



Neutral Citation Number: [2023] EWHC 241 (Admin)

Case No: CO/1032/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/02/2023

Before :

**THE HON. MR JUSTICE BOURNE**

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Between :

**IGOR GISCA**

**Applicant**

- and -

**PROSECUTOR GENERAL OF TRIESTE, ITALY**

**Respondent**

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**Alex Tinsley** (instructed by **Highgate Solicitors**) for the **Applicant**  
**Georgia Beatty** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 18 January 2023

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**Approved Judgment**

This judgment was handed down remotely at 10am on 10 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

## **The Honourable Mr Justice Bourne :**

1. This is an application for permission to appeal against the decision of District Judge Clarke on 10.3.22 ordering the Applicant's extradition to Italy. There are also applications to adduce further evidence consisting of English translations of some Italian documents which were in the original extradition bundle, and to add a further ground of appeal.
2. The case arises from two conviction warrants. The first ("EAW1") relates to 39 offences of a theft-related nature between 6 February and 7 May 2009 which gave rise to a sentence of 2 years 6 months of which 2 years remains to be served. The second ("EAW2") relates to an offence of burglary on 2 July 2010 with a sentence of 1 year 4 months, all of which remains to be served. The EAW2 offence triggered liability to serve the remaining part of the sentence for the EAW1 offences.
3. At the extradition hearing, following the provision by the judicial authority of further information, the Applicant conceded that there was no bar to extradition under section 20 of the Extradition Act 2003. By his amendment application he now seeks to rely on section 20 despite that concession. At the hearing he also relied on section 14, contending that his extradition would be oppressive, and section 21, contending that his extradition would infringe his rights under ECHR Article 8.
4. The district judge rejected evidence from the Applicant that he left Italy in 2009 because he was told that he faced deportation. Placing significant reliance on the fact that the deportation order was marked as being still to be executed, she did not accept that he "was thrown out in the way that he says that he was and that he was told not to return". She also said that she did "not accept that the RP left Italy in 2009 and did not return save for one transit through Verona airport on one occasion in 2011". It is not quite clear how that sentence should have been punctuated, i.e. which part or parts of that composite proposition might have been accepted even if the whole were not. However, she went on to explain that she did not know whether the Applicant left Italy and later returned, or "remained longer", but she did find that he was in Italy to commit the further offence in July 2010.
5. The district judge also rejected his evidence that when he was interviewed by Italian police at Verona airport on 30 November 2011, he was just passing through Italy, finding instead that he was also in Italy a few days earlier on 22 November 2011. At Verona airport on 30 November he was served with a form which said that he was being investigated and therefore "is forced to communicate any change of legal domicile", and he ticked a box which says "I refuse to choose registered residence and also to nominate an advocate for defence". Although she said she could not decide how good his Italian was, the district judge rejected his evidence that he signed the form without knowing what it meant.
6. In light of those findings, she ruled that he "knowingly placed himself beyond the reach of the legal proceedings in Italy and in relation to these proceedings and as a result is a fugitive".
7. That finding meant that the Applicant could not rely on section 14, which bars extradition where it would be unjust or oppressive by reason of the passage of time, because a fugitive is deemed to be responsible for the delay.
8. In respect of Article 8, the district judge directed herself by reference to the applicable case law, in particular *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; *HH v Italy* (2012) UKSC 25 and *Polish Judicial Authorities v Celinski & Others* (2015) EWHC 1274. She then carried out a careful balancing exercise, identifying the factors for and against extradition. Having regard to her finding that the Applicant was a fugitive and given the gravity of his offending, the former outweighed the latter. She therefore rejected his challenge under section 21 and ordered extradition.

9. The Applicant's perfected grounds of appeal focus on challenging the district judge's finding that he was a fugitive, which was central to her rejection of his case under section 14 and material to her rejection of his case under section 21.
10. In *De Zorzi v Attorney General Appeal Court of Paris* [2019] EWHC 2062 (Admin), it was said that the test for fugitive status is whether the requested person deliberately and knowingly placed himself beyond the reach of a legal process. The Judicial Authority must prove this to the criminal standard: see *Kociukow v Poland* [2006] EWHC 56 (Admin).
11. The Applicant's counsel makes the following submissions:
  - (1) The Applicant is not a fugitive in respect of EAW 1. He initially received a sentence of 2 years 6 months of which 6 months was served and the rest was suspended. The 2 years was activated because of the commission of the further offence in 2010. This process occurred in 2017 and he had no knowledge of it.
  - (2) There is no evidence that the Applicant had any knowledge of his trial, conviction or appeal in respect of the EAW2 proceedings for the 2010 offence.
  - (3) The finding of fugitivity is based on the form which he signed at Verona airport on 30 November 2011. That form only said that he was being investigated, not that he was being prosecuted, and did not identify a specific offence or any possible consequences of it. A space on the form for particulars had not been filled in. His choice not to provide an address or nominate a solicitor was one of three options on the form. He probably left Italy at the behest of the authorities and not of his own motion because he had received a deportation order dated 8 November 2009, which he and the serving police officer signed. It cannot safely be assumed that he was given a sufficient explanation by the Italian police or that he understood any explanation that he was given.
  - (4) On these facts, his departure represented a failure by the Italian authorities to deal with the 2010 offence. Instead of letting him depart, they could have arrested him and a decision could have been made either to charge him or drop the matter.
  - (5) If the district judge had not found the Applicant to be a fugitive, he would have had a strong case under section 14. There were long delays in dealing with the EAW2 offence and in activating the sentence in the EAW1 offences, during which time he went from being an 18 year-old care leaver to having settled work, a marriage and two children and to supporting an extended family in the UK.
  - (6) The delay would also have been an important factor under Article 8.
12. On 10 October 2022, Julian Knowles J refused permission on paper. Fugitivity was a question of fact for the district judge and he considered her findings of fact to be unimpeachable. Nor was there any arguable error in the Article 8 analysis.
13. On 7 December 2022 the Applicant applied to (1) adduce evidence of translations of certain Italian documents previously provided and (2) amend his appeal to rely on a further ground, under section 20 of the 2003 Act.
14. As to (1), the translations are of two pages concerning the order that the Applicant be deported from Italy. In the Italian original they are two of four pages, all dated (or referring to) 8 November 2009. The notification of the deportation order itself was in English and Italian. The first translated document, issued by the Prefect of the Province of Udine, was the deportation order which stated that the Applicant was expelled, that he could not return without authorisation within 5 years on pain of imprisonment and re-expulsion and that he had a right of appeal. The second translated document was issued by an official known as the Questor of the Province of Udine. It noted that the deportation order could not immediately be executed because of a lack of transportation, travel document and detention facilities, and then ordered the Applicant to leave the territory, stating that in case of transgression he would be arrested and then subjected to "expulsion with accompaniment to the border".

15. The Applicant contends that the translations show that he was telling the truth when he told the district judge that he had been required to leave Italy within 5 days, undermining her finding that he was a fugitive.
16. I accept the submission that the translations are not the type of “new” evidence whose admission should be subject to the familiar and restrictive *Fenyvesi* test. Rather they are material which assists the court in understanding the existing evidence. Their admission causes no prejudice to anyone. Their accuracy has not been questioned. In those circumstances, although the Respondent emphasised the lateness of the application and questioned whether the translations added anything, permission will be granted to rely on them.
17. I return to the application to add, or revive, the ground of appeal under section 20 of the 2003 Act. That section provides:
  - “(1) If the judge is required to proceed under this section ... he must decide whether the person was convicted in his presence.
  - (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
  - (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
  - (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
  - (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
  - (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
  - (7) If the judge decides that question in the negative he must order the person's discharge.”
18. The Applicant’s case is now that the questions referred to in subsections (3) and/or (5) should not have been answered in the affirmative.
19. The application explains that the section 20 ground was previously withdrawn at the extradition hearing because of information from the Respondent which stated that the Applicant would have a right to a retrial in Italy. However, Mr Tinsley, for the Applicant, observes that in that information:
  - “... there is no assertion that the request under that provision would actually result in a retrial. Given the issues pending before the Supreme Court, the law in relation to this issue is not settled and leave to appeal is sought.”
20. In other words, there may be a section 20 bar to extradition in relation to EAW2 because the Applicant was convicted in his absence and, consistently with the reasons for his having been found to be a fugitive, it is possible that he will be refused a retrial on return to Italy on the basis that he waived his right to be present. That possibility, under Article 175 of the Italian code of criminal procedure, was recognised in *Nastase v Italy* [2012] EWHC 3671 (Admin).
21. Mr Tinsley draws my attention to *Merticariu v Romania* [2022] EWHC 1507 (Admin). There Chamberlain J considered that there was force, supported by authority, in a submission that section 20(5) was not satisfied by the availability of a right to request a retrial when there was no assurance that this would actually result in a retrial. However, Chamberlain J considered himself bound by a ruling of the Divisional Court in *BP v Romania* [2015] EWHC 3417 (Admin) that there would be an “entitlement” to a retrial even if it could, once requested, be

denied on the basis of a finding by the issuing state's courts that the person had in fact waived their right to be present at trial: see [29]-[33]. This issue has been certified as raising a point of law of general public importance, and the Supreme Court has granted permission for an appeal which I am told is to be heard in October 2023.

22. Permission to appeal to the Supreme Court has also been granted in *Bertino v Italy* [2022] EWHC 665 (Admin), on the question of whether a person can have waived their right to be present at trial by deliberately absenting themselves, if they were not warned that a trial could proceed in their absence. That case will be heard on consecutive days with *Merticariu*. *Bertino* concerned the same Italian domestic provision as is referred to in the form given to the Applicant at Verona airport in November 2011. That form did not contain any detailed information about the new accusation which he faced. It did not state that it concerned a theft carrying a potential prison sentence.
23. In relation to EAW1, the Applicant seeks to rely on section 20 in a different way. When he was convicted in his absence of the EAW2 offence, his suspended sentence for the EAW1 offence was activated. He argues that the triggering of the sentence by a conviction in his absence was unlawful, not least because it infringed his right to a fair trial under ECHR Article 6. The Irish Court of Appeal has referred a case to the CJEU arising out of facts in which surrender is sought on the basis of a previously suspended sentence activated by reason of a conviction in absence, finding it arguable that surrender can or should be refused: see *Minister for Justice and Equality v Szamota* [2021] IECA 209.
24. As Mr Tinsley candidly acknowledges, there has been considerable delay in raising or resuscitating this ground. The point was not taken by previous counsel. After he left the independent Bar, Mr Tinsley was instructed and, as he puts it, further research identified these points.
25. In response, Ms Georgia Beatty, counsel for the Judicial Authority, first invited me to deal with the question of permission under section 14 and 21 in any event. She defended the district judge's finding of fugitivity, reminding me of the respect to be accorded to the findings of fact at first instance. That finding was fatal to the section 14 ground. She further submitted that, with or without the finding of fugitivity, the balancing of relevant factors in respect of Article 8 led to the same conclusion on section 21 in any event.
26. With the assistance of the translations, it seems to me that the grounds of appeal based on sections 14 and 21 are arguable. Fugitivity, as I have said, was decisive of the former and relevant to the latter. While it was for the district judge to make factual findings based on the evidence that she heard, and while she did identify issues about the Applicant's credibility, it was arguably a non-sequitur to say that, because his deportation order was not executed, the Applicant must have left Italy in order to evade justice and not as a result of the authorities requiring him to do so. That proposition does not deal with the fact that he was given a document, additional to the deportation order, which told him that he must leave Italy within 5 days failing which he would be committing an offence.
27. It is also arguable that too much weight was placed on the form which the Applicant signed at Verona airport on 30 November 2011, given its limitations mentioned at paragraph 11(3) above and given the difficulty of assuming that he understood its meaning or implications.
28. I will therefore grant permission to appeal on the grounds based on sections 14 and 21.
29. In respect of whether the Applicant should be permitted to amend his notice of appeal to revive his reliance on section 20, Ms Beatty relies on section 27 of the 2003 Act which provides:

- “(1) On an appeal under section 26 the High Court may—
- (a) allow the appeal;
  - (b) dismiss the appeal.
- (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
- (3) The conditions are that—
- (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
  - (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
- (4) The conditions are that—
- (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
  - (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
  - (c) if he had decided the question in that way, he would have been required to order the person's discharge.

30. Ms Beatty submits that subsection (4) is not satisfied because the arguments on which Mr Tinsley wishes to rely would not have resulted in the district judge having to order the Applicant's discharge. This is because the district judge did rule on section 20, stating at [24] that its requirements were satisfied, and made no arguable error in reaching that conclusion. On the facts, including the Applicant signing a form declining to provide an address or nominate a lawyer, he was deliberately absent from his trial, and/or he will be entitled to a retrial. Deliberate absence does not arise in *Merticariu*, and *Bertino* can be distinguished because in that case, Mr Bertino did provide an address for service but subsequently left that address without informing the authorities, whereas in the present case the Applicant did not engage with the proceedings at all. Meanwhile, a finding of deliberate absence in respect of EAW2 would defeat the Applicant's challenge in respect of EAW1. In any event, he was for section 20 purposes deemed to be present at the trial of the EAW1 matters because he was represented. There is no binding authority to the effect that a trial of a later matter resulting in the activation of a previous suspended sentence should be part of the section 20 assessment for the earlier matter.

31. I note that notwithstanding the delay, the new section 20 arguments do not depend on adducing new evidence. Applying the approach taken in *Hoholm v Norway* [2009] EWHC 1513 (Admin) at [19], I consider that it is in the interests of justice to allow the amendment (like the judges in a number of subsequent cases I consider myself bound by *Hoholm* and not by the competing views expressed by a differently constituted Divisional Court in *Khan v USA* [2010] EWHC 1127 (Admin)). These are issues which arose or could have arisen from the material before the district judge, and the Applicant should not be barred from relying on them merely because they were not apparent to previous counsel. The submissions made by Mr Tinsley are sufficient to establish that there are genuine issues whose ultimate merits remain to be determined. The form signed by the Applicant in relation to EAW2 is not necessarily fatal to his case and success on EAW2 could lead to success on EAW1.

32. Permission to amend is therefore granted. However, the application for permission to appeal on the ground based on section 20 will have to await the outcome of the appeals to the Supreme Court in *Merticariu* and *Bertino*. It seems to me that this appeal ought to be considered as a whole and not piecemeal and so, notwithstanding my grant of permission under sections 14 and 21, the appeal as a whole will be stayed until those decisions are given. I will invite counsel to agree directions to ensure that the way forward is considered promptly at that time.