Neutral Citation Number: [2020] EWHC 2892 (Admin)

Case No: CO/2491/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th October 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

OLUFEMI GBAJOBI	**Appellant**
- and -	
HIGH COURT REPUBLIC OF IRELAND	**Respondent**

- -
- -

Martin Henley (instructed by AM International Solicitors) for the Appellant
Tom Hoskins (instructed by the Crown Prosecution Service) for the **Respondent**

Hearing date: 28th October 2020

Judgment as delivered in open court at the hearing

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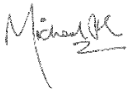
Approved Judgment

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 District 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 wanted for extradition to the Republic of Ireland. That is in conjunction with a mixed European Arrest Warrant (EAW) issued on 3 December 2018. He is wanted to be sentenced in relation to a sexual assault conviction following a guilty plea on 22 February 2001. The EAW also includes within it the prospect of him standing trial for a charge of rape. DJ Fanning ("the District Judge") ordered extradition on 20 June 2019 after an oral hearing on 13 June 2019. At that hearing the Appellant was represented by Counsel and he and his wife both gave oral evidence. In the District Judge's determination the issue of Article 8 ECHR was addressed as were other legal issues. Permission to appeal was refused by Saini J on 18 November 2019. At that stage the grounds of appeal exclusively being advanced in this court were Article 3 ECHR as set out in Perfected Grounds of Appeal dated 20 August 2019. Previously when the Appellant's Notice was filed on 26 June 2019 Article 8 had been relied on. The hearing of this renewed application for permission to appeal was adjourned on 29 January 2020 by Holman J and on 25 March 2020 by Johnson J.

The applications before me

2. The case comes before me today with a new and exclusive focus on Article 8. There is an application dated yesterday by new lawyers to amend the Grounds of Appeal to rely on Article 8 and an application to adduce as fresh evidence a new proof of evidence from the Appellant and witness statement from his wife. There are full written submissions from the Appellant's Counsel Mr Henley and from the Respondent's Counsel Mr Hoskins, filed yesterday. At this hearing Mr Henley addressed me orally for 55 minutes.

Mode of hearing

3. The mode of hearing was a BT conference call remote hearing. Both Counsel were satisfied, as am I, that that mode of hearing involved no prejudice to the interests of their clients. The open justice principle has been secured. This case and its start time were published in the cause list, where an email address was given that any member of the press or public could then use to be able to participate by making a phone call and so could observe this hearing. By having a remote hearing we eliminated any risk to any individual from having to travel to a court room or be present in one. I am satisfied that the mode of hearing was necessary, appropriate and proportionate.

Article 8

4. There is no dispute as to the law applicable to Article 8. It is common ground that the three key authorities are Norris [2010] UKSC 9, HH [2012] UKSC 25 and Celinski [2015] EWHC 1274 (Admin). The District Judge referred to all three of those cases in his judgment explaining that they give "clear guidance … to Appropriate Judges as to how to approach Article 8 issues" including "in particular … where children [are] likely to suffer an impact should a … parent be extradited". He added that "Celinski requires … a balancing exercise – weighing those factors in favour of extradition against those against". Mr Henley submits that although the District Judge had those cases in mind

and referred to them, he went on to make various errors of approach and arrive at an outcome which was wrong. He also submits that when the fresh evidence is considered the outcome can, on the basis of all the material before the Court including that new material, be seen as wrong. He emphasises, rightly, that the threshold for the purposes of today that he would have to cross is whether the appeal is 'reasonably arguable'.

How to proceed

5. At the start of the hearing I heard from both Counsel on the question of how this hearing should proceed. My provisional view was that it was appropriate, in the circumstances of this case, to start with the substance of the case: considering the Article 8 argument being put forward; taking into account the fresh and updating evidence; and, having done all that, form a view as to whether this case crosses the reasonable arguability threshold. If not, that would be the end of the matter and all applications would fall to be refused. But if the reasonable arguability threshold were crossed on that basis – being the most generous possible approach to the Appellant – I proposed in those circumstances to consider: the timing of the applications; the backcloth of changes of solicitors (and at one stage the Appellant informing the court of the that he wished to act in person); the implications of the very late applications made yesterday by the new lawyers; and the question of how to approach all of that in the light of the rules, the overriding objective and the need to dispose of this case properly and justly. Mr Henley invited me to proceed in this way and Mr Hoskins confirmed that he did not object. Having listened to Mr Henley's submissions and reflected on them I am quite satisfied that, even on that most generous basis, the threshold of reasonable arguability is not crossed in this case. In those circumstances I will be dismissing all of the applications before me and it is not be necessary for me to deal with what would have been the second stage.

The general criticisms

6. Mr Henley's starting point was to characterise the District Judge as having wrongly considered legal points which were not being advanced on behalf of the Appellant. He says that by considering points such as section 14 of the Extradition Act 2003 (passage of time: injustice and oppression) and section 25 (injustice or oppression by reason of physical or mental condition), with their higher thresholds, the District Judge was led into a confusion (or 'distortion') in the way he approached Article 8. Mr Henley's starting point is that the District Judge should have stuck to Article 8 and Celinski which he suggested was indeed the only authority needed given its discussion of Norris and HH.

7. Mr Henley's ending point, in his submissions, was that the approach the District Judge took to the Article 8 balancing exercise was a 'scattergun' approach and that, although the District Judge discussed the relevant topics, what he ought to have done was to have given a short list on factors on either side of the balancing exercise. Mr Henley realistically accept that that latter criticism is not of itself a material legal error since this Court will always look at the substance and the outcome. But his submission is that there was a 'distortion' through that approach in this case. As Mr Henley put it, had the District Judge given short lists on either side of the balance he would have seen for himself the other points that I have advanced in my submissions.

8. It is obvious from all of that that I need to consider on their legal merits the points that have been raised by Mr Henley in his submissions. That includes his points relating to alleged 'distortion' on the part of the District Judge from having considered other possible bars to extradition and the thresholds applicable to them. The structure and subject matter of Mr Henley submissions made clear that he, rightly, recognises that there are various 'headline topics' in this case relevant to the Article 8 analysis. I will deal with each of them in turn.

Seriousness of the offending

9. I start with the seriousness of the offending. In his written submissions Mr Henley recognises that the sexual assault is properly to be characterised as serious. It is a sexual assault against a 10 year old child. The Appellant was the child's neighbour. The Appellant admitted in an interview, as the District Judge recorded, "rubbing against [her] with his penis" and "touch[ing] her body". As the District Judge recorded, the Appellant was "adamant that he did not ejaculate, and did not progress to full intercourse". The District Judge also observed that: "Traces of semen were found on the external and internal anal swabs and the external vaginal swabs from [the child]. No semen was found on the internal vaginal swab. The DNA within the semen matched the [Appellant]'s DNA".

10. Relying on the EAW, Mr Henley says that in this case a prosecution for rape (which concerns the same incident) is framed as a possibility only if there is a future change of plea by the Appellant on the sexual assault. He says therefore the rape is contingent and 'speculative'. He submits as follows: since that the Court "cannot be sure that there would be any prosecution for rape" the Court must approach seriousness of offending by "assuming" the lesser charge of sexual assault based on the conviction. In my judgment that is not, reasonably arguably, a legally correct approach. In my judgment, the District Judge was perfectly entitled – as he did – to "reflect upon" the fact that "[t]he more serious allegation of rape appears not to have been pursued", but to take into account that the "outstanding allegation" is "very serious sexual offending … and it is right that the Irish judiciary adjudicates upon" that matter. I see no arguable error of law in that approach. In my judgment, it is not reasonably arguable that the District Judge erred and needed to 'assume' that only the lesser charge is relevant.

11. However, even if I am wrong about all of that and the District Judge was wrong to have in mind the rape allegation, in my judgment what emphatically stands and would stand on the substantive appeal in this case is the District Judge's characterisation earlier in his judgment. There the District Judge said this: "the [Appellant] is wanted to be sentenced for what on any reading is a serious sexual assault by a 30-year-old man on his 10-year-old neighbour. He pleaded guilty to sexual assault". It follows, in my judgment, from that characterisation that the District Judge was right so far as seriousness of offending was concerned to approach this case as concerning "a serious sexual assault" by the Appellant on a 10 year old girl. That alone, in my judgment, weighed and would weigh heavily in the public interest side of the balance in support of extradition. Nor, in my judgment, is that feature materially undermined by Mr Henley's reminder that the Appellant has served 1½ years on remand and that the maximum sentence in the Republic of Ireland for the sexual assault offence is 5 years.

12. If I stand back and posit this Court conducting a re-evaluation afresh on all the material before the Court, in my judgment it is inevitable that the starting point would be that

this case concerns criminal conduct which is very serious and therefore attracts a strong public interest when put alongside the principle of mutual respect. That is leaving aside the question of fugitivity (and so the public interest regarding 'no safe haven') to which question I will return.

Exceptionality

13. The next headline topic is exceptionality. Mr Henley criticises the District Judge as having erred in law when the District Judge said in the judgment: "the UK must honour its Treaty obligations other than in an exceptional case… This is not an exceptional case". Mr Henley cited paragraph 32 of HH (Lady Hale) and reminded me that there is no overall 'exceptionality test' under Article 8. He did however accept the relevance of asking whether there are "exceptionally severe" consequences in particular for third parties and especially children. That point is found in the same judgment in HH at paragraph 8(7). As Mr Hoskins pointed out 'exceptionally severe consequences' can be traced back through paragraph 111(d) of HH (Lord Judge CJ) to a passage in Norris (paragraph 107: Lord Mance). That passage was expressly set out by the District Judge as the heading to the conclusions on Article 8. The passage is this: "Interference with private and family life is a sad, but justified, consequence of many extradition cases. Exceptionally serious impact or consequences of such interference may however outweigh the force of the public interest in extradition a particular case".

14. In my judgment it is not reasonably arguable that the District Judge made a material error of law in using the language of "exceptional case". In my judgment it is clear, read in context, that the District Judge was focusing, rightly, on whether there were 'exceptionally severe consequences' capable of outweighing the force of the public interest in the particular case. I will return to the topic of hardship and the way in which the District Judge addressed the consequences and their severity.

15. But even if all of that is wrong, and if I posit this Court conducting the entire balancing exercise afresh in the light of the District Judges unimpeachable findings of fact on the evidence and having regard to all the material including the fresh evidence, there is in my judgment no realistic prospect at a substantive hearing of this Court concluding that the overall outcome in this case is wrong. In saying that I have had regard to all the factors in the case including the headline topics to which I have yet to come in explaining my reasons in this judgment.

Passage of time

16. The next headline point related to the passage of time. Mr Henley rightly reminded me by reference to HH at paragraphs 8(6) and 46 (Lady Hale) that the delay (the passage of time) can have one or other or both of two consequences in an Article 8 case, independently of questions of whether the requested person is a fugitive. Even if the individual is not a fugitive, the first possible consequence is that the nature of the delay may tend to diminish the weight to be attached to the public interest (HH paragraph 8(6)). On the facts of a particular case the length of delay can in that regard moreover suggest a lack of urgency about the pursuit of matters, having an indicative effect on the importance to be attached to the offending (HH paragraph 46). The second consequence that can arise independently of whether the individual is a fugitive is that the lapse of time since the crimes were committed may tend to increase the impact upon private and family life (HH at paragraph 8(6)).

17. It is at this point in the argument that Mr Henley advances one of his general 'distortion' criticisms. He submits as follows: that because the District Judge considered section 14 passage of time, to which a finding of fugitivity is a bar, and because the District Judge reached a finding of fact (unimpeachably) that the Appellant in this case was a fugitive, that led the District Judge into the error of not only rightly rejecting section 14 but wrongly overlooking the two ways (as just described) in which the lapse of time can properly inform the Article 8 analysis. I do not agree. In my judgment, it was proper for the District Judge to consider other relevant overlapping grounds of opposition to extradition. I say that even if Mr Henley is right in his premise: that Counsel who represented the Appellant before the District Judge was not relying on those as self-standing grounds to resist extradition. There is, in my judgment, no vice in a district judge considering related issues of law under the statute which, were they made out, would constitute a bar (or defence) to extradition. The important point, as Mr Henley rightly emphasises, is to ask whether in doing so the Article 8 analysis has been distorted. In my judgment there is no distortion in this case, reading the judgment as a whole. Nothing material was overlooked in the Article 8 analysis. I would add this. Even if not separately analysing other possible grounds constituting bars to extradition (or bases for discharging the individual), there is in my judgment, in principle, no error in a judge reminding herself or himself of relevant and overlapping principles and the way they play out. Understanding the way the jigsaw pieces of the law in relation to extradition fit together and operate is not a vice but can be a virtue.

18. The finding of fact that the Appellant in this case was and is 'a fugitive' was rightly addressed by the District Judge and rightly addressed by reference to the line of legal authorities on that issue in the context of section 14 passage of time. It is well-established that the concept of 'fugitive' applies the same legal principles whether one is considering it under section 14 or Article 8 or both. In considering the passage of time it was highly relevant for the District Judge to consider whether the Appellant was a fugitive. One can test that by supposing that the District Judge had concluded that he was not. Such a finding would have been a feature relied on, rightly, as part of the Article 8 analysis, as a factor counting against extradition, in the context of the passage of time, changes of circumstances and current circumstances. Equally it was highly material, and would be on any re-evaluation of Article 8, that the District Judge made an unimpeachable adverse finding of fact that the Appellant was a fugitive. He found that the Appellant had left the Republic of Ireland and 'put himself beyond legal process', having attended a hearing on 22 February 2001 at which he pleaded guilty to sexual assault, and having then failed to attend a sentencing hearing on 19 April 2002.

19. So far as the first Article 8 feature of lapse of time tending to diminish the weight to be attached to the public interest, it is obvious in my judgment – reading the District Judge's determination – that the District Judge took the view that the passage of time in this case did not materially diminish that weight. That he should have taken the contrary position is not, in my judgment, reasonably arguable. Nor in my judgment is there any realistic prospect that this Court at a substantive hearing would conclude that the weight to be attached to the public interest in this case is significantly diminished by the lapse of time.

20. It is relevant, in my judgment, to remember that counsel for the Appellant addressed the District Judge on the impact of the passage of time in the context of Article 8. His submission on how the lapse of time could affect the Article 8 analysis in this case was

summarised by the District Judge, as follows: "[Counsel on the Appellant's] behalf, points to the [lapse] of the 19 years since [the Appellant] ran away from the trial process in Ireland, and points to the family life [the Appellant] has built with his second wife since then. He has had three children since then, and the youngest of his first wife's children was born after his appearance at the court in Dublin… Although [Counsel] does not seek to rely on s.14 EA 2003, he does ask me to consider the passage of time in the context of Article 8". What that passage clearly does, and rightly does in my judgment in this case, is to recognise the need to focus on the impact upon private life and family life, particularly on the interests of the third parties: the wife and children. Mr Henley rightly accepts that that is an important part of where the emphasis lies and he submitted that this is a case of "blameless children born in the interim". In my judgment, it is very clear that the District Judge had that feature of the case very well in mind. The District Judge, having recorded that Article 8 is "an entirely separate issue" from section 14 (and having described the weight to be attached to injustice or oppression from the passage of time as "significantly diminished" when it is an Article 8 factor because the requested person is a fugitive and unable to invoke the section 14 bar), the District Judge went on to consider the impact in particular on the wife and children. He then said this: "I am bound to consider the impact upon his wife and his children of ordering his extradition. They are blameless victims of his admitting admitted offending". In a later passage the District Judge said of the children: "They are true innocents caught up in the aftermath of a criminal act by their father committed before they were conceived. They are entitled to a secure family life". That, as Mr Henley on reflection accepted, was the District Judge explicitly recognising that here are 'blameless children who were born in the interim'.

21. Once again, if I step back and consider the overall outcome in the light of all the factors of this case, and if I posit this Court conducting an Article 8 rebalancing and re-evaluation citing all the passages relied on from HH including the two features relevant to the lapse of time, there is in my judgment no realistic prospect that this Court would conclude that extradition in this case is incompatible with the Article 8 rights of anyone.

Impact and Hardship

22. I turn to the next headline topic in this case, namely that of the impact of extradition and issues of hardship. This topic links with some of the features of the case which I have already discussed.

23. Mr Henley relies on the position so far as the Appellant's medical condition is concerned and argues that the District Judge elided section 25 (with its high threshold of 'injustice or oppression') and the role played by medical or mental health conditions for the purposes of Article 8. This is another example of what he submitted at the outset was a 'distortion' in the District Judge's analysis through considering issues that were not being advanced. What the District Judge said was that the high section 25 threshold, on the evidence before him, was not met; and that he could not see how the Appellant could argue a breach of Article 8 rights on what he characterised as "this speculative basis". In my judgment that was not, even reasonably arguably, to elide the section 25 threshold with a threshold for the purposes of a physical or mental health condition being a relevant factor in an Article 8 balancing exercise. The District Judge's description of the medical condition, and risks being relied on as "speculative", need moreover to be read against his clear and explicit findings of fact. The District Judge did not believe the Appellant's evidence in relation to medical conditions and found

that he had lied and could not be trusted. Reading the judgment as a whole, it is against that backcloth that the District Judge was referring to 'speculation' as the basis for alleging future harm by reason of a medical condition following extradition.

24. Mr Henley invites me to take into account, as I have, the evidence now put forward in the very recent witness statement of the Appellant's wife and proof of evidence of the Appellant. I have read (and re-read) that evidence. I have posited this Court taking it fully into account. I place it alongside all of the other features in the case, stepping back and asking myself whether there is a realistic prospect that this case could succeed on a substantive appeal. In my judgment there is none. There is, in my judgment, no clear and compelling cogent medical evidence, still less of conditions which could weigh so strongly in the balance as to lead, together with other features, to the conclusion that extradition is Article 8 incompatible.

25. Mr Henley submitted today that the District Judge was wrong to reject the Appellant's claim that he was the children's "primary carer". At one point in his submissions Mr Henley suggested that that was "inconsistent" with the District Judge's finding elsewhere that the Appellant "featured heavily in their daily lives". There is in my judgment absolutely nothing in this. The District Judge considered the oral evidence and cross-examination. He gave very clear reasons what is plainly a sustainable and unimpeachable (beyond reasonable argument) finding of fact, namely: "I do not believe [the Appellant] to be the primary carer. Again, he is over egging the pudding so as to cause me to believe the impact of his extradition on the children will be catastrophic. I accept he is residing in the family home, and that he was playing his part in the children's day-to-day care, but no more than that".

26. Reliance has been placed on the housing position in this case. The 'fresh evidence' put before me describes various periods including an alarming description of a time at which for a period of "four days" it is said that the wife and children had been "forced to sleep in a car" having been evicted for rent arrears following the Appellant's arrest. I asked Mr Henley whether he could identify when in the timeline that 'sleeping in a car' was being described. I have in mind that the oral hearing in this case was 13 June 2019 and the Appellant had been arrested on 20 April 2019. I have in mind that the District Judge heard oral evidence from both the Appellant and the wife and that the District Judge specifically addressed the question of housing. Mr Henley candidly accepted that he could not point to a particular place on the timeline when this alarming evidence about the family sleeping in a car had taken place, assuming that it is to be believed. In my judgment, it is possible to do better though than that. Looking at the fresh evidence on its face the wife's witness statement explains that (i) following the Appellant's arrest the family were evicted for inability to pay the rent and were then forced to sleep in the car for four days; (ii) what happened next was that a friend was then "able to help us for a month"; (iii) what happened after that was that emergency accommodation by the local council was provided "for the next seven months"; (iv) and after that "for the last nine months" they have managed to live in private accommodation. The witness statement (although unsigned and undated in my version) is clearly given this month ("October 2020") and probably yesterday. If I trace "nine months" back from October 2020 I get to January 2020; if I trace "seven months" back from January 2020 I get to June 2019; and if I traced one month back from June 2019 I get to May 2019. That means the time said to have been spent sleeping in a car will have been the end of April or beginning of May at the very latest. I repeat: the oral

hearing was 13 June 2019 and the Appellant and wife both gave oral evidence at it. In any event, what the evidence describes is an accommodation position which stabilised quite quickly. The District Judge recognised, rightly, on this evidence that the housing position had stabilised. He also found as a fact that the wife was coping in her changed circumstances.

27. The District Judge went on to consider in some detail the position of both the wife and the children. In my judgment, it is clear that the District Judge was looking carefully at the impact on all of the third parties including the "blameless children born in the interim" which he had rightly recognised. Indeed, at the end of the judgment the District Judge made a separate, distinct and self-standing overall finding that the Appellant's extradition "would not impermissibly interfere with the Convention rights of any other person". Mr Henley submits that the children's interests were far more important than the District Judge recognised and that the children's best interests were not properly addressed. I cannot accept that submission. The high watermark of Mr Henley's submissions on this point is the criticism he makes of the District Judge for having said: "children are resilient. They adapt". I do not accept that criticism, even reasonably arguably. It is very important not to take one observation out of context by reading it in isolation. The District Judge did not say: 'so far as the impact on the children is concerned I find as a fact that there is no impact because children are resilient and they adapt'. He did not hang his conclusion on the observation he made as to resilience and adaptability. Rather: he considered all the evidence and features of it; he addressed the nature of the impact for these children, and on this evidence; he recognised that the Appellant had featured heavily in their daily lives until his arrest; he accepted that one of the children in particular had reacted badly; he explained that that particular child is of an age where loss of contact will be keenly felt; he considered the evidence as to the nature of the suffering of the other children in the family; he considered whether the Article 8 rights engaged had the consequence of outweighing the competing request for extradition; he explicitly recognised the difficulty for the children in visiting the Appellant and the opportunities for communication; he recorded that the children would feel the absence of their father keenly; he said, in terms, that the welfare of the children is a primary issue, but he said, correctly, that it was not "the" primary issue. So far as "the" primary issue is concerned the question was whether, weighing the factors in favour of extradition against those against and conducting the necessary balancing exercise, extradition would be disproportionate and incompatible with the Article 8 rights of the Appellant or his wife or his children. The District Judge explained that he had reached the conclusion that it would not be, having carefully considered all the live and the documentary evidence. Mr Henley is right to emphasise the position of the children. He is right to submit that their interests need to be carefully analysed and assessed within the Article 8 balancing exercise. In my judgment the District Judge in this case did precisely that. I have found no material error of approach in his analysis.

28. I repeat, moreover, what I have said during the course of this judgment. I have asked myself whether, in my judgment, there is a realistic prospect that this Court – were it to conduct the Article 8 balancing evaluative exercise for itself, afresh, and take into account the further evidence now provided – would conclude that the outcome in this case is wrong and that extradition is incompatible with Article 8. In my judgment, and having regard to all the points made in writing and orally by Mr Henley (who has said absolutely everything that could be said on behalf of his client), there is no realistic prospect. The Article 8 argument, in my judgment, is not reasonably arguable.

Disposal of the applications

29. In those circumstances I do not propose to address, or hear argument on, how the Court in this case would have approached the extremely late change of position by new lawyers in seeking to invoke and resurrect Article 8 and place further material before the Court. I have heard no argument on that. I reached no conclusion as to whether that could or would have been appropriate. Those questions, in the circumstances, are academic. What I do, having reached the conclusions which I have described, is to dismiss (i) the application for permission to appeal, (ii) the application to rely on fresh grounds of appeal and (iii) the application to adduce fresh evidence.

28.10.20