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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 2561 (Admin)

No. AC-2021-LON-001220

Royal Courts of Justice

Tuesday, 3 October 2023

Before:

MRS JUSTICE FARBEY DBE

B E T W E E N :

DOGA — Appellant

\- and -

GENERAL PROSECUTOR OF
THE LYON COURT OF APPEAL, FRANCE — Respondent

MR J STANSFELD (instructed by Tuckers Solicitors) appeared on behalf of the Appellant.

MR B SEIFERT (instructed by Crown Prosecution Service, Extradition) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE FARBEY:

Introduction

1 The appellant is an Albanian national whose extradition to France is sought pursuant to a European arrest warrant ("EAW") issued on 8 August 2019. The EAW was issued by a Criminal Division of the Court of Appeal of Lyon in relation to its judgment issued on 4 July 2017. By that judgment, the appellant was sentenced to 18 months' imprisonment for five drug-related offences. Following an extradition hearing in Westminster Magistrates' Court, District Judge Brennan ordered the appellant's extradition in relation to all five offences. The District Judge's order is contained in a written judgment dated 4 June 2021.

2 The appellant appealed against the District Judge's order. For reasons set out in a judgment given on 28 November 2022, I allowed the appeal in relation to two offences, but dismissed it in relation to three offences (see [2022] EWHC 3342 (Admin)). The appellant therefore faces extradition for three offences, namely, (1) the unlawful possession of drugs; (2) the unlawful offer or sale of drugs; and (3) participation in a criminal organised gang.

3 By application notice and written grounds dated 8 February 2023, the appellant applied to reopen the appeal, pursuant to rule 50.27 of the Criminal Procedure Rules. By order dated 24 May 2023, I directed a rolled-up hearing of the application and, should the application be granted, the re-opened appeal.

The issues

4 The foundation of the application to reopen the appeal is the legal effect of the appellant's longstanding bail conditions. It is not in dispute that, as at today, he has spent 34 months and 16 days on bail under electronically-monitored curfew ("EMC") between midnight and 5 a.m. Nor is it in dispute that, as a matter of French law, one day under an electronically-monitored house arrest ("EMHA") must be treated as one day of imprisonment, which must be deducted from the sentence of a person extradited from the United Kingdom. The dispute before me is whether the period of EMC should be treated as a corresponding period of EMHA under French law. If so, the appellant has now effectively served his sentence in full and, on established principle, his extradition would amount to a breach of Article 8 of the European Convention on Human Rights. Mr Stansfeld, who appears on behalf of the appellant, submits in the alternative that extradition would amount to an abuse of process.

5 As it is a question of foreign law, the question whether the appellant's EMC should be treated as being EMHA is a question of fact that must be decided on evidence. The appellant seeks to rely on fresh evidence that was not before the District Judge and was not before me when I heard and decided the appeal in November 2022.

6 The respondent resists the application to reopen the appeal on the grounds that the question of whether or not an EMC of five hours per day would amount to EMHA is a question of fact for the French authorities rather than this court to determine. The appellant may apply in France for his bail conditions to be taken into account in fixing the time to be served in prison but it is not appropriate for this court to speculate on the approach that the French authorities would take.

The appellant's bail conditions

7 The appellant was arrested under the EAW on 16 November 2020. He appeared before Westminster Magistrates' Court on 17 November 2020 when the extradition proceedings were opened. He was on that date released on bail on the following conditions:

(1) To live and sleep each night at an address in Portsmouth;

(2) To stay indoors at that address between midnight and 5 a.m. with electronic monitoring;

(3) Passport and identity document to be retained by the Home Office and surrendered to the police should they be returned;

(4) Not to enter any international travel hub;

(5) To keep a particular mobile phone number switched on, fully charged and on his person 24 hours a day;

(6) To report to a particular police station each Monday and Thursday between 10 o'clock and 11 o'clock in the morning;

(7) To lodge £5,000 security with the court; and

(8) Not to apply for or be in possession of any international travel documents.

I have been told today that these bail conditions have not changed since they were first imposed.

8 The appellant's extradition hearing took place on 6 May 2021. Given the limited issues before me now, it is not necessary to set out the evidence before the District Judge or to deal with the conclusions that he reached on the various grounds for resisting extradition that he was asked to determine. It suffices to note that the appellant did not challenge his extradition, either before the District Judge or before me, on the ground of time spent in the United Kingdom on bail.

The fresh evidence

9 In applying to reopen his appeal, the appellant relies on a report by Monsieur Étienne Arnaud dated 4 July 2023. Monsieur Arnaud is a lawyer qualified in France and practising in Paris. He specialises in criminal and extradition law. He has worked in these areas since he was admitted to the Paris Bar in 2014.

10 This is not the first case in which Monsieur Arnaud has provided evidence to an English court in extradition proceedings. His evidence on similar issues was accepted by the Divisional Court in *A v Deputy General Public Prosecutor of the Lyon Court of Appeal* [2022] EWHC 3214 (Admin) (Stuart-Smith LJ and JayJ). Mr Benjamin Seifert, who appears for the respondent, does not challenge Monsieur Arnaud's qualifications or expertise.

11 In considering the effect of the appellant's time on bail, on the time he would be required to serve in France, Monsieur Arnaud identifies and examines the provisions of the French Code of Criminal Procedure that deal with the effect of an EMHA on the calculation of a sentenced person's release date. As the applicable provisions are not in dispute, I can take them from the English translation which Monsieur Arnaud gives. He cites the following articles of the Code:

Article 142-11:

> "An electronically-monitored house arrest is assimilated to pre-trial detention for the purpose of counting its deduction from a custodial sentence, in accordance with Article 716-4".

Article 716-4:

> "Where there has been pre-trial detention at any stage of the proceedings, such detention shall be deducted in full from the length of a sentence imposed or, where appropriate, from the total length of the sentence to be served after conviction. The same shall apply in the case of pre-trial detention ordered in the context of proceedings for the same acts as those which gave rise to the conviction, if these proceedings were subsequently annulled.
>
> The provisions of the preceding paragraph shall also apply to deprivation of liberty undergone in execution of a warrant for bringing in or arresting a person, to imprisonment undergone outside France in execution of a European arrest warrant or on the request for extradition, and to imprisonment undergone pursuant to [other provisions of the Code].
>
> Where there has been pre-trial detention at any stage of the proceedings, this detention shall also be deducted in full from the duration of the security period to which the sentence is attached, where applicable, notwithstanding the simultaneous execution of other prison sentences".

12 Monsieur Arnaud explains that what he calls the "material conditions" of an EMHA, such as the length and hours of curfew, are not set by a judge but by a "prison integration and probation service". The trial court, therefore, never considers the "actual conditions of the electronic bracelet to determine whether it is equivalent to imprisonment". There is no required minimum period of daily curfew.

13 Monsieur Arnaud says that the calculation of a sentenced person's release date is undertaken by the Ministry of Justice and not by the court. It follows that there are few decisions applying the relevant legal provisions, because the courts will only need to consider them in the event of a dispute.

14 Monsieur Arnaud explains that there is no legal framework that can help calculate the minimum time spent under curfew for it to be considered as French EMHA. He continues:

> "However, the Cour de Cassation - which only rules on the law and not the substance of the cases - confirmed in a decision dated 17 March 2021 the lower court's decision which had ruled that a curfew with an obligation to stay indoors at an address from 10 p.m. to 5 a.m. monitored electronically, to refrain from visiting certain places and to check daily at the police station should be treated as EMHA, the duration of which is deductible from that of the prison sentence handed down, in accordance with the terms of Article 142-11 of the [Criminal Code]. The curfew had been imposed by an English court in… European arrest warrant proceedings.

> The court did not refer to a pre-trial detention but only compared the tagged curfew with the French EMHA.
>
> The court upheld the reasoning of the lower courts, which considered that, as the French EMHA measure did not require a minimum daily stay at home, the fact that it was only imposed for a daily stay of less than nine hours in the UK was irrelevant.
>
> It appears that the mere existence of the electronic bracelet - apart from the daily appearance at the police station or any other requirements - imposing the requested person to remain at home at certain hours was sufficient for the court to consider that this measure was equivalent to the French EMHA".

On this basis, Monsieur Arnaud concludes,

> "In my opinion and based on those decisions from the first and second instance courts, which eventually led to the 2021 decision [of the Cour de Cassation], even though Mr Doga's indoors hours are slightly shorter, I believe the conditions of his curfew would meet the criteria for an EMHA".

His report sets out what he calls the "procedural path" leading to the Cour de Cassation's ruling of 17 March 2021, but no point arises from that.

15 Finally, Monsieur Arnaud states that, should the appellant be extradited to France, he could apply to the Lyon Court of Appeal based on Article 710 of the Criminal Code in order to obtain a ruling on the deduction of the time spent under curfew. The Code does not set a minimum or maximum time limit for such proceedings but, in Monsieur Arnaud's experience, they usually takes between three and six months. He concludes, therefore, that the appellant would be detained for a period of about three to six months before the matter would be considered by the French courts.

16 The respondent relies on information provided by the French Ministry of Justice dated 28 March 2023. The information confirms that EMHA must be treated as a period of pre-trial detention and that it must be deducted from the total period of custody to be served. The information deals with the judgment of the Cour de Cassation to which Monsieur Arnaud refers and makes the following observations:

> "This judgment…gives an indication as to what may happen to the period of 'curfew' served in the UK on the basis of an arrest warrant. It should be noted, however, that, with regard to this judgment:
>
> 1. that equating a "bail with curfew conditions" measure to an EMCA measure is a matter for the unfettered discretion of the trial judges, and for their *in concreto* assessment of the circumstances of the case in the light of the information produced, in particular by the authorities of the executing State, on the details of the obligations and prohibitions imposed on the person in the context of the 'curfew' to measure whether, with regards to its type, duration, effects and methods of execution, this measure is 'of such a nature as to deprive the person concerned of his or her liberty in a manner

comparable to imprisonment' and could, if appropriate, be considered as a measure equivalent to a period of pre-trial detention deductible from the sentence to be executed.

that it is therefore impossible to deduce from this decision of the French Supreme Court…without engaging in an erroneous analysis of its scope, a rule of law applicable *in abstracto,* which would amount to considering that any 'curfew' measure would *de facto* equate to an EMHA measure.

2. that it did not in any way call into question the provisions of Article 26 of Framework Decision 2002/584, according to which the deduction of this period of 'detention' from the duration of the sentence to be executed is a prerogative of the State issuing the European Arrest Warrant and not of the executing state, as recalled by the [case law of the Court of Justice of the European Union].

that it is thus up to the State issuing a European Arrest Warrant in all cases to assess the nature of the measure of restraint exercised in the executing State in order to verify that the legal conditions provided by its national law with a view to deducting the sentence to be exercised or fulfilled, and to proceed, where appropriate, with this deduction".

17 As part of its duty of candour, the respondent has also, very properly, provided some of the evidence that was before the Divisional Court in the case of *A* which I have cited above. In a letter to the CPS, dated 4 August 2022, the Deputy State Prosecutor of the Lyon Court of Appeal, Thierry Luchetta, the respondent deals with the Cour de Cassation judgment as follows:

> "… The Criminal Chamber of the Court of Cassation admittedly agreed that an electronic surveillance measure in the United Kingdom could be offset against a prison sentence to be served in France by a convicted person subject to a European arrest warrant, but this can only be decided by the court which delivered the sentence, seized by the person concerned with an appeal on the grounds of difficulty of execution; the ruling being made after a full hearing of all parties and a rigorous examination of the material conditions of the house arrest abroad, in view of official documents from the judicial authorities of the state of the place of execution of the electronic monitoring measure".

18 In *France v Peci,* decided by Westminster Magistrates' Court on 19 April 2022, the Public Prosecutor's Office of the Rennes Judicial Court confirmed that time spent on curfew in the United Kingdom would be deducted from the remaining sentence to be served upon Mr Peci's extradition.

Legal framework

19 In order for the court to reopen the appeal, the appellant must give reasons why (i) it is necessary for the court to reopen the appeal decision in order to avoid real injustice; (ii) the circumstances are exceptional and make it appropriate to reopen the decision; and (iii) there is no alternative effective remedy (Crim PR 50.27(3)(b)). It is not necessary for me to consider these provisions in detail. Mr Seifert has helpfully confirmed that the respondent's

submissions hinge on the question whether it is necessary for the court to reopen the appeal decision in order to avoid real injustice, so I have not needed to hear argument on the other limbs of the test.

20 Article 26 of the Framework Decision, which applies in the present case, provides that the issuing Member State shall deduct all periods of detention arising from the execution of an EAW from the total period of detention to be served in the issuing Member State as a result of a custodial sentence being passed.

21 The relevant authorities were considered by this court in *A* at paras 33 to 39, as follows:

> "33.Turning to the English authorities, the Respondent's contention is that this Court simply should not entertain the question whether the Appellant has served his sentence. In support of its position, the Respondent relies upon the observation of Cavanagh J in *Lazo v Government of the United States of America* [2022] EWHC 1438 (Admin), [2022] 1 WLR 4673 that 'the starting point in extradition cases, both Part 1 and Part 2 cases, is that unless the contrary is established, things said and done by the requesting state are to be taken at face value and are to be trusted.' That principle is not in doubt: but it has no relevant applicability here. What was in issue in *Lazo* was whether the standard arrest warrant provided by the requesting state was valid. In that factual context the presentation of the warrant as part of the package of documents upon which the requesting state relied was a sufficient assertion of validity, unless the contrary was proved. In the present case, the Respondent has said nothing about whether or not, under French law, the Appellant has served his sentence. All it has done is to assert that the Appeal Court in Lyon (and no-one else) should decide the issue.
>
> 34.The issue raised by the Respondent is not novel. In *Newman v Poland* [2012] EWCA 2931 (Admin) the Court (Pitchford LJ, Foskett J) said at [19]-[20]:
>
>> '19. It is realistically conceded by Miss Tyler, on behalf of the respondent, that it would be an abuse of the process of this court and the court below to continue to seek the extradition of a person who has, in effect, served his custodial sentence in full, as a result of the application of Article 26, solely for the purpose of enabling the management decision for the discharge of the appellant to be taken in Poland. Secondly it is conceded that it would be a disproportionate interference with the appellant's right to a private and/or family life under Article 8 to extradite the appellant for the same purpose. … . … [I]t would, in our judgment, be an abuse of the process of this court if the requesting state continues to seek extradition knowing, in consequence of information given under Article 26.1, that the sentence has been served.
>>
>> 20. The passage of time since District Judge Zani's decision in March 2012 inevitably means that the ground now argued on behalf of the appellant could not have succeeded before him. In our judgment, Section 27 (2) and (4) of the 2003 Act apply

> to the present situation. This court may allow the appeal because evidence is now available which was not available at the time of the extradition hearing in the court below. Had the appellant served his Polish sentence in full by the date of the extradition hearing, for the purposes of Article 26, we have no doubt that the district judge would have discharged him since to have returned him to Poland would have constituted an unjustified interference with his Article 8 rights. On this ground we would allow the appeal.'

35. In *Marosan v Court of Cluj-Napoca, Romania* [2021] EWHC 3078 (Admin), [2022] 1 WLR 1759 at [22]-[23] the Court analysed whether the English court was entitled to consider the question of deductibility of time spent on bail and whether considering the question would involve trespassing on an issue which it is the exclusive province of the requesting state to decide. Fordham J concluded that it would not involve trespassing and that the English court, in appropriate circumstances, had an independent obligation to consider the question. In the absence of a clear statement from the Romanian authorities of a legal or policy position he considered the evidence before him and held that it would be disproportionate to return the appellant in that case: see [24]. To similar effect, Ouseley J in *R (oao) Danielius v Lithuania* [2014] 4 WLUK 721, relying on *Newman v Poland* held that it would be an abuse of process and disproportionate to extradite an individual if his or her sentence had been served. See also *Jesionowski v Poland* [2014] EWHC 319 (Admin) per Wilkie J.

36. By way of cautionary note, the Court has more than once said that, where a short period of sentence remains to be served, surrender would not be disproportionate for that reason alone. See, for example, *Molik v Poland* [2020] EWHC 2836 (Admin) at [11]: 'the Court considering Article 8 proportionality must, in principle, respect the time left to be served and which is required, by the requesting state authorities, to be served there: … .'

37.*Kloska v Poland* [2011] EWHC 1647 (Admin), upon which the Respondent relies, was a case where, on the requested person's case, there was still a short time left for him to serve in relation to the sentence that was imposed by the Polish courts: see [21]. The court held that, on the requested person's best case, there would be a further nine months of a total sentence of three years, six months to serve: see [27]. It was in that context that the Court said at [27], in a passage on which the Respondent relies:

> '… [E]xcept in most unusual circumstances, it cannot be for the courts in England to form a view on whether the person to be extradited has or has not served enough of his sentence that was imposed by the requesting judicial authority.'

This is, in our judgment, a reflection of the caution advised by the court in *Molik*. It is not a blanket exclusion that is applicable in a case such as the present, where there is no reasoned opposition to the evidence on which the Appellant relies.

38. The Respondent relies upon *Troka v Albania* [2021] EWHC 3424 (Admin) to support its submission that, where there is a question as to the interpretation of law in a requesting state, it is not for the Court in the requested state to become involved in the analysis. *Troka* was a case where the issue in question was the proper application of Italian limitation periods. Having reviewed the relevant authorities, Fordham J said at [18]:

> 'What those cases emphasise is that the Court will not become embroiled with disputed questions as to the application, under the requesting state's law, of limitation periods; such questions being for the courts of the requesting state to determine; at least unless the position is very clear cut.'

39. It is apparent from *Troka* and the cases there cited that limitation is treated as being a matter of exceptional complexity and sensitivity, sufficient to justify extreme caution on the part of the English court. However, even in relation to limitation, Fordham J allowed the possibility of the English court becoming involved if the position is very clear cut. In our judgment this is a necessary proviso because of the English court's obligation not to act in such a way as to cause a disproportionate interference with the relevant ECHR rights of a person whose extradition is being sought. Furthermore, whereas here there is no evidence from the Respondent about the criteria to be applied or how the French court would or might resolve the issue, it can hardly be said that the English court is liable to become 'embroiled with disputed questions'. In our judgment it is axiomatic that the English court has a primary obligation to satisfy itself that the Appellant's rights will not be subject to disproportionate interference if it were to order his extradition."

22 On the basis of these authorities, the court in *A* rejected the contention that it was not properly open to this court to consider the question of whether the appellant in that case had served his sentence. It held at para 41:

"We accept without reservation that the Court should tread very warily where what is suggested is that an appellant still has (or may still have) a period of his sentence left to run; but, on the information that is available to us, that is not this case – we are concerned with the assertion that the Appellant has served the full term of his sentence as a result of the time he has spent under electronically monitored curfew and the other restrictions that we have summarised above. We also accept without reservation that, had the Respondent provided us with material information that went to undermine the case that the

> Appellant seeks to run, that information should and would have been given the close attention and respect that flows from the obligation of mutual trust underpinning the extradition arrangements; but there is no such information here either as to the proper interpretation of French law, or the criteria that the French court would apply or how such criteria would affect the outcome of any determination of the length of sentence that the Appellant has served. That has remained the case despite considerable evidence being provided to the Respondent about the terms of the Appellant's bail, including restrictions of movement over and above the period of electronic curfew: see [7] and [9] above. Further information could have been requested if what had been provided was thought to be insufficient: but it was not. The Respondent has simply contended that the English court should not entertain the question whether the Appellant had served his sentence."

23 The court went on to admit the fresh evidence on which the appellant relied. The appeal was reopened and allowed on Article 8 grounds. The court said at para 49:

> "Had it been necessary to rely upon the residual jurisdiction founded on abuse of process, we would have reached the same conclusion by that route".

The parties' submissions

24 Mr Stansfeld submits that the present case is on all fours with the case of *A*. The March 2023 document filed by the respondent amounts to an uncontroversial commentary and exposition of the law but does not deal with the facts of the appellant's case. There is no evidence from the respondent as to how the French authorities would approach the appellant's case or apply the relevant legal provisions to his case. There has been no substantive engagement with Monsieur Arnaud's conclusions, such that, as in *A,* the respondent has placed all its eggs in one basket, namely, the proposition that the French courts alone are competent to determine whether the appellant has served his sentence, which was a submission rejected by this court in *A*.

25 Mr Seifert submits that the evidence and circumstances in *A* were different. The further information, namely the document of March 2023, provides sufficient information as to the basis upon which the judgment of the Cour de Cassation must be treated. The March 2023 document (he submits) provides a detailed interpretation of French law and the way it applies to cases such as the present.

26 Mr Seifert submits that the question whether or not a curfew of five hours could amount to an EMHA is a matter for the trial court. While that was also the case in *A*, the respondent has now also explained that it would be erroneous to suggest that any curfew measure would amount to an EMHA measure. Mr Seifert submits that the judicial authority has considered the position of the appellant and has determined that it is not currently able to assess whether or not his sentence is served. He reminds me that comments from a judicial authority ought to be taken at face value in accordance with the principle of mutual trust and confidence (see, for example, *Lazo v Government of United States of America* at para

49 per Cavanagh J). He submits that the judicial authority will have constantly monitored the appellant's situation and, in light of that monitoring, it still has not withdrawn the warrant. There can, therefore, be no acceptance that the appellant has served his sentence.

27 It is not appropriate simply to assume that the French court will apply the reduction in sentence. The appellant needs to make the necessary application for his bail conditions to be taken into account. That application needs to be made upon his surrender. While there is, understandably, a focus on the hours of the curfew, there are other conditions which ought to be analysed, such as reporting and other restrictions. For these reasons, Mr Seifert submits that it cannot be said, as a matter of law, that the applicant has effectively served the sentence for which his extradition is sought.

Discussion

28 The first question I should ask is whether I should admit the fresh evidence on which the appellant wishes to rely. Mr Seifert does not suggest that the conditions for admitting fresh evidence are not met and does not oppose the application to admit it. I shall admit it.

29 As in the case of *A,* the respondent does not challenge the way in which Monsieur Arnaud applies French law to the appellant's case. The March 2023 document from the Ministry of Justice does not deal with the appellant's case in any individualised manner but amounts to a general statement of the law which appears, as I indicated during discussion with counsel, to be all of apiece with Monsieur Arnaud's general statement of the applicable law.

30 As in *A*, the respondent does not provide any information about the criteria that would be applied by the Lyon Court of Appeal in determining whether the period of EMC would count towards the appellant's sentence and does not give any indication about how the appellant's bail conditions would be treated. This is not a promising baseline from which to invite the court to take a different approach to the Divisional Court in *A*.

31 I have been provided with no reason to distinguish *A* on any point of law. I accept that each case turns on its facts and that there may be some theoretical reason on the facts why the appellant's EMC would not be deducted from time to be served in France. I have, however, been provided with no evidence as to why that may happen. The fact that the judicial authority has not withdrawn the warrant is consistent with its position that the French courts are alone competent to determine whether the appellant's sentence has been served. It is not and cannot be evidence that the sentence has not been served: there is no particularised evidence from the respondent about the appellant's personal situation.

32 I can express the respondent's position in the present case in no more eloquent terms than the Divisional Court expressed the position in *A*. The respondent has placed all the eggs in one basket, namely that the French court is alone competent to assess whether time on EMC should be deducted from the outstanding period of the appellant's prison sentence as recorded in the EAW. For the reasons given in *A*, that submission cannot succeed. As *A* makes plain, this court has a primary duty to ensure that the appellant's extradition would be compatible with his Convention rights. It will perform that duty by considering the evidence before it. In the absence of reasoned opposition to the evidence on which the

appellant relies, the question of trust in what a requesting state says about a certain state of affairs does not arise. The principle of mutual trust and confidence does not have purchase when there is an absence of any evidence from the requesting state.

33 In the absence of any reasoned opposition to Monsieur Arnaud's evidence, I accept his opinion that the conditions of the appellant's curfew would meet the criteria for EMHA. I am satisfied that the appellant has effectively served his sentence in full and that his extradition would be a disproportionate interference with his right to respect for private or family life, which he has built up in the UK. In my judgment, it is necessary to reopen the appeal in order to avoid a real injustice in the present case.

34 As to the appeal itself, for reasons set out above, I have concluded that the appellant's extradition would breach his Article 8 rights. On this ground, his appeal will be allowed.

35 As in the case of *A*, I would have reached the same conclusion on the basis of abuse of process.

CERTIFICATE

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This transcript has been approved by the Judge.