Neutral Citation Number: [2021] EWHC 916 (Admin)

Case No: CO/4046/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th April 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

DANIEL MALECKI	**Appellant**
- and -	
THE DISTRICT COURT IN ZAMOSC, POLAND	**Respondent**

- -
- -

John Crawford (instructed by Tuckers Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 15.4.21

Judgment as delivered in open court at the hearing

- -

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 27 and is wanted for extradition to Poland. That is in conjunction with a conviction EAW (European Arrest Warrant) issued on 19 September 2018 and certified on 14 January 2019. Under the EAW the index offending comprises of three offences all committed on 11 February 2013 when the Appellant was aged 19. They are described as assaults on Rafal Werner and on David Werner, and an attempted burglary. On 28 June 2013 (becoming final in July 2013) the Appellant was sentenced to a custodial 20 month sentence, suspended for a period of 3 years on condition of continuing contact with Polish probation. Later in 2013 he went to Holland and the District Judge found that he subsequently knowingly failed to continue to comply with his ongoing probation contact obligations. That finding of fact is one which the Appellant does not seek to impugn on this proposed appeal. I will return to it in the context of the question of fugitivity. The 20 month sentence was activated on 12 November 2015 for non-compliance with the probation contact requirement. The Appellant, who had been in Holland, spent 3 months in Poland in 2018 and then came to the United Kingdom aged around 24 later in 2018. District Judge Goozee ordered the Appellant's extradition on 30 October 2020 after an oral hearing on 6 October 2020. On 26 February 2021 Johnson J stayed the application for permission to appeal in relation to the section 2/Article 6 ECHR issue pursued in the joined cases of Wozniak and Chlabicz, which are due to be heard mid-next month (May 2021). Johnson J refused permission to appeal on a ground of appeal relating to section 14 which is not pursued. He also refused permission to appeal on two grounds of appeal that are pursued in this renewed application. The first is section 12 (double jeopardy); the second is Article 8 ECHR (private life). The issue for me to decide today is whether those two grounds or either of them are reasonably arguable.

Mode of hearing

2. The mode of hearing was by BT conference call. The Respondent had indicated that it did not wish to participate at this hearing. The Appellant's legal representatives had requested a remote hearing in the context of the pandemic, and were content with a BT telephone conference hearing. Mr Crawford was satisfied, as am I, that the mode of hearing involves no prejudice to the interests of his client. I am satisfied that the request for a remote hearing was properly made and that a remote hearing was in all the circumstances justified, as was the use of BT conferencing. By having a remote hearing we eliminated any risk to any person from having to travel to a court room or be present in one. Although we hope we are in the autumn days of the pandemic and the national restrictions , there is an obvious continuing need at the present time for a precautionary approach and for careful consideration as to what is appropriate in each individual case. In-person hearings have been continuing in courts and in-person hearing would have been available in the present case had it been appropriate. The open justice principle was secured. The case and its start time were published in the cause list together with an email address usable by any person, whether associated with the parties, or a member of the public, or a member of the press, who wished to observe this hearing. They would be able to do so by simply sending an email and then making a phone call. The hearing was recorded and this ruling will be released in the public domain.

Section 12

3. The argument based on section 12 (double jeopardy) in essence, as I see it, runs as follows. There is an unresolved conflict, or at least an uncertainty, between the EAW (which refers to three index offences including the two assaults on the two different named individuals to which I referred at the outset of this judgment) on the one hand, and the international previous convictions printout (dated 1 May 2020, which refers to two offences (the burglary and a single assault) on the other. That contradiction (or uncertainty), in documents both involving information ultimately emanating from the same Polish authorities, supports the conclusion that section 12 is satisfied, because "it appears that [the Appellant] would be entitled to be discharged under any rule of law relating to [a] previous acquittal", so far as one of the assaults is concerned; or as Mr Crawford puts it in the alternative and emphasises today raises an issue which required exploration, investigation and further clarification of the information. Although it is true that the Appellant's argument before the District Judge involved the claim that he had been acquitted of the burglary, although both the EAW and the international printout record the conviction for the burglary, and although the Appellant's own evidence was that he had pleaded guilty of 'two assaults', there nevertheless was and remains a point on double jeopardy on which, reasonably arguably, the District Judge erred as to the approach, or gave inadequate reasons, and should have found in the Appellant's favour or this Court should do so, at least absent further information by way of clarification. Moreover, since the information all ultimately emanated from the Polish authorities, it was wrong to describe the information from the Respondent as "unequivocal", as the District Judge did. That is the essence of the argument.

4. In my judgment, the section 12 (double jeopardy) ground is not reasonably arguable. There is no realistic prospect that this Court, on a substantive appeal, would overturn the District Judge's conclusion on this issue, or require further clarification the information before ring able to determine this appeal. A material part of the District Judge's reasoning was that the Court should rely on the contents of the EAW. In any event, even if the District Judge had not seen it that way, that in my judgment beyond argument is the way that this Court would see it on a substantive appeal in revisiting the issue. That, in my judgment, beyond argument, is a complete answer to the point. The EAW, which is the primary document directly emanating from the Respondent, recorded in terms the three offences of which the Appellant was convicted, giving details about them. Moreover, the Supplementary Information also referred in terms to the three offences, giving the details. The District Judge was entitled to conclude that "the information provided by the [judicial authority] is unequivocal", based on the direct information in the primary sources; and to "place reliance on the information contained within the EAW which has been provided by the judicial authority and should be accorded proper respect and trust". The District Judge made the unassailable finding: "I am satisfied so I am sure that the [Appellant] pleaded guilty to two offences of assault and one offence of burglary". The position is reinforced by the Appellant's own evidence before the District Judge, which as I have said stated in terms that the Appellant had pleaded guilty of the two assaults. In these circumstances, I can leave aside the unattractiveness of the point, which entails that the failure in the print-out to identify the offence of assault on the same occasion on two linked individuals, described in the printout as "rule and battery" should derail extradition to face the sentence imposed by the Polish court. I can also leave to one side that the argument

before the District Judge about double jeopardy was a claim to having been acquitted of the burglary.

Article 8

5. The Article 8 ECHR ground of appeal, in essence, as I see it, is as follows. First, central to the District Judge's analysis was a finding of fact that the Appellant's actions in, from Holland, failing to maintain contact with probation rendered him a fugitive who had 'knowingly placed himself beyond the reach of the Polish authorities'. That was a legally unsound conclusion. There was no prohibition on leaving Poland. On the Appellant's evidence, he left having notified his relocation, he notified his address in Holland, and maintained contact with probation in Poland for a period, after which he stopped. The District Judge recorded this evidence and did not reject it, relying on the knowing discontinuance of contact with probation, in breach of a known condition, as sufficient to justify the finding of fugitivity. The circumstances are akin to those in De Zorzi [2019] EWHC 2062 (Admin) at paragraphs 48, 57 and 59 in particular. The present case is distinguishable from the scenario described in Wisniewski [2016] EWHC 386 (Admin) at paragraph 60 (describing a person who, subject to a suspended sentence, voluntarily leaves the jurisdiction "thereby knowingly preventing himself from performing the obligations of [the suspended] sentence"). Secondly, on that premise as to non-fugitivity, the Article 8 balancing exercise would have been materially different, and a passage of time (nearly 3 years, from activation in November 2015 to the issuing of the EAW in September 2018), which can be characterised as "culpable", would have weighed in the balance in a materially different way, together with the overall lapse of time, making a substantial impact as regards the outcome, when put alongside the other features and circumstances of the case. Added to this, and relevant in Article 8 terms, is the fact that as at the hearing today the qualifying remand time served by the Appellant (the start date being 16 June 2020) is 10 months of the 20 month sentence to which the EAW relates. Moreover, the Appellant has the anchor (durable basis) of remaining in the UK until the Wozniak/Chlabicz cases are resolved, meaning this court can properly 'project forward' to to a substantive appeal hearing at which point the remand time served will be greater (Mr Crawford realistically posits 12 months of the 20 month sentence having been served through qualifying remand). Finally, as a third feature, there is the private life built in the UK and all the facts and circumstances relevant to that. In all the circumstances and putting these features together, says Mr Crawford, it is reasonably arguable that this Court would overturn the Article 8 outcome arrived at by the District Judge. That is the essence of the Article 8 argument.

6. In my judgment, there is no realistic prospect that this Court would interfere with the Article 8 outcome in this case. That is the position, even 'projecting forward' (see Molik [2020] EWHC 2836 (Admin) at paragraph 30) to a substantive hearing in, say, July 2021, following the determination of Wozniak/Chlabicz being heard mid-May 2021, and taking into account the qualifying remand time then served: this would at that future stage be around 12 months, with a substantial period of 8 months still to serve (adopting the figures realistically and sensibly accepted by Mr Crawford). There is no realistic prospect that the qualifying remand time served, and reduced time to serve, could tip the balance, or combine with other features to tip the balance, in favour of finding an Article 8 breach. That is also the position, even if the most favourable stance is taken as to the issue of fugitivity. Even if not a fugitive, the Appellant breached the conditions

of a suspended sentence, knowing about those conditions and knowing that he was doing so. He did so having relocated abroad. I assume in the Appellants favour for the purposes of today that he would succeed on the issue of fugitivity and this Court would revisit the Article 8 balancing exercise. On doing so, the facts and circumstances to which I have just referred as to the Appellants knowledge and conduct would remain relevant to the overall evaluative exercise of considering all the circumstances, in the nuanced and fact specific approach taken to passage of time and delay for the purposes of Article 8. Fugitivity and non-fugitivity are not in the context of Article 8 and on/off switch , as they are in other areas of extradition law. There are strong public interest considerations in favour of extraditing the Appellant in accordance with the EAW, to serve his sentence and the remaining time to be served, even if the Appellant is not characterised as a fugitive. The passage of time – including a characterisation of "culpability" of delay – in terms terms of tending to weaken the public interest in extradition, and in terms of tending to strengthen private and family life, cannot in the present case – when put alongside the other features of the case, including the relevant length of time and lapse of time – support a finding of breach of Article 8, even if the Appellant is not characterised as a fugitive. The index offences are serious. The Appellant has a history of prior offending in Poland. He came to the United Kingdom just two/three years ago in 2018. He has during his time here a criminal conviction in the United Kingdom for possession of an offensive weapon leading to a 12 week custodial sentence (May 2020). The Appellant is single, and whilst he has has children from previous relationships, they are located in Poland and Holland. As the Respondent's Notice compellingly submits, reversing the finding on fugitivity would have no impact on the overall decision: "The factors militating against extradition are simply not capable of outweighing the public interest in extradition, even in the event that the Appellant is not considered to be a fugitive". If I posit this Court on a substantive appeal revisiting the balancing exercise and conducting that balancing exercise for itself, I can see no realistic prospect of this Court – having done so – concluding that extradition is a breach of the Appellant's article 8 private life rights.

Conclusion

7. For those reasons and in those circumstances permission to appeal, on the two grounds pursued before me, is refused.

15.4.21