Neutral Citation Number: [2020] EWHC 3146 (Admin)

Case No: CO/501/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

20th November 2020

Before:
MR JUSTICE FORDHAM

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- -

Between :

ADRIAN TUAKLI	**Appellant**
- and -	
JUDGE FOR PRELIMINARY INVESTIGATIONS, COURT OF TRIESTE, ITALY	**Respondent**

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- -

George Hepburne Scott (instructed by Lansbury Worthington Solicitors) for the **Appellant**
Catherine Brown (instructed by Crown Prosecution Service) for the **Respondent**

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JUDGMENT ON APPLICATION TO REOPEN THE APPEAL

Covid-19 Protocol: This Judgement was handed down by circulation to the parties' representatives by email and release to Bailii. The date and time for hand- down will be deemed to be 10:00 am on 20/11/2020. A copy of the judgement in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

MR JUSTICE FORDHAM :

Introduction

1. On Thursday 8 October 2020 at 0900, at a remote hearing by BT telephone conference, I heard a renewed application on behalf of the Appellant by Mr Hepburne Scott of Counsel. At the start of the hearing there was this exchange (transposed by my Clerk from the tape):

The Judge:	***Good morning. This is Mr Justice Fordham. Can I confirm that we have Mr Hepburne Scott on the line?***
Counsel:	***My Lord, yes.***
The Judge:	***Mr Hepburne Scott, is there anyone else on your side that you are expecting that hasn't yet joined us?***
Counsel:	***No thank you my Lord.***
The Judge:	***Thank you. I am going to just call on the case in just a moment. I am going to double check that it is recording…***

2. The hearing proceeded. I heard submissions from Counsel, in the way I would have done had we been present in a Court room together. I then gave an ex tempore judgment which, by using voice recognition software during its delivery, I was able to follow up with an approved written version. That has been my practice at all remote hearings with ex tempore judgments during the Covid-19 pandemic. It is designed and intended to provide maximum visibility and transparency in unconventional and challenging circumstances, to promote justice for the parties and open justice, without needing to access the tape. My judgment is [2020] EWHC 2371 (Admin). I said this in my ex tempore judgment (paragraph 2 of the approved written ruling):

> ***The mode of hearing was BT conference call. Mr Hepburne Scott was satisfied, as am I, that his client's interests were not prejudiced by that mode. Open justice, in my judgment, is secured by the fact that the hearing and its start time were published in the cause list together with an email address usable by anyone who wanted to observe the hearing. All it would take is the sending of an email and the making of a phone call. By having a remote hearing we eliminated any risk to any person from having to travel to, or be physically present in, a court room. I am satisfied that the mode was appropriate and proportionate.***

3. After I had delivered my judgment, but before ending the conference call, I was addressed by the Appellant. He had joined the hearing at some stage near the end. He wanted to make the Court aware of something and referred to 'a letter from my solicitors'. I decided to take the course which most closely followed what I would have done had we been in a physical court hearing, had the Appellant come into the court room and said the same thing in person. What I did was to explain that the Appellant and his Counsel needed to make sure they had each other's telephone number and needed to have a conversation, so that Counsel could elicit what it was that the Appellant wanted me to know. I said I was going to be moving on to the next case on the cause list – with its own remote hearing – but that I would want to be updated by email later in the day, as to what if anything I was being invited to do.

4. By email at 10:10 Counsel informed me that there were matters – which were outlined – which the Appellant wished to raise and that Counsel wished to address me to "set out the position and submit that the hearing should be re-opened IF Your Lordship was of the view that those matters, even if substantiated, would have made a material difference to the Article 8 appeal ground". The Article 8 ground was Ground Two: see my

judgment [2020] EWHC 2699 (Admin) at paragraphs 8-13. I replied to say: "If you wish to rely on these further matters I would like them set out in a document which will need to be (you will need to decide) [i] An application to adduce fresh evidence [ii] An application to reopen the appeal. Let me know when this will be received and I will make directions". At 12:22 Counsel emailed a written application to reopen the appeal, together with materials relied on. At 17:45, having dealt with the other cases in my list, I confirmed that I would "consider the application to reopen the appeal on its merits in due course. I have not read the materials. I will now proceed to get the approved order from today sealed and the written ruling released. I will deal with the new application as a distinct application". I subsequently directed that the Respondent have an opportunity to respond to the application which it did by a written response dated 26 October 2020. I wish to say that the lawyers, on both sides, have dealt with these unusual circumstances with commendable and conspicuous propriety.

Mode of determination

5. Before reaching a view on the substantive merits of the application to reopen the appeal, I wanted to make sure the process was the right one and disposed of the application justly. As the Respondent pointed out, in Government of the United States v Bowen [2015] EWHC 1873 (Admin) the Divisional Court dealt with such an application on the papers. I am satisfied that I have power to do so. The question is whether a hearing is necessary for just disposal of the application in all the circumstances of the case.

6. I was at one stage, subject to ensuring that I had the full picture as to what had happened, minded to have a further brief hearing. I had been told in the 10:10 email:

> ***He did wish to be at the hearing but was informed by letter that the hearing would be at 10:00am.***

The words I have underlined troubled me. It was being said, on the face of it, that the Appellant had dialled in promptly for a 10:00am hearing, having been misled by a letter that the hearing was taking place at 10:00am. I was concerned that what he had wanted to tell me about 'a letter from my solicitors' was that he had been misled as to the hearing time. If, through no fault of his own, he had missed his hearing then – as it provisionally seemed to me – that might of itself be a good reason to hear the application to reopen the appeal at a further hearing. Just disposal, including given the importance of appearances, might in those circumstances have called for that course to be taken. It is probable that I would have taken that course. On 30 October 2020 I emailed the legal representatives. I asked the Appellant's representatives, in relation to the statement that the Appellant had been "informed by letter that the hearing would be at 10:00am", this question: "Are you … able to provide me with that letter (or relevant extract from it) and/or otherwise confirm the accuracy of that statement?" I went on to ask for Counsel's positions as to attendance at any oral hearing "if, once I have formed a view, I were to decide" to convene one. I am glad I asked. I was sent the documents on 30 October 2020 at 15:51. I replied at 16:08 stating that, having seen them, I wanted a witness statement from the Appellant explaining (inter alia) "how, through his Counsel, he informed me that his understanding had been that the hearing was at 10am". A witness statement was provided on 2 November 2020. Having considered it and the documents, I made an Order on 2 November 2020, with reasons, directing that the application to reopen the appeal would be considered on the papers.

7. I was and remain fully satisfied that determination on the papers is the just, appropriate and proportionate course. The feature which I thought, provisionally, would justify a hearing has been put in a different light from the documents and what the Appellant says about them. He was not misled into thinking the hearing was at 10:00am. There was a letter from the solicitors on 30 July 2020 which said the hearing date was "8 October 2020 at 10:00am" with a "time estimate of 1 hour". The Appellant says in his witness statement: "I put this letter on my wall and I had it firmly in mind over the following days and weeks". However, as I explained in my reasons for the Order on 2 November 2020 ("A" is the Appellant):

> ***I have now seen the contemporaneous documents which show that on 6.10.20 at 1503 A's solicitors told him [by email that] it would be a remote hearing, gave him telephone dial-in details, and told him that the time of the hearing would be published the next day on the cause list (giving him the link). The hearing start time was duly published in the cause list as 9am.***

The published start time was something which I had recorded in my ex tempore judgment. The Appellant had a link to the cause list. I continued:

> ***Moreover, on 7.10.20 at 1500 A's solicitors emailed A telling him his case would start at 9am. The hearing duly took place at 9am on 8.10.10… A had not been left with the letter (30.7.20) communicating a 10am hearing. Indeed, I can see from the emails that A was himself using the mechanism of email at 0905 on 8.10.20 to ask about the hearing, and (0906) to ask for the location and link. He was then promptly reminded (0912) that he had already been given the details by email. He says he missed the email communications and thought it was 10am. I accept that. It explains his emails at 0905 and 0906. However, A cannot (and does not) blame anyone else for that.***

In these circumstances, the Appellant was not misled by anyone. He had nobody to blame but himself for missing his hearing. I explained in my Order on 2 November 2020 that, having dealt with the process question, I would proceed to determine the application on its substantive merits, but that there was no reason for a hearing. The concern which I had is answered by the contemporaneous documents.

<u>Analysis</u>

8. The case for reopening the appeal raises the following matters. (1) The Appellant is presently caring for his brother who has a serious neck condition and is helping with his brother's shopping. An email from the brother (dated 23 September 2020) states that "Adrian is helping me with my shopping as my neck is very bad at the moment and I am due to get an operation …" A letter from a Consultant Radiologist dated 8 March 2020 describes the results of the brother's MRI scan and corroborates the description of a significant neck condition. (2) The Appellant is presently helping a family friend who is suffering from cancer. An email from the family friend (apparently forwarded on 1 October 2020) states that she is in a "high risk Covid-19 category" and the Appellant "helps me with shopping tasks and small favours". (3) Had the Appellant attended the hearing of his renewed application for permission to appeal on time "these documents would have been handed up … and been able to be considered by" the Court. (4) The Court should reopen the appeal and make a fresh ruling "as if these documents had been presented in [that] way", which documents are "potentially determinative on the Article 8 issue" including "in conjunction with the other existing factors".

9. There is a further point, which comes from the Appellant himself. (5) The reason he gives for "why he did not provide information to anyone until 10am on the day of the

hearing" (that being a further question I raised in my email 30 October 2020 at 16:08, to be dealt with in his witness statement, as he does) is this: "I tried to call my Solicitor in the weeks leading up to the hearing and I felt that she never had time to listen to what I had to say so I feel that I never had the chance to put all these things to her". I have found this perplexing. The Appellant does not dispute that he did not provide the information to anyone. If there were relevant documents, they would surely at least have been posted or emailed to the solicitors. It is clear that neither they nor Counsel had any inkling from the Appellant that he had something more that he wanted to raise. If the Appellant thought he could attend an oral renewal hearing on permission to appeal and could simply 'hand up documents' – still less at a remote hearing – then I cannot see how that unrealistic perception is to be laid at the door of the solicitors. I am also conscious that there is something of a theme here – as regards the time of the hearing and the evidence now relied on. Having said that, I have decided that the most appropriate thing, in all the circumstances, is to put this aspect to one side and look at the substance. Without expressing any view, I will take the Appellant's explanation at face value, for the purpose of focusing on the substance of the matter.

10. Ms Brown for the Respondent submits as follows. (1) An application to reopen an appeal "is not designed to enable an unsuccessful party in extradition proceedings immediately to regroup after losing the appeal", to "come back to the court to have another go" (Bowen paragraphs 4 and 9). That, in substance, is what this is. (2) In order to be admissible on a High Court extradition appeal, fresh evidence (not put before the District Judge – in this case, at the hearing on 17 January 2020) must be capable of being "decisive". (3) None of the fresh evidence, either individually or cumulatively, could have altered the outcome, either in front of the District Judge or at the permission stage in this Court, in respect of the Article 8 ECHR issue.

11. Having considered all of the matters now put forward by the Appellant, I have reached much the same conclusion as did the Court in Bowen (at paragraph 4). Having considered the materials, I am quite sure that, had they been before me – because properly filed in good time or because 'handed up' on the day – the result would not have been different. I am quite satisfied that there has been no injustice calling for the reopening of the appeal. I am satisfied that the matters relied on are incapable, on their own or in combination with other features, of being decisive. I invite attention to my judgment at [2020] EWHC 2699 (Admin) at paragraphs 8-14, which I do not need to set out again here. In my judgment I dealt with the factors relied on, such as: unsettled childhood but settled employed status and fixed accommodation; age at the time of the alleged offending (18); British citizenship; hardship; likely sentence; lapse of time; non-fugitive status; no family in Italy. The Appellant is a single 21 year old man with no dependent adults or children, facing proceedings for acting as 'bodyguard' in the purchase of 1kg marijuana and then returning to steal drugs and other items from the drug purchaser. There are strong public interest considerations in favour of extradition. District Judge Zani was satisfied that there was no Article 8 incompatibility. Cutts J and then I, considering the points properly put forward by the Appellant's legal representatives, thought the case was very clear, and not properly arguable. Nothing I have seen or read about what the Appellant has been doing in 2020 for his brother and the family friend provide any prospect whatsoever of this Court concluding that extradition is incompatible with the Article 8 rights of any of them. The application is dismissed.