IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 839 (Admin)

No. CO/3509/2020

Royal Courts of Justice

Wednesday, 23 March 2022

Before:

MR JUSTICE HOLMAN
(Sitting in public)

B E T W E E N :

RAFAL ADAMKEIWICZ — Appellant

- and -

REGIONAL COURT OF BYDGOSZCZ (POLAND) — Respondent

MISS N. DRAYCOTT appeared on behalf of the appellant.

MR T. HOSKINS appeared on behalf of the respondent.

J U D G M E N T
(As approved by the judge)

MR JUSTICE HOLMAN:

1 This is an appeal from an order for extradition made by District Judge Snow in the Westminster Magistrates' Court on 24 September 2020, after a hearing on 18 September 2020.

2 So far as is material to the present appeal, I now know a great deal more about the relevant facts and history than the district judge did, as will shortly appear. I wish to stress at the very outset of this judgment that I make no criticism whatsoever of the manner in which the district judge conducted the hearing or of anything which he said in his judgment.

3 The European Arrest Warrant was a mixed warrant with both a conviction and an accusation element. The accusation element in fact was far more significant, alleging, as it did, no less than 31 offences of fraud committed in a short period between September 2016 and February 2017. However, *since* the hearing before the district judge all the accusation elements of the warrant have been withdrawn, and this appellant now faces extradition only on the single conviction matter. That was an offence of fraud alleged to have been committed between 20 and 26 September 2016. He was convicted on 11 September 2017, and sentenced to seven months' imprisonment, all of which remains to be served.

4 It is, and always has been, common ground that the appellant did not personally attend the trial on 11 September 2017. Accordingly, section 20 of the Extradition Act 2003 is engaged. That provides that the court must first decide whether the person was convicted in his presence. In this case, the answer to that question is 'no'. The court must then: ". . . decide whether the person deliberately absented himself from his trial." This whole appeal turns on those words.

5 If the court decides, as the district judge did decide, that the person deliberately absented himself from his trial, then it has to proceed to consider whether or not to make an extradition order. If, however, the court decides that the person did not deliberately absent himself from his trial, then the court has to go on to decide whether or not the person would be entitled to a retrial. If he is not so entitled, then the person must be discharged. It is also common ground in the present case that this appellant would not be entitled to a retrial and, accordingly, unless he deliberately absented himself from his trial, he must be discharged. It is common ground that the burden of proof is upon the Judicial Authority to prove that the person deliberately absented himself from his trial, and that the standard of proof is the criminal standard.

6 Before the district judge there was a proof of evidence by the appellant in which he stated that at the time of the trial, namely 11 September 2017: "I was in custody serving a prison sentence in respect of offences of theft." At paragraph 27 of his judgment, the district judge stated:

> "The RP gave oral evidence when he stated that he was unaware of the court proceedings that resulted in his sentence on 11 September 2017, although he conceded that he was represented during the investigative proceedings. He stated that he was in custody serving a prison sentence in respect of another case on that date."

At paragraph 28 of his judgment, the district judge said:

> "The RP's challenge pursuant to section 20 is founded upon his claim that he was not deliberately absent from his trial, as he was serving a separate custodial term. The RP has, however, contradicted himself as elsewhere in his evidence he stated that he was released in the summer of 2017."

For that and other reasons, the district judge concluded, at the end of paragraph 28, that:

> "It is highly unlikely that this would have resulted in the RP's imprisonment as early as 11 September 2017. The RP has provided no corroborative evidence for his claim. I do not accept that he was unable to attend his trial as he was in custody on 11 September 2017."

Pausing there, it is now common ground and accepted that the period during which the appellant was in prison for an earlier offence of theft was 11 July 2017 until 8 September 2017, when he was released from prison. It follows from that that the district judge was, indeed, correct in his conclusion that the appellant was not in custody on the date of the trial in question, namely, 11 September 2017.

7 Additionally, and correctly, the district judge placed considerable reliance upon what was stated in the European Arrest Warrant at box D. The judge cited from box D at paragraphs 9 and 10 of his judgment, and referred to it again at paragraph 30 of his judgment where he cited the well-known authority of *Cretu v Romania* [2016] EWHC 353 (Admin). He stated that the statements in box D are clear and unequivocal, and that "I must respect and accept those statements. I must not conduct my own enquiries." Accordingly, the overall conclusion of the district judge was that: "I am satisfied so that I am sure that the RP was deliberately absent from his trial."

8 It is next necessary that I should, myself, quote in full the material parts of box D as they appear in translation. It first states, as is common ground, that the appellant did not appear in person at his trial. The form then requires any relevant circumstances to be identified. The Judicial Authority relied, and relies, upon paragraph "b" of box D1, namely that:

> "This person was not summoned in person, but on in [sic] a different way on August 01 2017 was really delivered the official information on the fixed date and place of the trial . . . as a result of which the decision in case . . . was issued, in a manner allowing to state unambiguously that he/she knew of the set trial and was informed that the decision might be issued in case of his/her non-appearance at the trial."

9 Pausing there, that part of box D appears clearly to state that on 1 August 2017 this appellant was "really delivered" the official information on the fixed date and place of the trial such that it is possible "to state unambiguously" that he knew of the date. Further on, but still within box D, at paragraph 2 of box D, is the following statement:

> "The sentenced knew about the pending proceedings. He took part in the pre-trial stage of the investigation. The notice of the trial of the district court . . . to be held on 11 September 2017, was sent to the sentenced person to the address of residence indicated by him in the course of the preparatory proceedings. The above consignment, despite being notified twice on 14 July 2017 and 24 July 2017, was not received by the addressee. Consequently, the above notification should have been regarded as duly delivered in accordance with Article 133(2) of the Code of Criminal Procedure."

Pausing there, it is again common ground that the appellant did know about the pending proceedings and that he did take part in the pre-trial stage of the investigation. The rest of that quotation is a little internally contradictory. It refers to him being "notified twice on 14 July 2017 and 24 July 2017", but immediately goes on to say that the consignment "was not received by the addressee". The final reference that: "the above notification should have been regarded as duly delivered" is a little obscure, but gains some illumination from some further information to which I will shortly refer.

10 It is the case now of this appellant that he never received any notification from the court of the hearing date on 11 September 2017. That, of course, is a radically different case from saying that he could not attend on that date because he was in prison, which was the case essentially presented to the district judge. The appeal now rests on further evidence and information obtained since the hearing before the district judge. That, of course, immediately engages the well-known authority of *Szombathely City Court v Fenyvezi* [2009] EWHC 231 (Admin). That clearly establishes that in extradition proceedings fresh evidence should not

be admitted unless either it did not exist at the time of the extradition hearing, or was not at the disposal of the party wishing to adduce it, and which he could not with reasonable diligence have obtained. If it was at the party's disposal, or could have been obtained with reasonable diligence, then it was available.

11 The material that the appellant now relies upon is essentially material obtained from the file of the convicting court in Poland. It has been obtained by a lawyer, Natalia Walter, who inspected the file sometime during the year 2020 (her statement is dated 23 November 2020) but, it appears, after the extradition hearing in September 2020. Of course, if she was able to inspect it sometime between 24 September 2020 and 23 November 2020, she ought also to have been able to inspect it before the hearing on 18 September 2020. But there is within the bundle a letter dated 17 August 2020 from the appellant himself to the convicting court in Poland (now at bundle page 70) in which he does clearly (albeit writing as a lay person) request that court to supply information from the court file, including a copy of a letter which he, himself, wrote to that court on 16 October 2017. The letter of 17 August 2020 refers to 16 October 2018, but it is reasonably clear that that is a typographical error for a letter which he in fact wrote on 16 October 2017. So, it does seem to me that even before this extradition hearing on 18 September 2020, this appellant was using such reasonable diligence as could reasonably be expected of him to try to obtain the information which was later obtained by the lawyer, Natalia Walter.

12 Ultimately, I must seek to do justice both to the appellant and to the Judicial Authority, and I propose in these circumstances to admit in evidence everything which has been obtained and assembled by both sides since the hearing before the district judge. That includes the material that Natalia Walter found and photographed from the court file in Poland, and also all the further information that the Judicial Authority has provided, and also the most recent statement dated 22 March 2022 from the appellant himself.

13 Piecing this material together, it is now clear, first, that on 28 April 2017 the appellant personally signed for the receipt of an instruction from the Polish Court about an obligation to inform about a change of place of residence. That obligation persisted throughout the whole of the subsequent penal proceedings. That obligation persisted also during the period between 11 July 2017 and 8 September 2017, when the appellant was himself in prison for the earlier offence of theft. All that derives from a document dated 26 March 2021 from the court in Poland, now at bundle page 21.

14 It is also clear from the material obtained by Natalia Walter that the documents notifying the date of the hearing were never actually delivered to the address in Poland (which was his grandmother's address where he himself also lived) that the appellant had given. This is clear from documents now at pages 61 and 62 of the present bundle, which clearly evidence that the postal service attempted to deliver the documents at the grandmother's address on each of 14 July 2017 and 24 July 2017, but were not able to do so. The reason is not specified, but it may simply be that there was nobody present at the address at the particular time that the postal service attempted to deliver the documents. It is also clear from the document at page 61 that on 1 August 2017 the postal service itself returned to the sender (in other words, the court) the documents. Piecing that together with what is stated in box D1(b), what actually happened on 1 August 2017 was *not* that the notification of the date of trial "was really delivered", but, rather, that on 1 August 2017 the court received those documents back from the postal service as being undelivered. That being the reality of the matter, it is difficult, frankly, to follow how box D1(b) could continue by stating that the summons was delivered "in a manner allowing to state unambiguously that he knew of the set trial . . ."

15 The material from the postal service that Natalia Walter found and photographed on the court file is, of course, all of a piece with what is stated in box D2 of the warrant, namely that on

14 July 2017 and 24 July 2017 the "consignment" "was not received by the addressee". The explanation of what is stated in box D can now clearly be found in further information supplied by the Judicial Authority. That information is dated, and apparently does date from, 3 March 2021, but it was only served upon the appellant or, indeed, supplied to this court, a couple of days ago this week, in March 2022. Whatever the explanation for that long delay, the question posed was as follows:

> "Does the reference in EAW box D1 to August 1, 2017 refer to the date when the summonses of July 14th and July 24th 2017 were returned to the court as undelivered, and, thereby, the court regarded the summonses as duly delivered in accordance with Article 133(2) of the Code of Criminal Procedure?
>
> (a) if so, on what basis does the issuing Judicial Authority assert unambiguously that [the appellant] had actual knowledge of the set trial and was informed that the decision might be issued in case of [the appellant's] non-appearance at the trial, since these notices were returned as undelivered? . . ."

The answer given is that:

> "The date of 1.08.2017 indicates that on that date a procedure of substituted service to [the appellant] was properly completed and it was considered as the date of delivery of a notice to him."

Pausing there, it can, in my view, now be seen that far from it being possible "to state unambiguously" that the appellant knew of the trial date, there was, in fact, a process of "substituted service" which, almost by definition, presumes that he knew, without in fact evidencing or proving that he actually knew.

16 Today, Mr Tom Hoskins, who appears on behalf of the Judicial Authority, has placed some particular emphasis on a letter which the appellant wrote to the court in Poland on 16 October 2017, now at bundle page 65. That, of course, is only about four to five weeks after the date of trial itself. At the outset of that letter the appellant stated that:

> "I hereby request the deadline for bringing a complaint against the judgment passed on 11 September 2017 . . . to be restored."

However, further on in the letter he said:

> ". . . I inform that I have not received any letter (notification of the copy of the judgment) referring to this case. Furthermore, I would like to mention that during the period in which the court tried to deliver the letter to the address of residence I had indicated, I was on remand in Toruń for a one and a half month, and in prison in Koronowo for two weeks."

So, with some justification, Mr Hoskins submits that in the second part of that letter the appellant states that he has not received any letter or notification of the copy of the judgment referring to the case, and yet in the first part of the letter he correctly refers to the date of the judgment, namely 11 September 2017. Mr Hoskins submits that there is internal inconsistency in that letter which tends to indicate that, from some other source he had, in truth, been aware that the hearing was due to take place on 11 September 2017.

17 The appellant has, however, made a very recent statement dated yesterday, 22 March 2022, (in response to the information which was only served upon him this week) in which he again repeats that he was in prison throughout the period 11 July to 8 September 2017, and that he was totally unaware of any notification of the hearing date or of the hearing date itself. So, the question arises: was the district judge correct in his conclusion at paragraph 31 of his reasons that: "I am satisfied so that I am sure that the RP was deliberately absent from his trial"? Or was he unwittingly misled by: (i) the contents of box D, and (ii) the absence at the hearing before him of so much material that is now available to me? I repeat, as is common ground, that the burden of proof was, and is, upon the Judicial Authority to satisfy the court to the criminal standard that the requested person/appellant was deliberately absent from his trial.

18 The concept of deliberate absence has been the subject of authority, and in particular a very clear analysis by Ouseley J in *Dziel v Poland* [2019] EWHC 351 (Admin). Ouseley J said at paragraph 28:

> "The upshot of the authorities is quite clear . . . Section 20 is intended to ensure that a person whose extradition is sought to serve a sentence after a conviction in his absence has the right to a retrial unless he has already been present at his trial or was properly notified of it and deliberately absented himself. Its purpose is to ensure that no one is surrendered where that would mean a breach of their fair trial rights. A person will be taken to have deliberately absented himself from his own trial where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him. This includes breaching his duty to notify them of his changes of address, deliberately ignoring the court process. In such circumstances, there is no need for the further questions in section 20(4) and onwards of the Extradition Act to be considered. Extradition follows."

19 Mr Hoskins submits that, even if it is the case that the appellant did not actually know of the hearing date on 11 September 2017 because the documents were (as is now clear) undelivered and were returned to the court on 1 August 2017, he nevertheless deliberately absented himself by his own failure to notify the court of his change of address, namely the change of address when he ceased living with his grandmother but entered prison on 11 July 2017. Mr Hoskins submits that at that point the appellant should clearly have informed the court in question that he was about to begin a term of imprisonment, and of his prison address to which any relevant documents should be sent. Mr Hoskins, very understandably, places considerable reliance on the further information now at bundle page 21 as to the document signed by the appellant on 28 April 2017. Further, Mr Hoskins points out that there is evidence that on 3 July 2017, before he was imprisoned on 11 July 2017, the appellant received a notice of the actual indictment in the present case. So, submits Mr Hoskins, as he entered prison he should have been well aware that the relevant proceedings were active and current and that he needed to keep well in touch with the court.

20 In relation to that, the appellant has stated, in his statement dated 22 March 2022, at paragraphs 9 to 11:

> "9. I did not know that I needed to inform the authorities that I was in prison. I thought they would automatically know about it because they had put me there. I am surprised to find out that I was expected to inform them myself. In any event, I did not know which address to write to and I did not have a telephone number to call to obtain it.
>
> 10. As I have already stated in my application to the Polish Court dated 16 October 2017 [a reference to the letter to which I have referred above] I asked my correction officer when I was in prison in Koronowo whether there were any ongoing proceedings against me, and he said there were not. I was in the prison for two weeks and he checked information on his computer for me a few times while I was there. I wanted to attend court and I expected I would be informed of the trial date.
>
> 11. Before I was transported to Koronowo Prison, I spent one and a half months in a detention centre in Toruń. I was told that I had to be there because there were no spaces available in local prisons. During that time I spent nearly 24 hours a day in my cell. I did not have access to a phone and I could not contact anyone, including my grandmother who was the only close family member I had in Poland. I could not even write a letter to her because the wardens would not give me paper or envelopes. There were no correction officers available at that establishment."

21 Returning to the observations of Ouseley J, at paragraph 28 of *Dziel*:

> ". . . A person will be taken to have deliberately absented himself from his own trial where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him. This includes breaching his duty to notify them of his changes of address, deliberately ignoring the court process . . ."

22 It seems to me at least arguable that the situation that this appellant found himself in when he was imprisoned on 11 July 2017, as now described by him in his statement dated 22 March 2022, really falls short of "deliberately ignoring the court process", or "deliberately putting it

beyond the power of the prosecutor or court to inform him". I accept the submission of Mr Hoskins that he ought to have appreciated, as he went into prison on 11 July 2017, the importance of remaining in touch with the court in which the current proceedings were taking place, and he should have remembered the obligations to which he had signed up in the document of 28 April 2017. But it is, perhaps, too easy to be critical of a person sitting in a cell in Poland who, as he describes, could not even get access to paper or envelopes.

23 The bottom line is that on the basis of all the material now available to me today I am unable to be sure that this appellant deliberately absented himself from the trial. I stress that I make no criticism of the district judge in the manner in which he dealt with this case in September 2020, but section 27 of the Extradition Act 2003 is now engaged, and, in particular, the conditions in subsection (4). The situation now is that evidence or material is available to me that was not available at the extradition hearing. In my view that material would necessarily have resulted in the district judge deciding questions before him at the extradition hearing differently. In my view, he would have been driven, as I have been driven, to not be satisfied to the criminal standard that this appellant deliberately absented himself from his trial. That being so, he would have been required to order the requested person's discharge.

24 I will accordingly allow this appeal, order his discharge and quash the order for extradition.

CERTIFICATE

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