Neutral Citation Number: [2022] EWHC 3644 (Admin)

Case No: CO/2066/2022

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

Friday 18th November 2022

Before :
MR JUSTICE FORDHAM
- -

Between:

PETRICIA-LUIS ADAM	**Appellant**
- and -	
ROMANIA	**Respondent**

- -

- -

Martin Henley (instructed by AM International Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

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Hearing date: 15.11.22

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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

MR JUSTICE FORDHAM:

Introduction

1. The Appellant is aged 29 and is wanted for extradition to Romania. That is in conjunction with a conviction Extradition Arrest Warrant ("ExAW") issued on 27 May 2021 and certified on 23 July 2021. The ExAW relates to an 18 month custodial sentence all of which is to be served, subject to a any deduction for qualifying remand between the arrest date (9 August 2021) and date of release on bail (14 September 2021). Extradition was ordered by District Judge Bristow ("the Judge") on 7 June 2022 after an oral hearing on 20 May 2022. At the hearing the Appellant and his wife gave evidence. He was cross-examined but she was not. The Judge concluded that the Appellant's extradition was compatible with his rights under Article 3 ECHR. There was a prison assurance and the Article 3 issue was not maintained in the Grounds of Renewal. Following refusal of permission to appeal on the papers on 21 September 2022 by Collins Rice J, the single ground of appeal which is maintained is that the Judge was wrong to find extradition compatible with Article 8 ECHR rights to private and family life. The Judge rejected the Appellant's Article 8 arguments and Collins Rice J concluded that there was no reasonably arguable appeal. There is an application for permission to adduce putative "fresh evidence" of the Appellant's employment in the UK from January 2018. This case took a twist at the oral renewal hearing. That was because a new point occurred to Mr Henley "on his feet", in exchanges with the Court. The point being taken was not foreshadowed in the Perfected Grounds of Appeal. No skeleton argument had been provided. I decided to reserve judgment so I could think further about the new point and its implications.

Context

2. The context in which the issues arise is as follows. The offending to which the ExAW referred involves two offences of driving without a licence in Romania on 11 January 2019 and 19 April 2019, when the Appellant was aged 25. Subsequently, while in Romania, the Appellant indicated a plea of guilty and a willingness to accept a community sentence. This was recorded in a 'notary statement' which he had signed before a "notary public" in Romania on 2 November 2020. In the event, the Appellant was sentenced ten days later on 12 November 2020. The sentence was not a community sentence but a prison sentence. The Appellant, through a legal representative in Romania, unsuccessfully appealed the sentence. It became final on 12 April 2021. Overall, the sentence was the 18 months custody which is the subject of the ExAW. It was an aggregate "merged" sentence which included the activation of an 8 months suspended sentence previously imposed on 10 October 2017, suspended for a period of 2 years, subject to conditions with which the Appellant was required to comply. That suspended sentence related to an earlier offence of driving without a licence in Romania committed on 22 September 2015, when the Appellant was aged 22. The two offences in January and April 2019 had been committed during the period of suspension and were the reason for the activation. On the face of it, the suspension period ended on 10 October 2019.

Date of Coming to the UK

3. In addressing the Article 8 issue, the Judge rejected a factual contention which had been made in the Appellant's proof of evidence of 12 May 2022, and in his wife's

witness statement of the same date. They had both said that they had come to the United Kingdom, together, in January 2018. The Judge said he was "sure that is not correct". The basis for that adverse conclusion was that the Appellant "must have been in Romania" (a) in January 2019 (b) in April 2019 and (c) in November 2020. The Judge found as a fact that the Appellant and his wife "entered the UK after 2 November 2020". That finding about entry into the UK for the first time after 2 November 2020 'followed through', within the Judge's assessment of other features of the case, in two respects.

i) The first was the question whether the Appellant was a "fugitive". The Judge found that the Appellant entered the UK "at some time after 2 November 2020" as a "fugitive", who "departed Romania to avoid the consequences of his behaviour and that he deliberately sought to put himself beyond Romanian judicial process by so doing". At the heart of the finding of fugitivity was the fact that the Appellant "agreed in cross-examination that he did not comply with the requirement of the suspended sentence to give notice of changing domicile and of any travel longer than 5 days, as well as of his return date". That was a clear reference to a breach of a condition of the suspended sentence, which the Judge was treating as being applicable to the Appellant's UK entry – found to be for the first time – after 2 November 2020.

ii) The second respect in which the Judge's finding of first UK entry after 2 November 2020 'followed through' was the question of the duration of any family and private life in the UK. The Judge approached this on the basis that this had been for a "maximum" of "19 months" of private and family life. That was the period between November 2020 and the Judge's judgment in June 2022. Those were the two features. Mr Henley accepts – rightly – that there was no further adverse finding by the Judge which rested on any adverse credibility impression of the Appellant and his wife, having rejected their evidence on having come to the UK in January 2018.

The Original Argument

4. The essential basis of this appeal is that the Judge acted unreasonably and/or procedurally unfairly in reaching an adverse finding of fact as to the date of coming to the UK, which had the consequence of making the Judge's assessment and outcome in relation to Article 8 "wrong". This was described orally by Mr Henley as "the important issue". It was the root of all of the criticisms in the Perfected Grounds of Appeal. The argument runs in two stages.

i) First, as to the Judge acted unreasonably and/or unfairly in reaching adverse finding of fact as to the date of coming to the UK. The fact of the arrival in January 2018 was described in the wife's witness statement and she was not cross-examined. It was described in the Appellant's proof of evidence, which he adopted, and he was not cross-examined on that part of his evidence. Nor were either of them challenged on this point by the Judge. It was never put that they had not come to the UK in January 2018. It was never put that they had come to the UK for the first time after November 2020. The Respondent had never contested the January 2018 date. This is not denied in the Respondent's Notice. The Respondent's "Opening Note" dated 19 May 2022 had referred to January 2018 as the date of arrival. Yet the Judge – when he came to write the

judgment – addressed the point and reached an adverse finding. That was unreasonable and unfair. Had the point ever been raised, evidence could and would have been adduced. Indeed, there is the fresh evidence of the Appellant having been working in the UK from January 2018. The Judge's logic was also flawed. It simply did not follow that because the Appellant was in Romania in January 2019, April 2019 and November 2020, he had not come to the UK in January 2018. The Appellant's explanation is that he was visiting and – specifically – visiting his son (his stepson and the wife's son) who continued to live in Romania with grandparents (the wife's parents). If the Judge, on reflection – in writing the judgment – thought this point was a problem, it should have been raised fairly with the Appellant and his wife, if necessary reconvening a hearing. There was no realistic opportunity to raise the concern with the Judge. The problem emerged after the judgment had been delivered and the order for extradition made. The safeguard is appeal to this Court.

ii) Secondly, as to the consequence of making the Judge's assessment and outcome in relation to Article 8 "wrong". The Judge's finding skewed the Article 8 proportionality assessment. It was the basis for the Judge's finding on fugitivity, which was a significant adverse finding on a feature relevant to Article 8. If the Judge had recognised the January 2018 first entry to the UK, he would not have found fugitivity in the Appellant coming to the UK after 2 November 2020. It was also the basis for the assessment of a maximum of "19 months" in the UK. That affected the nature of the ties to the UK, the depth of private life and family life here, both for the Appellant and the wife, each of whose Article 8 rights were engaged and interfered with by extradition.

That was the original argument. Mr Henley emphasised – rightly – that the threshold for permission to appeal is reasonable arguability.

Discussion: Part I

5. Like Collins Rice J, I agree that it at least reasonably arguable that the Judge ought not, in the circumstances and without adopting a different procedural approach, to have made the finding about first entry to the UK after 2 November 2020. The question is where does that lead? It would mean the "maximum" of "19 months" would be wrong, raising questions about the Article 8 evaluation to which I will return. But so far as the consequence for the finding on fugitivity is concerned, I can see no viability in the argument as originally put. The reason is straightforward. If the Judge was right to characterise UK first entry after 2 November 2020 as constituting fugitivity – because of a continuing condition from the suspended sentence to notify a change of address – then a UK re-entry after 2 November 2020 would also have constituted fugitivity. There would have been a failure to notify a UK address, amply supporting the conclusion that the Appellant was knowingly placing himself beyond the reach of the Polish authorities by the manner in which he returned to the UK. It would not assist to say that he was returning to the UK, that he had already breached the condition in January 2018, the UK address was not a new one, or that this was not the breach relied on for the activation of the suspended sentence. In the circumstances, a breach – after 2 November 2020 – of a continuing condition to notify the UK address to which the Appellant went from Poland would support the adverse

finding that he was a fugitive from Polish justice. That was so even if he was returning to the UK.

The New Point

6. The new point taken by Mr Henley was that there was, as at November 2020, no continuing condition from the suspended sentence to notify a change of address. The suspension period had been two years from 10 October 2017. In his cross-examination, what the Appellant was accepting was a failure to notify a change of address when he first came to the UK, in January 2018. At that stage, the condition was live and applicable. But as at November 2020, it had expired 13 months earlier. No new duty to notify a change of address was being said by the Respondent, or found by the Judge, to arise from anything that had happened in 2019 or 2020. It follows that the condition of the suspended sentence could not be relied on as the basis of finding fugitivity. If this is right, it did not matter whether November 2020 was the first entry to the UK. Even if it was, there was no breach. The Judge clearly thought there was a condition applicable in November 2020. On the evidence before him, and to which he referred, there could be no such breach. That was the argument based on the new point.

Discussion: Part II

7. The new point could, and should, have been taken in the Perfected Grounds of Appeal; in the Grounds of Renewal; or at least in a Skeleton Argument. Any of these could have alerted the Respondent who could have responded. Having said that, the point is linked to the issue that was being raised. In particular, it is directly linked to the Appellant's acceptance of non-compliance (at January 2018) with the condition of the suspended sentence in cross-examination, on which the Judge relied in relation to fugitivity (at November 2020). In all the circumstances, I am satisfied that it is in the interests of justice to see where the new point leads, rather than to shut it out. I accept that it is arguable, based on the new point, that the assessment of the Appellant having been a "fugitive" through his actions in November 2020 was wrong. I also think it is arguable that January 2018 breach – which the Appellant accepted on what he said was his first UK arrival – may not make him a fugitive in the circumstances at November 2020. This would be apt for ventilation at a substantive hearing, if it is capable of making a difference alongside the "19 months" point. I will assume that the Appellant could succeed, on a substantive appeal, in showing that he was not in law a "fugitive"; and that the relevant duration of private and family life was from January 2018. Where would that leave the Article 8 compatibility of extradition.

8. In arguments based on section 14 and the passage of time, the issue of fugitivity operates as an "on/off" switch, in this sense: if a requested person is a fugitive, a section 14 argument is treated as unavailable. In the context of Article 8 ECHR, the position is more nuanced. If the requested person is a fugitive, that is always a key, adverse consideration. It also directly engages a pro-extradition public interest consideration about "safe haven". It colours questions about passage of time. It is part of the setting for questions about the impact of extradition. But if the requested person is not in law a fugitive, the circumstances in which they have come to the UK and have remained here can remain relevant in assessing Article 8 proportionality on all the facts and circumstances of the case. For example, factors weighing against extradition may attract greater significance and weight in the context of Article 8 if

they have arisen openly and in blameless ignorance of an investigation or proceeding in the state now requesting extradition. The present case illustrates the point well. Even if the Appellant was not in law a "fugitive" when he came (back) to the UK after 2 November 2020, he nevertheless came here when he was about to be sentenced by the Romanian Courts. He knew of the criminal proceedings and was asking for a community sentence, which he knew could be rejected. He also knew he had committed two offences during the two year suspension period and faced activation of the 8 month custodial sentence. He knew about the sentence. He unsuccessfully appealed it. He fully understood the implications of, and his responsibilities under, the Romanian criminal process. Those are the circumstances after November 2020 and in which the Appellant has then sought to resist extradition based on ongoing private and family life here. In addition, there is the Appellant's acceptance in cross-examination that as at January 2018 he had recently been sentenced to a suspended sentenced whose terms he breached by not notifying his change of address. That was not the basis of activation of the suspended sentence. I assume it could not constitute the Appellant a "fugitive". But these are all relevant features and circumstances of the case, when private and family life comes to be considered. The Appellant was knowingly 'running the gauntlet' from January 2018 by breaching a condition of his suspended sentence. He then reoffended, twice, in breach of the c conditions of the suspended sentence. He then left Poland (after 2 November 2020) and was sentenced (12 November 2020), to his knowledge. He would not be a "fugitive", but his actions were taken on a fragile, informed basis as regards his responsibilities.

9. The other circumstances of the case include the period of private and family life from January 2018, to which I now return. That was 42 months at the time of the Judge's judgment. It is now nearly five years. The Appellant and his wife have firm roots and ties to the UK. He has his employment here. I assume a continuity, notwithstanding periods of time in Romania, including in January 2019, April 2019, November 2020 and any other time. Mr Henley submits that these points, alongside a conclusion that the Appellant is not in law a "fugitive", can make a material difference to the assessment and outcome. He says, at least arguably, they would warrant the appeal being allowed.

10. I cannot agree. In my judgment, there is no realistic prospect that these changes in the picture, with their effects for the proportionality "balance-sheet", could change the "outcome", when factors in favour of and against extradition are taken into consideration in this case. The Judge concluded that there were strong factors in favour of extradition which decisively outweighed those capable of weighing against it. In my judgment that "outcome" would, beyond reasonable argument, plainly have been the same even if the Appellant were not in law a fugitive, and even if there were the additional time in the UK. The Judge explained that the Appellant and the wife have "pre-settled status". He identified the duration of their marriage which, on their evidence, was three years. He identified the wife's son and the Appellant's stepson as being in Romania, and the wife's family being in Romania. He described the sufficiently 'severe' interference that extradition would have for the Appellant and for the wife, as raising the question of proportionality. I accept that the severity is increased by reference to the greater period of having been in the UK. But the Judge explained why extradition was nevertheless decisively assessed as being proportionate. There are weighty public interest considerations in favour of extradition, even treating the Appellant as not being a fugitive. The 18 month

custodial sentence is significant. In addition to the features which I have described, the Judge said that the Appellant's wife could, if she wished to do so, relocate to Romania during the time of the Appellant's prison sentence, to her country of origin, where her family and her son live. That is a less weighty consideration in circumstances of longer private and family life in the UK, but it remains sound and relevant. The Judge also rightly made reference was the fact that the Appellant does not have an unblemished record, leaving aside the index offending. In the UK, he has committed a criminal offence of careless driving in which he was convicted in January 2021; and he then committed an offence of driving while disqualified and without insurance in March 2021 for which he received a fine and community sentence in November 2021. In France, he had committed an offence (aged 18) in April 2012 of aggravated procurement for prostitution for which he had received a 3-year custodial sentence from the French Courts.

11. There is, in my judgment, no realistic prospect that this Court, at a substantive appeal hearing, would find the overall Article 8 evaluative judgment or "outcome" to be "wrong", even accepting the absence of fugitivity and even accepting the two years of additional time in the UK. In all the circumstances and for these reasons, a reversed conclusion as to first arrival (the point to which the fresh evidence goes), and a reversed finding of fugitivity (the point to which the new point goes), are incapable of underpinning a successful outcome on appeal. For the same reason, the putative fresh evidence is incapable of being decisive. I will therefore refuse permission to appeal. I also refuse permission to adduce the putative fresh evidence.