Neutral Citation Number: [2023] EWHC 2860 (Admin)

Case No: CO/1153/2023
AC-2022-LON-000307

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 14th November 2023

Before:
FORDHAM J

- -

Between:

JACEK SMOLAREK	**Appellant**
- and -	
POLISH JUDICIAL AUTHORITY	**Respondent**

- -
- -

Tihomir Mak (Taylor Rose Solicitors) the **Appellant**
The **Respondent** did not appear and was not represented

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Hearing date: 14.11.23

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 61 and is wanted for extradition to Poland. That is in conjunction with a conviction Extradition Arrest Warrant issued on 23 July 2012 and certified, a decade later, on 25 August 2022, on which he was arrested on 6 October 2022. The index offence is the misappropriation of entrusted property worth PLN15,746 (I am told by Mr Mak, just under £3,000 at present rates, £2,300 at the time). That offence was in the late summer of 2004, 19 years ago. District Judge Zani ("the Judge") ordered extradition on 23 March 2023 after an oral hearing that day. The sole issue pursued on this renewed application for permission to appeal is Article 8 ECHR.

Adjournment

2. On 3 November 2023 the Appellant's solicitors had made an application to adjourn the hearing today, having been notified of it on 26 October 2023. The basis of the application was that Counsel who had prepared the appeal papers had "other professional commitments". On 8 November 2023 I enquired as to the nature of these and was promptly told that Counsel was now on secondment with the Foreign and Commonwealth and Development Office, but that he might be able to step away from those commitments were the hearing to be in December, January or February. The Appellant's solicitor also, candidly and creditably, told me in that response that he had in fact been able to identify replacement Counsel. He maintained that it would be preferable if continuity of Counsel could be secured. I refused the adjournment, communicating my decision later on 8 November 2023. I said that in all the circumstances I was not prepared to adjourn the case, given that alternative competent Counsel would be able to deal with it, and do it justice, given the timeframe. Mr Mak was duly instructed, adopted the grounds put forward in writing by his predecessor, and has assisted the Court in targeted oral submissions.

Context

3. The Judge concluded that, having conducted the Article 8 'balance sheet' exercise, the factors capable of weighing against extradition were decisively outweighed by those weighing in its favour. The Appellant has been here in the United Kingdom since 2006, with his wife of 23 years who is in full-time employment. They have an adult daughter and an adult son. The sentence which the Appellant is wanted to serve is 10 months custody. He has indefinite leave to remain in the UK and the Judge found that he would be able to return here after serving his 10 month sentence in Poland, so that the duration of the rupture of family and private life would be limited to that period of 10 months. That was also point emphasised by the Judge who refused permission to appeal on the papers.

Good Character

4. The appeal papers – adopted by Mr Mak – criticise the Judge for referring to the Appellant as having led a law-abiding life since settling in the UK in 2006, when the Judge should have made the point that the index offence is the first and only recorded criminal conviction against the Appellant anywhere. But the Judge was very well

aware of that. The point that the Judge was emphasising properly related to the Appellant's position during his period in the UK.

Seriousness

5. Another criticism is that the Judge wrongly referred to the index offending as relatively serious with a likely custodial sentence in the UK for equivalent conduct here. The word "likely" is attributed to the Judge in the appeal papers. But in the relevant passage – to which Mr Mak rightly took me – the Judge did not say that a prison sentence would be "likely" here. Rather, he said that a prison sentence "might" be imposed here. The written argument in the appeal papers contended that only a non-custodial sentence could ever be imposed here. But that adopted a categorisation under the Theft Sentencing Guidelines which overlooked the element of trust in the misappropriation of the CCTV camera equipment involved in the index offence. That equipment had been supplied in circumstances where the Appellant had represented that he was planning to open a shop, but those premises were subsequently found to be empty, and the Appellant had sold all but a small part of the equipment to a pawn broker. Mr Mak emphasises, in the context of the prospect of custody here, that the Appellant had no prior convictions. But the Judge was well aware of that and was making a fair observation, in the context of the seriousness of the offending.

Paying the Authorities

6. Points are made about the "unchallenged" evidence of the Appellant's wife, that she had paid a 2000PLN fine, at the request of the Polish authorities, during a holiday in July 2007, to deal with the index offending and the Polish authorities' interest in it. Mr Mak suggested that this "fine" could be equated with the "redress" required to be paid as a condition of the suspended sentence which had been imposed in July 2005, and which was activated in October 2008 following non-payment of the "redress". Mr Mak also says that the events of July 2007 affect seriousness and explain why the index offence does not appear in an ACRO (international convictions) print-out. The wife's evidence was that the payment in July 2007 had led her and her husband to believe that the matter now being pursued by way of extradition was at an end.

7. The problem with all of this is that the Judge made an express finding of fact that no action of the Polish authorities had led the Appellant to have any false sense of security. The Judge explained that one of the pillars upon which extradition is built is that of good faith on the part of the Issuing Judicial Authority. He referred to the Judicial Authority's statements that the 10 month previously suspended sentence had been activated in October 2008, because of the failure by the Appellant to pay the required redress. The Appellant had himself told the same story as his wife, about false sense of security. He had been cross-examined about it. The Judge had made clear in the judgment that, on any issue of conflict, he preferred the Issuing Judicial Authority's evidence. It is unsurprising that the Judge did not believe the story about the false sense of security. The Appellant had denied any knowledge after June 2005 that any proceedings were ongoing in Poland (an account which the Judge also specifically rejected). The Appellant, in cross-examination, claimed there had been the July 2007 payment and a court receipt for the 2000PLN, which receipt had then been lost. There was also the problem that 2000PLN felt very far short of the redress value of the equipment, only a small part of which was recorded as having been restored to the owner. There is no prospect of this Court at a substantive hearing

proceeding on the basis that, because the wife was not cross-examined, the analysis must proceed on the footing that she and the Appellant did have a false sense of security based on something which was said to have happened in July 2007.

Passage of Time

8. The remaining criticisms, in essence, all relate to the passage of time. This is the topic with which Mr Mak started his oral submissions. The Judge was very well aware of the passage of time. He had dealt separately with a section 14 argument (about whether extradition was oppressive by reason of the passage of time). In the context of Article 8, the Judge specifically cited the well-known authority of HH v Italy [2012] UKSC 25. He specifically took into account, in the Article 8 context, the time that had passed between the date of the Polish 'sentence' to the present day. Nothing can possibly turn on the fact that he did not refer to the passage of time back to the date of the 'offending'. As to the period after the 'offending', the answer was that there had plainly been no lack of diligence in the pursuit of the Appellant through the Polish criminal process. The Appellant had attended a hearing in June 2005 and then been convicted in his voluntary absence and sentenced in July 2005. The redress was required to be paid by July 2007. When that did not happen the sentence was activated in October 2008 and a domestic warrant issued in November 2009.

9. As to what happened next, the Extradition Arrest Warrant was issued in July 2012. But the fact that the Polish authorities had been looking for the Appellant is reflected in their having at that stage recorded that he was thought probably to be in the Netherlands. The Judge had found that the Judicial Authority had not been guilty of any culpable delay. They had carried out searches and had ascertained that the Appellant appeared to have left the country.

10. There was then the ten year period of time between the Extradition Arrest Warrant (2012) and its certification (2022). There is a passage in the Judge's judgment which says that any delay between issue and certification could reasonably be attributable to Brexit and the loss of the SIRENE database system. As Ms Mak submits, and as the Respondent's Notice accepts, points about Brexit and associated loss of the database only arose as at 2020. The Judge himself elsewhere specifically referred to the Trade and Cooperation Agreement as having come into force in December 2020.

11. In my judgment, this point about this aspect of the passage of time – and the other aspects of the passage of time – are incapable, even arguably, of overturning the Article 8 outcome as wrong. Mr Mak is right that all cases are fact-sensitive and fact-specific. The Appellant has unassailably been found to have left Poland as a fugitive. Fugitivity is not an 'on/off switch' in Article 8 'passage of time' terms. But it is a relevant feature. It has also unassailably been found that there was no culpable delay, and no false sense of security, on the part of the Polish authorities. The Article 8 family life and private life implications of the passage of time, including between 2012 and 2022, are recognisably capable of strengthening private and family life ties and also as tending to weaken the public interest considerations in favour of extradition. But this, combined with the other aspects of the case, is not in my judgment capable of undermining the Article 8 outcome. The Judge gave full weight to the private and family life circumstances, including the implications flowing from the passage of time. There is no realistic prospect that, even if the reasoning should

have been expressed differently, the overall outcome would be overturned as wrong. In those circumstances, permission to appeal is refused.

14.11.23