Neutral Citation Number: [2022] EWHC 17 (Admin)

Case No: CO/4074/2018

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

IN THE MATTER OF AN APPEAL PURSUANT TO THE EXTRADITION ACT 2003

Date:07/01/2022

Before :

THE HONOURABLE MR JUSTICE LANE

- -

Between :

VIKTOR TOTH	**Appellant**
V	
HIGH COURT OF SZOLNOK, HUNGARY	**Respondent**

- -
- -

Mr G Hepburne-Scott (instructed by Bark & Co.) for the **claimant**
Miss A Bostock (instructed by the Crown Prosecution Office) for the **defendant**

Hearing date: 16 December 2021

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Approved Judgment

Lane J:

1. The appellant appeals, with permission granted by Morris J, against the decision of District Judge Snow on 16 October 2018 to order the appellant's extradition to Hungary.

2. The delay since the hearing before the District Judge has occurred because this matter was one of a number of cases stayed behind the leading case of Zabolotnyi v Hungary [2021] UKSC 14, on the issue of prison conditions in Hungary.

3. The appellant applies for permission to amend his Grounds of Appeal to add a ground to the effect that, as a result of legislative changes, the Hungarian Courts can no longer be recognised as judicial authorities for the purposes of section 2 of the Extradition Act 2003.

4. A number of cases have already been stayed in the High Court, awaiting consideration of the lead permission application in Bogdan v Hungary (CO/3601/2021).

5. The respondent, therefore, realistically concedes that, without prejudice to arguability, permission should be granted to amend; and the appellant's section 2 ground stayed.

6. I invite Mr Hepburne-Scott to give effect to this in the resulting draft order.

7. The ground upon which permission to appeal was granted relates to Article 8 of the ECHR; and it is to this that I now turn.

8. The extradition of the appellant is sought by Hungary, pursuant to a European Arrest Warrant issued on 26 July 2018 and certified by the National Crime Agency on 7 August 2018. It seeks his return in order to serve the entirety of a sentence of three years immediate imprisonment, imposed on 7 June 2016 and becoming final (by lack of appeal) on 15 August 2016.

9. The sentence relates first to offences committed between 20 January 2004 and 20 February 2006, whereby the appellant embezzled funds from a company of which he was "a representative authorised to sign". The equivalent of some £350,000 were not accounted for through the liquidator of the company and were unlawfully appropriated by the Appellant.

10. The second offence was committed on 17 February 2005. It comprises the filing of a tax return with false data, which resulted in a loss to the Hungarian budget of the equivalent of approximately £34,000.

11. On 29 September 2009 and 29 April 2010, the appellant was questioned in relation to the offences. On the second occasion, he signed to acknowledge receipt of instructions that he must notify any change in his residence address within three working days. The appellant failed to comply with that obligation. He is considered to have been unlawfully at large from 29 April 2010.

12. The indictment was lodged on 11 December 2015, with the trial beginning on 1 April 2016. The verdict was handed down on 7 June 2016. The appointed defence lawyer did not appeal.

13. A national arrest warrant was issued in order to try to locate the appellant, prior to the trial on 15 February 2016. The warrant was ineffective. After the verdict, the case was passed to the sentence execution division on 8 September 2016. That division could not locate the appellant and a second national arrest warrant was issued on 5 January 2017. The Hungarian authorities only discovered that the appellant had left the country at the end of November 2017, which led to the issue of the EAW.

14. An assurance regarding the conditions in which the appellant would be held, following return to Hungary, was provided on 12 October 2018. The assurance mirrors that considered by the Supreme Court in Zabolotnyi to be sufficient to alleviate any real risk of a breach of Article 3 of the ECHR.

15. At paragraphs 1 to 5 of the judgment of the District Judge, the factual background is set out. At paragraph 3(ii), however, the date of 17/02/2015 is written in respect of the false tax return offence, rather than 17/02/2005.

16. This error is plainly typographic in nature. At the hearing before me, it emerged that the District Judge was here relying upon Miss Bostock's Skeleton Argument, which contained the error. In the circumstances, Mr Hepburne-Scott realistically accepted that it was difficult to say anything of significance turned on the error.

17. I am fully satisfied that the error is typographic only and that, reading the District Judge's judgment as a whole, it is clear that he was aware that none of the offences were committed in 2015. This is clear from paragraph 4 of his judgment, where he refers to the appellant being questioned "in relation to these offences" on 29 September 2009 and 29 April 2010.

18. At paragraph 10 of the judgment, the District Judge found that the appellant fell to be treated as a fugitive. Having considered the appellant's evidence, the District Judge was "satisfied that he moved with such obvious haste …in an attempt to evade prosecution by the JA".

19. At paragraph 13, the District Judge set out his findings of fact. These included the appellant becoming a fugitive from justice in August 2010, when he entered the United Kingdom. The District Judge noted that the appellant was married and had two children, then aged 18 and 14 years. The appellant's wife and children would remain in the United Kingdom, if the appellant were to be extradited. The appellant's wife had been made redundant but was applying for jobs and the appellant was optimistic that she would obtain employment. As we shall see, that optimism turned out to be well-founded. The appellant had no convictions in the United Kingdom.

20. At paragraphs 14 and 15, the District Judge carried out the Article 8 balancing exercise, as recommended in Polish Judicial Authorities v Celinski and Others [2015] EWHC 1274. The factors in favour of extradition included a strong public interest in the United Kingdom honouring its international extradition obligations and in discouraging persons from seeing the United Kingdom as a state willing to accept fugitives from justice. The decision of the Hungarian authorities should, furthermore, be accorded a proper degree of confidence and respect. The offending in question was serious. The appellant was a fugitive from justice and "his life in this country has been built in the knowledge of his fugitive status".

21. The factors against extradition were the appellant's residence in the United Kingdom since August 2010; the distress that would be caused to his wife and children; the financial difficulties that his family would face; and the fact that the appellant had no convictions in the United Kingdom.

22. At paragraph 17, the District Judge gave substantial weight to the distress that the children would suffer in the event of the appellant's extradition. However, the children were described as "not young, his son is at university". They would also have the support of their mother and probably continue to live in their existing home. Any financial difficulties would be lessened by the family's entitlement to benefits.

23. At paragraph 19, the District Judge gave substantial weight to the seriousness of the original offence and the appellant's fugitive status. Overall, he was satisfied that the factors weighing in favour of extradition outweighed those weighing against it.

24. Section 27 of the 2003 Act, so far as relevant, provides as follows: -

> "(1) On an appeal under section 26 the High Court may-
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that-
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

25. The leading case on the application of section 27 to the issue of "fresh evidence" is Szonbathely City Court v Fenyvesi [2009] EWHC 231 (Admin). It was held that evidence not available at first instance means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to

adduce it and which he or she could not with reasonable diligence have obtained. The court must be satisfied that the evidence would have resulted in the judge deciding the relevant question differently. The fresh evidence must, in other words, be decisive.

26. In the present case, a number of statements have been filed which were not before the District Judge. Some of the matters to which the statements relate concern the position regarding the appellant and his family as it was at the date of the hearing before the District Judge. In this regard, the section 27 requirements are not met.

27. So far as concerns the position arising after the hearing before the District Judge, the statements disclose that the appellant is in employment, as a keyworker, with a local authority; the appellant's wife is also in employment; they live in private rented accommodation; their financial position has improved; and the appellant's daughter, who has very recently turned 18, has relied on the appellant for support since she was subject to what is described as an incident of sexual harassment on her way home from school, some three years ago.

28. At the date of the hearing before the District Judge, the appellant was in custody. Shortly thereafter, he was released on bail. The conditions of bail include a daily curfew between 11pm and 4am, monitored by an electronic tag.

29. Mr Hepburne-Scott accepts that these curfew hours are not such as would result in any reduction in sentence, were the appellant before our domestic criminal courts. He nevertheless submits that there is caselaw, which suggests that the fact of being subjected to a curfew for what is now a significant period of time, should be weighed in the Article 8 proportionality balance.

30. I am mindful of the words of Lord Thomas in paragraph 14(3) of Celinski:-

> "Decisions of the Administrative Court in relation to Article 8 are often cited to the court. It should, in our view, rarely, if ever, be necessary to cite to the court hearing the extradition proceedings or on an appeal decisions on Article 8 which are made in other cases, as these are invariably fact specific and in individual cases judges of the Administrative Court are not laying down new principles. …"

31. In Bicioc v Baia Mare Local Court, Romania [2017] EWHC 3391 (Admin), Dove J said: -

> "16. The other case to which particular reference was made by Mr Seifert as part of his submissions was that of Einikis v Ministry of Justice Lithuania [2014] EWHC 2325 (Admin). The simple point upon which reliance was placed by Mr Seifert in respect of that case was that Ouseley J, in allowing the appeal, took into account as a factor against extradition being ordered that in that case the appellant had been the subject of a curfew between 2100 hours and 0500 hours for a period of one year and seven months together with a reporting requirement which was itself a not inconsiderable restriction of the appellant's liberty,

> albeit not one which would give rise to a deduction from the appellant's sentence."

32. Dove J dealt with the issue of curfew in the case before him as follows: -

> "36. Fourthly, it is necessary in my view to give some weight in this case to the fact that the appellant has, as set out above, been the subject of a curfew whilst on bail. This has been an interference with his liberty, and a form of punishment, albeit not by any means equivalent to the sentence which he is required to serve in Romania. It cannot, however, be ignored and provides further support for the appellant's case that the EAW should be discharged."

33. In Danfelds and Anor the General Prosecutor's Office, Latvia [2020] EWHC 3199 (Admin) the Divisional Court, at paragraph 79, considered that the curfew imposed on the second appellant "was a significant restriction on … liberty … over a prolonged period of time." The second appellant had been told that in the event of conviction in Latvia he was likely to be sentenced to a community sentence or a fine. It also appears that the length of curfew was such that it would have resulted in a reduction in sentence, if imposed in this country. The significance afforded by the Divisional Court to the curfew has, therefore, to be read in this light.

34. Notwithstanding the submissions made on behalf of the appellant in the present case, I am in no doubt that the new evidence regarding the family, and that concerning the curfew, even weighed cumulatively with the evidence that was before the District Judge, does not come close to being "decisive" in the sense that, had the District Judge considered it all, he would have been required to order the appellant's discharge. The position regarding family life is, as Miss Bostock submits better now than if the appellant had been imprisoned in 2010, when he was interviewed by the Hungarian authorities. Although separation from the appellant would be painful, the children are now both adults. Although they may currently rely upon the appellant for financial support, they are far better able to understand the reason for the separation that extradition is likely to bring. Although, I accept that the appellant's daughter may have had an unpleasant experience some years ago (as to which details are lacking), there is no evidence to suggest that she would suffer significant harm in this regard following the appellant's extradition.

35. Insofar as the curfew is concerned, it has not precluded the appellant from going out in the evenings. In this regard, it stands in contrast to the 9pm start of curfew in Danfelds.

36. All this means that I cannot allow the appellant's appeal unless I find that there was some error in the way in which the District Judge undertook the Article 8 balancing exercise, based on the evidence that was before him. Mr Hepburne-Scott submitted that there was such an error. The District Judge should have had regard to the delay between the commission of the offences and the extradition hearing. For support, he pointed to the finding by Lady Hale at paragraph 8(6) of Norris v US [2010] UKSC 9 that:

> "The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life."

37. I am unable to accept this criticism of the District Judge. The issue of delay does not appear to have featured in the submissions made to him by the appellant's counsel (not Mr Hepburne-Scott). That omission is understandable because, as Miss Bostock points out, the appellant's trial had, in fact, taken place as recently as 2016. Notwithstanding the delay between 2005 and 2016, the Hungarian Court decided that the appropriate sentence to impose on the appellant was one of three years' immediate imprisonment. It is not for this court to attempt to go behind that element of the decision of the Hungarian Court. The amount of money concerned in the frauds was, on any standard, significant, involving both a loss to the Hungarian exchequer and, in all likelihood, to creditors of the liquidated company.

38. Furthermore, and importantly, the District Judge found that the appellant was a fugitive. This had plainly caused difficulties for the Hungarian authorities and, thus, contributed to the delay in seeking his return.

39. Putting those matters together, there is no justification for disturbing the District Judge's decision, on the basis that he failed to have proper regard to the issue of delay.

DECISION

40. The appellant's appeal on the Article 8 ECHR ground is dismissed.