Neutral Citation Number: [2022] EWHC 2002 (Admin)

Case No: CO/4819/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

IN THE MATTER OF AN APPEAL UNDER SECTION 26 OF THE EXTRADITION ACT 2003

Before :

MRS JUSTICE MCGOWAN

- -

Between :

KARLIS ELMERIS	**Appellant**
- and -	
THE GENERAL PROSECUTOR'S OFFICE, REPUBLIC OF LATVIA	**Respondent**

- -
- -

Michael Haggar (instructed by **Taylor Rose MW**) for the **Appellant**
Stefan Hyman (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates:
26 October 2021 and 10 February 2022

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Approved Judgment

This judgment was handed down by Mrs Justice McGowan remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10.30 on 29.07.2022

Mrs Justice McGowan

Introduction

1. Karlis Elmeris, **("the appellant")** is sought pursuant to a European arrest warrant, **("EAW").** The EAW is a conviction warrant. His return is requested to serve a sentence of 3 years and 1 month's imprisonment for drugs offences.

2. After a hearing at Westminster Magistrates' Court, District Judge Fanning, (as he then was), ordered return for reasons given in his judgment of 17 December 2020.

3. Leave to appeal was granted by Holman J on 8 July 2021 after a hearing, on ground 1 (articles 2 and 3 of ECHR) and ground 2 (article 8). The crux of the appeal is the potential consequences in detention in Latvia of the appellant's status as a police informant. The primary issue, in simple terms, is whether the prison regime in Latvia can provide safe conditions for his detention.

4. Proceedings on appeal were delayed to await the outcome of a medical examination as it was suspected at one time that the appellant might have cancer. Fortunately, he does not, and he continues to be treated for an underlying medical condition.

5. I am very grateful to Mr Haggar for the appellant and Mr Hyman for the respondent for their helpful written and oral submissions.

Legal Framework

6. The appellant appeals pursuant to s.26 of the Extradition Act 2003. By s.27(2), this court can only allow an appeal if it is satisfied that the decision under appeal is wrong:

> *"(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;*
>
> *(b) if he had decided that question in the way he ought to have done, he would have been required to order the person's discharge."*

There is no issue between the parties on the test to be applied. The sole question is: did the district judge make the wrong decision?

7. It is also accepted that the Framework Decision 2002/584/JHA, **("Framework Decision"),** governs the EAW in this case under the transitional provisions.

8. Article 3 ECHR prohibits torture, inhuman or degrading treatment or punishment. Article 2 protects the right to life. Article 8 protects the individual's private and family life. It is a qualified right. Article 8(2) permits necessary and proportionate limitations on those rights for a legitimate aim, namely the prevention of crime.

9. If there is a risk to the appellant's health and life, it is said to arise from the possible action taken by non-state actors, in other words the inmates of any prison in which the appellant might be held.

Ground 1.

10. The appellant argues that, as he had provided assistance to the police in Latvia, incarceration in a prison there would put him at undue risk of violence by way of retaliation from which the authorities could not adequately protect him and therefore risk a breach of his article 3 and article 2 rights.

11. The district judge made a number of findings of fact, he paraphrased the appellant's evidence in extenso in his judgment,

> *"In 2014 I was in a bad place in my life, selling drugs. I was arrested for this offence and beaten up by the police in a police car. I agreed with the prosecutor that I would receive a suspended sentence. The agreement was finalised in court on I did not need to attend. The agreement was sent to me by the host I received a suspended sentence of two years six months suspended for three years. (In 2015)*
>
> *Under the suspended sentence I had probation supervision and a curfew which I obeyed the or stop during the term of the suspended sentence, I was caught in possession of drugs and arrested at all stop I was taken to the police station. The police officer said to me, 'if you help us to catch drug dealers then you will not go to prison and will remain subject to the suspended sentence'.*
>
> *The police said that, 'your suspended sentence may be extended to potentially because of a new offence, perhaps by around six month'.. I then signed the papers saying I would assist in the capture of drug dealers. I was told that I would be guaranteed anonymity. I helped the police by staging drug deals with drug dealers I had worked with. The drug dealers received a prison sentence and were in fact told about my status as an informant.*
>
> *The matter ended up in court on the 6th of February, 2017, the sentence was activated with an additional short period on top.*
>
> *The prosecutor appealed and wanted some more time to be added to my sentenced the was already added that long 12th of June, 2017, the prosecutor's appeal was unsuccessful.*
>
> *It then appealed to a higher court myself wanting the sentence to be suspended again. This appeal was unsuccessful in August 2017.*
>
> *I was aware that I may need to hand myself into prison.*
>
> *I was receiving threatening text messages they were saying that they would come to attack me in prison because I 'snitched on them' to the police will stop I no longer have these messages as they were saved on the same card from three years ago but I no longer have the. I was quite sure that some sort of physical retribution was coming. (He later clarified that all the text messages had come from the same number).*
>
> *I accept that I was aware my appeal against activation of the prison sentence had failed. Equally, no one came to collect me to take me to prison. I had no information as to how the sentence would be implemented.*

In any event I simply couldn't stay because I thought I was going to be either killed or seriously harmed in prison or on the outside.

I'd told my dad and mum who were in the UK but I would come and join them. My mum paid for my ticket."

12. In light of this account the judge rightly found that the appellant was a fugitive.

13. The judge also heard evidence from Mr. Valerijs Ickevics, an experienced lawyer in Latvia and tutor at the Council of Europe. Mr Ickevics told the court that there is a Law on the Special Protection of Individuals, ("Protection Law 2005") to protect witnesses and participating informants in a case such as this. He further told the court that Article 300 of the Latvian Law on Criminal Procedure lists grounds for the provision of special protection for persons under threat arising out of their testimony against other prison inmates. These provisions include segregation, transfer to another prison, 'strong control' (which I take to mean supervision) and separate transportation. The existence and level of a threat will be assessed by the Prosecutor General or his appointee. In addition, s. 31.2(2) and (4) of the Latvian Code on the Execution of Sentences provides that a participating informant whose sentence has been reduced accordingly will be held separately from other prisoners if they request such treatment.

14. He added the important caveat that staff shortages meant that it was hard to comment on the effectiveness of such measures. It would not be possible to guarantee that such preventative measures as separate detention could be met. All prisons are understaffed and therefore problems with violence continue, particularly arising out of 'hierarchies' established by the prisoners themselves. He commented on the conditions in Latvian prisons in general but as it is accepted that Latvia is not required to provide further assurances on prison conditions in general terms, the judge did not find it necessary to determine the adequacy of prevailing conditions in general terms.

15. The judge made detailed findings of fact as follows;

- The appellant understood that he would benefit from being a participating informant.
- He knew he had committed further offences whilst subject to a suspended sentence and that at the very least he would face the activation of that sentence.
- He chose to participate in the police operation in the hopes that he would benefit from doing so.
- The fact that his benefit was not as great as he had hoped is not the same as his claim that any promise that he would receive another suspended sentence was made and then broken.
- The judge found that he doubted whether the appellant was telling the truth about that 'promise'. He noted that he had been legally represented. He further noted that the prosecutor appealed against the leniency of the new sentence.

- That the appellant did, in fact, benefit from his cooperation because although the suspended sentence was activated it was not increased in length for his further offending.

- The appellant's dissatisfaction about the imposition of the new sentence was capable of being appealed which he did. That appeal was refused.

- The appellant knew that he was obliged to surrender to prison. He chose to flee and come to the UK to avoid that sentence.

- The appellant has the right, by statute, to seek protective custody. It had been years since he received any threats but that right continued.

- The judge doubted whether there was a realistic prospect of any continuing threats after the passage of time. In any event, he found that that was something the prison authorities could manage.

- He found the appellant would not be held alongside those against whom he had given evidence and it was unlikely that they would direct anyone else to harm the appellant years after the event.

- He found that the authorities in Latvia had in place the necessary safeguards to protect the appellant's life and his health.

- He found the existence of any risk to be entirely speculative. He seriously doubted that there was any such risk to the appellant now.

- He found the lawyers criticisms of Latvian prisons insufficient to entitle a judicial authority to refuse an extradition request.

16. Mr Haggar submits that the judge was wrong not to find that there were substantial grounds for believing that there would be a real risk to the appellant's health and life. He argues that the judge failed properly to apply the test in ***R (Bagdanavicius) v Secretary of State for Home Department [2005] UKHL 38 at [24].*** He argues that the judge failed adequately to consider, firstly, the objective risk of attack and, secondly, the steps which would be taken to protect the appellant from such attack.

17. He relies, in support, on the respondent's failure to identify the appellant as being an informant as an indication of their inability to deal with him accordingly if returned.

18. He relies on the evidence of the lawyer Mr Ickevics about the limitations on numbers of prison staff and the consequent impact that has on the effectiveness of measures to protect the appellant from what he submits is a substantial risk of harm. Further, he submits that the judge did not properly follow the stepped approach in ***Aranyosi [2016] 3 WLR 807*** as distilled in ***Mohamed v Comarca de Lisboa Oeste, Portugal [2017] EWHC 3237 (Admin)*** at [15],

> ***"Stage 1*** *of the procedure involves determining whether there is such a risk by assessing objective, reliable, specific, and properly updated evidence…….A finding of such a risk cannot lead, in itself, to a refusal to execute the EAW. Where such a risk is identified, the court is required to proceed to stage 2.*

> ***Stage 2*** *requires the executing judicial authority to make a specific assessment of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. To that end it must request the issuing authority to provide as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained.*
>
> ***Stage 3*** *deals with the position after the information is provided. If in the light of that, and of any other available information, the executing authority finds that, for the individual concerned, there is a real risk of inhuman or degrading treatment, execution of the warrant must be postponed but cannot be abandoned."*

19. Mr Hyman argues that the judge did precisely what he was required to do. The judge heard the evidence and made findings properly open to him which this court should not review by way of a re-hearing of the issues.

20. He submits that if the question at the first stage in *Aranyosi* is not answered in the affirmative then the test is met. He points out that it was not for the Judicial Authority to identify the appellant as an informant, presupposing that they were aware of it. It is, he argues, for the appellant to raise the point and then to show to the requisite standard that a risk arises and would not be met. He submits that the appellant has not discharged that burden, merely establishing his informant status is not sufficient, he must go on to show a real risk and a lack of adequate measures available to deal with such a risk.

Discussion

21. This is a case in which the possible risk would arise from non-state actors; fellow prisoners. Accordingly, as the House of Lords made clear in *Bagdanavicius*, if the risk is established, the duty on the state is to take reasonable measures to make the necessary protective measures from such harm available.

22. The principles were established in ***Krolik & Ors v Several Judicial Authorities of Poland*** **[2012] EWHC 2357 (Admin),**

    i) *"Member states of the Council of Europe are presumed to be able and willing to fulfil their obligations under the ECHR in the absence of clear, cogent and compelling evidence to the contrary;*

    ii) *That evidence would have to show that there was a real risk of the requested person being subjected to torture or inhuman degrading treatment or punishment;*

    iii) *The resumption in i) is of even greater importance with EU member states because there is a strong, albeit rebuttable, presumption that such states will abide by their obligations under the ECHR;*

    iv) *The evidence needed to rebut the presumption and to establish a breach of article 3 by an EU member state will have to be powerful."*

23. The appellant committed the second offence in May 2016 and was sentenced in February 2017. He gave evidence in June 2016. The judge was entitled to find that

whatever risk might have existed if the appellant had been imprisoned close in time to that testimony, there was no sufficient basis to find that any risk continued; the prospect was merely speculative.

24. In any event, the Latvian statutes provide specific rules for the segregation of prisoners such as the appellant. Even if there are concerns about the shortage of staff, the risk of violence could be minimised by the avoidance of the appellant being held with anyone he has testified against. The judge heard the evidence of the appellant and an expert called on his behalf and made sound findings of fact. There is no argument to show that he was wrong in those findings. This ground fails.

Ground 2

25. The appellant seeks to argue that his status as an informant, described as 'proactive assistance', was not given sufficient weight by the judge in granting extradition and in not determining that it was an unnecessary interference with his article 8 rights.

26. The judge heard the appellant's evidence and heard from the appellant's mother, Kristine Vinerte. She suffers from hepatitis C and is HIV positive, both conditions are well-managed and under control. She is supported by her son, who visits her two or three times a week and helps with grocery shopping. Both she and her partner are alcoholics, but she has been in employment and has the support of her partner who lives with her.

27. The parties agree that the test is the one helpfully set out in ***Polish and Slovakian Judicial Authorities v. Celinski and Others [2015] EWHC 1274 (Admin),*** by Lord Thomas CJ at [15]-[17],

> *"First, the appropriate judge should consider the evidence received and make findings of fact.*
>
> *Second, the appropriate judge should weigh the factors that militate in favour of and against extradition, thus creating a "balancing sheet" of "'pros and cons'".*
>
> *Third, the appropriate judge should decide the case on the facts applying the 'standard' of interference prescribed and giving reasons for his decision."*

28. The judge gave a very detailed and careful judgment on the pro and contra arguments. He listed every factor and applied the jurisprudence of ***Norris v Government of the USA(no.2) [2010] UKSC 9, HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] 25*** in addition to ***Celinski.***

29. He conducted the balancing exercise, using Mr Hyman's description in a 'text-book fashion', and found that the balance fell in favour of extradition. He did have as his first listed factor against extradition the appellant's status as an informant. Having already found that he had not established the 'real risk' required under articles 3 and 2, he did not find that it altered the balance away from the presumption in favour of extradition.

30. The article 8 argument, even with his informant status, as included by the district judge, does not show any error in the assessment exercise he carried out. It was a model

judgment which demonstrated the careful way in which he approached his decision. He did not err in reaching that decision. Ground 2 also fails.

Post-script

31. The judge found at the time of the hearing that the appellant was not suffering from any medical condition that should prevent his return. The factual position has changed since that date and I have given time for further medical examinations to be completed. The findings are summarised as follows, *'(t)here is no diagnosis of colo-rectal cancer. The diagnosis from the biopsy is "chronic inflammation with very patch mild acute inflammation"'*. This is a condition that can be treated by medication and will not require surgery.

32. Mr Haggar nonetheless invites me to step back and, in light of all the available material to decide the question again and reach a different conclusion from the judge in the court below. Time has passed and the appellant has been in custody during which time he has developed an inflammatory bowel condition. Neither of those factors, nor the combination, demonstrate that I should reach a different conclusion from the district judge. Both grounds fail and the appeal is dismissed.