



Neutral Citation Number: [2024] EWHC 2811 (Admin)

Case No: AC-2023-LON-000796

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2024

Before :

MR JUSTICE KERR

Between :

ALBERTO QUEBA BRAGANCA CASSAMA
- and -
TRIBUNAL JUDICIAL DA COMARCA DE
LISBOA NORTE, PORTUGAL

Appellant

Respondent

Douglas Wotherspoon (instructed by **Sperrin Law Solicitors**) for the **Appellant**
Lucia Brieskova (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 5 November 2024

Approved Judgment

This judgment was handed down remotely at 10am on 6 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE KERR

Mr Justice Kerr :

Introduction

1. I announced my decision to the parties yesterday, in open court (over a video link, following an adjournment for counsel to take instructions), with reasons to follow in

writing. These are my reasons. This is a multi-layered hearing. It is in part rolled up, in respect of the second and third grounds of appeal for which permission was refused. It is the substantive hearing of the appeal on the first ground, for which permission was granted. There is an outstanding application to add a fourth ground and an outstanding application made on 22 October 2024 to rely on further evidence.

2. That decision was of District Judge John McGarva, in a judgment delivered on 28 February 2024, to order extradition pursuant to a conviction warrant (**the AW**) issued by Tribunal Judicial da Comarca de Lisboa Norte on 23 February 2023 and certified by the NCA on 4 July 2023. The AW relates to two offences: one of theft and one of possession of a prohibited weapon, a shotgun cartridge. The sentence was two years' imprisonment, all of which remains unserved.
3. The first ground of appeal is that the learned judge erred in deciding that the second offence of possessing the shotgun cartridge was an "extradition offence". The linked proposed fourth ground, for which permission to amend is sought, is that if the first ground succeeds, the appellant can only be extradited for the theft offence and cannot be extradited to serve a sentence for possessing the shotgun cartridge.
4. It is therefore submitted that this appellate court must now decide whether the appellant's extradition is barred on the ground of "speciality" (sometimes called "specialty"); the principle that requires an extradited person to be dealt with by the requesting state only for the offence or offences for which he is surrendered to that state. This would raise the question whether Portugal's judicial authorities have power to "disaggregate" the sentence for the theft from the sentence for possessing the shotgun cartridge.
5. The second ground of appeal, for which permission is refused, raises the question of prison conditions in Portugal and article 3 of the European Convention on Human Rights (**ECHR**). The third ground, for which permission was refused, asserts that the judge's assessment of the balance under article 8 of the ECHR was wrong and should be reversed.

Facts

6. The appellant was born on 27 July 1989 and is therefore now 35. The two offences were committed in 2011, when he was aged 21. Before the district judge, he denied

committing them but he was present at his trial and was convicted of them. I proceed on the basis that he did commit them.

7. The first offence on the AW was a robbery on 6 January 2011. The appellant approached his female victim as she was climbing the stairs to her apartment and, in order to rob her of money or property in her possession, violently pulled her arm causing her to fall and lose consciousness. He took her wallet containing 53 euros and an ATM card.
8. The second offence was possessing a prohibited weapon, committed on 23 March 2011. After a search of the appellant's home was carried out, several blue bags were found for storing bank, credit or ATM cards, empty, from Caixa Geral de Depósitos, A 12-gauge cartridge was also found, for use in smooth-bore firearms of the same calibre, which was loaded with lead shot ammunition.
9. On 18 October 2011, the Tribunal da Comarca de Lisboa Norte made an order, which became final on 23 November 2011, after the trial at which the appellant was present. He was convicted and given a suspended sentence of two years' imprisonment. It appears that he came to the UK very soon after that court process ended, without informing the probation service of his whereabouts.
10. He accepted before the judge below that he came to evade his sentence. After arriving in the UK, he was sent by letter notice of a four year suspended sentence for other matters. He began a life here and did mostly casual work for cash in hand. He has family members here. He formed a relationship with a British woman. They have a daughter who is now about four. He has not avoided trouble with the law; he has committed offences here, including supplying Class A drugs for which he served a prison sentence.
11. After his passport expired in 2017 he was unable to renew it. He does not have settled status or pre-settled status. On 26 April 2018, the court in Lisbon revoked the suspension of his two year sentence and he came under a requirement to serve that sentence. That court order became final on 7 June 2018. The appellant's partner began a full time course, studying biochemistry at Queen Mary University. The appellant's evidence was that he takes his daughter to school. He is on bail with a tagged curfew from 7pm to 7am.

12. The AW is a conviction warrant founded on the convictions for the two offences committed in 2011. It was issued on 23 February 2023 by a Portuguese judge and certified by the National Crime Agency (**the NCA**) on 4 July 2023. On 13 July 2023, the appellant was arrested at his address in south east London, where he and his partner lived. On 14 July 2023 he was brought to Westminster Magistrates' Court in custody. He did not consent to extradition. He was granted conditional bail including the tagged curfew.
13. On 19 October 2023, further information about prisons in Portugal was provided to the CPS by the north Lisbon court. Sentencing courts, it was explained, cannot determine where a defendant will be incarcerated; that is decided by the prison authorities. Their rights to life, health, personal integrity, freedom of conscience, non-subjection to inhuman or degrading punishment, civil, political, social, economic and cultural rights and their freedom of religion and worship and various other rights are protected under Portuguese law except to the extent that this is incompatible with the purpose of the judgment imposing a deprivation of liberty measure.
14. The final hearing took place on 14 February 2024, with both sides represented by the same counsel as now appear. The judgment was given in writing on 28 February 2024. The appellant raised the issues of s.10 of the Extradition Act 2003 (**EA 2003**) and dual criminality in relation to the offence of possessing the shotgun cartridge; the passage of time (section 14 of the EA 2003); and section 21 read with articles 3 and 8 of the ECHR.
15. The appellant and his partner gave evidence. The judge noted in his judgment that the appellant was "candid about his motives in leaving Portugal"; it was to avoid the risk of serving the prison sentence". His frankness is to his credit but not surprisingly, the judge found that he was a fugitive from Portuguese justice.
16. The judge found that the offence of possessing the shotgun cartridge met the dual criminality requirement in section 10 of the EA 2003: "[i]f the same shotgun cartridge was possessed in the United Kingdom without a permit, it would be an offence." He rejected the other bars to extradition relied on. The passage of time objection was untenable because of the finding that the appellant was a fugitive.

17. As to article 3, there was no real risk that he would be subjected to inhuman and degrading treatment in prison. The judge did not mention the further information provided on 19 October 2023, but noted that an expert report dated 9 February 2024 from a Portuguese legal expert, Ms Diana Silva Pereira, mentioned certain open source material which, the judge said:

“does make it clear that overcrowding and otherwise poor prison conditions are an issue in Portugal. Because of this Portugal have given an assurance that the requested person will be afforded the minimum standards as required to comply with article 3. The assurance was given back in 2018. It does not specify where the requested person will be held. It unequivocally states that the requested person will be afforded more than 3 metres square. That he will have his own separated sanitary facilities, he shall not be held in the basement areas of Lisbon prison or any room lacking artificial light, the principles in Murcic will be adhered to and the details of the assurance will be recorded on the requested person's file. The assurance although old does guarantee the requested person the required minimum rights. Although the requested person's expert speculates where he may be held, I will not undertake that exercise, I am entitled to presume that wherever he is held the judicial authority will honour its diplomatic assurance. I note that the Portuguese prison population is on the increase, but I have no reason to doubt the reliability of Portugal's assurance... .”

18. As for article 8, the judge carried out the *Celinski* balancing exercise and concluded that the balance came down in favour of extradition:

“although extradition will be disruptive to the requested person and his innocent family, the impact cannot be said to be exceptionally severe. This is a fugitive from justice who is wanted to serve a prison sentence of 2 years. The public interest outweighs his article 8 rights.”

19. The appellant appealed. On 5 April 2024 the respondent put in its respondent's notice. The first ground of appeal was not opposed. The respondent submitted in relation to the dual criminality point:

“The Respondent concedes this ground in relation to the shotgun cartridge only. It is accepted that, from the description in the AW, it is not possible to prove to the criminal standard that the cartridge would require a certificate in this country (ie. that it does not fall within the exception contained in s1(4)(a) of the Firearms Act 1968).”

20. The exception is, as explained in a Home Office Guide on Firearms Licensing Law (paragraph 2.57) that:

“A shot gun certificate is not required to possess or acquire shot gun cartridges containing five or more shot, none of which exceeds .36 inch in diameter. All ordinary shot cartridges are covered by this description”.

21. On 29 April 2024, Bourne J granted permission to appeal in respect of the first ground of the appeal (section 10 of the EA 2003, so far as it concerns the charge of possession of ammunition) but refused permission in respect of the two other grounds of appeal (section

21 and articles 3 and 8). Bourne J also directed that any renewal hearing on the refused grounds, if a notice of renewal were filed, would take place at a rolled up hearing at the same time as the substantive hearing on the first ground.

22. On 8 May 2024 the appellant renewed his application for permission to appeal in relation to the second and third grounds. He raised a new speciality point pursuant to section 17 of the EA 2003 and article 652 of the Trade and Cooperation Agreement 2020 (**the TACA**) in reliance on Fordham J's judgment in *Nobre v Portugal* [2024] EWHC 417 (Admin). This is the proposed fourth ground he seeks to add to the other three. The application was made on 30 August 2024 and is before me for determination today.

23. There is also before me an application made on 22 October 2024 to rely on two reports, one of which Ms Pereira had referred to in her expert report. Self-evidently, they were available at the time of the hearing before the judge below, as one of them – a report from the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment - was referred to in her report and the other, the Portuguese government's response, bears the same date, 13 December 2023.

Issues, Reasoning and Conclusions

24. There was some measure of agreement between the parties about the best way forward in the present circumstances. I will take in turn each of the four grounds on which the appellant seeks to rely, though not in numerical order.

First ground: the dual criminality issue

25. The first ground of the appeal requires me to decide whether the judge was right to find that the offence of possessing the shotgun cartridge met the dual criminality requirement in section 10 of the EA 2003. If an offence is not an extradition offence, the judge must discharge the requested person in respect of that offence only (section 10(2) and (3), as amended by the Extradition Act 2003 (Multiple Offences) Order 2003).

26. By section 65(2) of the EA 2003, the conduct in the warrant is an extradition offence if the conditions in section 65(3)(a), (b) and (c) are met. The condition in (b) is that the conduct would constitute an offence under the law of if it occurred within the relevant part of the United Kingdom (here, England or Wales). The judge accepted that

possessing the shotgun cartridge would be an offence here: “[i]f the same shotgun cartridge was possessed in the United Kingdom without a permit, it would be an offence”.

27. In my judgment, that is not correct. The respondent concedes that it cannot be proved the cartridge in the appellant’s possession in March 2011 would not have fallen within the exemption in the law of England and Wales from the requirement to have a permit, in the case of cartridges containing five or more shot, none of which exceeds .36 inch in diameter. I can see no reason not to accept that concession, which is rightly made.

28. Accordingly, as the respondent accepts, the judge was wrong to find that the dual criminality requirement was satisfied. It was not and I therefore allow the appeal on the first ground and discharge the appellant in respect of the offence of possessing the shotgun cartridge.

Proposed fourth ground: the speciality issue

29. I will take this proposed new ground next, as it logically arises from the success of the first ground. The appellant seeks permission to rely on it. The two year sentence was imposed for both offences. I have discharged the appellant in respect of one of them, possessing the shotgun cartridge. There is nothing in the papers to indicate whether any thought was given to the proportion of the two year sentence attributable to the robbery offence, which alone can be the subject of an extradition order.

30. Section 11(1)(f) of the EA 2003 requires the judge to decide, if an offence named in a warrant is an extradition offence, whether extradition is barred by speciality. Section 11(2) and section 17, in combination, determine whether extradition is barred by speciality. The principle of speciality requires that a surrendered person is only dealt with for the offence or offences for which he is surrendered to the requesting state.

31. I need not set out the detail of section 17 here. The question that arises under it in this case is whether there are “speciality arrangements” under the law of Portugal such that if the appellant is extradited there for the robbery offence, he would not also be made to serve the sentence in respect of the offence of possessing a shotgun cartridge; or not without first being given a reasonable opportunity to leave Portugal.

32. The appellant accepts that that the burden is on him to demonstrate on the balance of probabilities that the appropriate speciality arrangements are not in place in the requesting

state; that there is a requirement for compelling evidence; and that there is a strong presumption that member states will act in accordance with their international obligations in regard to speciality.

33. The respondent did not consent to this ground of appeal being added to the other grounds, but I think it would be right to grant permission for it to be added to the three existing grounds and I do so. The issue of speciality arises only if and when (as I have decided, unlike the judge) the appellant is discharged on one offence but not the other. That was not the position before the judge. The issue was not raised before him. No doubt it should have been but I do not think the appellant should be prejudiced in that regard.
34. There was no undue delay on the appellant's side in raising the issue in early May 2024, once the respondent had, in late April 2024, conceded that the shotgun cartridge offence did not satisfy the requirement of dual criminality. Further, the decision of Fordham J in *Nobre* was given on 27 February 2024, only a day before that of the judge in this case and after the hearing on 14 February.
35. In *Nobre*, at [18], Fordham J posed two questions concerning speciality for the NCA to transmit to the Portuguese judicial authority. The questions sought to discover whether the Portuguese judicial authorities have the power to “disaggregate” sentences, where the appellant had been sentenced to three years for theft, which was extraditable, but to a total of five years (including that three years for the theft) for combined theft and money laundering (non-extraditable): see the judgment at [3].
36. Fordham J accepted at [3] that there was a “documented concern” as to whether Portuguese law permitted disaggregation of the two sentences. I understand from Ms Brieskova, who took instructions on the point, that the two questions have been answered or may soon be answered but the answers are not yet in the public domain and the proceedings in *Nobre* are ongoing.
37. In those circumstances it is surely right to adopt a similar approach and ask questions along the same lines but tailored to this case. Both parties accepted that course as an alternative to their opposing primary submissions. I do not think it would be right to rely solely on the presumption that Portugal will comply with its international obligations and that it will disaggregate the sentence if the appellant is extradited for the robbery only.

38. There is, as I have said, no identified separate period of imprisonment attributable to the robbery, as distinct from the shotgun cartridge offence. There is no mention in any of the documents coming from the respondent's side of any provisions of Portuguese law enacting an express power of disaggregation, even though the issue has been live in this case since early May 2024. And there is the "documented concern" identified by Fordham J in *Nobre*, of which I do not have the details.
39. I have asked the parties to prepare draft questions and attempt to agree them and to submit them for my approval. I will incorporate in my order or in a subsequent order the exact wording of the questions to be transmitted by the NCA. I grant permission to rely on the fourth ground and I adjourn it pending the response of the Portuguese authorities to those questions.

Second ground: section 21 EA 2003 and article 3 ECHR

40. The second ground of appeal is that the judge was wrong to find that there was no appreciable risk of inhuman or degrading treatment or punishment if the appellant were extradited to Portugal. Bourne J refused permission to appeal on this ground. The appellant, differing from Bourne J, makes lengthy and detailed written submissions on this ground and applies to put in the further evidence I have mentioned.
41. The respondent initially invited me to refuse permission at the hearing yesterday, on the basis that there was no flaw in the judge's reasoning and conclusion, nor that of Bourne J on the papers; that there is a strong presumption that EU member states will abide by their human rights obligations in the absence of compelling evidence to the contrary; that the assurance given in 2018 should be accepted; and that the judge below was right to observe that Ms Pereira was not an expert on prison conditions.
42. I drew the parties' attention to my order of 10 October 2024 granting permission to rely on an article 3 argument in another appeal involving prison conditions in Portugal, *Andrade v. Central Criminal Court of Almada, Portugal* (AC-2024-LON-000163). The appellant relied on the same Council of Europe report as in this case, dated 13 December 2023, but had also pointed to several decisions of the Strasbourg court which are said to undermine and outdate the 2018 assurance given by the Portuguese authorities; which has in this jurisdiction normally proved sufficient to defeat any article 3 argument.

43. In *Andrade*, Portugal has until 31 December 2024 to file any further evidence on which it wishes to rely, which could include further or updated assurances about prison conditions there. The substantive hearing of the appeal in *Andrade* is fixed to take place on 1 May 2025, with a time estimate of one day. In the light of that information and having taken instructions, Ms Brieskova was content that the renewed permission application in respect of the article 3 ground should be adjourned until after judgment in *Andrade*. The appellant did not oppose that course. I will adjourn that issue accordingly.

Third ground: section 21 EA 2003 and article 8 ECHR

44. The final ground of appeal to be considered is the third ground: that the judge was wrong to find that extradition would be compatible with the appellant's rights under article 8 of the ECHR and those of his innocent family. The judge's reasoning on this issue was not obviously flawed and on the material before him the case for discharge on this basis was, in my judgment, weak for the reasons he gave.

45. In agreement with Bourne J, I would have dismissed the renewed application for permission to appeal on this ground, were it not for the adjournment of the article 3 issue and the delay that will follow from asking questions about the issue of speciality. There is now, however, a small chance that the article 8 *Celinski* balance may have shifted by the time the other issues in this appeal come back to this court.

46. I will therefore leave the article 8 door ajar and adjourn that issue, rather than dismissing it now outright. I will direct that the parties may file further evidence on the article 8 issues (and indeed the other issues, discussed above) according to a timetable that will bring the evidence up to date in the spring of 2025, when the judgment in the *Andrade* appeal is expected to become available.

Conclusion

47. For those reasons, I will allow the appeal and discharge the appellant on the shotgun cartridge offence. I will allow the application to amend the grounds to add the new fourth ground of appeal, raising the speciality point. I will adjourn the application for permission to advance that ground until after the hearing of the appeal in *Andrade* in May 2025. I will adjourn the renewal hearing in respect of the second and third grounds, for which permission was refused. I will allow the appellant to rely on the further evidence

even though it was available at the time of the hearing below. I will include provision in my order for both parties to file updated evidence not later than the end of April 2025.