



Neutral Citation Number: [2024] EWHC 980 (Admin)

Case No: AC-2022-LON-002900 /CO/3852/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2024

Before :

THE HONOURABLE MRS JUSTICE CUTTS DBE

Between :

SAMUEL FORTES PAIVA

Appellant

- and -

TRIBUNAL DA COMARCA DE SETUBAL
PORTUGAL

Respondent

Sophia Kerridge (instructed by **Dalton Holmes Gray Solicitors**) for the **Appellant**
Gary Dolan (instructed by **CPS (Extradition Unit)**) for the **Respondent**

Hearing dates: 20 March 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on 29 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE CUTTS:

Introduction

1. On 14 October 2022 District Judge McGarva ordered the appellant's extradition to Portugal pursuant to a conviction Arrest Warrant (AW) issued by the Tribunal Judicial Da Comarca De Setubal, Portugal on 7 March 2022. The warrant was certified on 4 May 2022 and the appellant arrested on 6 June 2022. He has been on conditional bail throughout the proceedings.
2. This is his appeal, brought with permission, pursuant to section 26 of the Extradition Act 2003 ("the Act"). The issue is whether the district judge was correct to conclude that the appellant had "deliberately absented himself from his trial" in Portugal for the purposes of section 20(3) of the Act and so should be extradited to serve his sentence despite there being no evidence that he would be entitled to a retrial.

The Facts

3. The evidence relied upon by the requesting judicial authority is solely that set out in the AW. It is not in dispute that, as recorded, the appellant was sentenced to three years imprisonment in June 2015, following a trial in his absence. The offence was one of "qualified theft" on 16/17 April 2013 in Portugal. The appellant gained entry to a house by forcing a window lock whereupon he stole a Playstation, a microwave and a Nokia mobile telephone. The final decision is recorded as having taken place on 10 May 2019.
4. The AW records that the appellant was served with the established trial hearing date by letter sent to an address contained in a Statement of Identity and Residence (TIR) signed by him according to "the dispositions of article 196 of the Portuguese Code of Criminal Procedure." A page reference number is given but the actual TIR was not before the district judge or before me. In general terms, article 196 provides that a person who acquires the status of a defendant shall be required by the judicial authority or criminal police body to fill in a Statement of Identity and Residence. The Statement should mention that the defendant was informed of his obligation not to change his address or be absent from it for more than five days unless he notifies a new place of residence or address where he can be reached. The TIR will only be extinguished when the sentence expires. The Statement should also mention that failure to comply with his obligation to notify a change of address shall imply the need for his representation by a defence counsel in all procedural acts which he has the right or duty to attend as well as his trial in absentia pursuant to article 333.
5. There is no information as to why the appellant became a defendant or what he was told at that time. It is not known if he was arrested or formally questioned or what stage the case had reached at the time that the appellant signed it.
6. The AW goes on to say that on 15 August 2017 the appellant was personally served of the issued court judgment "having into account all legal applicable dispositions" at Lisbon airport. The warrant is entirely silent and there is no evidence from the

respondent authority as to what occurred between this date and 10 May 2019 for the decision to become final.

7. The appellant gave evidence that he moved to the United Kingdom from Portugal on 3 October 2015 which would have been nearly four months after his conviction in absence there. He came with his two sons then aged 8 and 6 years to return them to their mother who was living in the United Kingdom.
8. He did not know that there were criminal proceedings against him. He had not signed any statement of identity and residence. In his witness statement, which he adopted before the district judge, he said he first became aware of this matter when he was handed documents relating to his sentence at Lisbon airport. This was in August 2018, not 2017. The district judge in his judgment records that the appellant said in evidence that he first knew of his conviction and sentence when the police came to the car wash in Sheffield in 2018 where he worked and served him with the papers. He flew to Lisbon to resolve matters. In his statement and evidence, he said that he engaged a lawyer who looked into the case. She told him there was to be a hearing. He waited for two months and attended a hearing in a place which was not a court building. The alleged victim failed to attend. His lawyer told him the case was finished and he was permitted to return to the UK which he did. He honestly believed the matter to have come to an end.
9. The appellant is now aged 42 years. He has lived in the United Kingdom since moving here. He has settled status. He has worked throughout his time here. His two children live with their mother.

The AW

10. At box B, headed “Decision upon which the warrant is based” the text reads as I have already set out at [3].
11. At box D, the AW says that the appellant did not appear in person at the trial resulting in the decision. At subparagraph 3.1.b, it confirms that:

“The person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial and was informed that a decision may be handed down if he or she does not appear for the trial.”
12. At subparagraph 4, the warrant provides the required information about how the relevant condition has been met as follows:

“The subject was served of the established trial hearing date, letter with proof of deposit sent to the address of the Statement of Identity and Residence (TIR) signed by the subject, page 66, and according to the dispositions of article 196 of the Portuguese Code of Criminal Procedure. On the 15-08-2017 he was personally served of the issued court judgment, having into account all legal applicable dispositions, at the Portuguese Foreigners and Border (SEF) at Lisbon’s airport office - page 182 to 184.”

The finding of the district judge

13. In his analysis of the evidence, the district judge found at [8] that the appellant's evidence was "vague and lacking in particularity especially in so far as it purported to deal with his knowledge of the state of play in the criminal case in Portugal. When compared with the unequivocal statements from the judicial authority it does not stand scrutiny."
14. The district judge did not find the appellant to be a fugitive on the basis that the appellant was not arrested or made subject to any pre-trial restrictions or obligations to notify of any change of address. The district judge said that whilst he may reach a different conclusion on whether he was deliberately absent from his trial, he was not persuaded so that he was sure that the appellant was a fugitive.
15. In addressing at [21] what he described as the submission that "the warrant was defective and gave insufficient detail of where and when the summons was served and where the appellant was told to attend," the district judge said:

"I have considered the case of *Cretu*. This warrant contains an unequivocal statement that the requested person was served at his registered address. In my view the statement in the warrant is decisive and applying the principle of mutual recognition and respect I must accept it at face value, particularly when comparing it with the vague and unparticularised evidence of the requested person. I am satisfied beyond reasonable doubt that the requested person was deliberately absent from his trial. In these circumstances extradition is not barred by section 20 of the Extradition Act 2003 and I do not need to go on and consider whether the requested person has a right to a retrial."

The legal framework

16. Section 20 of the Act provides, so far as material:
 1. If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
[...]
 3. If the judge decides that question in the negative he must decide whether the person deliberately absented himself from the trial.
 4. If the judge decides the question in subsection (3) in the affirmative he must proceed under s.21.

5. If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial, or (on appeal) a review amounting to a retrial.

[...]

7. If the judge decides that question in the negative he must order the person's discharge.

In submissions before me, Miss Kerridge averred that it was common ground that there was no right of retrial or review in this case. Mr Dolan, for the respondent authority, did not suggest otherwise. There is no evidence before me that the appellant would be entitled to a retrial.

17. Section 20 of the 2003 Act is the domestic law provision governing the impact of a trial in a requested person's absence on whether extradition would nonetheless proceed in response to an AW. It follows the terms of article 4a of the amended Framework Decision 2009.
18. In *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin) the Divisional Court, in the judgment of Burnett LJ, interpreted section 20(3) of the Act at [34]:

“In my judgment, when read in the light of article 4a section 20 of the 2003 Act, by applying a *Pupino* conforming interpretation, should be interpreted as follows:

- (i) ‘Trial’ in section 20(3) of the 2003 Act must be read as meaning ‘trial which resulted in the decision’ in conformity with article 4a(1)(a)(i). That suggests an event with a ‘scheduled time and place’ and is not referring to a general prosecution process, Mitting J was right to foreshadow this in *Bicioc*'s case.
- (ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(1)(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate article 6 of the Convention.
- (iii) An accused who has instructed (“mandated”) a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it.
- (iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5) is to be determined by reference to article 4a(1)(d).
- (v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in section 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW.”

19. These conclusions were recently endorsed by the Supreme Court in *Bertino v Public Prosecutor's Office, Italy* [2024] UKSC 9 in which the court reviewed the law on trial in absence. The court underlined at [44-45] that where the AW is used properly to convey information which demonstrates that one of the criteria is satisfied that is ordinarily determinative and forecloses an endless factual exploration. However, the Amended Framework Decision recognises that the question whether to extradite is a matter for domestic law when none of the criteria is satisfied.
20. The court said that the phrase “deliberately absented himself from his trial” in section 20(3) of the 2003 Act should be understood as being synonymous with the concept in Strasbourg jurisprudence that an accused has unequivocally waived his right to be present at his trial. If the circumstances suggest a violation of article 6 the answer to the question in section 20(3) would be “no” and the judge would be required to consider whether there was a right to a retrial or appeal. If the circumstances suggest the trial in absence did not give rise to a violation of article 6 then the person is taken to have deliberately absented himself from his trial. It is for the requesting judicial authority to prove to the criminal standard that the requested person had unequivocally waived his right to be present at his trial.
21. The waiver must be unequivocal and effective, knowing and intelligent. The court stated at [54] that the standard imposed by the Strasbourg Court is that for a waiver to fulfil these criteria, the accused must have appreciated the consequences of his behaviour. This will usually require the accused to be warned in one way or another that if he did not attend his trial he could be tried in his absence. A manifest lack of diligence on the part of the accused is insufficient of itself to show an unequivocal waiver. The Divisional Court in *Zagrean v Romania* [2016] EWHC 2786 (Admin) put the point too widely in saying “a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial.”
22. At [58], the court concluded that behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence. Giving examples the court said:

“Where the accused states publicly or in writing an intention not to respond to summonses of which he has become aware; or succeeds in evading an attempted arrest; or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces. This points towards circumstances which demonstrate that when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option.”

Submissions from the parties

The appellant

23. In her written and oral submissions, Miss Kerridge, on behalf of the appellant, submits that the judge erred in his finding that the appellant was deliberately absent from his trial. She submits that there are four questions for the court in this case.
- i) The first relates to which hearing was the trial resulting in the decision. Miss Kerridge submits that this was not addressed by the judge who thereby fell into error. There were plainly two sets of proceedings in this case. The first was in 2015 when the appellant was convicted in his absence. He was notified of this and then appealed which was a re-hearing. This was also heard in absence and his appeal dismissed in 2019. In submitting that the proceedings in 2019 amounted to “the trial resulting in the decision,” Miss Kerridge relies on the decision of the Divisional Court in *Foster Taylor v Italy [2019] EWHC 2938 (Admin)* that it is the judicial decision finally disposing of the case on its merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned. She submits that the warrant proffers no information on events between 2018 and 2019 which caused the sentence to become final.
 - ii) The second question is whether the appellant was convicted in his presence. There is no dispute that he was not.
 - iii) The third question is whether he was deliberately absent. This is the key issue in the appeal. Miss Kerridge submits that there was no evidential basis upon which the district judge could be sure that he was. Whilst the appellant was in the United Kingdom, there were numerous ways in which details of the date and place of the appeal hearing could have been served on him. These included his legal representative, his home address in the UK which on the appellant’s case was known to the Portuguese authorities or to his brother’s address in Portugal. Although the judge was entitled to reject the appellant’s evidence about his knowledge of the proceedings and to find that he had not been assiduous in keeping in touch about his appeal, the judicial authority still had to show they had taken steps to acquaint him of those matters. There was no evidence that they had. Further, the judge’s finding that the appellant was deliberately absent was inconsistent with his finding that he was not a fugitive. If the appellant returned to the United Kingdom knowing of the appeal and deliberately failed to engage with it, he would be a fugitive as he would be out of reach of the judicial authority.
 - iv) The final question is whether the appellant would have a right to a retrial or review. It is common ground that he would not.

The respondent

24. Mr Dolan submits that there is no inconsistency in finding that the appellant was not a fugitive but was deliberately absent from his trial. The tests are different for each. In any event, given the requirements of a TIR under the Portuguese Code, the appellant was fortunate not to have been found a fugitive. The Judge was correct to apply the principle of mutual trust and confidence to the information provided by the respondent. During the appeal hearing, Mr Dolan submitted that either the appellant was notified of the time and date of trial or he acted with a manifest lack of diligence in failing to receive that information. Following the hearing, Mr Dolan brought the

decision in *Bertino* to my attention. He no longer relies on a manifest lack of diligence.

25. The warrant refers to the serving of a TIR. Article 196 of the Portuguese Code, cited in the warrant, states that any person who acquires the status of a defendant is required to fill in a statement of identity and residence. It is clear from the warrant that the appellant signed such a document and by inference must have provided an address. The Code requires the defendant to be informed of his obligation not to change his place of residence or be absent from it for more than 5 days without reporting his new address or where he can be reached. In the case of conviction, the statement of identity and residence will only be extinguished when the sentence expires.
26. The appellant was also served with the judgment at Lisbon airport. He was aware of the conviction and of his right of appeal as he exercised it. Thereafter, he did nothing to remain in contact with the authorities to ensure he was aware of the progress of his appeal.
27. If the relevant date was 2015, then the warrant makes clear that the appellant was notified by means of the TIR. If it was 2019, then he confirmed he was aware of the proceedings as he attended a hearing where the complainant did not appear.

Discussion

28. At [21] of his judgment, without explanation, reason or any attempt to engage with the submissions made to him, the district judge baldly stated that the AW in this case contained an unequivocal statement that the appellant was served at his registered address. On that basis, he declared himself satisfied to the criminal standard that the appellant was deliberately absent from his trial. In my view, there was insufficient evidence for him to be sure that was the case and, by so saying, he fell into error.
29. There is no dispute that the appellant was initially convicted in absence. There is a reasonable inference from the AW that the first instance decision resulting in the appellant's conviction was on 12 June 2015. For reasons discussed below, there is in my view, ambiguity as to whether this was the "trial resulting in the decision". If, however, box 4 of the AW can be taken to mean that notice of this first instance trial date was sent to the appellant at the address on the TIR, this would, in my view, be insufficient evidence of itself to prove that the appellant was deliberately absent from that trial.
30. This is because, in the absence of the TIR and/or any further evidence, it is not known why the appellant became a defendant so as to require such a document. There is no evidence as to whether he was merely a suspect, whether he had been arrested and questioned or whether he had been charged with the offence. There is no evidence that criminal proceedings had been initiated at that point and what the appellant's knowledge therefore was. Notwithstanding that the appellant by signing the TIR should have notified any change of address, applying *Bertino*, the respondent judicial authority has not come close in my view to establishing to the criminal standard that, having been officially informed that he was accused of committing a criminal offence and was therefore aware that he was going to be brought to trial, the appellant took deliberate steps to avoid receiving officially the information regarding the date and

place of the trial. He cannot in those circumstances be said to have voluntarily and unequivocally in a knowing and intelligent way foregone the right to have been present at it.

31. Further, it is of relevance in this case that the district judge did not find the appellant to be a fugitive. This was on the basis that the appellant was not arrested or made subject to any pre-trial restrictions or obligations to notify of any change of address. It is difficult to see how, in those circumstances, he then found that the appellant was deliberately absent from his trial. There is nothing in the judgment to assist on this question.
32. True it is that the appellant was subsequently informed of his conviction at Lisbon airport. This however raises more questions than it answers.
33. I accept Miss Kerridge's submission that the AW does not make clear which was the "trial resulting in the decision". As I have said, there is a reasonable inference that the first instance decision resulting in the appellant's conviction was on 12 June 2015. The AW says that the final decision was on 10 May 2019.
34. The AW is entirely silent (and there is no further evidence from the respondent judicial authority) as to what happened between 2017 (or 2018 on the appellant's case) and 2019 for the judgment to be made final. Miss Kerridge has submitted that there must have been an additional hearing in the form of an appeal. That may have been the case, although there is no evidence from the respondent judicial authority to that effect.
35. As *Cretu* says, "trial" in section 20(3) of the Act must be read as meaning "trial which resulted in the decision" in conformity with article 4(1)(a)(i). That suggests an event with a scheduled time and place and is not referring to a general prosecution process. If Miss Kerridge is right and there was an appeal hearing which finally disposed of the case on its merits, then in accordance with *Foster Taylor*, that would be the "trial which resulted in the decision", resulting in judgment in 2019.
36. If there was such an appeal hearing, paragraph 4.1 of Box D in the AW does not specify to which proceedings the information provided therein relates. As I have said, it seems most likely to me to relate to the first instance decision from the way it is written and the order in which the events are set out. This would indicate that notification of the first instance trial hearing date had been sent to the address in the TIR. The appellant was thereafter personally served with the judgment at Lisbon airport in the summer of either 2017 or 2018. If my reading of the information is correct, the AW is completely silent about notification of any appeal proceedings. If that reading is incorrect, the information in the AW is equivocal and/or ambiguous.
37. However, this is all supposition. It seems to me equally possible from the information in the AW that when the appellant received the issued court judgment at Lisbon airport "all legal applicable dispositions" may have told him that he had a right to an appeal which he did not exercise, resulting in the decision becoming final in 2019. In the absence of evidence to that effect, even that is supposition. The fact that the evidence allows for two possibilities shows of itself that the AW is far from unequivocal. It is in my view insufficient to satisfy the judge to the criminal standard that the appellant was aware of the date and place of whichever was the operative

hearing and had thereafter by his behaviour unequivocally waived his right to be present at it. It is insufficient to prove that he had deliberately absented himself from his trial.

38. It follows that I can see no possible basis upon which the district judge could be sure on the evidence that the AW contained an unequivocal statement that the appellant was served with details of the time and place of the hearing resulting in the operable decision to his registered address. The AW is at best equivocal on the matter.
 39. The appellant's evidence does not assist. The judge was entitled to disbelieve his account of what occurred in Portugal following service of the judgment upon him at the airport. I agree with him that it was vague and lacking in particularity especially in so far as it purported to deal with his knowledge of the state of play in the criminal case in Portugal. However, the burden is on the respondent judicial authority to prove to the criminal standard that the appellant was aware of the date and place of his trial and had unequivocally waived his right to attend so as to be deliberately absent. In the circumstances of this case, disbelieving the appellant's account alone cannot provide such proof.
 40. The district judge, having found the AW to be unequivocal, said at [21] that, applying the principle of mutual recognition and respect, he had to accept the warrant at face value. The difficulty in this case is knowing what that "face value" is. There is simply insufficient evidence providing a narrative as to what happened in Portugal to enable the court to properly understand what happened before and after conviction in absence and thereby determine or properly infer the appellant's state of knowledge as to the trial which resulted in the decision. It cannot have been difficult for the judicial authority to have provided evidence of the TIR and the state of the proceedings and appellant's knowledge of them at the time he signed the document. As Miss Kerridge said, it cannot have been difficult for the judicial authority to have identified the operable decision and to have provided sufficient evidence that they notified the appellant of the date and place of the relevant hearing. Such evidence has not been provided and in its absence, it cannot be assumed that all is as the respondent asserts.
 41. In my view, there was insufficient material before the court below to justify a finding that the appellant had deliberately absented himself from his trial. I conclude, in agreement with the appellant's submissions, that the district judge's finding in that regard cannot stand. The question should have been decided differently.
 42. There is no evidence that there is a right of retrial in this case. In accordance with section 20(7) of the Act, the appellant should therefore have been discharged. I allow the appeal and pursuant to section 27(5) of the 2003 Act order the appellant's discharge and quash the order for his extradition.
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