Neutral Citation Number: [2023] EWHC 1785 (Admin)

Case No: CO/127/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2023

Before :

MR JUSTICE LANE

- -

Between :

ADRIAN DRAGAN	**Appellant**
- and -	
DISTRICT COURT OF BAILA (ROMANIA)	**Respondent**

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- -

Mr M Henley (instructed by **AM International Solicitors**) for the **Appellant**
Mr D Ball (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 14 February 2023
Further written submissions on 1 and 5 March, 30 June and 6 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane :

1. The appellant appeals against the decision of District Judge Clews, dated 6 January 2021, to order his extradition pursuant to a conviction European Arrest Warrant (EAW) issued by the District Court in Brăila, Romania on 26 March 2019 and certified by the National Crime Agency on 12 February 2020. Some of the grounds of challenge are new and permission to bring them is required.

A. THE OFFENCES

2. The warrant relates to the following two offences:

   a. Attempting to pervert the course of justice between 22 and 23 April 2009. In return for 12,000 Euros from a witness, the appellant offered to speak to judges so that they would rule in favour of the company where the witness was employed. The appellant was sentenced to four years' imprisonment suspended for two years (but subsequently activated in light of conviction for the second offence);

   b. Using a lease agreement which was not valid to seek payments of state aid from Romanian and EU budgets. The framework list is ticked for fraud. The appellant submitted the lease to the authorities on 11 May 2013 resulting in payments totalling RON 78,295.59 (approximately £14,500). He then submitted the lease agreement again on 15 May 2014 seeking further payment. For this offence, the appellant was sentenced to two years and four months' imprisonment.

3. Ultimately, a combined term of imprisonment of six years and four months' imprisonment was imposed, all of which remains to be served.

B. EXTRADITION PROCEEDINGS

4. The extradition hearing took place on 3 November 2020. The warrant was supplemented by a prison assurance and further information. According to the judgment of District Judge Clews, only two issues were actively pursued.

5. It is important to mention that the lease and the appellant's use of it were the subject of civil proceedings in Romania. The appellant says the conviction concerning the lease was contrary to Article 6 ECHR, in the light of the findings of the Court of Appeal in Galati on 22 October 2015. In this regard, the appellant's legal team in Romania have brought various applications and appeals to have the conviction quashed. I shall explain why in due course.

6. The extradition proceedings have had a long and somewhat complex history, which it is unnecessary to recite. Suffice it to say that the appellant now (through Mr Henley) seeks to advance the following grounds, some of which require the permission of this court.

C. THE GROUNDS OF CHALLENGE

Section 10 and section 65 (dual criminality)

7. This ground relates to the conviction concerning the lease. In this jurisdiction, fraud by false representation requires a dishonestly made false representation. The appellant

says it is clear from the findings in the civil proceedings on 22 October 2015 that there was no misrepresentation or dishonesty. The offence therefore does not fulfil the dual criminality requirement. The Framework Decision classification of the offence as fraud is neither true nor fair. This means, according to the appellant, that this court must substitute its own assessment. Permission is required to bring this ground.

Section 12 (double jeopardy)

8. This ground relates to the conviction concerning the lease. The two sets of proceedings in Romania (civil and criminal) were based on identical facts. In essence, the appellant contends he was acquitted by virtue of the findings in the civil proceedings on 22 October 2015, such that the later criminal conviction would have amounted to an abuse of process in this jurisdiction: Connelly v DPP [1964] AC 1254. Section 12 acts as a bar in such circumstances: Fofana v France [2006] EWHC 744 (Admin). Permission is required to bring this ground.

Article 5 ECHR

9. This ground arises from a decision of the Constitutional Court on 17 February 2021 in the context of the fraud conviction. That decision post-dated the decision of the district judge. A flagrant breach of Article 5 might occur if an individual would be at risk of being imprisoned for a substantial period in the receiving state, having been convicted after a flagrantly unfair trial: Othman v United Kingdom [2012] 55 EHRR 1 at [23]. The Constitutional Court found that the pertinent wording of Article 52(3) of the Romania Code of Criminal Procedure was unconstitutional, in that it violated the principles of *res judicata* and thus ECHR Article 6. Clearly, if the trial resulting in the finding of guilt on the fraud charge was unfair, the resulting prison sentence breaches ECHR Article 5. Similarly, the appellant contends that the sentence of four years' imprisonment for attempting to pervert the course of justice must also be tainted and, thus, a breach of Article 5 (as the suspended sentence originally imposed was activated by virtue of the fraud conviction).

Article 8 ECHR

10. The appellant submits that the effect of the Constitutional Court's decision of 17 February 2021 reduces the public interest in extradition such that the decision of the district judge on the Article 8 balancing act is now wrong.

Abuse of process

11. The course of events in Romania has, according to the appellant, resulted in a grave injustice because of the refusal to apply the *ne bis in idem* principle or the *res judicata* principle. In light of the Constitutional Court's decision of 17 February 2021, it would now be abusive to extradite the appellant. On the face of the evidence before this court, he was convicted on the basis of Romanian provisions, which have since been held to be unconstitutional. It would be abusive to return the appellant to face the sentence arising from the unconstitutional conviction. It would also be abusive to return him to face the other sentence for perverting the course of justice, which was activated only by virtue of the unconstitutional conviction. Thus,

the case for the appellant is that he should not be extradited in respect of either conviction.

D. THE AGRICULTURAL PAYMENTS CONVICTION

12. It is necessary to examine in some detail the background to the conviction in respect of the agricultural payments and the subsequent legal proceedings in Romania concerning these payments, since these feature strongly in the grounds of challenge. In 2013 and 2014, the appellant submitted a lease in support of an application for EU agricultural funding. The lease was between a company called S.C. Agrotest SRL ("Agrotest") as the lessor and an entity called I.I. David MC Ana Maria as the lessee. The appellant's father owned Agrotest. The appellant was a director or administrator of I.I. David MC Ana Maria. At the relevant time, Agrotest was subject to insolvency proceedings and a liquidator had been appointed. On 17 January 2014, in civil proceedings, it was found that the lease which Agrotest had entered into with I.I. David MC Ana Maria was a nullity because it could not be signed by the appellant's father, in the light of the insolvency.

13. In July 2014, the Payment and Intervention Agency for Agriculture ("APIA"), which had made the agricultural payment, required its repayment. Meanwhile, civil proceedings had been brought by I.I. David MC Anna Maria against APIA. These proceedings culminated in a civil judgment from the Galati Court of Appeal, dated 22 October 2015. In that judgment, APIA's decision for the money to be repaid was annulled. As can be seen from the foregoing, the appellant relies heavily on this decision of the Galati Court of Appeal.

14. Notwithstanding the Court of Appeal's decision on the civil matter, criminal proceedings were brought against the appellant in respect of the agricultural payments. On 1 November 2017, the Brăila District Court found the appellant guilty of "submitting in bad faith forged, inaccurate or incomplete documents or declarations".

15. The appellant submitted the lease in 2013 and, again, in 2014, in respect of the agricultural payments. On 20 May 2014, after submitting the lease a second time, I.I. David MC Anna Maria told APIA that the lease was a nullity. It appears from the record of the Galati Court of Appeal that the disclosure to APIA of the lease's nullity came about as a result of a request by APIA. The Court of Appeal held that I.I. David MC Anna Maria "based on the lease agreement concluded with [Agrotest] fulfilled its obligations when submitting the application, respectively worked the leased land keeping the destination for which it requested the payment of the subsidy". As regards the good faith of I.I. David MC Anna Maria, the court recorded that it should "also be mentioned that it was she (sic) who informed the defendant that a court ruling had established the absolute nullity of the lease". As a result, the Court of Appeal found it "unlawful to sanction the applicant for the culpable conduct of [Agrotest] found at the time after the submission of the request for payment".

16. Following his conviction for the fraud offence, the appellant launched extensive legal challenges in Romania. In essence, the appellant argued that his conviction was unfair, in the light of the October 2015 decision of the Galati Court of Appeal in the civil matter. The appellant's challenges, however, have repeatedly been found unsuccessful. In November 2018, the Court of Appeal of Galati determined that it was

necessary to notify the Constitutional Court in relation to a challenge brought by the appellant. On 14 March 2019, the Galati Court of Appeal partly admitted the appeal of the appellant but maintained the final punishment of two years four months'.

17. On 17 February 2021, the Constitutional Court considered the constitutionality of Article 52(3) of the Civil Procedure Code. Article 52(3) provides that "final decisions of courts other than criminal ones on a preliminary issue in the criminal process, have the authority to be tried before the Criminal Court, except for the circumstances regarding the existence of the crime". It was argued that the exception was unconstitutional, in that it violates the principle of security of legal relations and the principle of *res judicata*. It was therefore contrary to ECHR Article 6.

18. By a judgment of the Constitutional Court on 17 February 2021, the Constitutional Court held that the exception was, in effect, unconstitutional for these reasons.

19. Following this judgment, the appellant filed a "motion for revision" at the Brăila court. On 21 May 2021, the Brăila court rejected the motion as inadmissible.

20. The appellant sought to appeal that judgment. On 16 August 2021, the Galati Court of Appeal rejected his appeal. The appellant sought unsuccessfully to have that judgment annulled.

21. On 3 June 2022, the Brăila court rejected the appellant's submission that there were, in effect, two judgments which could not be reconciled. The submission was ruled to be inadmissible.

22. The appellant sought to appeal that further decision. The matter was referred to the High Court of Cassation and Justice.

23. At the hearing before me on 14 February 2022, I was informed that the Court of Cassation had heard the case on 13 February. A decision was awaited. I required the parties to update me, no later than 14 March 2023. In the event, there have (as I shall set out) been a number of further judicial decisions in Romania, upon which the parties have filed and served written submissions.

24. On 1 March 2023, the respondent informed this court that the High Court of Cassation and Justice rejected as inadmissible a notification by the Galati Court of Appeal, requesting the pronouncement of a preliminary decision for the resolution of the following question of law in criminal matters: "If the phrase 'when two or more final court decisions cannot be reconciled' (article 453 of the Code of Criminal Procedure) also refers to the situation where the state of irreconcilability has been created between a final civil decision with a sanctioning character and, on the other hand, a final criminal decision, in the conditions where both final decisions have as their object identical or related factual states".

25. The appellant's case, which was pending before the Galati Court of Appeal on this issue before that court referred the matter to the Court of Cassation, was ordered by the latter court to be "put back on the docket and solved".

26. On 16 May 2023, there was a hearing before the Galati Court of Appeal against the decision of the Brăila Court on 3 June 2022 rejecting the appellant's appeal as inadmissible.

27. On 24 May 2023, the Galati Court of Appeal (in criminal case 311/113/2022) ordered the rejection as unfounded of the appeal against the decision of 3 June 2022 of the Brăila Court. In further information dated 24 May 2023, the judicial authority described this decision as "final". It also confirmed that the enforceability of the arrest warrant was "not affected", going on to say that "all legal proceedings initiated by [the appellant] were rejected by the national courts and no problems were identified by the Romanian courts for the execution of this custodial sentence."

28. I agree with the respondent that there has not been shown to have been a finding in the civil jurisdiction in Romania that the appellant applied for the 2014 subsidy only after he had told APIA that the lease was void. The respondent's position, taken from the official information, is that the appellant submitted the lease on 15 May 2018, for a second time, in order to authorise a second payment. It was on 20 May 2014 that the company I.I. David MC Ana Maria told APIA that the lease was a nullity. As I have already recorded, there is material which indicates that the notification was made only after APIA had asked. Furthermore, it occurred after the issue had been raised by the court-appointed liquidator of Agrotest. The data for September 2014, relied on by the appellant, appears to be the date on which the appellant started his challenge to the July 2014 decision ordering the earlier sum of money to be returned.

E. DISCUSSION

Section 10 and section 65 (dual criminality)

29. I can now address the grounds. The first ground concerns sections 10 and 65 of the Extradition Act 2003. The issue is dual criminality. The District Judge decided dual criminality, on the basis of the framework list. The EAW confirms that the framework list has been ticked. This meant the requirements of section 65(5) were met.

30. Mr Henley acknowledges that, in these circumstances and having regard to the judgments in Assange v Sweden [2011] EWHC 2849 (Admin), the appellant faces what is, in effect, un uphill task. The appellant needs to show that circumstances exist in which extraneous material should be admitted on the subject of dual criminality. However, as Sir John Thomas held, such circumstances will be very rare. There needs to have been a fundamental error or fundamental unfairness or bad faith on the part of the respondent.

31. The appellant was convicted of "using or presenting in bad faith forged documents or statements, inaccurate or incomplete", contrary to the provisions of the Criminal Code. It was, plainly, open to the respondent to certify that this was a case of fraud.

32. Dual criminality has been raised only recently. Many of the matters upon which the appellant now seeks to rely have been in play for some time, as can be seen from the dates given above. I agree with Mr Ball that it is, therefore, unfortunate that the issue has been raised so late.

33. Properly analysed, the appellant's case on this issue comes nowhere near demonstrating a fundamental error, or unfairness or bad faith, such as to preclude the application of the Framework List. The essential point is that the civil and criminal jurisdictions were concerned with different issues. The tribunals in question applied different tests. The civil case was an appeal in which the appellant was not Mr Dragan but the legal entity I.I. David MC Ana Maria. This court simply does not know the details of Romanian contract law in order to understand how the concept of a "controlling mind" operates in Romanian civil proceedings. It is, however, unnecessary to know this. It is sufficient to observe that the party is not the same in the civil proceedings as in the criminal ones; and that the legal and factual questions that each court needed to address would not be coterminous.

34. It is not for this court to inquire into the adequacy of the Romanian criminal courts' findings that the appellant knowingly submitted a document, which his father had signed and which he knew full well his father did not have any authority to sign. The EAW is dispositive of the matter. The appellant submitted a document as valid in order to obtain money, when he knew his father did not have the authority to sign the document. The appellant's submission that, because the lease was only declared a nullity on 17 January 2014, there was no issue with him submitting the application before that, on 11 May 2013, ignores the warrant. This sets out that, even on the earlier occasion, the appellant submitted the lease "knowing" that the agreement had not been lawfully concluded because he knew it was signed by his father who had no authority, following the appointment of the receiver. This court does not need to inquire into how or why the appellant knew his father did not have such authority.

35. If the appellant's conduct had occurred in this jurisdiction, he could have been found guilty of an offence of fraud, contrary to section 2 or section 3 of the Fraud Act 2006: fraud by false representation which is known to be untrue or misleading; or fraud by failing to disclose information. The respondent needed to establish that the appellant's conduct, had it occurred here, would be dishonest.

36. Applying the test in Ivey v Genting Casinos (UK) [2018] AC 391, the warrant records that the appellant "knew" his father had no managing authority to sign the lease, but that he nevertheless submitted it. This deals with the appellant's actual state of knowledge or belief as to the facts. As for the question of whether it would be dishonest by the standard of ordinary people to submit a document in support of an application for payment which one knows has been signed by someone without authority, it is in my view clear beyond doubt that such conduct is dishonest by the standards of ordinary people.

37. As a result, on the facts, the appellant could be convicted of fraud in this jurisdiction.

38. The defendant's case rests upon his contention that he was not dishonest because the Galati Court of Appeal so found in the civil proceedings. However, for the reasons I have given, the appellant's attempt to read across the civil findings into the criminal sphere simply does not correlate.

39. The appellant seeks to invoke the evidence of a Romanian lawyer, to explain the civil judgment on the basis that the company was, in any event, entitled to a subsidy if it worked the land, irrespective of the validity or otherwise of the lease. Even making allowance for the witness's expertise, that proposition is not one which emerges from

the English translation of the judgment of the court (see above); nor does it explain why it was considered necessary in the first place to rely on the lease in order to obtain the subsidy from APIA. At the relevant time, it is evident that APIA was imposing such a requirement and that is why the appellant thought it necessary to make the false representation.

40. I agree with the respondent that there is no issue regarding any "heightened test" for *mens rea*. In Romania, "bad faith" is required, just as, in this jurisdiction there is a requirement of "dishonesty". There is no appreciable gap in the *mens rea* of the Romanian offence, compared with the offence in England and Wales. Thus, the test to be applied is merely the standard test of whether it is an inference capable of being drawn from the facts set out in the warrant that the appellant acted dishonestly. I find that it is.

41. For these reasons, I find that this ground cannot succeed. It is, indeed, unarguable. Permission to bring it is therefore refused.

Section 12 (double jeopardy)

42. The next ground concerns section 12 and the issue of double jeopardy. Under section 12, extradition is barred if, and only if, it appears that the person concerned would be entitled to be discharged under any rule of law relating to previous acquittal or conviction, on the assumption that the conduct in question constituted an offence in (here) England and Wales, and that the person concerned was charged with the extradition offence in England and Wales.

43. In order for the section 12 bar to apply, the appellant must previously have been "put in peril of conviction": Zdinjak v Croatia [2012] EWHC 1554 (Admin). It is, I find, manifest that the appellant was not put in peril of conviction as a result of the civil appeal resulting in the decision of the Galati Court of Appeal of 22 October 2015. Mr Henley submits that both the criminal and the civil trial were based on identical facts. However, as we have seen, that is simply not correct. Accordingly, if the appellant were facing trial in England and Wales, he would not be entitled to be discharged under the double jeopardy rule because a corporate entity of which he was a director had been successful in a civil appeal.

44. This ground is, accordingly, unarguable.

Article 5/6 ECHR

45. The ECHR Article 5 ground has been recast by Mr Henley in a way that in fact relates more to Article 6, on the basis that the appellant asserts he was convicted after a flagrantly unfair trial. In this regard, the unfairness is said to concern Article 52(3) of the Code of Criminal Procedure which, as I have noted, was declared unconstitutional. This finding has caused the appellant to bring challenges to his conviction based on the finding regarding Article 52(3) and its alleged impact upon his conviction. This matter has, however, been the subject of multiple rulings that are adverse to the appellant. They include the decision of the High Court of Cassation and Justice on 13 February 2023 to reject, as inadmissible, the notification made by the Galati Court of Appeal, which was concerned about the impact of the Constitutional Court's decision on the fraud conviction. As I have recorded, the decision of the High

Court of Cassation and Justice was to reject that notification as inadmissible and, in our terms, to remit the matter to the Galati Court of Appeal. More recently, there is the decision of 24 May of the Galati Court of Appeal, described in paragraph 27 above.

46. The appellant's case under this ground is that the courts in Romania who have ruled against him (an increasingly long list) have all acted so wrongly and/or unfairly as to cause him to suffer a "flagrant breach" of his rights under articles 5 and 6 of the ECHR. In his written submissions of 30 June 2023, Mr Henley says that the written reasons for the decision of 24 May 2023 have not been forthcoming, owing to industrial action by the judiciary over the issue of pensions. Given this and the forthcoming long recess of Romanian courts over the summer, Mr Henley submits that, until the Court of Cassation overrules the Constitutional Court, the appellant's extradition cannot be compatible with his rights under Articles 5 and 6 of the ECHR. The appellant should, therefore, be discharged. The respondent can always reissue the warrant should the litigation ultimately be resolved against the appellant. He should not, however, be extradited without resolution of this issue.

47. As Mr Ball points out, a finding that there has been a flagrant breach of a qualified ECHR right needs to surmount a high threshold. I find it is not met by the civil judgment from the Galati Court of Appeal, upon which the appellant relies.

48. Whilst I have had full regard to the expert evidence, which (by reference to the position as it stood at the date of the hearing before me) *may* suggest that the position is otherwise, standing back, looking at matters as a whole and applying the correct high threshold, I find it is simply not possible to conclude that the criminal justice system in Romania has repeatedly reached the wrong conclusions, either through incompetence or out of malice against the appellant. Although Mr Henley attempted to cast aspersions on some of the statements emanating from officials at the Brăila court, there is a complete dearth of actual evidence to suggest that what has happened is as a result of some vendetta against the appellant. On the contrary, I agree with Mr Ball that the extensive judicial scrutiny to which the appellant's case has been subjected shows the system operating as it should. It indicates that the paragraph of the Romanian Code of Criminal Procedure, which was found to be unconstitutional, has no bearing on the decisions on which the warrant is based. There is nothing before me to show that this stance is misconceived, let alone that it is so misconceived as to indicate a flagrant breach of the ECHR by one of its EU signatory states.

49. In making these findings, I take account of the fact, in Lungu v Romania (2519/06), the ECtHR found that Romania had violated the Convention, where a criminal court disregarded a matter which had been decided by a civil court. The point at issue in the present case, however, is whether the unconstitutionality of the words of exception in Article 52(3) had any material bearing on the appellant's fraud conviction. For the reasons I have given, there is no good reason for this court so to conclude. Mr Ball submits that the appellant has been in the "last chance saloon" for some time; and that "he would now appear to be even beyond that." I cannot disagree.

50. Taking everything in the round, therefore, I find that the appellant has failed to rebut the presumption that Romania, as a signatory of the ECHR, has not violated the Convention in its judicial pronouncements upon the appellant and has failed to show that there is no real risk it will do so from here on.

Article 8 ECHR

51. I turn to the ground which concerns Article 8 of the ECHR. The appellant's revised grounds deal with Article 8 as a free-standing issue. It is now said that until such time as the appellant's conviction is set aside, the impact of that decision is to reduce the public interest in extradition. In the light of the decision of the High Court of Cassation and Justice in February 2023, however, this submission loses all force. The appellant faces a sentence of six years and four months' imprisonment. On any analysis, that is a very considerable period of imprisonment. The offences concerned are serious. The appellant has not succeeded in his attempt to invoke the civil judgment of the Galati Court of Appeal in overturning his conviction for fraud. He has also failed to show that this domestic failure constitutes a flagrant breach of his rights under Articles 5 and 6 of the ECHR.

52. Mr Henley contends that the district judge was wrong to find that the appellant was a fugitive. He says there is no evidence to support that conclusion, save for an inference arising from the timing of the appellant's arrival in the United Kingdom. No evidence was advanced showing any positive obligation had been imposed on the appellant to remain in Romania; or that he was subject to any conditions.

53. I reject that challenge. At paragraph 43 of his judgment, the district judge found, on the basis of the appellant's evidence to him, that the appellant "was perfectly well aware that the decision in Romania had gone against him and that there was a hearing two weeks later at which sentence would be passed. (It appears that the hearing may just have been the final confirmation of earlier proceedings, in which case it is likely the [appellant] knew what outcome would be)."

54. As the district judge held, it was then that the appellant left Romania. As a result, the district judge was perfectly entitled to find that "the only realistic conclusion I can draw is not that he came here to buy machinery but that, whatever his state of knowledge about them, he did so to avoid the final stage of the proceedings in Romania". Accordingly, the district judge was entitled to find that the appellant had "put himself beyond the jurisdiction of the Romanian courts and I am satisfied so that I am sure he is there as a fugitive from Romanian justice".

Abuse of process

55. The final ground of challenge concerns an alleged abuse of process. There is no substance in this challenge. Although Mr Henley draws attention to the case law e.g. Belbin v France [2015] EWHC 149 (Admin), which emphasises that an allegation of abuse of process should not be the first issue in an extradition hearing, I agree with Mr Ball that, in the present case, this ground is nothing more than a "second bite of the cherry". It is plain from both Mr Henley's skeleton argument and his oral submissions that the abuse of process ground centres on the contention that the appellant has suffered a grave injustice in respect of the alleged irreconcilability of the civil judgment of the Galati Court of Appeal and the appellant's conviction. For the reasons I have given, however, that allegation has no material basis.

F. DECISION

56. This appeal is dismissed.

Judgment Approved by the court for handing down.