IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

CO/4291/2017

[2018] EWHC 3548 (Admin)

Royal Courts of Justice

Tuesday, 31 July 2018

Before:

LORD JUSTICE SINGH

MRS JUSTICE CARR

B E T W E E N:

FUZESI Appellant

- and -

NATIONAL CRIME AGENCY Respondent

MS N. DRAYCOTT(instructed by Lawrence & Co Solicitors) appeared on behalf of the Appellant.

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

J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1We gave judgment in this matter on 16 July 2018, following a hearing on 13 July. Both appeals against extradition were dismissed. On 30 July 2018, an application by the first appellant ("Fuzesi") was issued either for permission to re-open his appeal under the Criminal Procedure Rules rule 50.27 in order to avoid real injustice or alternatively to certify a point of law of general importance and grant leave to appeal to the Supreme Court.

2The basis for the application to re-open the case is the judgment of the Court of Justice of the European Union in *ML* C-220/18 PPU (" *ML* ") delivered on 25 July 2018. It is said on behalf of Fuzesi to hold that in the context of systemic Art.3 ECHR (equivalent to Art.4 of the EU Charter) violations, such as in the present case, assurances may be provided and relied upon but that they must specify the prison in which the appellant will be detained and, unless there are no concerns about conditions there, must do more than "broadly guarantee" compliance with Art.3 ECHR and Art.4 of the EU Charter.

3Fuzesi submits that *ML* is binding on this court and overrules both our judgment and the earlier decision of the Divisional Court in *GS & Ors v Central District of Pest Hungary & Ors [2016] EWHC 64 (Admin)* , *[2016] 4 WLR 33*. We have not found it necessary to hold a hearing in order to dispose of these applications.

4It is necessary briefly to refer to the relevant parts of the Criminal Procedure Rules and the Practice Directions relating to extradition appeals. Rule 50.27, so far as material, provides:

> "(1) This rule applies where a party wants the High Court to reopen a decision of that court which determines an appeal or an application for permission to appeal.
>
> (2) Such a party must—
>
> (a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and
>
> (b) serve the application on the High Court officer and every other party.
>
> (3) The application must—
>
> (a) specify the decision which the applicant wants the court to reopen; and
>
> (b) give reasons why—

(i) it is necessary for the court to reopen that decision in order to avoid real injustice,

(ii) the circumstances are exceptional and make it appropriate to reopen the decision, and

(iii) there is no alternative effective remedy.

(4) The court must not give permission to reopen a decision unless each other party has had an opportunity to make representations."

5Rule 50.25 sets out the procedure for an application for permission to appeal from this court to the Supreme Court. It is unnecessary to set out its provisions in detail since they are well known, suffice to say that the procedure involves making an application both for a certificate of a point of law of general public importance and for permission to appeal.

6Rule 50.17, so far as material, provides:

"(1) The general rule is that the High Court must exercise its powers at a hearing in public, but …

(b) despite the general rule, the court may determine without a hearing …

(iii) an application for permission to appeal from the High Court to the Supreme Court

(iv) an application for permission to reopen a decision under rule 50.27 (Reopening the determination of an appeal) ..."

Application to re-open pursuant to rule 50.27

7This application is a surprising one. In circumstances where neither side invited this court to postpone judgment pending the decision in *ML* (see para. 34 (viii) of our judgment of 16 July) that possibility was expressly raised by the court at the hearing on 13 July. As was stated in para.38 of our judgment, the issue in Fuzesi's case, namely whether or not an assurance from Hungary must specify the particular prison where a requested person will be detained, did not arise in *ML. (* See the four questions for the court set out at para.40 of its judgment in *ML* and, in particular, para.47 where there is a summary of the issues raised.)

8As we have mentioned, rule 50.27 of the Criminal Procedure Rules requires the application to re-open to set out reasons why (a) it is necessary for the court to re-open its earlier decision in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to re-open the decision; and (c) there is no alternative effective remedy.

9In our judgment, there are no exceptional circumstances making it appro-

priate to re-open the decision. It was known to all at the time of the hearing before us that the judgment in *ML* was pending and expected in the near future, given the adoption by the CJEU of the urgent preliminary ruling procedure. We were invited to proceed nevertheless to give judgment and did so. Further, and in any event, we are not satisfied that there are properly arguable grounds of appeal and that it is necessary for the court to re-open its decision in order to avoid real injustice.

10The facts in *ML* briefly were that the German court in Bremen sought information as to which prison *ML* would be detained in and the prevailing conditions there. The Hungarian authorities responded that *ML* would be in Budapest Central for up to three weeks, then Szombathely for the duration of his sentence but that he might potentially be transferred to other prisons. The German court asked for information about Budapest Prison and other prisons to which he might be transferred. Hungary declined to answer but provided an assurance that the person concerned, irrespective of the facility he was detained in, would not be subject to any inhuman or degrading treatment within the meaning of Art.4 of the Charter as a result of his detention in Hungary. *ML* does not decide that in every "assurance" case the specific prison must be identified in order for a court to be satisfied that there is no real Art.4 risk. *ML* was addressing the position where particular prisons had been identified. All the comments in *ML* need to be read in that context. *ML* was not addressing the situation where, as here, no particular prison has been identified. Unsurprisingly, *GS* was apparently not cited to the CJEU, that being a decision of the High Court of this country. *ML* at paras. 77-87 states that the executing court does not have to be interested in prisons where there is only a possibility that the defendant might be detained. The comments at paras.87-101 addressed the situation where there is information as to where a person will be detained. Then, the executing court must consider the actual and precise conditions of detention in the prison or prisons in question.

11As to assurances, we note paras.115-116 of the judgment of the CJEU. Hungary had given a bold assurance of general compliance of Art.4 which was acceptable in the absence of specific indications that Budapest Prison would be in breach. That qualification makes sense when one is dealing with an identified prison, but that is not the present case. Where the skeleton argument on behalf of Fuzesi goes wrong, in our view, is the part in italics at para.13(a) where it is submitted:

> "Such an assurance may be acceptable (in the context of a specific identified prison.)"

That latter phrase does not in fact appear in the judgment of the CJEU. *ML* does not say in terms at least that one has to be able to identify a prison for an assurance to suffice. Here, we have a specific assurance which explicitly

refers to guaranteed personal space, albeit without reference to a specific prison. *ML* says at para.112 that the court must rely on that assurance at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Art.4 of the EU Charter.

Application to certify a point of law and for leave to appeal

12The point of law said to be of general public importance in the light of *ML* is:

> "In circumstances where extradition involves exposure to an extant systemic violation of Art.4 of the EU Charter of Fundamental Rights in that country's prison estate, is it ever permissible in law to extradite in the absence of identification of the prison(s) in which the requested person is likely to be detained and examination of the prevailing conditions there?"

13We do not consider this to be a point of law which arises on the facts of the present case. In particular, the question as formulated does not even mention the fact of the assurance that has been given by the respondent to this court in the present proceedings. Further, as we have said above, *ML* does not have the effect contended for on behalf of Fuzesi.

14For these reasons, we dismiss the application to re-open the appeal and the application for a certificate of a point of law of general importance, and leave to appeal to the Supreme Court.

For the benefit of the court associate, there is a draft of the order to reflect that oral judgment which will be given to you in a moment.

Unless there is anything else?

MRS JUSTICE CARR: No. Thank you.

MR JUSTICE SINGH: Thank you.