



Neutral Citation Number: [2019] EWHC 674 (Admin)

Case No: CO/4738/2017 AND CO/6151/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2019

Before:

LORD JUSTICE IRWIN
MR JUSTICE OUSELEY

Between:

(1) PAWEL LIS
(2) DARIUSZ LANGE **Appellants**
- and -
(1) REGIONAL COURT IN WARSAW, POLAND
(2) ZIELONA GORA CIRCUIT COURT, POLAND **Respondents**
(No 2)

Edward Fitzgerald QC and Florence Iveson (instructed by JD Spicer) for the First Applicant

Edward Fitzgerald QC and Saoirse Townshend (instructed by Lloyds PR Solicitors) for the Second Applicant

Helen Malcolm QC and Benjamin Seifert (instructed by The Crown Prosecution Service) for the Respondents

Hearing date: 22 February 2019

Approved Judgment

Lord Justice Irwin:

Introduction

1. In this judgment we address the submissions made by two of the three Appellants in respect of whom we gave judgment in *Lis, Lange and Chimielewski v Poland (No 1)* [2018] EWHC 2848 (Admin), handed down on 31 October 2018. In that judgment, this Court dealt with the generic matters advanced on behalf of the Appellants in respect of the judiciary and judicial system in Poland. At the conclusion of the earlier proceedings, the Court rejected the submissions made to date, concluding that there was “no general basis to decline extradition to Poland”. However, we noted that there was:

“71. ... sufficient concern about the independence of the Polish judiciary to mean that these Appellants and others in a similar position should have the opportunity to advance reasons why they might be exceptional cases, requiring individual “specific and precise assessment”, to see whether there are substantial grounds for believing they individually might run a real risk of a breach of their fundamental rights to a fair trial ... We indicate, on the basis of the limited material available to us, that these cases would appear unlikely to fulfil that test and that those sought to be extradited for ordinary criminal offences, with no political or other sensitive content, would seem unlikely to be able to establish the necessary risk.”

2. It is of note that on 19 November 2018, there was handed down the judgment of Ms Justice Donnelly, sitting in the High Court of Ireland in the case of *Minister for Justice and Equality v Artur Celmer (No 5)* [2018] IEHC 639. It will be recalled that the same judge, following *Minister for Justice and Equality v Celmer (No 1)* [2018] IEHC 119, referred the matter of the general position relating to the Polish judiciary to the Court of Justice of the European Union [“CJEU”] which in turn led to the decision of the CJEU in *LM C-216/18*, that being the decision of the CJEU addressed by this Court in our earlier judgment in this case. The conclusions of the Irish High Court in *Celmer (No 5)* cannot, in my judgment, be distinguished from the conclusions of this Court in *Lis, Lange and Chimielewski (No 1)*. In paragraph 122 of her judgment, Donnelly J said:

“122. In accordance with the decision of the CJEU in *L.M.*, this Court is obliged to determine, specifically and precisely, whether having regard to this respondent’s personal circumstances, the nature of the offence for which he is prosecuted and the factual context that forms the basis of the European arrest warrants and in light of the information from the issuing judicial authorities, there are substantial grounds for believing that he will run that risk if he is surrendered.”

3. In this Court’s Order of 15 November 2018, each Appellant was directed to:

“EITHER file and serve Amended Grounds, with short accompanying submissions not exceeding 10 pages (including a revised time estimate), setting out [A] any specific or individual basis on which it is claimed, as an

exception, that extradition should be refused on Article 6/Articles 47/48 of the Charter grounds, in the light of the judgment of 31 October 2018 and/or [B] any other basis on which it is now said extradition should be refused;

OR file and serve written Notice of withdrawal of the appeal against extradition.”

4. The Appellants Lis and Lange have sought to raise what are said to be specific and individual bases from which it is said they will suffer a flagrant denial of justice if extradited.

The Appellants’ Submissions

5. In their written submissions of 28 November 2018, the Appellants identify the arguments they put forward as follows:

“The Appellants respectfully submit that their respective personal situations satisfy the *LM* §75 test, for different reasons:

- In the case of the First Appellant, the risk is established by consideration of the nature of the specific court before whom he will be tried;
- In the case of the Second Appellant, the risk is established by consideration of the particular nature of the proceedings that he faces.”

6. These propositions were supported by Mr Fitzgerald QC on behalf of both Appellants, who supplemented the written submissions with a “Speaking Note” and oral submissions on 22 February 2019.

Lis and the Warsaw Court

7. The core submission in relation to the Appellant Lis is that the President of the Warsaw District Court and other judges have been removed and replaced. The important evidence about these changes is contained in a joint “legal opinion” of Dominika Stepinska-Duch and Damian Tokarczyk completed in late April 2018 [“Stepinska”]. In paragraph 23 of that legal opinion, the authors record:

“The President of the Court in Warszawa Srodmiescie was removed, because this court has lately recognised and acquitted few cases of the political demonstrators and activists. One of the Vice Presidents in the circuit court in Warszawa was also dismissed, because she commenced a disciplinary proceedings against the current deputy of the Ministry of Justice ...”

8. On the basis of this material and on the evidence of Professor Markiewicz, which was also before this Court in the earlier hearing, it is said that:

“In the Warsaw Courts, the First Appellant is at real risk of being tried before a judge hand-picked by his prosecutor. The attendant manifest risk of lack of judicial independence ... is not

dependent in any way on his case having a “*political or special interest*”.

9. Certain further evidence has been admitted before us which was not available at the time of the earlier judgment of this Court. This includes a letter from Judge Piotr Gaćiarek of the Warsaw Regional Court, submitted to the Irish High Court in respect of *Celmer (No 5)*. Judge Gaćiarek continues to serve in the Warsaw Court and is a critic and opponent of the changes affecting the judiciary in Poland. He comments explicitly on the “assessments and opinions expressed in the letter of the President of the Warsaw Regional Court sent to you [Donnelly J] on 26 September 2018”, that is to say the replacement President of the Warsaw Court imposed or appointed by the Polish Minister of Justice. That is an essential context for the views of Judge Gaćiarek.
10. In my judgment, two excerpts from his letter are of particular importance:

“To be understood correctly and precisely, I would like to stress that both me and other judges adjudicating in the Warsaw Regional Court try to perform our obligations to the best of our abilities and administer justice impartially and free from any pressures.

...

5) How can the removal Court Presidents might have any effect on the trial of Mr. Celmer, if he was to be surrendered

The statements by the Deputy Minister of Justice, Marcin Warchol, as quoted in the Report, should be perceived as a typical rhetoric of politicians currently in power, who build their position among voters based on illegitimate and unjust attacks on courts and judges. As a judge I do not see a direct effect of such statements or of the way of appointing court presidents on court rulings in this or other cases. One cannot, however, lose sight of the fact that under the provisions of Article 27 of the Law on the System of Common Courts, performance of his/her mandate by a president and vice-president of a court is subject to an assessment by the Minister of Justice, who can dismiss them during their term of office, among others should one identify a particularly low effectiveness in the field of administrative supervision or work organisation in the court or lower courts concerned.

I make the above comments acting in good faith and to the best of my knowledge. As a side note, I have been a judge for more than 15 years now, and for 8 years I have been adjudicating in the Warsaw Regional Court in criminal cases.”

11. In his oral submissions (and Speaking Note), having adopted the written submissions, Mr Fitzgerald began by emphasising that if there was a general risk for all defendants before the Warsaw Regional/Circuit Court, there would be a flagrant breach of their

Article 6 rights, and that must form a bar to such extradition. In that sense, it was wrong and potentially misleading to impose an “exceptionality” element to the test.

12. So far as that submission goes, I would be prepared to accept it. If it could be established that ordinary criminal defendants as a category were at real risk of flagrant breaches of Article 6 standards then that would constitute a bar to extradition, and there could be no requirement of “exceptionality” within such a cohort. However, it should be clear that the term was used by the CJEU (and by this Court) in the context where no such general risk had been established. It does not seem to me fruitful to continue any debate about the terms “exceptional” or “exceptionality”.
13. Mr Fitzgerald does submit that the evidence supports a “specific and precise risk to him personally” because of the particular problems identified in relation to the Warsaw Court. He cites earlier examples of such findings of fact in relation to the Moscow City Court, for example in the unreported decision in the Bow Street Magistrates’ Court of *Government of the Russian Federation v Maruyev and Chernysheva*, decision of the Senior District Judge 18 March 2005.
14. For myself I do not exclude the possibility that in an appropriate case, the evidence presented could establish a risk of a flagrant breach of Article 6 in respect of all suspects brought before a given court. I simply reject the proposition that the evidence does so here. Ms Malcolm QC for the Respondent makes the same point briefly and clearly. Indeed, it seems to me, that the evidence before us points in the opposite direction. The critical disputes between the judiciary and the Government, says Judge Gąciarek, have not affected the standards of justice for criminal defendants. The particular bases for dispute identified in the Stepinska report do not provide any such evidence either, as will be clear from the circumstances summarised.
15. In the course of argument, the Court asked Mr Fitzgerald if there was any evidence of an actual Article 6 breach in Warsaw in respect of an ordinary criminal defendant, whose case involved no political considerations. While emphasising that such evidence is not easy to obtain, he conceded there was not.
16. The Appellant Lis has been frank throughout in acknowledging that his “prospective trial does not ‘*arouse any political or special interest of any other kind*’”.
17. In those circumstances, I see no basis upon which a real risk of a flagrant breach of his Article 6 rights can be established in relation to the Appellant Lis and accordingly I would dismiss his appeal on this ground.

The Appellant Lange

18. This Appellant makes no submissions as to the effects of changes in the judicial system affecting the Court in Zielona Gora, to which he would be extradited. It is accepted that “there is no evidence that the judges in Zielona Gora have actually been threatened, sanctioned, removed or replaced in the same manner that they have in Warsaw” (written submissions, paragraph 20).
19. However, the submission advanced here is that the “compromised Polish Court might not [fairly] disaggregate his sentence”. This Appellant was sought so that he could serve an aggregated sentence of imprisonment of one year, of which six months and one day remain

outstanding. The warrant was issued in respect of five offences which in English criminal terms consisted of three assaults, a threat of violence and the allegation that he “abused verbally police officers ... on duty”. The District Judge found that there was no corresponding extradition offence to that of verbal abuse of a police officer, and extradition in respect of that offence was refused. It follows that the composite sentence will have to be disaggregated if the Appellant Lange is returned to Poland.

20. There have in the past, it is said, been difficulties in the disaggregation process, see for example *Brodziak and Others v Poland* [2013] EWHC 3394 (Admin) and *Kortas v Poland* [2017] EWHC 1356 (Admin). In *Brodziak* (see paragraph 54), the Court expressed a “degree of anxiety” as to the process to be followed, but resolved that anxiety by reference to the presumption of Poland’s compliance with international obligations. Mr Fitzgerald submits that such a presumption is no longer justified. He submits that that may particularly be so in an authoritarian society, as he characterises Poland today, and in the light of the presumed unpopularity of a defendant who has insulted a police officer, coupled with the fact that he can no longer be punished for that offence. Mr Fitzgerald submits that he may be subject to “unduly harsh treatment by judges who may well be biased in favour of the executive or susceptible to influence by the executive” and who have the responsibility of conscientiously disaggregating the sentence.
21. In *Kortas*, the Court reviewed the performance of the Polish courts in relation to disaggregation, particularly in the light of the earlier case of *Brodziak*. At paragraph 22 in *Kortas*, the Court concluded that there was no support from the cases dealt with in *Brodziak*, and their subsequent treatment in Poland, to show that “Poland will not abide by its international specialty obligations in this case or generally”. Further, in paragraph 27, Burnett LJ (as he then was) concluded that the “underlying legal position does not need explicit confirmation from the Polish Judicial Authority in future individual cases”. The Court considered what had happened in the case of a previous appellant, a Mr Dunek, and concluded that the problems which had arisen were derived from misunderstanding and error, rather than any systemic problem. In paragraph 40, Blake J said the following:

“40. It is apparent to us that there are mechanisms in place in Poland to give effect to the specialty obligation. All that is required is that the United Kingdom court is able to communicate, if it be the case where a return is made under a European arrest warrant for only one or more than one of a number of different offences, that that is made clear. The mechanism by which that can be made clear may include the order of the court, as my Lord has indicated; by a red pencil in the European arrest warrant itself striking out such offence as is not applicable; or in the decision of the district judge ordering extradition, all of which ought to be communicated to the requesting state at the same time as the person to be returned is returned to that state so the requesting state knows precisely the basis of the return. If that is achieved, I can see no evidence that the effective arrangements for respecting specialty have been undermined or will be undermined in the future.”
22. In my view, there is no basis for concluding that the Appellant Lange is at any particular risk of bias or other distortion of justice in relation to the disaggregation process. While insulting police officers may be unpopular, it is in no sense a serious offence, and it is

hard to believe that it is uncommon in Poland; nor is there any basis for concluding that the judiciary in Zielona Gora will be so exercised by this offence that they will descend to an unjust process of unlawful distortion of disaggregation of sentence in order to satisfy their feelings.

23. For those reasons I would dismiss this ground of appeal also.

Mr Justice Ouseley:

24. I agree.