Neutral Citation Number: [2020] EWHC 2318 (Admin)

Case No: CO/1349/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 August 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

KRZYSZTOF HORCHEL	**Appellant**
- and -	
POLISH JUDICIAL AUTHORITY	**Respondent**

- -
- -

George Hepburne Scott (instructed by Bark & Co Solicitors) for the **appellant**
The **respondent** did not appear and was not represented

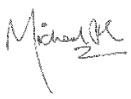
Hearing date: 18 August 2020

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 in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is an application for permission to appeal in an extradition case. The mode of hearing was BT conference call. The Administrative Court had provided an opportunity for the appellant's representatives to state any preference or provide any reasons why remote hearing was considered inappropriate. Like them, I was satisfied that a telephone hearing was appropriate. I heard oral submissions in exactly the way I would have done had we all been physically present in a court room. In relation to open justice, the hearing and its start time – together with an email address which could be used by any person wishing to observe the hearing – were published in the cause list. The hearing was recorded. This judgment will be released into the public domain. By having a remote hearing we eliminated any risk to any person from having to travel to, or be present in, a court. I am satisfied that no right or interest was compromised, and that if there was any interference with or qualification of any right or interest, it was justified as necessary and proportionate.

2. The appellant is aged 45 and is wanted for extradition to Poland. That is in conjunction with a European Arrest Warrant (EAW) issued on 20 May 2019. Following an oral hearing, District Judge Zani ordered the appellant's extradition on 6 April 2020. Swift J refused permission to appeal on the papers on 13 July 2020. The EAW is a conviction warrant. It relates to a custodial sentence of 2 years, all of which is unserved. That sentence was imposed on 1 December 2009. A domestic Polish warrant was issued on 1 December 2014. The appellant was arrested on 10 October 2019. The underlying offending consisted of a fraud on a bank in June 2007, 13 years ago, when the appellant was aged 32. The scale of the fraud was in the equivalent of £1,460 and involved the use of a false employment certificate. The basis on which extradition has, throughout, been resisted is article 8 of the European Convention on Human Rights. That was the ground for opposing extradition raised before the judge. It was the ground advanced in the appellant's notice and perfected grounds of appeal in April 2020, rejected by Swift J as unarguable. It was also the ground advanced in the notice of renewal and skeleton argument dated 15 July 2020.

The Wozniak point

3. By an application dated 4 August 2020 the appellant asked for permission to add a new ground of appeal and to stay this case. The ground of appeal now sought to be relied on is the same ground on which I granted permission to appeal on 3 June 2020 in the case of Wozniak [2020] EWHC 1459 (Admin). The course invited by Mr Hepburne Scott for the appellant is that I should give permission, with an extension of time, for the Wozniak ground to be added, followed by a stay pending the resolution later this year of Wozniak itself. This is a familiar scenario. I encountered it in Bibro [2020] EWHC 1592 (Admin) (18 June 2020), Socha [2020] EWHC 1909 (Admin) (14 July 2020) and Wawrzyniak [2020] EWHC 1955 (Admin) (20 July 2020). The central concern is this. The appellant in this case has now, albeit belatedly, raised the same point of principle as applies in Wozniak, and which I held in that case was reasonably arguable. It would, on the face of it in my judgment, be unjust for the appellant to be removed while that point of principle remains unresolved. Once the Divisional Court has addressed the point, the implications for other cases including

this one can readily and speedily be dealt with. The application of 4 August 2020 in this case records that it was being served on the respondent. It is not unusual for a respondent not to appear or be represented on a renewed application for permission to appeal. I have seen no document in the present case in which the respondent states any position in relation to the Wozniak point and its implications for the hearing today. I am satisfied, and Mr Hepburne Scott sensibly accepted, that it would be appropriate to include a liberty to apply, so that the respondent can raise any objection, if it wishes to do so. In all the circumstances I will give permission to amend the grounds of appeal and an extension of time. I will direct that the application for permission to appeal on the new ground be stayed pending the judgment in Wozniak. I will return at the end of this judgment to the question of the precise form of the order, in the light of the way in which I deal with the article 8 ground.

The Article 8 point

4. There is no reason, in my judgment, why the pre-existing article 8 point should not be addressed today on its substantive merits, in order to see whether the point is reasonably arguable and warrants the grant of permission to appeal. Mr Hepburne Scott did not request an adjournment and, in my judgment, he was right not to do so. If the article 8 point is reasonably arguable and does warrant the grant of permission to appeal, the appellant is then entitled to a substantive hearing on article 8, irrespective of Wozniak and its outcome. If it is not and does not, permission to appeal on the article 8 point should be refused. Again, that is a familiar scenario, as seen in the line of cases to which I have referred.

5. The essence of the article 8 argument is encapsulated in the written submissions filed in support of this renewed application, adopted by Mr Hepburne Scott orally. As it has been put:

> "The appellant's extradition is sought for a single minor fraud against a bank using a forged employment certificate to the value of £1,460.… The appellant has [as at 15 July 2020] served over 9 months in custody on remand in respect of these extradition proceedings (less 6 weeks served for domestic matters) … The appellant has already served the equivalent of more than a 16 month sentence for this single, low value, fraud for which he would have received a maximum six-month sentence… if committed here… The offence is over 13 years old; it is ancient… Prior to his remand in custody, the appellant was in employment and supporting his partner in providing her with very important care. His partner will, through no fault of hers, be left entirely without this vital care if he is extradited. She is in poor health and 'struggling' to look after herself without the appellant's support…
>
> Whether or not a requested person is a fugitive a long and culpable delay on the part of the authorities can provide a potent factor against extradition. It can be a determinative factor.
>
> … The court is entitled to stand back and say that the article 8 question ought to have been decided differently because the overall evaluation was wrong: crucial factors were not given enough weight (either individually or collectively) such as: (a) the delay of over 13 years since the offence; (b) the relatively minor nature of

> the offence; (c) the time the appellant spent on remand for this ancient, stale, low value single fraud; (d) the support that the appellant was providing for his partner …. very sadly … seriously injured in a car accident on Christmas Eve 2014 as a result of which she was no longer able to work … Prior to his [remand] in custody, the appellant helped [his partner] with washing, cleaning, dressing and eating. If he were extradited [she] would not receive this help from him.
>
> It is submitted that these matters should collectively have been weighed significantly differently as against the single, old, minor offence, so as to conclude the impact would be so severe as to make extradition disproportionate. Notwithstanding the appellant's criminal record, the matters militating against extradition in this case, in particular the appellant's partner's condition, arguably constitute precisely the type of 'strong counterbalancing' factors considered as required… in fugitive cases such as this."

In his oral submissions, Mr Hepburne Scott relied on these and his other written submissions. He helpfully drew my attention to the salient features.

6. Mr Hepburne Scott also added a point which updates the Court and links to the Wozniak ground. That point is this. As at today, the appellant is said to have served on remand 8½ months which would count towards the sentence of 2 years which is the subject of the EAW. The position in Poland, submits Mr Hepburne Scott, involves a discretionary release at the halfway point of the two-year sentence. Certain article 8 public interest considerations would, he submits, arise once that halfway point is reached, notwithstanding there would be no entitlement to be released in Poland and no entitlement to be discharged in the extradition proceedings. The link to Wozniak and the stay is this. Given that the Wozniak point is to be permitted to be added to the grounds of appeal, and the case stayed pending the resolution of that case, the appellant will be in the United Kingdom through to later this year and possibly the end of the year. Unless released on bail, his remand position by the end of the year would be that the 12-month halfway point is in substance reached. In those circumstances, a court considering the article 8 position as at that time would have regard to those updated and changed circumstances. In those circumstances, permission to appeal on the article 8 ground is appropriate, on the basis that there is a realistic prospect that the appeal would succeed when heard substantively later this year.

7. In my judgment, there is no realistic prospect of this court at a substantive hearing of this appeal concluding that extradition of the appellant is incompatible with article 8. That includes by reference to his article 8 rights, and it includes by reference to the rights of his partner. It also includes the scenario I have just described where at a substantive hearing later in the year the court would be considering a further period of remand served. So far as that last point is concerned, in circumstances where there is no entitlement to halfway release under Polish proceedings, and in circumstances where this court must afford appropriate respect to the decisions of the Polish authorities on sentencing matters, including sentencing policy and the pursuit of the extradition of an individual who may be at the halfway point, there is in my judgment no realistic prospect that the lapse of time in relation to remand could tip the balance in article 8 terms in the appellant's favour.

8. The key circumstances of this case of far as the familiar article 8 'balance sheet' is concerned were all accurately identified by the district judge and balanced. I bear in mind that this court on an appeal ought not only to examine the reasoning of the district judge but ought also to 'stand back' and look at the 'outcome' in deciding whether the overall conclusion in article 8 terms was wrong. As I have said, in my judgment there is no realistic prospect that the court would reach that conclusion in this case.

9. This is a case of fraud involving an unserved sentence of two years custody. That two-year prison sentence was imposed by the Polish authorities against a background of offending in Poland. The district judge referred to a long list of offending in Poland, and the documents describe a list of what I said to be some 17 convictions. The two-year sentence of the Polish court and the requirement that it should be served are matters calling for respect and engaging strong public interest considerations in favour of extradition. That is true notwithstanding the characterisation and nature of the fraud as being, as Mr Hepburne Scott put it today, 'relatively straightforward' and 'relatively unsophisticated'.

10. Strong reliance has been placed, as is clear from the passages that I have quoted from the written submissions, on the fact that this offending goes back 13 years to June 2007. The domestic warrant was issued in December 2014, very many years later, and the EAW was issued in May 2019 several years after that. But the circumstances of this case and the lapse of time involves particular features and considerations, as the judge recognised. The two-year sentence imposed in December 2009 was not one which the appellant was required to surrender to serve until April 2014. The reason for that was that he had made several requests for deferrals in the serving of the sentence, and those requests had been granted, many of them in the context of medical issues that he was facing. It was in that context, and the context of what is described as further offending, that he was eventually summoned and required to surrender to serve his two-year sentence, in April 2014. He failed to surrender and has been wanted since.

11. Moreover, it was against that background that the appellant came to live in the United Kingdom in what, on the basis of the materials before this Court, appears to have been a date in 2014. Certainly, he is said to have met his partner here in May 2014, and they were involved in the serious road accident in December 2014 that has led to her need for daily care. The district judge made a finding of fact which is unassailable, having had the advantage of hearing oral evidence at the hearing. The finding of fact is that the appellant came to the United Kingdom as "a fugitive". That is accepted as the premise of the article 8 submissions which I have quoted. But it has various consequences in article 8 terms. One is that it itself engages further public interest considerations in favour of extradition. Another is that it strongly qualifies reliance that can be placed on lapse of time. I have quoted from the submissions in which it has been contended in this case that "a long and culpable delay on the part of the authorities can provide a potent factor against extradition" which "can be a determinative factor". There is no basis on the evidence, in this case, for characterising lapse of time as being "a long and culpable delay on the part of the authorities". The reasons for the lapse of time are squarely to be laid at the appellant's own door, as the district judge recognised, in findings which are not capable of being impugned.

12. I emphasise these points because they are the context for the repeated references to the 2007 offence being "old", or "ancient", or "stale", or as Mr Hepburne Scott put it orally today: "very old". Those characterisations need to be put alongside the context and circumstances, which I have described, and do not in my judgment serve materially to support the appellant so far as the article 8 balance is concerned.

13. Lapse of time in the sense of the period of time in the United Kingdom, the nature of the lifestyle here, the relationships family and private life, and in particular the rights of third parties are always relevant in an article 8 case. The district judge recognised that in the present case. The appellant has been here since 2014. He has a settled relationship here and has provided important care to his partner. He is also had employment in the United Kingdom during his time here. All of that is relevant and all of it was properly considered. Having said all of that, the appellant is not 'a person of good character' here in the United Kingdom. In particular, in December 2019 he was sentenced to 12 weeks custody for criminal offending which included several non-domestic burglaries and possession of a bladed article. The position of the partner who has been described as a person with a disability, who is 'struggling', and has relied – prior to his arrest and remand – on the appellant for daily care, and who struggled in the light of that continuing remand, is an important factor to consider in the article 8 balance. It was carefully considered by the district judge. It is right to say, so far as family circumstances are concerned, that there are no dependent children in the picture.

14. Ultimately, the district judge in this case did what the authorities in this area require and conducted a careful 'balance sheet' approach. The balancing exercise was conducted: the factors in favour of granting extradition were listed as were the factors in favour of refusing it. Mr Hepburne Scott does not criticise the district judge for having missed out some important consideration in either direction. The judge went on, in a detailed paragraph, to set out the reasons and findings in relation to article 8. Both viewed in terms of the district judge's approach and whether it reasonably arguably should attract criticism on appeal, but also in terms of the overall evaluative conclusion 'standing back' from the case, this was in my judgment an approach and conclusions to article 8 which there is no reasonable arguable ground for impugning. That was how Swift J saw it. At the heart of his reasons for refusing permission to appeal on the papers he said this: "I do not consider that it is reasonably arguable that the district judge reached the wrong conclusion on the article 8 point". I agree. Permission to appeal on article 8 is refused.

Order

15. In this final paragraph, I set out the order which I make in the present case having had the opportunity to discuss it with Mr Hepburne Scott.

    (1) Permission to appeal is refused, on the ground on which it was advanced in the Perfected Grounds of Appeal dated 22 April 2020, namely Article 8 (section 21).

    (2) The Appellant has permission to amend his grounds of appeal, with an extension of time, to rely on the s.2 (judicial authority) point in Wozniak (CO/2499/2019), namely the Polish courts have ceased to be judicial authorities for the purposes of section 2 of the Extradition Act 2003 (see Wozniak [2020] EWHC 1459 (Admin)

at §§4, 6, 9-11, 14-15). The need for any further or amended Respondent's Notice is dispensed with.

(3) The Appellant's application for permission to appeal on the ground referred to at paragraph (2) above shall be stayed pending the judgment of the Divisional Court in the appeals of Wozniak (CO/2499/2019) and Chlabicz (CO/4976/2019). 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 at 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. The Respondent shall within 14 days of those written submissions file and serve any written submissions in response. The question of permission to appeal to be considered thereafter by a judge on the papers.

(4) Pending consideration of the application for permission to appeal on the ground referred to at paragraph (2) above, which application is stayed pursuant to and in accordance with paragraph (3) above, the Appellant shall not be extradited pursuant to the order made at Westminster Magistrates' Court (in this case, on 6 April 2020).

(5) The Respondent shall have liberty to apply, in writing and on notice, to vary or discharge paragraphs (2), (3) and/or (4) of this Order, such application to be considered in the first instance on the papers.

(6) No order as to costs, save for detailed assessment of the Appellant's publicly funded costs.

18 August 2020