Neutral Citation Number: [2020] EWHC 1459 (Admin)

Case No: CO/4299/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

ROBERT WOZNIAK	**Appellant**
- and -	
DISTRICT COURT IN GNIEZNO, POLAND	**Respondent**

- -
- -

EMILIE POTTLE for the **appellant**
ALEXANDER DOS SANTOS for the **respondent**

Hearing date: 3 June 2020

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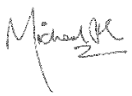
Approved Judgment

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

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be *tbc* at 10am.

MR JUSTICE FORDHAM :

Introduction

1. I heard this renewed application for permission to appeal on Wednesday 3 June 2020, by way of Skype conference hearing. It and its start-time were published in the cause list, as were email contact details usable by anyone who wished to observe the hearing. I heard oral submissions just as I would in the court room. I was satisfied that this constituted a hearing in open court, that the open justice principle was secured, that no party was prejudiced, and that insofar as there was any restriction on any right or interest it was justified as necessary and proportionate. I announced at the end of the hearing that I would be granting permission to appeal on the 'Judicial Authority' issue, but refusing permission to appeal on the Article 8 issue, for reasons which would follow in a written judgment.

The 'Judicial Authority' Issue

2. On this issue I grant permission to appeal, with (a) permission to amend the grounds of appeal (b) the Application to Amend Grounds of Appeal document dated 26 May 2020 standing as the Grounds of Appeal (c) permission to adduce the additional evidence referred to at paragraph 41 of that document. Whether further and updating material, as to the latest legislative developments in Poland and in the EU, may be relied on at the substantive hearing of this appeal will be a matter for the court dealing with that hearing. I direct that this case be linked to Chlabicz v Regional Court in Bialystok Poland CO/4976/2019, in which permission to appeal was granted by Lewis J on 3 June 2020, and that the substantive hearing of the appeal in this case should be heard by the same Court as deals with that case. The consequence is that the court, revisiting the first issue described in paragraph 3 of the judgment in Lis (No.1) [2018] EWHC 2848 (Admin) will at the same time be revisiting the second issue described in that same paragraph. The reasons why I have taken this course are as follows.

3. I start with the applications to amend the grounds of appeal and adduce the additional evidence. I decided it was appropriate to consider the matter being advanced as to its substance. Having done so, and having concluded that the matter in substance discloses a reasonably arguable ground of appeal, I have decided to allow the applications to amend and reduce the further material. The issue is an important one. The respondent had a full and fair opportunity to consider and respond. It is in the interests of justice, and the public interest, that the appellant should not be shut out. The Venice Commission Joint Opinion of 16 January 2020 (Venice Commission Report) is the key document relied on and could have been raised earlier. But it could not have been relied on before the district judge (the judgment was dated 30 October 2019), so the appeal court is necessarily in the realms of fresh material and a new argument. It could have been raised before permission to appeal was considered on the papers by Thornton J on 12 March 2020, and the appellant lost the chance to have her grant permission on it, and I have lost the advantage of any reasoning had she refused it. None of that, however, is a basis for shutting the point out, if there is something in it.

4. The issue, as I see it, comes to this. The question is whether the latest legislative developments in Poland (December 2019/January 2020) compromise the position of Polish courts so far as the fundamental guarantees of independence and impartiality

(the "2iGuarantees") are concerned, with the vitiating consequence of removing the necessary continuity of a 'Judicial Authority' (Extradition Act 2003 section 2) for the lawful maintenance of the pursuit of an EAW, in a conviction warrant case, where the legislative changes postdate the issuing of the EAW, and where there has been no determination by the Council pursuant to TEU Article 7. That resolves, for present purposes, into two main questions. (1) Whether a TEU Article 7 Council determination is a legal prerequisite before there can be any such vitiating consequence. (2) If not, whether the latest legislative developments can support the conclusion that there is such a vitiating consequence. I consider it reasonably arguable that the answers are (1) no and (2) yes.

5. The 2iGuarantees are familiar aspects of the rule of law, linked to effective judicial protection and the fundamental right to a fair trial: see the non-extradition case of AK v Sad Najwyzsky (Case C-585/18) [2020] 2 CMLR 10 (CJEU Grand Chamber 19 November 2019) paragraphs 120-125. AK was an equal treatment case involving the Polish labour courts, where the Luxembourg Grand Chamber treated the 2iGuarantees as parameters for necessary application by an appropriate Polish court with jurisdiction to do so: paragraphs 166-168 and 171. One concern articulated about the latest legislative developments in Poland is that they have a 'nullifying effect' on this: see the Venice Commission Report at paragraph 31 (discussing the "nullifying effect" of legislative provisions which "eliminate the competence of the Polish courts to examine whether another court decision was issued by a person appointed as a judge in compliance with the Constitution, European law and other international legal standards"), paragraph 36 ("These provisions, taken together, significantly curtail the possibility to examine the question of institutional independence of Polish courts by those courts themselves"), paragraph 59 ("Polish courts will be effectively prevented from examining whether other courts within the country are 'independent and impartial' under the European rules). This is an aspect of what is described (paragraph 60) as follows: "The amendments of December 2019… put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments".

6. A key concern articulated in relation to the latest legislative developments in Poland concerns possible disciplinary and penalising consequences against judges, for the content of what they say in the course of their judicial acts, as courts, if what they say constitutes "acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary" or which constitute "an infringement of the dignity of the office". The Venice Commission Report say this "threatens the principle of legality" because these provisions "invite very subjective interpretations and could easily be abused to interfere improperly in judicial roles" (paragraph 44). This is a concern about "disciplinary responsibility of judges for judicial acts" (paragraph 25). It is, on the face of it, a very serious concern. There are other concerns raised in the Report (summarised at paragraphs 59–60), relating to the 5 key features of the latest legislative developments (paragraph 19). Ms Pottle relies on them all, and on their cumulative effect. I would not have granted permission to appeal in this case, but for the concern relating to disciplinary implications regarding the content of judicial acts. I am not going to shut out reliance on the other points, and their effect in combination. I can see that the nullifying effect problem is a particularly important issue, and its implications for extradition seem at least appropriate for consideration. A disciplined focus on what really matters will be necessary.

7. The 2iGuarantees can be relevant in extradition proceedings in several ways. One way concerns the fair trial guarantee arising in the case of an accusation warrant, where the individual is being extradited to face a criminal trial. In cases of that kind, ECHR Article 6 considerations can be raised. The law adopts the familiar 2-stage approach, read across from the case-law about Article 3 and prison conditions: see LM Case C-216/18 (CJEU Grand Chamber 25 July 2018) paragraphs 59-60. That was the two-stage approach applied by the Divisional Court in Lis (No.1) at paragraph 71 (where the stage-1 threshold was crossed: "there is sufficient concern about the independence of the Polish judiciary to mean that these applicants and others in a similar position should have the opportunity to advance reasons why they might have an exceptional case requiring individual 'specific and precise assessment' to see whether there are substantial grounds for believing they individually might run a real risk of a breach of their fundamental rights to a fair trial"); and then in Lis (No.2) [2019] EWHC 674 (Admin) (where the stage-2 exercise was undertaken and the individual appellants' challenges rejected). This Article 6 ECHR fair trial topic is, as I understand it, to be revisited in Chlabicz CO/4976/2019, pursuant to the grant of permission to appeal by Lewis J, in the light of the concern relating to disciplinary implications and judicial acts. It is the first issue which was described in Lis (No.1) at paragraph 3 ("that those changes have so damaged judicial independence that the criminal proceedings in Poland to which they would return if extradited will entail a real risk of breaches of the right to a fair trial under Article 6 of the European Convention on Human Rights"). This is also the issue with which a Karlsruhe Court was concerned in a decision dated 17 February 2020, and with which an Amsterdam court was concerned in a decision dated 26 March 2020. But this is not the issue in the present case. The EAW in this case is not an accusation warrant. The appellant in this case does not face a criminal trial. I do not therefore accept that the Karslruhe or Amsterdam Court decisions directly engage with the issue arising in the present case, but I will not shut them out for what they are worth.

8. The very fact that systemic rule of law issues, relating to 2iGuarantees and the Polish courts, are viewed through the prism of Article 6 and the 2-stage approach (see LM) is an obvious impediment to the argument that they have a radical logically-prior vitiating consequence. It cannot be the case that Courts, in recognising that viable Article 6 issues are capable of arising in relation to accusation warrants, are at the same time describing circumstances which undermine the necessary continuity of a 'judicial authority' so as not to vitiate the entire ongoing pursuit of an EAW, whether in an accusation or a conviction warrant case. That is why the Divisional Court in Lis (No.1) at paragraph 57 rejected the reliance on the systemic rule of law concerns arising out of LM as being sufficient to undermine the continuity of a 'Judicial Authority'. To borrow those same concerns, which could satisfy the stage-1 test for Article 6 and fair trial rights in accusation warrant cases, and read them across to support an adverse conclusion as to 'judicial authority' in all EAW cases: "would be to subvert the central thrust of the decision of the Luxembourg Court [in LM]. It is inconceivable that it would have reached the conclusions it did, if it were already established that the Polish courts lacked independence to the degree which require them no longer to be treated as constituting judicial authorities within the scheme" (paragraph 57). That is compelling.

9. It does not follow, however, that no question can arise in relation to rule of law and 2iGuarantees, with a consequence as to whether there was (and continues to be) a

'judicial authority'. On this aspect, there is a relevant line of authorities which includes Kovalkovas (Case C-477/16PPU) [2017] 4 WLR 10 (CJEU 10 November 2016) and OG (Case C-508/18) (CJEU Grand Chamber 27 May 2019). Kovalkovas was about an EAW issued by the Lithuanian Ministry of Justice, and organ of the executive not constituting a 'Judicial Authority'. OG was about an EAW issued by German prosecutors not constituting a 'judicial authority' where "exposed to the risk of being influenced by the executive in their decision" (paragraphs 88 and 90).

10. In OG, the Grand Chamber explained the significance of the decision to issue the EAW, that decision needing to be one taken by an authority "capable of exercising its responsibilities objectively, taking into account all incriminating and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive" (paragraph 73, applying Kovalkovas paragraph 42). That description of the decision to issue the warrant does not assist the appellant in the present case. The decision to issue the EAW was taken by the respondent court before the latest legislative developments relied on. The same point arose in Lis (No.1): see paragraphs 52 and 53 ("This argument would not avail any of these applicants since their warrants were all issued before the material date").

11. Issuing the EAW is not the only role and significance of the 'judicial authority' It can be argued that 'continuity' is required so far as 'judicial authority' is concerned, for the extradition to be lawfully pursued and effected. That was the alternative argument summarised in Lis (No.1) at paragraph 53 ("They are not 'judicial authorities with whom the UK courts can (or should) be engaging in mutual cooperation/mutual recognition"). Support can be found in LM at paragraphs 56 and 58, which describe the 2iGuarantees as applicable not only to the decision on issuing an EAW, but also to "the entire surrender procedure between member states … carried out under judicial supervision", and to "enforcement of a custodial sentence" (that wording would be apt to include what happens in Poland in a conviction warrant case). The Divisional Court in Lis (No.1) did not hold that no such 'continuity' could arise as a legal requirement, capable of vitiating the extradition process and justifying release. It certainly held that something more fundamental and serious was required than the sort of material capable of satisfying stage-1 for article 6 fair trial purposes. The Court described the events in Poland including the European Commission's Reasoned Proposal (20 December 2017): see paragraphs 6-25. It described the appellants' description (paragraph 51): "the Ministry of Justice appoints and dismisses judges, disciplines judges, allocate case to judges and 'threatens' judges". That was enough for stage-1 for the Article 6 ECHR fair trial enquiry. But it didn't mean an absence of a 'judicial authority'.

12. It is at this point in the analysis that Mr Dos Santos identifies what he says is the complete answer to the entire argument. He points to recital 10 of the Framework Decision (2002/584/JHA), describing suspension of implementation of the EAW mechanism as being "only in the event of a serious and persistent breach" of TEU Article 6, as determined by the Council under Article 7. He points to paragraphs 71-73 of LM, which describe the significance of an Article 7 Council determination as supporting the automatic refusal of execution of EAWs without individualised examination of ECHR Art 6 fair trial rights. Most importantly, he points to paragraph

57 of Lis (No.1), and this passage: "such a general suspension of the scheme is reserved to the Article 7 process and to the European Council. For the English courts to conclude to the contrary would be a contradiction of European Union law". (The Divisional Court had previously discussed the position regarding TEU Article 7 and the Council at paragraphs 24–25.) This answer is worth probing.

13. Mr Dos Santos accepted – at least for the purposes of the hearing before me – that he is led, by his reliance on these passages when put alongside the Kovalkovas/OG line of authorities, to the following position. He accepts that a Council TEU Article 7 determination is not a prerequisite to any finding that the necessary 'judicial authority' is absent by reference to the 2iGuarantees, where the authority is a ministry (Kovalkovas) or a prosecutor (OG). He accepts that an enquiry in such a case is appropriate, and that it can have the consequence of being a general suspension on extradition: if EAWs are issued, for example, by prosecutors with a structural link to the Ministry of Justice so as to be amenable to inappropriate influence. His position, however, is that a Council TEU Article 7 determination becomes a perquisite wherever the authority is a 'court'. I have struggled with that, and cannot accept that – beyond reasonable argument – it is correct. I have been shown no passage in any authority which says it is correct. I find it striking. The following position is, in my judgment, at least reasonably arguable. There are principled imperatives which lead to an evaluation by reference to the 2iGuarantees, in cases like Kovalkovas and OG, where the authority is part of the executive or a prosecutor capable of being influenced by the executive. The same principled imperatives must permit (perhaps, compel) a similar evaluation where the authority is a 'court', said to have been compromised by arrangements undermining its ability to function independently, as a court. And if not, where is the line to be drawn: when precisely does the body become a 'court', so as to render the evaluation inappropriate and impermissible, and does that not itself call for consideration of the 2iGuarantees? None of this involves treating concerns which are sufficient in relation to stage-1 and Article 6 fair trial as being in themselves sufficient to sustain an adverse conclusion regarding 'judicial authority'. The Divisional Court's ultimate conclusion in Lis (No.1) was that: "As matters stand at present, in our judgment there exists no general basis to decline extradition to Poland" (Lis (No.1) paragraph 71). As to a Council TEU Article 7 determination as being a prerequisite, the position may be this. When asking in an accusation warrant case whether criminal courts in Poland fail to guarantee ECHR Article 6 fair trial rights, the need to pursue the 2-stage enquiry is removed by, and only by, an TEU Article 7 determination of the Council going to that issue: see LM paragraph 72. That does not mean the absence of a Council TEU Article 7 determination relating to the 'judicial authority' prohibits any enquiry on that issue, in the context of a 'court'.

14. What is to be derived from paragraph 72 of LM, and paragraph 57 of Lis (No.1), is worthy of full argument at a substantive hearing. If a TEU Article 7 Council determination is not a prerequisite, then the question of how serious must be the rule of law implications of the compromise of the 2iGuarantees, viewed against the standards articulated in OG and AK in particular. That and whether the relevant line is crossed by the latest legislative developments are serious and important questions on which the appellant's contentions are, in my judgment, reasonably arguable. So, I cannot accept either of Mr Dos Santos's core submissions as dispositive. He submitted that state interference with the 2iGuarantees in the case of a 'court' is a 'no-go area', with Article 7 TEU Council determination as the exclusive route, regarding

continuity of 'judicial authority' in a conviction warrant case. He also submitted that the latest legislative developments in Poland and the Venice Commission Report raise matters (of a 'broad and generic' nature) incapable of supporting an adverse conclusion as to 'judicial authority', if such an enquiry is open. He may prove to be right on these or other points. But he is not, in my judgment, right beyond reasonable argument. It is only because I consider the point be reasonably arguable that I have granted permission to appeal. I was not and would not have been persuaded by Ms Pottle's submissions based on the 'importance' of the issue, or what she said was the 'inevitability' of a Divisional Court needing to look at it. I decline Ms Pottle's invitation, made for the first time at the hearing, that there should be a reference to the CJEU or directions in relation to dealing with any such application. The Divisional Court dealt with the issue in Lis and how the issue as resolved in the present case be a matter for the court dealing with the substantive hearing of this appeal.

15. I have therefore given permission for the second issue described in paragraph 3 of Lis (No.1) to be revisited in the light of the latest legislative developments, namely the contention: "that the legislative changes should result in the conclusion that the courts in Poland can no longer be recognised as 'judicial authorities' for the purposes of section 2 of the Extradition Act 2003… or Article 6 of the Framework Decision governing the AAW system". I regard it as a virtue of the orders which Lewis J and I have made, that two linked issues can again be considered side-by-side.

The Article 8 Issue

16. I refuse permission to appeal on this issue. The appellant is aged 40. He is wanted for extradition in conjunction with an EAW which is a conviction warrant. The sentence was one of 9 months custody and it was imposed for an act of intentional criminal damage in January 2014, aggravated by the fact that it was within 5 years of previous offending. A sentence of 8 months and 28 days custody remains to be served, and the appellant had one week on remand in September 2019. The judge found as a fact that the appellant came to the United Kingdom in September 2015 as a fugitive, and there is no basis for impugning that finding. On well-established principles, it was appropriate for the district judge, and is appropriate for this court, to respect the sentencing policy and approach of the Polish courts. The appellant has no convictions in the United Kingdom and lives with his sister here. He has a partner with him he started a relationship in March 2019, but it did not involve co-habitation nor responsibility for her children. In her written Grounds of Appeal (written as recently as 26 May 2020) Ms Pottle emphasised a series of points they included lack of seriousness of the offence; the value of the damage; the submission that in England and Wales there would be likely to be a fine and a maximum of three-months custody; an argument based on 3 years of unexplained delay, a criticism of the weight placed on fugitive status, and detailed criticisms of the approach to the article 8 'balance sheet'.

17. In her oral submissions (3 June 2020) Ms Pottle emphasised a number of additional points. She criticised the district judge for overlooking a reference in the partner's evidence before him, that she had attempted to take her own life and the appellant had been with her in hospital and stayed with her until she was mentally stable enough to be on her own with her children. She criticised the district judge for describing the hardship to the partner, against that backcloth, as being "commonplace". She referred to further material, updating the court, describing a further suicide attempt in April

2020 where the appellant was able to call the police and then stay with her, as a result of which she and her children are under specialist care and support. Her evidence before the district judge said: "I depend on him massively, he is my rock and if it wasn't for his help and continued support I am not sure I would still be here". Her further evidence before me says the appellant "my rock, my world and the only person I really have that seems to understand me, help me and make me feel safe. The thought of not having [the appellant] around fills me with sadness, worry and dread and I am not sure how I will cope without him". I recognise the significance of that evidence. The district judge did not say that a suicide attempt was "commonplace". What he said was that "hardship, a comparatively commonplace consequence of an order for extradition, is not enough". I do not accept Ms Pottle's oral submissions that the district judge was alluding to an exceptionality test or referring inappropriately to authority about lapse of time.

18. I can find no error of approach in the decision of the district judge. Nor, standing back and looking at the overall evaluative outcome (Love [2018] EWHC 172 (Admin) at paragraph 26), can I see any realistic prospect of this court at a substantive hearing overturning the district judge's conclusion as 'wrong'. On the basis of all of the material, including the new oral submissions and the fresh material, and looking at the matter from an independent evaluative standpoint, I see no realistic prospect of this court concluding that extradition would be incompatible with Article 8 in this case.

5 June 2020