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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 2069 (Admin)

No. CO/3589/2020

Royal Courts of Justice

Wednesday, 7 July 2021

Before:

MR JUSTICE HOLMAN

B E T W E E N :

JOEL FRANCISCO ESTEVEZ — Appellant

- and -

COURT OF MANTUA (ITALY) — Respondent

MS L. COLLINS (instructed by Taylor Rose Solicitors) appeared on behalf of the appellant.

MS S. TOWNSHEND (instructed by CPS Extradition Unit) appeared on behalf of the respondent.

J U D G M E N T

(A s a p p r o v e d b y t h e j u d g e)

MR JUSTICE HOLMAN:

1 On 30 September 2020 District Judge Ezzat, sitting in the Westminster Magistrates' Court, made an order for extradition. There were before him two conviction European arrest warrants, which he labelled as "EAW 1" and "EAW 2". Those warrants related to separate convictions on completely different dates in relation to completely different offences committed at completely different times.

2 EAW1 related to a conviction in February 2014 for offences of violence and aggression towards a named victim in November 2006. The district judge declined to make an order for extradition on EAW1 and discharged the requested person. His reason for doing so was, in essence, that he was not satisfied that the requested person had been served with, or had had knowledge of, the relevant conviction proceedings in Italy, which had taken place in his absence.

3 There is before me today a renewed application by the respondent prosecutor for permission to appeal from that decision by the district judge in relation to EAW1. I have not yet heard any argument in relation to EAW1 and I say no more about it in the present judgment.

4 EAW 2 related to a conviction on 10 December 2011 at a hearing at which the requested person had indeed been present. The district judge made an order for extradition on EAW2 to serve an outstanding sentence of 5

months and 10 days imprisonment. I consider, first, the appellant's appeal from that order for extradition on EAW2.

5 The sole and whole description of the offence to which EAW2 relates is described in paragraph 2 in the EAW which, in translation, is now at page 137 of the present bundles. It reads as follows:

> "The sentenced person in that while he was in house arrest on 11 October 2011 in [stated address] in compliance with a decision of the Supervising Court of Bologna of 14 September 2010, filed and served on the person concerned on 15 September 2010, left the place of detention ... on 10 October 2011."

In that quotation I emphasise the words "house arrest" upon which this appeal turns.

6 A few lines further down, under the heading "Nature and legal classification of the offence" is the word "escape". On the next page of the translation is a heading "Full description of offence not covered by section 1 above", and under that, the sole word "escape".

7 In another document dated 29 April 2020 from the Public Prosecutor's Office at the Court in Mantua, now at bundle page 150, to which I will make further reference in a moment, there is reference to "conviction for the offence of breakout". The choice of the words "escape" and "breakout" may be simply the words selected by the particular translator into the English language, and so far as I am concerned, nothing turns on any difference, if any, between the word "escape" and the word "breakout".

8 Fundamental to the law of extradition is the rule of dual criminality. This requires that before a person is extradited, whether on a conviction or on an accusation warrant, the extraditing court must be satisfied that the conduct and/or acts or omissions alleged and relied upon would amount also to a criminal offence in this country. In short, this country does not extradite people in relation to conduct which may be regarded as criminal conduct in the requesting state if it is not also regarded as criminal conduct here. Statutory effect is given to that principle by section 65(3)(b) of the Extradition Act 2003. This makes it a condition of extradition that --

> "...the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom."

9 When considering that subsection and the issue of dual criminality, it is extremely important to appreciate that the focus is, as that subsection says, upon "the conduct". It does not matter what precise label is attached by the requesting state to the conduct or offence in question. What matters is whether the conduct itself, which is described and relied upon, would constitute an offence here.

10 Before the district judge, Ms Louisa Collins, who represented the requested person then, as now, strongly submitted that such facts and information as had been given in EAW2 did not, and do not, amount to any recognisable offence under the law of England and Wales. In answer to that submission and argument Ms Saoirse Townshend, who appeared on behalf of the

prosecutor then, as now, submitted that there is an analogous offence under English law, namely the common law offence of escaping without the use of force from lawful custody. This offence is described in the current edition of **Archbold** at paragraph 28-166.

11 In his most careful judgment District Judge Ezzat referred to this issue as to dual criminality. He said at paragraph 25 of his judgment that:

> "The RP asserts that the offence as described is more akin to the breach of the community order rather than escape from lawful custody. The former not being an extradition offence; the latter being one."

12 He continued at paragraph 26:

> "The JA argue that the offence contained in EAW2 is an extradition offence and that its equivalent in the UK would be the common law offence of escape."

13 The district judge then cited at some length from paragraph 28-166 of **Archbold,** and concluded, at paragraph 28 of his judgment, that the requested person was in custody for the purposes of the common law offence. He stated:

> "The RP was under house arrest. His immediate freedom of movement was under the control of another, albeit he was not physically restrained. He was therefore in custody."

14 He concluded at paragraph 29:

> "I am satisfied that being placed under house arrest is a form of custody. The RP's unauthorised departure from it, therefore, constitutes an escape from custody. Escape is an offence in this jurisdiction and therefore I find that the offence in EAW2 is an extradition offence."

15 The requested person now appeals to this court from that finding and conclusion. Permission to appeal was granted by Stacey J on 20 April 2021. She said, at paragraph 6 of her reasons and observations:

> "... I consider that ground one, which challenges the judge's findings at paragraphs 27 to 29 of his judgment on dual criminality, is reasonably arguable. [The requested person] was convicted of breach of house arrest for which the analogue offence in England and Wales was considered to be the common law offence of escape from custody. It is reasonably arguable that the conditions of house arrest did not constitute custody and that he was not 'under the direct control of another'. A more obvious comparison might be breach of a curfew requirement imposed either as a bail condition or community order, neither of which was discussed in the judgment, or whether it would amount to an extradition offence. Permission is therefore granted to appeal on this ground alone."

16 Today, Ms Townshend, on behalf of the respondent prosecutor, has accepted or agreed with me that, when considering the issue of dual criminality and whether or not an offence is "an extradition offence" for the purposes of section 65 of the Act and the condition in section 65(3)(b) of the Act, the court must be sure that the facts alleged and relied upon by the requesting state would indeed constitute an offence under the law of England and Wales. In a situation where the parameters of an offence may not be precisely defined, it is not enough that the facts alleged and relied upon *may* constitute an offence. The court must be satisfied that they *do* constitute an offence. Herein lies the difficulty in the present case. As I have said, the only analogue offence relied upon under the law of England and Wales is a common law offence. There is no statutory definition of the offence, whose boundaries would thus be clearly defined by the statute. It is only possible to determine the boundaries of the common law offence of "escape from custody" by reference to a collection of decided authorities, a number of which I will refer to, in **Archbold** at paragraph 28-166.

17 The principal current authority appears from that passage in **Archbold** to be *R v Dhillon* [2005] EWCA Crim. 2996, in which the Court of Appeal Criminal Division gave judgment on 23 November 2005. It is not, in fact, possible to extract a precise ratio from the judgment in that case, because it is very clear from the latter part of the judgment, beginning at paragraph 22 through to the end of paragraph 29, that the essential basis upon which the Court of Appeal allowed the appeal against conviction in that case was that the summing-up had been extremely discursive and, frankly, very confusing to any jury. Indeed, after quoting at some length from the summing up, the Court of Appeal said, at paragraph 27:

> "We are left rather breathless by this passage and remain concerned that the jury were not in any sense adequately instructed on the issues."

18 Thus the outcome in *Dhillon* did not depend upon any precise description or characterisation of the common law offence, but turned upon that unsatisfactory and confusing summing-up.

19 However, earlier in the judgment, the Court of Appeal helpfully referred to a collection of authorities on this topic. At paragraph 21, which is in effect reproduced by **Archbold** at paragraph 28-166, the Court of Appeal said:

> "In our judgment, these authorities demonstrate that the prosecution must, in a case concerning escape, prove four things:
>
> (i) that the defendant was in custody;
>
> (ii) that the defendant knew he was in custody (or at least was reckless as to whether or not he was);
>
> (iii) that the custody was lawful; and
>
> (iv) that the defendant intentionally escaped from lawful custody."

20 The focus of the difficulty in the present case is upon the meaning and effect of the words "in custody" in that passage and indeed for the purposes of this common law offence generally.

21 Earlier, at paragraph 16, the Court of Appeal had cited an earlier authority of *E v DPP* [2002] EWHC 433 (Admin) in which the court in that case had stated:

> "'Custody' was an English word which should be given its ordinary and natural meaning, namely 'confinement, imprisonment, durance', subject to any meaning given to it by statute. For a person to be in custody his liberty had to be subject to such constraint or restriction that he could be said to be confined by another in the sense that the person's immediate freedom of movement was under the direct control of another..."

22 A little further on, in paragraph 18 of the judgment in *Dhillon*, the Court of Appeal referred again to the concept of 'direct control' in the context of citing another authority, *Rumble* [2003] 167 JP 203. Between paragraphs 6 and 20 of the judgment, the Court of Appeal refer altogether to *E v DPP*, to which I have referred, *Rumble*, to which I have referred, and *H v DPP* [2003] EWHC 878 (Admin). This collection of authorities illustrates, in fact-specific contexts, situations in which courts have regarded a person as being in custody so as to trigger the common law offence when the person escaped or otherwise absented himself.

23 In *E v DPP* a person had been remanded to a local authority with a requirement that the local authority detain him in secure accommodation. It turned out that there was no such accommodation available and he was brought back to the Youth Court by a member of the Youth Offending Team, but he then absconded. To my mind it is clear that in those circumstances the person concerned was indeed in custody and under the direct control of another, namely the member of the Youth Offending Team who had brought him back to court. He had been remanded to secure accommodation, and it is of the essence of secure accommodation that, in accommodation of that description, a person is under the direct control of the staff and is, or should be, prevented from leaving by a combination of the staff and physical restraints, such as locks.

24 The judgment in *E v DPP,* as quoted in paragraph 17 of *Dhillon*, says:

> "Such a remand [viz in secure accommodation] was so restrictive of the appellant's liberty that it could properly be said to be custodial in nature. "

25 In *Rumble*, the defendant had surrendered to his bail at a magistrates' court. It happened that there was no usher or security staff present. Following imposition of a custodial sentence the defendant then escaped through the public entrance. The Court of Appeal clearly gave short shrift to a submission that he was not, at the material time, in custody so as to trigger the common law offence. Lord Justice Buxton said:

> "Once a person surrenders at the court as Mr Rumble did and was obliged by law to do, it will be very surprising indeed if the court's right to control him, and his vulnerability to the offence of escaping, depended upon the precise nature of the physical constraints imposed upon him."

26 Again, it seems to me patent, as it did to the Court of Appeal in that case, that once the defendant had surrendered to bail and was actually within the court premises, he was under the direct control of the magistrate or magistrates who were dealing with his case that day, if of nobody else.

27 The third authority, cited from paragraph 19 of *Dhillon,* is *H v DPP* [2003] EWHC 878 (Admin). In that case, the court had remanded the defendant to local authority accommodation. Following that remand he was released from physical custody into the care of a member of the Youth Offending Team, who left him briefly unsupervised and told him not to move. The defendant then absconded and was charged with escape. The court stated:

> "In order to determine whether an order ... was custodial in nature, which was a question of fact, it was necessary to concentrate on the moment when it was alleged that the defendant absconded. In the instant case the justices had remanded him to local authority accommodation under section 23 without attaching conditions and that sanction gave power to the local authority to detain the defendant. He had been told not to move by the Youth Offending Team member so that it was unrealistic to suggest that he did not know he was being detained... In those circumstances there was

> ample evidence upon which the justices could have concluded that his immediate freedom of movement was under the direct control of the Youth Team member and that by absconding he was escaping from her custody."

28 Again, in that case, one can clearly see that at the very moment of the absconding, power was being exerted by the Youth Offending Team member, albeit that she had temporarily left the defendant unsupervised.

29 All those cases clearly fall, as the respective courts held, on the side of the line of an offence being committed. An illustration of circumstances on the other side of the line is given in **Archbold** at paragraphs 28-166, where the editors state:

> "A person who is on bail is not in lawful custody and, therefore, does not commit the offence of escape if he absconds."

-- and the authority of *Reader* is cited.

30 Similarly, it is stated in **Archbold** that --

> "Where a prisoner, on temporary release from prison, fails to return to prison on expiry of his release period, he could not be said to have escaped from custody and could not therefore be guilty of escape..."

-- and the authority of *Montgomery* is cited.

31 There is, therefore, a line, which may be very fact-specific, around which there may be a grey area. As I have already stated, the district judge required to be sure, and indeed I require to be sure, that the known facts of the present case do fall on the offence side of that line. It is not enough that they may be in a grey area.

32 Part of the difficulty in the present case may derive from the fact that English law does not as such have, or apply, a concept of "house arrest". Anyone who reads the newspapers is familiar with "house arrest" to which many people, often political activists, are subjected in various parts of the world, but we do not have that concept.

33 I stress again, however, that the issue of dual criminality does not depend upon what legal labels are used, but upon the actual characterisation of the facts relied upon.

34 I have already quoted the description of the offence under EAW2 above. All that we know is that on the date in question, 10 October 2011, the appellant (as he is on this issue) "was in house arrest ... in compliance with a decision of the Supervising Court of Bologna..." The house arrest appears to have persisted for over a year, since the decision of the Supervising Court was dated 14 September 2010 and the "escape" was on 10 October 2011. Beyond that, we know absolutely nothing about the circumstances or conditions of the "house arrest". We have no information as to the extent to which it was policed, or whether any official was exercising any form of "direct control", or, indeed, any supervision or control at all over the appellant throughout that year and more of "house arrest".

35 I have been shown today some questions which were submitted by the Extradition Unit here to the authorities in Italy on 9 April 2020. Some of those questions related to EAW1, but question 4 read as follows:

> "4. Finally, we would be grateful for some clarification regarding the offence of 'escape'. How was the requested person made aware of the judgment of the Supervising Court of Bologna of 14 September 2010? What were the terms of the house arrest requirement?"

36 The only response to that question is a document from the Public Prosecutor's Office at the court in Mantua, dated 29 April 2020, to which I have already briefly referred. The only part of that document which in any way answers question 4 is a short sentence under a heading "Point 4" on page 2 of the document, now at bundle page 151. There the Public Prosecutor states:

> "The count for the offence of breakout within the judgment by the court ... points to the fact that the order issued by the court supervising sentence enforcement of Bologna on 14 September 2010 was served on the convict on 15 September 2010; therefore, he had knowledge thereof. The convict was present when the decision was read out."

37 That part of that document no doubt answers the question within the middle of question 4, namely "How was the requested person made aware of the judgment of the court of the Supervising Court of Bologna of 14 September 2010?", but it simply does not give any "clarification" whatsoever regarding

the offence of "escape". Further, and conspicuously, it does not in any way whatsoever answer the question: "What were the terms of the house arrest requirement?"

38 In this rather vague and unsatisfactory situation I am left very unclear as to exactly what were the terms, conditions or circumstances of the so-called "house arrest". I am left uncertain as to the extent, if any, to which, by October 2011, the freedom of movement of the appellant could be said to have been "under the direct control of another". It seems to me that the situation so vaguely described in the present case is far from the situation in any of the authorities of *E v DPP*, *Rumble*, or *H v DPP*, and I cannot be satisfied that the ingredients of the common law offence which were identified and described by the Court of Appeal in *Dhillon* were all satisfied in the present case.

39 In my view, therefore, and with respect to him, District Judge Ezzat could not, or should not, have been satisfied that the requirements of the common law offence had been established in the present case. In my view, he erred and was wrong in his conclusions at paragraphs 28 and 29 of his judgment on the question of whether or not the requested person was "in custody" for the purposes of the common law offence.

40 I have already quoted the observations of Stacey J at paragraph 6 of her reasons when granting permission to appeal. At that stage she said no more than that "it is reasonably arguable" that the conditions of house arrest did not constitute custody and that he was not "under the direct control of another".

41 So far as the substantive appeal is concerned, it seems to me that the onus is in fact the other way round. I would have to be satisfied that the conditions of house arrest did constitute custody, and that he was under the direct control of another. I am not so satisfied. For these reasons, in relation to EAW2, I exercise the powers of the court under section 27 of the Extradition Act 2003. In my view, the conditions under that section are satisfied in the present case, namely that the appropriate judge ought to have decided a question before him at the extradition hearing differently, and that if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge. Accordingly, I allow this appeal in so far as it relates to EAW 2. I order the appellant's discharge under EAW2 and I quash the order for his extradition in so far as it is made under EAW2.

42 I will now hear the argument from Ms Townshend, on behalf of the prosecutor, who wishes to renew her application for permission to appeal from the decision of the district judge to order the discharge of the requested person under EAW1.

LATER:

43 I now turn to consider EAW1. This alleges that on 25 February 2014 the requested person had been convicted of three offences committed in November 2006. These all involved the same named victim. In summary, the requested person was convicted of an attack on the victim which caused considerable physical harm, and of making a threat to kill the victim, and of entering the house of the victim unlawfully, for all of which he was sentenced to 1 year and 3 months' imprisonment.

44 The district judge discharged the requested person under EAW1 because he was not satisfied that the requested person had deliberately absented himself from his trial and there was now no right to a retrial. By its notice of appeal, the Prosecuting Authority challenges the finding that the requested person had not known about the proceedings or the trial and submits in essence that that was not a conclusion that was even open to the district judge. So far as this ground of cross-appeal is concerned, Stacey J neither granted nor refused permission upon it, but adjourned it to this hearing for the court today to consider whether or not to grant permission, and if permission was granted, to go on in a single so-called "rolled up hearing" substantively to consider it.

45 It is common ground that the requested person was not present at the trial to which EAW1 relates. However, the tick box form in EAW1 (now at bundle page 118) goes on to say:

> "The person was summoned in person on ... and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial."

46 In the above quotation the three dots between the words "on" and "and" appear as three dots in the original document. They do not denote some words omitted by myself. In other words, the tick box form had been completed in such a way as to assert that the requested person had been "summoned in person" and "thereby informed of the scheduled date and place of the trial" without giving any evidence or indication as to the date

upon which the requested person had been so summoned and informed. To my mind, as soon as a document of this kind omits to give what may be an important date, it invites some circumspection.

47 The requested person firmly asserted, both at paragraphs 19 to 21 of his written proof of evidence, and also in his oral evidence to the district judge, that he had not known about the trial to which EAW1 relates. At paragraph 20 of his judgment District Judge Ezzat made clear that:

> "I did not find the RP to be a reliable witness. On occasions the RP was evasive in his answers, answering questions that were not asked of him. The account that he gave in live evidence differed in several significant respects to his evidence in his proof of evidence."

48 Clearly, the district judge was viewing any of the evidence of the requested person through the prism that he was not a reliable witness. Nevertheless, at paragraphs 35 to 38 of his judgment he went on to say:

> "35. The RP maintains that he was never informed.
>
> 36. I made a finding earlier in this judgment that I do not find the RP to be a reliable witness. However, the burden lies with the JA to make me sure that the RP is a fugitive in relation to EAW1.
>
> 37. The only evidence used to demonstrate the RP's knowledge of the proceedings is the tick-box on the EAW. While I acknowledge and accept the principle of mutual trust and respect in terms of assertions

made in an EAW, it is telling in my view that the EAW is silent as to how the RP was purportedly informed. The FI shines no further light on the issue."

49 The district judge then cited the wording of the EAW which I have already quoted above, and continued:

"I am invited to take the EAW at face value by the JA and accept that the RP was personally served.

38. The lack of detail in the EAW and subsequently in the FI, especially given the issues raised by the RP (his lack of knowledge) caused me to have sufficient doubt so as to conclude that I cannot be sure that he was properly served. In such circumstances I cannot therefore conclude that the RP is a fugitive."

50 Under a heading "section 20" the district judge returned to the same point. He said, at paragraph 47:

"47. I have made a finding (paragraph 38) that I cannot be sure that the RP is a fugitive. It therefore follows I cannot be sure that he was deliberately absent from his trial."

51 Finally, at paragraph 62 he said:

"For the reasons set out earlier in this judgment, I cannot be sure that the RP was deliberately absent from his trial. I suspect that he may

> well not have known about it. Having been convicted in absence in those circumstances, and without the right to a retrial, the RP must be discharged."

52 By her cogent submissions this afternoon, Ms Townshend has returned to, and repeated, submissions she made to the district judge with regard to the principle of mutual trust and respect. In relation to assertions in the EAW she submits that, in the light of the assertion in the tick box answer in the EAW which I have quoted, to the effect that the requested person was summoned in person and was informed of the scheduled date and place of trial, it simply was not open to the district judge, as a matter of law, further to investigate the question of knowledge or to come to the conclusions which he did. She submits today that the district judge should have given much more credence to the EAW, and that the factual findings of the district judge on the issue of service and knowledge are "perverse". In this regard she relies in particular on two authorities. The first is the decision of the Divisional Court in *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin) in which, at paragraph 35, that court said that it is not appropriate for requesting judicial authorities to be pressed for further information relating to statements made in the EAW with regard to service, save in cases of ambiguity, confusion or possibly abuse of process. The Divisional Court said, starkly, that --

> "The issue at the extradition hearing will be whether the EAW contains the necessary statement."

53 The second authority, *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 (Admin), at paragraph 50, is to similar effect. That, indeed, is hardly surprising since *Stryjecki* followed many months after the decision and judgment in *Cretu*, which was cited in *Stryjecki*.

54 I do pause to note, however, that despite what Hickinbottom J said in paragraph 50 of *Stryjecki*, he went on, at paragraphs 56 and 57, to disagree with the finding of the district judge in that case that the appellant had deliberately absented himself from his trial. He said, at paragraph 54:

> "54 It cannot assumed from the sparse information available that 'proper notification about the trial date' ... " took place.

55 The ultimate conclusion in *Stryjecki* was to allow the appeal and discharge the warrants.

56 I do completely respect and understand the submission of Ms Townshend that, by investigating the question of service and knowledge, and by taking into account in the way he did the evidence of the requested person on this point, the district judge may have gone further than the authorities of *Cret*u and *Stryjecki* properly permit. But the fact of the matter is that the relevant section, namely section 20 of the Extradition Act 2003, does require the judge to decide a series of questions, including to decide whether the person deliberately absented himself from his trial.

57 This district judge clearly found the requested person not to be a reliable witness. He clearly repeated that finding in the relevant passage beginning at

paragraph 36 of his judgment. But he nevertheless reached a clear conclusion of fact that he could not be sure that the requested person had been properly served and could not be sure that he had deliberately absented himself from his trial. Whether the district judge went further than he should have done, as Ms Townshend so eloquently submits, it seems to me quite impossible for me, sitting here in an appellate capacity, to get behind those clear findings which he made. It is he who saw and heard the evidence from the requested person. He was not sure that the requested person had deliberately absented himself, and in my view it is simply impossible for me now to reverse that conclusion and substitute a finding that he did deliberately absent himself, simply on the basis of the tick box answer in EAW1 which, as I have said, is anyway defective in that it does not contain the material date.

58 For those reasons it seems to me that there is ultimately no substance in this ground of appeal by the prosecutor, and so I refuse this renewed application for permission to appeal.

59 The overall upshot is that there are now no subsisting orders for the extradition of this person to Italy.

CERTIFICATE

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