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Judgment: approved by the Court for handing down | *Delivered:* **19/05/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

THE REPUBLIC OF POLAND

Appellant;

-v-

PAWEL TUMKIEWICZ

Respondent.

_____

Before: Morgan LCJ, Gillen LJ and Weatherup J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal by the Republic of Poland (the appellant) from a decision of His Honour Judge Miller QC sitting in Belfast Recorder's Court on 28 November 2014 in which he dismissed the Requesting State's application for an extradition order in respect of the Requested Person (the respondent) on the basis that extradition would be a disproportionate interference with the rights of the respondent, his wife and five year old child under Article 8 of the Convention. Mr McGleenan QC and Mr McAlister appeared for the appellant and Mr Macdonald QC and Mr Devine for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The respondent was sought by a European Arrest Warrant dated 24 April 2009 to serve a prison sentence of 2 years, suspended for a probation period of 5 years, imposed on 11 May 2007 for the theft in late 2006 of 500 spindles for spinning machines from a warehouse. Although it is not stated explicitly in the warrant it is indicated in the papers that the respondent was also directed to pay compensation to the victim within a period of 1 year. Between 2010 and 2013 the respondent paid in instalments the compensation he had been ordered to pay amounting to £2000.

[3] In 2007 he left Poland. On 24 June 2008 the Polish court ordered the sentence of imprisonment to be put into effect because the respondent had "evaded surveillance and failed to rectify the damages". Although he asserted before the trial judge that he was not told to keep in touch with his probation officer he did not suggest that he informed anyone of his decision to leave Poland.

[4] On 12 January 2012 the European Arrest Warrant issued on 24 April 2009 was certified by the UK authorities. When the respondent applied for a driving licence in Northern Ireland he came to the attention of the PSNI and on 24 September 2013 was arrested and served with the warrant. He was brought before the court the following day but the hearing of the application for an extradition order was then adjourned on a number of occasions to obtain medical evidence. On 3 October 2014 the respondent was granted bail and on 21 November 2014 the extradition hearing proceeded. The time spent in custody in Northern Ireland was 1 year, 1 week and 2 days.

[5] The respondent and his wife had lived together since 2005. They married in 2009 and had a child. He had been employed at the mill against which the theft was committed and thus lost his job. He came to Northern Ireland in 2007 to work, and both he and his wife have been in full-time employment since coming here. He has now lived in Northern Ireland for 7 years and with the exception of some minor driving offences, has not committed any offences in Northern Ireland.

[6] At the County Court medico-legal reports were introduced on the impact that extradition proceedings were having and extradition would be likely to have on the respondent's wife and child. Dr Harbinson was told by the respondent's wife that Northern Ireland was her home and that, if her husband was extradited, she would stay in Northern Ireland with their son because in Poland she would have no work or accommodation. Her son had been born and raised in Northern Ireland. When the respondent was in prison they visited him twice a week but if he were extradited she would be unable to afford to fly to Poland with her son to visit him. At the time the respondent was arrested, they had planned to have a second child. To reduce expenses she moved from the family home to accommodation comprising one floor in a shared house.

[7] Dr Harbinson noted that the respondent's wife had no previous psychiatric history, but considered that she now had a depressive illness with poor sleep, appetite, motivation and energy. This was a consequence of her husband's imprisonment, her fear that he would be extradited, and her justified concerns about the impact this would have on her son's relationship with his father. Dr Harbinson concluded that extradition would undoubtedly exacerbate the depression and that treatment would be unlikely to be effective.

[8] Dr Chada conducted an examination of the respondent's wife on behalf of the appellant. She concluded that she presented as appropriately upset and distressed about the situation she found herself in but that she did not present with symptoms in keeping with a diagnosable ICD-10 mental illness. She had not attended her G.P. or missed time off work as a result of any psychological symptoms and she had continued to provide a loving and caring home for her son, though they had not been able to do as many activities as they had prior to the respondent's arrest.

[9] Dr Mangan provided a report on the impact on the respondent's son. She said that the respondent's wife had been the child's primary caregiver, her husband having worked 55 hours a week. The child was looked after by a child minder from 6.30am and, according to Dr Chada's report, it had been possible for him to be left with the childminder at a later time before the respondent's arrest. Prior to the respondent's arrest the family had lived in a three-bedroom house and the respondent had played football and games with his son in the garden and was committed to family life.

[10] Dr Mangan found that the respondent's son was a sociable, engaging boy who had coped well with the separation from his father and the practical changes to his family life. This was most likely because of the strong attachment he had to both parents, his trust in them, and his belief as reinforced by his parents that his father would be coming home soon. He had been led to believe that his father was sick and in hospital. Were extradition to occur the parents would have to provide a new explanation and the child's trust in them would be challenged, which could impact on his emotional wellbeing. If extradition caused the depressive disorder diagnosed in the mother to deteriorate, that would impact on the child. The child had already exhibited signs of supporting the mother emotionally. The child, who was about to begin school, needed his father in his daily life. In sum it was not in the best interests of the child or his mother for his father to be extradited and it would place increased stress on a vulnerable family unit.

The judgment

[11] The learned judge outlined the principles in Norris v Government of the United States of America (No 2) [2010] UKSC 9 and R (on the application of HH) v Westminster City Magistrates' Court [2012] UKSC 25 which indicated that courts should consider the proportionality of the decision to extradite in the context of Article 8, with particular emphasis on the needs of dependent children. It was

common case that when considering whether extradition would be a proportionate interference with Article 8 rights the question had to be looked at by reference to the family unit as a whole and the impact of removal on each member (Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39).

[12] Counsel for the respondent submitted that there were 8 factors that militated against extradition in the present case. These were:

i. the powerful impact extradition would have on the child;

ii. the appellant's wife's depressive illness and repercussions for the child if it deteriorated;

iii. the significant consequences of extradition on the child's social, emotional and academic functioning;

iv. the relative lack of gravity of the offences;

v. the fact that the sentence was initially suspended;

vi. the vintage of the offence, dating back to 2006, and the absence of any further offending;

vii. the fact that the respondent had now spent over a year in custody; and

viii. the fact that the respondent had made good the reparations required of him.

[13] The learned trial judge acknowledged that it is for the courts of the Requesting State to set and determine the length of the sentence to be served. That said, the question of time to be served could be taken into account albeit that it was one of several factors to be considered by the court and the weight to be given to it would depend on the circumstances of the individual case. (See Wysocki v Polish Judicial Authority [2010] EWHC 3430(Admin) and R (on the application of Kasprzak v Poland [2010] WL 4276032.)

[14] The remainder of the sentence was less than a year and it had taken 14 months for the extradition application to come before the County Court. The 12 months spent in custody in Northern Ireland did make a difference to the balance between private and public interests. The learned judge further took into account:

i. the effect of the time spent in custody on the respondent's wife and child;

ii. the loss of their home;

iii. the strain on the wife endeavouring to~~he~~ maintain the familial relationships; and

iv. the fact that such strain would be greatly exacerbated if the respondent were returned to Poland.

The ~~-~~judge concluded that, when all of these factors were added to the circumstances of the original offence, the requirements of justice tipped the balance in favour of the private as opposed to public interests.

The submissions of the parties

[15] The appellant accepted that the relevant legal principles were correctly identified but that the Judge had erred in applying them in this case. All extradition cases involve some passage of time and the length of the passage of time and reasons for it will always be relevant, as will the seriousness of the offending. Similarly all cases involving extradition of a parent interfere with Article 8 rights but it is only where the consequences of such interference are exceptionally severe that those rights outweigh the need to honour treaty obligations. In this case the expert medical evidence fell short of the evidence required to establish that the consequences of the interference with family life would be exceptionally severe. In particular, during the respondent's detention, his wife continued to work, did not seek medical assistance, and continued to care for her child. There was no evidence to suggest that the child had been affected to a sufficiently serious degree in that he had met his milestones, was enjoying school, and still had the care of his mother. Further, the proper application of the principles relating to passage of time did not elevate the case to a level where it would be disproportionate to extradite the respondent.

[16] Mr Macdonald noted that the judge had applied the correct legal test in a careful and meticulous judgment in which all the relevant factors were properly identified and then weighed in the balance. He had the opportunity to consider the respondent's wife's live evidence as to the impact of the absence of the respondent while in custody, and the impact he anticipated any further separation might have on her and her son. It was submitted that the evidence before the Court was compelling and pointed overwhelmingly to the conclusion reached by the judge.

Consideration

[17] Shortly after the hearing of the appeal but before judgment was given an issue arose as to the approach the court should take in conducting the task imposed by the statute. The appeal in this case was governed by sections 28 and 29 of the Extradition Act 2003. The relevant provisions are:

"*28. Appeal against discharge at extradition hearing*

(1) If the judge orders a person's discharge at the extradition hearing the authority which issued the Part 1 warrant may appeal to the High Court against the relevant decision….

(3) The relevant decision is the decision which resulted in the order for the person's discharge.

(4) An appeal under this section—

(a) may be brought on a question of law or fact…

29. Court's powers on appeal under section 28

(1) On an appeal under section 28 the High Court may-

(a) allow the appeal;

(b) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that-

(a) the judge ought to have decided the relevant question differently;

(b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge…"

The conditions in subsection (4) are not relevant.

[18] The basis upon which the judge ordered the discharge of the respondent is found in section 21:

"*21. …human rights*

(1) If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person's extradition would be compatible

with the Convention rights within the meaning of the Human Rights Act 1998.

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued."

[19] Mr McGleenan correctly drew our attention to the decision in Atraskevic v Republic of Lithuania [2015] EWHC 131 (Admin) where the court considered how the appellate court should carry out its statutory role. The Supreme Court addressed the issue of what was required by the Convention on an appeal in Re B (A Child) [2013] UKSC 33. Baroness Hale and Lord Kerr both considered that an appellate court was required to conduct its own assessment of proportionality but the majority concluded that the appellate function was by way of review.

[20] The most detailed analysis by the majority of the approach to proportionality in an appellate court was conducted by Lord Neuberger at paragraphs 93-95:

"93. There is a danger in over-analysis, but I would add this. An appellate 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 on 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, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).

94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based

> on his assessment of the witnesses' reliability or likely future conduct. 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.
>
> 95. I am conscious that the analysis in paras 80–90 appears to differ somewhat from that of Baroness Hale JSC in paras 204–205 and of Lord Kerr JSC in paras 116–127. However, at least in my opinion, it would, essentially for two reasons, be a very rare case where their approach would produce a different outcome from mine. First, it is only my category (iv) which gives rise to disagreement, in that they would not, as I understand it, accept that such types of case exist. However, many, probably most, cases that on my approach would fall into that category would, on their approach (especially in the light of what they say about the weight to be given to the ***1944*** trial judge's assessment) be in category (iii), which would yield the same outcome. Secondly, the advantage which the trial judge has in hearing the evidence and seeing the witnesses will mainly apply to his findings of primary fact, inferences of fact, and assessment of probable outcomes, which then feed into his assessment of proportionality (and, in this case, necessity). When those factors come to be weighed on the question of proportionality (or necessity), the advantage the trial judge has will normally be of less significance, and sometimes even of very little, if any, significance."

[21] In Atraskevic the court then went on to assert that it should not engage in an exercise of reassessing all the factual issues or reassessing the weight to be given to the various factors unless the judge misconstrued the statutory wording, erred in respect of some applicable principle of law, failed to take into account a relevant factor or took into account an irrelevant factor or reached an irrational or perverse conclusion on the issue as a whole. That test was then applied in respect of the consideration on appeal of the issue of proportionality when considering Article 8 rights.

[22] In substance the High Court in Atraskevic took the view that the assessment of proportionality should only be interfered with if the lower court had erred in law or reached a Wednesbury unreasonable decision. We do not accept that such an approach can be derived from Re B (A Child). The seven categories identified by Lord Neuberger at paragraph 93 of his opinion demonstrate an intensity of review in relation to the proportionality issue that is quite inconsistent with Wednesbury unreasonableness. This court set out its approach to the consideration of proportionality on appeal at paragraph 19 of The Republic of Poland v RP [2014] NIQB 59:

> "[19] An issue arose as to the approach of the court on appeal. This is an appeal under section 28 of the 2003 Act in which the appellant argued that the judge ought to have decided the relevant question differently and if she had decided the question in the way in which she ought to have done she would not have been required to order the person's discharge. An appeal under section 28 may be brought on questions of law and fact. Where the appropriate judge has made findings of fact the appeal court should hesitate before reaching a contrary conclusion, recognising the wide experience of those judges dealing with extradition cases (see Government of the United States v Tollman [2008] 3 All ER 350 at para 95). The striking of the balance between the Article 8 rights of the requested person and the public interest in extradition requires the court to form an overall judgment upon the facts of the particular case. The judgment of the lower court is entitled to respect but if after due consideration the appeal court forms a contrary view it is its duty to express that opinion as otherwise there would be little purpose in having an appeal (see Union of India v Narung [1978] AC 247 at 279)."

We see no material distinction between that approach and the approach of the Supreme Court in Re B (A Child) and we will address the issues in the appeal accordingly.

[23] In determining the issue of interference with Article 8 rights we consider that considerable assistance is to be obtained from the opinion of Lady Hale in HH v Westminster City Magistrates' Court [2012] UKSC 25. We recognise the need for a structured approach but accept that the issue in this case is whether the interference with family life is necessary in a democratic society in the sense of being a proportionate response to the public interest in extradition. In examining that question it is important to have regard to the particular interests of children which

were identified at paragraph 33 of her opinion. That involves consideration not just of the effect of the absence of the sole or primary carer but also the extent to which the physical, educational and emotional needs of the child will be affected by extradition.

[24] At paragraph 8 Lady Hale set out the conclusions that she drew from the earlier Supreme Court case of Norris v Government of the United States of America (No 2) [2012] UKSC 25:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.
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> (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.
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> (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

[25] There are a number of matters which can properly be taken into account in assessing the weight to be given to the public interest in extradition in this case. The offence is a property offence and the warrant indicates that the amount of goods stolen was worth something over €20,000. It is of some significance that the theft was from his employers and accordingly this is a breach of trust case. The offending occurred over a period of approximately one month. It is not a case which could properly be judged to be at the serious end of the spectrum but remains a significant criminal offence.

[26] As a result of time spent in custody in this jurisdiction there is just under 12 months potentially left to be served on the sentence. That is a considerable period of time. This case cannot be compared with cases such as Wysocki where the sentence would have been served by the time the requested person was returned to the requesting state. The respondent prays in aid the period since the commission of the offence in 2006. In considering that period it is necessary to take into account that the respondent left Poland in 2007 having been convicted on 11 May 2007. He knew that he was under an obligation to make reparation but chose to evade his responsibilities and declined to inform the authorities in Poland that he had left. There is no evidence of culpable delay by the authorities and in those circumstances any delay since 2007 is of little assistance in assessing the public interest in extraditing him.

[27] At its height the medical evidence in relation to the respondent's wife demonstrates that she has suffered from a depressive illness. It is of significance that she has not sought treatment in relation to it nor has she been required to take any time off work. The evidence indicates that she has been able to provide a satisfactory home environment for the child who has progressed well. In answer to Dr Chada, Dr Harbinson described her illness as being at the mild-to-moderate end of the spectrum.

[28] The child is a five-year-old boy. Dr Mangan found him to be a happy, social engaging boy. He denied having any worries and wanted his daddy home. He understood that his father was in hospital and the prison staff facilitated that story. If the respondent is extradited they will have to devise a new story and Dr Mangan was concerned that this may affect the trust of the boy in his parents. Dr Mangan also noted that the boy's mother may suffer emotional distress which would impact upon the boy if the respondent was extradited.

[29] For the reasons set out at paragraph 25 and 26 we consider that there remains a significant public interest in the extradition of the respondent. We recognise that there may be some impact upon the respondent's wife and child if he is extradited but the medical evidence indicates that the respondent's wife has coped with the hardship involved with his detention in custody and the child has prospered. Against that background we do not consider that it can be said that extradition in

this case would cause an interference with family life which would be exceptionally severe.

Conclusion

[30] For the reasons given we quash the order discharging the respondent, remit the case to the judge and direct him to proceed to order the respondent's extradition.