



Neutral Citation Number: [2020] EWHC 2690 (Admin)

Case No: CO/684/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7th October 2020

Before :

MR JUSTICE FORDHAM

Between :

BARTLOMIEJ TOMASZ WYSOCKI **Appellant**
- and -
CIRCUIT COURT IN WROCLAW, POLAND **Respondent**

Malcolm Hawkes (instructed by Armstrong Solicitors) for the **appellant**
The **respondent** did not appear and was not represented

Hearing date: 7th October 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 appellant is aged 39. He is wanted for extradition to Poland in connection with two conviction EAWs. Extradition was ordered by DJ Blake (the District Judge) on 14 February 2020. Permission to appeal was refused on the papers by Goose J on 7 July 2020. Up until that point this was an Article 8 ECHR case. The appellant seeks to rely on fresh evidence in support of his Article 8 arguments. As I shall explain, there is also a new point.
2. The mode of hearing was BT conference call. Mr Hawkes for the appellant was satisfied, as am I, that the mode of hearing does not prejudice his client's interests. Open justice is secured by the publication in the cause list of the hearing and its start time together with an email address usable by any person wishing to observe the hearing. By sending an email and making a phone call any member of the press or public would be able to listen in to this hearing. A remote hearing eliminated any risk to any person from having to travel to or be present in a court room. I am satisfied that the mode of hearing was appropriate and proportionate.

The Wozniak point

3. By further grounds dated 14 July 2020 the appellant seeks permission to add a new ground of appeal to raise the same issue as is raised in the case of Wozniak [2020] EWHC 1459 (Admin). The issue is described in that judgment. The position is a familiar one: see for example Horchel [2020] EWHC 2318 (Admin) and Niedzwiedz [2020] EWHC 2337 (Admin). As in other cases, in my judgment, it would be unjust for the appellant to be removed while the points of principle remain unresolved. I will give permission to amend the grounds of appeal and an extension of time. I will direct that the application for permission to appeal on the Wozniak point be stayed pending judgment in that case. I will address the reasonable arguability of the article 8 ground, bearing in mind that the appellant will remain in the United Kingdom in any event pending the resolution of Wozniak which I understand is due to be heard at the end of the year. I have seen 3 sets of submissions from the respondent in this case, all of which relate to Article 8 and the latest of which was a response to the proposed fresh evidence. I have however seen no response to the new grounds in this case, nor has Mr Hawkes, and I will therefore give the respondent liberty to apply to vary or discharge the parts of my Order dealing with reliance on the new ground, so that the respondent is fully protected if currently unaware, and will be able to have its voice heard. Whether it takes advantage of that liberty to apply is a matter for the respondent, and I have made no assumptions as to what its position is or may be in this case.

Article 8

4. I turn to the Article 8 ECHR ground of appeal. The nature of the argument put forward by Mr Hawkes, as I saw it, really came to this. He submits that the District Judge's conclusion on article 8 compatibility was wrong. He reminds with that for the purposes of today he only needs to satisfy a threshold of reasonable arguability. He says that in some respects the District Judge made errors, of which several were errors of omission in failing to have regard to certain factors or take them in to account in the balancing

exercise in particular ways. In other respects, he says that the District Judge made errors as to what he said and found within the judgment. For example, there was an error in describing offending in the United Kingdom; and particular emphasis is placed in writing and orally today on what is said to have been an erroneous approach to the chronology of events in this case. Mr Hawkes also says in writing, adopted in his oral submissions, that the court should have regard to fresh evidence which should be admitted on the basis that it is capable of being decisive when put alongside the other evidence in the case. He says the Court should look at the up-to-date position as at now rather than simply the position as it was in February 2020 when the District Judge considered the facts and circumstances. For all those reasons he essentially would be inviting this Court on appeal to conduct a rebalancing of Article 8 and arrive at the opposite conclusion to that reached by the District Judge.

5. So far as my approach is concerned, I am quite satisfied that for the purposes of this permission hearing in this case it is appropriate simply to focus with Mr Hawkes on the picture that he paints which he submits is the true and up-to-date picture, and to consider everything that is put forward in place before the court in examining this case afresh. That is the highest that it could be put on the appellant's behalf for the purposes of permission to appeal. And that is the approach that I have taken. I asked myself on that basis whether there is a reasonably arguable article 8 grounds. I asked myself whether there is a realistic prospect that a court at a substantive hearing in some months time would uphold the appeal on the basis that the outcome in article 8 terms in this case is wrong.
6. I turn to the detail of the case and the essence of the points of substance on which Mr Hawkes in writing and orally has relied. As I see it the key features which encapsulate the essence of the article 8 challenge are as follows.
7. The starting point is necessarily with the two conviction EAWs, both issued in July 2019. One of them related to drug offences which took place in May 2010 which subsequently led to a two-year custodial sentence, originally suspended for 5 years but then activated and the appellant summoned to prison, he serving part of the prison sentence between 5 March 2015 and 26 of April 2016 when he was conditionally released. In relation to that activated two-year custodial sentence, the conditional release regarding which was subsequently revoked in June 2017, there are 7 months 19 days unserved, subject to the question of remand in the UK.
8. The other EAW is also a conviction warrant relating to 5 offences of theft which took place in or around July 2013. They led in February 2015 to an 18-month custodial sentence, suspended for 4 years on conditions. That suspended sentence was subsequently activated on 12 September 2018. 17 months and 29 days remain unserved, subject again to the question of remand in the UK.
9. So, as Mr Hawkes accepts, the aggregate unserved subject to remand is just over 25 months' custody which the appellant is liable to serve in Poland.
10. The next feature of the case emphasised by Mr Hawkes is what he says is the 'comparatively low level' nature of the index criminal offending. He submits that it is of low gravity, that it is 'not grave or serious', comparatively speaking. He emphasises in particular that although there is a drug offence of heroin possession and another of heroin supply the amounts and values in question were small. He also characterises as

‘not grave or serious’ the offences of thefts of metal from the outside of buildings in 2013.

11. Alongside that Mr Hawkes relies on the significant lapse of time in this case since the drug offences in 2010 and the theft offences in 2013. Lapse of time in article 8 terms and the events that have taken place during any relevant lapse of time can serve both to reduce the public interest in extradition and increase the settled ties in the United Kingdom and therefore the impact of removal.
12. Next, Mr Hawkes has emphasised that the offending in Poland in 2010 and 2013 can be seen as connected to a drug dependency. That link is fortified when the conditions imposed in both suspended sentences are considered. In the context of the drug offences, in particular, the 2011 suspended sentence was conditional on both supervision but also drug rehabilitation treatment.
13. Reliance is placed on the position here in the United Kingdom, and the fact that the appellant has been here for nearly 4 years since November 2016. As Mr Hawkes submitted today the appellant’s successful drug rehabilitation here, reflected in the fresh evidence that has been put forward, is relevant in establishing that he has turned his life around from the drug dependency of his past in Poland and moreover, albeit very belatedly, the purpose of the conditions that had been imposed on him in Poland have finally in effect achieved their purpose.
14. Reliance is placed on a relationship of some two years which the appellant has with his partner here in the UK and their plans to marry.
15. The point is made that the appellant’s criminal conduct here in the UK was significantly overstated by the District Judge.
16. Although it is accepted that the appellant left Poland knowing about the proceedings and the conditions placed upon him, which he expressly accepts at least so far as the conditional release and its conditions are concerned, emphasis is placed on his description of his desire to leave behind him the threatening and menacing relationships through his previous drug activities that says Mr Hawkes in his submissions is at least a significant mitigating factor.
17. At the heart of Mr Hawkes’s submissions to me was the feature of this case concerning the appellant’s remand in the United Kingdom since his arrest on 10 October 2019. Viewed as at today that is 12 months of remand time. Moreover given that the appellant will not be removable from the United Kingdom because of the Wozniak point, and leaving aside any question of any bail application, that remand stands to continue and time continuing to ‘clock up’. Mr Hawkes submits that that remand time already more than accounts for the criminality in this case. He submits that remand is always a relevant factor from an article 8 perspective and he emphasises the especially harsh and punitive experience of custody during the Covid pandemic.
18. Another feature of the case particularly emphasised by Mr Hawkes, in his oral submissions and in writing, concerns the chronology of events in Poland in particular in 2015 and thereafter. Mr Hawkes submits that on the evidence there was a lack of fairness as well as a lack of clarity in the way in which the appellant was dealt with, which he says is relevant to the article 8 proportionality analysis. He submits that when

on 12 February 2015 the 18-month suspended sentence, suspended for 4 years, was imposed in relation to the 5 theft offences. He says the conditions placed on the appellant in an 'impossible' position. He was required to stay at his home address and respond to court letters and to make reparation, and yet it was known that he had been summoned to prison in November 2014 in relation to the now-activated suspended sentence regarding the drug offences. The appellant did surrender to prison on 5 March 2015 and was incarcerated for nearly a year till 26 April 2016 when he was conditionally released. Mr Hawkes says that there is not only a lack of clarity but a clear unfairness in relation to the conditions that were imposed regarding the thefts. He submits that the unfairness compounded when the suspended sentence was in due course activated in September 2018. The default during what is called 'the trial period' includes the period in which the appellant was serving his part of his sentence in relation to the drugs offences. That is strongly relied on as being a factor in his favour in the article 8 proportionality balance.

Article 8: Analysis

19. I have considered all of these matters and all of the circumstances of the case in all the evidence in the case the points made orally in the points made in writing. I have endeavoured to encapsulate the essence and the key points as I see them in the description that I have just given. Taking the position most favourable to the appellant, and looking afresh at everything, I have asked myself whether there is a realistic prospect of success on the article 8 ground. My clear conclusion is that there is no reasonably arguable article 8 ground in this case. In my judgment, and even projecting forward with a further period of a few months of remand, having regard to all the circumstances and evidence, and even if the court were conducting afresh an article 8 rebalancing exercise, there is no realistic prospect that the Court on appeal would overturn extradition of the appellant as being incompatible with article 8.
20. So far as the 'low gravity' of the offending is concerned the position in a conviction warrant case is that the domestic courts of this jurisdiction will and must give appropriate respect for the assessment formed by the prosecuting and sentencing judicial authorities in Poland. That includes the two-year suspended sentence with its subsequent activation in relation to the drugs offences and so far as those are concerned they do involve 'Class A' drugs and one of the offences did involve 'supply'. The Polish sentencing are also included the 18-month suspended sentence, subsequently activated, in relation to the theft offences. I agree with the observations of Goose J, when refusing permission to appeal on the papers, that these are 'not trivial or minor offences'. They are multiple offences were both on the drug side and on the thefts side. They are reflected in the sentences that were imposed.
21. So far as remand is concerned, I accept that time spent on remand is and can be a relevant factor in the article 8 balance. The position, however, in this case is that the remand period served is coming up for 12 months which has to be viewed against the 25 months left to be served under the Polish sentences. Mr Hawkes today cited an authority: Kalinauskas [2020] EWHC 191 (Admin) at paragraph 21. I was able to access that authority to look at the passage relied on. As Mr Hawkes accepted, that was an accusation warrant case in which the Divisional Court concluded that the remand period already served in this country by the appellant was 'already greater than any sentence that could be imposed by the requesting judicial authority'. It is obvious that all cases turn on their facts but that as a working illustration does not take the appellant

in this case close to a cogent argument based on the remand time so far served, even taking into account the implications of the experience of incarceration during the Covid-19 pandemic, of which I am acutely aware .

22. So far as the age of the offending and passage of time is concerned, it is true that the drugs offences go back to 2010 and the theft offences back to 2013. However, as I have already outlined there is a relevant timeline in relation to each of those sets of matters. Each of them included prosecution and conviction within the Polish system and the imposition of suspended sentences with conditions. So far as the thefts are concerned the suspended sentence had a 4-year suspension period which started on 12 February 2015. So far as the drugs offences were concerned the conditional release was 26 April 2016. It is a feature of this case that in circumstances in which the Polish court had imposed conditions relating to the thefts (as to which the 4 year period to February 2019 was applicable) and the Polish authorities had imposed conditions in releasing the appellant in respect of the drug offences (on 26 April 2016), what happened later in November 2016 was that the appellant left Poland for the United Kingdom. Subsequently, in June 2017 the conditional release was revoked so far as the drugs offences are concerned; and in September 2018 the suspended sentence relating to the theft offences was activated. I can see no cogent article 8 argument based on the passage of time, except for those features of the case which relate to the appellant's position here in the United Kingdom. I have summarised those features. Although Mr Hawkes it is able to say that there is evidence that the appellant was in fear when he left Poland in November 2016 , it is also very clear on the evidence that he was aware of at least some of the conditions that had been imposed on him. In those circumstances, like *Goose J*, I consider it inescapable that on the evidence that he left knowing that he had a conditional release with conditions and had served only part of that sentence, and placing himself beyond reach and in non-compliance of ongoing conditions applicable to him. I see no way around those features of the case so far as the analysis of the lapse of time is concerned. Putting it bluntly, I see no prospect on an appeal that the appellant could persuade this court that he should not be regarded as a fugitive.
23. Ultimately therefore, having regard to all those features, the question becomes whether the other factors of the case are sufficient reasonably arguably to lead a court to overturn the ultimate outcome. I will not repeat what the features of the case are. What I do repeat is that, in my judgment, there is no realistic prospect that they, in conjunction with the other matters relied on, would be sufficient to outweigh the relevant public interest considerations in support of extradition. That includes consideration given to the creditable way in which the appellant has rehabilitated himself and to the implications for him and his partner of extradition. Having said that, it is right to record that although the District Judge mischaracterised the appellant's criminal conduct within the United Kingdom, he does have convictions in the United Kingdom since his arrival here at the end of 2016. He was convicted of two offences of shoplifting which he committed in September 2017 and more recently he was guilty of a racially aggravated public order offence in July 2019.
24. *Goose J* came to the conclusion, looking at all the circumstances, that there was not here a reasonably arguable article 8 proportionality appeal. I agree with that conclusion. The District Judge's ultimate conclusion in this case in my judgment is unimpeachable. He recorded that he accepted that that there would be a serious effect on the appellant and his partner's family life. He noted that there were no children in this case affected

by an order of extradition. He balanced the making of an order for extradition as against the effect on the appellant and his partner. He was satisfied that it would not be disproportionate to order extradition. As I have explained I can see no realistic prospect on appeal of this court overturning that conclusion.

25. For those reasons the article 8 ground in this case, and the fresh evidence application since in my judgment it is not capable of being determinative, are both dismissed. The Wozniak point however is stayed as is the appellant's extradition for the reasons I gave at the outset.
26. Addendum. In approving the written judgment in this case I have recognised that there is one point on which I wish to add something by way of explanation. For transparency, this paragraph is additional to the reasons I gave ex tempore at the end of the hearing. The point I wish to add is to make clear that I was not persuaded by Mr Hawkes's characterisation of unfairness to the appellant by the Polish authorities in relation to the imposition (12 February 2015) and activation (12 September 2018) of the suspended sentence for the theft offences. The reason why I was not persuaded is this. It is true that the 'trial period', during which period the appellant was subsequently found to have been in default of the conditions placed upon him, included the period 5 March 2015 to 26 April 2016 when he was in prison serving part of the sentence in respect of the drugs offences. However, it extended far beyond that period and the appellant was not breached until 12 September 2018. That was long after he had been released, and was still subject to the conditions of the suspended sentence, and after (notwithstanding those conditions) he had come to the United Kingdom in November 2016.

7th October 2020