Neutral Citation Number: [2021] EWHC 984 (Admin)

Case No: CO/4615/2020

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 :

PETER KEVIN MILLER	**Appellant**
- and -	
GOVERNMENT OF CANADA	**Respondent**

- -
- -

Simon Gledhill (instructed by HP Gower 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

- -

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 72 and is wanted for extradition to Canada. That is in conjunction with an extradition request dated 8 August 2018. It is an accusation extradition request. It relates to 13 alleged offences of fraud, linked to 13 alleged counts of theft, which constitutes criminal conduct alleged against the Appellant between November 2010 and April 2013 in Canada when he was aged 61 to 64. The Appellant hotly disputes the allegations and strongly maintains that he is innocent of any criminal wrongdoing. The purpose of the extradition would be for him to be in the hands of the Canadian authorities for the purposes of standing trial. The Appellant and his wife (Ms du Plessis) left Canada in May 2014 and came to the United Kingdom where they have remained, subject to a period in Ireland between September 2014 and April 2015, and a 6 month period when the wife was in Canada in 2019. During a period between September 2012 and April 2013 they were in Mexico. The Appellant was originally arrested in Canada on 31 January 2014 in conjunction with the same matters but was released at that stage. He was arrested in the United Kingdom in conjunction with these extradition proceedings on 23 September 2019 and was released on conditional bail. After an oral hearing which took place on two dates in 2020 - namely to March 2020 and 1 September 2020 - and by a judgment dated 12 October 2020 SDJ Arbuthnot ("the SDJ") found against the Appellant on the various grounds on which he was resisting extradition, including Article 8 ECHR, and referred the case to the Home Secretary who ordered extradition to Canada on 2 December 2020. On 3 February 2021 Holman J refused permission to appeal on the papers, following which the Appellant sought reconsideration at this oral hearing, at which the sole issue is article 8 ECHR, alongside which there is an application to adduce fresh evidence relating to the current situation in custodial institutions and within the general population at large in the relevant part of Canada to which extradition is sought, British Columbia.

Mode of hearing

2. The mode of hearing today was BT conference call. Mr Gledhill was satisfied, as am I, that that mode of hearing involved no prejudice to the interests of his client. I have been able to listen to representations by Mr Gledhill in exactly the way I would have done had we been present together in the court room. I am satisfied that the mode of hearing was justified and appropriate, in the context of the Covid pandemic. The open justice principle was secured. This hearing together with its start time were published in the cause list with an email address usable by any member of the press or public who wished to observe this public hearing. Any such email request enabled the court to keep any interested person informed as to slippage in the Court's list when earlier cases overran. In any event the dialling details remained the same. The hearing has been recorded. This ruling will be released in the public domain.

Article 8

3. In extremely clear and comprehensive written and oral submissions Mr Gledhill has put before the Court a number of features of this case, which he submits either separately or in combination give rise to a reasonably arguable Article 8 ECHR ground of appeal. He submits that material errors were made in the approach of the SDJ. He submits that

leaving aside the question of individualised error, the appellate court would have the proper function of 'standing back' in considering whether the outcome viewed in light of all the circumstances and evidence in the case was wrong, and he emphasises the need in stepping back and in considering the points he has advanced to address them both on their individual freestanding merits but in particular also in combination.

Healthcare provision on bail in Canada

4. A first point emphasised by Mr Gledhill relates to healthcare provision available to the Appellant where he extradited to Canada. That arises in the context of health conditions which Mr Gledhill listed as will I: osteoarthritis in the lumbar spine right knee. Raised PSA level (and consequently increased risk of prostate cancer; a condition from which the Appellant's father suffered and can be hereditary) following a biopsy in 2009; hypertension (for which he receives prescribed medication); dyslipidaemia (for which he receives prescribed medication); a right inguinal hernia for which surgery is required but has been postponed due to Covid-19; panic attacks (which can be induced by claustrophobia). Mr Gledhill submits that the SDJ addressed healthcare provision following extradition by reference only to presence in a custodial institution whether on remand or - were there to be a conviction after a trial - during any custodial sentence. Mr Gledhill submits that a key missing point which the SDJ failed to evaluate and include within the Article 8 overall balancing exercise concerned the position in circumstances where he sought and obtained bail in Canada pending trial. In those circumstances, on the evidence, submits Mr Gledhill: the Appellant would be ineligible for healthcare provision, through his ineligibility for what is called the Medical Services Plan, documents relating to which were put before the SDJ and are put before this Court; that in those circumstances the Appellant wouldn't get healthcare, because the necessary private health insurance would be beyond his means. Mr Gledhill took me to the proof of evidence in which the Appellant referred to the option of applying for private medical insurance but then said that it would not cover pre-existing conditions and that even if he did find coverage "the premiums would be quite way too high for which I don't have the money; and "neither myself nor my spouse have the finances… to be able to afford medical services".

5. The problem with this submission, as I see it, is twofold. I posit this Court evaluating Article 8 by considering the position afresh on the basis of the evidence, and focusing specifically on the question of healthcare during a period of bail in Canada. The first point is that, having been able to examine the materials with Mr Gledhill's assistance, there is reference - as one would expect - to 'safety net' provision for those who are ineligible not having the appropriate immigration or residential status for the Medical Services Plan and not having the means to buy private health insurance. Within the bundle is material relating specifically to the question 'whether non-citizens can get free healthcare'. It says 'newcomers to Canada may not have the same access to services'. It says 'for newcomers the level of coverage depends on your immigration status', but that 'generally speaking immigrants have limited access to free medical care and will likely have to pay for some treatments or insurance'. It says 'the provinces and territories offer free emergency medical services but some restrictions may apply'. In other words, there is safety net provision. But the second point is this. The suggestion by the Appellant that he would seek and obtain bail but then be unable to purchase any medical healthcare insurance is directly linked to the question whether he would be 'destitute' if released on bail in Canada. The SDJ addressed that question directly. She

had in mind, as do I, that that scenario, on its face, would necessarily involve the Appellant putting forward an address in Vancouver (or at least in the appropriate region) where he would reside, as a bail address. That is itself difficult to square with the suggestion of destitution, which the SDJ expressly rejected as "speculative", specifically making the point I have just made about the need to provide a residential bail address.

6. The context for the healthcare provision argument is one in which as the SDJ recorded – on the evidence – the Appellant is "in relatively good physical health for a man of his age". It is one in relation to which as the SDJ also recorded – on the evidence – the Appellant "suffers from the complaints common to many of his age and … the medications he needs are easily available".

7. Finally, it is relevant when considering the bleak picture put forward for and on behalf of the Appellant, that human rights law has a 'safety net' threshold of its own, namely the ECHR Article 3 threshold based on substantial grounds for believing that there is a real risk that an individual will suffer the minimum level of severity to constitute inhuman or degrading treatment. Mr Gledhill rightly submits that that freestanding human rights protection is not exhaustive of the ways in which health conditions and healthcare provision can properly be relied on, and that it does not of itself provide a determinative answer to an evaluation for the purposes of Article 8. I accept that, but it is nevertheless relevant that the SDJ dealt with the ECHR Article 3 standard and it is not suggested on behalf of the Appellant that there is in this case any reasonably arguable Article 3 violation in extraditing the Appellant, an acceptance which in my judgment is plainly right.

Covid-19

8. The other principal point developed in detail orally by Mr Gledhill relates to Covid-19. He submits that the SDJ adopted an approach in relation to Covid-19 in the context of the Appellant and his extradition which is - reasonably arguably – unsound, at least given subsequent developments. He drew my attention in particular to observations to which the SDJ referred about the low prevalence of Covid in the general population, and how the risk out of prison was of significantly less importance than the risks in prison and in other similar settings. Mr Gledhill submits that those points do not provide an answer: it is not enough to identify a low prevalence, or a lesser importance; the fact is that there is an impact and a risk, which needed to be identified addressed and included within the balance. Mr Gledhill also drew my attention to the passage in which the SDJ recorded that, as at the date of the judgment, there was no existing upsurge or outbreak. By reference to the 'fresh evidence' Mr Gledhill submits that the current concerns, both in relation to upsurge and spikes within the prison population and remand population, and within the wider population at large, including by reference to the Covid 'variants', are features which in any event would undermine the SDJ's failure to identify the Covid risk as weighty in the Article 8 balancing exercise.

9. The answer to that, in my judgment, is that the SDJ had well in mind the point on the evidence relating to impact for the Appellant. She recorded, in terms, in her judgment the point made in the expert evidence that the Appellant's medical conditions 'do not increase the risk of his being Covid infected, but they do affect his risk of developing the disease and dying from it'. I do not accept that the SDJ lost sight of that feature of the evidence in her evaluation. So far as Covid surges and the position at the date of the

judgment is concerned, she had well in mind and set out that the situation was 'dynamic and changing' and that at an earlier stage, on the evidence, there had been surges and lockdowns, with screening and isolation. Her conclusion was not based on the position on the specific date before her. She found, in terms, as one of her conclusions that 'the authorities would be able to contain any future upsurge, as they had done in the past'. In my judgment, whether considered on a freestanding basis or in conjunction with the other features in the case including the first point about healthcare provision, the Covid-19 risks are not capable – even arguably – of supporting the conclusion that the outcome was wrong and extradition would breach Article 8. The fresh evidence, in my judgment, is incapable of being decisive and I refuse permission to rely on it.

10. Mr Gledhill, very properly, brought to my attention at today's hearing the fact that the Appellant has now been 'double vaccinated' (ie. he has had both vaccinations) in relation to Covid-19. That is a development which reinforces the conclusion to which I would in any event have come. (Ms du Plessis has, I was told, had her first Covid-19 vaccination and awaits the second.)

Other features

11. In his written submissions and augmented in his oral submissions, there are a large number of further features of the case emphasised on behalf of the Appellant by Mr Gledhill. I have considered all of them. The SDJ made an inapt reference to a public interest consideration concerning the United Kingdom 'not being a safe haven for fugitives', in a context in which she had not found the Appellant to be a fugitive. She made a reference to the fact that the Appellant has 'previously been in custody' as being a factor weighing in favour of extradition, a point which Holman J in refusing permission to appeal on the papers described as one which should not have been made, an assessment with which I agree. Mr Gledhill submits that these were material errors that should lead the Court to re-evaluate the balancing exercise. For the purposes of today I proceed on the basis that he is right about that and that the appropriate course is to posit this Court revisiting the Article 8 balancing exercise and conducting the evaluation for itself. In conjunction with that approach it is necessary to take into account, as I have, all of the points that are made on behalf of the Appellant including cumulatively. It is not necessary or appropriate for me to address each point in turn.

12. One topic which is of clear significance is the position of the Appellant's wife, Ms du Plessis. Mr Gledhill criticises the SDJ for doubting, he says without a sufficient explained basis for doing so, Ms du Plessis's evidence that she 'could not stay with any family member' were she to go to Canada upon her husband being extradited. As the SDJ recorded, Ms du Plessis has "parents, two sisters, her son and his family" there. Mr Gledhill also emphasised the point made before the SDJ about what he described today as the "financial, emotional and lifestyle" dependency of Ms du Plessis on the Appellant. He emphasised the particular difficulties in which she would be, if she remained in the United Kingdom and the Appellant: were extradited, were in Canada, were on bail, and were maintaining himself on bail. He criticised the SDJ for including within her reasons, in relation to possible destitution on the part of Ms du Plessis, that the Appellant has very close family in Cumbria where Ms du Plessis is and: "somebody has found £100,000 as a security for the [Appellant] is bail in this country". Mr Gledhill submits that that was not a relevant feature, since it will have been a temporary loan based on compliance with bail conditions by the two sisters of the Appellant who found that money for that purpose.

13. So far as concerns Ms du Plessis, and even – as I have said – positing this Court considering afresh and for itself the balancing exercise for the purposes of Article 8 proportionality and the relevant rights of all family members, it is, in my judgment, relevant to have the following points in mind. The SDJ concluded: that there would be hardship for Ms du Plessis but that the position would not be exceptionally severe in terms of its impact; that Ms du Plessis would have a choice either to remain in the United Kingdom or to go to Canada (as a Canadian national); that she had stated at the hearing in evidence that her intention, were the Appellant extradited, would be to remain in the United Kingdom; and that it was likely that she would be able to remain (a position reinforced by the fact that again, entirely properly, Mr Gledhill has disclosed to the Court today that she has now secured permanent residence status within the United Kingdom); that she would be less well off financially but did have a small private pension would be able to support herself; that she could be supported by the Appellant's family who were close by; and that she would not be destitute; that she had health issues including treatment for a painful leg and relating to a hip condition, which would be harder to manage; that if she chose to return to Canada it was relevant that she is a Canadian national who lived in Canada for many years that she would not be destitute there either; that her extensive family would assist her; and, in relation to what the Appellant had said in evidence, questioning how the Appellant would be able to survive if he were not with her, he being "her only friend", that Ms du Plessis had gone back to Canada in 2019 to see family, had stayed there for 6 months with a friend, had tried to get a job there, had had her gallbladder removed, and had had other surgery there, provided by the public health system.

14. The exercise I have described, positing the Court revisiting the Article 8 balancing exercise and the overall evaluative conclusion in the light of all the facts and circumstances of the case, would obviously need to have regard to the other features in the case. The Appellant has not been found to be a fugitive. Having said that, fugitivity is not an 'on-off switch' in the context of the Article 8 balance, and the Court will consider all the facts and circumstances relevant to the requested person's conduct, as part of the overall balance, in what is a nuanced exercise. It is therefore relevant to have in mind what the SDJ found about the Appellant having acted to avoid investors, and avoid investigation, by going with his wife to a Mexican Resort in the period September 2012 to April 2013, where they had intended to stay, and this having told investors that he was going to the United Kingdom for a holiday. All of these are factual matters which were before the SDJ and she evaluated having regard to the documentary evidence. It is relevant to have in mind that this is not a case of significant delay, as the SDJ also rightly found.

15. It is also important to keep in mind the relative seriousness of the matters in relation to which the Appellant's extradition is sought. The SDJ described this as 'a fairly substantial fraud over a period of months to benefit the Appellant and his wife'. References are made in the papers to $426,000 loss to investors; US$247,000 stolen; $679,837 collected from investors; and $282,000 having been used for personal purposes. (I interpose that Mr Gledhill submitted that the three "$" figures which I have just used would have been Canadian dollars or mixed Canadian and US dollars, and top that extent US$ equivalents would be some 20% or so lower.) I repeat what I said at the outset, that the allegations are strongly denied. But what is alleged does indeed involve 'a fairly substantial fraud', involving some 18 investors, who are said to have incurred substantial losses. Those features are relevant in considering the public interest

considerations in favour of extradition which necessarily fall within the Article 8 evaluative balancing exercise.

Overall

16. When I step back, in the light of everything that has been said by Mr Gledhill on behalf of the Appellant, and about him and about Ms du Plessis, when I consider the evidence and material in this case, in the light of what the SDJ found but having regard to the criticisms sought to be advanced about what she said, I can see no realistic prospect of this Court at a substantive hearing overturning the outcome in this case, and concluding that extradition would be incompatible with Article 8 rights of the Appellant or any family member including Ms du Plessis. Permission to appeal is therefore refused.

20.4.21