No. AC-2023-LON-002906

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

Neutral Citation Number: [2024] EWHC 1914 (Admin)

Royal Courts of Justice

Thursday, 6 June 2024

Before:

SIR PETER LANE
[2024] EWHC 1914 (Admin)
(Sitting as a Judge of the High Court)

B E T W E E N :

CICHOWICZ

Appellant

- and -

DISTRICT COURT IN BYDGOSZCZ

Respondent

MISS K HOWARTH (instructed by Taylor Rose) appeared on behalf of the Appellant.

MISS L BRIESKOVA (instructed by Crown Prosecution Service, Extradition) appeared on behalf of the Respondent.

J U D G M E N T

SIR PETER LANE:

1 The appellant appeals, with permission granted by Griffiths J on 23 February 2024, against the judgment of District Judge King on 26 September 2023 to order the appellant's extradition to Poland. The issue now centres on arrest warrant number 2. This concerns two accusations. The first is the use of a false instrument. It is alleged that, in August 2012, in a particular street in Poland, while having his ID checked by police officers, the appellant used as authentic a forged ID with the intent that it be used as an authentic ID, on which there was his photo. However, the personal data belonged to another named person. The potential penalty for that offence is up to five years' imprisonment.

2 The second accusation relates to what is described as serious bodily injury. Here it is said that, on 27 February 2013, in a particular street in Poland, the appellant stabbed the named individual into the belly with a tool with a sharp end by which he caused an abdominal integument stab wound with an abdominal integument arterial vessel injury, which led to a really life-threatening disease. The potential penalty stated in the documentation is imprisonment for up to ten years.

3 The first of the appellant's two grounds of challenge concerns sections 10 and 64 of the Extradition Act 2003. Section 10 provides that, *inter alia,* the judge must decide whether the offence specified in the Part 1 warrant is an extradition offence. If it is not, then he must order the person's discharge. Section 64 explains what is an extradition offence. For our purposes, we are concerned with section 64(3)(b), namely, "the conduct would constitute an offence under the law of the relevant part of the United Kingdom".

4 In *Muhumud v. Government of* Norway [2024] EWHC 300, at paras. 10 to 12, Fordham J set out three potentially relevant tests, as follows:

> "Norris: The 'Conduct Test'
>
> 10.Three principles from extradition case-law featured in the arguments. First, there is the 'conduct test' as recognised in Norris v USA [2008] UKHL 16 [2008] 1 AC 920. For the purposes of satisfying s.137 dual criminality (§65):
>
> > ***The court [is] required to make the comparison and to look for the necessary correspondence … between the conduct alleged against the accused abroad and an offence here.***
>
> This is 'the conduct test', with (§91):
>
> > ***the conduct … being that described in the documents constituting the request …***
>
> Assange: The 'Irresistible Inference' Test
>
> 11. Secondly, there is the 'irresistible inference' test, recognised in Assange v Sweden [2011] EWHC 2849 (Admin) at §57. Where a necessary element (or ingredient) of the UK offence is being 'inferred from the description of the conduct set out in the [Request]', it may be necessary for 'the facts set out … to impel the inference', as 'the only reasonable inference to be drawn from the facts alleged'. The Court gave an example: a description in the particulars provided in the Request of a 'use of force or coercion' would carry – as an irresistible inference – the absence of the defendant's reasonable belief in consent.
>
> Cleveland: The 'Missing Ingredient' Test
>
> 12. Thirdly, there is the 'missing ingredient' test, to identify when the Assange 'irresistible inference' test is applicable. This comes from Cleveland v United States [2019] EWHC 619

(Admin). Cleveland decided that the irresistible inference test is applicable only where 'the argument is raised that the offence alleged in the foreign state lacks an ingredient essential to criminality in this jurisdiction' (§63), and 'an essential ingredient under [UK] law is absent from the alleged foreign offence' (§61). Where that is not the case and the argument is simply that the 'particulars of conduct supplied in the warrant or request do not address an ingredient of an equivalent English offence', the test is different: whether 'an inference can properly be drawn' from information in the Request (§61); or whether that information is 'incapable of supporting any such inference' (§64)".

5 In saying what he did, Fordham J drew upon these important passages of Holgate J giving the reasoned judgment of the Divisional Court in *Cleveland v. Government of the United States of America* [2019] EWHC 619 (Admin.) Paragraphs 21 to 22, 25 to 27 and 59 to 64 read as follows:

"21. A number of relevant legal principles are well-established. In Norris v Government of the United States of America [2008] 1 AC 920 the House of Lords decided that a court should not consider whether the elements of the offence in an extradition request correspond with the elements of an English offence. Instead the court should consider whether the alleged conduct, if it had occurred in the United Kingdom, would amount to an offence under English law. Where, as in the present case, the request alleges multiple offences, each one needs to be considered separately, but need not be assigned to a reciprocal offence under English law. Where the alleged conduct relevant to a number of offences is closely interconnected, it does not matter whether that conduct would be charged in this jurisdiction in the same manner as in the requesting state (Tappin v Government of the United States of America [2012] EWHC 22 (Admin) at para. 44). There is no legal requirement for the Respondent to demonstrate a *prima facie* case in respect of any of the offences detailed in the indictment, nor is it for the court to examine the evidential strengths and weaknesses of the prosecution case (Norris at para. 77 and Ruiz and others v Central Criminal Court No.5 Madrid [2008] 1 WLR 2798 at para. 74).

22. On behalf of the Appellant, Mr Alex Bailin QC repeated the contention made before the district judge that the extradition request did not disclose conduct amounting to criminal liability under English law as an accessory to murder. He said that the conduct described was consistent with the Appellant's mere presence in the car and with Mr Smith having acted independently. He criticised the request for failing to allege any overt encouragement or assistance by the Appellant, such as uttering words of encouragement, passing the gun to Mr Smith or opening the passenger window to enable him to shoot at Mr Carter. Although the Appellant has been refused permission to argue that the extradition request failed to provide sufficient particulars to satisfy section 78(2)(c) of the 2003 Act, her argument does beg the question whether, as a matter of law, it was

necessary for the extradition request to set out details of the kind identified by Mr Bailin. In other words, the particularity required for an extradition request forms part of the context for considering whether the conduct alleged discloses an offence under English law of murder as an accessory.

25. Scrutiny by the court of the description of conduct alleged to constitute the offence specified, is not an inquiry into the adequacy of the evidence summarised in the warrant or request. The court is not concerned to assess the quality or sufficiency of the evidence in support of the conduct alleged (R (Castillo) v Spain [2005] 1 WLR 1043 at para. 25). Instead, the court is concerned with whether the warrant, or request for extradition, discloses matters *capable* of constituting conduct amounting to the extradition offences alleged (Palar v Court of First Instance Brussels [2005] EWHC 915 (Admin) at para. 7). In deciding whether a warrant or request identifies conduct amounting to an extradition offence, it is inappropriate to expect the specificity or particulars sometimes required for a pleading in civil proceedings or a count in an indictment (Fofana v Tribunal de Grande Instance de Meaux [2006] EWHC 744 (Admin) at paras. 38-39).

26. A balance must be struck between, on the one hand, a requested person's need to have an adequate description of the conduct alleged against him and, on the other, the object of the 2003 Act to simplify extradition procedures. The requested person needs to know what offence he is said to have committed and to have an idea of the nature and extent of the allegations against him in relation to that offence. The amount of detail may turn on the nature of the offence. Where dual criminality is involved, the level of detail must also be sufficient to enable the transposition exercise to take place (Ektor v National Public Prosecutor of Holland [2007] EWHC 3106 (Admin) at para. 7; Owens v Court of First Instance Marbella, Spain [2009] EWHC 1243 (Admin) at para. 11).

27. In Zak v Regional Court of Bydgoszcz, Poland [2008] EWHC 470 (Admin), the Divisional Court held that the warrant or request need not identify the relevant *mens rea* of the equivalent English offence for the purposes of satisfying dual criminality. Instead, it suffices that that necessary mental element *can* be inferred by the court from the conduct identified in those documents or that ‘the conduct alleged includes matters *capable* of sustaining’ the mental element necessary under English law (paras. 15 to 17).

59.The rationale for the Divisional Court's insistence upon the ‘inevitability’ test is clear and delimits the circumstances in which it is proper for that test to be applied by the court. Where the offence in a foreign state does not include an element (e.g. *mens* rea) essential to establishing criminal liability under English law, that element may be inferred provided

that it is an inevitable corollary of, or necessarily implied from, the conduct which will have to be established in that foreign jurisdiction. Plainly, where an essential ingredient under English law is absent from the alleged foreign offence, dual criminality can only be satisfied by insisting on that test, rather than by being satisfied that the inference is one which *could* or *might* be drawn; otherwise, a person could be convicted in a foreign court for something which would not be a criminal offence in this jurisdiction.

60. It is necessary to distinguish two situations which have arisen in some of the authorities and where, on a correct analysis, the principle in para. 57 of Assange is not engaged.

61. First, in some cases the argument raised is not that the *offence* alleged in the foreign state lacks an ingredient essential to criminality in this jurisdiction, but simply that the *particulars* of conduct supplied in the warrant or request do not address an ingredient of an equivalent English offence. In such cases there is no legal justification for applying the 'inevitable inference' test in para. 57 of Assange in order to ensure that the person requested could not be convicted of an offence overseas which would not amount to any crime in this country. That risk does not arise. Instead, the issue is whether *the particulars* contained in the warrant or request are sufficient to enable an offence under English law to be identified. In this situation, it is the principles summarised in paras. 21 to 28 above which fall to be applied. If a warrant or request fails to include any allegation dealing with an essential ingredient, the court *may* conclude that the *particulars* are insufficient and decline to order extradition. But in other cases, the court *may* conclude that a gap (whether as to conduct or any mental element) is filled because an inference *can* properly be drawn from information contained in the warrant or request. Here, that approach to the drawing of an inference is legally correct because the offence for which a person is to be extradited does not lack an ingredient essential to criminal liability under English law.

62. This distinction may be illustrated by considering the mental element of criminal conduct. The offence alleged in the foreign jurisdiction may require proof of a simple intention to commit that crime and the equivalent English offence may not require the proof of any additional specific intent. In this country proof of intention depends in most cases upon the drawing of inferences by the jury (or by the magistrates' court). Such inferences may be drawn from the conduct of an accused person and from what they said before, at the time of, and following the incident (see e.g. Chapter 8 of Part 1 of the Crown Court Compendium – December 2018). In this situation there is no 'gap' in the mental element of the foreign offence which needs to be filled. The mere fact that intention would need to be inferred from conduct in order to establish guilt in any future trial in the foreign court, does not justify the imposition of an 'inevitable inference' test in order to satisfy dual criminality at the extradition stage. Instead, where this issue is raised, the court need only consider whether the inference of intention is

one which is *capable* of being drawn from the matters alleged, leaving the question of whether that inference will be established to the trial process.

63. But in some instances, extradition may be resisted because the English equivalent offence requires proof of a specific intent (e.g. dishonesty or knowledge of or belief in a state of affairs), whereas the foreign offence for which extradition is sought only requires proof of a simple intent and not also that specific intent. In this situation it is necessary for the court to apply the test in para. 57 of Assange to decide whether that gap in the ingredients of the foreign offence can be filled by drawing an inference from other matters set out in the warrant or extradition request. Here, dual criminality depends upon the court being satisfied that, if the matters constituting the alleged foreign offence were to be proved, the inevitable or only reasonable inference would be that the additional intent required by English law would also be established.

64. There is a second situation which needs to be distinguished where the objection is not that the foreign offence lacks an essential ingredient of an English equivalent, but that the *particulars* fail to address an essential ingredient. If the respondent argues that that gap may be filled by the drawing of an inference from matters contained in the warrant or request, the court may conclude that those matters are *incapable* of supporting any such inference. This is the obverse case of the example considered in paragraph 61 above. Here again, the outcome does not depend upon the application of the test in para. 57 of Assange. Instead, the straightforward conclusion of the court is that it is inappropriate or impossible to draw the inference suggested".

6 The first matter that I must decide is whether this is a case to which the "inevitable inference" articulated in *Assange* applies. In doing so, I follow the approach of Holgate J in *Cleveland*. In essence, that approach is to say that the inevitable inference test applies if a required element for a corresponding offence under the jurisdiction of England and Wales is missing from the relevant foreign offence. In para.23 of his judgment, Fordham J articulates a possible gloss on that analysis. However, for reasons which I will give, I do not consider that this possible gloss assists the requesting authority in the present case.

7 I have concluded that the inevitable inference test is relevant in the present case. In doing so, I must have regard to provisions of the Criminal Code of Poland that have only very recently been made available. That this information is only recently now before this court

is a matter of some regret, but I emphasise that that is not a criticism of Dr Brieskova who appears for the requesting authority.

8 Article 9(2) of the Code provides that

> "A prohibited act is committed without intent where the offender does not intend to commit it but does so out of a failure to exercise due care under the circumstances, even though the possibility of committing the prohibited act was foreseen or could have been foreseen".

9 Dr Brieskova says that this applies to Article 156, which concerns grievous bodily harm. Article 156(1) deals with situations where the harm in question deprives a person of their sight, hearing, speech or the ability to procreate. Article 156(2) concerns inflicting on another person a serious crippling injury, an incurable or prolonged illness, a potentially fatal illness, a permanent mental illness, a permanent total or significant incapacity to perform a profession or a permanent serious bodily disfigurement or defamation. In such a case the person concerned is liable to imprisonment for between one and ten years.

10 Then, immediately after, the legislation says: "If the offender acts unintentionally he or she is liable to imprisonment for up to three years". Dr Brieskova submits that Article 9(2) applies to Article 156(2), with the result that the relevant offence requires either intention or recklessness.

11 Foreign law is a matter of fact and I must do the best I can on the evidence available to me. That evidence is, I have to say, somewhat lacking. I am not satisfied on that evidence that Article 9(2) can correspond to what, under the criminal law of this jurisdiction, would be intent or recklessness for the purposes, at least, of section 20 of the Offences against the Person Act 1861, still less for the purposes of section 18 of that Act. I say that because the words "or could have been foreseen" seem to me to import an element of negligence falling lower than the threshold that would be required in this jurisdiction.

12 In an attempt to rectify matters, I was asked shortly after the short adjournment today to have regard to a piece of information that has been supplied today by the Regional Court to those representing the respondent here. Ms Howarth, understandably, objected to this belated information. It concerns what is said to be in the bill of indictment in respect of the appellant. It asserts that that bill states that the appellant had the intention of causing grievous bodily injury by knowingly stabbing the victim.

13 I am greatly concerned about the belated nature of this information. I do not consider that, in the circumstances, it is in the interests of justice to admit it. Dr Brieskova submitted that, just as an appellant should not suffer as a result of inaction by those representing him or her, so, too, the requesting authority should not suffer. I do not accept that submission. It was the responsibility of the requesting authority to provide the requisite information to make good the extradition in respect of the alleged wounding. It has not done so. This is despite the fact that permission was granted on this ground at the end of February 2024. Accordingly, on the basis of the evidence that is admitted, for the reasons I have given, I do not consider that we are concerned with anything other than the so-called inevitable inference test.

14 Is that inevitable inference made good? I have had close regard to the written and oral submissions of Dr Brieskova in that regard. I agree, however, with Miss Howarth that the exiguous description of the offence (quoted earlier) is insufficient. It does not explain how the stabbing is said to have occurred. It does not explain the nature of the tool used. It does not explain what the appellant and the victim were engaged in at the time. It is not, in my view, fanciful to conclude otherwise than that the force with which the victim was injured is inevitably indicative of an intent or recklessness, as opposed to an accident (whether or not involving negligence on the part of the appellant).

15 For these reasons, I accept the submissions on behalf of the appellant as regards the accusation concerning the stabbing. The appeal succeeds to that extent and extradition is not to be ordered in respect of that accusation.

16 I said that I would return to why I do not consider that para.23(2) of Fordham J's judgment in *Muhumud* assists. This is because, for the reasons I have given, the request in the warrant does not explain or show the relevant ingredient. On the contrary, for the reasons I have given, Article 156, read with Article 9, does not correspond to what would be required for a section 20 offence. I emphasise that that is my finding based on the admissible evidence before me; nothing more and nothing less.

17 I turn to the second ground of challenge. I agree with Miss Howarth that the district judge erred in conducting his proportionality balancing exercise on the erroneous basis that the case involved a conviction warrant. For reasons I will give, however, I do not consider that - undertaking the balancing exercise in the correct manner, as I shall endeavour to do - the district judge would have been required to decide the ultimate matter differently. The accusation relates to a serious matter. The identity document offence, if proved, carries a maximum sentence of five years and it is clear from the further information that the respondent rejected the request made by the appellant for a community sentence. Given the appellant's lengthy and very serious criminal record in Poland, it is likely - indeed, highly likely - that a significant sentence of imprisonment would follow. In so saying, I expressly take account of the fact that the appellant has now spent significantly over a year in HMP Wandsworth on remand. I also take account of the provisions that exist in Poland for early release. I note, however, these are in the nature of a discretionary power.

18 Using a false identification, impersonating another actual individual and proffering this to the police, is an inherently serious matter. The fact that it was used in an attempt to persuade the police of the appellant's identity is, of course, an aggravating factor. So, too, is the fact

that there was a live victim involved; namely, the individual the appellant was pretending to be. I shall have more to say about this in due course when dealing with section 21A of the 2023 Act.

19 Miss Howarth relies upon delay and the length of time that has gone by since the offence was alleged to be committed. But any appeal to delay is, on the facts, negated by the district judge's finding (which is free from error) that the appellant is a fugitive as regards the ID offence.

20 I take account of the somewhat involved history of this matter, not least the fact that there was an arrest warrant (number 1), which has now been withdrawn. I also take account of the fact that Miss Howarth submits that the authorities in this jurisdiction could have acted earlier, since the evidence suggests that the appellant has been an absconder, in immigration terms, in this jurisdiction since about 2016. I do not, however, consider that, in the circumstances, any significant blame can be attached to the authorities in that regard. It is common knowledge that there are many such absconders and we know not what, if any, action was taken by the immigration authorities to identify and locate the appellant.

21 I take full account also of the factors set out in para.62 of Miss Howarth's skeleton argument. There, it is said that the appellant has developed a private life during over a decade spent living in the United Kingdom. It is said that the false ID offence is at the less serious end of the spectrum of offending seen in extradition proceedings. Whilst that may be so, for the reasons I have given I do not consider that it materially affects matters. Viewed in its own terms, the alleged offending is serious, particularly in view of the appellant's criminal record. I take account of the fact that time has marched on since the date when the district judge gave judgment. Nevertheless, the same points that I have just

made apply to that additional period, which is not significant, given that it has not involved any establishment of family life or any real deepening of the appellant's private life.

22 It is said that the appellant has turned a corner in terms of offending and that he has no criminal record in the United Kingdom. It is, however, apparent from the documentation that the appellant has at certain times been operating under a false identity in the United Kingdom. That emerges from the statement of the police officer in respect of the first arrest of the appellant.

23 Of greater potential significance is the fact that the appellant suffers from physical and mental ill health. He has been diagnosed with Hepatitis B, a matter that emerges from the most recent medical records, which I admitted by consent on a *de bene esse* basis at the commencement of this hearing, and which I now formally admit. That documentation also reiterates what the district judge found; namely, that the appellant has certain mental health issues. He has attempted self-harm whilst in custody in the past.

24 It is said, on behalf of the appellant, that there is some suggestion he has already spent time in custody in Poland in relation to the false ID offence. Miss Howarth, however, accepted that there may be doubt in that regard and that any time so spent was, in any event, short compared with the period spent on remand in this jurisdiction.

25 Accordingly then, bearing all those matters in mind in the appellant's favour, it is quite clear that the appellant's Article 8 claim cannot succeed by reference to the ID offence. Apart from the issue of delay and the issue concerning his health to which I have already referred, the appellant has only the barest of private lives in this country. Before the immigration judge, he argued an Article 8 family life, but that is no longer pursued. It is said that he has been working in this country. However, the basis upon which he has done so is subject to some serious doubt, in view of his apparent immigration status.

26 There is, in short, nothing on the appellant's side of the balance to counter the strong interest in returning a person accused of a serious offence under the extradition regime.

27 I turn to section 21A of the 2003 Act. I agree with Miss Howarth that the district judge did not deal with this matter in terms. It, therefore, falls to me to do so. The provisions of section 21A are as follows:

> "**21A Person not convicted: human rights and proportionality**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ('D')—
>
> (a)whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b)whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality—
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
>
> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
>
> (a) that the extradition would not be compatible with the Convention rights;

(b) that the extradition would be disproportionate.

(5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—

(a) that the extradition would be compatible with the Convention rights;

(b) that the extradition would not be disproportionate.

(6) If the judge makes an order under subsection (5) he must remand the person in custody or on bail to wait for extradition to the category 1 territory.

(7) If the person is remanded in custody, the appropriate judge may later grant bail.

(8) In this section 'relevant foreign authorities' means the authorities in the territory to which D would be extradited if the extradition went ahead."

28 The following specified matters relating to proportionality must be considered. First is the seriousness of the conduct alleged to constitute the explanation offence. I refer in this regard to what I have already said. Secondly, regard must be had to the likely penalty that will be imposed, if the appellant were found guilty of the extradition offence. Again, I refer to what I have said.

29 I must make reference to the case of *H v, Hungary* [2018] EWHC 2667 (Admin.) This is a judgment of Sir Ross Cranston, who allowed the appeal of the appellant in that case by reference to section 21A. He did so because he rightly found, in my respectful view, that the terms of the section required him to take a view as to the length of sentence. In the present case, I have done so and I find that the length of sentence that the appellant is likely to receive in respect of the identification offence will be greater than the period that he has served on remand. I also note the discretionary aspect of the "half-time" release from

detention provisions in Poland. Given all that is known about the appellant, there must be serious doubt as to whether he would qualify for a half-time release but, even if he did, it is still the case that, in all the circumstances, he will find himself having to face a further period of imprisonment following extradition.

30 Apart from what I have said, one cannot extrapolate anything of direct relevance from the judgment of Sir Ross Cranston in *H*. Each case turns on its own particular facts. Those in *H*, were striking in a number of respects; not least because it appears that the appellant was not a person with a long or indeed, any previous criminal record, otherwise than in respect of the alleged offence for which her extradition was sought. She had also experienced previous traumatic events, which cannot be compared with the physical and mental problems suffered by the present appellant.

31 Finally, I am not persuaded that there is a possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the defendant. This conclusion follows from everything I have said.

32 Accordingly, the appeal will be allowed to the extent that I have mentioned, but is dismissed insofar as it concerns the false identification offence. I will invite counsel to draw up an order that reflects that conclusion.

CERTIFICATE

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