Neutral Citation Number: [2020] EWHC 1931 (Admin)

Case No: CO/448/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 July 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

LASZLO FELEDI	**Appellant**
- and -	
REGIONAL COURT OF MISKOLC (HUNGARY)	**Respondent**

- -
- -

Jonathan Swain (instructed by McMillan William Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

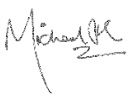
Hearing date: 16 July 2020

Judgment as delivered in open court at the hearing

- -

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 :

Introduction

1. This is an application for permission to appeal in extradition proceedings. It proceeded by Skype for Business conference hearing, at the request of the appellant's representatives, to avoid unnecessary travel to and physical appearance in the court room. It was a remote hearing which took place in accordance with the current High Court arrangements, during what is now a Covid-19 post-lockdown period. The hearing and its start time were published in the cause list, as was the fact that any person wishing to observe the hearing could contact my clerk (using a published email address) and do so, themselves without having to travel to or attend physically in a court room. I heard oral submissions just as I would have done had we all been sitting in the court room. I am satisfied of the following: this constituted a hearing in open court; the open justice principle was secured; no party was prejudiced; and insofar as there was any restriction on any right or interest it was necessary and proportionate.

2. The appellant is wanted for extradition to Hungary. He is wanted in conjunction with a European Arrest Warrant (EAW) dated 13 October 2018. That warrant relates to a sentence of the Hungarian court imposed on 31 January 2014, when a sentence of one year's custody was imposed, following a conviction on 6 counts from a 7 count indictment. The sentence became final on 13 June 2014. This is therefore a conviction warrant case. There was an oral hearing before the district judge. By agreement between the parties, following a concession, the warrant was discharged in relation to 2 of the 6 offences. Extradition was ordered by the district judge in relation to the remaining 4 offences. Permission to appeal to this court was refused on the papers by William Davis J in an order communicated on 5 June 2020. As is customary in renewed applications for permission to appeal in extradition cases, there has been no appearance before me by on behalf of the respondent. The respondent has confirmed that it relies on the submissions attached to its respondent's notice.

Section 2

3. The first ground on which permission to appeal is sought relates to section 2 of the Extradition Act 2003. The point is a short one. Mr Swain points out that box (e) "offences" in the EAW contains a description of 7 offences including offence number 2 which was the offence in relation to which the appellant was acquitted in the Hungarian criminal court. Mr Swain submits that that should not have been included in the EAW as part of the matters on which surrender is sought. He submits that that problem could be cured only by the district judge spelling out on the face of the court order that the appellant was not being extradited in relation to the matter on which he had been acquitted. The respondent's answer is that the EAW itself clearly spells the position out. William Davis J was, moreover, satisfied that the judgment of the district judge itself, on its face, also spelled the position out and that nothing more was required. I agree with them both. I am quite satisfied that there is absolutely nothing in this point. It is, in my judgment, already fatal that on the face of the EAW itself box (e) "offences" begins with the words "this warrant relates to in total: 6 (six) offences". The number "6" and the word "six" are both in bold type. Nobody could conceivably be misled by the fact that there was a description of the 7 indictment offences including offence number 2. No sooner does the reader encounter that offence than they see, again in bold type, that the EAW states on its face that the court acquitted the appellant in relation to

that matter, which explains – beyond any doubt or confusion – why it is that the warrant relates only to "6 (six) offences".

Section 10: dual criminality

4. The next ground relates to dual criminality and section 10. There are two limbs to dual criminality when one is considering whether that which is alleged and set out on the face of an EAW 'matches up' to an equivalent crime under UK domestic law. Although the cases do not always distinguish between accusation and conviction EAWs it is, in my judgment, always worth keeping this in mind. This case is not a description of the case against someone is who is being accused and would be standing trial. This case is a description of charges which led to a conviction and sentence. The first limb relates to the elements of the crime on the face of whatever provisions set out the legal constituent elements of the crime. If, on the face of the statute book or other material, it is clear that the Hungarian crime involves the relevant and disputed elements then that is sufficient. The reason for that is obvious. If, as a matter of Hungarian law, something was required to be proved and the individual has been convicted, the element can be taken to be satisfied. If, as a matter of Hungarian law in an accusation case, an element is required to be proved and the person is accused of that crime, the court can take it that that element is necessarily part of the case against the individual. Where the first limb is not satisfied, the second limb arises. Where the court cannot be satisfied in relation to the matching elements of the offence as prescribed, the court then looks at the conduct that is being described in the individual case. In doing so, the content of the description needs to impel the inference that the matching element is present, in the individual case: for that proposition, Mr Swain cited Cleveland [2019] EWHC 619 (Admin) at paragraph 59.

5. Mr Swain addressed me in relation to all 4 of the relevant offences. He submits that neither the prescribed element of the crime, nor the inference from the substantive description, can satisfy the requisite dishonesty which would be required of a domestic UK crime. The respondent's notice submits that are under both limbs there is a dual criminality required: first, which is sufficient, as elements on the face of the crime; and secondly, as an alternative and in any event, on the face of the description of the conduct. The district judge was satisfied on the face of the description of the conduct by reference to the second limb. The respondent has subsequently produced supplementary information, which I am quite satisfied the court on an appeal would admit. Indeed, Mr Swain relies on it, because he says the question has squarely been asked as to whether dishonesty is an element of the offences in Hungarian law and he submits that the answer that has come back is either 'no' or certainly not clearly 'yes'. Mr Swain's submission focuses, in particular, on the description in that further information that "unfair conduct does not constitute a legal element in the facts of cases of the felony of secreting assets covering a debt or the felony of embezzlement". "Secreting assets covering a debt" is the relevant offence in relation to the first matter and "embezzlement" is the offence described in relation to the other three. The conclusion that dishonesty is not a part of these Hungarian crimes, as it seems to me, necessarily carries with it the conclusion that the Hungarian crimes are "strict liability" offences. So, for Mr Swain's purposes, his logic – as I think he accepted in essence – is that it is or may be the position, at least reasonably arguably, that one or other of these offences are "strict liability" offences. That same logic is recognised into Polish

cases cited by the respondent Kazimierczuk [2011] EWHC 3228 (Admin) at paragraph 15 and Goldewski [2016] EWHC 2404 (Admin) at paragraph 11.

6. In my judgment, it is clear based on the further information that the statement "unfair conduct does not constitute a legal element" is not and cannot be read as meaning that these are "strict liability" offences not requiring a guilty mind. The language from the criminal code itself is indicative, in my judgment, of a guilty mind element. But, in my judgment, what puts the flaw in the appellant's logic beyond even reasonably arguable doubt is the fact that the same further information goes on later to spell out that the mere act of "refusing to return property or failing to make a settlement concerning it" is something which "only ha[s] civil law consequences", and does not constitute the crime of "illegal appropriation". In my judgment, it must logically follow from that, that "illegal appropriation" is not a "strict liability" offence is a matter of Hungarian law. Otherwise, that distinction would not arise and the mere act of "refusing to return" something or "failing to make a settlement concerning it" would constitute the crime, which it does not. On the basis of that, the statement that "unfair conduct does not constitute a legal element" cannot mean, and cannot reasonably be understood to mean, that there is no need for mens rea (a guilty mind).

7. Even if that were wrong, I am also at fully satisfied by reference to the description on the face of the EAW itself. As Mr Swain rightly accepts, the critical question ultimately relates to whether it was being said against his client that he had acted with requisite "knowledge". The first charge would have involved "knowledge" of the terms of a lease under which property are was held under lien, so that when rent went unpaid, there was no entitlement to dispose of that property. I agree with Mr Swain that that would need the irresistible inference that the allegation was one of "knowing" that there was a lien and "knowing" that there were arrears, and then removing and disposing of property in those circumstances. In relation to the other 3 offences, similarly, what would be required as an necessary inference in the allegation against the appellant is that he "knew" that property – a coffee machine, a drinks fridge and ice cream freezers – belonged to companies from whom they had been leased under agreements and/or "knew" that the consent of those companies was required prior to any disposal. It would need to be necessarily inferred that the case against the appellant that led to his conviction was that he had "knowingly" disposed, without consent, of that property "knowing" of those agreements and their terms. When I read the text of the warrant in my judgment it clear, beyond reasonable argument, that that was the nature and essence of the case against the appellant. The EAW spells out, repeatedly, that he individually signed the documents entering in to the agreements. It spells out, specifically, the very close proximity in terms of the date of entry into those agreements, which he himself signed, and the actions, which he then took, inconsistent with the terms of what he had agreed. It is necessarily implicit, in my judgment, that the case against him was that he knew perfectly well what the terms that he had agreed were and he took the deliberate acts of moving and disposing of property notwithstanding his knowledge of those agreements. I accept the submission to that effect made by the respondent in the respondent's notice. On this second limb, the district judge considered the position in relation to offences 3 to 5 (embezzlement). He said: "Simply put, in each of those charges [the appellant] had leased premises, and items within the premises. Contrary to his lease, he took and sold those items. That is the dishonest (he knew the lease prohibited it) appropriation of property belonging to another with the intention of permanently depriving that other of the property". In relation to offence 1 (secreting

assets covering a debt), the judge described the appellant at as having "sold goods to others knowing he had no right to" and said he "was certainly dishonest in disposing of property over which he had granted a right of lien to the landlord". The judge went on to consider the Fraud Act and various different possibilities as to the onward sale but, in my judgment, it was compelling and quite sufficient, and is certainly sufficient for the purposes of considering this application, that the judge characterised the described conduct in the way that he did. His reading of the warrant accords with mine. The contrary, in my judgment, is not reasonably arguable.

Article 8

8. A short point is made in relation to article 8 in this case. Mr Swain says that the reduction from 6 offences to 4 offences, when two matters by concession were the subject of discharge (each relating to offences of breaching accounting regulations), has a consequence for the article 8 analysis which should have led the judge to balance the various considerations and come to the opposite conclusion. Mr Swain says that the article 8 assessment is thus materially undermined. In my judgment, there is no realistic prospect of this court overturning the article 8 assessment on that basis, or any other basis. The district judge was very well aware of the fact that 2 of the offences were falling away. He did not, in my judgment, lose sight of that matter in considering proportionality. As the respondent's notice points out, there is no immediate and obvious inevitable consequence for the lessening of the one year sentence: it will be a matter for the authorities in Hungary to consider the implications of the fact that that 4 and not 6 offences have been the subject of surrender under the EAW. As William Davis J said, in refusing permission to appeal on the papers, the judge meticulously assessed the article 8 argument conducting the requisite approach and committed no error. I agree.

Article 3

9. That leaves a final ground of appeal arising under article 3. The point relates to prison conditions and the reliance placed on an assurance, in this case dated 7 December 2019. The position in domestic law is that the Divisional Court in a judgment dated 16 April 2019 in Szalai [2019] EWHC 934 (Admin) decided that such assurances could be relied on as answering the question of article 3 risk so far as prison conditions are concerned. There was, however, one aspect of that case which has given rise to sufficient concern that further steps in the domestic judicial system have taken place. The point related to evidence from named sources regarding what was said to be breaches of equivalent assurances given to other member states. The nature of the evidence is clearly set out on the face of the judgment in paragraph 29 to 32 of Szalai. The court in that case went on to take a particularly restrictive approach to that aspect and the evidence relating to it, at paragraphs 38, 44 and 71 in particular. The Divisional Court then subsequently, in October 2019, certified a point of law of general public importance relating to that issue. Following that, the Supreme Court in March 2020 gave permission to appeal. The certified point asks whether it is "correct" that "considerable caution" should be exercised "before admitting evidence … [relating to] an alleged breach of assurance to another EU member state".

10. The Szalai case obviously remains live and there is no surrender or removal of the appellants who have relied on that evidence. Moreover, Mr Swain tells me that there have been several other cases which have been stayed pending the resolution of that

issue. It is not difficult to see why. An approach has been taken by the Divisional Court to evidence, which is capable of making a real difference, and a point of principle now has to be resolved in order to be able to determine: whether that real difference is made by that evidence, with the consequence that an assurance can no longer be relied on. The assurance that could not, in those circumstances, be relied on is precisely the same nature and substance as the one in the present case. Were it not the position that that could be the consequence, there would have been at no sense in certifying the point or resolving it in the Supreme Court, with cases being stayed in the meantime. It is only because that evidence is capable of making a difference that that exercise is being undertaken.

11. In his order refusing permission to appeal William Davis J said this: "The Supreme Court is due to consider the position where there has been evidence presented of breaches of assurances given by the requesting state to other member states. If this case involved such evidence, there might be a basis for staying this appeal. In fact, it does not and a stay is not appropriate. There is no arguable case in relation to article 3 in prison conditions." In my judgment it is important to distinguish between two different situations, in asking whether a case "involve[s] such evidence". One situation is where the same documented evidence has been filed and served by one appellant as was filed and served in a previous case. Another situation it is where the appellant seeks expressly to rely on the logic and consequence of evidence that is known about, and that has been described in the public domain, the essence of which the appellant is able to identify. The present case does not involve the first of these: the same evidence as having been filed and served as was described by the Divisional Court at paragraphs 29 to 32 of Szalai. In the perfected grounds of appeal filed following refusal of permission, in order to support the application for renewal, Mr Swain submitted that "a number of other High Court cases have been stayed … This is true whether or not they have served any evidence in that respect". I was able to clarify with Mr Swain what appeared to me to be absent from those renewal grounds, and that was his clear statement on behalf of the appellant in this case, that: "there is relevant evidence that it is relied on and it is to be found described, in the public domain, in paragraphs 29 to 32 of the Divisional Court judgment in Szalai." The question is really whether a distinction, between cases where that same evidence has been obtained and is filed and served on the one hand, and cases in which that evidence is pointed to and relied on without being obtained and filed and served on the other hand, is sustainable in considering which cases should, and which cases should not, be stayed pending consideration by the Supreme Court.

12. I am quite satisfied that relying on that distinction would not promote the just disposal of cases such as the present. The consequence would be this. An individual appellant who is aware of the issue, who squarely raises it before a court, who points to the evidence that has been described in the public domain and which evidence is going to be considered by the Supreme Court, who is able to say that the consequences of that consideration would logically necessarily apply equally in their case, and who on any view would only be securing a stay of proceedings rather than a hearing to evaluate argument and evidence, would be denied a stay on the basis that they have not themselves obtained the identical evidence and served it in their proceedings. At the same time, the court would be staying an identical case where the evidence has been obtained and is served, most obviously (for example) because the appellant is represented by the same solicitors who had obtained a witness evidence or reports described in Szalai. I cannot see that drawing that distinction is one that would promote

the interests of justice. In my judgment, there is no reason in principle why an appellant needs to have obtained and served the self-same evidence as has been adduced in an earlier case providing, at least, that they can, with clarity, identify what the evidence is by reference to a description in the public domain, and can identify a pending case in which that evidence will be evaluated arriving at a conclusion which will then be determinative for their own case. I have no doubt that that is what Mr Swain in the perfected grounds of appeal was intending to convey but one of the virtues of the oral renewal hearing has been the opportunity to ask questions of him, and listen to him, in relation to that matter.

13. There are two very important features which fortify that conclusion, reached as a matter of principle. The first is that Mr Swain has been able to put before me examples from other cases. He tells me and, given his professional obligations to the court I unhesitatingly accept from him, as follows. He has communicated with other members of the Bar in relation to other such cases. In support of his submission that other judges have stayed Hungarian cases behind Szalai (or behind Garavolgyi, which is itself stayed behind Szalai) "whether or not the appellant has served any evidence in that respect", Mr Swain in his renewal grounds gave me 3 examples: Czifrak CO/1535/2019; Hnus CO/1954/2018 and Djubok CO/1821/2019. He tells me that the first of those was stayed on 12 September 2019 by Swift J behind Garavolgyi, which then itself has been stayed behind Szalai. Garavolgyi, he tells me, was a case which had filed and served the same evidence as Szalai but Czifrak did not file and serve that same evidence. Hnus, he tells me, relying on counsel who is in that case, also was a stay in which the evidence had not been filed and served, but we had no further detail. The third case Djubok was an example where the evidence had been filed and served. Those examples therefore are given in support of the proposition that cases have been stayed "whether or not evidence has been served". In response to a question for me, Mr Swain tells me that no member of the Bar alerted him to any case in which a stay has been refused for want of the serving of evidence, the only exception to that being the order of William Davis J in the present case. I am confident in my ability to rely on that information, and it fortifies the conclusion to which I would, in principle in any event, have come.

14. The final point which is also significant and strongly reinforcing is this. The party best placed to consider the position so far as a stay is concerned – and to consider what ingredients a case should have in order to warrant a stay, to be able to assist the court with whether distinctions are being drawn and preconditions such as the filing and serving of particular evidence being imposed – is the respondent. The respondent, as the judicial authority for Hungary, was made very well aware that the stay was being sought on the Article 3 ground in this case. It provided a respondent's notice with 16 pages of extremely helpful written submissions, drafted by Counsel. Those submissions, in relation to Article 3 and the stay, were commendably succinct. The respondent drew my attention to the certification of the point of law in Szalai. It then told me that the respondent was "neutral" to this application for a stay, being "aware that a stay has been granted in a number of other cases". That neutrality, and that reference to stays in other cases, combined with no point being taken in relation to the adducing – by filing and serving – of particular evidence also supports the conclusion that I have reached. My conclusion is that this would not be a just distinction to apply, to delineate the cases that will, and the cases that will not, be stayed behind Szalai.

15. In the circumstances, I have thought it right to set out in some detail what I made of the important point that had been raised in relation to all of that. But the upshot is that I will accede to the application it is made in relation to the article 3 ground, in the light of the respondent's neutrality on it, and notwithstanding the refusal on the papers of permission to appeal. I propose to discuss with Mr Swain the precise terms of the order. In circumstances where permission is being refused on the other grounds of appeal, I envisage that the appropriate course will be to stay the application for permission to appeal in relation to this Article 3 issue, pending resolution by the Supreme Court of the Szalai case, with a timetable for both parties to submit written representations once that has taken place. I will embody as a final paragraph the order that I make, having discussed the matter now with Mr Swain.

16. I made the following Order:

(1) Permission to appeal on the following grounds is refused: (i) section 2; (ii) section 10 (dual criminality); and (iii) Article 8 ECHR.

(2) As to the Article 3 ECHR ground of appeal, the Appellant's renewed application for permission to appeal shall be stayed pending the judgment of the Supreme Court in Szalai [2019] EWHC 934 (Admin). The Appellant shall, within 14 days following the date on which the judgment of the Supreme Court in that case is handed down, (a) inform the Court and the Respondent whether he intends to pursue an application for permission to appeal on the Article 3 ground; and (b) if such an application for permission to appeal is to be pursued, file and serve written submissions in support of that application. The Respondent shall within 14 days of those written submissions file and serve any written submissions in response. The question of permission to appeal to be considered thereafter by a judge on the papers.

(3) Pending consideration of the application for permission to appeal on the Article 3 ground, which application is stayed pursuant to and in accordance with paragraph (2) above, the Appellant shall not be extradited pursuant to the order made at Westminster Magistrates' Court (in this case, on 3 February 2020).

(4) The parties shall have liberty to apply, in writing and on notice, to vary or discharge paragraphs (2) and/or (3) of this Order, such application to be considered in the first instance on the papers.

(5) No order as to costs.

17 July 2020