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CO/1518/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 3rd February 2022

Before :
MR JUSTICE FORDHAM
- -

Between:

(1) CSABA NEMETH (2) MARIA LAKATOS	**Requested**
(3) MARIA HORVATH	**Persons**
- and -	
HUNGARIAN JUDICIAL AUTHORITIES	**Requesting State**

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- -

Mary Westcott (instructed by Lawrence & Co) for **Csaba Nemeth**
Amelia Nice (instructed by Lawrence & Co) for **Maria Lakatos**
Louisa Collins (instructed by Hodge Jones & Allen) for **Maria Horvath**
Amanda Bostock and Hannah Burton (instructed by CPS) for the **Requesting State**

Hearing date: 3/2/22
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, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

This is a Second Judgment

1. This judgment arises out of the Reconvened Hearing which I had described in my first judgment in these cases, on 9 December 2021: see [2021] EWHC 3366 (Admin) (the "First Judgment") at §1. No party has invited further reasons regarding anything dealt with there (see First Judgment §1).

There was a January Order

2. One development, subsequent to the First Judgment, was that the representatives in Marina Horvath's case were able to agree case-management directions for the Requesting State's appeal (First Judgment §§9-14). I made those directions within an Order which I made on 19 January 2022 ("the January Order"). It was also agreed between the parties, and embodied in that Order, that Marina Horvath's case would be "severed" from these remaining three cases, and that what was described as the "cross-appeal" of Marina Horvath was "withdrawn" (a topic to which I will return shortly). Within the January Order, I also acceded to an application by Marina Horvath to extend the representation order in her case, to include the instruction of a child psychology expert. As to that, I explained (in the reasons within the January Order) that I had been persuaded by the special circumstances to take that course, given in particular: Marina Horvath's position as respondent; the centrality to the Article 8 analysis (based largely on observations in HH: see First Judgment §12) of the welfare of a young child; on which topic an informed and up-to-date expert report could now be prepared for the assistance of the Court dealing with the substantive appeal.

Withdrawal of Marina Horvath's "cross-appeal"

3. The withdrawal of Marina Horvath's "cross-appeal", embodied in the January Order, was explained by her representatives to arise out of dicta in USA v Assange [2021] EWHC 2528 (Admin) at §31. The basis of withdrawal was this. If the Requesting State's appeal succeeded and DJ Fanning's decision to discharge her were quashed, and if the matter were then remitted and extradition were ordered, Marina Horvath would at that stage seek leave to appeal on the grounds which DJ Fanning had originally rejected and which had been the subject of the "cross-appeal". The Requesting State confirmed that it agreed with that analysis, as being the consequence and basis of the withdrawal. What I did was to record all of this, in recitals within the January Order. In the circumstances, it was not necessary for the Court to come to any view, on any question relating to jurisdiction and "cross-appeals", for the purposes of making the January Order.

Application to stay other matters, said to be linked to Bogdan

4. All parties' representatives commendably liaised and cooperated in devising an agenda for today's one-day hearing. They worked hard to assist the Court within that timetable. Happily, they were able to identify a detailed list of pre-reading. Even more happily, as it happens, I had the whole of a day available yesterday in which I was able to undertake that discipline. The first topic arising for determination is the issue which I described in the First Judgment at §4. That is the question of whether in addition to the Bogdan stay on the 'judicial independence' issue (First Judgment §3) there should also be a stay

in relation to four "other matters" (First Judgment §4). Counsel approached those on the basis that topics (3) and (4) were intimately linked and they were right to do so. Although to some extent Counsel for the Requested Persons found themselves outlining the nature of the grounds of appeal which it is intended that they will advance in relation to those topics, it was made clear at today's hearing that the Court's function was only to consider the question of a stay. I have reached no view on any question as to the reasonable arguability of any of those points. I announced in Court this morning that I had concluded that it was not appropriate to stay any of those matters, and what follows are the reasons why I arrived at that conclusion.

5. In relation to 'endemic delays' the scene has been set as to the relevant Strasbourg case-law relating to prolonged pre-trial detention as engaging both Article 5 and Article 6 ECHR and examples of violations found by the Strasbourg court. The Requested Persons accept that the questions of a sufficiency of courts and an efficiency of judicial process are not the same as the question of judicial independence. Having more judges and having faster judges is not the same thing as having independent judges. Reliance is placed, on this part of the cases, on a Report by Ministers' Deputies (dated 9.6.21) on the excessive length of judicial proceedings including in criminal matters in Hungary and the lack of an effective remedy. Within that Report is a description of the way in which "excessive delays in the administration of justice constitute a serious danger for respect for the rule of law". Emphasis is placed on that description as demonstrating the inevitable link between rule of law issues and endemic delays. In addition, reliance is placed on this theme: the significance of 'effective judicial protection', and on the detrimental and 'chilling' effect of 'compromised judicial independence', viewed in terms of the weakening or absence of a necessary legal safeguard (here, in the context of securing protection against endemic delays, viewed against the standards of Articles 5 and 6).

6. In relation to ill-treatment of detained accused persons of Roma ethnicity, reliance was placed on the expert report (of Dr Csire) relied on before DJ Fanning in the cases of Mr Nemeth and Ms Lakatos and I was shown passages from that report dealing with the nature of that ill-treatment. Other materials relied on and shown to the Court emphasised the importance of 'measures' said to be needed to provide protection for detainees of Roma ethnicity. Specific reliance was placed on Venice Commission materials describing a weakening in a layer of protection previously provided by the Equal Treatment Authority ("ETA") in Hungary, whose effectiveness was said to have been undermined by reform arrangements involving a 'merger', all described in a Report (dated 18.10.21). The same theme as arose in relation to endemic delays was raised in the context of ill-treatment of detainees (whether awaiting trial or post-sentence) of Roma ethnicity, namely that compromising the independence of the Hungarian judiciary undermines a vital layer of 'effective judicial protection' so far as concerns the standards within Hungarian law for vindicating the rights of detainees of Roma ethnicity.

7. In relation to prison conditions and the interrelated topics of overcrowding, guaranteed floorspace assurances and supervision, a number of points were emphasised. As with the position of the ETA and protection against discriminatory ill-treatment, reliance was placed on materials describing a weakening through downgrading of the role of the Ombudsman ("CFR"). In that context the link to 'independence' was emphasised by reference to a passage describing the importance of independence in relation to the CFR

as a supervising authority. While being shown passages from the April 2021 judgment of the Supreme Court in Zabolotnyi v Hungary [2021] UKSC 14 [2021] 1 WLR 2569, I asked whether reliance was being placed – in the context of prison conditions – by the Requested Persons on a reference in §62(6) of Zabolotnyi to the role of "penitentiary judges", but it was (very fairly) conceded, in response to that question, that that cohort of the Hungarian judiciary is, rather, one 'concerned with decisions about parole'. Again, the general theme was invoked as to the consequences for 'effective judicial protection' in relation to applicable legal standards, if it is the case that the independence of the judiciary has been undermined.

8. Notwithstanding the sustained attempts to establish a need, and justification, for staying the applications for permission to appeal on all of these topics in these cases pending the resolution of the 'judicial independence' issue raised in Bogdan, in my judgment, the Requested Persons were unable to identify any convincing overlap or other reason justifying this Court ordering such a stay. As the Requesting State rightly emphasises, the pending issues in Bogdan concerns very specific questions, viewed through a very specific legal lens, as to 'judicial independence' and as to any 'direct implications', should a relevant conclusion regarding the 'compromise of judicial independence' be reached. The arguments in Bogdan are about what constitutes a 'judicial authority' for the purposes of section 2 of the 2003 Act. The interrelationship between independence of the 'judicial authority' for the purposes of section 2 in a conviction warrant case like Bogdan, and in relation to Article 6 ECHR in accusation warrant cases like the present cases (in relation to many of the EAWs), is illustrated by and lay behind the order I made on the previous occasion (First Judgment §3) to stay the section 2 and Article 6 'independent judiciary' points. In relation to these further topics – endemic delays, ill-treatment of detainees of Roma ethnicity and prison conditions – and in relation to the Articles 3, 5 and 6 ECHR standards which these topics are said to engage, there is, in my judgment, no sufficient overlap nor any other reason why hearing the applications for permission to appeal on these matters should await a final determination in Bogdan.

9. To illustrate the difficulty, in my judgment, in making out the case for a stay on these further matters, I make the following observations. The Strasbourg caselaw, which I was shown as relevant to these matters, nowhere links the analysis to any question or assessment of 'judicial independence'. The expert evidence on behalf of the Requested Persons in relation to the treatment of detainees of Roma ethnicity (Dr Csire) similarly made no link at all to the question of 'judicial independence'. On the contrary, in the very next passage after the one in which reliance was placed by the Requested Persons, the expert deals with the question of 'judicial independence' and the 'rule of law' and expressed the clear view that there arose no particular concern in these cases linking ill-treatment as detainees of Roma ethnicity to that issue of 'judicial independence' and 'rule of law'. In the context of prison conditions and 'assurances' the Requested Person emphasised that these are cases in which the relevant 'assurances' are given by the Hungarian Ministry of Justice (rather than a court). But, if anything, in my judgment, that serves to demonstrate the absence of a nexus between the points about 'judicial independence' in the Bogdan case and the prison conditions and assurances issues. It is right that there are themes relating to compromised 'independence' in the context of both the ETA and the CFR, but the point is that those concerns relate to the independence of those bodies (EAT and CFR); they do not relate to any question of compromised independence of the judiciary. To say that 'the executive would be the perpetrator' of any acts serving to compromise 'judicial independence', and that

therefore there is a link which would undermine assurances given by the Ministry of Justice (which, in fairness to Counsel for the Requested Persons, was a way of putting a point about 'judicial independence' which it was I – rather than they – who raised) is clearly too much of a stretch to constitute a link, still less a direct link, between MOJ assurances and compromised judicial independence which could justify a stay. It is understandable that emphasis should be placed on a phrase which links 'endemic delays' to "danger for respect of the rule of law", and in many ways that passage was the high water-mark of the overlap between the rule of law and endemic delays which was identified in argument. But the point being made is clearly the wrong way round, in order to be able to assist. The point being made is that where the system has 'endemic delays' in getting before a court in a criminal prosecution, that constitutes a "danger for respect for the rule of law". It does not begin to follow from that observation that a distinct issue ('judicial independence') which poses a 'danger for respect for the rule of law' thus overlaps with the question of 'endemic delays'.

10. The general theme of 'effective judicial protection' is understandably relied on by the Requested Persons in relation to all of these topics. It is not difficult to think of a whole series of issues arising in extradition cases where one feature of the legal landscape is the enforcement, in the domestic law of the Requesting State, of relevant legal standards. To take an example, wherever one finds reference to the "presumption" that the public authorities of a relevant requesting state will discharge the obligations arising under the ECHR, it could be said – no doubt – that one important feature in that picture is that there are courts able to hold those public authorities to account and ensure that they do so. But, in my judgment, it is quite impossible to rely on that general theme of 'effective judicial protection' as justifying a stay on the hearing of applications for permission to appeal in relation to these further matters. The Requested Persons can, and should, argue before the Court about whether – and if so how – they can identify reasonable arguable grounds to appeal in relation to these further matters. In advancing those arguments it will be open to them to point to the fact that the Bogdan case – an appeal which has been refused permission to appeal by Sir Ross Cranston on the papers on 17 January 2022 and is currently awaiting an oral renewal hearing – raises structural issues as to 'judicial independence' which are an 'open question' until that case has finally been determined. If and insofar as there is material purchase in that observation, it will be available to the Requested Persons in this case. Stepping back, I am quite satisfied that the appropriate course is that those applications for permission to appeal should be made, at a further oral hearing, listed as soon as possible. If the grounds or any of them are, in all the circumstances, viable as disclosing reasonably arguable grounds of appeal, permission to appeal will be granted and stock can then be taken.

Section 12A grounds (Nemeth and Lakatos)

11. It is convenient to deal next with the section 12A issue in the cases of Mr Nemeth and Ms Lakatos. This was a topic referred to in the First Judgment at §5. This issue arises out of the judgment of DJ Fanning on 8 April 2021 (for these purposes "the Judge"), who ordered extradition in the cases of Mr Nemeth and Ms Lakatos, except in relation to one matter in Mr Nemeth's case on which he was discharged by the Judge. One of the issues which the Judge had to consider were the s.12A arguments raised by both of the Requested Persons, in relation to some of the EAWs on which they faced extradition. In the case of Mr Nemeth there were seven EAWs and the s.12A ground of appeal is advanced in relation to three of them: EAW4 issued on 29 July 2019 relating

to 31 offences of swindling described as 'grandchild fraud' (a description to which I will return); EAW6 issued on 19 October 2020 relating to 7 further counts of similar 'grandchild fraud'; and EAW7 issued on 1 December 2020 relating to 19 further offences of similar 'grandchild fraud' with one offence of money laundering. All of those EAWs, and the others in the set of seven EAWs in Mr Nemeth's case, are 'accusation' EAWs. This 'index offending' is therefore 'alleged offending'. In the case of Ms Lakatos, the section 12A ground of appeal is advanced in relation to two out of six EAWs: EAW1 issued on 30 January 2017 relating to four offences of controlling prostitution and trafficking; and EAW6 issued on 15 September 2020 and relating to 16 offences of 'grandchild fraud'. Each of those is an 'accusation' EAW, as are two of the remaining four EAWs. The remaining two EAWs are 'conviction' warrants.

12. The Judge dealt with the issue of section 12A in considerable detail. The focus is on section 12A(1)(a) (of the Extradition Act 2003). The question under the statute is whether it appears to the appropriate judge that there are reasonable grounds for believing (a) that the competent authorities have not made a decision to charge or have not made a decision to try (first limb) and (b) that the person's absence from the territory of the Requesting State is not the sole reason for the failure to have done so (second limb). There are a large number of authorities on the application of that two-limbed test. Many of them were faithfully set out by the Judge and it is common ground that there was no error by him as to the law. The Judge also set out with care the key passages and features of the evidence in the case. For good measure, Counsel for the Requested Persons assisted me by taking me to the primary materials – in particular, the EAWs and the Further Information – in order to show me in their setting within the primary documents the passages which the Judge set out, together with certain other features.

13. The Requested Persons emphasise, rightly, that the question for today is whether there is a "reasonably arguable" ground of appeal. In the context of the particular EAWs to which this section 12A ground of appeal relates, they have emphasised a series of features. A first feature emphasised was the content of the "preamble" to each relevant EAW. In the case of several of the EAWs, the preamble had specifically been amended to emphasise that arrest and surrender was being requested for the purposes of "conducting a criminal prosecution". In the case of others, the preamble had been left 'unamended' but, as I put to Counsel and they accepted, an 'unamended' preamble does not involve any incoherence or inconsistency. That is because the use of the 'unamended' preamble confirms that one or other of the permissible (prosecutorial or imprisonment) purposes is the rationale for the EAW. In order to do justice to the arguments I feel I must at this stage refer to some authority. In relation to the preamble what is there confirmed is that the warrant has been "issued for one of the two legitimate purposes of extradition": see Powney v Slovenia [2015] EWHC 2543 (Admin) at §26. As to the position where a preamble is 'unamended' see Asztaslos v Hungary [2010] EWHC 237 (Admin) at §40. Reference was made to the contents of the EAWs and the use of the word "investigation", and the word "suspected", as to each of which see Puceviciene v Lithuania [2016] EWHC 1862 (Admin) at §40(i). Reference was made to EAWs issued by an "investigation judge" as to which see Powney at §27. Reference was made to 'generic' further information, in particular in answering questions about 'forum', and to the language there used by the Requesting State. And reference was made to 'specific' further information – relating to other EAWs – where specific questions had been asked about whether decisions to prosecute had been taken and where those questions had been explicitly and affirmatively answered. In the light of

all of those and the other features relied on by the Requested Persons, the submission is that – although correct on the law and although right in setting out the key features of the evidence – it is reasonably arguable that the Judge went wrong in concluding that there were no reasonable grounds for believing that the first limb was not satisfied. It is further submitted that, in light of the overall context, and the progress that the Hungarian authorities were able to achieve in relation to other EAWs, that it was at least reasonably arguably wrong for the Judge to conclude that the second limb was also not satisfied.

14. It was common ground between the parties that the relevant decision for the first limb of section 12A is satisfied by a decision that charges will be laid against a requested person following their surrender. It was also common ground that where further information was provided in these cases, where explicit questions were asked and answered, they were not answered affirmatively by reference to the taking of any new step; but rather by the giving of information in relation to a step that had already been taken at the time of the description in the EAWs. It was also common ground that it was (and is) at least relevant for the Judge (and this Court) to consider the EAWs as a group including how they fit together.

15. In my judgment, it is not reasonably arguable that the Judge was "wrong" in relation to the adverse conclusion at which he arrived, in the context of the section 12A challenges to these EAWs. The onus of showing reasonable grounds for believing that the two limbs of section 12A were met was, in the first instance, on the Requested Parties. The Judge was not "wrong" to regard the various features in the language of the EAWs as not indicating that the first limb of section 12A was satisfied. As to those, I have made reference above to the passages in the relevant authorities. It is certainly the case that the preamble is not necessarily decisive, when put alongside other features: see, for example, Litwinczuk v Poland [2019] EWHC 2745 (Admin) at §27. But the Judge was, in my judgment, beyond argument, not only entitled but correct to come to the conclusion that he did, and in a judgment which I cannot accept, even arguably, is wrong or for that matter legally inadequately reasoned. There are, in my judgment, very strong features in this case as to why there is no realistic prospect that this Court at a substantive hearing would come to a different view from the Judge on this section 12A issue. This is a set of EAWs which it is, in my judgment, clearly right to consider in their overall context. It is right that the language relied on by the Requested Persons can be found on the face of the EAWs and in some of the 'generic' further information. But, in my judgment, the insurmountable problem that they face is that that is equally true of those EAWs which they accept are describing allegations as to which the relevant decision to prosecute has been taken. Once that is accepted, as the Requested Persons do, the impact of the general textual descriptors on which they rely, and the features of the EAWs and other generic further information on which they rely, is very significantly undermined. The fact is that it is convincingly shown – not by reference to some new step, but rather by information about some pre-existing step – that the use of this language does not indicate the absence of a relevant section 12A (first limb) decision.

16. In the end, in my judgment, the key point that the Requested Persons' raise is this. It is a fact that some of the EAWs issued in relation to them involve 'specific' further information where an explicit answer is provided to an explicit question. The explicit question, posed by the CPS, is this: has there been a decision to prosecute? The explicit

answer, given in each case by the Requesting State, is: yes. The Requested Persons are able to say, as they do, that it is 'striking' and 'conspicuous' that there should be direct and positive evidence of that kind in relation to some of the EAWs, but not in the cases of these others. On that basis, they invite the inference that there is the absence, in the case of these other EAWs, of a relevant decision to prosecute. That argument – contending for an inference based on a 'striking' and 'conspicuous' absence of a statement from the Requesting State – can, in my judgment, only run if the Requesting State has been asked the question by the CPS: has there been a decision to prosecute? It would only be where the Requesting State was asked that same question that the absence of a positive answer would be 'conspicuous' and 'striking'. Absent being asked that question, it would be entirely benign. Ms Bostock, as Counsel for the Requesting State in this case, has explicitly accepted that given the contours of this argument the Requesting State would owe a duty of "candour", to disclose to the Court and to the Requested Persons any similar question which had been put to the Requesting State by the CPS in relation to any of these warrants, and which had therefore not led to a similar positive and clear response. I have no doubt that she is right to accept the obligation of "candour" would extend that far. She tells the Court moreover, and I unhesitatingly accept from her, that the reason why no similar question has been disclosed to the Requested Persons and to the Court in relation to these EAWs is that no such question was asked of the Requesting State by the CPS in relation to those EAWs. In other words, the evidence of a direct and explicit answer is provided in each and every case in which the question has been raised by the CPS. In those circumstances, far from being "striking" and "conspicuous", and underpinning some adverse inference, the absence of similar specific further information and an explicit answer is, in my judgment, beyond reasonable argument, entirely benign. It has no purchase towards discharging the onus on the first limb of section 12A. Since that is the high-watermark of the argument on section 12A – on the necessary first limb – the ground of appeal, in my judgment, clearly goes nowhere.

17. Finally, in relation to this part of the case it is sensible, in my judgment, to perform a 'reality check'. These are a series of EAWs. They relate, so far as four of the EAWs regarding which the section 12A argument is raised, to the same subject matter of the 'grandchild fraud' in relation to which the Hungarian authorities – in a case summary – have explained they are so anxious (understandably) to proceed by taking to criminal trial. Moreover, these Requested Persons are identified as being in the 'leadership group' of those against whom the prosecuting authorities are acting. Many of the EAWs, and all of the EAWs where the explicit section 12A (first limb) question has been explicitly asked and answered and where it is accepted that decisions to prosecute have been taken in relation to the same individuals, concern this same 'grandchild fraud' criminal enterprise. What is "conspicuous" and "striking" against that picture, in my judgment, is the suggestion that there is some basis for concluding that there was an absence of a decision to prosecute in relation to some of these EAWs.

18. Another 'reality check' which, in my judgment, this Court would inevitably perform at any substantive hearing is this. The EAWs which are said by Mr Nemeth or Ms Lakatos not to involve a decision to prosecute include EAWs which are the "mirror image" of an equivalent EAW, issued on the same date in relation to the same or substantially the same subject matter, in respect of the other of them. They are husband and wife. So, the logic is this, that although there was a decision to prosecute the husband (Mr Nemeth) in relation to his EAW1 – issued on 30 January 2017 relating to the four offences of

controlling prostitution and trafficking – there was not a decision to prosecute his wife (Ms Lakatos) in relation to the same subject matter of her equivalent EAW issued on the same date. The same goes for Mr Nemeth's EAW5, which is accepted to involve a decision to prosecute him, and her EAW6 issued on the same day (15.9.20) and in relation to the same subject matter of 'grandchild fraud'. Again, if anything is "striking" and "conspicuous", in my judgment, it is the suggestion that there is a basis for concluding that one of those cases has, and the other has not, involved a decision to prosecute. The same point applies, the other way round, in relation to Ms Lakatos's EAW5 and Mr Nemeth's EAW4. Her EAW5 is accepted to have involved a decision to prosecute. It was issued on the same day (29.7.19) as the equivalent EAW4 against her husband, which he says that there are reasonable grounds to consider concerns matters which involved no decision to prosecute him.

19. In the light of this sort of 'reality check', my conclusions as to the viability of this ground of appeal are strongly reinforced. And in all of these circumstances the second limb simply does not arise.

A Third Judgment

20. In giving this judgment ex tempore, I have now reached 5:05pm on the single day which was set aside to deal with all of the matters on the Agenda, including the delivery of the Court's rulings on those matters. I am going to pause at this point in delivering judgment. That pause is to allow Counsel the opportunity to address me on whether I should proceed ex tempore, and detain court staff longer, in order to give my reasons in relation to the remaining issues; or whether their invitation is that I put into writing my rulings and reasons on the remaining matters, issuing a third judgment in this series.

21. [Continuing:] Although I would have been entirely content to carry on with this ex tempore judgment, and deal with the remaining matters, the position is that no Counsel is inviting me to do so. All Counsel have confirmed that they would, for their part, be content that the remaining matters be dealt with in a further, third judgment in this sequence, handed down 'virtually' having been circulated in draft. I have at the forefront of my mind the position of the court staff, including the court 'logger', who would be required to remain for what is likely to be a significant further period of time while I continue. I am able to deal with the remaining topics without requiring that of them and it is for that reason that I am going to conclude this ex tempore ruling here and issue a further, and third, judgment. It will continue where I am leaving off, and will give my reasons in relation to the remaining applications which I heard today.

3.2.22