences. The suspended sentence was activated in November 2007.

[4] It can be seen therefore that this is a warrant based on the conviction of the appellant in Poland and his surrender so that he might serve the balance of his prison sentences which appear to have some two years at least still outstanding.

[5] The appropriate test to be applied by this court has been considered by a three man Divisional Court in England recently: *Polish Judicial Authorities v Celinski et alia* [2015] EWHC 1274 (Admin). The court (Lord Thomas CJ, Ryder LJ and Ouseley J) considered a number of cases and expressly considered the approach of the court and we adopt the conclusions as set out in the judgment of Lord Thomas. At paragraph 18 the court considered the approach of this court on appeal. They referred to the decision of the Supreme Court in *Re B (A Child)* [2013] UKSC 33. The majority therein held that an Appellate Court should treat the determination of the proportionality of an interference with the rights protected by the ECHR as an appellate exercise and not a fresh determination of necessity or proportionality, notwithstanding the duty of the court as a public body to consider human rights.

[6] The Divisional Court followed the analysis by Lord Neuberger at paragraph [93] of *Re B* as the approach of an Appellate Judge:

> "There is a danger in over-analysis, but I would add this. An appellant judge may conclude that the trial judge's conclusion on proportionality was
>
> (i) The only possible view.
>
> (ii) A view which she considers was right.
>
> (iii) A view in which she has doubts, but on balance considers was right.

(iv) A view which she cannot say was right or wrong.

(v) A view on which she has doubts but on balance considers was wrong.

(vi) A view which she considers was wrong.

(vii) A view which is unsupportable.

The appeal must be dismissed if the Appellant Judge's view is in category (i) and (iv) and allowed if it is in category (vi) or (vii).

94. …. So far as category (v) is concerned, the Appellate Judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an Appellate Judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

[7] Lord Thomas at paragraph [24] of *Celinski* then said the following:

"The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger said, as set out above, that the appeal can be allowed."

[8] In their skeleton argument counsel for the appellant submitted that the Appropriate Judge had failed to take into account a number of factors under the heading of this man's rights under Article 8 of the European Convention on Human Rights. They stressed that he was youthful at the time of these offences i.e. 19 to 21. They stressed the passage of time since then. They stressed his good behaviour in the United Kingdom since coming here in 2008. They drew attention to the fact that he had a girlfriend in the jurisdiction with whom he was keen to have a long term relationship. Ms McDermott points out, inter alia, that he did have one minor conviction in the UK.

[9] However, Kociolek's counsel were unable to refer to any actual error or omission in the consideration by the learned judge at first instance of these matters.

He was particularly aware of the contention of delay but made the valid point that this largely stemmed from the appellant's avoidance of the sentence of the court in Poland and subsequent emigration from the country. Whilst accepting that the possession of drugs charge was a relatively trivial matter the other offences had something of the character of street robberies or muggings.

[10] This is not a strong case on Article 8. Unlike the appellant in *Miller v Polish Judicial Authority* [2016] EWHC 2568, relied on by Mr O'Donoghue QC and Mr Devine, this appellant has no children living in this jurisdiction let alone providing for them as Miller was.

[11] We conclude that the appropriate judge was not wrong but entirely correct in rejecting the Article 8 contention.

Framework Decision: Article 4(6)

[12] Counsel for the appellant, however, had a further argument for relief or for seeking a reference to the European Court of Justice ("ECJ") 'in order to clarify the law in respect of a failure of the United Kingdom to transpose into our domestic law Article 4(6) of the Council Framework Decision of 13 June 2002'. The relevant provisions read as follows.

> "Chapter 1. **General Principles**.
>
> Article 4. **Grounds for optional non-execution of the European arrest warrant**.
>
> The executing judicial authority may refuse to execute the European arrest warrant:
>
> ……
>
> 6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;."

It is suggested that the decision of the United Kingdom not to transpose Art. 4 (6) into its domestic law is in breach of European law.

[13] Mr O'Donoghue relies on the views of Advocate General Yves Bot (previously

chief prosecutor in the courts of Paris) in *Wolzenberg [2010] 1 C.M.L.R. 33* at paragraphs AG 101-108. For our part we do not find the reasons advanced by the Advocate General persuasive. They rather tend to assume the outcome without advancing cogent reasons why that is the correct interpretation. In any event he acknowledged that the contrary view could be taken. Importantly the Court did not adopt his view.

[14] The introductory words of Article 4 set out above would readily yield themselves to the interpretation that it is an option for the Member States to introduce these additional grounds but not that they are obliged to do so. That would be a natural meaning of "optional" in the title.

[15] We acknowledge that they are open to the alternative interpretation that the option will rest with the judicial authorities when Article 4(6) and the other paragraphs of the Article are implemented.

[16] The Advocate General in *Lope Da Silva Jorge [2013] Q.B. 283* inclines towards that view. See his paras. 30, 31 but he acknowledges the alternative view at para. 34. However the only judicial decision on the point, also in *Lopes,* as Mr Ritchie of counsel (in the case of Riordan heard on the same morning and before Kociolek) submitted, would appear to run contrary to the applicant. I set out the relevant paragraphs.

> "30. Although the system, established by Framework Decision 2002/584 is based on the principle of mutual recognition, that recognition does not mean that there is an absolute obligation to execute the arrest warrant that has been issued. The system established by that Framework Decision, as evidenced inter alia by article 4 thereof, makes it possible for the member states to allow the competent judicial authorities, in specific situations, to decide that a sentence must be enforced on the territory of the executing member state: *Proceedings concerning lB (Case C-306/09) [2011] 1 WLR 2227. Paras 50 and 51.*
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> 31. That is true, in particular, of article 4(6) of Framework Decision 2002/564 which sets out a ground for optional non-execution of the European arrest warrant under which the executing judicial authority may refuse to execute such a warrant issued for the purposes of enforcing a custodial sentence where the requested person 'is staying in, or is a national or a resident of, the executing member state',

and that state undertakes to enforce that sentence in accordance with its domestic law.

32. In that regard, the court has held that that ground for optional non-execution has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires: see *Kozlowski's case 12009108 307*, para 45; *Wolzenburci's case 120091 ECR 1-9621 par-as 62, 67, and lB's case, para 52*.

33. Nevertheless, when implementing that provision, the member states have a certain margin of discretion. The member state of execution is entitled to pursue such an objective only in respect of persons who have demonstrated a certain degree of integration in the society of that member state: see to that effect, *Wolzenburg's* case, paras 61, 67, 73.

34. Thus, member states may, when implementing article 4(6) of Framework Decision 2002/584, limit, ' in a manner consistent with the essential rule stated in article 1(2) thereof, the situations in which it is possible, as an executing member state, to refuse to surrender a person who falls within the scope of article 4(6), by making the application of that provision, when the person requested is a national of another member state having a right of residence on the basis of article 21(1)FEU , subject to the condition that that person has lawfully resided for a certain period in that member state of execution: see, to that effect, *Wolzenburg's* case, paras 62 and 74.

35. However, if a member state transposes article 4(6) of Framework Decision 2002/584 into its national law, it must have regard to the fact that the scope of that provision is limited to persons who are nationals of the excluding member state and to those who, if not 'nationals' of the executing member state, are 'staying' or 'resident' there: see, to that effect, *Kozlowski's* case, para 34."

The tone of this passage, culminating in the words "if a member state transposes article 4(6)" is not supportive of the appellant's submissions.

[17] Furthermore, applying the normal canons of construction to this piece of legislation, albeit European, one would expect the language to be mandatory if indeed Member States were required to implement some version of Article 4(6). That clearly is not the case.

[18] In addition Mr Ritchie drew our attention to the leading text book of Nicholls, Montgomery and Knowles on 'The laws of Extradition and Mutual Assistance' 3ed. where the authors set out at paragraph 15.79 that not only the United Kingdom but Ireland has chosen not to transpose Article 4(6) into their domestic law. In addition the authors point to Estonia and Latvia as not having transposed Article 4(1). Neither side can point to any attempt by the European Commission to require those Member States to transpose Article 4(1) or (6). That would be a pointer to there being insufficiently mandatory language in the Article of the decision to require those States so to do.

[19] It is also common case between the parties that even those States which have implemented Article 4(6) have varied in their approach. One significant difference between them is that some have confined this opportunity only to their own national citizens rather than to residents. If Article 4(6) was in truth mandatory that might appear not to be a valid application of the paragraph in the light of the wording … "staying in, or is a national or a resident ".

[20] Indeed in the submissions of the Advocate General of the ECJ in *Lopes* it is pointed out that the German text has an "and" where other texts have "or": para. 34. That is not a problem if, as is the present situation, Article 4(6) is an option that can be exercised by a Member State. It is most surprising if the Member States are obliged to implement this paragraph. We conclude that the clearly preferable view here is contrary to the submission of Mr O'Donoghue and that the United Kingdom was indeed not obliged to implement 4(6). Given the decision of this Court there is no basis upon which to make a Preliminary Reference to the ECJ as we view the position as not requiring clarification

[21] Two further matters were raised in argument. Firstly, it might seem surprising that this matter has not been the subject of judicial decision in the United Kingdom since the Extradition Act 2003 if transposition was mandatory. However, it may be that the Repatriation of Prisoners Act 1984, which allows the Secretary of State to agree with an equivalent Minister in another State to take on or give up responsibility for a prisoner, may have addressed the issue.

[22] Secondly, and of considerably greater weight, is the issue addressed by the Recorder in his judgment. If we were to refer the matter now to the ECJ there would be an elapse of time before that court was able to hear the matter. It would first of

all, of course, have to receive the submissions of the parties and the views of the Advocate General. After those stages and a hearing and preparing its judgment it seems inconceivable that any decision would be before some time next year and could be longer.

[23] The Parliament of the United Kingdom authorised the Government of the United Kingdom to commence the process of the United Kingdom leaving the European Union. This was done with effect from 29 March 2017 and by the provisions of the Treaty takes effect in two years. It is quite unrealistic to think that Parliament could enact new primary legislation, which would be required, to transpose Article 4(6), if the ECJ so found to be necessary before that decision to leave the EU took effect. It is, of course, most unlikely that the political will to introduce such legislation would be present in any event. We therefore endorse the view of the learned Recorder that such a reference to the ECJ at this time would indeed be largely academic. We remind ourselves of the dictum of Lord MacDermott in *McPherson v The Department of Education, NIJB 22 June 1973,* that an order of the court "does not usually issue if it will beat the air and confer no benefit on the person seeking it". That is apposite here.

[24] For all these reasons we uphold the judgment of the court below and decline to make a reference to the ECJ.