

CO/10065/2010

**Neutral Citation Number: [2011] EWHC 1498 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Wednesday, 20 April 2011

**B e f o r e:**

**LORD JUSTICE LAWS**  
**MR JUSTICE COLLINS**

**MR JUSTICE STADLEN**

**Between:**  
**ISTANEK**

Appellant

v

**DISTRICT COURT OF PREROV**

Respondent

**ATTORNEY GENERAL**

Interested Party

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**Mr Paul Garlick QC** and **Miss Aoife Drudy** (instructed by Dass) appeared on behalf of the Appellant

**Mr John Hardy QC** and **Miss Amelia Nice** (instructed by Crown Prosecution Service) appeared on behalf of the Respondent

**Mr Ben Watson** (instructed by the Treasury Solicitor) appeared on behalf of the Interested Party

**J U D G M E N T**  
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1. LORD JUSTICE LAWS: This is an appeal against an order for extradition pursuant to the Extradition Act 2003 made by Deputy Senior District Judge Wickham, sitting in the City of Westminster Magistrates' Court, on 22 September 2010. By that decision, the district judge ordered the extradition of the appellant to the Czech Republic.
2. There is a single and important issue before us relating to the validity of the European Arrest Warrant ("EAW") which led to the extradition proceedings against the appellant. The EAW was issued by Judge Lysek of the District Court of Prerov on 19 May 2010. It was certified by the Serious Organised Crime Agency on 14 July 2010. The EAW set out particulars of four offences of dishonesty. The appellant was arrested on 6 August 2010 and subsequently released on bail. At length the matter came before District Judge Wickham who ordered extradition.
3. The appellant had been convicted in the Czech Republic in his absence. He is entitled to seek and obtain a full re-trial. No great formality is required. He must apply within eight days of the conviction being served upon him. The application is made - and his right arises - under Section 306a of the Czech Penal Code. The eight-day period has not expired. Indeed, it has not started to run: the Czech authorities have apparently resolved only to serve the judgment of conviction upon the appellant on his return to the Czech Republic.
4. The EAW is what is called a conviction warrant under Section 2 (2) (b) of the 2003 Act; that is, it contains - in this case in considerable detail - the statement referred to in Section 2 (5) and the information referred to in Section 2 (6). Those sub-sections respectively provide:

"(5) The statement is one that —

(a) the person in respect of whom the Part 1 warrant is issued has been convicted of an offence specified in the warrant by a court of the category 1 territory, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence.

(6) The information is —

(a) particulars of the person's identity;

(b) particulars of the conviction;

(c) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence, if the person has not

been sentenced for the offence;

(e) particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offence, if the person has been sentenced for the offence."

5. Section 2 (2) (a) by contrast concerns what is called an accusation warrant, which must contain the statement referred to in Section 2 (3) and the information referred to in Section 2 (4). The Section 2 (3) statement is to the effect that the person concerned is accused of a specified offence in the requesting State and the EAW is issued so that he might be extradited and prosecuted there. The Section 2 (4) information includes the circumstances of the alleged offence and the sentence that might be imposed in respect of it.
6. It seems to have been submitted before District Judge Wickham that the EAW was not a conviction warrant. She held that it was and that it complied with Section 2 and was valid. It is now accepted on all hands that the EAW is properly described as a conviction warrant.
7. The question which has emerged on this appeal is whether, in the events which have happened, the appellant is in truth an accused, not a convicted, person. Miss Drudy for the appellant submitted to Mr Justice Ouseley that he is an accused person, that the EAW is accordingly bad and he is entitled to be discharged. The essence of her argument was, as Mr Garlick QC's submission before us is, that the appellant enjoys an indefeasible right to be re-tried having been convicted in absence. The right is given by Section 306a of the Czech Penal Code. We have a letter dated 27 August 2010 from Judge Lysek who issued the EAW. It is notable that this is there said:

" ..... the sentenced person was sentenced to imprisonment in a length of two years and classified into a security prison (a third type of prison out of four) by a final and conclusive judgment issued by the District Court in Prerov on 26 May 2007, ref no. .... This sentence is enforceable.

The judgment is final and enforceable until the sentenced person, after having been delivered the judgment, files a motion to reverse the judgment under section 306a (2) of the Penal Code."

8. The appeal first came before Mr Justice Ouseley who on 3 February 2011 adjourned it to a Divisional Court of three judges because it appeared to him that there were conflicting authorities of this court bearing on the issue.
9. The case was restored before Lord Justice Pill, Mrs Justice Rafferty and Mr Justice Mackay on 2 March 2011. Lord Justice Pill had asked the Attorney General to appoint a friend of the court to assist and Mr Watson appeared in that capacity, as he has appeared before us today. The prosecuting authority moreover had, by the time of the hearing in the Divisional Court, instructed leading counsel Mr Hardy QC. Also at Lord Justice Pill's request the Court Office had, on the day before the hearing, contacted EUROJUST with a view to seeking some comparative information as to how the

distinction between accusation and conviction warrant is applied in other Member States of the European Union. The court received some ten replies, some the day before and some on the morning of the hearing. Mr Hardy's skeleton argument had also been received the day before. Based on the arrival of all this material when the hearing was imminent - and I hasten to say there is no criticism for delay on anyone's part - it is not surprising that Miss Drudy for the appellant sought an adjournment. That was granted, and so the matter comes before us today.

10. As well as all the other documents, we have the advantage of an up-to-date skeleton argument from Mr Watson which collates the European material. That now includes some late submitted documents, including one from the Czech authorities to which I will refer in due course.
11. The conflicting or apparently conflicting authorities of this court to which Mr Justice Ouseley referred are as follows.
12. Bikar [2003] EWHC Admin 372. The appellants had been convicted and sentenced in their absence in the Czech Republic. Reference was made to Section 306a which is in play in the present case as entitling the appellants in Bikar to an automatic appeal, as it was put, against the judgment within eight days of the delivery of that judgment. The question arose as to whether the appellants were accused persons or convicted persons. It was argued on their behalf that they were convicted persons because the documents provided by the Czech Republic repeatedly referred to their convictions as final by operation of Czech law. However this court found that owing to the rights of the appellants to have their convictions set aside, it was manifestly plain that the convictions were not final and that therefore the appellants were accused persons (see per Henriques J at paragraphs 30 to 35). The warrant in that case was an accusation warrant.
13. In Czech Republic v Janiega [2010] EWHC Admin 463 the prospective extraditee had absconded after the commencement of his trial in the Czech Republic. An EAW was issued. In the period between issue of the warrant and the extradition hearing in this jurisdiction the proposed extraditee was convicted in his absence although lawyers attended the hearing on his behalf. He was also sentenced. His lawyers lodged an appeal against conviction and sentence. On appeal, the conviction was upheld but the sentence reduced by one-third. At the extradition hearing here the district judge ordered the requested person's discharge on the basis that the warrant was defective because the requested person's status had changed from that of an accused person to that of a convicted person. The requesting state appealed. The Divisional Court allowed the appeal. Mrs Justice Swift, giving the judgment of the court, held that the effect of the right to a reversal of judgment under Section 306a was that the requested person's conviction was not final and enforceable. Accordingly the requested person was accused and not convicted within the meaning of the 2003 Act. Mrs Justice Swift stated at paragraph 53:

"53 The further information which has been provided by the Czech Republic Judicial Authority puts it completely beyond doubt in our view that the conviction and sentence were not final and enforceable."

14. The Divisional Court allowed the Czech Republic's appeal and the accusation warrant was held to be good.
15. In Ruzicka v Slovakia [2010] EWHC Admin 1819, this court referred with approval to the decision in Janiega and reached a like conclusion in respect of a similar provision in the law of Slovakia. I need not, with respect, take further time with that authority.
16. As can readily be seen, the Czech Republic was the requesting state in the first of these two cases, in both of which the appellants were convicted in their absence but enjoyed the right to a re-trial under Section 306a. The court held that the convictions were not final and the appellants were to be treated as accused persons.
17. The case which seemed to Mr Justice Ouseley to go the other way was Sonea v Mehedinti District Court of Romania [2009] EWHC Admin 89. In that case the appellant had been tried and convicted in his absence. However he enjoyed - or more accurately this court on somewhat uncertain evidence was prepared to assume that he enjoyed - a right to a re-trial. He was sought in this country on a conviction warrant. It was submitted that he should only have been amenable to an accusation warrant. Lord Justice Scott Baker, with whom Mr Justice Maddison agreed, said:

"16 The structure of Part 1 of the Extradition Act 2003 envisages a step by step approach by the judge. Each step requires consideration of a particular question and its answer determines the next move that the judge is required to make. It is to be noted that it is only when the step by step exercise takes the judge to s.20" -

which I have not set out -

"that he is required to consider whether the person was convicted in his presence, whether he deliberately absented himself from his trial and whether he would be entitled to a retrial or (on appeal) to a review amounting to a retrial. As Ms Mannion, for the respondent, observes s.20 is only reached where a person has been convicted and if Ms Freeman's argument is correct none of the steps set out in such detail in s.20 would be relevant.

17 The important s.20 criteria, it seems to me, come into play at the relevant time. As the authors of the second edition of the Law of Extradition and Mutual Assistance point out at para 5.99:

'Section 20 is intended to ensure that defendants who have been convicted in their absence but who did not have an opportunity to appear at their trial (e.g. because they were unaware of it) are not extradited unless they are guaranteed a fair trial in their presence in the category 1 requesting state. The judge is required to proceed under s.20 if the defendant is alleged to be unlawfully at large after conviction of an extradition offence (s.11(4)).'

18 Ms Freeman's argument, as it seems to me, puts the cart before the

horse. It seeks to extract questions that Parliament has said fall to be dealt with under s.20 and make them issues that determine the nature of the warrant, whereas the legislation clearly sets out a step by step process that the judge must follow."

18. Lord Justice Scott Baker then referred to Caldarelli v Court of Naples in their Lordships' House [2008] 1 WLR 1724, and continued at paragraph 22:

"22 The fact, if it be the case that the appellant has, as I am prepared to assume, an unfettered right to a retrial does not stop the warrant from being a conviction warrant or mean that the judge has gone wrong at any point when going through the 2003 Act. As Lord Bingham pointed out at para 23 in Caldarelli:

'Providing as they do for international cooperation between states with differing procedure regimes, the Framework Decision and the 2003 Act cannot be interpreted on the assumption that procedures which obtain in this country obtain elsewhere. The evidence may show that they do not.'

23 The differing procedural regimes in other countries are apparent from many of the authorities. What is essential is that judges dealing with applications for extradition under European Arrest Warrants should follow carefully the step by step approach set out in Part I of the 2003 Act. That in my judgment is the relevant message from their Lordships in Caldarelli and that is the course that was evidently followed in the present case."

19. Mr Justice Ouseley was inclined to consider (paragraph 12) that Sonea was "more consistent with the statutory framework" than the three cases relied on for the appellant.
20. It seems to me that the following propositions are of some importance; indeed they are determinative of this appeal.
21. (1) The 2003 Act has to operate in relation to warrants from different jurisdictions where the principles and procedures of the criminal courts often differ, both from each other and certainly - most of them being civilian jurisdictions - from criminal process in England.
22. (2) Accordingly the statements and information prescribed to be given by Section 2 (3) to (6) of the 2003 Act will in every case reflect local practice; it is possible that what one State regards as an accusation case will in another be treated as a conviction case. The material supplied by other Member States of the European Union through EUROJUST, and very helpfully collated by Mr Watson acting as friend of the court, shows that there is no consensus across the European Union as to the approach to be taken within the EAW scheme to convictions in absence where the individual enjoys an unqualified right of re-trial. Indeed, the Czech authorities, with respect, seem to have shifted ground somewhat on that issue.

23. (3) It must be inherent in the scheme that our courts, in deciding whether the fugitive's extradition is sought on a valid EAW within the meaning of Section 2 of the 2003 Act, will go on the basis of the statements in the warrant; and will properly categorise the relevant facts according to the procedures and law of the requesting State.

24. Lord Bingham said in Caldarelli (paragraph 24):

"24 Under Article 1 of the Framework Decision the EAW is a judicial decision issued by the requesting state which (by Article 2) this country (subject to the provisions of the Decision) must execute on the basis of the principle of mutual recognition. It might in some circumstances be necessary to question statements made in the EAW by the foreign judge who issues it, even where the judge is duly authorised to issue such warrants in his category 1 territory, but ordinarily statements made by the foreign judge in the EAW, being a judicial decision, will be taken as accurately describing the procedures under the system of law he or she is appointed to administer. Here, as is common ground, the foreign judge has treated the appellant as an accused and not a convicted person. This seems strange to an English lawyer, familiar with a procedure by which a defendant sentenced to imprisonment at the end of a jury trial goes down the steps from the dock to the cells. But such is not the practice in Italy where the trial is indeed a continuing process, not yet finally completed in this case, and not an event."

25. The statement of information, having its source in the judicial authority in the requesting state, is ordinarily in our courts to be taken at face value. It may exceptionally be appropriate to initiate further inquiry of the requesting state's authorities. There is, as it happens, a further letter from Judge Lysek in the present case.

26. (4) The broad definition of the EAW given in Article 1.1 of the Framework Decision is as follows:

"1 The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

This contains no reference to a final decision though there is a reference to a final judgment at Article 8.1 (f) of the Framework Decision. Article 8.1 sets out what the EAW shall contain.

27. Insofar as finality is properly an incident of conviction for the purposes of a conviction EAW, consistently with propositions (2) and (3) above, the warrant will reflect the meaning of finality applied in the criminal jurisdiction of the requesting state.

28. (5) The existence of a right of re-trial cannot be treated, as a matter of law, as systematically inconsistent with the fugitive being a convicted person. That would be

to apply a "one-size fits all" approach which is contradicted by the considerations I have already set out. And as Lord Justice Scott Baker observed in Sonea (paragraphs 16 to 18), it is an approach which cannot sit with Section 20 of the 2003 Act.

29. It is in my judgment notable that the three decisions of this court relied on by the appellant are all cases where the result arrived at was in fact in conformity with the requesting state's position on the question whether the proposed extraditee was to be treated as accused or convicted. So far as those cases contain dicta inconsistent with the propositions which I have set out, with very great respect I would disagree with their reasoning. But there is no reason to hold that in the result any of those cases was wrongly decided on its facts. And it seems to me plain that Sonea was correctly decided.
30. Mr Garlick's whole argument - though he would not accept this formulation of it - is that it is for our courts to decide according to their lights whether on the facts the case is a conviction case; and that according to our lights we should hold that because of the appellant's Section 306a right it must in fact be regarded as an accusation case. That approach is contrary to the position taken by the Czech authority, as plainly explained in Judge Lysek's letter to which I have referred. We also have a very recent communication which I have mentioned in passing. It comes from an official of the Czech Republic and follows the inquiry initiated by Lord Justice Pill. That document has this:

"The right of a fugitive person, who has been convicted in the proceedings 'against a fugitive', to ask within eight days from service of the judgment for reversal of judgment of conviction and re-opening of the case, cannot be compared to usual appeal procedure. It is unique right given only to the fugitive person in order to realise the legal principle according to which every accused person has the right to be present at criminal proceedings. The whole criminal proceedings as such will be repeated. Nevertheless, if the fugitive who has been convicted in absentia doesn't ask for re-opening of the case, the judgment remains legally binding and enforceable, since the whole proceedings had been already taken place and the judgment is already legally valid."

31. For all these reasons I would hold that the EAW in this case was good and I would dismiss the appeal.
32. MR JUSTICE COLLINS: I agree.
33. MR JUSTICE STADLEN: I also agree.
34. LORD JUSTICE LAWS: Nothing consequential, is there, Mr Hardy?
35. MR HARDY: Not from the respondent's perspective, my Lord, no.
36. LORD JUSTICE LAWS: It remains for me to thank counsel for their expeditious and clear argument in this case and in particular Mr Watson for having assisted the court at the request of the Attorney General.