



Neutral Citation Number: [2022] EWHC 1761 (Admin)

Case No: CO/2681/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 7th July 2022

Before :

MR JUSTICE FORDHAM

Between:

VLADIMIR DOCHEV

Appellant

- and -

DISTRICT PROSECUTORS OFFICE IN YAMBOL
BULGARIA

Respondent

Joshua Kern (instructed by Kayders Solicitors) for the **Appellant**

The **Respondent** did not appear and was not represented

Hearing date: 7/7/22

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 and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. This was the in-person hearing of a renewed application for permission to appeal in an extradition case. The Appellant is aged 29 and is wanted for extradition to Bulgaria. That is in conjunction with a conviction European Arrest Warrant (EAW) issued on 30 May 2019 and certified on 19 November 2020. It relates to custodial sentences, in aggregate of 20 months, for possession of methamphetamine in January 2018 and September 2018. The second offence was committed by the Appellant while he was serving a suspended sentence in relation to the first offence, in consequence of which the suspended sentence was activated. In ordering extradition on 30 July 2021, DJ Goldspring (“the Judge”) found the Appellant to be a fugitive having heard oral evidence from the Appellant at a hearing on 28 May 2021. The Judge refused an application on behalf of the Appellant to adjourn that oral hearing. There was a jurisdictional point relating to the belated service of the appeal notice. That was resolved – and I have been able to reassure Mr Kern that it was resolved – in light of the decision of the Supreme Court in O’Connor [2022] UKSC 4, by an extension of time granted by Sir Ross Cranston on 28 January 2022. It was Sir Ross Cranston who had refused permission to appeal on 29 December 2021. May J adjourned this oral hearing, directing skeleton arguments on the Article 14 ECHR issue.

Adjournment

2. A point has been raised and had been maintained in writing in relation to the Judge’s refusal of an adjournment: cf. Olah v Czech Republic [2008] EWHC 2701 (Admin). That point was the subject of a parallel application for permission to for judicial review which Sir Ross Cranston refused, and certified as totally without merit, on 29 December 2021. Insofar as it still forms part of this appeal, I agree with Sir Ross Cranston that there is no viable argument impugning the Judge’s refusal to adjourn.

Article 14

3. At the heart of this appeal, which the interchange that oral hearings allow has brought into clear focus, is what is said by Mr Kern to be a distinct and viable Article 14 ECHR ground of appeal, whether Article 14 is read with Article 3 or read with Article 8. It concerns the Appellant’s position as an openly gay man who would be serving a custodial sentence in Burgas Prison in Bulgaria. That is the relevant custodial setting, based on the evidence, including an assurance of a type which the recent lead case confirms is adequate so far as concerns general prison conditions and Article 3 ECHR: Mihaylov v Bulgaria [2022] EWHC 908 (Admin). The focus of the Article 14 argument is on the risk of inter-prisoner violence and ill-treatment, and insufficiency of protection by the Bulgarian state authorities, in the custodial setting. It is common ground that the specifically relevant custodial setting is the Open Prison Hostel at Burgas Prison.

The Judge’s approach

4. The Judge analysed the issues relating to threats to the Appellant by reason of his sexual orientation, from other prisoners, through the prism of Article 3. Article 8 ECHR having been raised, the Judge also went on to conduct the familiar Article 8 ‘balance sheet’ exercise. He found that extradition would be compatible with all three ECHR Articles

Article 3, Article 8 and Article 14: . In the context of Article 3, the Judge considered an expert report of Dr Petrov (26 March 2021), Dr Petrov having visited Burgas prison in February 2021 including the Open Prison Hostel and having spoken to the Governor and obtained information from the person who is (as a shorthand) described as the welfare officer. The Judge did not consider, in light of his findings in relation to Article 3, that a separate line of analysis was needed regarding Article 14. The Judge’s analysis regarding the risk of ill-treatment as a gay man in Burgas Prison involved the following headline points.

- i) First, the Judge identified a need for the Appellant to adduce an “up-to-date” body of “cogent evidence” (i) amounting to an international consensus of “systemic failings within the prison system” to “deal with and protect those who are homosexual” or (ii) to show that the Appellant “as a specific individual” faces being treated in an “inhumane, degrading or torturous way”. Part of Mr Kern’s arguments today was to submit that that approach to evidence, reflected in the Article 3 jurisprudence, would not constitute the appropriate test for considering failure to provide sufficient protection where what is being alleged is that the failure is a discriminatory failure (by reason of some discriminatory motivation purpose or ground).
- ii) Secondly, the Judge concluded that the material adduced on behalf the Appellant in any event came nowhere near satisfying that test.
- iii) Thirdly, the Judge identified, in any event, a “strong, albeit rebuttable, presumption” that Bulgaria as an EU member state would comply with its ECHR obligations (focusing on Article 3), absent “clear, cogent and compelling evidence” to the contrary. I interpose that there is no getting away from the fact that that is a presumption which is equally applicable to Article 14 compliance.
- iv) Fourthly, the Judge concluded that there was no evidence which had been adduced on behalf of the Appellant which could serve to rebut that presumption.
- v) Fifthly, and in support of those conclusions, the Judge explained that the expert report was of “little” or “limited value” and did not constitute a basis on which the Court could draw conclusions in relation to ill-treatment of gay men at Burgas Prison.

“Flagrant breach”

5. I put to Mr Kern at the start of this oral hearing that the starting point is that the test applicable for an Article 14 violation barring extradition is whether there is the relevant “real risk” on “substantial grounds” of a “flagrant breach” of Article 14 ECHR, by the Bulgarian state authorities, when Article 14 is read in conjunction with Article 8 or Article 3. Mr Kern told me that, on reflection, he did not accept that starting point, albeit that it was accepted and set out in the skeleton argument that he had filed. He submitted to me, by reference to an authority which had not made its way into the files of dozens of authorities filed for this hearing, that it was arguable that a different approach to “flagrant breach” would be applied in the context of extradition to European states. He relied on a July 2018 Luxembourg case called LM which he accepted was argued on the basis of a “flagrant breach” standard. One of the disadvantages of taking new points, on the hoof – in circumstances where there are been directions for written arguments,

where authorities have been provided, where pre-reading has been done, and where (in this case) the Judge's clerk has confirmed with Counsel that all material that is needed is available – is that it then takes time to consider a new point which is raised, for the first time orally, with no notice to anybody. In the event, through the magic of electronic documents that allow 'word searches' I was able to put to Mr Kern an example, namely the case of Litwinczuk v Poland [2019] EWHC 2745 (Admin), a case which postdates Mr Kern's LM case. In Litwinczuk at §8 the judge (Julian Knowles J) adopts the familiar "flagrant denial" of justice test in the context of Article 6 ECHR, in a case involving extradition in a European country (Poland). That case is clearly flatly against the argument now sought to be advanced. In any event, it is quite impossible in my judgment to see why in principle the test should be a differentiated one, so that a less exacting standard is applicable for extradition to European countries. Having said that, I make clear that that, in the event, in this case nothing turns on whether it would be "flagrancy" or simply real risk of "breach".

Non-state agents

6. The relevant harm in this case is directly harm from "non-state agents". This is not a case in which it is said that there is evidence that there would be an act of a custodian or other state agent which would visit ill-treatment on a detainee, for discriminatory reasons. The authorities before me include a graphic example of the sort of case which can arise: see X v Turkey (App. No. 24626/09) 9 October 2012 ECtHR. That was a case where the Turkish state agent custodians had imposed solitary confinement on a prisoner. He said it was punishment imposed by reason of his sexual orientation. They said it was protective custody to protect him from inter-prisoner violence from fellow inmates. The Strasbourg Court was satisfied (see §57) that "the main reason" for adopting the solitary confinement had been the applicant's "sexual orientation" and found a breach of Article 14 read with Article 3. Another example would be if there were a case in which there was evidence of a risk that there would be beatings administered on detainees on grounds of their sexual orientation by prison guards. Mr Kern rightly accepts that, on the material in this case, the direct source of the harm would be fellow prisoners. He also rightly accepts that ECHR standards would not be directly applicable to their conduct, as non-state agents. What that means is that the Article 14 discriminatory act would need to be an act of the public authorities in Bulgaria. Mr Kern submits that the relevant discriminatory act is an act of failing to provide sufficient protection, on account of sexual orientation.

Key relevance of failure of protection

7. What that argument immediately demonstrates is that a 'stepping stone' on the pathway to establishing Article 14 discrimination, in failing to protect, would be to examine the question of failure of protection in the first place. In my judgment, what that does is to bring into clear focus the fact that in the circumstances of case such as the present it may prove quite sufficient to have examined the issues by reference to Article 3. I put to Mr Kern that if there were a case where, on the evidence, an individual by reason of vulnerability including sexual orientation were at risk of ill-treatment from fellow prisoners, against which prison guards would fail to provide reasonable protection, that individual would succeed in any event in an argument based on Article 3. Therefore Article 3 would bar extradition and it would not materially add to say that the reason why protection would not be provided was their sexual orientation. In my judgment,

there is no good answer to that logic in circumstances where sufficiency of protection is at the heart of all of the human rights arguments for resisting extradition.

Distinctiveness of Article 14

8. Mr Kern submits that Article 14 has a separate and distinct operation, read with another ECHR rights within whose “ambit” the claimed discriminatory acts or omissions arise. Here, the “ambit” is Article 3, or Article 8, or both. There can be a breach of Article 14 without there being any breach of the other right whose “ambit” is in play. I agree with that analysis. But it does not alter the fact that in the present case the relevant act of discrimination is said to be a failure in the provision of protection for prisoners whose sexual orientation places them at risk of inter-prisoner violence. Mr Kern submits that the Judge was wrong to consider Article 14 alongside Article 3, answered by reference to the same considerations. It needed separate consideration. On a separate consideration, the Article 14 outcome could and should have been different and would be different in this court.

Evidence misappreciated

9. Moreover, and in any event, Mr Kern has developed an argument that – even if he is wrong about everything else – the Judge misappreciated and downplayed the evidence in the expert report. There is a real risk of a (discriminatory) failure of reasonable protection, constituting a breach (if necessary, a flagrant breach), exposing gay prisoners at Burgas Prison to inter-prisoner violence or requiring them to conceal their sexual orientation as the price of escaping it. Insofar as there is any gap in evidence, Mr Kern submits that the Court should require “further information” from the Respondent.

Arguability

10. Mr Kern reminds me that the threshold is reasonable arguability. He submits it is crossed and permission to appeal should be granted.

Discussion

11. In my judgment, beyond reasonable argument, the Judge was right in this case to recognise that the Article 14 claims could not prosper in the light of the conclusions at which he had arrived in the context of Article 3. The Judge was also, beyond reasonable argument, right to conclude that the expert report and open source materials referenced in it, could not constitute an up-to-date body of cogent evidence of systemic failings to protect homosexuals at Burgas Prison; but nor in any event could it rebut the presumption of compliance by the Bulgarian authorities with ECHR rights.
12. The question was and is whether Article 14 ECHR could bar the Appellant’s extradition, by reason of relevant risks of (flagrantly) discriminatory action or inaction, in the context of reasonable protection from risks of inter-prisoner violence towards a gay man at Burgas Prison. That necessarily meant looking at the picture as regards the position of gay prisoners at Burgas Prison and the question of reasonable protection. The submissions this morning and exchanges that this oral hearing has allowed between the Court and Counsel have served to emphasise and illuminate, in my judgment, that that was and is the case, in the context of the contours of the discrimination argument that is raised here. It was and would be necessary to go directly to the question of

sufficiency of protection and to consider whether there could be said to be any failure of protection in relation to prisoners who are gay men at Burgas prison.

13. I have read and considered the expert report. It discussed the 6 or 7 gay men within the Open Prison Hostel at Burgas Prison. The expert recorded that 5 or 6 of these prisoners concealed their sexual orientation. The other prisoner was open about his sexual orientation. The expert's report recorded no violence being experienced by any of them. The expert described the prison governor as having stated that there was "no reason" why "a prisoner who did not conceal" their sexual orientation in the Open Prison Hostel would be subjected to torture and inhuman or degrading treatment. The expert report went on to describe that response as "supported" by the fact that the Open Prison Hostel is for "first-time offenders" who have committed "lesser crimes" and with "shorter sentences". The expert report went on to consider an identified absence of policies for the prevention of sexual violence. It discussed a 2020 study relating to "Bulgarian criminal law and LGB people", referencing a 2010 Special Rapporteur observation about hierarchy in Bulgarian detention facilities and discrimination. It explained that the 2020 study had described a limited number of cases of sexual violence in prison in Bulgaria which had resulted in prosecution and conviction, noting that one rare prosecution had arisen from events within Burgas Prison in 2017. That was a case involving violence towards an inmate who was imprisoned for attempted murder of a child. Mr Kern was anxious that this Court should consider, for itself, that material. That is what I have done with his assistance. He was anxious that I should identify the various sources on which the expert had drawn, in the discussion in the report.
14. Mr Kern's submission, ultimately, was that the reference in the expert report to choices and actions taken by the 6 or gay men themselves, which served to protect them from ridicule, conflict situations and discriminatory treatment by other prisoners, reflected an evidenced failure by the prison authorities at Burgas prison to have protective arrangements in place and, more importantly, a discriminatory failure to have protective arrangements in place. In my judgment, it is quite impossible to read that evidence as evidence in support of those conclusions. I have no doubt at all that had the expert been intending to communicate that position, and to support it as a matter of opinion on the basis of what information was being elicited, what would have been stated in the report was (i) that there was a discriminatory failure to provide protection, and (ii) the basis that had been identified so far as evidence of it is concerned. The Judge was plainly right that this evidence could not support the conclusion that there was any "systemic failure" of reasonable protection within Burgas Prison Open Prison Hostel; nor that the Appellant faced being treated in an "inhumane, degrading or torturous way". Even if I take Mr Kern's argument at its highest, and leave that to one side as a relevant test, there is, in my judgment, no basis on which the evidence that has been adduced in this case could support a conclusion that there was a relevant risk arising from a failure of reasonable protection. Once that position has been reached, it is the end of the arguments which relates to insufficiency of protection, whether by reference to Article 3 or on a discriminatory basis by reference to Article 14. Even leaving all of that to one side, the Judge was also plainly and beyond argument right – in my judgment – in the other way in which he expressed the point. He was right that that evidence could not displace the strong presumption of compliance with the ECHR. As I have emphasised, that is a presumption of compliance with ECHR rights and obligations. It plainly applies to Article 14. I can see no basis at all, on the material before this Court, for a finding that the Judge was wrong to reject the claims made under Article 3 and/or Article 8, or

that the outcome was wrong in relation to Article 14 (read with one or other of those rights). In those circumstances I will refuse the renewed application for permission to appeal.

7.7.22