



Neutral Citation Number: [2020] EWHC 2341 (Admin)

Case No: CO/1221/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 August 2020

Before :

MR JUSTICE FORDHAM

Between :

FLAVIUS-FLORIN SAPTELEI
- and -
JUDECATORIA HUNEDOARA, ROMANIA

Appellant

Respondent

Mark Smith (instructed by Payton's Solicitors) for the **applicant**
The **respondent** did not appear and was not represented

Hearing date: 25 August 2020

Judgment as delivered in open court at the hearing

Approved Judgment

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

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THE HON. MR JUSTICE FORDHAM

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

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The mode of hearing was a BT conference call. The Administrative Court always provides a prior opportunity for the parties' representatives to state any preference, or provide any reasons why remote hearing was considered inappropriate. Like the appellant's representatives, I was satisfied that a telephone hearing was appropriate. I heard oral submissions in exactly the way I would have done had we all been physically present in a court room. As regards open justice, the choice of telephone hearing rather than Skype for Business was a welcome one: see Urynowicz [2020] EWHC 2267 (Admin) para 3. The hearing and its start time – together with an email address which could be used by any person wishing to observe the hearing – were published in the cause list. The hearing was recorded. This judgment will be released into the public domain. By having a remote hearing, we eliminated any risk to any person, from having to travel to, or be present in, a court. I am satisfied that no right or interest was compromised and that, if there was any interference with or qualification of any right or interest, it was justified as necessary and proportionate.

'Retrial-conviction' cases/s.21A(1)(b) proportionality bar

2. The appellant is wanted for extradition to Romania. That is in conjunction with a conviction European Arrest Warrant (EAW) issued in November 2018 which states that the appellant was convicted in his absence but will be entitled to a 'retrial' were he extradited. He therefore falls within the category of what I will call "retrial-conviction cases". That is the sort of case considered by the Supreme Court in Konecny [2019] 1 WLR 1586. A retrial-conviction case is nevertheless a 'conviction warrant' case for the purposes of the statutory scheme, as the Supreme Court held. That means that the appellant was precluded by statute from raising the Extradition Act 2003 section 21A(1)(b) proportionality bar (approached by reference to Practice Direction 50A). From that arises the central point in this case.

A reasonably arguable ground of appeal

3. I am going to grant permission to appeal in this case because I am satisfied that Mr Smith has raised a reasonably arguable ground of appeal engaging an important point of principle and arising out of the reasoning in Konecny.

Konecny

4. What the Konecny case decided, in essence, was that the distinction drawn between conviction warrant and accusation warrant cases, in the context of section 14 of the 2003 Act and the passage of time, introduced into the law a substantively unfair distinction, requiring to be accommodated by an adjusted Article 8 proportionality analysis. The distinction was between an ability to rely on passage of time since the alleged offending (in an accusation warrant case) and the ability to rely on passage of time only since being unlawfully at large (in a conviction warrant case). It was pointed out that a retrial-conviction case was in substance like an accusation warrant case. The Supreme Court identified this as a substantive unfairness calling for legislative amendment, but which should be addressed – and had in that case adequately been

addressed – by considering the equivalent passage of time considerations through the available prism of Article 8 (by reference to Lady Hale’s observations in HH [2013] 1 AC 338 paragraphs 6 and 8): see Konecny at paragraph 57. At first sight that seems to be a mile away from the present case. It can also be observed that the “full and appropriate account” to be taken of passage of time under Article 8 (see paragraph 70 of Konecny) was not spelled out by the Supreme Court as necessarily having to be an identically equivalent exercise, positing how section 14 would have been applied on the facts, using the accusation warrant start date (date of alleged offending).

The building blocks of the argument

5. In my judgment, there is force in Mr Smith’s essential argument which, as I see it, runs as follows. The District Judge took the position that the case-law was to be taken and applied based on the issues which the Courts have thus far determined, observing that the point being raised by Mr Smith had not been determined by the Supreme Court in Konecny but rather specifically left open by that Court (see paragraph 71). The District Judge proceeded to address the question of seriousness of the conduct and likely penalty (ie. the matters relevant to consideration of the proportionality bar, if it applied) only through the conventional prism of Celinski [2015] EWHC 1274 (Admin) paragraph 13(iii). Understandable though that may be on the part of a District Judge in the magistrates’ court, it is reasonably arguable that the law now, on further analysis, requires a modified approach. That is properly an issue for this Court on appeal.
6. Next, in principle, it can work ‘substantive unfairness’ for a retrial-conviction appellant to be disqualified from the same statutory protection as would arise in the case of an accusation warrant. That was so in the context of section 14: see Konecny. But there are other features of the statutory scheme where the problem also arises. The statutory proportionality bar is one of them, as the Supreme Court explicitly recognised might be the case (see Konecny at paragraph 71). That is because, if the appellant were facing an accusation warrant to be extradited to face a trial, he would be entitled to invoke the proportionality bar in section 21A(1)(b), (2), (3) and (4)(b). He would be entitled to have the court evaluate the seriousness of the “specified matters” including conduct, and moreover to do so pursuant to the guidance in Practice Direction 50A. That means if the case falls within a specified category in the Guidance, and absent “exceptional circumstances”, the court “should generally determine that extradition would be disproportionate”. All of this is denied him, even though he is being extradited to face a trial, because it is a retrial-conviction pursuant to a conviction EAW.
7. That ‘substantive unfairness’ requires that the Article 8 proportionality evaluation accommodate the same features, and eliminate the substantive unfairness. Taking “full and appropriate account” of all this, is a modified position, which goes further than Celinski paragraph 13(iii), albeit that it uses the existing gateway of Lady Hale in HH paragraph 8(5) (referenced in Celinski at paragraph 6) to get there.
8. Those are the essential building blocks, as I see it, of the central argument.

A ‘hard’ and a ‘soft’ version of the argument

9. As it seems to me, there are in fact two versions of this central argument. The ‘hard’ version is that the domestic court is duty bound to replicate, pursuant to Lady Hale’s gateway, the very same conclusion as would have been arrived at had the section

21A(1)(b) proportionality bar been available to the retrial-conviction appellant. The ‘soft’ version is that the domestic court is at least obliged to have regard to the section 21A(1)(b) proportionality bar exercise, and take it sufficiently into account in the overall Article 8 balance, albeit without necessarily being required to achieve absolute symmetry. Both versions are, in my judgment, reasonably arguable.

‘Reduced public interest’

10. In refusing permission to appeal on the papers, Swift J concluded that a ‘reduced public interest’ analysis, by reference to ‘seriousness of the conduct’, could not make a difference to the overall Article 8 evaluation in the present case. The key point, as it seems to me, is that – if Mr Smith is correct in either version of his central contention – what will be needed is something greater than the currently-recognised approach which sees seriousness of the criminal conduct as a factor informing the weight to be given to the public interest. If Mr Smith is right, more will be needed than a ‘reduced public interest’ approach. In particular, what will be needed will be the having of close regard to how the proportionality bar would have been applied in the individual case, were it an accusation warrant case

Is the premise unsound?

11. In those circumstances, I have looked to see whether there is a ‘knockout blow’ in this case, based on the fact that Mr Smith has adopted a false premise. His premise is that, were this an accusation EAW case, the appellant would stand to be discharged by reference to section 21A(1)(b) proportionality bar. It is that premise that provides the oxygen supply for the ‘substantive unfairness’ point. But is the premise sound? The District Judge did not answer that question. He did not analyse the case by reference to the features of section 21A(1)(b) and (2)-(3). He addressed the case by reference to the conventional exercise described in Celinski, and by reference to the principle of (and threshold applicable to) abuse of process. I look to the respondent’s notice filed in this case, to see whether the respondent was disputing the premise. It was open to the respondent to put forward a reasoned basis on which, beyond argument, it was contested that the proportionality bar could have assisted even if it had applied or being treated as applicable or relevant for Article 8 purposes. No such submission is found within the submissions attached to the respondent’s notice. The appellant says he would be discharged in this case were this accusation warrant. He relies on the Practice Direction and the description of “minor road traffic, driving -related offences”, exemplified by the description “where no injury, loss or damage was incurred to any person or property’. The offences underlying this EAW were two offences of driving without a licence in Romania in July 2015 and October 2015. The appellant says that the relevant sentencing guidelines in England and Wales would involve a range with a maximum of a level 3 fine, including if the aggravating factor of no licence have ever been held were present. He says driving without a licence falls squarely within the description in the Guidance. He says that the fact that there were two offences would not take the case into the “exceptional circumstances” territory, on the basis of “multiple counts”, that being an evaluative overall judgment not a rigid test. As I have said, the respondent has decided not to address any of this in the respondent’s notice. The premise is not said by the respondent to be unarguable. In my judgment, based on the arguments, materials and authorities currently before the Court, the premise is a reasonably arguable one. I

put it no higher than that, nor need Mr Smith put it any higher than that for the purposes of this application. I will therefore grant permission to appeal.

Listing before a Divisional Court?

12. Two matters remain. The first is the question whether I should direct that this case be heard by a Divisional Court. Mr Smith's suggested rationale for that is that, if he is right, it would be necessary to depart from Celinski which only a Divisional Court could do. I am not persuaded by that submission, as things stand. If Mr Smith is right, by reference to the logic of subsequent Supreme Court authority in Konecny and in one particular sub-category of cases, Celinski paragraph 13(iii) will be the subject of a further development and will call for a qualification in those cases. If he is right, the Article 8 prism for that qualification is the gateway identified by Lady Hale in HH at paragraph 8(5). That gateway is itself described in paragraph 6 of Celinski. I do not accept that the acceptance by the High Court of the legal logic of the appellant's argument in this case would mean departure from Celinski of a nature that would not be open to a single judge of the High Court. What I will say is this. I can see considerable force in the suggestion that it would be better, all things considered, if this case were listed to be heard before a Divisional Court. I do think it can be said with force that that would be a good idea. These observations should be, and no doubt can be, considered by those dealing with listing decisions. There is no reason why they should not choose to have this case heard by a Divisional Court. But I am not prepared to tie anybody's hands, so far as that is concerned.

Other features of the case

13. The second and final matter is this. Various other features of the case, and various other criticisms of the District Judge are to be found within the grounds of appeal. They include, for example: the criticism of the District Judge in the way that Article 8 was approached, and the way it was not approached; and in the fact that the District Judge emphasised abuse of process. I asked Mr Smith whether he accepted that the only route for inviting this Court on appeal to reopen the question of Article 8 evaluation is the argument that I have summarised above. He sensibly accepted that it was. Put straightforwardly, if he is wrong about the arguments based on the proportionality bar, and his 'hard' or 'soft' versions of the central argument, no further or other feature of this case would justify this Court in overturning as "wrong" the District Judge's conclusion. Viewed in conventional Article 8 terms - and without reference to the proportionality bar 'substantive unfairness' point - there is, I am quite satisfied, no independent, self-standing, reasonably arguable, ground of appeal. If the proportionality bar argument justifies the Article 8 analysis being revisited in this case then it will be open, of course, to the Court dealing with the substantive appeal to consider all matters relating to the Article 8 balance (but no doubt in the light of the District Judge's findings of fact).

Conclusion

14. For all these reasons, permission to appeal is granted and (having discussed the order with Mr Smith) the terms of the order are: (1) Permission to appeal is granted; (2) No order as to costs, save that there be a detailed assessment of the appellant's publicly funded costs. I also made various case-management directions.

25 August 2020