Neutral Citation Number: [2021] EWHC 3317 (Admin)

Case No: CO/1383/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

7th December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

PAWEL CIS	**Appellant**
- and -	
REGIONAL COURT IN KIELCE (POLAND)	**Respondent**

- -
- -

Lucia Brieskova (instructed by Justitia) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 7/12/21

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

MR JUSTICE FORDHAM :

Wozniak

1. Two grounds of appeal were originally going to be advanced on this renewed application for permission to appeal in this extradition case heard in person at the RCJ. The first involved the contention that the section 2 ground of appeal, which Eady J stayed on the papers on 21 July 2021 with directions for submissions in the light of the judgment of the Divisional Court in Wozniak, should now be given permission to appeal in the present case. That potential argument focused on submissions which had been "reserved" for the Supreme Court if the Wozniak case had arrived there: see the judgment [2021] EWHC 2557 (Admin) at paragraph 226. Ms Brieskova this morning confirmed at the start of the hearing that this ground was being abandoned in light of the Divisional Court's subsequent refusal to certify a point of law of general public importance. She was right to do so. The Divisional Court was very well aware of those "reserved" arguments – identified in its judgment – when it made its decision declining to certify. The finality is informed and deliberate. I formally refuse permission to appeal on the section 2 (Wozniak) ground of appeal which was the subject of the stay.

Article 8 ECHR

2. I am going to grant permission to appeal on the second ground of appeal, which relates to Article 8 ECHR. Ms Brieskova has sought in writing, and in her brief oral submissions today, to identify arguable 'errors of approach' in the 'balance-sheet' assessment of the Judge. The location on the legal map where, in my judgment, the viability of the Article 8 argument is to be found – warranting the grant of permission to appeal – is rather the question of whether the "overall evaluation was wrong" because "crucial factors should have been weighed so significantly differently", as described in the well-known passage in Love v USA [2018] EWHC 172 (Admin) at paragraph 26. Ms Brieskova accepted that that formulation embraces at least to a very large extent the thrust of the submissions that she has identified as wishing to advance on the Appellant's behalf in the present case. In my judgment, there are features of the present case which, particularly when viewed in combination, make it reasonably arguable that the overall evaluative "outcome" was "wrong". Having decided to grant permission to appeal I am not shutting out any of the various points which are sought to be advanced on behalf of the Appellant, whether or not they involve suggestions of 'errors of approach'. The Judge conducted a thorough and conscientious evaluative balancing exercise. But there are three features which in my judgment support, to the point of reasonable arguability, the contention that the overall outcome was nevertheless the wrong one, having regard to the way in which matters were weighed in the balance.

3. These features arise in a context where the 37-year-old Appellant is wanted for extradition to Poland. That is in conjunction with a conviction European Arrest Warrant (EAW) issued on 31 December 2008 and certified on 9 December 2014. The EAW relates to what the Judge (unimpeachably) found involves 11 months to serve of a 14-month custodial sentence, arising out of index offending in June 2006 involving the sale of amphetamines and the possession of amphetamines and hemp. The features, to which I will shortly come, also arise in a context where the Judge (again unimpeachably) found the Appellant to have left Poland in September 2007 as a fugitive. That was in circumstances where the 14 month custodial sentence had been imposed, on an appeal by the prosecutor from the 18 month suspended sentence which

had been imposed in January 2007. Given all of this, there are undoubtedly powerful public interest factors in support of extradition. However, in that context, there are these three features:

i) The first feature which has informed my view on arguability relates to the passage of time. That involves a first period of six years between the issue of the EAW in December 2008 and its certification by the NCA in December 2014. There is then a second further period, of another six years, between certification in December 2014 and the Appellant's arrest in December 2020. The Judge referred to evidence from the NCA, which he accepted, as to "basic checks" which had been conducted and which had found "no trace" of the Appellant in the UK. The Judge also found as a fact that the Appellant had been living in the United Kingdom entirely "openly", throughout. The Judge recorded that it was "inexplicable" and "beyond me" how the authorities allowed the periods of time without any progress or further successful pursuit. Unlike in the world of section 14 of the Extradition Act 2003 (oppression by reason of the passage of time), in the world of the evaluative balancing exercise under Article 8, fugitivity does not operate as an 'on-off' switch for the purposes of weighing the implications of the passage of time. The question may be whether the Respondent's own blamelessness, together with the Appellant's originating fugitivity and the NCA's "basic checks", are a sufficient basis to avoid the following conclusion: that there is in this case a passage of time involving sufficient "culpability" as materially to undermine the strength of the public interest considerations in favour of extradition that would otherwise apply. Particularly when the 12 years passage of time is put alongside the changes in the Appellant's life, including for example the birth of his daughter in April 2012 and the 2015 separation from her mother which means that his only chance of being in her life on an ongoing and day-to-day basis is his being in the United Kingdom.

ii) The second feature of the case which weighs with me, for the purposes of the arguability threshold on permission to appeal, is the transformative position so far as concerns the Appellant himself. The index offending took place in June 2006 when he was aged 22. The offending arose against an upbringing and chaotic family life which the Judge described as "tough" (into which I need not go further for the purposes of these brief reasons), and in circumstances where the Appellant had become a drug addict. As the Judge recognised, the 37-year-old, the proportionality of whose extradition now has to be considered by the courts of this country, is a transformatively different person. The Judge described him as "wholly rehabilitated", "a credit to his family and friends" and "a shining example to society" who, through "perseverance and love" had overcome the difficult start in his life and who now showed in the care and love for his daughter that he is "not the role model" that his own father and stepfather had been in his own childhood and upbringing.

iii) The third feature of the case which informs my view as to arguability is the position of the Appellant's nine year old daughter, whose best interests and welfare were the subject of a report from a senior social worker which the Judge considered. Although her primary carer is her mother – the Appellant's ex-partner – the evidence, which the Judge accepted, was that the Appellant has daily contact with his daughter. The impact of extradition for them both, as well

as the current partner and fiancée to which the Judge also referred, and for the relationships between them all falls also to be seen in the light of a further feature of the case: the uncertainties now arising as to whether the Appellant would be able to return to this country, were he surrendered to Poland to serve the remaining 11 months of his custodial sentence there.

4. In relation to all these matters, Ms Brieskova says there are decided cases of this Court which, although turning on their individual facts, are 'working illustration' cases, which could assist the Court at the substantive hearing. She has illustrated that contention with examples. For the purposes of this permission stage, I am inclined to agree.

5. These features, and the combination of them all, have persuaded me that – notwithstanding the context in which they arise – this Article 8 appeal is "reasonably arguable" and justifies ventilation at a substantive hearing where the Respondent can attend, both advocates can assist the Court, and the Article 8 ECHR compatibility of extradition in this case can be given further and full consideration.

7.12.21