Neutral Citation Number: [2018] EWHC 1253 (Admin)

Case No. CO/2674/2017

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

Royal Courts of Justice

Date: Thursday, 17 May 2018

Before:

MR JUSTICE HOLMAN

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B E T W E E N :

DG — Applicant

- and -

DISTRICT COURT IN LUBLIN, POLAND — Respondent

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MISS M WESTCOTT (instructed by Kaim Todner Solicitors Ltd.) appeared on behalf of the applicant.

MR R EVANS (instructed by CPS) appeared on behalf of the respondent.

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J U D G M E N T (As approved by the judge) MR JUSTICE HOLMAN:

1 There was listed for hearing today a so-called rolled-up application for permission to appeal and the substantive appeal, if permission is granted, from a decision and order made as long ago as 31 May 2017 in extradition proceedings. One only has to see that that order is now

within a whisker of a year ago to appreciate how deeply I regret yet further adjournment of this very long protracted application. The purpose of these brief words is to explain, and create a record of, my reasons for doing so.

2 The underlying application is for the extradition of the applicant to Poland on two warrants; the first to serve the remainder of his sentence in relation to offences of which he has already been convicted; the second to face trial in relation to other offences which he is alleged to have committed but upon which he has never yet been tried. There has already been a long period of delay, since the subsisting sentence was imposed as long ago as May 2007, and the alleged offence upon which he may face trial is said to have been committed in November 2010. Those periods of delay do not, of themselves, necessarily stand in the way of extradition and, indeed, the district judge, in his decision, took account of the delay but, nevertheless, decided to make an extradition order.

3 The applicant and his partner moved to live in England in November 2010 and shortly after that, in January 2011, their only son was born, so he is now aged seven. A major plank of the grounds of resistance to extradition was that that child has a range of very particular needs. I need only briefly mention them for the purposes of this judgment today.

4 It was firmly contended by the applicant and his partner at the hearing before the district judge that their son is autistic and I, for my part, fully accept that that was their genuine belief in the light of advice that had previously been given to them. It was said that, as a result, he has a range of behavioural, developmental and learning difficulties, which I need not further elaborate today. The mother lives at home, caring for him when he is not at school; the father has worked ever since they came to England and supports the family.

5 The essential case that was presented to the district judge was that, because of the unusual and particular needs of this child, the extradition of his father would have a marked and disproportionate effect upon him so as to outweigh the many other factors pointing in favour of extradition in this case. In his written reasons, the district judge considered that case at some length and in some detail. His overall conclusion was that any damaging effect on the child was not likely to be so great as ultimately to outweigh the factors favouring extradition.

6 The applicant then applied to this court for permission to appeal. The broad thrust of his case on this ground was, and is, that there were certain errors in the reasoning or approach of the district judge; but more especially, that there had been an underestimation of the severity of the problems suffered by this child and of the likely impact upon the child if his father is extradited and the family unit and its source of income broken up. All these issues, of course, fall squarely within Article 8 of the European Convention on Human Rights and it was from the perspective of Article 8 that this application was originally mounted.

7 By a written decision dated 11 October 2017, Supperstone J refused permission to appeal on the then two grounds which are firmly rooted in the above points. He gave quite detailed reasons for his decision.

8 As he was entitled to do, the applicant then renewed his application for permission to appeal on the original grounds, and has subsequently sought to introduce into the case further evidence which had not been adduced before the district judge, nor, indeed, Supperstone J. By a decision dated 17 October 2017, itself now seven months ago, Julian Knowles J directed that the renewed application for permission to appeal should be adjourned and listed to a rolled-up hearing, and gave directions for certain other evidence in relation to the

child to be assembled.

9 All that was done, and the case came again before Ouseley J on 22 February 2018 for the rolled-up hearing to take place. However, by then the applicant had made a further application to be able to obtain and adduce a report from an identified expert child psychologist, Mr Graham Rogers. So, yet again, this case was adjourned. The report of Mr Rogers has been obtained and I will refer to it shortly. Today was listed as what was anticipated to be the final hearing of this entire appeal if permission was granted at this hearing.

10 Since February 2018 there has, however, been a further supervening development. The High Court in Dublin has delivered a judgment in a case called *Celmer* in which the view is expressed that there are currently systemic difficulties in the judicial system in Poland such that an application for extradition on an accusation warrant to stand trial in Poland (which is one of the warrants the present applicant faces) engages Article 6 of the European Convention on Human Rights. That, in turn, has had the effect that certain cases concerning extradition to Poland have been listed for hearing, patently as test cases, before the Divisional Court, namely *Lis and others v Poland*. Those cases are now due to be heard in mid-June 2018. Inevitably, that has had the effect that, in all current cases in which orders for extradition to Poland have been made on accusation warrants, there have been applications for permission to amend the grounds to include a ground based on Article 6 and for substantive consideration of permission to be postponed or adjourned until after, at the earliest, judgments have been delivered in the cases of *Lis and others v Poland*.

11 The present applicant has made such an application without resistance today by, or on behalf of, the respondent (who express their position as one of neutrality). I will grant this

applicant permission to amend without reservice his Grounds of Appeal to add a ground based on Article 6 and I will, inevitably, postpone consideration of permission on that ground until after the judgments are available in *Lis and others*.

12 The question then arises as to the pre-existing Grounds of Appeal based on Article 8 and firmly rooted in the situation of the child. The expert, Mr Rogers, has now thoroughly investigated the situation of this child and clearly spent a considerable amount of time assessing and reporting on this case. His written report is dated 27 April 2018. That does stand as fresh evidence on the Grounds of Appeal under Article 8.

13 The correct approach of a court when fresh evidence of this kind is adduced is, first, to consider whether or not the relevant ground or grounds of appeal have been made out, taking the evidence as that which was in existence at the time of the decision under appeal. In other words, the first stage should be to consider the decision of the district judge on the basis of the evidence and material that was before him. If, indeed, he made an error such that the appeal should be allowed, it is not necessary even to consider the fresh evidence.

14 However, I record my own provisional view, which I have already clearly stated in open court today, that it does not provisionally seem to me that the district judge can be said to have fallen into any error on the basis of the evidence and material as it was before him. Essentially, I respectfully agree with the reasons that Supperstone J gave in his written decision of 11 October 2017. I stress that that is no more than a provisional view, since I have not heard any substantive oral argument from Miss Mary Westcott, who appears on behalf of the applicant today, although I have, of course, read her most thorough and cogent written submissions dated 8 May 2018.

15 If the court takes that view on the evidence and material as it was before the district judge, then the next stage is to consider the subsequent fresh evidence and material to see whether it has the effect that the earlier decision, although rightly made at the time, should not, or cannot now stand.

16 Although other evidence has been assembled from the local authority and other sources, frankly that is all now distilled within, and crystallised by, the report of Graham Rogers dated 27 April 2018. That report will be available for any judge subsequently considering this matter fully to consider. In essence, however, it does not currently add much, if any, weight to the case previously presented to the district judge. Indeed, the first and most striking opinion expressed by Graham Rogers is that this child does not, in fact, have autistic spectrum disorder at all. I stress, as I have already said, that I do not, myself, doubt the good faith with which the applicant and his partner earlier said that he does. So, it may, indeed, be some comfort to them that this psychologist has currently definitively said that their child is not autistic. He does go on to describe that the child has low intellectual functioning and language impairment, and discusses a range of developmental and behavioural difficulties. But, frankly, the overall conclusion of the report is that if this child's father was extradited today, or soon, any regression in, or damage to, the child would be able to be managed and would not persist.

17 On internal page 4 of his report, Mr Rogers says:

> "If the extradition were to take place quickly…the separation is one that would, under normal circumstances, cause a regression in the child. However, with emotional support and the structure of the school (the current class and teacher) this can be managed; [the child] would recover within a few months."

The reference there to "the current class and teacher" is one which pervades other aspects of the report. The thrust of the report is that, if his father is extradited whilst this child remains at the same school in the same class with the same teacher, then any regressive or damaging effects would be quite limited. So, on internal page 27, Mr Rogers says:

> "At this moment in time [the child], due to the school, is emotionally protected by the actions of the teacher and the school. Hence, if the separation were to occur, it needs to occur very quickly, and at least three to four weeks before the school break (mid-July), while the school is able to support the initial separation, and while a structured routine is available to him."

However, Mr Rogers immediately continues, at the top of internal page 28:

> "In my view, if separation occurs during the school summer break (from mid-July to early September), when there is no structure or additional support available, the regression could be severe…"

18 At the outset of this hearing this morning, Miss Westcott, who appears on behalf of the applicant, submitted that these Article 8 issues are freestanding and separate and distinct from the Article 6 issue, as indeed they are, and that I could and should hear this case today and finally rule upon those grounds of appeal which relate to Article 8. Her submission was that if the appeal is, in any event, successful under the Article 8 grounds, then that will, of course, be the end of extradition for this particular applicant and it is not necessary to await final outcome in relation to *Lis and others* and Article 6. I do not know, but Miss Westcott may have made that submission in a spirit of optimism that her appeal was, in any event, on

strong grounds under Article 8 and would succeed today. I am afraid that I had rapidly to disabuse her of that. I told her, as I have already recorded, that my provisional view (without hearing any submissions from her) was that she would be unlikely to be able to demonstrate error by the district judge; and that my provisional view also was that the thrust and effect of the report of Mr Rogers is not such as to outweigh the decision already reached by the district judge. It seemed, and seems, to me that the inevitable thrust and effect of the report of Mr Rogers is that this applicant could, in fact, be extradited now and before about mid-July without any outweighing damage to his son.

19 The difficulty is, however, that, as that report itself says, extradition might be considerably more damaging if it cannot take place before mid-July. The further difficulty is that it is not, of course, known when the Divisional Court will deliver its judgment or judgments in the case of *Lis and others*, although they are likely to be reserved, at any rate for some period, however short.

20 The consequence, as it seems to me, is that the effect of the inevitable delay in resolution of this appeal until after the judgments are available in *Lis and others,* and some further time for reflection and consolidation in all these many Polish extradition cases which await the outcome of those judgments, is that this applicant will not now be able to be extradited before the mid-July point to which Mr Rogers refers.

21 Any case which raises Article 8 considerations in relation to a growing and developing child necessarily requires to take account of the position of the child at the time of decision making. In view of the thrust and language of the report of Mr Rogers, it does not seem to me that I could responsibly dismiss altogether the Article 8 grounds of appeal today, when the situation of that child and the impact of extradition upon him may finally fall to be

considered some months after today in the light of resolution of the Article 6 issues. It may, of course, be that the decision of the court is *Lis and others* will effectively be determinative either way of the Article 6 point. If the effect is that, in any event, this applicant cannot be extradited, then the Article 8 ground will fall way. If, on the other hand, the effect is that there is no continuing Article 6 point, then it seems to me that, at that stage, this court will have to give anxious consideration to the Article 8 ground, bearing in mind the thrust of the report of Mr Rogers, and taking into account any updating evidence as to the situation and circumstances of the child.

22 So, for those reasons, although with the utmost regret, I have concluded that I cannot responsibly finally resolve or dispose of these Article 8 grounds today, and there will be directions for them to be further considered after the outcome of *Lis and others* is known. It does not seem to me that the earlier order for a rolled-up hearing should necessarily simply revive, and I propose that the case should be submitted on paper to a judge for further consideration at that stage, first, of whether or not to grant permission on the Article 6 ground and, second, as to what further directions should be given in relation to the grounds based on Article 8.