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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 2873 (Admin)

No. CO/361/2018

Royal Courts of Justice

Thursday, 10 October 2019

Before:

MR JUSTICE HOLMAN

B E T W E E N :

TAMAS KISS

Appellant

- and -

MUNICIPAL COURT OF MISKOIC HUNGARY

Respondent

MS AMELIA NICE appeared on behalf of the appellant.

MS SAOIRSE 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. This is a substantive appeal from an extradition order made by District Judge Blake in the Westminster Magistrates' Court on 19 January 2018. The order requires the extradition of the requested person, now the appellant, to Hungary. The reason why there has been such a very long period between the date of the extradition order and this hearing is that, among a number of other grounds of appeal, the appellant raised consideration of prison conditions in Hungary. That was the subject of protracted litigation here in another case called *Fehyvesi and Szalai* and, even now, there are further issues in relation to prison conditions in Hungary, which, as I understand it, will be the subject of consideration by the Divisional Court in a case called *Orsos* on or about 20 November 2019. That ground of appeal, or area of this case, remains stayed until after the judgment in the case of *Orsos* is known. But in the meantime, Nicol J ordered recently that the other issues that arise in the present case should be finally heard and adjudicated upon at the present hearing today.
2. The present judgment addresses only one of those issues in relation to only one of the two European arrest warrants in point in the present case. For reasons which I will shortly describe, I have decided that the first of the two European arrest warrants should now be discharged and, to that extent, this appeal will, in any event, be allowed.
3. I wish to stress very clearly that the reasons for my decision in relation to this first of the two European arrest warrants turn entirely on the situation as it now is. They do not reflect or indicate the slightest criticism of the district judge in his own ruling and decision of 19 January 2018.
4. The essential facts for the purposes of this part of the case, and this judgment are as follows. The appellant moved to this country in 2011 and has lived here ever since. On 5 September

2017 he was arrested under two European arrest warrants. The second of those two warrants is an accusation warrant, which alleges that on 22 May 2011 he committed a burglary and stole a digital camera, camera lens, travel bag and a laptop, having a total value of the equivalent of about £420. That, as I say, is an accusation warrant about which I say nothing further in the present judgment.

5. The first of the two European arrest warrants (which I will call “EAW1”) is a conviction warrant. The warrant describes that the appellant was convicted in 2011 of two discrete offences. The first - described as “Facts One” - is that between 14 February and 11 March 2011, in his apartment, he consumed a marijuana cigarette on one occasion at least. The second offence - which is described in EAW1 as “Facts Two” - is that, on or about 13 February 2011, he provided substances with a narcotic effect, but not qualifying as narcotic drugs, on several occasions to a specified individual, “despite being aware that [that individual] was under the age of 18 years, and thus he assisted a minor to the pathological indulgence of a substance with a narcotic effect.” Later information from the Ministry of Justice of Hungary in a letter dated 12 October 2017 says that,

“The offence of inciting substance abuse was committed by a substance called mefedron, which is not listed as a drug in Hungary, nevertheless, causes similar narcotic effect like drugs, such as euphoric state of mind, physical and psychological dependency, furthermore depression and physical degradation in a long run. Consuming such a substance is not a crime under Hungarian law in itself, however, persuading a minor to do so classifies as a criminal offence, since the protected social interest of this crime is the healthy, physical and psychological development of minors.”

As I understand it, although possession or supply of mefedron is not of itself an offence in Hungary, except to a minor, the supply of that substance in this country is an offence.

6. The EAW1 describes that, in relation to the two offences described under Facts One and Facts Two, the appellant received an aggregate sentence of one year's imprisonment in a medium security prison. That sentence, if it stood, remains to be served in full.
7. At the hearing before the district judge in January 2018, the Requesting Judicial Authority invited the district judge to discharge the requested person in respect of the conviction for the offence of consuming a marijuana cigarette (*viz.* Facts One) on the grounds that the facts, as so described in EAW1, do not amount to a criminal offence in this country. The district judge, accordingly, did discharge the requested person in respect of the offence under Facts One in EAW1.
8. The consequences of that discharge upon the sentence for the remaining offence under Facts Two in EAW1 have since been the subject of enquiry and investigation in Hungary. In summary, it is now quite clear from material received from the Ministry of Justice in Hungary - and also from the relevant Hungarian court and judge - that if the appellant is extradited under EAW1, in relation to the offence described as Facts Two alone, the sentence of one year's imprisonment would be disaggregated and he would fall to be re-sentenced for the offence under Facts Two standing alone. It has been described, in particular, in a letter dated 25 September 2019 from the judge of the relevant court in Hungary, that the court would adopt a process of determining the portion of sentence imposed for the offence for which the appellant was extradited,

“by comparing the ratios of the maximum sentences which can be imposed for the offences for which the consecutive sentence is imposed as a starting point.”

The letter continues,

“In the case at hand, the prescribed scale of penalties for both offences is between three months and two years, and the court imposed one year of imprisonment, as a cumulative sentence. Accordingly, during its procedure, the court must determine the portion of sentence imposed for the offence for which surrender was requested within the timeframe of three months to one year and in the course of this, it must weigh the aggravating, the mitigating circumstances and all other relevant data that pertain to the convict and the given act.”

9. Further, the letter continues by explaining that, under specified sections of the Hungarian Criminal Code, “the punishment portion determined by the court based upon the above rules” must include any time spent by the appellant in detention here, and also that “based on the available data, the four days that the convict spent under British criminal supervision correspond to one day of imprisonment”.
10. Pausing there, as I understand it, any period of time that this appellant spent in actual detention was so short as to have negligible impact on sentence. However, where the letter says “the four days that the convict spent under British criminal supervision correspond to one day of imprisonment”, this appears to mean that every four days spent “under British criminal supervision” shall correspond to one day of imprisonment. It does appear, on the basis of expert material very recently supplied by a Hungarian attorney, Balazs Toth, that,

under Hungarian law, periods of time spent subject to restrictions and conditions do rank as “criminal supervision”. It is now over two years since this appellant was first arrested. Throughout that period he has been on conditional bail, but the conditions have been quite onerous ones. For the first 15 months, until 7 December 2018, the conditions included a condition as to residence, a curfew, a tag, and weekly reporting to a police station. Since 7 December 2018, the tag has been removed and the curfew relaxed. However, the appellant has still been required to reside and sleep at specified premises and the police reporting was increased from once a week to three days a week. It thus appears that there has now been over two years of “criminal supervision”, which would correspond to approximately six months of imprisonment in Hungary.

11. On behalf of the appellant, Ms Amelia Nice now relies heavily on that recent letter dated 25 September 2019 from the relevant court in Hungary and, indeed, on a yet further letter dated 9 October 2019, which was yesterday, from the Ministry of Justice of Hungary itself. That letter further addresses the approach a court would take upon disaggregation, although, in the end, that letter does not seem to me to add further to what the letter of 25 September 2019 says.
12. Ms Nice submits that, in the light of the discharge by the district judge in relation to the offence under Facts One in EAW1, section 65 of the Extradition Act 2003 is now engaged in relation to the remaining offence under Facts Two. The effect of section 65(3)(c) of that Act is that a person cannot be extradited in relation to an offence of which he has been convicted and sentenced to a lesser term of imprisonment than four months. She submits, essentially, as a matter of law and as a knock-out point, that, in view of the fact that the Hungarian court itself has said in their letter of 25 September 2019 that the disaggregated sentence in relation to the offence under Facts Two would be “within the timeframe of three months to one year”, one cannot now be sure that this appellant will be sentenced after

disaggregation to at least four months. So, she submits, the conditions under section 65 of the Extradition Act are not satisfied.

13. The difficulty with that submission is that the facts and circumstances of this case do not fall precisely within the overall language of section 65. Section 65 provides as follows:

“(1) This section sets out whether a person’s conduct constitutes an ‘extradition offence’ for the purposes of this Part in a case where the person -

(a) has been convicted in a category 1 territory of an offence constituted by the conduct, and

(b) has been sentenced for the offence.

(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3) ... are satisfied.

(3) The conditions in this subsection are that—

(a) the conduct occurs in the category 1 territory;

(b) 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;

(c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.”

14. In the present case, this appellant has been convicted in category 1 territory. As things stand, he has been sentenced for the offence, so the requirements of subsection (1) are both satisfied.
15. One turns, therefore, to the conditions in subsection (3). The conduct did occur in the category 1 territory. The conduct would constitute an offence under the law of England and Wales, so the requirements of subsection (3)(a) and (b) are satisfied.
16. The current position is that a sentence has been imposed as EAW1 describes, and it is a sentence of one year’s imprisonment, so, if applied literally, the condition in subsection (3)(c) is also satisfied, in that a sentence has been imposed in the category 1 territory for a term of four months or a greater punishment.
17. The conundrum in the present case is that we know that that sentence will, in fact, be disaggregated and he will be re-sentenced. It is at least arguable that the circumstances of the present case now fall more closely within section 64 of the Extradition Act than section 65, although Ms Nice and Ms Saoirse Townshend, who appears on behalf of the Requesting Judicial Authority, both submit that it is section 65 and not section 64 which is in point.
18. The submission of Ms Nice is, first, that one can no longer be sure that after disaggregation there will be a sentence of four months or more, because of what is stated in the letter of 25 September 2019, which I have quoted.

19. I am not, myself, satisfied that that amounts to a knock-out point, precisely because, as I have indicated, it is difficult to fit the facts and circumstances of the present situation into section 65, and it does not seem to me that one can necessarily say that the condition in section 65(3)(c) is not satisfied in this case. However, I do accept the second, and more general submission of Ms Nice that the court must always guard against a situation which has become, in the technical sense, abusive in relation to extradition.

20. Ms Nice draws my attention to the authority of *Zakrzewski v. Regional Court in Lodz, Poland* [2013] UKSC 2 in which Lord Sumption, giving the judgment of the Supreme Court, said at paragraph 11:

“The second safeguard lies in the inherent right of an English court, as the executing court, to ensure that its process is not abused ...”

21. The facts and circumstances of *Zakrzewski* are different from those in the present case. In that case there was a process of aggregation of several sentences in the Polish convicting court, which had produced a cumulative sentence of 22 months, as opposed to an aggregate sentence of 45 months’ imprisonment under the original sentences. This led the Supreme Court to say that, on the facts and in the circumstances of that case, the facts stated in the warrants were no longer accurate and, on that technicality, the extradition would have been set aside, although, as it happens, the appellant had returned voluntarily to Poland before the judgment of the Supreme Court was given.

22. At paragraph 15 of his judgment, Lord Sumption quoted some words of Lord Hope that,

“all the executing court needs to know in these circumstances is whether or not the sentence was one for at least four months.”

Lord Sumption continued:

“The position would be different if the composite sentence was below the four-month threshold, because there would then be no extradition offence.”

23. It seems to me, on the facts and circumstances of this case, as they now are, that there is a real possibility in this case that, if this appellant is now extradited under EAW1, in relation to the offence under Facts Two, he would not be sentenced to a sentence of four months’ imprisonment or more. There are two reasons for that. The first is the language of the letter of 25 September 2019. The second is the credit that would clearly be given in Hungary for the period of over two years that the appellant has now spent “under British criminal supervision”. It seems to me, therefore, that there is a real risk in this case that, if this appellant is now extradited under the balance of EAW1, he would be being extradited to serve an ultimate remaining sentence of less than four months, which is clearly contrary to the policy of the Extradition Act.
24. In addition, it seems to me that there is an obvious issue of proportionality in this case in relation to the remaining offence under EAW1. It was committed about eight and a half years ago in February 2011. It consisted of supplying some narcotic substance, the possession of which is not even an offence in Hungary. This appellant has been living here now for over eight years. I say nothing at all in relation to the proportionality or Article 8 arguments, which Ms Nice will shortly make submissions on, in relation to the quite separate accusation European arrest warrant in relation to the alleged burglary. But, so far as the balance of EAW1 is concerned, it would, in my view, plainly be abusive and lack any proportionality now to extradite this appellant. I stress, again, that this judgment and

decision are based on the circumstances as they now are in October 2019 and take account also of fresh evidence, namely, further information that has only recently been received from Hungary. I allow the appeal in relation to EAW1, but I do not indicate that there was any error in relation to it on the part of the district judge.

J U D G M E N T

MR JUSTICE HOLMAN:

25. This judgment should be read in continuation of the one I gave this morning in the same case.
26. I now turn to the second European arrest warrant which I will call “EAW2”. This is an accusation warrant. It relates to a single offence, which is described in the warrant as “Misdemeanour of theft involving a minor value ...” It does seem, however, to have included the element of burglary as that offence is known under English law.
27. There is a relatively long factual description of the circumstances of the alleged offence in paragraph (e) of EAW2. It is not entirely easy to follow, but the gist of it appears to be as follows. A man called Biro owned an apartment, which was itself subdivided into two separate apartments, or areas. Mr Biro lived in one part and the requested person rented the other part from Mr Biro and lived in it. The two parts were separated by a door. It appears that around 2 p.m. on 22 May 2011, Mr Biro, this requested person, and other friends were drinking on the terrace of the part of the apartment which was used by Mr Biro. The requested person entered the part of the apartment which was used by Mr Biro several times (it appears with the permission of Mr Biro) during which he unlocked the door separating the two apartments using the key in the lock. It is said that at about 4 p.m. on the same day,

Mr Biro and his friends left to go to a pub, leaving the requested person in the apartment.

He was now able, in the words of the warrant, “to subsequently freely enter the apartment of [Mr Biro] from his apartment”.

28. The allegation is that, after Mr Biro and his friends had left, the requested person entered the apartment of Mr Biro through the door which separated the two apartments, which he had previously unlocked. It is alleged that he then appropriated a digital camera and its lens, a travel bag and a laptop, all owned by Mr Biro, having an aggregate value of the equivalent of about £400 sterling. The EAW continues, “The defendant subsequently moved out of the apartment that day, sold the objects stolen from [Mr Biro] in Budapest and went abroad.”
29. Those are the alleged facts of the single offence alleged in EAW2.
30. Ms Nice is well prepared and clearly has an armoury of points that she would wish, if necessary, to argue. But time is short today, for there is another substantive appeal waiting to be heard, so I required Ms Nice to focus on what she identifies as her best point. She has done so. She rightly says that, as EAW2 concerns an accusation warrant, section 21A of the Extradition Act 2003 is in point. I will not read the whole of that section into this judgment, but it has the effect that, in the case of persons who have not been convicted (viz. the situation of this appellant in relation to EAW2, which is an accusation warrant), the court has to have regard to proportionality. Specifically, by section 21A(3), there are certain specified matters relating to proportionality, namely, the seriousness of the conduct alleged to constitute the extradition offence, the likely penalty that would be imposed, and the possibility of the relevant foreign authorities taking measures that would be less coercive than extradition. If the court considers that extradition would be disproportionate, it must order the requested person’s discharge.

31. District Judge Blake dealt with proportionality relatively briefly at paragraph 28 of his ruling, where he said as follows:

“EAW2 being allegations, I have considered section 21A of the Act and I am satisfied that extradition is compatible with the requested person’s Convention rights and, further, I considered section 21A(3) with regard to proportionality. I consider the offence is of significant seriousness to justify extradition and that it is likely to be met by a sentence reflecting that if the requested person is convicted. I am satisfied that there was no possibility of the Requesting Judicial Authority taking less coercive measures.”

Ms Nice submits that that treatment of the issue of proportionality is inadequate and overstates the gravity of the facts alleged, and probably overstates the likely penalty.

32. There was no evidence in this case from Hungary as to the actual likely penalty if the requested person was extradited and was convicted of this offence. One has to fall back, therefore, on some consideration of the likely penalty if he were convicted of that offence here. Frankly, it does seem to me, with respect to the district judge, that he overstated the gravity of the offence and overstated the likely penalty. I note that at paragraph 10 of his ruling, he summarised the facts of the offence alleged in EAW2 in very brief terms, saying no more than that: “He burgled an apartment and stole a digital camera, camera lens, travel bag and laptop.”
33. I do not in any way seek to minimise the gravity when adjacent occupants of a subdivided apartment abuse the trust that the one may place in the other, but, that said, this offence was not on the same scale as breaking into somebody’s home as a stranger. The requested person

had entered Mr Biro's flat with the full knowledge and awareness of Mr Biro and had, it is alleged, seized the opportunity to leave the interconnecting door unlocked. The value of the goods stolen is, as I have said, about £400. There are no aggravating features of any kind. It seems to me highly unlikely that, seven and a half years after the event, any English court would have imposed any custodial sentence upon this requested person in relation to facts of that kind.

34. There are other factors which impact upon the proportionality of extradition. By the time of the hearing in front of the district judge, the appellant had lived in England for about seven and a half years. He has now lived here for nearly nine years, subject to his extradited return to Hungary to which I will shortly refer. He has no convictions of any kind since he came to live in England. He has worked here and, indeed, established a small business running a bike shop, so he appears to have lived a good and industrious life in all the time that he is living here. It is right to say that, at an earlier stage in his life, he had a significant criminal record. He apparently had 19 previous convictions and had served seven years in prison, or thereabouts, in Hungary. But the really striking feature of the facts and chronology in relation to the present case is that this appellant was extradited to Hungary in May 2016.

35. At that time, there were, evidently, two European arrest warrants issued. One of them related to breaking in with others to a shop or similar commercial premises and attempting to steal from those premises, although he was caught before anything was stolen. In relation to that matter, he was successfully extradited to Hungary in May 2016. He was sentenced to six months' imprisonment, which he served, and was then released in November 2016. But, at the same time as the European arrest warrant in relation to that matter, another European arrest warrant had been issued on 5 May 2014 in relation to the very matter which is now the subject of EAW2. At that time, the Hungarian authorities did not proceed with that

European arrest warrant since they had successfully obtained extradition in relation to the break in to the shop or commercial premises. Further, it is said that, while he was back in Hungary in prison in 2016, he was actually questioned in prison on 4 October 2016 in relation to the very matter which is now the subject of EAW2, but he was released from prison on 15 November 2016.

36. It seems to me, frankly, that, in relation to this relatively minor offending, committed, or allegedly committed, as long ago as May 2011, the Hungarian authorities have, frankly, had their chance. They already knew about this alleged offence, since there was the earlier European arrest warrant issued in 2016. They knew that he was back in Hungary. They knew that he was in prison, since they actually interviewed him in prison in October 2016 in relation to this very matter. There was, obviously, ample opportunity at that time for a prosecution to take place and for this matter to be resolved before ever he left Hungary again. But he was enabled to return here late in 2016, and another nine months or so elapsed before the present EAW2 was issued on 23 August 2017. Quite frankly, in my view, the Hungarian authorities had an ample opportunity to prosecute, if they wished to do so, in relation to this matter. It is not a serious matter. The likely penalty is, at most, a short term of imprisonment. In my view, with respect to him, the district judge formed a wrong view with regard to proportionality at the time of his ruling and order in January 2018. Even if I am wrong about that, nearly another two years have elapsed and this case requires to be considered now on the basis of the facts and chronology as they now are.
37. Section 27 of the Extradition Act 2003 provides that, on an appeal under section 26, the court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied. In my view, the conditions in subsection (3) of this case are satisfied. In my view, the district judge ought to have decided the question of proportionality differently and, if he had done so, he would have been required to order the requested

person's discharge. But, even if I am wrong about that, this appeal falls to be considered now in October 2019 on the basis of the facts as they now are, which includes the further very considerable passage of time, the evidence as to which was not, of course, available at the time of the extradition hearing.

38. In my view, it is beyond argument that by now the appropriate judge would have to have decided the question of proportionality differently and, if he had done, he would have been required now to order the appellant's discharge.
39. So, for those reasons, I do now allow this appeal. I order the discharge of the appellant and I quash the order for his extradition on both EAW1 and EAW2.

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