Neutral Citation Number: [2021] EWHC 3428 (Admin)

Case No: CO/1315/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

14th December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

ADRIAN LUCKI	**Appellant**
- and -	
REGIONAL COURT IN BYDGOSCZ (POLAND)	**Respondent**

- -
- -

Ania Grudzinska (instructed by Hollingsworth Edwards Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 14/12/21

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.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The Appellant is aged 38 and is wanted for extradition to Poland. That is in conjunction with a mixed accusation and conviction European Arrest Warrant ("EAW") issued on 15 September 2020 and certified on 26 December 2020, on which latter date he was arrested. Extradition was ordered by DJ Griffiths ("the Judge") on 6 April 2021 after an oral hearing on 12 March 2021 at which the Appellant gave evidence. The application for permission to appeal was considered on the papers by Eady J who made an order on 9 September 2021.

Stayed grounds

2. Eady J stayed two grounds of appeal, relating to Article 3 ECHR (prison conditions) and section 2 of the Extradition Act 2003 (Wozniak/Article 6), pending their resolution in lead cases, and with directions. On 9 December 2021 the Appellant's representatives notified the Court that those grounds of appeal had been dropped in light of the resolution of those lead cases. I will formally refuse permission to appeal in relation to those grounds, for the avoidance of doubt. The position in relation to the stay has had the consequence that the Appellant had until very recently what I have elsewhere described as an 'freestanding durable basis' to be in the United Kingdom, something which can be relevant when considering qualifying remand and 'projecting forward': see Molik v Poland [2020] EWHC 2836 (Admin) at §30.

Renewed grounds

3. Eady J refused permission to appeal on Article 8 ECHR (private and family life) and section 21A(1)(b) (proportionality). Those grounds have been renewed before me. Today's hearing was an in-person hearing at the Royal Courts of Justice.

The conviction aspect

4. The conviction aspect of the EAW has now 'fallen away'. At the time when the EAW was issued there were 4 months and 12 days to serve in relation to that aspect, out of an 8-month custodial sentence, originally suspended for five years. The Appellant had been present in court in Poland on 3 April 2012 when he was convicted on counts of threatening to kill five different individuals during 2011 aged 27 and 28. The suspended sentence was activated on 20 December 2013, the Appellant having breached notification requirements which were conditions of the suspension. He had served qualifying remand of nearly 4 months in Poland to 12 January 2012. He came to the United Kingdom in April 2012, aware of the four months to serve, and necessarily putting himself in breach of his suspended sentence conditions. The Judge unimpeachably found that he came here as a fugitive in relation to the conviction EAW matters. At the time of the hearing before the Judge on 12 March 2021 some three months had been served . The Appellant had been on qualifying remand in this country since 26 December 2020. The bright "line" (Molik at §17) would be crossed on 8 May 2021, as in due course it was. By the time of Eady J's decision on the papers on 9 September 2021 only extradition on the accusation aspect of the EAW remained in play. It may be that the description I have just given will come to be revisited in this case but,

for the purposes of this permission hearing, I am proceeding on the basis of what I have just described. I am aware of nothing that serves to undermine its accuracy.

The accusation aspect

5. The accusation aspect of the EAW relates to an alleged offence of fraud committed on 25 February 2011 (aged 27), involving obtaining a bank loan worth the equivalent of £6,500, by fraud, using false documents. The Appellant protests his innocence on the basis that there has been a mistaken identity. Ms Grudzinska points out that in relation to that matter the Appellant is to be treated as having served seven months and six days of qualifying remand as at today. That is on the basis that the qualifying remand in relation to this (accusation) aspect of the EAW started on 8 May 2021 when the sentence in relation to the other (conviction) aspect of the EAW was treated as having been served.

Changing circumstances

6. The Judge grappled with the statutorily-prescribed "specified matters" (section 21A(3)) in relation to section 21A(1)(b) proportionality. The position before her was that the conviction aspect of the EAW was still in play, the Appellant was still wanted for extradition on other matters, and no period of qualifying remand had yet (at 6.4.21) been served in relation to the accusation matter, nor could it commence being served for another month (8.5.21). The circumstances were different at the time of Eady J's decision three months ago (9.9.21). They are different again today (14.12.21). I am satisfied, for the purposes of considering permission to appeal, that it is appropriate to posit that this Court would be considering the position as it now is. I emphasise that I am not "projecting forward" to a substantive hearing at which the Appellant will have served further qualifying remand (on the basis that he is not released on bail). It would not be appropriate to do that for the reasons I explained in Molik (at §19), there being no 'freestanding durable basis' for him to be here (Molik at §30). The correct approach is to consider the position as it is at today: the time of addressing permission to appeal. It is at least reasonably arguable that, if this Court were dealing with a substantive appeal today, it ought to be looking at the qualifying remand picture as at today.

Two domestic sources

7. Two sources from our domestic legal regime come into play in this case in the application of section 21A(1)(b) proportionality. One is consideration of the "Table" set out in the Criminal Procedure Rules Practice Directions Part 50 on extradition, together with the "exceptional circumstances" paragraph in that Practice Direction. The other is the Sentencing Guideline (Fraud). The Judge in the present case considered both of those sources and put them in their correct place in the sequence of the legal analysis.

Practice Direction

8. In applying the contents of the Practice Direction, the Judge accepted that the example "obtaining a bank loan using forged or falsified document" fell within the listed categories of indicative non-seriousness which raise the question of whether there were "exceptional circumstances". The Judge addressed that question by reference to two features. One was the Appellant's "previous offending history" comprising a theft

offence Poland in August 2007 when the Appellant was aged 24 and for which, according to the materials, received a custodial sentence. The other was that "extradition was being sought in relation to other offences". The latter feature was the remaining sentence on the threats to kill. It is reasonably arguable, in my judgment, that this Court considering this aspect now, would recognise that – the conviction element of the EAW having fallen away through the service of qualifying remand – one of the features relied on by the Judge is no longer present; and that this can matter. It is reasonably arguable that the Court would be persuaded to revisit whether there are "exceptional circumstances" in the context of the previous offending history, which is a single offence of theft, three years previously, albeit with a custodial sentence. I am satisfied that the Appellant should have the opportunity to invite the Court, on this appeal, to revisit that question. I make clear that I have reached that conclusion, in particular, in the light of the position that arises in relation to the other domestic instrument that is in play (the Sentencing Guidelines), to which I turn.

Sentencing Guideline

9. The Judge faithfully addressed the domestic Sentencing Guideline (Fraud). I accept, for the purposes of today for the purposes not simply of identifying whether this offence would be treated as triggering "custody" in this jurisdiction; but also considering the 'likely length' of that custody. Ms Grudzinska did not drill down, to a level of detail, in her submissions for today the precise nature of the principle which triggers consideration of a domestic Sentencing Guideline. She showed me Kalinauskas v Lithuania [2020] EWHC 191 (Admin), paragraph 13 of which appears to reflect the District Judge in that case looking not just at the question of custody, but at likely length. Paragraphs 16 and 18 of that judgment are also supportive of the fact that this Court was looking at likely length.

10. The domestic Sentencing Guideline is of course only a proxy and one used in circumstances where the extradition court does not have clarity from the requesting state. In the Judge's application of the relevant Sentencing Guideline she put the case within 'harm category 4' and 'culpability category B'. That was because the bracket, so far as financial scale is concerned, was between the £5,000 and £20,000 referred to in the Guideline. She recognised that the starting point (26 weeks) is based on £12,500. In this case it is just over half of that: £6,500 equivalent. I am not impressed by the point made in writing that this should have been treated as "an opportunistic one-off offence" with "very little or no planning". That is because, as the Judge explained this was a fraud using two separate forged documents to obtain a bank loan which indicates a degree of planning. That point has not been emphasised in oral submissions today, and in my judgment rightly so. There is also the previous (theft) conviction. But the point that is fairly made by Ms Grudzinska *in the current circumstances* is that, positing as a proxy a length of sentence by reference to that Guideline, given the 26 weeks "starting point", it is arguable that this Court would now reach the conclusion (seen in the Kalinauskas case at paragraphs 20 and 21) that, if extradited the Appellant can be taken to face the prospect of 'immediate release'. I am not deciding that that is the position as at today. But I am persuaded that it is reasonably arguable. This point is in addition to the point which I have already discussed about the application of the Practice Direction.

Permission to appeal

11. I am giving permission to appeal in this case and I am not going to restrict it. I have explained the reasons that have led to my conclusion on reasonable arguability. I do make clear that I would not have granted permission if the only issue were "less coercive measures" (s.21A(3)(c)) and whether the response on 8 March 2021 to the Appellant's s.21B request, for which the District Judge specifically deferred the giving of judgment, was unreasonable.

Article 8 ECHR

12. I am also going to grant permission on Article 8 grounds. There is a substantial overlap between the features which can infuse an Article 8 analysis (for section 21A(1)(a)) and those which are relevant to section 21A(1)(b) with (2) and (3). It is, in my judgment, reasonably arguable that – even if this case were not to succeed by reference to section 21A(1)(b) – other features of the case could be brought in and put alongside the current circumstances, including those which I have addressed in this judgment, to support the conclusion that the outcome arrived at by the District Judge is now, *in the circumstances as they now are*, wrong and that extradition is now incompatible with Article 8.

Endnotes

13. I emphasise that my decision today is very much the consequence of events which have occurred subsequent to the hearing in March of this year before the Judge. But for the reasons that I have given, I will grant permission to appeal on both grounds that are advanced. I will identify with Ms Grudzinska's assistance any appropriate directions.

Order

14. Ms Grudzinska has confirmed that she will submit to me a draft order, for my adjustment and approval, which includes appropriate directions for the substantive hearing of this appeal. Provisionally, I agree with her that the time estimate for the substantive appeal should be two hours.

14.12.21