APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 26
HCA/2020/08/XM

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the application for leave to appeal under section 26 of the Extradition Act 2003 by

ILIA ILIEV

Applicant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Vengoechea; Good & Stewart
Respondent: DJ Dickson AD (sol adv); the Crown Agent

31 March 2021

Introduction

[1] This is an application for leave to appeal against a decision of the sheriff at Edinburgh on 12 March 2020 ordering the extradition of the appellant to Romania in terms of a European Arrest Warrant issued under Part I of the Extradition Act 2003. Appeals are governed by section 27. This provides, in summary, that the court may allow an appeal only if the sheriff ought to have decided the question differently (s 27(3)) or a new issue is raised or new evidence is available which would have had that result (s 27(4)).

Background

[2] The appellant is a Bulgarian national. On 5 November 2015 he was convicted in absentia by the Law Court of Arad, Romania of driving without a licence on 29 April 2015. He was sentenced to one year's imprisonment. An EAW was issued on 5 January 2016.

[3] On 28 December 2016 the appellant travelled to Sweden and was detained on arrival at the port of Nyköping. On 26 January 2017 the Nyköping District Court (Tingsrätt) refused to order his (Ilia Ilies Krasimirov's) extradition. The public prosecutor had informed the court that there was a risk that the appellant would be subjected to treatment which would contravene Article 3 of the European Convention in the event of his extradition to serve a custodial penalty. Romania had been given the opportunity to provide assurances that the appellant would not be subject to such treatment. They had only been able to guarantee that, for some of the custodial term, he would have a cell space of $2m^2$ instead of the minimum $3m^2$ in multi-occupation cells which the European Court of Human Rights has deemed to be required (C-128/18 *Proceedings concerning Dorobantu* [2020] 1 WLR 2485 at para 72).

[4] The appellant returned to Bulgaria for a time. On 9 May 2019 he travelled to the United Kingdom to join his wife, who is also a Bulgarian national. The EAW was still extant. He was arrested on arrival at Edinburgh Airport and appeared at Edinburgh Sheriff Court the following day.

The sheriff's decision

[5] A hearing had been set down for May 2019, but the appellant failed to appear at the preliminary hearing and an arrest warrant was issued. He appeared on 3 June and was granted bail. There were multiple adjournments based upon a submission that the issue of

Romanian prison conditions insofar as relating to Article 3 of the Convention was going to be resolved in a test case on appeal before this court. The issue was ultimately not raised in that case (*DV* v *Romania* 2020 SCCR 355).

[6] A hearing eventually took place on 12 March 2020. Meantime, the appellant had, on 11 September 2019, lodged a written case and argument. The only point raised in opposition to the extradition was based on Article 3 and, as with the Swedish process, concerned Romanian prison conditions. Reference was made to certain cases and to the Council of Europe's 2019 report on Romanian prison conditions (*Report to the Romanian Government on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 19 February 2018 (CPT/Inf (2019) 7)*.

[7] On the day of the hearing, the appellant's agent made several motions to adjourn once again: first, on the basis that he required to explore the circumstances of, *inter alia*, the previous extradition attempt in Sweden and one said to have taken place in the Czech Republic; secondly, in order to seek legal aid sanction to instruct counsel; thirdly, to raise any further bars to extradition that might emerge following the instruction of counsel; and, fourthly, because the appellant had been refused legal aid to fund an independent report into Romanian prison conditions. The motions were refused on the basis that they came too late. The appellant's agents had had a copy of the Swedish decision for some eight months.

[8] The Sheriff found that the offence was an extradition offence (2003 Act, s 10). It was accepted by the appellant that there were no bars to extradition (s 11). These could have included a contention that it would be unjust or oppressive to extradite the appellant by reason of the passage of time since the commission of the offence. The sheriff proceeded to consider whether extradition would be Convention compliant (s 21(1)). The appellant

testified that he was aged 44 and lived in St Andrew's with his wife. They had a daughter, but she lived in Bulgaria. The appellant worked in a restaurant and his wife worked in a laundry.

[9] The respondent produced two letters. The first, dated 12 August 2019, was from a judge of the Law Court of Arad. It provided details of the offence and the procedure which had followed. It referred to making enquiries of Bulgaria about the appellant's whereabouts and being told that he was serving a sentence of 42 months in the Czech Republic; Bulgaria having refused to accommodate him for the purposes of serving a sentence which had been imposed in Prague. The appellant denied ever having been in the Czech Republic. The letter from Arad made reference to the Swedish proceedings.

[10] The second letter was from a Prison Chief Superintendent, to the Romanian Ministry of Justice, dated 13 August 2019. It stated that the appellant would initially be quarantined for 21 days at Bucharest Rahova Prison. He would have a cell with a minimum space of $3m^2$. He would then be moved to a permanent location. In light of the length of his sentence, this would probably be to an open security facility at Gãesti Prison. Gãesti is a small town in southern Romania. The nature of the cells, and other facilities, was described in some detail and an assurance was given that the minimum of a $3m^2$ space would be met. The appellant would have access to Bulgarian consular facilities.

[11] The sheriff had difficulty in understanding whether the appellant's agent was continuing to rely on the Article 3 point. The agent accepted that he had no evidence to support his contention that the appellant's imprisonment in Romania would not be Article 3 compliant. The sheriff was satisfied that he could rely upon the assurances given by the Romanian authorities. There was no evidence to the contrary. The appellant's agent had

raised Article 8 in his submissions on the basis that the extradition proceedings were an "abuse of process" and precluded by the principle of *res judicata*.

[12] The sheriff found that *res judicata* did not apply to extradition. Under reference to *Cel-Mare* v *Romania* [2019] EWHC 1076 (Admin), which also involved a conviction of driving without a licence, he carried out a balancing exercise and concluded that the factors in favour of extradition outweighed those against it. Weight had to be attached to the strong public interest in ensuring that extradition arrangements were honoured and that those convicted should not escape punishment. The case involved a recent offence which had resulted in the appellant's conviction. He was a fugitive from justice. Since his arrest in Sweden, he had known that the case was being actively pursued by Romania. He had a wife, but no child, in Scotland. The case could not be described as an abuse of process. It was of little moment that the offence of which the appellant was convicted was treated more seriously in Romania than it would have been in Scotland.

Submissions

Appellant

[13] The ground in the application for leave to appeal is that extradition would be in breach of Articles 3 and 8. The ground gives a brief narrative of the appellant's domestic circumstances and the procedure in Sweden. Whether the appellant should be extradited was *res judicata*. The further request to extradite was an "abusive process". There is no mention of Romanian prison conditions

[14] In the appellant's written submission, it was said that the Article 8 challenge was no longer insisted upon.

[15] The appellant maintained, first, that the sheriff's refusal to adjourn the hearing had prevented the appellant from obtaining objective evidence of Romanian prison conditions. These conditions, according to "publicly available information", were notorious for being over-crowded, violent and below the standards to be expected of a Member State (Council of Europe : "*Report … 2018 (CPT/Inf (2019) 7)*). The assurance given meant that, excluding a bed and furniture, the appellant would have a space of less than $3m^2$, which was the minimum requirement (C-128/18 *Proceedings concerning Dorobantu* at para 72). There were cogent reasons not to rely upon the assurances provided (*Rezmiveş* v *Romania* [2017] ECHR 378). Had the sheriff allowed expert evidence to be sought, he would have decided the question of the appellant's extradition differently. The appellant had now obtained an expert report on prison conditions in Romania and asked the court to have regard to it.

[16] Secondly, as the Swedish court had already made a decision on extradition, any subsequent decision to extradite was barred by the plea of *res judicata*. The sheriff failed to take into account the principle of mutual recognition and high trust among Member States. *Res judicata* applied when there was duplication of the identity of parties, subject matter and a final decision. It was designed to protect litigants and the courts from second (or successive) actions which sought to re-litigate issues already decided and to prevent parties from raising proceedings for the same cause *ad infinitum*. The appellant and Romania were the opposing parties. The same parties and subject matter were before the Swedish court. The decision of the Swedish court was final.

[17] If *res judicata* did not apply in extradition proceedings then the concept of abuse of process did (*Auzins* v *Latvia* [2016] 4 WLR 75 at para 37). Requests originating from the same state, made to several other states, in relation to the same person and for exactly the same offence may amount to an abuse of process. To hold otherwise would curtail the right

of a national of a member state to exercise his freedom of movement as guaranteed by Article 21(1) of the Treaty on the Functioning of the EU. An appropriate balance had to be achieved (*Camaras* v *Romania* [2018] 1 WLR 1174 at paras 30-31)

Respondent

[18] The respondent submitted that the appellant failed to demonstrate that there were arguable grounds of appeal. The Council of Europe report had been available, but not advanced, before the Sheriff. The appellant failed to meet the required test (s 27(4)(a)). The new material would not have resulted in the sheriff deciding the question differently.

[19] The mere existence of evidence that there were deficiencies, which may be systemic or generalised, with respect to detention conditions in an issuing member state did not necessarily imply that, in a specific case, the individual concerned would be subject to inhuman or degrading treatment (*C-404/15PPU Criminal Proceedings against Aranyosi* [2016] QB 921 at para 93). In a prison estate which has been found to be generally non-compliant with Article 3, the requesting state could discharge its burden by giving an assurance that the circumstances in which the person will be detained carried no real risk of inhuman and degrading treatment (*Ivoskevicius* v *Lithuania* 2019 SCCR 225 at para [9]). Effective, reliable and unequivocal assurances provided an appropriate mechanism for the provision of Article 3 compliant conditions within a system of detention that was generally non compliant (*Ilia* v *Greece* [2015] EWHC 547 (Admin) at para. 38).

[20] The principle of mutual trust required that judicial authorities rely on assurances given by an issuing judicial authority, unless on clear and cogent evidence there are substantial grounds for believing that the appellant would face a real risk of being subjected to inhuman and degrading treatment (*Jane* v *Lithuania (No 2)* [2018] EWHC 2691 at para 9).

The reference to the Council of Europe report was insufficient to call the assurances into question. The court ought to be satisfied that the assurance given in the letter of 13 August 2019 was effective, reliable and unequivocal.

[21] There was no *res judicata* in extradition proceedings (*Giese* v *United States of America* [2018] 4 WLR 103 at para 24). The institution of a second set of extradition proceedings would not necessarily amount to an abuse of process. The exceptional plea of *res judicata* was a residual relief "where the contention is that the prosecutor or judicial authority has acted in bad faith, deliberately manipulating proceedings, undermining the statutory regime to the unfair prejudice of the defendant" (*Giese* at para [29]). The 2003 Act provided wide protections through the multiple bars to extradition. The appellant invoked the bar through Article 3 compatibility. Romania had directly addressed those concerns by providing an improved assurance.

The Expert Report

[22] The appellant produced a report from James McManus dated 25 March 2021, having been instructed on 1 March. Dr McManus has considerable experience of prison conditions throughout the world. He was, for some years, the UK member on the European Committee on the Prevention of Torture. Although he had not been to Romania, he had visited prisons in many of its neighbouring countries, which had similar problems. His report is derived from conversations with others and internet research. It covers many aspects of the conditions in Romanian prisons; explaining that the best source of detailed independent information is the 2019 Council of Europe report. Although not raised as grounds of complaint either before the sheriff or in the grounds of appeal, the report covers ill treatment

by staff, inter prisoner violence, poor hygiene, inadequate food and a lack of medical facilities.

[23] Dr McManus's conclusion is that the Romanian prison system is one in "long term crisis" which, because of lack of resources, cannot be resolved in the immediate future. Improvements had been made but it was not able to guarantee the minimum European Court standard of $3m^2$ space for all prisoners. Substantial compensation payments had been made to prisoners whose Article 3 rights had been breached. There would be particular difficulties with the quarantine prison (Bucharest-Rahova) to which the appellant would initially be sent. Only half of the cells there provided more than $3m^2$.

[24] With the added complication of the current pandemic, Dr McManus concluded that:

> "it is not possible to have confidence that the country can comply with Art 3 should [the appellant] be extradited. His own situation, as a non-Romanian speaking, foreign national and Roma, heightens the risks he would face were he to be sent to Romania.
> The Assurances given by the Romanian authorities would… prove very difficult to implement and almost impossible to monitor".

Decision

Article 3

[25] There is no doubt that there are serious problems in the Romanian prison system, as there are in those of many other European countries. In *Rezmiveş* v *Romania* [2017] ECHR 378, the European Court of Human Rights adopted its pilot-judgment procedure in order to identify the structural problems which existed and to indicate measures which should be taken in order to address these. The procedure is also used to induce Romania to resolve, at a domestic level, the large numbers of individual cases arising from the structural problem (see paras 102 – 105). The Court had already issued a large number (150) of judgments

which found violations relative to Romanian prison conditions. It had previously issued guidance to Romania in 2012. The Committee of Ministers had assessed the measures which Romania had adopted and concluded that there continued to be a worrying state of affairs, including overcrowding, in the majority of Romanian prisons. Although there had been improvements, the Court stated that further measures were required. These were steps to reduce overcrowding (para 115) and to provide adequate compensation for proven breaches (para 125). Romania was required to provide a timetable for the implementation of these measures.

[26] The import of *Rezmiveş* is reflected in Dr McManus's report. The court has no reason to doubt the general position in relation to Romanian prison conditions which Dr McManus describes. The difficulty which remains for the appellant is two-fold. First, the material which is contained in Dr McManus's report was available at the time of the hearing before the sheriff in the form both of *Rezmiveş* and the Council of Europe report. The sheriff was no doubt aware of the general conditions in Romanian prisons. Secondly, the existence of such conditions did not prevent the sheriff from accepting assurances from Romania that, in the particular case, the appellant would not be subject to inhuman or degrading treatment because, in his case, he would be accommodated in an Article 3 compliant space (C-128/18 *Proceedings concerning Dorobantu* [2020] 1 WLR 2485 at para 54).

[27] There is a presumption that Romania, as a contracting state, will abide by its assurances. Its general failures might influence the court's decision on whether to rely on these, but that would normally require to be tested by reference to previous compliance or non-compliance. Proof of substantial efforts to improve the system could be evidence of good faith and reliability (*Ivoskevicius* v *Lord Advocate* 2019 SCCR 225, LJC (Lady Dorrian), delivering the opinion of the court, at para [9] and adopting *Jane* v *Lithuania (No 1)* [2018]

EWHC 1122 (Admin) Hickinbottom LJ at paras 54-55). Although there were states which might be regarded with suspicion, "friendly foreign governments of states governed by the rule of law", which included members of the European Union, did not fall into that category (*Jane* v *Lithuania (No 2)* [2018] EWHC 2691 (Admin) Hickinbottom LJ at para 7, following *Giese* v *United States of America* [2018] 4 WLR 103, Lord Burnett LCJ at para 38). Where an assurance is given or endorsed by a judicial authority, it should, as an aspect of mutual trust between these authorities, be relied upon "at least in the absence of specific indications that the detention conditions in a particular detention centre" infringe the relevant protections (*C-220/18 PPU Criminal Proceedings against ML* [2019] 1 WLR 1052, at para 112).

[28] The judicial authorities in Romania have endorsed the assurances given in relation to the conditions in which the appellant will be kept. Although Dr McManus casts doubt on whether these assurances can be implemented and monitored, neither the sheriff nor this court have been provided with any specific basis upon which to doubt them in the appellant's case. Although some of the accommodation in Bucharest Rahova Prison is not Article 3 compliant, some of it is. After the quarantine there, the appellant is likely to be in open security conditions at Gãesti Prison. In these circumstances, given the requirement to rely on assurances about the conditions in which the appellant will be detained, in the absence of a reason not to do so (C-128/18 *Proceedings concerning Dorobantu* [2020] 1 WLR 2485 at para 54, following *Criminal Proceedings against ML* at para 111), an appeal based on Article 3 would be bound to fail.

***Res Judicata* and Abuse of Process**

[29] The Extradition Act 2003 sets out a number of steps which the sheriff required to take when deciding whether or not to allow the extradition to proceed. One of these (s 11) is to

consider whether there are any bars to extradition. It was accepted that none of these applied to the appellant's case. Having ascertained that the appellant had been convicted in absentia but would be entitled to a retrial or a review amounting to a retrial in the event of extradition (s 20), the sheriff had to decide whether the appellant's extradition would be compatible with his Convention rights (s 21).

[30] In *Auzins* v *Latvia* [2016] 4 WLR 802 (Admin), the appellant, who was living in England, had been arrested on an EAW during a visit to Scotland. The sheriff had declined to order the appellant's extradition because of the inability of the Latvian prison service to provide adequate facilities to treat what were serious medical conditions. The sheriff held that, in terms of section 25 of the 2003 Act, it would be "unjust or oppressive to extradite him". Three years later he was arrested on a new, but largely identical, EAW. By that time, the required facilities were in place. The judgment of the court in England (Burnett LJ, with whom Cranston J agreed) on the new application requires to be examined in some detail in order to determine whether the approach in England would be adopted in Scotland.

[31] Burnett LJ carried out (paras 24 *et seq*) a comprehensive review of the interaction of *res judicata*, issue estoppel and abuse of process in English civil and criminal law. *Humphrys* [1977] AC 1 had determined that issue estoppel had no place in the criminal law. Burnett LJ concluded (at para 36) that the same should apply in extradition proceedings. In doing so, he noted the terms of Article 3(2) of the Framework Decision 2002/584 and its reference to double jeopardy only in connection with decisions of member states to acquit or convict (*ne bis in idem*). He illustrated the problem by considering the situation in which extradition had been ordered in Scotland but the person had absconded to England. He would not be barred from rearguing his case "because of issue estoppel or some other aspect of *res judicata*". Due regard would be had to the decision in the other jurisdiction but Burnett LJ

did not "accept that an estoppel arising from the application of *res judicata* would be appropriate".

[32] There remained the "abuse of process" jurisdiction. The court described this (at para 44) as follows:

> "The underlying purpose of the abuse jurisdiction in extradition cases is to protect the integrity of the statutory scheme of the 2003 Act and the integrity of the EAW system, as well as to protect a requested person from oppression and unfair prejudice… [I]t becomes an abuse of process to raise in subsequent proceedings matters that could have been dealt with in the earlier proceedings…".

The court observed (at para 46) that:

> "circumstances relevant to a successful human rights argument may move on in a requesting state so that an extradition would no longer be barred on human rights grounds"

[33] In *Giese* v *United States* [2018] 4 WLR 103, Lord Burnett LCJ was to revisit his dicta in *Auzins* in circumstances in which an earlier extradition request had been refused because of inadequate assurances on a particular matter and the extraditing state re-applied once adequate assurances had been obtained. Standing *Auzins*, the matter was examined in the context of the English abuse of process jurisdiction. Lord Burnett said:

> "32. The key… to cases where it is said that the requesting state failed in the first set of proceedings such that the second set are an abuse of process is to make 'a broad, merits-based judgement which takes account of the public and private interest involved and also takes account of all the facts of the case': see *Johnston* v *Gore Wood & Co* [2002] 2 AC 1 para 31 and *Arranz* v *Spain* [2016] EWHC 3029 (Admin) at [32]-[33]… Such a broad, merits-based judgment should take account of the fact that there is no doctrine of *res judicata* or issue estoppel in extradition proceedings.
>
> 33. Underlying extradition are important public interests in upholding the treaty obligations of the United Kingdom; of ensuring that those convicted of crimes abroad are returned to serve their sentences; of returning those suspected of crime for trial; and of avoiding the United Kingdom becoming (or being seen as) a safe haven for fugitives from justice. The 2003 Act provides wide protections to requested persons through the multiple bars to extradition, Parliament originally and through amendment, has enacted. There are likely to be few instances where a requested person fails to substantiate a bar but can succeed in an abuse argument".

[34] *Res judicata* does have a place in Scots criminal law. As it is put by Alison: *Practice* (at 615):

> "The plea of *res judicata* is good to form a bar to a new trial, if it appears that the former one, whether it terminated in a conviction or acquittal, was bona fide raised and regularly gone through before a competent Judge, that it related to the offence which is now a second time brought *sub judice*, and if it proceeded though all its stages, to a sentence condemnatory or an acquittal".

[35] The same principle, which is essentially the prohibition on double jeopardy or the principle of *ne bis in idem*, would no doubt apply in England and Europe albeit not using the same generic description. *Res judicata* in a criminal process takes the form of a plea in bar of trial. It also applies more generally to decisions taken in the course of a criminal process where identical applications are made on the same grounds and relying on the same facts. In the latter case, it is unlikely to gain traction where, as in the case of the appellant, there has been a material change in circumstances which justify a different decision (eg *Stewart* v *HM Advocate* 1997 JC 217). This appears also to be the position in Sweden in relation to improved assurances (Case No O 6598-19, Supreme Court of Sweden 8 April 2010. In the case of acquittals after trial, the plea is now subject to the exceptions in the Double Jeopardy (Scotland) Act 2011.

[36] "Abuse of process" is not a term in general use in criminal proceedings (*Potts* v *Gibson* 2017 JC 194, LJG (Carloway), delivering the opinion of the court, at para [16]; *Jones* v *HM Advocate* 2010 JC 255, Lord Carloway at paras [75] and [86]). The appropriate categorisation is "oppression" which, rather like its English equivalent, will prohibit proceedings which, in the trial context, amount to an "affront to justice". Whether it can be established is a matter of facts and circumstances "including the Crown's conduct, the

seriousness of the charge and the public interest in securing that crime is prosecuted". In situations which are analogous to, but do not entirely fit with, those which would fall to be determined according to the principles of *res judicata*, it may be that a plea of oppression would be sustained.

[37] The plea of *res judicata* is not mentioned in the 2003 Act. As Lord Burnett explained in *Auzins*, the Framework Decision's reference to double jeopardy, as reflected in section 12 of the Act, is only in connection with decisions of member states to acquit or convict (*ne bis in idem*). However, as the Lord President (Cooper) described it in the civil context of *Grahame* v *Secretary of State* 1951 JC 368 (at 387; adopted in *RG* v *Glasgow Council* 2020 SC 1 at para [27]):

> "The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis".

[38] One of the features of the plea is that it prohibits the individual from having to defend or pursue matters repeatedly, when they have already been the subject of an earlier decision. Where it applies, it is likely to feature as a significant element if a person's Article 8 right to respect for his or her private life were to be pled in defence to an application for extradition. Such an application, where there has already been a refusal to extradite in the same or in another jurisdiction, on the same grounds and in the same circumstances may be regarded as disproportionate in Article 8 terms. Whether it is so or not would require an analysis of all the circumstances. In that event, the Article 8 determination is likely to subsume any arguments based upon an extra statutory plea of oppression such that a separate decision on the latter would neither be necessary nor would it be likely to succeed. In that respect the court agrees with the observations of Lord Burnett

in *Giese* v *United States* (at para 33). If an Article 8 plea were rejected, it is difficult to envisage how a separate oppression or *res judicata* point could succeed.

[39] It is unfortunate in these circumstances that the appellant has expressly disavowed a submission based on Article 8. The court nevertheless considered whether, on the limited information which the court has been given, an argument based upon Article 8 could succeed. The answer is in the negative. The sheriff carried out the type of balancing exercise that is required and determined that the factors in favour of extradition outweighed those which were against. On the one hand there was the public interest in ensuring that extradition arrangements were honoured and that those convicted of crimes should not escape punishment. The appellant was a fugitive from justice. The sentence which has been imposed, although apparently draconian for this type of offence in Scottish terms, is a relatively short custodial term which is likely to be served mostly in an open prison. Although he has a wife and now a child in Scotland, the court was provided with very little detail about his personal circumstances other than, upon inquiry, that he does not have settled status in the United Kingdom. In all these circumstances, the court does not consider that this ground is arguable.

[40] Leave to appeal is therefore refused.