IN THE WESTMINSTER MAGISTRATES' COURT

BEFORE

DISTRICT JUDGE (MC) GOLDSPRING

COURT OF MILAN, ITALY
(Issuing Judicial Authority)

V

MICHAL KONRAD HERBA
(Requested Person)

JUDGMENT

PRELIMINARY MATTERS

1. The Surrender of Michal Kondrad Herba, the requested person ("the RP") is sought by the Court of Milan, Italy (IJA) by virtue of a European arrest warrant (EAW)

2. The EAW was issued on the 11TH August 2017 and certified by the National Crime Agency on 12 August 2017.

3. Italy is a designated Category 1 territory to which Part 1 of the Extradition Act 2003
(EA 2003) applies, as amended.

4. The European arrest warrant ("EAW") seeks the RP's return in respect of an accusation of a single offence of kidnapping, arising from events which took place between 11 July and 17 July 2017. It is said that the RP, acting "in complicity" with his brother Lukasz Pawel Herba and other

unidentified persons, drugged and kidnapped the victim in Milan and requested 300,000 Euros in ransom money.

5. An order of preliminary custody in prison was issued on 11 August 2017 by the Judge for Preliminary Investigation attached to the Court of Milan. (see box (b) EAW)

6. The RP was arrested on 16 August 2017 and appeared before Deputy Senior District Judge Ikram for an initial hearing at Westminster Magistrates' Court on 17th August 2017. Issues relating to identity, service of the EAW and production before the court(ss 4(2), 4(3) and 7 EA 2003 were dealt with at that hearing, all matters being resolved in favour of the IJA. Following a full bail application bail was refused and he was remanded in custody where he has remained since.

7. The Extradition hearing took place before me on the 25th September 2017. The IJA were represented by Miss. Iveson. The RP had the benefit of a court appointed interpreter throughout the hearing and was represented by Mr. Hepburne Scott. The Rp abandoned his challenge under Section 12(A) EA 2003 as a result of further material served by the IJA on the 22nd September 2017.

8. The Rp does not raise a challenge under Section 10 EA 2003(extradition offences), however I am nonetheless required to satisfy myself that the conduct described in the warrant would equate to an offence in the UK. I am satisfied that the conduct discloses the taking of a person by another, without their consent, by the use of force or fraud and without lawful authority and would amount to the common law offence of Kidnap in this Jurisdiction. The requirements of Section 64 EA 2003 are satisfied to the criminal standard.

9. On the 27th September 2017 I received by email a request on behalf of the Rp to adjourn judgment in order for him to explore with the IJA the possibility of less coercive measures, specifically an interview by video link with the IJA by way of Mutual Legal Assistance (MLA). Given the lateness of the application I emailed the parties seeking written submissions on the application, suffice to say the application is opposed by the IJA. On the 28th I received a response from the IJA that Public Prosecutor has declined to provide the Rp with the opportunity to be interviewed by video link as a MLA measure. On the 28th September the IJA confirmed that the Public Prosecutor had declined to take advantage of MLA.

10. The procedure is governed by Section 21 (B) EA 2003, that section states;

for temporary transfer etc
(1)This section applies if—
(a) a Part 1 warrant is issued which contains the statement referred to in section 2(3) (warrant issued for purposes of prosecution for offence in category 1 territory), and
(b) at any time before or in the extradition hearing, the appropriate judge is informed that a request under subsection (2) or (3) has been made.
(2) A request under this subsection is a request by a judicial authority of the category 1 territory in which the warrant is issued ("the requesting territory")—
(a) that the person in respect of whom the warrant is issued be temporarily transferred to the requesting territory, or
(b) that arrangements be made to enable the person to speak with representatives of an authority in the requesting territory responsible for investigating, prosecuting or trying the offence specified in the warrant.

(3)A request under this subsection is a request by the person in respect of whom the warrant is issued—
(a) to be temporarily transferred to the requesting territory, or
(b)that arrangements be made to enable the person to speak with representatives of an authority in the requesting territory responsible for investigating, prosecuting or trying the offence specified in the warrant.
(4)***The judge must order further proceedings in respect of the extradition to be adjourned if the judge thinks it necessary to do so to enable the person*** (in the case of a request under subsection (2)) or the authority by which the warrant is issued (in the case of a request under subsection (3)) to consider whether to consent to the request.
An adjournment under this subsection must not be for more than 7 days.
(5)If the person or authority consents to the request, the judge must—
(a)make whatever orders and directions seem appropriate for giving effect to the request;
(b)order further proceedings in respect of the extradition to be adjourned for however long seems necessary to enable the orders and directions to be carried out.
(6)If the request, or consent to the request, is withdrawn before effect (or full effect) has been given to it—
(a)no steps (or further steps) may be taken to give effect to the request;
(b)the judge may make whatever further orders and directions seem appropriate (including an order superseding one made under subsection (5)(b)).
(7)A person may not make a request under paragraph (a) or (b) of subsection (3) in respect of a warrant if the person has already given consent to a request under the corresponding paragraph of subsection (2) in respect of that warrant (even if that consent has been withdrawn).

(8)A person may not make a further request under paragraph (a) or (b) of subsection (3) in respect of a warrant if the person has already made a request under that paragraph in respect of that warrant (even if that request has been withdrawn).
(9)If—
(a)a request under subsection (2) or (3) is made before a date has been fixed on which the extradition hearing is to begin, and
(b)the proceedings are adjourned under this section,
the permitted period for the purposes of fixing that date (see section 8(4)) is extended by the number of days for which the proceedings are so adjourned.]

11. I refuse the application for the following reasons, firstly the application should have been made as soon as practicable, whilst I recognise the expedition with which his new lawyers acted to ensure this case was ready for hearing in a very short time, it is nonetheless right to note that the proceedings started on the 17th August, there have been a number of review hearings and more importantly a full hearing on the 25th September 2017. The time to make such an application was at one of those hearings and certainly before the evidence closed, the application cannot be said to have been made as soon as practicable.

12. Furthermore the Section only applies when the appropriate judge believes such an adjournment to be necessary to enable the MLA to take place, it is clearly not necessary given the indication by the IJA.

13. On the 26th September 2017 I also received a request form the press to release documents referred to during the extradition hearing. I invited the parties to make submissions in this regard by 4pm on the 28th September

2017. No representations were received form either the IJA or the Rp.

14. It is not necessary for the ruling in respect of that application to be recited here, it is dealt with in a separate ruling.

15. Thus the RP raises the following challenges to his surrender.

- Section 2(4) c EA 2003 Validity of the Warrant
- Section 21(A) EA 2003 Human Rights, Articles 6&8 ECHR
- Abuse of Process

THE LAW

Section 2 EA 2003 – Validity of the warrant

16. The Act requires, as a minimum, that the: “particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of law of the category 1 territory under which the conduct is alleged to constitute an offence" are given, to comply with Section 2(4) (c).

17. The leading authority is ***Ektor v The Netherlands [2007] EWHC 3106 (Admin)*** where King J held at [7]:-

- The description must include when and where the offence is said to have happened
- The description must include what involvement the person named in the warrant had

- The person sought by the warrant needs to know what offence he is said to have committed to have an idea of the nature and extent of the allegations against him in relation to that offence

18. The general principles are:

19. Mere "broad omnibus" descriptions are insufficient to satisfy section 2(4) (c). See ***Von der Pahlen v Government of Austria [2006] EWHC 1672 (Admin)*** per Dyson LJ at [21].

20. The amount of detail may turn on the nature of the offence.

21. In ***Ektor*** (supra) was considered by Collins J in ***Pelka v Poland [2013] EWHC 939 (Admin)*** at [5] and [6], finding that the Act requires: ***"... where involvement in a conspiracy is alleged it is not necessary to include any great detail as to the precise acts committed in furtherance of the conspiracy. But as a general proposition it seems to me that a warrant ought to indicate at least in brief terms what is alleged to have constituted the involvement or the participation of the individual in question. It seems to me that prima facie simply to say that there was a conspiracy and he conspired with others is to do whatever the end result of the offence is, is not likely to be sufficient."***

22. As with any European instrument these requirements must be read in the light of its objectives.

23. A balance must be struck between in this case the need on the one hand for an adequate description to inform the person and on the other the object of simplifying extradition proceedings.

24. In ***Owens v Court of First Instance Marbella, Spain [2009] EWHC 1243 (Admin)***The Divisional Court held that [16-18 and 20]:

"It is clearly essential that the description in the warrant of the facts relied upon as constituting an extradition offence should identify such an offence with a degree of particularity so that the individual to whom it relates may understand the essential nature of the allegations made against him. However, the authorities include warnings against imposing too onerous a burden in this regard on requesting judicial authorities. Ms Dobbin on behalf of the issuing judicial authority has drawn our attention to the following passage in the speech of Lord Hope in Dabas at paragraph 18: "These provisions show that the result to be achieved was to remove the complexity and potential for delay that was inherent in the existing extradition procedures. They were to be replaced by a much simpler system of surrender between judicial authorities. This system was to be subject to sufficient controls to enable the judicial authorities of the requested state to decide whether or not surrender was in accordance with the terms and conditions which the Framework Decision lays down. But care had to be taken not to make them unnecessarily elaborate. Complexity and delay are inimical to its objectives." I would accept that the requirement for particularisation must be placed in the context of a legislative scheme designed to eliminate undue complexity.

20 Contrary to the submission of Mr Summers, I do not consider that it is necessary in the present case to provide particulars as to the precise manner in which the killing was carried out. This may well not be known to the prosecuting authorities, particularly

where, as here, the body was not recovered for over a year. Furthermore, I do not consider that in the present case it is necessary that the warrant particularise the precise acts performed by the appellant in pursuance of the alleged joint enterprise. It is enough that the joint enterprise alleged is described in the terms of the warrant and that he is alleged to have acted as part of that joint enterprise. In contrast with Von der Pahlen and Vey , the description in the warrant in the present case, in my judgement, encapsulates the allegations against the appellant in a concise way and adequately conveys to the appellant sufficient particulars of the murder and robbery of which he is accused

25. In ***King v Public Prosecutors of Villefranche sur Saone (2015) EWHC 3670***, the Divisional Court held that it was not necessary for an EAW to describe in great detail the circumstances surrounding the offence. Instead, the particulars, in respect of both accusation and conviction cases, should provide sufficient information to enable the requested state and the requested person to know whether any barriers to extradition applied.

26. In relation to whether a different standard applied as between accusation and conviction cases the court noted that, whereas s.2 of the Act appeared to draw a distinction between accusation and conviction EAWs, art.8 of the Framework Decision did not. The court found that in principle there was no material difference between what was required in an accusation or conviction case. The level of particularity needed to meet the requirements would depend on the circumstances of each case.

SECTION 21 EA 2003 - ECHR Challenges

27. Extradition proceedings may be barred if there is either a real risk that extradition will breach the requested person`s Convention Rights: (see ***Soering v UK (1989) EHRR***) or where the domestic extradition procedure would result in a violation of the Convention.

ARTICLE 6 ECHR – Right to a fair trial

28. The question in Article 6 ECHR cases is whether the defendant, if extradited, would be exposed to a real risk of being subjected to a flagrant denial of justice. It is for the defendant to adduce evidence capable of proving the real risk, and where such evidence is adduced, it is for the government to dispel any doubts about it. It is a very high test (***Soering v United Kingdom [1989] 11 EHRR 43)***

29. Article 6 of the ECHR provides:

"1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…
2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3 Everyone charged with a criminal offence has the following minimum rights:
to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
to have adequate time and the facilities for the preparation of his defence;
to defend himself in person or through legal assistance of his own choosing or, if he has not

sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

30. The test is set out ***in R v Special Adjudicator ex parte Ullah (2004) UKHL 26*** in Paragraph 24 which follows on the consideration of the test for Article 3 (see above Paragraph 141). Lord Bingham said:

"Where reliance is placed on Article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state…"

31. The meaning of the expression "flagrant denial of a fair trial" was considered again by Lord Bingham in ***EM (Lebanon) v Secretary of State [2008] 3 WLR 931*** at Paragraph 34:

"What constitutes a "flagrant" denial of justice …the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article if occurring within the Contracting State itself…In our view, what the word "flagrant" is intended to convey is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article."

32. In ***Othman v United Kingdom [2012]*** it was held that:

258. It is established in the Court's case law that an issue might exceptionally be raised under art.6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country. That principle was first set out in Soering v United Kingdom [1989] and has been subsequently confirmed by the Court in a number of cases.

259. In the Court's case law, the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of art.6 or the principles embodied therein. Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

• conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge ;

• a trial which is summary in nature and conducted with a total disregard for the rights of the defence;

• detention without any access to an independent and impartial tribunal to have the legality the detention reviewed;

• deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.

260. It is noteworthy that, in the 22 years since the Soering judgment, the Court has never found that an expulsion would be in violation of art.6.

33. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that "flagrant denial of justice" is a stringent test of unfairness.

34. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of art.6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by art.6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article.

35. In assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in art.3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it.

36. The test for this court is therefore whether the RP has satisfied the court that there is a real risk of a flagrant denial of justice or fair trial.

Article 8 ECHR - Right to respect for private and family life

37. This Article protects an individual`s right to private and family life. The Divisional Court has confirmed that the concept of `private life` per Article 8 is to be broadly defined (see ***Niemitz v Germany (1977) EHRR.)***

Article 8 provides:-

i. Everyone has the right to respect for his private and family life, his home and his correspondence.
ii. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals or for the protection of the rights and freedoms of others.

38. The principles for the application of Article 8 in extradition cases were set out by the United Kingdom Supreme Court in ***Norris –v- Government of United States of America [2010] UKSC 9*** and subsequently refined in ***HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25***.

39. Examples of common factors which have been included in the court's assessment of proportionality include:

(i) The seriousness of the offence: (***Admin Ode –v- High Court, Criminal Courts of Justice, Dublin, Ireland [2013] EWHC 3718***). However "it is not for this court to in effect substitute its own appraisal of the appropriate sentence …" (***Borkowski –v- Circuit Court of Torun [2014] EWHC 1695 (Admin)*** per Foskett J at paragraph 14)' and "…it is not for this court to suggest that the sentence of a court in a European Union state is disproportionate simply because, at first blush and without knowing all the facts, it appears that it may be more than would be imposed here." (***Kempa –v- District Court in Wroclaw, Poland [2014] EWHC 1418 (Admin)*** per Burnett J).

(ii) The age of the requested person at the time of the offence and at the time of the extradition hearing: ***Podolski –v- Provincial Court in Pulawy, Poland [2013] EWHC 3593 (Admin).***

(iii) Change in lifestyle over a long period of time: ***Podolski*** (supra).

(iv) The fact that the requested person has not been in trouble since coming to the UK: ***Podolski*** (supra).

(v) The impact of extradition on the requested person's family: ***Podolski*** (supra).

(vi) Delay in bringing the proceedings, issuing or certifying the EAW: ***Juchniewicz –v- Regional Court in Szczecin, Poland [2013] EWHC 1529 (Admin)***. Delay weighs more heavily in the balance if it is found to be culpable: ***Glica –v-Regional Court of Kielce, Warsaw, Poland [2014] EWHC 359 (Admin)***. Merely because it is unexplained does not make delay culpable: R on the application of ***Blazejewicz –v- Circuit Court in Torun, Poland [2014] WL 2807812***. The recent observations of Collins J in ***Wolack –v- Regional Court in Gdansk, Poland [2014] EWHC 2278 (Admin)*** emphasises the caution with which the Court approaches allegations of culpability on the part of the requesting authority/state:

"It is … quite wrong for this court to assume culpability in any delay unless it is so excessive or there are factors which indicate it really was not reasonable for the authority to fail to issue a warrant earlier than it did. Furthermore, even when a warrant is issued, it may take time for it to be appreciated where the appellant precisely is in this jurisdiction. It is all very well to say it should not have been difficult to find him but one must also bear in mind that there

are priorities that have to be adopted by the authorities here." (Paragraph 9)

40. Where delay is not culpable it weighs only slightly in the requested person's favour in the proportionality assessment: ***Wolack*** (supra) (at paragraph 10).

(vii) However, delay is only a factor: the Court's assessment of proportionality depends on the totality of circumstances in the individual case which means that reference to other cases is of limited value: ***Piestrak –v- District Court in Legnica [2014] EWHC 1757 (Admin)***

SECTION 21(A) EA 2003 - PROPORTIONALITY

41. The proportionality bar was introduced by Parliament to meet concerns that the EAW was being used in circumstances where extradition was disproportionate. It only applies to accusation cases in the limited circumstances set out by the section.

42. The decision of the administrative Court in ***Miraszewski v District Court in Torun [2014] EWHC 4261*** makes it clear that for this purpose the judge is only entitled to take into account the matters listed in section 21A (3) – the seriousness of the offence, the likely penalty if found guilty and the possibility of the foreign authorities taking measures less coercive than extradition. The scope of section 21A is narrow, and for these purposes the court should not take into account the passage of time spent in the UK and the defendant's good record in this country. Those factors may be relevant under the passage of time bar and for article 8.

s. 21A reads,

“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.”

ABUSE OF PROCESS

43. The starting point in domestic Abuse of Process challenges would be ***Connelly v DPP (1964) (AC)1254*** where one of the points of appeal was that the trial judge was wrong to hold that he had no discretion to stay proceedings even if he thought that they were unfair.

44. ***In re Riebold (1965) 1 All ER 653*** the House of Lords expressed their concern that there was a real danger that Connolly would be interpreted as tantamount

to a near unbridled discretion by the lower courts to halt prosecutions that were perceived to be unfair or oppressive. Their Lordships sought to rein in the interpretation of Connolly by stating that the court should only intervene to stay proceedings where there was clearly an abuse.

45. Lord Salmon stated in ***Riebold*** (supra) that …**`*.a judge has no power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it not have been brought. It is only if a prosecution amounts to an abuse of process of the Court and is oppressive and vexatious that the judge should has the power to intervene. Viscount Dilhorne echoed similar sentiments when he said, in a concurring judgment that a prosecution should only be halted…. "In the most exceptional circumstances".***
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46. It is established law that an Appropriate Judge dealing with an extradition request under the provisions of the 2003 Act retains residual Abuse of Process jurisdiction.

47. In ***R (Government of United states of America) v Bow Street Magistrates Court and Tollman (2006) EWHC (Admin)*** Lord Phillips CJ identified the steps that are to be followed in relation to an Abuse of Process challenge:

(i) The Judge should initially insist that the conduct alleged to constitute the abuse is identified with particularity.

(ii) The Judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process.

(iii) If it is, then the Judge must next consider whether there are reasonable grounds for believing that such conduct may have occurred.

(iv) If there are, then the Judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred.

48. This issue was further visited in ***Symeou v Greece (2009) EWHC (Admin)*** (para 33):

"….. The focus of this implied jurisdiction is the abuse of the requested state`s duty to extradite those who are properly requested, and who are unable to raise any of the statutory bars to extradition. The residual abuse jurisdiction identified in Bermingham and Tollman concerns abuse of the extradition process by the prosecuting authority. We emphasise those latter two words. That is the language of those two cases. It is the good faith of the requesting authorities which is at issue because it is their request coupled with their perverted intent and purpose which constitutes the abuse. If the authorities of the requesting state seek the extradition of someone for a collateral purpose, or when they know that the trial cannot succeed, they abuse the extradition processes of the requested state."

49. In ***Fuller v Attorney General of Belize (2011) UKPC 23***, Lord Phillips, at paragraph 5, described the abuse of process jurisdiction in the following terms: ….

"`Abuse of process` is not a term that sharply defines the matter to which it relates. It can describe:

(i) making use of the process of the court in a manner which is improper, such as adducing false evidence or indulging in inordinate delay,
or

(ii) using the process of the court in circumstances where it is improper to do so , for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law,
or

(iii) Using the process of the court for an improper motive or purpose, such as to extradite a defendant for a political motive".

50. In the absence of evidence to the necessary standard that calls into question the ability of the receiving state to discharge its responsibilities or a specific matter that gives cause for concern, it should not be necessary to require any assurances from the requesting state within the European Union. It will therefore ordinarily be sufficient to rely on the presumption. It is therefore only in a very rare case that a requested person will be likely to be able to establish that measures to prevent a substantial risk of suicide will not be effective. Furthermore it should therefore not ordinarily be necessary at a hearing before the District Judge for him to be referred to the facts of other cases: Lord Reid described them as merely illustrative in Howes. We would repeat the observation in Dewani at paragraph 73 in relation to s.25 and s.91 of the 2003 Act that little help is gained by reference to them."

51. The relevant test is whether the extradition process is being usurped, resulting in prejudice to the requested person (see ***Belbin v The Regional Court of Lille,***

France [2015] EWHC 149 (Admin) at paragraph 59 below)

"We wish to emphasise that the circumstances in which the court will consider exercising its implied "abuse of process" jurisdiction in extradition cases are very limited. It will not do so if, first, other bars to extradition are available, because it is a residual, implied jurisdiction. Secondly, the court will only exercise the jurisdiction if it is satisfied, on cogent evidence, that the Judicial Authority concerned has acted in such a way as to "usurp" the statutory regime of the EA or its integrity has been impugned. We say "cogent evidence" because, in the context of the European Arrest Warrant, the UK courts will start from the premise, as set out in the Framework Decision of 2002, that there must be mutual trust between Judicial Authorities, although we accept that when the emanation of the Judicial Authority concerned is a prosecuting authority, the UK court is entitled to examine its actions with "rigorous scrutiny". Thirdly, the court has to be satisfied that the abuse of process will cause prejudice to the requested person, either in the extradition process in this country or in the requesting state if he is surrendered."

THE EVIDENCE

52. The following material has been served in this case, although it is not necessary to summarise or refer to all of it in this judgment I have considered all the material before me.

- The EAW
- Skeleton argument on behalf of the RP

- Opening note on behalf of the IJA
- Statement of arrest (Pc J Newton)
- PNC printout showing no convictions or cautions
- Transcript of Telephone call from Lukasz Herba
- Further information from IJA dated November 2015
- Further information specific to this case dated 22.9.17
- Proof of evidence RP
- Bundle of authorities
- “Open source material” bundle (89 pages)

53. The Rp gave evidence and adopted his proof of evidence as his evidence in chief. He confirmed his name and date of birth, he is currently residing at HMP Wandsworth and is a Polish national

54. He corrected some errors in the signed proof. Firstly he corrected his date of birth, it is incorrectly recorded as the 20th September 1980 in the statement, it is in fact the 30th. He also amended the proof in so far as it says that someone broke into his mother’s home, it should read someone attempted to break into my mother’s flat.

55. He was not asked and he did not add anything by way of supplementary evidence.

56. Under cross examination he said the following;

57. I have a partner in England. I haven’t provided her name and she isn’t present to give evidence today. It is correct I have not provided any information about her. I cannot give her name as she is heavily pregnant, it could add to her stress and she is due to give birth. I don’t want to risk her health or the health of the baby.

58. He added in response to a question from me that he had been with his partner for around 2 years in November. They met her in November 2015.

59. When asked the expected date for the child (after hesitating) he said “I won’t give you specific date but it is due in October 2017”

60. He said they are supposed to live together after the baby is born and are supposed to get married. He confirmed it is their first and only child.

61. He continued that he did not want his partner to be harassed by press and that is the reason he will not give her name.

62. When asked if he had been to any antenatal classes he replied that his partner had a lot of visits to Poland but they live a distance away and he was at work. She told him it wasn’t necessary He accepted he could have at least served medical notes to confirm his partner is pregnant and that all the court has about it is his word for it.

63. No further evidence was called on his behalf.

FINDINGS

64. The Rp gave evidence about his pregnant girlfriend, he did not call or serve any evidence to corroborate his assertion. He did give an explanation as to why, he did not want her to suffer from added stress which he thought likely if she were identified as his partner and he thought she would be pursued by the press. Whilst I have my doubts about the veracity of his evidence, particularly as he was hesitant when given detail of the pregnancy thus far, I did not have a strong sense that he was lying and

therefore the benefit of doubt must fall to him. I will proceed on the basis that he does have a partner nearing the birth of their first child, with whom he shares a strong and loving relationship.

65. His proof also refers to his relationship with his mother and the financial support he provides her. He was not crossed examined on this part of his evidence. I accept the evidence.

CONCLUSIONS

Section 2 (4) (c) EA 2003 - validity of EAW

66. The focus of this challenge is that the EAW fails to set out what specifically this Rp did in respect of the kidnap. It is true that the warrant does not give any details of a specific role played by the RP. However it sets out that he is alleged to be complicit in the drugging and kidnapping of Miss Ayling, it sets out in clear and unequivocal terms the nature of the offending, with whom he is complicit, the date and place of the offending, the amount of ransom requested and all the elements required for a kidnap to be made out.

67. The allegation is straight forward, it is not one of a complex fraud where clearly more detail is required. The RP cannot sensibly argue that he is unaware of the nature and extent of the allegation, what bars to surrender may be available or sufficient to exercise his specialty protection in the event of surrender. The fundamental principles of the EAW scheme must be borne in mind when assessing validity. It is inimical to its purpose to require IJA's to set out criminal pleadings of the sort needed in an indictment or opening note, of course a balance must be struck between expedition and sufficient to allow the RP to properly challenge his surrender

68. I am satisfied so that I am sure that the statutory requirements are met with sufficient detail to strike such a balance, I am satisfied this is a valid warrant and therefore reject this challenge.

Section 21 (A) EA 2003 – Human Rights Article 6 ECHR

69. The starting point with any Article 6 ECHR challenge is that as Italy is signatory of both the convention and as a member of the council of Europe they start from a presumption that they will honour their obligations under the convention. That presumption can only be rebutted by cogent evidence that a real risk that the RP will face a flagrant denial of justice exists.

70. The evidence before me cannot show that the Rp faces the real risk of conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge, trial which is summary in nature and conducted with a total disregard for the rights of the defence, detention without any access to an independent and impartial tribunal, have the legality the detention reviewed or deliberate and systematic refusal of access to a lawyer. In other words none of the features of a flagrant denial of justice are present.

71. The submission is put on the basis that the “open source material” proves that the allegation is a sham and most likely a publicity stunt by Miss Ayling.

72. Firstly the 89 pages of open source material consists almost entirely of press reports expressing opinion and theories about the veracity of Miss Ayling’s account, that is not evidence to support it is a sham and moreover it does not assist in showing that the Italian authorities will deny

the RP justice in the manner set out above. Secondly and more importantly such issues are evidential issues for the Italian court to determine.

73. The Rp has failed to provide any cogent evidence that he will risk a flagrant denial of justice and therefore this challenge must also fail.

SECTION 21 (A) EA 2003 - HUMAN RIGHTS Article 8 ECHR

74. The leading case is ***HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC25***. This amplifies the guidance given in ***Norris v USA (2010)UKSC*** .The convention right is not an unqualified right, I have to consider whether on the particular facts of this requested persons circumstances, the interference with his rights to a family and private life, would be outweighed by the public interest in extradition.

75. I have to conduct a balancing exercise. Recently the LCJ Lord Thomas set out the approach this Court should adopt in the case of ***Polish Judicial Authorities v Celinksi (2015) 1274 Admin u***nderlying the principles laid down in Norris and HH. In particular the LCJ said (paras 8-12)

HH concerns 3 cases, each of which involved the interests of children, and the judgement must be read in that context

The public interest in ensuring that extradition arrangements are honoured is very high. So too is the public interest in discouraging persons seeing the UK as a state willing to accept fugitives from justice.

The decisions of the judicial authority of a member state making a request should be accorded a proper degree of mutual confidence and respect

The independence of prosecutorial decisions must be borne in mind

Factors that mitigate the gravity of the offence or the culpability will ordinarily be matters that the court in the requesting state will take into account. Although personal factors relating to family life will be factors to be brought into the balance under article 8, the extradition judge must also take into account that these will also form part of the matter is considered by the court in the requesting state in the event of conviction

76. Therefore all relevant factors must be balanced one against another. The interests of children are a primary consideration, but other factors include but are not limited to;

• The public interest in honouring extradition treaties,

•The Article 8 rights of victims, as well as the RP and his family

• The gravity of the offences,

• The strong public interest in ensuring that children are properly brought up,

• Delay and whether during the lapse of time the RP and (if relevant) family have made a new and blameless life for him/ themselves

• The age of the requested person at the time of the conviction.

• The UK should not be treated as a safe haven for fugitives

• Impact of his private life that extradition that would cause, including the financial effect of loss of employment

FACTORS IN FAVOUR OF EXTRADITION

77. The constant and weighty public interest in the UK honouring its extradition treaties is high. The autonomy of the Italian Courts decision to prosecute must be respected.

78. The offending is serious, the EAW alleges involvement in a very serious kidnap, and the public interest is all the more pressing in such cases.

79. There is no delay in this case capable of militating the public interest.

FACTORS IN FAVOUR OF DISCHARGE

80. The RP has developed a family and private life having lived in the UK on and off for the last 11 years and has a pregnant partner expecting their first child imminently. I am satisfied that in these circumstances his, his partners and the unborn child's Article 8 ECHR rights are engaged.

81. Clearly in the event of surrender his partner and unborn child will suffer emotionally. He will not have the opportunity and nor will the child to build an early life attachment.

82. Whilst living in the United Kingdom the Requested Person has led a law abiding life, the PNC record shows he has no convictions or cautions in the United Kingdom

83. He has a strong bond with his mother, who resides in Poland but visits the UK regularly and along with his brother (at least until his remand in custody in Milan) provides financial support to her. Again no evidence was served to allow this court to assess the extent of the hardship she might suffer.

84. He initially came to the UK in 2006 and stayed until 2007, he returned to Poland for a couple of years and came back to the UK in about 2008 or 2009, again he only stayed a short time and returned to Poland, eventually he settled in the UK in 2011, thus he has been settled in the UK for the last 6 years during all the periods of residence in the UK he has led a productive life working and paying taxes. Clearly he has settled and has developed a private and family life in the UK. I recognize that surrender may mean the loss of his current employment and accommodation.

ANALYSIS

85. The Rp relies on his family and private life and the impact upon his partner, his unborn child and his mother in the event of surrender. It is obvious that those factors counter balance the high public interest, however emotional hardship is a sad inevitability in extradition proceedings.

86. There is no evidence that the emotional harm will be severe or beyond that which is inevitable in such cases. In the absence of any evidence to the contrary I must conclude that his partner will be able to cope emotionally and financially in the event of separation, and if that

proves not to be the case the state will assist with adequate health and social care.

87. There is no delay to militate the public interest, and although I take full account of the factors in favour of discharge they are not such so that either individually or cumulatively they can outweigh the public interest.

ARTICLE 8 ECHR DECISION

88. The strong public interest is not outweighed by those counter balancing factors.

89. I find there are no sufficiently compelling features in this case that would militate against the starting point that there is a constant and weighty public interest in the United Kingdom giving effect to its treaty obligations, and subsequently the factors in favour of extradition are NOT outweighed by those in favour of discharge and therefore extradition would not be a disproportionate interference with the RP's Article 8 rights.

90. I therefore reject this bar to extradition.

Section 21(A) EA 2003 - PROPORTIONALITY

91. Although Mr. Hepburne Scott did not seek to argue that the request should fail on proportionality grounds as this is an accusation warrant I nonetheless must satisfy myself that the request is proportionate.

92. The decision of the administrative Court in ***Miraszewski v District Court in Torun [2014] EWHC 4261*** makes clear that for this purpose the judge is only entitled to take into account the matters listed in section 21A (3) – the seriousness of the offence, the likely penalty if found guilty and the possibility of the foreign authorities

taking measures less coercive than extradition. The scope of section 21A is narrow, and for these purposes the court should not take into account the passage of time spent in the UK or the defendant's record in this country.

93. The offending is very serious indeed, if made out and a conviction follows, whatever this RP's role is, it is highly likely that the RP would receive a custodial sentence. I have not been provided with any information regarding likely sentence by the IJA, it is therefore for me to assess on the basis of domestic sentencing policy. This fortifies my view in respect of seriousness as without doubt a conviction in this jurisdiction for Kidnap would attract a significant custodial sentence

94. It is for the Rp to identify which less coercive measure is appropriate and available. Given the IJA response to the Section 21(b) EA 2003 application it is clear that no form of MLA is either appropriate or available in this case.

95. I therefore reject this bar and find that extradition would be proportionate.

ABUSE OF PROCESS

96. The starting point is whether the conduct identified by the RP could amount to an abuse if true. The ratio in ***Belbin*** (Supra) firmly places the focus of attention on the behaviour of the IJA. The test is not whether the complainant is to be believed or not, but rather, has the IJA behaved in such a way so as to usurp the extradition process. Plainly that is not case here.

97. The material served shows that an allegation was made, it has been investigated and evidence in the form of videos, DNA, computer analysis and the complainant's statement has been gathered and considered and the IJA

believe that there is sufficient evidence to put the RP on trial.

98. The concept of due process is well known and the steps that the IJA have taken are entirely legitimate, the assessment of whether it is sufficient to prove guilt is an evidential issue to be determined by the IJA themselves.

99. There is no evidence that they have acted in bad faith, sought to misled or seek a prosecution for some collateral purpose, the fact that doubt exists about the veracity of the complainant is not capable of making the request an abuse of process.

100. Therefore the conduct particularised is not capable of amounting to an abuse and so the Court is not required to proceed to the next stage set out in ***Tollman*** (Supra) and therefore I reject this challenge.

101. I have carefully considered all of the challenges raised on the RP's behalf and rejected them all.

102. This request is proportionate and in compliance with the ECHR rights of the RP and does not fail on any other grounds.

103**. I therefore order the RP's surrender pursuant to Section 21(A) (5) EA 2003.**

104. The Rp has 7 days to appeal this decision and if he does he will not be removed until and unless the High Court uphold this decision, if he chooses not to appeal he will be removed within 10 days thereafter (17 days from now). The IJA can seek the permission to extend the time for removal from a Judge at this court.

DISTRICT JUDGE PAUL GOLDSPRING