Neutral Citation Number: [2019] EWHC 3489 (Admin)

Case No: CO/336/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/12/2019

Before :

LORD JUSTICE SINGH
MRS JUSTICE MCGOWAN

- -

Between :

Sasho Mihaylov Asenov	**Appellant**
- and -	
Local Court of Arad Romania	**Respondent**

- -
- -

Mr Malcolm Hawkes (instructed by **Oracle Solicitors**) for the **Appellant**
Mr Jonathan Swain (instructed by **CPS**) for the **Respondent**

Hearing dates: 28/11/2019

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Approved Judgment

Mrs Justice McGowan:

Introduction

1. This case concerns the application of the practice of the aggregation and disaggregation of sentences by a Romanian judicial authority and its effect on extradition proceedings in a conviction warrant case.

2. The Appellant appeals against the order for his return to Romania made by the Westminster Magistrates' Court on 22 January 2019. District Judge Griffiths ordered his return to serve a 12-month sentence imposed by the Local Court of Arad on 7 June 2017 for an offence of driving without a valid driving licence.

3. The Appellant is a Bulgarian citizen born on 19 May 1979. He is the subject of a conviction warrant, issued by a Romanian judicial authority on 14 July 2017 which was certified by the National Crime Agency on 8 August 2017. Romania is a Category 1 territory.

Background

Factual History

4. In July 2014 he was convicted by the Nova Zagora Court in Bulgaria of an offence of driving with excess alcohol. His driving licence was suspended. He was also sentenced to a term of four months imprisonment suspended for three years for that offence.

5. On 13 February 2015 the Appellant was detained in Romania at a border crossing for offences of driving without a licence and forgery, namely the possession of a forged driving licence. Proceedings for those offences were commenced in Romania.

6. Meanwhile, in July 2015 the Appellant came to the UK with his wife and daughter, dob 15/5/1999. His son, dob 21/4/2001, joined the family later in 2015. The Appellant has been in employment and has not committed any offences while resident in the UK.

7. On 28 April 2016, in his absence, he was convicted by the Judicial Authority in Arad, Romania of the two offences for which he had been detained at the border on 13 February 2015:

    i) On 13 February 2015, the possession of a false driving licence (use of a forged document); and

    ii) On 13 February 2015 driving without a driving licence.

8. He was sentenced to a term of six months imprisonment for the use of a forged document and a 12-month term for the offence of driving without a driving licence. On that date the court aggregated the two sentences into a term of 14 months imprisonment.

9. On 28 June 2016 a European Arrest Warrant, ("EAW"), was issued in relation to those convictions. The Romanian authorities state that he had been given proper

notice of the requirement to attend. The Appellant contends that he was unaware of the hearing. The District Judge found that he was not a fugitive.

10. On 27 August 2016 the Appellant returned to Bulgaria. On 28 August 2016 he was arrested in Bulgaria and that EAW was executed.

11. He was detained on the EAW. The judicial authority in Bulgaria elected to enforce the prison sentence, pursuant to Article 4(7) of the Framework Decision 2002, which provides for the optional non-execution of an EAW where the subject is a national or resident of the requested state and that state undertakes to execute the sentence in accordance with its domestic law. On 15 February 2017, the Burgas District Court in Bulgaria elected to enforce the sentence in respect of the offence of possession of a false driving licence only, requiring the Appellant to serve 6 months imprisonment for that offence. The Bulgarian court did not enforce any part of the sentence for driving without a licence.

12. Driving without a driving licence is not a criminal offence in Bulgaria. Therefore, the judicial authority took no action on that matter. He was released on 7 March 2017, having served six months and seven days in respect of the offence of possession of a false driving licence

13. The suspended sentence imposed in 2014 was not activated on that occasion.

14. Following the action of the Bulgarian court, on 7 June 2017 the Judicial Authority of Arad, Romania *'proceeded to demerging the sentence of 1 year and 2 months'* and imposed a sentence of 12 months for the offence of driving without a licence. The court also *'restores the individuality of the increment of 2 months in prison'*. The information states that the decision of the Bulgarian court '*does not absolve'* the Appellant from serving the 12-month sentence specified in the EAW.

15. It is accepted that the course followed by the authority in Romania was in accordance with the domestic sentencing regime.

16. On 27 June 2017 a Romanian national warrant was issued by the court in Arad for the offence of driving without a licence and the sentence of 12 months imprisonment.

17. On 5 July 2017 the Appellant was imprisoned in Bulgaria on the activated suspended sentence of four months imprisonment imposed in 2014 for the original offence of driving with excess alcohol.

18. On 14 July 2017 Romania issued, EAW 5494/55/2017, that is the warrant at the centre of these proceedings. On 8 August 2017 it was certified by the NCA.

19. The Appellant was released from the four-month sentence on 2 October 2017. He remained in Bulgaria for about a year. He returned to the UK from Bulgaria on 16 October 2018.

Domestic Proceedings

20. He was arrested on the EAW on his arrival at Gatwick. He appeared before the Westminster Magistrates' Court on 17 October 2018 and has been on bail since that date.

21. The hearing took place on 21 November 2018 and 19 December 2018. Judgment was reserved and was handed down on 22 January 2019.

22. The appeal is brought on three grounds:

Ground 1: s.12 Double Jeopardy

Ground 2: s. 14 Passage of time

Ground 3: s.21, Article 8, proportionality.

Leave was granted by Yip J on 27 September 2019 on all grounds.

Material Legislation

23. The District Judge was asked to consider submissions under ss. 12,14 and 21 of the Extradition Act 2003, ("the Act") and the European Convention on Human Rights, ("the Convention"). Further, she was asked to rule on whether there had been an abuse of the process of the court. In particular, this case called for consideration of Article 26 of the European Framework Decision of 13 June 2002.

24. Rule against double jeopardy-s.12.

> *"A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption—*
>
> *(a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;*
>
> *(b) that the person were charged with the extradition offence in that part of the United Kingdom."*

25. Passage of time-s.14

> "*A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—*
>
> *(a) committed the extradition offence (where he is accused of its commission), or*
>
> *(b) become unlawfully at large (where he is alleged to have been convicted of it)"*

20. Article 26 Framework Decision:

> *"The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed."*

26. The EAW states that the Appellant has guarantees, described as 'legal warrantees'(sic). Under Article 466 of the Romanian Criminal Code he may re-open 'the criminal trial' within 10 days of his physical extradition.

Decision of the District Judge

27. The District Judge gave a detailed reserved judgment. She found that the Appellant was not a fugitive. She concluded that there were no bars to the grant of the extradition request and that extradition would not be a disproportionate interference with the Appellant's rights under the convention.

Submissions

Appellant.

Ground 1: s.12 Double Jeopardy.

28. Mr Hawkes, on behalf of the Appellant, argues that the original aggregation of the two sentences resulted in there being only one sentence of 14 months. He relies on the fact that after the merger the sentence had only one reference number. He submits that having aggregated the sentences and ordered that a total period of 14 months should be served, any subsequent disaggregation or demerging process was unfair. In any event it could, at most, only ever leave the balance of 14 months less the six served in Bulgaria outstanding. It is argued that it is a fundamental error to treat the sentence as having two parts. Accordingly, he submits that to return the Appellant to serve a sentence of 12 months is to offend against the principle of double jeopardy.

29. It is submitted that the District Judge made an error in treating the sentence as having two parts. Mr Hawkes submits that it might mean that the Appellant will be required to serve a longer total sentence. He argues that this fails a simple test of fairness. He accepts that the District Judge was troubled by this aspect but contends that her considerations reached the wrong conclusion.

30. He further submits that the District Judge failed to consider the burden and standard of proof to be applied in cases of double jeopardy.

Ground 2: s. 14 Passage of time.

31. It is conceded that the passage of time is not as great a factor in this case as in many other cases. Mr Hawkes submits that s. 14 of the Act introduces a twin test of oppression and injustice. He recognises that only four years have elapsed between the offending and return but invites this court to look at the nature of the offending; the number of times that the Appellant has been arrested and most importantly the fact that the sequence of events and their consequences are not the fault of the Appellant.

He accepts that this is a conviction warrant but submits that the passage of time is a relevant matter if the result would be unjust.

Ground 3: s.21, Article 8, proportionality

32. Mr Hawkes invites this court to consider the seriousness of the conduct. He submits that return would be a disproportionate outcome. In England and Wales driving without a valid licence is not an imprisonable offence and it is not a crime at all in Bulgaria. He submits that it is a minor driving matter and that, of itself, provides a ground for discharge. By analogy he draws comparison with the ***Criminal Practice Direction Amendment No.2 [2014] EWCA Crim 1569*** which deals with "minor driving matters". He recognises that the CPD applies to accusation warrants but argues that this case involves a conviction in absentia and the Appellant does have right to apply to re-open the proceedings on return, which should mean it is treated as though analogous to an accusation warrant.

33. It is argued that the Appellant has deep ties in the UK here. His family life is here. He submits that the public interest element of the test in extradition is diminished because the Appellant has already served a prison sentence for the more serious offence.

34. The relative lack of severity of the offending should, he submits, not tip the balancing exercise to be carried out by the court considering extradition in favour of return. The Appellant has a settled family life in the UK.

35. The core submission that Mr Hawkes makes is that return would be unjust and disproportionate because the effect of disaggregation or 'de-merger' of the sentences will mean that the Appellant may serve longer than the original sentencing court intended. His extradition is sought so that he would serve a further 12 months, in addition to he six served in Bulgaria, by a court that thought 14 months was the appropriate sentence.

36. The submission relies, additionally on the finding that the Appellant is not a fugitive. He did not deliberately evade the sentence imposed.

37. Mr Hawkes conceded that the right to apply to re-open his case on return does provide a remedy. He points out that any remedy he might have in Romania might well only be accessed from prison. There is no evidence about the procedure but the Appellant believes he would go into custody, he presumes he could apply for bail but Mr Hawkes submits that his chances of release pending the re-opening of his case are not likely to be good.

Respondent

38. The Respondent argues that the District Judge applied proper and fair consideration to all relevant matters. She reached decisions that she was entitled to reach on the facts and submissions and that her judgment is not arguably wrong.

Ground 1: s.12 Double Jeopardy.

39. The Respondent does not accept the characterisation of this case as offending the rule against double jeopardy. The Appellant is not being convicted twice nor being

convicted of an offence for which an acquittal has been recorded. These are two sentences for two offences. They might have been reduced if served at the same time but are not rendered arguably unlawful by virtue of being separated back into their constituent parts.

40. Mr Swain submits that Romanian domestic law gives the judicial authority the power to merge or aggregate sentences which they can subsequently "de-merge" or disaggregate. He submits that the Bulgarian judicial authority did not re-sentence the Appellant, rather they imposed the original sentence for the charge they recognised as a criminal offence and took no action on the matter which does not attract criminal sanctions under their domestic law. The proceedings in the Bulgarian court did not deal with the conviction or acquittal of the Appellant on any matter, it simply executed the material part of the EAW, under Bulgarian domestic law, for the implementation of the only criminal offence and sentence they recognised.

41. The Respondent contends that it is not for this court to go behind the application for his return to serve the 12-month period. He acknowledges that Article 26 is binding on the Romanian authorities and they have a duty to comply.

42. The Appellant has the right to re-open proceedings on return and that provides him with a route of challenge which the UK should accept as a proper means of challenge. He can argue that it would not be lawful to order him the serve part or all of the balance of the sentence on his return. On any view, it is submitted, there remains at least eight months of the aggregated sentence to be served.

Ground 2: s. 14 Passage of time.

43. Mr Swain points out that the provisions of s.14 and the CPD apply to accusation not conviction warrants. Return sought on an accusation warrant does not deal with any likely sentence. The Act does not set out sentence or likely sentence as a relevant consideration. In any event he argues that the length of time is acceptable, given the appellant's failure to appear before the judicial authority in Romania.

Ground 3: s.21, Article 8, proportionality

44. He argues that the interference with the Appellant's family life would not be disproportionate and would not fail the test in ***Polish Judicial Authorities v Celinski and others*** *[2015] EWHC 1274 (Admin)*. The Appellant's children are adults, his wife has their support in England if she chooses to remain.

Discussion

45. This court should only interfere with the decision of the District Judge if it is wrong. It is not arguable that because the regime operates differently, even if more severely, that an application for extradition should be refused. If the regime meets the criteria of the convention it is not for the UK to refuse an application to return a convicted offender to serve all or part of his sentence. If there is an argument that a national regime does not comply with Convention requirements then, provided there is an adequate route of review or challenge, that should be pursued domestically.

46. Firstly, it is settled that the public interest in the mutual respect of states in honouring extradition agreements is very high. The statement of principle is set out by Lord Thomas CJ in *Celinski* at paragraph 10:

> *"…the decisions of the judicial authority of a Member State making a request should be accorded a proper degree of mutual confidence and respect. Part I of the 2003 Act gave effect to the European Framework Decision of 13 June 2002; it replaced the system of requests for extradition by Governments (of which the judicial review before the court in respect of the Polish national is a surviving illustration). The arrangements under Part I of the 2003 Act operate between judicial authorities without any intervention of governments. In applying the principles to requests by judicial authorities within the European Union, it is essential therefore to bear in mind that the procedures under Part I (reflecting the Framework Decision) are based on principles of mutual confidence and respect between the judicial authorities of the Member States of the European Union. As the UK has been subject to the jurisdiction of the CJEU since 1 December 2014, it is important for the courts of England and Wales to have regard to the jurisprudence of that court on the Framework Decision and the importance of mutual confidence and respect"*

47. Secondly, the difference in the operation of a sentencing regime in a member state and the UK should not be a gauge against which extradition is determined in cases of conviction warrants. Romanian law allows for the aggregation and subsequent disaggregation of sentences. UK law does not. However, the sentencing regime in the UK may reduce or balance sentences by the application of the "totality principle". The administrative regime in the UK grants remission after an individual has served a shorter period than that imposed by the court. Neither of those aspects of the domestic sentencing regime operate in many other states. Those different approaches are variations which demand and must be given respect in other states. It is not for the UK to regard differences in the Romanian regime as providing a sound basis for refusing an otherwise valid request for extradition. The court has not been referred to any authority which deals specifically with the issue in this case. The national practice of the aggregation and disaggregation of sentences is analogous to the difference in the principles of activating suspended sentences as discussed in *Celinski (supra).* There must be due respect for such national differences.

48. Thirdly, the domestic remedy lies in the Romanian Criminal Code. Article 466 gives a right to apply to re-open the "criminal trial" within 10 days of the Appellant's return.

49. Fourthly, if Mr Hawkes is right in his submissions about Article 26 of the Framework Decision, that point can be made to, and will be accepted by the Romanian courts, since they are bound by EU law. In that sense EU law is part of domestic law. In the event of a failure of the judicial authorities in Romania to apply domestic law (including EU law) properly or to act in breach of their Convention obligations there is a right to make an application to the European Court of Human Rights. That route is available to the Appellant in the event that his protection under domestic law

(including Article 26 of the Framework Decision) or any Convention right is not respected. Of course the only rights which he would be able to rely on in that Court are the Convention rights but, if his arguments in the Romanian courts succeed, he will have no need to resort to the European Court of Human Rights. If they fail in the Romanian courts, he will have the opportunity to complain about a breach of his human rights to the European Court of Human Rights.

50. Fifthly, there will undoubtedly be interference with the Appellant's family life. That is the inevitable consequence of any custodial sentence. The assessment of whether that interference is disproportionate is essentially the function of the District Judge in her carrying out the balancing exercise between the competing considerations. The District Judge in this case carried out a careful and thoughtful analysis of all matters raised. The test for this court as enunciated in *Celinski* is a simple, though not necessarily an easy, one. Did the district judge make the wrong decision? She heard relevant evidence, considered all submissions and concluded that extradition was not a disproportionate interference with the Appellant's family rights. This court should not interfere unless that decision is wrong. Romania takes a more severe view of driving without a licence than the UK. That is a view that the court is bound to respect. Balancing, as she did, the relative seriousness of the offending, the time since conviction and the effect on his family it cannot be argued that her decision was wrong.

Conclusion

51. The decision of the District Judge is not arguably wrong. For the reasons given I would dismiss this appeal.

Lord Justice Singh:

52. I agree.