IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 1855 (Admin)

CO/4391/2020

Royal Courts of Justice

Thursday, 17 June 2021

Before:

THE HONOURABLE MR JUSTICE JOHNSON

B E T W E E N :

DANIEL LAMAJ

Appellant

- and -

COURT OF APPEAL OF ANCONA (ITALY)

Respondent

MR M. HALL appeared on behalf of the Appellant.

MR HOSKINS (instructed by Crown Prosecution Service) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE JOHNSON:

1 The appellant appeals against an order for his extradition made by District Judge Ezzat, sitting at the Westminster Magistrates' Court on 24 November 2020. His extradition is sought pursuant to a European Arrest Warrant, issued on 18 June 2018, which seeks the appellant's surrender to serve an outstanding sentence of three years, ten months and 27 days. That sentence was imposed in respect of convictions for three offences, which were described by the district judge in this way:

> "Offence one: July 1999 to 28 February 2000, conspiracy to supply drugs.
>
> Offence two: 11 August 1999, possession of drugs, 20kg of hashish.
>
> Offence three: 27 to 28 February 2020 supplying drugs, 500g of hashish-type drug."

2 The first offence is described in the European Arrest Warrant as follows:

> "The person conspired with others to commit more than one offence of unlawful possession, purchase, giving transportation, import and export of large amounts of heroin, cocaine and hashish-type of drugs. The association comprised three groups acting on the national and international territory."

3 The appellant was apprehended on 28 February 2000 and was remanded in custody until 30 May 2001. At that point, he was released pending trial and he notified the address at which he would reside. That was an address where he lived with his brother.

4 In February 2002, he moved to Albania. In doing so, he was not in breach of any obligation imposed in connection with the criminal proceedings in Italy. In November 2002, he married and the couple moved to Greece. In 2005, there is evidence that the Italian police attended the appellant's brother's property. The appellant's first child was born in February 2006 and a second child was born in February 2008.

5 In his proof of evidence, the appellant says that, in 2012/2013, he travelled from Greece to Italy to visit his mother, who was living in Italy but was very sick. He was not, however, allowed to enter Italy. He says that he was stopped by the police, when he disembarked from the ferry in the port of Ancona: his details were checked and he was told, "We don't want you here".

6 On 27 June 2013, a hearing took place in the Court of Appeal of Ancona that resulted in the judgment which is, ultimately, the subject of the European Arrest Warrant. The appellant did not attend court, but he was represented by lawyers. An appeal against that judgment was lodged by those lawyers. That appeal was dismissed by the Supreme Court of Cassation on 23 April 2015. Further information shows that an imprisonment order was made on 24 April 2015 and 9 September 2015. Searches were made for the appellant in June 2015 and August 2016 and he was considered by the Italian authorities to be a fugitive from that date.

7 The appellant says in his proof of evidence that he has visited his mother in the interim, including in October 2016, December 2016 and March 2018, and on each of those occasions he was able to enter Italy without difficulty.

8 The appellant was arrested under the European Arrest Warrant on 26 February 2020 and the initial hearing took place on 27 February 2020. He was initially remanded in custody but

was granted conditional bail from 6 March 2020. The substantive extradition hearing took place on 3 September 2020. The appellant challenged his extradition on grounds of passage of time, under s.14 of the Extradition Act 2003, and on the grounds that his extradition would be incompatible with his rights to respect for private and family life under Article 8 of the European Convention on Human Rights.

9 The district judge heard evidence from the appellant, from the appellant's brother and from the appellant's wife. The district judge also heard evidence from an expert witness on Italian law. So far as the appellant's wife is concerned, she gave evidence about her health. In her witness statement, she says,

> "I suffer from regular migraines. I do regular acupuncture for them. I have tried many treatments but nothing much worked, but I tried another acupuncture treatment recently and it worked. When they come, they can last for three to four days. They are so bad that I vomit and they stop me from leaving the house or even getting out of bed. When I have a migraine, Daniel does everything, childcare, work, etc. I do not know how I will cope if Daniel is sent to Italy."

10 A medical legal report was also put before the district judge from Mr Amin, a consultant neurosurgeon. He said that the appellant's wife's general practitioner records show that she has been diagnosed with migraine since the age of 12 and her current symptoms remain consistent with that diagnosis. He said:

> "The prognosis of migraine is highly variable and unpredictable. There is no cure for it. In [her] case, I would expect her migraine to worsen in the absence of her husband who helps her with the care of their children and the house chores, as physical and mental stress are known to exacerbate the severity and frequency of the migraine attacks."

11 The district judge rightly observed that the appellant is not entitled to rely on s.14 of the Act if he is a fugitive. Accordingly, the district judge first determined whether or not he was a fugitive.

12 The judge recognised that the appellant had been permitted to move out of Italy and that he chose to do so. Accordingly, he did not thereby commit any offence and he was not in breach of any obligation owed to the Italian authorities. The district judge did not believe the appellant's evidence that he thought that, once he was released from custody, that was an end of the matter. Although the district judge accepted that the appellant was free to leave Italy, he found that the appellant's motivation for leaving Italy was "at least in part to avoid the possibility of being returned to prison".

13 In considering whether the appellant was a fugitive, the district judge expressly applied the test set out in *De Zorzi v. Attorney General Appeal Court of Paris(France)* [2019] EWHC 2062 (Admin) at [46]:

> "[A person is a fugitive where that] person has knowingly placed himself beyond the reach of a legal process …"

The district judge found that the appellant was a fugitive. He said:

> "I am satisfied that while the requested person was not restricted from leaving Italy, he chose to leave to avoid a potential return to custody. Whether the

> requested person engaged with his lawyers or severed all contact with them makes little difference. If he remained in contact, then he was aware of the proceedings. He chose not to engage and placed himself beyond the reach of the legal process. If he left Italy and failed to keep himself informed about the progress of proceedings, then the same can be said about placing himself beyond reach. I am satisfied that one of the two scenarios is true. Either makes him a fugitive".

It followed that the appellant was not entitled to rely on s.14.

14 In respect of Article 8, the district judge set out those factors that weighed in favour of extradition and those which militated against. In respect of the former, he referred to the "constant and weighty public interest" in ensuring that those convicted of crimes serve their sentences. He recognised that the weight of that interest depends on factors that include the seriousness of the underlying offending. He considered that the offences for which the appellant was sought were serious and that they involved significant criminality. Moreover, a substantial sentence had been imposed and the remaining sentence to be served was significant. He recognised, too, the public interest in complying with the UK's obligations under the EAW system and in discouraging people from seeing the United Kingdom as a safe haven for fugitives from justice.

15 In relation to the factors that militated against extradition, the district judge referred to the

> "considerable unexplained delay, the fact that the appellant's wife suffered from migraines and that when they strike she is unable to care for the children."

16 The district judge referred to the fact that the appellant had led a life free from criminality for the last 20 years, that he has an established life with his wife and two children (and now three children) in the United Kingdom, and that his extradition would be hard for his family to cope with. He recognised that his extradition would have a significant impact on his wife and children, but said that the children - and at that point he was considering the two older children - were old enough to have the circumstances explained to them in an age-appropriate way. He considered that they would be able to maintain contact by various means whilst the appellant served his sentence. He recognised, however, that that could not be said in respect of the appellant's then expected child, now his young infant child. He said:

> "While the impact on the unborn child does feature in this balancing exercise, it is worthy of note that the requested person and his partner chose to conceive this child during extradition proceedings when they were both aware of the very real possibility that the requested person would be extradited to serve a prison sentence of just under four years".

He considered that the appellant's wife would be able to call on the support of family members who lived relatively close.

17 In all the circumstances, he did not consider that the impact was "exceptionally severe" and it was, he considered, ,"no greater than what would be expected following the loss of a parent from any household". He found that there were "no … human rights issues"; in other words, the considered that extradition was compatible with Article 8 and would not amount to a disproportionate interference with the appellant's Article 8 rights.

18 The appellant appeals against that decision and contends that the district judge was wrong, both in respect of his finding that the appellant was a fugitive (such that he could not rely on s.14) and in respect of his finding that extradition would be compatible with Article 8.

19 Permission to appeal was granted by Sir Ross Cranston, sitting as a high court judge, on 20 May 2021. In granting permission, Sir Ross Cranston said:

> "Given *inter alia* the lapse of time since the offending, I am just persuaded that permission should be given and the case moved to a hearing. However, I note that a number of Mr Hall's criticisms in the perfected grounds seek impermissibly to undermine the judge's factual conclusions and the weight that he was entitled to attach to matters".

20 On the question of whether the appellant is properly regarded as a fugitive, Mr Hall argues that he was not under any obligation to attend court or to remain in Italy. His case is that the appellant could only become a fugitive if he acted in breach of such an obligation. Merely remaining in a third country, he says, does not render an individual a fugitive.

21 In principle, I accept the later proposition: a person does not become a fugitive merely by remaining in a third country. Here, however, the district judge applied the correct test and reached a factual finding that the appellant, knowingly, placed himself beyond the reach of the legal process at the point that he left Italy. That was a factual conclusion that the district judge reached after hearing the appellant give evidence. Mr Hall makes a number of points which would have supported a different factual conclusion. This was, however, a matter for the district judge's assessment. He applied the correct test and reached a conclusion which, in my judgment, has not been shown to be wrong. He was entitled to find that the appellant was a fugitive. It follows that he was right to find that the appellant could not rely on s.14. It follows that the s.14 ground of appeal is dismissed.

22 In relation to Article 8, Mr Hall primarily relies on the overall period of delay in this case and the impact that that has on the Article 8 balance. He says that the district judge did not attach significant weight to that delay. That was also the point which persuaded Sir Ross Cranston to grant permission to appeal.

23 Mr Hoskins, in his helpful written and oral arguments for the respondent, recognises that delay can erode the public interest in extradition. However, he argues that the extradition request here is in respect of serious offences for which a significant sentence remains to be served. He says that it is incorrect to suggest that the district judge had insufficient regard to delay, because he placed it squarely within the balancing exercise that he undertook. Moreover, the appellant must bear some responsibility for the delay, given, on the district judge's finding, which I have upheld, he left Italy in order to flee from justice. Mr Hoskins does, however, accept that there are significant periods of unexplained delay.

24 In respect of the approach to be taken to the question of delay in the Article 8 balancing exercise, Mr Hoskins draws attention to the decision of the Divisional Court in *Public Prosecutor's Office of Landshut Germany v. Harjit Singh* [2019] EWHC 62 (Admin). In that case Hickinbottom LJ said at [41]:

> "The district judge appears to have considered that delay was determinative of the proportionality issue, but I do not consider that to have been the case. First, set against any culpability of the state authorities, undoubtedly the respondent was culpable in respect of the entire delay. It was he who fled Germany to avoid facing the criminal proceedings about which he well knew.

> He was, and is, a fugitive from justice. Second, and more importantly, as I have indicated, the focus of the Article 8 balancing exercise is not upon simply the length of any delay but rather its effect on the Article 8 rights of relevant people, including the respondent's wife and children, and the effect of the delay on the public interest in extraditing him".

The important point, Mr Hoskins submits, and I accept, is that delay is not a freestanding feature which determines whether or not extradition is a proportionate interference with private and family life. Rather, it is necessary to undertake a fact-sensitive analysis of the impact of the delay in the particular circumstances of the individual case. Significant periods of delay can decrease the public interest in favour of extradition. Where there is a strong public interest in criminal proceedings being brought and determined timeously, the public interest in favour of extradition can, in principle, diminish if there has been an extensive period of time since the alleged commission of the offences. On the other hand, the requested person may have developed in their personal and family life over the period between the alleged commission of the offences and the extradition request, in a manner that increases the weight that is to be attached to their right to respect for private and family life.

25 On behalf of the appellant, Mr Hall relies on the decision of the Divisional Court in *Lysiak v. District Court Torun Poland* [2015] EWHC 3098 (Admin). In that case, an order had been made for the appellant's extradition to Poland pursuant to a European Arrest Warrant issued in July 2014. It was issued in respect of a conviction for offending that took place between June 2000 and February 2001. The offending was described as "conspiracy to obtain satellite television dishes fraudulently", the sum involved being approximately £130,000. The sentence remaining to be served was 18 months' imprisonment, subject to early-release provisions. The appellant had opposed extradition on the grounds that it would be incompatible with his right to respect for private and family life, under Article 8. He relied in particular on the fact that it took nine years for the case to come to trial in Poland and a further two and a half years for the conviction to be confirmed in appellate proceedings.

26 The district judge accepted "that the age of both the offences and the requested person at the time is relevant to the Article 8 challenge". Burnett LJ, however, considered that the delay in that case "should have been taken into account by the district judge as a more potent factor than the extracts from his decision … suggests he did" (see at [30]). He considered that the district judge had misdirected himself as to the relevance of the long delay in that case. Burnett LJ pointed out that the offences had been committed when the appellant was 25 years old, whereas he was now 41. He considered that it was significant that the appellant had left Poland with permission and that his life now is entirely different. His family were entirely dependent upon him and would be placed in a very difficult position for the duration of any sentence he might have to serve in Poland. It was not realistic for them to follow him to Poland and the elder child, in particular, had been educated in the United Kingdom since the age of five and was on the point of transferring to secondary education. Burnett LJ, with whom Hickinbottom J agreed, concluded that it would be disproportionate in Article 8 terms to extradite the appellant to Poland.

27 In the present case, the district judge undoubtedly took delay into account. It was strongly relied on by the appellant and he identified it as a relevant factor in his *Solinsky* balance sheet. He was fully aware of the chronology which he had set out at the outset of his judgment. He was, therefore, in particular, aware that the case had taken 13 years to reach the Court of Appeal of Ancona, a further two years to reach the Court of Cassation and that the European Arrest Warrant was not issued until three years and two months after the Court of Appeal decision.

28 However, although the district judge rightly recognised that delay was a factor in the balancing exercise, he did not make any reference to its impact on the public interest in favour of extradition and nor did he tie the family and private life that had been generated since 2000 in any clear way to the delay that had taken place.

29 I have concluded that his Article 8 assessment was flawed for that reason. The Article 8 balance therefore falls to be reassessed.

30 The delay in this case is indeed striking. It is not, however, a factor in itself that is determinative of the Article 8 balancing exercise for the reasons that I have given. Rather, it is necessary to conduct that exercise afresh, recognising the impact of the delay on each side of the balance sheet. The factors in favour of extradition were correctly identified by the district judge. I respectfully agree that the offences are very serious, that a substantial sentence was imposed and that a significant period of time remains outstanding to be served. Those are all factors that are relevant to the public interest in favour of extradition. So, too, in circumstances where the appellant has been justifiably found to be a fugitive, is the strong public interest against the United Kingdom being a safe haven for those who flee from justice.

31 However, the weight of the public interest in favour of extradition is substantially diminished by the period of time that has passed since the offending. Although the appellant bears personal responsibility for fleeing justice, and although that may explain some of the period, particularly between 2016 and 2020, there is no evidence that the appellant's conduct is responsible for the time that it took for the offences in 1999 and 2000 to reach a final determination in 2013 and 2015. Moreover, the background evidence suggests that this may, on the contrary, be attributable to systemic delays in the Italian justice system. There is no suggestion that the appellant has committed any offence in the intervening time.

32 The nature of the alleged offending is such that there is nobody in the role of complainant and no identified third parties that have a particular stake in the outcome of the criminal proceedings distinct from the general public interest in ensuring that criminal proceedings taking their course.

33 In all the circumstances of the case, whilst I consider the district judge was entirely right to regard this as very serious offending, the public interest in extradition is substantially diminished by the period of time since 1999 and 2000.

34 So far as the factors against extradition are concerned, they were again correctly identified by the district judge. The fact is that the appellant's life, perhaps not surprisingly given the period of time, has changed out of all recognition since 1999. At that point, he was a young man on the cusp of adulthood. He was unmarried, he had no children or other familial responsibility. He is now in his forties. He is in employment. He is married and he has three children. His position is very different from what it was in 1999 and 2000. Extradition will have a very significant impact on his private and family life. It will remove him from his wife and three children.

35 It is necessary separately to consider the Article 8 rights of the other members of the family. I have referred to the appellant's wife's health. The district judge found that she would be able to call on family members to assist. I respect that finding. However, family members who have their own responsibilities and lives are unlikely, satisfactorily, to be able to replace the care, attention and support that can be provided to her by the appellant. The

incapacity caused by migraine is explained in the expert evidence. The practical consequence is that there will be times when the appellant is primarily responsible for the children. Their interests again must be taken into account. Extradition will separate three children from their father, for the purpose of a retrial (it being common ground that he will be entitled to a re-trial) for offending that took place many years before they were born. It will, in particular, involve the separation of a young infant from the father. That would amount to a very significant interference with their right to respect for private and family life.

36 Further, the appellant has already spent 15 months on remand in custody. That is a substantial proportion of the sentence that is left to serve, albeit I am not in a position to find that it would fall to be deducted from the sentence that is left to serve and it may well be that the sentence left to serve has been calculated after making allowance for the time spent on remand.

37 Mr Hall, additionally, relies on the uncertainty occasioned by the United Kingdom's departure from the European Union and the consequential possibility that the appellant might be unable to return to the United Kingdom following completion of his sentence or his acquittal, if that is the outcome of a retrial. I accept that there may be circumstances where this is a factor that falls to be weighed in the balance (see, for example, the decision of Fordham J in *Antochi v Germany* [2020] EWHC 3092 (Admin) at [49] – [52]; see also *Ryback v. District Court in Lublin* (*Poland)* [2021] EWHC 712 (Admin) *per* Sir Ross Cranston at [37]). In the circumstances of the present case, however, I do not consider that "Brexit uncertainty" is a significant factor. It was not raised at first instance, and was not taken into account by the district judge. The appellant makes no point about it in his proof of evidence. There is no evidence that the uncertainty causes him or the family any particular distress. I am not prepared to infer that it causes distress, although, of course, the extradition itself is likely to have that effect. They have only lived in the United Kingdom since November 2018 and there is nothing to suggest that they would be unable to resume their lives elsewhere in the European Union.

38 Moreover, just as it is possible that the appellant would be unable to return to the United Kingdom after serving his sentence, it is also possible that, even if he were not extradited, he would not continue to enjoy leave to remain within the United Kingdom. For all those reasons, I do not consider that that is a significant factor to weigh in the balance.

39 Ultimately, I recognise that there is a strong public interest in extradition and against the United Kingdom being seen as a safe haven for fugitives from justice, but that public interest is ameliorated to a very considerable degree in the circumstances of this case by the very significant delay and period of time since the underlying offending. On the other hand, extradition would have a very substantial impact on the right to respect for private and family life enjoyed by the appellant and by his wife and by each of his children. Balancing those competing considerations, I have come to the conclusion that extradition would amount to a disproportionate interference with the right to respect for private and family life and that it is, therefore, incompatible with Article 8 of the European Convention on Human Rights. I, therefore, allow this appeal.

CERTIFICATE

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This transcript has been approved by the Judge.