Neutral Citation Number: [2022] EWHC 258 (Admin)

Case No: CO/2355/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 9th February 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

PAUL HABERLIN	**Appellant**
- and -	
DISTRICT COURT HAMBURG GERMANY	**Respondent**

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- -

Malcolm Hawkes (instructed by Brunskill Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

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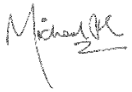
Hearing date: 9.2.22
Judgment as delivered in open court at the hearing

- -

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

MR JUSTICE FORDHAM:

Introduction

1. This is an in-person renewed application for permission to appeal in an extradition case. The Appellant is aged 53 and is wanted for extradition to Germany. That is in conjunction with an accusation European Arrest Warrant ("EAW") issued in August 2019 and certified in October 2019. It relates to an alleged offence of tax evasion with a scale said to be €3½m in unassessed German VAT, carrying a maximum sentence of 10 years imprisonment. Extradition was ordered by DJ Griffiths ("the Judge") on 2 July 2021 after an oral hearing on 21 May 2021 at which all evidence was given by the Appellant, by Professor Iqbal (a consultant clinical psychologist) and by Dr Guler (giving expert evidence as to German law, having considered materials relating to the present case). Permission to appeal was refused on the papers by Cavanagh J on 26 November 2021. The Court has the benefit of very lengthy and detailed perfected grounds of appeal, reproduced within grounds of renewal, in the context of a lengthy and detailed judgment by the Judge.

Section 14

2. Permission to appeal is sought in relation to the passage of time and oppression or injustice (section 14 of the Extradition Act 2003). The Judge examined in detail the explanation as to why, following a judicial examination of a Mr Hourigan in February 2015, the German authorities' suspicions switched to a Mr Parkes, who in June 2017 identified the Appellant as the individual controlling the operations of the company called Blossom Capital which is at the heart of the alleged VAT evasion. The German domestic warrant against the Appellant was issued in October 2018 and the EAW in August 2019. The Judge unassailably found that to a large extent the passage of time had been explained by the requesting state authorities. There was no arguable error, in my judgment, in the Judge not finding that this was a case of "culpable" delay. But more importantly, the Judge unassailably, in my judgment, found that the thresholds of "oppression" or "injustice" by reason of the passage of time were not, in the circumstances, met. To a large extent the themes in this case relating to "oppression" are also relied on under the Article 8 ECHR ground of appeal to which I will turn. There is, in my judgment, no materiality in the point made orally today that one of the factors described in the Respondent's "Further Information" – namely the stated need to confirm the Appellant's place of birth – could be impugned within the evaluation so as to undermine the Judge's overall conclusion on this part of the case.

Article 8

3. The proposed appeal relating to Article 8 ECHR has at its heart three features:

    i) One is the impact – on the Appellant, his wife and their daughter – of his extradition, in particular in the light of the mental health conditions and implications addressed in detail in the evidence of Professor Iqbal. One key and troubling aspect concerns a risk of suicide on the part of the Appellant's wife.

    ii) A second key feature of the Article 8 analysis relates to refusals by the German authorities to proceed by interviewing the Appellant, rather than extraditing him. On that point, the position of the Appellant before the Judge – and before me –

is that what was needed, in the circumstances, by the German authorities was a proper "review", and then engagement through interviewing the Appellant.

iii) A third key feature is what is said to be a "manifestly weak" prosecution case against the Appellant in Germany. On that topic, reliance is placed on the ways in which Mr Parkes has been (in other proceedings) discredited; and on the nature of the evidence being relied on, from Mr Parkes and otherwise said to be "circumstantial". All of that was addressed by Dr Guler in his evidence. His opinion was that in this case the relevant test for 'suspicion' had not been made out.

4. In his oral submissions today, Mr Hawkes has identified three key questions, corresponding to these features of the Article 8 analysis:

i) First, he says that the "impulse"/ "voluntary act" approach to suicide risk – which has been applied in section 25 cases on the authority of the Turner – is not an approach applicable to third party family members in the context of Article 8 proportionality. Mr Hawkes says that the Turner test is itself in doubt, even for section 25 purposes, by reference to a case called Modi v India [2021] EWHC 2257 (Admin), in which (he tells me) permission to appeal was given by Chamberlain J in August of last year, and which is pending before a Divisional Court. He submits that the Judge in this case arguably erred in law in dealing with the wife's suicide risk by applying the Turner "voluntary act" test. That argument is located by Mr Hawkes alongside other features of the case and in particular the severity on the evidence of the daughter's mental health condition, her current circumstances and the implications for her of her mother's mental health and suicide risk, if her father is extradited.

ii) Secondly, Mr Hawkes submits that relevant for Article 8 purposes are the Respondent's refusals to interview the Appellant by way of "less coercive measures". His proposition came to this: that "patent unreasonableness" in refusing to engage with "less coercive measures" is relevant to Article 8, at least in a suicide risk case. Linked to this argument were his submissions about the German authorities' need to "review" the position.

iii) Thirdly, Mr Hawkes in his submissions today emphasises "the patent weakness" of the prosecution case which, in his submission, must be an important feature of the Article 8 analysis. As put in writing – in his grounds of renewal – his proposition was that an allegation of criminal conduct which is "on its face unsustainable" cannot be a "serious" matter for Article 8 purposes. His proposition orally was that the Judge erred in law in failing to conclude that "on its face there was strong grounds to believe that the prosecution case is weak". On this part of the case Mr Hawkes emphasises: the rejection (by DJ Godfrey) in the other proceedings of Mr Parkes's evidence; and the view of the independent expert Dr Guler about the strength of the prosecution case and the application of the 'suspicion' threshold.

Finally, and importantly, Mr Hawkes submits that these features need to be considered in combination and not in isolation. Where there is a risk of suicide of a spouse, and where the case for prosecuting the requested person is manifestly weak, and where there

is a patent unreasonableness in refusing to engage by interview, extradition cannot be said to be proportionate for Article 8 purposes.

5. Mr Hawkes, rightly, emphasises that for the purposes of today the threshold is one of reasonable arguability. However, in my judgment, that threshold has not been crossed and there is no reasonably arguable Article 8 ground of appeal by reference to these and the other features of the case.

   i) I was able, with Mr Hawkes's assistance, to locate the passages in the Judge's judgment when she addressed the wife's suicide risk. It is true that the Judge expressed the conclusion that the wife "does not lack capacity to resist the impulse to commit suicide unless she is inebriated" and that "her failure to deal with alcohol issues is not her mental condition but her own voluntary act putting her at risk at dying". I was able to identify and link that passage in the Judge's later Article 8 assessment to what Mr Hawkes had showed me in the Judge's earlier discussion, when she earlier said the same thing: that the wife's failure to deal with the alcohol issues meant it was not mental condition but "voluntary act" that put her at risk of dying. However, reading the judgment fairly and as a whole, this was one strand in the Judge's assessment of the suicide risk. That risk was carefully and properly approached. It informed the Article 8 proportionality evaluation. It is not, in my judgment, reasonably arguable that the Judge erred in law in treating the Turner impulse/voluntary act test as operating as an 'on-off switch' for the purposes of suicide risk of a family member in the context of Article 8. The Judge carefully evaluated, in lengthy and detailed passages, the relevant evidence of Professor Iqbal, in relation to all three family members, and the risks to them from the prospect of extradition, viewed in terms of impacts. Those strands were identified by Cavanagh J in his refusal of permission to appeal on the papers. There was no material error of approach, in my judgment, in the approach that the Judge took to the mental health evidence and the impacts of extradition. That applies too to the daughter's position. I do not accept that it is arguable that (as Mr Hawkes submits) the Judge engaged in "speculation" when she considered the position in relation to "support" at school and from the local authority. So far as concerns the impact for the daughter of the mother's suicide risk, in the father's absence, that was a point which the Judge specifically addressed in saying that she 'took account' in the context of the daughter of 'her mother's mental health suicide risk and vulnerabilities' and 'that it will be particularly difficult for the daughter if the Appellant were extradited'. I have had regard to the updating evidence about the daughter now being back at home (from boarding school) and attending a state school.

   ii) I turn to "less coercive measures": the German authorities' refusals to interview. In my judgment, it is not reasonably arguable that in this case there is a "patent unreasonableness" in failing to engage, on the part of the German authorities. The requests have been considered and were rejected. The Judge considered the position of the German authorities and the importance of what the Judge, unassailably, characterised as a "clearly serious" alleged crime. Ultimately, this point engages the criticisms made on behalf of the Appellant as to the need for a "review" of the position. But the Judge, unassailably in my judgment, found that the German authorities had reviewed the position, including in the light of

the judgment of DJ Godfrey rejecting the evidence of Mr Parkes. As the Judge specifically found, the Respondent had 'maintained their view that extradition is appropriate and they had not agreed to interview the Appellant as opposed to extradition'; that 'there was no failure to review the case, in fact the opposite was the case'. There is, in my judgment, no arguable error of approach on the part of the Judge in the way in which she dealt with this part of the Article 8 assessment.

iii) On the (linked) question of the "weakness" of the prosecution case, it is not in my judgment reasonably arguable that the Judge ought to have found that the prosecution is "on its face unsustainable". As for the alternative formulation about "strong grounds to believe that it is weak", the Judge considered that matter. Her evaluation of it had two limbs. The first is that she, correctly, identified that there is an absence – in the context of a case such as the present – of any test which requires the extradition court to address the 'evidential basis' of the prosecution. It is not, as she explained, the function of the extradition court to have and consider the file of evidence on which the German prosecutors are relying. There is no "prima facie case" test. But she went on, by means of a second limb, to explain that the Respondent had specifically addressed the contention that the "only" evidence against the Appellant is that of Mr Parkes. The requesting authority had specifically explained, in Further Information, that that was not the case. Furthermore, they had specifically "reviewed" the case, having been sent the judgment of DJ Godfrey relating to the evidence of Mr Parkes. The Judge unassailably found that, according to the Respondent, Mr Parkes's evidence is not "the only evidence" against the Appellant. So far as the evidence of Dr Guler is concerned, again the Judge carefully and painstakingly evaluated the evidence before her, and reached an unassailable conclusion. She explained why she could not accept that Dr Guler's evidence served effectively to impugn the decision taken by the German prosecutors as to satisfaction of the "suspicion" threshold. On that, she had the advantage of an exchange in Dr Guler's oral evidence, to which she made extensive reference. In substance, he was expressing one view of the evidence and the Judge was unassailably satisfied, in the light of what he said when questioned at the hearing, that there was another tenable review of that evidence.

6. The Judge evaluated Article 8 proportionality in the light of all of these considerations. I have considered the arguability of the Article 8 appeal in light of these points, including in combination. Whether they are looked at distinctly, or whether they are looked at 'in the round' and in combination, in my judgment there is no realistic prospect that this Court at a substantive hearing would allow this appeal and overturn the Judge's conclusion. That conclusion was that the Appellant's extradition – and notwithstanding the impacts of extradition which she anxiously considered – the Appellant's extradition to face prosecution in Germany for this "clearly serious" matter engages strong public interest considerations which decisively outweigh those considerations capable of weighing in the balance against extradition.

Conclusion

7. For these reasons, I agree with Cavanagh J that the appeal is not reasonably arguable and I refuse permission to appeal.

THE HON. MR JUSTICE FORDHAM
Approved Judgment

9.2.22