Neutral Citation Number: [2018] EWHC 2809 (Admin)

Case No: CO/948/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2018

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

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Between :

	ZOLTAN CSABA BOTOS	**Appellant**
	- and -	
	PUBLIC PROSECUTORS OFFICE, AT THE COURT OF UDINE, ITALY	**Respondent**

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Gemma Lindfield (instructed by **Kaim Todner Solicitors Ltd**) for the **Appellant**
Hannah Hinton (instructed by **CPS**) for the **Respondent**

Hearing date: 16 October 2018

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Judgment Approved**Mr Justice Supperstone :**

Introduction

1. The Appellant, a Romanian national, appeals against the decision of District Judge Blake, made on 1 March 2018, to order his extradition pursuant to a European arrest warrant ("EAW"), issued on 12 May 2017 and certified by the National Crime Agency on 13 October 2017.

2. The Appellant is represented by Ms Gemma Lindfield and the Respondent Judicial Authority is represented by Ms Hannah Hinton.

3. The Appellant's extradition is sought to serve a sentence of 1 year and 6 months. Following his conviction on 8 May 2014 for one offence of facilitation of unauthorised entry and residence to Italy, a sentence of 5 years' imprisonment was imposed by the Court of Udine, which was finally confirmed on 31 October 2014. Subsequently he was granted a pardon, which it appears was as a result of a general amnesty, and on 14 October 2015 his sentence was reduced to 1 year and 6 months' imprisonment.

4. The particulars of the offence given in Box (E) of the EAW are that on the night of 22/23 May 2003 the Appellant was involved in bringing two Ukrainian girls and two female Moldovan nationals illegally from Austria into Italy via woodlands on the Austro-Italian border for them to be forced into prostitution, for which he was paid €400. He was found guilty of complicity in aiding and abetting illegal immigration.

5. Box (D) provides the following information about the proceedings:

   i) The Appellant was arrested on 23 May 2003. He was assisted by a Romanian interpreter and informed that he may appoint a defence lawyer of his own choice. He was invited to elect domicile for the purpose of service of process on the territory of the Italian state, and he was told that if he did not do so then service of process shall be made to the defence lawyer. He was further advised that he was under an obligation to notify any change of elected domicile and that if he did not do so service of process shall be made by delivery to the defence lawyer. The Appellant did not appoint a lawyer of choice and so the Judicial Police appointed a lawyer for him, Michela Vianello.

   ii) On 26 May 2003 the Appellant appeared before the pre-trial investigation judge at a hearing to confirm his arrest and was represented by Ms Vianello and assisted by a Romanian interpreter. The Appellant was remanded in custody to 22 November 2003.

   iii) On 28 May 2003, whilst in custody in Venice, the Appellant appointed lawyer Danilo Tashin practicing in Padua as his defence lawyer of choice.

   iv) On 16 July 2003, whilst in custody in Trieste, the Appellant appointed lawyer Mariapia Maier practicing in Trieste as his defence lawyer.

   v) On 22 November 2003, upon release from custody, the Appellant elected domicile for the purpose of service of process at the law firm of his defence lawyer, Ms Maier. The Italian Code of Criminal Procedure prescribes that service of process on a defence lawyer with whom a suspect or defendant has elected domicile shall have the same value as the service of process personally on the person concerned.

   vi) On 4 December 2012 Ms Maier resigned her position as the Appellant's defence lawyer after being served with a notice informing the parties that a preliminary hearing had been set. Consequently on 6 December 2012 the pre-trial investigation judge appointed a defence lawyer on behalf of the Appellant. This was without prejudice to the election of domicile for the purpose of service of process at the law firm of Ms Maier that the Appellant had never revoked.

   vii) The Appellant's trial took place in his absence, starting on 14 June 2013 and ending on 8 May 2014, when judgment was given. During the trial the Appellant was assisted by Rossella Gorizzizzo, a court-appointed lawyer.

viii) On 22 February 2016 the Appellant gave power of attorney to Ms Maier, and on 2 March 2016 Ms Maier applied to the Court of Udine for a retrial on the ground that the Appellant did not have knowledge of the criminal proceedings against him. On 15 September 2016 the court refused this application, holding that the Appellant did have knowledge of the criminal proceedings against him and there had not been any impediment for him to attend the trial. An appeal against this decision lodged with the Supreme Court of Cassation has been dismissed.

ix) On 16 September 2016 the Appellant was personally served with a document issued by the Public Prosecutors Office at the Court of Udine on 14 October 2015, entitled "Enforcement order for imprisonment and a decree of suspension thereof" including the details of his conviction, which informed him that he may ask for the application of alternative measures to detention. He personally signed for the document when it was delivered to his address in Romania. On 4 November 2015 the same document had been served on Rossella Gorizzizzo, the court-appointed defence lawyer at his trial. The Appellant did not apply for alternative measures to detention.

Grounds of Appeal

6. On 25 May 2018 Holman J granted permission to appeal on two grounds:

i) first, that the District Judge erred in concluding that the Appellant's extradition is not barred by s.20 of the Extradition Act 2003 ("EA 2003") in that the Appellant does not have a right to a review amounting to a re-trial; and

ii) the District Judge erred in concluding that pursuant to s.21 EA 2003, the Appellant's extradition would not amount to a disproportionate interference with his right to a private and family life under Article 8 ECHR.

The Parties' Submissions and Discussion

Ground 1: The Appellant's extradition is barred by s.20 EA 2003

7. The issue is whether the Appellant deliberately absented himself from his trial.

8. The District Judge was satisfied that the Appellant by his own conduct absented himself from the proceedings because he knew he must keep in touch with his lawyer and failed to do so. Ms Maier stated in her e-mail of 12 February 2016 to the Appellant that she had renounced her defence of him because she was unable to contact him as she had no phone number or contact details for him. In the same e-mail Ms Maier stated, "it is regrettable that you did not keep in contact with both me and the Italian authorities because all this could have been controlled for your peace of mind".

9. In *Cretu v Romania* [2016] EWHC 353 (Admin), the Divisional Court considered the proper approach to the interpretation of s.20 EA 2003 in the light of Article 4a of the

EAW Framework Decision 2002, inserted by the EAW Framework Decision 2009. Burnett LJ (as he then was) said at para 34:

> "(i) 'Trial' in section 20(3) of the 2003 Act must be read as meaning 'trial which resulted in the decision' in conformity with Article 4a(1)(a)(i). That suggests an event with a 'scheduled date and place' and is not referring to a general prosecution process.
> …
>
> (ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by Article 4a(1)(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate Article 6 of the Convention."

10. In *Tyrakowski v Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin) at para 29, Julian Knowles J, paraphrasing a summary of the principles established in *Cretu* by Hickinbottom J (as he then was) in *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 (Admin), para 50, stated:

> "The EAW system is based on trust and confidence as between territories. Consequently, where the EAW contains a statement from the requesting judicial authority as required by para 4A(1)(a) of the EAW Framework Decision 2002, that will be respected and accepted by the court considering the extradition request, unless the statement is ambiguous (or, possibly, if there is an argument that the warrant is an abuse of process). If the statement is unambiguous, the court will not conduct its own examination into those matters, nor will it press the requesting authority for further information."

11. Ms Lindfield submits that the District Judge fell into error in the way in which he approached the question of whether the Appellant deliberately absented himself from his trial. She submits that the manner in which the Appellant was summoned did violate his Article 6 rights because of the unique circumstances of his case and therefore he cannot be taken to have been deliberately absent from his trial.

12. Ms Lindfield acknowledges that it is open to the Italian authorities to summon the Appellant at his lawyer's address, however she submits that this cannot be Article 6 compliant when the authorities are aware that under Italian law a lawyer need only retain a client's file for five years, and the preliminary hearing did not commence until January 2013, at least four years after the Appellant's file was required to be retained. Ms Lindfield contends that the reason why Ms Maier was not able to contact the Appellant was because she no longer had in her possession the Appellant's file, which would have contained his contact details, rather than because of any failing on the Appellant's part to keep in contact with her.

13. I do not accept this submission. It seems to me that the District Judge was entitled on the evidence to find that the Appellant deliberately absented himself from his trial. Ms Maier was served with notice informing the parties that the preliminary hearing had been set (see para 5(vi) above). It was not the evidence of Ms Maier that she did not have the means to contact the Appellant because of the destruction of his file; she indicated that

she was unable to contact him because she had no contact details for him. His election of domicile for the purpose of service of process at Ms Maier's law firm remained valid and effective. The Italian authorities were therefore under no duty to contact the Appellant personally. In those circumstances, and having regard to the evidence to which I have referred, I do not consider the District Judge erred in concluding that the Appellant was deliberately absent from his trial.

14. That being so, the issue of a re-trial does not arise.

15. Nevertheless I note Ms Hinton's submission that under Italian law a right of re-trial is guaranteed by Article 175 of the Italian Code of Criminal Procedure. The existence of procedural steps does not remove the entitlement to a re-trial (see *Nicoli Nastase aka Nicolae Solomon v Office of the State Prosecutor, Trinto, Italy* [2012] EWHC 3671 (Admin)).

16. However, Ms Hinton realistically accepts, in the light of the dismissal of the Appellant's application for a re-trial by the Court of Udine and the Supreme Court of Cassation on the basis that he deliberately absented himself from his trial (see para 5(viii) above), that it is inconceivable that the Appellant would be granted a re-trial.

Ground 2: The Appellant's extradition will breach his Article 8 ECHR rights

17. Ms Lindfield submits that the District Judge fell into substantial error in relation to the facts when considering the Appellant's case in respect of Article 8.

18. First, the judge incorrectly stated that the Appellant's return was sought in relation to a conviction warrant "in relation to an offence of being concerned in people trafficking" (para 6). This is not correct. He was convicted of facilitating unlawful entry and residence. It is that offence which is ticked on the Framework List, not "trafficking in human beings". The judge was therefore in error in describing the offence of which the Appellant was convicted as "one of the most serious offences short of murder and serious sexual assaults which come before the extradition court".

19. Second, Ms Lindfield complains that when conducting the balancing exercise and considering the seriousness of the offence the Judge did not take into account either that the sentence of 5 years had been reduced to one of 1 year and 6 months, or that the Appellant was offered a non-custodial alternative. There was evidence before the District Judge from Ms Murariu, the Appellant's legal representative, that the Appellant was offered in the document issued by the Prosecutor's Office at the Court of Udine on 14 October 2015

> "the option to apply to suspend the execution order of 1 year, 6 months' imprisonment and substitute it for a prescribed alternative. He will then be given an alternative to detention which could be either probation, bail, conditional release or suspension of the sentence."

Ms Murariu continued, "The application for suspending this executing order needed to be served to the court within 30 days of the date that he is notified of the present law".

Both the reduction in sentence and the offer of a non-custodial sentence suggest that the Respondent authority did not consider the offence as being as serious as the District Judge considered it to be.

20. In my view both these criticisms of the District Judge's decision are well-founded. That being so I must conduct the appropriate balancing exercise afresh.

21. The delay of nine years which occurred between the end of the investigations and the preliminary hearing, for which there is a complete absence of explanation, was, as the District Judge described it, "nothing short of lamentable". Further information provided by the office of the prosecutor attached to the Court of Udine stated

> "The trial case file does not contain any explanation with regard to the long time elapsed (about 9 years) between the end of investigations and the preliminary hearing."

22. In *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25 (at para 8), Lady Hale observed "the delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life".

23. The public interest in ensuring that extradition arrangements are met is very high. However, I agree with Ms Lindfield that the significant delay in this case impacts on that public interest.

24. The District Judge expresses his "very sincere sympathy for the [Appellant]'s current position", but he is not able to regard extradition to be disproportionate to his and his family's Article 8 rights because of the seriousness of the offence of "people trafficking". However, as I have noted, the Appellant was not charged with or convicted of that offence. Whilst the offence of facilitation of unauthorised entry and residence to Italy is a serious offence, it does not have the impact on the balancing exercise that the very serious offence of people trafficking had for the District Judge.

25. Further, the reduced sentence (from 5 years to 1 year, 6 months) and the offer of a non-custodial sentence indicate the degree of seriousness that the Respondent attached to the offence of which the Appellant was convicted. The Appellant's evidence is that he did not receive notice of this offer which was contained in the document issued by the Public Prosecutor's Office at the Court of Udine on 14 October 2015 and said to have been served on him personally on 16 September 2016 (see para 5(ix) above) until a year later. It was signed for on 16 September 2016 at his family home in Romania, not by himself but by his sister. No findings were made by the District Judge in relation to this conflict in the evidence. However, the Appellant's statement that in September 2016 he "would have grabbed with both hands" an alternative sentence to custody if he had known about it is supported by the correspondence between the Appellant and Ms Maier between January and September 2016 and his application to the Court of Udine in June 2016 (refused on 15 September 2016 and notified to him by Ms Maier on 25 September 2016), which evidences his concern to avoid serving a term of imprisonment.

26. There are numerous substantial factors (in addition to the years of delay) that militate

against ordering extradition.

27. Fifteen years have now passed since the commission of the offence. The Appellant was 25 at the time. He is now 40. He has no convictions in any country save for the matters subject to these proceedings.

28. In February 2007 he moved to the UK with his then fiancée. They married in July 2007. Their son was born in the UK on 17 April 2008. He is a British citizen. He does not speak Romanian.

29. The Appellant has a settled life with a wife and son in the UK. He has a good employment record. His wife is an accountant. They have a substantial mortgage and other expenses which cannot be met on the salary of his wife alone; she would struggle with balancing her work and childcare commitments in the absence of the Appellant.

30. At the time of the permission application there was a concern that the Appellant may have cancer. Holman J directed that before the hearing he must obtain a report or other evidence from a gastroenterologist. There is now a letter dated 2 July 2018 prepared by Dr Adam Humphries, consultant gastroenterologist. He confirms that investigations rule out a cancer diagnosis but that the Appellant suffers "significant acid reflux". It is a condition that may be alleviated by lifestyle changes, vitamin supplements and over-the-counter prescription medications. He is under the supervision of a consultant.

31. The only additional factor to which I consider some, albeit only a little (the Appellant being regarded as a fugitive since 4 November 2016), weight may be attached militating against extradition is that the Appellant has been subjected for nearly a year to an electronically-monitored curfew (see *Toleikis v Klaipeda District Court, Lithuania* [2015] EWHC 904 (Admin) at paras 23-24; and *Bicioc v Baia Mare Local Court, Romania* [2017] EWHC 3391 (Admin) at para 36).

32. Having regard to the very lengthy unexplained delay in this case, the nature of the offence and the degree of seriousness attached to it by the Respondent in terms of sentence, and the numerous factors that militate against extradition, I have come to the conclusion that the extradition of the Appellant would amount to a disproportionate interference with his right to a private and family life under Article 8 ECHR.

Conclusion

33. For the reasons I have given, the first ground of appeal (s.20 EA 2003) is not made out; however I do consider that the District Judge erred in his conclusion in respect of the Article 8 ECHR issue (Ground 2). This is one of the exceptional cases where the public interest in extradition is outweighed by the Article 8 ECHR rights of the Appellant and his family.

34. Accordingly, this appeal is allowed.