Neutral Citation Number: [2022] EWHC 398 (Admin)

Case No: CO/1856/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

24th February 2022

Before:

MR JUSTICE FORDHAM

- -

Between:

KATARZYNA ZYGMUNT **Appellant**

- and -

DISTRICT COURT IN GDANSK (POLAND) **Respondent**

- -
- -

Amelia Nice (instructed by Armstrong Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

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Hearing date: 17/2/22

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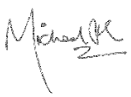
Approved Judgment

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

MR JUSTICE FORDHAM:

Introduction

1. This was an in-person hearing of for permission to appeal in an extradition case. After hearing submissions before lunch, and having become aware of Counsel's difficulties in attending in the afternoon, I offered to give judgment by means of a short written 'reserved' judgment, in place of the 'ex tempore' judgment which I would otherwise have delivered later in the day. The Appellant is aged 43 and is wanted for extradition to Poland. That is in conjunction with a conviction extradition arrest warrant ("EAW") issued on 16 October 2019 and certified on 9 April 2020 on which she was arrested on 10 June 2020. The EAW relates to a custodial sentence of 3 years 11 months of which 3 years 4 months 5 days remains unserved. The difference is attributable to 7 months having been served by the Appellant on remand in Poland. The index offence to which the conviction and sentence relate is a violent attack described as follows by DJ Callaway ("the Judge") who on 19 May 2021 ordered the Appellant's extradition after an oral hearing on 20 April 2021 (at which she and her partner gave oral evidence):

> ***The offence… is one of extreme seriousness. It involves a single offence of causing grievous bodily injury, equivalent to an offence in the UK of an assault occasioning grievous bodily harm. The particulars comprise the striking of another person repeatedly in the head and causing serious injury including the fracture of facial bones and a subdural haematoma to the extent that the person assaulted had her life threatened.***

2. Permission to appeal was refused on the papers by Sir Ross Cranston on 26 November 2021. He stayed the familiar section 2 Wozniak point, pending a final determination by the Divisional Court in that case. That occurred shortly afterwards and, as a result, that point has fallen away. So has an Article 3 (prison conditions) point in light of the determination of that issue in another lead case. The sole ground of appeal advanced concerns Article 8 ECHR. Ms Nice, for the Appellant, submits that the Judge was wrong in the approach which he took to the Article 8 analysis, reasoning and enquiry; and, in any event, that the "outcome" is "wrong", stepping back, in light of the way in which the material factors for and against extradition were weighed in the balance by the Judge (see Love v USA [2018] EWHC 172 (Admin) at §26).

3. The operative judgment of the Polish court was dated 20 February 2019. It followed a criminal process in which the Appellant had been informed of her rights and obligations, including an obligation to notify any change of address, on 26 July 2018. After her conviction and sentence, she was issued with notices on 27 March 2019 and 9 May 2019, to attend a detention centre on 25 April 2019 and 6 June 2019 respectively. She did not do so. She had come to the UK on 6 March 2019. Prior to that, she had become reconciled with the partner to whom she had been married between 2000 and 2009. He came to the UK in 2014. The couple had three children, who were all taken into care in Poland. The three children had been aged 18, 14 and 9 when the Appellant came to the UK in March 2019. The eldest daughter (now aged 21) came to the UK in July 2019. The two other children are now aged 18 and 12 and in Poland; the youngest is still living in the orphanage there. Having come to the UK, the Appellant became pregnant at the end of 2019 and gave birth on 12 July 2020 to the couple's fourth child, their young (now 19 month old) son. His birth came a month after his mum had been arrested in these extradition proceedings, on 10 June 2020, after which she was released on conditional bail with an electronically-monitored curfew of 12 hours a day. He and his best interests are central features of the Article 8 analysis in this anxious case.

The argument

4. The essence of the Article 8 argument, put forward by Ms Nice on the half of the Appellant, as I see it, is as follows.

   i) A key feature of this case concerns the seriousness of the impact on the young son, for whom the Appellant is the primary carer. The Judge (rightly) described as "devastating" the impact of extradition for the Appellant and the young child. The Judge also (rightly) referred to the decision of the Supreme Court in HH v Italy [2012] UKSC 25 as setting out "the current law" applicable "where a child or children are concerned, as in the present case". However, the Judge's analysis did not include express recognition of key passages regarding impact, from HH, in particular: at §44 (describing deprivation of a child's primary attachment figure while the child is still under the age of four as a loss which can have lasting effects upon the child's development); and at §60 (recognising that severe psychological damage may occur if the bond of attachment between child and primary care-giver is severed between the ages of six months and four years). If the Judge's reasoning had identified specific points of this nature – and if this Court's reasoning did so at a substantive hearing – this would materially affect the 'calibration' of the 'weight' to be attributed to impact in the Article 8 balance.

   ii) Linked to the important questions regarding the impact on extradition is the evidence about the seriously problematic nature of the challenges for the other family members in coming up with any viable alternative care plan for the young son in the Appellant's absence. The Judge referred, as a factor in favour of extradition, to the child having a "family network established in the UK who have expressed a willingness to care for him should the extradition sought in this case proceed". He referred to the family as having identified a "pragmatic" option, involving the oldest sister caring for her young brother, albeit far from "ideal" and "a very considerable ask of anybody". On that topic, there is now putative fresh evidence – which this Court should accept – explaining that that option has fallen away and that there are very considerable difficulties faced by the father in trying to balance working arrangements and affordability of a childminder.

   iii) Another key feature of the case, linked to the impact on the child and the mother, is the alternative of a "transfer" – by arrangement between the Polish and British authorities – of the custodial sentence so that the Appellant can serve it in the UK. It is true that this would entail the same child-care challenges for the family, during any period while the Appellant is serving a prison sentence. But it would involve a geographical proximity, and the prospect of regular contact between mother and child, which would be far better in promoting the best interests of the child than would be the Appellant's extradition to Poland. The Judge recognised that the option of transfer of the sentence had twice been raised with the Polish judicial authorities, who had twice refused. He recognised that a "point" was being "made" on the Appellant's behalf that "one option in this matter is for the court to stay a final determination … and invite the CPS to make further enquiries of the [Respondent judicial authority] as to whether or not, as the case may be, the sentence could be transferred to the UK". Transfer is an important alternative in terms of proportionality given the recognised

appropriateness, in a case involving the effect of extradition on the interests of a child, of considering "whether there is any way in which the public interest in extradition can be met without doing such harm to the child" (HH at §33). It is true that putative fresh evidence now makes clear that there is now no case for any adjournment. That is because enquiries in Poland have resulted in a crystallised position by the Polish judicial authorities, communicated in a letter dated 3 February 2022. The Polish authorities have made clear that no further substantive consideration will be given to the option of transferring the sentence to be served in the United Kingdom until the High Court has reached its "final" determination, as to whether (a) to uphold the Judge's order for the Appellant's extradition or (b) to overturn it and order her discharge from extradition. As in Laskiewicz v Poland [2014] EWHC 3701 (Admin) (see §7), the stance of the Polish judicial authorities entails transfer being treated as "a fallback position in the event of the appeal being allowed, rather than a willing request on its part positively for a transfer". It is unclear whether the Polish authorities would reconsider transfer if the "final" determination were to dismiss this appeal. What can be said is this. If she were discharged by this Court there is a possibility that the authorities in Poland and the UK would adopt an arrangement under which the prison sentence would be transferred to be served here. However, if she were not discharged by this Court and the Judge's order for extradition stands, that possible solution stands to disappear. That is an important feature of the case which the Court should have at the forefront of its mind.

iv) In considering the question of transfer of the sentence the Court should also have in mind by way of a reinforcing analogy – although not directly engaged by any function of this Court – Article 4(6) of the Framework Decision 2002/584/JHA. Under that provision, in the case of an own-national or resident, an executing judicial authority may refuse to execute an EAW if the executing state authorities undertake to execute the sentence in accordance with domestic UK law. Where that provision is applicable, particular weight is given to the possibility of increasing the requested person's chances of reintegrating into society where the sentence imposed on them expires (see Kozlowski [2009] QB 307 at §45).

v) Another key feature, linked to the impact of extradition, and linked to the question of transfer of the sentence, are the uncertainties in relation to the Appellant's ability to return to the UK after any extradition to Poland. So far as that is concerned, the Judge recognised that the Appellant's position in the UK would be "very much more secure" post a sentence served here than if she were extradited. The Judge said that, if extradited, the Appellant "would not be excluded from the UK" and that there was "a live issue as to whether she would be able to return", which would "influence the future of her care for her child and her future within her family who are similarly settled in the UK". The Judge also referred, as a "factor in favour of extradition" to the fact that the Appellant "has already applied for settled status in the UK, an application which may take its ordinary course for determination, notwithstanding the fact of extradition". This reasoning understated the position, including the subjective and objective implications, which position is moreover clearer now. A more accurate encapsulation of the position is that the Appellant is likely to be unable to return, or to find it very difficult to return; and her extant application for settled status

would have lapsed. These problems and the uncertainties give rise to an objective impact, and a subjective anguish, which the Judge failed appropriately to identify and weigh in the reasoning and balancing process and this Court would need to ensure.

vi) A further key feature relevant to impact is the fact that the Appellant has a recognised health issue: a virus called HPV. Although common and although most people will have it at some point in their lives without knowing, and although it usually goes away on its own, this can sometimes be long-lasting and may cause abnormal cells in the cervix which can over time turn into cancer if left untreated. All of this is set out in putative fresh evidence, a letter dated 27 January 2022 from the NHS cervical screening administration service.

vi) So far as the seriousness of the offending is concerned, this is not a 'trump card' and it should not be overstated. There are a number of key points which need to be appreciated. One is the appropriateness of considering what a sentencing court in the UK would be likely to impose, in an equivalent criminal case here. Such consideration can assist the Court in reaching an informed evaluation of the Article 8 compatibility of extradition, in a case involving the interests of the dependent child: see HH at §132. Applying the England and Wales Sentencing Guideline, applicable to an assault involving grievous bodily harm, and adopting a "lesser culpability" categorisation (based on "impulsive/spontaneous and short-lived assault" and/or "excessive self-defence"), putting all relevant features alongside the 7 months remand already served, and taking into account what in England and Wales would now be a 20 month period of 12 hour "qualifying curfew", half of which would count by way of further deduction from the sentence, this is a case where it can be said that the Appellant would if sentenced here be released after a short or relatively short time.

vii) In the light of all of those features, and the other circumstances of the case, the "outcome" in this case was the "wrong" one. It stands to be overturned at a substantive hearing by this Court. For the purposes of the present application for permission to appeal the threshold is one of reasonable arguability and that threshold is met.

That is the essence of the argument.

My conclusion

5. I have reached the same conclusion as did Sir Ross Cranston on the papers. My conclusion, notwithstanding all of the points that have been made and the ways in which they link and combine, is that there is no realistic prospect that this Court at a substantive hearing would reach a conclusion other than that the strong public interest considerations weighing in favour of extradition decisively outweigh those considerations capable of weighing against extradition.

6. I have no doubt that the Judge had very well in mind the passages in HH which had been cited to him relating to the impact on a child under the age of four of the severance of the bond with his mother and primary carer. The word "devastating" used by the Judge was apt; as was the word "tragedy" used by Sir Ross Cranston. The Judge, who had referred specifically to HH, described the impact as "devastating" for the Appellant

and "especially the child", "particularly" at "this stage" in his life, which he said "weighs heavily in the scales against extradition". In any event, I have kept at the forefront of my mind the passages which are relied on from HH.

7. The Judge also clearly had in mind the uncertainties and difficulties relating to the post-Brexit position of the Appellant. I have them well in mind. On that, and the other topics, I also have in mind the updating evidence, as to the circumstances and developments since the Judge was considering the case. That includes the evidence relating to the currently considered family arrangements for the son and the difficulties and challenges that that will necessarily entail in particular for the father, including the potential economic implications for his work and income and for the family as a consequence. I have in mind the Appellant's healthcare issues. I have in mind the other features of the case. To take one example, there is the absence of any convictions in the UK since the Appellant came here in March 2019, a factor which the Judge rightly weighed in the balance against extradition.

8. Reliance has been placed on the possible transfer of the sentence to be served in the UK. As to that:

   i) This is something which presents as a 'less intrusive' alternative to extradition. The concept of 'less intrusive measures' is well known to the human rights application of proportionality standards, including in the context of Article 8. In the extradition field, similar concepts such as "less coercive measures" can be located, having a distinct role and place within the statutory scheme.

   ii) The starting point is that the question of whether to request a transfer of the custodial sentence, so that the UK authorities would permit it to be served by the Appellant within a UK prison, is a question for the Polish authorities in conjunction with the UK authorities. It is not a direct question for a decision by this Court. The decisions taken by the Polish authorities, twice refusing requests to transfer the sentence in this case, and then on a third and the most recent occasion deciding against giving the matter any further substantive consideration until after this Court has done its job of finally determining the appeal raising the Article 8-compatibility of the Appellant's extradition, are decisions which this Court should and must, in principle, respect.

   iii) If the Judge's conclusion in this case is "wrong", so that extradition would be incompatible with Article 8 rights to respect for private and/or family life, then this Court will so determine. Once determined, any consequences regarding any transfer of the sentence would then be for the Polish authorities to consider. If the Judge's conclusion is not wrong, so that extradition has not been found to be incompatible with Article 8 rights to respect for private and/or family life, then this Court will similarly so decide. Again, once determined, any consequences regarding any transfer of the sentence would be for the Polish authorities then to consider.

   iv) What cannot in my judgment, even arguably, be right, at least in the circumstances of the present case, is for this Court effectively to determine that 'the course which would better promote the Polish or UK public interest' is transfer of the sentence to be served in the UK, with a view to this Court's determination allowing the appeal and discharging the Appellant from

extradition then 'forcing the hand' of the Polish authorities. The invocation of Article 4(6) was striking, as was its conspicuous absence from anything put forward in writing in the Appellant's grounds of appeal (or grounds of renewal) to which the Respondent had (or could have) responded. In the event, Ms Nice accepted that Article 4(6) and the Extradition Act 2003 do not provide any freestanding basis for discharging a requested person on grounds that transfer of sentence is characterised by this Court as an appropriate course, or a suitable and appropriate alternative to extradition. That question is not this Court's function.

v) What this Court must do is focus on whether surrender of the Appellant to serve her sentence in Poland would, or would not be, a disproportionate interference with the Article 8 rights of her young son, herself and her partner. Ms Nice has certainly ensured that this Court has in mind, so far as concerns the considerations engaging the Article 8 evaluation: that the picture is not necessarily an 'all or nothing one'; that discharge does not necessarily mean the Appellant avoiding serving the sentence; and that transfer could substantially ameliorate some of the negative impacts of extradition. For the purposes of this application for permission to appeal, I have assumed in the Appellant's favour that it is appropriate to take such points into account in the Article 8 evaluation.

9. Turning to the seriousness of the index offending, I am quite unable to accept, even arguably, that the public interest considerations in support of extradition are in the present case materially impacted by an invitation to this Court – including at a substantive hearing – to look through the prism of an English sentencing Judge, adopt an assessment involving "lesser culpability", and arrive at a short or relatively short remaining sentence viewed in terms of seven months in remand in Poland and 20 months "qualifying curfew" (of which half would serve to reduce a sentence is imposed in this jurisdiction). The Judge repeatedly characterised the index criminality as being a criminal act of "extreme seriousness". That was a characterisation which, in my judgment, was not only open to the Judge but was also plainly appropriate. There are very strong public interest considerations in favour of the Polish authorities being able to insist on the Appellant facing her responsibilities for serving the significant custodial sentence which has been imposed on her by the Polish court. No analysis based on a comparison with sentencing in the UK can serve even arguably materially to undermine or reduce the weight of those public interest considerations in the circumstances of the present case. There is no 'direct read-across' to the reduction for "qualifying curfew" if sentenced in this country, but 20 months on a 12 hour electronically monitored curfew is a significant intrusion on personal liberty, and a factor which can be considered within the Article 8 balance sheet exercise. The matter is serious and significant, in terms of the offending, in terms of the Polish sentence, and in terms of the public interest considerations arising in relation to facing those responsibilities before the legal system of the court which imposed them.

10. Added into the weighty public interest considerations in support of extradition is this further feature of this case which the Judge rightly emphasised. It was having been informed of her rights and obligations – including a specific obligation to notify a change of address – and it was in the context of full knowledge of the criminal proceedings in respect of this matter that the Appellant chose to come to the UK on 6 March 2019. She came as a fugitive, acting to avoid facing up to her responsibilities in

Poland. Furthermore, the conviction and sentence are recent. The Judge found her to be a fugitive on the basis that it is clear that she knew that the proceedings had yet to conclude, that the matters which they concern are serious and more particularly that she left Poland in full knowledge of that fact and without notifying the authorities. 3½ years to serve is a substantial period of custody and she deliberately acted to evade it.

11. There has been no lack of promptness on the part of the Polish authorities. They issued the notices requiring the Appellant's attendance at the detention centre in March and May 2019. They then issued an order in June 2019, a wanted notice in July 2019, and then issued the EAW in October 2019.

12. It is appropriate that I return to the anxious concern, which is at the heart of this case: the best interests of a very young child. In his determination on the papers Sir Ross Cranston ended with this observation:

> ***The separation of the Appellant and her son will be a tragedy for both, but that does not mean that it is arguable that the outcome the Judge reached is wrong.***

I agree. If I posit this Court conducting afresh the balancing exercise, including by reference to all of the putative fresh evidence, there is in my judgment no realistic prospect of the Court overturning the Judge's conclusion as wrong and discharging the Appellant. Permission to appeal is refused.

Order

13. There were developments, prior to the judgment being handed down, after its circulation in confidential draft. The upshot was this. Counsel for the Respondent confirmed that the Respondent had no objection to the Order, which refuses the renewed application for permission, coming into effect 8 weeks after the handing down of the judgment. The purpose of this agreed delay is to enable the Applicant to pursue her application before the Polish courts to transfer her sentence to the UK. The parties agreed terms which give effect to this position. Given that agreement, the Order made at the same time as handing down the judgment not only refuses the application for permission to appeal (§1) with no Order as to costs save that there be a detailed assessment of the Appellant's publicly funded costs (§2). It also then says this: "It is further ordered by consent that: "(3) Subject to paragraph (4) below, the appeal be dismissed pursuant to section 27(1)(b) of the Extradition Act 2003. (4) This Order will come into effect on 20 April 2022, so that the Appellant may pursue the application to transfer her sentence. (5) The Court, the clerk to Fordham J, and the Respondent are to be updated as soon as possible regarding any outcome of the application to transfer. (6) The parties have liberty to apply in writing on notice to vary the date referred to in paragraph (4), such application to be dealt with by Fordham J if available." I was satisfied that it was appropriate, in these particular circumstances, for the Court – without further deliberation, determination or delay – to make an Order giving effect to this agreed position, as invited by both parties.