Neutral Citation Number: [2020] EWHC 1522 (Admin)

Case No: CO/3050/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 June 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

RAFAL MICHAL KOTLARSKI	**Appellant**
- and -	
REGIONAL COURT IN BIELSKO-BIALA, POLAND	**Respondent**

- -
- -

George Hepburne-Scott for the **appellant**
Tom Hoskins for the **respondent**

Hearing date: 11 June 2020
Judgment as delivered in open court at the hearing

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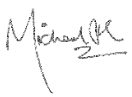
Approved Judgment

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 for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down are deemed to be 11th June 2020 at 2pm.

MR JUSTICE FORDHAM :

1. This is an extradition appeal. It was heard by telephone conference hearing. It and its start time were listed in the cause list, with contact details available to anyone who wished to dial in, as at least one member of the public did. Both Counsel addressed me in exactly the way that they would have done had we all been sitting in the court room. I thought about whether, and am satisfied that: this constituted a hearing in open court; the open justice principle has been secured; no party has been prejudiced; and insofar as there has been any restriction on a right or interest it is justified as necessary and proportionate.

2. Permission to appeal in this case was given at a renewal hearing by Mrs Justice Steyn on 5 March 2020, in circumstances where permission had previously been refused on the papers by Mr Justice Dove. In granting permission to appeal, Mrs Justice Steyn also gave permission for reliance on updating evidence, so far as events in the Polish courts were concerned. The appellant is wanted for extradition to Poland. That extradition was ordered by District Judge Sarah-Jane Griffiths, in a judgment dated 1 August 2019 after a hearing on 17 July 2019. The sole issue advanced on this appeal is a human rights argument based on the familiar ECHR article 8 rights, to respect for private life and family life. The ultimate question is the familiar question of proportionality. Earlier reliance on section 2(6) of the Extradition Act 2003 has been abandoned for the purposes of this appeal before me.

3. The case undoubtedly had a twist at the permission stage. In the renewal application before Mrs Justice Steyn the appellant had relied on what was thought – in good faith – to have been a striking development in the Polish courts. That was an exercise in 'aggregation' of existing sentences which was said to have taken what had been an overall sentence of some 4 years and 11 months, bringing it down to a sentence of some 1 year and 3 months. This, moreover, was in a case where the appellant has been on remand since 6 May 2019. That was understandably, given the view that was taken, put forward strongly on behalf of the appellant. The argument was that there was a significant net effect of an apparent reduction which was a powerful factor. It was put as follows: "It is submitted that the reduction of this outstanding term by 3 years and 9 months fundamentally alters the article 8 position and this is a factor now sought to be argued by the appellant in relation to that ground". That was the point that persuaded Mrs Justice Steyn. She gave very careful reasons as to why, notwithstanding what was undoubtedly a careful and comprehensive examination by the district judge as matters stood before the district judge, it was 'reasonably arguable' in this court that the article 8 balance was worthy of revisiting and with a different outcome. Mrs Justice Steyn said this: "It is reasonably arguable that the aggregation and discontinuance of sentences generate a lack of clarity … The reduction of overall sentence … is a huge reduction. The applicant has been in custody in these proceedings for 10 months which will also be accounted for. In these circumstances, the article 8 balance falls to be reconsidered".

4. As Mr Hepburne-Scott for the appellant candidly and rightly accepts, in fact there has been no such dramatic reduction. The 'bottom line' position is this it is agreed that the term outstanding is 4 years and 5 months. Mr Hoskins for the respondent points out that on one view it might be seen to be 4 years and 8 months though he does not place any reliance on that or the difference between the two for the purposes of today; nor does any party asked me to resolve any issue or give any explanation. I therefore take, as both parties have, 4 years and 5 months as the 'bottom line' position. From that needs

to be effectively deducted the remand period to which Mrs Justice Steyn referred as being relevant. Again, there is helpful common ground between Counsel that the 'overall bottom line' position, in terms of time left to serve, is 3 years and 4 months. As Mr Hepburne-Scott therefore candidly and rightly accepts, the article 8 arguments put before this court are less substantial than they were thought by everyone to be. I make no criticism of anyone in relation to that. I do not need to delve into what happened. But, on the face of it, the language of 'discontinuance' of some matters had been used in a description of the Polish aggregation exercise. That understandably led to the inference that the matters being described as 'discontinued' were no longer live and relevant and were no longer custody facing being served. It turned out that the language of 'discontinuance' was used in a different sense, namely that those additional matters were not included within the aggregation exercise and therefore their merger within an aggregated sentence was what was being 'discontinued'. That meant they continued to have self-standing and ongoing effect. I also do not need to get involved in issues as to whether what was originally a 'mixed' warrant is still, in some narrow sense, partially still an 'accusation' warrant. Everybody is sensibly agreed that this is effectively to be treated as a 'conviction' warrant with the relevant terms being those which I have described.

5. Mr Hepburne-Scott realistically does not focus on an attack on the factual evaluation, or adequacy of reasoning, on the part of the district judge. He takes a different course and it is one that is open to him. He effectively submits, on the basis of the judgment of the Divisional Court in the case of Love v United States of America [2018] EWHC 172 (Admin) at paragraph 26 that this Court can and should look at the 'outcome', in order to evaluate whether that article 8 outcome is one which was 'wrong'. As Burnett LCJ explained in that passage: "The appellant court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed". That, as I understand it and as it seems to me, is really the high watermark for the appellant so far as the approach on this appeal is concerned. Therefore, it is not necessary or appropriate to delve into the specific strands of reasoning on the part of the district judge, save as is relevant to deal with that overall "stand back", evaluative exercise.

6. The case, as I see it, really comes to this. Mr Hepburne-Scott says that extradition can, in article 8 terms, be seen in this court as disproportionate and the district judge's outcome 'wrong', given in particular the following. First, that these offences are very old. The underlying offending which is the subject of the European Arrest warrant in this case is offending from 2001 to 2004. It was, in particular, a series of thefts and burglaries including burglaries of dwellings and thefts of vehicles. One of the points very fairly pointed out by Mr Hoskins on behalf of the respondent, which is a point in the appellant's favour, is that the recent events so far as aggregation of sentences and other developments are concerned has narrowed the timeframe for the index offending. It was previously 2001 to 2006 and is now 2001 to 2004. That enables Mr Hepburne-Scott to rely on the fact that not only are these offences very old , but they were offences which were committed when the appellant was aged 17 to 20. Next, the appellant has had 14 years in the United Kingdom, from ages 22 to 36. He has a stable family here and stable and solid family relationships. He has a partner and together they have two children: there is a daughter aged 14 and a son aged 2½. Mr Hepburne-Scott emphasises, in particular, the 'severe impact' which he says the court can and should

conclude will inevitably be felt by a 2½ year old boy from an extradition given the age and the formative stage at which such a child is. The way that is put in the skeleton argument is as follows: "The appellant's extradition is likely to have a severely deleterious impact upon the appellant's wholly innocent son who is it a crucially formative time of his life". The next feature relied on in support of the article 8 argument is the appellant's good character in the United Kingdom. This is therefore a classic case where what is said, in essence, is that the individual facing extradition has 'turned his life around', having come to the United Kingdom; that he is, on the face of it, a hard-working taxpayer who has been here for a very long period of time, living a law-abiding fruitful life, as well as having his private life and family life. The lapse of times is relied on as, in a familiar way, reducing the public interest in extradition and increasing the impact on family life and private life. It is essentially by reference to those considerations that the claim is made that extradition would be disproportionate in this case and I should overturn the evaluation of the district judge.

7. I am not persuaded by those submissions. I start from the position of the district judge. Notwithstanding the approach identified in Love, to which I have referred, the context which should never be overlooked is that the primary fact-finder is the district judge who in this case heard oral evidence from the appellant and the appellant's partner. Moreover, there was what I will call "expert evidence" (in fact it was witness evidence by suitably qualified people giving professional opinions, rather than expert reports in the sense used in the Criminal Procedure Rules) adduced before the district judge as to impact. There was expert evidence both relating to the impact on the partner and relating to the impact on the daughter.

8. The district judge made findings of fact on the evidence adduced before her. She proceeded then to conduct the 'balance sheet' approach as is required by the authorities in this area of law. Having done so, she then explained and articulated the overall balancing conclusion that she had arrived at. Her findings of fact included that the appellant was a fugitive and came to the United Kingdom from Poland as a fugitive. She made findings of fact that the partner will cope with the extradition in terms of work, the support of welfare benefits and the support of extended family nearby. She found as a fact that the children would remain in the mother's care. She found that the daughter, in respect of whom the expert evidence had been put forward, would experience distress but it was of a typical nature encountered in extradition cases and there would be appropriate support. She considered the impact on the partner, again by reference to the expert evidence, and made findings that there was appropriate support and treatment. She found in the appellant's favour that he was of good character in the United Kingdom. She had regard to the lapse of time but reminded herself that that was a factor which arose in the context where she had found the appellant to be a fugitive: that is to say, in effect, the delay and lapse of time was something that he had brought on himself, being the cause, having evaded his responsibilities and come to the United Kingdom in the circumstances that he did. She then, as I have said, conducted the balance sheet exercise and the balancing. She ultimately concluded that there were no very strong counterbalancing factors in this case capable of outweighing the strong public interest considerations in favour of extradition. I have already said that no particular criticism of any particular finding or aspect of reasoning is relied on. In all those circumstances, I do not propose to prolong this judgment by quoting chunks from the district judge's assessment and analysis.

9. In my judgment, the judgment of the district judge in this case was a thorough and proper evaluation, arriving at findings and conclusions that were entirely open to her. In the original decision refusing permission to appeal, Dove J said this: "The district judge undertook a very careful and comprehensive examination of the relevant balancing factors in the article 8 assessment which she performed and I can detect no arguable basis on which it could properly be contended that her conclusions were wrong". I am not revisiting the question of 'arguability', but I have reached the same conclusion as to the substantive merits of the article 8 argument. I can detect no basis on which I could properly arrive at the conclusion that the judge's assessment and evaluation and the ultimate outcome in this case were wrong. I would go further: the district judge in this case is to be commended for what, in my judgment, was an impeccable approach and analysis.

10. I return to some of the key features of the case which are of particular relevance when re-evaluating the overall outcome. I have already said that the length of sentence is 4 years 5 months, or 3 years 4 months taking into account remand. That is a very substantial term of custody, to which the appellant is responsible to face up. Next, there is important factor that he has been found as a fact, in a finding which cannot be and is not impugned, to be a fugitive. That adds weight to the public interest considerations in favour of extradition, given the distinct public interest in the United Kingdom not being a safe haven for fugitives from justice. It also materially tempers the approach to lapse of time. In circumstances where the individual is a fugitive it is not the case that lapse of time becomes irrelevant. The court will have regard, in particular, to the roots that the appellant has put down during the period of time that has elapsed; to the private life and family life ties that have arisen; and to the impact that flow from what has been established during that period. But those are precisely the matters which the district judge had at the forefront of her consideration and I have had forefront of mine.

11. Next, I would emphasise that, as the district judge found, the children in this case will remain in their mother's care and she will be in a position to be able to cope, as to work and benefits and the support of family. No distinct point is taken in relation to impact on partner and daughter which aspects, as I have said, were the subject of expert evidence before the district judge. So far as the son is concerned, there was no expert evidence before the district judge and there is none before me either. The point that is made is one that relates to the typical impact that can be expected in the context of extradition, to face a significant sentence abroad, of the parent of a child as young as 2½. That is a relevant consideration which, of course, calls for careful reflection and evaluation. However, it is right to say that ultimately the point that is being made is not one concerning any particular evidenced impact peculiar to this particular child. It is, rather, the typical and inevitable consequence of extradition for a child of that formative age. In the context of all of these considerations as to impact, Mr Hoskins was right to remind me of the observations of Lady Hale in HH [2012] UKSC 25 at paragraph 8(7) where she said: "It is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe". She was not laying down a legal litmus test and I do not approach that passage on that basis, and nor did the district judge do so. However, regrettable and inevitable though the impact for the 2½ year old child in this case is, it cannot begin to outweigh the strong public interest considerations in favour of extradition of a fugitive to face a significant custodial period, nor does it begin to do so when put into the balance alongside all of the other factors pointing in each direction.

12. The authorities in this area emphasise the respect which is appropriately paid by the appeal court to the article 8 proportionality evaluation of the primary decision-maker, namely the district judge; that this is an appeal; and that it is not simply regarded as a substitutionary jurisdiction where all evidence is re-evaluated. I do not hear oral evidence. Nor indeed have I even had the expert evidence put before me for the purposes of this appeal. That is no criticism because it was an appropriate recognition of the distinction between the functions of the district judge and this court considering an appeal. However, in order to test the legal merits in the present case, I have approached the matter by reference to considering what I would make of the arguments, were this a substitutionary 'correctness' jurisdiction, taking the evidence as described by the district judge at and asking myself what I consider to be the 'correct' outcome. That, as I have said, is not the approach taken on an appeal because of the appropriate respect to be given to the district judge. But it is, in my judgment, a healthy cross-check to ask that question in order to test the legal merits in a human rights case. In my judgment, even were I adopting a substitutionary approach, I would have dismissed this appeal, on the basis that the district judge came to the correct outcome in this case. Indeed, I would have concluded that she came to the correct outcome by a very significant margin.

13. For all of those reasons, the district judge's judgment is upheld and the appeal dismissed.

11 June 2020