Neutral Citation Number: [2021] EWHC 904 (Admin)

Case No: CO/3930/2020

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 :

WOJCIECH MARIUSZ STEFANSKI	**Appellant**
- and -	
REGIONAL COURT IN KIELCE (POLAND)	**Respondent**

- -
- -

Louisa Collins (instructed by HP Gower 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

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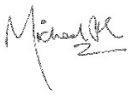
Approved Judgment

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

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 :

1. This is a renewed application for permission to appeal in an extradition case. The Appellant is aged 46 and extradition is sought to Poland. That is in conjunction with an accusation European Arrest Warrant (EAW) issued on 18 November 2010 and certified by the NCA on 29 November 2015. One of the two offences for which extradition was sought (failure to pay child maintenance) was conceded not to constitute an extradition offence and the Appellant was discharged on that matter. The remaining matter is an alleged robbery which took place on 23 November 2002. Permission to appeal was dealt with on the papers by Lane J. He granted a stay in relation to two of the three grounds of appeal (section 2 of the Extradition Act 2003 and Article 6 ECHR), pending the outcome of the linked cases of Wozniak and Chlabicz which are due to be heard by the Divisional Court next month. Lane J refused permission to appeal on the third ground of appeal: section 14 passage of time ("unjust" to extradite). That is the ground which has been renewed before me at this hearing. The focus is squarely on the "unjust" limb of section 14; "oppression" is no longer advanced.

2. The mode of hearing was by BT conference call. Ms Collins was satisfied – as am I – that this mode of hearing involved no prejudice to the interests of her client. A remote hearing was requested by the Appellant's representatives. The Respondent had notified the fact that it would not be participating at this hearing. By having a remote hearing we eliminated any risk to any person from having to travel to a court room or be present in one. I am satisfied that a remote hearing, through the mode of BT conference call, was justified and appropriate in all the circumstances. The open justice principle has been secured. The case and its start time were published in the cause list together with an email address usable by any person who wished to observe this hearing, whether they were associated with the parties, a member of the public or a member of the press. The hearing was recorded and this ruling will be released in the public domain.

3. The circumstances of the case include the following. The Appellant was questioned in conjunction with the November 2002 alleged robbery, in December 2003 and February 2004, and he subsequently appeared in court in April 2004. There was then a judgment of the Polish court but that was subsequently revoked in September 2004, which Ms Collins characterises as a "break" in the Polish proceedings. There was then a domestic arrest warrant issued in June 2005. By that time the Appellant had come to the United Kingdom in October 2004. As I have said the EAW was issued in November 2010 and certified by the NCA 5 years later in November 2015. The Appellant was arrested on 19 August 2020 and has been on remand since. An oral hearing took place on 7 October 2020 before District Judge Hamilton who gave judgment on 22 October 2020 ordering the Appellant's extradition. The District Judge declined to find that the Appellant was a fugitive, but dismissed the section 14 ground of resistance based on passage of time, both by reference to whether extradition was "unjust" and whether it was "oppressive". He found that it was neither. One of the features of the case, as recorded by the District Judge was that there was no proof of evidence or oral evidence from the Appellant himself. The District Judge made no finding as to whether delay by the requesting judicial authority or the NCA was "culpable", being satisfied that that would only be of relevance in a marginal case,

whereas this was a clear case so that characterising the delay as "culpable" could not make a difference.

4. In essence, as I see it, Ms Collins for the Appellant makes submissions which I can describe in two parts, though ultimately all considerations need to be evaluated in the round. The first part is this. Ms Collins submits that that the District Judge made a material error of law on the question of delay and "culpability". She says there are two particularly significant periods of long delay in this case. The first is the period from 2002 (the date of the alleged index offence) and 2010 when the EAW was issued. That, she submits, falls to be characterised as "culpable" delay on the part of the Polish authorities. The second period on which she has relied at this hearing is the 5 year period between 2010 and 2015, which she submits falls to be characterised as "culpable" delay on the part of the NCA (National Crime Authority).

5. Ms Collins submits that the District Judge made an error of law in treating the question of "culpability" of delay as being an 'on-off switch', only relevant (switched 'on') in a "borderline" case. She submits that "culpability" of delay does not have this 'on-off switch'. Put another way, there is no 'binary' analysis of its relevance and non-relevance, based on whether it is a "borderline" case. Rather, "culpability" of delay is a factor capable of engaging the evaluative judgment of the Court on the question of 'injustice' or 'oppression' linked to the passage of time, albeit that it may weigh more heavily in the balance in particular in a "borderline" case. In support, Ms Collins relies in particular on two passages dealing with the way in which "culpability" features. The first passage comes from the case of La Torre [2007] EWHC 1370 (Admin) at paragraphs 34 to 37, in particular at paragraph 37 where the Court emphasised that what is needed is an

> "overall judgment on the merits… unshackled by rules with too sharp edges".

The Court said:

> "All the circumstances must be considered in order to judge whether the unjust/oppressive test is met. Culpable delay on the part of the State may certainly colour that judgment and may sometimes be decisive, not least in what is otherwise a marginal case".

Ms Collins submits that that passage supports culpability as having a role even in a non-"borderline" case. The second passage comes from Eason [2020] EWHC 604 (Admin) at paragraphs 34 and 35, in particular paragraph 35 where the Court said:

> "[Counsel's] essential submission … was that the culpability of delay is usually only relevant in a case on the margins where it might tip the balance in favour of a person whose extradition is sought. I accept that this is the only way in which culpability is directly relevant, as a fact in itself. But in this case it also goes, in my view, to whether the person whose extradition is sought was entitled to believe that he would not be the subject of a request after a significant period time of had gone by, during which a competent prosecuting authority could naturally been expected to initiate extradition proceedings if there was considered to be a case for him to answer".

That passage emphasises that usually culpability will only be directly relevant in a "marginal case", but the word is "usually", and moreover there is a recognised indirect relevance where linked to a false sense of security.

6. Based on those passages and those submissions Ms Collins submits that it is arguable that there was a material error of law on the part of the District Judge in this case when he said: "Because of the lack of cogent evidence on the point it is very hard to reach any conclusion on the issue of culpable delay. But I do not find it necessary to do so as this would only appear to be a factor that really only needs to be it taken into account in 'borderline cases'… and I consider [the appellants] case to be quite a long way from the border"..

7. Linked to this part of the argument Ms Collins submits that the onus was on the Respondent judicial authority to provide an explanation for the long periods of time in this case and that, absent such an explanation, the finding of "culpability" should in principle have followed. In support of that approach sees cites Eason paragraph 34 where a conclusion on culpability, not there resisted by the respondent, was specifically linked by the Court to the fact that "no sensible explanation or excuse [had] been given for the 6 year delay".

8. I said earlier that Ms Collins' submissions in support of permission to appeal on the section 14 injustice ground can be described in two parts. The second part concerns a number of further arguments, made in writing or orally, whose essence, as I see it, is as follows. (1) That it is important not to fall into the trap of asking whether a fair trial as possible in a Polish court: the section 14 risk of injustice through passage of time question is not synonymous to the question whether a fair trial could still be held (see Eason at paragraph 42; Zubkova [2014] EWHC 1242 (Admin) at paragraph 12). (2) That, whole accepting that cases are inevitably fact specific and comparisons are of limited use (Warne [2015] EWHC 981 (Admin) paragraph 23), relevant examples which assist the Court in the present case and support the Appellant are cases where a defence of alibi would be undermined by an independent witness becoming unavailable due to passage of time (Kakis, discussed in Zubkova paragraph 12) and cases of inevitable disadvantage through the fading of memories (Eason paragraph 41). (3) That the Further Information from the Respondent in this case stated that: "The court is not able to confirm – due to the long period of time that has elapsed from the date of the offence of which [the Appellant] was accused – that all witnesses in the accusing cases covered by the EAW are still available and ready to testify". (4) That there is clear evidence of procedural disadvantage through the long lapse of time. (5) That, for the purposes of today, the ground of appeal only needs to be reasonably arguable.

9. In my judgment, there is no realistic prospect that this Court at a substantive hearing would overturn the District Judge's conclusion that extradition in this case would not be "unjust" through the passage of time.

10. The alleged robbery with which this case is concerned is described as follows in the EAW: "On 23 November 2002 in Kielce, acting jointly and in consultation with another unidentified man, for whom the materials were excluded for separate proceedings, using violence against Tadeusz Parkita and Stanislawa Beben consisting of inflicting blows to Tadeusz Parkita with fists and a rubber hose on the head and kicking over the body, he caused his injuries in the form of a broken nose from the

nasal bone fracture, wounds of broken right out eyebrow, bruises on the skin of the chest and left forearm, breaking of 5 ribs on the right side, and these injuries (rib fracture) disturb the body organs function for the period longer than 7 days, the victim was exposed imminent danger of serious bodily injury, and by putting the knife to Stanislawa Beben's neck and by kicking her in the abdomen and [hitting] her face with his hand as a result of which [s]he suffered with facial and chest pain, which resulted in violation of her bodily integrity, he took to appropriate money in the amount of 3.00 zlotys to the loss of Tadeusz Parkita".

11. As the Respondent's Notice compellingly points out, there are in this case no "concrete reasons" put forward, such as were the subject of the illustrative authorities on which reliance is placed. Eason was a case where there was an allegation of historic mortgage fraud in circumstances where the appellant's lawyer no longer had access to notes of an unrecorded interview. Kakis was a case where the appellant's defence was one of alibi and the appellant's independent witness was, through passage of time, no longer available.

12. Even taking the most favourable view to the Appellant of the way in which "culpability" can feature in the balance, there is in the circumstances of this case – in my judgment – no realistic prospect that this Court at a substantive hearing would find that there has been any material error of law by the District Judge. In my judgment, beyond argument, this is not a case in which a finding of "culpability" could have made a difference to the evaluative exercise of considering whether extradition would be rendered unjust by the passage of time, having regard to all the features and circumstances of the case. There is a risk of fine and technical distinctions encroaching this area in what in which what is needed is "an overall judgment on the merits" which is "unshackled by rules with too sharp edged edges", as the Court put it in La Torre. The District Judge in this case was satisfied that it was not necessary to resolve the question of "culpability", because it could not make a difference to the overall evaluation. In my judgment, beyond argument, that conclusion in substance is unassailable. But even if I posit this Court considering afresh at a substantive hearing the evaluative question of injustice through passage of time, and even if I posit the Court accepting that the description of "culpability" is apt for either or both of the periods on which reliance is placed, I can still see no realistic prospect that this Court would conclude that it is "unjust" through passage of time to extradite in the circumstances of the present case.

13. So far as concerns the features put forward on the Appellant's behalf as indicating that extradition would be unjust through passage of time, in my judgment – and beyond reasonable argument – the District Judge was entitled to characterise the analysis and suggested assessment based on an 'injustice' through passage of time as being "pure speculation" and that "no cogent evidence [had] been provided to the effect that injustice is actually likely to arise". In my judgment, there was no arguable error of approach in the District Judge having regard to the ways in which courts deal with historic criminal cases (the example given was historic sexual abuse) and the approach taken to hearsay evidence where a witness is no longer able to attend the trial. It was also relevant for the District Judge to have in mind the undisplaced presumption that in these sorts of regard the fair trial guarantee stood undisturbed. That was not to fall in the to the trap of treating justice and passage of time as synonymous with the question whether a fair trial was still possible. For the reasons I

have explained, there was no material error of approach in the District Judge concluding that it was not necessary to make a finding on whether delay was "culpable". In my judgment, beyond argument, the characterisation of delay as "culpable" could not – as I have explained – have made a material difference and would not do so on a substantive appeal, in this case.

14. In refusing permission to appeal on the papers Lane J said this: "The Appellant decided not to adduce evidence to the District Judge. Against this background, it does not lie with the appellant to complain that the district judge should have made findings about the reasons for the delay in his case. In any event, the District Judge was entitled to conclude that this was not a borderline case where establishing culpability might make a different in the section 14 exercise. There was no evidence that the passage of time and seen any relevant changes in the appellant's private and family life… The only issue raised by the appellant was that the passage of time risked his entitlement to a fair trial in Poland. The District Judge however, gave cogent reasons… why he rejected that submission.… Furthermore, as the Respondent's Notice points out, the speculation identified by the district judge in the appellant submission is heightened by the fact that the District Judge was told nothing about the Appellant's proposed defence or whether or even whether he would contest the charges". Lane J's conclusion was that the section 14 passage of time ground of appeal was not reasonably arguable. As is obvious, I have focused on the points put forward to me in writing and orally at this renewal hearing, and I have articulated in my own reasons why in my judgment the ground is not properly arguable. But having done so, I have come to the same conclusion as did Lane J on the papers. Permission to appeal on the section 14 injustice ground is refused.

14.4.21