Neutral Citation Number: [2020] EWHC 3335 (Admin)

Case No: CO/1062/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 December 2020

Before :

MRS JUSTICE FARBEY

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Between :

FREDDY NIKA **Appellant**

- and –

THE DOUAI COUNTY COURT, FRANCE **Respondent**

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Malcolm Hawkes (instructed by **National Legal Service**) for the **Appellant**
Catherine Brown (instructed by **CPS**) for the **Respondent**

Hearing date: 24 November 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.

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 4 December 2020 at 10:30am

Mrs Justice Farbey :

Introduction

1. The appellant (who is a Kosovar Albanian born on 13 June 1973) appeals under s.26 of the Extradition Act 2003 ("the Act") against the decision of District Judge Tempia (sitting at Westminster Magistrates' Court) to order his extradition to France. The decision was made following a hearing on 10 March 2020.

2. The appellant is sought by the Douai County Court in France following his conviction for the facilitation of illegal entrants as part of a gang which organised illegal entry from France to the United Kingdom.. He was convicted in his absence by a court in Dunkirk on 12 June 2019 and sentenced to 5 years imprisonment, all of which remains to be served. He has not been personally notified of the court's decision but will, if he is sent to France, be served with it and told of his right to a new trial or to lodge an appeal. France is a Category 1 territory for the purposes of the Act and so Part 1 of the Act applies.

3. Before the District Judge, the appellant submitted that his extradition would breach his right to respect for private life under article 8 of the European Convention on Human Rights ("the Convention"). The Judge found that the appellant's extradition would be compatible with his Convention rights.

4. The appellant's principal contention, which plays a part in all his grounds of appeal, is that the French authorities cannot reasonably suspect that he committed the extradition offence: the circumstances of its commission are inconsistent with his life (at all material times) as a street homeless person in North London. In so far as the grounds of appeal are each founded on this principal contention, they overlap. However, the legal formulation of each of the grounds is different and goes beyond article 8 of the Convention. The appellant therefore raises new legal issues for this court to consider. Setting out the grounds in a different but more convenient order than they appear in the perfected grounds of appeal, they may be summarised as follows:

    i. The appellant's extradition would be incompatible with his right to respect for private life under article 8 of the Convention and so would be contrary to s.21 of the Act;

    ii. The appellant's extradition would be incompatible with the right to liberty of the person guaranteed by article 5 of the Convention and so would be contrary to s.21 of the Act;

    iii. The appellant's extradition is barred by reason of the passage of time because it would be unjust under s.14 of the Act;

    iv. The appellant's extradition would be an abuse of process.

5. Permission to appeal was initially refused on the papers on all grounds by William Davis J. By order dated 24 June 2020, Kerr J granted permission to appeal following an oral hearing. The terms of his order did not limit the grounds to those issues raised below. Ms Catherine Brown (who appeared on behalf of the respondent) accepted for pragmatic reasons that I should hear argument on all grounds, while emphasising that

the District Judge could not be criticised for failing to consider arguments which were not made.

Background

6. The EAW seeks the appellant's surrender in relation to one offence of people smuggling between 23 February and 3 April 2016. The appellant is said to have played a significant role in an organisation smuggling people to the United Kingdom from France. He is alleged to have been in contact with truck drivers and other members of the conspiracy based in France, managing payments and the reception of illegal immigrants while he was in Great Britain. He is said to have instigated at least 11 illegal crossings or attempted illegal crossings. The conduct has been marked on the Framework List as "facilitating the illegal entry and stay in a foreign country."

7. An "accusation" EAW was issued on 13 November 2017 and certified by the National Crime Agency on 11 December 2017. On 12 June 2019, a warrant for the appellant's arrest was issued in France following his conviction in his absence of the offence for which his extradition is sought. On 21 December 2019, the appellant was arrested pursuant to the accusation EAW. On 23 December 2019, an initial hearing took place at Westminster Magistrates' Court.

8. A "conviction" EAW was issued on 23 December 2019 and certified on 2 January 2020. Although I saw no relevant documentation, the parties agreed that, on 14 January 2020, the appellant made a request to the French authorities to be interviewed with a view to satisfying them that he is not the person who committed the extradition offence. The request was sent to the French authorities by the CPS. As the appellant was as yet unaware of the conviction warrant, the request was made under s.21B of the Act which deals (among things) with requests from those who are the subject of accusation warrants to provide information to requesting judicial authorities.

9. Subsequently, the appellant's solicitors prepared two proofs of evidence (which I have seen in unsigned and undated form) and gathered witness statements from those who know the appellant in the United Kingdom (which are also before me). The CPS forwarded the proofs and witness statements to the French authorities for their consideration as part of the s.21B request.

10. On 28 January 2020, the appellant was arrested pursuant to the conviction warrant. On that day, the initial hearing took place in relation to this second warrant and the accusation warrant was discharged.

11. By letter dated 9 March 2020, the French Ministry of Justice responded to the s.21B request. The appellant's request for an interview was rejected on the grounds that he had already been tried and convicted. The letter explains that the Dunkirk court has issued an arrest warrant, the effect of which is to make the prison sentence enforceable immediately (in other words, as soon as the appellant is arrested). The letter continues:

> "Consequently, we cannot give a positive response to the requests made by Mr NIKA Freddy, who is to serve his prison sentence on French soil. However, as soon as he is notified of the judgment, he will be able to oppose the judgment and request a new hearing while remaining in prison."

Enclosed with the letter was the order referring the case to the criminal court, which summarises the investigation and the information on which the French authorities had identified the appellant ("the referral order").

The District Judge's judgment

12. As I have mentioned, the only issue raised by the appellant before the District Judge was that his extradition would constitute a disproportionate interference with his right to respect for private life under article 8 of the Convention. In her judgment, the District Judge set out the background and procedural history. She summarised the allegations against the appellant and summarised the evidence before her. She reminded herself of the terms of article 8 and of the relevant legal principles in extradition cases. She set out the submissions of the parties.

13. The District Judge went on to set out the factors in favour of extradition and the factors against extradition, in accordance with the well-established approach in *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin), [2016] 1 W.L.R. 551. In drawing together the competing factors, she held that it was not her function to decide whether or not the appellant committed the extradition offence:

> "45. …I have read the statements and evidence provided to this court [which were] sent to the French authorities under the section 21B request, to prove that the [appellant] was not, and could not, have been involved in the offending and therefore it would be disproportionate to extradite him. That is not a matter for me; that is a matter for the French courts to consider when no doubt the [appellant] will apply for a retrial."

14. She accepted that the appellant has established a private life within the United Kingdom and that his extradition would interfere with his private life:

> "…I accept the [appellant] has article 8 rights, albeit he is homeless and without a job or family, although he now has temporary accommodation with friends and has a settled life in the UK. I accept extradition will cause him a degree of emotional upset and be a significant disruption in his life."

15. Balancing other factors, she accepted that the appellant is not a fugitive. There had, however, been no delay by the French authorities in seeking his extradition. The offence for which he was convicted was very serious as reflected by the sentence of 5 years imprisonment. The District Judge concluded that, having regard to the public interest in the United Kingdom complying with its extradition obligations, the appellant's extradition would be compatible with his Convention rights.

Legal framework

16. Section 7 of the 2003 Act deals with the identification of a person brought before the court in extradition proceedings. It provides (in so far as relevant) that the appropriate judge must decide whether the person before the court is the person in respect of whom the EAW has been issued. The judge must decide that question on a balance of probabilities. If the judge decides the question in the negative, the person must be

discharged. If the judge decides the question in the affirmative, the case will proceed. There is no right of appeal against a s.7 decision. The right of appeal lies only against an order of extradition (*Nikonovs v Governor of Brixton Prison* [2005] EWHC 2405 (Admin), [2006] 1 All ER 927, paras 9-15).

17. In relation to conviction warrants, s.14 of the Act provides that a person's extradition to a Category 1 territory is barred by reason of the passage of time if it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have become unlawfully at large.

18. Section 14 concerns the passage of time in relation to two concepts – injustice and oppression. Injustice primarily concerns the risk of prejudice to the accused in the conduct of his trial. Oppression concerns hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration. There is room for overlap and the two concepts between them cover all cases where to extradite the accused would not be fair (*Kakis v Government of the Republic of Cyprus* [1978] 1 W.L.R. 779 per Lord Diplock at 782H-783A). Culpable delay on the part of the requesting state can weigh more heavily in the balance and may sometimes be decisive, especially in a borderline case (*La Torre v Republic of Italy* [2007] EWHC 1370 (Admin), para 37).

19. Section 21 of the Act establishes a bar to extradition if a judge decides that extradition would not be compatible with a person's human rights.

20. Section 21B of the Act deals with the procedure to be followed when a person subject to an accusation warrant has made a request to speak with representatives of a requesting authority (for purposes such as conveying in an interview with the authority that he is not guilty of the extradition offence). If a s.21B request is made, the judge must order that further proceedings be adjourned for no more than seven days if the judge thinks it necessary to do so to enable the authority to consider whether to consent to the request (s.21B(4)). If the authority consents to the request, the judge must adjourn the proceedings and make any orders or directions that are appropriate (s.21B(5)). There is no equivalent provision in relation to requests made in response to conviction warrants.

21. It is well-established that it is not a matter for the District Judge, or this court on appeal, to determine the guilt or innocence of a person subject to extradition proceedings. In this regard, I adopt the reasoning of Ouseley J in *Starzomski v Regional Court, Kielce Poland* [2014] EWHC 2673, para 4:

> "The fundamental error which Mr Starzomski makes is to suppose that it is for this court to resolve whether he is guilty or innocent of the accusation. If he shows that he was in the United Kingdom and could not have committed the offences because he was in the United Kingdom, the Polish court will of course have to consider what impact that has on his innocence or guilt. But it is not for this court to resolve where he was or what significance that has for his ability to commit the offences."

The court's jurisdiction on appeal

22. The court may allow an appeal only if (a) the appropriate judge ought to have decided a question raised at the extradition hearing differently; and (b) if the question had been answered as it ought to have been, the District Judge would have been required to order the person's discharge (s.27(3) of the Act).

23. If the appellant raises a new issue, the appeal may be allowed only if the issue would have resulted in the District Judge deciding a question before him at the extradition hearing differently such that the judge would have been required to order the person's discharge (s.27(4)).

Article 8 of the Convention: private life

24. On behalf of the appellant, Mr Malcolm Hawkes submitted that the appellant could not have committed the offence for which his extradition is sought. The person considered to have committed the offence is described by the referral order as an Albanian national whereas the appellant was born in Kosovo. The person considered to have committed the offence is said to have a brother whereas the unchallenged evidence before the District Judge was that the appellant has no brother. The mobile telephone number which the French authorities ascribe to the person who committed the offence is not the same as the appellant's known mobile telephone number. Nor is there any evidence that the appellant used an alias as suggested by the French authorities.

25. The appellant's criminal record demonstrates that he appeared before Harrow Crown Court for offences in London in 2016 and 2017 which was broadly in line with the period of the French allegations. The plain evidence before the District Judge was that he was street homeless during this period – and so incapable of engaging in organised crime across international borders. The French authorities have supplied no proper identity evidence. The evidential foundation of the identification of the appellant is baseless.

26. Mr Hawkes submitted that, given the complete absence of any evidence connecting the appellant to the offence, the French authorities were unreasonable to reject his s.21B request to be interviewed with a view to his complete exoneration. The witness statements sent to the French authorities from people who know the appellant describe his distinctive appearance. The French authorities had failed properly to respond to those statements.

27. Mr Hawkes pointed out that the French authorities had rejected the s.21B request on the basis that, by the time of their response to the request, the appellant had already been convicted. Although s.21B applies only to "accusation" cases and does not apply to "conviction" cases, the appellant should have been treated as an accusation case because it was not his fault that he was convicted before having had an opportunity to make and resolve a s.21B request. The procedure laid down in s.21B provides a safeguard and ensures the protection of a person who has a complete answer to a case against him. In the circumstances, fairness required that he be treated in the same way as an accusation case.

28. Mr Hawkes submitted that, in light of the poor identification evidence and the failure of the French authorities to interview the appellant under s.21B, his extradition would

amount to a disproportionate interference with his private life and so breach article 8 of the Convention. It would be disproportionate to extradite the appellant when it is plain that he is not the person who committed the extradition offence.

29. Mr Hawkes drew my attention to certain dicta within the case law about whether it is possible to reopen the question of a person's identity under s.7 of the Act after the matter has been determined by a District Judge at the initial hearing (*Nur v Public Prosecutor Van Der Valk* [2005] EWHC 1874 (Admin), paras 20-21; *Hilali v Central Court of Criminal Proceedings No 5 of the National Court, Madrid and another* [2006] EWHC 1239 (Admin), [2007] 1 W.L.R. 768, para 20; *Ivanovs-Jeruhovics v Rezekne Court Latvia* [2013] EWHC 1913 (Admin), para 22).

30. Ms Brown submitted that the appellant was asking the court to depart from established authority that the issue of the guilt or innocence of the appellant falls outside the statutory scheme for extradition. The District Judge had properly directed herself in law and had applied the appropriate legal principles to the facts of the case in a carefully structured judgment. There was no good reason for this court to interfere.

31. I agree with Ms Brown's submissions. The question before the District Judge was whether the appellant's extradition was proportionate under article 8. She took into consideration that the appellant claimed not to have committed the extradition offence but declined to adjudicate on whether or not the appellant was guilty. In my judgment, her approach was impeccable. It would have been contrary to authority and principle for the Judge to have embarked on such a course.

32. I have reservations about the use of an appeal to this court as a vehicle for making submissions on guilt or innocence as if the court's function was to rehear the case before the District Judge or to conduct what would in effect be a mini-trial of the issues before the French courts. In my judgment, the appellant's attempt to introduce the question of his guilt or innocence – albeit by the side wind of s.21 of the Act and the article 8 proportionality exercise – must fail.

33. Nor does case law relating to s.7 of the Act advance Mr Hawkes's submissions. The question under s.7 is whether the person identified in the warrant is the person before the judge. There is no properly formulated ground of appeal in relation to the s.7 question. I am not persuaded that the s.7 case law is relevant to the question whether the appellant or some other person committed the offence, which is a different matter.

34. Mr Hawkes maintained that the District Judge's judgment was flawed because she failed "almost entirely to consider the Article 8 impact" on the appellant of being extradited "to answer for someone else's conduct." That is not correct. In weighing the factors against extradition, the District Judge expressly took into consideration that the "evidence provided to the court and the French authorities proves he could not have been involved in the conduct and it would be disproportionate to extradite."

35. Mr Hawkes submitted that the District Judge had failed adequately to analyse the extent of the interference with the appellant's private life, asserting that she had devalued his itinerant lifestyle. That is not correct. The District Judge accepted that extradition will disrupt the appellant's life significantly. It does not follow that he cannot be extradited.

Article 5 of the Convention: right to liberty

36. In the course of discussion, I reminded Mr Hawkes that the test of whether the appellant's extradition would be in violation of article 5 of the Convention was whether he was at real risk of a flagrant breach of that article (see *Othman (Abu Qatada) v United Kingdom* (2012) 55 E.H.R.R. 1; *Mohamed Elashmawy v Court of Bresica, Italy* [2015] EWHC 28 (Admin)). Mr Hawkes submitted that, as the appellant had been tried in his absence, he should be treated as someone who has not been convicted of an offence but who will be brought before a court for trial. Article 5(c) of the Convention provides that a person may only be lawfully detained for the purpose of being brought before a court if there is a reasonable suspicion that he has committed an offence. There can be no such reasonable suspicion in the present case, so that the flagrancy test was satisfied.

37. I am not persuaded that the appellant, having been tried and convicted of an offence in his absence, should be treated as a person who has not been tried. Mr Hawkes cited no authority to support such a proposition which I regard as tendentious. Even if Mr Hawkes is correct, I am not persuaded that the high threshold of flagrancy has been reached. At highest, there is evidence before this court that may mean that the appellant did not commit the extradition offence. That is a far cry from indicating that the appellant's extradition would give rise to the risk of a flagrant breach of his article 5 rights.

38. Mr Hawkes further submitted that the flagrancy threshold had been met because the French authorities had failed to undertake a genuine inquiry into the basic facts of the case. He submitted that the French authorities knew that the corollary of the execution of their extradition request was that the appellant would be imprisoned in France without having had the opportunity to answer the allegations against him. If he had been provided with such an opportunity, he would inevitably have vindicated himself. I have already held that this court will not determine whether the appellant is guilty of the extradition offence, and so will not determine the inevitability or otherwise of the appellant's exoneration. There is nothing to suggest that the French authorities are seeking to imprison a person that they know to be innocent. No realistic submission about the flagrancy test was advanced before me. For these reasons, this ground of appeal is dismissed.

Section 14: passage of time

39. Mr Hawkes did not argue that extradition would be oppressive, limiting his submissions to the question of injustice under s.14. He submitted that the appellant's extradition would be unjust on account of the delay between the issue of the accusation warrant in November 2017 and the applicant's arrest pursuant to that warrant in December 2019.

40. Mr Hawkes submitted that there had been culpable delay by the French authorities in issuing the conviction warrant two years after the accusation warrant. The French authorities knew the appellant's whereabouts when the accusation warrant was issued. Instead of seeking to extradite the appellant on that warrant, they had proceeded to try the appellant in his absence.

41. As a result of the actions of the French authorities, the appellant had (i) lost the right to have a substantive response to the exonerating evidence submitted with his s.21B application; (ii) lost the presumption that he would be granted bail in France; and (iii)

lost the presumption of innocence. The appellant was therefore in a significantly worse position than he would have been, if the accusation warrant had been promptly executed.

42. Mr Hawkes submitted that the appellant's trial in his absence could have been avoided if he had been arrested earlier in the United Kingdom. There has been no explanation as to why the appellant was not arrested sooner pursuant to the accusation warrant when he was known to the British police and has always lived at or been discoverable in the same area of London for over nine years. The delay in his initial arrest means that he was not able to rely on a s.21B request: by that time, the French authorities had closed their minds to any such request on account of the appellant's conviction. The appellant has been or will be prejudiced in a case where he is not a fugitive and when all of the proceedings in France have taken place without his knowledge or participation. Both the actions of the French authorities and the delay before the execution of the accusation warrant have caused him significant prejudice amounting to injustice under s.14.

43. Ms Brown submitted that Mr Hawkes' reliance on s.21B was misplaced as that section of the Act applies only to accusation warrants (see s.21B(1)(a)). The accusation warrant in the present case was discharged and the District Judge was concerned with a conviction warrant. The French authorities had in any event considered all the relevant evidence and reached a reasonable conclusion that the appellant should not be interviewed.

44. Ms Brown submitted that the delay between the issue of the first EAW in November 2017 and the appellant's arrest in 2019 was not the fault of the French authorities who were under no obligation to chase the warrant's execution in the United Kingdom. The appellant's conviction pre-dated his arrest under either of the EAWs, so that it could not possibly be argued that the French authorities had orchestrated a situation in which the conviction warrant was issued to remove rights under the accusation warrant. The French authorities were entitled to try the appellant in his absence: there were no grounds for this court to call that step into question.

45. I prefer Ms Brown's submissions. The concept of injustice is concerned primarily with the fairness of the trial (see *Kakis*, above). It is not inherently unjust to try someone in his absence, and the appellant's trial did not amount to injustice in this case. Although the appellant was convicted in his absence, he has the right to a retrial in France. He has not identified any particular issues that would give rise to prejudice in the conduct of his retrial (for example the non-availability of an alibi witness).

46. The French authorities were not responsible for the delay in the execution of the accusation warrant. Their conduct in progressing to trial before the accusation warrant was executed is not open to criticism in this court. Their response to the s.21B request was reasonable in the circumstances. Nor do I regard the delay by the police in London as a cause of any injustice. Mr Hawkes relied particularly on the loss of the presumption of bail and the loss of the presumption of innocence but there is no evidence before me about either of those matters.

Abuse of process

47. Mr Hawkes submitted that, in light of the evidence sent to the French authorities about the appellant's identity and life in the United Kingdom, the authorities now know that

the appellant did not commit the offence. It follows that the French authorities know that the case against the appellant is unsustainable. They are pursuing extradition for some other motive, tailoring the materials placed before the court to give effect to the extradition request. In my judgment, there is no evidence that the French authorities are pursuing the appellant's extradition for an improper purpose. All the evidence before the District Judge and before me points to the enforcement of a sentence of imprisonment following the appellant's trial in his absence. Nothing has been "tailored." This ground of appeal fails.

48. None of the other points made by the appellant about the findings of the District Judge – catalogued in a list of so-called "errors" towards the end of the perfected grounds of appeal – can possibly lead to the conclusion that the Judge ought to have discharged the appellant. Nor were they advanced as discrete grounds of appeal as opposed to further commentary about the grounds that I have considered above. I agree with Ms Brown that the District Judge made adequate findings of fact in relation to the issues before her. There are no grounds to hold that she ought to have decided any question differently. There are no grounds to hold that she ought to have ordered the appellant's discharge.

49. For these reasons, this appeal is dismissed.