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



No. AC-2022-LON-000072

[2024] EWHC 1269 Admin

Royal Courts of Justice

Tuesday, 14 May 2024

Before:

MRS JUSTICE McGOWAN DBE

B E T W E E N :

PT

Applicant

- and -

ROMANIAN JUDICIAL AUTHORITY

Respondent

MR B JOYES (instructed by ITN Solicitors) appeared on behalf of the Applicant.

MISS L HERBERT (instructed by CPS Extradition) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE McGOWAN:

- 1 This is an application to re-open an appeal under the Criminal Procedure Rules 50.27 and to admit fresh evidence. The applicant is sought on a conviction warrant issued by the Judicial Authority of Romania dated 12 October 2021, certified by the NCA on 15 October 2021. He is wanted to serve a sentence of two years for an offence which is described as driving without a licence, which is said to have occurred on 7 December 2018; the sentence of two years for that offence all remains to be served. Query whether that offence also included some criticism of the driving but, at worst, it would appear to be careless driving. The respondent quite rightly points out that it was at a time on which he was still under some form of licence or probation for an earlier prison sentence for an offence of rape. At the hearing before the district judge, the applicant was unrepresented and relied, effectively, on Article 3 and Article 8.

- 2 Extradition having been ordered, a series of applications was made for permission to appeal. The s.20 and Article 8 applications were refused on the papers by Hill J on 22 April 2022. She stayed the Article 3 issue at that stage. There was then an oral renewal before Fordham J on 7 July 2022, which was also refused. There was then, and I do not include every step in this case, an application filed on 2 May 2024 for permission to rely on fresh evidence which came before Heather Williams J on 23 June 2023 and she adjourned that to an oral hearing.

- 3 The evidence which it is sought to adduce is itemised, and I do not include every part of it but, in particular, it includes the psychiatric report of Dr Lyall, medicolegal report of Dr Gregory and various other medical notes and other national health service records of therapy conducted by or with the applicant. His application also seeks to amend the original application notice pursuant to r.50.70(6) to raise a new ground under s.5.

4 The matter having been adjourned by Heather Williams J, it came before Graham Knowles J on 31 October 2023. It was again adjourned and there was an order that the applicant apply for an extension to the Legal Aid order to commission a report on PTSD. That report was provided, albeit a few days out of time.

5 Before me this morning, Mr Joyes, on behalf of the applicant, seeks to re-open the Article 9 point and upon that he says that is a “parasitic” application to add the new ground under s.25. He also applies to re-open the s.20 point, which was determined by Hill J on the papers.

6 In essence, his submission is that the case ought to be re-opened because the criteria under r.50.27 are satisfied. The fresh evidence, he submits, establishes objective proof that the applicant was previously repeatedly raped in custody and this may be a determinative factor against extradition as it profoundly enhances the severity of the impact of extradition upon him. He submits further it needs to be weighed in the balance and it is therefore necessary to re-open the appeal to avoid real injustice, the circumstances are exceptional and there is no alternative effective remedy.

7 I should have said at the outset that I have granted his application for anonymity for the applicant until 4.00 p.m. on 15 May 2024.

8 In terms of delay, Mr Joyes relies upon the witness statement of Miss O’Mara, who gives evidence of the errors or mistakes by the previous solicitors, which clearly have been a significant cause of the delay in this case and provide a reasonable explanation, he submits, for that delay. There is no disagreement between the parties. He sets out the test for re-opening in his skeleton argument and that is accepted by the respondent. He draws my

attention, in particular, to para.50 of *The United States v Bohan*. He says there are exceptional circumstances in this case and the matter ought to be re-opened to avoid real injustice because there has been what is referred to in the authorities as a “supervening development” by the provision of the new medical evidence. He invites me to rely on the approach and the reasoning in *XY* at para.51 and sequential paragraphs.

9 In addition, he seeks to re-open the argument under s.20. He submits that the applicant only has the right to apply for a re-trial, rather than a right to a re-trial. He describes the ticking of the various boxes, again, which I do not go through for the purposes of this judgment, given the time factor, but describing the question of whether a box is ticked or not as in *Merticariu* at para.51, 52. I paraphrase slightly, but it effectively amounted to his saying that there was an ambiguous tick as opposed to a tick which clearly satisfied the requirements.

10 The respondent accept the test as laid out. Miss Herbert relies on the need for there to be exceptionality. She reiterates the well-known criteria that there has to be finality in these cases. Effectively, she says that the applicant is trying to have a second go at the same argument because he now has new expert evidence which supports an argument that was canvassed by him in the court below. She says the requirement of exceptionality which is not achieved in this case. She disagrees with the applicant’s submission that this is analogous to the case of *XY*. She says, effectively, that the facts in that case were much worse, that the risk of suicide is not as high in this case as it was in *XY*, which it was described as “very high”. Here it is said, “It is possible that he was overwhelmed... the risk would be significant”. She also adds that there is clear evidence here to show that the applicant’s mental health has benefitted from treatment and therapy over the passage of time. She, in essence, says that there is no real injustice. These matters were effectively

canvassed before the district judge. The district judge was aware of some of the applicant's health problems and had confirmed that he had taken them into account.

11 I deal first with the s.20 point. Miss Herbert very simply relies on *Merticariu*. She points out that if what is contained in the warrant which is the evidence in this case is wrong, then the protection of domestic complaint and correction, both internally and internationally, under his broader human rights. But, in particular, she points to para.26 of the judgment of the Supreme Court and says that if Box 3.4 is ticked then he is entitled to a re-trial. That is clear on the face of the documentation. It should, she submits, be sufficient, along with the usual safeguards. She submits that the parallel which Mr Joyes seeks to draw between the way that Article 4.66 was dealt with in *Merticariu* and should be dealt with in this case does hold not good. Effectively, there is a tick in Box 3.4, the Supreme Court has said that means he is entitled to a re-trial and that, for these purposes, is sufficient. I accept the thrust and the strength of that submission. It seems to me that the grounds put forward to re-open this under s.20 are not made out.

12 Turning to the Article 8 and the s.25 point, I accept entirely all that is said in all the authorities about the need for finality. It goes without saying that it ought not to be open to an applicant, having lost his case before the district judge, to go away and find a bit more evidence on a particular topic which can then be advanced as new and exceptional. Paragraph 9 of *Bohen* requires that something must have developed after the determination. However, I think I must be guided by para.20 of *Seprehoso v Romania*, where Cranston J said:

“However, CPR 50.27(3)(b) requires not only that there be a real injustice as a consideration to re-opening an extradition appeal, but it is necessary for the court to re-open the appeal in order to avoid a real injustice.”

- 13 To my mind, that requires consideration of whether re-opening the appeal would provide a practical remedy for injustice in an appellant's case. In my view, that is the position in this case. It is not for me to say that there would a real injustice, simply that there is a real risk of a real injustice and that exceptionally in this case, given the availability of the material, there are good grounds for re-opening the appeal. I accept, again, in line with the cases of *McIntyre v USA* and *Garaluk v Poland* the circumstances have to be exceptional, but I find them to be exceptional in this case.
- 14 The court will, as part of a balancing exercise, consider the nature of the offence, the type of the sentence, the fact that at least the equivalent of a year would have been deemed to have been served by the bail curfew if the matter were to be dealt with domestically. This applicant was unrepresented in the court below. The district judge heard some evidence of the physical injury which, on the face of Dr Gregory's statement appears, credibly, to have been caused by repeated anal rape whilst in custody. The district judge heard evidence of those physical injuries but went on to find that that was not probative or supportive of sexual abuse. That new information, if accepted on appeal, at its highest could arguably be determinative and if it were, it would be a factor which would avoid a real risk of injustice.
- 15 Accordingly, I give leave for the matter to be re-opened in respect of the Article 8 and s.25 points. I do not give leave for the matter to be re-opened to argue the s.20 point. It seems to me that the Supreme Court has determined that issue. In this case, the Box 3.4 was ticked and without more that establishes the fact that this applicant, if returned, would have the right to a re-trial in all the circumstances.
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