Status: Positive or Neutral Judicial Treatment

Janusz Miraszewski, Lukasz Kanigowski, Marcin Flu#niak v District Court in Torun, Poland, Circuit Court, Rzeszow, Poland

Case No: CO/4300/3476/3976/2014

Divisional Court

17 December 2014

[2014] EWHC 4261 (Admin)

2014 WL 6862801

Before: Lord Justice Pitchford Mr Justice Collins

Date: Wednesday 17th December 2014

On Appeal from Westminster Magistrates Court

Senior District Judge Riddle (Chief Magistrate)

District Judge McPhee (Magistrates' Court)

District Judge Michael Snow (Magistrates' Court)

Hearing dates: 2nd December 2014

Representation

Edward Fitzgerald QC and Malcolm Hawkes (instructed by Lansbury Worthington and Shah Law Chambers) for the 1st and 2nd Appellants.

Edward Fitzgerald QC and Nick Hearn (instructed by Lawrence & Co) for the 3rd Appellant.

Mark Summers QC and Adam Payter (instructed by The Crown Prosecution Service) for the 1st 2nd and 3rd Respondents.

Judgment

Lord Justice Pitchford:

The appeals

1 These are appeals by Janusz Miraszewski, Lukasz Kanigowski and Marcin Flu#niak under section 26 of the Extradition Act 2003 against orders made in the Westminster Magistrates' Court for their extradition to Poland. Section 21A of the Extradition Act 2003 inserted by section 157(2) of the Anti-Social Behaviour, Crime and Policing Act 2014 applies to an extradition decision made on or after 21 July 2014. These appeals have been listed together at the direction of Master Gidden because they raise for the first time in this court common issues as to the compatibility of extradition with Convention rights and the proportionality of extradition that arise under section 21A(1)(a) and (b) of the Act. While the submissions made on the appellants' behalf

largely concerned the correct application of section 21A(1)(b) [the new freestanding proportionality test], the appellants also contend that their extradition is incompatible with their Convention rights under Article 8 ECHR . I shall describe the legislative history of section 21A later in this judgment commencing at paragraph 17. I have been much assisted by the researches and submissions of counsel on both sides.

The judges' findings

Janusz Miraszewski

2 Janusz Miraszewski was born on 7 October 1963 in Chelmno, Poland and is now aged 51 years. He is alleged to have committed burglaries in Poland contrary to article 279, paragraph 1 and article 64, paragraph 2 of the Penal Code . The allegation is that on the night of 7 – 8 December 2004, shortly after being released from a sentence of 3 years and 9 months imprisonment, with another he broke into five sheds situated on allotments in Chelmno and stole a quantity of property: a guitar, camp bed, lawnmower, cabbage shredding machine, radio, two aluminium freezers, two knives, electric samovar, sink and battery. The appellant was interviewed on 9 and 15 December 2004. He stated in evidence before District Judge Michael Snow that he had admitted his guilt to the police during interview. He was instructed to notify the police of any change in residence for longer than seven days. The appellant left Poland in March 2005 in breach of his obligations under Article 75 . On 1 April 2005 an order was made for the appellant's preliminary detention in Poland but no European Arrest Warrant (“EAW”) was then sought because there was an error in the order. The error was not corrected until 31 August 2012. A fresh order for preliminary detention was made on 13 September 2012. The EAW was issued on 12 March 2013. It was certified by the National Crime Agency (“NCA”) on 24 April 2014. The appellant was arrested on 15 June 2014 and remanded in custody. The order for extradition was made by DJ Snow on 20 August 2014.

3 As to the appellant's Convention rights under Article 8 (section 21A(1)(a)), the District Judge accepted that the appellant had been in the UK for nine years. There had been “clear culpable delay” by the judicial authority in Poland for a period of seven years before the EAW was issued. Although the appellant claimed that he had returned to Poland in 2007 and said “in a vague way [that he had] been seen by the local police who took no action against him” the judge concluded that the appellant can have gained no false sense of security. The judge found that the appellant had taken no active steps to clarify whether he was still wanted by the police because he knew that he was being sought for the purposes of prosecution. The appellant's connections with the UK were “incredibly thin”. He was an alcoholic living in a hostel before his remand and had resorted to begging.

4 As to the proportionality of a decision to extradite under section 21A(1)(b) , the District Judge expressed difficulty in assessing the seriousness of the charges. The appellant acted jointly with another and damage was caused. He committed the offence during the currency of his release on probation from prison and within three months of his release. The judge concluded that in England and Wales the appellant could well face a sentence of imprisonment. The maximum penalty in Poland was 10 years imprisonment. There was no evidence to suggest that Poland would take less coercive measures than extradition.

5 The District Judge found that the appellant's surrender was compatible with his Convention rights and proportionate for the purpose of section 21A .

Lucasz Kanigowski

6 Lukasz Kanigowski was born on 20 June 1986 in Torun, Poland and is now aged 28 years. He is alleged to have committed two offences of attempted burglary and one offence of burglary, contrary to Article 279, paragraph 1 and Article 13(1), paragraph 1 of the Penal Code . It is alleged that in October or November 2006 acting with others he attempted to break into “bower no. 10” belonging to Marek Braszkiewicz; that in November he attempted with others to break into “bower no. 9” owned by Andrzej Smolinski; that on 16 or 17 November 2006 with others he gained entry to premises belonging to Franciszek Kobialka by forcing a window and stole property to the value of PLN 1,200. On 4 June 2007 a warrant was issued in Poland for the appellant's arrest. The EAW (1) was issued on 4 May 2011 and the warrant was certified on 18 December 2012. On 20 February 2013 the appellant was arrested in the UK.

7 The appellant is also wanted for conviction matters (EAW (2)). On 7 April 2006 the appellant stood convicted of three offences, committed on 3 September 2005 and 20 August 2005, of stealing with others handbags and their contents, including jewellery, mobile phones, credit cards and cash, from restaurants where the victims were dining, contrary to Article 278, paragraphs 1 and 5 , and Article 11, paragraph 1 of the Penal Code . The value of the property stolen was, in the first case, PLN 315, in the second case, PLN 5,480 and, in the third case, PLN 11,140. The appellant was sentenced to 10 months imprisonment suspended for 4 years.

8 On 9 July 2007 the appellant stood convicted of an offence contrary to Article 288 paragraph 2 of the Penal Code , committed on 18 March 2006, of damaging the entrance door, a window pane and a glow lamp at the Complex of Vocational Schools No. 2 in Torun. He was sentenced to a term of 179 days imprisonment.

9 A conviction EAW (2) was issued by the requesting state on 23 March 2011. The warrant was certified on 3 December 2013 and the warrant was executed on the same day.

10 The Chief Magistrate, District Judge Howard Riddle, found that the suspended sentence was activated in April 2007. On 9 July 2007 the appellant's sentences were amalgamated and he was ordered to serve 179 days imprisonment. There had been a delay in the issue of both EAWs. The appellant was detained for the theft offences on 4 September 2005. On 19 June 2006 the appellant was informed by his probation officer of his obligations under the suspended sentence to keep in touch and to appear at court when required. He last saw his probation officer on 1 December 2006. On 12 December 2006 the appellant was interviewed as a suspect about the accusation offences. However, on about 20 December the appellant left Poland without notifying the authorities of his change of address and arrived in the UK. On 20 April 2007 he failed to appear at the hearing in Torun at which enforcement of the appellant's sentence was suspended pending the issue of a warrant for his arrest. Not until September 2008 was the warrant drawn up. In August 2010 the police informed the court that the appellant was in the UK. A request to issue a EAW was made on 9 February 2011.

11 The EAW (2) theft offences were committed when the appellant was aged 19 years and the alleged EAW (1) burglary offences when he was aged 20 years. He had been in the UK for 8 years. He lived in Oldham, worked shifts at a bakery in Manchester and paid child maintenance for his son, Oliver, aged 5, to his ex-partner who lived with Oliver in Barnsley. The judge accepted that he saw Oliver every other weekend. The appellant's mother worked as a carer. His father suffered an injury to his heel in November 2012 and the appellant provided him with support and care. The judge concluded that were the appellant temporarily prevented from continuing his weekly visits with Oliver this would be a hardship. However, the dependence of the appellant's father on his son had been exaggerated. The father was able to walk with a stick and arrangements for transport and an interpreter were made when necessary. The father received assistance from friends and other members of his family that, in the judge's view, had been deliberately underplayed in the evidence. Again, the appellant's absence would be a hardship. It was the judge's view that in the UK the hardship of separation that would be caused to the family would not make the difference between a custodial and non-custodial sentence in the appellant's case. The appellant had fled the jurisdiction while still subject to a suspended sentence. While delay was a factor it was the judge's view that extradition was a proportionate response. There was a “constant and weighty public interest” in enforcement of the UK's international obligations by extradition. Extradition was a necessary interference with the appellant's family life.

12 As to the section 21A(1)(b) test of proportionality, which applied only to the accusation EAW (1), the judge took account of the seriousness of the alleged criminal conduct, the likely penalty and the possibility that Poland would take less coercive measures than extradition. The judge rejected the submission that the offences alleged were not serious. They were repeat offences of non-dwelling burglary that could well attract a custodial sentence in the UK, particularly when the offender had already been sentenced to imprisonment for other offences. These alleged offences appeared to have been committed while the investigation into the theft offences was in progress. Since the appellant was also the subject of EAW (2) for conviction offences it was difficult to imagine that the Polish authorities would take less coercive measures to secure the appellant's return. The Chief Magistrate was aware of and had seen the proposed Practice Direction (see paragraph 19 below) and concluded that these were serious offences. He could not be certain what would be the penalty in Poland but the findings he had made, together with an appreciation that the appellant was wanted for conviction offences, were relevant considerations. He concluded that extradition to answer the charges in EAW (1) would not be disproportionate.

Marcin Flu#niak

13 Marcin Flu#niak was born on 23 September 1980 at Milomlyn, Poland and is now aged 34 years. Between 26 February 2004 and 5 December 2005 the appellant served the custodial part of a sentence of 3 years and 6 months imprisonment imposed by the District Court of Dzler#onlów for offences of robbery and assault. It is alleged that between 6 December 2005 and December 2006 he was a member of an organised crime group whose purpose was to commit currency exchange and trading-in-securities offences, namely by counterfeiting Euro banknotes and placing them in circulation, contrary to section 258, paragraph 1 of the Penal Code . It is further alleged that during the same period the appellant, with others, placed counterfeit Euro banknotes in circulation by making purchases from unidentified individuals with counterfeit notes, contrary to Article 310, paragraph 2 and other provisions of the Penal Code . These were aggravated forms of the offences because they were committed within five years of his release from prison and carried a maximum penalty of 10 years imprisonment.

14 On his release from prison the appellant was subject to the requirements of his probation. He left Poland and travelled to England in May or June 2006. In January 2008 the appellant visited Poland to attend his father's funeral and in June 2010 he returned to attend his brother's wedding. On 27 July 2010 the appellant was sought by the Polish authorities in relation to the current alleged offences. An order for provisional detention was made by the court on 10 May 2011. On 5 April 2012 the EAW was issued. It was certified on 27 March 2014. Following his arrest on 2 May 2014, at the initial hearing the appellant was admitted to conditional bail.

15 On 21 July 2014 District Judge McPhee held that the appellant was not a fugitive from justice. However, he rejected the appellant's claim under section 14 of the Act that it would be oppressive to return him to Poland after an interval of 8 years, the appellant having made his family life in the UK with his partner and child of 6 years. The judge did not find that the delay was culpable. The separation would be a hardship but the appellant's partner was a working mother with the assistance of a nanny. The appellant's parents saw the appellant's partner weekly and his brother was available to give assistance. The charges were serious and it would not be oppressive to extradite the appellant to face them.

16 As to the appellant's Convention rights under Article 8 the District Judge took account of the interests of the family and not just of the appellant. The offences were of “some age” but were “not insignificant” in that they involved serious allegations of organised crime. The judge accepted that extradition would disrupt family life and would have an adverse effect upon the appellant's son, but concluded that to some extent the effect would be ameliorated by the continuing loving care of the child's mother. The extent of the hardship was not such that it outweighed the need for the UK to comply with its treaty obligation to return a citizen of a category 1 territory to face trial on serious charges. Extradition was both necessary and proportionate. The judge made no separate assessment of proportionality under section 21A(1)(b) which came into force on the day the District Judge gave his judgment.

Section 21A Extradition Act 2003

17 Section 21A provides:

> **“21A Person not convicted: human rights and proportionality**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person (“D”)—
>
> (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.

(4) The judge must order D's discharge if the judge makes one or both of these decisions—

(a) that the extradition would not be compatible with the Convention rights;

(b) that the extradition would be disproportionate.

(5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—

(a) that the extradition would be compatible with the Convention rights;

(b) that the extradition would not be disproportionate.

(6) If the judge makes an order under subsection (5) he must remand the person in custody or on bail to wait for extradition to the category 1 territory.

(7) If the person is remanded in custody, the appropriate judge may later grant bail.

(8) In this section "relevant foreign authorities" means the authorities in the territory to which D would be extradited if the extradition went ahead."

Thus, the proportionality test in section 21A(1)(b) applies only to accusation and not to conviction cases.

18 Section 2 of the 2003 Act makes provision for the issue, receipt and certification of a EAW between the United Kingdom and a Category 1 territory. Section 2(7) provides that the designated UK authority may issue a certificate that the issuing authority in the Category 1 state is authorised to issue EAWs in that territory. The certificate is a pre-condition to an extradition decision. Section 157(3) of the Anti-Social Behaviour, Crime and Policing Act 2014 also inserted the following amendment to section 2 (after subsection (7)):

"(7A) But in the case of a Part 1 warrant containing the statement referred to in

subsection (3) *[that the requested person is accused and is wanted for prosecution]* , the designated authority must not issue a certificate under this section if it is clear to the designated authority that a judge proceeding under section 21A would be required to order the person's discharge on the basis that extradition would be disproportionate. In deciding that question, the designated authority must apply any general guidance issued for the purposes of this subsection.

(7B) Any guidance under subsection (7A) may be revised, withdrawn or replaced.

(7C) The function of issuing guidance under subsection (7A), or of revising, withdrawing or replacing any such guidance, is exercisable by the Lord Chief Justice of England and Wales with the concurrence of—

(a) the Lord Justice General of Scotland, and

(b) the Lord Chief Justice of Northern Ireland."

19 It follows that the designated authority is required to anticipate the judge's decision whether to order the requested person's discharge because extradition would be disproportionate within the meaning of section 21A of the Act. The Lord Chief Justice has issued Guidance under section 2(7A) of the Extradition Act 2003 by means of *Criminal Practice Directions Amendment No. 2 [2014] EWCA Crim 1569* , as follows:

"New Practice Direction on Extradition

CPD II Preliminary Proceedings 17A: Extradition: General Matters

General matters: expedition at all times

17A.1 Compliance with these directions is essential to ensure that extradition proceedings are dealt with expeditiously both in accordance with the spirit of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States and the United Kingdom's other treaty obligations. It is of the utmost importance that orders which provide directions for the proper management and progress of cases are obeyed so that the parties can fulfil their duty to assist the Court in furthering the overriding objective and in making efficient use of judicial resources.

General guidance under s. 2(7A) Extradition Act 2003 (as amended by the Anti-Social Behaviour, Crime and Policing Act 2014)

17A.2 When proceeding under section 21A of the Act and considering under subsection (3)(a) of the Act the seriousness of the conduct alleged to constitute the extradition offence, the judge will determine the issue on the facts of each case as set out in the warrant, subject to the guidance in 17A.3 below.

17A.3 In any case where the conduct alleged to constitute the offence falls into one of the categories in the table at 17A.5 below, unless there are exceptional circumstances, the judge should generally determine that extradition would be disproportionate. It would follow under the terms of s. 21A(4)(b) of the Act that the judge must order the person's discharge.

17A.4 The exceptional circumstances referred to above in 17A.3 will include:

i. Vulnerable victim

ii. Crime committed against someone because of their disability, gender-identity, race, religion or belief, or sexual orientation

iii. Significant premeditation

iv. Multiple counts

v. Extradition also sought for another offence

vi. Previous offending history

17A.5 The table is as follows:

1 **Category of offence** Minor **theft** – (not robbery/ burglary or theft from the person)	**Examples** Where the theft is of a low monetary value and there is a low impact on the victim or indirect harm to others, for example:
	(a) Theft of an item of food from a supermarket
	(b) Theft of a small amount of scrap metal from company premises
	(c) Theft of a very small sum of money
Minor financial offences (**forgery** , **fraud** and **tax** offences)	Where the sums involved are small and there is a low impact on the victim and / or low indirect harm to others, for example:
	(a) Failure to file a tax return or invoices on time
	(b) Making a false statement in a tax return
	(c) Dishonestly applying for a tax refund using a ment
	(d) Obtaining a bank loan using a forged or falsified document
	(e) Non-payment of child maintenance
Minor **road traffic, driving** and related offences	Where no injury, loss or damage was incurred to any person or property, for example:
	(a) Driving whilst using a mobile phone

	(b) Use of a bicycle whilst intoxicated
Minor **public order** offences	Where there is no suggestion the person started the trouble, and the offending behaviour was for example:
	(a) Non-threatening verbal abuse of a law enforcement officer or government official
	(b) Shouting or causing a disturbance, without threats
Minor **criminal damage** (other than by fire)	For example, breaking a window
Possession of controlled substance (other than one with a high capacity for harm such as heroin, cocaine, LSD or crystal meth)	Where it was possession of a very small quantity and intended for personal use

The extra-statutory materials

20 The origins of an extradition test based, at least in part, upon the "triviality" of the accusation offence can be traced to section 11(3) of the Extradition Act 1989 which provided:

> "(3) Without prejudice to any jurisdiction of the High Court apart from this section, the court shall order the applicant's discharge if it appears to the court in relation to the offence, or each of the offences, in respect of which the applicant's return is sought, that—
>
> (a) by reason of the trivial nature of the offence; or
>
> (b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or
>
> (c) because the accusation against him is not made in good faith in the interests of justice,
>
> it would, having regard to all the circumstances, be unjust or oppressive to return him."

21 On 5 November 2009 a European Commission ("EC") meeting of experts took place in Brussels under the chairmanship of the Head of the EC's Criminal Justice Unit to discuss the operation of the EAW between member states. The representative from the Polish Ministry of

Justice explained that under the Polish “principle of legality” Poland's law enforcement authorities were obliged to “take all measures to bring someone to justice”. The EAW is treated as a measure that makes enforcement possible. There is thus no exercise of discretion as to whether on the grounds of proportionality a EAW should be withheld. Poland could change this situation only if the Framework Decision was amended.

22 At its meeting on 3 and 4 June 2010 the Council of the European Union (“CEU”) considered recommendations for the application of a proportionality test by the issuing state and its conclusions were incorporated into a revised text of the “European Handbook on How to Issue a European Arrest Warrant”. The third paragraph of the Introduction states:

> “The EAW should be used in an efficient, effective and proportionate manner as a tool for the prevention and repression of crime, while safeguarding the human rights of suspects and convicted persons. The instrument, which is based upon the deprivation of personal liberty, is in principle designed to further the prosecution of more serious or more damaging crime which may substantially justify its use, or for purposes of enforcement of convictions. It is only intended to be used if an arrest warrant or any other enforceable judicial decision having the same effect has been issued at national level.”

23 At section 3 the Handbook states that while the Framework Decision makes no express reference to the need for “a proportionality check” the restrictions on physical freedom and the free movement of the requested person that would follow an order for extradition required an issuing member state, before issuing a warrant, to consider a number of important factors including, in particular, the seriousness of the offence, the possibility that the suspect will be detained, the likely penalty if convicted, the effective protection of the public and the interests of victims. At page 15 the Handbook states that the guidance is consistent with the general philosophy behind the EAW Framework Decision. The section continues:

> “The EAW should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention. The warrant should not be issued, for instance, where, although preventive detention is admissible, another non-custodial coercive measure may be chosen – such as providing a statement of identity and place of residence – or one which would imply the immediate release of the person after the first judicial hearing. Furthermore, EAW practitioners may wish to consider and seek advice on the use of alternatives to an EAW.
>
> Taking account of the overall efficiency of criminal proceedings these alternatives could include:
>
> • Using less coercive instruments of mutual legal assistance where possible.
>
> • Using videoconferencing for suspects.
>
> By means of a summons
>
> • Using the Schengen Information System to establish the place of residence of a suspect
>
> • Use of the Framework Decision on the mutual recognition of financial penalties
>
> Such assessment should be made by the issuing authority.”

The court was informed by Mr Summers QC for the respondent that Poland continues to apply the principle of legality.

24 The application of a proportionality threshold for the issue of EAWs received the approval of the review of the UK's extradition arrangements conducted by the Rt Hon Sir Scott Baker whose report was delivered to the Home Office on 30 September 2011 (pages 162 – 174) (“the Scott Baker report/review”). The review cautioned against the unilateral amendment of domestic

legislation to add a proportionality requirement in the UK (when acting as the requested state) but recommended that efforts should be made to generate uniformity of application of the principle by issuing member states.

25 The problems created by the principle of legality applied in some member states and the recommendations made by the Scott Baker report were the subject of comment by Lord Phillips of Worth Matravers in *Assange v Swedish Prosecution Authority (Nos. 1 & 2) [2012] 2 AC 471* at paragraphs 85 to 90. Notwithstanding the reservations of the Scott Baker review, Parliament decided to adopt the unilateral course.

26 The amendments to the Extradition Act 2003 introducing subsection 2(7A) and following and the new section 21A(1)(b) represents Parliament's decision to apply the European Union principle of proportionality to the domestic certification of EAWs issued by a category 1 territory *and* to the judgment of the court as to whether extradition should be ordered. The word used in subsection (3)(a) is not “triviality”: the court will evaluate the “seriousness” of the conduct alleged to constitute the offence(s) in the judgement as to whether extradition is a proportionate exercise of the UK's international obligations under the Framework Decision. The Lord Chief Justice's Practice Direction (at paragraph 19 above) applies both to certification and to extradition decisions made on and after 6 October 2014. Its statutory purpose is to guide the decision-maker whose task it is to issue a certificate under section 2(7) . However, the Lord Chief Justice could hardly give that guidance unless, at the same time, he informed judges of the threshold of triviality. Although the guidance, as addressed to judges, is in places couched in mandatory terms, paragraph 17A.2 and following are explicitly guidance only.

27 The parties are agreed that the Practice Direction is necessarily limited by its statutory authority and, in my view, that is an appropriate agreement. The judge will be applying the statutory factor of seriousness as a component of the judgment of proportionality, but the guidance provides a measure of assistance to the assessment of seriousness. There is a compelling practical reason why the designated authority should be cautious before making a decision to refuse a certificate under section 2(7A) . It would be procedurally undesirable for the focus of attention in such cases to become the rationality of the certification decision in claims for judicial review rather than the testing of the merits of the proportionality issue through the normal statutory hearing and appeal process. This may be one explanation for the very low threshold of seriousness identified in the guidance to the designated authority.

28 I accept the submission made by Mr Fitzgerald QC on behalf of the appellants that it is appropriate for judges to approach the Lord Chief Justice's guidance as identifying a floor rather than a ceiling for the assessment of seriousness. The test for the designated authority is whether “it is clear … that a judge proceeding under section 21A would be required to order the person's discharge on the basis that extradition would be disproportionate”. The Lord Chief Justice's guidance is, it seems to me, deliberately aimed at offences at the very bottom end of the scale of seriousness about which it is unlikely there could be any dispute. It must be so, otherwise the judge's freedom to apply the statutory criteria of proportionality would be unlawfully fettered. The guidance states that in the identified cases the triviality of the conduct alleged would *alone* require the judge to discharge the requested person. Subject to the exceptional circumstances identified in paragraph 17A.4, the NCA's decision-maker can assume that the judge *would be required to discharge* the requested person if he is sought for an extradition offence in one of the categories listed. However, a judge making the proportionality decision is not limited by these categories. He may conclude that an offence is not serious even though it does not fall within the categories listed in the guidance. If so, the proportionality decision may depend on the paragraph (b) or (c) factors. It is noticeable, for example, that none of the offences of violence to the person, even the least serious, is captured by the guidance, but the terms of paragraph 17A.2 (“the judge will determine the issue on the facts of each case as set out in the warrant, subject to the guidance in 17A.3 below”) make it clear that other offences may be assessed by the judge as being non-serious or trivial offences. Further, the fact that one of the paragraph 17A.4 defined “exceptional circumstances” applies, causing the NCA to certify the EAW, does not preclude the judge from holding that extradition would be disproportionate. The judge has responsibility for weighing relevant factors for himself.

29 I also accept the submissions of both counsel that section 21A(1) creates two separate bars to extradition in an accusation case. It may be that the factors influencing an Article 8 balance under section 21A(1)(a) will overlap with an assessment of proportionality for the purpose of section 21A(1)(b) , but that they require separate consideration is made plain by the terms of

section 21A(2) and (3) . Subsections (2) and (3) require a free standing judgment that (subject to the bracketed words in subsection (2) , to which I shall return) is formed upon consideration of, and only upon consideration of, the seriousness of the conduct alleged, the likely sentence and alternative methods of securing the requested person's attendance at the court of the Category 1 territory.

The process of assessment

The legislative purpose

30 The Home Office minister, Damien Green MP, when introducing the section 21A amendment to the House of Commons on 16 July 2013, identified the mischief at which the amendment was aimed as:

> "the disproportionate use of the EAW for trivial offences … New clause 23 means that UK courts will be able to deal with the long-standing issue of proportionality, which is a fundamental principle of EU law. It will require the judge at the extradition hearing to consider whether extradition would be disproportionate. In making that decision the judge will have to take into account the seriousness of the conduct, the likely penalty, and the possibility of the issuing state taking less coercive measures than extradition; for example issuing a court summons. Putting that proportionality bar in the legislation will ensure that extradition, which, of course, entails a person being sent to another country and being arrested and likely to be detained, happens only when the offence is serious enough to justify it."

31 The starting point is that, provided the EAW complies with the formal requirements of section 2 of the Extradition Act 2003 , the UK has an obligation under the Framework Decision, subject to the statutory bars, to enforce the warrant by extradition. Section 21A(2) does not otherwise place a specific burden either on the requesting state or on the requested person. The proportionality of extradition is for assessment by the judge. Mr Summers QC, for the respondent, submitted that the proportionality test should be treated as "a simple test to weed out obviously and clearly trivial and/or unnecessary EAWs that the Issuing Judicial Authority would obviously never have voluntarily issued but for the principle of legality". Mr Fitzgerald QC responded that the task of "weeding" out obviously trivial EAWs would, under the scheme, be performed by the designated authority under section 2(7A) . It is, in my view, important to note that section 21A(1)(b) applies to all accusation EAWs and not only to those issued by member states that apply the principle of legality. The ambit of judicial judgment is constrained only by the factors identified in section 21A(2) and (3) . There are in subsection (3) three factors capable of affecting proportionality of which "seriousness" is just one. I agree with the appellants' argument. The test is identified in straightforward terms but the exercise of the judge's task is not further constrained by any particular standards of "triviality" – the Lord Chief Justice's guidance recognises this in paragraph 17A.2. Within the boundaries set, the scope for judgement is comparatively broad. The judgement will be made against a background of mutual respect between the UK court and the issuing authority but I cannot accept that the judge will be engaged in an attempt to locate what would have been the action of the issuing authority had the principle of legality not been engaged. The court may, depending on its evaluation of factors, conclude that "extradition would be disproportionate" if (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances.

32 Mr Summers QC argued that paragraphs (a) – (c) create a hierarchy of importance. He reasoned that only seriousness was capable of measurement against a standard. Since the Lord Chief Justice had issued guidance that defined triviality, the fact that an offence came within its ambit would be enough to meet the test of disproportionality. I agree that the guidance identifies offences that are trivial but I do not agree that the guidance defines triviality or that the statutory test is triviality. As I have said, the guidance sets the threshold at which the NCA can assume the judge would be required to discharge the requested person, whatever the paragraph (b) and (c) factors may be. An offence outside the categories listed in the guidance may also be identified as non-serious (or trivial) but that finding will not necessarily be conclusive. The bracketed words in

subsection (2) make clear that it is the task of the judge to place weight where he assesses it is due. Since I do not accept that only those offences identified in the Lord Chief Justice's guidance could be treated by the judge as non-serious, other subsection (3) factors (such as a likely custodial sentence or the availability of other means of coercion) might become determinative. I do not accept that the draftsman created a predetermined rank of importance although I do accept that in most cases the seriousness of the offence will be determinative of the likely sentence and, for that reason, of proportionality.

33 Mr Fitzgerald QC did not in opening the appeal address the court upon the significance of the bracketed words in subsection (2) whose full context I repeat for convenience:

> "(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); … "

In writing it was suggested on behalf of the appellants that, if the judge does not give consideration to a subsection (3) factor, reasons should be given. The question arises whether the bracketed words mean that the judge has a complete discretion whether to consider all or any of the subsection (3)(a) – (c) factors or that the judge must consider them all but is free to make an assessment of their comparative weight. In my opinion, the breadth of the expression used within brackets is such that the judge may decline to give consideration to the subsection (3) factors at all but, since section 21A(1)(b) requires the proportionality decision to be made, it is a decision that must be made judicially. For example, there may be a concession made on behalf of the requested person that upon considered advice no point on proportionality is taken; or the answer to the proportionality issue may be so obviously apparent on the face of the EAW that no analysis of the subsection (3) factors is necessary. However, in the overwhelming number of cases in which the point is taken it seems to me that the statutory function could not be performed unless the judge expressly addresses the subsection (3) issues. I also consider that the bracketed words enable the judge to give differential weight to subsection (3) factors depending upon the circumstances of the case. For example, the judge may not be able to reach a conclusion as to the likely sentence. If the judge cannot resolve the issue one way or the other, necessarily the weight to be given to the paragraph (b) factor will be reduced. I accept the submission that the judge should give reasons both when he examines the subsection (3) factors and when he finds it inappropriate to do so.

The relevance of delay

34 It was submitted on behalf of the appellants that the statutory factors listed in subsection (3) should be a given broad, purposive interpretation. For example, and of particular relevance to the current appeals, Mr Fitzgerald QC submitted that delay is relevant to an assessment whether extradition is proportionate; accordingly, delay is a factor to be considered when making the decision whether extradition would be proportionate. I do not accept the breadth of the submission as originally expressed in writing. In my judgment, delay can only be relevant for the purposes of section 21A(1)(b) to the extent that it informs the paragraph (a) – (c) factors. I do not exclude the possibility that in some circumstances prolonged delay might be relevant to the requesting state's view of seriousness, but in my opinion, in the absence of direct evidence, the inference would be weak. I accept that the passage of time might affect the judgement as to the likely penalty on conviction and the possibility that the foreign authorities could and would take less coercive measures to secure the requested person's attendance. Separately, delay may be relevant to the Article 8 issue in section 21A(1)(a) (see paragraph 35 below) and is relevant to the passage of time bar in section 14 of the Act. Having regard to the mandatory terms of subsection (2) , it is an inevitable construction of the section that delay is not a free-standing factor in the proportionality judgement required by section 21A(1)(b) .

Further information?

35 Mr Fitzgerald QC made two submissions as to the practical approach to assessment of proportionality between which, at first sight, there may be some tension. The first was that in making the assessment of seriousness and the likely penalty on conviction the judge should first consider whether a custodial sentence would be imposed for the extradition offence by a court in

England and Wales. This, he argued, is the approach taken when considering the compatibility of extradition with the requested person's Convention rights under Article 8 . Mr Fitzgerald relied on passages in the judgment of Lord Judge CJ in *H (H) v Deputy Prosecutor of the Italian Republic [2012] UKSC 25; [2012] 1 AC 338* at paragraphs 131 — 132. At issue in H (H) was the degree to which the interests of children dependent upon the care of a requested person should weigh in the decision as to whether extradition would be a proportionate performance of the UK's international obligations, having regard to the consequential interference with the requested person's right to respect for his family life under Article 8 ECHR . The court accepted that delay was a material consideration in the judgment of proportionality for Article 8 purposes because, during that period of delay, family ties and the nature of the dependency may have changed to such an extent that the effects of interference would have become exceptionally severe. However, in the passage to which the court was referred, Lord Judge did not suggest that sentencing decisions in England and Wales were the primary measure of seriousness or penalty; he said that it would be in very rare cases that extradition could properly be avoided if the sentencing courts in this country would, despite the interests of dependent children, impose an immediate sentence of imprisonment. At the same time the UK should be careful not to impose its own standards on the requesting state, particularly when informed that the requesting state was likely to impose such a sentence. When, however, the courts of England and Wales would either not impose a sentence of imprisonment or would suspend a sentence of imprisonment, that knowledge remained a relevant consideration to be weighed against the degree of interference with family life established, including the interests of dependent children. Secondly, Mr Fitzgerald QC argued that, “where appropriate” the judge should seek information from the requesting state as to the likely penalty in that state. The issue of practical importance for judges raised by these submissions is whether they are obliged to require advice upon the seriousness of the conduct alleged and/or the likelihood of a custodial sentence on conviction. I shall confront this issue in the following paragraphs.

Subsection (3)(a) – seriousness of the conduct alleged

36 I have already considered the general approach to seriousness in paragraphs 30 — 33 above. Section 21A(3)(a) requires consideration of “the seriousness of the conduct alleged to constitute the extradition offence”. I agree that, as Mr Fitzgerald QC argued, paragraphs (a), (b) and (c) of subsection (3) all assume an approximate parity between criminal justice regimes in member states that embrace the principles of Articles 3, 5 and 6 of the ECHR and Article 49(3) of the Charter of Fundamental Rights of the European Union . In my view, the seriousness of conduct alleged to constitute the offence is to be judged, in the first instance, against domestic standards although, as in all cases of extradition, the court will respect the views of the requesting state if they are offered. I accept Mr Summers QC's submission that the maximum penalty for the offence is a relevant consideration but it is of limited assistance because it is the seriousness of the requested person's *conduct* that must be assessed. Mr Fitzgerald QC's identification of 7 years imprisonment as the maximum sentence for theft in England and Wales makes the point. Some offences of theft are trivial (see the Lord Chief Justice's Guidance); others are not. In my view, the main components of the seriousness of conduct are the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim. I would not expect a judge to adjourn to seek the requesting state's views on the subject.

Section 21A(3)(b) – the likely penalty on conviction

37 Section 21A(3)(b) requires consideration of “the likely penalty that would be imposed if D was found guilty of the extradition offence”. Since what is being measured is the proportionality of a decision to extradite the requested person under compulsion of arrest, I consider that the principal focus of subsection (3)(b) is on the question whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state. The foundation stone for the Framework Decision is mutual respect and trust between member states. The courts of England and Wales do not treat as objectionable the possibility that sentence in the requesting state may be more severe than it would be in the UK. Raised in the course of argument was the case of a member state that imposed minimum terms of imprisonment for certain offences by reason of the particular exigencies of the crime in the territory of that state. Appropriate respect for the sentencing regime of a member state is required under subsection (3)(b) ; the UK has itself imposed minimum terms of custody as a matter of policy. However, in the extremely rare case when a particular penalty would be offensive to a domestic court in the circumstances of particular criminal conduct, it is in my view within the

power of the judge to adjust the weight to be given to “the likely penalty” as a factor in the judgement of proportionality.

38 It would be contrary to the objectives of the Framework Decision to bring mutual respect and reasonable expedition to the extradition process if in every case the judge had to require evidence of the likely penalty from the issuing state. Furthermore, the more borderline the case for a custodial sentence the less likely it is that the answer would be of any assistance to the domestic court. Article 49(3) of the Charter of Fundamental Rights of the European Union requires that the severity of penalties must not be disproportionate to the criminal offence. The EAW procedure has since 2009, when the Charter came into effect, been the common standard for members of the Union. In my judgment, the broad terms of subsection (3)(b) permit the judge to make the assessment on the information provided and, when specific information from the requesting state is absent, he is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood. In a case in which the likelihood of a custodial penalty is impossible to predict the judge would be justified in placing weight on other subsection (3) factors. However, I do not exclude the possibility that in particular and unusual circumstances the judge may require further assistance before making the proportionality decision.

39 While the focus of subsection (3)(b) is upon the likelihood of a custodial penalty it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate. If an offence is serious the court will recognise and give effect to the public interest in prosecution. While, for example, an offence against the environment might be unlikely to attract a sentence of immediate custody the public interest in prosecution and the imposition of a fine may be a weighty consideration. The case of a fugitive with a history of disobeying court orders may require increased weight to be afforded to subsection (3)(c) : it would be less likely that the requesting state would take alternative measures to secure the requested person's attendance.

Section 21A(3)(c) – less coercive measures

40 Section 21B of the Extradition Act 2003 , inserted by section 159 of the Anti-Social Behaviour, Crime and Policing Act 2014 , enables either the requesting state or the requested person to apply to the court for the requested person's return to the requesting state temporarily or for communication to take place between the parties and their representatives. Section 21A(3)(c) is concerned with an examination whether less coercive measures of securing the requested person's attendance in the court of the requesting state may be available and appropriate. His attendance may be needed in pre-trial proceedings that could be conducted through a video link, the telephone or mutual legal assistance. The requested person may undertake to attend on issue of a summons or on bail under the Euro Bail scheme (if and when the scheme is in force) or the judge may be satisfied that the requested person will attend voluntarily and that extradition is not required.

41 It would be a reasonable assumption in most cases that the requesting state has, pursuant to its obligation under Article 5 (3) ECHR , already considered the taking of less coercive measures. I accept the submission made by Mr Summers QC that there is an evidential burden on the requested person to identify less coercive measures that would be appropriate in the circumstances. Where the requested person has left the requesting state with knowledge of his obligations to the requesting state's authorities but in breach of them, it seems to me unlikely that the judge will find less coercive methods appropriate. On the other hand, as the Scott Baker report recognised at paragraph 5.153 there may be occasions when the less coercive procedure is appropriate. If the requested person fails to respond to those alternative measures the issue of a further warrant and extradition could hardly be resisted.

The appellants' cases

42 Mr Fitzgerald QC concentrated in his submissions upon the conduct alleged in the EAWs, which he suggested was not serious, if not trivial, and, as he argued, upon the improbability that a custodial sentence was justified or likely. As to the latter submission he relied upon the length of time that had elapsed since the alleged conduct had taken place. Either extradition was disproportionate under section 21A(1)(b) or it was incompatible with the appellant's Convention rights under section 21A(1)(a) because the interference with the private or family life of the

appellant could not be justified by the legitimate objective.

Janusz Miraszewski

43 On appeal both section 21A(1)(a) and section 21A(1)(b) issues are raised but section 14 is not. By any measure the offences for which the appellant is wanted are not trivial; neither are they of particular seriousness. As the judge observed they were committed with others, damage was caused and property of limited value (about £137) was stolen. They were repeat offences committed shortly after and in breach of the appellant's probationary release. The appellant, having admitted the offences to the police, left Poland with the intention of avoiding his responsibility to the authorities. There had been prolonged delay before the EAW was sought but the judge found that the appellant at all times knew that he was being investigated in Poland. On the information available, it is not possible to determine whether, on conviction, an immediate sentence of imprisonment in Poland is likely. At the time of his arrest the appellant's life was chaotic. He had suffered the loss of his former partner in 2013 and he was living an itinerant and alcohol dependent lifestyle. In my judgment, District Judge Snow was entitled to conclude, and correct to conclude, that extradition would be compatible with the appellant's Convention rights and was a proportionate exercise of the UK's obligations under the Framework Decision.

Lukasz Kanigwski

44 On appeal the appellant relies upon section 21A(1)(a) and (b) . The appellant is a fugitive in relation both to the investigation in which he is wanted and the conviction offences for which he has been sentenced. He is wanted for offences of burglary. The offences are not trivial; neither is the conduct alleged of particular seriousness. In my view, a custodial penalty is likely for those offences on conviction because the appellant is already wanted following conviction to serve two sentences of immediate imprisonment. The appellant has established a private and family life in the UK while he has been a fugitive but, as the judge found, the degree of his family's dependence upon the appellant has been exaggerated in the evidence. That family life was made at a time when the appellant knew he was wanted in Poland. Extradition would be a hardship but no more than that. I agree with the conclusion of the Chief Magistrate that interference by extradition with the appellant's private and family life was not incompatible with the appellant's Convention rights and was proportionate in the circumstances.

Marcin Fluniak

45 This appellant also relies on section 21A(1)(a) and (b) but does not pursue a section 14 argument. The offences for which the appellant is wanted are serious. Mr Fitzgerald QC argued that the appellant played the minor role of placing counterfeit currency in circulation. That may be so but the appellant is charged with doing so as a member of a criminal organisation. The face value of the counterfeit currency circulated by the appellant is said to have been between 156,000 and 312,000 euros. A custodial sentence is, in my view, likely. Although the appellant has been on bail during the extradition proceedings, no indication was given at any stage of the proceedings that the appellant would attend his trial in Poland except under compulsion. It is not demonstrated to me that less coercive measures to secure the appellant's attendance are either possible or appropriate. The appellant has acquired a family life in the UK but the appellant is not the sole or main carer of his child. In my judgment, District Judge McPhee was right to conclude that extradition was not incompatible with the appellant's Convention right under Article 8 . I conclude that extradition is proportionate within the meaning of section 21A(1)(b) .

Conclusion

46 For the reasons I have given I would dismiss all three appeals.

Mr Justice Collins

47 I agree


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