CO/4050/2016

Neutral Citation Number: [2018] EWHC 1823 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Thursday, 28 June 2018

Before:

MR JUSTICE HOLGATE

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B E T W E E N :

ANTON ZDRAVKOV
Appellant

- and -

JUDICIAL AUTHORITY OF BULGARIA
Respondent

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A P P E A R A N C E S

MS F IVESON (instructed by JD Spicer Zeb) appeared on behalf of the Appellant.

MR J SMITH (instructed by CPS Extradition Unit) appeared on behalf of the Respondent.

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J U D G M E N T

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MR JUSTICE HOLGATE:

1. Mr Anton Zdravkov has been granted permission to appeal against the order of District Judge Ikram on 5 August 2016 for his extradition to Bulgaria arising out of an EAW issued on 15 May 2015 by the Regional Prosecutor's Office. The EAW is a conviction warrant for one offence of theft in 2011 when he stole diesel worth about £1,500. A sentence of three years' imprisonment was imposed.

2. The appellant was arrested on 3 August 2015 pursuant to the warrant. He remained in custody until at least 16 February 2017 when William Davis J granted conditional bail, subject to an electronically monitored curfew between 8.00 p.m. and 8.00 a.m. For about ten weeks of the period spent on remand, the appellant was also serving a domestic prison sentence imposed for aggravated vehicle taking.

3. In March 2015 he had been diagnosed with HIV. At some point during 2016 he was diagnosed with a form of TB.

4. The hearings before the District Judge took place on 16 and 17 February 2016. Following the judge's decision to order extradition, the appellant applied for permission to appeal on 11 August 2016. At that stage, no issues had been raised by him before the judge about any implications his health might have for extradition.

5. Instead the Appellant sought to resist extradition instead by an argument made under Art. 3 concerning general prison conditions in Bulgaria and an Art. 8 claim. The district judge recorded in his judgment that those conditions had not reached an Art.3 compliant level across the whole prison estate and therefore the authority had accepted that extradition depended on case-specific assurances that the circumstances of the Appellant's imprisonment would be Art.3 compliant. The District Judge went on to find in the case of the appellant there was no real risk of any breach of Art.3 rights.

6. Turning to Art. 8 the judge gave detailed reasons as to why the appellant was a fugitive from the proceedings in Bulgaria, which are not challenged in this appeal. He then went on to carry out the balancing exercise necessary when applying Art.8 in accordance with *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551. The factors against extradition at that stage included the circumstances concerning the appellant's then one year old son. The judge concluded that extradition would not amount to a disproportionate interference with the Art.8 rights of the appellant or his family.

7. The original grounds of appeal raised only two issues. First, it was argued that there had been an error in finding that prison conditions would not involve a real risk of a breach of Art.3 and there had been an error in finding that there would be no disproportionate interference with Art.8 rights. However, the Art.8 ground of appeal was abandoned when perfected grounds were served on 25 August 2016. I note that at that stage the appellant had the benefit of being represented by the same counsel, Ms Iveson, who represents him today.

8. On 8 November 2016 Sir Stephen Silber granted permission to appeal in respect of the Art.3 ground in the appellant's case and others on the basis that the assurances given by the judicial authority and previously accepted by the Divisional Court in *Vasilev v Regional Prosecutor's Office, Silistra, Bulgaria* [2016] EWHC 1401 (Admin) had been breached.

9. On 15 December 2016 Cranston J "stood down" the appellant's case while three other cases were dealt with, including *Kirchanov v Judicial Authority in Bulgaria*. Three hearings then took place in that lead case of *Kirchanov*. The third and final judgment was handed down on 26 July 2017: see [2017] EWHC 2048 (Admin).

10. There then followed further litigation arising from reports published by the Bulgarian Helsinki Committee which led to an order by Jeremy Baker J on 27 November 2017 in which he gave directions for three appeals (one of which brought by Georgiev) were selected as lead cases to deal with the new allegations regarding breaches of assurances. The appellant's appeal was stayed pending the determination of those cases. *Georgiev v Regional Prosecutor's Office, Shuman, Bulgaria* was decided on 28 February 2018. All three appeals were dismissed: see [2018] EWHC 359 (Admin).

11. The appellant now accepts that the original grounds of appeal upon which he was granted leave are not arguable. As I have pointed out, there was no challenge to the way in which Art.8 was dealt with in the district judge's judgment on the material then put before him.

12. In the meantime, the appellant's case took a different course. On 11 October 2017 he applied to rely on fresh evidence and to amend the grounds of appeal to include new arguments under Arts.3 and 8 concerning (inter alia) his illnesses and health problems.

13. On 19 October 2017 at a hearing before Sir Wyn Williams the appeals were adjourned. The judge ordered a report on the availability of treatment for HIV and tuberculosis in

Varna Prison because the intention of the judicial authority if that the appellant should serve the remaining part of his sentence in that institution. This new ground of appeal relates to those medical conditions and also anaemia.

14. In summary, the appellant now seeks permission to amend his grounds of appeal so as to rely upon, in relation to the medical issues, Art.3 and then secondly, in the alternative, s.25 of the 2003 Act. Then thirdly, he wishes to rely upon Art.8 on the basis not only of the medical issues, but also updated evidence in relation to his family and private life.

15. It is common ground that the court should only grant permission to amend if satisfied that the grounds are arguable and that it is appropriate for the court at this stage to look at the fresh evidence *de bene esse* for that purpose.

16. The relevant legal principles are not, for the most part, in dispute. In relation to Art.3, the test to be applied is whether it is arguable that there are strong grounds for believing that there would be a real risk of a breach of Art.3 if the appellant were to be extradited: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. Secondly, there is a strong but rebuttable presumption that EU member states will comply with ECHR: see *Krolik v Judicial Authorities in Poland* [2012] EWHC 2357 (Admin); [2013] 1 WLR 490. Thirdly, if a requested person wishes to rebut that presumption, they will need to provide clear, cogent and compelling evidence.

17. Ms Iveson lays particular emphasis upon the decision of CJEU in *Aranyosi* [2016] QB 921. For example, she refers to para.88 in which it was stated that where the judicial authority of an executing member state is in possession of evidence of a real risk of inhuman and degrading treatment of individuals detained by a requesting state, it must make an assessment of the existence of that risk, so that return will not result in an individual

suffering inhuman and degrading treatment.

18. At para.94 it was stated that, where such evidence is before the court, the key issue is whether there are substantial grounds to believe that in the case of the specific person before the court there is a risk of an Art.3 breach. If that threshold is reached, then according to para.95, the requesting state must request supplementary information about the conditions in which the requested person will be detained upon return.

19. But as Ms Iveson fairly accepted, the approach set out in *Aranyosi* begs the initial or prior question whether the case reveals evidence of a real risk of inhuman and degrading treatment. The procedural principle in *Aranyosi* must be read in the context of the body of case law which defines what is meant by treatment of that nature.

20. In the present case there is a very substantial body of case law to the effect that the threshold for establishing an arguable breach of Art.3 in relation to a lack of medical care for illness in the receiving country is very high indeed. A leading authority is the well-known case of *N v UK* [2008] 47 EHRR 39: see in particular paras. 42 to 45 and the preceding analysis of the relevant case law.

21. Turning to s.25 of the 2003 Act, Ms Iveson rightly submits that there is a considerable overlap between the question whether in relation to a particular health condition extradition would present a real risk of a breach of Art.3 or, in terms of s.25, would be "oppressive". In *Kolanowski v Circuit Court in Zielona Gora* [2009] EWHC 1509 (Admin), the Divisional Court stated that the burden on a requested person in proving oppression is a high one and is not the same as, but approaches, the burden of proving a breach of Art.3.

22. In *Mikolajcyk v Wroclaw District Court* [2010] EWHC 3503 the Divisional Court held that when considering the quality of medical care likely to be received, it is not necessary for

there to be parity with the conditions in the United Kingdom. The test is whether the difference in treatment would mean that extradition would be oppressive. I also note the helpful guidance given by Julian Knowles J in *Magiera v District Court of Krakow, Polan*d [2017] EWHC 2757 (Admin).

23. Finally, in addition to these authorities Mr Smith refers to the decision in *Brazuks v Prosecutor General's Office, Republic of Latvia* [2014] EWHC 1021 (Admin) where it was stated by Collins J in the Divisional Court that only in extremely rare cases would a lack of medical treatment not amounting to a breach of Art.3 amount to a breach of Art.8. But, as is fairly submitted by Ms Iveson, that observation has to be read in context. In the present case, the appellant seeks to rely under Art.8 upon other factors in addition to the medical matters.

24. In terms of the new evidence which has been put before the court, it really falls into two broad categories. In the bundle which has been provided for this hearing, there is a series of reports or statements by doctors concerned with the treatment of the appellant. They have explained the diagnosis in relation to HIV, TB and anaemia and the various types of medication which have been prescribed from time to time and continue to be prescribed. The evidence from doctors on the appellant has been supplemented by an additional witness statement from Dr Birley dated 27 June 2018. He is responsible for treating the appellant's' anaemia and HIV.

25. The second category of evidence describes conditions in the prison estate in Bulgaria, in particular Varna Prison. The main document, and the one which is most relevant to the appellant’s position is tab 35, a report dated 17 November 2017 by the Helsinki Committee. In addition, the appellant has relied upon reports by CPT both in 2016 and their most recent document produced in May 2018.

26. As the argument proceeded, the issues between the parties narrowed. It is plain from any fair reading of tab 35 that Mr Stanev explains that the medication and treatment appropriate for the appellant and his conditions is indeed available within the prison in which it is proposed that he should be detained. His counsel did not suggest otherwise in her submissions this morning. I see nothing in the CPT material which could possibly undermine that conclusion drawn from tab 35.

27. Instead, the focus of the argument this morning by Ms Iveson was on evidence said to indicate an inadequate number of medical staff at Varna Prison. The skeleton also referred, although emphasis was not placed on this orally, to complaints emerging from prisoners about a lack of medical care, but these were short generalised comments without any detail, and could not add materially to the main points counsel sought to make.

28. The Respondent relied upon the assurances which have been given by the judicial authority as set out in tabs 32 and 33 of the bundle. In addition, Mr Smith points out that in his most recent report dated 27 June 2018, Dr Birley describes the appellant as being generally well and contrasts that with statements which were made by the doctor in earlier reports. Moreover, the anaemia problem is referred to as resolved.

29. Ms Iveson essentially relies upon evidence about the level of suppression of the Appellant's immune system and says that he is therefore at risk of infection to a greater extent than other prisoners and that this may give rise to a possible need for treatment, for example, in an emergency. She says that taken in that context, the ongoing lack of on-site medical care at Varna Prison engages Art.3 or s.25 in the Appellant's case. She accepts that if, on the other hand, the appellant were to be detained in Sofia Prison, then these particular complaints, leaving aside the Art.8 matter, would not arise.

30. Having been carefully taken through the relevant passages in these documents, it is plain to

me, and here I accept the submission made by Mr Smith, that it is demonstrated that the external care which would be necessary for the sort of concerns raised by Ms Iveson would be available if extradition were to proceed. This is made plain in various passages contained in the specific report produced at tab 35 in relation to each of the Appellant's three main conditions: see, for example, paras.24 and 25 in relation to TB. What is notable is that this report, which was obtained specifically in order to assist the appellant in promoting this new basis for his appeal, pursuant to the order of Sir Wyn Williams, does not suggest that any of the other difficulties in Varna Prison to which it refers, for example a shortage of on-site medical staff, would impact in any way on these key conclusions in relation to the Appellant.

31. I remind myself of the test which would need to be satisfied in order to make out a breach of Art.3. I am certain that the points raised on behalf of the appellant, albeit skilfully, come nowhere near demonstrating an arguable breach of Art.3. I see no basis upon which the court could conclude any differently in relation to s.25 and the test of oppression.

32. I turn to the remaining ground of appeal under Art.8. I take into account the matters relating to medical circumstances and availability of treatment to which I have already referred. Here the argument is slightly different in as much as it is said that because of these circumstances, the appellant is vulnerable.

33. Secondly, Ms Iveson points to paras.29 to 32 of tab 35 describing conditions in Varna Prison and submits that they would be all the more harmful to someone in the appellant's position, someone who should be treated as vulnerable.

34. Thirdly, she points out that he has already been in custody for a period of time exceeding one half of the sentence imposed in Bulgaria and in addition, he has been on a twelve hour

curfew for at least six months.

35. Fourthly, she points to the delay which has occurred in this case which she attributes, in part at least, to a failure on the part of the Bulgarian authorities to comply with assurances given to the Divisional Court, which has resulted in protracted litigation on the part of lead appellants which in turn has delayed the present proceedings.

36. Fifthly, she points out that family life has developed considerably, particularly since the appellant was released on bail. In particular, it is said that the interests of his son, Sevy, with whom the appellant has formed a bond, must attract, more weight than before.

37. Mr Smith submits that any development of family life which has occurred since the judgment given by the district judge has been while the appellant has been subject in this country to the EAW and extradition process. His position and the family interest that Art.8 seeks to protect has at best been precarious. The appellant has been in the United Kingdom as a fugitive from Bulgarian justice and the offence the subject of the EAW was serious, albeit not the most serious of offences. He also points out that the time spent in custody on remand could not conceivably be treated as a breach of Art.8.

38. I remind myself of the factors which were set out by the district judge in his judgment, a balance sheet respecting the principles set out in *Celinski*. I adjust those factors to take into account the additional matters which have been raised, in particular those relied upon by the appellant.

39. Even allowing for the delay caused by the litigation to ensure that Bulgarian assurances were satisfactory and the other matters which have been emphasised by the appellant, applying *Celinski* and *Norris v Government of United States of America (No. 2)* [2010] UKSC 9; [2010] 2 AC 487. I reach the firm conclusion that the factors against

extradition do not provide a sufficient counterbalance to the strong factors in favour of extradition so as to render in this case extradition disproportionate. I reach that conclusion on the basis that the contrary is not arguable.

40. For all those reasons, I refuse leave to amend the grounds of appeal. It must also follow that the application to adduce additional evidence is refused as well. The appeal is not put forward on any other basis and so must be dismissed.

MR JUSTICE HOLGATE: I am very grateful for all the help that I have received on both sides.

MR SMITH: Thank you, my Lord.

MR JUSTICE HOLGATE: Thank you. Have I covered everything?

MR SMITH: Yes. Thank you, my Lord. I do not know whether my learned friend has any application in relation to public funding.

MS IVESON: My Lord, there is normally an item on the order dealing with public funding. I believe it is granted----

MR JUSTICE HOLGATE: A detailed assessment.

MS IVESON: Yes.

MR JUSTICE HOLGATE: Yes. It would be normal to ask you to draw up an order which I could approve?

MR SMITH: Certainly.

MR JUSTICE HOLGATE: Who would like to do that or who would least like not to do that?

MR SMITH: I have another professional commitment this afternoon, so if I could pass that one to Ms Iveson.

MS IVESON: I am very happy to do that.

MR JUSTICE HOLGATE: I am very grateful. Thank you. (After a pause)

Yes. As has been pointed out, you have all got my clerk's email address.

MS IVESON: Yes.

MR JUSTICE HOLGATE: Thank you.

MR SMITH: Thank you very much, my Lord.