Neutral Citation Number: [2022] EWHC 350 (Admin)

Case No: CO/2448/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 17th February 2022

Before :

MR JUSTICE FORDHAM

- -

Between :

RADOSLAW KORZYNSKI	**Appellant**
- and -	
REGIONAL COURT OF BIALYSTOK (POLAND)	**Respondent**

- -
- -

Rebecca Hill (instructed by Lawrence & Co Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

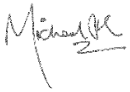
Hearing date: 17/2/22

Judgment as delivered in open court at the hearing

- -

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:

Introduction

1. This is an in-person hearing of a renewed application for permission to appeal in an extradition case. The Appellant is aged 28 and is wanted for extradition to Poland. That is in conjunction with a mixed extradition arrest warrant ("ExAW") issued on 10 September 2020, on which he was arrested on 10 March 2021, and to which the new post-Brexit arrangements apply. The ExAW relates to a series of crimes or alleged crimes for which his extradition to serve sentence or face trial is sought. That index offending is a series of similar frauds. Extradition was ordered by SDJ Goldspring ("the Judge") on 9 July 2021 after an oral hearing on 15 June 2021. Permission to appeal was refused on the papers on 15 November 2021 by Sir Ross Cranston. A stay on the section 2 point of principle in the Wozniak case was granted but that ground has fallen away in light of the Divisional Court's final determination in that case.

Section 20 and a substituted sentence

2. There is a single point on which permission to appeal is sought. It relates to one of the criminal matters constituting the index offending. It would not therefore result in discharge of the ExAW but, rather, discharge of the Appellant in relation to one of the constituent elements of the ExAW. The relevant element were frauds which were said to have been committed at the end of November 2015. The Appellant was convicted and sentenced, in his absence, on 13 July 2016. He had been summoned on 1 July 2016, and he had agreed in writing to the sentence which was subsequently imposed. It was described as a "restriction of liberty" and it is clear from the papers, as Ms Hill submits, that it was a 12 month community sentence with conditions. At a subsequent hearing on 13 January 2017 there was substituted for the 12 month community sentence a custodial sentence of 182 days. The basis for the substituted custodial sentence was the breach by the Appellant of the conditions of the community sentence. Ms Hill emphasises that the sentence imposed on 13 January 2017 was a distinct and substituted sentence; that it was the determination of a custodial sentence; and that it was not the activation of a suspended sentence of imprisonment.

3. The argument for discharge advanced on the Appellant's behalf runs by reference to section 20 of the Extradition Act 2003. Ms Hill, who did not appear below, accepts that the argument was not raised before the Judge on behalf of the Appellant. Although it may be said that the extradition court has a responsibility to consider all possible bars to extradition, and that the Respondent bears the onus to the criminal standard of satisfying applicable criteria in relation to those bars (including section 20), Ms Hill rightly accepts that the Judge cannot possibly be criticised in the present case for not dealing with the specific point, which was not raised. However, it has been raised now. It is, in my judgment, appropriate that this Court should address the point on its merits, when considering whether to grant permission to appeal.

The premise: Ardic distinguished

4. The argument has a premise. The premise is that the section 20 protections are applicable to the hearing on 13 January 2017, as a distinct part of the "trial". So far as that is concerned, Ms Hill distinguishes the decision of the Luxembourg court (the CJEU) in Ardic Case C-571/17 PPU (22 December 2017), and relies on the reasoning

of the court in its judgment in that case, and on the reasoning in the two cases both decided by that court on 10 August 2017, which are discussed in the Ardic judgment. They are Tupikas Case C-270/17 PPU and Zdiaszek Case C-271/17 PPU. Ardic decided that a hearing which was concerned with the activation of a suspended custodial sentence would not attract the protections (domesticated in this jurisdiction by means of section 20). Ms Hill's argument is that such a conclusion would not follow in the case of a distinct custodial sentence following breach of the conditions of the community sentence. She submits that such a sentence, as in the present case, constitutes a "material change" in the "nature and quality" of the sentence previously imposed. She also submits that there is, in principle, a continuity as to the post-Brexit legal application of the EU Framework Decision 2002/584-based standards, as identified in the Luxembourg case, given the deliberate equivalence in the language (under the new TCA and under the Framework Decision Article 4a), especially given that the underlying root for the principled application of the legal safeguards in this area is Article 6 of the ECHR (see Ardic at §74).

5. In my judgment, so far as the premise is concerned, Ms Hill has identified a reasonably arguable legal analysis which there is a realistic prospect that this Court would at a substantive hearing accept. She tells me, and I accept from her, that she has not been able to uncover any post-Ardic case which addresses whether it is applicable, or to be distinguished, in the context of a sentence of custody imposed following breach of the conditions of a community sentence. She told me, and I accept from her, that a case called Murin v Czech Republic [2018] EWHC 1532 (Admin) was another case about activation of a suspended sentence, the reasoning in which does not materially assist as to the present issue. In some respects, custody that is imposed following a breach of the conditions of a community sentence may be thought to be very similar to custody which is imposed following the breach of the conditions of a suspended sentence. But there are clearly differences otherwise the two. After all, otherwise, the two distinct types of sentence would not exist. Only one of them involves the prior imposition of a "custodial" sentence, albeit suspended. In my judgment, one only has to examine the reasoning of the Luxembourg court in Ardic at §§67 and 75 to see the emphasis being placed on "the custodial sentence imposed" and "the decision determining the custodial sentence to be served", as to which the Luxembourg court was making the link to the Strasbourg case law on Article 6 ECHR (§75). There are other reference points in Ardic which are relevant to the argument constituting Ms Hill's premise. One is the "distinction between measures which modify the quantum of the penalty imposed and measures relating to the methods for execution of such a penalty" (§40). Another way of putting the matter, emphasised by Ms Hill, is her 'material or fundamental change to the nature and quality of the sentence'. It is unnecessary to say more, or to cite further passages from the trilogy of Luxembourg cases.

The consequence: Stryjecki §§50(vi) and (vii)

6. In advancing her section 20 argument Ms Hill must, however, succeed not only on her premise but also as to the consequence which flows from it if that premise is legally correct. For the purposes of today, she needs only to demonstrate that it is reasonably arguable that she could prevail so far as that consequence is concerned. I bear in mind: that threshold of arguability; and also the Respondent's onus and the criminal standard that apply so far as concerns section 20 safeguards and "deliberate absence" in particular (see Stryjecki v Poland [2016] EWHC 3309 (Admin) at §§50(i) and 61(i)). I

also have in mind that, since the argument now being advanced was not identified before the Judge, particular caution is appropriate in approaching the Judge's findings and the evidence in the case. The starting point, so far as the consequence is concerned, is this. The emphasis which has been placed in this case on the summons, and the awareness which the Appellant had, in relation to the hearing on 13 July 2016 subsides once it is recognised that the focus is on the subsequent hearing of 13 January 2017. So far as that 13 January 2017 hearing is concerned, it is not said that the Appellant was 'aware' that that concrete scheduled hearing, on that particular date, was taking place; nor that he had received a 'summons'; nor indeed that a 'summons' had been sent to any address or prior address of the Appellant.

7. All of that takes the analysis through to propositions (vi) and (vii) identified in Stryjecki at §50. Proposition (vi) is this:

> ***Establishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person is deliberately absented himself from his trial.***

That proposition has been called into question in subsequent cases: see Kotsev v Bulgaria [2018] EWHC 3087 (Admin) (16 November 2018) at §31 (referring to Tyrakowski v Poland [2017] EWHC 2675 (Admin) at §30). Ms Hill tells me, and I accept from her, that she has not been able to find any subsequent case which has resolved the shadow of doubt placed over proposition (vi) by those subsequent cases. In those circumstances, I proceed on the basis that proposition (vi) remains intact and it is proper for Ms Hill to continue to rely on it. She says it answers the question so far as the consequence for the present case is concerned.

8. Proposition (vii) is this:

> ***However, where the requested authority cannot establish that the person actually received that information because of "a manifest lack of diligence" on the part of the requested person, notably where the person concerned has sought to avoid service of the information so that his own fault led the person to be unaware of the time and place of his trial, the court may nevertheless be satisfied that the surrender of the person concerned would not breach his rights of defence.***

Ms Hill accepts that that proposition remains intact. The critical question is whether it is reasonably arguable that the evidence and findings in this case do anything other than to support, to the appropriate criminal standard, an adverse conclusion in the application of that "manifest lack of diligence" proposition (vii).

9. Ms Hill advances two alternative bases for giving an affirmative answer to that question. In the first place, she submits that – on the legally correct interpretation and application of the "manifest lack of diligence" proposition – there would need to be the issuing of a "summons" and/or "an attempt to serve a summons", by way of a pre-requisite. She emphasises the role which the serving of a summons, or the provision of actual information, relating to the trial hearing play in the wording and structure of Article 4a, and she tells me (and I accept from her) of the post-Brexit arrangements which have replaced it. In the case of Zagrean v Romania [2016] EWHC 2786 (Admin) there is a relevant passage at §§73-84. It arose in a context where there had been the "issue" of a "summons": see §83. That case is therefore consistent with the submission that a summons and/or an attempt to serve a summons is a pre-requisite. As Ms Hill put

it, absent a summons or attempt to serve a summons a court "could not know or conclude" that there was a 'manifest lack of diligence' on the part of the requested person. Even if known to be absent, a requested person's registered address might be a family address, or the address of a friend, or might otherwise mean the summons coming to the attention of the defendant, who might instruct a lawyer to represent them at the hearing. Both as to language and structure of the operative provisions, and as to their purpose, she submits that a summons and/or attempt to serve a summons is necessary to the "manifest lack of diligence" proposition being made out.

10. In my judgment, that is not a reasonably arguable analysis of the "manifest lack of diligence" proposition. No case which I have been shown says that a summons or attempt to serve a summons is a prerequisite. Proposition (vii) in Stryjecki does not contain any such prerequisite. The purpose of the protections cannot in my judgment, even arguably, extend to requiring steps which are known and assessed to be utterly futile. I put to Ms Hill the example of a situation where the local public authorities in the requesting state have established, beyond any doubt, that it is pointless to serve or attempt to serve a summons, on an address which is known now not to be occupied by the defendant or by any person connected with the defendant. It is relevant always to have in mind that what these protections are concerned with the "fair trial rights" of the individual, as the Court emphasised in Zagrean at §78. It is not, in my judgment, reasonably arguable that there would be a need to establish – as a prerequisite – a summons and/or attempt to serve a summons, in circumstances where these have been established – beyond doubt – by those on the ground to be utterly futile because the individual is known to have 'disappeared' and to be 'evading' steps whereby they could be contacted. This point is not free from authority. In Kotsev, Julian Knowles J addressed and applied the "manifest lack of diligence" proposition: see §§34 and 37. He did so having (at §§32-33) made a specific finding that the requested person in that case could not be regarded as having been "summoned" to his trial. Having adopted the starting point that there was no "summons", he went on to say this (at §34, emphasis added):

> ***That being the case, the Respondent can only prove that the Appellant deliberately absented himself of it can prove that through some other means he knew about the place and time of his trial, and waived his right to be present, or that it was his own deliberate conduct (eg by moving abroad without leaving an address with the authorities so as to evade justice, as in Zagrean …), which led to his lack of knowledge about his trial.***

Julian Knowles J went on to reject, on the facts, the applicability of the "manifest lack of diligence" proposition in that case. In doing so, he restated that that proposition would have been made out if on the evidence (§37):

> ***… the Appellant's lack of knowledge of the date of his trial was because of his own deliberate conduct in putting himself beyond the reach of the Bulgarian criminal justice system (eg by leaving the country).***

11. Ms Hill then puts the matter on the second, alternative, basis. She submits that, leaving aside points concerning a summons or attempt to serve a summons, there was no finding or adequate finding by the Judge in this case which could justify an adverse conclusion as to "manifest lack of diligence" in relation to the hearing on 13 January 2017. She submits that such a conclusion could, moreover, not be justified on the evidence in this case. And she emphasises again that, for the purposes of today, the threshold is reasonable arguability.

12. I cannot accept those submissions. The evidence is clear in this case, as were relevant findings by the Judge. On the basis of that evidence, and those findings, there is in my judgment no realistic prospect of this Court at a substantive hearing coming to any conclusion other than that this is a "manifest lack of diligence" case: where it is the own fault of the individual in steps taken by them to avoid service of information which have led to an awareness about the time and place of the relevant hearing; that it was the Appellant's own deliberate conduct by moving abroad and without leaving an address with the authorities so as to evade justice which led to his lack of knowledge about his trial; that his lack of knowledge of the date of his trial was because of his own deliberate conduct in putting himself beyond the reach of the Polish criminal justice system by leaving the country.

13. The first feature of the evidence which matters, so far as all of this is concerned, is that the community sentence imposed on 13 July 2016, with the conditions with which the Appellant was required to comply, had been imposed with his full awareness and indeed his agreement. The Judge recorded in his judgment the findings that the Appellant was "aware of the sentence to be served as he had agreed the sentence with the prosecutor" and that he "confirmed this agreement by his signature on 21 March 2016". The Judge also went on specifically to find that the Appellant's evidence had been evasive and dishonest. Although he denied being aware of the sentence to be served he had clearly agreed and confirmed his agreement to it. The Respondent, in its submissions accompanying the Respondent's Notice, says: "It cannot be said on any sensible view of the evidence that [the Appellant] was unaware of the likely consequence of breaching the terms of the sentence he agreed with the prosecutor". I agree.

14. It was against that backcloth that the second feature arose. What happened was that the Appellant defaulted as to compliance with the requirements imposed on him by the community sentence. He evaded those responsibilities. Attempts were made by the authorities to locate him, so that he could discharge his responsibilities. He was found to be uncontactable. The Polish court, which went on to impose a substituted 180 day custodial sentence (13 January 2017), was told all of this. In his judgment, the Judge recorded – based on the Respondent's Further Information – that the Appellant had "avoided completing the community service which had been ordered"; that "the police [had] informed the court" that they "could not locate" him and that "he had not informed them of any change of address".

15. The Judge then went on to record that the Appellant had come to the United Kingdom in autumn 2016, and to find that he had done so deliberately, to avoid his responsibilities, and to "hide" from the authorities. The Judge said this: "in short I did not believe a word he told me relation to his knowledge and avoidance of the proceedings. I find that is because he sought to avoid and hide from them in every turn. I have no doubt that he left Poland to avoid the proceedings". This third feature, recognised by the Judge in the context of the evasion and the police attempts to locate the Appellant and what the police told the court about his evasion and his uncontactability, is that he had already left the United Kingdom to hide from his responsibilities and the authorities at every turn, as a fugitive.

16. In my judgment, these findings and this evidence are a clear-cut case: where the Appellant by his own deliberate conduct by moving abroad without leaving an address with the authorities and by acting to evade justice had a lack of knowledge about the relevant hearing date on 13 January 2017; that it was his own deliberate conduct that

put himself beyond the reach of the Polish criminal justice system by leaving the country; where there are findings of fact by the Judge which amply support that conclusion; so that this is a "manifest lack of diligence" case where the requested person's own conduct in evading the authorities made it his own fault that he was unaware of the time and place of his trial. Tested, again, by reference to the purpose of these protections the ignorance of the date and time of the hearing on 13 January 2017 cannot conceivably be said to have involved any breach of the Appellant's "fair trial rights".

Conclusion

17. In those circumstances, the arguability of Ms Hill's premise cannot avail her or her client or justify the grant of permission to appeal, which is refused.

17.2.22