IN THE COURT OF APPEAL OF NEW ZEALAND

CA719/2009
[2009] NZCA 570

	BETWEEN	SLAWOMIR RYSZARD BUJAK Appellant
	AND	THE MINISTER OF JUSTICE Respondent

Hearing: 30 November 2009

Court: Robertson, Arnold and Ellen France JJ

Counsel: F C Deliu for Appellant
V E Casey and A Mobberley for Respondent

Judgment: 4 December 2009 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] The Republic of Poland wishes to prosecute the appellant, Mr Bujak, on fraud charges in relation to his business activities in that country. To that end Poland

seeks to have him extradited. In addition, a Regional Court in Poland has issued an order freezing Mr Bujak's property. This order has been registered in New Zealand as a foreign restraining order under s 2 of the Mutual Assistance in Criminal Matters Act 1992.

[2] Mr Bujak has vigorously resisted these endeavours – challenging in separate proceedings (which he pursued to the Supreme Court) the registration of the freezing order and the District Court's determination under the Extradition Act 1999 (the Act) that he was eligible for surrender: see *Bujak v Solicitor-General* [2009] NZSC 42 and *Bujak v District Court at Christchurch* [2009] NZSC 96 respectively.

[3] Having failed in those challenges, Mr Bujak sought to prevent the Minister from taking the next step under the Act, namely determining under s 30 whether he was to be surrendered: see *Bujak v Minister Internal Affairs* HC WN CIV 2009-485-1884 3 November 2009. That attempt was unsuccessful, and the Minister determined on 6 November 2009 that Mr Bujak should be surrendered.

[4] Mr Bujak then issued judicial review proceedings challenging the Minister's decision on numerous grounds, most of which are irrelevant for the purposes of this appeal. Those proceedings were heard urgently. In a comprehensive and careful judgment, speedily delivered, Gendall J dismissed Mr Bujak's claim: HC WN CIV-2009-485-002266 18 November 2009.

[5] In reaching his decision under s 30, the Minister did not take account of certain humanitarian considerations that had been raised on Mr Bujak's behalf. Gendall J held that the Minister was right not to do so as the extradition treaty between New Zealand and Poland (the extradition treaty) did not permit it. In reaching this conclusion, Gendall J followed *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463, a decision of this Court sitting as a bench of five.

[6] The Judge granted Mr Bujak an interim stay until 5 pm on 20 November 2009 to allow him to file an appeal, which he duly did. We heard the appeal as a matter of urgency.

Issues on appeal

[7] The essential issue on the appeal is whether the humanitarian considerations raised on behalf of Mr Bujak were relevant to the Minster's decision under s 30. The matters which Mr Deliu identified were:

(a) The precarious state of Mr Bujak's health, and the effect that travel and possible incarceration in Poland would have upon it;

(b) The likelihood that Mr Bujak would be detained prior to trial in conditions that were to some extent inhumane; and

(c) The unlikelihood that Mr Bujak would receive a fair trial in Poland.

We return to these at [48] – [57] below.

[8] Mr Deliu advanced two submissions in relation to these humanitarian factors. He argued that:

(a) Section 30 makes specific provision for consideration of humanitarian factors. As there is nothing explicit in the extradition treaty to prevent the Minister from taking them into account, he should have done so.

(b) If the Court concludes that the extradition treaty is worded so as to preclude consideration of humanitarian factors, those factors should nevertheless be taken into account. This is required by New Zealand's commitment to the norms reflected in instruments such as the International Convention on Civil and Political Rights (1966) 999 UNTS 171 (ICCPR), the European Convention on Human Rights (1955) 213 UNTS 221 (the European Convention) and the New Zealand Bill of Rights Act 1990 (NZBORA). If necessary, this Court should overrule *Yuen Kwok-Fung*.

The treaty and legislative background

[9] To put Mr Deliu's arguments in context, we need to describe briefly the extradition treaty and the Act. We begin with the extradition treaty.

The extradition treaty

[10] The extradition treaty was entered into between Poland and the United Kingdom in 1932. Its provisions were extended to New Zealand as a result of the Poland (Extradition: Commonwealth of Australia & New Zealand) Order in Council 1934. It is preserved by s 104(2) of the Act.

[11] By art 1 the extradition treaty provides:

> The high contracting parties engage to deliver up to each other, under certain circumstances and conditions stated in the present treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in article 3, committed within the jurisdiction of the one party, shall be found within the territory of the other party.

[12] Article 3 sets out the offences for which extradition may be sought. They include the offences alleged against Mr Bujak. Under art 4 each party reserves the right to refuse to surrender one of its own citizens to the other. Articles 5 – 7 set out circumstances where extradition must not be granted, including *autrefois acquit* or *convict* (art 5), undue delay (art 6) and where the proposed extradition relates to an offence of a political character (art 7). Article 10 provides:

> If the requisition for extradition be in accordance with the foregoing stipulations, the competent authorities of the State applied to shall proceed to the arrest of the fugitive.

[13] The extradition treaty then goes on to deal with other matters such as the standard and nature of evidence required before a person's surrender can be ordered and the timeframe within which the decisions must be made.

[14] There is no explicit mention in the extradition treaty of humanitarian considerations. An important issue in the appeal is whether the treaty permits the Minister to take account of such considerations or is inconsistent with that.

The Act

[15] Broadly the Act envisages a two stage process. First a court must determine whether a person is eligible for surrender, then the Minister must decide under s 30 whether the person is to be surrendered. The present appeal concerns the latter stage.

[16] Section 30 provides for both mandatory and discretionary restrictions on surrender. For present purposes only those dealt with in s 30(2) and (3) are relevant. Section 30(2) provides that the Minister must not determine that a person is to be surrendered in certain circumstances, including where:

(a) A mandatory restriction in s 7 applies; or

(b) The person faces a risk of torture if extradited.

[17] Under s 7 a mandatory restriction on surrender exists in relation to (among other things):

(a) Offences of a political character (s 7(a));

(b) Situations where the person may be prejudiced, prosecuted or punished "by reason of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions" (s 7(b) and (c));

(c) Persons who suffer mental disabilities (s 7 (e) and (f)).

[18] Section 30(3) deals with discretionary restrictions on surrender. It provides that the Minister may determine that a person should not be surrendered if it appears to the Minister that (among other things):

(a) The person may suffer the death sentence (s 30(3)(a));

(b) A discretionary restriction on surrender applies under s 8 (s 30(3)(b));

(c) "[C]ompelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person" (s 30(3)(d));

(d) The person should not be surrendered for any other reason (s 30(3)(e)).

[19] Discretionary restrictions on surrender under s 8 arise where:

(a) It would be unjust or oppressive to surrender the person because of the trivial nature of the case, a lack of good faith in pursuing it or undue delay (s 8(1));

(b) The person is already facing other charges in New Zealand (s 8(2)).

[20] Sections 11 and 105 of the Act are also important. Section 11(1) provides:

> If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.

Section 11(2) provides that, despite s 11(1), "no treaty may be construed to override" certain provisions of the Act. These include s 7 (mandatory restrictions), ss 30(2)(b) (return to torture) and 30(3)(a) (return to suffer the death penalty).

[21] This Court considered the effect of s 11 in *Yuen Kwok-Fung*. The Court characterised s 11 as "a very strong direction", by virtue of which the Act was overridden by inconsistent treaty provisions: at [15]. The Court described the process contemplated by s 11 as a "reconstruction" of the Act. It illustrated the point by reference to the discretionary grounds at [17]:

> The discretionary grounds provisions help illustrate the operation of s 11(1). If a treaty had no discretionary ground, New Zealand, as the requested state, would not under the treaty be able to refuse surrender on a discretionary ground. To do so would be to breach its basic obligation to surrender the accused person. In such a situation s 11(1) would require s 8 not to be applied or in effect require it to be read out of the Act. By contrast, if, as in the present case, the discretionary grounds in the treaty are broader than

> those in the Act, they are read into the Act which is then construed appropriately. The question in this case is how that is to be achieved.

As can be seen, it is necessary in terms of s 11 to determine the scope of the relevant treaty in order to determine what is consistent or inconsistent with it.

[22] The Court then went on to note the qualifications in s 11(1) at [18]:

> The direction in s 11(1) is not unqualified. Subsection (2) (like s 3(3) of the 1965 Act) qualifies the basic proposition in subs (1) by excepting basic protections in the Act from the override. It accordingly contemplates the prospect that the Act may override a particular treaty. That apparent exception to the principle that treaties must be complied with may be explained in three ways. First, the basic protections in paras (a) – (c) are routinely included in bilateral extradition treaties or in one case (the torture exception) in a very widely accepted multilateral treaty …; and, so far as para (d) is concerned, it is not in general the practice for extradition treaties to dictate whether the executive or the judiciary is to exercise a particular function. Secondly, subs (2) is in effect a direction to the executive that in negotiating extradition treaties it is to ensure that the listed protections are incorporated; such directions are expressly given by ss 100 and 101 of the Extradition Act 1999 …. Thirdly, the protections stated in subs (2) essentially look to treaties concluded in the future. That arises from subs (3) which makes s 11 subject to s 105, a provision concerned with treaties in force when the 1999 Act came into force. ...

[23] This brings us to s 105. It provides:

> **105 Certain conditions in Extradition Act 1965 continue to apply**
>
> (1) Subsection (2) applies to any Order in Council referred to in subsection (1) or subsection (2) of section 104 that has not been amended and has not ceased to have effect since the commencement of this Act.
>
> (2) If this subsection applies,–
>
> (a) This Act applies in relation to the extradition country to which the Order in Council relates subject to conditions to which the extradition country was subject–
>
> (i) Under subsections (1) to (6) of section 5, section 5A, and section 9(1)(f) of the Extradition Act 1965; or
>
> (ii) By virtue of the operation of section 5(7) of that Act; and
>
> (b) Sections 7, 8 and 30(3)(d) (including where section 30(3)(d) is applied under section 49) of this Act do not apply in relation to the extradition country to the extent that they are

> inconsistent with any provision of the relevant extradition treaty.

[24] The extradition treaty in this case falls within s 105. As with s 11, s 105 requires an assessment to be made of the scope of the relevant treaty so that a view can be reached as to its consistency or inconsistency with the provisions enumerated in s 105(2)(b).

Discussion

[25] We propose to order our discussion under three headings – the role of humanitarian considerations in extradition decisions, the scope of the extradition treaty and the humanitarian concerns at issue. We then summarise our conclusions.

The role of humanitarian considerations in extradition decisions

[26] On the basis of the arguments presented, there are two dimensions to this issue, namely the role of humanitarian considerations under the Act and their role in other jurisdictions. We deal with each in turn.

(i) Under the Act

[27] As will be apparent from the brief outline of relevant provisions from the Act given at [15] – [24] above, there is scope for the Minister to take account of humanitarian considerations when making a decision under s 30 in relation to non-New Zealand citizens such as Mr Bujak. In particular:

(a) There is an absolute prohibition on return to torture, which applies even if it is inconsistent with the relevant treaty (s 30(2)(b) and ss 11(2)(c) or s 105(2)(b)).

(b) Some of the mandatory restrictions in s 7 are humanitarian in character. They will apply to treaties governed by s 11 even if inconsistent with them (s 11(2)), but not to treaties governed by s 105 which are inconsistent with them (s 105(2)(b)).

(c) The discretionary consideration in s 30(3)(d) (see [18](c) above) clearly relates to humanitarian factors, although the Minister will only be able to take them into account where that is consistent with the relevant treaty (s 11(1), s 105(2)(b) and *Yuen Kwok-Fung*).

[28] Mr Deliu argued that s 30(3)(e) also permitted the Minister to take account of humanitarian factors. Under s 30(3)(e) the Minister may determine that a person should not be surrendered "[f]or any other reason". While this is a broad catchall phrase, it does refer to "other reasons" (ie, reasons other than those stated in the preceding paragraphs of the subsection). While it is possible that it may cover circumstances of a humanitarian nature, it cannot be used as a mechanism to circumvent the restrictions in s 105(2)(b), which was the effect of Mr Deliu's argument.

[29] As we have said, the prohibition on return to torture is absolute. This reflects New Zealand's obligations as a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85 (the Torture Convention). "Torture" is broadly defined in art 1 of the Convention to mean:

> … any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

As "torture" is defined to include severe mental suffering, albeit deliberately inflicted, it is arguable that the prohibition on returning to torture extends to a return to severe mental suffering. It could, then, accommodate at least some serious humanitarian concerns where a public official is involved. As we indicate in the discussion which follows, this approach has been adopted in relation to prohibitions against torture or cruel or degrading treatment in other jurisdictions. We will address its implications for this case later in this judgment.

(ii) More generally

[30] Mr Deliu argued that New Zealand had committed itself to certain basic values in the NZBORA and the ICCPR and, consistently with other jurisdictions, should apply those values in extradition decisions when appropriate.

[31] This is a large topic, which we cannot address comprehensively in this judgment: see, for example, Clayton & Tomlinson *The Law of Human Rights* (2ed 2009) at [8.117] – [8.124] and Nicholls, Montgomery & Knowles *The Law of Extradition and Mutual Assistance* (2ed 2007) ch 7. Further, decisions from overseas jurisdictions must be considered in their legislative context. Accordingly we do not propose to traverse all the decisions to which Mr Deliu referred. What is clear, however, is that even where humanitarian considerations may properly be taken into account, they must be compelling.

[32] We begin with the decision of the European Court of Human Rights (ECHR) in *Soering v United Kingdom* (1989) 11 EHRR 439. Mr Soering was wanted in the United States for murder. He argued that the United Kingdom had breached art 3 of the European Convention by agreeing to surrender him to American authorities to face murder charges in Virginia. Article 3 provides that "[n]o-one shall be subjected to torture or to inhuman or degrading treatment or punishment". Mr Soering said that if he was convicted and sentenced to death he would suffer the so-called "death row phenomenon" and this would contravene art 3. The "death row phenomenon" includes features such as the process by which the death sentence could be imposed following a finding of guilt and the considerations relevant to that, the long delay (on average six to eight years) between imposition of the sentence and its being carried out, the circumstances of detention in the intervening period and the psychological trauma and emotional stress associated with these various features of the process.

[33] In the course of its reasoning the Court noted the competing considerations at play. It said at [89]:

> … Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger

> international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

[34] The Court concluded that there was a real risk that Mr Soering's art 3 rights would be breached: at [111]. It emphasised the very long time spent on death row in extreme conditions, including the associated emotional impact, and Mr Soering's personal circumstances, including his age and mental state at the time of the offence. The Court also noted that the legitimate purpose of extradition could be achieved by another means that would not involve such suffering (ie, trial in Germany).

[35] Mr Soering had also alleged a breach of art 6, which deals with the rights of those charged with offences. The Court dismissed that claim but said that it did "not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country": at [113].

[36] The House of Lords applied *Soering* and other decisions of the European Court in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. The issue was whether, in circumstances where art 3 of the European Convention was not engaged, a person who faced removal from the United Kingdom could argue that other provisions of the Convention would be breached by his or her removal, for example, art 2 (the right to life). The House of Lords held that other articles could be relied on, in particular art 2, art 4 (prohibition on slavery and forced labour), art 5 (right to liberty and security), art 6 (right to a fair trial), art 7 (no punishment without law), art 8 (right to respect for family and private life) and art 9 (freedom of thought, conscience and religion). However, Lord Bingham emphasised that "successful reliance demands presentation of a very strong case" and that the test was "stringent": at [24]. Lord Steyn said that "a high threshold test will always have to be satisfied" and that it was necessary "to establish at least a real risk of a flagrant violation of the very essence of the right before other articles [than art 3] become engaged": at [50]. Finally, Lord Carswell noted that the European Court "has

consistently stated that before any article of the Convention other than article 3 could be regarded as engaged, it would require an extremely serious breach of the provisions of that article": at [68]. Lord Carswell said a "flagrant" breach was required, by which he meant "the right in question would be completely denied or nullified in the destination country": at [69]. The House of Lords has recently reiterated the requirement for flagrancy: see *RB (Algeria) v Secretary for the Home Department* [2009] 2 WLR 512; see also *R (Wellington) v Secretary of State for the Home Department* [2009] 1 AC 335 per Lord Hoffmann at [28] – [29].

[37] These cases concerned provisions which conferred open-ended discretions on members of the executive, which were construed in the context of human rights legislation. The current United Kingdom extradition legislation, the Extradition Act 2003, specifically provides for human rights considerations to be taken into account by judicial officers in extradition decisions (see ss 21 and 87), but similar principles to those discussed above will presumably be applied: see Nicholls, Montgomery & Knowles ch 7.

[38] A similar approach has been adopted in Canada, where the Supreme Court has held that the test is whether ordering extradition would "shock the conscience" or whether the fugitive "faces a situation that is simply unacceptable": see the discussion in *Lake v Canada (Minister of Justice)* [2008] 1 SCR 761.

[39] It has been held that the prohibition on torture or cruel or degrading treatment or punishment in art 3 of the European Convention may operate in some situations where humanitarian considerations relating to physical or mental infirmity are raised. For example, in *Bensaid v United Kingdom* (2001) 33 EHRR 10 the ECHR considered the position of a schizophrenic who was suffering from a psychotic illness for which he was receiving treatment in the United Kingdom and whom the United Kingdom sought to expel. He argued that his art 3 rights would be violated if he were to be expelled. The ECHR said at [37]:

> Deterioration in the applicant's already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (eg withdrawal and lack of motivation). The Court considers that suffering associated with such a relapse could, in principle, fall within the scope of article 3.

However, it went on to say at [40]:

> The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of [*D v United Kingdom* (1997) 24 EHRR 423] where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts.

[40] The House of Lords considered this and other decisions of the ECHR in *N v Secretary of State for Home Department* [2005] 2 AC 296, a case where the applicant suffered from HIV/AIDS. She was to be returned to Uganda where, it was accepted, she would not receive the medical attention which she needed (and would receive in the United Kingdom), with the result that she would die within a year or two of her return (as opposed to surviving for many years in the United Kingdom). The House of Lords concluded that art 3 could be invoked in this type of case, if it could be shown "that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying": per Lord Hope at [50]; per Baroness Hale at [69]; and per Lord Brown at [94]. On the facts, this very high test was not met.

[41] In principle, we see no reason why this approach could not apply under the Act, through the prohibition on torture, although that is not a point on which we need to express a final view, for reasons that will become apparent. But by way of illustration, in argument in the High Court, and also in this Court, Mr Deliu raised the position of a hypothetical fugitive under the extradition treaty who had a very short life expectancy as a result of a terminal illness. He said that if the extradition treaty excluded consideration of humanitarian factors, the requesting country would be entitled to insist upon the person's return despite the terminal illness. Gendall J accepted that this was a possible outcome, but said that the answer lay in diplomatic channels: at [78]. Before us, the Crown said that this was the correct approach.

[42] But if the concept of "torture" were to be interpreted consistently with the approach taken to art 3 in the authorities mentioned above, this type of case could be

dealt with by means of the prohibition on a return to torture. A possible difficulty with this analysis is that art 3 refers to cruel or degrading treatment as well as to torture, and those terms have been held to be wider than torture: see *Ireland v United Kingdom* (1978) 2 EHRR 25 at [167]. But despite that, we think it is arguable that the prohibition on a return to torture could cover extreme cases of the type represented by Mr Deliu's hypothetical example.

[43] To summarise the international authorities, if the Minister was entitled to take humanitarian considerations into account in the present case, he would be entitled to impose a stringent test. In other words, the Minister would not be entitled to deny the requesting state the ability to try a person for offences committed within its territory on the basis of human rights or humanitarian concerns unless they were sufficient to meet a very high standard, or, as the Canadian Supreme Court put it, unless the suspected offender's return would shock the conscience. This is, however, subject to the terms of the relevant extradition treaty, which might allow for a less rigorous standard or for more expansive grounds, as was the case in *Yuen Kwok-Fung*.

The scope of the extradition treaty

[44] Mr Deliu argues that because the extradition treaty does not specifically exclude consideration of humanitarian concerns, they may legitimately be taken into account. In our view, that is a strained and artificial reading of the extradition treaty.

[45] The extradition treaty sets out the basis on which the contracting states have agreed that each will meet extradition requests from the other. Where a request is made consistently with the terms of the extradition treaty, the requesting state is entitled to the return of the fugitive. As we have already noted, the extradition treaty provides that extradition cannot occur in certain circumstances (see [12] above). Nothing in the extradition treaty enables the requested state to deny a request on the basis of humanitarian or human rights concerns. (This may reflect the vintage of the extradition treaty, as some more modern treaties do, we understand, provide for the denial of extradition requests on the basis of humanitarian or discrimination concerns: see Aughterson *Extradition: Australian Law and Procedure* (1995) at

171.) To the extent that the extradition treaty is inconsistent with the Act in recognising humanitarian concerns, the extradition treaty prevails: s 105(2)(b) of the Act.

[46] There is a single exception to this, and that relates to a return to torture. Although there is no prohibition in the extradition treaty on returning a fugitive to torture, that is absolutely forbidden under the Act. The prohibition on a return to torture provides the only basis on which the extradition treaty can be "overridden" in this context.

[47] As will be apparent, we accept the primacy of the extradition treaty vis-a-vis the Act. That follows from this Court's decision in *Yuen Kwok-Fung*. Mr Deliu indicated that he proposed to ask us to overrule that decision if necessary. Although he did not abandon that argument, he did not press it with any vigour at the hearing. In any event, *Yuen Kwok-Fung* is a recent decision this Court, sitting with five Judges, and, quite apart from that, we consider that it is correct.

Humanitarian concerns

[48] As we have said, Mr Deliu identified three matters under the general rubric of humanitarian considerations: see [7] above. However, the principal focus of his argument was on the first, that is, the state of Mr Bujak's health and the impact that travel and incarceration would have on him. We think Mr Deliu was right to focus on this aspect. As the cases discussed above indicate, it is difficult to resist extradition on the basis of breach of fair trial rights, particularly where delay is part of the complaint and the fugitive has been substantially responsible for the delay: see the discussion in *Gomes v Trinidad and Tobago* [2009] 1 WLR 1038 at [18] – [30] (HL) in an analogous context.

[49] In relation to health issues, Mr Bujak relied on a letter dated 30 September 2009 from Mr Bujak's general practitioner, Dr Hunter, to the Minister. Given its importance, we quote Dr Hunter's letter in full:

> I have been asked to provide a medical report on behalf of my patient, Slavek Bujak.

I have known Mr Bujak since March 2005 when I became his general practitioner.

He has severe physical and psychological problems which I believe extradition to Poland and travel back to Poland would exacerbate.

1. He suffers from a moderately severe anxiety disorder. He often feels shaky, a tight knot in his stomach, headaches, difficulty sleeping. He takes regular medications to treat his anxiety concerns.

   Because his English is limited, counselling is somewhat difficult.

2. Depression. Since 2006 he has suffered from a moderately severe depression. The symptoms are low mood, sleep disturbance, feeling hopeless and in despair, irritability and suicidal thoughts. He takes antidepressant medication daily.

3 Low back injury. On 31.7.06 he bent over during his work as a builder to pick up a heavy beam and sustained a back injury. He suffers from severe low back pain which radiates to his left thigh with numbness and tingling.

   This injury has proved very persistent and difficult to treat.

   He is taking anti-inflammatory medication, analgesics, attended physiotherapy, seen two musculoskeletal specialists and an MRI back of his back which shows damaged discs at 4th and 5th lumbar levels, had steroid injections, seen an orthopaedic back specialist and a pain management specialist.

   He remains with disabling, low back and leg pain.

4. Visual impairment. He is almost blind in the left eye. He had trauma to his left eye in Poland in 1985 and had left cataract surgery then.

   In 2005 a branch flicked into his left previously injured eye and he now has another dense left cataract and scarring in his left eye. He is on the waiting list for complex ophthalmic surgery for this with no guarantee of useful vision subsequent to this surgery.

For all these reasons, I believe that extradition to Poland, incarceration in a Polish jail, even the 30 hour plane trip back, would all seriously jeopardize his health and that compassionate consideration of his various quite disabling health problems should be taken into account when deciding if extradition is granted.

[50] We should also note that we were advised that Mr Bujak has been on a hunger strike since the Minister made his decision on 6 November, so that his condition now may be materially worse that it was when Dr Hunter provided his letter. Mr Deliu said that Mr Bujak has been hospitalised as a result of his refusal to take food. However, to the extent that Mr Bujak's medical problems have worsened

as a result of that refusal, Mr Bujak has caused his own difficulties. Accordingly, we propose to put that development to one side, and focus on the position as it was when the Minister made his decision.

[51] As Mr Deliu emphasised, in the final paragraph of this letter, Dr Hunter expressed himself in strong terms about the impact that travel and incarceration will have on Mr Bujak's health. Nevertheless, we are entitled to look at what underlies the doctor's opinion.

[52] First, it is difficult to see how Mr Bujak's eye injury could possibly be regarded as something that militates against his extradition. He is due to have eye surgery, but there does not seem to be any reason why that could not be obtained in Poland.

[53] Second, Dr Hunter expresses the opinion that Mr Bujak suffers from a moderately severe anxiety disorder and moderately severe depression. As the letter indicates, this opinion is substantially based on self-reporting by Mr Bujak. Putting that to one side, we note that Dr Hunter does not indicate what underlies the disorders. Dr Hunter has been treating Mr Bujak since March 2005, shortly after he was first arrested so that the District Court could consider whether he was eligible for surrender. Since that time Mr Bujak has been embroiled in litigation about the registration of the Polish freezing order in New Zealand and about his extradition, litigation which has, from his perspective, been notably unsuccessful. In addition, we understand that Mr Bujak has been involved in other civil litigation, and his wife has returned to Poland with their young son. In these circumstances, it is perhaps not surprising that Mr Bujak is feeling anxious and depressed, but it is difficult to see that as something that could preclude his extradition. Assuming that humanitarian considerations may be taken into account, this type of anxiety and depression would not meet the high test required.

[54] Third, there are Mr Bujak's back problems. They may well make a long aeroplane trip uncomfortable for Mr Bujak. But that does not meet the high standard required. Mr Bujak does not seem to be in any different position in this regard than the many other people who suffer from persistent and painful lower back problems.

[55] Finally, if Mr Bujak is subjected to conditions of confinement in Poland that fall below minimum standards, he will have access to remedies both within Poland (through the Office of the Commissioner for Civil Rights Protection) and within the European Community (through the ECHR). The Minister was advised of these avenues for redress, and was entitled to take account of their availability in reaching his decision: see *Gomes* at [33] – [36], discussing fair trial rights.

[56] In summary, the humanitarian concerns raised by Mr Deliu on behalf of Mr Bujak fall well short of the standard of seriousness required on the overseas authorities. Accordingly, assuming that the Minister could take such concerns into account (whether through the prohibition on a return to torture or in some other way), he must inevitably have rejected them in this case. As the ECHR said in *Soering*, there is a strong public interest in suspected offenders who flee to overseas jurisdictions being returned to their home jurisdictions so that their guilt or innocence can be determined. Overseas jurisdictions should not become safe havens for suspected offenders. These observations were echoed in *Gomes* at [36]. While it may be necessary that a suspected offender not be surrendered for humanitarian reasons, that is exceptional. The test is a high one, for understandable reasons.

Conclusion

[57] Accordingly, we agree with Gendall J that the Minister was not obliged to take account of the humanitarian concerns raised on behalf of Mr Bujak in making his decision under s 30 of the Act. They were not consistent with the provisions of the extradition treaty, nor did they fit within the absolute protection provided by the prohibition on a return to torture.

Decision

[58] We dismiss the appeal. The appellant must pay the respondent costs for a standard appeal on a band A basis, plus usual disbursements. We certify for two counsel.

Solicitors:
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