IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 1938 (Admin)

No. CO/662/2021

Royal Courts of Justice

Wednesday, 29 June 2022

Before:

MR JUSTICE LANE

B E T W E E N :

OPREA — Appellant

- and -

REGIONAL COURT IN LUBLIN, POLAND — Respondent

MR G. HALL (instructed by Oracles Solicitors) appeared on behalf of the appellant.

MR S. ALLEN (instructed by CPS Extradition Unit) appeared on behalf of the respondent.

J U D G M E N T

MR JUSTICE LANE:

1 This is an appeal against the decision of a district judge, sitting at Westminster Magistrates' Court who, on 19 February 2021, ordered the appellant's extradition to Poland. The appellant is in fact a national of Romania.

2 Permission was granted by Whipple J on 10 November 2021, on two grounds. The first is that the district judge wrongly found that the appellant had deliberately absented himself from his trial or court hearing at which he was sentenced to one year and six months' imprisonment, which was suspended with conditions for a period of four years. The suspended sentence was activated on 17 January 2018.

3 It is argued that because of errors in the judge's approach, he was wrong to order the appellant's extradition. Instead, the district judge should have ordered the appellant's discharge pursuant to section 20(7) of the Extradition Act 2003 ("the 2003 Act").

4 The second ground concerns section 21 of the 2003 Act. The appellant submits that the district judge was wrong to find that the appellant's extradition to Poland would not involve a violation of Article 8 of the ECHR; that is the right to respect for private and family life.

5 The district judge set out the facts of the extradition offence at paragraph6 of his judgment:

> "The RP was convicted of one offence in Poland at the District Court in Lublin: An offence between 10.5.15 and 11.6.15, jointly with others, of breaking into a building of the Oczyszczalnia Group 1 [a treatment plant], and after dismantling the disused transformer, stealing copper wire, causing a loss of 50,000 PLN, contrary to Article 279.1 of the Penal Code.
> The loss in UK £ is the equivalent of £9,800 approximately."

6 Beginning at paragraph 8, the district judge explained the nature of the European Arrest Warrant:

> 8. Court proceedings. The **RP** did not appear at his court hearing on 24.10.16. He was convicted in his absence. He was sentenced to 1 yr and 6 months' imprisonment, suspended for 4 years, with 4 years probation, and various financial obligations.
>
> 9. Box D [of the European Arrest Warrant] clearly states that he was *'not summoned in person but by other means… in such a manner that it was unequivocally established that he was aware of the scheduled trial and was informed that a decision may be handed down if he or she does not appear for the trial'.*
>
> 10. Box D also states *'The judgement was issued as a result of filing the motion for conviction without conducting a trial by a prosecutor in procedure of the Article 355.1 of the Code of Criminal Procedure'.*
>
> 11. Box D also states that after being convicted the **RP** *'did not request a re-trial or appeal within the applicable time frame'.*
>
> 12. The judgement containing the sentence became final on 20.12.16.

> 13. The suspended sentence was activated on 17.1.18, presumably as a result of a failure to engage with probation or meet his financial obligations.
>
> 14. The full term of 1 yr, 6 months imprisonment remains to be served."

7 The appellant gave evidence. The district judge described this evidence as follows:

> "18. The **RP** gave evidence before me with the benefit of a Romanian interpreter. After being sworn, he stated his written proof of evidence stood as his evidence in chief. He was not asked further questions.
>
> 19. He was cross examined by the JA. He agreed there was a 'sentence deal' with the prosecution. As part of it he says he was told to leave Poland and not to return. When challenged about this, he said he was told he should admit the offence and then he would be released and able to go home, although he would not be able to return. He denied he was changing his story. He said he was asked for an address in Poland but did not have one. He said he was not aware of the hearing date in Poland and only became aware of the sentence after he arrived in the UK. When it was put to him he had knowingly and deliberately failed to attend the hearing, he repeated his assertion that he was not told of it and was not aware of it.
>
> 20. He said he first came to the UK about 3 years ago and finally came here to settle on 28.2.20. His wife and 3 children [of school age] followed him here in about August 2020. He has a stepson who remains in Romania."

8 At paragraphs 20 and 21, the district judge described the evidence of the appellant's wife.

9 After making a finding at paragraph 23 regarding the issue of whether the appellant had provided the Polish authorities with an address, the district judge moved to his findings:

> "24. Findings. I do not believe the evidence given by the RP. He came across as evasive and untruthful. I find he was interviewed in Poland, admitted the offence and was aware of the obligations upon him and he chose not to comply. There is no reason to believe, other than that he was made aware of the proceedings and chose to ignore them. He was well aware the sentence had been agreed by the prosecution and it follows that he knew there would be a court hearing for that sentence to be imposed. I do not believe he was told he must leave Poland and not return. I find to the criminal standard that he is a fugitive from Polish justice".

10 At paragraph 25, the district judge found as follows:

> "25. I accept the **RP** may have been living and working openly in the UK for some time, certainly there is no evidence to counter that assertion, but he has knowingly and deliberately put himself out of the reach of the legal process in Poland, as per *Wisniewski & Ors v*

Regional Court of Wroclaw, Poland & Ors, [2016] EWHC 386 (Admin)".

11 Beginning at paragraph 33 the district judge addressed the passage of time:

> "33. It is now some time since the offence was committed. The general rule is that a person's extradition is barred if it appears that it would be either unjust or oppressive to extradite him by reason of the passage of time, since either the commission of the offence or he became unlawfully at large. It is necessary to demonstrate not only a long delay, but also the actual injustice or oppression relied on.
>
> 34. But in this case, I have found as a fact that the **RP** is a fugitive from Polish justice. In those circumstances he is prevented from relying on the passage of time, unless there are exceptional circumstances. Lord Diplock said in **Kakis v Government of the Republic of Cyprus,** [1978] 1WLR 779. ' *Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country concealing his whereabouts or evading arrest, cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him".*
>
> I accept the RP did not actively conceal his whereabouts or evade arrest but the act of fleeing is sufficient. The later case of **Goodyear v Trinidad and Tobago**, [2009] UKHL 21, further decided that if a person deliberately flees, he cannot then rely on the passage of time, even if the requesting state has significantly contributed to the delay".

12 The district judge also cited *RT v The Circuit Court in Tarnobrzeg, Poland* [2017] EWHC 1978 (Admin), where, at paragraph 62, Ouseley J observed:

> "It is a frequent submission that someone has been living in the UK, openly, often having had contact with various official bodies here, but neither the foreign Judicial Authority nor the NCA can be expected to explore the by-ways and alleyways of British officialdom to discover whether someone is in this country".

13 The district judge's conclusion on delay, (in the section 14 sense) was as follows:

> "40. I will further address the question of delay below, when I give consideration to Article 8, but as there is no argument as to exceptional circumstances based upon my finding that the RP is a fugitive who deliberately left Poland to avoid the sentence that he knew had been agreed with the prosecution for these offences, the s.14 challenge must fail".

14 Turning to Article 8 of the ECHR, the district judge said this:

> "42. Delay is capable of being relevant to an argument under Article 8 and the issue of delay has been considered in case law on a number of occasions and it is difficult to reconcile some of the decisions. It was decided in *HH v Deputy Prosecutor of the Italian Republic*

[2012] UKSC 25, that delay is a matter that can be taken into account, even if the RP is a fugitive, but that in such a case there must be a strong case before there can be a conclusion that extradition would be disproportionate."

15 Having considered then what Ouseley J said in *Wisniewski* and also in *Wanagiel v Poland* [2018] EWHC 2092 about delay in the context of Article 8, the district judge said this:

> "46. The delay in this case is not of significant length, but I have considered it in so far as the evidence allows me to do so, but as the RP is a fugitive I am unable to take it into account to any extent in his favour, or make any allowance for it. Even if the delay were significantly longer, the above authorities make it clear that in view of my finding, it would not avail him. There would have been no delay if the RP had remained in Poland and attended his court hearings.
>
> 47. The offence is not trivial, by any means, and involved a loss of approximately £9,800. It was a planned offence and involved others. In those circumstances, it is impossible to say that any passage of time has diminished the public interest in the RP's extradition".

16 At paragraph 48, the district judge directed himself as to the so-called balancing exercise, required to be undertaken in Article 8(2) cases, setting out the factors in favour of and against extradition in order to determine if extradition would be a violation of Article 8. In doing so, the district judge had regard to *Celinski v Poland,* 2005 EWHC 1274, *HH v Italy,* [2012] UKSC 25 and *Norris v USA* c [2008] UKHL16. The district judge then held as follows:

> "52. Balancing decision. As stated there is no allowance I can make for any delay. The public interest is high, particularly so because the RP is a fugitive and nothing has occurred to diminish the public interest in his extradition. I have considered both the delay, as above, and what has happened since the RP came to the UK.
>
> 53. The RP has not been here very long and his wife and children have been here only for a matter of months. That fact demonstrates she is capable of looking after the children by herself. The **RP** has no financial commitments or obligations in the UK. He states that since June 2020 he was 'doing various ad hoc jobs working in construction, car wash and doing deliveries'. He does not therefore appear to have stable employment. In his proof of evidence, the **RP** states that he has 'a few relatives here in the UK, nephews and cousins'. There is no reason that I am aware of as to why they cannot assist if needed.
>
> 54. In **HH** Baroness Hale said that given the constant and weighty public interest, the cases in which extradition can be held to be disproportionate interference with a person's Article 8 rights are likely to be exceptional. There is, however, no prescribed test of exceptionality. There is nothing exceptional here and the balance is strongly and clearly in favour of extradition.
>
> 55. It was submitted to me that it would be disproportionate to order extradition for an offence that is not of 'high value'. However, it was pointed out by the LCJ in **Celinski,** each Member State is entitled to

set its own sentencing regime and levels of sentence and I should not substitute my own view with what sentence a UK court might have imposed. For what it is worth, I doubt the sentence in the UK court would have been greatly different. I cannot, in any event, accept the submission that it is not a high value offence.

56. I cannot find any circumstances in this case that entitle me to say the constant and weighty public interest is outweighed by Article 8 considerations. There are no exceptional features in the **RP**'s circumstances that would entitle me to so find and the fact that he is a fugitive further counts against him.

57. I cannot find this is a case where the public interest has diminished with time. It is impossible for me to conclude that the inevitable interference with the **RP**'s Article 8 rights that would be caused by extradition would be disproportionate in the circumstances.

58. I cannot decline to extradite the **RP** on Article 8 grounds."

DISCUSSION

17 I address first the section 20 ground. For the appellant, Mr Hall puts the matter essentially as follows. In order to be considered deliberately absent, the respondent must prove to the criminal standard that the appellant was summoned to the scheduled date and place of trial which resulted in the decision, such that he had actual personal knowledge of the hearing. In that regard, Mr Hall relies on Dworzecki C-108/16 PPU [47-48]; also *Strieki v Poland* [2016] EWHC 3309 (Admin). Alternatively, it is necessary for the respondent unequivocally to establish that the appellant was, in fact, aware of the scheduled date and place of the trial: *Dworzecki* [47][58].

18 Mr Hall says that to discharge this burden, the respondent must properly complete the EAW. Where an EAW has not been properly completed, the court will need to conduct its own assessment. In doing so, the court cannot operate on assumptions: *Strieki* [51]-[54]). Where Box D provides conflicting information, the EAW is, Mr Hall says, bad, and the court cannot properly make the relevant determinations it is required to undertake. In this regard, Mr Hall relies on *Iftimie v Romanian Judicial Authority*, [2016] EWHC 1637 (Admin): [17] and [24].

19 The assessment of deliberate absence is fundamentally one of intent. The court must assess what was in the mind of the person in question. A manifest lack of diligence may support a conclusion that a person intended, deliberately, to absent themselves from trial. That is, however, not enough in itself: *JK v Poland*, [2018] EWHC 197 (Admin).

20 Mr Hall submits the district judge's ruling on section 20 is wrong for the following reasons. First, the EAW plainly provides conflicting or contradictory information. If one reads Box D option two with Box F, one sees that the judgment of 24 October 2016 was issued without conducting a trial. That, Mr Hall says, is presumably why no summons was ever sent – as to which, see Box D, option 1(a). Nevertheless, Box D, option 1(b) states it can be unequivocally established that the appellant, "was aware of the scheduled trial". That is inconsistent with the above points. Furthermore, and in my view importantly, Mr Hall says option 2 has not been properly completed. Option 2 provides that where option 1(b) has been completed, the respondent must provide information about how the relevant condition has been met. However, option 2, as completed in this case, does not explain how it was

that the appellant was unequivocally informed about a trial, which it appears did not take place.

21 Instead, option 2 talks about the judgment having been issued as a result of the filing of a "motion for conviction, without conducting a trial by a prosecutor". This is said to have been in accordance with "the procedure of the article 355 paragraph 1 of the Code of Criminal Procedure. The penalties were said to be "agreed on between the prosecutor and the accused".

22 Mr Hall submits that where an EAW is incomplete or confusing, the court may make its own assessment. The Court, however, cannot operate on assumptions: see *Strieki*.

23 In the present case, the district judge did not conduct his own assessment. Rather, he made conclusions which are based on impermissible assumptions. I recall that the district judge said:

> "There is no reason to believe, other than that [the appellant] was made aware of the proceedings and chose to ignore them".

24 Mr Hall says there is no basis for that conclusion. The EAW requires the respondent to insert, at option 2, the basis on which it is alleged that the appellant knew of the scheduled date and place of trial. It does not do so. The judge's conclusion is therefore unreasonable and wrong.

25 Next, Mr Hall takes issue with the finding of the district judge that:

> "[The appellant] was well aware the sentence had been agreed by the prosecution and it follows that he knew there would be a court hearing for that sentence to be imposed".

26 Mr Hall says the first part of that sentence is correct, but the part that begins, "it follows", is not based on any evidence. It is, in fact, entirely speculative. It is impossible to say that the judge could be satisfied to the criminal standard that the appellant knew there would be a trial. The information given in box D, option 2 does nothing in this regard. There was, accordingly, no basis on which it could be concluded that the appellant was informed of the scheduled date and place of the trial.

27 Mr Allen, for the respondent, places emphasis on the principle of mutual trust and confidence. Mr Hall, however, makes the point that this principle has its limits. Reliance on the principle of mutual trust and confidence cannot take place where the EAW is incomplete or leads to confusion, which he submits is the position here. In that regard, Mr Hall relies on *Caldarelli v Court of Naples, Italy,* [2008] 1 WLR 1724, *Goluchowskii v District Court in Elblag, Poland* [2016] 1 WLR 2665 and *Spanish Judicial Authority v Arranz (No.3)* [2015] EWHC 2305 (Admin).

28 In that last case, Lord Thomas LCJ said, at paragraph59:

> "59. There is in any event nothing inconsistent with the principles of mutual recognition and mutual confidence in requiring one judicial authority to explain to another why it has taken a certain course where the evidence plainly calls for such an explanation. Providing simple reasons enhances confidence; declining to do so can undermine

confidence and thus work against the basic principles that underpin mutual recognition".

29 Mr Allen relies, in this regard, on the judgment of Dove J in *Taranenco v Bucharest Section 1 Court (Romania)* [2020] EWHC 1198. Speaking in the context of section 20, Dove J held that:

> "… material has to be approached in a constructive manner, seeking to identify the sensible meaning of the documentation, bearing in mind that the information is provided in good faith and has been translated. An overly forensic scrutiny of the precise language may obscure, rather than elucidate, the intended meaning."

30 I agree with Mr Allen that, bearing all these principles in mind, nothing material turns on the issue of whether there was or was not a trial. It seems to me to be sufficiently plain that the hearing which took place in October 2016, which lead to the imposition of the criminal penalty on the appellant, was not a trial of the issues but rather a hearing that followed what effectively would be a plea of guilty in this country.

31 I also accept that the evidence suggests the appellant had the previous year agreed with the prosecutor (i) that he was guilty of the offence and (ii) what the penalty for that should be. It is, nevertheless, an essential requirement of the appellant's extradition that the respondent should show to the criminal standard that the appellant was aware of the date and place of the court hearing in October 2016. Even applying the principles and observations relied upon by Mr Allen, and adopting what he describes as a "cosmopolitan approach to the EAW", I am in agreement with Mr Hall that the EAW in this case is flawed.

32 In Box D, option 2, as completed, fails to say how the respondent could form the view that the appellant was aware of the date and place of the hearing. The fact that he had agreed the penalty with a prosecutor over a year earlier is, in my view, nothing to the point.

33 The district judge appears to have concluded that he was able, nevertheless, to reach a finding to the criminal standard because the appellant's own evidence was unsatisfactory. I have set out paragraph 19 of the judgment, which recites the evidence of the appellant, and the district judge's findings on that evidence at paragraph 24. I agree with Mr Hall that the district judge's rationale for concluding the appellant was evasive and untruthful is unreasoned. It is trite that a judicial factfinder does not have to give extensive reasons for finding that a person is or is not a witness of truth; but comparing paragraphs 19 and 24 of the decision, I consider that the district judge has failed to give a legally adequate reason for his conclusion.

34 Accordingly, there was no basis at all upon which the district judge could conclude that the section 20 matter had been proved to the criminal standard. For this reason, the appellant's appeal has to be allowed and the appellant discharged in respect of this EAW.

35 In view of my finding on the section 20 issue, I need not spend a great deal of time on the Article 8 ground.

36 It is frequently the case that judicial factfinders, undertaking a balancing exercise under Article 8(2) ECHR, find themselves in difficulties if they refer to the concept of exceptionality. It is well known now that, in the Article 8 context, there is no legal test of exceptionality. That was made plain, in the extradition context, in *HH*. Exceptionality is, rather, a predictive tool in that, given the weighty nature of the public interest in extradition, it will not frequently be the case that people with an Article 8 case succeed in showing that

extradition would be a disproportionate interference with their Article 8 rights (or those of others).

37 In the present case, with some hesitation, I have concluded that Mr Hall is right that in paragraph 54 and, particularly, paragraph 56 of the judgment, the district judge was using exceptionality as a threshold test, rather than merely as a predictive tool. In fairness, Mr Allen did not really demur from Mr Hall's submission on this issue.

38 Were it not for my finding on section 20, it would therefore, have been necessary for me to undertake, for myself, the requisite Article 8 balancing exercise. In that event, I would have found in favour of the respondent on this issue.

39 Applying the balance sheet approach, there is of course, a weighty public interest in extradition. Even accepting, as Mr Allen effectively did, that the appellant is not a fugitive from justice and that the district judge's finding on that issue is also flawed, I do not consider that the public interest in extradition has been materially diminished by any delay.

40 As Mr Allen said, the sentence of immediate imprisonment was imposed in January 2018 and in June 2020 the EAW was activated. That is a period of some 18 months which, in all the circumstances, does not appear to me to be unduly long. The appellant arrived here in 2017 and at first was moving between this country and Romania. In 2020, however, he was joined by his wife and some of their children. I bear in mind the fact that the youngest child has settled in school and that the other children may now have established themselves, to some degree, in this country. The fact of the matter is, however, that they have all been here only for a short period of time. Furthermore, and importantly, the wife and children initially remained in Romania when the appellant was, actively engaged in various forms of employment in the United Kingdom. That strikes me as a significant feature.

41 Accordingly, balancing the factors for and against extradition, I would have come to the conclusion that the appellant could not have shown his extradition would violate Article 8. For the reasons I have given however, that is not determinative of this appeal, which is allowed on the section 20 ground. I therefore order the discharge of the appellant.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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