DRAFT

[2019] EWHC 816 (Admin)

No. CO/10241/2013

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Thursday, 31st January 2019

Before:

LORD JUSTICE BEAN

MRS JUSTICE FARBEY

B E T W E E N:

ZIBALA — Applicant

- and -

PROSECUTOR GENERAL'S OFFICE,
THE REPUBLIC OF LATVIA — Respondent

ANONYMISATION APPLIES

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MR D. JOSSE QC and MR B. KEITH (instructed by Lawrence and Co) appeared on behalf of the Applicant.

MR T. COCKROFT (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

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J U D G M E N T

LORD JUSTICE BEAN:

1 The applicant was accused of an offence of dishonesty allegedly committed in Latvia in 2009. She arrived in the UK in April of that year and gave birth to a son , who is to be referred to only as "V", on 3 September 2009. Her extradition to Latvia was ordered by District Judge Arbuthnot (as she then was) on 26 July 2013.

2 Ms Zibala appealed and her appeal was dismissed by a Divisional Court comprising Moses LJ and Collins J on 9 April 2014. It is reported as *Brazuks and Ors v Latvia* [2014] EWHC 1021 (Admin). She absconded before her extradition could take place.

3 On 19 July 2018 she was arrested for domestic offences by the Norfolk Police. On 18 September 2018 she was conditionally discharged in the Magistrates' Court in relation to those offences. Extensions of time for her removal to Latvia were granted by the High Court on 24 September and 8 October 2018.

4 On 29 October 2018 an application was made to the High Court to reopen the determination of her appeal against extradition and for an injunction to stay her extradition to Latvia. Jeremy Baker J considered these applications on the papers and by an order of 5 November 2018 refused both of them. After setting out the history of the proceedings, he wrote:

> "There is nothing relating to the circumstances of the applicant or her son which are sufficient to justify the reopening of the appeal. Moreover, given that the applicant's now nine-year-old son is currently looked after by Norfolk County Council Children's Services who are due to file statements in the Family Court or an interim care order in respect of him, there is nothing which makes it necessary for the court to reopen the decision in order to avoid real injustice. Likewise, there are no sufficient grounds for an injunction to stay the applicant's extradition to Latvia."

5 The order stated after the judge's signature:

> "There is no right to renew the application to reopen the determination of the extradition appeal. Any application to renew the application for an injunction to stay the applicant's extradition must be lodged at court and served on the respondent by 2.00 p.m. on 6 November 2018."

6 On 8 November an oral hearing took place before Ouseley J of applications to reopen the decision on the extradition appeal and for an injunction to stay the applicant's removal. The National Crime Agency were added as a second respondent, the Latvian Prosecutor's Office being already first respondent. Ouseley J ordered that the National Crime Agency were not to remove the applicant until further order of this court and adjourned the application to reopen the appeal. He directed that within 28 days Norfolk County Council Social Services were to provide the court and the parties with a report concerning the applicant's son V.

7 He ordered that in addition to issues relating to the substance of the matter, at the adjourned hearing the parties would need to address whether there is a right to a renewed oral hearing on a reopening application in an extradition case under the Criminal Procedure Rules. He referred to his own judgment in *Armitage v SOCA and CPS* [2012] EWHC 476 (Admin) and to the language of the Civil Procedure Rule 52.30.

8 Procedure in this court relating to extradition appeals has since the coming into force of the Criminal Procedure Rules 2015 been governed by those rules, in particular Rule 50, rather than by the Civil Procedure Rules. Criminal Procedure Rules 50.17 and 50.27 provide, so far as material:

> "50.17 - (1) The general rule is that the High Court must exercise its powers at a hearing in public, but...
>
> (b) despite the general rule, the court may determine without a hearing ...

(iv) an application for permission to reopen a decision under rule 50.27 (Reopening the determination of an appeal).”

9 Criminal Procedure Rule 50.27(1) provides:

"This rule applies where a party wants the High Court to reopen a decision of that court which determines an appeal or an application for permission to appeal.

(2) Such a party must—

(a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and

(b) serve the application on the High Court officer and every other party.

(3) The application must—

(a) specify the decision which the applicant wants the court to reopen; and

(b) give reasons why—

(i) it is necessary for the court to reopen that decision in order to avoid real injustice

(ii) the circumstances are exceptional and make it appropriate to reopen the decision, and

(iii) there is no alternative effective remedy.

(4) The court must not give permission to reopen a decision unless each other party has had an opportunity to make representations."

10 Mr Josse QC and Mr Keith for the applicant draw attention to the contrasting wording between Criminal Procedure Rule 50.27 and Civil Procedure Rule 52.30. In particular, (5) and (7) of Civil Procedure Rule 52.30 provides:

"(5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.

> ...
>
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final."

11 They submit that, since Criminal Procedure Rule 50.27 does not expressly debar an oral renewal hearing of an application to reopen, then if the applicant applies for one, such a hearing should be granted "both as an entitlement and in fairness." They remind us that these proceedings are of a penal nature and that decisions of high authority say, in the words of Lord Lloyd-Jones in the case of *RB (Algeria) v SIAC* [2018] AC 418 at para.29, that:

> "It is a fundamental principle of the common law that in enacting legislation Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear."

12 Later in the same paragraph Lord Lloyd-Jones cited the well-known observations of Lord Hoffman in *R v Secretary of State for the Home Department, Ex P Simms* [2002] AC 115 at 131:

> "Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

13 Neither of those authoritative statements is of course contentious. The decision in *RB (Algeria)* itself, as Mr Josse accepted, does not inform the decision we have to make in the present case. The Supreme Court decided in *RB (Algeria)* that the appellant, who had formerly been but was no longer lawfully detained, could not be made subject to conditional bail since that was inconsistent with his right to be at liberty.

14 In my judgment the submission that the absence of express provision in Criminal Procedure Rule 50.27 prohibiting renewal of an application to reopen is entirely misconceived.

15 The Extradition Act 2003 provides for an appeal from an order of the Magistrates' Court to this court. Nowadays, that requires permission, but that is not an issue in the present case.

16 Once an appeal has been dismissed, as Ms Zibala's appeal was in 2014, and the time for any application to seek to take the matter to the Supreme Court has passed, that is the end of the litigation. The only exception is where the High Court is asked to reopen a decision. Such an application may be "determined" without an oral hearing by virtue of Rule 50.17(1)(b)(iv). Once the High Court judge has refused the application on the papers, it has been "determined". Subject to any contrary provisions in primary statute or in court rules, a court determines an application, appeal or trial once, not twice.

17 There are of course significant exceptions provided for in court rules. One example is application for permission to appeal from the Magistrates' Court to the High Court in an extradition case: Criminal Procedure Rule 50.22(2) so provides. Another even better known exception in the Civil Procedure Rules is an application for permission to seek judicial review, which if determined in the first instance (as most applications are) on the papers may be renewed to an oral hearing subject to the provisions of Civil Procedure Rule 54.12.

18 In each case, the right to renew orally exists because the rules provide for it expressly, but in the absence of such a provision a court's determination is final. That applies to applications for permission to reopen a decision of the High Court, whether a Divisional Court or a single judge is determining an extradition appeal. It follows that we have no jurisdiction to consider this application to renew orally the application made to Jeremy Baker J to reopen the 2014 decision of this court. Mr Josse QC conceded, entirely correctly, that we cannot sit as a Court of Appeal from Jeremy Baker J either.

19 Counsel for the applicant invite us, alternatively, to treat this hearing as a second application for permission to reopen. They submit that the decisions of Jeremy Baker J refers to Social

Services' material concerning V on which he had not invited submissions, and which the appellant's advisers had not seen.

20 I would refuse the alternative application for each of the following reasons. Firstly, it is not Jeremy Baker J's decision which would have to be reopened, but that of the Divisional Court in 2014.

21 Secondly, the jurisdiction to allow a second application for permission to reopen a decision, whether in the extradition jurisdiction under Criminal Procedure Rule 50.27 or in the Civil Courts under Civil Procedure Rule 52.30, may exist in theory, but Mr Josse QC and Mr Keith could not point to any case in which it has ever been exercised. For my part, I find it difficult to imagine circumstances in which it would be appropriate for a court to allow a second application. Even first applications for permission to reopen are overwhelmingly without merit: see the notes to Civil Procedure Rule 52.30 in the Civil Court Practice, although there are some, very rare, examples of first applications succeeding.

22 Thirdly, even if one ignored the fact that this is a second attempt to reopen, permission to reopen may only be granted, as Criminal Procedure Rule 50.27(2)(a) makes clear, if the application is made as soon as possible after the applicant becomes aware of the ground for doing so.

23 In the reported decision of this court concerning Ms Zibala and others in 2014, the position of V, then aged four and a half, was prayed in aid by the appellant; but the court, having referred to it, nevertheless, dismissed the appeal. The grounds on which it is said that the 2014 decision should now be reopened, on which we have not heard detailed argument, are essentially that the impact on V of his mother's removal to Latvia to face trial would be much greater now than it would have been in 2014 and that increased impact on V now makes it disproportionate for extradition to be carried out, having regard to his and his mother's Article 8 rights.

24 Assuming for the moment that factually that is the case, it is something of which the applicant has been aware for years. It would in my view be wholly contrary to public policy to allow a fugitive whose extradition appeal has failed and who has then absconded to reappear five years later when arrested and then argue that the appeal decision should be reopened because of the worsened position of the fugitive herself or her child. I would, therefore, refuse the alternative application to reopen the 2014 decision.

25 It follows that the stay on removal granted by Ouseley J must be discharged, since a stay on removal is in effect a form of injunction and an injunction must be ancillary to a substantive right. Mr Josse accepted that if the court was against him on jurisdiction and on the application to reopen, then the injunction would have to be discharged. The applicant now has no legal right to remain in the UK and there is no basis on which an injunction or stay can continue.

26 I would therefore declare that we have no jurisdiction to consider a renewal of the application to reopen made to Jeremy Baker J; refuse the second application to reopen the decision of the Divisional Court in 2014 to dismiss Ms Zibala's appeal against extradition; and discharge the injunction or stay granted by Ouseley J.

MRS JUSTICE FARBEY:

27 I agree.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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