Neutral Citation Number: [2020] EWHC 2879 (Admin)

Case No: CO/1566/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/20

Before :
MR JUSTICE FORDHAM
- -
Between :

MODESTAS BUIVIS	**Appellant**
- and -	
DEPUTY PROSECUTOR GENERAL (REPUBLIC OF LITHUANIA)	**Respondent**

- -
- -

Mary Westcott (instructed by Birds Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 27th October 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. I adjourned this application for permission to appeal, together with the other applications that are before the Court, a week ago for the reasons I then gave: [2020] EWHC 2815 (Admin). As I explained, I wished the Respondent specifically to have the opportunity to respond to an argument which had been 'fleshed out' and which I outlined at paragraph 3. It concerns section 21A(1)(b) proportionality. My outline was as follows:

> ***The argument has three stages. It arises under section 21A of the Extradition Act 2003 in the context of an accusation EAW. It relates, in particular, to 'likely penalty'. The first stage of the argument is this. Absent specific information from the requesting state the Court is at least entitled to apply domestic sentencing practice as a measure of likelihood: see Miraszewski [2014] EWHC 4261 (Admin) [2015] 1 WLR 3929 at paragraph 38. The second stage in the argument involves considering likely penalty against relevant domestic case law. Four cases have been identified though in the most recent a further two cases are cited. In date sequence the four cases are Hoxha [2012] EWCA Crim 1765, Picchi [2014] EWCA Crim 2771, Mehmeti [2019] EWCA Crim 751 and Coskun [2019] EWCA Crim 2135. The third stage in the argument is that the answer to the second step then produces the same consequence as arose in Kalinauskas [2020] EWHC 191 (Admin) at paragraphs 16 to 22.***

I went on to explain that this point had struck me, on the papers, as one in relation to which it was appropriate to allow the Respondent to respond, as they had confirmed they wished to do and now have.

2. The Appellant is aged 35 and is wanted for extradition to Lithuania. That is in conjunction with an accusation EAW issued on 27 October 2017 relating to an alleged offence on 4 May 2011 of possession of a forged driving licence. The description in the EAW also refers: to the Appellant as having been "using" that forged driving licence (the meaning of this is contentious and moreover it is not spelled out whether any alleged use said to form part of the crime was as an identity document or for the purposes of driving); to the fact that he had previously been disqualified from driving; and to the fact that he attempted to discard the forged driving licence. DJ Bouch ordered extradition on 2 March 2020, handing down a judgment she had completed and been ready to hand down a year earlier on 5 March 2019. That was after an oral hearing on 11 February 2019 which the Appellant had (as she found) deliberately refused to leave custody to attend. Julian Knowles J on 16 June 2020 granted an extension of time for the Notice of Appeal but then on 17 September 2020 refused permission to appeal and an application to adduce fresh evidence relating essentially to family life, financial support and the impact of extradition on the Appellant's partner and child. Ms Westcott for the Appellant renews the application for permission to appeal on both grounds identified in the Grounds of Appeal: Article 8 ECHR being one; the section 21A(1)(b) proportionality ground (to which my summary related) being the other. She also maintains the application to adduce the fresh evidence and an application to extend the representation order to obtain a report evidencing likely penalty in Lithuania. An Article 3 ECHR prison conditions ground for resisting extradition has been abandoned.

Mode of hearing

3. The mode of hearing was BT conference call. Ms Westcott was satisfied, as was I, that that mode of hearing involved no prejudice to her client. I am satisfied that the open

justice principle has been secured and indeed promoted. The consequence of a remote hearing is that we have eliminated any risk to any person from having to travel to or be present physically in a court room. The hearing and its start time, together with an email address usable by any member of the press or public who wished to observe this hearing, were published in the cause list: all that it took to observe this public hearing was to send an email and make a telephone call. I am satisfied that the mode of hearing was necessary, appropriate and proportionate.

Context

4. This is in many ways a deeply unattractive case. The Appellant did not appear, as I have said, at his oral hearing on 11 February 2019. That meant that any evidence he may have wished or been able to put forward could not be tested before the primary judicial decision-making and fact-finding authority: the District Judge. The Appellant was eventually re-arrested on 11 February 2020 and there was imposed on him, and served by him, a 6 week custodial term for failing to surrender in breach of his bail conditions (he had been released on bail on 4 December 2018). Further, the District Judge found as a fact that he had left Lithuania as a fugitive. Moreover, his original arrest on 8 January 2018 was in conjunction with a domestic burglary here in the United Kingdom in respect of which he was convicted on his guilty plea on 14 May 2018 and there was imposed on him, and he has served, a five-month custodial sentence in respect of that.

Remand Time Served

5. Notwithstanding the unattractive backcloth for this case, it remains the position that an accepted feature of the factual matrix is a period of remand served by the Appellant, when excluding time served in relation to other sentences, which would by operation of law qualify for the purposes of analysing the position on extradition. That period of remand has been calculated as 4½ months. The Appellant was released on bail on 7 July 2020 and is currently on bail. The 4½ month remand period is therefore a past period which exists as at today. The arguments being put forward by Ms Westcott do not involve projecting forward while clocking up on going qualifying remand and positing the position as it may be before a substantive appeal Court some months down the line. I have held in another recent case of Molik [2020] EWHC 2836 (Admin) that such an approach would be wrong in principle. But that problem does not arise in this case.

Section 21A(1)(b) proportionality

6. I start with the section 21A(1)(b) ground of appeal. In my judgment, the three-stage argument which I summarised (and have repeated) remains the central point. I am quite satisfied, having now received the written representations from the Respondent, that the point is reasonably arguable. The Respondent has expressly accepted stages one and two of the three stage argument. As to the first stage, the Respondent does not, at least for the purposes of the arguments for today, seek to maintain the position described by Julian Knowles J in refusing permission to appeal. He said this: "what the penalty would be in this country is not relevant on the facts of this case". That is not the Respondent's position. The Respondent in its submissions emphasises the District Judge's finding that the 'likely penalty' in this case would be one of 'custody'. But, in my judgment that does not – at least not beyond reasonable argument – answer the point. The question is whether the period of likely custody can be seen already to have been exceeded by

relevant time spent on remand. At the second stage of the analysis, which – as I say – the Respondent at this stage accepts, the Respondent also recognises that the case of Hoxha (where a four-month custodial sentence was imposed) can be taken as directly comparable. That acceptance, on the face of it, applies on the premise that the Respondent is correct on the (contentious) questions about how the reference in the EAW to the "using" of the forged driving licence is to be approached.

7. In relation to stage three of the argument there is an interesting departure. The Respondent's submission before me is that the time served on remand "is a factor that is relevant to the Article 8 balancing exercise, not the stand-alone proportionality argument". In a follow-up email it is recognised by the Respondent's Counsel that the divisional court in Kalinauskas formed the opposite view and so – as it is said by the Respondent – "it may be that this court prefers that reasoning".

8. Pulling all of this together, in my judgment, it is plainly reasonably arguable that the three-stage line of argument is correct and would lead to success on section 21A(1)(b) proportionality. I am not deciding the point, but only that it is reasonably arguable. It may be that the Respondent will be able to persuade a substantive appeal court that the analysis does not hold in the present case by reason of the fact that domestic sentence is a proxy whereas the Court in Kalinauskas was expressing with confidence its assessment of a time-served remand period what the foreign court penalty would necessarily not exceed. On the other hand, on the authority of Miraszewski the domestic sentence is described as a 'measure of likelihood' of penalty, which suggests that it answers the question for the purposes of the relevant statutory factor (likely penalty if convicted of the conduct alleged to constitute the criminal offence). Or it may be that the Respondent will prosper in its reliance on Miraszewski paragraph 39 where it is emphasised that the Court's conclusion that the sentence following extradition would be 'non-custodial' does not 'preclude' the Court from deciding that extradition is proportionate for section 21A(1)(b) purposes, the example given being one of a fugitive with a history of disobedience. On the other hand, that is a description of the situation where there would nevertheless be a sentence to be imposed on the individual and served by the individual following extradition. The analysis under the three stage argument, if correct, would involve the conclusion that no sentence would remain to be imposed or, put another way, that a custodial sentence would be imposed but the individual immediately released having served that custodial sentence by serving the relevant period of custody on remand in the extradition proceedings.

9. I will grant permission to appeal on this ground of appeal. I have recorded already that the question of "using" of the forged passport is contentious. I also record that Ms Westcott submits that for the purposes of section 21A(1)(b) proportionality the District Judge is to be taken as not having characterised the offence as "serious". She says, moreover, that that point is common ground given that the Respondent itself submits that the District Judge "does not refer to the offending as being serious in her analysis in this section of the judgment". Ms Westcott's analysis, I record at this stage, is that the 'non-serious' characterisation relevant, she says, for section 21A(1)(b) purposes must carry across and therefore be a basis for impugning as unsafe the District Judge's later characterisation in the Article 8 ECHR analysis of this as "a serious offence". I mention these points to illustrate the other features which seem to me to be relevant and which I anticipate will be the subject of argument on the substantive appeal. I am not shutting out any party from making any submission in relation to this ground of appeal.

But I do want to say that, for my part, I can see nothing else in the case so far as this ground of appeal is concerned.

Representation Order

10. So far as the application to extend the representation order is concerned I am going to refuse it. Ms Westcott has maintained the application on the basis that it would 'assist the Court', in the absence of information from the Respondent, to have from the Appellant's side evidence as to likely penalty in Lithuania. In my judgment, it is not necessary or appropriate to order that such material be prepared and adduced. The line of authorities to which I have already referred deals with the position where there is a vacuum in information from the Respondent as to likely sentence in the requesting state's courts. That is stage one of the three-stage argument. It gives the Appellant in this case an applicable line of argument which will either succeed or fail. In my judgment, it is not necessary or appropriate to give permission or direct that evidence be adduced from the Appellant's side to fill that vacuum, in circumstances where the authorities identify the proper approach to be taken in a case in which such a vacuum arises. I repeat: stage one of the argument has expressly been accepted by the Respondent in its submissions before me.

Article 8 ECHR (and Fresh Evidence)

11. I turn to the other ground of appeal: Article 8 ECHR. In my judgment Ms Westcott is right, as well as realistic, in recognising that an appropriate course would be to direct that this ground – together with the application to adduce fresh evidence – should be before the Court at the substantive hearing of this appeal, but not to give permission at this stage for either of them. In my judgment that is the correct approach. I am certainly not prepared to refuse permission to appeal in relation to Article 8. It would be unjust, in my judgment, for the Article 8 ground not to at least be available for consideration by the Court at the substantive hearing, should that Court consider it appropriate. I have two points in particular in mind.

12. The first point is that the Respondent has submitted – and will therefore presumably seek to maintain – that the correct prism for considering remand time served is not section 21A(1)(b) but is Article 8 (and so section 21A(1)(a)). For that argument to be advanced, in circumstances where I have identified a reasonably arguable ground through the prism of section 21A(1)(b), but with the Article 8 ground then having fallen away completely from the case, could have unjust consequences.

13. The second point is this. As it seems to me, it is possible that the following analysis could prove to be correct in the present case. The Court could conclude that the remand time served point is at the threshold of section 21A(1)(b) disproportionality but not does not quite cross the line. In other words, it would be a 'near miss'. If the analysis is that there is such a 'near miss', it is possible then that the position of the Appellant's partner and child might 'tip the balance'. Those factors are not within the exclusive statutory factors to which regard is had for the purpose of section 21A(1)(b) proportionality. But they would be part of the Article 8 analysis.

14. I am satisfied that the court at the substantive stage needs to have the potential to consider the Article 8 alternative, depending on how it sees the ground on which I am granting permission to appeal. I am satisfied that the appropriate course is to defer the

question of reasonable arguability of the Article 8 point so that the Court at the substantive appeal can consider that question alongside the arguments which it has received in relation to the section 20A(1)(b) point, and that Court will be able to see how the points fit together. Whether Article 8, in the circumstances of this case, constitutes a reasonably arguable further or alternative ground of appeal is something for that Court in my judgment to evaluate. It will be best placed to do so and if it regards the answer as clear-cut it should not be required, through any order I have made today, to hear substantive argument.

15. There is a further point which supports that approach to Article 8. It relates to the application for fresh evidence. I am not prepared to grant permission today to the Appellant to rely on the fresh evidence. Even if I did so, I would want to make clear that the final decision as to whether to allow reliance to be placed on it would be for the Court at the substantive hearing. I have already described some of the unattractive features of this case. The Appellant did not attend his oral hearing and evidence from him could not be tested. On the other hand, Ms Westcott is right that insofar as financial support is concerned the evidence being adduced relates to a change of circumstances in July 2020 when the Appellant was released on bail and when, such was the financial support for his partner and child, that their benefits were reassessed and reduced. The District Judge in her judgment when considering Article 8 had explained that she did not accept that the Appellant was financially supporting any family member.

16. All questions as to whether the fresh evidence should be permitted to be adduced, and what its implications are, will be open for consideration at the substantive appeal as a result of my order today adjourning the application for fresh evidence to the substantive hearing. Even assuming everything else in the Appellant's favour it would be necessary to consider whether the evidence is 'capable of being decisive'. That question goes hand in hand, in my judgment, with the point I have made about the possibility of impact on the partner and child 'tipping the balance' if there is otherwise a 'near miss' in proportionality terms: whether under section 21A(1)(b) or Article 8.

17. As with the first ground of appeal, so with Article 8, nothing that I say is intended to shut out either party from making such submissions as are considered appropriate. However, as before, I do wish to make clear that I cannot for my part see anything else in this case so far as Article 8 is concerned.

Order

18. Having discussed with Ms Westcott the precise terms of the Order I record it here. Excluding case management directions and recitals, my Order was: (1) The Appellant has permission to rely on the Amended Grounds of Appeal dated 16 October 2020. (2) The Appellant has permission to appeal on the section 21A(1)(b) proportionality ground of appeal. (3) The Appellant's application (10 September 2020) for an extension of the representation order for a report from a Lithuanian lawyer as to the likely penalty if convicted of the extradition offence is refused. (4) The Appellant's application for permission to appeal on the Article 8 ECHR ground of appeal is adjourned for hearing on a "rolled up" basis at the substantive hearing of this appeal. If permission to appeal is granted at that hearing, the Court will proceed immediately to determine the substantive appeal on this issue alongside the other issue (section 21A(1)(b) proportionality). (5) The Appellant's application to adduce the fresh evidence (14

October 2020) is adjourned to the Court hearing this appeal. (6) No order as to costs, save for detailed assessment of the Appellant's publicly funded costs.

27.10.20