Neutral Citation Number: [2021] EWHC 3309 (Admin)

Case No: CO/346/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

7th December 2021

Before :
MR JUSTICE FORDHAM
- -

Between:

IRENE ELLERT — **Appellant**

- and -

JUDGE OF THE DIRECTOR OF PUBLIC PROSECUTIONS OF THE COPENHAGEN DISTRICT COURT (DENMARK) — **Respondent**

- -
- -

Malcolm Hawkes (instructed by National Legal Service) for the **Appellant**
Richard Evans (instructed by CPS) for the **Respondent**

Hearing date: 2/12/21

- -

Final 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.

.....

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The hearing was in-person at the Royal Courts of Justice.

Mode of judgment

2. Ordinarily I would have proceeded to give an ex tempore judgment. Unfortunately, the time taken by oral submissions meant that the case used far more time than had been allocated to it. Submissions only concluded at 13:20. I had another hearing fixed for 2pm. In these circumstances I was invited by Mr Hawkes, with the support of Mr Evans, to produce my ruling in writing rather than seek to find a later time slot in court to deliver it orally. I have acceded, on this occasion, to that request. I do not regard this as a precedent, for me or any other judge.

Context

3. The Appellant is aged 49 and is wanted for extradition to Denmark. That is in conjunction with an accusation European Arrest Warrant (EAW) issued on 3 June 2020 and certified on 17 June 2020 on which she was arrested on 11 July 2020 before being released on bail. The description of the alleged offending is the subject of "further information" dated 8 September 2020. Extradition was ordered by DJ Hamilton ("the Judge") on 25 January 2021 after an oral hearing on 22 December 2020. Permission to appeal was refused on the papers by Johnson J on 28 May 2021.

4. The Danish authorities allege that a large-scale money laundering enterprise was carried out over a significant period of time, by a number of perpetrating participants, between around 2008 and 2016. Their case is that 52 shell corporations were created for money laundering purposes. Those shell companies received €4.3 billion into accounts opened at an Estonian branch of a Danish bank by virtue of over 9,000 transactions; and then €4.3 billion was transferred out of those accounts by reason of more than 26,000 transactions. In part of a summary of the prosecution case adopted by the Judge in the judgment, which part Mr Hawkes for the Appellant accepts accurately reflects the EAW and further information, the Danish prosecutor's case includes that:

> ***the purpose of these transactions was to hide the origin of the money. It is alleged that the [Appellant] facilitated the transactions and benefited from them.***

The Appellant accepts that she introduced clients to the bank and that she registered 23 of the companies. She strongly protests her innocence. Her position is that she would be able to 'put this matter to rest' at the interview which is the next stage of the prosecutorial process. That interview is a stage which the Respondent had originally agreed to undertake in the summer of this year while the Appellant was in this country, an offer which was subsequently withdrawn.

Section 25

5. The first ground of appeal raised is section 25 of the Extradition Act 2003 and the contention that extradition would be oppressive by reason of the Appellant's health condition. This argument is advanced by reference to fresh evidence and an application

to amend the grounds of appeal, filed yesterday. It is opposed by the Respondent on the basis that this proposed new ground is not reasonably arguable and the proposed fresh evidence is incapable of being decisive. The position had been that in a witness statement given in the extradition proceedings in August 2020 the Appellant had described a thyroid problem which was potentially cancerous. The Judge referred to the Appellant's "possibly cancerous lumps in her neck which may require treatment" and recorded that the Appellant had explained in her oral evidence "that the lumps or nodules will be removed and then subjected to a biopsy". The biopsy took place in September 2021 and it has now been confirmed (27 November 2021) that the Appellant has a diagnosis of thyroid cancer. Mr Hawkes submits that the legally correct application of section 25 would now yield a stay of some six months until a review has been undertaken and greater clarity achieved. He submits that the current medical position is plainly very serious; that steps will now be taken whereby the relevant clinician team will identify and agree a treatment plan; that continuity of care is an imperative; and that in all the circumstances extradition at the present time crosses the threshold of being oppressive. He emphasises for the purposes of today that the test is whether that is reasonably arguable.

6. In my judgment, this does not constitute a reasonably arguable ground of appeal. I accept the submission of Mr Evans that the presumption of adequate medical care in Denmark provides a clear, complete and legally adequate answer to the serious concerns arising out of the biopsy and diagnosis, including as to the identification and implementation of a treatment plan, and including as a matter of next steps over the coming months. It is not, in my judgment, reasonably arguable that extradition, at this stage, would meet the applicable legal threshold of being "oppressive" on grounds of the Appellant's health condition and situation.

Section 21A

7. The next ground of appeal identified is section 21A of the 2003 Act. Mr Hawkes submits that it is reasonably arguable that extradition should not proceed on the ground that there is the possibility of less coercive measures. He relies on two features of the case in particular. The first is the interview step which it is common ground would be the next step in the prosecutorial process. Mr Hawkes points to the fact that the Respondent had agreed to conduct an interview while the Appellant was in the United Kingdom, in the summer of this year and in the context of an extant appeal against the Judge's January 2021 decision. He submits that in withdrawing the offer, the Respondent was "evidently mistaken" as to the timeframe for a hearing of the renewed application for permission to appeal following Johnson J's refusal in May 2021. He submits that the interview is a key component of the process which "would put this matter to rest", on the Appellant's case that she can demonstrate that she has committed no crime, such that extradition would not be necessary. Secondly, Mr Hawkes tells me this morning about an application which has been filed in Denmark today to bring this matter to a conclusion, which he tells me it is anticipated will lead to a ruling within four weeks. Like the fresh evidence relating to the medical position I have been prepared, for the purposes of this application for permission to appeal, to accept what Mr Hawkes tells me so far as that very recent development is concerned and to take it into account, as I do.

8. In my judgment it is not reasonably arguable that extradition has become legally inappropriate for the purposes of section 21A by virtue of the possibility of less coercive

measures. The interview is clearly the next step in the process. Clearly, I can make no finding or assessment that it will stand to "put this matter to rest"; nor can I conclude with confidence that it could not do so. The critical point, in my judgment, is that it is plain that the authorities squarely addressed the question of whether they were prepared to conduct the interview with the Appellant in the UK. The previous willingness to do so hardened into a refusal once Johnson J refused permission to appeal on the papers. The Respondent has not been prepared to go ahead with such an interview while this renewed application has been outstanding. The question is whether it is reasonably arguable that the Appellant is not extraditable today by reference to the possibility of less coercive measures. I am quite satisfied that that is not a reasonably arguable proposition.

Article 8

9. The next ground of appeal addressed by Counsel was Article 8 ECHR. On this part of the case Mr Hawkes emphasises the Appellant's recent thyroid cancer diagnosis, to which I have referred. He also emphasises the ill-health of the Appellant's partner who as the Judge recorded "has a serious health condition which is currently being controlled with medication"; namely what has been described as a type of controlled leukaemia. Mr Hawkes emphasises the serious implications for their 12 year old daughter who will be placed in the invidious position by her mother's extradition of needing to rely on her father as sole carer, in circumstances where he has his own serious health condition. Mr Hawkes also emphasises the fragility of the Appellant's pre-settled status for the purposes of the Brexit arrangements, and the impact that permanent exclusion would have for the family were the Appellant to be in Denmark for more than six months and stand thereafter to be permanently excluded from the UK. Mr Hawkes submits that the test under Article 8 is one of necessity, which is not met. He emphasises the Appellant's good character with no previous convictions in Denmark or in this country or anywhere else other than the matters of which she stands accused. He describes the human impact of extradition in this case as devastating and submits that viewed overall – in light of all relevant features – it is reasonably arguable that extradition would be disproportionate in Article 8 terms for the Appellant, her husband, her daughter or all three of them.

10. In my judgment it is not reasonably arguable that extradition in this case would be disproportionate for the purposes of Article 8, viewed in terms of any and all of the family members. At the heart of this case are matters for which the Danish prosecuting authorities seek to have the Appellant stand trial. Those matters are plainly extremely serious. The context is of the €4.3 billion said to have been money laundered through the accounts of the 52 shell companies who were customers of the Estonian branch of the Danish bank. The Appellant is said to have been embroiled as a perpetrator in that serious criminal wrongdoing, having been responsible for introducing clients to the Danish bank and registering 23 of the 52 shell companies. As I have explained, it is accepted to be a fair summary of the EAW and further information that the Danish prosecutors' contention is that the purpose of the €4.3 billion transactions was to hide the origin of the money, and that the Appellant facilitated the transactions and benefited from them. The domestic sentence in Denmark is described as a maximum of 6 years which can in aggravating circumstances be increased by a further 50% to give a maximum of 9 years. In further information dated October 2020 the Respondent has confirmed that the Danish prosecutors will be seeking the maximum sentence in this

case. The Judge concluded that the Article 8 balance came down decisively in favour of extradition. Refusing permission to appeal on the papers Johnson J thought the contrary was not reasonably arguable. Notwithstanding the very recent thyroid cancer diagnosis and the other matters that are relied on before me, I have reached the same conclusion as Johnson J. I can see no realistic prospect of this Court concluding that extradition is incompatible with Article 8, whose 'necessity' test is implemented through the principled prism of the Article 8 balancing exercise described and illustrated in the authorities. In the context of Article 8 I have found it helpful to have in mind as a working illustration the cases whose Article 8 compatibility was the subject of the detailed discussion by the Supreme Court in HH [2012] UKSC 25. In the FK appeal in that case it was a combination of factors including the degree of seriousness of the offending (see §§36 and 45) alongside the evidenced severe impact for the two youngest children in circumstances where extradition had been assessed as meaning that their father would need to give up work to look after them which was likely to lead to severe and crippling depression (§§41 and 44) together with the delay and lapse of time (§§6-47), which rendered the extradition disproportionate. In the present case, it is, in my judgment, clear that a principled calibration and evaluative balancing of the features of the case beyond reasonable argument would lead this court to the conclusion that extradition is proportionate in Article 8 terms.

Section 14

11. The next ground of appeal is section 14 of the 2003 Act. Mr Hawkes submits that it is reasonably arguable that extradition of the Appellant would be oppressive on the basis of the passage of time. It is common ground in this case that she is not a fugitive and therefore not barred from raising section 14. Section 14 was not argued before the Judge. I have considered the position on its legal merits. In my judgment, having regard to the nature of the passage of time and of the circumstances that have arisen in conjunction with that passage of time, it is not reasonably arguable that the impact of extradition is rendered oppressive applying the high threshold governing oppression.

Section 64

12. The penultimate ground of appeal concerns at section 64 of the 2003 Act and the rule of so-called "dual criminality". The critical feature of Mr Hawkes's argument on this part of the case, as I see it, centres around his submission that the case against the Appellant described in the EAW and further information does not involve identifying the "predicate offence" which meant that monies transferred into the bank accounts of the companies were "criminal property". Mr Hawkes submits that money laundering, as exemplified in section 328 of the Proceeds of Crime Act 2002, which the Judge identified and set out in his judgment, would involve a prosecutor in this jurisdiction needing to "say what the crime is" that made the property "criminal property". Since the EAW and further information makes no attempt to identifying the predicate offence or offences, the statutory rule of dual criminality cannot be satisfied, at least reasonably arguably.

13. Mr Evans for the Respondent has two lines of response. The first is that he submits that in the context of a "framework offence" no question of dual criminality arises, citing Assange [2011] EWHC 2849 (Admin), for example at §§55 and 59. He accepts that a different comparison may arise, namely as to whether the requested person's alleged conduct matches the offence under the law of the requesting state (here, Danish law),

citing Assange at §112, but that no such question arises here. Mr Hawkes contests the proposition that dual criminality cannot arise in relation to a framework offence. In support, he cited Adamczewski [2014] EWHC 2958 (Admin), but that seems to me to be a case in which the conclusive certification by the requesting state of the framework offence, reflected in the then section 65(2)(b) (see the judgment at §6) was displaced by the applicable sentence having been less than 12 months (a requirement of then s.65(2)(c): see §7). I found it very surprising that such an elementary point was the subject of dispute and that, given that it was, neither Counsel came to the hearing having equipped me with the materials so that I could be shown the applicable legislation, still less shown a conclusive answer in a clear passage of a binding or persuasive authority. I will put that point to one side for now, and see where it leads.

14. Mr Evans adopted as a second line of argument this submission: that the section 64 arguments and the contention about the unidentified "predicate offence" was not, even arguably, made out. He submits that the contention that under the money laundering offence and offences applicable in this jurisdiction – including section 328 – the prosecution would need to identify and prove "what the crime is" is not supported by the statutory wording, nor by any authority or commentary which the Appellant has cited or placed before the Court. I accept those submissions. Their consequence is that I need say no more about the first line of argument. On this second topic, I put to Mr Hawkes a scenario to test the logic of his proposition as to the duty to identify "what the crime is" that makes the property "criminal property". The scenario I put was this. An accused money launderer is said to have known and understood that monies were the proceeds either of illegal drug deals or of illegal weapons deals. Using that scenario to test the position, I cannot accept that, on the basis of the language and structure of section 328, that the prosecution would need to identify and prove whether the proceeds derived from drugs or weapons. It would surely not matter, provided that it was clearly one or the other. What would surely be necessary was to be satisfied that the monies were "criminal property", and to have a sound route on the evidence for such a conclusion. The scenario given by Mr Hawkes in response involved a case where monies are the proceeds either of illegal deals or of benign deals. I can quite see that it would be necessary in such case to show that monies alleged to have been laundered by the accused were the proceeds of illegal rather than benign deals. But that does not support Mr Hawkes' proposition about needing to say "what the crime is". Nothing I have seen in the present case suggests that any part of the €4.3 billion transferred in and out of the 52 shell companies, on the prosecution case, was lawful and benign. I do not accept that it is reasonably arguable that the absence of a spelled-out "predicate offence" contravenes the standards of section 64 dual criminality, even if Mr Hawkes is arguably right about framework offences and dual criminality.

Section 2

15. The final ground of appeal concerns section 2 of the 2003 Act and the duty of particularisation. Mr Hawkes emphasises the need for fair, proper and accurate particulars as a mandatory minimum requirement. He accepts that the summary of the nature of the allegations faced by the Appellant, adopted by the Judge in a passage early on in the judgment, would constitute legally adequate particulars. He submitted that in three respects the Judge's summary did not reflect the underlying information in the EAW and further information as to what was being alleged against the Appellant which, when examined, evidenced a lack of adequate particularisation. He submitted that there

was a lack of clarity as to the case which the Appellant faces in the Danish prosecution, as to (i) the number of shell companies to which her alleged criminal conduct relates, as to (ii) the relevant date range and as to (iii) the relevant amounts of money involved.

16. In my judgment, in each of those respects Mr Evans was able convincingly to show that fair proper and accurate particulars are given in the EAW and further information. So far as the number of companies is concerned the Appellant is accused of having registered 23 of the 52 shell companies. So far as the relevant date range is concerned the alleged criminal conduct spans the years 2008 to 2016. So far as concerns the relevant amounts, the prosecution case is that the entirety of the €4.3 billion is relevant on the basis that this was a joint enterprise in which the Appellant was a facilitating participant and beneficiary. I repeat that this is all in the context where Mr Hawkes accepts that it is a fair summary of the EAW and further information that the prosecution case is as follows: that the purpose of the transactions by which the €4.3 billion were transferred into the accounts of the 52 companies and transferred out was to hide the origin of the money; and that the Appellant facilitated these transactions and benefited from them. Finally, in relation to the number of companies, Mr Hawkes submitted that the particularisation of the case against the Appellant was rendered misleading by the fact that the Respondent authorities have explained their intention:

> ***… due to the scope of this case… to split the case up, so that we focus on six of the 52 companies to start with. Then we can move on to the other companies if the case of the first six companies is successful.***

Mr Hawkes submits that the failure to identify which six companies are to be the initial "focus" renders the particulars legally inadequate. In my judgment, there is nothing in that point. The Appellant is being extradited in relation to the case against her. The case against her includes the case is made in relation to the 23 companies which she accepts she registered. She is not being extradited in relation only to 6 companies. How the prosecuting authorities deal with the prosecution is a matter for them. They would be quite entitled to identify some of the matters on which the Appellant is extradited and proceed with those first. They would also be entitled having done so to reflect on whether to proceed with other matters on which she had been extradited, in the light of the outcome of that initial first trial. None of that undermines as legally adequate the particularisation of the case against her. The duty to collect particularise the case against the Appellant applies across the board. In my judgment, by reference to all these points, there is no realistic prospect of this Court concluding that the statutory standards of legally adequate particularisation, as discussed in the relevant authorities, have been breached in this case.

Conclusion

17. For all those reasons I have reached the same conclusion as was reached by Johnson J on the papers. I have found no reasonably arguable ground of appeal in this case, from any of the points advanced in writing or orally. I refuse permission to appeal. The fresh evidence is incapable of being decisive and I formally refuse permission to adduce it.

Application to stay the judgment/order

18. Having received a confidential draft of this judgment Mr Hawkes made an application to "delay the entry into force of the judgment" or "to stay the entry into force of the

order", for some 6 weeks (to 17 January 2022): (i) for an appointment on 8 December 2021 "understood" to be "to settle [the Appellant's] treatment plan"; (ii) for a first cardiac myocardial perfusion scan on 15 December 2021; (iii) for a second scan on a date to be fixed; (iv) to receive the results of the scans and have "detailed discussions with her treating physicians about her treatment plan" and gather together medical documents; (v) to avoid amplification of her anxiety, depression and insomnia; and (vi) to allow her and her family time to deal with the medical issues and prepare for surrender. Mr Hawkes submitted that it is "highly unlikely" that any progress could be made with the Appellant's criminal case in Denmark during that period. That application is refused. As Mr Evans pointed out, I have concluded in this judgment at §6 that "the presumption of adequate medical care in Denmark provides a clear, complete and legally adequate answer to the serious concerns arising out of the biopsy and diagnosis, including as to the identification and implementation of a treatment plan, and including as a matter of next steps over the coming months". Permission to appeal having been refused on the papers, the listing of this renewal hearing provided the foreseeable finality horizon, absent the Court's satisfaction that there was some reasonably arguable ground of appeal. In my judgment, a stay or suspension of the Court's judgment or order is not a justified course.

7.12.21