Neutral Citation Number: [2019] EWHC 3550 (Admin)

Case No: CO/1954/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2019

Before:

MR JUSTICE JEREMY BAKER

- -

Between:

Nazariy Hnus	**Applicant**
- and -	
Nyiregyhaza District Court (Hungary)	**Respondent**

- -
- -

Mr Benjamin Seifert (instructed by **Sonn Macmillan Walker**) for the **Applicant**
Miss Amanda Bostock (instructed by **CPS Extradition**) for the **Respondent**

Hearing date: 5 December 2019

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Approved Judgment

Mr Justice Jeremy Baker:

1. On 19 April 2017 a European Arrest Warrant ("EAW") was issued by the Nyiregyhaza District Court in Hungary ("the respondent") for the arrest and extradition of Nazariy Hnus ("the applicant").

2. The EAW was certified by the National Crime Agency ("NCA") on 19 May 2017 and the applicant was arrested on 3 January 2018. The extradition hearing took place on 4 May 2018 before District Judge Coleman in the course of which four issues were raised under the Extradition Act 2003, namely,

    i. Section 12 – Double Jeopardy

    ii. Section 12A – Absence of a prosecution decision

    iii. Section 21A(1)(a) – Article 3 ECHR

    iv. Section 21A(1)(a) – Article 8 ECHR

3. In her judgment dated 11 May 2018 the District Judge determined each of those issues against the applicant and ordered his extradition to Hungary.

4. The applicant applied for permission to appeal in relation to two of these issues namely,

    1. Section 12 – Double Jeopardy

    2. Section 21A(1)(a) – Article 3 ECHR

5. The application was considered by Sir Wyn Williams on 15 August 2019 who adjourned the application and ordered a "rolled-up" hearing of the application and, if granted, the appeal.

6. The matter came before Holman J on 23 October 2019 who adjourned the hearing to enable further material to be provided which has now been done.

Section 12 – Double Jeopardy

7. The background to the matter, according to a Department for Work and Pensions summary report dated 22 November 2017, is that the Hungarian National Bureau of Investigation had been investigating a large-scale operation involving identity theft, forgery of official documents, misuse of Hungarian identities and related financial crimes. The investigation involved non-European Union citizens, mostly from Russia or Ukraine, fraudulently obtaining the private data of genuine Hungarian citizens and then using that data to apply for either Hungarian passports or identity cards. It was found that whilst the details of the name, date of birth and place of birth on the passports matched a genuine Hungarian citizen, the

photograph and fingerprint details, where they were provided, matched the non-European Union citizen.

8. It became apparent that a number of Government officials had been involved in the processing of the false applications; the suspicion being that the Government officials had been bribed and were deliberately colluding in the issuing of the fake passports. The imposters then used the stolen identities to live, work and claim benefits in other European Union member states.

9. The applicant is a Ukrainian national who was born on 2 August 1985. According to the account he provided to the Metropolitan Police following his arrest on 7 November 2017, the applicant entered the UK in 2008 using his Ukrainian passport and a visa to gain admission. However, upon expiry of his visa he left the UK and travelled to Hungary as he had heard that he could get a Hungarian passport. Once in Hungary he paid 5000 Euros to a Russian speaking individual who supplied him with a passport in the name of "Sandor Balint" but with the applicant's photograph inserted into it. He then returned to the UK and continued to work using the name of Sandor Balint and, in order to do so, he used the passport as evidence of his identity in order to obtain a national insurance number SS430228A, which was issued to him.

10. Subsequent to his arrest by the Metropolitan Police, a decision was made to prosecute the applicant who appeared in the Crown Court at Isleworth on 6 December 2017 when he pleaded guilty to an indictment containing a single count which alleged his Possession of an Identity Document with Improper Intention, contrary to section 4(1) and (2) of the Identity Documents Act 2010. The particulars of the count being that

> "… between 9 February 2015 – 7 November 2017 with improper intention, he had in his possession or under his control an identity document, namely a Hungarian Passport in the name of Sandor Balint, that was improperly obtained and that he knew or believed to have been improperly obtained."

11. In opening the case for the purposes of sentencing, the prosecution informed the judge, The Honorary Recorder of The Royal Borough of Kensington and Chelsea, that the false passport had been issued on 23 January 2015 and then used by the applicant to re-enter the UK before applying for a national insurance number on 9 February 2015 which was issued to him on 17 December 2015, thereby enabling the applicant to work in the construction industry within the UK.

12. Following the opening, the judge sentenced the applicant to 12 months' custody. In his sentencing remarks the judge observed that the applicant

was in possession of a passport which had been obtained from the Hungarian authorities and used it to enter the UK and obtain a national insurance number. The judge indicated that in assessing the nature and extent of the applicant's criminality, he had taken into account the case of *R v Ovieriakhi* [2009] EWCA Crim 452.

13. In the meantime, the respondent issued the accusation EAW on 19 April 2017 seeking the applicant's arrest and extradition in respect of,

> "One count of felony of the forgery of administrative documents committed as an abettor under section 14(1) of Act C of 2012 on the Criminal Code (CC) by a public official as an accomplice, classified and punishable by virtue of CC Item (c) of Section 343(1)."

14. According to the EAW,

> " i. The Criminal Department of the Szabolcs-Szatmar-Bereg County Police Headquarters is conducting an investigation under the number 24/2016. bu. against an unknown person who, on 22 January 2015, submitted an application for the issue of a private passport using the personal data of Sandor Balint who had been naturalised by the Head of the Hungarian State on 5 November 2014 at the Balkany Branch Office of the Nagykallo District Office of the Szabolcs-Szatmar-Bereg County Government Office. In line with the application, the private passport was produced (issued) under the number BH 0113213 with the personal data of Sandor Balint but bearing the photo of the unknown person. The identity of the person who had the passport issued with the personal data of Sandor Balint and with his own photo has not been hitherto established.""
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> ii. Pursuant to section 343(1)(c) of Act C of 2012 it is a felony punishable by imprisonment for a period between one to five years, for any public official who, by abusing their official competence, includes, falsely, any essential fact in an administrative document.
>
> iii. Pursuant to section 14(1) of Act C of 2012 an abettor is a person who intentionally persuades another person to commit a crime."

15. At the extradition hearing before the District Judge, it was submitted on behalf of the applicant that, because of the similarity between the offence in respect of which the respondent was seeking the applicant's extradition and the offence of which he had already been convicted and punished in the Crown Court, his extradition was barred under section 12 of the Extradition Act 2003.

16. The District Judge rejected the submission and determined that double jeopardy did not arise in this case. Her reasons for doing so were as follows:

> "In this case there are two quite separate and distinct types of conduct although I accept that both are to do with the passport.
>
> In Hungary, the mischief of the offending is abetting a public official to issue a false passport. It involves persuading a public official to commit a fraud. The date of the offending is 22nd January 2015. This is a type of corruption.
>
> The offending in the UK is the possession of the document with improper intention knowing it to have been improperly obtained. This relates to possession and to future conduct."

17. At the date of the hearing before the District Judge there was an outstanding request for further information from the respondent concerning the issue of double jeopardy. The District Judge declined to allow an adjournment for this to be obtained. Since the hearing the further information has been received from the respondent which, although it is dated 8 May 2018, was not taken into account by the District Judge prior to her determination.

18. The further information is to the following effect,

> "……the double jeopardy principle is not offended if [the applicant] gets surrendered to Hungary to conduct the criminal procedure.
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> The prosecution office stated that [the applicant] can be suspected with being an instigator to forgery of official documents committed by a public official.
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> …..according to the available data, [the applicant] was found guilty because he made use of the official document (passport), that was essentially real, only it was issued in another person's name, in order to be able to reside and work in the UK; it constitutes another crime in Hungarian law: forgery of official document.
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> …..the British judgment would not have any effect on the prosecution in Hungary because the suspicion (the crime) is not that of using the passport but the issuing of it in Hungary."

19. Although this document was not considered by the District Judge it is accepted on behalf of the applicant that in accordance with the approach taken in *FK v Germany* [2017] EWHC 2160 (Admin), as this further

evidence confirms a factual finding made by the lower court, it is in the interests of justice to admit it.

Ground of appeal

20. The first ground upon which the applicant seeks permission to appeal against this determination is that the judge erred in finding that extradition was not barred by reason of the rule against double jeopardy.

21. It is pointed out that Article 3(2) of the Framework Decision provides that extradition is prohibited,

> "if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts."

22. Moreover, that Article 54 of the Convention on implementing the Schengen Agreement provides that,

> "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

23. Reference is made to *Van Straaten* (2006) C-150/05 in which it was held that, given its objective, even when there are,

> "divergent legal classifications of the same acts in two different Contracting States"

there is no obstacle to the application of Article 54.

24. It is also pointed out that in *Mantello* C-261/09 [2011] 2 CMLR 5, it was stressed that the concept of "same acts" under Article 3(2) cannot be left to the discretion of the judicial authorities of the member states on the basis of their national law and that there needs to be a

> "uniform application of European Union Law."

25. It is apparent that section 12 of the Extradition Act 2003 seeks to reflect these provisions and itself provides that,

> "A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption—

> (a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;
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> (b) that the person were charged with the extradition offence in that part of the United Kingdom."

26. It is submitted that the leading case relating to this provision is *Fofana v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France* [2006] EWHC 744 (Admin) in which the law was summarised as follows,

> "18. In summary the authorities establish two circumstances in English law that offend the principle of double jeopardy:
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> > Following an acquittal or conviction for an offence, which is the same in fact and law – autrefois acquit or convict; and
> >
> > following a trial for any offence which was founded on "the same or substantially the same facts", where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show "special circumstances" why another trial should take place.
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> 19. In Connelly, their Lordships reached this position in practical, though not unanimously in formal, terms by, in the main, confining the notion of double jeopardy to the narrow pleas in bar of autrefois acquit or convict, but allowing for a wider discretionary bar through the medium of the protection afforded by the court's jurisdiction to stay a prosecution as an abuse of process. In Humphreys, where their Lordships sanctioned a prosecution for perjury based on the same facts plus evidence of perjury by the Defendant at an earlier failed prosecution for a driving offence, Lord Hailsham of St Marylebone indicated the second broader discretionary bar in the following passage at 41D-E:
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> > '(10) Except where the formal pleas of autrefois acquit or convict are admissible, when it is the practice to empanel a jury, it is the duty of the court to examine the facts of the first trial in case of any dispute, and in any case it is the duty of the court to rule as a matter of law on the legal consequences deriving from such facts. In any case it is, therefore, for the court to determine whether on the facts found there is as a matter of law, a double jeopardy involved in the later proceedings and to direct a jury accordingly.'

> 20. In R v Beedie [1998] QB 356, [1997] 3 WLR 758, [1997] 2 Cr App Rep 167, the Court of Appeal, Criminal Division, gave more formal expression and separation to the two routes to preventing a second prosecution where the charges and/or facts relied upon are the same or substantially the same, the first, where the charge also is the same, and the second, where the charge is different. It confined the principle or doctrine of autrefois acquit or convict to the first, and allowed the court a 'discretion' to stay the proceeding where there are 'special circumstances'.
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> 21. The semantic bonds that so constrained their Lordships in Connelly and the Court of Appeal in Beedie to confine the notion of "double jeopardy" – the terminology now employed in ss 11 and 12 of the 2003 Act – to the absolute plea in bar of autrefois acquit or convict, were loosened by their Lordships, albeit indirectly, in R v Z [2000] 2 AC 483, [2000] 3 All ER 385, [2000] 3 WLR 117, so as to apply it to a case where, even though the charge is different, it is founded on the same or substantially the same facts as an earlier trial. Lord Hutton, considering the various speeches in Connelly and speaking for their Lordships, said at 497C-D:
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> > 'In my opinion the speeches in the House recognised that as a general rule the circumstances in which a prosecution should be stopped by the court are where on the facts the first offence of which the Defendant had been convicted or acquitted was founded on the same incident as that on which the alleged second offence is founded.'"

27. It is pointed out that in *Dar v Staatsanwaltschat Frankfurt am Mein* [2016] EWHC 2405 (Admin), Irwin J (as he then was) determined that extradition was precluded under section 12 of the Extradition Act 2003 because the appellant in that case had been acquitted of

> "offences which were at the least closely entwined with the extradition offences."

28. In the light of these authorities it is submitted that the applicant's extradition is barred under section 12 due to the fact that the applicant is accused of an offence arising out of the same or substantially the same facts as founded his conviction in the Crown Court. Although it is acknowledged that the latter offence only alleged possession of the false passport, it is pointed out when sentencing the applicant the judge referred to the fact that the passport had been obtained from the Hungarian authorities which is the same conduct which forms the basis of the offence in respect of which the respondent seeks the applicant's extradition.

29. Furthermore, it is submitted that the only inference which could be drawn from the conduct described in the summary report provided by the Department for Work and Pensions was that the applicant had paid a corrupt public official which is again the very conduct which forms the basis of the extradition offence.

Discussion

30. It is readily apparent that there is a common feature between the offence in respect of which the applicant's extradition is sought and the offence of which the applicant has been convicted by the Crown Court, namely the Hungarian passport which, whilst containing the correct name and date of birth of a Hungarian citizen also contains the applicant's image, such that there can be no doubt that the passport is a false document.

31. However, it is equally clear that the nature of the two offences are materially different in that they reflect significantly different aspects of the applicant's alleged criminality in relation to the passport. The first of these offences involves the applicant's alleged abetting of a public official in Hungary to falsify an administrative document namely the false passport, whilst the second of these offences involves the applicant's subsequent possession of the false passport in the UK with intent to use it to establish personal information about him.

32. It is correct that the summary report provided by the Department for Work and Pensions included information concerning the activities of public officials in Hungary relating to the issuing of false passports. However, not only was this not reflected in the offence of which the applicant was convicted in the Crown Court, but this aspect was neither reflected in the prosecution opening, nor was it reflected in the judge's sentencing remarks.

33. Furthermore, not only is the nature of the two offences materially different, but so too does the criminality which they involve differ in terms of both time and location; the extradition offence taking place in Hungary either before or at the time when the passport was obtained, whilst the offence of which the applicant was convicted in the Crown Court took place subsequently in the UK.

34. It is also of significance that both offences involve separate but nevertheless equally serious aspects of criminality, (such that it cannot be said for example that the criminality involved in one adds little to the criminality involved in the other); the first relating to abetting corrupt public officials, whilst the latter involved the use of the false passport to obtain a national insurance number.

35. It is true that in his sentencing remarks the judge in the Crown Court made reference to the passport having been obtained from the Hungarian authorities. However, that was simply an acknowledgment that the document itself was not a false one, only the image which was contained within it. Moreover, his reference to the case of *Ovieriakhi* requires to be understood in the context of a sentencing exercise which sought to distinguish between the differing levels of criminality involved where an offender uses a false passport for the purpose of evading the controls on entry into the UK, as opposed to those who are already lawfully in the UK and use the false passport for the purpose of obtaining employment.

36. This difference in the level of criminality had already been identified in *R v Carneiro* [2007] EWCA Crim 2170, the former type of criminality being considered to be more serious than the latter; hence the need for the judge in the applicant's case to have identified the appropriate level of criminality involved during the course of the sentencing exercise. The result was that the judge concluded that the appellant's criminality involved the more serious level, due to his use of the false passport to enter the UK when he would not otherwise have been entitled to do so. However, that did not involve the judge sentencing the applicant either expressly or implicitly for the separate aspect of serious criminality which is sought to be dealt with by the respondent.

37. Moreover, to the extent that the applicant seeks to rely upon the dicta in *Dar v Staatsanwaltschat Frankfurt am Mein* the facts of that case were unusual in that not only did the Judicial Authority fail to attend the hearing in the Divisional Court, but on the limited information which was available it appeared that the acquittal in the Iranian court related to the "same criminal charge" in relation to which the German authorities were seeking extradition; a materially different position than in the present case.

38. In these circumstances, not only is it apparent that the principle of autrefois convict would not arise in the present case, but nor would any prosecution in the Crown Court for an offence of abetting forgery be liable to be stayed as an abuse of the process of the court. Therefore, I am satisfied that the District Judge was entitled to reach the determination which she did in the present case in relation to section 12 of the Extradition Act 2003, namely that the applicant's extradition to Hungary is not barred by reason of the principle of double jeopardy.

39. To the extent that any clarification from the respondent was required as to the situation in Hungary, this has now been provided by the respondent in the further information dated 8 May 2018. Although it is of course necessary for the courts of the requested state to determine the issue, it is

of note that the position in Hungary is not dissimilar to the position in the UK; such that there is no conflict between the two and supports the uniform approach across the member states as stressed in *Mantello.*

Conclusion

40. Accordingly, as there is no merit in the first ground of appeal relating to section 12 of the Extradition Act 2003, I decline to grant permission to appeal on that ground.

41. However, the position with the second ground is that there is an outstanding application to the Supreme Court for permission to appeal, following the decision of the Divisional Court in *Szalai & Zabolotnyi v Hungarian Judicial Authorities* [2019] EWHC 934 (Admin) that there is a point of law of general public importance arising from its dismissal of an extradition appeal relating to prison conditions in Hungary, under Section 21A(1)(a) and Article 3 ECHR.

42. In these circumstances, it is the joint position of the parties in the present case that the determination of the application in relation to the second ground of appeal should be adjourned pending the outcome of the decision in the Supreme Court.