Neutral Citation Number: [2023] EWHC 1541 (Admin)

Case No: CO/2774/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 22nd June 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

EMIL SEBASTIAN GRABOWSKI	**Appellant**
- and -	
CIRCUIT COURT IN SWIDNICA (POLAND)	**Respondent**

- -

- -

Martin Henley (instructed by AM International) for the **Appellant**
The **Respondent** did not appear and was not represented

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Hearing date: 22.6.23

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 and approved by the Judge,
after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. The Appellant is aged 35, as is his Partner. He is wanted for extradition to Poland. That is in conjunction with a conviction Extradition Arrest Warrant ("ExAW") issued on 15 March 2022 and certified on 28 April 2022, on which he was arrested on 9 May 2022. The ExAW relates to an offence of attempted robbery on 12 January 2010 aged 22, in respect of which the he was convicted and sentenced in his presence on 27 February 2013 to a two-year custodial sentence, suspended for a period of 5 years which began on 7 March 2013. The suspended sentence was in due course activated on 19 July 2017. The Appellant is wanted to serve 23 months and 29 days in custody in Poland. Extradition was ordered on 29 July 2022 by District Judge Bristow ("the Judge") after an oral hearing on 15 July 2022 at which the Appellant gave oral evidence. The Judge made several findings, among which were the following. The Appellant had come to the UK at the end of 2016 or the beginning of 2017. He did so, having committed further offences of dishonest appropriation in Poland: first, on 23 September 2016; and second, on a date between 27 October 2016 and 16 November 2016. He was subsequently convicted of those two further offences, on 16 March 2017 and 27 April 2017 respectively. His relationship with his partner had begun 3 years earlier (that is to say, in 2019). He was an active father figure for the 3 children from the Partner's previous relationship ("N", "A" and "S"; aged 15, 10 and 4 respectively, as at the extradition hearing), and their child ("F") aged 17 months (that is to say, born in early 2021).

2. The Appellant, in giving his oral evidence before the Judge, had been able to put forward and adopt an unsigned and undated written witness statement. That document had explained the following. "N" had kidney cancer diagnosed when he was aged 4, and he had had one whole kidney removed. He was then ill again 4 years later, and had a third of his remaining kidney removed. He was currently under strict supervision by his doctors, having two appointments a year at the Royal Marsden Hospital, with tests and follow up appointments (the next of which had been scheduled for 12 July 2022). "N" could still go to school and participate in sport and had pretty much a normal life, but he had to be very careful.

3. Among the Judge's other findings were also a finding that the Appellant had come to the UK as a fugitive, and the overall finding that the factors supporting extradition decisively outweighed those weighing against it, so that extradition was compatible with the Article 8 rights (to respect for private and family life) of all those concerned. In his grounds of appeal and grounds of renewal Mr Henley challenges the Judge's judgment on two topics. These were assessed as unarguable by Farbey J, who refused permission to appeal on the papers on 31 March 2023.

Fresh evidence

4. In support of this renewed application for permission to appeal, Mr Henley has put forward very belatedly (two days ago) a bundle of 42 pages of putative fresh evidence which he applies to adduce. That application has been opposed by the Respondent in writing. The fresh evidence comprises a June 2023 updating statement by the Partner; a June 2023 addendum Proof of Evidence from the Appellant; birth certificates for "F" (born on 6 February 2021) and now (as a "key fact") the latest child of the family

"SS" (born on 31 December 2022); and medical records and other materials relating to "N", together with Macmillan Cancer Support's briefing paper about Wilms' tumour in children. I have received – without yet formally admitting – the evidence, to see what difference it makes, in the usual way.

Fugitivity

5. Mr Henley's first ground of appeal is that the Judge's finding of fugitivity was arguably wrong, as follows. The Appellant had come to the UK being free to do so, and being under no obligation to remain in Poland, or to notify a change of address. The terms of the probation related to the suspended sentence had (as the Judge found) been revoked on 26 October 2016. Furthermore, the activation of the suspended sentence was far from inevitable. It would be a matter of discretion or judgment for the Polish criminal courts, involving (a) a judgment as to whether there had been a blatant breach and (b) a decision to exercise the discretionary power to activate. It was speculative to say that the Appellant was aware that the suspended sentence "would be" activated. Nothing had been decided.

6. In my judgment, the finding of fugivity is unassailable. This is not a case in which the requested person is a fugitive because they left the requesting state during a suspended sentence, of whose terms the act of leaving was a known breach, such that the suspended sentence stood to be activated. Here, the Appellant left Poland having reoffended and therefore having already acted in known breach of the suspended sentence, such that it stood to be activated. This plainly supports a finding of fugitivity. It is not that the act of leaving was the breach. The breach was the offending. Indeed, the Judge unassailably found – based on the Appellant's own oral evidence – that he knew that the authorities were dealing with the offence committed on 23 September 2016; there was an indication about activation and an indication that activation might be avoided by paying compensation; and that no compensation was paid. The Judge also unassailably found that the Appellant had come to the UK, at a time just a few months after the further offending, in a manner which involved going into "hiding", even from his own family members back in Poland.

7. It is correct that activation was not inevitable but would involve an exercise of judgment or discretion by the Polish criminal courts. But that is no answer. The same is true in a case when a requested person is a fugitive because they have left the requesting state during a suspended sentence, of whose terms the act of leaving was a known breach. It was unnecessary to find that activation was inevitable when the Appellant had left Poland. Nor did the Judge make any such finding. What the Judge said was that one of the Appellant's reasons for departing Poland was to "avoid punishment once the sentence was activated". That is a reference to avoiding punishment which would arise from an activation. Nothing turns on an inevitability of activation or any finding of inevitability. This was plainly a case in which the Judge was entitled to find that the Appellant had come to the UK as a fugitive. The Judge was plainly right to approach the Article 8 analysis on that basis, and so must I.

Article 8

8. Mr Henley's second ground of appeal is this. Leaving aside fugitivity, he says that the Judge's finding of Article 8 compatibility was arguably wrong, or would stand to be overturned in the light of the fresh evidence. He also submits that if he is right about

fugitivity then the judges finding of article 8 compatibility was arguably wrong. In his oral submissions Mr Henley has realistically accepted that the second of those is by far the stronger. I have already addressed the question of fugitivity. But I will turn to deal with Article 8.

9. Mr Henley criticises the Judge's characterisation of the index offence of January 2010 as being "serious", as to which he emphasises the Appellant's age and that the offence was 13 years ago. He also – in his written arguments – described the Appellant as having served the vast majority of the sentence. He then criticises the Judge for having wholly disregarding a witness statement which was "admissible hearsay" from the Partner, describing the position of the family including the children. He emphasises the medical condition of "N" and the close monitoring by the Royal Marsden Hospital, which he says reflects a clear high risk of relapse. As to the fresh evidence, Mr Henley says this arguably provides a basis to overturn – or to support overturning – the Article 8 outcome. It is admissible, as updating evidence and in the interests of justice, and as capable of being decisive. There are the medical records and materials which evidence "N"'s medical history and the current and regular checkups at the Royal Marsden. There is the Royal Marsden's May 2012 "Treatment Summary and Long Term Follow Up Plan", which records – among other things – possible future kidney problems and gives advice about maintaining hydration, investigating suspected urinary tract infections, avoiding and reporting injury to the remaining kidney. The Partner's signed updating statement gives evidence about the family, about the level of reliance on the Appellant for the shared carer responsibility, about the birth of baby "SS", and about the impacts on the family of the Appellant's extradition. The Appellant's own updated evidence also describes the family circumstances. This is, I accept, a family who depend on each other and on universal credit, for whom extradition of the Appellant will mean serious impacts and implications.

10. In my judgment, notwithstanding all of the evidence, the Article 8 arguments do not have any realistic prospect of success. In the first place, I can see no arguably sustainable criticism of the approach taken by the Judge to the evidence. The Judge was fully justified in describing the offence in the ExAW as "serious". As the Judge explained, this was "a serious offence of violence", being "an attempted robbery with an imitation firearm". The Appellant had been aged 22 at the time of that offence. The offence involved him acting jointly and in cooperation with "a minor". This was an attempt to rob a shop by showing an imitation firearm and threatening to use it against the shop assistant. The attempted robbery failed because the alarm went off and the robbers fled the scene before any money was handed over. The Judge was well aware of all of this. The Judge specifically listed, as a factor militating against extradition, that the offence "dates back to 2010". The passage of time thereafter is linked to the facts that this was a suspended sentence imposed in 2013, breached in its fourth year of operation (2016), after which proceedings and then activation followed, but the Appellant had left Poland and gone into hiding, before being tracked down in 2022. I did not understand the submission which was made in writing that the Appellant has "served the vast majority of the sentence". All but one day of the 2 year custodial sentence – originally suspended but then activated – remains to be served. The Appellant has not been on qualifying remand but was released on bail on 9 May 2022 following his arrest.

11. Next, the Judge was fully justified in the approach taken to the evidence from the Partner and the Appellant. The Partner's statement was – as the Judge explained – both undated and unsigned. The Partner did not attend the hearing and there was no application for an adjournment so that she could attend the hearing. What the Judge had was written and oral evidence from the Appellant, with cross-examination. The Appellant was able to, and did, cover the ground relating to the relationship, the children and the medical condition of "N". I have already summarised what had been said about "N" from the Appellant's own adopted evidence. In fact, the passage which I have summarised about N's childhood kidney cancer were identically drafted as in the unsigned statement of the Partner. The Appellant's evidence was a proper and sufficient route for that evidence to be adduced. The Judge accepted the material features of that evidence by accepting the evidence of the Appellant. There is no arguable basis on which putting the unsigned Partner's statement to one side undermines the Judge's evaluative conclusions and the outcome. The Judge observed that he had seen no medical evidence to support the Partner's evidence stating that she was pregnant. I accept of course that she was pregnant, and that the family now has new baby "SS".

12. Throughout his evaluative assessment, the Judge repeatedly referred to the children's best interests, and referred to these as being a primary consideration. He also understood and accurately recorded the evidence relating to "N", who he described as being under the care of doctors and being strictly observed, being still under the care of the Royal Marsden Hospital and attending several appointments a year. As the Judge also recorded, "N" was able to attend school and participate in sports. As the Judge went on also to say: none of the children had special needs or special educational needs; and they all had settled status in the UK; the Partner was on state benefits; she had been able to care for 3 oldest children for a period between the end of her relationship with their father and the start of her relationship with the Appellant; and the kidney operations and diagnosis involving "N" had occurred many years before the Appellant had become involved with the family. The Judge conducted the familiar 'balance sheet' exercise. He recognised the nature of the interference with the Appellant's family life and private life, and the interference with private and family life of the other family members; that the Appellant had been in the UK for some 5 years and 7 months; that it was not in the best interests of any of the children to be separated from the Appellant; that the Appellant had not committed any offences in the UK; that he had not been convicted of any offences other than those described in the ExAW; as well as that the attempted robbery had taken place back in January 2010. To these, I can add the period of compliance with the probation, before the offending which subsequently activated the suspended sentence.

13. Notwithstanding all of the features, the Judge concluded that the scales fell decisively in favour of extradition. That was by reference to: the public interest in honouring extradition arrangements and in discouraging the UK being seen as a state willing to accept fugitives from justice; the attempted robbery being a serious offence of violence; a significant sentence having been imposed for the offence, the great majority of which remained to be served; and the Appellant being a fugitive who fled Poland to avoid the prison sentence. I agree with Mr Henley's, realistic and correct, acceptance that the finding of fugitivity is key with the Article 8 outcome difficult to overturn unless that could be displaced. In my judgment, it is not just difficult, but impossible to overturn the outcome, including stepping back. I agree with Farbey J's

assessment, that there is no realistic prospect of this Court at a substantive hearing overturning the outcome as wrong. In my judgment, that remains the position having considered the fresh evidence, which is not arguably capable of being decisive. There is of course the youngest and fifth child "SS". There is the position of the Appellant as a father to all five children. There is the reliance on welfare benefits. There are the medical records relating to "N". There is an updated picture of the impacts for the family members. There are harsh impacts, for them and each of them, of the Appellant's extradition. Just as the Judge did, this Court will always want carefully to consider the Article 8 impacts for all family members, with the best interests of each child as a primary consideration. I have done so. But the public interest factors in support of extradition do decisively outweigh all of those capable of weighing against it. The Article 8 ground of appeal has no realistic prospect of success. In those circumstances I refuse permission to appeal and refuse permission to rely on the fresh evidence.

22.6.23