Neutral Citation Number: [2020] EWHC 849 (Admin)

Case No: CO/1593/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2020

Before :

MR JUSTICE FORDHAM

- -

Between :

ADRIAN WALASZCZYK	**Appellant**
- and -	
REGIONAL COURT OF LAW IN CZESTOCHOWA, POLAND	**Respondent**

- -
- -

SAOIRSE TOWNSHEND (instructed by **ORACLE SOLICITORS**) for the **APPELLANT**
EMILIE POTTLE (instructed by **CROWN PROSECUTION SERVICE**) for the **RESPONDENT**

Hearing date: 25 March 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be Wednesday 8 April 2020 at 10am.

MR JUSTICE FORDHAM :

Introduction

1. This is an extradition appeal in which the issue is whether extraditing the appellant to Poland is compatible with Article 8 ECHR (private and family life). Permission to appeal was granted by Holman J on 22 October 2019.

Mode of hearing

2. As in the case of Jankowski [2020] EWHC 826 (Admin) CO/3448/2019, which I heard on the same day, I conducted an oral hearing using arrangements, by agreement of the parties, necessitated by the coronavirus pandemic. I sat, robed, in court 2 at the Royal Courts of Justice. The case and its timing were listed in the published cause list and the court building was open. The cause list recorded that the hearing was to be a telephone hearing and an email address was given by which any person could contact the court to request dial-in details. The two Counsel addressed the court just as if physically present in court, and everything said by them and me could be heard in open court and recorded on the court recording system, which I was told was running. On the application of any person, the recording so made will be able to be accessed in a court building, with the consent of the court. The two Counsel, the appellant's solicitor (Gitana Megvine) and the appellant himself were all able to join the hearing by telephone. These arrangements were agreed between the parties, and by me, in the light of the Protocol regarding Remote Hearings published on 20 March 2020. The parties were content, as was I, that telephone - as opposed to Skype - was a suitable and appropriate mode. As in Jankowski, the observations in which as to the applicable rules I do not repeat, I do not consider that there has been any derogation from the open justice principle, nor from the need to conduct an oral hearing in open court, nor from the rights of the parties. If and insofar as there has been any derogation, I am satisfied that it was necessary to secure the proper administration of justice. I am confident that the hearing, as conducted, was lawful and within my powers, as being necessitated by the interests of justice. I commend everyone for the prompt, cooperative and practical way in which they approached the hearing, which I am satisfied caused no prejudice to any person or their interests, nor detriment to the public interest.

Context

3. Extradition of the appellant is sought in this case by the Polish judicial authorities based on a conviction EAW (European Arrest Warrant) issued on 3 June 2016 and certified on 23 June 2016. Extradition of the appellant is sought in respect of 1 year 2 months and 4 days to serve of a 15 month prison sentence imposed on 30 November 2009, originally as a suspended sentence with a 3 year suspension period, but activated subsequently by the Polish judicial authorities in the light of the appellant's conduct during that period. The district judge made certain findings of fact. They included a finding that the appellant had come to the United Kingdom on 23 September 2011 (not November 2012 as he had continued to insist); a finding that he had defaulted on the compensation requirement in respect of the criminal damage conviction as well as probation supervision requirements which were conditions of the suspended sentence, which breached led to its subsequent activation; and a finding that he had come to and stayed in the UK as a fugitive. These findings of fact are not

impugned by Ms Townshend, rightly as there is no basis on which they would be overturned by this Court.

Fresh evidence and the Court's approach

4. This is a case in which fresh evidence is put forward in order to support the article 8-incompatibility argument, by reference to an updated factual picture. To that end, a series of updating proofs of evidence were filed, describing the appellant's position and circumstances. Miss Pottle, on behalf of the respondent, accepts that the updating evidence did not exist at the time of the extradition hearing before the district judge and was not at the appellant's disposal. She resists it by reference to its materiality, submitting that it is not capable of being decisive. Ms Townshend, for the appellant, submits that the appeal should be allowed pursuant to section 27 (4) of the extradition act 2003. She says that evidence now available and not available before the district judge, put alongside the other evidence in the case, would have resulted in the district judge deciding the article 8 issue in the appellant's favour, and ordering his discharge.

5. Ultimately and as was common ground, the question for me – focusing on the "outcome" – is whether the conclusion that extradition would be article 8-compatible is the "wrong" decision, in the circumstances of and in light of all the evidence in this case, respecting (subject to inconsistency with the fresh evidence) the findings of fact made by the district judge. The approach on "outcome" and whether the decision was "wrong" is described in Polish Judicial Authority v Celinski [2015] EWHC 1274 (Admin) [2016] 1 WLR 55 at paragraph 24.

6. In those circumstances, I received the evidence, including the latest update as at the date of the hearing, and decided to deal with the case on its substantive merits, based on all the evidence. I was satisfied that this was the correct case-management approach, having regard to the overriding objective. If Miss Pottle is correct, and the outcome before the district judge remains the "correct" outcome when all the evidence is considered, the appeal will fail and she will succeed on the substantive merits. If Ms Townshend is correct, and the outcome before the district judge is not the "correct" outcome, when all the evidence is considered, the appeal will succeed on its substantive merits. To the extent that the fresh evidence is supportive of a conclusion in Ms Townshend's favour, it is because it will have been relevant and material. Whether the material is capable of being decisive will therefore come out in the wash. I see no need or utility in revisiting, at the end of the assessment of the case based on all the evidence, admissibility and refusing to admit the evidence if the appeal fails. I will consider all the evidence, and where it leads will be a matter of substance. This is a case-specific case-management approach and I am not describing or laying down any general practice or principle. In those circumstances, at least in the present case, I regarded as unnecessary and artificial to deal with the application to adduce fresh evidence as a self-standing matter.

Adjournment

7. I refused an application by Ms Townshend to adjourn the hearing of this appeal, with reasons to follow. Here they are. Ms Townshend submitted that the coronavirus pandemic, with military flights to Poland currently grounded and extension of time applications routinely being made for extradition removal windows 10 days after 30 April 2020, meant this court should adjourn the hearing of this appeal. She submitted

that it was in the interests of justice that the appeal should be heard only at such time it is clear that evidence as to the impact of extradition is being considered as close to an actual removal date as is possible. In my judgment, that did not of itself give rise to a good reason why it was necessary in the interests of justice to adjourn. Foreseeable delays between the date of the hearing and determination of an appeal and the actual removal are not unique or unforeseeable. Indeed, they are an eventuality built into the statutory scheme. The possibility of a game-changing new set of factual circumstances is also provided for. If there is something capable of justifying the reopening of the appeal, criminal procedure 50.27 makes specific provision for that. It would, in my judgment, introduce further and unjustifiable impediments into the extradition system if an appeal – capable of being determined on the current state of the evidence – were adjourned, simply so that a later update closer to an extradition removal date could be considered. So, I was not persuaded by the 'wait and see' points.

8. Ms Townshend also identified, in the context of her adjournment application, to a number of 'look at the position now' points. She advanced a number of considerations in relation to which she said the current position of risk and uncertainty arising out of the coronavirus pandemic could be relevant to the article 8 balancing exercise, conducted on an informed basis. She also pointed to the prospect that in the present circumstances the appellant could, given a suitable delay, now pursue an application for settled status in the United Kingdom. So far as settled status is concerned, the pursuit of such an application – which it is accepted could have been pursued at an earlier stage – could not in my judgment conceivably justify an adjournment. As to the considerations arising out of current risk and uncertainty, in my judgment the answer to that is to receive and consider all updating material and submissions that Ms Townshend wished to make on behalf of the appellant, and ensure their inclusion within the evaluation of the human rights-compatibility of the proposed extradition in the light of the current state of circumstances is put before the court. That course, but no adjournment, is necessary in the interests of justice. As I informed the parties at the hearing, that was the course which I regarded as the appropriate one. Submissions were made on that basis. All of the 'look at the position now' points which could be made as relevant to the proportionality balance were made, and I have considered them all in my evaluation.

<u>The essence of the claimant's case</u>

9. In her submissions on the appellant's behalf, Ms Townshend emphasised a number of features of this case, relevant to the article 8 proportionality balance. Their essence, in my judgment, can be encapsulated as follows. (1) The index offending, in respect of which extradition is sought, were an ABH assault and criminal damage on a single occasion, committed by the appellant on 13 February 2009. (2) That is 11 years ago, which is a substantial lapse of time. (3) The appellant was aged 18 at the time of that offending. (4) The 11 years since then are especially significant, as they constitute the passage of time from the age of 18 to the age of 29. These are very different stages of the development of an adult. (5) The length of the sentence imposed by the Polish criminal court was 15 months custody, originally suspended. (6) The period to be served as identified in the EAW was just over 14 months. Given a 3-week period of remand served by the appellant between his arrest on 23 April 2018 and his release on bail on 16 May 2018, the period in fact to be served is some 13 months. (7) The

appellant, who remained in Poland for two of the three years of the probation supervision required by the suspended sentence order with its three-year suspension period, has come to the United Kingdom and has succeeded in turning his life around. (8) That success has endured over a substantial period of time, from September 2011 (aged 21) through to the hearing before me in March 2020 (aged 29). During that period, the appellant has put down roots in the United Kingdom. (9) He is a reformed character. During his 9 years in the UK he has committed no criminal offences. (10) He has established a settled family life here, meeting his partner (Sara) in the summer of 2016, 4 years ago. They have a son, now 2½ years old, born on 14 October 2017. They are a tight and interdependent family unit. (11) They are on low paid work and are economically vulnerable. (12) The child has allergies and severe hay fever. (13) The appellant himself has mental health difficulties. (14) The impact of extradition will be serious for the appellant, for Sara, and their child. That serious impact will include emotional and economic consequences. (15) Sara, herself a Polish national, lives in the same part of the UK as her mother and sister and could not reasonably be expected to relocate to Poland. There is little prospect of Sara and their son being able readily to visit the appellant in Poland. (16) There are serious concerns, arising out of Brexit, as to whether the appellant will be able to return to join Sara and their son in the United Kingdom after serving any sentence in Poland. (17) All of this, submits Ms Townshend, is seriously exacerbated by the present circumstances as to the coronavirus pandemic. The present health risks themselves pose a basis for genuine concern and anxiety, for all three of them, but exacerbated in the case of the appellant (with his mental health difficulties) and the son (with his medical conditions). The prospect of travelling to Poland to visit the appellant is yet more precarious, as is the prospect of the appellant's return subsequently.

10. All of these are, I am satisfied, relevant factors for inclusion in the article 8 proportionality balancing exercise. I also agree with Ms Townshend, and with Holman J granted permission to appeal, that the appellant's age at the time of the index offending was not explicitly included within the 'balance sheet' set out by the district judge, following the guidance in Celinski at paragraphs 15 to 17. That, together with the reception of the fresh evidence, justifies this court in revisiting the proportionality balance afresh, having regard to all the evidence, but giving appropriate respect for the findings of fact made by the district judge.

Analysis

11. Stepping back from it, at the heart of the case for the appellant is that the index offences are extremely old, and 'not particularly serious'; that they constituted teenage offending; that the appellant has for 9 years been a settled and reformed character in the United Kingdom; and that there will be a severe impact of extradition for him, his partner and their young child – whose best interests are a primary consideration – in a context and circumstances which include health concerns, economic precariousness and the special risks and uncertainties arising out of Brexit and now coronavirus.

12. It is appropriate that the court closely scrutinise the question of whether it is proportionate to extradite a 29 year old to serve a relatively short custodial sentence relating to an incident of criminality more than a decade old, after some nine years of settled residence with good character in the United Kingdom; given the undoubtedly significant impact for him and his blameless young family in the context of a 3½ year

stable relationship and the welfare of a 2½ year old child. It is important to have close regard to everything said about the appellant's mental health difficulties, the son's health condition, and the economic, emotional and practical impacts that extradition would undoubtedly visit on this family. I have done so.

13. However, in my judgment, the respondent has discharged the onus of demonstrating that the considerations advanced and capable of being advanced on behalf of the appellant do not displace the public interest considerations in favour of extradition. In my judgment, the outcome as found by the district judge was the correct one. In coming to this conclusion, I emphasise the following. (1) As the district judge found, the appellant is a fugitive. He deliberately evaded the criminal sentence and court-imposed conditions, to which he was subject. He failed to meet the probation-supervision requirements and defaulted on the compensation requirement imposed by the Polish court. He knew that he was the subject of a sentence of imprisonment, and deliberately avoided its consequences, by coming to the United Kingdom. (2) The appellant is moreover the sole author of any subsequent delay. He has built his life here knowing that he faced the sentence of the Polish court. Polish justice has caught up with him. (3) There is a strong and weighty public interest in extradition, that those convicted of crimes should serve their sentences, and that the UK should honour its international obligations and not become a safe haven. That public interest, whose weight is calibrated according to the nature and seriousness of the criminality in question, is a very high one. (4) There is also the public interest in the decisions of the judicial authorities of another member state being accorded proper mutual confidence and respect the counterbalancing factors are insufficiently strong to render extradition disproportionate. (5) The index criminal offending, reflected in the sentencing policy and sentence of the Polish judicial authorities, is properly characterised as serious, and a significant custodial term remains to be served. (6) Sara and their son will be entitled to access relevant state support. Sara's mother and sister live in the same part of the United Kingdom. Indeed, between the date of the hearing before the district judge (6 March 2019) and his judgment (11 April 2019) the appellant, Sara and their son had moved in with the partner's mother and, on the evidence, remained there for some 8 months. The district judge recorded that it had been Sara's evidence that she intended to move in with her mother, were the appellant extradited. (7) There will be real emotional, financial and practical impacts of the appellant returning to Poland to face his responsibilities and serve his sentence. There are also real and legitimate concerns as to whether he could be visited by Sara and their son, while serving his sentence. There is uncertainty as to whether he will be allowed to return to the UK, although – as Miss Pottle submitted – if that is what article 8 requires of the Home Secretary, he will have avenues for pursuing such a claim. These impacts and difficulties do not, in my judgment, outweigh the factors in support of extradition. Nor do the health condition of the child, the child's welfare and best interests. Nor do the appellant's own mental health difficulties. So far as the latter are concerned, the district judge was right to point out that the expert evidence states that "extradition is unlikely to have a serious and permanent effect on [the appellant's] mental health". The emotional, economic, practical and other implications of extradition are real and unmistakable, and it is right to recognise their cumulative effect, but they do not in my judgment serve to outweigh the strong public interest in extradition.

Three specific points

14. There were three specific points relied on by Ms Townshend which I concluded did not materially advance the appellant's case. I will deal with them here.

15. First, I asked Counsel at the hearing whether it was a point in the appellant's favour in the article 8 proportionality assessment that the Polish judicial authorities had originally suspended the 15 month sentence of custody, that the appellant complied for a period with the probation-related components of the suspended sentence, and that there is a document which reflects him informing the Polish probation service of his proposed move to the United Kingdom, giving a UK address. Ms Townshend embraced these and submitted that they operated materially to reduce the public interest in favour of extradition to serve the activated sentence of custody. I cannot accept that submission. I am satisfied that this point is answered – as Miss Pottle submitted – by the passage in Celinski at paragraph 13(ii). As the court there explained: "Each member state is entitled to set its own sentencing regime and levels of sentence" and "it is not for a UK judge to second-guess that policy". The court added: "For example, if a state has a sentencing regime under which suspended sentences are passed on conditions such as regular reporting … a court in the UK should respect the importance to courts in that state of seeking to enforce non-compliance with the terms of a suspended sentence". In the present case, the district judge received from the respondent a clear explanation of the circumstances in which the suspended sentence had come to be activated. Polish Probation had taken that step, in circumstances of non-compliance with supervision conditions, as well as the complete failure to pay compensation to the corporate victim of the criminal damage, all of which arose in the context of explanations and warnings given to the appellant. The district judge, in his fact-finding function, accepted that explanation. These considerations persuade me that it would not be appropriate to include, in the appellant's favour, within the proportionality balancing exercise, a feature relating to the suspensive nature of the sentence as originally imposed, or the appellant's part-compliance. These are all matters for the Polish authorities. The suspended sentence has been activated and the seriousness of the appellant's criminality and subsequent conduct is squarely reflected in the period of custody for which his extradition is sought and maintained. The case is to be approached on the basis of the custodial sentence outstanding and to be served under Polish sentencing and enforcement policy, from the serving of which the appellant is a fugitive.

16. Second, Ms Townshend criticised the district judge for the way in which he characterised the index offending. She submitted, by reference to the magistrates' court sentencing guidelines as applicable in England and Wales that the criminal damage charge – since it would here be characterised as "moderate" rather than "significant" – could not have been sentenced to a term of custody. On that basis, she submitted that the judge's observation that "in the event of a conviction in the UK for like criminal conduct, a prison sentence may be imposed" was therefore incorrect. I accept the submission of Miss Pottle that "like criminal conduct" was a reference to the two linked offences, taken together. The district judge, earlier in the same sentence, had spoken about "the assault charge set out in the EAW [which] is serious and albeit the criminal damage charge is less so, a considerable amount of damage was caused". That was, and would be, the "like criminal conduct". It would not have made good sense for the district judge to single out the criminal damage for the observation that he then made. I am satisfied that he was not doing so. In any event, nothing turns or can turn on this criticism. I am revisiting, by reference to the

outcome, the proportionality balance. The seriousness of the criminality is reflected in the nature of the sentence imposed and activated by the Polish authorities: Celinski para 13. I also have in mind that the criminal damage itself involved some £2000-equivalent worth of damage, and gave rise to the requirement of the payment of compensation, in respect of which no payment was ever made, one of the breaches which activated the custodial sentence. As to the assault, as the EAW states the appellant, acting with another 'beat up the victim by dealing blows with his hands all over his body, including the head, in consequence of which the aggrieved party sustained bodily injuries in the form of contusion of the facial skeleton in the right jugular area with abrasions of skin on the right cheek and nose, causing impairment of the function of a bodily organ or impairment of health …' The index criminal offending, as reflected in the Polish sentence under Polish sentencing policy, is properly to be characterised as "serious". The district judge so found. That finding was open to him. Indeed, in my judgment, it was correct.

17. Thirdly, Ms Townshend contended that this was a case where there was "culpable delay". As I have already made clear, I accept that the passage of time informs the article 8 proportionality balance. It does so for well-recognised reasons: the weakening of the public interest in extradition and the strengthening – depending on the facts and circumstances of the individual case – of private and family life considerations. All of those are legitimate considerations in the present case. However, Ms Townshend went further. She submitted that this was a case of "culpable delay", by the United Kingdom authorities during the period between certification (23 June 2016) and arrest (23 April 2018). In support of that submission, she cited a line of authorities preceding Celinski. Disputing the relevance of that line of authorities in the light of paragraph 14 (iii) of Celinski, Miss Pottle submitted that there was in any event no evidential basis for a conclusion that such "culpable delay" had taken place. I accept that latter submission, and therefore I do not need to delve into the line of authorities and its potential relevance if supported by a sound factual platform. Here, there is no such platform. I am satisfied, on the evidence, that there is nothing in this point. It was common ground before me that the Polish authorities had acted at all material times with all material expedition. I was not persuaded by the submission that the UK authorities could and should have put the appellant through some readily-accessible database after June 2016, with the consequence that he could and should have been arrested in the summer of 2016, instead of which he went on to meet his partner and establish their family life together with their son. There was in my judgment no evidence to support the contention of culpable delay, and no basis in my judgment for inferring it.

The prospect of serving the sentence in Poland "under electronic surveillance"

18. Finally, there was also a discrete point which arose out of the most recent updating evidence. Ms Townshend relied on very recent material as to the implications of the coronavirus pandemic, namely the statement of principles of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), issued on 20 March 2020, and a Reuters report of a proposal for short prison sentences to be "served in the electronic supervision system", "under electronic surveillance". She originally submitted that this was a development materially affecting the proportionality balance in the appellant's favour. However, by the time of her reply, it became clear that she was in fact suggesting something far more

fundamental. I gave directions for Counsel to submit a joint document setting out crisply their positions, and commend them for being able to do so speedily and effectively. In the end, the point comes to this.

19. The parties are agreed that the prospect of the Polish authorities deciding that the appellant should serve his custodial term "under electronic surveillance" would not render extradition incompatible with section 65(3)(c) of the 1983 Act, because the requisite "sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed". Ms Townshend submits that such a decision would render extradition incompatible with section 2(5)(c), because there would no longer be the requisite "extradition … for the purpose of … serving a sentence of imprisonment or another form of detention imposed in respect of the offence". She says Polish "electronic surveillance", as currently applied to sentences up to 12 months and proposed to be extended to up to 18 months, would not be likely to constitute a 'deprivation of liberty', as the principled benchmark for "imprisonment or … form of detention": cf. Korcala v Polish Judicial Authority [2017] EWHC 167 (Admin) at paras 37-38, 51. Ms Townshend also draws to my attention the abuse of process analysis of the Supreme Court in Zakrzewski v Regional Court in Lodz, Poland [2013] UKSC 2 [2013] 1 WLR 324 at paras 11-15. Miss Pottle's position is that these are draft proposals only and that it cannot be taken, even if implemented, that they would constitute a restriction on liberty 'for some hours only' rather than a deprivation of liberty.

20. In my judgment, the answer to this point is to be found in the analysis in Zakrzewski. There, as here, the argument was that a change of circumstances constituting fresh sentencing decision-making of the requesting state invalidated or undermined the prerequisite information required of the EAW. In that case, activated suspended sentences had been replaced by a fresh sentence. The Supreme Court held that: (1) the warrant was and remained valid (para 14) despite being overtaken by fresh sentencing decision-making; (2) fresh sentencing decision-making could however constitute an abuse of process, if a statutory prerequisite was no longer in substance met, which meant showing (see paras 13 and 15) true facts which were (a) clear and beyond legitimate dispute and (b) material to the operation of the statutory scheme. A fresh sentence which exceeded 4 months' imprisonment was not a change material to the operation of the statutory scheme. Applying this principled approach to the present case: (1) the EAW was and remains valid under section 2(5)(c); and (2) Ms Townshend cannot point to a true fact which is clear and beyond legitimate dispute, which would in substance render the serving of the sentence in Poland "a form of detention" involving a deprivation of liberty. I add this. It would in my judgment be odd if a requesting state, intent on implementing a custodial sentence by means of extradition, were disentitled to proceed by reason of acceding to calls to allow sentences to be served at home and on electronic surveillance; and if the authorities were incentivised to impose the most stringent regime in order to justify the extradition; and all in the circumstances of dealing with a pandemic in which the health of the putative detainee is what justifies serving the sentence under surveillance.

21. Ms Townshend had a more modest way of putting the point. She submitted that the prospect, or risk, that the Polish authorities might choose to impose electronic curfew falling short of deprivation of liberty – combined with the fact that the appellant has

been on an electronic tag in the United Kingdom for some 2 years as a bail condition – is a feature which materially affects the article 8 proportionality balancing exercise. I cannot accept that submission. The section 2(5)(b) and abuse of process point is either a good one or it is not. I do not see, having fallen short of the parameters described in Zakrzewski, that the appellant can then recycle the same point as an article 8 factor. As things stand, extradition is sought pursuant to a valid warrant, where the pursuit has not become improper (as an abuse of process) because of evidence as to a proposal regarding "electronic surveillance". I do not think the risk that the sentence might be served by something less than "detention" counts in the proportionality balance against extradition. But nor in my judgment, even if it did, would it make a difference to the balancing exercise in the present case.

Conclusion

22. For these reasons, the appeal is dismissed.