Neutral Citation Number: [2021] EWHC 897 (Admin)

Case No: CO/565/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th April 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

DENIS MITAT SINANI	**Appellant**
- and -	
POLISH JUDICIAL AUTHORITY	**Respondent**

- -
- -

Laura Herbert (instructed by Montague Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 14.4.21

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.

.....

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 :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The Appellant is aged 24 and is wanted for extradition to Poland. That is in conjunction with a conviction EAW (European Arrest Warrant) issued on 25 September 2018 and certified on 12 October 2018. The index offence to which the EAW relates is an offence of robbery committed in September 2015 in Poland when the Appellant was aged 19. On 29 December 2017 after a trial in absence, the Appellant having come to the United Kingdom in about February 2016, he was sentenced to serve a custodial sentence of 2 years and 3 months. Taking into account time on remand in Poland, the unserved custodial period to which the EAW related was one year, 11 months and 13 days. However, as I will explain, qualifying remand has continued to 'clock up' in this country. The Appellant was arrested, in conjunction with the EAW, on 3 October 2019 and has been on remand ever since. On 7 February 2020 District Judge Blake ordered the Appellant's extradition after an oral hearing. On 23 September 2020 Sir Ross Cranston granted permission to appeal (with directions for a one-hour substantive hearing of the appeal) on two grounds of appeal then being advanced: (i) inadequacy of judgment; and (ii) section 20 of the Extradition Act 2003. Sir Ross Cranstion refused permission to appeal on a third ground then being advanced: (iii) Article 8 ECHR. On 20 November 2020 the Appellant's representatives did two things. First, they applied to renew the application for permission to appeal on the Article 8 ground. Secondly, they made an application for permission to amend the Grounds of Appeal to add the section 2/Article 6 ECHR ground familiar in all Polish cases and arising from the linked cases of Wozniak and Chlabicz, due to be heard by the Divisional Court on 17/18 May 2021, with a stay pending resolution of those cases by that Court. Those two applications are before me at this hearing today.

2. The mode of hearing today was a remote hearing by BT conference call. The Respondent had notified the Court that it would not be participating in this hearing. The Appellant's representatives requested a remote hearing and indicated that they were content with BT conference call. Ms Herbert for the Appellant was satisfied, as am I, that this mode of hearing involves no risk of prejudice to her client. I am quite satisfied that the mode of hearing was justified and appropriate in all the circumstances. We all hope that we are coming to the end of the pandemic and national restrictions relating to it, and court hearings in person are available and are taking place on a daily basis. However, there is still an appropriate need for a precautionary approach and for consideration to be given to the mode of hearing in individual cases. By having a remote hearing we eliminated any risk to any individual in having to travel to a court room or be present in one. The open justice principle was secured. The case and its start time were published in the cause list. Also published in the cause list was an email address usable by any member of the press or public who wished to observe this public hearing. That facility has been used. The hearing was recorded and this ruling will be released in the public domain.

Application to Amend, with a Stay

3. It is appropriate to start with the application to amend to add the Wozniak/Chlabicz point. I am satisfied that the Respondent has had an opportunity, if it wished to do so, to take a position on that application, made as it was in writing on 20 November 2020,

and featuring as it does in the Appellant's skeleton argument dated 12 April 2021, which documents I am told were all served on the Respondent. But I will in any event include a liberty to apply in case the Respondent has in any way been taken by surprise and wishes to have the position reconsidered.

4. I am quite satisfied, notwithstanding that the point has been raised belatedly, that it is in the interests of justice and appropriate, having regard to the overriding objective and the special objective, to allow the grounds of appeal to be amended and to order a stay of consideration of the application of permission to appeal on this new ground, until after the Divisional Court has given its judgment. I will order as follows:

    (1) Permission to amend the grounds of appeal on the section 2/Article 6 ECHR ground with reference to the cases of Wozniak CO/4299/2019 and Chlabicz CO/4976/2019 is granted and the application for permission to appeal on that ground stayed pending the judgment of the Divisional Court in those cases.

    (2) The Appellant shall within 14 days following the date on which the judgment of the Divisional Court in those cases is handed down (a) inform the Court and the Respondent whether he intends to pursue an application for permission to appeal on the ground referred to at paragraph (1) above; and (b) if such an application for permission to appeal is to be pursued, file and serve written submissions in support of that application.

    (3) In the event that the Appellant, within 14 days following the date on which the judgment of the Divisional Court in those cases is handed down, informs the Court that he does intend to pursue an application for permission to appeal, that application shall be considered on a rolled up basis by the Court dealing with the substantive appeal in this case. Otherwise, the application for permission to appeal shall be dismissed 14 days after the date on which the judgment of the Divisional Court in those cases is handed down.

    (4) The Respondent shall have liberty to apply in writing on notice to vary or discharge paragraphs (1) to (3) of this order, such application being considered in the first instance by a Judge on the papers.

Procedural Sequence

5. I am satisfied, as appears from paragraph (3) of the order just described, that – given the proximity of the Divisional Court's consideration of the linked cases of Wozniak and Chlabicz, it is appropriate that the substantive hearing of this appeal – on the grounds on which Sir Ross Cranston gave permission to appeal on 23 September 2020, and any further ground on which I grant permission to appeal today – should take place after the Divisional Court has given its judgment in Wozniak and Chlabicz. As I have explained, the point on which the grounds are being amended will if pursued be considered on a rolled up basis at that hearing. I will also direct that the hearing should be listed for the first available date after 1 July 2021. There are particular reasons why that procedural sequence is appropriate in the light of the conclusions which I have arrived at regarding Article 8 (including qualifying remand time), to which I now turn.

Article 8 and Ongoing Qualifying Remand

6. I turn then to the Article 8 ground on which the renewed application for permission to appeal is advanced before me today. The essence of Ms Herbert's argument, as I see it, is really as follows. One feature which is in principle relevant to a consideration of Article 8 proportionality is the amount of qualifying remand time served in the United Kingdom in conjunction with the extradition proceedings, at the time when the Court is considering the substantive argument. A recent illustration is Chechev [2021] EWHC 427 (Admin) at paragraph 79 where "the crucial factor which now tips the balance in [the Appellant's] favour" was that he had "already served in actual custody the large part of his sentence" and that the "likelihood" was that "even if returned in the next four months or so, he would be released from custody almost immediately". In that case the Appellant had served 9½ months of a 14 month sentence, at the time of the Court's decision, and the Court had regard to the prospect of discretionary release after half of the sentence under Bulgarian law. The key point for the purposes of today, and arguability is that Chechev illustrates that qualifying remand and the diminishing duration of custodial sentence left to be served can, alongside the other features in the balancing exercise, tip the Article 8 balance, even in a case where the Respondent would be able to say that if extradited promptly upon the judgment of the Court the appellant may stand to serve a few months of custody. Everything will depend on the particular facts and circumstances of the individual case. I emphasise that for the purposes of today in the present case, I have to focus on whether it is reasonably arguable that the Appellant could prevail and a substantive hearing. I add this. The previous line of authorities on qualifying remand and time left to serve includes the cases which I listed in paragraph 2 of my judgment in Molik [2020] EWHC 2836 (Admin).

7. Returning to the present case the remand period served in the UK meant that at the time of District Judge Blake's order for extradition there was still some 20 months remaining to be served in Poland in the present case. As the Grounds of Renewal (26 November 2020) emphasise, as at that date, the period remaining to be served was some 10 months which it was submitted is a factor capable of affecting the Article 8 balancing exercise. At the date of the Appellant's skeleton argument for today (12 April 2021) the period remaining to be served is put at 5 months; and as at today's hearing it is a few days less than 5 months. Projecting forward to a substantive hearing at which the Court considers the Article 8 balance, there is a realistic prospect – and therefore the ground is reasonably arguable – that the Court would allow the appeal on Article 8 grounds, when the period of qualifying remand, and time left to serve, at that stage is put alongside the other features of the case.

8. One of the features of this analysis is the nature of the period to which this Court should 'project forward'. In principle, there could be a substantive hearing of this appeal relatively soon. But in circumstances where it is in principle appropriate to make directions – as I have – which allows for orderly steps in subsequent to a judgment of the Divisional Court which is due in linked cases due to be heard on 17/18 May 2021, in my judgment in the particular circumstances of the present case the Court should be 'projecting' to look at the remand position once the Wozniak/Chlabicz outcome is known. In my judgment that is the appropriate point at which the substantive consideration of the Article 8 balance should take place. Anything else, in my judgment in the circumstances of the present case, would be artificial. That is because, even if the Article 8 and other grounds were rejected and a substantive hearing prior to the Divisional Court's judgment, the Appellant would retain a durable basis for being in

the United Kingdom pursuant to the stay which I am ordering. That means the qualifying remand would continue to accrue. This feature reinforces the conclusion to which I came earlier, as to the orderly way of approaching the present case so far as the procedural sequence is concerned. It follows that I can and should appropriately 'project forward' to a period in say July 2021 at which the Appellant would have some two months of the sentence remaining to be served.

9. Looking at the case in that way, I am satisfied that it is reasonably arguable that this Court at a substantive hearing would allow the appeal on Article 8 grounds. The substantial period of qualifying remand time served and the ever diminishing time remaining to be served would need to be put alongside the other features of the Article 8 balancing exercise. There are other matters of significance in the present case, so far as that balance is concerned. The District Judge – who I repeat was considering the Article 8 balance at a time when 20 months of custody remained outstanding and to be served in Poland – recognised that the Appellant and his partner were "both vulnerable people who have had difficult lives and have sought to turn their lives around'. The District Judge, moreover, declined to find that the Appellant was a fugitive. The District Judge found that the Appellant had established a life in the UK; that he supported a partner who is vulnerable and has had issues with regard to mental health which have led to self harming; that the Appellant has established an employment record in this country; that he has overcome a difficult and violent childhood, and the loss of his brother who committed suicide; that the Appellant's life could be said to have "turned a corner" by coming to the United Kingdom – notwithstanding a conviction and 8 week custodial sentence in August 2017 for possession of a bladed article. The Appellant and his partner are both relatively young. These and the other circumstances of the case, including the objective implications of Brexit for return and reunion with the partner (see Rybak [2021] EWHC 712 (Admin) at paragraphs 33 to 37), would inform the Court's Article 8 balancing exercise, with the diminishing period remaining to be served capable of tipping that balance. Ms Herbert has emphasised the Brexit point in the interrelationship between it and the diminishing time to be served following extradition. In my judgment, at least arguably, she is quite right to do so. At a substantive hearing considering the article 8 balance the court would as it seems to me have to consider the duration of the sentence left to be served alongside any points arising as to the practical and legal implications of the Appellant having been extradited to serve that short period. In that evaluation it could make a material difference that the Appellant's position so far as presence in the United Kingdom and reunion with his partner are concerned has been made very much more difficult and fragile in the light of Brexit. It would also as it seems to me be relevant to consider the extent to which the Appellant would have a durable basis to stay in the United Kingdom were he not extradited. All of that is a matter for the court dealing with the substantive hearing.

10. I am satisfied that the article 8 ground, whose essence - with Ms Herbert's assistance - I have sought to encapsulated, is reasonably arguable with a realistic prospect of success. I am also satisfied that 'projecting forward' in the way that I have is appropriate in principle. The reason for that is the one I articulated in paragraph 30 of Molik. There is a "freestanding durable basis to stay within the United Kingdom" in this case. In fact there are two. The first is to Ross Cranston's order granting permission to appeal on two grounds. The second is the stay pending the outcome in Wozniak and Chlabicz. I will therefore further order as follows:

(5) Permission to appeal on the Article 8 ECHR ground is granted.

(6) The substantive appeal shall have a revised time estimate of 2 hours (revising paragraph 2 of the directions made by Sir Ross Cranston on 23 September 2020), and shall be listed for the first available date after 1 July 2021.

14.4.21