Neutral Citation Number: [2020] EWHC 2893 (Admin)

Case No: CO/1759/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th October 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

NESIN KADERLI	**Appellant**
- and -	
CHIEF PUBLIC PROSECUTORS OFFICE OF GEBZE, TURKEY	**Respondent**

- -
- -

Malcolm Hawkes (instructed by MW Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

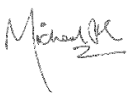
Hearing date: 27th October 2020

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.



.....

THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. Permission to appeal is sought against the decision of DJ Goldspring (the District Judge) on 16 March 2020 sending the request for extradition to the Home Secretary to consider ordering the Appellant's extradition to Turkey. Extradition was ordered on 12 May 2020. Permission to appeal was refused on the papers by Johnson J. There is also an application to adduce fresh evidence.

2. The mode of hearing was a BT conference call. Mr Hawkes was satisfied, as am I, that this mode of hearing involved no prejudice to his client. I am satisfied that the open justice principle has been secured indeed promoted. This case and its start time were published in the cause list together with an email address which any member of the press or public could use if they wished to observe this public hearing: all that was needed was to send an email and make a telephone call. By having a remote hearing we eliminated any risk to any person from having to travel to a court room or be physically present in one. I am satisfied that the mode of hearing was necessary, appropriate and proportionate.

3. The question for me today is whether I am satisfied that any of the five grounds of appeal put forward by Mr Hawkes for the Appellant is reasonably arguable. I will deal with each of the grounds in turn.

My Conclusions

4. I say now that I am going to grant permission to appeal in this case but on a limited basis. There are two points in this case which cause me concern and which, on the face of it and on the material before me today, are in the case of one of them a basis in my judgment for a grant of permission to appeal. In the case of the other point since, in my judgment, it is not a point articulated clearly on the face of the Grounds of Appeal, the appropriate course is to direct that the ground to which the point relates be before the Court hearing the substantive appeal on a "rolled up" basis. That Court should decide, at a point at which the Respondent will by then have had a fair opportunity to respond, whether there is a 'knockout blow' or some other reason why the point is not reasonably arguable or should not be entertained. I will need carefully to consider, in the light of these conclusions, which of the five grounds can properly go forward to a substantive hearing in this case.

Articles 5 and 6 ECHR

5. The first ground of appeal engages section 87 of the Extradition Act 2003 and Articles 5 and 6 ECHR. Mr Hawkes accepts that those two Articles fall to be taken together. The Appellant's broad position on these two Articles is this.

    i) He says that there is clear evidence that the Turkish trial process in this case produced an outcome at odds with the evidence before the Turkish court; that that outcome does not bear scrutiny; that this supports the conclusion that there has in this case been a 'flagrant' denial of Article 6 rights; and that this means

an extradition to serve custody would in consequence constitute an Article 5 breach.

ii) Mr Hawkes goes on to submit that the most probable reason for that outcome, on the evidence, was the explanation given by the Appellant namely that the other defendants when requested gave bribes to the prosecutors and that he when requested refused to do so: I will call that 'the bribery narrative'. The focus of the attack under this ground has been on the way the District Judge dealt with the question of the bribery narrative. He rejected it on the evidence. Mr Hawkes submits that in doing so the District Judge made an error of law, having accepted a relevant 'international consensus' (that judicial corruption is a significant problem in Turkey).

It is essentially on the basis of all of these features that Article 6 and 5 are put forward as a ground of appeal. Johnson J focused, entirely understandably, on the District Judge's conclusion rejecting, on the evidence, the bribery narrative.

6. In my judgment, there is an important aspect to these arguments which is troubling and which of itself gives rise to a reasonably arguable ground. I will need to explain what it is but first it is important to say something about the nature of the underlying case behind extradition. The prosecution case at the trial in Turkey, which led to the conviction of the Appellant on 25 December 2008, concerned a young alleged victim of anal rape on two separate and consecutive days but by different defendants.

i) The first offence (and related offending) in respect of which there were two defendants took place on 3 April 2007. There are issues about the complainant's age and whether her complaint was maintained or had been withdrawn. There are also issues about whether anal intercourse on that day had been consensual. The prosecution case against those two defendants led to acquittals.

ii) The case against the Appellant alleged a different incident the following day on 4 April 2007 which was said to be an anal rape at gunpoint in the Appellant's taxi. He denied that offence but was convicted.

7. In his Grounds of Appeal Mr Hawkes refers to "a series of substantial contradictions, inconsistencies, and conclusions on guilt and innocence which are untenable". He goes on to contend that these matters are a basis viewed together, at least with the 'international consensus' (described above) for concluding that the bribery narrative is correct. He says there has been an Article 6 breach and extradition would be incompatible with Article 6 and Article 5. The Respondent submits that: "It is not an appropriate exercise to undertake the kind of analysis the applicant attempts". The Respondent goes on to submit that this Court does not have all of the evidence that was before the Turkish court and that there is no requirement for the Respondent to adduce evidence in relation to the criticisms made.

8. There is, in my judgment, one point which is a troubling one and – at present at least – is reasonably arguable as a basis for concluding that in this case there has been something 'so egregious as to nullify the proceedings' or 'fundamentally destroy' the fairness of the trial process. I will explain what it is. Mr Hawkes says that the

documents, emanating in this case from the Respondent itself, record the following position.

i) In the case of the two other defendants and the events of 3 April 2007 the Turkish Court (a) found as a fact that the complainant was over 15 at the time and (b) found that she had withdrawn her complaints and on that basis (c) acquitted the defendants pursuant to the Turkish Criminal Code articles 104 and 103. The judgment records the acquittals as based on the facts that "the age of the victim is over 15" and there was a "lack of complaint".

ii) However, and in the very next paragraph of the official (translated) judgment, having just recorded as a basis for acquittals of the two other defendants that "the age of the victim is over 15" and there was a "lack of complaint", what the Court then describes in the case of the Appellant is the proven offence of sexual abuse "against [a] minor victim", making reference to the same article 103 of the same Code. Article 103 of the Code, in the translation which I was shown, describes an offence of sexually abusing "a child". The question of concern is whether how and why a factual finding in relation to age and withdrawal of complaint should lead to an acquittal under the relevant provisions of the Code in the case of the other defendants but should then not equally be part of the reasoning in relation to the Appellant.

iii) Mr Hawkes then says that the position is made more troubling, rather than allayed, when this Court looks at further material from the Respondent dated 17 January 2020. That formal Further Information addresses the question of whether the complainant had also withdrawn her complaint against the Appellant. The description given by the Respondent as to why she was not taken as having done so is: "As the age of the victim is below 15, withdrawing a complaint does not have any effect on the crime itself". Mr Hawkes' point is that the Turkish Court had found as a fact that "the age of the victim is over 15", which was the basis for finding that the withdrawal of her complaint meant the other defendants were acquitted.

9. The District Judge in his judgment, understandably, focused on the bribery narrative being put forward. He did deal with the issue relating to the acquittals alongside the conviction. He said that the picture showed "nothing untoward" and that one explanation could be that the Turkish Court had found that the anal rape on 3 April 2007 by the other defendant was consensual, as a basis for acquittal, whereas the Turkish Court was satisfied in the Appellant's case that he had committed a non-consensual anal rape at gunpoint. It is true that the documents make reference to the issue of 'consent' or 'non-consent' but the key passages to which I have referred and on which Mr Hawkes relies, on their face, do not. What those documents together with his submissions bring into clear focus, in my judgment, is a question about the logic of the reasoning on the face of the formal Court judgment and other documents together with the Further Information.

10. I have searched in vain in the Respondent's submissions for information or evidence or an explanation which addresses and answers this concern. I was unable, including with Mr Hawkes's help, to find one. There may of course be an answer and all I am deciding is that the point gives rise to a reasonably arguable ground of appeal.

11. The position taken by Mr Hawkes on behalf of the Appellant ranges wider. He submits that this feature of the case sufficiently calls into question what went on at this trial that it reasonably arguably undermines as incorrect the District Judge's approach in rejecting the bribery narrative. He also submits, as I have indicated, that the 'international consensus' which he says was accepted by the District Judge should have led in law to a different approach: namely that, at least without a rebutting clear and cogent explanation, the District Judge should – on that basis alone – have found a breach of Article 6 (together with Article 5) on grounds of flagrant denial of justice.

12. As it seems to me, the point about age and withdrawal of complaints not being applied to the Appellant is, of itself, a reasonably arguable Article 6 'flagrant denial of justice' point which could therefore, of itself, underpin the twin Article 6 and Article 5 grounds for discharge. I also accept, however, that this is a sufficiently troubling feature, unless there is some convincing answer to it, that it brings into sharp focus the question of what was happening in relation to these defendants, viewed against the backcloth of the concerns relating to corruption. I have to say that, speaking for myself, it is only because I have 'picked the stick up' at 'the end' of it which relates to the documents which I have emphasised, and the basis for acquittals and then conviction, that it seems to me that the corruption points should also be before the Court at the substantive hearing. If one puts to one side the materials which I have described and focuses simply on presumptions and rebuttal (picking up the stick at the bribery narrative end) it is very much harder to say the least, in my judgment, to impugn the approach taken by the District Judge. Indeed, on one view Mr Hawkes' general logic about the 'international consensus' and what he says flows from it as a matter of law is that every Turkish conviction should be regarded as an Article 6 breach on the basis of concerns relating to corruption. I strongly doubt that there is any sustainable point here absent the particular point of concern that I have emphasised. But I am going to give permission on this ground, to allow twin Articles 6 and 5 to be argued at a substantive hearing.

Section 81

13. I will also give permission on the section 81 ground of appeal (extraneous considerations) but I do say making very clear that that point, in my judgment, is entirely parasitic on the Court first arriving at a conclusion that the real risk of corruption aspect of Articles 6 and 5 is made out in this case. It is that, and that alone, which would be the platform for the (short) argument made under section 81: that the principled refusal, as it is said, to pay a bribe to have the prosecution against him dropped constitutes 'imputed political opinion' which can then warrant characterising the extradition as 'persecutory' or 'politically motivated' for the purposes of section 81. That is not intended as a gloss or characterisation of that ground but rather an attempt to encapsulate its essence as I see it.

Section 85

14. I turn to the third ground of appeal: section 85 of the 2003 Act and trial 'in absentia' together with what is said to be the absence of a right of retrial. Here, there is the second very specific point which has been raised before me which in my judgment is a matter for concern and needs an answer. I do not currently have an answer. That is for reasons which are understandable. The point that has been explained orally before me today is not, in my judgment, a point which can be found either in the Perfected

Grounds of Appeal or in the Renewed Grounds of Appeal which largely replicate them. If this were the only point in the case, I would have to consider whether it could be relied on at all and whether it could be relied on fairly. I would have to consider issues as to whether the Respondent should have a targeted opportunity to respond. I approach the issue, however, on the basis that the case is already proceeding, with permission to appeal. In those circumstances, the appropriate course in my judgment – as I have already indicated – is to direct that permission to appeal on this ground of appeal be adjourned to the hearing of the substantive appeal. All options will therefore be open to that Court as to whether the specific point now made can properly be relied on, and whether there is anything reasonably arguably in it in the light of any response to it by then made by the Respondent.

15. The very specific point which concerns me is as follows. Based on the Respondent's documents, Mr Hawkes submits that the underlying Turkish trial process in this case involved two Court hearings on the same day in different Courts in different places. The day was 29 February 2008. In Gabze there was a hearing on that day at which the then detained Appellant was produced and his lawyer was appointed. But at another court (called the "assisting court") in another area of Turkey (Uskudar) and on the very same day, 29 February 2008, the victim was giving evidence with an opportunity for anyone to question her. That opportunity in that other court is described in the Respondent's Further Information dated 17 January 2020 as the opportunity giving the Appellant "his right to pose questions to the victim". What is said, in that formal document of the Respondent, is that the Appellant as "the accused person did not attend that hearing of the assisting court", and so "did not use … his right to pose questions to the victim". The point of concern is that he could not possibly do so, and nor could his newly appointed Court lawyer, if he was on the same day being brought before a Court elsewhere where that lawyer was being appointed. This fact, moreover, is not only known to the Respondent but it is described by the Respondent in its own formal documents.

16. Again, I have searched in vain to see whether I could find in the Respondent's submissions or the analysis of the District Judge an answer which explains this point. On the face of it, it is a point of significance for two reasons. One is the emphasis placed by the Respondent, as I have explained, on the importance of that hearing before "the assisting court". The other is the fact that the presence of an appointed legal representative at a hearing, even if the Appellant were himself absent, would in principle stand to be a complete answer to the issue under section 85 (whether there was part of a trial in absentia with involuntary absence): Mr Hawkes accepts that; in my judgment, rightly.

17. Again, Mr Hawkes ranges more widely. Other points have been raised under this ground of appeal about other aspects of the evidence. In my judgment, those other aspects are on the face of it conclusively answered by the fact that at other key hearings the Appellant was either himself present or his appointed legal counsel was present. The same Further Information dated 17 January 2020 records the Appellant's counsel as having attended "each hearing on which essential proceeds [which I think must mean proceedings] have been carried out". The difficulty is the one I have identified arising out of an earlier paragraph in the very same Further Information document, which is emphasised by the Respondent itself as having been an important hearing before the "assisting court", when put alongside other evidence about the

hearing elsewhere at which the lawyer had been appointed. It is that point which gives rise to the serious concern. These observations are wider points are simply to make clear that I was not persuaded that, if the concern I have identified is answered, there was any other point arising under this ground of appeal which would support it as a reasonably arguable ground for appeal. Having given that candid transparency as to how the points under this ground seem to me, I should say that ground of appeal relating to section 85 will be at large before the Court hearing the substantive appeal. Were there some other point that appeared to that Court to be of key relevance, my grant of permission to appeal would not have shut it out, albeit that I have shared my own reasons here. Finally, in relation to section 85, if there is some basis for concluding that a relevant part of the trial process in Turkey was conducted with the Appellant involuntarily 'in absentia' then the question will arise as to whether there is a right of retrial so as to answer the point. On that aspect I see in this case no clear knockout blow demonstrating that, on that premise, a right of retrial right does arise.

Section 91 and Article 3 ECHR

18. That leads to the remaining grounds of appeal with which I need to deal. The first remaining ground is section 91 and oppression based on a mental health condition. The other is Article 3 ECHR, based on the implications of being incarcerated in isolation in Turkey. They are linked. These are anxious and important points and there is a lot of material that relates to them. They were considered by the District Judge and by Johnson J on the papers. I am unpersuaded that there is any reasonably arguable ground of appeal relating to these matters. The District Judge dealt with the expert evidence adduced before him the Appellant's mental health condition. He focused on the question of whether he was satisfied that there had been 'torture' in previous custody (which he rejected) and he characterised as 'overstated' the evidence of suicide risk. He accepted in principle as sufficient, by reference to Yilmaz [2019] EWHC 1939 (Admin) the assurances that have been put forward in this case which he accepted and explained that they addressed appropriately the issues relating to mental health.

19. I have in mind the evidence adduced and also the threshold applicable to 'oppression'. Mr Hawkes has emphasised in his oral submissions that the District Judge accepted the expert evidence in relation to the Appellant's PTSD. In a nutshell his submission was that the District Judge should have gone to find extradition 'oppressive' for this reason: it is self-evidently oppressive, he submitted, to return a person with PTSD to a Turkish prison when that condition has arisen from the experience in being imprisoned in Turkey. I am not able to accept that these submissions, or the material, disclose reasonably arguable grounds that extradition would be oppressive on the basis of a mental health condition. The District Judge evaluated all the evidence carefully and came to what, in my judgment beyond reasonable argument, is a sustainable conclusion. I agree with Mr Justice Johnson that this ground is not reasonably arguable

20. The same is true, in my judgment, in relation to the final point regarding prison conditions and the Yilmaz assurances. I remind myself that the test is whether there is on substantial grounds a real risk of relevant Article 3 ill-treatment. I remind myself of the anxious evaluation needed by the primary evaluative judge – in this case the District Judge – but also appropriate for close scrutiny on an appeal. Mr Hawkes admits that the prisons expert who gave evidence before the District Judge relating to

the severe impact of incarceration in Turkey in isolation as a vulnerable prisoner (as it is said that the Appellant would be in the light of the subject matter of his conviction) should have led the District Judge to reach the opposite conclusion to the one he did reach. I am unable to accept that ground of challenge as reasonably arguable. The District Judge in my judgment reached an evaluation of Article 3, in the light of all the evidence and in all the circumstances, which there is no realistic prospect of this Court overturning on a substantive appeal. I agree with the assessment on this point of Johnson J.

Fresh Evidence

21. Finally I will refuse the application to rely on fresh evidence, so far as it is relied on in support of grounds of appeal on which permission to appeal is being refused. The report sought to be put forward (dated May 2020 and updated in September 2020) is a report concerning a different case. But what, in my judgment, the Appellant ought to be able to do is to make that document available to the Court in this case at the substantive hearing, so that if the issue of the bribery narrative is reached or if the Appellant is able to point to some specific passage supportive of the position on the two specific points of concern identified in this judgment, the Appellant will be able to invite the Court dealing with the substantive appeal to allow that material to be adduced. That Court will be able to see its cogency and whether it is 'capable of being decisive'. I seriously doubt whether it is, but it is right in my judgment that the final view in relation to that should be one for the substantive appeal Court to express in all the circumstances. So, on the grounds on which I am granting permission to appeal or adjourning permission to appeal I therefore also adjourn the application for permission to adduce as fresh evidence the new report.

Assisting the Court's Pre-Reading

22. Finally it is fair to say that this case has raised some questions in my mind about the way the Court is best assisted by an appellant's grounds of renewal, the provision of voluminous material, and the absence of a targeted and realistic reading list. But it is also fair to say that it was not necessary in the event to spend time at this hearing on ventilating such matters. All I will say – and this is an observation which is prospective and intended to assist in other cases – is this: the Court has limited pre-reading time; the Court is greatly assisted by bundle references which are correct; and by having the original documents to which a Respondent's notice was responding; and by having a pre-reading list identifying essential reading together with a time estimate for that reading. As it happens, additional time was found in this case for pre-reading and this hearing, listed for one hour, has in the event taken 2¼ hours, including the delivery of this judgment.

Order

23. I will now discuss with Mr Hawkes the precise form of the order which I will make in this case and will include it here at the end of this written ruling. Leaving aside recitals and case-management directions, the Order I made was. (1) The Appellant has permission to appeal on (i) section 87 (ECHR Articles 5 and 6); and (ii) section 81 (extraneous considerations). (2) The Appellant's application for permission to appeal on (iii) section 85 (relating to trial in absentia) is adjourned for hearing on a "rolled up" basis at the substantive hearing of this appeal. If permission to appeal is granted at

that hearing, the Court will proceed immediately to determine the substantive appeal on this issue alongside the other issues. (3) The Appellant's application for permission to appeal on (iv) (section 91 (oppression: mental health) and (v) Article 3 ECHR is refused. (4) The Appellant's application to adduce fresh evidence, insofar as relevant to grounds (i) to (iii) is adjourned to the Court hearing this appeal (and insofar as relevant to grounds (iv) and (v) is refused). (5) No order as to costs, save for detailed assessment of the Appellant's publicly funded costs.

27.10.20