Neutral Citation Number: [2021] EWHC 985 (Admin)

Case No: CO/3652/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th April 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

ZBIGNIEW HARTUN	**Appellant**
- and -	
REGIONAL COURT OF GDANSK (POLAND)	**Respondent**

- -
- -

Ben Cooper QC (instructed by EBR Attridge Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 20.4.21

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.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The Appellant is aged 56 and is wanted for extradition to Poland. That is in conjunction with a conviction EAW (European Arrest Warrant) issued on 10 July 2018 and certified on 24 August 2018. It relates to a custodial sentence of 4 years 6 months to serve, the combination of 3 decisions (6.11.15, 20.5.16 and 15.6.16) activating what were originally suspended sentences (10 months, 2 years and 20 months respectively) for a series of 8 offences of using false documents to obtain credit. Extradition was ordered by DJ Ikram on 5 October 2020 after an oral hearing. On 15 January 2021 Johnson J refused permission to appeal on the papers on the grounds of appeal advanced: section 14 of the Extradition Act 2003 (oppression by reference to the passage of time) and Article 8 ECHR (private life).

2. The mode of hearing today was by BT conference call. Mr Cooper QC was satisfied, as am I, that that mode of hearing involved no prejudice to the interests of his client. A remote hearing eliminated any risk to any person from having to travel to a court room or be present in one. I am satisfied that a remote hearing by BT conference call was appropriate and was justified. The open justice principle was secured. The case and its start time were published in the cause list. So was an email address usable by any person – including any member of the press or public – who wished to observe this public hearing. The hearing was recorded. This ruling will be released in the public domain. Although my previous case over-ran and it was necessary to put this case back I was able, through emails to my clerk, to ensure that if any third party had requested to observe this hearing they could by email the informed. In any event the dial-in details remained the same.

The Wozniak/Chlabicz point

3. Mr Cooper QC did not, in his Perfected Grounds of Appeal on 20 November 2020, raise the familiar Wozniak/Chlabicz issue which has been the subject of various orders to stay applications for permission to appeal pending the outcome of a hearing of those linked cases before the Divisional Court (now scheduled to take place in May 2021, next month). Had he done so, I have no doubt that Johnson J would have stayed the application for permission to appeal in relation to that issue, but would have gone on to consider the other grounds on their legal merits. By grounds of renewal dated 22 January 2021 Mr Cooper QC has now sought permission to amend the grounds of appeal to take the point. He made clear in his oral submissions that he was maintaining everything that he had put forward in writing and I confirm that I had read and considered all the materials. In those circumstances it was not necessary to take up time at this hearing in relation to this issue. I am satisfied that it would not be in the interests of justice to deny this Appellant the opportunity to rely on a point of principle applicable in all Polish cases, notwithstanding that the point has been raised belatedly. I will grant permission to amend the grounds of appeal and order a stay of the application for permission to appeal on this ground until after the Divisional Court's judgment has been delivered. I will come back at the end of this ruling to the question of the order which I will make. I am equally in no doubt that it is appropriate for me to proceed to consider today on their merits whether the other grounds of appeal are reasonably arguable, so as to warrant permission to appeal.

Article 14 (oppression) and Article 8

4. At the heart of the case, both in relation to section 14 oppression and the passage of time and in relation to Article 8 are a number of features. Mr Cooper QC has drawn attention to these in writing and orally. A first feature is that the Appellant has been present in the United Kingdom since August 2014, now nearly 7 years. Next, he has no criminal offences here, and no criminal offences since the index offences of 2009 in Poland, and he is settled in the United Kingdom. Although the 16 year old daughter – around whom his life, on the evidence, was centred when they came here together in August 2014 so that she could pursue a further education opportunity here – returned to Poland in 2016 and is now living there with her husband, there are personal circumstances and private life in the United Kingdom on the part of the Appellant himself for the purposes of section 14 and Article 8.

5. Next, there are a number of features of the case which are relevant concerning the circumstances in which the Appellant and his daughter came to the United Kingdom in 2014 and remained here thereafter: what he was and was not required to do so far as conditions of the suspended sentences were concerned; what he did and did not do; whether it was or was not appropriate for those sentences to be activated; and whether it was procedurally fair to activate those sentences in circumstances where the Appellant says he was unaware that those steps were underway and that hearings were taking place. The Appellant maintains that the position in relation to all of those matters is as follows. He says it was agreed that he had permission to relocate to the United Kingdom, as a permanent or indefinite relocation to live here. He says that he did provide the Polish probation authorities with the address at which the daughter was a college and also the residential address where they were living. He says that he kept in touch with probation for two months in September 2014 and October 2014 as required, and he accepts that he ceased contact with probation - leaving aside what he says are occasional greetings cards and other communication - from October 2014 onwards. He accepts that he did not pay compensation, and that payment of compensation was itself a condition of the suspended sentences. That was because he could not afford to pay compensation in circumstances where he was putting his daughter first, as the documents reflect. He says that the compensation requirements were shared among co-defendants. He points to the difficulties that he has had, across the years including in recent times, to discover what compensation is still owed, and in attempting to pay it. He says that the activations of the custodial sentences were done without notice to him, were fundamentally procedurally unfair, were disproportionate and unjustified.

6. Mr Cooper QC submits that there are at least two findings of fact by the District Judge which this Court on an appeal should 'reopen', and correct as 'wrong', in the light of all the evidence. The first is the finding of fact, based on Further Information provided by the Respondent in May 2020, that the permission to come to England from Poland was supposed to be temporary and that the Appellant was supposed to return to Poland after a month in contact probation. As a variant to the submission that that finding of fact was unsustainable, Mr Cooper QC has submitted today that the nuanced correct position on all the evidence is that Polish probation "acquiesced in a new plan", which involved the Appellant and his daughter staying in the United Kingdom. The second finding of fact which Mr Cooper QC says this Court would appropriately 'reopen' on a substantive appeal is the finding that Polish probation did

not have the UK address of the Appellant, including at the time of the activation process, and therefore could not notify him. The Appellant says that he had notified the address from the beginning and had never moved from it. Again, as a slightly more nuanced position advanced in the alternative and orally, Mr Cooper QC submits that even if the probation authorities were not sure of "current whereabouts" - because the Appellant had not been in contact and they did not know whether he had moved - that does not mean that they were without the original address, which in fact they could have used to make contact, since in fact the Appellant had never moved. Mr Cooper QC submits that, either armed with the reopening of findings of fact or alternatively even based on the District Judge's own findings of fact, the District Judge arrived at an unsustainable conclusion that the Appellant was a fugitive. The District Judge also, says Mr Cooper QC, held against the Appellant – and which coloured his evaluation of the evidence – adverse observations about the fact the compensation had not been mentioned in the Appellant's original proof of evidence. Mr Cooper QC submits that the Appellant was open and candid in his oral evidence, that the omission in the POE was entirely understandable and not the Appellant's fault, and that the District Judge became "fixated" on that adverse observation, together with his adverse finding on fugitivity.

7. Mr Cooper QC reminds me that for the purposes of today the appeal on any or all of the grounds needs only to be reasonably arguable. He reminds me that the Appellant Court as an appropriate role of standing back - even if it does not identify any particular error on any particular feature - and considering the outcome and whether the overall evaluative conclusion was wrong. As as he put it this morning, Mr Cooper QC submits that the District Judge focused on negatives and the overall findings are not balanced or fair in weighing up factors in the Appellant's favour.

8. I have considered all of those submissions and arguments, and all the features of the case, against the backcloth of all the materials and evidence in the case, and the considerations in the District Judge's judgment read as a whole. In my judgment, there is no realistic prospect that this Court at a substantive hearing would overturn the 'outcome' in this case, either on section 14 (oppression) or on Article 8 grounds. That is true, in my judgment, even if the Court were persuaded to proceed on the basis that the Appellant should not be regarded as a fugitive; and even if the Court were therefore persuaded that the section 14 oppression gateway is open and oppression through passage of time needs to be evaluated on its merits.

9. I cannot accept - even reasonably arguably - that it would be appropriate on an appeal for this Court to overturn either of the two specific findings of fact to which I have referred. The District Judge considered all the factual materials and evaluated all the circumstances. The District Judge heard oral evidence from the Appellant which, in my judgment, was highly relevant and was for him to evaluate, on questions relating to whether an address had been provided to probation, and whether the arrangement was originally (or became as a new plan) indefinite remaining in the United Kingdom rather than a temporary arrangement. The District Judge, in my judgment, beyond argument, cannot be criticised for accepting the Further Information dated 13 May 2020 from the Respondent which records that the permission to come to the United Kingdom was supposed to be temporary and that the Appellant was supposed to return after a month. Nor, in my judgment, can the District Judge be criticised for finding as a fact that Polish probation did not have the Appellant's address. He

considered all the relevant materials, including multiple references in a 2015 probation report to probation not having information about the Appellant's current whereabouts. But even if I posit this Court reopening those two aspects, the facts remain: that the Appellant did not pay the compensation that was a condition of the suspended sentences; and that he ceased contacting probation after two months in October 2014, in breach of a condition that had been imposed on him, and did so shortly after having come to the United Kingdom.

10. One central difficulty for the Appellant, in my judgment, in advancing the various considerations in opposing extradition, is that to a very large extent they are inviting the Court in the United Kingdom to go behind or criticise the substantive or procedural approach taken to activation in the Polish courts, and to do so through the prism of oppression in section 14 or disproportionality in Article 8. In my judgment, beyond reasonable argument, this Court would not approach either section 14 or article 8 on the basis that it was unjustified or unfair for the Polish authorities to activate the suspended sentences, particularly in circumstances where there is no dispute that there was a compensation payment default and the cessation of contact after two months. So far as subsequent events are concerned, including attempts to pay compensation, lack of notification and issues relating to reasonableness and justification, it is in my judgment highly relevant that the latest appeal in Poland to reopen the activations has been heard, considered and rejected by the Polish court on 19 February 2021.

11. What is left is consideration – through the dual prisms of oppression in section 14 in the light of the passage of time, and of article 8 proportionality – of all the facts and circumstances, including Appellant's durable presence in the United Kingdom over the last 7 years. But in my judgment, beyond reasonable argument, extradition is neither incompatible with section 14 (as oppressive) or Article 8 (as disproportionate). The Appellant has been here for a significant period. But, even if not to be characterised in law as a fugitive, the facts relating to the cessation within two months of being here of the contact with probation – required by the conditions imposed upon him in the Polish suspended custodial sentences – are relevant to the nuanced and fact-specific assessment of all the circumstances including the passage of time, both for section 14 and for Article 8. So is the non-payment of the compensation. The Appellant cannot point to a family life here, or relationships of dependence here. There is, in my judgment, nothing approaching oppression and nothing approaching the sort of impact which could counterbalance the strong and legitimate public interest considerations in favour of extradition. Of particular significance, in my judgment, is this. It is, beyond argument, appropriate for this Court to respect the 4 year 6 month custodial sentence, all of which remains to be served, and its activation.

12. Even if delay is characterised as culpable, and even if the Appellant is treated as not having left Poland as a fugitive and not having become a fugitive by ceasing to remain in contact with probation, the evaluative assessment of oppression for the purposes of section 14 and the balancing exercise for the purposes of Article 8 result decisively in the conclusion that there is no arguable bar to extradition in this case. It follows that no material error has been made by the District Judge, even on the most favourable view to the Appellant.

Order

13. I will make the following order:

    (1) The application for permission to appeal on the section 14 and Article 8 ECHR grounds is refused.

    (2) The application for permission to amend the grounds of appeal to rely on a section 2 ground with reference to the cases of Wozniak (CO/429 9/2019) and Chlabicz (CO/4976/2019) shall be stayed pending the judgment of the Divisional Court in those cases.

    (3) The Appellant shall, within 14 days following the date on which the judgment of the Divisional Court in those cases is handed down: (a) inform the Court and the Respondent whether he intends to pursue an application for permission to appeal on the ground referred to in paragraph 2 above; and (b) if such an application for permission to appeal is to be pursued, file and serve written submissions in support of that application.

    (4) In the event that the Appellant within 14 days following the date on which the judgment of the Divisional Court in those cases is handed down, informs the Court that he does intend to pursue an application for permission to appeal, then that application shall be determined on the papers by a Judge as soon as practicable thereafter. Otherwise, the application for permission to appeal should be dismissed 14 days after the date on which the judgment of the Divisional Court in those cases is handed down.

    (5) No order as to costs save that there be detailed assessment of the Appellant's publicly funded costs.

20.4.21