CO/8847/2007

Neutral Citation Number: [2008] EWHC 887 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 11th April 2008

B E F O R E:

LORD JUSTICE KEENE

MR JUSTICE TREACY

- - - - - - -

THE QUEEN ON THE APPLICATION OF WLADYSLAW LAKATUS
Claimant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

and

THE GOVERNMENT OF THE REPUBLIC OF POLAND
Interested Party

Computer-Aided Transcript of the Palantype Notes of
Wordwave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr Alun Jones QC and **Mr Ben Cooper** (instructed by Messrs Kaim Todner, London EC4A 4AS) appeared on behalf of the **Claimant**
Mr Ben Watson (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**
Miss Adina Ezekiel (instructed by Crown Prosecution Service) appeared on behalf of the **Interested Party**

J U D G M E N T
(**As approved by the Court**)

1. LORD JUSTICE KEENE: This is an application for judicial review of two decisions made by the Secretary of State to extradite the claimant to Poland, those decisions being made in letters dated 2nd March 2006 and 10th July 2007. The decisions were made under section 12 of the Extradition Act 1989, the request for extradition having been made prior to 31st December 2003.

2. The claimant, who is a Polish national, is wanted by the Polish authorities for trial on a number of serious charges. Those charges relate to alleged offences occurring between November 1996 and August 1997. A warrant for the claimant's arrest was issued in Poland on 21st August 1997.

3. The claimant arrived in this country illegally in 1999. He was arrested on 4th November 2003 and detained because of the request for extradition. He subsequently claimed asylum, which was refused. He appealed against that decision, but an adjudicator dismissed the appeal in September 2004 and leave to appeal against that decision was refused in January 2005.

4. The offences for which the claimant is wanted in Poland are both numerous and serious. There are some 60 in all. They included conspiracy to rob and to commit blackmail; conspiracy to steal a motor vehicle; possession of a firearm with intent to commit what we would call an indictable offence; demanding sums of money with menaces; another conspiracy to rob and one to wound; theft of money and of diamonds; two offences of malicious wounding with intent to do serious bodily harm; three offences of unlawful imprisonment; threats to kill; robbery; conspiracy to kidnap; and other firearms offences. The gist of the charges is that the claimant was part of an organised and armed criminal gang, which, between the dates I have mentioned, carried out a series of attacks on some seven different people involved in business or other forms of commercial activity in Poland. It is alleged that some of the victims were beaten, another was tied to a tree and threatened with petrol, and generally that this gang was running a protection racket. Those of course are simply allegations.

5. The magistrate at Bow Street committed the claimant on 23rd June 2004, under section 9 of the 1989 Act, to await the Secretary of State's decision as to his extradition.

6. By letter dated 8th July 2004 solicitors on behalf of the claimant made representations to the Secretary of State against extradition. It was these which gave rise to the first of the Secretary of State's decisions now under challenge. Little attention has been focused this morning on that first decision by the Secretary of State, but we deal with it for the sake of completeness. The representations on behalf of the claimant at that stage focused on the medical and educational problems of one of his children, a son, Dawid, who had a moderate hearing loss and who uses hearing aids. It was said that it was in the son's interests that the claimant remain and that the son remain in the United Kingdom. Two other issues were raised: first, an allegation that the claimant is of Romany origin and had been assaulted in Poland because of that, and now faced a repetition if he were returned. Secondly, it was said that he feared reprisals from criminals if he were to be held in custody in Poland.

7. In his decision letter of 2nd March 2006 the Secretary of State dealt with these issues. He recognised the right of the claimant's son to remain in the United Kingdom as a citizen of the European Union. That would mean that extradition of the claimant would involve separating him from his family, but the Secretary of State noted that that was often a feature of the extradition process. It was, in his view, not sufficient to justify avoiding bringing a fugitive to justice.

8. Later in the letter the Secretary of State referred to the finding of an adjudicator, who had rejected the asylum claim by the claimant, to the effect that health care arrangements in Poland would meet the needs of the claimant's son.

9. The Secretary of State did not accept that the claimant was of Romany origin and he gave his reasons for that. Nor did he accept that there was evidence that the claimant would be assaulted in Poland for such a reason. He also emphasised that there was no evidence that the claimant had previously been assaulted when in prison, the claimant having served prison sentences in Poland in the past. The Secretary of State rejected that as a risk, and overall he found that it would not be unjust or oppressive to return the claimant. That was the decision of 2nd March 2006.

10. Some five months later, on 14th August 2006, solicitors on behalf of the claimant sent supplementary representations to the Secretary of State. These were very detailed and, indeed, they were subsequently added to by further documents and reports.

11. The supplementary representations asserted that to return the claimant to Poland would involve a breach of his rights under Articles 3, 6 and 8 of the European Convention on Human Rights ("the ECHR"), and also that it would be "unjust or oppressive" within the meaning of section 12 of the 1989 Act to return him. In fact these representations dealt first with the section 12 point, under the heading "it would be oppressive to return Mr Lakatus". They noted that he and his wife had five children, aged at that time 16, 15, 13, 9 and 7. The 16-year-old was a stepdaughter of the claimant called Daria. Great emphasis was laid on her precarious health, it being argued that it was essential for her health that the claimant remain with her and the family. A consultant's letter dated 7th July 2006 was attached and relied on. That referred to a diagnosis that Daria had acute lymphoblastic leukaemia, as a result of which she had been admitted to the Royal Marsden Hospital on 4th May 2006. A course of chemotherapy had begun. According to the consultant's letter, that would last for a minimum of two years, with a good outlook, some 70 per cent of patients being cured. The treatment was particularly intensive, said the letter, in the first year. The consultant expressed a view on the value of the claimant's presence in various respects, not all of which would seem to fall within his expertise. Thus he spoke of the presence of both Daria's parents being vital for economic support and practical support in attending hospital, as well as providing emotional support. Overall, the consultant expressed the belief that "the presence of Daria's father would help Daria proceed through her treatment" in those ways.

12. On the basis of this evidence the solicitors contended that the claimant's case "now falls to be considered as an exceptional case" (see paragraph 13). Reference was also made to the hearing problems and other problems of the son, Dawid, and to the claimant's wife suffering from depression.

13. Then, under the separate heading "Article 8 ECHR", these representations contended that there would be a breach of the claimant's right to family life because of the separation of him from the rest of the family if returned. Daria's serious ill-health was of "central importance in assessing the proportionality of the inevitable violation of Article 8" (see paragraph 19). The representations then referred to various factors relevant to striking the fair balance required by proportionality and contended that there would be "overwhelming hardship".

14. Finally, under the heading "Article 6 ECHR", the representations argued that there was a real risk that there could not be a fair trial in Poland because of the delay which had occurred, and which would occur in future after return to Poland and before a trial could take place. There would also be difficulties over legal aid.

15. Those representations were dealt with by the Secretary of State in his decision letter dated 10th July 2007, the second decision now under challenge. That letter says that the Secretary of State has looked afresh at the whole case. After summarising the representations, the letter goes on to state as follows, and I quote crucial paragraphs from it:

> "The Secretary of State has carefully considered these points.
>
> As to the circumstances facing Mr Lakatus' family, the Secretary of State sympathises with the difficulties that are now faced, particularly those consequent upon Daria's illness. However, he does not consider either (as you suggest) that these matters amount to 'wholly exceptional circumstances', or that the return of Mr Lakatus in light of these matters would be contrary to the requirements of ECHR Article 8. Although Daria's treatment is expected to last for at least two years, and despite the matters referred to in the medical report sent under cover of your letter dated 10th January 2007, the prognosis is generally good and her condition is not at present life threatening. The Secretary of State is also mindful of the difficulties which Mrs Lakatus may face as a lone parent providing financial, physical and emotional support for five children, two of whom have medical needs; but he does not consider these to be so unusual or so compelling as to outweigh the case for Mr Lakatus' surrender. Mrs Lakatus will, of course be able to seek assistance from appropriate social and support services should she need to.
> In addition to the points set out in your representations, the Secretary of State has also had regard to the fact that Mr Lakatus' extradition has been sought on the basis that he stands accused of many serious offences in Poland, and to the general importance of the United Kingdom in honouring its obligations on matters of extradition. Having regard to all material circumstances, the Secretary of State is not persuaded either that there are such 'wholly exceptional circumstances' as to stand in the way of Mr Lakatus' return, or that the decision to return him constitutes any breach of ECHR Article 8."

16. The letter then goes on to deal with the Article 6 arguments and the issue of delay and legal aid in Poland. The Secretary of State did not accept that there was a risk of the

claimant suffering a flagrant denial of a fair trial. He spelt out the course of events since the claimant's arrest in November 2003 and concluded that there had been no undue delay, noting that the claimant had entered the United Kingdom illegally in 1999 and had then claimed asylum after his arrest. The letter deals in detail with the issue of delay and legal aid in the criminal justice system in Poland, but I need not take time on that. The Secretary of State states that he has decided to confirm the decision of 2nd March 2006 to order the claimant's return.

17. Those two decisions are now challenged. The original grounds on which judicial review was sought were numerous and somewhat unselective. They have been very sensibly pared down in a recent supplementary note, so-called, provided by Mr Alun Jones QC and his junior, Mr Cooper. We are grateful for that. Two main arguments are now advanced by Mr Jones on behalf of the claimant, with a further point about discretion if the Secretary of State has indeed erred. Those points have been put forward by Mr Jones with his usual skill and succinctness.

18. First, it is submitted that the Secretary of State applied the wrong test in relation to Article 8. It is argued that the Secretary of State in the decision letter of 10th July 2006 applied the test of whether there were "wholly exceptional circumstances". That, it is submitted, is wrong. The proper test under Article 8 is one of proportionality. Reliance is placed on a passage from the judgment of Dyson LJ in Jaso v Central Criminal Court No 2 Madrid [2007] EWHC 2983 (Admin), where at paragraph 57 it was said, relying on Huang v Secretary of State for the Home Department [2007] UKHL 11 and AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801, that exceptionality is not the test under Article 8. Dyson LJ went on there to state in the same paragraph:

> "Thus, although it is wrong to apply an exceptionality test, in an extradition case there will have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's article 8 rights."

19. Had that approach been applied, then it is submitted that one cannot say that the same result would necessarily have been reached. Mr Jones points to material which could lead to a reasonable decision-maker on such a test discharging the claimant. Such material relates both to the family circumstances, including material since the July 2006 decision, and material about the prospects of a fair trial. We have been taken to medical reports dated January of this year and other more recent material postdating the Secretary of State's decisions. That material, it is said, shows the continuing difficulties of this family.

20. Mr Jones is right in saying that "exceptionality" is not the appropriate test in Article 8 cases. That is well established by the House of Lords' decision in Huang and, for my part, I agree fully with Dyson LJ's comments in Jaso to which I have referred.

21. However, the claimant's submissions on this aspect of the case do, in my view, involve a misreading of the decision of the Secretary of State of 10th July 2006. It was of course a decision dealing primarily, though not exclusively, with the further

representations which had been submitted on behalf of the claimant on 14th August 2006. The decision letter, its structure and its phraseology need to be seen in that context. When the decision refers to there not being wholly exceptional circumstances, it is clear, as indeed it says, that it is referring to the submission made in those terms on behalf of the claimant in the supplementary representations at paragraph 13 of the letter. The decision letter on its second page says, as the passage I have quoted earlier in full shows, that the Secretary of State "does not consider either (as you suggest) that these matters amount to 'wholly exceptional circumstances', or that the return ... would be contrary to the requirements of ECHR Article 8" (emphasis added). The suggestion that there are exceptional circumstances comes, as I say, from paragraph 13 of the supplementary representations. Significantly, that submission was there being made on behalf of the claimant, not in relation to the Article 8 point, but under the heading of "it would be oppressive to return Mr Lakatus". The Article 8 issue is dealt with later in the representations, starting at paragraph 17.

22. In any event, the Secretary of State in his decision letter was dealing separately with the two issues of oppression and Article 8. He says in the passages criticised that, first:

> "... he does not consider either (as you suggest) that these matters amount to 'wholly exceptional circumstances', or that the return of Mr Lakatus in light of these matters would be contrary to the requirements of ECHR Article 8." (Emphasis added)

Then again, a little later:

> "... [he] is not persuaded either that there are such 'wholly exceptional circumstances' as to stand in the way of Mr Lakatus' return, or that the decision to return him constitutes any breach of ECHR Article 8." (Emphasis added)

23. The structure of both those passages, which I have just quoted, makes it evident that the Secretary of State was not applying the exceptional circumstances test to the Article 8 issue. The two matters were separate and distinct. It is true that the decision letter does not expressly use the word "proportionate" when dealing with the Article 8 issue. That in itself does not matter, so long as the Secretary of State has adopted such an approach.

24. I find that he has. I do so for two reasons. First of all, proportionality had been specifically drawn to his attention in the supplementary representations at paragraph 19. Indeed, that was then expanded upon in the following paragraphs, which emphasised, perfectly properly, the need to strike a fair balance between the severity of the interference with family life and the "legitimate aim". That is a description of the concept of proportionality. Having been reminded of that, it would be remarkable if the Secretary of State had overlooked it in his decision.

25. But secondly, and what puts the matter then beyond doubt, the Secretary of State deals with this topic by setting out the position as he sees it in respect of Daria's medical condition, the claimant's role in respect of her and the mother's difficulties if the

claimant is extradited, and then he says that he does not see those factors as so unusual or so compelling as to "outweigh" the case for the surrender of the claimant.

26. That wording indicates a classic balancing exercise of the kind involved in the concept of proportionality: weighing up the factors on one side against the factors on the other. The Secretary of State then adds in a reference to the gravity of the alleged offences, a matter which is also material. Furthermore, the words "so unusual or so compelling" come very close to, and in my view reflect, the approach which we find in Jaso and other cases.

27. For those reasons, I am not persuaded that the Secretary of State erred in his approach to the issue of proportionality or to that of Article 8 more generally.

28. The second argument advanced on behalf of the claimant is that the Secretary of State has not sufficiently considered whether it would be oppressive, by reason of the passage of time or otherwise, to order extradition. This is of course a reference in particular to section 12(2)(a) of the 1989 Act, which provides, in part:

> "(a) the Secretary of State shall not make an order in the case of any person if it appears to the Secretary of State in relation to the offence, or each of the offences, in respect of which his return is sought, that —
>
> ...
>
> (ii) 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; ...
>
> it would, having regard to all the circumstances, be unjust or oppressive to return him."

29. Mr Jones submits that the Secretary of State should have dealt with oppression and Article 8 more distinctly in his decision letter. The two tests are not the same. Yet the Secretary of State paid inadequate attention to the passage of time, and to the fact that if the claimant is extradited the consequence may be that he will never see his stepdaughter again. Her continuing difficulties over a period of time and her changing medical condition require the Secretary of State now to have another look at this case.

30. I do not find this line of argument persuasive. Again, one needs to read the decision letter in the context of the representations with which it was dealing. Those representations do not assert that the claimant's return would be oppressive because of the passage of time. None of the arguments with which this court is familiar in extradition cases are really being advanced. None of the arguments along the lines of the claimant having been in this country for such a long time that he has put down roots here; that his children have established friendships here; that they are at school here; that he has a job here; and that it would be oppressive for that reason to return him.

31. The representations say, in effect, two things under the heading of "oppression". First, that it would be oppressive, because of Daria's medical problems, and her and her

mother's need for the claimant to be present, to return the claimant. Secondly, that the passage of time would give rise to a risk that there would not be a fair trial in Poland.

32. As to the first of those, the decision letter deals with the point that it was essential for the stepdaughter's health and for the rest of the family that the claimant remains in the United Kingdom. Like the claimant's solicitors, the Secretary of State deals with this under the heading of "oppression" and whether these factors amounted to exceptional circumstances. I have no doubt that that reference to exceptional circumstances also reflected a consideration of the passage of time, because of what Lord Diplock had said in the well-known case of Kakis v Government of the Republic of Cyprus [1978] 1 WLR 779, at 782, that where an accused has fled his country or concealed his whereabouts, it would normally be neither unjust nor oppressive, save in the most exceptional circumstances, that he should have to accept the consequences of the passage of time. Here there had been a finding by the asylum adjudicator that the claimant had indeed fled Poland because he feared prosecution.

33. As far as the second point made in the representations goes, that would normally be regarded as coming under the heading of "unjust" rather than "oppressive" on Lord Diplock's categorisation in Kakis. This is the fair trial point. Be that as it may, the Secretary of State dealt with the point and no point is now raised in respect of the fair trial issue.

34. It seems to me that the Secretary of State did give proper and separate attention to the issue of oppression, both generally and under section 12(2). The factual matters relied on by the claimant under that head were very similar to those relied on under the Article 8 argument, and the Secretary of State was not required to repeat them in a separate paragraph in his decision letter. It is enough that he can be seen to have dealt with both oppression and Article 8 in a proper fashion, and to have applied the appropriate test to each of those matters.

35. In short, I cannot see that the decision letter of 10th July 2007 fails to deal with those representations which were in fact made on behalf of the claimant. The Secretary of State dealt with them all and in an adequate fashion. Nor do I discern any breach of his statutory duty under section 12.

36. It follows that, for my part, I can discern no basis for quashing his decisions of either date. That being so, there is no basis for requiring him to have another look at the case, as it is put. The issue of how he would decide it if it went back to him does not arise.

37. Therefore, for the reasons I have given, I would dismiss this application for judicial review.

38. MR JUSTICE TREACY: I agree.

39. LORD JUSTICE KEENE: Any application?

40. MR WATSON: No, my Lord, thank you.

41. LORD JUSTICE KEENE: Thank you all very much. We are very grateful to you all for all your written material.

42. I meant what I said, Mr Jones, about our gratitude for the very succinct way in which you managed to pare down the issues in this case. That has been extremely helpful to the court.
