Neutral Citation Number: [2021] EWHC 2036 (Admin) Case No: CO/4483/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 20th July 2021

Before :
MR JUSTICE FORDHAM
- -

Between :

WILLIAM CESARIO BARCELOS	**Appellant**
- and –	
JUDICIAL COURT OF THE JUDICIAL DISTRICT OF LISBOA NORTE (PORTUGAL)	**Respondent**

- -

George Hepburne Scott (instructed by Tuckers Solicitors) for the **Appellant**
Natalie McNamee (instructed by Crown Prosecution Service) for the **Respondent**

Hearing date: 13.7.21

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Approved Judgment

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

Introduction

1. This is an extradition appeal on Article 8 ECHR grounds, brought with the permission of Chamberlain J. The mode of hearing was an in-person hearing at the Royal Courts of Justice. The Appellant is aged 52 and is wanted for extradition to Portugal. That is in conjunction with a conviction EAW issued on 23 April 2020 and certified on 1 June 2020. It relates to a 12-month custodial sentence, all of which remains to be served. Extradition was ordered by District Judge Ikram on 26 November 2020 after an oral hearing at which the Appellant gave oral evidence as did his Portuguese lawyer Dr Alves.

Understanding the impact for the partner's work

2. A point arose about the unchallenged witness statement from the Appellant's partner (Ms Resende). That statement was relied on at the hearing before the District Judge and Ms Resende was not cross-examined. The witness statement described her background as "a Radiographer, specialised in mammography". It described how in the UK she has progressed to being "an Application Specialist for a big company in Breast Health, so I am teaching the Radiographers/Mammographers how to use the mammography systems, for a better and faster Breast Cancer Detection and treatment". It said: "If I had to move back to Portugal, I would lose my job that I love since there are no vacancies in Portugal, and I would have to go back to practising as a Radiographer". It said: "The issue here is that if I was lucky enough to find a job as a Radiographer, I would not be able to put in practice the knowledge I have acquired up until today in the UK and I would never have the chance to do it there". Earlier, the statement had said: "In Portugal it is almost impossible for any of us to get a job"; "the employment situation there is unbearable" and: "If we are lucky enough to get a job, we never have stability since they never employ anybody permanently. That gives them the authority to fire anybody they want for no reason". Mr Hepburne-Scott distilled this evidence as coming to this. If the Appellant were extradited and Ms Resende accompanied him to Portugal, she would lose her secure and existing higher-level job here, she would have to revert to Radiographer and in Portugal, with uncertainty as to whether such a job would be secured and with insecurity in how it is held. I accept that as a fair distillation of unchallenged evidence. The District Judge recorded: that Ms Resende "works as an application specialist in the health sector"; that she "would give up her job and move to Portugal" if [the Appellant] were extradited; that it "would uproot her and disrupt her career if she were to move as she would have to revert to her previous role as a radiographer". I approach that reasoning, and this aspect of the case, in light of the distillation to which I have referred. Mr Hepburne-Scott, rightly and understandably, emphasises this feature of the case.

The position in Portugal

3. The background is as follows. Just after midnight on 28 April 2011 the Appellant was driving a motorbike with excess alcohol in his blood. The motorbike was overturned. Mr Hepburne-Scott invites me to proceed on the basis – on instructions and in the absence of contrary suggestion in the documents – that nobody else was involved in the accident and that only the Appellant was injured. I am prepared to proceed on that basis. The Appellant was found to have 243 mg of alcohol per 100 mL of blood. That was over the legal limit both in Portugal and in the UK (where the limit is 80 mg/100ml). The Appellant pleaded guilty at trial on 19 January 2012. He was sentenced on 13 February 2012 to a 12-month custodial sentence suspended for one year. He remained subject to a

requirement, which had been imposed on 7 July 2011, to notify any change of address. One of the conditions of the suspended sentence was the delivery up of his driving licence, as to which he defaulted, but that was in due course the subject of a distinct 6 month suspended sentence which was later served and has been recognised as extinguished (20.5.20) and which I can put to one side. Another condition of the 12-month suspended sentence (13.2.12) , for the offence of driving with excess alcohol (28.4.11), was attendance at an alcohol treatment centre. At the time when the sentence was imposed he had attended that centre three times (25.1.12, 1.2.12 and 8.2.12) and by the time the sentence was made final (on 19.3.12) he had attended on a fourth occasion (29.2.12). After the sentence became final he attended on 3 further occasions (4.4.12, 6.6.12 and 3.10.12). At the hearing before the District Judge there was a debate about the documentary evidence in relation to what proportion of the required attendance had been performed by the time of the last attendance (3.10.12). The District Judge, based on the oral evidence of Dr Alves, accepted and found as a fact that the Appellant "had attended half his obligation as regards appointments". Mr Hepburne-Scott characterises this as "substantial compliance" and the Appellant having "substantially completed" the condition. For accuracy, such descriptions must be understood as meaning 'complied as to half' and 'completed half', which the District Judge unassailably found.

4. What happened next was this. On 25 November 2012 the Appellant came to the United Kingdom. There is evidence was that he did so in order to find work and the District Judge did not reject that evidence but adopted its correctness as a premise for the factual evaluation ("even if the [Appellant]'s motive to come to the UK was for work…"), as will I. The work which the Appellant succeeded in finding in the United Kingdom after 2012 enabled him to provide monthly financial support to his elderly mother in Portugal in the payment of her care home fees, a matter which the District Judge expressly recorded. In coming to the United Kingdom the Appellant did not notify his changed whereabouts. That was a breach of the requirement which had been imposed on him to do so. Coming to the United Kingdom also meant that he would not complete his obligation to attend at the alcohol centre which was the condition of the suspended sentence. That put him in breach of a condition of the sentence and meant it was on the cards that the sentence being activated. As the District Judge recorded, in his oral evidence the Appellant accepted that he left without completion of the requirements; that a possible consequence was that he could be breached and the sentence activated; and that he was aware of that risk. The District Judge unassailably found that the Appellant had come to the United Kingdom in November 2012 as a fugitive. In the context of a suspended sentence, this is a classic fugitivity scenario, an analysis which Mr Hepburne-Scott could not resist. The Portuguese court took a serious view of non-compliance of the terms of a suspended sentence, which was activated in full on 8 May 2014, meaning that the Appellant has the full 12 months custody to serve. While in the United Kingdom, the Appellant accepted that he had become aware in 2015/2016 that the Portuguese authorities were pursuing him and that the suspended sentence had been activated. In 2016 and 2017 he said he had been seeking help through Portuguese lawyers. The information provided by the Respondent records that applications were made on his behalf on 20 December 2018 and 4 October 2019. The latter was an application advanced by Dr Alvez, who has continued to assist the Appellant in Portugal. It was he who was successful in ensuring that the suspended sentence for the failure to deliver the driving licence has been extinguished. He has not, however, been successful in his attempts to persuade the Portuguese courts to revoke the 12-month sentence or restore the suspended sentence. That, then, is the position in Portugal.

Law

5. So far as the law is concerned, reliance is placed in particular on the leading cases of Norris [2010] UKSC 9 [2010] 2 AC 487 and HH [2012] UKSC 25 [2013] 1 AC 338, both of which were cited extensively in the District Judge's judgment. The District Judge undertook the familiar 'balance sheet' exercise and set out the relevant factors for and against extradition, concluding that extradition was compatible with the Article 8 rights of the Appellant, his partner Ms Resende and other family members. Reliance is placed on the principle articulated in Love v USA [2018] EWHC 712 (Admin) at paragraph 26: that the extradition appellate court can appropriately 'stand back' and consider the 'outcome' based on the position in the round; that this includes asking whether a question 'ought to have been decided differently' because the overall evaluation was 'wrong'; that it includes the position where some crucial factor or factors 'should have been weighed so significantly differently' as to make the decision wrong.

The Sumption formulation

6. The culmination of Mr Hepburne-Scott's skeleton argument was this submission: "it is submitted that the damage that will be done to the orderly functioning of the system of extradition, or the prevention of disorder or crime, by declining to extradite the Appellant in this case is not so great as to outweigh the devastating impact that extradition would have upon the Appellant, his partner and his wider family's lives". This is a beguiling formulation, enticing the Court to ask 'what damage will be done to the extradition system by declining extradition of this individual?' Mr Hepburne-Scott traced its conceptual source to Article 8(2) ("necessary in a democratic society … for the prevention of disorder or crime") and attributed its articulation to the then Jonathan Sumption QC, whose submission in Norris was recorded by Lord Phillips at paragraph 12: "The court must ask how much damage will really be done to the orderly functioning of the system of extradition, or the prevention of disorder or crime, by declining to extradite Mr Norris in this case. And whether that damage is so great as to outweigh the devastating impact that extradition would have upon the rest of his and his wife's life together. These questions must, moreover, be answered with an eye to the fact that the test imposed by article 8(2) is not whether his extradition is on balance desirable, but whether it is *necessary* in a democratic society". Mr Hepburne-Scott submitted that the Sumption formulation was adopted by the Supreme Court in Norris and poses the correct question for the extradition court. I do not accept that submission. If this were the question to ask, it would surely have been asked in the judgments in Norris, and then in HH, and ever since. It has not been. And for good reason. The ideas of 'necessity', of 'damage' and of 'impact' are all addressed through the prism of the now-familiar Article 8 proportionality balancing exercise as applied in the extradition context. That is the tool which appropriately secures the relevant public interest imperatives of the 'system', while appropriately securing the relevant rights to respect for private and family life – of all relevant persons affected – by protecting them against unjustified and so disproportionate interference. In this way, moreover, the trap is avoided of concluding that 'declining extradition of this individual' will not damage 'the system'. In any coherent justice system based on the rule of law – remembering always that cases are intensely fact-specific – it can never simply be a question of 'this case'; it must always be a question of 'cases like this case'. There is no principled way of 'letting this one through'. If 'this case', then why not 'other similar cases'? That is the wider perspective as to 'damage' and the 'system'. For all these reasons, I am quite sure it is right to stick to the guidance in cases like Norris, HH, Celinski and Love and not to be beguiled into

treating the Sumption formulation as the central question for the Court. As Lord Mance said in Norris at paragraph 106, although "the ultimate question is whether Mr and Mrs Norris's interests in the continuation of their present private and family life in the United Kingdom are outweighed by a necessity, in a democratic society and for the prevention of disorder or crime, for Mr Norris to be extradited", nevertheless: "Whether extradition is necessary depends on whether it is proportionate to the legitimate interest served by extradition in his case or …. 'whether a fair balance [is] struck between the competing public and private interests involved'". And so, after an interesting diversion, we are back to the proportionality test applied under the guidance in particular of Lady Hale's famous HH paragraph 8, to which many advocates and judges so gratefully turn.

Not "so long"

7. Mr Hepburne-Scott submits that the District Judge, by using the phrase "he has not been here so long", misappreciated or underweighed the eight-year duration of the Appellant's time in the UK between his arriving (25.11.12) and the District Judge's judgment (26.11.20). There is nothing in this. The District Judge had just said, in the same paragraph, that the Appellant "has been in the UK since around 2012" and "has established his life in this country", so there was no doubt or confusion. The important word is "so". This was 8 years, in the context of a 52-year-old man of South African origin who came here aged 44, having lived in Portugal for 24 years between 1988 and 2012. What was important was to consider the circumstances of the case, including the circumstances in which he had come here and had remained here, and the ties to the United Kingdom, the relationships and the impacts which would arise as a consequence of having established a private and family life here. That is what the District Judge did. It is what I will do.

A "prison sentence if committed here"

8. The District Judge said this: "The offence is not trivial and would carry a prison sentence of committed here. I note the [Appellant] has other similar convictions prior to the offence in Portugal and do not agree that the offence is minor". Mr Hepburne-Scott tells me – and I accept – that his submission was "relatively minor", and that the likely sentence here was not the subject of argument. He submits, by reference to the domestic sentencing guidelines, that the likely sentence would be a community order. One problem with that exercise is that it begs the question whether the hypothetical English or Welsh sentencer is taken to be sentencing against the previous convictions as dealt with by the Portuguese courts (as Ms McNamee submits) or whether it is necessary to ask how those earlier convictions would have been dealt with here (as Mr Hepburne-Scott maintains). In my judgment, it is certainly the case that the offence "could" carry a prison sentence – remembering that a suspended sentence is a prison sentence – if committed here. That would involve sentencing outside the bracket, based on the aggravating features: the Appellant was not simply stopped and breathalysed, he crashed his motorbike; he had a poor record with previous drink driving convictions (2.8.97, 16.1.03, 9.6.05) and a conviction for drunkenness (2.2.08). The characterisation that the offence "would" carry a prison sentence – including a suspended sentence – was in my judgment open as a statement of a judicial view, especially if Ms McNamee is right (as I think she is) that the District Judge was at least entitled to factor in the ways in which the Portuguese courts had imposed previous suspended sentences of imprisonment (9 months on 16.1.03 suspended for 2 years; 12 months on 9.6.05 suspended for 4 years; 12 months on 2.2.08 suspended for 1 year). All of this, moreover, is in the context of the District Judge characterising the index offence, explaining why it was "not trivial" and "not … minor".

I cannot accept that there was any misappreciation or overweighing of the nature of the index offence. My own characterisation would be that the index offence was a matter of "some real seriousness": it was the Appellant reverting, yet again as he had done several times before, to taking to the roads while intoxicated and well over the drink-driving limits, imperilling others, and crashing his motorbike. The seriousness is reflected in the 12-month custodial sentence, suspended for 12 months, imposed by the Portuguese court which it is appropriate for the extradition courts of this country to respect. This factor had to be included and weighed in the balance, alongside the other relevant features, as it was by the Judge and will be by me.

The Article 8 argument

9. The essence of the Article 8 case advanced by Mr Hepburne Scott, as I see it, is as follows. The Court needs to step back and look at the overall picture, to see whether the outcome is wrong. The index offending in this case is lacking in relative seriousness. It was back in 2011, a decade ago. Alongside those matters – the age and nature of the offence – are the other features of the circumstances. One is that the Appellant suffered from drug and alcohol addictions between 2007 and 2014. He needed treatment and the treatment was reflected in the alcohol centre attendance requirement. The very rationale of the sentence which lies behind this EAW was that he needed treatment and needed to conquer his addiction, the achievement of which would rehabilitate him and protect the public. There were significant and substantial steps to comply with that requirement, and he had achieved half, with just 6 months to go. The Appellant came to the United Kingdom in November 2012 because he was able to secure employment here, and thus able to provide financial support for his mother. That has continued with him paying her care home fees. The Appellant is well established in the United Kingdom having been here now for nearly 9 years. He has been gainfully employed here ever since. He has been providing financial support, not only for his mother's care home fees in Portugal, but also for other family members including his two grown-up daughters (aged 21 and 29) from a marriage in 1991 which broke up in 2001, and his grandchildren. He is in a settled relationship with Ms Resende, a relationship which is in its sixth year. If he is extradited she will be accompanying him to Portugal, losing her important and specialised job, facing the prospect of trying to get her lower-level job with the vulnerabilities and insecurities of that. She is an innocent third party. The couple will lose everything that they have built up together here. The other family members – also innocent third parties – will lose the financial support which the Appellant provides. Since 2014 the Appellant has successfully resolved the alcohol problems which lay behind his offending in Portugal. He has turned his life around with no convictions in the United Kingdom in the more than ten years since coming off his motorbike that night in April 2011, and in the nearly 9 years that he has been here in the UK. He has demonstrably achieved the rehabilitation which was the aim of the sentence and addressed the addictions which were the root of the offending. In the light of those circumstances, this is a case in which the considerations arising under the Article 8 private and family life rights of the Appellant, or of his partner, or of other family members – including when considered cumulatively – outweigh the considerations weighing in favour of extradition. The Court should allow the appeal. That was the essence of the argument.

Discussion

10. I am not able to accept those submissions. I have already explained the position regarding the impact on Ms Resende's work, the nature of the offending and the length of time. I factor in here what I have said about them, without repeating it all.

11. The starting point is that the index offence is a matter of some real seriousness, particularly when put alongside the previous convictions. The Portuguese court passed a 12-month custodial sentence, which it suspended on clear conditions, all of which this Court must respect. The Portuguese court, moreover, has activated that custodial sentence in full, another act which this Court must respect. That qualifies the extent to which the Appellant can say he substantially complied in 2012, and he has now achieved the purpose the sentence which was to beat his alcohol addiction. The conditions of the sentence were breached, custody was activated and it is required to be served, pursuant to the proper working of the Portuguese justice system. There are strong public interest considerations in favour of extradition.

12. The passage of time – capable as it always is of tending to diminish the public interest considerations in favour of extradition and operating as a component of the strength of private and family life considerations weighing against extradition – has arisen in circumstances where the Appellant failed to comply and left Portugal without notifying his whereabouts. The documents from the Respondent outline a series of steps which the Portuguese authorities took in consequence. They began with the revocation of the suspended sentence for breach (8 May 2014), the Appellant not having attended and summoned to do so hearings on 21 January 2014 and 20 February 2014; a domestic warrant for arrest (12 March 2015); a declaration of default (21 April 2016); a further warrant for arrest to serve custody (22 June 2017); and then the decision to issue an EAW (27 June 2018). What happened subsequently were applications filed on the Appellant's behalf in Portuguese courts. Mr Hepburne-Scott, rightly, does not suggest that this is a case of unexplained or culpable delay. The Appellant left Portugal, knowingly in breach of the condition of the suspended sentence, and knowing of the risk that it would be activated as a consequence. He also left in breach of the condition imposed on him to notify any change in whereabouts. The finding that he left as a fugitive is clearly correct. It is important. It means that the strong public interest considerations in support of extradition include the public interest considerations relating to fugitivity and ensuring that you the United Kingdom is not a safe haven for those who come here as fugitives from foreign criminal justice. The relationship which the Appellant began with Ms Resende, in around 2015, is one which was begun and pursued with him knowing (and being in a position to share with her) the facts and circumstances. It has moreover to be seen against the backcloth where the Appellant accepts that he learned through his mother that he was being pursued in Portugal (in 2015/2016); and he discovered (in or by 2016) that the sentence had been activated.

13. It is important in the context of Article 8 to give careful consideration of the impacts on all of those who would be affected by the Appellant's return to Portugal. In this case, as Ms McNamee points out in her skeleton argument, the Appellant is not a carer for young children and nor is Ms Resende. Ms Resende, who herself originates from Portugal, says that - rather than be separated from the Appellant while he is serving a term of custody – she would leave the United Kingdom, leaving behind her specialist job. That job constitutes important work which serves to help others in relation to breast cancer and its detection and treatment. Ms Resende would give it up and leave, trying to obtain work as a radiographer in Portugal, with its uncertainties and insecurities. The fact that she

would leave to be in Portugal where the Appellant is, while he serves a custodial sentence, is relevant to the question of separation: as the District Judge observed, they would not be separated in the sense of being in different countries. This feature of the case also attests to the strength of the relationship. It is evidence alongside the evidence about the loss of the Appellant's work and income, and the loss of his presence at home. All of these raise important considerations as to impact and hardship. However, even placing that evidence as to relocation and impact on jobs at the highest it can reasonably be put – and even approaching this case in the way most beneficial to the Appellant, by effectively evaluating afresh the Article 8 balancing exercise – the impacts on the individuals affected, alongside the other features of the case which weigh against extradition, are not sufficiently powerful to outweigh the public interest considerations which weigh in favour of extraditing the Appellant. In my judgment, even if conducted afresh, the balance comes down decisively in favour of extradition. That means the Appellant must face his responsibilities under the judicial process and justice system in Portugal. The appeal is dismissed.

20.7.21