Neutral Citation Number: [2024] EWHC 2613 (Admin)

Case No: AC-2024-LON-000534

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

Royal Courts of Justice
Strand, London, WC20 2LL

Date: 16th October 2024

Before :

MR JUSTICE LINDEN

- -

Between :

JONATHAN ASHBY — **Appellant**

- and -

THE COUNTY COURT IN SIBENIK, CROATIA — **Respondent**

- -
- -

Jonathan Swain (instructed by **Ventis & Co Solicitors**) for the **Appellant**
Amanda Bostock (instructed by **Crown Prosecution Service**) for the **Respondent**
Hearing date: 9th October 2024

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Mr Justice Linden:

Introduction

1. This an appeal against the decision of District Judge Cieciora, on 9 February 2024, to order the extradition of the Appellant pursuant to a conviction warrant which was issued by the Respondent Judicial Authority on 29 December 2022 ("the Arrest Warrant"), and certified by the National Crime Agency on 3 March 2023. The Warrant concerns one offence of production and trafficking of Class A, B and C drugs on 26 July 2015, at a music festival, for which the Appellant was sentenced to 1 year and 2 months' imprisonment, 332 days of which remain to be served.

2. On 23 April 2024, permission to appeal was granted on the papers by Sir Peter Lane to argue two grounds of challenge. These are, first, abuse of process and, second, that the extradition of the Appellant would be incompatible with Article 8 of the European Convention Human Rights ("ECHR"). He refused permission to argue an Article 3 ECHR ground, and that ground is not pursued.

3. The Appellant is a British citizen aged 56. The complaint which is common to both his abuse of process and his Article 8 grounds is that, on 24 January 2020, the United Kingdom accepted that he could serve his sentence here ("the January 2020 decision"). Albeit that sentence has not actually been served by the Appellant since then, it is said that by the proceedings for his extradition the Judicial Authority has reneged on its position that he should be permitted to serve it here, and that this amounts to an abuse of process. In relation to Article 8 ECHR it is said that, by its original request that the sentence be transferred to the United Kingdom, the Judicial Authority recognised the desirability, from an Article 8 point of view, of the

Appellant serving his sentence here. The Appellant has a legitimate expectation that he will be able to do so and his extradition would therefore be disproportionate.

Background

4. Before the Westminster Magistrates' Court the Appellant challenged his extradition on six grounds, but I will concentrate on the aspects of the background which are relevant to the two grounds which are "live" in the appeal.

5. The sentence which is the subject of the Arrest Warrant was passed on 27 October 2015, when the Appellant pleaded guilty. At this point he had been remanded in custody since 26 July 2015. He was also fined.

6. I am told that the custodial sentence will expire on 25 November 2025.

7. On 23 November 2016, the Judicial Authority requested that the Appellant be permitted to serve his sentence in Great Britain. The request stated that enforcement of the sentence here would contribute to a better social rehabilitation of the Appellant given that he is a British citizen and resident here.

8. There was a second request on 21 November 2019, no response to the first one having been received. One of the requests (it is not clear which) was granted by the Secretary of State for Justice who issued a warrant under the Repatriation of Prisoners Act 1984 authorising the Appellant's detention in a prison in the United Kingdom to serve the balance of his sentence. By letter dated 24 January 2020 the Appellant was therefore required by Mr Stephen Gardner of the Cross Border Section of His Majesty's Prison and Probation Service ("HMPPS") to report to HMP Wandsworth at 2pm on 26 February 2020.

9. The Appellant did not do so and, instead, took a number of points as to why he could not be required to. These included that he had paid the fine imposed by the court and there was therefore no further sentence to serve. The proceedings in Croatia were at an end when the fine was paid and that is why he was released. However, on 29 April 2020 Judge Nikolac of the Respondent Judicial Authority confirmed that the fine was an ancillary punishment to the prison sentence and the fact that it had been paid did not affect the sentence to be served. The Appellant also argued that his lawyer's request to the Judicial Authority, on 30 March 2016, for him to be permitted to serve his sentence here had been made without his knowledge or consent. And, for example, he argued that his period of remand in Croatia had been wrongly calculated.

10. HMPPS gave the Appellant an extension of time in which to serve the sentence, apparently owing to the Covid-19 pandemic. Over the following 2.5 years, there was then sporadic correspondence with solicitors instructed by him and further extensions were granted whilst the solicitors said that they were making enquires with the Croatian authorities about various details of the case. On 15 March 2022 an indefinite extension was granted by HMPPS on the grounds that the solicitors were *"having problems getting information from Croatia"*. This extension was continuing as at the date of the Arrest Warrant. At the time of the hearing before the District Judge the Appellant had not begun to serve the sentence and that remained the position at the time of the hearing before me.

11. An issue at the extradition hearing was whether HMPPS had notified the Croatian authorities of the acceptance of their request to transfer the sentence. The correspondence between HMPPS and the Croatian authorities which was before the District Judge was far from complete and there were items before the District Judge

which suggested that they may have, and items which suggested that they had not. It was apparent that, in January to April 2020, Mr Gardner had sought clarification from the Croatian authorities of various matters in relation to the sentence. But this included, on 23 April 2020, asking them why they had released the Appellant without confirmation from the British authorities that they were willing to take over the sentence. In an email to the Appellant's solicitor dated 16 November 2021, which Mr Swain relied on in his skeleton argument, Mr Gardner stated that he had *"advise[d] the Ministry of Justice in Croatia"* but Mr Swain rightly accepted in his oral submissions that it was unclear what he had advised them of. The communication with the Ministry of Justice itself was not before the District Judge, nor any evidence of who precisely he had notified of what, and when. In an email to the CPS dated 27 April 2023 Mr Gardner also said *"The British authorities agreed to take over the sentence 26 February 2020 and sent the documentation to the address provided on the application"*. In fact, this had been agreed sometime earlier than 26 February 2020 as I have noted and, again, the documentation which was sent was not before the District Judge.

12. On the other hand, on 21 October 2021 Judge Nikolac wrote to Mr Gardner referring to the November 2016 request and stating that *"to this day"* the Judicial Authority had not received any notice of the British authorities acting on it. He asked to be informed as soon as possible. No reply to this communication was before the District Judge. The Arrest Warrant was then issued by Judge Nikolac on 29 December 2022. In Further Information, dated 11 May 2023 and addressed to *"the competent court"* the same Judge said that they did not receive any notification or decision in relation to their request, which was why the arrest warrant was issued. Similarly, in a second

Further Information, dated 4 October 2023, responding to questions from the Crown Prosecution Service, the Judge said:

> *"Given the fact that you have not come to any decision regarding our petition of 23rd November 2016 to take over the sentence of imprisonment for over 5 (five) years, we issued a European arrest warrant on 29th December 2022.*
>
> *... we are of the opinion that the convict is attempting to evade the serving of the sentence of imprisonment."*

13. In the light of Judge Nikolac's clear statements Mr Swain accepted before me that the Respondent Judicial Authority had not been notified of the January 2020 decision. However, he said that Mr Gardner's 16 November 2021 email indicated that the Ministry of Justice in Croatia may have been informed and, if so, that the Respondent was unaware of this.

The District Judge's decision

14. In the relevant section of her Judgment, the District Judge set out the competing arguments of the parties before going on to analyse the documentary evidence and to explain her decision.

15. As far as the Appellant's argument was concerned, she noted that it had been stated by the Judicial Authority that the Arrest Warrant had been issued because no decision had been made on its transfer request for over 5 years. This decision was said by the Appellant to be flawed because the United Kingdom had agreed to the transfer which had been requested on the grounds that it would contribute to the better social rehabilitation of the Appellant, and that decision had been communicated to the Judicial Authority. Nothing had changed save that the sentence had not in fact been

enforced as a result of the Covid-19 pandemic and the need to resolve queries which were legitimately raised by the Appellant. Moreover, the certificate of transfer had not been formally withdrawn.

16. Before the District Judge it was accepted by the Appellant that the Judicial Authority was entitled to withdraw its transfer request at any time prior to the enforcement of the sentence i.e. prior to his being taken into custody. This concession was consistent with Council Framework Decision 2008/909/JHA of 27 November 2008 which provides for the relevant judgment and a standard form certificate to be sent requesting that another Member State executes a sentence. Article 13 then provides

> *"As long as the enforcement of the sentence in the executing State has not begun, the issuing State may withdraw the certificate from that State, giving reasons for doing so. Upon withdrawal of the certificate, the executing State shall no longer enforce the sentence."*

17. But it was argued on behalf of the Appellant that it was a manifest abuse of process, in all the circumstances, for the Respondent to renege on the agreed transfer. Moreover, the Appellant and his family would suffer prejudice as a result given that the sentence would otherwise be served in this country.

18. Having traced the chronology revealed by such documentation as was available, at [182] the District Judge said that the transfer process had been a *"catalogue of miscommunication between the UK and the Croatian Authorities"*. At [183] she said that she would make no finding as to whether HMPPS did in fact communicate their decision to the *"Croatian Authorities"* and added *"However, it is not surprising to me that the [Requesting Judicial Authority] was unsure of the position"*. She then

explained why in some detail, by reference to the available documentation, observing that:

> *"What was clear throughout, was the HMPPS was not, in fact, requiring that the sentence be enforced. Rather, HMPPS was permitting the Requested Person to dictate the course of proceedings."*

19. She went on to say:

> *"184) The letter from the RJA dated 4 October 2023 does not contain any formal phrase or words formally withdrawing the certificate of transfer, but it is absolutely clear from the content of the letter and the subsequent issue of the AW that the RJA has done so.*
>
> *185) As acknowledged by the Requested Person, the RJA has the right to withdraw the transfer request. The issue, the Requested Person submits, is whether the decision to do so amounts to an abuse of process.*
>
> *186) Given the chronology, it was entirely reasonable of the Croatian Authorities to consider that the UK had not (and has not) in fact agreed to enforce the decision. In such circumstances the RJA's decisions to withdraw the transfer request and issue the AW do not amount to an abuse of process.*
>
> *187) As per my previous factual findings, I am sure that the Requested Person knew proceedings were not finalised, but paid the fine knowing that it afforded him the opportunity to leave Croatia. He then left Croatia as soon as he could, knowing that the proceedings had not concluded and knowing that there was a period of imprisonment left to be served. It*

follows that I am sure that the 'concerns' he raised to HMPPS were in fact a means of avoiding serving the sentence.

188) There is no cogent evidence that the RJA has acted in such a way as to usurp the statutory regime of the Extradition Act 2003, nor has the integrity of the process been impugned.

189) I am sure that there is no abuse of process."

20. Earlier in her judgment, she had found, rejecting the Appellant's evidence, that he had not genuinely believed that the fine was an alternative to custody and that the criminal process in Croatia was at an end. Nor did she believe him when he said that he did not give permission to his lawyer to request a transfer of the sentence or know that this had been done (his alleged belief being that there was no sentence to be served). The Appellant also admitted, at the hearing, that the period on remand in Croatia had been correctly calculated. At [116], the District Judge found that the Appellant had been pursuing the arguments that he was not required to serve any further part of his sentence *"knowing them to be false*".

21. As far as Article 8 ECHR is concerned, the District Judge referred to the applicable legal principles, which are very well known and need not be repeated here. She took into account the factors for and against extradition which were argued by the parties and concluded that the Appellant's Article 8 rights were outweighed by the public interest in his extradition. The Appellant had relied on the fact that he is a British national with an established private and family life in the United Kingdom, and that he is not a fugitive. He had argued that he had a legitimate expectation that there was no custodial sentence left to serve, and he adduced evidence that extradition would adversely affect his and his wife's health and her financial situation. He also said that

he provided emotional support for his mother, and he relied on delay since 2015 when the offence was committed.

22. The District Judge did not find the Appellant to be a credible or reliable witness. She considered that he had exaggerated the degree of hardship which would be experienced by him and his family if he were to serve the remaining 332 days of his sentence in Croatia. There would be hardship but this did not go beyond the hardship which ordinarily results from extradition. She also held that the delay since 2020 had been the result of his deliberate efforts to avoid serving his sentence.

The Appeal

23. Both parties referred to the decision of the Divisional Court in *Belbin v The Regional Court of Lille, France* [2015] EWHC 149 (Admin) where Aikens LJ said, at [59]:

> *"We wish to emphasise that the circumstances in which the court will consider exercising its implied "abuse of process" jurisdiction in extradition cases are very limited. It will not do so if, first, other bars to extradition are available, because it is a residual, implied jurisdiction. Secondly, the court will only exercise the jurisdiction if it is satisfied, on cogent evidence, that the Judicial Authority concerned has acted in such a way as to "usurp" the statutory regime of the EA or its integrity has been impugned. We say "cogent evidence" because, in the context of the European Arrest Warrant, the UK courts will start from the premise, as set out in the Framework Decision of 2002, that there must be mutual trust between Judicial Authorities, although we accept that when the emanation of the Judicial Authority concerned is a prosecuting authority, the UK court is entitled to examine its actions with "rigorous scrutiny".*

> *Thirdly, the court has to be satisfied that the abuse of process will cause prejudice to the requested person, either in the extradition process in this country or in the requesting state if he is surrendered."*

24. Earlier in his judgment, at [44] he had said of the statutory regime:

> *"It would, for example, be "usurped" by bad faith on the part of the Judicial Authority in the extradition proceedings or a deliberate manipulation of the extradition process. But any issues relating to the internal procedure of the requesting state are outside the implied abuse of process jurisdiction concerning extradition proceedings... Moreover.....this "usurpation" of the statutory extradition regime has to result in the extradition being "unfair" and "unjust" to the requested person. In this regard, it has also to be shown that, as a result of the "usurpation" of the statutory regime, the requested person will be unfairly prejudiced in his subsequent challenge to extradition in this country or unfairly prejudiced in the proceedings in the requesting country if surrendered there."*

25. Mr Swain also accepted that the Appellant has a high hurdle of persuasion. The paradigm manifestation of abuse of process is bad faith on the part of the prosecuting authority: where the requesting authority seeks extradition knowing that it has no real case or for a collateral motive, namely to oppress or unfairly prejudice a defendant: see e.g. *Aleksynas & Others v Republic of Lithuania* [2014] EWHC 437 (Admin) at [80]. He also relied on *R (Government of the United States of America) v Bow Street Magistrates Court* [2007] 1 WLR 1157 ("*Tollman*") where Lord Phillips CJ said this at [84]:

> *"The judge should be alert to the possibility of allegations of abuse of process being made by way of delaying tactics. No steps should be taken to investigate an alleged abuse of process unless the judge is satisfied that there is reason to believe that an abuse may have taken place. Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred. The common issue in the two sets of appeals before the court relates to how he should do this."*

26. Mr Swain argued that the District Judge should have followed the step by step approach indicated in this passage. There was no issue as to whether the abuse in question was sufficiently particularised. The District Judge did not make an explicit finding as to whether the conduct alleged was capable of amounting to an abuse and, crucially, she declined to make any finding as to whether the Croatian authorities had in fact been notified of the United Kingdom's acceptance of the transfer of the sentence. This was wholly impermissible given that there was evidence that the decision may have been communicated, at least to the Ministry of Justice even if not to the Respondent, and given the importance of this question to the allegation of abuse of process. It was no answer for the District Judge to say that it was not surprising that the Respondent was unsure of the position and there was no explicit evidence to justify this conclusion. If the decision had been communicated then the issuing of the

arrest warrant would be entirely unreasonable. Accordingly, instead of dismissing the abuse argument the District Judge should have found that there were reasonable grounds to suspect an abuse of process and sought further information from the Respondent as to whether it has been notified of the January 2020 decision.

27. Mr Swain submitted that, in any event, seeking the extradition of the Appellant in circumstances where the United Kingdom has agreed to the transfer of the sentence and where HMPPS has agreed to delay its implementation is an abuse of process. The present situation is the fault of HMPPS rather than the Appellant, who has a legitimate expectation of serving his sentence here. Mr Swain said, on instructions, that the Appellant is willing to do so, but he was not able to show me any evidence of formal approaches by the Appellant to HMPPS or the Judicial Authority to request that he be permitted to start the requisite period of imprisonment.

28. Mr Swain argued that there will inevitably be prejudice to the Appellant in that extradition is inherently more draconian for him than serving his sentence in this country. He added that there had not been a formal withdrawal, with reasons, addressed to the relevant body with the result that HMPPS could still enforce the sentence. In all the circumstances the decision of the District Judge on the abuse of process issue was wrong.

29. As far as Article 8 is concerned, Mr Swain relied on the reasons for the original request for the transfer of the sentence, namely the likelihood of a better social rehabilitation of the Appellant if the sentence was served here. He submitted that it can be inferred that the Secretary of State for Justice agreed with this view. He relied on his arguments in relation to abuse of process to the effect that there is no evidence that the position has changed materially and he submitted that in all the circumstances

extradition would be disproportionate. He pointed out that the result of accepting his argument would not be impunity, assuming that the Appellant served his sentence here: the issue was as to the proportionality of him serving his sentence in Croatia rather than in this country. And he complained that the District Judge did not engage with this aspect of the Appellant's case when considering the position under Article 8.

Discussion and conclusion

Jurisdiction

30. Sections 27(2) and (3) of the Extradition Act 2003 provide:

> *"(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."*

The abuse of process argument

31. I will take this point first, despite the fact that abuse of process is a residual ground, given the way in which the appeal was argued.

32. The starting point is that the Respondent was free to withdraw its request for the sentence to be transferred at any time prior to the Appellant beginning his sentence

here. This is permitted by the process: see Article 13 of the Framework Decision, which I have set out above.

33. Secondly, that is what the Judicial Authority did by issuing the 29 December 2022 Arrest Warrant and pursuing the extradition of the Appellant thereafter. I take the point that Article 13 refers to the issuing state withdrawing the certificate and giving reasons, but that has also been done: see the Further Information documents dated 11 May and 4 October 2023. It is clear that the Judicial Authority was dissatisfied at the lack of progress over the years since its first request in 2016 and considered that the Appellant was deliberately avoiding serving his sentence in this country by giving the United Kingdom authorities "the run around". The District Judge's unchallenged finding of fact was that this was indeed what he was doing.

34. The Judicial Authority's decision and the reasons for it have been communicated clearly. Even if, as Mr Swain argues, they should also have been communicated directly to the Ministry of Justice here, any failure to do so does not make the decision abusive. Moreover, there is no reason to doubt that the Ministry of Justice/HMPPS are well aware that the request has been withdrawn, and the suggestion that the Appellant could now be required to serve his sentence here seems to me to be wholly unrealistic.

35. Given that A has not begun to serve his sentence here, this appears to me to be an end of the matter. But, in any event, the high point of the case that the issuing of the Arrest Warrant was abusive is that the expectations of A had been raised, the Croatian Ministry of Justice may have been notified of the agreement to transfer the sentence, the Judicial Authority may have been mistaken in proceeding on the basis that there had been no notification, and it may yet be agreeable to the transfer if it were aware of the true position.

36. In my view, the notion that the Judicial Authority remains unaware of the January 2020 decision and might take a different view if it did know of it is artificial. The clear position on the evidence is that the Judicial Authority has run out of patience and requires the sentence to be served in Croatia. It considers (rightly on the evidence given that the Applicant has not begun the sentence and there has been an indefinite extension of time for him to do so since March 2022) that its request has not been acted on. But if I am wrong on this, it is a matter which can be addressed by notifying the Judicial Authority of the January 2020 decision and asking whether, in the light of this, it wishes to maintain its current stance.

37. As I have noted, Mr Swain accepted that the Judicial Authority was unaware of the January 2020 decision at the time of the Arrest Warrant. But even if one assumes that the Ministry of Justice in Croatia had been notified of the decision, and so had the Respondent Judicial Authority, the fact remains that the sentence has not been implemented and the Judicial Authority was and is entitled to take the position that this is unsatisfactory and therefore withdraw its request for transfer.

38. There is therefore no evidence of bad faith on the part of the Judicial Authority, or manipulating the process or acting for ulterior motives in issuing the Arrest Warrant. The Appellant's case, at its highest, is that there may have been a mistake or miscommunication at the time of the Arrest Warrant. The District Judge was entitled to find, without making further inquiries, that there was no cogent evidence of usurpation of the statutory regime and nor had the integrity of the process been impugned.

39. The District Judge could also have added that the Appellant fails the second limb of the test identified in *Belbin* at [44]. On the evidence, extradition of the Appellant

would not be "unfair" or "unjust" to him and will not result in him being unfairly prejudiced in some subsequent challenge to extradition in this country or unfairly prejudiced in the proceedings in Croatia if surrendered there. There appears to be no challenge to the validity of his sentence. He was given a fair opportunity to serve that sentence here but, instead, chose to avoid doing so on grounds which he knew to be unfounded. It is not unfair or unjust for him now to be extradited.

40. This ground of appeal therefore fails.

The Article 8 argument

41. The reality of Mr Swain's argument is that the District Judge ought to have attached decisive weight to the fact that the Judicial Authority and the United Kingdom authorities accepted that it would assist the Appellant's rehabilitation if he served his sentence here. There are various problems with this argument.

i) First, the District Judge was aware of this feature of the evidence and no doubt had it in mind.

ii) Second, however, the question of proportionality depended on the District Judge's assessment of the evidence rather than the views of the Judicial Authority or HMPPS. Moreover, they appear to have considered whether it was more conducive to the social rehabilitation of the Appellant that he serve his sentence here (as no doubt it is in many cases, and might be regarded as a given in the present case without reference to the rest of the evidence), but that was not the question for the District Judge. The issue for her was, taking into account the evidence as a whole, whether the public interest in the extradition of the Appellant was outweighed by his Article 8 ties to this jurisdiction.

iii) Third, if there had, instead, been a request for extradition in January 2020 it would have been proportionate to extradite the Appellant for the reasons given by the District Judge, which reasons are not challenged other than by reliance on the decision that the sentence could be transferred. The Appellant was nevertheless given an opportunity to serve it here. The circumstances since then have changed in that, on the District Judge's findings, the Appellant abused the opportunity which had been given to him and therefore no longer had any reasonable expectation of being permitted to do so. As a result, by the time of the Arrest Warrant the Judicial Authority no longer sought transfer of the sentence and had evidently concluded that extradition was the appropriate course. Nothing had occurred in the interim to strengthen the Appellant's Article 8 case. It remained proportionate, the Appellant having been given an opportunity to serve his sentence here but not taken it, for him to be extradited.

iv) Fourth, the District Judge was entitled to find that this is not a case in which the degree of hardship to the Appellant and his family which would be caused by his extradition was unusual. The fact that there had been agreement to the transfer of his sentence does not affect this conclusion.

v) Fifth, standing back and taking account of all of the circumstances including the January 2020 decision, the District Judge's decision was not wrong.

42. The Article 8 ground therefore also fails.

Conclusion

43. The appeal is dismissed.