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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2020] EWHC 3679 (Admin)



No. CO/3118/2020

Royal Courts of Justice

Wednesday, 16 December 2020

Before:

LORD JUSTICE COULSON

and

MR JUSTICE HOLGATE

B E T W E E N :

TOMASZ GAWRYLUK

Applicant

- and -

DISTRICT COURTS OF LOMZA AND BIALYSTOK  
(POLAND)

Respondent

MR M. HAWKES (instructed by Goscimski & Associates) appeared on behalf of the Applicant.

MR D. STERNBERG (instructed by CPS Extradition Unit) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE COULSON:

- 1 This application raises three issues. The first is whether the applicant has a right to renew his application for permission to appeal at an oral hearing, in circumstances where the High Court on the papers (Sir Ross Cranston) refused to consider that application because the appeal notice was lodged out of time. The second issue is whether, assuming there is a right to renew orally, the reason why the High Court declined to accept the appeal notice should be upheld. That involves a consideration of this court's decision in *Szegfu v Hungary* [2015] EWHC 1764 (Admin). The third issue is whether, even if the court should look beyond *Szegfu*, the overall position in respect of delay is such that the court should not allow the renewed application for permission to appeal against the order of Sir Ross Cranston.
- 2 The extradition order in this case was made on 27 August 2020. It is common ground that the notice of appeal should have been lodged on 2 September 2020. It was lodged in the small hours of the following day, 3 September. Mr Hawkes repeated on a number of occasions that the notice of appeal was lodged a total of ninety-six minutes late. It would, of course, have been seen by whoever was dealing with this matter some time on 3 September so it was, as a matter of practicality, a day late.
- 3 The application was referred to Sir Ross Cranston, sitting as a High Court Judge. On 10 September, he made an order in which he refused to consider the application. He said that the notice of appeal could not be accepted. His reasons were as follows:
  - “(1) The appeal notice was not given within 7 days of the Extradition Order as required by s.26(4) of the Extradition Act 2003, i.e., by 2 September 2020. It was filed electronically at 1.30am on 3 September.
  - (2) Under s.26(5) of the Extradition Act 2003, the court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given.
  - (3) In this case, the applicant's solicitor states that he was involved in lodging the appeal but had to take an urgent flight to Poland in the early hours of 2 September to meet clients in another case where a death in the family occurred last week. The matter was being prepared for an urgent bail application for this Friday. The solicitor returned home within the last two hours of 2 September 2020. The solicitor states that he was unable to lodge the application whilst in Poland. He adds that the day prior to 2 September was a Bank Holiday and that prior to that was a Sunday (in fact, the Bank Holiday was 31 August not 1 September).
  - (4) The Respondent is not opposing the application.
  - (5) However, in *Szegfu* a strong Divisional Court held that an applicant cannot rely on the errors of his legal representatives to found an application for an extension of time. The integrity of the extradition system depends on an adherence to strict time limits. It is very unfortunate in this type of case but a bright line rule applies.
  - (6) There shall be detailed assessment of the Appellant's legal aid costs.”
- 4 The applicant has sought to renew his application for permission to appeal at an oral hearing. That raises the first issue, as to whether there is any such right. The respondent

contends that there is no such right and that Sir Ross Cranston’s decision is final. By an order dated 21 September 2020, Holroyde LJ ordered that the issue as to whether the applicant has a right to renew his application for permission to appeal would be dealt with by a Divisional Court at the first available date. That is, therefore, the principal reason for today’s hearing.

5 The court was referred to a number of authorities and a number of different rules and statutory provisions. I have considered them all. I do not set them all out in this *ex tempore* judgment. However, I ought to deal with a number of important provisions.

6 First, s.26 of the Extradition Act 2003. That provides as follows:

“(4) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made.

(5) But where a person gives notice of application for leave to appeal after the end of the permitted period, the High Court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given.”

7 We were also referred to a large number of the Criminal Procedure Rules. I identify what I hope is the minimum necessary to understand my reasoning. Part 50 of the Criminal Procedure Rules deals with extradition. Rule 50.2 refers to the special objective in extradition proceedings which identifies the importance of:

“(b) the conduct of extradition proceedings in accordance with international obligations, including obligations to deal swiftly with extradition requests.”

8 Criminal Procedure Rule 50.17 is entitled “Exercise of the High Court’s powers”. R. 50.17(1) states:

“The general rule is that the High Court must exercise its powers at a hearing in public, but—

...

(b) despite the general rule, the court may determine without a hearing—

(i) an application for the court to consider out of time an application for permission to appeal to the High Court ...”.

9 Criminal Procedure Rule 50.20 is headed “Form of appeal notice”. That provides various minimum requirements for such a notice at r.50.20(3). That is a topic to which I return later in this judgment.

10 There was a considerable amount of debate about r.50.22. This provides as follows:

“(1) This rule—

(a) applies where the High Court—

(i) refuses permission to appeal to the High Court, or

(ii) gives permission to appeal to the High Court but not on every ground identified by the appeal notice; but

(b) does not apply where—

(i) a defendant applies out of time for permission to appeal to the High Court, and

(ii) the court for that reason refuses to consider that application.

(2) Unless the court refuses permission to appeal at a hearing, the appellant may renew the application for permission by serving notice ...”.

- 11 Of the authorities to which we were referred, the most important is *Szegfu*. There, the notice of appeal was late and the appellant sought to justify the delay by reference to omissions on the part of his legal representative. Burnett LJ (as he then was) rejected that argument and concluded that a delay on the part of the legal representative was a delay on the part of the appellant. That has been referred to in other places as the “surrogacy principle”.
- 12 For the reasons that I shall elaborate in a moment, I have concluded that the applicant has no right to renew the application which was refused on the papers by Sir Ross Cranston. Criminal Procedure Rule 50.22 makes that plain. The rule could not be clearer. In circumstances where the defendant applies out of time for permission to appeal to the High Court, and the court for that reason has refused to consider that application, then there is no right of renewal. Rule 50.22(2) is disapplied by the specific application of r.50.22(1)(b). In this case the applicant was out of time. Sir Ross Cranston refused to consider the application because it was out of time. There is, therefore, no right to renew.
- 13 In his written submissions, Mr Hawkes did not refer to Criminal Procedure Rule 50.22. He relied instead on the general provisions in r.50.17(1). Those do not deal with the specific situation that arose here, which is expressly covered by r.50.22. But in my view it makes little difference, because r.50.17(1) would lead to the same result. Although Mr Hawkes’ principal argument was that, in general terms, the rules do not prohibit an application to renew, the rules to which I have referred show the opposite.
- 14 Before leaving the Criminal Procedure Rules, I should also refer to r.50.27, which Mr Hawkes referred to for the first time this morning. That allows a party, in certain circumstances, to seek to reopen a decision on appeal. His submission was that, if the court concluded that there was no right to renew, then he could avail himself of this mechanism so as to circumvent that difficulty and advance the applicant’s case in a slightly different way, as an application to reopen or appeal Sir Ross Cranston’s decision.
- 15 In my view, there are two main reasons why r.50.27 does not help him. First, there is no application to appeal the decision of Sir Ross Cranston before this court. The application is to renew the application which Sir Ross Cranston refused to consider. Therefore, questions of appeal do not arise. The order of Holroyde LJ plainly set this up as a hearing to deal with the right to renew, not the right to reopen an appeal. Furthermore, the truly exceptional circumstances required to reopen the determination of an appeal simply do not arise here. It is sometimes referred to as the *Taylor v Lawrence* jurisdiction. There are a number of cases which have dealt with this issue recently, including *R (Wingfield) v Canterbury City Council and another* [2020] EWCA Civ 1588. It is necessary to show exceptional circumstances in order to reopen and, in my view, this case is plainly not a case involving exceptional circumstances.
- 16 For completeness, I should deal with one or two of the other points that were in the written submissions on the first issue. Mr Hawkes referred to a number of parts of the Civil Procedure Rules to suggest that there was an underlying right to an oral hearing. In my view, the CPR does not support that proposition. There are plenty of Parts of the CPR where the right of an oral renewal is expressly prohibited, such as r.52.4(3), r.52.5(1) (which provides that applications for permission to appeal to the Court of Appeal will generally be determined without an oral hearing), and r.54.12(7).

- 17 Mr Hawkes also sought to rely on the decision of *MD (Afghanistan) v Secretary of State for the Home Department* [2012] EWCA Civ 194. That is a case where Stanley Burnton LJ was dealing with the right of oral renewal in rather different circumstances, and he made it clear that that right only existed where “there is no order or legislation” to the contrary. Here, of course, there is legislation to the contrary: the primary legislation in the Extradition Act and, perhaps more importantly, the secondary legislation represented by the Criminal Procedure Rules.
- 18 So, for those reasons, I consider that Criminal Procedure Rule 50.22 is a complete answer to this application to renew. Sir Ross Cranston has refused to consider the appeal because the original application was late. The applicant has no right to renew the application rejected by Sir Ross Cranston and, therefore, this court has no jurisdiction to consider any such application.
- 19 That is, of course, an answer to today’s hearing but, in deference to the careful submissions of both counsel, I would be anxious to address the other points which arose. So let us assume that I am wrong and there is a right to renew the application in respect of the late notice of appeal. The next question is whether or not Sir Ross Cranston was right to reject the notice of appeal because of the delay in its being lodged. As I have said, in his reasons, Sir Ross Cranston relied on *Szegfu* as authority for the proposition that an extension of time will not be granted because of errors by the applicant’s legal representatives.
- 20 One of the points of principle that divided Mr Hawkes and Mr Sternberg concerned the period that fell to be scrutinised when an application was late. Does the court look at the whole of the period, including the permitted 7 days, plus any further period before the step was taken, or – as Mr Hawkes submitted - does the court just look at the net period of delay?
- 21 It seems to me plain that the court must look at the whole period from the start of the 7 days onwards. Generally, when periods of delay are being considered by a court, it is normal for the court to consider the entire period in question: the period when something could and should have been done in accordance with the rules, and the delay beyond that. It is unusual for the court only to look at the period beyond a specific date or event.
- 22 More specifically here, I consider that just looking at the period of delay beyond the 7 days would constitute an error of law. The obligation under the Extradition Act is that a notice of application must be given before the end of the permitted period, which was 7 days starting with the date of the order. Accordingly, what the applicant does or does not do for the whole of the period, including the 7 days, becomes very important. That can be tested in this way. If an applicant did absolutely nothing until the eleventh hour of the seventh day, and was then able to demonstrate that from that eleventh hour onwards he did all that it was reasonably possible for him to do, it would be absurd to say that the applicant was entitled to the necessary extension of time. It is plain that the court has to look at the whole of the period to decide if the applicant had done all that he reasonably could do.
- 23 That matters in this case because, as Sir Ross Cranston pointed out, the only reason for the delay was the urgent flight to Poland on 2 September. In other words, the sole reason for delay put forward was what happened on the very last day of the seven day period. There is no explanation of what happened before that. Why were matters left so late? Why was a notice of appeal not filed within a day or two of the decision? On the evidence before the court, it appears that the matter was left until the last minute and then, because of the urgent trip to Poland, the notice was not provided in time. That was plainly a relevant factor, as set out in Sir Ross Cranston’s reasons.

- 24 *Szegfu* is also important because it is authority for the proposition that, if the delay is the responsibility of the applicant's legal adviser, then that is a delay attributable to the applicant himself. On that basis, it might be said that *Szegfu* is on all fours with this case, although I accept Mr Hawkes' submission that there the overall period of delay in *Szegfu* was longer.
- 25 Mr Hawkes suggested that *Szegfu* was, or might be, wrongly decided and that this court should not follow it. He made that submission by reference to *Mucelli v Albania* [2009] UKHL 2 and *Pomiechowski v Poland* [2012] UKSC 20. That was an ambitious submission because both of those authorities were expressly addressed in *Szegfu*. Mr Hawkes also referred to the decision of the Court of Appeal in Northern Ireland in *O'Connor* which doubted *Szegfu*, but that decision, of course, is not binding on us. *Szegfu*, on the other hand, is binding.
- 26 All that meant that Mr Hawkes had to distinguish *Szegfu* on the facts. As I have already said, the delay in *Szegfu* was longer than the delay here. But, for the reasons that I have given, too much focus on the delay alone runs the risk of looking at what happened solely by reference to the period of delay and not the preceding 7 days.
- 27 In all the circumstances, looked at in the round, it is not possible for this court to say that Sir Ross Cranston was wrong to reach the conclusion that he did by reference to the decision in *Szegfu*. We note that whatever might be said to be the period of delay, Sir Ross Cranston made it clear that, in his view, there was a bright line rule, because of the importance of extradition generally and the critical need for its time limits to be kept to. That, of course, is echoed in the Criminal Procedure Rules at 50.2.
- 28 I would, however, be anxious to ensure that the question of delay in this case was the subject of a holistic evaluation. That is to reflect Mr Hawkes' fair point about the need for elasticity. He was anxious that the court did not simply apply a guillotine. So for that purpose I am prepared to assume both that he can renew his application and that *Szegfu* is somehow not applicable to this case. Assuming those two points in the applicant's favour, the remaining question is whether, in all the circumstances, the court should exercise its discretion and allow the application to be made notwithstanding the delay. For the reasons canvassed in argument, I have concluded that, even taking the most generous view of what happened here, the overall delays mean that the application to renew, even if validly made, should be refused. That is based on an analysis of what the applicant actually provided and when, set out below.
- 29 The form of an appellant's notice in an extradition case is helpfully set out in the template provided by the Administrative Court. It requires grounds of appeal to be attached to the notice in accordance with the Criminal Procedure Rules. I have already referred to r.50.20(3) in this regard. The template sets out a number of matters which the grounds of appeal are required to address. The language of the template is mandatory: it uses the word "must". It provides:

"The grounds of appeal must—

- (i) specify the date of arrest;
- (ii) specify whether the appellant is in custody;
- (iii) specify the issues raised in the court below;

(iv) if the appellant is raising an issue not raised at the extradition hearing or evidence which was not available at the extradition hearing, an explanation must be provided for its omission;

(v) identify each ground of appeal on which the appellant relies, numbering them consecutively if there is more than one, and concisely outline each argument in support;

(vi) summarise the relevant facts;

(vii) identify any relevant authorities;

(vii) identify any other document or thing that the appellant thinks the court will need to decide the permission to appeal and the appeal. If the court grants permission, please note that any report relied upon must be attached to this application form;

(ix) include or attach a list of those on whom the appellant has served the notice of appeal and the date of service;

(x) where the appellant is in custody, include any application for (a) bail pending appeal, (b) a direction that an unrepresented appellant be produced for the hearing of the appeal; and

(x) where grounds have been settled by counsel, they must be signed by counsel with the name of counsel printed underneath.”

30 The notice of appeal that was served in this case on 3 September was accompanied by a document, rather unpromisingly entitled “Application for permission to appeal out of time and holding grounds of appeal”. It is, I think, accepted that neither the Criminal nor the Civil Procedure Rules recognise the validity of a document called “a holding grounds of appeal”. In the present case, the “holding grounds of appeal” are primarily concerned with the delay. As to the substance of the appeal itself, the grounds are limited to this:

- “Section 2 JA 2003 – judicial authority point
- S14 – passage of time
- Article 8 of the ECHR is argued
- This appeal is being made out of time.”

31 Mr Hawkes accepted that those grounds were, in his word, “perfunctory”. I am content to use his description. In my view, these perfunctory grounds do not provide a proper basis for an appeal. I accept that in extradition cases, particularly with the seven day time limit, it is common for original grounds of appeal to be drafted in relatively short order, but I consider that these fall the wrong side of any line. They are barely comprehensible. Moreover, as we shall see in a moment, a decision to put in short form grounds of appeal comes with a clear obligation to put in proper grounds of appeal within a short period of time. Indeed, I note that, in the present case, the “holding grounds of appeal” promise that “these grounds will be perfected by counsel within 14 days”.

32 It is perhaps unnecessary, in these circumstances, to go through all the mandatory questions in the Administrative Court template to identify which of them are not addressed in the “holding grounds of appeal”. Suffice to say that most of the questions have simply not been answered. Of course, it was in its perfunctory form that Sir Ross Cranston had to consider the application on 10 September, which he refused. Accordingly, it is necessary, if the applicant wishes to put in what might be called proper or compliant grounds of appeal, for

an extension of time to be granted to allow compliant grounds of appeal to be filed. But there is no basis for such an extension of time in this case. That is illustrated by looking at what happened after the decision by Sir Ross Cranston on 10 September.

- 33 On 10 September, it must have been apparent to the applicant and his representatives that they were in serious difficulties. The notice of appeal had been refused by the judge because it was late and they only had in place what they accept were perfunctory grounds of appeal in any event. I would have expected, therefore, every effort to have been made to put in compliant grounds of appeal, if not before Sir Ross Cranston decided the case, at least within days thereafter. That, after all, was in accordance with the fourteen days that the “holding grounds of appeal” had promised.
- 34 In addition, such a period is envisaged by Criminal Procedure Rule 50.20(5). That allows an appellant, unless the High Court otherwise directs, to amend the appeal notice “not more than 10 business days after service of the appeal notice”. That expressly envisages the provision of complaint grounds of appeal if the original were in short form. The ten business days, and the fourteen days promised by the solicitor in this case, give rise to the same sort of time period.
- 35 But nothing happened. The promise in the “holding grounds of appeal” was not met and the leeway offered by Criminal Procedure Rule 50.20(5) was not accepted by or on behalf of the applicant. Instead the perfected grounds of appeal were provided on 3 December 2020. Those are the grounds of appeal that had been promised within fourteen days of 3 September. They were therefore the best part of three months late.
- 36 Accordingly, whilst I accept the practice in extradition cases of putting in short form notices of appeal, an applicant cannot have it both ways. If he or she chooses to put in such a notice of appeal, he or she must ensure that their grounds are properly amended so as to set out all the salient points in accordance with the period identified in Criminal Procedure Rule 50.20(5). What an applicant cannot do is put in a short form notice of appeal to meet the first time limit (ignoring the mandatory questions in the template), and then ignore the 10 day leeway offered by r.50.20(5).
- 37 Mr Hawkes accepted that if he wanted to rely on the grounds of 3 December 2020, he would need a lengthy extension of time down to that date. In my view, there is no justification for granting such an extension of time. There was nothing in the evidence to explain why it had taken almost three months for the full grounds of appeal to be provided.
- 38 At one point, Mr Hawkes suggested that the 10 day period in r.50.20(5) had not started to run because Sir Ross Cranston had refused to accept the application in the first place. There are three answers to that. The first is that, in my experience, if any party to court proceedings is late in doing something early on, it usually behoves that party to ensure that it is bang on time in doing everything else. The second is that, if Mr Hawkes was right and the period had not started to run, then that would mean that an applicant who had failed to provide a notice of appeal in time was in a better position and would have longer, perhaps considerably longer, to put in compliant grounds of appeal, than an applicant who had complied with the rules and appealed within 7 days. That cannot possibly be right. The third is that it would mean that no extension of time would be necessary, even now, which was contrary to Mr Hawkes’ earlier acceptance that it was.
- 39 In this way, even if the court had the jurisdiction to consider the application to renew, and even if the court had been able to consider Sir Ross Cranston’s decision *de novo*, I would still have exercised the court’s jurisdiction against the applicant because of the delays in



relation to the notice and the grounds of appeal to which I have referred. It seems to me that everything that happened or did not happen here was contrary to Criminal Procedure Rule 50.2(b). The public lawyer's habit of ensuring that you have your foot in the door is one thing, but a habit whereby you put your foot in the door, and then expect to have months in which to decide what to do with it next, is impermissible.

40 Accordingly, for those reasons I would dismiss this application.

MR JUSTICE HOLGATE:

41 I agree.

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This transcript has been approved by the Judge.