Neutral Citation Number: [2022] EWHC 1759 (Admin)

Case No: CO/4083/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 7th July 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

ANDRZEJ DYKO	**Appellant**
- and -	
POLISH JUDICIAL AUTHORITY	**Respondent**

- -
- -

Martin Henley (instructed by Montague Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

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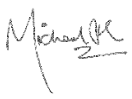
Hearing date: 7.7.22
Judgment as delivered in open court at the hearing

- -

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

MR JUSTICE FORDHAM:

1. This was the in-person oral renewal hearing of an application for permission to appeal against the order of a district judge ("DJ2") on 23 November 2021 ordering the extradition of the Appellant to Poland following an oral hearing on that day at which the Appellant appeared in person. Permission to appeal was refused by Hill J on 21 April 2022. A notice of renewal was filed on 27 April 2022. The background, circumstances and contours of this case have all been fully set out in the judgment of Holman J in Dyko (No.1) [2021] EWHC 2910 (Admin) (the "First Judgment"), which is publicly available and to which I invite attention. Everything is clearly set out there.

2. The Respondent argued before Holman J that a passage in the judgment of Irwin J in Zakrewski v Poland [2015] EWHC 3393 (Admin) [2016] 4 WLR 23 at §22 (described as §14 of Zakrewski in the First Judgment) was applicable to the present case, with the consequence that it was erroneous and artificial for the previous district judge ("DJ1") to have discharged the Appellant on Article 8-incompatibility grounds on EAW1 (5 months 4 days to serve), in circumstances where the Appellant was – compatibly with Article 8 – to be extradited on EAW2 (2 years 4 months to serve).

3. What Irwin J had said was:

> ***[I]f hypothetically EAW1 was in respect of a relatively minor offence, committed or allegedly committed a long time ago, whereas EAW2 arose in respect of a very serious offence committed recently, it would be wholly artificial to refuse extradition on the former by reference to an Article 8 impact rendered quite academic by the latter.***

Mr Henley emphasises the particular context in which that statement was made. He says Irwin J was dealing specifically with the procedural merits and virtues of dealing together with linked cases, rather than having 'left-hand' and 'right-hand' problems, where different warrants relating to the same individual are dealt with at separate hearings. But, in my judgment, there is no getting away from the fact that the observation that was made by Irwin J relates to Article 8 "impact" and whether that impact should be approached in an "artificial" way, in the sense that an impact does not arise given that there is to be extradition in any event. The emphasis on extradition proceeding on another EAW, rendering "academic" an "Article 8 impact" is, in my judgment, crystal clear. It also makes perfect sense. To take an example which I was able to put to Mr Henley in his oral argument, suppose you have one EAW that relates to a 4-month sentence for a relatively trivial offence but serious impacts arising from the rupture in family life, including in the context of a very young child. Considering those impacts might give rise to the conclusion that extradition would be disproportionate because of the effect on the child of having the parent removed from their life in the UK. But the position in relation to those impacts is obviously different if the fact is that the parent is going to be removed in any event because there is to be extradition to serve a 10 year prison sentence on another EAW relating to a very serious offence. It is, in my judgment, obvious that Article 8 proportionality would need to consider "impact" in a sensible and realistic, real-world sense, and not an "artificial" sense. That was what Irwin J was saying and that was how he was understood.

4. The Respondent had appealed against DJ1's discharge of the Appellant in relation to EAW1. The Appellant had cross-appealed against DJ1's non-discharge of him in relation to EAW2. Both parties were represented by Counsel. Holman J examined the

proportionality in Article 8 ECHR terms of extraditing the Appellant on EAW2. He found extradition on EAW2 to be Article 8-proportionate. He then dealt with EAW1. He concluded that it could not, in the circumstances of the present case, be disproportionate in Article 8 terms to extradite the Appellant in relation to EAW1, in circumstances where he was being extradited in relation to EAW2. He concluded that DJ was had fallen into the error described by Irwin J. Holman J's reason for that conclusion is set out at paragraph 48 of the First Judgment.

3. When the matter was remitted pursuant to section 29(5)(b) of the Extradition Act 2003 to the Westminster Magistrates Court(WMC) it was with a "direction" to proceed as DJ1 "would have been required to do had he decided the relevant question differently" at the extradition hearing (see First Judgment §50, also reflected in the court order). Holman J spelled out (First Judgment §49) that he was "satisfied" that DJ1 had "decided a question wrongly" in relation to EAW1 and that "if he had decided that question correctly, he would have been required to order extradition".

4. No judgment was handed down by DJ2 in ordering extradition on 23 November 2021. It has been confirmed by the CPS that there was no judgment and Mr Henley tells me he has had equivalent confirmation from WMC. That is entirely unsurprising, given what had been so clearly said in Holman J's judgment both as to its substantive content and logic; and specifically in the concluding paragraphs (First Judgment §§49 and 50) to which I have referred. When I drew his attention to §49 the First Judgment Mr Henley submitted in response that that paragraph is "not clear enough" as to what Holman J was directing. I cannot accept that submission, even arguably. In my judgment, it is crystal clear what had been held and what the direction was that the WMC was then being required to act in accordance with.

5. Mr Henley next submits that, insofar as that was the nature of the direction, it was improper. He says that what is inevitably required by a district judge considering Article 8 issue is a 'balance sheet' exercise under the relevant authorities. He describes that exercise, in the present context, as a standard of "due process". He submits that "due process" required that DJ2 should conduct an evaluative balancing exercise. I cannot accept, even arguably, that there was any failure of "due process" in this case. The High Court as appeal court has the statutory power to remit. It is not in dispute the High Court can make directions. In a case where the High Court has, authoritatively and clearly, evaluated the Article 8 implications of extradition and has come to a conclusion that it is not possible, in the circumstances, to characterise extradition as Article 8-disproportionate it would, in my judgment, be entirely inappropriate for a district judge on receiving the matter back – and especially with a direction such as was made in the present case – to embark afresh on an evaluative balancing exercise. There could be circumstances that could warrant such a course. It might be said that there were some new supervening event or circumstance or fresh evidence or new consideration. But none of that was are suggested in the present case whether previously or now. This was simply a case that was being remitted with a direction to WMC in light of a very clear High Court judgment that have been handed down the previous month. There was no basis on which, on 23 November 2021, DJ2 could have concluded that extradition on EAW1 was a disproportionate interference with Article 8, when the High Court had ruled the previous month that that position was unsustainable. Still less was there any reason or basis for DJ2 to reopen the question of extradition on EAW2 and its Article 8

compatibility, on which the High Court had also authoritatively ruled the previous month. Nor was there any reason to hear evidence.

5. This application for permission to appeal invokes Article 8 ECHR. It is a straight rerun of the very issues that were addressed in the judgment of Holman J, and of the way in which he disposed of the appeal before him. Mr Henley's headline points are as follows: that Holman J was "wrong" to direct (if he did) WMC to proceed as they would have been required to do namely by ordering extradition on EAW1 (if that is what he directed); that Holman J was "wrong" to apply Zakrewski §22, which is distinguishable; that DJ2 was "wrong" not to hear evidence and make fresh findings of fact in relation to Article 8 conducting a 'fresh balance' sheet exercise; that even if the outcome was inevitable, "justice needed to be seen to be done"; and that DJ2 ought to have concluded in all the circumstances – and this Court on appeal ought to conclude – that extradition would be disproportionate in Article 8 terms, at least on EAW1. Those are the essential headline arguments.

6. There is no realistic prospect that this appeal could succeed at a substantive hearing. Whether it was appropriate to apply Zakrewski §22 in the present case was the point directly in issue before Holman J. It was fully argued, with skeleton arguments and oral submissions, with Counsel on both sides. The First Judgment determined the issue. It also determined the appropriate resolution and order. If there had been an application to reopen the appeal after the First Judgment, it would have been robustly dismissed on the basis that it was an attempted "second bite at the cherry". DJ2 did what this Court had directed WMC to do and took the only course that was open in the light of the First Judgment and Order of Holman J. But even if I were considering the matter entirely afresh, I can see no reasonably arguable error by Holman J in the First Judgment, or by DJ2, or in the observation of Irwin J relating to "artificiality" and "impact" rendered "academic". The "outcome" – that there is no Article 8 disproportionality in relation to either or both of the two EAWs – is not, even arguably, wrong.

7. Mr Henley submitted that DJ1 did not full foul of any "artificiality" relating to "impact". His argument was that DJ1 was determining proportionality of the two EAWs, viewed together and in the round, in light of the conclusions reached regarding EAW2, and DJ1 properly concluded that extradition on EAW1 was disproportionate. Mr Henley says that the key in relation to Article 8 and EAW1 was the age of the offending that was the subject of EAW1, the relative lack of seriousness and the fact that the Appellant had served all but five months of the 2 year sentence. There are two difficulties, beyond argument, with that line of attack. In the first place, it falls foul of the problem of being a straight rerun of arguments relating to Article 8 which have already been ventilated and decided by the High Court in a case in which there was legal representation on both sides and the Article 8 implications were addressed as was the approach that have been taken by DJ1. Secondly, and again putting that to one side, there is this problem. It is very clear from the reasoning of DJ1 that the basis of the finding on proportionality was informed by a consideration of "counterbalancing factors" which included "impact". DJ1 referred specifically to extradition as being disproportionate because of the counterbalancing factors including the Appellant's "productive life" in the UK and "family life" here. That linked back to the family life that DJ1 had described. It specifically linked to the "financial and emotional impact" on the family if the Appellant were extradited. DJ1 had listed that "impact" in the 'balance sheet'. The problem is that that "impact" fell into the trap of being "academic", and not a real-world impact, in circumstances where the family

life was going to be being ruptured in any event by an extradition if it were ensuing on EAW2. I repeat: all of this was open for argument, and was argued, in front of Holman J and he authoritatively dealt with the Article 8 implications in the context of all considerations and both warrants.

8. Mr Henley submits that underlying Holman J's application in the First Judgment of the observations of Irwin J is an error of approach that would treat EAWs as 'standing or falling together' for all purposes or at least in the context of all arguments capable of arising under Article 8. I do not accept that that is the consequence. The point which Irwin J was making, and which was the focus of Holman J's analysis, was simply a common sense point about "impact" and how it factors into an evaluation if – by virtue of another EAW – that "impact" is going to arise in any event because of an extradition which is going in any event to take place. That does not drive the conclusion, in all cases, that all EAWs will necessarily always stand or fall together but what it does is to require that impacts are considered in a real-world and non-artificial way.

9. For those reasons I will refuse this renewed application for permission to appeal.

7.7.22