Neutral Citation Number: [2012] EWHC 173 (Admin)

Case No: CO/5797/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2012

Before :

THE HONOURABLE MR JUSTICE LLOYD JONES

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Between :

Lukasz Zakrzewski	**Appellant**
- and -	
(1) District Court in Torun, Poland	**Respondents**
- and -	
(2) Regional Court in Lodz, Poland	

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Ms. Mary Westcott (instructed by **Shaw, Graham and Kersch**) for the **Appellant**
Ms. Katherine Tyler (instructed by **Crown Prosecution Service**) for the **Respondents**

Hearing dates: 25th and 26th January 2012

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Judgment

The Hon. Mr. Justice Lloyd Jones :

1. I make an order formally extending the time for the hearing of this appeal in the interests of justice pursuant to CPR Part 52 PD.120 22.6A (4) to the date of the hearing of the appeal before me.

2. This is an appeal against the decision of District Judge Rose made on 16th June 2011 pursuant to section 21(3) of the Extradition Act 2003 ("the Act") to order the appellant's extradition to Poland.

3. The proceedings are based on two conviction European Arrest Warrants ("EAW 1" and "EAW 2"). EAW 1 was issued by the District Court in Torun, Poland on 3rd February 2010. EAW 2 was issued by the Regional Court in Lodz, Poland on 24th February 2011.

4. Poland is a designated Part 1 authority for the purposes of the Act. Accordingly Part 1 of the Act (as subsequently modified) applies to these proceedings.

5. The issues on the appeal were both raised before the District Judge. They are

(1) Whether EAW 2 is invalid for a failure to comply with section 2(6)(e) of the Act because it fails to state the aggregate sentence imposed for the six offence to which it relates; and

(2) In respect of both warrants, whether his extradition is compatible with the appellant's rights under Article 8 ECHR.

6. The appellant first came before City of Westminster Magistrates' Court on 6th May 2010 having been arrested pursuant to EAW 1. EAW 1 relates to eight convictions (thefts between 2003 and 2004) which resulted in a two year custodial sentence, originally suspended, but activated on 1st August 2006.

7. The appellant was arrested pursuant to EAW 2 on 28th September 2010. EAW 2 relates to six offences which resulted in four sentences. EAW 2 relates to six offences which resulted in four sentences.

(1) A three year suspended sentence in respect of offences of assault and robbery were subsequently activated due to a further offence.

(2) A four year suspended sentence in respect of robbery and theft.

(3) A three year suspended sentence in respect of theft.

(4) A four year suspended sentence in respect of theft.

In each case the sentence was later activated due to the commission of a further offence.

8. It was necessary to adjourn a number of extradition hearings due to ongoing hearings at Kingston Crown Court in which the Appellant was the Defendant.

9. District Judge Rose heard evidence on 20th May 2011. Two additional pieces of information provided by the Polish Courts were considered. The first was a document dated 16th May 2011 which had been provided by the District Court in Torun. The second was a document dated 18th May 2011 provided by the Regional Court in Lodz. The second document states that on 19th April 2011 the District Court in Grudziadz passed a cumulative sentence which combined the sentences imposed on the Appellant for the offences to which EAW 2 relates, resulting in a cumulative penalty of one year and ten months' imprisonment.

10. Extradition was ordered on 16th June 201. The appeal to this court was lodged on 16th June 2011.

Ground 1: The second warrant is invalid because it fails to meet the requirements of section 2(6)(e).

11. The appellant submits that the District Judge was wrong to conclude that EAW 2 is a valid warrant. He submits that it fails to meet the requirements of section 2(6)(e) of the Act because it fails to give particulars of the sentence which has been imposed in respect of the offences.

12. Section 2(2) of the Act requires that a warrant contain a statement in accordance with section 2(5) and information in accordance with section 2(6).

13. Section 2(5) provides:

> "(5)The statement is one that—
>
> (a) the person in respect of whom the Part 1 warrant is issued has been convicted of an offence specified in the warrant by a court in the category 1 territory, and
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> (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence."

14. Section 2(6) provides in relevant part:

> "(6) The information is—
>
> …
>
> (e) particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offence, if the person has been sentenced for the offence."

The effect of The Extradition Act 2003 (Multiple Offences) Order 2003 is that, unless the context otherwise requires, any reference in the Act to an offence (including an extradition offence) is to be construed as a reference to offences (or extradition offences).

15. The Appellant accepts that EAW 2 was initially valid. Box E of the warrant states that it pertains to a total of six offences subject to four judicial verdicts. Box C sets out the details of the four sentences imposed, explaining that in the case of each of the first two that it is a cumulative penalty and identifying the single penalties from which it is derived. However it is submitted that the warrant is no longer valid because of the passing of a "cumulative sentence" which substituted a total penalty in respect of all of the offences to which the second warrant relates of one year, ten months' imprisonment.

16. The translation provided to the court of the letter of the Regional Court in Lodz dated 18th May 2011 states in relevant part:

> "In reply to your letter of 12 May 2011 the…Regional Court in Lodz…hereby respectfully provides that on 19 April 2011 the…District Court in Grudziadz passed in respect of Lukasz Zakrzewski a valid cumulative sentence whereby the court combined the prison sentence imposed on the convict in all the judgements covered by the European Arrest Warrant executed by this court on 24th February 2010 i.e. the following judgements passed by:

1. …District Court in Grudziadz on 10 December 2003…

2. The…District Court in Grudziadz on 18 March 2004…

3. The…District Court in Swiecie on 28 May 2004…

4. The…District Court in Grudziadz on 14 February 2005…

> Pursuant to the judgement passed, Lukasz Zakrzewski has been sentenced to a cumulative penalty of one year and ten months' imprisonment. The court was obligated to impose the said cumulative sentence pursuant to Article 569 section 1 Polish Criminal Procedures Code and Article 85 Polish Criminal Code. In accordance with the provisions referred to herein above it is possible to impose a cumulative sentence if the offender has been convicted under valid judgements passed by various courts for two or more offences committed prior to the first judgement being passed, even if not in full force and effect, in respect of any of these offences. At that, it should be underscored that a cumulative sentence does not invalidate any of the single sentences covered by that cumulative sentence and its only effect is that instead of executing the single penalties of imprisonment imposed on the convict, a cumulative penalty is executed in the extent determined in the cumulative sentence. In other words, in connection with the cumulative sentence having been passed in respect of the convict, Lukasz Zakrzewski's situation, as compared with that which would exist if the cumulative sentence were not passed, is in as much more favourable that instead of serving the sentences passed in respect of each offence he will serve the cumulative prison sentence of one year and ten months for all the offences covered by the European Arrest Warrant executed by the…Regional Court in Lodz."

17. The District Judge was satisfied that the warrant complied with the requirements of section 2(6)(e) despite the cumulative sentence that was passed on 19th April 2011. She referred to the passage in the requesting court's letter which stated that the cumulative sentence does not invalidate any of the single sentences. The District Judge considered that the warrant therefore still accurately reflected "the sentence which has been imposed" as required by the subsection.

18. On behalf of the appellant Miss Mary Westcott submits that the requirement in section 2 and in Article 8 of the Framework Decision that a warrant must state the sentence imposed in respect of the offences on the warrant requires any aggregate sentence to be stated. She submits that the further information provided by the Regional Court in Lodz in its letter of 18th May 2011 makes it plain that a one year and ten months aggregate sentence now prevails over the individual sentences detailed in the second warrant. She does not submit that the component sentences are invalid in Polish law. However she does submit that the failure to state the aggregate sentence is a fatal defect in the context of section 2(6)(e).

19. The primary response of Miss Katherine Tyler on behalf of the Respondent is that the aggregate sentence is not the sentence imposed but the remainder of the sentence left to be served. She submits that this is apparent from the following sentence in the response of the Regional Court:

> "…it should be underscored that a cumulative sentence does not invalidate any of the single sentences covered by that cumulative sentence and its only effect is that instead of executing the single penalties of imprisonment imposed on the convict, a cumulative penalty is executed in the extent determined in the cumulative sentence."

She then goes on to rely on ***Banasinski v District Court of Sanok (a Polish Judicial Authority)*** [2008] EWHC 3626 (Admin) and ***Pietrzak v Regional Court in Wloclawek, Poland*** [2008] EWHC 2138 (Admin) which establish that is not a requirement for the validity of a warrant that it state accurately the remainder of the sentence left to be served.

20. The statement by the Regional Court in Lodz is, with respect, far from clear as to the precise status and effect of the order of 19th April 2011. However, I have difficulty in accepting that, as Ms. Tyler submits, its status is something less than an order imposing a sentence. The further information from the requesting authority was provided in response to the question "Is it correct that the Polish courts have imposed as single sentence of one year, ten months in respect of all the offences in both European Arrest Warrants?" Two replies were received. The first from the Regional Court of Torun and dated 16th May 2011 referred to the first warrant. It stated that it "was not informed on the cumulative sentence covering the sentence of EAW of 3rd February 2010 being adjudicated" and added this did not cause the invalidity of the warrant. The second response was from the Regional Court in Lodz and has been quoted above. It refers to the order as imposing "a valid cumulative sentence". It explains that "[p]ursuant to the judgement passed" he "has been sentenced to a cumulative penalty". It then explains that instead of serving the individual sentences he will serve the cumulative sentence.

21. The order of 19th April 2011 is, therefore, an order of a court which is referred to throughout this correspondence as a sentence. Furthermore, it is clear that the cumulative sentence is the operative sentence and that the previous individual sentences, while remaining valid, are not operative. Thus the letter from the Regional Court in Lodz explains that the appellant's situation is more favourable because he will now serve the cumulative sentence. While it is said that the individual sentences remain valid, this cannot mean that those sentences are to be served. The letter states the contrary. I consider that the order of 19th April 2011 is a judicial order setting the totality of time which the Appellant must serve in prison. To my mind it is the sentence of the court and not the balance of time which the Appellant must serve.

22. This conclusion is consistent with the logic of the decision of the House of Lords in ***Pilecki v. Circuit Court of Legnica, Poland*** [2008] UKHL 7, [2008] 1 WLR 325. That case was concerned with the distinct question whether it was sufficient for the purposes of the Act that a European Arrest Warrant stated the length of sentence that the requested person was to be required to serve under a cumulative sentence of the Polish court, without particularising the individual sentences. The House of Lords

held that it is sufficient for the warrant to state the aggregate sentence. However, I note that Lord Hope described the practice in Polish courts as disclosed by the information in that case as follows:

> "The information that has been given in the European Arrest Warrants indicates that it is the practice in Poland for the sentencing court, in multiple offence cases, to aggregate the sentences that would have been appropriate for the offences if taken individually and to apply a discount from the total of the individual sentences to arrive at the overall sentence of imprisonment or detention that must be served." (At para 30).

Since the issue in the present case was not before the House of Lords it would be inappropriate to attach any significance to the words used by Lord Hope to describe the later order. However, he went on to conclude that a reference to that order was capable of satisfying the requirement of section 2(6)(e).

> "...it seems to me that section 2(6)(e) does not present a problem. As modified, it requires information to be given of particulars "of the sentence which has been imposed under the law of the category 1 territory in respect of the offences". The singular use of the word "sentence" even in multiple offence cases, matches exactly the wording or the Annexed Framework Decision." (at para 33).

Similarly, in addressing the requirements of section 65(3) he considered that, if the other requirements are satisfied, all the judge need do is to determine whether "the sentence for the conduct taken as a whole" meets the requirement that it is for a term of at least four months (para 34). He concluded that the cumulative order satisfied that requirement. It follows that in that case the cumulative order was treated as a sentence imposed.

23. I consider therefore that the order of 19th April 2011 imposed a sentence and that it is not to be regarded as merely a statement of the remainder of the sentence left to be served. If this is correct, ***Banasinski*** and ***Pietrzak*** cannot assist the Second Respondent.

24. In the alternative the Second Respondent submits that, in cases where after the issue of the European Arrest Warrant the outstanding sentences have been aggregated, there is no requirement for the European Arrest Warrant to include the aggregated sentence.

25. Miss Tyler draws attention to section 2(5) and submits that the requirements of the statement to be provided under subsection (5) refer to the situation as it existed at the time the warrant was issued and that therefore section 2(6) should be read in the same way. On that basis she submits that it is sufficient for the purposes of section 2(6)(e) if the warrant provides an accurate statement of the sentence at the time the warrant was issued. To my mind, it is not necessary to express any conclusion as to whether her submission on section 2(5) is correct because section 2(6) imposes a discrete requirement to provide information. There is no reason to conclude that the requirements of section 2(6) are to be read subject to any limitation which may be derived from section 2(5).

26. A more fundamental objection, however, to Ms. Tyler's alternative submission lies in the purpose of section 2(6). It imposes an obligation to provide information which will be needed by the courts of the requested State in order to determine whether the requirements of the European Arrest Warrant scheme, as reflected in the Act, are satisfied. In cases such as the present, information as to the sentence imposed is necessary to enable the courts of the requested State to determine whether the requirements of section 65 are satisfied. In order to determine whether the offences identified in the warrant are extradition offences within section 65(2), (3), (4), (5) or (6) the court has to ascertain the length of sentence which has been imposed. As Latham LJ observed in ***Pietrzak***, referring to Article 8.1 of the Framework Decision:

> "The importance of the length of sentence that has been ordered, which is the requirement of Article 8.1, is that it is the length of sentence which has been ordered in this type of case which determines whether or not the offence in respect of which the appellant had been sentenced is one which falls within the meaning of an extradition offence for the purposes of section 65." (at paragraph 10).

Similarly in ***Pilecki*** Lord Hope observed:

> "It is the length of the sentence that the requested person is to be required to serve, and the length of that sentence alone, that determines whether or not it falls within the scope of a European arrest warrant." (at paragraph 28).

However, in order to fulfil this purpose, the information must relate to the current operative sentence and not to earlier sentences which have been subsumed in an aggregated order. In determining whether the requirement of section 65 is satisfied, the court needs to know the total length of time which the court of the requesting State has ordered must be served in prison. In the present case that is the aggregated order. In the absence of such information there is a danger that a court may proceed on the basis of earlier individual sentences and, in certain circumstances, may come to an incorrect conclusion as to whether the warrant relates to an extradition offence.

27. In this regard I would also draw attention to the requirement of Article 8 of the Framework Directive that a European arrest warrant shall contain information about "(f) the penalty imposed, if there is any final judgment…". The reference to a final judgment is important because the courts of the requested State must proceed on the basis of the final determination by the judicial authorities of the requesting State of the sentence. Where there is an aggregated sentence, as in the present case, it is that which is the final judgment. The constituent sentences may remain valid but they do not constitute the penalty imposed by a final judgment.

28. More generally, I consider that under the European Arrest Warrant scheme there is a duty on the requesting authority to ensure that the information contained in the warrant is proper, fair and accurate. (***Castillo v Kingdom of Spain*** [2005] 1 WLR 1043; ***The Criminal Court at the National High Court, First Division v Murua*** [2010] EWHC 2609 (Admin)). I make clear that there is no suggestion of any impropriety on the part of the Polish judicial authority in this case. However the

effect of the aggregated sentence is that the information contained in the warrant is no longer accurate.

29. The requirements of section 2(2) are mandatory. It is well established that the contents of the warrant are crucial to the operation of the system and that if the warrant does not conform to the requirements set out in section 2 it will not be a Part 1 warrant and Part 1 of the Act will not apply. (***Cando Armas*** [2005] UKHL 67 per Lord Hope at paras. 26 and 28; ***Dabas v High Court of Justice in Madrid, Spain*** [2007] UKHL 6 per Lord Hope at para. 50).

30. For these reasons, I have come to the conclusion that where, after a European arrest warrant is issued, the courts of the requesting State vary the length of sentence imposed for the offence to which the warrant relates, it is necessary for the requesting authority to withdraw the warrant and issue a new warrant which accurately states the sentence imposed and meets the requirements of section 2(6)(e).

31. I am very conscious of the need to avoid technicalities in the application of the European Arrest Warrant scheme. However, for the reasons given I consider it a matter of fundamental importance to the operation of that scheme that the warrant should provide accurate information as to the sentence imposed. Furthermore, I consider that having to withdraw a warrant and issue a new warrant would not be unduly onerous.

32. For these reasons, I consider that EAW 2 is invalid.

Ground 2: Article 8 ECHR

33. Pursuant to section 21 of the Act the Appellant submits that his extradition to Poland would be a disproportionate interference with his rights under Article 8 ECHR. In this regard he relies in particular on the circumstances of his fiancée and infant child in this country, on his history of mental illness and on his submission that there would be very little, if anything, of his sentence left to be served if he were returned to Poland.

34. There was before the District Judge the statement of the Appellant's fiancée Miss Romanowska. They have been in a relationship for about two years and they have together a daughter who was born in May 2010 when the Appellant was in prison. Miss Romanowska speaks of the hardship she experiences in having to take care of everything on her own, meeting bills while looking after a home and caring for a year old daughter. She also says that she has financial problems. She is not working and the rent is very high. She explains that if the appellant is sent to Poland it would be impossible for her and their daughter to travel to Poland to see him.

35. In a witness statement the appellant explains that he is now aged 26 and grew up in the north of Poland. His first contact with mental health services was at the age of 14 when he was detained in a psychiatric hospital. Later he appeared in court and was ordered by the court to undergo an investigation of his mental state after committing theft. Following further offences of theft, he was sentenced to two years' detention in a young offenders institution. He claims that, just before going there, he was diagnosed as suffering from schizophrenia by a doctor in a psychiatric hospital in Torun, who recommended that he be admitted to hospital. Following his release from

prison he spent two terms of six months and eight months respectively in mental institutions. After that he was sent to prison again before he came to the United Kingdom in 2006.

36. He explains that in July 2009 he received a two year community order for assaulting his girlfriend and assaulting a police officer. In September 2009 he was involved in another incident which led to a charge of grievous bodily harm. Following a plea of guilty he was sentenced on 18th February 2010 at Kingston Crown Court to 36 weeks in prison.

37. He explains that towards the end of 2009 he heard that his mother was coming to the United Kingdom. He wanted to get away from her and when he heard that she was coming he cut his arm open with a bottle. This resulted in a six hour operation to reconstruct his veins.

38. Since these extradition proceedings commenced in May 2010 he has been in custody. He states that during this period he has been suicidal and says that if his extradition to Poland is ordered he will attempt suicide because it will bring back all the bad memories of hospital admissions and psychiatric treatment in Poland.

39. Before the District judge the Appellant gave evidence that he had been attacked in Poland in 2003 by criminals to whom he owed money for drugs. He stated that he had problems in the Polish prison system when moved to the "normal prison for normal prisoners" because they assumed he was a sex offender. This resulted in beatings. His evidence before the District Judge was that he had a recent diagnosis of hepatitis C for which he will have treatment.

40. There were before the District Judge two reports by Dr. Richard Taylor a consultant psychiatrist. Dr. Taylor was hampered by the lack of medical records. However, his overall conclusion was that the Appellant's current mental state did not support a diagnosis of schizophrenia. Dr. Taylor states:

> "It is difficult to make sense of his account of mental health symptoms. If his account is genuine then it is possible that he suffered from a psychotic episode with features of paranoia and persecutory delusions. However, the description he gives of psychotic symptoms is rather inconsistent. He also describes self harm and suicide attempts and the alternative explanation would be that he is suffering from personality disorder with a probable emotionally unstable, paranoid and antisocial traits. (sic) In support of the diagnosis of personality disorder is his account of significant neglect and emotional abuse during childhood coupled with early substance misuse and disruption to his education. He appears to have had a significant problem with offending behaviour in the context of polysubstance abuse and there is evidence of previous self harm.
>
> …
>
> It is important to note that without contemporaneous psychiatric records it is not possible to draw a firm conclusion

> about [his] reported previous episodes of mental health problems. However his clinical presentation and recent history are more suggestive of a young man with significant abnormal personality traits. In my opinion, the most likely diagnosis is that he has a combination of emotionally unstable, antisocial and paranoid personality traits. This would provide an explanation for his apparent pattern of repeated offending, polysubstance abuse and repeated episodes of self harm, all of which would be consistent with the diagnosis of personality disorder."

41. In an addendum report Dr. Taylor considers that there is a risk of suicide but says that he would not assess the level as being very high risk. He considers that if the Appellant were to be extradited this could potentially increase the risk of suicide but he does not think it likely that it would be a very high risk.

42. The Appellant maintains that he has effectively served the sentences detailed in the warrants. His extradition is sought to complete sentences of two years (EAW 1) and one year, ten months (EAW 2). His evidence was that he understood that these would be served concurrently. However, as the District Judge pointed out, there is no evidence of Polish law as to whether the sentences would be completed as concurrent or consecutive.

43. The document of 18th May 2011 from the requesting authority explains that the Appellant will not be eligible for automatic release but that an application can be made after half the sentence is served. It also confirms that "the entire time [he] has spent in custody in connection with the European arrest warrant having been referred for enforcement will be credited to the cumulative penalty of one year ten months imprisonment".

44. In ***Norris v Government of the United States of America*** [2010] UKSC 9 Lord Phillips made clear that it is only if some quite exceptionally compelling feature or combination of features is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves.

45. In considering this matter I have given careful consideration to the Article 8 rights of the appellant himself, and those of his fiancée and their baby. However, I do not consider that these circumstances and the appellant's unfortunate history, taken together are sufficient to render his extradition disproportionate. The threshold to be achieved is a very high one and mere hardship will not suffice. Furthermore, the fact that the appellant is capable of self harm is not, in my judgement, sufficient to tip the balance in his favour in the circumstances of this case.

46. I accept that in certain circumstances the fact that a very short period of time remains to be served may be a circumstance that the court will take into account in making its assessment under Article 8. (See ***Kasprzak v Poland*** [2010] EWHC 2966 (Admin); ***Wysocki v Poland*** [2010] EWHC 3430 (Admin).)

47. However, there is no clear information as to how long the appellant would have to serve if he were now returned to Poland under the first warrant. The matter was canvassed before me in argument. One complicating factor here is that since the

beginning of the extradition proceedings the Appellant has been in custody serving a sentence of 36 weeks imprisonment for an offence of causing grievous bodily harm. It is not clear whether the requesting authority is aware of that or how it would be taken into account. It was common ground before me at the hearing that, taking the most favourable position from the Appellant's point of view, he would have approximately four months left to serve on the first warrant, if the entire time that he spent in custody is deducted from his existing sentence. Even if one could be confident that this is in fact the case, I do not consider that this would tip the balance under Article 8 in favour of the Appellant.

48. I agree with the District Judge that the calculation of how long he has left to serve is a matter for the Polish authorities to calculate once he is there, taking into account the time he has spent on remand in the United Kingdom. Furthermore it is essentially a matter for the Polish court to determine whether he should be released after serving half of his sentence.

49. For these reasons I consider that the extradition of the Appellant would be compatible with his Convention rights and those of his fiancée and child.

Conclusion

50. The appeal is allowed in relation to the second warrant. I order the Appellant's discharge and quash the order for his extradition on the second warrant.

51. However, the appeal is dismissed in relation to the first warrant. I order the extradition of the Appellant to Poland on the first warrant.