Neutral Citation Number: [2022] EWHC 168 (Admin)

Case No: CO/615/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
28th January 2022

Before:
MR JUSTICE FORDHAM

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Between :

MATE KONCZOS	**Appellant**
- and -	
LAW COURT IN GYOR (HUNGARY)	**Respondent**

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- -

Myles Grandison (instructed by Dalton Holmes Gray Solicitors) for the **Appellant**
Amanda Bostock (instructed by Crown Prosecution Service) for the **Respondent**

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Judgment on the Application to Certify Points of Law of General Public Importance and for Leave to Appeal

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

MR JUSTICE FORDHAM:

1. On 3 December 2021 I gave my judgment in this case ("the Judgment"): [2021] EWHC 3287 (Admin). On 15 December 2021 the Appellant made an application for a certification "that there is a point of law of general public importance involved in the decision" (s.32(4)(a) of the Extradition Act 2003) and for leave to appeal on the basis that "the point is one which ought to be considered by the Supreme Court" (s.32(4)(b)). The Respondent responded on 11 January 2022, following which the Appellant's Counsel emailed the Court asking whether the Court would be assisted by a brief reply. I have reached the view that it is unnecessary to invite a reply or to convene an oral hearing, for the purposes of determining the application.

2. The two points which Mr Grandison invites me to certify, and on which I am further invited to grant leave to appeal, are as follows:

> ***(1) For the purposes of section 20 of the 2003 Act and Article 4a of the 2009 Framework Decision, does a hearing constitute the "trial resulting in the decision" where it involved no assessment of the evidence or merits of the case, solely because the requested person was "deliberately absent" from that hearing within the meaning of s.20(3)?***
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> ***(2) Is a requested person to be regarded as "deliberately absent" from their trial/retrial within the meaning of s.20(3), where they failed to place themselves within the reach of a legal process instituted in another country by not attending their trial/re-trial, because doing so would have entailed a breach of a fundamental right conferred under the ECHR? Or, must the requested person demonstrate that the putative breach of that fundamental right was "overbearing" so as to negative their free will?***

As to certification, Mr Grandison's submission is that the Judgment "raises" these two points, which are points of law and of general public importance. He identifies the first point as arising by reference to the Judgment at §19; and the second point as arising by reference to the Judgment at §25.

3. In support of certification, Mr Grandison cites Bicioc v Baia Mare Local Court, Romania [2014] EWHC 628 (Admin) (at §1), as an illustration of a case where the Court said that "deliberate absence" raised "a vexed question … to which a clear answer ha[d] not yet been given by our own costs".

4. In support of his submissions as to leave to appeal (if it arises), Mr Grandison has cited passages from six new authorities, which (with Bicioc) were provided as a bundle of supplementary authorities. None of these sources was cited at the substantive hearing of the appeal before me. None are therefore analysed (or mentioned) in the Judgment. I will list here the six further authorities (and specific content) which have now been cited: (i) Council of Europe Resolution (75) 11 at Rule 5; (ii) Pelladoah v Netherlands App. No. 16737/90 at §40; (iii) Krombach v France App. No. 29731/96 at §87; (iv) Sejdovic v Italy App. No. 56581/00 at §88; (v) Van Geyseghem v Belgium (2001) 32 EHRR 24 at §34; and (vi) Bader v Sweden (2008) 46 EHRR 13 at §47. Also mentioned in Mr Grandison's submissions is Sanader v Croatia App. No. 66408/12 at §87. Mr Grandison has not applied to reopen the appeal (Crim PR 50.27). He is right not to have done so: that jurisdiction is not designed to allow a disappointed party to reconsider their arguments and the materials deployed in support, and "have another go": United States v Bowen [2015] EWHC 1873 (Admin) at §9.

5. In framing section 32(4) (certification), Parliament has made a number of points clear. One is that there must be "a point of law". A second is that this must be a point of law "involved in the decision". A third is that this point of law, involved in the decision, must be one "of general public importance". A fourth is that it is for this Court to address whether these characterisations are apt. A fifth is that none of this should be elided with the distinct question of whether the point "is one which ought to be considered by the Supreme Court". If this Court is satisfied that there is a point of law, involved in the decision, which is of general public importance – but is not satisfied that it ought to be considered by the Supreme Court – then the appropriate course would be to certify, but to refuse leave to appeal, leaving to the Supreme Court (if leave to appeal is pursued) the question of whether the case should be entertained by that Court. On the other hand, if this Court is not satisfied that there is a point of law, involved in the decision, which is of general public importance, the appropriate course is to refuse to certify, and the question of leave to appeal does not arise.

6. In her submissions opposing certification (and leave to appeal), Ms Bostock described this case as involving a "very specific and unusual set of facts". I agree. The Judgment records at §9 the position that the "factual context" of the present case, where section 20 fell to be "applied", involved "a special set of circumstances" (as indeed both Counsel had accepted). In this case the circumstances were that the Appellant faced extradition; that he could have "sat tight" and resisted extradition on EAW2, in which case he would have "retained his future entitlement to the twin rights following extradition", and there could have been "no question of any arrest or detention in Hungary other than following a … prison assurance"; but that he "chose instead to invoke the right to seek a retrial in Hungary", making his "request for the Hungarian custodial sentence, and EAW2, to be suspended pending that retrial" (Judgment §15). It is also a case where it has been found –as a fact – that his choice not to attend was "freely made"; a finding of fact which was found to be "unimpeachable" (Judgment §25). It is a case where the requested 'suspension' failed because, under Hungarian law, "the domestic Hungarian sentence remained extant, unless and until set aside on a successful appeal" (Judgment §5). It is a case where the logic of the Appellant's own position was that he "was prepared, voluntarily, to return to Hungary to attempt to clear his name at his retrial, without any prison assurance which would apply if he were convicted at that retrial" (Judgment §25). It was a case in which his retrial would be "terminated" and "extinguished" under section 409(3) of the Hungarian domestic statute", if the Appellant was treated as having "left for an unknown place", as the Hungarian court concluded was the position (Judgment §5).

7. I will start with the substance of Question (2), which involves basic human rights. The formulated question speaks of a situation where "attending" a "trial" or "retrial" is an act which "would have entailed a breach of a fundamental right under the ECHR". But the point is a specific one about extraditability and prison assurances, where the UK court would not order extradition to face incarceration absent a prison assurance (Judgment §3). The Judgment identified (at §11) a 'future retrial' scenario where Article 3 and the absence of an assurance would affect extraditability. The Judgment identified (at §12), a 'past trial/retrial' scenario where it would not (§12), as was common ground. The issue in the present case concerned the situation where, facing extradition, the Appellant had chosen to invoke the right to a retrial but then not to attend for it (Judgment §25). And it was the Appellant's own argument which argued that the prison conditions point – and the absence of the prison assurance – meant

there was an "absence of free will" which "so affected" the "decision" so that it was not truly "deliberate" (Judgment §24). The basic problems were (i) that there was an "impeachable" finding of fact that the choice was "freely made", and (ii) that the Appellant's own logic is that he "was prepared, voluntarily, to return to Hungary to attempt to clear his name at his retrial, without any prison assurance which would apply if he were convicted at that retrial" (Judgment §25).

8. The formulation of Question (2) involves a far broader and more general proposition, not determined in the Judgment. The "prison conditions" point which was actually "involved in the decision" was a very specific one. It came to this.

> *In a case where Article 3 would prevent extradition being ordered without a prison assurance, which prison assurance has not yet been provided – but where the requested person while facing extradition (i) chose to initiate the right to a retrial in a requesting state court (ii) "freely made" a decision not to attend the retrial hearing and (iii) was prepared to attend that retrial if a previous sentence and warrant were discharged (even though he would then, if convicted, face being imprisoned without any prison assurance) – does the absence of the prison assurance prevent his non-attendance at the retrial hearing from being classed as 'deliberate'?*

This was the "prison conditions" question addressed in the judgment. The Judgment gives the answer "no" to this question. I accept that this question engages a question of law. But I cannot accept that it engages a point of law "of general public importance" for the purposes of section 32(4).

9. Having dealt with the human rights aspect, I turn to the substance of Question (1). The formulated question speaks of whether "a hearing" can constitute the "trial resulting in the decision", where there is no EMH (hearing on the evidence and merits: see Judgment §5), "solely because the requested person was 'deliberately absent'". Again, it is important to identify what the judgment decides. This case is about the "contingent" nature of the twin rights and the role played by deliberate absence "especially in the context of retrial" (Judgment §19). It is about the requested person's "own action in default" which means that the retrial right has been "relevantly foregone" (§19). The formulation of Question (1) involves a far broader and more general proposition, not determined in the Judgment. The Judgment makes clear, for example, that the requesting state could not "impose" the "invidious" choice of attending a time-limited retrial during the extradition process, where non-attendance extinguishes the retrial right (see §14). The nuance is simply not reflected in the formulation of Question (1). The present case is, again, about making a 'freely made' choice, during the extradition proceedings, and by reason of deliberate absence not taking advantage of the retrial right then duly afforded.

10. The "deliberate absence" point which was actually "involved in the decision" was a very specific one. It came to this.

> *In a case where the requested person had initially been convicted in absence at trial, having not at that stage "deliberately absented himself" – but where, while facing extradition, he (i) chose to initiate the right to a retrial in a requesting state court and then (ii) "freely made" a decision not to attend that retrial hearing (which non-attendance extinguished the right of retrial under*

> *the domestic law of the requesting state) – is he extraditable, compatibly with section 20 of the 2003 Act (read with Article 4a of the Framework Decision), notwithstanding that the retrial hearing involved no hearing on the evidence and merits?*

This, then, was the "deliberate absence" point addressed in the Judgment. The Judgment gives the answer "yes" to this question. I accept that this question engages a question of law. But I cannot accept that it engages a point of law "of general public importance", for the purposes of section 32(4).

11. It is important – when identifying a putative point of law of general public importance – to tailor the analysis closely to the specific questions of law which the judgment actually decides. That may be because the identified question was a question of law which was the ultimate question being determined by the Court. Or it may be because the identified question was a question of law constituting an identifiable and necessary step in the Court's reasoning, by which it arrived at its ultimate decision. A disciplined focus is necessitated by these twin aspects of section 32(4): "general public importance" and "involved in the decision". For certification, the two must overlap. In Fuzesi v National Crime Agency [2018] EWHC 3548 (Admin), for example, a suggested 'point of law of general public importance' was formulated (see §12), but the Divisional Court explained that, as formulated, it did not describe "a point of law which arises on the facts of the present case" (see §13). In Celczynski v Poland [2020] EWHC 3450 (Admin), for example, suggested 'points of law of general public importance' were formulated (see §2), but Dove J explained that they did "not, in truth, arise in the circumstances of the present case" (see §6). In my judgment, the same problem arises from the suggested 'points of law of general public importance' here. I agree with the submissions of Ms Bostock for the Respondent. The fact-specific nature of the Court's determination, on the very special facts of the present case, mean that those questions of law which were involved in the decision are not questions of law of general public importance. Conversely, Mr Grandison's broader questions of "general public importance" were not "involved in the decision", whether as ultimate decisions or as necessary steps. I refuse the application to certify points of law of general public importance. It follows that I also refuse the application for leave to appeal.