IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2018] EWHC 3369 (Admin)

CO/4074/2017

Royal Courts of Justice

Tuesday, 20 November 2018

Before:

MR JUSTICE OUSELEY

B E T W E E N :

GULAN — Appellant

- and -

REGIONAL COURT IN GLIWICE POLAND — Respondent

MR M. HENLEY (instructed by AM International) appeared on behalf of the Appellant.

MR J. SWAIN (instructed by CPS) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE OUSELEY:

1 This is an appeal against the decision of District Judge Bain as long ago as 31 August 2017. There were a number of interlocutory matters during the course of the appeal process, and the matter comes on before me for the full appeal after a period which is unusual.

2 At one level there are simple issues based upon the District Judge's decision relating to Article 8, the real issue argued below, but the decision has become a great deal more complicated than that, by reason of matters to which I shall come.

3 On the face of it, the appellant was ordered to be extradited to Poland on two warrants. EAW1 was issued on 19 December 2011 by a judge of the Regional Court in Gliwice, and certified by the NCA on 24 September 2016. EAW1 sought the return of the appellant to stand for offences of supplying drugs between April and September 2007 and an allegation of handling stolen goods in October 2007, together with a conviction component, namely the service of a prison sentence of two years following conviction for a series of offences relating to interference with and damage to motor vehicles committed in 2001, when the appellant was but 17 years old. The custodial sentence had been suspended, but was activated following further offending.

4 EAW2 was an accusation warrant in respect of an offence of supplying cannabis on a date between July and September 2009. The EAW was issued in 2017 by a judge of the Regional Court and certified on 5 May 2017. The allegation was that the appellant had supplied an individual with hashish on a number of occasions, but the total of hashish was not less than 7 grams for which he would have received a total of 140 Zloty; the amount could, therefore, have been a little more.

5 The judge concluded that the appellant was a fugitive in relation to each EAW, noted that he was a single man with no dependants in the UK or Poland, who had worked steadily since arriving in the UK in the spring of 2008, and who had not committed any crimes here. The judge took the view that, notwithstanding those factors, he should be returned. That decision, made on 31 August 2017, was made but a month or so after the appellant was taken into custody on 11 July 2017, and he has remained in custody ever since, making a total of around 16 months in custody.

6 Matters began to get complicated after the appeal was launched. Some of the matters I can deal with shortly. There is now a contention that the allegation of handling stolen goods was not an allegation with dual criminality because the language of the allegation did not identify any dishonesty or refer to dishonesty. It said that the appellant had "accepted a car amplifier . . . which had been stolen as a result of a burglary . . ." There was no allegation in that that the appellant was dishonest or knew the goods had been stolen. Mr Henley, for the appellant, submitted, and Mr Swain, for the requesting authority, accepted that that language was not good enough to satisfy to the criminal standard the requirement of dual criminality. That is correct because it contained inadequate material to impel the conclusion that there was *mens rea* on the part of the appellant.

7 Mr Swain provided further information for the court when that matter was raised; it was not raised before the District Judge. The further information said that the appellant acted dishonestly and knew that the car amplifier had been stolen. That

information is contained in the letter from the Circuit Public Prosecutor; as Mr Henley pointed out it therefore did not meet the requirements of coming from the Judicial Authority itself. But that, in my judgment, is not a sufficient answer because that information comes under cover of a letter dated 8 March 2018 from the Judicial Authority enclosing the requested information. The Judicial Authority is adopting that information as if it were coming directly from the Judicial Authority. When the Judicial Authority provided that further information in my judgment, it is sufficient to make good the deficiency that would otherwise exist.

8 The second issue, which I can deal with shortly, is that it was accepted by the requesting authority, pursuant to further information obtained after the hearing before District Judge Bain, that although the appellant was a fugitive in relation to the first EAW, he was not a fugitive in relation to the second EAW. That, submits Mr Henley, has significance for a number of the other arguments which he wished to raise, notably in relation to s.21(a) and proportionality, and Article 8. Those arguments depend significantly on the next issue, a slightly complicated one, to which I come, which concerns the various travails of the EAWs and the EAW system.

9 The reason for that is that the form of EAW1, which the parties and the District Judge had, was not the form which the Polish authorities intended them to have. By an order, which has not been made available to the court, dated 22nd August 2016, changes were made to EAW1. Mr Henley submits that, in effect, what happened was that EAW1 was withdrawn and never replaced. But the sequence of events matters.

10 It was necessary to start with the order of 26 August 2016. By that order two changes were made to the version of the EAW which the District Judge was provided with. The first was that for certain offences, the limitation date had been due to expire in 2017 but had now been extended by a change in the law. This changed limitation date was inserted into the EAW. The second was that certain dates of the drug offences, previously given as September 2007, to adopt the general formulation, were narrowed to particular dates within September 2007. A replacement Form A, summarising the EAW, was also provided. A certificate was then issued, as the District Judge referred to.

11 The EAW was unchanged, however, in saying that the issuing judicial authority was Helena Filarovska-Kopec, a regional High Court Judge, and the decision was 19 December 2011. The certificate by the NCA says that:

> "I hereby certify that the European Arrest Warrant issued by Helena Filarovska Kopec, Judge of the Regional Court in Gliwice Poland, on 19 December 2011 for the arrest and extradition of [the appellant] was issued by a Judicial Authority of a category 1 territory which has the function of issuing arrest warrants."

12 The EAW in the bundle is an EAW covered by that certificate. It is also clear from an examination of the structure of the Polish text that the EAW in the bundle is the unamended form with the original limitation dates, and the original broader expression of the offence dates. It is, however, accompanied by a Form A supplementary information, which cross-refers to the same Schengen reference number on the certificate, but also adds under the heading "Important Notice 'Text'.

This form cancels and replaces the former one relating to Public Prosecutor's case Part 1/2." I infer from that that the EAW to which the certificate attached was the one before the Order changes, but the Schengen Information System form related to the later one. Such a muddle seems to me to be no great surprise when an Authority seeks to amend an EAW.

13 The question, on the basis that those are the facts, is what is the legal significance of what has happened? Mr Henley submits that, in effect, what happened was that the EAW, which the District Judge had in front of him, had been withdrawn by the Polish Authorities, so there was nothing upon which the District Judge's decision could bite. The corrected version was not in front of the District Judge and, on the basis of the finding I have made, had not been certified by the NCA. So, if one examines the position before the Judge his decisions, although interesting, were of academic interest only and what he ought to have done was discharge the appellant and that was that. He could then, of course, be re-arrested immediately, on the second warrant (the corrected one) and much good would have been achieved. But, nonetheless, if the argument is good, there is no jurisdiction and that is the end of the matter.

14 In my judgment, that argument is not correct. I think one needs to examine, first of all, what was being done by the requesting Judicial Authority? They were not replacing one warrant with another, they amended the warrant correcting two parts, neither of which directly go – or go at all – to the certification functions of the NCA under s.2. The same Judicial Authority, the same Judge, the same country, the same offences, with, for these purposes an irrelevant variation to the offending date, are referred to. There is but one EAW. Secondly, nothing that the NCA did to that could amount to a withdrawal of the warrant, and nothing that the requesting Judicial Authority did to it could have amounted to the withdrawal of a warrant. It was a correction only. This is not a case, as has happened in others, where there was a withdrawal followed, as would have to be the case under s.41, by a discharge of the appellant on the warrant.

15 So what, then, is the significance of the fact that the District Judge, as I find to be the case, did not have the version of the single EAW, corrected as it should have been, with the correct text? In my judgment, that goes to the question, not of jurisdiction, but whether there was any unfairness in what happened. There remained a varied EAW before her, changed in respects which related to and could give rise to no argument before the District Judge, nor to a jurisdictional issue. The reality is that, although the District Judge should have had the additional text, it made no difference to either the certifying of it or to the content of it. No point that could have been taken was removed and no possible prejudice was suffered beyond the fact that there was a good deal of muddle which then ensued, which had to be resolved. In my judgment, what the Polish Authorities did, although capable of giving rise to the confusion which then ensued, is not legally different from the provision of further information independently from a change to the warrant, explaining that the limitation periods had changed, and they were particularly focusing on the offence dates. It would have been noted, but one would have scarcely thought any more of it than that. The fact that they chose to do it by way of a correction to the version, which was held by the Schengen Information System, is neither here nor there. I do not consider that the provisions of s.240 make any difference to that.

16 I have considered the various authorities which the parties have cited to me on this. I do not consider, interesting though the various muddles that it is possible to get into are, that *Zmyslowski* [2016] EWHC 3271 (Admin) suggests otherwise. Although I can understand why it was deployed by Mr Henley, who may feel that when he says there is one EAW the court holds it is two, and when he says there are two the court holds it is one. The crucial difference in that case is that the appellant was discharged by a court on the EAW; it was seen as a separate EAW. That is not what happened here.

17 It seems to me then that the decision in *Budai v Hungarian Judicial Authority* [2017] EWHC 229 (Admin) is against him, and the approach adopted by Whipple J in *Ulaszonek v Polish Judicial Authority* [2018] EWHC 2016 (Admin) in which she treated the variation or amendment of a warrant as no different from the provision of further information, is apt. In my judgment, the essence of the decision is that it is possible to amend the warrant to the extent that one could supplement it with further information, and nothing that happened here really gives rise to any argument about validity. The Regional Court confirmed on 4 April 2018 that the amended EAW was not a new one but an amendment and, although it confirmed that the old version had been withdrawn and replaced, hence Mr Henley's argument, that is simply dealing with the administrative problem of physically having in the system two differently worded EAW forms for precisely the same EAW. There was no withdrawal in law. So, for those reasons, I do not accept Mr Henley's submission that there should have been a discharge, or that the District Judge acted without jurisdiction.

18 On the basis that EAW1 is valid, I now turn to consider briefly the consequences of s.14 for EAW2. I accept Mr Swain's submission that it is not adequate for a person to say that they are concerned that they will have some difficulty in putting forward an alibi in order for them to demonstrate that extradition would be unjust. The alibi here is the alibi that the appellant was in England and not in Poland at the time of the 2009 drug offences. He has given no evidence to suggest that that would be particularly difficult.

19 The next point Mr Henley raised was s.21(A) of the Extradition Act. This, because the EAWs were both accusation EAWs in whole or large measure, created a duty on the District Judge to consider proportionality. Mr Henley points out, correctly, that the District Judge did not consider s.21(A) as she ought to have done, and the consequence of that is, as both parties agree, that the task of considering proportionality falls upon me.

20 The particular issue, pursued before me by Mr Henley, concerns the seriousness of the conduct alleged to constitute the extradition offence. For these purposes he points particularly to the seriousness of the drug offences. He submits that I should consider each of the offences, although being entitled to examine the totality of the offending and the gravity of each. What, in my judgment, is the position as the result of the Criminal Procedure Practice Direction, para.50, is that although I should examine the seriousness of each one separately, there are exceptional circumstances for certain offences in which multiple counts, and the fact that extradition is sought for other offences, can mean that what would otherwise be disproportionate under s.21(A) is proportionate. Mr Swain points out that CPPD the tabulated offences, which are minor drug offences, are offences of possession. Here, the offences alleged are offences of supply, albeit, it appears, on a small scale, but Mr Swain is right that there

are, whichever way one puts it, either multiple counts, or extradition sought for other offences.

21 So far as EAW1 is concerned, I have no difficulty concluding that extradition for the accusation offences would not be disproportionate at all because of the number of offences and the other offences included in the accusation frame. I have to say I have real reservations about EAW2. It seems to be a very insignificant piece of offending, although it is one which, because it is supply and not simple possession, comes into the more serious category. It is not clear why the Polish authorities thought it necessary to issue a separate EAW some years after the other one, in order to extradite this appellant on really quite a small charge. If it stood by itself it would, in my judgment, not be proportionate at all to extradite this individual on that offence. The question really is whether, when taken with the other offences, extradition on it is proportionate. I appreciate it is for supply, but this offending is of some antiquity, 2009; it involves a very minor supply offence; it is inconceivable that any significant custodial sentence could rationally be passed on its own, or that it could significantly affect any sentence following conviction on any of the other offences. However much respect to be accorded to the decision of another Judicial Authority, I have come to the conclusion that extradition on EAW2 is just disproportionate, event with the other offences.

22 The appellant is not a fugitive either in relation to that offence – another factor which the District Judge, on the information she had, may have got right, but not on the information now before this court, and accepted by Mr Swain.

23 That then leaves Article 8 and the EAW1. As I have said, there is a two year sentence to be served by the appellant on the conviction offence. He has not been convicted on the accusation offences, and it is difficult to know how they would have been treated, had there been convictions which were sentenced at the same time as the suspended sentence for the conviction offences was activated. The only point that Mr Henley raises is the fact that the appellant has already served 16 months in custody in the United Kingdom (or England and Wales) and that would be the equivalent of serving over two and a half years in custody in the United Kingdom. I appreciate that the release provisions are different in Poland but, nonetheless, it is a very substantial proportion of the maximum he could serve for the conviction offence. As I have said, had he been convicted of the other offences and sentenced at the same time, his sentence might well have been but little increased, if at all. That is, however, a matter of speculation, and Mr Swain makes the point, perfectly fairly, that the opportunity of being dealt with for those offences at the same time lay in the appellant's hands, but he declined to avail himself of it. I also recognise that, in totality, they amount to a significant level of offending in relation to which he is admittedly a fugitive.

24 I have taken very careful consideration of the period of time that he has spent in custody, but I have concluded that that does not make extradition disproportionate; sentencing for the other offences will be for the Polish Courts, and their consideration of the significance of his having spent 16 months in custody in the United Kingdom.

25 For those reasons, I allow the appeal in relation to EAW2 and discharge the appellant on it, but dismiss the appeal in relation to EAW1, upon which the appellant will be extradited.

MR JUSTICE OUSELEY: Mr Swain, will you convey that to Mr Henley?

MR SWAIN: I will.

MR JUSTICE OUSELEY: It may be he might have guessed that result anyway, but if you convey that to him.

CERTIFICATE

Opus 2 International Ltd. hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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Tel: 020 7831 5627 Fax: 020 7831 7737

admin@opus2.digital

This transcript has been approved by the Judge.