Neutral Citation Number: [2022] EWHC 1287 (Admin)

Case No: CO/1907/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2022

Before :

MRS JUSTICE MAY

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Between :

Lucian-Ionut Pancu	**Appellant**
- and -	
Judicial Authority for Romania	**Respondent**

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Robbie Stern, instructed by JD Spicer & Zeb, for the **Claimant**
David Ball, instructed by the CPS Extradition Unit, for the **Defendant**

Hearing dates: 19.05.2022

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Approved Judgment

Mrs Justice May :

Introduction

1. This is an appeal on Article 8 ECHR grounds against an order for the appellant's extradition made by District Judge Zani ("the District Judge"), dated 26 May 2021. The order was made pursuant to a conviction EAW issued by a Judge of the Judecatoria Piatra Neamt, Romania on the 3 January 2018 and certified by the NCA on the 16 January 2018. I granted permission to appeal on 25 Jan 2022.

Offence for which extradition is sought

2. The appellant is wanted to serve a 3 year sentence for burglary. He and others stole various components of a train, the value of which equipment was put at 15,000 Romanian Leu (equivalent of around £3,122). The offending occurred in 2009, proceedings were commenced in 2014 and became final when the appellant's appeal against conviction and sentence was dismissed by the Romanian court in December 2017.

3. The appellant has been on remand awaiting a final decision on extradition since his arrest in this country on 18 December 2020.

The District Judge's judgment

4. Having set out the evidence, including the arrival of the appellant in the UK in 2011 with his wife and daughter following in 2017, the District Judge dealt with the passage of time. He found that the appellant had not come to the UK as a fugitive in 2011, since proceedings against him had not then started. Further, after proceedings had been commenced in Romania the appellant had returned there from the UK several times to participate in such proceedings. The District Judge observed that the appellant was *"therefore entitled to rely on s.14 as a challenge to this request and the passage of time also feeds into the Article 8 challenge"*. Referring to the fact that the appellant had been at large from December 2017 when his conviction and sentence became final upon the dismissal of his appeal, and having regard to the changes that had occurred in the appellant's life since then, the District Judge concluded that it would not be oppressive to order his return for the purposes of the challenge under s.14 of the Act.

5. Moving to the Art 8 challenge the District Judge discussed the principles set out in *Norris v United States of America (No 2)* [2010] 2 AC 487 and *Poland v Celinski* [2016] 1 WLR 551 before turning to the factors for and against extradition. He listed factors in favour as the strong public interest in the UK abiding by its international extradition obligations and the seriousness of the criminal conduct attracting, as it had, a sentence of 3 years. Factors against extradition included the appellant feeling settled with his wife and daughter in the UK, the fact that the appellant had been in employment since arriving, with his own car-wash business set up in December 2019, and the absence of any offences committed here, save for a caution for attempted shoplifting in 2014.

6. The District Judge went on to find that it would not be a disproportionate interference with the appellant's Article 8 rights to order his extradition, having regard to the seriousness of the offences and the strong public interest in abiding by international extradition treaty obligations. He said he had considered Brexit uncertainty but neither that nor *"the period of time that has passed since conviction to date"* was sufficient to tip the balance against extradition. He acknowledged hardship to the appellant's wife and child but considered that such hardship was also insufficient to preclude extradition.

Arguments on appeal

7. I am grateful to both counsel for their excellent written and oral submissions. Mr Stern, who appeared for the appellant on this appeal, argued that the District Judge made an error of principle when considering delay; moreover that he had in any event failed to give any or any sufficient weight to the following factors: (i) delay, (ii) the interests of the appellant's 11 year-old daughter and (iii) the relative lack of seriousness of the offence for which the appellant was sought.

8. The principal focus of Mr Stern's challenge was directed at the treatment of the passage of time by the District Judge in his judgment, specifically when considering Article 8. Mr Stern argued that the District Judge had erred in failing to consider the entire passage of time since the offending in 2009 for the purposes of Article 8; instead, he suggested, the District Judge had mistakenly restricted his consideration of delay to the period from final confirmation of conviction and sentence in December 2017, when the appellant became unlawfully at large within the meaning of s.14 Extradition Act 2003 ("s.14").

9. But even if the District Judge did have in mind the full period of the delay from 2009, Mr Stern argued, he failed to give it any or any sufficient weight in the *Celinski* balancing exercise. Mr Stern submitted that the offence – non-domestic burglary – was relatively simple and straightforward, yet the delay in investigation from 2009 until proceedings were first issued in 2014, and then the further delay from the initiation of proceedings until their final resolution nearly four years later in December 2017, had been completely unaccounted for by the judicial authority. Mr Stern submitted that in those circumstances the delay should properly been seen as culpable delay and the District Judge should have accorded the full passage of time much more weight than he did. He pointed out that delay had not even been listed by the judge as a factor when considering the factors for and against extradition; moreover in his conclusions at paragraph 88(iv) the District Judge had only referred briefly to *"the period of time that has passed from conviction to date"*, that period being insufficient (as noted above) in any event.

10. Referring to the well-known passages in the speech of Lady Hale in *R (HH) v Westminster Magistrates Court* [2013] 1 AC 338, Mr Stern emphasised the effect of unexplained delay as weakening the public interest in extradition, also as reducing the importance the requesting state attaches to bringing the requested person to justice. He suggested that, even if the delay could not properly be described as culpable, it could still diminish the public interest in extradition, referring to the observations of Fordham J in *Makowska v Poland* [2020] 4 WLR 161 at [49].

11. Mr Stern criticised as too brief the judge's consideration of the effect of delay in the balancing exercise. He pointed out that other than a reference to the appellant

"feel[ing] settled in the UK" the District Judge had given no real consideration to the impact of delay upon the appellant and his family.

12. Mr Stern next moved to the District Judge's treatment of the impact of extradition upon the appellant's daughter. This had also been wholly inadequate, he suggested. He submitted that the impact of extradition upon a child was a "cogent consideration" which required "careful attention" to be paid (drawing attention to *Norris* at [65]; *HH* at [33]). In this case, he said, the District Judge had made only two passing references to the appellant's daughter in the Article 8 balancing exercise. Moreover the District Judge's treatment of the evidence - that separation from her father had caused the child such distress that her mother had obtained counselling for her - had wrongly ignored the distress caused and instead had regarded the counselling as a protective factor telling in favour of extradition.

13. Finally as to seriousness, Mr Stern did not press the points made in his skeleton by reference to the Sentencing Council of England and Wales Guideline on Non-Domestic Burglary, arguing instead that there was a sliding scale of seriousness which the District Judge in this case had failed to take into account. Notwithstanding the 3-year sentence which the Romanian court passed, Mr Stern submitted that an offence of burglary of goods to the value of just over £3,000 was not at the high end of severity, suggesting that the judge had ascribed too much weight to this as a factor.

14. In response, Mr Ball acknowledged that delay could be a factor against extradition. But although the District Judge may not specifically have listed it as such, Mr Ball stressed that he clearly had the chronology in mind, having addressed it in great detail earlier in his judgment when considering oppression in connection with s.14. Since the appellant's partner and child had not joined him in the UK until at or around the date upon which his conviction and sentence became final, family life in the UK had in reality only started from 2017.

15. Mr Ball submitted that in the Article 8 balancing exercise the effect of delay in diminishing the public interest in extradition, and the effect of delay in strengthening family life in the UK are two sides of the same coin. Where, as here, family life in the UK had not started until 2017, any delay prior to this necessarily assumed a lesser importance, he suggested.

16. Referring to the case of *Germany v Singh* [2019] EWHC 62 (Admin) and to the observations of the court in that case at [53], Mr Ball submitted that unexplained delay was to be distinguished from culpable delay. He argued that the court should be very cautious in finding culpable delay, particularly in relation to the investigation process, prior to proceedings being commenced.

17. As to the treatment by the judge of the effect of extradition upon the appellant's daughter, Mr Ball argued that the District Judge had sufficiently addressed this. He pointed out that the child had lived apart from her father from 2011 to 2017, and then again more recently from December 2020 following his arrest in these proceedings. Mr Ball reminded me that, in accordance with the observations in HH, the consequence of extradition must be shown to be "exceptionally severe" in order to outweigh the strong public interest in extradition. The evidence before the District Judge in this case went nowhere near the level required for him to find that level of hardship, Mr Ball suggested. The only evidence of impact upon the daughter came from the mother and

there was no other evidence addressing the effect upon the child of separation from her father.

18. As to seriousness, Mr Ball emphasised, by reference to the court's observations at paragraph [13] of *Celinski*, that severity is a matter for the requesting court. It is for that court to arrive at a proper view of seriousness or significance of sentence; length of sentence was a key indicator, Mr Ball suggested, of the view taken by the court in Romania of the seriousness of the offending, as to which 3 years was, on any view, a significant period of custody.

19. Mr Ball concluded by submitting that even if the District Judge could be said to have erred in his treatment of delay, standing back and considering the facts of this case it could not be said that the outcome was wrong.

Decision

20. I have no hesitation in deciding that the District Judge erred in his treatment of delay for the purposes of Article 8. He should expressly have listed delay as a factor telling against extradition and, having done so, he should have analysed what weight ought properly to have been accorded to the full period of delay from 2009 in the *Celinski* balancing exercise. As it is, delay was not listed as a factor at all; and although passage of time was mentioned briefly in the judge's concluding sentences on Article 8 he referred only to the post-conviction period, apparently wholly disregarding the lengthy passage of time from 2009 to 2017 (eight years). The fact that, earlier in his judgment when reciting the evidence and dealing with oppression when considering s.14 EA 2003, the district judge accurately set out the full chronology only serves to throw this omission from the Article 8 section of his judgment into starker relief, as I see it.

21. However I am not persuaded that the District Judge erred in his consideration of the impact of separation from her father upon the appellant's 11-year old daughter. It is right that he expressed his conclusions only briefly when considering the Article 8 balancing exercise, but in the course of his judgment the judge had dealt fully with the evidence, such as it was, directed at the degree of hardship which the daughter must necessarily suffer in the event that her father was extradited.

22. Nor do I think that the District Judge was wrong to describe the offending as "serious". I agree with Mr Ball that it is for the requesting state to determine the degree of severity of the offending, and that the best indicator of that can be found in the sentence which the court in the requesting state has seen fit to pass. Here, the court imposed a sentence of 3 years which was subsequently upheld on appeal. That is a significant period of custody, from which it may reasonably be concluded that the offending giving rise to that sentence was serious.

23. Of much more difficulty is the question of whether the judge's error in his consideration of delay can, on the particular facts of this case, properly be said to render the final decision wrong. In *Celinski* at [24] the court summarised the position thus:

> "the single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger PSC said, as set out above, that the appeal can be allowed. Findings of fact, especially if evidence

> has been heard, must ordinarily be respected. In answering the question whether the district judge in the light of those findings of fact, was wrong to decide that the extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

This approach has been more recently considered and affirmed in *Love v USA* [2018] EWHC 172 (Admin) where the Divisional Court (Lord Burnett CJ and Ouseley J) said this (at [25] to [26]):

> "25…. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. That is not what *Shaw's* case or *Belbin's* case was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that the judge's decision was wrong, and the appeal should be allowed.
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> 26 The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in the *Celinski* case and *In re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

24. Although the District Judge did not, in my view, err in his approach as to the effect upon the appellant's daughter or the severity of the offence, it is the overall evaluation, taking every relevant factor into account, which matters. This is the "mixing desk" approach graphically referred to by Fordham J in *Koc v Turkey* [2021] EWHC 1234 (Admin) at [25].

25. The relevant factors to be considered in this case are as follows:

(1) In favour of extradition, as the district judge rightly identified, is the strong public interest in the UK abiding by its international extradition obligations and the relative seriousness of the offending, as (primarily) indicated by the length of sentence imposed.

(2) Against extradition are the following factors: (a) the fact that the appellant has been settled in the UK since he arrived in 2011 (b) the delay from 2009 to the present, during which time he came to the UK in 2011, long before proceedings were issued

in Romania, being joined by his partner and daughter in 2017 (c) the fact that the appellant has been convicted of no offences here since arriving, albeit that he incurred a caution for attempted shoplifting in 2014 (d) on his own evidence he has been consistently employed since 2011, setting up his own car-wash business in 2019 (e) he has a daughter (now aged 12) whose distress at his absence has required her to see a counsellor. I take into account also (as did the Divisional Court in *Lysiak v Poland* [2015] EWHC 3098 (Admin)) the fact that the appellant has by now been on remand for approximately 17 months in this jurisdiction. Brexit uncertainty is a further factor, again rightly referred to by the District Judge in his judgment.

26. Having carefully considered all these factors I find myself unable to say that the final decision in this case was wrong. Mr Stern suggested that the circumstances of the appellant and his family in *Lysiak* were strikingly analogous. It is right, of course, that each case must depend upon its own particular facts, but since Mr Stern laid so much emphasis on that case it is helpful to identify what I consider to be important differences between *Lysiak* and the present case: The appellant in *Lysiak* came over together with his family and they were then settled together in this country over the period of his trial, conviction and appeal in the requesting state. They had one child when they arrived together, another being born some 6 months before the arrest on the EAW in that case. The appellant in *Lysiak* remained on bail, living with his family throughout. By contrast, here, the appellant came to the UK separately from his partner and child. He was in the UK, living apart from them, for some 6 years before they came to join him. As it happened, their arrival coincided with his conviction and sentence, finally resolved in December 2017. His daughter had been two years old when he left and was 8 years old when she and her mother re-joined him. The appellant was arrested 3 years later in December 2020 and has been remanded since then, as a result of which his daughter and her mother have once again been living apart from him. No further children have been born whilst the family have been living here. A further factor upon which the Divisional Court laid stress in *Lysiak* was that the wife and child in that case were entirely financially dependent upon the requested person, with no support or other family in the UK. That is not the case here, where the evidence was that the appellant's partner is managing the car-wash business and that her brother is in this country, at one stage living with them.

27. Mr Stern argued that the length of the period of delay, from 2009 to 2014 when criminal proceedings started, and then from 2014 to 2017 when they completed and the appeal process concluded, was sufficiently long and unexplained as to require the court to conclude that it was culpable delay, to which great weight should be attached. It is indicative, he said, of a lack of urgency on the part of the requesting state in bringing the appellant to justice. Referring to the case of *Makowska* he argued that even if the delay is not culpable then it can nevertheless be relevant in the balancing exercise.

28. These are fine distinctions. 8 years between offending in 2009 and commencement of proceedings in 2014 is quite long, and it is unexplained. On the face of it, the theft of railway parts having a value of some £3,000 would appear to be a straightforward case to investigate and prosecute. But it seems that there were multiple defendants and the length of sentence suggests that there was more to the offending than is wholly captured by the value alone of the parts which were taken.

29. I bear in mind these cautionary observations of Collins J in *Wolak v Poland* [2014] EWHC 2278 (Admin) at [8]-[9]:

> "8. The delay is, of course, unfortunate but it is not as excessive as one finds in some other cases and it is necessary for the court to be well aware that there are considerable pressures upon the authorities in Poland and it is not always one single authority that is concerned, there may be one authority and another not perhaps liaising as closely as sometimes might be appropriate.
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> 9. It is, in my judgment, quite wrong for this court to assume culpability in any delay unless it is so excessive or there are factors which indicate that it really was not reasonable for the authority to fail to issue a warrant earlier than it did.…"

30. These comments were made when considering delay in issuing a warrant. I agree with Mr Ball that a court should be even slower to find culpability in connection with the process of investigation and prosecution. I am not in any event convinced that a period of 3 years (2014-2017) to conclude all proceedings, including an appeal against conviction and sentence, is excessive.

31. Thus I am not prepared to find that the delay from 2009 to 2017, or any part of it, is culpable delay. But even if I were prepared so to find, it would not in my view alter the balance sufficiently in this case. In *Singh* the court observed as follows:

> "But the delay on the part of the state authorities, whether or not culpable, is not a trump card, however long. Its effect must be considered in the context of the particular facts of the case, and the question that must be addressed by a District Judge is how and to what extent delay impacts on the two aspects [public interest and family life] to which I have just referred."

In the present case the appellant's private and family life together with his family really only started to be established in this country from 2017, at a time when he and his partner knew that he had been convicted and sentenced to a significant term in custody back in Romania. In these circumstances the additional years of delay from 2009-2017 can add relatively little to the Article 8 balancing exercise, because the appellant had no family life here in the UK during that time.

32. Accordingly, although the District Judge made a material error in failing to identify the full period of delay as a factor bearing upon the Article 8 balancing exercise, in the event the result which he reached cannot be said to be wrong. The appeal must therefore be dismissed.