Neutral Citation Number: [2019] EWHC 1253 (Admin)

Case No: CO/4577/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2019

Before :

THE HONOURABLE MR JUSTICE KERR

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Between :

Przemyslaw Bialkowski	**Appellant**
v	
Regional Court in Kielsce, Poland.	**Respondent**

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Catherine Brown (instructed by **Kaim Todner Solicitors**) for the **Claimant**
Rachel Kapila (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 14th May 2019

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Judgment

The Honourable Mr Justice Kerr:

1. The appellant, Mr Bialkowski, appeals against the decision of District Judge Tempia made on 12 November 2018 to extradite him to Poland to serve a six month prison sentence for driving while disqualified. The offence was committed on a public road in Kielce, Poland, on 26 March 2006. The prison sentence was imposed first as a suspended sentence on 21 September 2006; then, on 10 September 2007, the sentence was activated.

2. Silber J granted permission to appeal on two grounds, of which one is pursued: whether it was open to the district judge to find that the appellant had deliberately absented himself from his trial; the issue arising under section 20 of the Extradition Act 2003 (the Act). He refused permission to appeal on the basis that extradition would breach the appellant's rights under article 8 of the European Convention on Human Rights (ECHR).

3. The appellant was arrested and questioned in Kielce on 29 March 2006. He provided his address in Poland and was given a document stating that he must appear at any "request from law enforcement authorities over the time of proceedings" and must notify any change of address; if he did not do so, any correspondence sent to the address he had provided would be considered properly served on him.

4. He was questioned again on 4 May 2006 and signed a document acknowledging his obligation to notify any change of address. He then came to the UK during the same month, May 2006. A notice to appear at court was sent to the address he had given. He did not collect the notice to appear. The local court in Kielce held a hearing in his case in his absence on 24 August 2006. On 15 September 2006, a summons was sent to his address notifying him that he must appear in court on 21 September 2006.

5. He did not attend. On 21 September 2006, in his absence, the court imposed the six month suspended prison sentence. The appellant did not appeal or request a retrial within the statutory time limit. As a result the sentence became final on 29 September 2006. The summonses to attend court were returned to the court marked "post returned to the sender after non-collection within time limit".

6. Later, the appellant was summoned to appear at the court on 10 September 2007 by a document sent to the same address. He did not collect the summons; nor did he appear at the court on that day. In his absence, the court activated the previously suspended sentence of six months' imprisonment. Notification of the court's decision was sent to the same address. He did not collect that decision to activate the suspended sentence.

7. The decision to activate the suspended sentence became final, in the absence of any communication from the appellant, on 11 October 2007. He was sent a further communication, to the same address, requiring him to report to the remand centre in Kielce by 24 June 2008. He did not collect that document, nor did he attend the remand centre to serve his sentence.

8. On 26 January 2009 he made an application to vary the decision to activate his suspended sentence. So he must have known about that decision. The local court in Kielce refused that application on 17 February 2009. The appellant personally collected the written decision refusing his application. He appealed against that refusal decision, to the

regional court in Kielce. The regional court made a decision on 7 April 2009, upholding the refusal to vary the decision to activate the suspended sentence.

9. The appellant did not attend the hearing at which that decision was given. Written notice of the decision was sent to the same address. That document was collected by the appellant's mother. On 27 April 2009, the appellant applied for a stay of the sentence of immediate imprisonment. The local court refused that application on 27 May 2009.

10. He appealed to the regional court, which dismissed his complaint and upheld the local court's decision. It appears from the information provided by the Polish judicial authorities that this decision was made on 9 September 2009 and that at the same time the local court issued a domestic search warrant. The appellant was not found in Poland because he was living in the UK.

11. A European Arrest Warrant (EAW) was issued on 18 November 2010 in respect of the appellant, seeking his extradition to Poland. It was certified by the National Crime Agency (NCA) on 10 June 2015. The appellant was then arrested in this country on 6 December 2015 but released on conditional bail on 13 January 2016.

12. An extradition hearing took place on 19 April 2016. District Judge Baraitser discharged the appellant under section 20(7) of the Act. That must have been on the basis that the appellant would not be entitled to a retrial or (on appeal) to a review amounting to a retrial. It therefore appears (though I have not seen a written decision) that the district judge did not find that the appellant had deliberately absented himself from his trial.

13. A second EAW was issued on 31 August 2016 and certified by the NCA, this time rather more speedily, on 9 September 2016. Nearly two years later, on 14 August 2018, the appellant was living with a woman near Manchester and committed two battery offences, one against her and one against a neighbour. He was arrested the next day, probably both under the second EAW and also in connection with the two offences of battery.

14. His extradition hearing was adjourned on 16 August 2018, to await the outcome of the domestic charges, to which the appellant pleaded guilty on 14 September at the Greater Manchester Magistrates' Court. He was given a community order and a restraining order was made in favour of the neighbour. The extradition hearing was then fixed and heard by District Judge Tempia on 2 November 2018.

15. The appellant was unrepresented. He gave evidence on oath, which the district judge found dishonest, evasive and unworthy of belief in several respects. She gave her written decision on 12 November 2018. She largely accepted his evidence about his life and work in the UK, but rejected his account of events relating to the proceedings in Poland. In particular, she rejected his evidence that he was estranged from his mother and that he had, in 2015, been arrested under the first EAW and then released in the Netherlands.

16. The district judge decided to extradite the appellant to Poland under section 21(3) of the Act. She rejected the proposition that it would be unjust or oppressive to order his extradition. She was satisfied, to the criminal standard, that he had deliberately absented himself from his trial. He was therefore not entitled to rely on absence of a right to a retrial. Finally, she applied the "balance sheet" approach recommended by the Divisional

Court in *Celinski v. Slovakian Judicial Authority* [2015] EWHC 1274 (Admin) and found that extradition would be compatible with the appellant's Convention rights.

17. Both counsel referred in their written and oral arguments to recent case law on the issue of proof that a requested person has deliberately absented himself from his trial. I was grateful for the tour through the cases, from which, without reviewing them in detail, I discerned the following points relevant to the present appeal.

18. An accused is taken to be deliberately absent from his trial if he has been summoned to appear at court in a manner which, even though he may have been unaware of the scheduled date and place of trial, does not violate article 6 of the ECHR: *Cretu v. Local Court of Suceava, Romania* [2016] 1 WLR 3344, per Burnett LJ (as he then was) at [34], proposition (ii)).

19. In connection with cases where the accused is not personally given the summons to attend court, the Court of Justice (Fourth Chamber) stated in *Openbaar Ministerie v. Dworzecki* C/108-16 PPU at [51] that the executing judicial authority may "have regard to the conduct of the person concerned" and referred to a test of "manifest lack of diligence of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him".

20. In *Romania v. Zagrean* [2016] EWHC 2786 (Admin), the Divisional Court, dealing with three applications, reaffirmed the authority of *Cretu*, citing (at [66]) the propositions at [34] in that case, including the proposition at (ii), quoted above. Cranston J (giving the judgment of the court also including Sharp LJ) held that the authority of *Cretu* had not been shaken by the analysis of the CJEU in *Dworzecki*: see at [77]. A requested person "will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial" ([81]).

21. The following month, in *Stryjecki v. District Court in Lublin, Poland* [2016] EWHC 3309, Hickinbottom J (as he then was) drew seven propositions from those three cases, including at (v) that "generally the requesting authority must unequivocally establish … that the person actually received the relevant information as to time and place [of trial]" and that it is "insufficient for the requesting authority to show merely that the domestic rules as to service … were satisfied, if it is not established that the person actually received the trial information".

22. His next proposition, at (vi) was that:

> "[e]stablishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person has deliberately absented himself from his trial".

23. And at proposition (vii), Hickinbottom J said where actual knowledge of the trial information is not shown, because of a "manifest lack of diligence" on the part of the accused, "notably where the person concerned has sought to avoid service of the information so that his own fault led the person to be unaware of the time and place of his trial, the court may nevertheless be satisfied that the surrender of the person concerned would not breach his rights of defence".

24. Hickinbottom J's sixth and seventh propositions have not commanded complete support in this court. In *Tyrakowski v. Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin), Julian Knowles J at [30] respectfully queried whether the sixth proposition be reconciled with the Divisional Court's proposition in *Zagrean* at [81] that an accused "will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial".

25. And in *Dziel v. District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin), Ouseley J at [17] shared the concern of Julian Knowles J and professed himself unsure of "the derivation and accuracy either of [the proposition numbered] (vii)". He preferred to refer only to the Divisional Court cases. Ouseley J added the useful point at [28] that "deliberately putting it beyond the power of the prosecutor or court to inform him" of the time and place of trial "includes breaching his duty to notify them of his changes of address".

26. The Divisional Court (Irwin LJ and Stuart-Smith J) then proceeded to "respectfully endorse and adopt" Hickinbottom J's seven propositions, setting them out in full: *Szatkowski v. Regional Court in Opole, Poland* [2019] EWHC 883 (Admin), at [22]. It is not clear whether the decisions of Julian Knowles J and Ouseley J were cited to the Divisional Court; there is no indication in the judgment of the court that they were.

27. For my part, I respectfully consider that the seventh proposition is sound and that the sixth proposition can be reconciled with what was said by Cranston J in *Cretu* at [81]. I think Hickinbottom J was simply making the point that the requesting state does not prove that an accused deliberately missed his trial just by proving that he acted evasively in an attempt to avoid receipt of trial information documents. However evasive the accused's conduct, the requesting state must still prove that it took the steps that would acquaint a non-evasive accused with the time and place of trial.

28. I come to the submissions of the parties and my reasoning and conclusions. Ms Brown submitted first that the appellant has no right to a retrial if extradited to Poland, a point accepted by Ms Kapila for the respondent; but absence of a right to a retrial only assists the appellant if he did not deliberately absent himself from his trial (as the district judge correctly pointed out at paragraph 66 of her judgment).

29. More pertinently, Ms Brown submitted that it was not open to the district judge to find that the appellant had deliberately absented himself from his trial. At paragraph 68 she professed herself sure that he had done so:

> "… The further informations make it clear that Mr Bialkowski provided an address to the authorities and was under an obligation to notify them of any change of address for longer than 7 days. All the notifications for his hearings were sent to his nominated address. Furthermore, in his application to appeal the decision to activate his suspended sentence on 25th January 2009, his address is recorded as being that which he gave to the authorities in 2006."

30. She commented further (paragraph 69) that the summons to appear sent to him on 15 September 2006, was sent to the address he had given. At paragraph 70, the judge noted that she had not accepted his evidence about his knowledge of the proceedings and said

that the evidence was "overwhelming" that he had deliberately absented himself from his trial.

31. Ms Brown's submission in written argument was that the respondent must prove the appellant "actually received the relevant information as to time and place of trial". That is not necessarily correct, for reasons already explained. She also submitted that the information from the respondent "does not assert that the Appellant was actually made aware of the hearing, merely that collection notices … were left at his address on two occasions" and that there was "no evidence that either of those notices were actually received by the appellant or that they contained any details as to the date of the trial".

32. Ms Brown criticised the reasoning of the district judge as too thin to support her conclusion that the appellant had deliberately absented himself from his trial. She relied on Hickinbottom J's fifth and sixth propositions, explained above. She said the judge had failed to engage with the case law and had not considered any "manifest lack of diligence" issue.

33. Ms Kapila defended the reasoning of the district judge, submitting that she was entitled to find that the appellant was not a witness of truth; that it was sufficient for the respondent to show that his unawareness of the trial date was his own fault and the result of his own conduct; and that there was ample evidence to support her finding that, if he did not know the actual trial date, that was because he had deliberately acted to avoid receipt of documents by leaving Poland without notifying a change of address. He had also managed in 2009 to make a series of applications to the courts in Poland.

34. I have no difficulty in accepting those submissions and rejecting those of the appellant, eloquently though they were made by Ms Brown. The reasoning of the district judge is succinct and to the point. She was not required to set out the case law in detail. She heard the evidence and her findings against the appellant were fully justified on the basis of the evidence she had heard. I agree with her characterisation of that evidence as "overwhelming".

35. It is true that she did not make a clear finding as to whether the appellant actually knew the trial dates in 2006. But that does not matter. It would be difficult to be sure whether he knew the trial dates and deliberately did not attend on those dates, or whether he deliberately avoided knowing what the dates were because he did not want to know what they were. Either will do. The reasoning is adequate to support the conclusion, based as it was on the detailed findings of fact at paragraphs 50-55. That ground of appeal fails.

36. The appellant renewed his application for permission to appeal on the ground that extradition would be incompatible with his rights under article 8 of the ECHR. Silber J refused permission to appeal on that ground. Ms Brown submits that the district judge was bound to find that extradition would not be compatible with the appellant's article 8 rights.

37. The judge accepted the appellant's evidence about his life and work in the UK. He had been in a relationship with his partner for a year and a few months. He works in the building trade and is self-employed. He was living in Salford, not with his partner in Stalybridge because of the restraining order, which he was hoping to get discharged.

38. The district judge set out the factors for and against extradition, in line with the "balance sheet" approach. It is not suggested that she erred in principle in her approach to the exercise.

39. She accepted that the offence committed in Poland was long ago and was not the most serious of crimes. On the other hand, the disruption to his life from a short sentence would be relatively slight precisely because the crime was not serious enough to attract a lengthy prison term. She took into account that the appellant has no dependant children and that his partner's daughter, aged 12, does not live with the appellant and his partner. He had assaulted his partner but she stood by him.

40. There was an application to adduce fresh evidence. I looked at that evidence *de bene esse*. In my judgment, there is no need to determine the application to adduce the fresh evidence. The new evidence adds little or nothing to the evidence that was before the district judge, so far as the article 8 issue is concerned. I would, in any case, not admit the fresh evidence about the appellant's experience in the Netherlands, since the judge rejected his account on that point. But it does not impact on the article 8 issue.

41. I am clear in my mind that Silber J was, with respect, right to refuse permission to appeal on this ground. There was no possibility whatever of the evidence persuading the judge that the high bar set in *HH v. Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 was surmounted. The consequences of the interference with family life would have to be exceptionally severe to outweigh the public interest in extradition. Here, they are not especially severe and the judge rightly rejected the article 8 argument.

42. For those reasons, the appeal must fail and is dismissed.