Neutral Citation Number: [2023] EWHC 556 (Admin)

Case No: CO/3531/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL
14th March 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

VICTORIA STUMBRE	**Appellant**
- and -	
PROSECUTOR GENERAL'S OFFICE (LITHUANIA)	**Respondent**
(No.2)	

- -
- -

Graeme Hall (instructed by Taylor Rose) for the **Appellant**
The **Respondent** did not appear and was not represented

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Hearing date: 14.3.23

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 and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. The Appellant is aged 35 and wanted for extradition to Lithuania. She was previously surrendered to Lithuania on 30 November 2020. That was in conjunction with an accusation European Arrest Warrant issued in June 2018 in relation to 21 alleged offences of forgery or fraud, alleged to have been committed between February 2017 and March 2018. Her Article 8 appeal culminated in an adverse judgment of Supperstone J on 6 November 2019 [2019] EWHC 2991 (Admin), which sets out the background. She is now back before this Court, wanted in conjunction with an accusation Extradition Arrest Warrant issued on 6 August 2021 and certified on 30 October 2021, on which she was arrested on 19 November 2021. She is on conditional bail. The Extradition Arrest Warrant relates to now 36 alleged offences of swindling, attempted swindling and forgery between 31 January 2017 on 23 December 2018. The aggregate amount of the alleged offending is some €254,000. As I will explain extradition has been discharged in relation to 3 of the offences. Extradition was ordered by District Judge Bristow ("the Judge") on 21 September 2022 for the reasons set out in a 107-paragraph judgment ("the Judgment"). There had been an oral hearing on 7 September 2022 at which the Appellant and an independent clinical psychologist Dr Helen Wain gave oral evidence. Dr Wain had provided a 65-page report dated 23 February 2022. Permission to appeal to this Court was refused on the papers by Sir Ross Cranston on 30 January 2023. It is appropriate in an anxious case such as this one that I should look at all matters advanced afresh. Two issues were maintained namely section 19B Forum and Article 8 ECHR disproportionate interference with the right to respect for private and family life.

Article 3

2. At the beginning of this hearing Mr Hall told me candidly that, prompted by conversation with another barrister outside Court, he now wished to raise with me a new Article 3 prison conditions issue. He began to tell me about a CPT Report dated 23 February 2023, relating to prison conditions. He began to describe what that Report says about the current position relating to past recommendations. He accepted that those recommendations are ones which were made in the past. Ultimately, he told me that he would need time to consider that issue and that, whatever I decide on Article 8 and section 19B, he would be asking me to "make directions" to allow him time to put forward Amended Grounds of Appeal to advance an Article 3 argument. Article 3 prison conditions issues are of course matters which attract very anxious concern. But this is a Report now several weeks old. Mr Hall is unable to point to any Lithuanian extradition case in which there has been any traction from that 'new development'. As I have explained, Mr Hall recognised that that is a Report referring to recommendations made in years past and describing the current position as to whether or not those recommendations have been implemented. It is, in my judgment, obvious that if the failure to implement past recommendations meant that there was an extant Article 3 prison conditions problem barring extradition, that would itself have been the position in the past, and would continue to be the position. I am not prepared, in all the circumstances, to make any direction in response to the new Article 3 argument, and I decline to do so.

The Children and the Previous Proceedings

3. The Appellant has four children. They and their Article 8 rights are central, in my judgment, to this extradition case. The oldest daughter was born in January 2004 and is now 19. Middle sons were born in September 2008 and November 2013 and are now aged 14 and 9. These three children all featured in the first extradition case including in the November 2019 judgment of Supperstone J. So did the Appellant's mother – the children's maternal grandmother – who is now aged 61. The fourth and youngest child is a son born subsequently, in February 2020, who is now aged three. When DJ Baraitser ordered the first extradition on 8 February 2019: there was evidence that the grandmother would move to London to look after the children; and it had been assessed that she was able to care for them. By the time of Supperstone J's judgment, fresh evidence from the grandmother stated that she would not be able to care for the children by reasons of health, income or her own private and family life. Supperstone J was unpersuaded, given the absence of any satisfactory explanation for the grandmother's change of tune. He also found that, if necessary, the children could accompany the Appellant to Lithuania. An application to reopen the appeal on further evidence was dismissed subsequently by Johnson J.

Section 19B (Forum)

4. Section 19B (Forum) was an issue which had been considered and rejected by DJ Baraitser but which was not advanced on the appeal to Supperstone J. It was considered and rejected by the Judge and is advanced on this proposed appeal. The Judge, as I have mentioned, discharged the Extradition Arrest Warrant in relation to 3 of the 36 offences, which it was common ground did not constitute extradition offences under the statutory scheme. There were then 8 of the 33 remaining offences which were controversial so far as concerned section 19B's first-stage test (s.19B(2)(a)): namely whether a "substantial measure of D's relevant activity was performed the UK. In respect of the other 25 offences it was common ground that that first-stage test was satisfied. Mr Hall submits that it is reasonably arguable that the Judge was wrong in his application of the first-stage test. Mr Hall submits that the Judge's assessment was inconsistent with the authorities on section 19B, as well as being an unexplained departure from the judgment of DJ Baraitser. He says that the Judge should have looked at the overall conspiracy, not in an atomistic way at each alleged index offence, but at the offending picture as a whole. He therefore relies on the fact that there was such a large number of other offences where it was recognised that the first-stage test was satisfied. At my request Mr Hall took me to a prime example of two allegations: one judged to fall one side of the line; and the other judged to fall on the other side of that line. From those, it is clear that of the three features emphasised by the Judge – namely location of property, location of the complainant, and location of the deprivation – it is the first of those three (the location of property) which explains why the Judge was drawing the distinction that he did. It is where the Judge could identify the property in question as being in Lithuania – as well as the other features including the deprivation of money (in Euros) and the location of a Lithuanian complainant – that the Judge found the first-stage test was not satisfied. Mr Hall says that arguably that was wrong.

5. But that complaint can go can go nowhere, unless Mr Hall can also show that the Judge was reasonably arguably wrong at the section 19B second-stage (s.19B(2)(b)). The Judge specifically addressed the second-stage position in any event: "if I am

wrong". That description can only have applied to the offences that the Judge had found not to satisfy the first-stage test. In my judgment, for entirely convincing reasons – despite the Appellant's connection with the UK (s.19B(3)(g)), there being no prosecutorial statement of belief in either direction (s.19B(3)(c)) and that the evidence could be available in either jurisdiction (s.19B(3)(d)) – the "interests of justice" favoured extradition and Lithuania as forum. That was by reference to the remaining statutory factors: the place of loss and harm (s.19B(3)(a)); the interests of the victims (s.19B(3)(b)); the significant delay which would be injected if a trial were to take place in the UK (s.19B(3)(e)); and the interests of all connected prosecutions taking place within the same jurisdiction (s.19B(3)(f)). I do not accept the Judge erred in his approach or reached the wrong outcome on forum, even arguably.

6. Mr Hall emphasises that the Appellant has admitted the offences. On that basis he posits as a scenario that there would need to be no trial at all and nobody would have to give any evidence. He also says the availability of the evidence in the UK was wrongly treated by the judge as a neutral factor when it should have weighed in favour of the UK as a forum. He also says the Judge arguably went wrong in looking at the question of "desirability and practicability" and the jurisdictions where witnesses, co-defendants and suspects are located, and the "practicability" of evidence being given (s.19B(3)(f)(i) and (ii)). He submits that, on the authorities, "practicability" features as an 'on/off switch' not a 'question of degree' engaging preferability. In my judgment, none of those points are capable – even arguably – of rendering the Judge's very clear reasoned outcome on section 19B wrong. The Judge cited on this part of the case the authority of Wyatt v USA [2019] EWHC 2978 (Admin) at §15, which Mr Hall says was a passage dealing with victims interests in the context of trial and the giving of evidence. But in my judgment that is a passage, on its face, which is emphasising that the interests of victims "go beyond" a "narrow compass" of being a witness and giving evidence at a trial. Mr Hall cited USA v Osborne [2022] EWHC 35 (Admin) at §85 in support of his contention that "practicability" is an on/off switch and cannot engage questions of degree. In my judgment that passage does not, even arguably, support the contention that there can be no question of degree. It would be very odd if questions of practicability were, always and invariably, a binary question. Particularly given that this is put alongside the other component: "desirability". Stepping back from all of the points, in my judgment beyond argument, the outcome was the right one and there is no realistic prospect of this Court on an appeal concluding to the contrary.

Article 8: Mr Hall's Key Points

7. The starting point is that the Judge identified the relevant legal principles from the key authorities and there is, in my judgment, no arguable misdirection in law in the discussion of those authorities and those principles. Mr Hall advances five key points, of which the fifth (5) is the "overall" picture. The others are as follows. (1) He says that the Judge failed to incorporate into the Article 8 balance the exceptionally serious harm that he had earlier accepted. (2) He says that the Judge's reasoning diminished the children's best interests, inconsistently with the guidance in HH [2012] UKSC 25 [2013] 1 AC 338 at §§15 and 78. (3) He says that the Judge, having earlier identified the possibility of a prosecution in the UK (in considering s.19B(3)(d)), failed then to include that within the article 8 balance, as HH §83 makes clear he ought to have done. (4) He says that the Judge reached an unreasonable finding of fact in rejecting

the contention that the Appellant's fugitivity was solely for the reason of returning to her children in circumstances of grave concern regarding their care by the grandmother, and that the Judge was accordingly wrong to identify fugitivity being in part for the purpose of avoiding the Lithuanian criminal process.

The Current Position of the Children

8. The Article 8 ECHR considerations in this case are anxious ones. The Judge recognised that. So do I. The picture is now materially different from what it was in February 2019 when DJ Baraitser ordered extradition and November 2019 when Supperstone J dismissed the appeal. There are now the 33 alleged offences, rather than 21. But it is the changed position in relation to the children which causes such anxious concern. The Judge found as a fact that the grandmother is "unwilling, unable and unsuitable" to look after the children, though she could be expected to keep in contact with them. The Judge found that extradition would mean the two middle boys being taken into local authority care, and probably also the 3 year old being taken into care (though it was possible that the youngest son's father might take up his care). The Judge also found that it is likely, in being taken into foster care, that the siblings would be separated from each other. The Judge also found as a further fact that the children could not reasonably be expected to accompany the Appellant to Lithuania.

9. The anxious and evidenced concerns about the three children were undoubtedly at the forefront of the Judge's analysis. In particular, the Judge specifically accepted the following:

   i) in relation to the now 14 year old boy, that Dr Wain's clinical opinion which the Judge accepted was that his anxiety would significantly increase if the appellant were extradited; and that if separated from his siblings he would suffer difficulties of a severe intensity; that these would be more pronounced in the short term but were likely to be lifelong.

   ii) in relation to the now 9 year old boy that Dr Wain's clinical opinion which the Judge accepted was that he would suffer severe consequences and possibly exceptionally severe consequences to his emotional, social, relational and behavioural function if the Appellant were extradited; that moreover foster placements may breakdown; and that the consequences would be lifelong.

   iii) in relation to the now 3 year old that Dr Wain's clinical opinion, which the Judge accepted, was that his anxiety would increase if the appellant were extradited; the harm of extradition would be exceptionally severe due to his age and developmental needs; and that this would be the case in the short, medium and long term.

Incorporating the Harm

10. Mr Hall's first key point (1) criticises the Judge for later losing sight of the serious nature of those impacts. As Mr Hall put it, the Judge failed to incorporate all of that "squarely" within the Article 8 balancing exercise. Mr Hall says the references that the Judge made, within that balancing exercise, were "fleeting" and "oblique". But the Judge repeatedly referred, within the Article 8 assessment, to the children "suffering the consequences described by Dr Wain", and "the considerable consequences

identified by Dr Wain". The Judge's Judgment needs to be read as a whole and the Judge plainly had and kept well in mind what those consequences were, having specifically set them out and having specifically accepted them. It was specifically within the Judge's Article 8 'balance sheet', when listing the factors militating against extradition, that the Judge spoke of the children's best interests and the children "suffering the consequences described by Dr Wain". Mr Hall rightly accepts that, had the Judge at that point repeated what he meant by that and what he said earlier in the Judgment, this non-incorporation point (1) would have nothing in it. In my judgment, that is exactly what the Judge was doing. He was not required to repeat what he meant and had said so clearly earlier in the judgment.

Diminishing the Best Interests?

11. I am more troubled by the next key point (2). Mr Hall submits that, at least arguably, the Judge diminished the best interests of the children when – having identified the children's best interests as a factor militating against extradition – the Judge said this:

> ***The factors I have identified which tend to militate against extradition also carry weight. The weight to be attached to them is, in my judgment, diminished for a number reasons.***

That is a striking expression. Mr Hall is able to point to HH §15 ("the best interests of the child … may be outweighed by countervailing factors, but … [t]he importance of the child's best interests is not to be devalued by something for which she is in no way responsible …") and §78 (speaking of features which "would have added to the weight on one side of the scales, while in no way diminishing the weight to be given to the child's interests on the other"). The Judge went on in the next passage to refer again to the children's best interests and the considerable consequences identified by Dr Wain. He then listed a number of features about being cared within local authority care, medical care and social services support, and the grandmother's watchful eye. But all those features were already aspects built-in to the evaluation that had led to the assessed very serious consequences and implications. In my judgment, it is striking to list them having made an observation about "reasons" why weight was "diminished". Beyond that, certainly the Judge had to weigh in the balance features that tended to support extradition. But that would be a question of attributing weight to those matters, not a "diminished" weight given to what was in the balance against extradition. I think on this key point Mr Hall has been able to identify an arguable basis for an appeal, on which it could be appropriate for this Court to re-conduct the Article 8 balancing exercise.

The Other Key Points

12. In those circumstances, Mr Hall may also be able to elicit some traction from his key point (3) – the fact that the UK prosecution point referenced in HH §83 ("prosecution here") did not feature explicitly in the Article 8 evaluation.

13. As to key point (4) – why the Appellant returned to the UK – I make clear that I have misgivings about whether it is likely that this Court would reopen the Judge's characterisation of her fugitivity and what her reason or reasons were; particularly in circumstances where the Judge had heard oral evidence from her, together with cross-examination.

14. So far as key point (5) – the overall picture – is concerned, I make clear that I do accept, in the circumstances, that the threshold of reasonable arguability of the appeal has been crossed. In the end, if I step back from this case – and when I remember that it is not the Appellant's Article 8 rights that are central here but those of the children – I am satisfied that this case warrants consideration at a substantive hearing. At that hearing, the Court will not be considering arguability. It is, in my judgment, in the interests of justice and the public interest in a case as anxious as the present one that a substantive hearing should take place.

15. I have explained my reasons in some detail, notwithstanding that I am giving permission to appeal. That is partly because I do not consider section 19B to be reasonably arguable and I am refusing permission to appeal on that. It is also partly because there is an aspect – key point (1) – of the Article 8 issue which is not, in my judgment, reasonably arguable.

End-note

16. There is one aspect of the case to which I wish to return, just to explain the circumstances, and why the Judge – understandably – found them so striking. Having been extradited in November 2020 to Lithuania to face trial (for the 21 alleged index offences), the Appellant had been conditionally released in Lithuania in November 2020. She then sought, but was refused, permission to return to the UK in December 2020. She sought to complain about that refusal, which complaint was dismissed in January 2021. She then sought an annulment, which was also refused, on 25 January 2021. Then, in order to return to the UK she deceived the authorities in obtaining a passport. The Judge identified those circumstances as constituting a factor in her case that "adds significant weight to the public interest in extradition". The Judge said she had totally disobeyed the bail conditions imposed on her in Lithuania to prevent her leaving that jurisdiction; and she had then used deceit at the Migration Department to obtain a passport to facilitate her departure. I have described as understandable that the Judge should have found those circumstances to be striking. They will be no doubt an important part of the picture when this Court comes to evaluate the Article 8 issue, alongside focusing on the rights and interests of the children, who the Appellant says she was returning to protect.

17. All that I have decided is that this case crosses the arguability threshold and warrants a substantive hearing. That ought not to be misunderstood as giving rise to false hope. It will be a matter for this Court at the substantive hearing to decide whether or not extradition in this case would be a disproportionate interference with the children's Article 8 rights in all the circumstances.

14.3.23