Neutral Citation Number: [2022] EWHC 2331 (Admin)

Case No: CO/3240/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

13th September 2022

Before :

MR JUSTICE FORDHAM

- -

Between :

MAREK KURTA	**Appellant**
- and -	
REGIONAL COURT IN POZNAN (POLAND)	**Respondent**

- -
- -

Martin Henley (instructed by Freemans Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

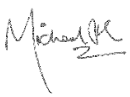
Hearing date: 13.9.22

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 and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. This renewed application for permission to appeal comes before the Court for an in-person oral hearing, as a consequence of the judgment of the Divisional Court [2022] EWHC 1906 (Admin). The background and context can be seen from paragraphs 2 and 13 to 21 of that judgment. As the Divisional Court recorded at paragraph 20, there is a single ground of appeal under Article 8 ECHR, the essential contentions being that the District Judge's reasoning on the Appellant's fugitive status was flawed, and the Judge failed to deal with the seriousness of the offending. The test for today is arguability.

Seriousness of the offending

2. This point was clearly set out by Mr Henley in writing and was maintained by him in his oral submissions. So far as concerns the seriousness of the offending, he submits, in essence, as follows. As reflected in the authorities on Article 8, seriousness of the offending is a key consideration in order to assess the strength of the public interest. In a "serious omission", the Judge failed to assess the seriousness of the offending here. Correctly characterised, the index offence is one of "no great gravity". It was a fraud against a financial institution in a sum (30,000 PLN) approximating to £6,000. The Polish court saw fit to impose a suspended sentence of 16 months, the sole community penalty element being the payment of compensation. In identifying the factors in favour of and against extradition, the seriousness – or rather relative lack of seriousness – of the offending did not feature and nowhere did the Judge record an assessment of how it was to be characterised. The Article 8 evaluation was therefore arguably wrong.

3. In my judgment, there is no realistic prospect of this Court identifying a material error of approach, still less outcome, based on seriousness of offending. The Judge was very well aware of the nature of the offence and had recorded that the Appellant had fraudulently obtained a loan of 30,000 PLN on 4 January 2013 by submitting an unreliable employment certificate. The Judge was very well aware of the nature of the sentence which had been imposed, which was also recorded. The Judge also recorded in detail the Appellant's previous convictions in Poland. Mr Henley accepts that this was a "very poor record". The Judge explained that these involved a previous suspended sentence of two years imprisonment in June 1998 activated in October 2002 with early release on parole revoked in December 2007; a sentence of community service for theft in November 2002 which was revoked and replaced by a 90 day prison sentence in December 2004; 5 months imprisonment suspended in July 2006 for escaping from custody, which sentence was activated in December 2008; community service for theft in September 2007 which was revoked and replaced by a 105 day prison sentence in January 2010; and eight months prison suspended for 5 years in November 2012 for an offence of perjury. The Judge was also well aware of the relevance of seriousness. In discussing the Article 8 authorities the Judge made reference to those facing extradition for "serious" as opposed to "trivial" offences; he made reference to cases of extradition in relation to offences "of no great gravity". When the Judge came to the balancing exercise what he did was to include within the balance sheet the fact that 16 months imprisonment remained to be served; and then in the balancing exercise passage of the judgment he recorded that he gave "substantial weight" to the length of the sentence imposed. It is not reasonably arguable in the circumstances of the present case that there was here an error of approach, still less one

which infected the outcome. The Judge was not required to characterise this offence as being of "no great gravity", or as being "trivial", and was not required to list that characterisation as a factor against extradition. Indeed, the Judge was clearly right not to do so. The Judge was entitled to see relative seriousness as reflected in the length of the 16 month prison sentence, which had been suspended but activated for non-payment of the compensation to the bank fraudulently induced to make the 30,000 PLN loan. This was an unimpeachable approach to public interest and the outcome would and could not have been different had it been expressed differently.

Fugitivity (and "abuse")

4. So far as concerns fugitivity, Mr Henley submits in essence as follows. The Judge's adverse finding that the Appellant was a fugitive (a finding arrived at in the Judge's analysis of the section 14 passage of time issue) adversely permeated as a theme the Judge's Article 8 ECHR assessment. That finding was unsafe. The Judge disregarded important evidence. In particular, the Judge did not address the fact that the EAW issued on 30 May 2019 recorded as "residence and/or known address" that the Appellant "may be residing" in the territory of Great Britain at a given address in Warrington (the address being set out). The words "may be" support this as being on the Polish court record from 5 years earlier. The "presumption" is that the Warrington address appears on the EAW because the Appellant had given it to the authorities and it was on the Polish court record in 2014. Fugitivity needs to be proved, by the requesting judicial authority, to the criminal standard. The fact that the requesting judicial authority was able to give the correct UK address for the Appellant in May 2019 supports the inference that the Polish judicial authorities were already well aware of the UK address at which the Appellant had been living with his family in 2014, before returning to Poland in August 2014 and engaging with the Polish criminal process between August and November 2014. Indeed, this is "highly likely" to be the derivation. The Appellant's own evidence at the extradition hearing was that the Polish court was "aware of his address in the UK", to which he then returned after the imposition of the suspended sentence. Added to these features is the fact that the Judge found that the Appellant had actively engaged with the Polish judicial process subsequently in 2017 by instructing a lawyer to rely on the part payment (300 PLN) of the compensation, in resisting activation at an adjourned hearing on 21 February 2017 and in appealing the April 2017 activation of the suspended sentence, which appeal was dismissed on 13 June 2017. The Appellant's return to Poland to address these matters back in 2014 and the active engagement through an instructed lawyer in the activation proceedings in 2017 are not the actions of a fugitive. Moreover, the activation was for non-payment of compensation; not for failure to provide a change of address. The Respondent's evidence does not spell out that there was any failure to notify the address. It was unsound and unsafe for the Judge to conclude, to the criminal standard, that the Appellant had returned to the United Kingdom after 12 November 2014 in breach of an obligation to notify a change of address, where there was this evidence to support the conclusion that he had made the Polish authorities well aware of the address to which he was returning. The facts recorded in "Further Information" that there was a decision to search for him by on 4 January 2018 and that the police wrote on 7 February 2018 – events after a very substantial gap in time – to say that the Appellant was now believed to be in the UK, following which extradition proceedings were pursued, do not support an inference that the Polish authorities had not already been made aware of the Warrington address, still less to the criminal standard. The Judge invested far too much

significance in that evidence. It is a "possibility" that the Appellant left failing to have informed the authorities of his address. But the criminal standard could not be met by the Respondent, on the evidence. In all these circumstances, the non-fulfilment of the compensation condition from the UK, and the choice not voluntarily to return to Poland to serve the activated sentence, cannot constitute fugitivity. See the cases of Pillar-Neumann v Austria [2017] EWHC 3371 (Admin) and De Zorzi v France [2019] 1 WLR 6249.

5. Mr Henley raises a related point namely that there was no proper basis for the Judge to find that the respondent judicial authority was "entitled to protect the integrity of their system against abuse" as a factor weighing in favour of extradition, to which the Judge subsequently said he gave "substantial weight". I will deal with that "abuse" point before turning to fugitivity. In my judgment, there is nothing in the criticisms made about protecting the "integrity" of the Polish judicial system from "abuse". The Judge explained that what he meant by that was that the Appellant "has almost completely disregarded his responsibilities to the [judicial authority], that behaviour occurring against the background of a similar pattern of behaviour previously". This was in the context of the Judge having found that the Appellant had been under a notified obligation to notify a change of address and had signed a document recording that obligation, which obligation the Appellant had subsequently breached in leaving Poland to return to the United Kingdom without notifying the address to which he was going. It was also in the context of the Judge having found that the substantive condition of the suspended sentence was the payment in full of the compensation to the lending institution, which had been discharged only to the degree of 1%. It was in circumstances where the Judge was finding that the Appellant, as a fugitive, was avoiding his responsibilities to serve the sentence of imprisonment which had now been activated. In my judgment, beyond reasonable argument, the Judge was entitled to weigh these matters in the balance as relevant public interest factors in favour of extradition, and to have in mind the previous pattern of activated sentences and re-sentencing which he had earlier set out, and there was no error of approach or reasoning, still less of outcome in his reference to protecting the system from abuse. That leaves the central question of fugitivity, to which I return.

6. The Judge's finding of fugitivity was made to the criminal standard reflected in his language "I am satisfied so that I am sure". The Judge had earlier recorded the authoritative approach to fugitivity from Wisniewski v Poland [2016] 1 WLR 3750 at para 59: knowingly placing oneself beyond the reach of a legal process. The Judge found, as a fact, and to the criminal standard ("I am sure") that the Appellant had been "made subject to an obligation that he notify the [judicial authorities] of any change in his address lasting for 7 days and that he failed to comply with that obligation when he moved to this country without the [judicial authorities'] knowledge". That, in my judgment, beyond reasonable argument, is an unimpeachable finding of fact. It is also, beyond reasonable argument, an unassailable basis for the finding of fugitivity.

7. It is right that the Appellant had stated in his evidence to the Judge that the Polish judicial authorities already knew the UK address. But there is no clear explanation of why or how or in what circumstances he says he gave them that information. There was and is no evidence of him notifying his change of address from Poland (where he was from August to November 2014) to the United Kingdom, after having signed to acknowledge his obligation to do so in November 2014. The Appellant denied that he

owed that obligation. The Judge found that he owed it and, knowingly, breached it. So far as further features of the case are concerned, the Judge was well aware that the Appellant was in Poland between August and November 2014 when he was convicted and sentenced in his presence and the obligation to notify change of address and the obligation to pay the compensation in full were imposed. The Judge made adverse findings on credibility against the Appellant who had denied any obligation to notify the address and who had denied that compensation had been a condition of the suspended sentence. The Judge was well aware that the Appellant had participated through a lawyer (relying on a part payment) in 2017, which were features again denied by the Appellant (he claimed ignorance of the proceedings and malice on the part of an ex-wife, including in making an evidenced 1% part-payment). The Judge was plainly entitled to rely as he did on the "Further Information" which described police intelligence in February 2018 that the Appellant was in Great Britain, relied on by the Polish judicial authorities to pursue him here through extradition, as meaning that this information was not already known and had not been notified in accordance with the obligation imposed. That in my judgment was a straightforward and certainly permissible reading and understanding of the Further Information. In the end, in my judgment, Mr Henley's arguments rest on his contention that the fact that the address was recorded within the EAW makes it "highly likely" that that address had been provided to the Polish judicial authorities in August or November 2014. It does not appear that this point was made to the Judge by the advocate (not Mr Henley) who appeared at the hearing before him. The answer is that the fact that by May 2019 the Polish judicial authorities were able to give an address in Warrington for the Appellant does not mean that they had that information all along from 2014, but still less that the Appellant provided that information in the discharge of an obligation whose existence he denied, in a case where he does not even say that he did discharge that obligation by providing that information after 12 November 2014. As the Further Information reflects, by 7 February 2018 there had been a search and there was intelligence from the police. At that stage it was said that the Appellant was understood to be in Great Britain. A striking feature of this case – which the Divisional Court emphasised in its judgment at paragraph 17 – is that on 19 March 2019 the Appellant had obtained a new Polish passport and identity document from the Polish Consulate in Manchester. It is not difficult to see why by 30 May 2019 the Polish authorities were able to give the Warrington address. The Supplementary Information (Form A) accompanied the EAW, emanated from the Respondent and is receivable information. It says "last known address": "he stays in your country and is to live [sic] at the address" in Warrington (set out). That appears just six lines above the recorded reference to the "origin of identity" documentation as being the Polish ID and Polish passport issued on 19 March 2019, in Manchester, by the Polish Consulate. So, it is obvious that – by the stage of the EAW – the Polish judicial authorities had accessed facts and circumstances about the Appellant having come to apply and obtain a passport and ID card, from and in the north-west of England.

8. I can see no realistic prospect on a substantive appeal of this Court concluding that the Judge's adverse finding of fugitivity was unsound whether by reference to the approach, the reasons or the way in which the Judge dealt with the evidence or even by reference to this Court revisiting the question on all of the evidence for itself. I add this. Nor can I see how the Article 8 outcome in this case would be different, even if revisited and re-evaluated afresh, and even if the Appellant was not a fugitive. The activation was final in June 2017; he was summonsed to serve the 16 months in September 2017; there

was a domestic arrest warrant in January 2018 and the EAW in March 2019. In all the circumstances of this case, the public interest considerations in favour of extradition to serve the activated 16 month sentence (less some 44 days of qualifying remand here), following the 99% non-fulfilment of a compensation condition, in the context of the offence of fraudulently obtaining a £6,000 equivalent loan, would still decisively outweigh those capable of weighing against extradition. That includes such factors as: UK residence since October 2013; the passage of time since the offending occurred; the interests of and impact on the Appellant, his wife and their two adult children; the impact for his work; the financial difficulties for the family; and the absence of any convictions in the UK. Whether or not a fugitive, it is not arguable that extradition is incompatible with Article 8 rights.

Conclusion

9. For these reasons, and in agreement with Hill J who refused permission to appeal on the papers, the application for permission to appeal is refused.

13.9.22