Kess v Examining Magistrate, Belgium

[2018] EWHC 983 (Admin)

Queen's Bench Division, Administrative Court (London)

Knowles J

27 April 2018

John Howey (instructed by **JFH Law**) for the **Appellant**

Benjamin Seifert (instructed by **CPS**) for the **Respondent**

Hearing dates: 18 April 2018

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Approved Judgment

The Honourable Mr Justice Julian Knowles:

1. This is an appeal with the permission of Sir Stephen Silber by the Appellant, Eferere Kess, against the extradition order to Belgium made by District Judge Bayne on 6 October 2017. She is represented by Mr Howey (who did not appear below) and the Respondent Issuing Judicial Authority is represented by Mr Seifert.

The proceedings before the district judge

IMAGE NOT AVAILABLE

IMAGE NOT AVAILABLE

2. The EAW issued by the Respondent on 30 May 2017 relates to one offence of people trafficking and sexual exploitation over a period of two years. In 2012 a woman whom I shall call M was found by police in Brussels to be soliciting in the window of a brothel. When she was interviewed by the police she said that she had been kidnapped and trafficked from Nigeria to Belgium for the purposes of prostitution. She said that after arriving in Europe the traffickers told her that she owed EUR 65 000 for her flights which she would have to repay by working as a prostitute The Appellant, Ms Kess, is alleged to have acted as M's 'madam' and to have touted her out for prostitution whilst taking her earnings. On the EAW, the Framework list offence of trafficking in human beings has been ticked.

3. The Appellant was arrested in the UK on 24 July 2017. She did not consent to extradition and an extradition hearing took place at which the Appellant gave evidence. She resisted extradition on the grounds of s 12A of the Extradition Act 2003 ('EA 2003'); s 21A/Article 8 of the European Convention on Human Rights; and s 21A (proportionality). No point was taken at that stage about the validity of the EAW. The judge rejected the challenges under s

21A, and these have not been pursued on this appeal. In relation to s 12A, the judge said that it had been conceded by the Respondent that no decision had been taken to charge or try the Appellant. However, the judge said that further information received from the Respondent showed that the sole reason for decisions not having been taken was because of the Appellant's absence from Belgium. She said that it has been stated that the Appellant's presence in Belgium was needed to continue the investigation. Accordingly, the judge ordered the Appellant's extradition.

Grounds of appeal

4. In his Perfected Grounds of Appeal and Skeleton Argument Mr Howey on behalf of the Appellant raised two grounds of appeal:

a. The EAW was invalid because it did not refer to the national arrest warrant on which it was based. Box (b) of the EAW ('Decision on which the warrant is based') merely stated, 'arrest order 30.5.2017'.

b. The judge was wrong to find that extradition was not barred under s 12A of the EA 2003 by reason of the absence of decisions to charge or try the Appellant.

5. In relation to the first ground of appeal, Mr Howey's written submissions pointed out that in *Criminal Proceedings Against Bob-Dogi* [2016] 1 WLR 4583 the CJEU held that an EAW could not be based upon itself, but that there had to be a separate national arrest warrant in existence in order for the EAW to be valid; see also *Goluchowski v District Court in Elblag, Poland* [2016] 1 WLR 2665. It was argued that the EAW did not set out sufficiently clearly or at all that there was such a warrant (the date given in box (b) being the same date as the EAW itself), and hence that the appeal should be allowed and the Appellant fell to be discharged.

6. Following receipt of the Perfected Grounds of Appeal, the CPS sought further evidence from the Respondent. In relation to the first ground of appeal, the CPS sought a copy of the domestic arrest warrant, which was duly supplied. It is entitled 'International Arrest Warrant Issued By Default'. On behalf of the Respondent, Mr Seifert submitted that I could and should receive this document. He pointed out that in *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin) the Divisional Court held that on appeal under s 26 of the EA 2003 against the making of an extradition order it had the power of its own motion to seek and to receive fresh evidence from the issuing judicial authority notwithstanding that s 27(4) did not permit such evidence to be adduced.

7. In light of the emergence of the domestic arrest warrant and *FK*, supra, Mr Howey on behalf of the Appellant realistically accepted that the first ground of appeal was no longer arguable. However, at my invitation, he formally reserved his position in relation to it, should the Supreme Court overturn *FK* (the Divisional Court certified two questions of law of general public importance and a permission decision is expected soon from the Supreme Court).

8. Hence, the argument before me focussed solely on the second ground of appeal, and to that I now turn.

Statutory framework and legal principles

9. Category 1 territories in the EA 2003 are those territories which have been designated for the purposes of Part 1 of the EA 2003. Currently these are the EU Member states. EAWs from Part 1 territories are dealt with under Part 1 of the EA 2003.

10. Section 12A of the EA 2003, which was inserted by s 156(2) of the Anti-social Behaviour, Crime and Policing Act 2014('the 2014 Act'), provides:

"12A Absence of prosecution decision

(1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)--

(a) it appears to the appropriate judge that there are reasonable grounds for believing that--

(i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and

(ii) the person's absence from the category 1 territory is not the sole reason for that failure,

and

(b) those representing the category 1 territory do not prove that--

(i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or

(ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.

(2) In this section "to charge" and "to try", in relation to a person and an extradition offence, mean -

(a) to charge the person with the offence in the category 1 territory, and

(b) to try the person for the offence in the category 1 territory."

11. It was demonstrated in *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) that it is possible for a person whose surrender is requested under an accusation EAW to be both required for the purpose of being prosecuted for the offence identified in the warrant and to be an accused person, but still not yet be the subject of a decision by the relevant judicial authority in the requesting state to charge him or to try him: see paras 140 and 151. An accused whose surrender was requested for the purposes of conducting a criminal prosecution may still, on certain facts and in some judicial systems of EU Member states, be wanted for continuing criminal investigation, where no decision either to charge or to try the requested person had been made: paras 140, 150 and 153.

12. That state of affairs runs the risk of creating injustice if a defendant is extradited, only to be remanded in custody for a long period before the decision is taken whether or not he is to be tried. Section 12A was intended to meet that problem. The Explanatory Notes to the 2014 Act explained::

"462 *Subsection (2)* inserts new section 12A into the 2003 Act, which provides for a new bar to extradition in Part 1 cases on the grounds of "absence of prosecution decision". This is intended to ensure that a case is sufficiently advanced in the issuing State (that is, there is a clear intention to bring the person to trial) before extradition can occur, so that people do not spend potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence.

463 New section 12A will ensure that, in cases where the person is wanted to stand trial, extradition can only go ahead where the issuing State has made a decision to charge the person and a decision to try the person (or is ready to make those decisions). Where it appears to the judge, from considering all relevant information and evidence, that there are reasonable grounds for believing that a decision to charge and a decision to try have not both been taken in the issuing State (and that the person's absence from that State is not the only reason for that), extradition will be barred unless the issuing State can prove that those decisions have been made (or that the person's absence from that State is the only reason for the failure to take the decision(s)). The courts have interpreted the provisions of the 2003 Act in a "cosmopolitan" way, mindful of the differences in criminal procedure in other Member States, and it is anticipated that the courts will apply the same approach to the interpretation of section 12A and, in particular, the concepts "decision to charge" and "decision to try"."

13. Section 12A is not a straightforward provision, and it has been considered in detail in two Divisional Court decisions: *Kandola v Generalstaatwaltschaft Frankfurt, Germany* [2015] 1 WLR 5097 and *Puceviciene v Prosecutor General's Office of the Republic of Lithuania* [2016] 1 WLR 4937. The following discussion is gratefully adapted from those decisions.

14. The application of s 12A involves two distinct stages. In the first stage, which involves both s 12A(1)(a)(i) and (ii), the appropriate judge is concerned with whether there are reasonable grounds for believing that at least one of two decisions have not been taken, ie the decision to charge or the decision to try the requested person, and, then, furthermore, if one of those two decision have not been made, that a state of affairs (the absence of the requested person from the category 1 territory) is not the sole reason for the failure to make one or other or both of those two decisions. Both those negatives have to be established (to the requisite level of proof) by the defendant. The appropriate judge only has to consider the issue of whether it appears that there are reasonable grounds for believing that the sole reason for a failure to make one or other or both of the two decisions (to charge and try) is not the defendant's absence from the Category 1 territory if it appears to him that there are reasonable grounds for believing that at least one of those two decisions has not been made.

15. The appropriate judge only needs to embark on the second stage, in s 12A(1)(b)(i) and (ii), if he is satisfied that there are reasonable grounds for believing both that no decisions to charge and/or to try have been made and that the person's absence from the Category 1 territory is not the sole reason for those decisions not being taken. Again, the statutory wording puts the matter in a negative way. However, at this second stage, it is for 'those representing the Category 1 territory' to 'prove', ie prove to the criminal standard (see s 206(2), (3)(b)), that it has made a decision to charge and has made a decision to try the requested person. If those two matters are proved, that is the end of the s 12A challenge. However, if those representing the Category 1 territory cannot prove, or accept, that either or both of the decisions have not been taken, then, in the alternative, the Category 1 territory can prove (again, to the criminal standard) that the sole reason for whichever of those decisions has not been taken is the requested person's absence from the Category 1 territory. If those representing the Category 1 territory do not prove either of the matters identified in section 12A(1)(b)(i) and (ii) to the criminal standard, then the defendant's extradition to that territory for the extradition offence will be barred.

16. The second part of the judgment in Kandola, supra, concerned the role which the court considered that mutual legal assistance ('MLA') had to play in answering the s 12A questions. The effect of that part of the judgment was that in deciding whether the sole reason why there has been no decision to charge or try is the defendant's absence from the territory of the requesting state, the requesting judicial authority was being asked whether or not it has considered the use of MLA; and if it has considered but rejected its use to provide its reasons, which were then scrutinised by the English court.

17. In Mr Kandola's case itself (there being a number of conjoined appeals before the court), it found that there were reasonable grounds for believing that the sole reason for the lack of relevant decisions was not Mr Kandola's absence from Germany, but that the necessary examination of Mr Kandola, to conclude the investigative stage of the proceedings and to enable the opening of the main proceedings, had not taken place. Although this normally took place in Germany, it could take place abroad pursuant to a request for MLA. The German Ministry of Justice had written saying that the prosecutors would use MLA before the issue of a warrant if it were thought practicable, but the prosecutor had not thought it practicable for Mr Kandola since it would alert him to the risk of prosecution and create a flight risk. At para 43, Aikens LJ said: "The decision on whether to use MLA must be one for the German prosecutor to take, having considered all relevant circumstances." The court was satisfied that the use of MLA had been considered and rejected on the reasonable grounds that it would create a flight risk, which there were no reasons to doubt.

18. Ms Droma, one of the other appellants, however, was successful. There were reasonable grounds for believing that Ms Droma's absence from Germany was not the sole reason why the relevant decisions had not been taken. The Court held on the basis of the evidence that MLA could be used for the examination of Ms Droma, and in the absence of any coherent explanation of why MLA has not been used, the requesting judicial authority had not proved to the criminal standard that the sole reason for not making the two decisions was Ms Droma's absence from Germany.

19. In *Puceviciene,* supra, the Divisional Court presided over by the Lord Chief Justice disapproved the second part of the judgment in *Kandola*, supra*,* and the approach taken in it to MLA. It said that it was satisfied that Kandola's case was clearly wrong in its consideration of MLA in the context of the questions which arise under section 12A, and should no longer be followed in this respect.

20. The Court said that it is not part of the intended operation of s 12A of the EA 2003 that the judge at the extradition hearing should ask why absence from the territory has prevented the decisions being taken, or whether some other solution could have been considered or should have been adopted which might have avoided absence from the territory preventing the decisions being made. It said that to permit questions as to why mutual legal assistance has not been considered would be inconsistent with the language and purpose of s 12A, the EAW Framework Decision (ie, the *European Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between member states* (2002/584/JHA)). and with the confidence and recognition which underpins the European arrest warrant system: see paras 66, 68-72, 73, 75, 76.

21. Specifically, at paras 70-71 the Court said:

"70 If the requesting judicial authority's reason for not taking the decision or decisions, given on behalf of a court or prosecutor, is that the requested person is absent from the territory of the requesting state, that statement concludes the questions and answers. The Act does not require the judge at the extradition hearing to go behind the answer and explore whether it is a good or bad reason. Indeed, section 12A must envisage, in the light of the mutual confidence and recognition between judicial authorities, that the answer would be final.

71 Parliament has not identified one of the questions in section 12A as being why MLA has not been used. It is not part of the intended operation of section 12A that the judge at the extradition hearing should ask why absence from the territory has prevented the decisions being taken, or whether some other solution could have been considered, or should have been adopted which might have avoided absence from the territory preventing the decisions being made. The language of Kandola's case risks judges at the extradition hearing forming views on what

prosecutors or judges in other jurisdictions did or did not consider and forming views on what they should, but have not, done to further the prosecution of the case under their procedures. That too would be inconsistent with the confidence and recognition which underpins the EAW system. It would be incompatible with ordinary notions of judicial comity; and the court here would be ill-placed to make an informed judgment on laws and procedures which are likely to be very different. It is the authorities in the requesting state who know the case, the nature of the evidence, their own procedures and law, and thus what course from their domestic point of view should be followed. We cannot envisage that Parliament intended to set in train a process which is both unprincipled and impractical."

22. Hence, *Puceviciene*∏ supra, establishes that where, as a matter of law, a decision to try a defendant could in theory be taken notwithstanding that they are absent from the requesting Category 1 territory, but the relevant authority in that territory states that they are not prepared to take that decision until the defendant has been questioned, and they wish that questioning to take place in their home state, then the sole reason for the absence of a decision to try the defendant will be the defendant's absence from the requesting Category 1 territory.

Discussion

23. The question for me is whether the judge was entitled to reach the conclusion that the further information received from the Respondent showed that the sole reason for decisions not having been taken was because of the Appellant's absence from Belgium.

24. In the further information dated 28 August 2017 which was before the district judge the investigating magistrate stated that the Appellant's:

"... presence here in Belgium is needed in order to continue the investigation ..."

and she went on to explain that once the investigation had been finalised, the presiding judge in the *Chambre de Conseil* would either send her for trial or else clear her of the charges.

25. In response to the question whether, if no decision to try the Appellant had been taken, this was because of her absence from Belgium, the magistrate replied:

"Her absence from Belgium at this stage merely explains the need for the issuance of the EAW and for her extradition. It is very difficult to conclude the investigation in her absence, as she is the prime suspect. Once extradited we can usefully continue the investigation, the results of which will eventually lead other decision-makers, as explained above, to determine whether she should stand trial."

26. The further information obtained from Belgium after the extradition hearing (which I can take into account on this appeal: see above) dated 29 March 2018 stated (original emphasis):

"With respect to this <u>indispensable extradition</u>, the elements of this case demonstrate that the suspect Kess is more than just 'the Madam' of this one victim DADA Maureen. She is as well one of the main suspects as a recruiter for the human trafficking from Nigeria to Europe, more specifically to Italy, Austria, and Denmark. It is utterly necessary to interrogate her as well about these accusations."

27. On the basis of this material, I am satisfied that not only was the district judge entitled to reach the conclusion she did, she was correct to do so. The Belgian judicial authority has stated that the case cannot progress to a decision whether or not try the Appellant until such time as she has been questioned in Belgium. For the reasons I have explained, this means that the sole reason for the absence of the decision to try her is her absence from Belgium.

28. Mr Howey pointed out that no direct answer in the form of 'yes' or 'no' was provided by the Respondent when it was asked the direct question whether the sole reason for absence of a decision to try was the Appellant's absence from Belgium, and he pointed out that the question had been asked twice. That is true. But a 'yes'/'no' answer is not essential. The substance of the responses that have been received is that the Appellant's presence in Belgium is required for questioning so that the case can then proceed to a trial decision. That is sufficient to establish, pursuant to s 12A(1)(b)(ii), that the sole reason for the absence of a decision is that the Appellant is absent from Belgium.

29. It follows that this appeal is dismissed.