Neutral Citation Number: [2021] EWHC 1362 (Admin)

Case No: CO/3184/2020

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 :

MAREK NEMETH	**Appellant**
- and -	
CZECH JUDICIAL AUTHORITY	**Respondent**

- -
- -

George Hepburne Scott (instructed by Bark & Co) for the **Appellant**

Hearing date: 20.5.21

Judgment as delivered in open court at the hearing

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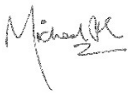
Approved Judgment

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

MR JUSTICE FORDHAM :

1. The Appellant is aged 44 and is wanted for extradition to the Czech Republic. That is in conjunction with what Mr Hepburne Scott describes as a "retrial conviction EAW". That is to say there is a European Arrest Warrant which is a conviction warrant but in a case in which it is accepted that if extradited the Appellant would be entitled to a retrial. The EAW was issued on 18 September 2014 and certified on 23 June 2017. It relates to offences said to have taken place between October 2008 and January 2009, in relation to which the Appellant was sentenced in December 2011, a sentence which took effect the following month. The Appellant was arrested on 8 January 2020 and subsequently released on bail on a £2,000 pre-release security.

2. Extradition was ordered by DJ Zani (the Judge) on 7 September 2020 after an oral hearing on 19 August 2020. The Appellant and his wife had both attended the oral hearing. The Appellant gave oral evidence and was cross examined. His wife had filed a supportive proof of evidence and was not required to be cross-examined as to its contents as the Judge recorded. The sole ground of appeal is Article 8 ECHR, renewed before me following a refusal of permission to appeal on the papers by Thornton J on 23 April 2021.

    i) In his judgment the Judge found as a fact that the wife "suffers from debilitating back problems and … is clearly in need of care and assistance". He found that the Appellant "provides important care for her". These were aspects addressed in her witness statement on which she was not required to give evidence or be cross-examined. Her husband to did give oral evidence and was cross examined was not cross-examined as to his wife's disability or need for care and assistance. Mr Hepburne Scott emphasises that on any view those aspects of the evidence constitute a secure factual platform for the Article 8 analysis. I accept that submission.

    ii) The Judge also identified as a factor against extradition the Appellant's "assertion" that there was "no other family member who would be able to care for his wife and that she may have to go into care if extradition were to be ordered". However, as to this topic, the Judge found that the Appellant and his wife were "deliberately underplaying the support that may be available either from family, friends and/or social services to assist [the wife] and that they are seeking to exaggerate the isolation that the [Appellant] and his wife are said to find themselves in and that they are bereft of any outside support".

    iii) The Judge identified as a further factor against extradition that the Appellant "asserts that he is not a fugitive from justice". The Judge made no explicit finding as to fugitivity but said this: "I find it more than coincidental that [the Appellant] chose to leave the Czech Republic shortly after the offences are said to have occurred".

3. The essence of Mr Hepburne Scott's arguments in support of his application for permission to appeal, as I see it, is as follows.

    i) The Judge was wrong to find that the Appellant's wife was "deliberately underplaying" available support, in circumstances where the contents of her witness statement were accepted by the Respondent and she was not required

to give live evidence and was not cross-examined. Her evidence was therefore "agreed". The wife's evidence dealt with the nature of her disability, her need of care and support, and the importance to her of the Appellant. But it went further. Her statement in terms said that the daughter Amanda, aged 19 at the time of the statement, had moved to another city and contact had ceased, so that they (the Appellant and the wife) did not know her whereabouts. The statement also said, in terms: "I have no supporting network in the UK… I do not maintain contact with my daughter. I do not know her whereabouts therefore there is no one that I can count on. I am unable to live on my own as I do require contact assistance." In circumstances where the wife's evidence was not challenged, the Judge, in principle, should have accepted that the Appellant was sole carer and that if extradited the wife would indeed be bereft of any outside support. That is significant because one of the reasons which Thornton J gave for refusing permission to appeal on the papers was that the Judge was entitled to have regard to medical documents and come to an adverse view about the assistance available from family members.

ii) Next, Mr Hepburne Scott submits that it could not be held against the Appellant that he was a fugitive. That would have involved a clear finding to the criminal standard. There was no such finding. It follows that fugitivity could not feature in the assessment and cannot explain the absence of reference to the passage of time in the Judge's Article 8 'balance sheet' assessment. That is significant because the second of the reasons which Thornton J gave for refusing permission to appeal on the papers was that there was sufficient clarity as to the circumstances in which the Appellant had left the Czech Republic as to explain why delay did not feature in the Judge's assessment.

iii) Delay and the passage of time, says Mr Hepburne Scott, are always relevant to the Article 8 analysis. They are relevant even in a case in which there is an adverse conclusion on fugitivity. They are all the stronger in a case where there is the absence of any such finding. As is clear from the authorities, the passage of time tends to weaken the public interest considerations in support of extradition and strengthen the private and family life ties which operate as factors against extradition. In the present case there is a "massive" delay which is highly relevant. The offences date back 12-13 years ago. The sentence was passed in December 2011 and became effective in January 2012. The EAW was not issued until September 2014. It was not certified until June 2017. The Appellant was not arrested until January 2020. The passage of time, and the absence of an explanation for it, combine to produce a strong factor against extradition.

iv) The Appellant and his wife came to the United Kingdom in 2009 and have been present here, with a settled private life and family life, for 12 years. They have lived openly here. They have lived a law-abiding life here. Although wanted in relation to matters in the Czech Republic, as to which the Appellant's protestations of his innocence would be a matter for any retrial, the Appellant has no convictions in the United Kingdom during the 12 years here.

v) At the heart of this case is a heavily disabled wife who has been wheelchair-bound since 2015, and for whom the Appellant has been sole carer, all matters which – as I have said I accept – constitute a sound factual basis for the assessment. The role of the appellate Court includes standing back and saying whether a question ought to have been decided differently because the overall evaluation was 'wrong': crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed (Love [2018] EWHC 172 (Admin) at paragraph 26). For the purposes of today it is sufficient that the case is reasonably arguable.

So, that was the essence of the argument.

4. I consider it appropriate for the purposes of today, in the circumstances of this case, to proceed on the basis that the Judge made no sufficiently clear adverse finding of fugitivity, having regard to the criminal standard applicable. I accept that the passage of time is in principle relevant and has the two recognised consequences, to which I have referred. I proceed on the basis that some of the period at least between 2009 and 2014, and possibly the period between June 2017 and January 2020, could fall to be characterised or re-characterised by this Court on a substantive appeal as relevant, unexplained (and even "culpable") delay. I interpose that for the period September 2014 to June 2017 is one as to which the Judge unassailably identified a satisfactory explanation, there having only been an alert in June 2017 that the Appellant was living in the Leeds area.

5. However, the matters in respect of which extradition is sought are on their face matters of seriousness. What is said is that acting with an accomplice and using threats of violence the Appellant over a period of 3 months forced a named individual to purchase TV sets, take out contracts on mobile phones, to withdraw a pension and sign over a transfer of shares and deliver up identity documentation. The sentence imposed by the courts in the Czech Republic is 3 years, all of which remains to be served. There are, notwithstanding the passage of time and the absence of an adverse finding of fugitivity, clear and strong public interest considerations in favour of extradition.

6. The critical question is whether the hardship to the Appellant's wife from the loss of the important care provided by the Appellant for her, all of which the Judge expressly recognised, was or is together with the other features of the case capable of outweighing the factors pointing in favour of extradition.

i) I cannot accept, even reasonably arguably, that the Judge was obliged to accept that the Appellant would have "no one that I can count on" including the daughter and other family members and friends. It is true that she said this in her witness statement, on which she was not cross-examined. It is also true that she specifically addressed the loss of any contact with the daughter. However, the position before the Judge was that the Appellant was giving oral evidence and was cross-examined. He was moreover cross-examined in relation to matters regarding other family members and other means of support, in the context of assertions which he too had made in his statement. The backcloth for the decision that it was not necessary to cross examine his wife was that he had already been cross-examined on those matters. It cannot

in my judgment, even reasonably arguably, have been taken that it was being agreed that the wife's evidence in relation to those same features was being accepted and that there was therefore no challenge or the Respondent was not maintaining the position which it had been advanced in the cross examination of the Appellant. I cannot see that anyone could have been misled in relation to that, nor that anyone was treated unfairly. Everyone knew the lay of the land.

ii) There were relevant documents before the Judge. I agree with Thornton J that it was plainly open to the Judge to have regard to those documents. The Judge was particularly concerned about contemporaneous entries in the wife's medical records, which had been obtained and which were before the Judge. The medical records described the "daughter" named "Amanda" together with the husband (the Appellant) having frequently attended at medical appointments. The daughter is not only named as Amanda but an age is recorded which reflects the date of birth given by both the Appellant and his wife for their supposedly now estranged daughter. Mr Hepburne Scott characterises more recent entries in the records as being descriptions of occasions where a family member participated as an interpreter. He submits that there could have been a compelling answer to explain what is said in the medical records, had there been cross examination about of the wife, and that there is a danger of unfairness from relying on them when she was not cross-examined. But there is no getting away from the fact that the medical records expressly record that at 09:10 on 3 August 2020 Dr Alison Roberts of Bellbrook Surgery was trying to contact the "daughter" on the mobile phone number given in the notes. Then at 11:09 on 3 August 2020 there is a contemporaneous record of Dr Roberts having spoken to the "daughter". The daughter is there named as "Amanda". That is a direct conversation, in a contemporaneous record. It was not the actions of a friend-interpreter. The record describes Amanda, the daughter, apologising for the missed calls and explaining that she had moved her SIM card to a different phone. It is not difficult to see why the Judge was so troubled. The proof of evidence of the Appellant and witness statement of his wife claiming that all contact had been lost with the daughter were dated the very next day, 4 August 2020. In my judgment, beyond argument, it was entirely appropriate in circumstances where that material was before the Judge and where the Appellant was giving live evidence and being cross-examined, for the Judge to rely on this material. I agree with Thornton J.

iii) There is then this problem. If there were an explanation for all of those records and entries including how it could be that on 3 August 2020 Dr Roberts using a mobile phone number for the daughter Amanda had been able to speak to the daughter, I have no doubt at all that the explanation could have been bottomed out and would have been put before me, in order to show that there is substance in the complaint that some unfairness has occurred from the fact that it was the Appellant and not the wife who gave live evidence and was cross-examined. All the more so, in circumstances where Thornton J on 23 April 2021 refused permission to appeal, holding that the Judge was clearly entitled to rely on the medical records.

iv) There is more to this case than that. The Judge recorded how the Appellant's evidence had shifted from describing "extended family [who] live in Leeds and nearby but… will not be able to step in as they have their own family and work responsibilities", as had been described in the Appellant's proof of evidence, and his oral evidence in which he "said that all the extended family had, in fact, left the area". In the judgment, the Judge continued: "When pressed for further details, [the Appellant] stated that some members of the family had left the area last year while others had left some months ago. He did not expand on why they had all chosen to leave the area now or indeed where they had moved to". It is not difficult to see why that troubled the Judge. The case for resisting extradition was being built, materially, on the assertions that the wife would be left, bereft of support. The Judge was clearly entitled to reach the view, as he did, that there were "very serious doubts" about the evidence of all extended family having left the area.

v) There was more. The Judge's concerns were illustrated by reference to the £2,000 pre-release security in relation to bail. The Appellant maintained in oral evidence, under cross-examination, that "a family friend" had lodged the £2,000 for bail purposes. It was the same "family friend" who had driven the couple to London from Leeds for the oral hearing. He was cross examined as to whether in fact the payment had been made by his brother. He denied that. But, as the Judge explained in the judgment, the court record revealed that the payment had been made by a "Kevin Nemeth" whose address was "19" at a named address in Leeds. The Appellant is "Marek Nemeth" and his address is "6" at the same named address in Leeds.

vi) Again, in circumstances where this came to light at the hearing before the Judge and was carefully articulated in the judgment, it is highly revealing that there is no material before this Court to suggest that some injustice has been done in this case. That is in circumstances where the Judge reached his conclusion that the Appellant and his wife were "deliberately underplaying the support that may be available either from family, friends and/or social services… and… seeking to exaggerate the isolation that he and his wife are said to find themselves in and that they are bereft of any outside support".

7. In my judgment, in this case an Article 8 proportionality challenge to extradition could not get off the ground if there were other family members to whom the wife could look. There is strong evidence that the Appellant and his wife appreciated that as being the case. They were found – for compelling objectively justified reasons – to have overstated and exaggerated the position. The Article 8 case was damaged beyond retrieval and no retrieval is now achievable. Mr Hepburne Scott submitted that even on the basis of the disbelief of what was said about family and support, having regard to the evidence of disability and impact, and having regard to the other features of the case, there is an arguable Article 8 ground of appeal in this case. As relevant features he emphasises non-fugitivity, delay and the lack of criminal conduct during the period in the United Kingdom. Once the position in relation to other family and support is convincingly and compellingly rejected, there is in my judgment no prospect that the Article 8 claim by reference to the wife's disability and need full support could succeed in all the circumstances. The features serving to weigh against extradition are beyond reasonable argument decisively outweighed by those in

support of extradition. In my judgment, there is no realistic prospect that this Court would conclude that the Judge's evaluative outcome in relation to Article 8 was the wrong outcome, having regard to all the circumstances of the case.

20.5.21