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



No. CO/2787/2020

[2022] EWHC 642 (Admin)

Royal Courts of Justice

Thursday, 3 March 2022

Before:

THE HONOURABLE MR JUSTICE KERR

B E T W E E N :

NUNO EMANUEL REGO

Appellant

- and -

JUDICIAL DISTRICT COURT OF AÇORES (PORTUGAL)

Respondent

MR GRAEME HALL (instructed by Shaw Graham Kersh Solicitors) appeared for the Appellant.

MR DAVID BALL (instructed by the Crown Prosecution Service) appeared for the Respondent.

J U D G M E N T

MR JUSTICE KERR:

Introduction

- 1 The appellant, Mr Rego, is a Portuguese national who in recent years has been living in the Açores or Azores islands. He is wanted by Portugal to serve a sentence of 10 months' detention by house arrest for two offences, one of driving with excess alcohol in his blood and the other of driving without a valid licence.
- 2 Mr Rego appeals by leave of Lane J against the decision of District Judge Sarah-Jane Griffiths dated 7 August 2020, ordering his extradition to Portugal pursuant to a conviction European Arrest Warrant ("EAW") dated 19 February 2019 and certified by the National Crime Agency on 20 September 2019.
- 3 There is now only one ground of appeal: that the district judge was wrong to find that Mr Rego deliberately absented himself from his trial such that he is not entitled to a retrial, for the purposes of the Extradition Act 2003, section 20.

Facts

- 4 Mr Rego was born in 1982. According to a proof of evidence signed by him, he left the Azores with his parents at the age of two and has spent most of his life in the USA and Canada where he has worked as a painter and decorator. He married his wife, Kirsten Rego, in the Azores in 2009. She is a dual national with Portuguese and Canadian citizenship. They have three children.
- 5 His father kept a bakery in the Azores and travelled there regularly. In 2015, after his father died, Mr Rego returned with his family to the Azores to help run the business, which then closed. He has had alcohol problems. He acquired convictions for drink driving and theft in 2016 and one for driving without a valid licence in May 2017. He did not receive custodial sentences for these offences.
- 6 Mr Rego's case is that he speaks very little Portuguese and his wife none. However, in his signed statement he states that since arriving in the UK he has been teaching his son Portuguese.
- 7 On 29 October 2017 in Ponto Delgado, the main island, he was arrested while driving in the evening. He was found to have excess alcohol in his blood and not to have a valid driving licence. He signed a document called "*termo de identidade e residência*", variously translated ("the TIR"). His address was included in it. It required him to appear at court the next day and thereafter as required. His case is that he had little understanding of the TIR because of his poor Portuguese and because he was drunk.
- 8 The notes in the TIR warned him that he must attend when required under the legal process; he must not change address or leave it for more than five days without notifying a change of address; and that subsequent notifications would be made by mail delivery to him at that address; and that he could be tried in his absence if he did not appear; and that his counsel could intervene on his behalf at trial if he were not there.
- 9 He did not appear at court the next day, 30 October 2017. A lawyer was appointed by the court to represent him. There is no evidence of contact between Mr Rego and the lawyer. The latter obtained an adjournment to prepare a defence. A new trial date was set for 10 November 2017.

- 10 A letter of 30 October 2017 was sent summoning Mr Rego to attend the trial on 10 November 2017. It was sent by post to the address on the TIR. Under Portuguese law, service is deemed valid without proof of actual receipt by the accused, provided the summons is sent to and delivered to the accused's given address. Service is deemed effective five days from the delivery. In this case, delivery was on 2 November 2017, making service effective on 7 November 2017.
- 11 On 10 November 2017 Mr Rego did not attend court. His appointed lawyer did. The trial started. One prosecution witness was heard. The court set a further hearing date, 29 November 2017. According to Mr Rego's Portuguese law expert, Ms Vania Costa Ramos, the court did this because it "considered that it was necessary to have a social report made in order to decide on the sentence". The court also ordered the arrest of Mr Rego for up to 24 hours, to bring him to court on that date. He would therefore become subject to arrest from 28 November 2017.
- 12 Social workers attended his home address on 14 November 2017. He and Mrs Rego attended their offices and were interviewed. Ms Costa Ramos had access to the subsequent "social report" dated 17 November 2017. The judge below did not and nor do I. It included mention of language difficulties, Mr Rego apparently speaking only poor Portuguese and Mrs Rego none.
- 13 When the police went to arrest him to bring him to court on 29 November 2017, he was not at home and they could not find him. He says he arrived in the UK in November 2017 - probably, it was some time on or after 14 November 2017, the day he was interviewed by social workers. No further letter was sent to his home address notifying him of the date of the reconvened trial, 29 November 2017.
- 14 On that date his trial was concluded, without him there. His court appointed lawyer was there. The prosecution and defence made their closing arguments. The judge, Dr Patricia Pedreiras, gave her judgment on that date. She sentenced Mr Rego to an overall sentence of 10 months' detention, in the form of house arrest.
- 15 Mr Rego was soon joined by his family in Feltham. There he lived and worked for the next year. In November 2018, he was served with a copy of the judgment by the Metropolitan Police. Another year went by. Then he was arrested on 1 or 2 November 2019 in connection with a domestic incident and was taken to Staines police station. There, he was further arrested on an EAW issued in Portugal. He has been on conditional bail since.
- 16 After various enquiries and translation issues, the details of which do not now matter, Mr Rego came before the district judge at a live hearing. Neither he nor Mrs Rego was called, though both provided witness statements. Mr Hall, who appeared below and before me, told the judge he did not rely on their evidence. Therefore, they were not cross-examined though their evidence was contentious. Ms Costa Ramos gave written and oral evidence by video link.
- 17 The judge gave her reserved decision on 7 August 2020. She decided, adversely to Mr Rego, various issues which are no longer live in this appeal. She also decided that the requesting authority had proved that he had deliberately absented himself from his trial. He was a fugitive from justice. By his own conduct, he had put it beyond the power of the prosecutor or court to inform him of the date and place of trial. That includes the situation where he breaches the duty to notify a change of address and is deliberately ignoring the court process.

18 Mr Rego appealed. After some delay, Lane J granted permission to appeal on two of three grounds then pursued, of which one only remains live. In October 2021, Holman J adjourned the appeal to enable certain further information to be provided. The sole ground of appeal now is that the Judge wrongly found that Mr Rego deliberately absented himself from trial such that he is not entitled to a retrial, for the purposes of section 20 of the 2003 Act.

Appellant's submissions

19 Mr Hall argued that the judge had wrongly failed to apply an “intention based assessment” to the issue whether Mr Rego deliberately absented himself from his trial. He submitted that the judge had erred by undertaking, instead, a conduct based or fault based assessment of the issue.

20 Mr Hall took me on a tour through many of the leading cases, domestic and international (from both Strasbourg and Luxembourg). They included some of the authorities I had occasion to look at in *Bialkowski v. Poland* [2019] EWHC 1253 (Admin). I need not review the authorities again here. Mr Hall’s point was that the judge should have characterised Mr Rego’s failure to attend as resulting from conduct that may have been foolhardy or unwise but did not amount to deliberately absenting himself.

21 The judge should, Mr Hall argued, have found that the judicial authority had failed to prove to the criminal standard that Mr Rego intentionally absented himself. The evidence was insufficient: Mr Rego was drunk on his arrest, he was held for about one and a half hours, he had crashed the car, had a history of alcohol problems and had only poor Portuguese and no interpreter at the scene. He would be unlikely to understand fully the TIR.

22 Next, Mr Hall submitted that Mr Rego was not adequately informed about his trial. He reminded me that the “trial” for this purpose, refers not to the general prosecution process but to the scheduled event which resulted in the decision.

23 Where the issue of guilt or innocence and of sentence is discussed at court on more than one occasion, the decisive one for this purpose is likely to be the last one, at which guilt is determined and sentence imposed: See *Criminal Proceedings against Tupikas* [2017] 4 WLR 188, Case C-270/17PPU), at [81]; cf. *Criminal Proceedings against Zdziaszek* [2017] 4 WLR 189, Case C-271/17PPU), at [96].

24 Here, Mr Hall submitted, the decisive occasion was the last hearing, on 29 November 2017. No letter was sent to Mr Rego’s address summoning him to that hearing. Even if Mr Rego was being evasive, the judicial authority still had to prove it took steps that would have alerted a non-evasive person to the hearing date and place.

25 And the earlier summons in the letter dated 30 October 2017, summoning Mr Rego to the hearing on 10 November 2017 was only treated as valid by the legal fiction of deemed service, without proof that he had actual knowledge of the summons to that hearing. It could not be proved that Mr Rego actually knew about that earlier hearing date.

26 Mr Hall then submitted that Mr Rego was not adequately informed that he could be tried in his absence. The notes within the TIR stated this and he signed the TIR, but it was in Portuguese, a language largely unknown to him and not translated to him into English.

- 27 Mr Rego is not, Mr Hall pointed out, entitled to a retrial as of right. He should therefore, it was submitted, be discharged under section 20 of the 2003 Act.
- 28 Mr Hall further submitted, finally, that if (which he does not accept) the court is bound by the warrant to regard the EAW as conclusive as to the facts stated within it, it would be an abuse of process for Portugal to rely on deemed knowledge of the trial date and venue, five days after delivery of the summons to the relevant address, since the Framework Decision requires actual knowledge or intentionally blinding oneself to that knowledge.

Respondent's submissions

- 29 Mr Ball, for the judicial authority, reminded me that under section 27 of the 2003 Act, I can only allow the appeal if the judge ought to have decided the issue of deliberate absence from trial differently and that if she had done so she would have been required to discharge Mr Rego.
- 30 Mr Ball also referred extensively to authority, with lengthy citations. The judicial authority, through him, was inclined to question whether the subjective intention based assessment of the issue was the whole of the law rather than only part of it; he emphasised the role of manifest lack of due diligence on the part of the requested person.
- 31 At least, he argued, conduct amounting to a manifest lack of due diligence can ground an inference that the accused either knew full well when and where the trial would take place, or was deliberately putting notification of those matters beyond the power of the court or prosecutor because he did not want to know when and where his trial would take place.
- 32 Mr Ball emphasised the primacy of the information in the EAW as the authoritative source of fact. The court could not and should not go behind what is on the face of the warrant, or should not do so other than in rare and exceptional cases, of which this is not one, he submitted.
- 33 Here, the only basis for Mr Rego denying knowledge of the details of his trial was his own lack of co-operation with the judicial process, wilfully ignoring the warnings in the TIR he had signed. He could not shelter behind ignorance of those matters having signed the document confirming his awareness of them. He had every opportunity to attend his trial and if he did not do so his absence was wilful and not merely foolhardy.
- 34 Further, Mr Ball submitted, the proposition that Mr Rego was unaware of the trial date on 29 November 2017 is unsustainable. He must have learned of it when spoken to by social workers on 14 November 2017 even if he was not in contact with his court appointed lawyer.
- 35 The court, for its part, did enough, said Mr Ball, to acquaint a non-evasive accused with the time and place of trial; he was validly served with notice of the hearing due to take place on 10 November 2017. A non-evasive accused would have been at that hearing because he would have opened the letter of 30 October, delivered (on 2 November 2017) to the home address cited in the TIR.
- 36 Mr Rego was obliged under the terms of the TIR to be living at that address or to notify the court otherwise. He breached that obligation by fleeing to the UK and cannot pray in aid his own breach of duty. The judge was, Mr Ball submitted, right so to decide. The court should not look behind the information in the EAW.

- 37 Mr Ball argued that Mr Rego was informed in the TIR itself that he could be tried in his absence. Mr Rego was a Portuguese national born in the Azores. He cannot plead ignorance of the language of his country. He was not a stranger to criminal proceedings.
- 38 By the same reasoning, there is no possible basis, Mr Ball submitted, for the proposition that the extradition proceedings are an abuse of process.

Reasoning and Conclusions

- 39 I am grateful to the parties for their extensive and cogent submissions but I do not find it necessary to trawl through the authorities cited to me. They have been discussed in many cases already and I see no need to add to the case law when in my judgment the solution to this appeal is relatively simple.
- 40 In answer to a query from me during the hearing, Mr Hall accepted that if in fact Mr Rego was actually aware that his trial was to come on for hearing on 29 November 2017 then he, Mr Rego, would indeed have deliberately absented himself from the trial; he would have decided not to attend on the occasion when sentence was passed.
- 41 Mr Hall's appeal therefore rests on Mr Rego not having had actual knowledge of that hearing date. He says the judge was not, on the evidence, entitled to be satisfied to the criminal standard that he did have knowledge of that date.
- 42 Although the judge's findings were quite brief and did not engage in close analysis, it seems to me clear that she was deeply sceptical of the proposition that Mr Rego was ignorant of the last trial date, 29 November 2017. Her findings included (at paragraph 25b of her decision) the following (with my italics):
- “I find that the RP was aware of his obligations to appear at court on 30 October 2017 and of his obligation to inform the JA of any change of address. The RP came to the UK and did not notify the JA of any change of his address as he was required to do. The RP was aware of his obligations and I find that he deliberately left Portugal to avoid the court proceedings. *The RP was served with the new dates of court appearances and he failed to attend. The RP was spoken to by social services and he still failed to make any attempt to attend court or to contact the court.* The only conclusion is that the RP was aware of his obligations and failed to comply, deliberately to avoid the proceedings. The RP deliberately absented himself from the trial.”
- 43 That passage seems to me to include a finding to the criminal standard of proof, albeit not expressed in the clearest terms, that Mr Rego was aware of the hearing date on 29 November 2017 and chose not to attend but instead to flee to the UK. Unless that finding is unsustainable and I am satisfied (applying the tests in section 27), that is wrong, that is the end of this appeal.
- 44 In my judgment, that finding is not only sustainable but incontestably right. It beggars belief that Mr Rego did not know his trial was coming back to court on 29 November 2017. It is not an adequate answer to say that the onus of proof was on the judicial authority. The evidence before the judge of Mr Rego's knowledge of that hearing date was overwhelming.
- 45 First, he was familiar with life in the Azores. He was born there and had been living there since 2015. The language spoken there is the language spoken by his compatriots. Second, he was familiar from three previous cases in the previous two years with the criminal justice system and, in particular, how it operated in driving cases. His written statement said nothing about having needed an interpreter in those previous cases.

- 46 Third, although he claimed to know little Portuguese, he was teaching his son the language in 2020 or 2021, a year or two after leaving the Azores for the chillier climes of Feltham. That evidence was before the judge. She also noted (at paragraph 12) that he was not to be called to give evidence. Therefore, he would not be cross-examined.
- 47 The absence of oral evidence from Mr Rego and cross-examination was highly relevant to whether the judicial authority could prove to the criminal standard that he was aware of the hearing date on 29 November 2017. If he was not aware of it, he would be expected to give oral evidence to rebut the otherwise obvious inference that he understood exactly what was going on in the court's processes during the events of late October to late November 2017.
- 48 Next, Mr Rego was spoken to by social workers on 14 November 2017, when he attended their offices. It is not credible, without any oral denial from him (and he did not mention the point in his written witness statement) that he came out of that meeting ignorant of the hearing date on 29 November 2017. It would be an astonishing coincidence if his departure to the UK that very month was not connected to that court hearing date.
- 49 Mr Rego's written statement included an assertion that he went to the UK because he received an offer of work there. He did not give oral evidence and the judge noted that Mr Hall would not be calling him or his wife because he did not rely on their evidence. One could therefore be forgiven for drawing the inference that his departure for the UK owed more to the court process in the Azores than any offer of employment in the UK.
- 50 I read the judge's decision as including a finding that Mr Rego knew about the court hearing on 29 November 2017. There was ample evidence to support that finding. The judge did not set it all out systematically but her reasoning was essentially sound. Mr Rego was not co-operating with the legal process. He preferred to flee the jurisdiction than to face the music.
- 51 I uphold that account of events, as found by the judge. There was ample evidence to support it. My upholding the judge's finding is determinative of the appeal. There is no need to embark on another round of analysing the cases. The appeal cannot survive the damning factual position confronting Mr Rego. His appeal must fail and I dismiss it.
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This transcript is approved by the judge.