Neutral Citation Number: [2020] EWHC 2304 (Admin)

Case No: CO/4864/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 August 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

SABAH ZEKA	**Appellant**
- and -	
THE COURT OF FIRST INSTANCE, WEST FLANDERS DIVISION, BRUGES (BELGIUM)	**Respondent**

- -
- -

Florence Iveson (instructed by McMillan Williams Solicitors) for the **appellant**
The **respondent** did not appear and was not represented

Hearing date: 20 August 2020

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is an application for permission to appeal in an extradition case. The mode of hearing was BT conference call. The Administrative Court had provided an opportunity for the appellant's representatives to state any preference or provide any reasons why remote hearing was considered inappropriate. Like them, I was satisfied that a telephone hearing was appropriate. I heard oral submissions in exactly the way I would have done had we all been physically present in a court room. In relation to open justice, the hearing and its start time – together with an email address which could be used by any person wishing to observe the hearing – were published in the cause list. The hearing was recorded. This judgment will be released into the public domain. By having a remote hearing we eliminated any risk to any person from having to travel to, or be present in, a court. I am satisfied that no right or interest was compromised, and that if there was any interference with or qualification of any right or interest, it was justified as necessary and proportionate.

The old s.2 point (species/number)

2. The situation which I face today involves two sets of arguments being before the Court. The first set of arguments stem from the Grounds of Appeal that were originally pursued in this case when an appellant's notice was filed back in December 2018. What had happened was that the District Judge on 30 November 2018 had ordered extradition after an oral hearing on 15 November 2018. Extradition was ordered on a European Arrest Warrant (EAW) which was an accusation warrant. At that time and by way of a proposed appeal it was intended to pursue two points. One was an article 3 point which has been abandoned but which was in fact the reason why this case was stayed. The other point was a section 2 Extradition Act 2003 point which was all about whether the accusation EAW was section 2-compliant in the way in which it communicated the alleged offending. That point had stayed in the case through to today. Goose J on 2 July 2020 refused permission to appeal on the basis that this point was not reasonably arguable. I agree with him. In my judgment, this is not a reasonably arguable ground of appeal.

3. As it seems to me the point, in this case, really comes to this. Although it is accepted that the EAW communicated the substance of what I will call the 'species' of the offence, the unidentified 'number' of incidents of that species of offence put the warrant in breach of section 2, because the UK court was not in a position to perform its duty of testing for compatibility, in particular, with the requirement of 'dual criminality'. It is right that the EAW in this case states that 'the total number of offences were yet to be determined'; and that the further information refers to 'at least a total of 25 facts committed'; and so Ms Iveson can therefore say that there is, on the face of it at least, a lack of clarity as to number of incidents. But, in my judgment, that does not give her a reasonably arguable ground of appeal. She has accepted, in my judgment rightly, in her skeleton argument for today that the EAW read with the further information contained enough information (or as she put it "just enough" information) to comply with section 2 insofar as summarising the conduct complained of. Nor, in my judgment, was there any deficiency in this case so far as the 'species' of offence is concerned. That was the point that Goose J was making on the papers

when he referred to 'the offence' being clear. If the 'species' of offence is clear, then 'dual criminality' compatibility testing can be undertaken. If the species of bird is known, the precise number within the flock does not change the fact that the species can be tested as to the requirement of dual criminality.

4. Ms Iveson showed me as her 'best shot' in relation to this point Taylor 2012 EWHC 475 (Admin). That was certainly a case about multiple offences and section 2 compatibility. But, in my judgment, that case does not support her proposition that the 'number' of occasions when it is being alleged that a 'species' of offence was committed has to be spelled out in an EAW. Indeed, I note that Counsel's submission in that case did not even go that far. The submission was (see paragraph 10) that the EAW should have given "some indication of the number of occasions that each sort of offending was committed". Nor did Collins J, as I read his judgment, accept that formulation, put in even that way. His concern (at paragraph 12) was to do with the need, in that particular case, to identify "the place" at which offences had been committed, in the context of understanding the substance of what was being alleged. I think the respondent are right in the respondent's notice, and Goose J was right in his decision on the papers, this is not a reasonably arguable ground of appeal and I refuse permission on it.

The new points

5. That is not, however, the end of the case. I said there were 'two sets of arguments'. By an application dated 12 August 2020 Ms Iveson has sought to introduce fresh evidence and 3 new grounds of appeal. They are closely interlinked, as I see them. Ordinarily, such an attempt would be peremptorily dismissed on the basis that it is far too late to be introducing new grounds of appeal. On one view all 3 points are points which could, and should, squarely have been raised in this case in the light of a letter dated 15 January 2019. To explain what happened, subsequent to the District Judge ordering extradition on the accusation EAW, and subsequent to the filing of the notice of appeal, the Belgian authorities proceeded to convict the appellant in his absence on the matters for which he was accused. That conviction was described, in a letter constituting further information, dated 15 January 2019. That change, says Ms Iveson had the consequence in substance of 'transforming' what previously had been an accusation warrant, and extradition based on an accusation warrant, into what was in now in substance extradition on a conviction warrant. All 3 of her linked new grounds arise out of that and the subsequent events.

6. I am not prepared to deal with permission to appeal without having given the respondent squarely an opportunity, directed by me, to respond to the substance of the 3 new points. In fairness, Ms Iveson's instructing solicitor recognised as a possible course, in an email to the court prior to this hearing, that I might 'wish to hear from the CPS before deciding on permission to appeal'. If I were satisfied that there is absolutely no justification for the delay in raising these points, or if I were satisfied that there is absolutely nothing in the points without hearing from the respondent, then I would simply refuse permission to introduce them. That, however, is not the position. Having said that, I am not prepared to grant permission to appeal either. One option would be for me to adjourn this case part-heard, to allow the respondent to file a response, and then deal with permission to appeal having done so. I am persuaded, in all the circumstances, including the fact that in fairness the respondent was served with the application of 12 August 2020 and has not specifically responded to it, that

the better course is to direct a 'rolled-up hearing' on the 3 new grounds. That is what I propose to do. The purpose of this judgment is really to explain why I am doing that and what I envisage will happen next in this case. One of the virtues of a rolled-up hearing, given that we are already at an oral hearing stage, is that the Court can simply 'grasp the nettle' in the near future, at a short hearing, and deal with all the points, with both parties able to say everything they want to say. It may be that having done so permission to appeal will be refused. It may be that the matter will be dealt with substantively. I do see the case-management and judge-allocation advantages, though, in this matter effectively being part-heard, having heard one voice of the two. And in those circumstances, I propose to reserve the rolled-up hearing to be listed before myself if possible.

7. The reason why I do not peremptorily dismiss the late introduction of the new grounds is this. Ms Iveson is entitled to say that, albeit through the prism of an application for an extension of the representation order to allow expert evidence, she did ventilate promptly – clearly foreshadowing them – two of the 3 linked new grounds. An application made promptly after the letter of 15 January 2019, on 4 February 2019, to this Court for an order to extend the representation order allow for expert evidence. That application specifically raised the prospect that the new January 2019 development would raise a ground under section 20 and a ground based on abuse of process. Ms Iveson is also entitled to say, as she does, that that application was renewed subsequently on 27 January 2020, again specifically linked to the points which she was saying that the appellant wished to raise. The application for an extension of the representation order was never substantively dealt with until Goose J refused it on 2 July 2020, when refusing permission to appeal. This renewal application puts that issue squarely before me. To that extent, and on that basis, Ms Iveson can properly say that the points have been foreshadowed and nobody simply 'sat on their hands'. She makes an additional point, on which I do not need to comment at this stage, namely she says 'the boot was on the other foot' and that there was a legal obligation, in the context of extradition, for the respondent to be putting forward positively updating information relevant to what was happening in Belgium.

8. The 'transformative' change, as Ms Iveson characterises it, in the nature of the extradition case arose from the conviction in December 2018 which led to the appellant being sentenced to 8 years custody. That sentence was on appeal increased to 10 years, as I understand it, in November 2019. But that appellate court decision has itself been annulled on further appeal and the case remitted back to a different appellate court, currently with a hearing listed for 13 November 2020. The updated picture before the court relies on a witness statement of Mr Cohen which is before the court as putative fresh evidence. Since I am not ruling on them, I need not go into the new grounds in detail. I am not going to shut out any aspect of them. I am only refusing permission in relation to the old and pre-existing section 2 ground. I will however explain briefly how I currently see the picture and why I consider that there are questions that arise at which call for the respondent's response.

The s.20 point

9. It is convenient to take first the new section 20 point. The essential ground, as I currently see it, is as follows. The Belgian conviction 'transforms' this extradition in substance from an accusation-based extradition to a conviction-based extradition. That calls for the application, albeit through the prism of the Court's appellate

jurisdiction, for an evaluation of whether the legal standards and safeguards relevant in conviction cases are adhered to in the present case. The argument is that the participation of a lawyer who was seeking to persuade the Belgian court not to proceed in the appellant's absence cannot be taken as an article 6 ECHR-compliant participation by the appellant in a trial in his own absence. Nor, it is said, can it be said with the necessary confidence that the conviction in absence leaves the appellant with article 6-compliant 'retrial' rights. Goose J thought about this point, in rejecting permission for extending the representation order for the expert evidence. He considered that the further information contained in the letter of 15 January 2019 was a complete answer. That letter states that during an appeal the appellant will have the right to take part fully asserting his right of defence and able to challenge "some facts or introduce new evidence". Goose J thought that a complete answer to the question of article 6, and therefore section 20, compatibility.

10. The current position is that the case has been remitted to the Antwerp appeal court. According to the witness statement of Mr Cohen the Court of Cassation in remitting the case to the Antwerp Court, and annulling the previous appeal court decision, has made a finding as follows: "the fact that the accused person is subject to bail conditions in another jurisdiction due to an EAW does not necessarily mean he cannot exercise his right to be present at trial because he can consent to extradition in order to do so". There is a factual question and a point of principle here. The factual question is whether, on further information, the respondent will be able reliably to assure this court that there are – and remain – 'merits retrial' rights, open to the appellant clearly joined. The point of principle is as to the article 6, and section 20, implications of denying a continuing 'merits appeal' jurisdiction to a person resisting extradition, on the grounds that they are a person resisting extradition, in circumstances where those protections arise to a person resisting extradition before a court considering whether to uphold the order for their extradition. If the factual position is that there is a prospect that the remitted appeal hearing in Antwerp in this case will deny what would otherwise have been a 'merits retrial' appeal, on the basis that the appellant is resisting extradition and choosing not voluntarily to go to Belgium, then the point of principle as it seems to me would squarely be raised.

11. In my judgment, the court needs the assistance or at least to give the respondent the opportunity of providing assistance on both the factual and the legal perspective in relation to that ground. I am sufficiently concerned by it not to reject it at this hearing without further and fuller and more fully-informed consideration. All arguments will be open to the respondent including the delay point if they wish to pursue it.

<u>The new s.2 point</u>

12. The next linked new ground arises under section 2. Ms Iveson submits that in a case where an accusation EAW is in place and extradition is pursued and ordered, and then the individual is tried and convicted in their absence, there is a sufficiently 'transformative' change in the nature and basis of the extradition that in principle and as a matter of law what is needed is a fresh (conviction) EAW with a fresh right to a fresh hearing. I have, at first blush, some real reservations about whether that submission put in that way is correct. The closest authority she was able to show me was <u>Bartlett</u> [2012] EWHC 2480 (Admin). That was a 'transformative' case, where 'accusation' became a 'conviction', but it was also a case where – possibly for other reasons – the requesting party issued a fresh warrant namely a conviction EAW

warrant. It was also a case which engaged trial in absence and article 6 ECHR and abuse of process considerations. It is not, as it seems to me, on all fours in either direction with the point that is raised here. I strongly suspect that the answer to this point is that at most it reinforces, but flows ultimately into, the section 20 point and that the critical issue is whether or not section 20 protections are in place for someone who has become a 'convicted' person having been previously an 'accused' person during the extradition process. I have formed no view.

The abuse of process point

13. Thirdly and finally Ms Iveson raises a ground based on abuse of process. She submits that there is, reasonably arguably, a ground of appeal on the basis that even if she is wrong about section 2 and section 20 it is an abuse of process either to have proceeded to convict the appellant while his extradition was pending and/or in failing to keep the court up to date as to the steps being pursued. Provisionally, that sounds to me like a 'backdoor' way to attempt to win a point which has failed through the 'front door' (of section 20 and section 2). But I am conscious that Bartlett analysed the position that arose in that case by reference to abuse of process.

Extension of the representation order for expert evidence

14. It seems to me that these 3 points are sufficiently interlinked that it would be artificial, and could cause injustice, to seek to sever some of them at the present stage. I am therefore going to direct a 'rolled-up hearing' in relation to all 3 of the new grounds. It is my intention that that hearing take place in the near future, if possible before me, once the respondent has had a fair opportunity to respond and both parties are in a position to prepare for the hearing. In light of the materials and questions that are now squarely before the court, and the fact that the respondent will have the opportunity to participate in what may well become a substantive appeal, and bearing in mind the evidence of Mr Cohen and the fact that the appellant has in the event been able to adopt the 3 points as grounds of appeal, I do not see a basis for adopting a different position than did Goose J on the question of expert evidence. That will simply serve to delay matters for what, on the face of it at the moment, seems to me to be no good reason. However, given that I am not granting permission to appeal but directing a 'rolled up hearing', the case will still be at the permission stage, but with the substantive to follow at the rolled-up hearing if the Court is then satisfied that it is appropriate to do so at that stage. I am not encouraging it, but it seems to me that it would be open to either of the parties to put forward in writing and in the run up to that hearing any stage or timeframe that they regard as truly necessary for the just disposal of this case. I am not prepared to give permission for expert evidence today. It seems to me that the issues are sufficiently and squarely before the Court based on the material that the Court has.

Conclusion

15. It follows from everything that I have said that this, in the end, is a case which raises interesting legal points about the change that takes place when someone is convicted and sentenced in their absence during extradition proceedings, were extradition was ordered on the basis of an accusation warrant. If there is a 'knockout blow' based on any decided case I have not been shown it, nor has the respondent yet taken the opportunity to draw my attention to it. I agree with Ms Iveson that there is no reason

why the rolled up hearing need be listed for more than half a day but the respondent will be able to apply in writing to vary the time estimate if it considers it appropriate to do so. It would be my intention that this rolled up hearing should come on speedily now before me are so that the nettle can be grasped and the issues disposed of.

16. I ordered as follows: (1) Permission to appeal on the section 2 ground contained in the Perfected Grounds of Appeal dated 21 December 2018 is refused. (2) There be a rolled-up hearing (permission to amend the grounds, permission to appeal, substantive hearing to follow if permission granted) on the 3 grounds of appeal contained in the Application to Amend Grounds dated 12 August 2020 on the first available date after 12 October 2020, to be listed before Fordham J if possible, with a time estimate of half a day. (3) Permission to rely on the statement of Mr Cohen as fresh evidence to be dealt with at that rolled-up hearing. (4) The application to extend the representation order to cover expert evidence is refused. (5) No order as to costs.

20 August 2020