Neutral Citation Number: [2021] EWHC 2402 (Admin)

Case No: CO/5941/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

26th August 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

JANOS LAJOS MAGYAR	**Appellant**
- and -	
BUDAPEST ENVIRONS COURT, HUNGARY	**Respondent**

- -
- -

Martin Henley (instructed by AM International solicitors) for the **Appellant**
Stuart Allen (instructed by Crown Prosecution Service) for the **Respondent**

Hearing date: 26.8.21

Judgment as delivered in open court at the hearing

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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.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge.

MR JUSTICE FORDHAM :

Introduction

1. This is an appeal in an extradition case on Article 3 ECHR grounds relating to conditions in prison. Extradition to Hungary is sought for the Appellant to serve the balance of the 5 years 7 month sentence imposed for the robberies and conspiracy to steal committed by him by impersonating police officers in 2008. Permission to appeal on Article 8 ECHR grounds was refused after an oral hearing by Garnham J on 13 May 2021. An issue has also been raised orally in relation to section 2.

Article 3

2. Permission to appeal on Article 3 was granted by Ouseley J on 26 April 2018. The case was subsequently stayed pending the determination of test cases including Zabolotnyi v Mateszalka District Court, Hungary [2019] EWHC 934 (Admin) (Divisional Court 16 April 2019) upheld by the Supreme Court [2021] UKSC 14 [2021] 1 WLR 2569 (30 April 2021). There was a later order staying the case pending resolution of other Hungarian cases.

3. In Zabolotnyi, Ouseley J had granted permission to appeal on Article 3 ECHR prison conditions grounds on 27 April 2018, the day after he did so in the present case. In Zabolotnyi the Hungarian Ministry of Justice (MoJ) on 20 July 2018 gave a specific assurance that the appellant would be guaranteed a minimum of $3m^2$ and be detained at the prisons at Szombathley or Tiszalok, the relevant terms of which assurances were set out by the Divisional Court at paragraph 24 of its judgment. In the present case, the MoJ – 15 days earlier on 5 July 2018 – gave a specific assurance in materially identical terms in relation to the Appellant. I will come later to a question about the text of the assurances letter in the present case and what preceded the guarantee and assurances, Council having candidly told me that they cannot say whether the same preamble was present in Zabolotnyi.

4. The ‘overall assessment’ approach to be taken to an assurance from a non-judicial source like the MoJ had authoritatively been addressed in previous authorities and that point was considered by the Divisional Court (see paragraph 75) and in the Supreme Court (see paragraphs 34-35 and 42). In Zabolotnyi the Divisional Court was satisfied by the MoJ assurance, undertaking the ‘overall assessment’ (paragraph 47). Putative fresh evidence was put forward of breaches of other assurances, which the Divisional Court rejected as incapable of being decisive (paragraph 78). The issue of principle addressed by the Supreme Court concerned the approach to alleged breaches of assurances given to non-UK extraditing states. The Supreme Court upheld the Divisional Court’s conclusion on Article 3 compatibility, explaining that the putative fresh evidence (regarding alleged breaches) was not capable of being decisive, nor was it such as to require the UK extradition court to request further information: see the Supreme Court judgment at paragraphs 62-63.

5. Mr Henley has maintained this Article 3 appeal notwithstanding the outcome of the test case of Zabolotnyi, and notwithstanding moreover the rejection of the Article 3 prison conditions points which he made in Piroska v Appeal Court in Gyula [2021] EWHC 2054 (Admin) (see paragraphs 6-21).

6. Mr Henley says that the Respondent's reliance in this case on the MoJ assurance of 5 July 2018 means that the Article 3 assessment of the district judge on 20 December 2017 cannot stand. Precisely the same point arose out of the Article 3 assessment of the same district judge on 1 September 2017 in Zabolotnyi. Mr Henley says that the Respondent took a strategic or tactical decision not to issue an assurance at the earlier stage in the proceedings. Precisely the same could be said in Zabolotnyi. The ebb and flow in relation to the need for Hungarian prison conditions assurances is explained in Zabolotnyi (SC paragraphs 6-11).

7. Mr Henley says that what is needed is a formal application to adduce the assurance as fresh evidence on this appeal, which he says would also be the introduction of new issue as well as of evidence which could have been adduced before the district judge. He invites the Court to refuse to admit the fresh evidence and fresh issue, and allow the appeal. In the alternative, he says that, if now allowed at this very late stage, the Appellant should be given the opportunity of an adjournment and relisting to seek expert evidence and adduce rebuttal evidence with regard to the cogency and reliability of the assurance. Mr Henley's skeleton argument referred to "serious developments in the last few weeks" in relation to Hungary and the rule of law. I will return to that topic.

8. There is no basis for refusing to admit the assurance; nor for adjourning to allow a further opportunity to adduce evidence in relation to Article 3. The assurance in this case was put forward and has been relied on for more than 3 years. There is a direct parallel with Zabolotnyi. The caselaw makes clear that if there are relevant gaps and concerns it is the duty of the extradition courts to elicit the information it needs from the Respondent. Excluding the assurance would take the Court into a duty to ensure information to fill the gap, and the assurance would necessarily then need to come into the picture. It would be wholly artificial and contrary to the interests of justice, the public interest and the overriding objective, to do other than consider the assurance. The Court has the information it needs. Insofar as formal permission were needed it was always obvious that it was being sought and would be granted. In the test case of Zabolotnyi, materials were provided to the Divisional Court and Supreme Court which was said to be capable of undermining the cogency and reliability of a materially identical assurance. In the present case there is no material put forward at all, notwithstanding the clear and obvious opportunity. Nor is there any basis for an adjournment to allow putative fresh evidence to be obtained regarding the assurance. I will return below to the position regarding section 2. The listing of today's hearing was notified 4 weeks ago. Confusion relating to the terms of a stay provides no reason for an adjournment.

9. Mr Henley raised other points in his skeleton argument. He says it is legally unsound for the Courts to refer to any second-stage 'presumption' that an assurance will be adhered to pursuant to the principle of mutual trust. But the position is authoritatively identified in Zabolotnyi by the Supreme Court at the end of paragraph 44, reflecting the analysis at paragraph 34. It is also explained in Piroska at paragraph 10. The fact in any event is that in this case, on an overall assessment of all the information, there is nothing undermining the Court's ability to rely on the assurance.

10. Mr Henley submits that the assurance does not go into the necessary detail since there is nothing in it relating to monitoring or transit into the country or detail as to whether the named prisons are Article 3 compliant. There is nothing in that. An assurance containing this content is not capable of being impugned as to its terms. That was

recognised in Zabolotnyi (DC paragraphs 24 and 28). The assurance in this case, as in that case, has identified two prisons recognised as reliably guaranteeing Article 3 compliance: see Fuzesi v Budapest-Capital Regional Court, Hungary [2018] EWHC 1885 (Admin) at paragraph 8 (a case discussed in Zabolotnyi and in Piroska).

11. It follows that there is nothing in the Article 3 argument in this case in light of: the assurance given on 5 July 2018; the resolution of the test case of Zabolotnyi in the Divisional Court and Supreme Court; and the absence of any fresh evidence, still less any capable of being decisive and triggering the Court's duty to require further information.

Explicit reliance on the assurances

12. Mr Henley has pointed out that the assurances letter dated 5 July 2018 is prefaced on its first page with an invitation to the British executing judicial authority to agree to the surrender of the requested person on the basis of mutual recognition and mutual trust. The second page of the letter provides the guarantee and the assurances "if [that] is not possible at this time". There is no reason to suppose that the structure of the assurances letter was any different from the one in Zabalotnyi. The invitation on the first page does not undermine the Court's ability to decline it and rely on the guarantee and assurances on the second page. I raised with both Counsel whether it was appropriate to make this reliance explicit. They each agreed that it was, and I do so here and in a recital in my Order, as follows:

> The Court makes clear and explicit (i) that the guarantee and assurances set out on page 2 of the Ministry of Justice's letter dated 5 July 2018 are necessary and are relied on by this Court in determining that extradition is compatible with Article 3 ECHR and (ii) that the British executing judicial authority does not agree to the surrender of the Appellant to Hungary on the basis of mutual recognition and mutual trust (page 1 of the letter) but only on the basis of the guarantee and assurances (page 2).

Section 2

13. In his skeleton argument dated 22 August 2021 maintained at today's hearing Mr Henley refers to "serious developments in the last few weeks in that the President of the Commission of the European Union has expressed serious doubts about whether the executive in Hungary has breached its obligation to uphold the rule of law in Hungary". He also refers there to an Article 7 referral. At the oral hearing today I was informed of the following. (1) DJ Rimmer on 9 July 2021 gave a detailed judgment in Ambrozi, Bogdan and Lakner, considering arguments from Leading Counsel on both sides as to whether an issue of principle arises by reference to section 2 of the 2003 Act. DJ Rimmer rejected the section 2 argument. (2) It is anticipated that that argument will in the near future come before this Court, in Ambrozi et al or possibly in another case. (3) Mr Henley himself raised on the section 2 argument in another case in the magistrates' court on 10 August 2021. (4) The same section 2 argument was raised in Lukacs CO/3586/2019 and on 22 July 2021 consideration of that case was adjourned by consent by order of Cutts J, because of the understanding that the issue was imminently to arrive and be considered by this Court. (5) The section 2 point is or may be analogous to the issue of principle raised in the context of the Polish authorities in Wozniak [2020] EWHC 1459 (Admin). The point, if viable, may have the same consequences for other

Hungarian cases as was seen in relation to Wozniak and Polish cases. (6) Mr Henley seeks an opportunity to marshal an argument and materials raising the Ambrozi section 2 point. He also submits that, if the point is viable, there is a connection to assurances from the Hungarian MoJ, which would need to inform the Article 3 overall assessment and could lead to the appeal being allowed on Article 3 prison conditions grounds. Mr Allen has made clear that he does not accept, even arguably, that there is such a connection with such potential consequences.

14. In those circumstances I was able to discuss with both Counsel whether there needs to be an appropriate safeguard so that the implications of this section 2 development, if considered viable, can then be considered before the Appellant is extradited. Mr Henley submits that given that there is an extant appeal before me today I should adjourn or stay the appeal with directions to allow the section 2 point to be developed in writing, together with any argument as to knock-on effect or connection so far as concerns Article 3 and assurances. I am not prepared to take that course. There is no material before me today which enables me to form any view at all. I agree with Mr Allen that the appropriate safeguard in those circumstances would be the invocation, if so advised, of the jurisdiction to reopen the appeal. I am not encouraging, still less giving permission for, any such application. But I am satisfied that the mechanism for applications to reopen appeals is one which provides a safeguard for Mr Henley and the Appellant. It would enable Mr Henley to set out for the Court in a proper form, to which the Respondent can respond, what argument or arguments he is advancing. If developments relating to independence and section 2, including by reference to pipeline test cases, provide a basis on which extradition should not proceed, then once the position has been properly set out this Court could consider it and make any appropriate directions. The concern that inevitably arises about the timeframe, the vacation and the need for an extradition judge to consider the position are all resolved by Mr Allen's sensible agreement that this Court should make the following order which I do: "The "10 day" period for the purposes of section 36(3)(b) of the Extradition Act 2003 shall commence on 7 October 2021". If there is a point of principle which, by reference to its viability and/or the fact that it is as yet not authoritatively resolved, would make extradition of the Appellant unjust, then the re-opening jurisdiction would provide a suitable safeguard.

26.8.21