Neutral Citation Number: [2021] EWHC 1665 (Admin)

Case No: CO/3955/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2021

Before:

MR JUSTICE JAY

- -

Between:

MAREK VAJDIK **Appellant**

- and –

DISTRICT COURT OF BRATISLAVA, SLOVAKIA **Respondent**

- -
- -

Graeme L. Hall (instructed by **National Legal Service**) for the **Appellant**
Jonathan Swain (instructed by **CPS**) for the **Respondent**

Hearing date: 11 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was 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 is deemed to be Friday 18th June 2021 at 10.00am.

MR JUSTICE JAY:

Introduction

1. Marek Vajdik appeals against the decision of District Judge Zani sitting at Westminster Magistrates' Court ordering his extradition to Slovakia. Hereafter, I will be referring to the parties as "the RP" and "the JA", and to the District Judge as "the DJ".

2. The appeal turns on a short point as to the validity of the EAW for the purposes of s. 2 of the Extradition Act 2003. There are other grounds of appeal, in respect of which the RP requires my permission; but I have adjourned these for the time being.

3. The RP is wanted in Slovakia to be tried for a robbery which allegedly took place on 5th August 2012. The EAW sets out the circumstances, and it is not suggested that in this respect it is defective in any way.

4. The nature of the RP's case on this appeal is that the EAW is replete with "wholesale" defects which could not be cured by the provision of Further Information. These defects relate to the characterisation of the warrant. It is said that the EAW does not specify that this is an accusation rather than a conviction case.

5. The merits of each side's cases are finely balanced. In the circumstances, a review of relevant authority is required.

The EAW

6. The EAW in this case is dated 13th February 2020. It was signed, and therefore certified, by Judge Dr Roman Fitt. As is required in Part 1 cases, the responsibility for translating the EAW from its original Slovak lay with the JA.

7. The preamble to the warrant reads as follows:

> "This arrest warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of serving the prison sentence that has already been imposed."

8. This wording could not be clearer. As Mr Graeme Hall for the RP pointed out, the JA has adapted the wording set out in the Annex to the Council Framework Decision of 13th June 2002, 2002/584/JHA, which provides:

> "This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

9. Box B of the EAW identifies the decision on which the warrant is based. Given that the pro forma document is used for both accusation and conviction warrants, the "decision" in question could either be an arrest warrant (in the relevant state) or a determination by the relevant criminal court. In the present case, the "decision" that is described is clearly an arrest warrant.

10. Box C of the EAW is headed "Indications on the length of sentence". Here, there are three possibilities. The first is that the RP has been convicted and sentenced. The second is that he has been convicted and is awaiting sentence. The third is that he is being sought to stand trial. The EAW in this case specifies that the maximum sentence for this type of robbery is one of eight years' imprisonment, and that no sentence has been imposed. Mr Hall submitted that the warrant was therefore neutral: looking at Box C in isolation, one could not tell whether it was an accusation or a conviction warrant. Mr Jonathan Swain for the JA submitted that Box C had to be seen in context. In my judgment, Box C needs to be seen both in isolation and in context. If, for example, it were otherwise clear from the EAW that it was a conviction warrant, Box C would not create any difficulty, because the inference would be that the RP had been tried and was awaiting sentence. But the context of the present case is somewhat different.

11. Box D is the most problematic. It is headed, "Indicate if the person appeared in person at the trial resulting in the decision". Here, the author of the EAW has completed para 3.4 which states that the RP was not personally served with the decision, that he will be as soon as possible after surrender, and that on this occasion he will be informed of his right to a retrial or appeal. In the original language version, para 2 of Box D has also been endorsed, but that is not reflected in the translation.

The Further Information

12. The DJ considered that the EAW was ambiguous and adjourned the first hearing so that the JA could clarify its type. Judge Fitt provided three sets of Further Information in answer to the questions posed of him. On 3rd September 2020 he stated that the RP had not been convicted and that the translator made a mistake when translating the EAW. This was an accusation warrant.

The Legal Framework

13. Section 2 of the Extradition Act 2003 provides in material part:

> "**Part 1 warrant and certificate**
>
> (1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.
>
> (2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—
>
> (a) the statement referred to in subsection (3) and the information referred to in subsection (4), or
>
> (b) the statement referred to in subsection (5) and the information referred to in subsection (6).
>
> (3) The statement is one that—
>
> (a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.

(4) The information is—

(a) particulars of the person's identity;

(b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it.

(5) The statement is one that—

(a) the person in respect of whom the Part 1 warrant is issued has been convicted of an offence specified in the warrant by a court in the category 1 territory, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence.

(6) The information is—

(a) particulars of the person's identity;

(b) particulars of the conviction;

(c) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence, if the person has not been sentenced for the offence;

(e) particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offence, if the person has been sentenced for the offence."

The DJ's Ruling

14. In para 39 of his ruling handed down on 22nd October 2020, the DJ held:

> "The reply from the Judicial Authority states that this is an accusation warrant. Judge Roman Fitt of the District Court in Bratislava confirms that there has been no conviction in this case and adds that the errors which appears to have caused the confusion, were those of translation by the individual tasked to translate the EAW into English. Accordingly reading the EAW in conjunction with the further information I am satisfied that the EAW complies with the requirements of s.2 in respect of information needed by MV to be able to know why his return is sought and to be able to consider the appropriate challenges that may be available to him. The defence have not identified any bar to extradition that they are unable to pursue as a result of the further information clarifying that this is, and always has been, an accusation-based EAW."

Relevant Jurisprudence

15. In *Zakrzewski v Poland* [2013] UKSC 2; [2013] 1 WLR 324, the Supreme Court was considering the validity of an EAW in the context of s. 2(6) of the 2003 Act. Lord Sumption JSC, approving a dictum of Sir Anthony May P. in an earlier case, held at para 13:

> "I agree with this statement, subject to four observations. The first is that the jurisdiction is exceptional. The statements in the warrant must comprise statutory particulars which are wrong or incomplete in some respect which is misleading (though not necessarily intentionally). Secondly, the true facts required to correct the error or omission must be clear and beyond legitimate dispute. The power of the court to prevent abuse of its process must be exercised in the light of the purposes of that process. In extradition cases, it must have regard, as Sir Anthony May P observed, to the scheme and purpose of the legislation. It is not therefore to be used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant, this being a matter for the requesting court. Third, the error or omission must be material to the operation of the statutory scheme. No doubt errors in some particulars (such as the identity of the defendant or the offence charged) would by their very nature be material. In other cases, the materiality of the error will depend on its impact on the decision whether or not to order extradition. The fourth observation follows from the third. In my view, Ms Cumberland was right to submit to Sir Anthony May P in *Murua* that the sole juridical basis for the inquiry into the accuracy of the particulars in the warrant is abuse of process. I do not think that it goes to the validity of the warrant. This is because in considering whether to refuse extradition on the ground of abuse of process, the materiality of the error in the warrant will be of critical importance, whereas if the error goes to the validity of the

> warrant, no question of materiality can arise. An invalid warrant is incapable of initiating extradition proceedings. I do not think that it is consistent with the scheme of the Framework Decision to refuse to act on a warrant in which the prescribed particulars were included, merely because those particulars contain immaterial errors."

16. *Zakrzewski* did not consider the possibility of the executing state seeking further information of the JA pursuant to article 15(2) of the Council Framework Decision. This is described as "supplementary information". In the handbook published by the European Commission the following guidance is given:

> "Typical situations in which supplementary information may be necessary are when:
>
> (a) a relevant part of the EAW form is not filled in;
>
> (b) the content of the EAW is unclear;
>
> (c) there is an obvious error in the EAW;
>
> (d) it is uncertain whether the correct person was arrested pursuant to the EAW."

This suggests that the power to seek further information is broad, although it is not the last word on the subject.

17. The *locus classicus* on this topic is the decision of the Supreme Court in *Goluchowski v Poland* [2016] UKSC 36; [2016] 1 WLR 2665. The focus of that case was s. 2(6)(c) of the 2003 Act. Both counsel have cited extensively from the judgment of Lord Mance JSC, and it is unnecessary for me to repeat that exercise. I have considered, in particular, paras 38-40, and 44-47 of his judgment. Critically, in my view, Lord Mance applied the cautionary words of the CJEU in *Bob-Dogi* (EU:C:2016:385) which in his opinion detracted from the "austerity" of Lord Sumption's approach in *Zakrzewski*: on one reading at least, what he said might suggest that an incomplete warrant could not be saved by supplementary information. Lord Mance also sought to temper what might be described as the even more austere observations of Lord Hope in *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 8; [2007] 2 AC 31. Thus, in Lord Mance's view, if it were unclear whether the EAW was based on an enforceable judgment of the issuing state (i.e. an arrest warrant issued in that state), the executing state was (a) obliged to seek supplementary information as a matter of urgency, and (b) could properly take that information into account if it demonstrated that the EAW was validly predicated (para 40).

18. Lord Mance contrasted this with the following scenario (see the last sentence of para 40):

> "On the other hand, if subsequently obtained information undermines in a fundamental respect a statement in an EAW which on its face evidences an enforceable judgment or

> equivalent judicial decision, it could not be right to give effect to the EAW willy-nilly."

19. In my judgment, *Goluchowski* does not provide a complete answer to the instant case. There, the EAW was indisputably valid on its face (see para 48) but the underlying national arrest warrant was not fully or accurately "evidenced". Mr Hall's submission was that the gross ambiguity in this particular EAW means that it cannot be said just by considering its terms whether it is valid on its face.

20. *Alexander v France* [2017] EWHC 1392 (Admin); [2017] 3 WLR 1427 also attracted extensive citation by counsel. In that case (and the conjoined case of *Di Benedetto v Italy*), the issue was whether supplementary information pursuant to article 15(2) could remedy unclear or inadequate particulars provided for the purposes of s. 2(3) of the 2003 Act. The Divisional Court (Irwin LJ and Sweeney J) held that further information could fill in lacunae (paras 73 and 75), and resolve ambiguity (para 75), but could not save "wholesale failures" to provide the statutory particulars (para 75). In this respect, extradition could not be secured by providing "a bit of paper" (para 75).

21. In *M & B v Italy* [2018] EWHC 1808 (Admin), the Divisional Court (Gross LJ and Nicol J) held that further information could not cure EAWs which were "wholly deficient" in failing to specify the offences in respect of which extradition was being sought.

22. In *Avadanei v France* [2019] EWHC 2534 (Admin) Elisabeth Laing J, as she then was, held that further information could not be used as a substitute for particulars of the offences that were "wholly deficient". She held that the case before her was clearly on the wrong side of the line, all of these cases being fact-sensitive.

23. I was taken to other cases, all of which seemed to me to turn on their own particular facts.

24. Lastly, and taken out of chronological sequence, is the decision of Cranston J in *Komar v Poland* [2015] EWHC 2547 (Admin). In that case, it was argued that the EAW was ambiguous, and fatally flawed, because it was not clear whether it was an accusation or a conviction warrant. Box D had been completed in a manner which suggested that the appellant had not appeared for his trial and had been sentenced. No relevant further information had been sought. At paras 15-16 of his judgment, Cranston J held:

> "15. The purposes of the EAW must be discerned from the document as a whole: *Asztaslos v. Szekszard City Court, Hungary* [2010] EWHC 237 (Admin) , [15]. In interpreting the warrant the court must adopt a cosmopolitan approach, without assuming that words and phrases in an EAW have the same significance as they do in English criminal procedure: *In re Ismail* [1999] 1 AC 320 .
>
> 16. In my view, the fact that box D contains the statement that the appellant did not appear at the "trial resulting in the decision" does not create ambiguity in the light of the clear indication in boxes B and C that he has not been convicted. The reference to the "decision" is to the decision at box B, the judicial decision

> on preventive detention. The notion of the "trial" can be easily understood, adopting a cosmopolitan approach and making allowances for different understandings of the concept of a trial, as the Polish court hearing on 20 December 2013, which resulted in the domestic warrant being issued. The references in box D to service with the "decision" on surrender and the right to appeal refer again back to the decision of preventive detention, the basis of the EAW. The phrase "the sentenced person was a perpetrator" in the EAW at box E is a mistranslation of the Polish EAW, which refers to a "suspect". The EAW was clearly for the purposes of having the appellant stand trial. In my view the District Judge cannot be said to be in error on this point."

25. I have left *Komar* to last because its bears the closest factual similarities to the instant case. Yet, there are important differences, not least because it was possible to construe "trial", in context, as including the hearing which led to the issue of the arrest warrant in Poland.

26. Troubled by the possibility that *Komar* was an obstacle to his case, Mr Hall drew my attention to the decision of the CJEU in *Dworzecki v Poland* (Case C-108/16). Although the CJEU made it clear that "trial" in Box D was a reference to the RP's criminal trial (see paras 32 and 36), that was very much fact-specific. I do not read *Dworzecki* as undermining *Komar* in any way: it, in its turn, was very much fact-specific.

The Parties' Submissions in a Nutshell

27. Mr Hall submitted that this was a case of wholesale failures which could not be remedied by further information, however clear the latter might be. He relied on the preamble to the EAW and the terminology of Box D, both of which clearly indicated that this was a conviction warrant. Mr Hall submitted that the DJ should not have adjourned the hearing for further information to be obtained, and that once it had been procured he wrongly took it into account.

28. Mr Hall was also extremely sceptical about Judge Fitt's assertion that there have been translation errors. He pointed to the deliberate way in which the preamble had been adjusted from the template in the Annex to the Framework Decision, and to the manner in which Box D had been completed.

29. Mr Swain relied on various passages in *Goluchowksi* to which I have referred, and submitted that this was a case of ambiguity, not wholesale failure. He invited me to consider the terms of the EAW in its entirety. The Divisional Court said in *Alexander* that further information could clarify an ambiguity, and this was such a case.

Discussion and Conclusion

30. I reserved judgment in this case not because the point was lengthy or particularly complex. I felt that it was necessary to examine the authorities with care and extract from them the guiding principles in a domain which is very much fact-specific.

31. It must be a question of fact and degree whether a case exhibits "wholesale failures" on the one hand, in which event further information cannot provide salvation, or lesser

errors of omission, lack of clarity or ambiguity which are remedial. Given that the DJ did not consider whether this case might be one of wholesale failure, the decision must one be for me. This is not a question of reviewing a decision: it was not made.

32. The relevant provisions here are s. 2(3) and (5) of the 2003 Act. Is there a clear statement in the EAW that the RP is being sought for the purposes of prosecution and trial in Slovakia? The answer to that question is that there is an individual statement to that effect in Box B, but that the EAW taken as a whole is ambiguous. Indeed, there are other statements in the EAW which are inconsistent with the proposition that this is an accusation warrant. Is there a clear statement in the EAW that the RP is being sought for the purposes of serving a period of imprisonment after having been convicted? The answer to that question is more nuanced. There are indications in the EAW that he has been convicted: see the preamble, and Box D, which in my judgment may only be read in that way. Conversely, however, if this truly were a s. 2(5) case it would have to be pointed out that no statutory particulars of any criminal conviction have been supplied. For example, the RP is left none the wiser as to the date of the conviction and the court in which he was tried. Of course, the explanation for that is he has not been convicted at all.

33. I would not be content to decide this appeal on the basis that the explanation for the ambiguity is translation error. Without seeking to detract in any way from the principles of mutual trust and confidence, it is not clear to me where these errors lie. In these particular circumstances, it would have been helpful had they been specified. Nor am I disposed to decide this appeal on the basis that "trial" in Box D in this particular EAW includes the procedure which led to the issue of the arrest warrant in Slovakia. The wording of Box D in the present case appears to differ from that in *Komar*, and it was not suggested by Mr Swain that there was a formal procedure in Bratislava which led to the warrant being formalised.

34. However, I fall short of deciding that this is a case of "wholesale failures". This EAW was unclear. There are ambiguities and apparent contradictions which are capable of explication. I can see that the problem here would have been greater from the JA's perspective had the RP in fact been tried and convicted, and it was being said that this was a conviction warrant, but that is not the case here. All that the further information achieves is to cure the ambiguity and to make it plain that he has not been convicted. The offending portions (the preamble and Box D) can be, and are, notionally blue-pencilled out.

35. Unlike the type of case examined in *Goluchowski* (see §18 above), this is not a situation where the further information undermines the EAW. Furthermore, the RP is not prejudiced in any way. The EAW tells him what his trial will be about, and makes it plain, because there was previous doubt, that he has not yet been tried.

36. The instant case is not quite the same as any previously decided case, and a fact-specific inquiry must be undertaken. Having performed it, I have concluded that the present case is on the right side of the line, from the JA's perspective, and that the RP's ground of appeal based in s. 2 of the Extradition Act 2003 must fail.

37. There must be a rolled-up hearing as soon as possible to determine the RP's renewed application for permission to appeal on other grounds.