Neutral Citation Number: [2021] EWHC 3273 (Admin)

Case No: CO/2474/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

2nd December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

ANDRZEJ GOTOWALA	**Appellant**
- and -	
CIRCUIT COURT IN SIERADZ (POLAND)	**Respondent**

- -
- -

Danielle Barden (instructed by Taylor Rose Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

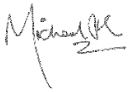
Hearing date: 2/12/21

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.

MR JUSTICE FORDHAM:

Mode of hearing

1. This is a renewed application for permission to appeal in an extradition case. The mode of hearing was a remote hearing by Microsoft Teams. The case was originally listed to be heard in-person at the Royal Courts of Justice but I acceded to the request made by the Applicant's legal representatives. The context was that a remote hearing would enable Counsel not only to present her oral argument at this oral renewal hearing, but it would avoid undermining her ability to deal with a six week crown court trial in which she appears for one of the defendants. There was in my judgment a good public interest reason in those circumstances for acceding to the request, along the lines that I explained in Boguszewski [2021] EWHC 3241 (Admin) at §2. The Appellant's representatives were satisfied as am I that this mode of hearing involved no prejudice to the interests of their client. The Respondent had already indicated that it did not intend to be represented at today's hearing but commended what it had said in writing to the Court for the purposes of today. The open justice principle was secured in the usual ways: the case and its start time were published in the cause list; together with an email address, usable by any member of the press or public who wished to observe the hearing.

Context

2. The Appellant is aged 64 and is wanted for extradition to Poland. That is in conjunction with a conviction European Arrest Warrant (EAW) issued on 14 January 2020 and certified on 2 June 2020. There is a hot controversy as to what the warrant relates to. The Respondent's position is that the Appellant is wanted for extradition to serve a 10-month custodial sentence, activated in August 2015, having been imposed in October 2012 for an offence committed in June 2010 of fraud on a bank by securing a loan with a false representation relating to the acquisition of a TV set. Extradition was ordered by DJ Callaway ("the Judge") on 12 July 2021 after an oral hearing on 16 June 2021. Permission to appeal on the foregrounds that are featured in argument this morning was refused by Jay J on 15 October 2021. A section 2 Wozniak ground, familiar in all Polish cases, was stayed by Jay J and that order remains undisturbed so that the Appellant's representatives can consider with him the position in the light of yesterday's pronouncement by the Divisional Court.

Last-minute fresh evidence

3. Fresh evidence was provided to the Court at 08:21 this morning, for a hearing due to commence at 09:00. Ms Barden candidly tells me that the substance of the updating position described in that evidence was something that had been discussed with the Appellant and so known to the Appellant's solicitors back in October 2021. The reason that the Court was given, in an email this morning, as to why the material was so very late was that it had needed to be "read and translated to the Appellant". It is a matter of serious concern when fresh evidence is adduced so late at an oral renewal hearing. One of the implications is that it is known that the Respondent has not briefed Counsel to assist the court at the oral renewal and, although the material was copied to Counsel who had drafted the Respondent's submissions accompanying the Respondent's notice, it is frankly unrealistic to expect the Respondent's team to be on 'standby' to respond, in case unheralded materials are provided on which they might wish to have

commented. The timing is extremely regrettable, as is the fact that there was no warning to the Court or to the Respondent that this material was in the pipeline. Having said all of that, I have decided in the circumstances of the present case that I will consider what I am told in that updating evidence. I have been prepared, notwithstanding the serious concerns which I have raised, to have it in mind on this occasion rather than hold against the Appellant the way in which the evidence has come to be adduced.

A contingent application

4. Also before the Court is a contingent application to extend the representation order to allow an updating report of Dr Brown the psychiatrist who gave an expert report in this case on 28 January 2021 and also gave oral evidence at the hearing before the Judge in June 2021. The application is 'contingent' because Ms Barden submits that the Court should grant permission to appeal and, if it grants permission to appeal, should also grant the extension of the representation order for the updating report. For the purposes of the arguments at the hearing, she asks me to bear in mind that the Court at the permission stage does not have updating expert material which she says the Court would appropriately have at a substantive appeal hearing, were permission granted.

Three grounds and their common premise

5. The first three grounds of appeal can be taken together. They relate to the following: the standards of adequacy of particularisation (section 2 of the Extradition Act 2003); the threshold of minimum applicable custodial sentence length for the purposes of extraditability (sections 10 and 65); and the fair trial requirements about whether there was absence at trial, if so whether it was deliberate and, if not, whether there is a future retrial right (section 20). Ms Barden accepts that her submissions on each of those proposed grounds have the same shared premise. Indeed, it is the rejection of the premise which explains the way the Judge dealt with these issues. And it is the rejection of the premise which constitutes the thrust of the Respondent's opposition in writing to permission to appeal. Moreover, Jay J concluded that the Appellant's position in relation to the premise was unarguable. It is clearly appropriate to start by examining the premise.

6. The position as to the premise comes to this. The EAW and further information refer not only to the fraud offence in June 2010 but also to a second offence, a theft offence relating to the Appellant's wife's jewellery. The jewellery theft offence is said to have taken place in a period in late 2008 and the beginning of 2009. The Respondent's position has been, and the Judge found, that extradition is squarely being sought and is taking place in relation to the fraud and the activated 10-month sentence relating to the fraud. Ms Barden's premise is that it is reasonably arguable that the contents of the EAW and relevant further information embrace the theft offence, together with a 59 day substituted sentence passed by a Polish court in July 2013 (there having previously been an unpaid fine in relation to the jewellery theft). She relies, first, on the fact that the EAW describes two offences as having been dealt with on 15 October 2012. Secondly, she relies on the fact that the EAW describes "one year" in prison "including 10 months imprisonment". That, she says, indicates that 59 days have been added to 10 months. Thirdly, she relies on the fact that further information in April 2021 made express reference to the Appellant's return being sought in relation to the jewellery theft. The document said this: "his return to the country is also required in connection with the crime under article 284 section 1 of the criminal code, in relation to article 12

of the criminal code, as the fine imposed for this crime has not been enforced". Ms Barden submits that the sentence which I have just quoted is referable to the jewellery theft. She is plainly right about that and indeed the Respondent has accepted this. as she also rightly submits, the quoted sentence needs to be read alongside the fact that the question that was being asked of the Respondent: "please confirm whether [the Appellant]'s return is sought in any way in relation to the second offence for which he was convicted on 28 June 2010" (a reference to the jewellery theft). On the premise that extradition is being sought in relation to the jewellery theft offence, the problems under the first three grounds of appeal are then said to arise.

7. In my judgment, there is no realistic prospect of this Court at a substantive appeal hearing deciding, in the Appellant's favour, that in this case extradition is being sought not only for the 10-months activated sentence relating to the fraud, but also 59 days of custody relating to the jewellery theft. I agree with Jay J that the premise is not reasonably arguable. The EAW makes very clear on its face that it is concerned with "one offence" which is then describes as the fraud. It says that the length of custodial sentence is "10 months" and then that the remaining sentence to be served is "10 months". On each occasion that text is put in bold. The "10 months", in bold text, is described as having been "included" within "one year". There was never a one-year sentence nor was the 10 months included within such a sentence. But in any event the bold text makes clear what the focus is for the purposes of the EAW. The EAW describes only the fraud as the relevant offence. Swindling is the (only) box that is ticked as applicable. The theft enters the fray, as described on the face of the EAW, in this way. The fine which was imposed in relation to that distinct jewellery theft offence – which Ms Barden rightly says on the documents was imposed on 15 October 2012, the same time that the 10-month suspended sentence was imposed for the TV loan fraud – was an unpaid fine involving a relevant act of default by the Appellant. That act of default was put alongside the Appellant's default in failing to pay the redress (relating to the loan) which was a condition of the 10-month suspended sentence. All of those matters featured in informing the decision taken to activate the 10-month sentence. That is what the EAW clearly says. The form a supplementary information with the EAW is also very clear. It records that there is "one offence" and then describes it as the fraud offence, which it characterises as swindling. The further information makes the reference in the sentence which I have quoted, in answering the question at that had been posed. Before the Judge the Respondent made the submission, which as a matter of inference the Judge must have accepted, that the description of being the Appellant being "required" in "connection" with the theft, in circumstances where the fine for the theft had not been enforced, is consistent with what had been said on the face of the EAW, namely this. The activation of the 10-month sentence – which was clearly relevant to the EAW based on the 10-month sentence, because that activation turned a suspended 10-month sentence into an immediate 10-month custodial sentence – was an activation in part informed by the Applicant's default in paying the fine relating to the jewellery theft. In my judgment, there is no realistic prospect that this Court at a substantive appeal would come to any different conclusion. In those circumstances, the consequential points relating to the three grounds of appeal do not arise.

Article 8 ECHR

8. The remaining ground of appeal concerns Article 8 ECHR. The features emphasised by Ms Barden are as follows. There are the Appellant's ties during the 11 years when he

has been in the United Kingdom, including: the long-term employment that he secured (he is currently off work as a result of depression to which I will return); his settled accommodation; and a relationship with a partner described only in this morning's fresh evidence (which gives a description as to why the Appellant had been anxious not to disclose that relationship earlier). Emphasis is placed on the fact that there is only the 10 months to serve. Emphasis is placed on the passage of time and in particular the period of just over four years, between November 2015 when a Polish domestic ruling was made ordering that the Appellant be traced and January 2020 when the EAW was issued, together with a further nearly 6 months before it was certified. All of that lapse of time on the evidence (as I accept) arose where the Respondent knew that the Appellant was in the United Kingdom. Next, Ms Barden says this is not a case where the Appellant should in law be regarded as a fugitive. She makes two points about that. The first is that the only default, described on the face of the documents, is the Appellant's failure to honour the redress obligation which was imposed as a condition of the 10 month suspended sentence for the loan fraud. She says that coming back to the United Kingdom knowing that there is a redress condition for a suspended sentence, and then not meeting that redress condition, does not in law serve to make the Appellant a fugitive, absent some other default such as the breach of a present duty to notify a current address or such as the breach of a condition preventing the individual from leaving the country. The second is that, in any event, the Appellant's evidence was that he thought he had already – in substance – met the redress condition, on which the Judge made no finding. These points arise in the context where fugitivity has to be proven to the criminal standard by the Respondent. They also arise in a context where we are today only at the stage of permission to appeal and therefore reasonable arguability. Next, Ms Barden emphasises a 17 month period on tagged curfew. As to that, she accepts that it is the weaker Article 8 factor of what would, in this jurisdiction, be a "non-qualifying" curfew; rather than the stronger factor applicable where there is a "qualifying" curfew involving a greater intrusion on liberty of the individual. Next, Ms Barden emphasises the Appellant's lack of UK convictions, and indeed any other convictions in Poland (leaving aside the jewellery theft and the loan fraud). Next, Ms Barden emphasises that this case involves an index offence of fraud in relation to a loan for the purchase of a television which is "not particularly serious" in the scheme of things. Then Ms Barden emphasises the evidence relating to the Appellant's mental health condition. She took me through the key features of the report of Dr Brown who: described the Appellant's diagnosis of adjustment disorder; described the worsening mood and anxiety with suicidal thoughts that the Appellant had reported since his arrest on the EAW and the threat of extradition; expressed the opinion that, if extradited, there was a significant risk that the symptoms would worsen and the suicidal thoughts would intensify and be acted on; stated that, in the short to medium term, the risk of suicide was high based on the factors which she described in the report; and stated that the risk of an attempt by the Applicant on his life would increase significantly if extradited, the long-term prognosis being difficult to predict.

9. Ms Barden made a number of points which involved criticising the Judge for the way in which he dealt with some of these matters, for example; in the four paragraphs in the Judge's judgment which discuss Dr Brown's written and oral evidence; and on the way in which the "seriousness" of the fraud offence featured as a factor in favour of extradition in the balance sheet, and was also included alongside a list of factors against extradition on the basis that the fraud offence was "not the most serious". For the purposes of today I am satisfied that it is appropriate, in the present case, for me to posit

this Court considering "afresh" the evaluation of the relevant factors, on the evidence, and in the light of the Judge's findings. I am also satisfied that it is appropriate to have in mind that Dr Brown's report is dated January 2021, that I have been told this morning by the Appellant about a worsening in his mental health condition, and that it can therefore be said that I do not have an up-to-date expert evaluation.

10. The difficulty is that, in my judgment, and notwithstanding applying that most favourable approach to the Appellant, I can see no realistic prospect of this Court at a substantive hearing deciding that the extradition of the Appellant is a disproportionate interference with his Article 8 rights. Even if I assume in the Appellant's favour that he would not in law fall to be characterised as a "fugitive", for the purposes of the evaluative exercise under Article 8 it would nevertheless be relevant that – on the evidence – he left Poland knowing that he owed an obligation under a suspended sentence to make redress, and that he then failed to make that redress (just as he failed to pay the fine in relation to the theft offence). He went back to the United Kingdom and failed to pay the redress which was the condition of the suspended sentence. Those circumstances are relevant in the evaluation of the passage of time and the Appellant's own role. That was really what the Judge was getting at when he described delay as being "partly" a consequence of the Appellant's actions. Those actions included, as the Judge explained, the action of failing to supply a forwarding address. Even if that was not an express condition imposed on him, it was nevertheless a fact, as the Judge found. Bearing in mind all of the factors to which I have referred, and the factors which weigh in support of extradition – including the familiar and weighty public interests and the requirement of mutual respect –this is a case in which the factors in favour of extradition decisively outweigh those which can count against it. In my judgment, the contrary is not reasonably arguable.

Conclusion

11. In agreement with Jay J, I therefore refuse permission to appeal on all four grounds that have been advanced. Ms Barden invited me in my order to spell out in a recital to my Order refusing permission to appeal: "upon the Court being satisfied that the Appellant is only being extradited in relation to the 10 month activated sentence arising out of the fraud committed on 28 June 2010". I think that is a very good idea and entirely appropriate and I included that recital in my order.

2.12.21