Neutral Citation Number: [2022] EWHC 169 (Admin)

Case No: CO/733/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
28 January 2022

Before:
MR JUSTICE FORDHAM

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Between :

KAROLY MAROSAN	**Appellant**
- and -	
COURT OF CLUJ NAPOCA (ROMANIA)	**Respondent**

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- -

James Lewis QC & Zoe Lash (instructed by Crown Prosecution Service) for the **Respondent**
Alex Tinsley (instructed by Coomber Rich Solicitors) for the **Appellant**

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Judgment on the Application to Certify Points of Law of General Public Importance and for Leave to Appeal

MR JUSTICE FORDHAM:

1. On 19 November 2021 I gave my judgment [2021] EWHC 3098 (Admin) in this case. On 29 November 2021 the Respondent made an application for a certification "that there is a point of law of general public importance involved in the decision" (section 32(4)(a) of the Extradition Act 2003) and for leave to appeal on the basis that "the point is one which ought to be considered by the Supreme Court" (section 32(4)(b). The Appellant responded on 13 December 2021. I am satisfied that it is unnecessary to convene an oral hearing for the purposes of determining the application.

2. The two points which I am invited to certify, and on which I am further invited to grant leave to appeal, are as follows:

> ***(1) Is time spent on dual detention, namely where the requested person was detained both (a) in relation to the extradition Arrest Warrant and (b) in relation to a domestic United Kingdom criminal investigation and/or prosecution; and where that period or part thereof of detention has not subsequently been treated as 'time served' for the purposes of a domestic United Kingdom criminal sentence, a qualifying period for Article 26 of the EU Framework Decision purposes?***
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> ***(2) Should an executing United Kingdom court in considering the Article 8 ECHR proportionality rights of the requested person treat any period of dual detention as a qualifying remand deductible under Article 26 of the EU Framework Decision, or is the question of deductibility under Article 26 solely a matter for the requesting judicial authority to decide?***

   These reflect the two questions of principle which I identified in the judgment at §17 which arose out of the question of law identified at §1.

3. So far as the second question is concerned ("solely a matter for the requesting judicial authority to decide"), in the present case – leaving aside "principle" (see §22) – there were special circumstances of the present case (see §23). The first was that in its further information of 27 October 2021 the Respondent was in the present case looking to this court correctly to characterise the period spent by the Appellant on remand (see paragraph 23(i)). The second was that by reference to the stayed Article 3 issue as a 'freestanding durable basis' for remaining in the UK (§4), the Appellant was not going to be removed and the real question was whether a further 9 weeks of continuing custody needed to be awaited in order to cross the "bright line" in the authorities (§23(ii)). That is why I would have taken the course which I described in §11, had I preferred the Respondent's arguments. The Appellant in those circumstances would have served the further 9 weeks (by now, in fact) and the point would have fallen away.

4. As I explained at §7, there were two arguments which were not advanced before me and which were therefore not points "involved in the decision", nor does my judgment stand as authority in relation to those and argued points.

5. Section 32(4) (certification) makes a number of points clear. The first is that there must be "a point of law … involved in the decision". The second is that that point of law, involved in the decision, must be one "of general public importance". The third is that it is for this Court to address whether these characterisations are apt. The fourth is that they should not be elided with the distinct question of whether the point "is one

which ought to be considered by the Supreme Court". If this Court is satisfied that there is a point of law, involved in the decision, which is of general public importance – but is not satisfied that it ought to be considered by the Supreme Court – then the appropriate course would be to certify, but to refuse leave to appeal, leaving to the Supreme Court (if pursued) the question of whether the case should be entertained by that Court.

6. I accept that both points identified are questions of "law" (see judgment §1) and engage "questions of principle" (§17). But I agree with the Appellant's written submissions that they are not aptly characterised as being of "general public importance". Those words – all three of them – are important. As I have said, I keep separate the distinct (leave to appeal) question of whether they "ought to be considered by the Supreme Court". Qualifying remand has an important role in extradition cases. On any view Article 26 of the Framework Decision is capable of giving rise to questions of "interpretation" (of the "autonomous" meaning), questions of "application" for the requesting state, and questions of 'margin of generosity' for the requesting state. These were all aspects which I discussed at §§6 and 22 of the judgment. The Respondent emphasises that the law "is not currently settled", there having been (prior to my judgment) "no authority which determines the issue arising on present appeal", as I recorded at the end of §19 of the judgment. The Respondent also submits that it is "self-evident" that the questions of law are of "general public importance" and that the judgment "has clear ramifications for the application of the law in other cases".

7. The Framework Decision, as the Appellant points out, has been operative in relation to the United Kingdom from 2004. The Berk case, in 2009, dealt with a particular factual scenario where 'dual remand' has come to be treated as 'time served' (see §19(ii) of the judgment). The Newman case, in 2012, dealt with a particular factual scenario where the 'dual detention' involved a custodial sentence being served (see §19(i) of the judgment). The Petkowski case, in 2013, left open the issue which I have now decided, as to 'dual remand' not subsequently treated as 'time served' (see §19(iii) of the judgment). As it happens, Petkowski stands as an illustration where the issue not capable of being decisive. No other case was (or still has been) drawn to my attention, in the entirety of the period since 2004 in which the issue with which I grappled had arisen and was material to the outcome. That is particularly striking in circumstances where the point had been identified and specifically left open in 2013. In the recent case of Orsos, the requesting state conceded the point (see §15 of the judgment). In my judgment, the Appellant is right to draw attention to this picture, and to submit that "the fact that no other published judgment has dealt with circumstances where the outcome is turned on the issue at hand", which "strongly indicates that the point is very exceptional and thus not one of much broader impact".

8. Finally, I add two endnotes. The first is this. If I am proved by subsequent experience to be wrong in my assessment of "general public importance" then, as the Appellant points out, it would be open for a requesting state in any future case to challenge my judgment as wrong in law (or to argue the unargued points I identified at §7), to invite 'departure' from my reasoning (examples of this, from the extradition context, have been given by the Appellant), to request that an appeal be listed before a Divisional Court, and then to raise certification following a further judgment. The second is this. It is difficult to see the circumstances of the present case as giving rise to any

injustice, so far as this requesting state (the Respondent) is concerned, in the Appellant not having been extradited. That is in light of the points which I identified at §§10-11 and 23 of the judgment: the Respondent looked to this Court to address Article 26 deductibility; and the Appellant would not have been surrendered for extradition, but rather would have served a further 9 weeks in custody here.

9. I refuse the application to certify points of law of general public importance. It follows that I also refuse the application for leave to appeal.