Neutral Citation Number: [2021] EWHC 1361 (Admin)

Case No: CO/3498/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th May 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

LESZEK RADOSLAW HERBASZ	**Appellant**
- and -	
THE REGIONAL COURT IN GDANSK (POLAND)	**Respondent**

- -
- -

George Hepburne Scott (instructed by Bark & Co solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

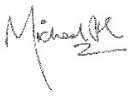
Hearing date: 20.5.21

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.



.....

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

1. The Appellant is aged 44 and is wanted for extradition to Poland. That is in conjunction with a conviction European Arrest Warrant (EAW) issued on 12 February 2020 and certified on 8 April 2020. A 3 year custodial sentence remains to be served in Poland. That sentence was imposed on 21 April 2018. Qualifying remand (now 11 months) from the time of the Appellant's arrest on 19 June 2020 would fall to be deducted. Extradition was ordered by DJ Snow (the Judge) on 28 September 2020 following an oral hearing on 24 September 2020. An application for permission to appeal on the familiar Wozniak/Chlabicz ground was stayed by Morris J on 20 January 2021. For the same reasons as those which I gave in the case of Antoniewicz [2021] EWHC 1022 (Admin) at paragraph 5, I will similarly stay the application for permission to amend the appeal notice to add the Article 3 prison conditions ground in the Litwinczuk CO/3399/2020 test cases, making the same order as set out in paragraph 15(1) to (3) of the judgment in Antoniewicz. I refuse the application made in this case for an expert report on prison conditions. I am confident that the issues will be ventilated before an informed Court in the test cases, and satisfied that nothing further is appropriate than to await that determination. The sole issue renewed before me is Article 8 ECHR, which Morris J held was not reasonably arguable.

2. At the heart of Mr Hepburne Scott's submissions relating to Article 8 ECHR are the interests of a child said to have been born on 21 March 2018 to the Appellant and his former partner. Mr Hepburne Scott submits that I should adjourn the Article 8 consideration, directing pursuant to section 7 of the Children Act 1989 an assessment report to provide the Court with information about the child and the implications for the child of extradition of the Appellant. Alternatively, Mr Hepburne Scott submits that I should grant permission to appeal on the basis that the Article 8 argument is reasonably arguable, with or without a section 7 direction. Mr Hepburne Scott strongly relies on RT [2017] EWHC 1978 (Admin) at paragraphs 32 to 34. Those passages emphasise the importance of the of question whether an extradition court considering Article 8 has sufficient information to enable it to make an informed decision on proportionality, in a context where the best interests of a child affected by the extradition of the parent are a primary consideration. They emphasise: that the extradition court may require evidence of practical care arrangements, akin to those which would be envisaged in a pre-sentence report; that more detailed information will be needed in the case of extradition of both parents or of a sole or primary carer; and that where necessary evidence should be provided to or obtained by the District Judge at first instance. In the RT case specific reference is made to directing a report from social services. Mr Hepburne Scott has placed before me a May 2010 Protocol allocating responsibilities in the context of section 7 assessments. Before the Judge an adjournment was sought so that a section 7 assessment could be obtained. The Judge declined to adjourn. One of Mr Hepburne Scott's arguments before me is that it is reasonably arguable that the Judge was wrong to refuse that adjournment.

3. The position before the Judge was that the Appellant failed to appear at the oral hearing on 24 September 2020. The Judge was satisfied that the Appellant had refused to comply with a lawful order that he attend. The Judge was also satisfied that the Appellant was attempting to frustrate the proceedings by refusing to attend. The Judge further concluded that the Appellant's attempt to frustrate proceedings by refusing to attend had the consequence of not allowing the assertions he had made in a signed

proof of evidence to be tested by cross-examination. These conclusions, beyond reasonable argument, were unassailably open to the Judge. That left the Judge with the question of what to do about various assertions which had been made in the proof of evidence. The Appellant had asserted that there was a son born on 21 March 2018 to him and his former partner and that, although the relationship between them was at an end, he had been the sole carer for the child prior to his arrest on 19 June 2020. The Appellant had also asserted that the former partner had violently assaulted him as a result of which she was being charged with criminal offences. That was said to be the context in which he had become sole carer for the child prior to his arrest. The Appellant made other assertions. He asserted that the former partner had an 8 year old daughter. He also asserted that he had been working on a building site prior to his arrest. At the hearing before the Judge the Respondent confirmed, following enquiry, that there was no record of any charges having been laid against the former partner. The Judge disbelieved the Appellant as to all of the assertions and said so.

4. Immediately prior to the Judge giving judgment a solicitors' letter dated 8 September 2020, sent by a firm of solicitors to the former partner, was provided by the Appellant's solicitors, to the Judge. It recorded that the named former partner had voluntarily attended a police station on 13 June 2020 for interview and that it had subsequently been confirmed to the solicitors by the police that she was to be charged for grievous bodily harm, attempted grievous bodily harm, two counts of assault, and criminal damage. That solicitors' letter was and is relied on as corroboration for the assertions that the Appellant was making. The Judge declined to accept it as evidence in the case and proceeded to deliver his judgment. Before me is fresh evidence from the Appellant's solicitor which sets out the chronology. She had received the solicitors' letter by email from the former partner at 21:23 on Thursday 24 September 2020. The oral hearing before the Judge had taken place earlier that same day. She then sent the letter to the Judge at 06:18 on Monday 28 September 2020. That was the day on which judgment was handed down and, as I understand it, the Judge had already circulated as a confidential draft his judgment. I accept that it is relevant for this Court to have the Appellant's solicitor's explanation of what happened. I also accept that the solicitors' letter of 8 September 2020 to the former partner is, on its face, supportive of the assertion made by the Appellant that his former partner had attacked him and that he understood she was being charged. I will proceed – today – on the basis that the letter could not reasonably have been adduced earlier than it was and that there was a sufficiency of diligence. I will approach the fresh evidence on the basis of considering whether its substance is capable of being decisive.

5. The central concern that is raised by Mr Hepburne Scott, as I see it, is this. If the former partner is facing the prospect of a custodial sentence following a conviction on the charges described in the solicitors' letter then, unless the child can return to be cared for by the Appellant, the child faces being taken into care. Extradition would remove the possibility of the Appellant acting as carer while the former partner serves any custodial sentence. That impact is, in principle, capable of being sufficiently serious to outweigh the public interest considerations in favour of extradition, at least when put alongside other features of the case. In particular, they are that the Appellant has been in the United Kingdom since November 2017, and that he has not been charged with any criminal offences here. This Court should now act to ensure an assessment takes place which provides for visibility as to what the impact and implications for the young son truly are. Whatever the criticisms are that may be

levelled at the Appellant, the child has Article 8 rights, and welfare interests standing as a primary consideration, in the evaluation of Article 8 compatibility of extradition. As Mr Hepburne Scott puts it today, if it is the case that the Appellant is telling a pack of lies about the child or about the previous care arrangements for the child, that would soon be exposed on an investigation for the purposes of a section 7 assessment. As he emphasises, a date of birth has been given for the son and in one respect – the description of an attack and the prospect of criminal charges – what the Appellant had said in his proof of evidence, which was doubted and disbelieved, has in fact been vindicated. Permission to appeal should be granted. Alternatively, there should be a stay and a direction for a section 7 assessment. The justice of that course needs to be considered against a backcloth where there are already two freestanding bases on which applications for permission to appeal are being stayed. That, then, encapsulates the essence of the argument. It was put forward, as always, with clarity and crisp economy by Mr Hepburne Scott.

6. I do not accept that there is before the Court a proper justification for taking the step of directing a section 7 assessment in relation to the position of the child described by the Appellant; nor for adjourning for that or any other purpose relating to Article 8; nor for granting permission to appeal on the Article 8 ground. It has repeatedly been pointed out in this case that the description of the child and of the point in time at which it is said that the Appellant served as a 'primary carer' for the child are simply assertions, in a signed proof of evidence, from an individual who avoided evidence being tested in cross-examination by deliberately refusing to attend a court hearing. The Judge in his judgment made clear that he did not find, based on the uncorroborated statement of the Appellant, that the Appellant had a son or any dependent children. The Respondent's submissions on 23 October 2020 clearly refer to the evidence concerning the care of the Appellant's son as being entirely lacking. The point is also made that there is a contradiction between the assertion that the Appellant was sole carer for his son prior to his arrest on 19 June 2020 and the assertion that prior to that arrest he was employed full-time on a building site. The paper refusal of permission to appeal by Morris J on 20 January 2021 also contained within the reasons the observation that "the [Judge] was entitled to conclude that he was not satisfied, on the evidence before him, that the Appellant has a son". This Court has absolutely nothing on which I can begin to have any confidence, on which to place any reliance, so far as concerns the assertion of the son or the assertion of the Appellant having, for a time, been the son's primary carer. That is not a criticism of Mr Hepburne Scott or his solicitors. No doubt they will have been taking steps to come up with more that the solicitors' letter about the ex-partner's police interviews and the intended charges of assault against her. But the cupboard is bare. The Appellant's signed proof of evidence dated 12 August 2020 said this: "Prior to my arrest, I was a primary carer of my son.… A few months ago [my former partner] attacked me with knives. She was arrested. The social services were involved and I became the primary carer for our son. However, upon my arrest, she took back our son as we had no other supporting network in the UK".

7. I have searched for support for these assertions about the son and about caring for the son. There are no photos of the son. There is no birth certificate. The solicitors' letter of 8 September 2020 refers to the former partner's attendance on 13 June 2020 at the police station as having been voluntary attendance for further interview. Mr Hepburne Scott is entitled to say that this letter is part corroboration for part of what

the Appellant has said. I recognise that the Appellant is on remand and says he has not been able to make contact with the former partner or his son during the 11 months since his arrest. But, as I say, there is nothing. The solicitors' letter was written to the ex-partner at an address in Leeds. It provides no support for the Appellant having been primary carer of the son at the time of an earlier incident of assaults, or at the time of a first arrest and first interview, or at the time of the later voluntary attendance and interview. There is no document reflecting any social services involvement. Then there is this. The Appellant was arrested 6 days after the former partner voluntarily attended at a police station for her further interview. His assertion is that he was primary carer for the son at that time. That would mean that the partner no longer had care of the 2 year old son. Care would have been given up, in conjunction with an earlier arrest and interview. There is no evidence about this. There is no detail from the Appellant. There is no document which gives any support. The Appellant's arrest was on 19 June 2020. That arrest was at an address in Redditch where the Appellant was living. Before the Court is the witness statement of the police officer conducting the arrest. It refers to the Appellant's 'girlfriend' as having been at that address at the time of that arrest. On the Appellant's case that is not the former partner; it is someone else. There is no reference to a child. There is no explanation of what happened to a child of whom the Appellant was sole carer on 19 June 2020 when he was arrested. Then there is this problem. There is no explanation of what happened to the former partner's other child – the 8 year old daughter – while she was being interviewed by the police. If the former partner could not care for a child because of her arrest and first interview, and if there was no other support (as asserted by the Appellant), then she could not care for the 8 year old either. What happened? Were the two children not kept together? What did social services do and why? There is absolutely nothing by way of explanation, detail or supporting evidence.

8. There has now been ample opportunity to provide a further explanation. That is particularly so in the context of the very clear conclusions of the Judge in September 2020, the very clear submissions of the Respondent in October 2020, and the very clear observations of Morris J in January 2021. This is a wholly unsatisfactory and inadequate platform for the Court to be directing public authorities to take steps to conduct assessments and provide reports. I am not prepared to make any such direction; nor am I prepared to adjourn. After all, this is a fresh evidence case: the solicitors' letter has been put forward; there has been contact with the former partner including via her email address. In my judgment it is entirely the wrong way round in the context of the present case to say that a section 7 report should be ordered in order to explore whether the Appellant is telling a pack of lies. In my judgment, it is wholly insufficient to say that there has been part-corroboration of part of what the Appellant was asserting about the former partner, an attack and the involvement of the police.

9. I have asked myself these questions. What if the Appellant could make good the assertion that there is a 3 year old son, and the assertion that he was for a short time around June 2020 looking after the then 2 year old son, in circumstances where the relationship with the mother was at an end and she was being interviewed by the police in conjunction with assaulting him? Could an assessment report from social services in relation to the child in the context of extradition, lead this Court to conclude that extradition is a breach of Article 8. Might it do so? I must not – and do not – speculate as to what the evidence would be. But I am confident that there is no prospect whatsoever of that outcome.

10. This is an extradition case relating to index offending committed aged 39 in September 2016 constituting drug dealing. The sentence is 3 years custody. Even accounting for the qualifying remand and the stays while the test cases are determined, a substantial custodial sentence remains to be served. The Judge unassailably found that the Appellant came to the United Kingdom in 2017 as a fugitive. He was only here for some 2½ years before he was arrested in conjunction with these extradition proceedings. His record in Poland includes a long series of offences of dishonesty leading to custodial sentences. That includes fraud aged 26 in 2003 leading to 6 months custody; theft aged 27 in December 2003 leading to 5 months custody; 3 offences of theft and one of handling in 2009 aged 32, leading to further custodial sentences; he committed a robbery with threats aged 27 in December 2003 for which he received a custodial sentence of 2 years 8 months; he also committed a drugs possession offence aged 31 in December 2008, receiving a two-month custodial sentence. When the Appellant was arrested in the United Kingdom on 19 June 2020 at his address in Redditch, police found property consistent with drug supply comprising weighing scales, snap bags, a bong and a small amount of cannabis. That is a relevant feature of the evidence notwithstanding that the Appellant has not been charged.

11. Whether the Appellant's former partner will herself face a custodial sentence for the assaults said to have taken place remains to be seen. I accept, on the evidence, that this is a real possibility. Any sentencing court will have in mind the implications for both of her children, as will social services. I have considered as a feature the prospect of the partner facing custody. I have considered the prospect of the Appellant, in those circumstances, being assessed as providing a care solution for the three year old, the two children being separated, and the Appellant being unable to work. All this in a case where the Appellant has had no contact with the son for 11 months. I ask myself: is there any realistic prospect of the fact that extradition would deprive the child of that option, with the impact of that for the child, being sufficiently weighty – when combined with the other features relied on by Mr Hepburne Scott – to be capable of barring the Appellant's extradition on Article 8 grounds. I am confident that there is none. That is not a conclusion based on speculation. But it is one based on realism.

12. If I thought there was any prospect that allowing an opportunity to adduce evidence as to the impact of extradition on a 3 year old boy leading to information being placed before the Court were capable – in combination with other relevant features of the case – of outweighing the public interest considerations in favour of extradition, I would want to pursue an enquiry to ensure that the Court is properly and fully informed. Especially in circumstances where this case is stayed for two other reasons, albeit possibly not for long. I would take that step, notwithstanding that the Appellant has brought this situation on himself and has thwarted attempts to test his evidence. But I have complete confidence that in this case, in all the circumstances, there is no prospect – and certainly no realistic prospect – that it could lead to a conclusion of Article 8 violation. I add this. It is not reasonably arguable that the Judge was wrong not to adjourn the hearing before him and direct a section 7 assessment.

13. I refuse permission to appeal on the Article 8 ground. Since the fresh evidence (the solicitors' letter and the witness statement concerning it) is incapable of being decisive I refuse the application to adduce it.

20.5.21