Neutral Citation Number: [2020] EWHC 1580 (Admin)

Case No: CO/126/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 June 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

ANDRZEJ EUGENIUSZ OSTROWSKI	**Appellant**
- and -	
CIRCUIT COURT WARSZAWA-PRAGA IN WARSZAWA, POLAND	**Respondent**

- -
- -

Ben Cooper QC (instructed by National Legal Service solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 11 June 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 :

Mode of hearing

1. This was a telephone conference hearing. It and its start time were listed in the cause list with contact details available to anyone who wished permission to attend. As always in remote hearings during the pandemic, I heard oral submissions just as I would have done had we all been sitting in the court room. As always, I addressed my mind to the following, and was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Adjournment

2. I previously granted an adjournment on 2 June 2020. I subsequently on 9 June 2020 refused a further adjournment, but I said that the matter could be revisited at today's oral hearing. In any case, Mr Cooper QC submitted, and I accept, that in principle and under the rules his client is entitled to have an application which was refused on paper reconsidered on a renewal in open court. The first question is whether to adjourn today.

3. I raised a point on the papers that it appeared not to have been recognised and brought to the court's attention that a development regarding what was going to happen next in Poland had been known to the appellant, but not communicated to the court. It has subsequently been explained that, for various reasons as to the sequence of events and the need for translation of an email, although known to the appellant, the development was not known to his representatives. I put that to one side, accepting that explanation.

4. There were, however, independent reasons why I declined to adjourn. These needed to be addressed today, as they have been. I took steps, as did the appellant's representatives, to ensure that the respondent saw all of the materials before the court relating to the adjournment. The respondent's position is that it is a matter for the court, but that they point out that the court may wish to have in mind timing of future dates and be more reticent to grant an adjournment should there be a longer delay in the hearing. The situation is this so far as the adjournment is concerned:

5. The appellant has marshalled further medical evidence and wishes the Polish court to consider it. The Polish court, I am told, has adjourned that consideration to 26 June 2020. On that occasion the Polish court, who is in principle the requesting judicial authority, will review – in the light of medical evidence – the sentence to which this case relates, and will consider the question of whether it regards it as proportionate to pursue this European Arrest Warrant. The obvious alternative is effectively to re-suspend what was originally a suspended sentence, and to allow a further opportunity to pay the compensation, the default as to which was the reason for activation of the sentence. In any event, that court will consider from its perspective the proportionality of the pursuit of the EAW.

6. Mr Cooper QC has cited authority namely, in particular, BS [2017] EWHC 571 (Admin) at paragraphs 39, 51 and 52. That authority recognises that there is a

continuing proportionality function that belongs to the judicial authority pursuing the warrant. That issue in that case arose in a context where 'further information' had been sought, and questions posed, but an answer contended to have been inadequate had been provided: see paragraphs 10 to 12 of the judgment. That was the way in which the issue wove-into the extradition proceedings before the UK court. It supports the conclusion that there is an exercise relating to proportionality from the end of the requesting judicial authority.

7. Mr Cooper QC's submission is that this court should permit the respondent 'to go first' and consider the question of proportionality from its perspective in relation to the maintenance of the EAW. The logic of the position is that the respondent will consider that issue on 26 June 2020, and decide whether the warrant is maintained.

8. I entirely see the force of that submission, so far as it concerns the sequence between the respondent's reconsideration – on the basis that it has said it wishes to reconsider – and the issue of any surrender or removal. I entirely see the force of the submission that the respondent should consider proportionality from its perspective before any removal is effected.

9. Mr Cooper QC, in his written submissions, identified – and very much as his fallback position – that this court could "direct that its order", were I to refuse permission to appeal, "should be suspended to take effect from after 26 June 2020". That course would deal with the sequence so far as any removal or surrender is concerned, were I not persuaded that there were reasonable grounds to appeal from the perspective of this court and its proportionality and oppression analysis. Mr Cooper QC's written submissions also told me that: "This course has been adopted in equivalent scenarios in order to ensure that the court of the issuing judicial authority has an opportunity to decide first whether extradition is necessary at all before surrender is put into effect". I accept from him that that course has been adopted in those scenarios with that consequence.

10. As I said in my written reasons refusing an adjournment, and as I have again put to Mr Cooper QC today: if the requesting authority, in reconsidering from its perspective as it has said it wishes to do the proportionality of pursuit of the warrant, decides not to pursue the warrant, then in those circumstances there would be no surrender for that reason; if, however, the requesting authority decides that it is maintaining the pursuit of the warrant then in those circumstances the issue would arise as to whether there is any other impediment to surrender and that could only be because there is a reasonably arguable ground of appeal viewed from the perspective of this court. That is the issue which is open to be pursued before me today.

11. Mr Cooper QC submits that it is 'unfair and unjust' for this court to consider today whether there are reasonably arguable grounds of appeal – on the premise that the EAW is, as it currently is, being pursued. I do not accept that submission. He was unable, in my judgment, to identify any basis on which that is either 'unfair' or 'unjust'. He is in a position to address me on the outcome as it is in this case – with the extradition having been ordered by the district judge – in the light of all the facts and circumstances of the case including the present facts and circumstances and including the evidence that is before this court.

12. The proportionality analysis which has to be addressed by the United Kingdom courts belongs to these courts and has to be properly evaluated and considered. That is the function that engages the application for permission to appeal. It engages all of the evidence that is before the court, and any other issue that is raised going to that question. It is not, however, the same question as the question of proportionality from the requesting judicial authority's perspective, as to the pursuit of a warrant. That can readily be seen from the 'respect' that the UK courts give to the sentencing decisions and policies of requesting states. It is a matter for the requesting state, for example, to consider any question of re-suspension of a sentence, or to restore an opportunity for compensation to be paid. I entirely accept that there is an overlap between the two functions. That is why it is so important that the appellant should have a full and fair opportunity to put before this court the considerations which are said to engage with proportionality and oppression from the perspective of this court. However, in my judgment, there is no 'injustice' or 'unfairness' – or risk of injustice or unfairness – in this Court discharging its function and considering the arguments and the material that are before me.

13. I was shown no authority supporting the proposition that there needed to be a sequence and the United Kingdom Court, in principle, must always 'go second' when the ongoing question of proportionality – from the requesting state's perspective – is in play. The case of BS, as I have said, explains how woven-in to the domestic court's consideration was that a request for further information had been made of the requesting state. Mr Cooper QC's description of 'the course adopted in equivalent scenarios' also suggests that there is no principle or rule or presumption that the sequence is to adjourn and await developments in the respondent requesting state's court.

14. In his oral submissions, Mr Cooper QC added this. He submitted that it will be open to the appellant to provide the court of the requesting state further medical evidence in the two weeks available to the appellant between now and the hearing in Poland. He also submitted that it would be open to the Polish court to decide to adjourn on that occasion and to allow a further opportunity for further medical evidence to be obtained. Those are not, in my judgment, of themselves reasons why it is 'unjust' or 'unfair' for this court to proceed today. If there were a basis for adjourning today, because it is 'unfair' for this court not to await further imminent medical evidence from the appellant, relevant to this court's consideration of issues of proportionality under article 8, and oppression, then that could and would have been put forward as a reason to adjourn today's hearing. I can see no such reason for adjourning today, on the basis of allowing further time for further material, or on the basis that the Polish court may decide to allow further time for further material.

15. In my judgment, the appropriate course is to look at all the material before this court and consider whether there is or is not a reasonably arguable ground of appeal, on the premise that the EAW is currently being maintained. I do not accept that doing that in any way prejudges or forecloses on what the Polish court may decide that it considers it appropriate to do. On the contrary, in my judgment, all that it entails is this court discharging its function, on the material that is before it.

16. It was for all of those reasons that I indicated that I was not prepared to adjourn today's hearing, explaining that I would give my reasons more fully in my ruling, as I have just done. I am satisfied that Mr Cooper QC has had, in writing and orally, a full

and fair opportunity on behalf of his client to put forward that his submissions as to why he says there is a reasonably arguable ground. That is the issue to which I now turn.

Permission to appeal

17. The EAW in this case is dated 13 June 2019 and was certified on 27 July 2019. It is a conviction warrant relating to 18 months custody, initially a suspended sentence but subsequently activated and becoming final in April 2018 in circumstances where the monetary compensation ordered had not been repaid. The custodial term remaining unserved is 17 months and 28 days.

18. The district judge conducted hearings on 4 October 2019 and 5 December 2019, and gave a judgment on 8 January 2020. As to the two issues which are pursued before this court, she concluded that there was no disproportionality or violation of article 8, nor would extradition be section 25 oppressive, for reasons that she gave.

19. The underlying offending to which the warrant relates goes back to 2007 and 2009. It concerns: the obtaining of loans, which cumulatively come to over £16,000 equivalent, using false documents; and the possession of counterfeit documents. The appellant has been in the United Kingdom since mid-2011. His wife and children are here. The children were aged 12 and 9 as at October 2019. He put before the district judge material relating to health conditions those include Legionella diagnosed in 2017 and mild obstructive sleep apnoea diagnosed in July 2019. His wife is his registered carer.

20. The district judge heard oral evidence from the appellant and his wife. They were both cross-examined. That and all of the documentary evidence before the court was considered and findings of fact made. The judge found that the appellant came to the United Kingdom as a fugitive. The judge found that there was no relevant delay in the circumstances of this case. The judge found the assertions of the appellant relating to an episode of serious pneumonia and an inability to walk certain distances were unsubstantiated by the evidence. The judge found that the offending in this case was properly to be characterised as serious. The judge then went on to address article 8 and oppression. Mr Cooper QC has realistically accepted today that notwithstanding the ground of appeal – namely that "the judge … fail[ed] to attach sufficient weight to the rights of the [appellant]'s children and his considerable health difficulties" – that, on the evidence before the district judge, the ruling was "eminently reasonable". In my judgment that is plainly right and there is no realistic prospect at all of overturning the judge's analysis by reference to any flaw in it or any finding not having been open to the judge.

21. In that light, how it is put today is that this is now squarely a case where there has been what Mr Cooper QC described as 'a fundamental change in the evidence'. He points to new medical evidence which he summarises at from the appellant's GP in a document which confirms that [the appellant] is 'experiencing a poor state of health' and 'at present receiving medical attention under our care'. He gives a description of "medical problems which are multiple and confirmed as current by [the] GP", namely: the "obstructive sleep apnoea; Legionella; Chronic obstructive lung disease; Peripheral vascular disease; Type 2 diabetes; [and] Benign cramp fasciculation symptoms". There is also a letter relied on which "diagnosed these cramps". Also

relied on is a recent proof of evidence describing health conditions "dramatically worse over the last couple of months". The submission continues that the appellant is seeking to obtain further up-to-date evidence but delay in obtaining a report from a pulmonologist has been said to run to "4 to 6 months". Also supplied to me is the NHS guidance relating to Coronavirus and the clinical vulnerability, put today by Mr Cooper QC as "medium", for those with lung conditions in particular. Mr Cooper QC's submission is that it is reasonably arguable, in the light of all of that evidence, that to extradite the appellant now in the present circumstances relating to risk would be article 8 disproportionate or alternatively oppressive and unjust. Reliance is being placed, in support, specifically on physical integrity as well as psychological impact, and on the current implications of the pandemic, so far as a revisiting of the balancing evaluation is concerned. Mr Cooper QC also reminds me that originally the sentence was a suspended one. He submits that there has been a long and significant delay in this case. He submits that others could be put at risk if the appellant is surrendered. He submits that the appellant is seeking to address matters and take steps whereby he can be allowed to pay the compensation. He submits that the public interest in extradition has, for various reasons in this case, materially diminished.

22. I am prepared to look, and I have looked, at the fresh and further evidence and consider the position as at today. I also take account of the fact that may be possible for the appellant to produce further material, for example were there to be a substantive hearing of an appeal. I also accept, for the purposes of today, that it is appropriate to think about the 'outcome' of this case, and the ultimate decision. And I accept that the threshold is 'reasonable arguability'.

23. However, having considered all the materials and in the light of the circumstances of the case, and having in mind the issues that were before the district judge and were properly evaluated and the subject of findings of fact by the judge, I have reached this conclusion. In my judgment, this is not a case where there is a realistic prospect that this court would decide – were there a substantive hearing today or at a future date – that the extradition and surrender of the appellant, on the premise that it is being pursued, would be unlawful by reference either to article 8 or to oppression.

Suspension of the order

24. I return, however, to Mr Cooper QC's 'fallback' position. Although it wasn't his primary case, he did rightly remind me that it was an appropriate course if I considered it to be the right step in this case. It was that any order I made, were I refusing permission to appeal, could be 'directed to be suspended to take effect from after 26 June 2020'. The respondent has made no submissions or comment in relation to that. It is not being contradicted that the respondent does wish to reconsider whether to maintain the warrant. And it is not being contradicted that that is going to take place on 26 June 2020, on the material that the appellant is putting forward for that hearing. I said, earlier on, that I quite saw the force of Mr Cooper QC's submissions, so far as that was concerned. I accede to them. I agree with him that it wouldn't be right for there to be a sequence in this case where the appellant is actually removed from the United Kingdom, prior to 26 June 2020, on the basis that I have been told – and it has not been contradicted – that the respondent itself wishes to re-evaluate whether to maintain and pursue the EAW, by reference to its consideration of proportionality of that pursuit, against the medical evidence. I will therefore accede to the fallback request that my order should be 'suspended to take effect from after 26th

June 2020' and I am now going to invite Mr Cooper QC to address me on the precise form of that order.

Conclusion

25. That concludes my ruling on the application. The adjournment is refused and permission to appeal is also refused.

Postscript

26. In his oral submissions on consequential matters at the hearing, Mr Cooper QC properly brought to my attention that, on reflection, he wondered whether there may be a line of authorities, which perhaps could have been researched and brought to my attention, in which United Kingdom courts may have taken a resistant line relating to questions of sequence and whether it is appropriate to defer or adjourn, to allow requesting states' authorities or courts first to consider matters from their perspective. I am grateful to him. Whatever any such researches and authorities may have shown, I have, in any event, declined the adjournment in this case.

11 June 2020