Neutral Citation Number: [2018] EWHC 1909 (Admin)

Case No: CO/4247/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2018

**Before** :

**MR JUSTICE OUSELEY**

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**Between :**

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| | **TIFRAC** | **Appellant** |
| | **- and -** | |
| | **ROMANIAN JUDICIAL AUTHORITY** | **Respondent** |

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**MR MARTIN HENLEY**
(instructed by **AM INTERNATIONAL SOLICITORS**) for the **Appellant**
**MR BENJAMIN SEIFERT**
(instructed by **CPS EXTRADITION**) for the **Respondent**

Hearing dates: 19 July 2018

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# Judgment Approved**MR JUSTICE OUSELEY :**

1. This is the rolled up hearing of the application for permission and appeal against the decision of the Deputy Chief Magistrate Tan Ikram at Westminster Magistrates' Court on 12 September 2017 ordering the extradition to Romania of Mr Tifrac on two conviction EAWs. Mr Tifrac was not represented at the hearing and did not take the two points relating to the validity of the EAWs which Mr Henley has pursued before me. The Deputy Chief Magistrate did not take them either, and in view of their nature, I am not surprised. However, they are points of law which require no further evidence beyond the Further Information which it was agreed the Requesting Judicial Authority could present in response to one of them. Mr Henley also raised and pursued article 8 ECHR as briefly as his duties to his client required and to the court permitted. I grant permission for his grounds of appeal to be argued.

## The particulars in the EAWs

2. EAW 1 states that it relates to two offences in total. The extradition of Mr Tifrac is sought pursuant to a judicial decision of June 2016, sentencing him to 1 year's imprisonment for driving without a licence, and to 6 months' for presenting a false driving licence to the officers who stopped him. No issue concerning the particularisation of those offences arises under s2(6)(b) of the Extradition Act 2003,

which requires an EAW to contain "particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence…."

3. However, it states in box "c" "Indications on the length of sentence" that the June 2016 decision revoked conditionally suspended sentences for four other offences: two, each of 1 year's imprisonment, dealt with in a file of 2010 as I shall call it for convenience, and previously treated as a single sentence of 1 year; and two, one of 1 year's and one of 9 months' imprisonment, previously treated as a single sentence of 1 year, dealt with in a file of 2011 as again I shall call it for convenience. The separate file numbers were given. The June 2016 decision merged the three groups of offences into a single period of 3 years to serve, as the District Judge found. As Mr Henley points out, that period includes time for offences in respect of which no s2(6)(b) particulars are given in the EAW.

4. EAW 2 also states that it relates to two offences. Extradition is sought pursuant to a judicial decision of October 2015, sentencing Mr Tifrac to 1 year and 6 months' imprisonment, as the heavier of two sentences for an assault and a public order offence committed as part of the same offending. It merged the same four sentences, referred to above, into a single year's penalty, and added it to the assault/public order sentence of 1 year 6 months to make a total of 2 years and 6 months' imprisonment. The file numbers and court numbers show that the four sentences dealt with in the October 21 decision on which EAW 2 was based were precisely the same as those which led to the aggregation of sentences in June 2016 included in EAW1. Again, no s2(6)(b) particulars were provided of those other offences. In each case the same periods spent in custody in relation to the offences in the 2010 and 2011 files are referred to.

5. It was not in dispute but that the EAWs were required to contain the s2(6)(b) particulars of the other offences which contributed to the total aggregated sentences referred to in the EAWs and which Mr Tifrac would be required to serve as a result of his extradition on those warrants. Had they been included in the EAWs no question as to their validity would have arisen. The EAWs were invalid in the absence of such further particularisation.

6. The RJA provided information to the Magistrates' Court by letter dated 11 August 2017 on the other offences which concerned cigarette smuggling; the particulars were sufficient to satisfy s2(6)(b).

7. Mr Henley submitted that the particulars of those latter offences in the EAWs were so lacking that each EAW was invalid, and that, although further information before the Deputy Chief Magistrate was capable amply of remedying the omissions had the information been incorporated in the EAWs themselves, this went far beyond the sort of supplemental information which could be used to remedy what would otherwise be invalid EAWs. Neither *Criminal proceedings against Bob-Dogi* [2016] 1 WLR 4583, a CJEU decision, nor any of the subsequent domestic authorities, *Goluchowski v District Court in Elblag, Poland* [2016] UKSC 36, [2016 1 WLR 2665, *Alexander v Public Prosecutor's Office, Marseille District Court of First Instance, France* [2017] EWHC 1392 (Admin), [2017] 3 WLR 1427, or *M and Others v Preliminary Investigation Tribunal of Napoli, Italy* [ 2018] EWHC 1808 (Admin) supported so large a use of supplementary information. Mr Seifert for the RJA contended that the further

information simply filled in a gap, which was a permissible use of supplemental information so as to remedy a flaw which went to the validity of the EAW. The technical nature of Mr Henley's submissions, though going to the validity of the EAWs, could be measured by the fact that were Mr Tifrac to be discharged, EAWs, containing no further information than was already before the Deputy Chief Magistrate, could be issued; and after a short delay, Mr Tifrac would only be arguing Ground 2.

8. So the issue revolves around the size or nature of the gap or failure which supplementary information can fill. Of course, it is not to the point that the omission goes to the validity of the EAW; that is inherent in the process of supplementing it with further information. I therefore turn to consider the effect of the authorities.

9. *Bob-Dogi*, which clearly changed the UK legal landscape over EAW validity, concerned the omission of any reference to the necessary prior domestic warrant. However, before refusing to give effect to an EAW which did not state that such a national warrant had been issued, the executing judicial authority had to enquire of the RJA as to whether one did in fact exist. The relevant passages are in [64-5 and 67] as follows:

> "64. Given that article 8(I)(c) of the Framework Decision lays down a requirement as to lawfulness which must be observed if the European arrest warrant is to be valid, failure to comply with that requirement must, in principle, result in the executing judicial authority refusing to give effect to that warrant.
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> 65. That being so, before adopting such a decision, which, by its very nature, must remain the exception in the application of the surrender system established by the Framework Decision, as that system is based on the principles of mutual recognition and confidence, the executing judicial authority must, pursuant to article 15(2) of the Framework Decision, request the judicial authority of the issuing member state to furnish all necessary supplementary information as a matter of urgency to enable it to examine whether the fact that the European arrest warrant does not state whether there is a national arrest warrant may be explained either by the fact that no separate national warrant was issued prior to the issue of the European arrest warrant or that such a warrant exists but was not mentioned."
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> "67. In the light of the foregoing considerations, the answer to question 2 is that article 9(I)(c) of the Framework Decision is to be interpreted as meaning that, where a European arrest warrant based on the existence of an "arrest warrant" within the meaning of that provision does not contain any reference to the existence of a national arrest warrant, the executing judicial authority must refuse to give effect to it if, in the light of the information provided pursuant to article 15(2) of the Framework decision and any other information available to it, that authority concludes that the European arrest warrant is not valid because it was in fact issued in the absence of any national warrant separate from the European arrest warrant."

10. In *Goluchowski*, Lord Mance, with whom the other Justices agreed, said this at [39] and [45]:

> "39. The better interpretation of para 64 of *Bob-Dogi* appears to be that article 8(I)(c) requires an EAW to evidence on its face a prior separate national arrest warrant in order to comply with article 8(I)(c), and that it is not sufficient that such a prior separate arrest warrant actually exists. However, despite that words "shall contain" used by article 8(I) and the language of "requirement" used by the Court of Justice, it is also clear that the court was not treating the identification on the face of the EAW of a prior separate national arrest warrant as an absolute condition of the EAW's validity. On the contrary, the executing court was obliged to investigate the underlying factual position further, by requesting further information under article 15. Whether the EAW was to be treated as valid and enforceable would depend not on how it was expressed, but on the underlying factual question whether or not it proved actually to be based on a prior separate national arrest warrant.
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> …
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> 45. Accordingly, even if a reference to the activating decisions should strictly have been made in the EAWs alongside the reference to the judgment as enforceable, this cannot as a matter of European law mean that the EAWs should be treated as invalid or incapable of being executed. That being so, I consider that the same position must once again carry through into section 2(6) OF THE 2003 Act. Section 202 must be understood as enabling the same sort of co-operation and regularisation of formal, rather than substantive, defects appearing in an EAW that article 15 of the Framework Decision contemplates."

11. These cases were considered by the Divisional Court in *Alexander*, by Irwin LJ with whom Sweeney J agreed. Irwin LJ expressed reservations about the use of the concepts of "formal" and "substantive" as the means of distinguishing between remediable and irremediable omissions, if that is how Lord Mance intended that his comment should be read. Irwin LJ pointed out that *Bob-Dogi* is clear that if the information which an EAW is required to contain is absent and not forthcoming on request, extradition cannot be ordered. He continued at [74-5]:

> "74…Are the date, place and nature of the offence, and the question of maximum sentence, to be regarded as "formal" or "substantive" matters? They are required matters. The effect of the two key recent decisions is, we conclude, that missing required matters may be supplied by way of further information and so provide a lawful basis for extradition.
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> 75. None of this means that extradition can properly be achieved on the basis of a "bit of paper". In our view, there must be a document in the prescribed form, presented as an EAW, and setting out to address the information required by the Act. An

> otherwise blank document containing the name of a requested person, even if in the form of an EAW, will properly be dismissed as insufficient without more ado. The system of mutual respect and co-operation between states does not mean that the English court should set about requesting all the required information in the face of a wholly deficient warrant. Article 15(2) of the Framework Decision expressly concerns itself with "supplementary" information, and can properly be implemented with that description in mind. That will of course include resolution of any ambiguity in the information provided. It will include filling "lacunae". The question in a given case whether the court is faced with lacunae or a wholesale failure to provide the necessary particulars can only be decided on specific facts.
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> 76. We note the indication in *Bob-Dogi*'s case [2016] 1 WLR 4583, para 65, that a court has a duty to make further inquiries as to further information before declining to execute a warrant. We accept that there is an obligation on a court to consider each case, before ordering extradition, whether the necessary information is present. We accept that, subject to any exception which may arise, an English court may inquire as to further information, before concluding against extradition. However, a number of other points should be stressed in this context."

12. He then went on to stress that the responsibility for presenting a valid EAW rested with the RJA.

13. This approach was adopted in *M and Others,* in which Nicol J, with whom Gross LJ agreed. The wholesale failure in that case [55] was that EAWs with many defendants and charges, had "failed entirely to make clear for what offences the Appellants were to be prosecuted. The deficiencies were not simply lacunae that could be made good by further information: the problems with the warrant were far more fundamental than that." The Court was not in a position to assess how it would have reacted had the further information been provided before the District Judge, and had remedied the deficiencies. However, at [56], the Court held that the further information in fact wholly undermined the way in which the RJA had presented its case: "the form of the warrants led the District Judge into believing that the Appellants were wanted for each and every offence set out in the warrants. That had never been the case." Hence the Court's comment that admitting the further information reinforced the conclusion of a wholesale failure, rather than providing the basis upon which the decision of the District Judge should be upheld.

14. Applying those tests to the omission here, I place the omission of the particulars of the offences, which are part of the aggregation, on the gap side of the divide, if that is how the concepts of "lacuna" and "wholesale failure" are to be seen. The EAWs deal with the main offences which generate the sentences; they identify the existence of aggregated sentences, their duration, and the judicial decisions whereby the aggregation was arrived at. The omission of the other offences cannot properly be described as a "wholesale failure", akin to that in *M and Others*. As I note, the Court there did not have to consider the position if the failures had been corrected before the Magistrates' Court in a way

consistent with how the EAW was being read. That is a far cry from the position here.

15. The "formal" and "substantive" divide is not a useful tool of analysis in this case, so I do not use its language. Like Irwin LJ, I find it difficult to see its practical application to distinguish one omission from another when all are failures to comply with requirements as to the contents of the EAW. The language in *Bob-Dogi* draws no such distinction. The purpose of *Bob-Dogi* is to require an executing authority not to find invalidity without enquiring of the RJA what the position is in relation to the omission; plainly that is intended to give the RJA the opportunity to remedy the omission, saving the EAW. The omission in *Bob-Dogi* was not formal; it went to the very power to institute the EAW process. The *Bob-Dogi* duty has to be judged by what is missing and not by what the answer is. The outcome of the enquiry may show that the EAW is or is not valid. I do not read Lord Mance as intending his words to create such a test for the enquiry, as a result of *Bob-Dogi*, but rather as words en route to the ending of the *Dabas* approach to validity.

16. The more apt "lacuna" versus "wholesale failure" test still needs some care. I am not sure whether that is intended to cover the whole gamut of possible failures or whether there is an attribued range of failures between "gap" and "wholesale failure." If it does cover the whole gamut, the dividing point between the two concepts, one of which implies something relatively small and the other something very large, means that the two concepts, or one of them, have to be stretched somewhat. I see nothing in *Bob-Dogi* to confine the duty to seek further information or the role of supplementary information in quite that way. I see the better expression of the test as being that the Court is relieved of the obligation to seek further information, and voluntarily provided further information will not save the EAW itself, only where the failure falls within the notion of a "wholesale failure" as illustrated by *M and Others*. I see that as the point behind the first part of [75] of *Alexander*. Here the information is on the right side of the line, however drawn.

17. Accordingly, I reject ground 1.

## Double jeopardy

18. The factual basis for this contention is that each EAW contains an aggregation of sentences. In each EAW, the sentence for the offences particularised in each EAW as issued is aggregated with sentences for four other offences, themselves disaggregated for re-aggregation with the sentence for the specified offences. Taken on their own and separately, there is nothing wrong in that respect with either EAW. What concerns Mr Henley is that in EAW 1, the sentences for the driving offences have been aggregated with the sentences for the smuggling offences. In EAW 2 the sentences for the assault/ public order offences have been aggregated with precisely the same sentences for the same smuggling offences. There is therefore an overlap between the sentence to be served under EAW1 and the sentence to be served under EAW2, in respect of the smuggling offence sentences. Yet there has been no specific indication from the RJA that double-counting of the sentences will be removed when sentence actually comes to be served.

19. (The Deputy Chief Magistrate treated the remand periods as falling to be deducted from the 2 years and 6 months, as I agree is clear from the EAW 2 language. The language of EAW 1 is a little less clear, but I doubt that the treatment of the periods in remand for

those offences was intended to be different, as he appears to have thought. Mr Seifert in his written submission for the RJA treated the remand periods as already having been deducted to arrive at the period of 2 years 6 months in EAW 2, contrary to what the Deputy Chief Magistrate decided, but wrote nothing about the periods in EAW1. No Appellant argument was addressed to this, and nothing turns directly on it, but I point out that the periods need to be treated consistently, since they relate to the same offences and the same periods on remand. The deduction for time on remand will be dealt with by the Romanian authorities on return. This is not the basis for the point taken by Mr Henley.)

20. The "double jeopardy" issue was not raised before the Deputy Chief Magistrate. Mr Henley did not therefore object to my considering further information provided by the RJA. He also submitted that it added nothing to what was stated on the face of the further information of 11 August 2017. This confirmed that the sentences in the two EAWs "are separate sentences." The next comment loses something in translation: answering whether the two would be served consecutively or concurrently, the answer as I understand it, is that that is for decision on appeal, when the sentence comes to be executed, to the appropriate court in Romania. This is clarified in the further information dated 8 March 2018, which states that the two "penalties can be united, at the request of the defendant, after extradition."

21. I am clear that the issue of the overlapping aggregation of the smuggling offences in the two sentences has not been raised or addressed.

22. Mr Henley is wrong to treat this as a s12 Extradition Act "double jeopardy" issue. It is impossible to fit in within that language, and in any event, Mr Tifrac has not served any part of the smuggling sentence save for that period on remand which each EAW refers to as having to be deducted. I am not prepared to conclude that the EAWs, if not offending s12, are an abuse of process because of the way in which the aggregation thus far has appeared in each EAW. They appear in each EAW because they have been aggregated on two occasions with different offences.

23. Mr Seifert submits that I should have confidence in and trust the fair and effective operation of the appeal process described in relation to the aggregation of sentences to be able to cope with this overlap, and that the Romanian Courts had no interest in in making anyone serve sentences twice over. I did consider whether to seek further information, but I do not consider that to be necessary. Still less do I consider it appropriate to order extradition on one EAW and discharge on the other, leaving Mr Tifrac with the option, perhaps at the conclusion of the sentence, of agreeing to waive speciality and serve the outstanding sentence, or to return to the UK where a further EAW would procure his return to serve the non-overlapping part consecutively.

24. I conclude that, as there is a procedure for aggregating or uniting the sentences, which Mr Tifrac can institute in Romania, he can raise the point there, and the overlap will be stripped out. I am not prepared to hold that the procedure would fail to do so, requiring him to serve the same sentence twice over. Besides, he may take a copy of this judgment with him, making it clear that he is being extradited on the basis that this overlap will be removed when the aggregation or uniting of the sentence is considered. I am prepared to trust that to the Romanian authorities.

25. This ground is therefore dismissed.

26. **Article 8** was not pursued once Mr Henley accepted that the Deputy Chief Magistrate had not made the error attributed him, as to when Mr Tifrac became a fugitive. In reality, it was hopeless.

## Conclusion

27. I grant permission to appeal but this appeal is dismissed.