



Neutral Citation Number: [2020] EWHC 2337 (Admin)

Case No: CO/306/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 August 2020

Before :

MR JUSTICE FORDHAM

Between :

ADRIAN NIEDZWIEDZ

Appellant

- and -

THE REGIONAL COURT IN POZNAN, POLAND

Respondent

Juliet Wells (instructed by Hollingsworth Edwards Solicitors) for the **appellant**

The **respondent** did not appear and was not represented

Hearing date: 25 August 2020

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 an application for permission to appeal in an extradition case. The mode of hearing was a BT conference call. The Administrative Court always provides a prior opportunity for the parties' representatives to state any preference, or provide any reasons why remote hearing was considered inappropriate. Like the appellant's representatives, I was satisfied that a telephone hearing was appropriate. I heard oral submissions in exactly the way I would have done had we all been physically present in a court room. As regards open justice, the hearing and its start time – together with an email address which could be used by any person wishing to observe the hearing – were published in the cause list. The hearing was recorded. By having a remote hearing, we eliminated any risk to any person, from having to travel to, or be present in, a court. I am satisfied that no right or interest was compromised and that, if there was any interference with or qualification of any right or interest, it was justified as necessary and proportionate.
2. The appellant is aged 30. He is wanted for extradition to Poland in conjunction with an accusation European Arrest Warrant (EAW) issued on 31 January 2019. The alleged offences relate to drugs. The first, which carries a maximum 10-year prison sentence under Polish law, is a class B drug possession offence alleged to have taken place on 6 May 2017. The second offence, carrying a domestic Polish maximum 3-year prison sentence, is an alleged cannabis cultivation offence. The appellant came to the United Kingdom in 2017. His extradition was ordered by DJ Goozee on 22 January 2020, following an oral hearing on 8 January 2020. Permission to appeal was refused by Goose J on 25 June 2020. The respondent filed a respondent's notice but requires an extension of time. That is not opposed and I grant it.

The Wozniak/Chlabicz points

3. By an application dated 8 July 2020 the appellant seeks permission to add new grounds of appeal, to take the section 2 Extradition Act 2003 point and (because this is an accusation warrant case) the article 6 ECHR point raised in the appeals of Wozniak (CO/2499/2019) and Chlabicz (CO/4976/2019) respectively. Those issues are linked and those cases await a hearing before a Divisional Court later this year. The position which arises at this hearing is a familiar scenario. I encountered it in Bibro [2020] EWHC 1592 (Admin) (18 June 2020), Socha [2020] EWHC 1909 (Admin) (14 July 2020) Wawrzyniak [2020] EWHC 1955 (Admin) (20 July 2020) and Horchel [2020] EWHC 2318 (Admin). It would, on the face of it in my judgment, be unjust for the appellant to be removed while the points of principle remain unresolved. Once the Divisional Court has addressed them, the implications for other cases including this one can readily and speedily be dealt with. In the circumstances I will give permission to amend the grounds of appeal and an extension of time, to include the points. I am not prepared to grant permission to appeal, at least absent an independently arguable ground. Absent that, I would instead direct that the application for permission to appeal on the two new grounds be stayed pending the judgment in Wozniak and Chlabicz. I will return at the end of this judgment to the question of the appropriate order, in the light of the way in which I deal with the other grounds. Wisely, Ms Wells does not submit that I should adjourn consideration of the other grounds of appeal. There is no

reason for failing to grasp the nettle and determine whether there is, or is not, any other reasonably arguable ground.

The s.21A(1)(b) proportionality point

4. One issue which the District Judge had to decide was whether the extradition would be disproportionate pursuant to section 21A(1)(b) of the 2003 Act, having taken into account (so far as he thought it appropriate) the “specified matters” in section 21A(3), in accordance with its duty under section 21A(2). Ms Wells submits that it is reasonably arguable that the District Judge was “wrong” to reject this basis for resisting extradition. Goose J was not persuaded by that submission. Having considered the points made in writing and orally, nor am I.
5. The first “specified matter” was the seriousness of the conduct alleged to constitute the extradition offences. General guidance for the determination of that issue is set out in Criminal Practice Direction 50A, to which the District Judge referred. He held that the alleged conduct included conduct which fell within “possession of controlled substance” but found that this was not “possession of a very small quantity and intended for personal use”. Ms Wells says that the District Judge fell into the trap of treating the language of the guidance as rigidly determinative, overlooking the room to determine that extradition would be disproportionate in a case involving drugs offences but not falling within “possession of a very small quantity and intended for personal use”. In this submission she relies on the ‘floor and ceiling’ point in Miraszewski [2015] 1 WLR 3929 at paragraph 28. Ms Wells also says that the District Judge fell into the error of fixating on the characterisation and categorisation in Polish law, treating a statement of the Polish prosecutor, characterising the amount of drugs on the possession accusation as “substantial”, as relevant. She says he should have rejected that characterisation, relying on the nature and character of the conduct, and in light of his finding that the likely sentence for equivalent offending in England and Wales would have been a community sentence.
6. The second “specified matter” was the likely penalty would be imposed in Poland if the appellant were found guilty of the extradition offences. Here, Ms Wells again submits that the District Judge fell into the error of treating as determinative information from the Polish prosecutor. The prosecutor in further information had described the 12 month immediate custodial sentence that the prosecutor intends to invite. It does not follow from that, says Ms Wells, that that is the likely response of the Polish court. She cites Ogreanu 2020 EWHC 1254 (Admin) at para 40. She submits for a number of reasons that, approaching the evidence correctly, the DJ could not conclude that a custodial sentence was likely. Ms Wells also submits (in writing) that the prosecutor’s 12 months immediate custody would constitute a ‘gross and egregious disparity’ when compared with the likely response in the UK that it should for that further reason have been rejected as offensive.
7. The third “specified matter” was the possibility of the Polish authorities taking measures less coercive than extradition. Ms Wells submits that the District Judge fell into the error of rejecting that possibility on the grounds that extradition is being pursued, a position which would inevitably always be fatal and would empty the statutory specified feature of any meaning or effect.

8. Ms Wells submitted in writing, albeit as an incidental matter, that the District Judge was wrong to rely on the appellant's previous drugs conviction in Poland. She submitted that that could not in principle be relevant to any of the three "specified matters". Orally, she emphasised that it was not a freestanding further "matter".
9. The fundamental problem is this. In my judgment, there is no realistic prospect of this Court overturning as "wrong" the District Judge's rejection of the statutory disproportionality bar in section 21A applied to the facts of this case. Even if the Court were persuaded that it was appropriate to look at all questions afresh, and put to one side the way in which the District Judge approached them, I can see no realistic prospect of this court arriving at a different outcome. But nor, however, do I consider it reasonably arguable that the District Judge went wrong in law in his approach, on any of the bases which have been suggested.
10. So far as the seriousness of the conduct is concerned, the District Judge rightly looked at the guidance in the Practice Direction. As the Respondent's Notice points out, this is not a case in which a further 'species' of offence, not contained in the table in the Practice Direction, is being relied on. This is a case in which the guidance in the Practice Direction specifically identifies "possession of a controlled substance" as a relevant category, but then indicates where the indicative line is drawn. It was therefore highly relevant to address the description in the guidance. The District Judge was plainly right to conclude that this was not "possession of a very small quantity and intended for personal use". The District Judge did say that the Practice Direction "would only require me to consider discharging the [appellant]" if the description in the guidance applied. But he did not follow it slavishly. He found that the drugs in the possession charge were "substantial", and that the offending was not "trivial or minor". The alleged conduct, even focusing solely on the possession charge, involved 61.08g of dried cannabis and 90.84g of amphetamines being a quantity of 174 tablets. That spoke for itself. It was properly described as "substantial". That description appeared not only in further information from a prosecutor, but in the description on the face of the EAW itself. The further information from the prosecutor explained that the word "substantial" was a description which linked to the relevant provisions of Polish law. The District Judge was quite entitled to rely on those descriptions, in considering the nature and quality of the conduct to assess its seriousness. In my judgment, it is not reasonably arguable that he lost sight of the need to focus on conduct, or that he allowed questions of likely penalty, or Polish characterisation of the conduct, to cut across the need to ask that question.
11. On the 'incidental' point, I do not accept that it is reasonably arguable that the District Judge went wrong in reminding himself that the two drugs offences in this case arose against the backcloth of a previous Polish conviction for a drugs offence. The Practice Direction itself refers to "previous offending history" as being capable of constituting "exceptional circumstances", for the purpose of evaluating whether one of the listed exemplar species can constitute sufficiently serious conduct. What that recognises is the basic truth that seriousness – comprising action, culpability and harm – can incorporate considerations of previous offending history, as relevant to culpability.
12. So far as concerns the likely penalty in Poland, I do not accept that the District Judge elided the distinct heads (conduct and likely penalty), so that this infected the analysis of conduct; nor that he double-counted the latter, nor that those criticisms are reasonably arguable. The District Judge was well aware that the prosecutor's

description was that the sentencing court would be requested to impose a one-year prison sentence without conditional suspension. The District Judge did not rely on that as determinative of what the likely sentence would be. The District Judge's careful conclusion was that the likely sentence would be a custodial sentence. I do not accept that it is reasonably arguable that it was unsafe, or unsound, for the District Judge to come to that conclusion, and that he could only reasonably have found that the likely penalty was a Polish community sentence. The fact that the District Judge did not say it would be likely to be 12 months custody, shows that he was not proceeding from 'prosecutor statement of request' to 'conclusion as to likelihood'. Again, he rightly had in mind that this was an individual with a previous drugs conviction. His evaluative conclusion – that custody was likely – was perfectly open to him on the evidence. He was also entitled, indeed plainly right, to conclude: "I find this is not one of those extremely rare cases where the penalty being sought by the prosecutor in Poland would be offensive to a domestic court in the circumstances of the [requested persons] particular criminal conduct".

13. Finally as to the third specified matter – the possibility of less coercive measures than extradition - the District Judge referred to the appropriateness of respecting the judicial authorities' determination that an EAW should be issued. He said he had considered the possibility of less coercive measures. He had no evidential basis for making any alternative finding. He did not in my judgment approach this feature as empty of content on the basis that extradition was being pursued. He considered the evidence that was before him and reached a conclusion that was open to him.
14. I repeat: even if Ms Wells were to succeed in showing that one or more aspects of the District Judge's reasoning justified this Court in re-evaluating the statutory proportionality question, I see no realistic prospect of the overall conclusion being overturned as "wrong" by this Court in the circumstances of this case.

The s.21A(1)(a) Article 8 point

15. In her Article 8 submissions, written and (briefly) oral, Ms Wells contends that errors in relation to statutory proportionality would resound in the appellant's favour on the Article 8 balance. In my judgment, there are no such reasonably arguable errors, a point which resounds against the appellant in relation to the Article 8 balance. Ms Wells submits that the District Judge ought not to have found against the appellant in relation to his employment status and financial support for a child in Poland, when he was not challenged in cross-examination by the District Judge at the hearing. Putative fresh evidence is put forward on these points. Ms Wells advances orally this further submission: having accepted that he could not find the appellant to be a "fugitive", the DJ was wrong to find that the appellant was aware of the presence of the drugs at the mother's address, which was 'in effect treating him as a fugitive'. I do not accept the logic of that submission. I do not accept that there was any inconsistency on the face of the District Judge's findings or reasons. The DJ made coherent findings open to him.
16. Goose J said this: "in assessing whether extradition was compatible with the applicant's Article 8 rights, as well as those of his partner and child in Poland, the District Judge heard the applicant in evidence. The absence of documentary evidence to prove his employment and payments to his child was identified in the factual findings made but was not a significant factor in the District Judge's balancing exercise between public interest and Article 8. The fresh evidence, the absence of which in the extradition

hearing is not explained, would not arguably have made a difference either to the decision upon the balancing exercise or the decision to grant extradition.” I agree with that reasoning and cannot improve upon it. This is a 30 year old who has been in the United Kingdom for 3 years. He has no dependent family here. He has two drug-related matters against him during his period here. Although it counts in his favour that he is not a fugitive, in all the circumstances of this case there is no reasonably arguable basis on which it can be said that the District Judge was “wrong” to find extradition as incompatible with the relevant Article 8 rights.

Order

17. I set out the order which I make in the present case having had the opportunity to discuss it with Ms Wells: (1) Permission to appeal is refused, on the two grounds advanced in the Grounds of Appeal dated 28 January 2020, namely (a) section 21A(1)(b) (proportionality) and (b) section 21A(1)(a) (Article 8 ECHR). (2) The Appellant has permission to amend his grounds of appeal, with an extension of time, to rely on the grounds of appeal advanced in the Application dated 8 July 2020, namely the section 2 (judicial authority) and Article 6 (fair trial) points raised in Wozniak (CO/2499/2019) and Chlabicz (CO/4976/2019). The need for any further or amended Respondent’s Notice is dispensed with. (3) The Appellant’s application for permission to appeal on the ground referred to at paragraph (2) above shall be stayed pending the judgment of the Divisional Court in the appeals of Wozniak (CO/2499/2019) and Chlabicz (CO/4976/2019). The Appellant shall, within 14 days following the date on which the judgment of the Divisional Court in those cases is handed down, (a) inform the Court and the Respondent whether he intends to pursue an application for permission to appeal on the grounds referred to at paragraph (2) above; and (b) if such an application for permission to appeal is to be pursued, file and serve written submissions in support of that application. The Respondent shall within 14 days of those written submissions file and serve any written submissions in response. The question of permission to appeal to be considered thereafter by a judge on the papers. (4) Pending consideration of the application for permission to appeal on the grounds referred to at paragraph (2) above, which application is stayed pursuant to and in accordance with paragraph 3 above, the Appellant shall not be extradited pursuant to the order made at Westminster Magistrates’ Court (in this case, on 22 January 2020). (5) Extension of time for the Respondent’s Notice is granted. (6) Costs reserved.

25 August 2020