IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 838 (Admin)

No. CO/3226/2020

Royal Courts of Justice

Thursday, 24 March 2022

Before:

MR JUSTICE HOLMAN
(sitting in public)

B E T W E E N :

PATRYK SEBASTIAN DEDZA — Appellant

- and -

THE REGIONAL COURT IN OLSZTYN (POLAND) — Respondent

MS H. HINTON (instructed by Bark & Co.) appeared on behalf of the appellant.

MR T. HOSKINS (instructed by CPS Extradition Unit) appeared on behalf of the respondent.

J U D G M E N T
(As approved by the judge)

MR JUSTICE HOLMAN:

1 This is an appeal from an order made by District Judge Griffiths in the Westminster Magistrates' Court on 9 September 2020 for the extradition of the appellant to Poland.

2 As has happened recently in many, if not most, cases concerning extradition to Poland, there has been a very long delay during which this and many other cases have, in effect, been stayed to await the decision of the Divisional Court on the issue of the independence of the Polish Judicial Authority, which no longer arises as an issue in the present case. The result is that it is now over 18 months since the hearing before, and judgment of, the district judge, and this appeal is only being heard today. Indeed, it is already just over a year since the single judge, Murray J, gave permission to appeal.

3 There was an earlier European Arrest Warrant, which was later withdrawn, in relation to which the appellant spent time remanded in custody here. It is common ground that that period of remand in custody will now count towards the sentence under the current European Arrest Warrant.

4 This warrant is a conviction warrant in relation altogether to five offences. The first four offences were committed in a relatively short period in May and June 2012. Two of the offences concerned the supply of quantities of marijuana, and two offences concerned serious threats made jointly with two other people to break the hands and legs of two victims unless they parted with quite considerable sums of money. So, in effect, those two offences were serious offences of extorting the payment of money by serious threats of causing physical harm. Ms Hannah Hinton, who appears on behalf of the appellant today, rightly stresses that no actual physical harm was caused to either victim.

5 The fifth offence is quite separate in time, and was committed in December 2016. It involved the possession of relatively small quantities of green hemp and amphetamine. The sentences imposed for the four offences committed in 2012 were initially suspended for five years on terms that the appellant repaid the sums of money which had been extorted by the threats, and also did not commit any further offences. Those sentences were activated as a result of the further offence in December 2016 and, indeed, the fact (which I believe remains the case) that the appellant did not repay any of the extorted money. Jumping ahead in time, on 14 November 2019, by which time the appellant himself had fled to England, the sentences in relation to all those five offences were aggregated to an ultimate aggregate sentence of two years' imprisonment, not further suspended. At the time of the commencement of the extradition proceedings there remained outstanding 1 year 10 months and 27 days to be served.

6 In February 2017, the appellant travelled to England and has lived here ever since. At paragraph 42 of her judgment, the district judge made a clear finding that he was, and is, a fugitive from justice. She described that he travelled here clearly knowing that the suspended sentence was liable to be activated as a result of his breaching the terms of it, as I have described. It is right to say, and to stress at the outset, that since arriving in this country the appellant has lived an open life. He had trained as a chef in Poland and has always worked hard as a chef here in the five years or so that he has now been here.

7 As I have said, in relation to an earlier European Arrest Warrant, he served a period of time in custody on remand here, totalling nine months and five days between 17 April 2019 and 22 January 2020. If that is deducted, as it must be, from the amount outstanding at the commencement of the extradition proceedings, it follows that the amount still to be served under the aggregated sentence of two years' imprisonment is one year, one month and 22

days. I pause to observe that although that may be regarded as only a little over half, it nevertheless still is over half of the sentence of two years' imprisonment.

8 Since he was re-arrested on the current European Arrest Warrant on 11 February 2020, the appellant has been subject to a continuous curfew between the hours of midnight and 6 a.m. every day, which is electronically monitored by a tag, so as of today he has been the subject of that tagged curfew for about 25 and a half months. At the time of the hearing in front of the district judge in September 2020 the outstanding amount still to be served was the same then as now, namely 1 year, 1 month and 22 days. However, at the time of the hearing in front of the district judge the total period of time subject to the tagged curfew had been about seven months, so it is appreciably longer now than then. This, as I have explained, has become a familiar feature of cases concerning Poland, because of the long delay in resolving issues with regard to the independence of the Polish Judicial Authorities and other matters.

9 When Murray J gave permission to appeal on 18 March 2021, he expressed within his reasons that:

> ". . . it is arguable that the district judge failed to consider the early release provisions in Poland and the fact that the applicant has been on electronically monitored curfew since 11 February 2020 in undertaking the Article 8 balancing exercise and that, had she done so, she would have reached a different conclusion."

It follows from that, that the grant of permission to appeal in this case was not of itself based on the passage of time or circumstances and events since the hearing before the district judge, but on the proposition that the district judge herself was arguably in error at the time she heard this case in September 2020. Today, there are, in effect, two prongs to the overall case and submissions of Ms Hinton. She does continue to submit that the district judge herself was in error at the time she dealt with this case in September 2020, essentially for the two

reasons identified by Murray J, which Ms Hinton had argued before him at the permission hearing. But, as her second prong, she submits that in any event, even if the district judge was not in error, the long passage of time, namely 18 months, since the hearing in front of the district judge has resulted in significant changes such that I should, in any event, re-exercise the discretion under Article 8 and should, myself, conclude that now, even if not in September 2020, extradition should be refused.

10 I must, therefore, consider this appeal in two discrete stages. First, I must consider whether or not in my judgment the district judge herself was wrong at the time of, and in the circumstances prevailing at the time of, her decision in September 2020. Of course, if I consider that she was wrong even then, then the appeal will necessarily be allowed. But if I consider that she was not wrong at the time, then I must go on to consider whether or not there have, indeed, been changes in the circumstances between then and now such that now the appeal should be allowed and the order for extradition quashed.

11 Before engaging in those two considerations, it is convenient to describe the situation with regard to the appellant and his wife and his son. The appellant was married in Poland in 2014. His wife is also Polish and has family living in Poland. They have one son from their marriage, who was born on 1 November 2016 in Poland. So that son is now about five years and four and a half months old. The evidence before the district judge, and before me, is that this is a happy and fulfilling marriage between the spouses, both of whom are devoted to their son. Nevertheless, there have been significant periods of separation, all, frankly, bound up with the decision of the appellant to flee to England in February 2017. At that time, his wife and son remained in Poland. They remained apart for some 16 months until the wife and son travelled here in June 2018. They then lived together here for about 11 months until April 2019 when, under the pressure of the first extradition proceedings, the wife, with their son, travelled back to Poland. At the time of the hearing in front of the district judge in

September 2020, the wife and son were still living in Poland, although the district judge said at paragraph 110(a) of her judgment that:

> "Whilst the RP's wife and son are in Poland, the RP plans for them to join him in the UK soon. The RP has a settled intention to remain in the UK with his wife and son."

That was stated on 9 September 2020.

12 In the event, it was almost a year later, namely on 27 August 2021 that the wife and son actually travelled to England to be reunited with the appellant. Although there is no evidence precisely to this effect, it may well be that it was partly a consequence of the Covid pandemic that the arrival of the wife and son here was delayed for so relatively long. At paragraph 5 of his addendum proof of evidence dated 15 October 2021, the appellant actually says:

> "On 27 August 2021, my wife and son joined me in the United Kingdom. It took us a long time to make that decision as our future was uncertain due to the extradition proceedings and Brexit. However, we both made a conscious decision that this would be the best solution."

So the current position is that the appellant and his family have now been living together here in England since August 2021, namely for the last seven months or so. In his addendum proof of evidence, the appellant describes a picture of a reunited and happy family who, at any rate as of October 2021, were financially dependent upon him. He says at paragraph 5 of his addendum proof of evidence:

> "My wife is currently unemployed but I am certain she will be able to secure a job very soon. At this stage, I am the sole breadwinner of the family . . ."

13 He describes that the son started at reception in September 2021 and is doing really well and seems to be enjoying his new environment and friends. He describes that he has a healthy and happy marriage, and that his wife is an amazing person, and his biggest support. He says at paragraph 8:

> "These extradition proceedings have had a great emotional impact on all of us. Our future is uncertain. Our sense of stability and security have also been affected. However, we try to remain positive."

He adds, at paragraph 9 that:

> "If I was not extradited, I would take full advantage of the opportunity given to me. I have not done anything immoral or illegal for many years and will not return to the path of crime. An extradition would tear our family apart."

14 I turn, then, to consider first whether there is any error in the decision and approach of the district judge as at the time she was dealing with this matter in September 2020. In the course of a very long and thorough judgment (which traversed a number of other defences that had been taken as well, but which are not now pursued) she turned, at paragraph 105, to consider Article 8, which is unquestionably engaged in this case. She correctly directed herself as to the law and approach in paragraphs 106 to 108, and referred in particular to the very well known authorities of *Norris*, *HH* and *Celinski*. There can be no criticism of the manner in which she directed herself as to the law. At paragraph 109 she performed the well-known *Celinski* balance and set out "factors favouring extradition being granted". At paragraph 110 she set out "factors against extradition being granted". From paragraph 111 onwards she discussed and performed "the balancing exercise".

15 Substantially, there can be, and has been, no possible criticism of the factors that the district judge identified and listed on either side of the balance, and I will not further lengthen this

judgment by quoting them all. With regard to the time actually spent in custody the district judge said, within the "factors favouring extradition", that 1 year 10 months and 27 days remained to be served. She said within the "factors against extradition" that:

> "The RP has spent some time in custody in the UK. He was remanded in custody in the UK on the initial EAW for just over nine months. That said, there is still a term of imprisonment remaining which is not insignificant."

So she did, at that point, clearly identify and take into account the amount of time that he had already spent in custody, but balanced against it the outstanding term of imprisonment. At paragraph 115 of her judgment she said:

> "I accept that the RP has been of good character since he has been in the UK. That said, the RP was sentenced to a term of imprisonment of two years, of which 1 year 10 months and 27 days' imprisonment remains to be served. The offences in the EAW are not insignificant. The RP has spent just over nine months in custody in the UK in relation to these offences, however there is still a term of imprisonment remaining which is not insignificant."

16 In relation to all that reasoning and that balance, Ms Hinton makes two major submissions. First, she submits that the district judge failed to give any consideration to the possibility that in Poland, under Polish law, the total amount of time required to be served may later be reduced to one-half, that is, one year of imprisonment, such that the remaining time to be served would only be 1 month and 22 days. I readily accept that if, on the facts and in the circumstances of this case, the only remaining sentence to be served was 1 month and 22 days any judge exercising a discretion under Article 8 might decide that it was not proportionate or justifiable to extradite simply to serve that relatively short outstanding period. The difficulty with the submission and argument of Ms Hinton is that it is, frankly, speculative whether or not a Polish Court would or might release the appellant after he had served half the sentence. The argument is founded on a passage in the authority of *Sobczyk*

v Poland [2017] EWHC 3353 (Admin). In that case, as described at paragraph 28 of the judgment of the Divisional Court, specific questions had been posed to an expert body as to the law and practice in Poland with regard to releasing after half the sentence had been served. At paragraph 28(ii) there is a question asking whether release after half the sentence is automatic or discretionary, and the answer cited in the authority is:

> "After half of the sentence is served in Poland, the subject can apply to the court to have the sentence reduced or the remainder suspended but this is not automatic and is a decision for the court. . ."

I comment that at paragraph 29 of their judgment in *Sobczyk* the Divisional Court observed that:

> ". . . even at the half way point it will be a matter for the discretion of the Polish court as to whether the remainder is reduced or suspended. It is not for us to anticipate how any such discretion may be exercised . . ."

The appeal in that case was dismissed.

17 Today, Mr Tom Hoskins, who appears on behalf of the Judicial Authority, has protested relatively robustly against any reliance now, in 2022, upon that answer which is quoted in the judgment in *Sobczyk* in 2017. He submits that it simply is not good enough to base an argument, some four and a half years later, on a brief answer of that kind cited in an earlier judgment, without obtaining proper current evidence as to the current state of Polish law. In any event the answer, as cited in *Sobczyk*, does not give the least indication as to the statutory basis of the discretion or any criteria on the basis of which it might be exercised. I pressed counsel this morning on whether they were aware of the actual Polish statutory provisions, and with considerable ingenuity and speed, Ms Hinton turned up Article 77 of the Polish Penal Code dated June 1997.

18 Again, Mr Hoskins has bridled strongly at Ms Hinton, or I, myself, placing any reliance at all on some provisions of a penal code that have merely been downloaded on the hoof, as it were, from the internet. I understand and respect that position taken by Mr Hoskins, and I am very conscious of the dangers of internet research of this kind. There may, for instance, have been amendments to the penal code which have not found themselves into the version of it that Ms Hinton, in good faith, has downloaded. All that said, I have looked at Articles 77 and 78 of the Polish Penal Code in the form in which Ms Hinton has submitted it this morning. Article 78 provides that:

> "The sentenced person may be conditionally released after serving at least half of the sentence, albeit with a minimum of 6 months."

It will be observed at once that there is clearly a discretion within that provision which employs the word "may", and further that the release may be "conditional" although there is no indication as to what form the conditions might take. Article 77 provides more generally that:

> "The court may conditionally release a person sentenced to the penalty of deprivation of liberty from serving the balance of the penalty, only when his attitude, personal characteristics and situation, his way of life prior to the commission of the offence, the circumstances thereof, as well as his conduct after the commission of the offence, and while serving the penalty, justify the assumption that the perpetrator will after release respect the legal order, and in particular that he will not re-offend."

19 Assuming (without so holding) that those two Articles are, indeed, currently part of the Penal Code of Poland it is very, very clear that they confer a discretion. The discretion may be exercised conditionally, and a number of matters as listed in Article 77 require to be considered and taken into account by the Polish court. Just as the court said in paragraph 29 of *Sobczyk* that: "It is not for us to anticipate how any such discretion may be exercised", so it seems to me that it is impossible for me, and would, indeed, have been impossible for the

district judge, to make any prediction at all as to whether or not this particular appellant would be released after serving half his sentence. Amongst other considerations, Article 77 refers to: "his conduct after the commission of the offence, and while serving the penalty", and I, frankly, have no idea what view the Polish Court might take of his conduct in fleeing to England in February 2017 at the point when he knew that the suspended sentence was liable to be activated. So, to my mind, there is no error at all on the part of the district judge in failing to make any express reference to, or consideration of, possible release after half-time in Poland. That is wholly speculative and she was not required to consider it, and for the same reasons nor am I.

20 I should, perhaps, mention that today Ms Hinton has referred to a decision of Cavanagh J of *Lewandowski v Polish Judicial Authority* [2021] EWHC 2049 (Admin). It is right to say that in that case, at paragraph 30, Cavanagh J did make some reference to the possibility or, as he thought, probability, of early release in Poland. The factual context, however, is very different from the present case. Of an initial sentence of one year eight months' imprisonment, the appellant in that case had served all but one and a half months. So, at paragraph 27 Cavanagh J said:

> "The central issue in my view is whether the fact that the bulk of the sentence has already been served whilst awaiting extradition means it would be disproportionate to extradite the appellant to Poland . . . There is just over one and a half months still to be served . . ."

It was in that context that at paragraph 30 Cavanagh J did say:

> "In Poland there is a discretionary power to release a person after half the sentence and, in some cases, after two-thirds of the sentence (See *Sobcyzk*). There is no guarantee of course that a Polish Court would choose to suspend or to release at the point at which the appellant would be returned to Poland but, since he has served well beyond two-thirds of the sentence, there must be a strong probability of this."

I think that Mr Tom Hoskins would cavil at the propriety of Cavanagh J even attaching as much weight and regard as he did to what had been said in *Sobcyzk*, but at all events that is a somewhat passing reference to this consideration in the very different context of the requested person having already served "well beyond two-thirds of the sentence". To my mind, it has no impact at all on the proper approach of either the district judge or myself in the situation in which the requested person/appellant has not yet even served half the sentence.

21 The second limb of Ms Hinton's criticism of the district judge is that, as is the case, she did not make any reference at all to the period of time that, even then, the appellant had spent subject to tagged curfew. As I have already said, at the time of the hearing in front of the district judge it was about seven months. Now it is about 25 months.

22 There is no doubt that in appropriate cases numerous judges of the Administrative Court have had some regard to periods of time spent subject to tagged curfew. One instances of that is the decision of Sir Stephen Silber in *Michalik v Poland* [2014] EWHC 4423 (Admin) where, at paragraphs 12 to 16, he discussed "the effect of the curfew". On the basis of the evidence in that case, he concluded that the length of the curfew, which was six hours a day, would not count as such at all against the remaining sentence in Poland. So, Sir Stephen said:

> "Thus I do not accept that the appellant has served his sentence, although I do accept that the time that he has been on curfew is something that can be considered when I move on to the second ground, which is the Article 8 ground."

When discussing that ground he said at paragraph 23:

> "Although I have said that the time spent on curfew is not something for which he can be given total credit, it does show to some extent that he has had some form of punishment, and there must be a very

> substantial chance that he will succeed in having his prison sentence reduced to a curfew when he returns to Poland."

In the end, on what he described as not "an easy case" and "a fact sensitive decision" he was "just persuaded" to allow the appeal and quash the order for extradition. So, to that limited extent, there is an example of that distinguished judge paying some regard to time spent on curfew.

23 Another example drawn to my attention is, in fact, a decision of myself, in *Morawski v Poland* [2020] EWHC 228 (Admin). I remember that case well because of the extreme tragedy of the underlying facts and circumstances, about which anyone may read in the judgment. In the context of that very fact specific case, I did say at paragraph 19:

> "So, he has himself spent over six months in custody in relation to this two-year sentence. Additionally, for over a year now, he has been on bail conditions, which include living and sleeping every night at a specified address in Hull, a daily curfew between 11 p.m. and 5 a.m., and a requirement to be electronically monitored. In court today he has shown to me that he does indeed have that tag fitted."

I continued: "So, in relation to this very serious offence, this appellant has already in a range of ways undergone significant punishment" and I referred to: "a further year of deprivation of liberty to the extent of the bail conditions." My overall conclusion was:

> ". . .that on the exceptional facts and circumstances of this case, and bearing in mind the life histories of himself and his partner and how highly interdependent they now are on each other, their Article 8 rights outweigh the normal weighty public interest in extradition."

That was, frankly, a very exceptional case with extreme life history facts and circumstances. But, I accept, it does illustrate a judge, myself, taking into account the period of time spent on curfew.

24 In the present case, at the time of the hearing in front of the district judge, the total period of time spent tagged was seven months. In my view, a period of that length on a curfew between midnight and 6 a.m. could not have made any difference to the overall exercise of discretion by the district judge, and I reject the submission that she erred in that respect. Accordingly, in my view, the overall decision reached by the district judge in September 2020 is impregnable, and the conditions in subsection (3) of section 27 of the Extradition Act 2003 do not begin to be satisfied.

25 I must, however, now turn to consider the situation as it now is, since 18 months have now elapsed since the hearing before the district judge. Today, Ms Hinton renews the submission that I should take into account the possibility, or she would say "probability", that this appellant would be released at half-time by the Polish Court so that the amount still outstanding is only 1 month and 22 days which, she submits, is not, of itself, enough now to justify extradition. I reject that speculative argument for the reasons I have already given.

26 There is, of course, the difference today that the time spent subject to tagged curfew is now not 7 months but 25 months, as I have explained. I accept the submission of Ms Hinton that 25 months spent subject to a curfew, which requires a person always to sleep at the same address, does represent a restriction or restraint on liberty. Certainly, in a marginal case, 25 months spent on curfew might be sufficient to tip the balance. But I cannot accept that even 25 months subject to a curfew between the hours of midnight and 6 a.m., when most people might reasonably expect to be in bed at home anyway, begins to outweigh 1 year 1 month and 22 days of imprisonment. The degree of restriction on liberty of a tagged curfew is altogether different from the restriction of being imprisoned 24 hours a day within a prison. So, I accept that the fact that he has been subject to a curfew for 25 months should go into the Article 8 balance, but it is not a factor which could now tip that balance the other way from the manner in which the district judge decided this case.

27 To my mind, the more cogent consideration now is the position now of the appellant's wife and son. At the time that the district judge considered this case, they were, as I have said, actually living in Poland, and it was merely predicted that they would travel to join him in the United Kingdom "soon". The facts and circumstances clearly are different now. They are all living here together as a family and have been for the last seven months. I have already quoted from the appellant's addendum proof of evidence from last October. I must, of course, give great weight to the position of the wife and, more especially, of the son. But their position cannot be decisive in a case such as this.

28 The fact remains that this appellant is a fugitive. The fact remains that he was convicted of serious offending, and the fact remains that he still has over half of a sentence of two years' imprisonment to serve. I take into account, by reference, all the other factors both favouring and against extradition that the district judge listed in her judgment. She, herself, said that she gave substantial weight to the interests of the son. I must, and do, give even greater weight to those interests now that the wife and son are living here in England.

29 In relation to the new evidence arising from the passage of time and changes since September 2020, I have to apply the condition in subsection (4) of section 27 of the Extradition Act 2003. This provides that:

> "(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

30 I readily agree that evidence is available to me that was not available at the extradition hearing, both in relation to the much longer period of tagging, and to the presence now of the wife and son here in England, and, more generally, as to a further 18 months of the appellant living an apparently good and upright life here. I readily accept that that evidence would have resulted in the appropriate judge attaching even more weight to the position of the wife and son than she, in any event, did attach, and perhaps attaching some weight to the much longer period of tagged curfew. But the crunch question is: even if she had done so, would she "have been required", as section 27(4)(c) requires, to order the person's discharge? I am unable to answer that question in the affirmative. In my view, even if she was considering this case on the basis of all the facts and the circumstances as they are today, this district judge could, without error, have made an order for extradition. What predominates in my mind is that over a year remains to be served, and that is significant.

31 For those reasons I will dismiss this appeal.

CERTIFICATE

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