Neutral Citation Number: [2018] EWHC 1129 (Admin)

Case No: CO/5108/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2018

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

DARINKA KRICKA	**Appellant**
- and -	
COUNTY COURT IN VARAZDIN, CROATIA	**Respondent**

- -
- -

Florence Iveson (instructed by **JD Spicer**) for the **Appellant**
Catherine Brown (instructed by **CPS Extradition Unit**) for the **Respondent**

Reasons for the Decision of the Court made following the hearing
Hearing date: 26 April 2018

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Judgment Approved

Mr Justice Supperstone :

Introduction

1. The Appellant appeals against the decision of District Judge Grant made on 27 October 2017 to order her extradition to Croatia pursuant to three European Arrest Warrants. The first EAW was issued on 17 July 2015 and certified by the NCA on 13 March 2017. The second EAW was issued on 29 February 2016 and certified by the NCA on 13 March 2017. The third EAW was issued on 4 July 2016 and certified by the NCA on 13 March 2017.

2. The first EAW is an accusation warrant in respect of eight offences which have been charged under Croatian law as "abuse of trust and economic transactions". A domestic arrest warrant was issued on 8 May 2014. The offence carries a maximum sentence of ten years. The second EAW is an accusation warrant in respect of one offence classified under Croatian law as "instigation of abuse of trust in economic transactions". The third EAW is an accusation warrant in respect of two offences, the first classified under Croatian law as "abuse of trust in economic transactions", and the second as "counterfeiting business documents".

3. This appeal is only concerned with the first EAW ("EAW1").

4. On 1 February 2018 Holman J granted permission to appeal on two grounds:

i) First, whether offences 1-3 and 5-7 in EAW1 comply with s.2 of the Extradition Act 2003 ("the Act") (Ground 1); and

ii) Second, whether those offences in EAW1 are "extradition offences" within the meaning of ss.10 and 64 of the Act (Ground 2).

Holman J added that if the judge on appeal upholds ground 1 and/or 2, then he left open to him to consider any consequential reconsideration that may be required of the Article 8 balancing exercise.

5. On 17 April 2018 further information was requested of the Respondent (arising from how the case was being argued on behalf of the Appellant and as permitted by Holman J when granting permission). On 20 April the Respondent responded to the request.

6. As a result of the new information provided by the Respondent, Ms Florence Iveson, for the Appellant, accepts that sufficient particulars have now been given so that offences 1-3 and 5-7 in EAW1 comply with s.2 (Ground 1)

7. Accordingly the principal issue for determination on the appeal is whether those offences in EAW1 are "extradition offences" (Ground 2).

8. At the conclusion of the hearing, having heard oral submissions from Ms Iveson and Ms Catherine Brown, for the Respondent, I decided that offences 1-3 and 5-7 in EAW1 are "extradition offences" within the meaning of ss.10 and 64 of the 2003 Act.

9. It followed, as Ms Iveson accepted, that no issue now arises under Article 8 on this appeal.

10. That being so, I ordered that the appeal be dismissed. I gave brief reasons for my decision and stated that I would give full reasons in writing, which I now do.

11. I am grateful to both counsel for their helpfully presented submissions.

The legislative framework

12. The court must be satisfied that the conduct contained within the EAW is "an extradition offence" pursuant to s.10 of the 2003 Act. Extradition offences are defined in s.64 of the Act for accusation warrants. In this case, since the offending occurred in Croatia, either s.64(3) or 64(5) must be satisfied, which read as follows:

> "(3) The conditions in this sub-section are that—
>
> (a) the conduct occurs in the category 1 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;
>
> (c) the conduct is punishable under the law of the category 1 territory with imprisonment or another form

> of detention for a term of 12 months or a greater punishment.
>
> …
>
> (5) The conditions in this sub-section are that—
>
> (a) the conduct occurs in the category 1 territory;
>
> (b) no part of the conduct occurs in the United Kingdom;
>
> (c) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list;
>
> (d) the certificate shows that the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment."

13. The relevant legal principles are not in issue.

14. In *Alexander and Di Benedetto v Italy* [2017] EWHC 1392 (Admin), the Divisional Court held that, in the light of *Goluchowski v Poland* [2016] UKSC 36 and *Bob-Dogi* C-241/15 it was open to an issuing judicial authority to add missing information to an otherwise deficient EAW in order to establish the validity of the EAW.

15. The Court has to be satisfied to the criminal standard that the conduct on the EAW would constitute an offence under the law of England and Wales, and the burden is on the issuing judicial authority to demonstrate this (*Mauro v Government of the United States of America* [2009] EWHC 150 (Admin), at para 9).

16. In *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) the Divisional Court held that a possible inference would not be enough. Sir John Thomas (at para 57) said that:

> "… The facts set out in the EAW must not merely enable the inference to be drawn that the Defendant did the acts alleged with the necessary mens rea. They must be such as to impel the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged. Otherwise, a defendant could be convicted on a basis which did not constitute an offence under the law of England and Wales, and thus did not satisfy the dual criminality requirement…"

17. In *Gruszka v Regional Court in Opole and Circuit Court in Swidnica, Poland* [2015] EWHC 2564 (Admin) King J, at para 5, observed that:

> "It is well established that this court concentrates on the conduct, not on the label attached to the offence in the law of the requesting country."

At para 21 he commented in relation to the particulars of the offence that:

> "… although the word 'fraudulently' is used, the warrant, … does not expand or explain why it was considered the conduct to have been fraudulent or indeed dishonest beyond the mere fact of the transactions set out. The phrase 'acting with an aforethought intent' adds nothing to the analysis."

Submissions of the Parties and Discussion

18. In addition to EAW1, further information was provided on 6 June 2017 ("June 2017"), 15 September 2017 ("September 2017"), and 20 April 2018 ("April 2018").

Offence 1

19. The Respondent contends that it is clear from the EAW and further information that:

    i) Between the end of 2002 and mid-2007, in Cakovec, the Appellant (as president of company management board of MTC Tvornica Carapa and of MTC Djecje Trikotaze, and managing director of OLZ and of RIF Biro), committed a breach in economic activities in relation to the protection of property interests, and therefore obtained unlawful material gain and caused damage to the entities whose property interests they should have protected, causing Mega Holding to obtain a majority package of stocks in MTC Tvornica Carapa without Mega Holding providing any funds for those stocks. This caused gain and loss to the respective companies.

    ii) The Appellant acted in agreement with co-defendants "in order to unlawfully obtain material gain" by "acquiring majority package of stocks" "without any funds". The Appellant acted dishonestly with intent for Mega Holding to receive material gain and for MTC Tvornica Carapa and MTC Tvornica Djecje to be caused loss (in respect of the figures detailed in the EAW); and the Appellant acted dishonestly throughout to enable the respective gains and losses to the companies to be caused. In order to do so she began the offending by concluding a contract on 9 December 2002.

    iii) The UK offence is false accounting. Post-February 2007, when the Fraud Act 2006 ("the 2006 Act") came into force, the material offences are fraud by false representation contrary to s.2 of the 2006 Act, and fraud by abuse of position contrary to s.4 of the 2006 Act.

20. Ms Iveson does not accept that the description of conduct set out in EAW1 and in the further information satisfies the dual criminality requirement of ss.10 and 64 of the Act. She submits that while the latest information provides detailed information regarding various complex loans and transactions between various businesses, it is difficult to identify how any of the various activities of the businesses could be definitively described as dishonest. It is, she submits, unclear why the conclusion of a separate contract for the sale from OLZ to Mega Holding of stocks in MTC Tvornica Carapa on 12 July 2007 is said to be dishonest, and whether it would be considered to be so in the Courts of England and Wales. It may, she contends, just be sharp accounting practice, allowing for the movement of stock and debt.

21. The EAW alleges that the Appellant acted, together with co-defendants, "in order to unlawfully obtain material gain". I accept Ms Brown's submission that those words impel an inference of dishonesty. They recorded what they did as loans even though they were not loans. I agree with Ms Brown that what is said in the EAW alone is sufficient to impel an allegation of dishonesty.

22. The June 2017 further information confirms that in respect of this offence, it is alleged that the Appellant acted dishonestly with intent that the company Mega Holdings would receive material gain. I agree with Ms Brown that the further information confirms that the Appellant was acting dishonestly. The April 2018 further information details five instalments and the Appellant's role within those five instalments in the transfer of funds between the companies between 2002 and 2006. With regard to the fifth of those transactions it states that the Appellant was managing director of MTC Tvornica Djecje Trikotaze and confirms the role of that company within the fraud. The April 2018 further information goes on to detail her role in the offending post 2007.

23. The allegations in respect of this offence and some other offences in EAW1 with which we are concerned, are, as Ms Brown acknowledges, complex. However, I am satisfied that the various activities of the businesses referred to in the particulars of offences in the EAW and further information can be definitively described as dishonest.

Offence 2

24. The Respondent contends that it is clear from the EAW and further information that:

    i) Between 16 April 2007 and March 2009, in Cakovec, the Appellant, (as president of company of management board of MTC Tvornica Carapa and managing director of RIF Biro), acted with the goal of obtaining unlawful material gain for RIF Biro. Funds were given to RIF Biro and registered in business books as loans but which in reality were not loans but book financial transactions. Under a purchase and sale agreement signed by the Appellant on 16 March 2011, MTC Tvornica Carapa bought a plot of land from the Appellant and the Third Defendant. The value paid was equivalent to the amount owed to MTC Tvornica Carapa by RIF. The books later stated that RIF Biro had re-paid its debts to MTC Tvornica Carapa, however, the debts had not been repaid. Furthermore the property was never registered to MTC Tvornica Carapa. The Appellant acted dishonestly throughout the relevant period in order to cause the relevant losses and gains. She and the Third Defendant sought to show that the loan had been paid back by the purchase of the property. However the property was never transferred to MTC Tvornica Carapa.

    ii) The UK offences are fraud by false representation contrary to s.2 of the 2006 Act, and fraud by abuse of position contrary to s.4 of the 2006 Act.

25. In relation to this offence Ms Iveson criticises the latest further information for not answering directly the question as to whether the Respondent considers the Appellant to have acted dishonestly, and if so whether the dishonest conduct arose from the outset of the conspiracy. Further, she submits that it is still not clear (1) whether the

parties were aware that it was not possible for MTC Tvornica Carapa to own the property referred to, and (2) whether there was never an intention to pay the money owed by RIF Biro back.

26. I am satisfied that the conduct clearly demonstrates organised conspiracy to defraud. The particulars in the EAW which state that the Defendants were "acting with the goal to obtain unlawful material gain for RIF Biro" impels, in my view, the inference that the Appellant was acting dishonestly. The further information makes clear that the Appellant, together with the Third Defendant, concluded a purchase and sale contract with MTC Tvornica Carapa for the purchase of land. It was then recorded that RIF Biro had repaid its monies to MTC Tvornica Carapa, however the purchased property could not be owned by MTC Tvornica Carapa and the property was never registered to MTC Tvornica Carapa. Thereby the Defendants defrauded MTC Tvornica Carapa. The appellant and the Third Defendant were, as stated in the EAW, "acting with the goal to obtain unlawful material gain". The EAW does not expressly state that she was acting dishonestly, but the EAW and the further information read together impel the inference of dishonesty.

Offence 3

27. The Respondent contends that it is clear from the EAW and further information that:

    i) Between 2002 and the end of 2011, the Appellant (as president of company management board of MTC Tvornica Carapa and managing director of RIF Biro), issued invoices to MTC Tvornica Carapa to allegedly pay for services delivered by staff from RIF Biro. Those services were never provided.

    ii) The Appellant acted with a goal to make unlawful gain for RIF Biro. She acted dishonestly in respect of the monies paid pursuant to the invoice.

    iii) The UK offence is are false accounting, and post-February 2007 fraud by false representation and fraud by abuse of position.

28. Ms Iveson's principal criticism is that the Respondent has failed to indicate that the allegation encompasses both the issuing of the invoices and the Appellant's knowledge that the services in respect of which invoices were issued were not provided. These are matters, she contends, that go to the heart of the Respondent's allegations of dishonesty.

29. Ms Iveson submits that the offence in Croatia may be something approaching a strict liability offence and as such the issuing of the invoice when the services were not provided may have been enough to be considered dishonest. However, with regards to ss.10 and 64, the Respondent, despite being asked a direct question, has still not been able to say that the Appellant was aware that RIF Biro did not have staff able to provide intellectual services to MTC Tvornica Carapa. In order for this to be considered an offence in England and Wales the Appellant would have had to have actual knowledge that the services were not provided, which has not been alleged by the Respondent.

30. I reject this submission. I accept Ms Brown's submission that the particulars provided make clear that the Appellant was involved in a conspiracy to defraud MTC Tvornica

Djecje Trikotaze of the monies that were paid to RIF Biro for services that were never provided. The April 2018 further information states that the Appellant "acted with the goal to obtain unlawful material gain for RIF Biro… and cause loss to MTC Tvornica Carapa", and that she was "acting with direct intent as mode of guilt".

Offences 5-7

31. The Respondent contends that it is clear from the EAW and further information that:

In respect of Offence 5:

i) Between 2004 and 2 January 2011, in Cakovec, the Appellant (as president of company board management of MTC Tvornica Carapa and managing director of OLZ), withdrew money from MTC Tvornica Carapa for herself. She asked that the monies be recorded as a loan although there was no loan agreement in place. In 2011 the liability of the loan was transferred from the Appellant to OLZ.

ii) The Appellant acted with intent to obtain for herself unlawful material gain when she withdrew the initial sum in 2004. She acted dishonestly in 2011 with the transfer of the liability of the loan.

iii) The UK offences are false accounting in 2004 by the withdrawal and recording as a loan; and post-February 2007 fraud by false representation and fraud by abuse of position.

In respect of Offence 6

iv) Between 2004 and 2011, in Cakovec, the Appellant (as president of company management board of MTC Tvornica Carapa and managing director of Mega Holding), transferred in 2004 money from MTC Tvornica Carapa to the Second Defendant. On 2 January 2011 the liability for the "loan" was transferred from the Second Defendant to Mega Holding and the money was never returned.

v) The Appellant acted contrary to a prudent business person with the objective to obtain unlawful material gain. In 2004 when the money was withdrawn from MTC Tvornica Carapa for the Second Defendant, she caused the monies to be recorded as a loan in the books although there was no loan in place. She acted dishonestly in 2011 with the transfer of the liability of the loan.

vi) The UK offences are false accounting, namely recording the monies as a loan; and from 2011 onwards, fraud by false representation and fraud by abuse of position.

In respect of Offence 7

vii) Between 1 January 2004 and January 2011, in Cakovec, the Appellant (as managing director of OLZ), obtained a personal loan which from 2004 onwards she did not return and declared it every year as a new loan.

viii) She acted with the objective to obtain an unlawful gain for herself in that she took the monies and did not return them.

ix) The UK offences are false accounting; and post-February 2007, fraud by false representation and fraud by abuse of position.

32. In relation to these three offences Ms Iveson submits that it is still not apparent whether or not at the time the loans were issued in 2004 there was never from the outset an intention to pay them back. That is the key issue which, she submits, the Respondent has still failed properly to address in the April 2018 further information provided, despite the specific question in the request as to whether it was alleged that the Appellant acted dishonestly "from the outset". Failing to pay money back is not, of itself, inherently dishonest since it could have come about because of poor business practices rather than a direct intention to steal or defraud at the time the loans were made.

33. I agree with Ms Brown that it is difficult to see how the Appellant's conduct could not amount to criminal conduct in this jurisdiction. In the June 2017 further information it is said that she acted dishonestly in 2011. The request for further information in April 2018 focuses on what was done in 2004. The response is that she acted "with the objective to obtain unlawful material gain in amount of HRK523,785,00 withdrew in 2004 this amount from MTC Tvornica Carapa d.d. account and did not return any part of that sum". I am satisfied that this response, read together with the information provided in June 2017, impels an inference of dishonesty in relation to the allegation of offending in 2004.

34. This is also made clear in relation to offence 6 by the April 2018 further information which states that the Appellant acted "with the objective to obtain unlawful material gain in amount of HRK712,313,42 for defendant Ksenija Preininger with whom she agreed in 2004 that this amount be transferred from MTC Tvornica Carapa d.d. account to Defendant Ksenija Preininger's. According to the indictment both the Requested person and the Defendant Ksenija Preininger portrayed this transaction in business books as a loan although no written document was issued and no contract was concluded and no repayment deadline, interest rate and instrument of repayment security were set and neither did the Company Mega Holding d.o.o. return withdrawn amount to MTC Tvornica Carapa d.d".

35. The April 2018 further information provided in respect of offence 7, in response to the request as to whether it was alleged that the Appellant acted dishonestly from the outset, states that she "acted with the objective to obtain for herself unlawful material gain by not returning the loan in total amount of HRK482,933.89 which she did not return to OLZ d.o.o.". Again, this response, read together with the EAW and June 2017 further information, impels an inference of dishonesty.

36. I am satisfied in relation to offences 5-7 that the information provided impels an inference that the Appellant was acting dishonestly in respect of the allegations of offending from the outset in 2004.

Conclusion

37. For the reasons I have given, in relation to all these offences, I am satisfied that the EAW, read together with the further information, impels the inference that the Appellant did the acts alleged with the necessary mens rea, and that each offence is an extradition offence within the meaning of ss.10 and 64 of the Act.