



Neutral Citation Number: [2023] EWHC 2954 (Admin)

Case No: CO/2115/2023
AC-2023-LON-001773

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 21st November 2023

Before:
FORDHAM J

Between:
JAKUB KOWALEWSKI **Appellant**
- and -
POLISH JUDICIAL AUTHORITY **Respondent**

George Hepburne Scott (represented by Bark & Co) for the **Appellant**
Tom Davies for the **Respondent**

Hearing date: 21.11.23

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.

FORDHAM J

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

FORDHAM J:

Introduction

1. The Appellant is aged 36, having been born in March 1987. He is wanted for extradition to Poland. That is in conjunction with a conviction Extradition Arrest Warrant issued on 24 November 2022 and certified on 14 February 2023, on which he was arrested at home on 4 March 2023 and then released on conditional bail on 10 March 2023. His extradition was ordered by District Judge Clarke (“the Judge”) on 8 June 2023. That was after an oral hearing on 16 May 2023 at which the Appellant was represented by Counsel and gave oral evidence.
2. The index offending is a series of 8 offences – now possibly 6 offences – committed, at the ages of 17 and 18, between April 2004 and November (or December) 2005 . The Appellant came to the United Kingdom in January 2006. The Judge unimpeachably found that the Appellant came here as a fugitive. He was aware of the suspended sentences imposed for the attempted commercial burglary of April 2004, and for the cannabis and firearms possession in December 2004, of 2 years and 18 months respectively. The Appellant was also aware that he had been charged in relation to the further offences: the attempted burglary in February 2005, the two offences of criminal damage in November 2005 and the threats and criminal damage in December 2005. And the Appellant was aware of, and was breaching, his obligation to notify the Polish authorities of any change of address. After coming to the UK his suspended sentences were duly activated in February and December 2006.
3. It was 11 years later in 2017 that the Appellant himself decided to take steps to try to resolve matters in Poland. He instructed a lawyer to apply for a new aggregated sentence. In January 2020, that application was granted. An aggregate sentence of 4 years custody was imposed, which became final in July 2020. The Appellant was aware of that and chose not to return to serve that sentence. Searches for him were undertaken and by November 2021 it had been determined that he was in the UK. An application was made in March 2022 for the Extradition Arrest Warrant then issued in November 2022. In the same month – November 2022 – the Appellant secured settled status in the UK.
4. Two distinct issues have arisen in the context of the appeal to the High Court, which is currently at the permission stage.

The Polish Court Decisions

5. One issue is a new argument that applications to, and decisions by, the Polish courts constitute a material change in circumstances, so that the position would need to be regularised before any extradition could proceed. That could, as one consequence, involve the withdrawal of the existing Extradition Arrest Warrant and the issuing of a new Extradition Arrest Warrant on which the Appellant would need to be arrested were there to be any extradition at all. The translated documents that are before this Court as putative fresh evidence, on the face of them, are as follows:
6. The documents start with a Polish court decision dated 23 August 2023 which is the subject of an application to adduce fresh evidence dated 8 September 2023. The Appellant’s position has been that the August 2023 judgment had set aside the

aggregate 4-year custodial sentence imposed in January 2020. The Respondent's first answer to that, which Johnson J had seen and accepted when refusing permission to appeal on the papers, was that in fact what the August 2023 judgment was doing was setting aside a June 2023 decision in the Polish courts. That June 2023 decision had ordered discontinuance of an April 2023 motion by the Appellant's lawyer seeking a new 'joint judgment'. On this basis, the April 2023 motion remained extant and there was a decision remaining to be made in the Polish court. There was a second answer, to which I will return. I record that Mr Davies was unaware of the email submissions dated 12 September 2023 from his client, giving these answers.

7. The documents subsequently placed before the Court, with a further application (5 November 2023) to adduce fresh evidence, appear to be decisions of Polish courts on 2 October 2023 and 27 October 2023. What is recorded comes to this: that the November 2005 criminal damage sentences have been discontinued and are now treated as void; and that the sentences for all the other six offences have again been merged into what is now a two-year overall custodial sentence.
8. The Respondent's response takes a different line as to these subsequent documents. What is said is that the "authenticity" and "provenance" of these October 2023 documents is "currently unknown", and that permission to adduce the fresh evidence should be refused for that reason. In his oral submissions today Mr Davies has added that there has been no correspondence or witness statement provided by the Appellant's solicitors. That would have been a more powerful submission had that ever been said to those solicitors or had they ever been asked to provide any further information. In the alternative, the Respondent maintains what was the second answer advanced previously. It is that, even if there is a change of circumstances and a freshly aggregated sentence, that does not give rise to the Extradition Act 2003 s.2 particularisation argument, on which the Appellant seeks permission to amend and permission to appeal. That is said to be on the authority of Zakrzewski v Poland [2013] UKSC 2 [2013] 1 WLR 324. The Respondent says that the November 2022 Extradition Arrest Warrant would not be rendered unenforceable for want of particularisation. Instead, says the Respondent, the sole argument which could be advanced would be an "abuse of process" argument (Zakrzewski para 11), which would not be a viable argument in the circumstances of the present case.
9. I am going to adjourn the question of permission to appeal on the Zakrzewski issues (as I will call them) and direct that they come back before the Court on a "rolled-up" basis at a hearing at which the Court will be able to deal with permission to adduce the fresh evidence, permission to appeal and proceed immediately to the substantive issue which will follow for substantive determination were those applications granted. I decline the invitation by Mr Hepburne Scott simply to order permission to appeal. I also decline the invitation of Mr Davies to shut out the putative fresh evidence.
10. I am taking the course that I have identified, for these reasons. First, I am concerned that the Respondent's position should be unclear as to whether the Polish courts have or have not taken the decisions of 2 October 2023 and 27 October 2023. The application to adduce that fresh evidence was made 15 days earlier. Either the Polish courts have, or they have not, taken those decisions. I do not regard it as satisfactory for the Respondent to place "authenticity" and "provenance" into doubt on the eve of today's hearing – yesterday after 6pm – still less for the Court today to shut out the material on that basis. That position as to "authenticity" and "provenance" was not the position the

Respondent took on 12 September 2023, in relation to the appeal court judgment of 23 August 2023. This case starts from the position of an aggregated sentence in a Polish court decision, after an application by the Appellant's lawyer, in January 2020. I think the Court needs a proper answer as to whether this case ends with a replacement aggregated sentence on an application by the Appellant's lawyer, in October 2023, which has halved the overall custodial sentence for which the Appellant is wanted to serve, and a decision earlier in October 2023 which has removed 2 of the 8 offences and therefore any sentence relating to those. The second reason is this. The Supreme Court did not, as I read it, say that abuse of process was the only appropriate safeguard. Lord Sumption said in Zakrzewski at paragraph 10 that "further information" could properly be sought by the executing court. That supports the idea that clarity should be secured in a situation like the present, before any extradition proceeds. The third reason is this. Mr Hepburne Scott says that the s.2 particularisation analysis revives, notwithstanding Zakrzewski, by reason of Alexander v France [2017] EWHC 1392 (Admin) §§60-61, after Goluchowski v Poland [2016] UKSC 36 [2016] 1 WLR 2665. This is how the further ground of appeal is being put. I have recorded that the Respondent's response came after 6pm last night, that was after a day of chasing. I also record that Zakrzewski was not supplied, and the later authorities were unmentioned.

11. I am not prepared to grant permission to appeal, as I have said, and the formal decision as to whether to grant permission for the putative fresh evidence should I think await the stage at which it can be known whether that evidence is capable of being decisive. But given that the Respondent has been unable, in the 2 weeks so far, to confirm or deny that the Polish courts have indeed made the October 2023 decisions recorded in the documents now before me, and given that it has chosen to raise issues of "provenance" and "authenticity", I am going to afford a further opportunity for that to take place. There can then – absent agreement between the parties – be the prompt resumption of this part of the case, and the Court can consider and on an informed basis the safeguard described at paragraph 10 of Lord Sumption's judgment in Zakrzewski alongside any Alexander section 2 particularisation arguments or possible abuse of process.

Article 8

12. The other issue in the case concerns Article 8 ECHR. I am neither prepared to grant permission to appeal on that ground, nor to defer it. In my judgment, there is a clear answer to it, even if the relevant period of custody to serve is the 2-year newly re-aggregated overall sentence for the remaining 6 of 8 offences. I will explain why.
13. I accept that the Article 8 balance would, or may, need to be revisited and restructured if the newly aggregated sentence is indeed established to be 2 years; and the index offences are 6 rather than 8 offences (not now the two November 2005 criminal damage offences). I will test the Article 8 argument on the premise, in the Appellant's favour, that that is the position.
14. Mr Hepburne Scott has helpfully emphasised a number of features in the case on behalf the Appellant. There is a very long passage of time of 18/19 years, taken back to the index offending. The offending was at the ages of 17 (as a minor) in respect of the April 2004, December 2004 and February 2005 offending; and as an 18 year old in relation to the December 2005 offending. Subsequent to the 2006 activation of the suspended sentences imposed for the 2004 offences, there was then an 11 year period in

the passage of time. What happened next was not some action or activity by the Polish authorities. Rather, it was the steps taken by the Appellant himself, through the Polish lawyer, which brought matters to a head from 2017 through to 2020. The offending, relatively speaking, as at the less serious end of the scale. The Appellant has transformed his life in the United Kingdom. Here, he has been blameless and productive. He has a solid record of employment. He has no convictions in this country.

15. In my judgment, notwithstanding those and all the other features of the case, this is a case in which the strong public interest considerations which weigh in favour of extradition would still decisively outweigh those capable of weighing against it. The Judge characterised the index offences as matters of seriousness and emphasised the repetition in 2004 and 2005. That characterisation remains apt, even if two of the 8 offences are out of the picture. The Judge emphasised her adverse finding of fugitivity, as relevant to the passage of time and to the weighty public interest considerations in support of extradition. She accepted that there were the Appellant's strong and legitimate private life ties to the UK, recognising that extradition would have a serious impact on the Appellant. So do I. But she also pointed out this is not a family life case, there are no innocent third parties whose Convention rights are engaged, such as a partner or a child or children. Even a two-year sentence is a significant period of custody as to which the Appellant is wanted. Stepping back and looking overall, I cannot see the Article 8 argument succeeding in this case, even on the basis that the new two-year aggregation is confirmed. I do of course leave to one side questions arising out of whether the extradition arrest warrant will need to be replaced or has become deficient but that is the other and distinct issue with which I have already dealt. On this part of the case, I will therefore refuse permission to appeal on the Article 8 ground.

Order

16. After receiving Counsel's assistance, I am making the following Order. I am reserving the question of costs so that the Judge at the next hearing can revisit any costs issue arising out of today, should it prove appropriate to do so. I will record as recitals:

UPON the Appellant's further applications ("the Applications") to adduce fresh evidence (dated 8 September 2023 and 4 November 2023), to amend the grounds of appeal and for permission to appeal on issues relating to judgments of the Polish courts ("the New Issues")

AND UPON the Court recording its wish to receive Further Information from the Respondent confirming: (i) whether the authenticity of the transcripts of the decisions of the Polish Court provided by the Appellant, are accepted or not; (ii) whether or not the Extradition Arrest Warrant dated 24 November 2022 has been or is to be withdrawn.

I will Order:

(1) Permission to appeal on the Article 8 ground is refused. (2) On the New Issues, the Applications are adjourned to a rolled-up hearing (time estimate 2.5 hours) on the first available date on or after 35 days after this Order, to be fixed in conjunction with Counsel's availability, the hearing incorporating the substantive hearing if permission to appeal and to adduce fresh evidence are granted. (3) The Respondent shall provide any Further Information and written submissions within 21 days of this Order. (4) The Appellant's skeleton argument to be filed and served no later than 14 days prior to the date of the rolled-up hearing. (5) The Respondent's skeleton argument to be filed and served no later than 7 days prior to the date of the rolled-up hearing. (6) Agreed hearing and authorities bundles to be filed no later than 7 days prior to the date of the rolled-up hearing. (7) Costs reserved.

21.11.23