Neutral Citation Number: [2024] EWHC 461 (Admin)

Case No: AC-2023-LON-002109

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday, 4th March 2024

Before:
FORDHAM J

- -

Between:

KAMIL GALBARCZYK	**Appellant**
- and -	
THE REGIONAL COURT IN RADOM, POLAND	**Respondent**

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- -

Tihomir Mak (instructed by ITN Solicitors) for the Appellant
The **Respondent** did not appear and was not represented

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Hearing date: 28.2.24
Draft judgment: 29.2.24

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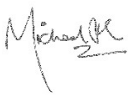
Approved Judgment

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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FORDHAM J

FORDHAM J:

Introduction

1. I have put my reasons into writing, in preference to asking Counsel to return to hear them delivered ex tempore at the end of a long court day with several intervening hearings. The Appellant is aged 40 and is wanted for extradition to Poland. Extradition was ordered by District Judge Sternberg ("the Judge") on 4 July 2023, after hearings in January and May 2023 at which the Appellant was represented and adduced written and oral expert evidence (17.1.23 and 25.3.23) from a Polish Law Lecturer and Attorney (Dr Zygmont). The Judge also had Further Information from the Respondent (11.4.23). After the May 2023 hearing the Judge asked for, and received, a final piece of Further Information (30.5.23); and the Appellant's representatives filed a response from Dr Zygmont (16.6.23).

2. The extradition is in conjunction with a conviction Extradition Arrest Warrant issued on 31 May 2022 and certified on 20 July 2022, on which the Appellant was arrested on 17 September 2022, before being bailed two days later. The index offending is that he was a member of an organised criminal group operating in France and Poland between 2009 and 2011, stealing passenger and commercial vehicles, using fake purchase documents and forged vehicle identification numbers. The Appellant's role was helping to hide passenger vehicles knowing that they have been stolen in France and Germany.

3. The Judge unassailably found as follows. The Appellant was convicted at a trial in his presence and, in February 2015, sentenced to a two-year custodial sentence, suspended for 4 years on conditions requiring his keeping in touch with a probation officer. The 4 year probation period ended on 10 February 2019. The Appellant came to the UK in 2016 and initially discharged his obligation to keep in touch with probation. But from October 2018 he stopped keeping in touch with his probation officer, in breach of the conditions of the suspended sentence. On 21 November 2018, probation requested activation of the sentence. Activation was originally refused by a first-instance court on 10 January 2019 but then, on appeal, the sentence was activated in full on 25 March 2019.

Article 5(4)

4. The sole issue raised on appeal is that extradition would be incompatible with the Convention rights, because of "clear and cogent evidence" of a "real risk" of a "flagrant breach" of Article 5(4) ECHR. Mr Mak's carefully constructed argument is as follows:

    i) An issue as to the domestic Polish lawfulness of the detention arises. That is because of a legal point and a factual point. The legal point is that, in Polish domestic law, a suspended sentence can only be activated where the person whose liberty is at stake has been sent (a) prior written warning and (b) a summons for the activation hearing. The appeal court (25.3.19) will have been well aware of the legal point. The factual point is that only a warning text was said, by the Respondent to the Judge, to have been sent; not a written warning; and no summons. The appeal court (25.3.19) overlooked this. It gives a basis for saying that the activation was unlawful under Polish domestic law.

ii) Article 5(4) requires that: "Everyone who is deprived of his liberty by … detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release order if the detention is not lawful". The question is whether this entitlement is being secured, in relation to the activation (25.3.19).

iii) If the appeal court had exercised its power to remit, and if the activation had then been by the first-instance court, there would have been a right of appeal against the activation. That would have satisfied Article 5(4). That is so, even if no appeal were pursued; or even an appeal had been timed out. The fact is that, because the appeal court decided to substitute its own decision, and not to remit, that appeal right was lost. This is crucial to the analysis.

iv) It is true that an activation decision will not normally engage Article 5(4) – if a person breaches the conditions of a suspended sentence and a court activates that sentence – because the detention falls within Article 5(1)(a), as a deprivation of liberty in accordance with a procedure prescribed by law, which is the lawful detention of a person after conviction by a competent court. It is also true that if Polish domestic law had never provided a right of appeal, and an activation took place which was unappealable, this would not engage Article 5(4). That is even if a precondition in Polish domestic law, to an activation decision, was unfulfilled. But what makes the difference is that there is a right of appeal and, here, there was no remittal.

v) In the absence of any appeal right against the activation – because of the non-remittal – there would need to be some other remedy satisfying Article 5(4). There is none. The Ombudsman has been suggested, but this does not satisfy "speedily". The Further Information (30 May 2023) suggests a right under Article 24 of the Executive Penal Code, where a court may set aside its decision on new information unknown at the time. But – as Dr Zygmont's response (16 June 2023) pointed out – that means "unknown" and "factual" information; and not a defect or the missing of a procedural step. The domestic law breach in the present case is neither factual nor unknown; it is a defect in the missing of a procedural step. In any event, as Dr Zygmont also pointed out, Article 24 is an 'own-motion' power, which the Appellant would have no right to invoke.

vi) This meets the standard of "clear and cogent evidence" of a "real risk" of a "flagrant breach". The Judge's reasons did not adequately deal with the argument, was wrong not to admit Dr Zygmont's final report (16.6.23) and was wrong in the discussion of the substance of that and the other evidence. The Judge was therefore wrong to reject the Article 5(4) incompatibility of extraditing the Appellant. For today, it is sufficient that the Judge was, reasonably arguably, wrong.

Reference-Points

5. I think it helps to have in mind a number of basic points:

i) There is a bespoke protection, based on Article 6 ECHR fair trial rights, where a requested person is tried in their absence, raising issues about (a) deliberate absence and (b) retrial rights. In the Extradition Act 2003, it is s.20. But it, and

Article 6, do not apply to an activation hearing, because that is not part of the "trial". See eg. Miroslav Murin v District Court in Prague (Czech Republic) [2018] EWHC 1532 (Admin) at §35.

ii) Imprisonment in accordance with an activated custodial sentence, previously suspended, is imprisonment pursuant to a criminal conviction. Imprisonment pursuant to a criminal conviction is squarely covered by Article 5(1)(a) ("the lawful detention of a person after conviction by a competent court"): see eg. Romania v Ceausescu [2006] EWHC 2615 (Admin) at §11. Mr Mak accepts that, ordinarily, this covers activation of a suspended sentence and Article 5(4) is not engaged.

iii) The threshold for resisting extradition on Article 5(4) grounds is deliberately a high one, requiring "clear and cogent evidence of a real risk of a flagrant breach". See eg. Ceausescu §12; Agius v Malta [2011] EWHC 759 (Admin) §12; Nemeth v Hungary [2022] EWHC 1024 (Admin) §6.

iv) There is no Article 6 (fair trial) duty on the extraditing court to inquire into the fairness of the process in the requesting state: see eg. Sobczak v Poland [2011] EWHC 284 (Admin) at §13. The same must apply, by reference to Article 5 and due process rights.

v) There is a mutual trust and recognition, with a presumption that ECHR states will comply with their own Convention responsibilities (Agius §12), which responsibilities are ultimately matters for the requesting state: see Sobczak §13; Kaderli v Turkey [2021] EWHC 1096 (Admin) §52.

6. The Judge had all of these points well in mind as is clear from his reasoning; as did Saini J in refusing permission to appeal in this case on the papers; and as must I.

Discussion

7. In my judgment, the argument skilfully advanced by Mr Mak faces several fatal difficulties.

i) The first arises out of what has, rightly, been accepted. Mr Mak accepts that a suspended sentence 'activation' decision normally falls squarely within Article 5(1)(a) ECHR, and does not engage Article 5(4). His logic accepts that this is ordinarily so, even if there is some domestic law criterion, principle or precondition which is said to have been misappreciated or misapplied. He also accepts that if Polish domestic law never provided a right of appeal, and an activation decision by a court misappreciated or misapplied a domestic Polish law criterion, principle or precondition, Article 5(4) would not require Polish domestic law to provide any entitlement to take proceedings to have that question of lawfulness determined. But once all of that is right, I cannot see how Article 5(4) then operates to apply to some activation decisions, depending on whether domestic law chooses to confer a right of appeal or depending on which tier of the court system has made the activation decision. A principled position would require the Article 5(4) protection whenever there is an activation decision and an issue of domestic lawfulness of that decision arises. Mr Mak disavows that.

ii) The second involves a reality check. The Appellant has been found to have discontinued contact with probation, from the UK. The Further Information recorded that probation used the last mobile number available for him to warn him of activation. His legal logic is that written notification, sent to some last known address, was required and that the Appellant has been denied some key procedural entitlement. But it is accepted that there would have been no violation if a letter had been posted through a Polish letter box and never came to his attention, because he was in the UK and had discontinued contact. In addition, there is this. Suppose that the appeal court, having concluded that it was wrong of the lower court not to have activated the suspended sentence, had remitted the case to the lower court. Suppose the lower court had then duly activated. How, sensibly, could the appeal court then have been asked to revisit the activation? I find it very difficult to see how the reality of this could form the basis of a human rights violation; still less a flagrant one.

iii) The third concerns taking the Appellant's logic and applying it to the post-extradition right of recourse. Mr Mak says the appeal court (25.3.19) must be taken to have been aware of any and all fundamental procedural preconditions in domestic Polish law. He says fulfilment of the precondition was absent, which was misappreciated, but that this is not "factual" nor "unknown". He points to Dr Zygmont's description (16.6.23) of Article 24. But that describes relevant circumstances "of a factual nature" which were "previously unknown". It distinguishes a decision which is "legally defective because of a mistake made in the order or because of a change in the state of the law". Suppose the Appellant is right. The appeal court was well aware of the legal preconditions. It made the activation decision. A fundamental precondition was missing. That was because a text had been sent, and not two letters. That is factual. It must have been overlooked. So it was unknown. So, if this truly is the fundamental vitiating feature for which the Appellant argues, it can be brought to the attention of the court who then has the Article 24 power to which specific reference has been made by the Respondent in Further Information in this case.

iv) The fourth involves remembering that we are talking about an entitlement said to flow from Article 5(4) ECHR. This engages the mutual trust and recognition, with a presumption that ECHR states will comply with their own Convention responsibilities, which responsibilities are ultimately matters for the requesting state. If Mr Mak and Dr Zygmont are right, the Appellant can in principle invoke Article 5(4) and require a Convention-compatible approach to Article 24.

v) The fifth is the high threshold which requires clear and cogent evidence disclosing a real risk of a flagrant breach of a Convention right; and the corollary principle as to the absence of any general duty of enquiry. I see no basis for saying that this deliberately very high threshold is, or is at risk of being, crossed.

8. In my judgment, any one of these difficulties would be fatal. As it happens, they arise in combination. I have been unable to accept that it is reasonably arguable that the Judge was wrong not to find an Article 5(4) incompatibility in this extradition, on all the evidence in the present case. The Judge's reasons, including in dealing with the substance of Dr Zygmont's final response, and in any event the Judge's conclusion are unassailable. I agree with Saini J's refusal of permission to appeal on the papers. In those circumstances, and for those reasons, I will refuse permission to appeal.

29.2.24