



Neutral Citation Number: [2024] EWHC 637 (Admin)

Case No: AC-2023-LON-000711

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 20th March 2024

Before:
FORDHAM J

Between:
MICHAEL LOMAS
- and -
(1) REPUBLIC OF SOUTH AFRICA
(2) SECRETARY OF STATE FOR THE HOME
DEPARTMENT
(No.2)

Appellant

Respondents

Ben Keith and Rebecca Thomas (instructed by Mullenders Solicitors) for the Appellant
The First and Second Respondents did not appear and were not represented

Hearing date: 20.3.24

Judgment as delivered in open court at the hearing

Approved Second 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.

FORDHAM J

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

FORDHAM J:

Introduction

1. This is a sequel to the judgment I gave in this case at [2023] EWHC 388 (Admin), after hearing exactly a month ago on 20 February 2024. That judgment was handed down on 23 February 2024. It explained why I was refusing the Appellant permission to appeal on the basis that I could see no arguable ground of appeal.

Fitness to Fly

2. However, I explained in §13 of that first judgment that there was evidence from a consultant neurosurgeon expressing the opinion that the Appellant was not fit to fly. Under a heading “Fitness to Fly” I said this at §15:

There is, as I have mentioned, one statement by one clinician (Mr Ameen) which describes an unfitness to fly. I do not accept that this feature of the evidence, alongside the other evidence in the case, can support an arguable appeal. I raised with Counsel the approach illustrated by Arezina v Bosnia [2023] EWHC 1980 (Admin) at §§22-23 where, having rejected health-based grounds of appeal, the discrete issue of fitness to fly was adjourned to allow for further evidence. Mr Keith and Ms Thomas did not invite an adjournment for this purpose, and all Counsel recognised that fitness to fly would need to be assessed, prior to any act of extradition, as would any necessary adjustments. I am satisfied, in these circumstances, that there is no need for an adjournment or further direction on this appeal.

3. As I there explained, I had given explicit consideration to the possibility of adjourning the extant appeal proceedings in this Court, for further evidence on the question of fitness to fly. That was the course that had been taken in the Arezina case. As I also explained, the point had been ventilated, no adjournment was sought by the Appellant’s team and that all Counsel (for the Appellant and the Respondent) “recognised” that “fitness to fly would need to be assessed” prior to extradition, as would any necessary adjustments. I explained that it was “in [those] circumstances” that I saw no need for any adjournment or further direction.

The Case Returns

4. I am dealing today with an urgent application, the essence of which is to take me back to that same issue of fitness to fly, in the light of the communications which have postdated that first judgment. The vehicle by which the application comes back before me is the invocation of rule 50.27 of the Criminal Procedure Rules. It provides for applications, in writing and on notice, for permission to reopen an appeal.

Other Parties

5. In making the application to reopen, the Home Secretary has been joined as a Second Respondent, alongside the Republic of South Africa (represented by the CPS). The Home Secretary has a direct role in extradition in a non-EU country case. It was the Home Secretary in this case who ordered extradition, as I explained at §1 of the first judgment. Also featuring in the case is the National Crime Agency. The NCA has had a role of notifying the Appellant of his need to surrender for a flight to South Africa tomorrow early evening, that notification having been issued by the NCA on Monday 18 March 2024. I have had the benefit of written observations from the NCA in an

email yesterday morning. It is possible that, whether formally or informally, it will assist for the NCA to have an opportunity to have its voice heard.

My Decision

6. I am entirely satisfied that the appropriate course is to grant permission today, pursuant to rule 50.27, to reopen the appeal for a narrow and very specific purpose: namely to revisit fitness to fly and paragraph 15 of my first judgment.
7. The consequence of my granting that permission is that the non-extendable statutory 28 day window for removal (see s.118 of the Extradition Act 2003) will be displaced by the re-existence of an extant appeal before this Court. It has been emphasised in the Home Secretary's email observations that that 28 day window is not susceptible to extension. I record that in the circumstances that have arisen Mr Keith and Ms Thomas had offered, and have repeated at this hearing, their preparedness on behalf of the Appellant to undertake not to make any application for discharge, were that 28 day period to elapse. In the event my order today will have the displacing consequence that I have described.

The Alternative

8. An alternative course was put forward on behalf of the Appellant, namely that I could – either in the context of reopening the appeal or possibly by reconstituting myself as a judicial review court and dispensing with formalities – grant an interim injunction preventing the Home Secretary from removing the Appellant until fitness to fly has been addressed. The Home Secretary in written submissions resists that course and I have decided against adopting it.

My Reasons

9. The reasons why I have decided to grant permission to reopen the appeal, on this narrow fitness to fly issue, are as follows. First, this was already an issue of concern which is why it was reflected in my first judgment at §15. Secondly, it was – even then – supported by expert evidence and now has been reinforced by further such evidence. Thirdly, it has yet to be the subject of any fitness to fly assessment by any of the authorities who have a role in this case. Fourthly, the matter is very urgent and has properly been pursued with urgency, that is in the light of Monday's notification to the Appellant that he was – as things stood – required to attend at Heathrow airport tomorrow afternoon to be flown to South Africa. Fifthly, the platform on which all Counsel stood when they addressed me – on the point which I recorded in §15 of the first judgment – is no longer the solid basis which they each perceived. There are now serious question-marks and uncertainties about how fitness to fly is to be dealt with in these cases. Sixthly, the positive position put forward by the Home Secretary in the written observations for today submit that it is the role of this Court to address the question of fitness to fly. I cannot possibly do that at this urgent brief hearing. But nor can I allow the Appellant to be placed on a plane tomorrow and extradited without the issue having been addressed. It may or may not be the case that it is the role of the High Court to address fitness to fly, but I am certain in this case that the Court needs to grapple – with the assistance of all relevant parties – with the question of who does to consider that question and in what way. Seventhly, I am quite satisfied that the Appellant's representatives have raised and pursued the matter promptly and properly.

A clear letter was written by the Appellant's representatives on 1 March 2024. That was at a time when the 28 day window was known, but no specific notification relating to any particular flight had been given. That letter was written to all relevant parties. Its recipients included the Home Office, as well as the First Respondent (the Republic of South Africa). Eighthly, there has been as yet no clear and satisfactory resolution, in my judgment and on the face of it, in the period of 19 days since that letter was written. The positions taken are as follows:

10. The Home Office originally requested the evidence so that they could consider it. Subsequently, they pointed to the 28 day period and the inability to extend it. Most recently, they have submitted that fitness to fly was and is a question for this Court and that any application against the Home Secretary should be dismissed. The submission has been made on behalf of the Home Secretary that there is no analogy with immigration and that it would be burdensome if the Home Secretary had any obligation to consider fitness to fly. So, the logic appears to be that the role properly belongs to this Court. One of the potential implications of that, as it seems to me, is this. It is always possible that an issue could arise, immediately prior to a flight, in an extradition case. One can posit a serious condition and a clear question-mark as to fitness to fly. It may be right that the sole answer in such circumstances is an urgent application to a court. But it is not self-evident to me, at least at this stage, that that is necessarily the answer. Even if it is the answer is only serves to reinforce the need for me now to grant permission to reopen this appeal. I interpose that, in thinking about roles and responsibilities and fitness to fly, it may be sensible for consideration also to be given to EU country cases and the role of the NCA and any respondent EU judicial authority.
11. The NCA, in its email yesterday morning, made observations that a stay would be needed if the Appellant were not to be handed over to the airline. There was a further observation that it may be that the airline would refuse to carry the Appellant, based on a "dynamic assessment" from the airline's knowledge. I am quite satisfied that that is a solution which raises significant question-marks, and these require proper consideration.
12. The Crown Prosecution Service (for the First Respondent), who had been properly notified on 1 March 2024, took the position yesterday afternoon that they were not at that stage making submissions, fitness to fly being a matter for the Home Secretary. I have been assisted by some observations from the CPS filed this morning. The CPS do not agree with the Home Secretary that this is all a matter for this Court, because they oppose any reopening of the appeal. They take up the idea of the airline assessing fitness to fly as being the appropriate safeguard. I have already made reference to question-marks that arise about that. I interpose that one of them is that, if fitness to fly is a function of human rights obligations, then it may be necessary to grapple with the extent to which an airline would owe the sort of positive ECHR obligation (eg. Article 3) that would apply to a public authority. The CPS, for reasons I entirely understand, have drawn attention to the spinal decompression surgery which has been scheduled for the Appellant for 2 April 2024, taking the position that extradition should not be delayed for that surgery or recuperation. All of that is itself part of the set of factual circumstances that need properly to be addressed by someone, whether it is the Court or one of the relevant authorities.
13. Ninthly, I am satisfied that the procedural safeguards of rule 50.27 have been complied with. The application has been made in writing, as soon as practicable after becoming

aware of the grounds for making it. It has been served on all other parties and they have each been given an opportunity to make representations.

14. It is in all these circumstances, that I am satisfied that it is necessary to grant permission to reopen this appeal, for the limited scope and purpose which I have identified, to avoid real injustice in exceptional circumstances – rendering appropriate that course – and where there is no alternative effective remedy.

A Narrow Reopening

15. In the Appellant’s written submissions in support of this urgent application, the narrow nature of what is being pursued is properly recorded. The point that is made is that the reopening is so that the fitness to fly assessment can be made and, once that has satisfactorily been addressed, “the refusal of permission [to appeal] can be reinstated and extradition can take place”. That is important because what is not happening in this case is a general reopening of any appeal, still less with an open-ended temporal nature.

Other Aspects

16. I will now hear observations as to the form and content of the order that I should make to give effect to the reasons that I have given, together with any observations about the timeframe for the next steps in this court dealing with this case.

Order

17. I made the following Order. (1) Permission to reopen the appeal is granted, pursuant to Crim PR 50.27, for the narrow purpose of the Court revisiting §15 of the Judgment [2023] EWHC 388 (Admin) and the question of fitness to fly. (2) The Home Secretary is joined as a party. (3) The case will be listed for Tuesday 26 March 2024 (t/e 90 minutes) before Fordham J. (4) Liberty to all parties to apply by email to Fordham J’s clerk for any timetabling directions. (5) Liberty to any party to apply in writing on notice to vary or discharge this Order.

20.3.24