Neutral Citation Number: [2020] EWHC 2693 (Admin)

Case No: CO/1049/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th October 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

AGNIESZKA KICAK	**Appellant**
- and -	
DISTRICT COURT IN KOSZALIN, POLAND	**Respondent**

- -
- -

Mary Westcott (instructed by Lansbury Worthington Solicitors) for the **applicant**
The **respondent** did not appear and was not represented

Hearing date: 8th October 2020

Judgment as delivered in open court at the hearing

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Approved Judgment

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

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THE HON. MR JUSTICE FORDHAM

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

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The appellant is aged 43 and is wanted for extradition to Poland. Extradition was ordered by District Judge Griffiths on 11 March 2020 after an oral hearing. Permission to appeal was refused on the papers by Saini J on 10 June 2020. This is a case which has a number of moving parts and there are quite a few applications before me today. I am going to explain what I have decided to do and then I am going to give some brief reasons that led me to that position in the light of the written and oral submissions made on behalf of the appellant by Ms Westcott. I am going to direct that there be a substantive appeal hearing in this case to take place on the first available date in January 2021 with a time estimate of one day. The Court at that hearing will be able to consider all relevant issues and I will endeavour to deal in my Order with each matter in an appropriate and proportionate way.

Mode of hearing

2. Before I go any further I will deal with the mode of hearing today. This was a BT telephone conference remote hearing. Ms Westcott was satisfied, and I am satisfied, that that mode of hearing did not prejudice the interests of her client. So far as open justice is concerned I am satisfied that the arrangements secured and promoted open justice. The case and the start time for the hearing were all published in the cause list. An email address was given and any member of the press or public could send an email and subsequently make a telephone call and in that way observe this public hearing. By having a remote hearing we eliminated any risk to any person from having to travel to a court room or be present in a court room. I am satisfied that this mode of hearing was appropriate and proportionate.

Wozniak

3. It makes sense first to deal with a new point not raised in the original Grounds of Appeal which were before Saini J. The point was raised promptly thereafter because it featured in the notice of renewal and was then expanded upon in Amended Grounds of Appeal. The point is a very familiar one in Polish cases it arises out of the case of Wozniak (see [2020] EWHC 1459 (Admin)), a case which is due to be heard by the Divisional Court at the beginning of December. The application is to be able to rely on the Wozniak section 2/Article 6 ground with an extension of time and with a stay on any removal pending resolution of that issue. The respondents adopt a neutral position in relation to that application. The position has been encountered in a number of Polish cases in which permission has been granted and stays on removal have been ordered. As in those cases, so in this one, I am quite satisfied that it would be unjust – even leaving everything else to one side – for the appellant to be extradited while a point of principle remains unresolved that is equally applicable in her case.

A general stay of permission to appeal?

4. The next question is whether simply to stay all aspects of this case at the permission to appeal stage, in the light of that response to the Wozniak issue. In my judgment, the appropriate course is to roll up our sleeves and grapple today with each of the other

grounds of appeal being advanced, but bearing in mind the position in relation to the Wozniak issue and looking out for any crossover or link. With Ms Westcott's assistance I have addressed my mind at this hearing to all of the various moving parts of the present case.

Addendum Psychiatric Report

5. I start with the application for an addendum psychiatric report. The District Judge had before her a report from September 2019 from Dr Forrester a psychiatrist and an addendum report also from Dr Forrester dated 17 November 2019. Dr Forrester also gave evidence at the oral hearing before the District Judge. The District Judge's determination was dated 11 March 2020. The application before me is for an extension of the representation order in this case for a further and up-to-date addendum psychiatric report, from the same psychiatrist Dr Forrester, for which an appropriate cost estimate has been provided. The District Judge considered the psychiatric evidence carefully in her judgment. It was relevant to at least two of the issues that were before her, that is to say: the section 25 argument based on oppression arising from mental or physical condition; and the article 8 ECHR argument. She rejected both of those arguments having considered that evidence though she also stated the importance, upon any extradition being actioned, of all those concerned having access to the relevant reports so that they were in an informed position.

6. I am persuaded by Ms Westcott that it is necessary, appropriate and proportionate that I should grant the application today to extend the representation order so that the updating psychiatric report can be prepared. The expectation is that that will be able to take place in the coming weeks. I reach that conclusion having regard to everything that I have read and heard but in particular I have noted the contrast in the appellant's description of her state of mind as it was immediately prior to the hearing before the District Judge and as it now is. In a previous statement immediately prior to the hearing before the District Judge she had recorded that her mental health had 'improved through medication' although 'I have felt very low for a couple of weeks'. There is on the face of it a significant contrast between that description and the most recent statement, put forward as putative fresh evidence but in any event relevant to my evaluation of whether to grant this application. She describes herself as: 'constantly stressed and terrified of going to prison'. She says 'all I do every day is to go to work, come back home, eat, shower, go to sleep about 6pm. I do not know how to enjoy life anymore. My whole life seems to be a bad dream from which I cannot wake up. I feel powerless and helpless. All I want to be as free and happy'. That description engenders in me a sufficient concern so as to justify as necessary an up-to-date evaluation. It is, in my judgment, appropriate and to their credit that the appellant's representatives have sought to secure the continuity of the same clinician (Dr Forrester) even though that may have meant waiting slightly longer. An up-to-date independent evaluation is, in my judgment, necessary and appropriate in this case in the context of the issues that will be before the Court. My decision in that regard does not of course arise in a vacuum. There is no point ordering an addendum report unless it is capable of being material on a relevant ground of appeal. I am satisfied that it is, as I will come on to explain.

Article 8

7. I will deal next with the Article 8 ECHR ground of appeal. I am satisfied that it is reasonably arguable that the District Judge's ultimate conclusion of article 8

compatibility of extradition was wrong. I am satisfied that the that this Court ought to consider that issue at a substantive hearing. Nothing that I say in granting permission to appeal will influence, still less bind, any subsequent Court considering this case. But I will explain what features of this case have led me to my conclusion as to arguability.

8. In order to understand this case it is important in my judgment to note at the outset that there were 3 offences which took place in Poland in 2011 and 2012 involving vehicles and alcohol. The appellant was convicted of all 3 offences and each of them led ultimately to a suspended sentence.

   i) On 18 May 2011 the appellant committed an offence of driving with excess alcohol. Following the timeline through in relation to that first offence the following events have subsequently taken place. She was sentenced on 22 August 2011 to 6 months custody suspended for 2 years. On 21 May 2013 the Polish court activated that suspended sentence (revoking the suspension). On 15 October 2013 the court postponed enforcement of the six-month penalty. It further postponed that penalty on 11 June 2014. Subsequently, and after the appellant came to the United Kingdom on 1 November 2014, the Polish court re-suspended the six-month suspended sentence on 16 February 2015. That was the first of these 3 offences.

   ii) The second such offence took place on 13 June 2011 less than a month after the first. It was another offence of driving with excess alcohol. The timeline in relation to that offence was as follows. On 3 November 2011 the appellant was sentenced to 10 months custody suspended for 4 years. That sentence was activated on 8 May 2013 (the suspension being revoked), just a couple of weeks before the activation of the first sentence. The Polish court postponed enforcement of the 10 month sentence on 14 August 2013 and on 5 March 2014. Then, after the appellant had come to the United Kingdom on 1 November 2014, and had by a letter on 12 February 2015 requested a further postponement (and subsequently as I understand it seeking re-suspension) the Polish court on 11 March 2015 refused any further postponement. That order became final on 27 July 2015 and is the subject of the EAW issued on 12 September 2018 to which these extradition proceedings relate.

   iii) The third such offence took place on 16 June 2012 and was an offence of riding a bicycle while intoxicated with alcohol. The timeline in relation to that matter is shorter. On 17 December 2012 a four-month custodial sentence was passed but again suspended for 4 (or perhaps 5) years. That sentence subsequently remained suspended.

9. There are features of this case, in my judgment, which have real resonance and traction – at least arguably – so far as article 8 is concerned. Those matters are relevant to the balancing exercise that the Court undertakes in an article 8 extradition case. By way of illustration, it is relevant that two offences in close proximity and very similar in nature (the first and second), each leading to suspended sentences, have led the Polish authorities to very different outcomes. As I have explained, one suspended sentence in relation to driving with excess alcohol, though previously activated, was subsequently postponed and then re-suspended. Alongside that, the suspended sentence for the equivalent offence a month later was activated, postponed but has not been re-suspended. That narrative raises a relevant question, at least arguably, in my judgment.

It is relevant to the strength of the public interest considerations in support of extradition in the particular circumstances of the present case. I have searched the papers, with Ms Westcott's assistance, but have not been able to derive any explanation as to why it is (after the appellant came to the United Kingdom) that one suspended sentence should be re-suspended in the other lead to the pursuit of extradition. It may be that there is a cogent explanation. It may be that such is the respect that the domestic courts in this country should give to the Polish authorities that no explanation is needed. It may be sufficient that the second offence was clearly aggravated by the fact that it was a second offence. But there are questions which arise which, in my judgment, are suitable when considered alongside the other circumstances of the case for consideration at a substantive hearing.

10. Another aspect of this case, also linked to the circumstances I have described, relates to the alcoholism at the time of the index offending. There is both a prior dimension and a subsequent dimension to that aspect of this case. There are circumstances which again, in my judgment, are relevant – at least arguably – to the article 8 balance. The appellant in evidence that is before the Court describes two abusive marriages, following a childhood that included being taken into care as a baby, raised by grandparents and other circumstances (which it is not necessary in this judgment for me to describe). Those matters are said to link to the subsequent alcohol dependency which on the evidence pervaded the appellant's life in Poland. That is the prior dimension. So far as the subsequent dimension is concerned, there is a very significant contrast. Having come to the United Kingdom in November 2014 and in the 6 years since, the evidence tells the story of an individual who has very successfully put her prior alcoholism behind her. As it is put in Dr Forrester's evidence she has 'sustained a full remission'.

11. There is further evidence before the Court relevant to the Article 8 balancing exercise. It includes evidence as to the appellant's vulnerability; the nature of her condition and situation; and the impact on her of extradition. There are issues concerning her ability (or inability) to be able to 're-establish herself', the ability being a factor which weighed with the District Judge in favour of extradition but which Ms Westcott says was an unsound. There is the existing evidence of Dr Forester who describes a possible substantial risk of suicide, alongside many other relevant observations unnecessary for paraphrase here. There is the nature of the index offending and its relative seriousness. I do not propose to say more than that (i) the article 8 issue is reasonably arguable and (ii) it is appropriate that the addendum psychiatric report be prepared so that the Court has the up-to-date independent evaluation. Before I turn to the next topic I say now that there is one other feature of the Article 8 analysis to which I will return in later discussion and that is the question of fugitivity.

Section 25

12. The next topic concerns section 25 of the Extradition Act 2003 and mental and physical condition raising the question of injustice or oppression. The District Judge found on the evidence before her that the relevant threshold was not crossed so far as mental and physical condition was concerned and in any event that there was no oppression. Ms Westcott emphasises that she relies not only on mental health and suicide risk but the appellant's holistic physical and mental condition and all the circumstances including, on the question of oppression, a substantial crossover with Article 8. Questioned by me today, Ms Westcott conceded that realistically success on the section 25 issue and for

that matter its viability was parasitic on the up-to-date psychiatric evaluation which I have directed, when it comes to be viewed together with the other evidence in the case. In those circumstances she also realistically accepted that the appropriate course would not be to grant permission to appeal in relation to section 25 but rather to direct that the section 25 ground of appeal be before the Court in the January hearing on a "rolled up" basis. That Court will then be able to consider, in the light of the up-to-date psychiatric evaluation, whether there is any reasonably arguable point and, if so, will be able to deal with it substantively. That is the course that I will take so far as that ground is concerned.

Section 14

13. The remaining ground of appeal is section 14 of the 2003 Act: passage of time while unlawfully at large, and whether extradition would be unjust or oppressive on that basis. The District Judge rejected the section 14 argument on the basis that the appellant was a fugitive at all relevant times. That finding is challenged by Ms Westcott on her proposed appeal. It is a finding that is relevant both to section 14 but also to the article 8 analysis (I flagged up earlier that there was one point to which I would return and this is it).

14. I will confess that at first sight I considered, and I still consider, that Ms Westcott faces an uphill battle in relation to fugitivity so far as section 14 is concerned. I am going to explain the reason why. The District Judge found as a fact that the appellant "knew at the time she left Poland that she had to serve a sentence of imprisonment unless the court agreed to defer the sentence". As I see it that finding of fact was central to the District Judge's conclusion that by leaving Poland on 1 November 2014 the appellant deliberately put herself out of reach of the authorities. It may very well be that not only is that finding of fact unimpeachable on appeal but that it is fatal to any contention denying that the appellant was when she left Poland and has subsequently at all material times continued to be a fugitive. There are authorities that discuss the position of a person who leaves the country knowing that there is a suspended sentence and knowing that by leaving they are putting themselves in breach, so that if there is a subsequent activation of the sentence that they are already and remain a fugitive. There must be considerable force in the argument that if that is right the position can be no better where the individual has a suspended sentence which has already been activated and which activated custodial sentence is simply the subject of sequential applications for temporary postponement. Whether or not a postponement is in place at the time the individual leaves the country, they know that they face serving a term of imprisonment and the only thing that stands between them and the requirement to do it is the Polish court having agreed a temporary deferral and the prospect of asking for a further deferral. All of that maybe fatal at least for the purposes of section 14. However, I am not satisfied that the position is so clear cut that I should refuse permission to appeal on the section 14 ground. I will grant permission to appeal in relation to section 14 on the basis that there is a reasonably arguable point, notwithstanding that I have doubts – for the reasons I have given – as to whether it can succeed.

15. Alongside the points I have made, there are other relevant features to be borne in mind. The appellant on the evidence wrote a letter from the United Kingdom on 12 February 2015, very soon after coming here, requesting a further postponement of the activated sentence in respect of the second offence. On the evidence, that letter gave her United Kingdom address because subsequent further information from the respondent records

the 'British address' as having been known to them in March 2015. Ms Westcott submits that the appellant was cooperative and open and that insofar as she was in default of any obligation (which is not accepted) in leaving Poland, there was a genuine misunderstanding and full attempt to cooperate. All of that may be relevant to the Court's evaluation of fugitivity from the perspective of section 14. Even if it is not, it may very well be the position that factors of that kind will inform the analysis, in a more nuanced way, under Article 8 than the binary fugitive or non-fugitive test which operates in the context of section 14. Ms Westcott says that, having found the appellant to be a fugitive in the section 14 binary sense, the District Judge failed to evaluate the relevant circumstances in the round for the more nuanced purposes of article 8. That aspect has fed into my decision to give permission to appeal in relation to article 8 (as I indicated earlier). Finally, so far as section 14 is concerned and including the question of oppression that would need to be addressed if the appellant is not a fugitive, it is relevant in my judgment that there is a very substantial crossover and over between the sorts of features that will be relied on under Article 8 (on which I am granting permission to appeal) and features that will be relevant under section 14. In all the circumstances, I am satisfied that the appropriate course is to give permission to appeal on both article 8 and section 14.

Cross-over with Wozniak

16. Ms Westcott submitted that there are various touching points between the Wozniak issues and the grounds of appeal with which I have been dealing. It is not necessary, in the end, for me to form any settled view as to whether she is right or may be right about that. I am quite satisfied, given that we are at 8 October 2020 today, given that I am going to direct a one-day substantive hearing, and given that I am directing the preparation of an addendum psychiatric report, that the appropriate course is to direct a one-day hearing in (or after) January 2021. The Wozniak case is listed before the Divisional Court for a hearing as I understand it at the beginning of December. It ought therefore to be possible for any knock-on effect to inform the substantive hearing in this case. If some development occurs that gives rise to a difficulty it may be that another judge will have to consider whether there is a need for a further deferral of the present case. I do not go so far as to say that I was persuaded that this hearing that there were such overlap points as necessitated a sequential set of hearings. But since I am directing a January 2021 hearing, I am satisfied that on the face of it if there is an overlap it is something that should be able to be accommodated in a sensible and focused way.

Fresh evidence

17. Finally there is the question of fresh evidence. So far as the fresh evidence relating to the Wozniak point is concerned I refuse permission today to rely on that material. The Divisional Court in Wozniak will need to, and will no doubt, consider all material relevant to the issues in that case. There is no advantage, at least at this stage, and no need to be giving permission to adduce it in this appeal. It follows logically from what I have directed that and I am intending that the addendum psychiatric report should be before the Court at the hearing in January. There is other material relevant to this case including the appellant's recent statement (to which I have referred) and other supporting material. Ms Westcott rightly recognises that part of the test for adducing fresh evidence is whether it is 'capable of being decisive'. The appropriate course, in my judgment, is that that material should be before the Court at the substantive appeal

hearing, but that the final decision as to admissibility can be taken by that Court having regard to whether or not that material is capable of being decisive. I will therefore give permission to reduce the fresh evidence and the addendum psychiatric report, but subject to final decision on admissibility being made at the appeal hearing. That was the way in which the proposed order was designed by Ms Westcott.

Conclusion

18. That is what I am going to do and those are my reasons. I will now discuss with Ms Westcott the precise terms of the order that I am going to make and check with her whether there is any loose end that I have failed to address and ought to do so at the end of this ruling. After doing so, I made the following Order (omitting the case-management directions): (1) The Appellant has permission to amend his grounds of appeal, with an extension of time, to rely on the s.2/Art 6 ground. The need for any further or amended Respondent's Notice is dispensed with. (2) The Appellant's application for permission to appeal on the ground referred to at paragraph (1) above shall be stayed pending the judgment of the Divisional Court in the appeals of Wozniak (CO/2499/2019) and Chlabicz (CO/4976/2019). The parties are to update the Court dealing with the substantive appeal in this case and that Court can make any appropriate determination or direction. (3) The application to adduce fresh evidence on the s.2/Art 6 ground is refused. (4) The application for an extension of the representation order for a further addendum psychiatric report (quoted at up to £1,080) is granted. (5) As to the application for permission to appeal on the s.25 ground, that application is adjourned to be listed for hearing on a "rolled up" basis at the substantive hearing of this appeal. If permission to appeal is granted at that hearing, the Court will proceed immediately to determine the substantive appeal on this issue alongside the others. (6) As to the application for permission to appeal on the Art 8 and s.14 grounds, permission to appeal is granted. (7) The Appellant has permission to adduce the further evidence within Volume 2 (save for evidence which goes to the s.2/Art 6 ground) and the addendum psychiatric report, subject to a final decision on admissibility to be made at the substantive appeal hearing. (8) Time for the hearing of the appeal under Crim PR 50.23 is extended to the hearing date. (9) The substantive appeal hearing shall be fixed for the first available date after 1 January 2021 with a time estimate of one day. If the Respondent is of the view that a different time estimate is required they must notify the Court within 5 business days of the date of this Order. (10) The listing date will be fixed by the Listing Office and regard should be had in this case to Counsel's availability if possible and within reason. (11) No order as to costs, save for detailed assessment of the Appellant's publicly funded costs.

8th October 2020