Neutral Citation Number: [2020] EWHC 3144 (Admin)

Case No: CO/1997/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

20th November 2020

Before:
MR JUSTICE FORDHAM

- -

Between :

IRENA MAKOWSKA

Appellant

- and -

REGIONAL COURT, TORUN, POLAND

Respondent

- -
- -

MALCOLM HAWKES (instructed by Tuckers Solicitors) for the Appellant
JONATHAN SWAIN (instructed by Crown Prosecution Service) for the Respondent

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JUDGMENT ON APPLICATION FOR CERTIFICATION

Covid-19 Protocol: This Judgement was handed down by circulation to the parties' representatives by email and release to Bailii. The date and time for hand- down will be deemed to be 10:00 am on 20/11/2020. A copy of the judgement in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

MR JUSTICE FORDHAM :

Application arising out of [2020] EWHC 2371 (Admin)

1. In this case I have given judgment [2020] EWHC 2371 (Admin) allowing the Appellant's appeal. The Respondent applied on 15 September 2020 for (i) certification that "there is a point of law of general public importance involved in the decision" (section 32(4)(a) of the Extradition Act 2003) and (ii) permission to appeal on the basis that "the point is one which ought to be considered by the Supreme Court" (section 32(4)(b)). The Appellant responded on 30 September 2020. By an Order dated 9 October 2020 I gave directions to which both parties responded on 19 October 2020. By the same Order I declared that the "permitted period" Under section 32(5) of the 2003 Act runs from 9 September 2020 (extending time to that end should that be necessary). This is my judgment dealing with the Respondent's application. I am using "Appellant" and "Respondent" to describe the parties' positions as they were before me: their roles and labels would be reversed on any appeal to the Supreme Court.

Mode of determination

2. In response to my directions each party has made clear that they are not asking this Court to direct a hearing on the application for certification and permission to appeal to the Supreme Court. I have noted that there was no hearing of the application in the Dempsey or Celczynski cases, to which I will refer below. I am satisfied that no oral hearing is necessary and that I can fairly and properly determine the applications on the papers.

Virtual re-hand down of [2020] EWHC 2371 (Admin)

3. I have referred above to an Order I made on 9 October 2020 in which I declared that 9 September 2020 was the relevant date for the purposes of any appeal in relation to the judgment [2020] EWHC 2371 (Admin). That Order resolves what Mr Swain rightly called the "considerable confusion about the formal handing down" of that earlier judgment. The parties were commendably patient and have confirmed that, for their part, no further enquiry or explanation is called for. One problem was that "virtual hand down" of that judgment was never published in the cause list. That is an important step and when it is missed, in my judgment, should be remedied. I directed by further Order on 6 November 2020 of my own motion that, having regard to the open justice, the judgment [2020] EWHC 2371 (Admin) be the subject of a further virtual hand down deemed to take place at the same time as the hand down of this judgment, each to be separately listed in the published cause list.

The suggested point of law of general public importance

4. The point of law of general public importance which the Respondent invites the Court to certify is as follows: "Is a requested person a 'fugitive' for the purposes of extradition proceedings in circumstances where, whilst outside of the issuing jurisdiction, they have breached a requirement placed on them (such as a requirement to pay a compensation or a financial penalty as the term of a suspended sentence), but who have otherwise not concealed their whereabouts from the judicial authority?"

Analysis

5. The Respondent's formulation raises a question which can properly be characterised as a question of "law". The question can readily be reformulated to spell out the characterisation: "Is a requested person, necessarily and as a matter of law, a 'fugitive' for the purposes …" The critical question, so far as concerns certification is whether this is certifiable as a point of law "of general public importance". It can be said (as the Respondent puts it) that "fugitivity arises routinely in extradition cases", and it can be said that extradition cases matter and there is a public importance in getting them right. Is that enough? I must be careful, in addressing "of general public importance", not to collapse the distinction between certification and permission to appeal, and not to apply a test of "ought to be considered by the Supreme Court" (that applies to the permission to appeal limb). On the other hand, "of public importance" must add something real.

6. One of the directions which I made in my Order of 9 October 2020 was that the parties should: "… supply any authorities which they would wish the Court to take into account regarding the approach to 'general public importance'." The parties each declined the opportunity, as they were entitled to do. Left to my own devices, I have found some assistance and it is appropriate to be transparent about it. If some key authority has been overlooked, that is regrettable, especially as it was readily avoidable. The cases make clear that the Court can and should properly decline to certify a point raised, albeit that it is properly to be characterised as a point of law, if the answer to the line of analysis which the party wishes to advance in the Supreme Court is clear. An example is Dempsey v Government of the United States of America [2020] EWHC 603 (admin) at paragraph 4. A further example is Celczynski v Polish Judicial Authority [2019] EWHC 3450 (admin) at paragraph 5. The cases also support the further proposition that certification is inappropriate insofar as the impugned analysis is in truth "a fact specific decision relating to the circumstances of [the present] case": United States of America v Giese [2016] EWHC 365 (admin) at paragraphs 10 and 11. I was not surprised to find the cases reflecting these points. It would be very odd if the Court were, in effect, obliged to certify a point of law of general public importance whenever, in a context like extradition with its public importance, a "point of law" arises, independently of whether the analysis involves fact specific decisions, or where the thesis sought to be advanced comes up against an answer which is conspicuously clear, bearing in mind always that nothing binds the Supreme Court or constrains what it might do.

7. It is important, therefore, to identify the analysis which the Respondent is advancing as the engine for its 'point of law of general public importance', to see whether it readily unravels. This is the nature of the Appellant's position. Certification is opposed by the Appellant on the following basis: "The question asked was addressed, in detail, in the court's judgment and is the correct interpretation of the law on the question of fugitivity and how it should apply. It is not in conflict with prior authority on the issue. Accordingly, no public interest arises in any further examination of this point".

8. In my judgment [2020] EWHC 2371 (Admin) I dealt with "fugitivity" at paragraphs 23 to 36. I identified at paragraph 23 the four cases cited to me (I need not repeat the citations): Wisniewski, Kakis, Gomes and Pillar-Neumann. The Respondent does not seek to maintain what I called its secondary case (paragraphs 32-35). Mr Swain advances the logic which I identified at paragraph 30, it: "would render a fugitive a person who failed to pay redress as a condition of a suspended sentence, even if there was full and demonstrable openness with the Polish authorities", including a "person who writes a letter at the time of the default, stating clearly their whereabouts, but says

they are not able or willing to pay the redress". Yes, says Mr Swain, for it is the "failure to comply … which triggers the fugitivity" and a contrary analysis "has the potential to result in perverse outcomes". The thesis that lies behind that contention is spelled out in the application before me. What is said is that "recent authorities have erroneously construed the decision in Wisniewski", such that "the scope of fugitivity has narrowed significantly", which is a "manifest shift" and "watering down" of Wisniewski. Mr Swain identifies the "recent authorities" as being (i) Pillar-Neumann (ii) De Zorzi and (iii) my judgment in the present case. He accepts that (iii) is in line with (i) and (ii), but all three are out of line with Wisniewski. He also accepts that the analysis in Wisniewski is correct and provides the authoritative reference point: that is his whole thesis.

9. For the purposes of this application for certification, further authorities on fugitivity, not cited to me at the hearing of the appeal before me, are relied on. They are: Pinto v Judicial Authority of Portugal [2014] EWHC 1243 (Admin); Salbut v Circuit Court Gliwice [2014] EWHC 4275 (Admin); Budzik v Regional Court of Tarnow, Poland [2015] EWHC 2856 (Admin); Herman v Polish Judicial Authority [2015] EWHC 2812 (Admin); Jankowski v Regional Court in Bialystok, Poland [2015] EWHC 2522 (Admin); and De Zorzi v Attorney General Appeal Court of Paris, France [2019] EWHC 2062 (Admin). I am not reopening the appeal before me, nor rewriting the judgment on that appeal. I have read and considered the authorities and the further submissions made about them.

10. In my judgment, the thesis that (i) Pillar-Neumann (ii) De Zorzi and (iii) my judgment in the present case have "erroneously construed", manifestly shifted from and watered down Wisniewski is very clearly wrong. In my judgment, the analysis that it is inconsistent with Wisniewski to fail to identify as a fugitive a person, who is not a fugitive in coming to the United Kingdom owing an obligation under a suspended sentence to pay redress, but who then while here fails to pay redress as a condition of a suspended sentence, even if there was full and demonstrable openness with the Polish authorities (indeed, even if they wrote a letter at the time of the default, stating clearly their whereabouts, but says they are not able or willing to pay the redress). Failure to comply is not a fugitivity trigger and there are no perverse outcomes. All of this, in my judgment, is very clear. The reasons why are these.

    i) This analysis collapses the important distinction between two things which it is important not to confuse: "unlawfully at large" and "fugitivity" (Wisniewski at paragraph 50). The first of these applies where the individual is "at large in contravention of a lawful sentence under the applicable legal system" as "an objective state of affairs" (Wisniewski at paragraph 54). This is the respect in which Salbut and Budzik doubted Pinto (Wisniewski at paragraphs 43-45).

    ii) Since 'fugitive' has the same meaning as in its section 14 'passage of time' context, the whole point is that it "precludes reliance on the passage of time" (Wisniewski at paragraph 58) and means the individual has acted such that they "cannot rely on the passage of time resulting from his absence from the jurisdiction" (Wisniewski at paragraph 60). That is what the "principle" (knowingly placing themselves beyond the reach of legal process) is addressing (Wisniewski at paragraph 59). No cogent reason has been identified why an individual, acting with full and demonstrable openness with the Polish authorities (indeed, even if they wrote a letter at the time of the default, stating clearly their whereabouts, but says they are not able or willing to pay the

redress), should not be able to rely on passage of time if the Polish authorities decide not to pursue extradition for a long period of culpable delay. This puts into focus the claimed 'perverse' consequences.

iii) The principle of "knowingly placed himself beyond the reach of a legal process" (as being the person who "cannot invoke the passage of time resulting from such conduct on his part") is at the heart of the analysis (Wisniewski at paragraph 59). It is this principle which has to be applied "on a case by case basis". Pillar-Neumann, De Zorzi and the present case are applications of that principle.

iv) The question of how that principle would "work in relation to a breach of a suspended sentence" was specifically addressed (Wisniewski at paragraph 60), and it was "a person subject to a suspended sentence who voluntarily leaves the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence" (Wisniewski at paragraph 60), as well as "a person who breaches conditions of his sentence which require him to keep in contact thereby becomes somebody whose whereabouts are known to the authority which is entitled to know of them and puts it beyond the authority's power to deal with him" (Wisniewski at paragraph 62). The thrust (emphasis added) is unmistakeable. The Court could, and would, so easily have said if breach of the condition of a suspended sentence, in and of itself, sufficed.

v) Pinto – where in 2014 Mitting J had reached the same conclusion as I have on fugitivity (but he had also found that the individual was not even unlawfully at large) – was discussed in Wisniewski (at paragraphs 40-41). It (and its suggestion of a need for knowledge of activation) proved wrong as to 'unlawfully at large' (Wisniewski at paragraph 54). But there was no suggestion that Pinto had been wrongly decided as to fugitivity. The scenarios discussed as constituting fugitivity in relation to a suspended sentence were conspicuously distinct and were expressly linked to 'knowingly placing himself beyond the reach of legal process'.

vi) Once Wisniewski – itself a Divisional Court decision – is recognised as being the authoritative source (as it is for the Respondent's thesis) we then have Hamblen LJ and Sweeney J in the Divisional Court in Pillar-Neumann and Rafferty LJ and Garnham J in the Divisional Court in De Zorzi expressing their understanding and application of Wisniewski. De Zorzi is particularly problematic for Mr Swain's analysis (there, the requested person breaching an obligation imposed on them, before leaving the requesting state, to answer a summons and then breaching that obligation from the UK). Had I been shown De Zorzi (and Pinto) it would have reinforced my view and Mr Swain is right to accept that my analysis is in line with it. It is not that, if I have misread Wisniewski, I am in good company. It is that, with respect to Mr Swain, I cannot see in this body of case-law what these judges have misread or misapplied.

vii) All that is left is the fact specific decision relating to the circumstances of the present case, where there is a "principle" (whether the person has knowingly placed themselves beyond the reach of a legal process), applicable "on a case by case basis", including in the context of breach of a suspended sentence (Wisniewski at paragraphs 59, then 60-62).

11. I have not re-traversed my own judgment in this case. I have focused on Wisniewski because Mr Swain's thesis – and his application for certification and permission to appeal – rests squarely upon its principled message as having been "erroneously construed", its scope "narrowed", with a "manifest shift" and a "watering down". The answer to that is, in my judgment, clear to the point that this thesis does not engage a point of law of general public importance. I therefore decline certification and the application for permission to appeal falls away.