

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



No. CO/3542/2019

Royal Courts of Justice

Wednesday, 24 June 2020

[2020] EWHC 2465 (Admin)

Before:

MR JUSTICE KERR

B E T W E E N :

DAMIAN BAKOWSKI

Appellant

- and -

DISTRICT COURT IN SLUPSK, POLAND

Respondent

MISS DANIELLE BARDEN (instructed by McMillan Williams Solicitors) appeared on behalf of the Appellant.

MR DAVID BALL (instructed by CPS Extradition Unit) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE KERR:

Introduction

1 This is an appeal against a decision to order the appellant's extradition to serve a sentence in Poland for burglary. The appeal is brought with the permission of Julian Knowles J on a single ground arising under section 21 of the Extradition Act 2003 and article 8 of the European Convention on Human Rights. It is said that extradition to serve the sentence would be disproportionate because of the impact on the appellant and his family and, in particular, his son, who has an autistic spectrum disorder (**ASD**) and learning difficulties.

The Facts

2 The offending took place from 10 to 12 November 2010 in a town in Poland, Lębork. The matter which led to the appellant's conviction is that he obtained entry to a storehouse and misappropriated or stole grocery products to the total value of the equivalent in pounds sterling of about £6,770 at today's exchange rate. The goods taken were sugar and oil in quite substantial quantities, about a tonne of each.

3 He was convicted in September 2011. On 5 October 2011 he was sentenced to a suspended sentence of one year and two months' imprisonment suspended for three years, with probation supervision and an obligation to pay compensation.

4 His son was born on 15 March 2012, some five months after the sentence. In October 2012 he sought permission to travel to the UK and provided an address. That permission was granted. He came to live in this country in November 2012 and was joined by his wife and son in March 2013. On 11 March 2013, he made a statement confirming his obligation to notify the probation service in Poland of his circumstances and keep up payments of compensation in instalments.

5 The three year period of suspension expired in September 2014, but in November 2014 the sentence was activated because he had not paid the whole amount of compensation ordered. I am told that one year, one month and 29 days of the sentence remains to be served. The

decision to activate the sentence was confirmed on 21 January 2015 and the appellant was summoned to prison but did not go. Accordingly, in March 2016 a wanted notice was issued.

- 6 The Polish authorities did not locate the appellant in Poland and a conviction European Arrest Warrant was then issued by a judge of the District Court in Slupsk on 5 December 2017. By that stage the appellant's son, Oskar, was four years old. A year later, aged five and a half or so, he was diagnosed with ASD, having just started at a primary school in Lincolnshire.
- 7 In January to April 2019, he was assessed by Lincolnshire County Council and, in the usual way, professional advice and reports were obtained from education professionals, including an educational psychologist, for the purpose of assessing his educational needs. The process culminated in a report issued in April 2019, as a consequence of which Oskar began to receive 15 hours a week of additional support on a one to one basis, while continuing his schooling in the mainstream primary school he was attending.
- 8 Unfortunately for the family, the appellant was then arrested on 17 May 2019 and brought before the District Judge the next day for an initial hearing. After spending about 14 days in custody, he was released on conditional bail at the end of May 2019 with a surety of £2,500, a residence requirement at the family address in Lincoln and an electronically monitored curfew and surrender of travel documents.
- 9 The effective hearing took place before District Judge Robinson during the school summer holiday period, in August 2019. When that hearing took place, the most recent school report available was the end of year report from Oskar's class teacher, which provided some grounds for optimism about his progress compared to the significant learning needs and difficulties documented in the earlier reports, which had led to the decision to provide the additional 15 hours a week of one to one support.
- 10 At the hearing on 22 August 2019, the judge had much of that evidence – if not all of it – and, in addition, a report from a psychologist, Dr Todd, instructed on behalf of the appellant, commenting on the reports. The judge also had other documents about the family's financial circumstances. The appellant and his wife gave oral evidence at the hearing.

- 11 Between the hearing and judgment being handed down, a letter was prepared in the form of an email from a Mrs Carpino, the special needs coordinator at the primary school. In that letter, Mrs Carpino expressed her serious concern that Oskar's behaviour and condition would deteriorate severely if he were deprived of his father through extradition. The District Judge had that letter before him after the hearing and between hearing and judgment, and before giving judgment indicated that he had read it, but it did not alter his view.
- 12 His judgment was given on 5 September 2019. He decided to order the appellant's extradition. He summarised the evidence heard under the following headings: (i) circumstances regarding the offence and the proceedings (ii) the family's domestic circumstances (iii) the health of Magdalena Bakowska, the appellant's wife (iv) the family's work and financial circumstances and (v) Oskar's circumstances, including consideration of Dr Todd's report.
- 13 His findings were along the following lines. Oskar was suffering from ASD and learning difficulties, and Mrs Bakowska from a depressive disorder of a mild severity. Oskar's ASD and learning difficulties were such that it would be highly likely his behaviour and academic performance would suffer if his father were extradited. Mrs Bakowska's depression would deteriorate to a moderate degree should that happen.
- 14 He found that the family unit would probably be significantly weakened in the event of extradition. He found that the appellant was a fugitive who had known that he had, as part of conditions of suspension of his sentence, to keep up payments of compensation and had not done so, knowing that as a consequence he was required to surrender to prison to serve his sentence. He had not done so and had moved address without notifying the authorities in Poland.
- 15 The judge found that Oskar's circumstances were as he had set out above:
 "... including his diagnosis of ASD and learning difficulties. His behaviour and learning has improved this year and he is currently thriving within the limitations of his condition. Oskar's ASD and learning difficulties will make it highly likely that his behaviour will deteriorate and his academic performance will suffer should [the appellant] be extradited."
- 16 And the judge repeated his findings about the likely impact on Mrs Bakowska's depression and the family unit being weakened. He then reminded himself of the applicable law and the requirement to carry out the usual "balance sheet" exercise ordained by cases such as *Celinski*. No criticism is made of the way the judge expressed the task he was required to undertake.

17 His findings were then recorded in the judgment. He began by commenting on the impact on Mrs Bakowska, who would face an increased burden and financial difficulties. He commented on Dr Todd's evidence about the adverse impact extradition would have on Mrs Bakowska's mental health and at paragraph 53 set out his key findings in relation to the impact of extradition on Oskar. That paragraph is worth setting out in full:

“The most significant consequence of the RP's [requested person's] extradition would be its impact on Oskar, both direct as he would miss his father – and would do so in the context of his limited understanding and disabilities – and indirect as he experiences his mother's distress. Given his particular difficulties it is highly likely that his behaviour will deteriorate and his academic performance will suffer. These are serious matters and Oskar's welfare is the court's primary consideration. However, Oskar would remain with his primary carer and it is notable that notwithstanding Oskar's experience in May albeit temporary, when the RP was remanded into custody, his school report in July speaks to the fact that he is now thriving at school and home and has made great progress with his behaviour. The expert package of support that is in place for him at school and which has facilitated significant improvements for him will remain in place. Dr Todd does not suggest that the scale of any behavioural deterioration or drop in academic performance would be severe nor longer lasting than the period of the RP's absence. There is no suggestion that he is currently difficult to manage behaviourally”.

18 Pausing there, I observe that the first part of that paragraph presents the negative impacts that extradition would have on Oskar. The passage beginning with the word “however” then, as it were, sets the silver lining against the cloud, referring to the package of support then in place, which would remain in place, and that there was no evidence from Dr Todd suggesting that deterioration in behaviour and academic performance would be “severe nor longer lasting than the period of [the appellant's] absence”.

19 The paragraph ends with the words: “[t]here is no suggestion that he is currently difficult to manage behaviourally”. The judge then, in the remaining four paragraphs of the decision, commented on the circumstances of the offence and on the failure to keep up the payments of compensation and to comply with the suspended sentence conditions,, i.e. on what I would call the criminal justice side of the balancing exercise, as distinct from the “impact on family life” side of the balancing exercise.

20 The judge concluded at paragraph 57:

“The negative impact of extradition on Oskar, [the appellant] and Magdalena [Mrs Bakowska] would be serious but not exceptionally serious. Further, that the interference with their private and family life is proportionate to the public interest in their extradition. The factors against extradition are outweighed by those in favour.”

21 The appellant appealed. Permission to appeal was initially refused by Laing J, on the papers, but granted by Julian Knowles J in May 2020. I refused an application to adjourn the appeal, made last week. The appellant wished to rely on a new ground, namely that Poland is no longer to be regarded as a competent judicial authority within article 6 of the Council Framework decision of 13 June 2002 (2002/584/HA). I refused permission for that new point to be taken for reasons already given briefly in writing.

The Appeal

22 I can only allow the appeal if I am satisfied that the decision of the District Judge is wrong. Mr Ball cited much case law, which I need not set out here, in support of his proposition that such is also the position in appeals founded on article 8. He emphasised that it is not for me to conduct the balancing exercise *de novo* unless there is an error of approach or law or perversity, or something of that kind, that would justify me doing so.

23 As to article 8 of the Convention, in the usual way I refer to Baroness Hale's remarks in *R (HH) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25. The question is whether the interference with the private and family lives of the requested person and other family members is outweighed by the public interest in extradition. That public interest always carries great weight. How great depends on the nature and seriousness of the crime involved.

24 Delay since the crimes were committed may diminish the weight to be attached to the public interest in extradition and increase the impact of private and family life. The public interest in extradition is likely to outweigh the article 8 rights of the family unless the consequences of the interference will be "exceptionally severe". The impact of extradition upon children is a primary consideration and of primary importance but can be outweighed by other factors.

25 That is because, as Baroness Hale observed, children need a family life in the way that adults do not because they rely upon the care of others and, above all, need to be loved if they are to become functioning members of the community. There is a strong public interest in ensuring that they are properly brought up and careful attention must be given to what will happen to children where, which is not the case here, the requested person is their sole available carer.

Submissions for the Appellant

- 26 Ms Barden's submissions amounted to the proposition that the District Judge overlooked aspects of Oskar's ASD and learning difficulties and their consequences and the likely effect on them of extradition of his father and, therefore, gave them too little weight in the balancing exercise. She criticised the finding that his academic performance would only drop while his father was away, the finding that the drop in level would not be severe and the finding that he was currently, as at the hearing date, not difficult to manage behaviourally.
- 27 Specifically, she submitted that he had failed to take into account significant elements of Oskar's ASD and learning difficulties. She took me to passages in the reports highlighting Oskar's previous behavioural difficulties in the earlier part of the history and she took me through the details of those findings, including inappropriate social behaviour and lack of appreciation of social norms. She submitted that the judge dealt inadequately with Oskar's inability to access learning independently of adult assistance, the degree of his language disorder, his inability to maintain attention and focus and to interact socially and to understand and act on instructions from adults, among other things.
- 28 In short, Ms Barden submitted that the judge underplayed his vulnerability and susceptibility to sudden sharp and severe deterioration should the father be extradited. She submitted further that the length of the sentence was significant, being nearly two years, which for a child aged about seven to nine is a long time; and that the judge had failed to take this into account.
- 29 She submitted that common sense supported the proposition that Oskar would not be able to regain lost ground on the return of his father after serving his sentence. She said the judge had been wrong to single out and rely on the absence of evidence from Dr Todd explicitly to that effect. She pointed to the factor that, because of his ASD and learning difficulty, Oskar would be unable to understand the reason for his father's absence; and pointed to the experience of deterioration even during the short period of 14 days when the appellant was temporarily in custody while attempting to meet his bail conditions.
- 30 Next, Ms Barden submitted that the judge had been wrong to include in his judgment a finding that Oskar is not currently difficult to manage behaviourally. She submitted that he had placed unjustified weight on the optimistic and upbeat school report from July 2019 and

had overlooked the evidence of continued difficulties with behavioural management, albeit alleviated to a degree in the months leading up to the end of the summer term, whilst starting from a low base of very difficult behaviour.

- 31 Again, Ms Barden cited from the detail of the reports and complained that the judge had inadequately reflected them in his judgment and findings when weighing matters in the scales on the article 8 side of the balancing exercise.
- 32 Those factors, submitted Ms Barden, had led the judge to reach a conclusion not justified on the evidence before him. She invited me, accordingly, to reverse that conclusion and overturn the finding of extradition.

Submissions for the Respondent

- 33 In defence of the District Judge's reasoning, Mr Ball submitted that each of the matters that had formed the subject of Ms Barden's criticisms had been addressed, albeit in some cases briefly, in the judge's findings. The judge was not required to set out all the evidence in depth and detail. Mr Ball produced quotes from the judgment which, he submitted, showed him addressing most, if not all, of the very points relied on by Miss Barden. I need not go through the detail of that exercise in rebuttal.
- 34 Mr Ball also reminded me that it was then for the judge to weigh in the scales the matters falling on the other side of the balance, namely the criminal justice issues. He submitted that it was well open to the judge on the evidence to find that those outweighed the impact that extradition would have on private and family life. The appellant, he reminded me, had become a fugitive, disappearing from the view of the authorities in Poland. He had failed to pay compensation and "his chickens had come home to roost".

Reasoning and Conclusions

- 35 I have not found this case easy. The submissions of Ms Barden were detailed and required careful scrutiny to see whether they do, indeed, amount to more than what Mr Ball characterised as merely rearguing the case below and disagreeing with the conclusion reached on the facts. At times, Ms Barden did appear to be inviting me to ascribe different and greater weight to aspects of Oskar's ASD and learning difficulties than had the judge.

36 It is striking that criticisms are levelled against the judge's treatment of parts of the evidence relevant to Oskar's ASD and learning difficulties, but it is not and could not be suggested that he was unaware of that diagnosis and those difficulties. Nor is it suggested that he was unaware of the task he was required to carry out, nor that he carried it out in a manner that, in terms of method, differs from that mandated by case law. I remind myself that I must not be tempted by the eloquence of Ms Barden to undertake the balancing exercise myself, unless persuaded that the judge got something wrong.

37 I bear in mind that, as Mr Ball accepted in his skeleton argument, on the authority of *Love v USA* [2018] EWHC 172 (Admin), an appellate court such as myself is entitled to stand back and say that the question should have been differently decided because the overall evaluation was wrong, but that I can only do so if, (see *Love* at [26]):

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

38 In the end, notwithstanding Ms Barden's eloquence, I have come to the clear conclusion that her criticisms are not of sufficient magnitude to bring the case within that category. They were beautifully presented and eloquent but, with respect, over-analytical. I was not persuaded that the judge failed to have in mind the long list of features to which Ms Barden pointed and I do not think, in the end, it was realistic to submit that he was not alive to those aspects of Dr Todd's reasoning in his report.

39 The judge was not required to quote the report in full or allude to it more fully than he did. Nor do I think it realistic to suppose that the judge did not have in mind that those points relied on now and below had featured in the needs assessment and had contributed to the decision to offer from Lincolnshire's sparse budget resources to fund support at 15 hours a week. It might have been better if the judge had specifically referred to that package of support but the fact that he did not does not persuade me that he overlooked the difficulties that led to it being available.

40 The key finding in the judgment, in paragraph 53 which I have quoted above, paints a fair and balanced picture of the favourable and unfavourable points that have characterised Oskar's development in recent months and years. I do not find it necessary to go through each element of the judge's findings and reasoning with a fine toothcomb in the way that Ms Barden did. When I stand back and look at his findings and his weighing of those findings

and the conclusions he drew from them in the balancing exercise he carried out, I do not in the end find myself near to being persuaded that his assessment was wrong.

41 The outcome is, of course, very hard on young Oskar and on Mrs Bakowska but that is because of the crime the appellant committed. If the consequences for the family were to be regarded as exceptionally severe in this case, there would be many more cases in which that test would be met than can properly be accommodated within the epithet “exceptional”. There are cases where the balancing exercise can only lead, and must lead, to the conclusion that extradition would be disproportionate but the judge was, I am satisfied, right to decide that this was not one of them.

42 I have the utmost sympathy for Mrs Bakowska and her son. The impression one gets from the reports is close to heart-breaking because the impression is that just when everything is starting to go better, this severe setback hits the family. That is very harsh for the family but, having carefully considered the points made in this appeal, I do not accept that the judgment was unbalanced or its conclusion wrong. I must therefore, with something of a heavy heart, dismiss this appeal.

CERTIFICATE

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