



Neutral Citation Number: [2020] EWHC 2349 (Admin)

Case No: CO/257/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 August 2020

Before :

MR JUSTICE FORDHAM

Between :

KRYSTYNA IVANISHINETS
- and -
THE LOCAL COURT OF MATESZALKA
(HUNGARY)

Appellant

Respondent

John Howey (instructed by JFH Law) for the **appellant**
The **respondent** did not appear and was not represented

Hearing date: 20 August 2020

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

1. This is an application for permission to appeal in an extradition case. The mode of hearing was BT conference call. The Administrative Court had provided an opportunity for the appellant's representatives to state any preference or provide any reasons why remote hearing was considered inappropriate. Like them, I was satisfied that a telephone hearing was appropriate. I heard oral submissions in exactly the way I would have done had we all been physically present in a court room. There was also an interpreter who dialled in and was able by an external Skype link to simultaneously translate for the appellant. In relation to open justice, the hearing and its start time – together with an email address which could be used by any person wishing to observe the hearing – were published in the cause list. The hearing was recorded. This judgment will be released into the public domain. By having a remote hearing, we eliminated any risk to any person from having to travel to, or be present in, a court. I am satisfied that no right or interest was compromised, and that if there was any interference with or qualification of any right or interest, it was justified as necessary and proportionate.
2. The appellant is aged 31 and is wanted for extradition to Hungary. An accusation EAW issued in December 2016 describes an offence in October 2014 of paying US\$3,000 to a Hungarian official to obtain a Hungarian passport, bearing her photograph but a name and date of birth that were not hers. She accepts that all of that took place, but she claims that it was all in good faith on her part. She married in 2016 and in October 2018 came to join her husband in the United Kingdom, he having been here since 2013. They are both, as I understand it, Ukrainian nationals, and he also has permanent residence status in Slovakia. The appellant was arrested on 6 September 2019. She gave birth to a daughter on 7 November 2019. After an oral hearing on 14 January 2020 the District Judge (DJ Baraitser) ordered that the appellant be extradited.
3. The essence of the appeal – as I see it – is as follows. It is said that extradition would be incompatible with article 8 of the European Convention on Human Rights, by reference to the appellant, also her husband and his rights, and in particular their young daughter and her human rights. Emphasis has been placed on the fact that the appellant was found by the District Judge not to be a fugitive; and on the lapse of time since the alleged offence in October 2014. Emphasis is placed on the settled relationship of marriage and residence in the United Kingdom, the roots which the husband has put down in the 7 years since he has been here, the importance to him of staying here for his work in the construction industry, and the real difficulties were he to relocate to Hungary. Emphasis is placed on the uncertainties as to what would happen in Hungary and when, including whether the appellant would be given bail or detained on remand, and as to the length of any sentence if convicted of the passport offence, the maximum sentence being one of 5 years, and of uncertainty as to the daughter's position regarding travel with her mother if extradited. At the heart of the case is the young daughter, her welfare and her best interests. That involves the questions of harm to her if incarcerated with her mother as a baby, if separated from her mother, including separation while her mother is on remand or serving a prison sentence in Hungary, and if separated from her father, whether through being in custody with her mother and whether in circumstances where the father has said he would not relocate to Hungary if his wife is extradited.
4. The Perfected Grounds of Appeal, which I read at the start of the hearing they having been originally omitted from the bundle, make a number of these points, if not all of

them. The Grounds concede that the District Judge adopted the correct approach in law. They contain various criticisms of her approach to various aspects of the case. They submit that the view that she arrived at in the overall outcome was unsupportable. They submit that the District Judge's approach was flawed in relation to the questions of uncertainty: it is said that the District Judge approached the uncertainties as counting against the appellant when they should have strongly featured in her favour. Emphasis is placed on the separation of the daughter from her father, on the realities for the father of the question of whether or not to relocate to Hungary and the implications of that choice either way should the appellant be extradited. The Perfected Grounds also describe what is portrayed as a bleak situation in a mother and baby unit in a Hungarian place of incarceration. Emphasis is placed, as it has been Mr Howey's oral submissions today, on the real concerns about the daughter's position not so much as a baby accompanying her mother in mother and baby unit while being breast-fed up to the age of one, but her position after that after having reached the age of one: the prospect then of being separated from her mother, the appellant remaining in custody and the daughter being with some other carer in the outside world. The Perfected Grounds of Appeal criticise the District Judge for concluding that at this passport offence would have been 'likely to attract custody' in the United Kingdom, Mr Howey submitting to me that that is 'wrong' and the Perfected Grounds of Appeal making the contention that more likely would be a suspended sentence. Reliance is placed on the 'significant delay', as it is described.

5. Mr Howey's oral submissions today picked up on a number of the key themes from the written documents, including the Perfected Grounds of Appeal, which Mr Howey has moreover adopted without needing to repeat them all. In his oral submissions he emphasised, in particular, that 'things have moved on' in this case since the District Judge decided the case in January of this year. At that stage the daughter was 2 months old, and a considerable focus – understandably – was on mother and breastfeeding baby and arrangements up to the age of one. That was because the District Judge was ordering extradition in January 2020. By virtue of the pursuit of this (now renewed) application for permission to appeal, the daughter is now 9½ months old, and so what looms largest now is the question of what would happen at and after her first birthday. Orally, Mr Howey emphasised the concern about whether the daughter would have the travel documents or necessary clearance to accompany her mother on any extradition. He also submits that insufficient weight was placed in this case on the husband's article 8 rights. The husband would find himself in an invidious position, through no fault of his, in circumstances where he is well-established in the United Kingdom and working here. He would either face separation from his young daughter or he would face becoming the sole carer or principal carer for her, with the prospect of, again, an invidious position with a decision to make about whether to relocate from the United Kingdom to Hungary, with all the implications of that for him.
6. As I put to Mr Howey, I find it particularly helpful in this case to remind myself of what was said in Love v United States of America [2018] EWHC 172 (Admin) [2018] 1 WLR 2889 at paragraph 26, where the Divisional Court said this:

The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the District Judge was wrong...The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should

have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed.

That is an approach which in my judgment has particular resonance in this case for the nature of the challenge that is being made to the District Judge's assessment.

7. These are always anxious cases and it is important that they are scrutinised with great care. I am quite satisfied that the District Judge scrutinised the facts and circumstances with scrupulous care. I have looked at the matters afresh, in the light of the Divisional Court's guidance. I remind myself that this is only the permission stage and the question is whether Mr Howey has shown a reasonably arguable case. In my judgment, there is no realistic prospect of this Court on appeal overturning the outcome on article 8 grounds in this case. In my judgment the District Judge identified the relevant considerations, addressed them, did so in the light of the oral evidence that she had heard from the appellant and from her husband, and made sustainable findings in relation to the evidence. The judge's findings and observations are not in my judgment, and do not in my judgment include, findings that it is reasonably arguable were "wrong". But, perhaps more importantly, there is in this case in my judgment no reasonably arguable basis for saying that the outcome of ordering extradition, even viewed as at the current time and on the basis of everything that has been written and said, is a human rights-incompatible outcome.
8. At the heart of this case, as Mr Howey has throughout rightly emphasised, is a little girl. The District Judge carefully considered the uncertainties and implications for that little girl. She examined each aspect of the uncertainty and the various key scenarios. She was satisfied, for example, that the interests of the child would be considered at any bail hearing, and that they would be taken into account in the determination of the length of any sentence. She was satisfied that, if breast-feeding a baby while detained in Hungary, the appellant as mother with baby would be accommodated in a mother and baby unit until the age of one. Particularly important, in the light of the points made today about things having 'moved on', the District Judge addressed and was satisfied that if the daughter was removed from her incarcerated mother after reaching the age of one, it was likely that the father would make arrangements for her care until her mother was released. That important finding was made on the basis of evidence including the oral evidence that I have described. I see no reasonably arguable base of that finding being overturned. The District Judge accepted that a custodial environment was likely to have a detrimental impact on the daughter, as would any separation from her mother, as would the separation of the child from her father, which moreover would all stand to have a significant and adverse effect on each member of the family. But she concluded that the negative impact of extradition for each member of the family was not of such a level that the court ought to do other than uphold this country's extradition obligations. She emphasised that the best interests of the child are a primary consideration but "not always the only primary consideration and not necessarily the paramount consideration".
9. The judgment of the District Judge, in evaluating the factors for and against extradition, and in making findings, having considered all the evidence including oral evidence from both the appellant and her husband, was a very detailed and careful evaluation. I will not set it all out or summarise all of it. But I do want to quote from the passages that appeared towards the end of the analysis, when the District Judge was approaching the requisite article 8 'balance sheet' exercise. I consider it helpful in this case to quote

some passages appearing in the culmination of the article 8 assessment, bearing in mind that they had been preceded by a detailed assessment of the facts and circumstances, with in my judgment unimpeachable findings on the evidence. I pick up the judgment at the part at which the District Judge turned to the question of delay and fugitivity.

10. The District Judge said this:

Regarding delay, there has been no significant delay in this case. The allegation arose in 2014, an investigation was commenced in May 2015 ... a national arrest warrant was issued on 20 October 2016, the EAW was issued on 17 July 2018 and certified by the NCA on 6 April 2017. [The appellant] was arrested in this jurisdiction on 6 September 2019. In any event the following factors are likely to have contributed to delay: [the appellant] is a Ukrainian national and has never lived within the jurisdiction of Hungary; between 2014 and 2019 she has used three different names, Krystyna Dorii (her unmarried name) Krystyna Ivanishinets (her married name since 2016) and Marianna Mojszjuk; she has ties to a number of jurisdictions including Slovakia (she has a residence card there), the Ukraine and the UK; and there is no reason to believe the Hungarian authorities were in possession of contact details for her.

Regarding her fugitive status, I accept that she is not a fugitive from justice. Nevertheless for reasons given above I have rejected her account that she obtained this passport in good faith. When she used it to enter the UK and thereafter to obtain a National Insurance number, work and to open a UK bank account, all in a name which was not her own, she must have been aware that she was acting unlawfully and any settled life established subsequent to this conduct was established in this knowledge.

I take account of the constant and weighty public interest in extradition. The UK should honour its treaty obligations to other countries. The public interest in honouring extradition arrangements is high.

Furthermore, the decision of the Hungarian Judicial Authority in making a request for extradition should be accorded a proper degree of mutual confidence and respect.”

11. The District Judge then continued (numbering added):

“In the balance in favour of extradition, I take account of these factors: (1) Mutual confidence and respect for the decisions of the Judicial Authority. (2) The constant and weighty public interest in extradition. (3) The offence is serious. [The appellant], a Ukrainian national, paid a significant sum for a Hungarian passport. The passport carried her photograph but the identifying details of another person. She used the passport to gain access to the UK and obtain a National Insurance number, work and to open a UK bank account. (4) [The appellant] has an infant daughter. However the Hungarian authorities have confirmed that if extradited, she will be accommodated in a mother/baby unit which will enable her child to remain in her care until she reaches the age of one. (5) [The appellant]’s husband is clearly a committed father and is likely to

remain involved in her care in the future. (6) There has been no significant delay in these proceedings. (7) [The appellant] has been in the UK, since November 2018, a relatively short period. Prior to arriving in the UK she lived in the Ukraine. Following their marriage in 2016 she and her husband lived apart and in different countries until she came to the UK in 2018.

In the balance for the Requested Person, I take account of these factors: (1) [The appellant] has lived in the UK since November 2018. (2) She is not a fugitive from justice. (3) Extradition is likely to result in her infant daughter remaining with [the appellant] in a Mother – Baby unit in detention in Hungary. Any placement of a child in conditions of detention will undoubtedly have a detrimental impact on the child. (4) [The appellant]’s removal to Hungary with [the daughter] will result in separation between a father and his infant child. [The husband] is one of [the daughter]’s primary carers and this separation is likely to be psychologically detrimental to each member of this family. (5) [The appellant] has no convictions in the UK.

In my judgment, there is no compelling feature (nor combination of features) which overrides the strong public interest in extradition in this case. [The appellant] is alleged to have committed a genuinely serious offence in which she is said to have purchased a Hungarian passport, using her photograph and biometric data, in order to access the benefits available to those living within the European Union. The allegation arose in 2014 and since that date she has lived for a period in the UK (for eight or nine months) and in the Ukraine (2015 to 2018) before settling in the UK in November 2018. She has therefore spent a relatively short period in this jurisdiction. When she settled here she did so in the knowledge that she had used a false identity supported by this passport and she must have known there was a real risk that such conduct would not be overlooked by the Hungarian authorities.

[The appellant] now has an infant child born on 7 November 2019. The child is likely to accompany [the appellant] if she is extradited to Hungary. Ordinarily in an accusation case, a court in the Requesting State will conduct a hearing on the return of a Requested Person and determine issues of bail pending trial. It is reasonable to assume that the interests of her daughter will be considered at such a hearing. Further, if [the appellant] is convicted, the interests of her daughter will again be taken into account when determining the nature and length of sentence. If [the appellant] remains in custody I accept that this environment is likely to have a detrimental impact on this child. I also accept that the separation of [the daughter] from her father is likely to have a significant and adverse effect on each member of this family. However the impact is ameliorated by her remaining in the care of her mother, one of her primary carers, until she reaches the age of one. Thereafter, if [the appellant] is still incarcerated, in light of his clearly expressed commitment to the care of his daughter, it is likely that [the husband] will make arrangements for her care until her mother is released. For these reasons I have concluded that the negative impact of extradition on [the appellant] and each member of her family is not of such a level that the court

ought not to uphold this country's extradition obligations. I am satisfied that [the appellant]'s extradition remains proportionate and necessary.

12. I have set those passages out in full and at length. I have done so because they demonstrate, in my judgment, the careful, proper and lawful way in which the District Judge approached the issues in this anxious and difficult case. In my judgment, not only was that an analysis which was sustainable and open to the District Judge, but it was an approach and assessment and evaluative reasoning which was impeccable.
13. In refusing permission to appeal on the papers, Goose J said this:

“The District Judge heard the Appellant and her supporting witness, who gave oral evidence under cross examination, in which the central issue for decision was the Article 8 rights of the Appellant and her child (born 7.11.19). Further, additional evidence was obtained to clarify the conditions of detention within the Requesting Party's criminal justice system for a detained mother with an infant child. In her Judgement the District Judge recorded the materially relevant facts in favour of and against extradition, before reaching a fully reasoned conclusion. The grounds of appeal seek to argue that the District Judge gave either too much or too little emphasis to some of the evidence, in reaching the decision to grant extradition and that the uncertainty of the likely period of detention should have been a factor against granting the order. The District Judge plainly applied the correct legal principles, heard the oral evidence and assessed the factors for and against extradition. The uncertainty of the period of detention is a common feature of extradition requests. It was not for the District Judge to try and assess what it would be. The District Judge was entitled to take into account the possibility of a bail application and the possible relevance of the needs of the Appellant's child in any sentencing process if there was a conviction. The decision reached is not arguably wrong.

I have reached the same conclusion. Permission to appeal is therefore refused.

20 August 2020