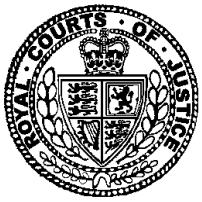

Neutral Citation Number: [2020] EWHC 1800 (Admin)

Case No: CO/310/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2020

Before :

LORD JUSTICE MALES
MR JUSTICE JULIAN KNOWLES

- -

Between :

MARIS ZELENKO	**Appellant**
- and -	
PROSECUTOR GENERAL'S OFFICE OF THE REPUBLIC OF LATVIA	**Respondent**

- -
- -

David Josse QC and John Crawford (instructed by **Tuckers Solicitors**) for the **Appellant**
Alexander dos Santos (instructed by **CPS**) for the **Respondent**

Hearing date: 1 July 2020

- -

APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

1. This is the judgment of the Court to which both of us have contributed.

2. This appeal under s 26 of the Extradition Act 2003 (EA 2003) has been restored before us in unfortunate circumstances. The Appellant's extradition has been requested by Latvia so that he can stand trial for drugs offences. In English law terms the offences would be possession and possession with intent to supply. The drug in question is methamphetamine, which in England and Wales is a Class A drug. He faces a minimum period of two years in jail if he is convicted of possession with intent. On 17 January 2019 Deputy Senior District Judge Ikram ordered the Appellant's extradition under Part 1 of the EA 2003. He appealed to the High Court against the extradition order and was granted permission by Yip J.

3. The hearing before the district judge and the issues on the appeal primarily focussed on the Appellant's health. He is HIV positive and also at one time suffered from hepatitis C, although his viral load has been cleared after treatment. However, he now has a cirrhotic liver and is at risk of developing liver cancer. The medical evidence from two practitioners (Dr Lawrence John and Dr Dawn Friday) was (and is) to the effect that the Appellant requires liver tests every six months so that if cancer does develop it can be spotted and treated early. He also requires a regular gastroscopy to guard against the risk of oesophageal varices, which are often associated with cirrhosis and which, if they rupture, can lead to death. He also requires drugs to combat his HIV infection.

4. I heard the Appellant's appeal sitting as a single judge and gave judgment on 3 October 2019. The Appellant argued that his extradition is barred by s 25 of the EA 2003. This provides:

> *"Physical or mental condition*
>
> (1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
>
> (2) The condition is that the physical or mental condition of the person in respect of whom the Part 1 warrant is issued is such that it would be unjust or oppressive to extradite him.
>
> (3) The judge must—
>
> (a) order the person's discharge, or

> (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied."

5. He argued that the evidence did not show that he would get the treatment he needs in prison in Latvia and that the district judge had been wrong to conclude otherwise.

6. My judgment is reported at [2019] EWHC 3840 (Admin). In summary, I found that the judge had been wrong to reject the Appellant's argument in relation to s 25. I said at [24] of my judgment:

> "24. The appellant has specific medical needs; namely, six-monthly monitoring and testing to ensure that any liver cancer is detected early enough. He also requires a gastroscopy every three years. Timely monitoring of patients at risk of cancer is vital in providing the best chance of survival should it develop. Delayed monitoring can, in some cases make, the difference between life and death. The reply from Latvia is not in my judgment sufficiently precise to have enabled the judge properly to conclude that proper and timely treatment will be provided to the appellant given the context. That context, as I have made clear, is a serious life-threatening illness which may develop unless the appellant receives appropriate and on time testing. Because of the qualifications set out (very fairly) in the government's response, it is impossible to conclude from the evidence that the appellant will receive proper and timely treatment, despite the existence, as I have said, of appropriate expertise and facilities in principle."

7. However, rather than allowing the appeal, for the reasons I explained at [25], I allowed the Latvian authorities the opportunity to supply suitable undertakings that the Appellant would receive the necessary treatment. I said at [26]:

> "26. I will therefore give the Latvian judicial authority a period of 14 days from today to supply an undertaking that the appellant will receive appropriate monitoring and surveillance at the Latvian Infectiology Centre for the development of liver cancer, including alpha-fetoprotein and liver ultrasound scans not less than every six months and gastroscopy not less than every three years. In the event that such an undertaking is received, then the appeal will stand dismissed. If such an undertaking is not received, then the appeal will stand as allowed on the basis that the judge should have decided the question under s 25 differently and he should have concluded that because of the appellant's medical condition it would be oppressive to extradite him to Latvia."

8. This was recorded in an order, the relevant part of which read:

> "3. Upon such an undertaking being provided to the Court and the Appellant by 4pm on 17th October 2019, the appeal shall stand dismissed;
>
> 4. If such an undertaking is not provided to the Court and the Appellant by 4pm on 17th October 2019, the appeal shall stand allowed on the grounds that the judge should have decided the question under s25 of the Extradition Act 2003 differently and discharged the Appellant."

Events following the 3 October 2019 judgment

9. Following my judgment, on 6 October 2019 the CPS lawyer in charge of the case wrote to the Latvian Issuing Judicial Authority in the following terms:

> "I would be grateful if you could provide an undertaking that the Requested Person shall receive appropriate treatment upon return including: (a) Surveillance and tests of his liver (alpha –fetoprotein and liver ultrasound scans) not less than every 6 months; (b) Gastroscopy to be carried out not less than every 3 years; (c) Being held in the Latvian Infectology Centre or other establishment which permits appropriate surveillance and testing as set out in a) and b) above."

10. Two documents dated 9 October 2019 were received in response from Latvia under cover of a letter dated 10 October 2019 from the General Prosecutor's Office. We will set out the detail later.

11. However, these responses were not filed and served by 4pm on 17 October 2019, as I had ordered, and that deadline expired.

12. On 18 October 2019 the Appellant's solicitor wrote to the Court advising that no undertaking had been provided and asking for confirmation that the appeal should stand allowed pursuant to [4] of my order. After further correspondence in which the Appellant's solicitor sought confirmation of the status of the case, the matter was brought to my attention on 28 October 2019. On the following day I ordered that the CPS should file submissions and a witness statement explaining what had happened by 31 October 2019, and that the Appellant should reply by 4 November 2019.

13. The CPS lawyer frankly admits in her witness statement that it was her fault that the Latvian responses were not filed and served by 17 October 2019:

> "The reason for not serving it on time in compliance with the court order of 4pm on 17 October 2019 was simply due to human error. I have a diarised system for all of my

> High Court cases and unfortunately I had failed to record the date for serving the undertaking.
>
> There was no intention on my part to restrict Mr Zelenko's rights or impede the Court in its duty to deliver justice. I would like to apologise to all parties if this has, in fact, been the result of my error in this case."

14. The witness statement was accompanied by the responses from Latvia and an application to extend time to 31 October 2019 for their filing and service.

15. On 5 November 2019, following an extension by the Administrative Court Office (ACO), the Appellant lodged submissions in response, these are dated 4 November 2019 (the November submissions). Four submissions were made, the principal one being that the effect of my 3 October 2019 order was that the Appellant was discharged on 17 October 2019 at 4pm when the CPS failed to file and serve an undertaking in time. The other submissions were repeated before us on the appeal and we will set them out later.

16. Following receipt of these submissions, on 6 November 2019 I made a further order that the CPS should file submissions in reply by 8 November 2019. Unfortunately, through an oversight by the ACO, this order was never served on either party.

17. Neither party pursued the matter, and so over six months passed before, on 15 May 2020, the ACO realised its mistake. Again, the matter was brought to my attention and on that day I made a further order extending time to 31 May 2020 for service of the Latvian responses.

18. On 18 May 2020 Mr Josse QC and Mr Crawford on behalf of the Appellant lodged further submissions (the May submissions) echoing the November submissions and requesting that the case be listed for an oral hearing.

19. On 1 June 2020 the Respondent filed submissions in response to the Appellant's November and May submissions.

20. I subsequently directed that the appeal be restored before a Divisional Court.

The parties' submissions on the appeal

The Appellant's submissions

21. On behalf of the Appellant, Mr Josse QC raised six points, the first five of which broadly mirror those which were argued in the November and May submissions. Mr Josse and Mr Crawford submitted that:

    a. There is no jurisdiction for the Court to hear the application to extend time under Crim PR 50.17(6)(a). As of 4pm on the 17 October 2019 the Appellant had been discharged under the EAW pursuant to the 3 October 2019 Order, therefore the Court is *functus officio*.

b. The wrong application has been made by the Respondent. The only application available to it would have been apply to re-open the case under Crim PR 50.27, however such an application has not been made and in any event would have been bound to fail on its merits.

c. The application to extend time should fail on the merits.

d. The Respondent's application lacks sufficient grounds to justify overturning the usually strict deadlines in extradition cases.

e. Further and in any event, the undertaking provided is insufficient to satisfy the concerns of the Court.

f. Further, they rely on what they say is fresh evidence about the impact of the COVID crisis, which they say shows the assurances cannot be relied upon.

22. In relation to the first point, Mr Josse emphasised the importance of finality in extradition and said that the order of 3 October 2019 was intended to, and should be treated as having, imposed a final long-stop date for the extradition proceedings against the Appellant.

23. Next, if this Court has jurisdiction and is not *functus officio*, Mr Josse submitted that what the Respondent should have done was to apply to re-open the appeal under Crim PR 50.27. He argued that any attempt to avoid Crim PR 50.27 by applying under Crim PR 50.17(6)(a) (which provides that the High Court may shorten a time limit or extend it (even after it has expired), unless that is inconsistent with other legislation) is a clear subversion of the rules by seeking to avoid the proper test for the true application.

24. Next, Mr Josse argued that if the proper application is under Crim PR 50.17(6) to extend the deadline in the 3 October 2019 order, it should be refused because extradition proceedings as a whole, and particularly on appeal, take a very strict approach to deadlines. He relies on cases such as *Rzeczkowski v Poland Judicial Authority* [2011] EWHC 2600 (Admin), where an application to extend time to apply for permission to appeal to the Supreme Court was refused following the deadline being missed from a lack of diligence by the Appellant's solicitors.

25. Further and in any event Mr Crawford, who took this part of the argument, submitted that the responses from Latvia did not comply with the form of undertaking that I indicated needed to be given. He referred to a paragraph in the letter of a Ms Trocka of 10 October 2019:

> '… if Maris Zelenko, born in 1976, will be returned to Latvia and remanded into a prison, then in case of necessity the tactics for his health care will be decided by prison's medical practitioner registered with the Register of Medical Practitioners, and to Maris Zelenko will be provided the medical examinations, monitoring and treatment according to the technologies approved in Latvia, as well as will be prescribed and used medications registered in the Medicinal Product Register of Latvia.'

26. Mr Crawford said this suggests that the Appellant will be treated in line with the normal Latvian system and his treatment will be decided by the Latvian authorities according to that. He said this is at odds with my order which set out the specific treatment required. Mr Crawford's essential submission was that the Latvians are saying they will treat the Appellant as they see fit (our words, not his) in accordance with their procedures and they will not be dictated to about what treatment they have to provide. He also said that the responses were deficient in that although they indicated the Latvian doctors agreed with the English doctors that the Appellant's condition posed a threat to his life, they did not guarantee that he would receive the necessary testing with the frequency which Drs John and Friday said he requires.

27. Shortly before the hearing, the CPS served a further response from Latvia concerning medical treatment dated 4 June 2020. We will set out the detail later, but Mr Crawford said this had come too late and that we should not have regard to it.

28. Mr Crawford also sought permission, pursuant to *Szombathely City Court v. Fenyvesi* [2009] EWHC 231 (Admin), [2009] 4 All ER 324, to rely upon fresh evidence in the form of material dealing with how the Latvian prison system is dealing with the current COVID-19 crisis. He says this impacts upon the effectiveness of the Latvian authorities' undertakings about the Appellant's medical treatment (without prejudice to his primary submission that these are not adequate in any event).

The Respondent's submissions

29. On behalf of the Respondent, Mr dos Santos divided the Appellant's submissions into four parts and responded as follows.

30. In relation to the first submission, namely that the 3 October 2019 order made on 3 October 2019 was designed to be the final order disposing of the case and thus that Court is now *functus officio*, he said that irrespective of the wording of paragraphs 3 and 4 of that order, applying the relevant jurisprudence and Criminal Procedure Rules, the order did not dispose of the appeal either on 3 October 2019 nor on 17 October 2019 and was not a final order.

31. Mr dos Santos relied on Crim PR r 50.17(6)(a), which states that the High Court has the power to 'shorten a time limit or extend it (even after it has expired), unless that is inconsistent with other legislation.' He said this gave the Court the power to extend the 17 October 2019 deadline. He said the cases relied on by the Appellant did not assist and dealt with different factual or statutory provisions.

32. As to the submission that the Respondent has made the wrong application, and that it should have applied to reopen the appeal under Crim PR 50.27, which would be bound to fail on its merits, he said that no final order has been made, and that Crim PR 50.27 does not therefore apply. He said the correct application is for an extension of time. Even treating the order of 3 October 2019 as an unless order, the power remains to extend time, which has the effect of providing relief from sanctions. He relied on [3.1.2] and [3.4.5] of the White

Book. If he was wrong about that Mr dos Santos said that it was open to us to treat the application for an extension of time as an application to re-open the appeal under Crim PR 50.27 and that we should exercise our discretion under that provision to allow the Respondent to file and serve the responses from Latvia.

33. As to the submission that the responses from Latvia do not sufficiently comply with my order, Mr dos Santos said that they are sufficient to guarantee that the Appellant will receive the treatment that he requires. He said the most recent material from Latvia makes this clear.

34. Finally, Mr dos Santos submitted that the fresh material which the Appellant seeks to rely upon is general and insufficient to demonstrate that the assurances provided by Latvia will not be respected.

Discussion

Jurisdiction

35. The powers of the High Court on an appeal against an order for extradition pursuant to an EAW are set out in s 27 of the EA 2003:

> "(1) On an appeal under section 26 the High Court may–
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that–
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person´s discharge.
>
> (4) The conditions are that–
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person´s discharge.

(5) If the court allows the appeal it must–

(a) order the person´s discharge;

(b) quash the order for his extradition."

36. Accordingly, when an appeal is allowed, the Court must order the requested person's discharge and quash the order for his extradition. Until that happens, the proceedings before the High Court remain in being and have not been terminated.

37. Mr Josse submitted that the effect of the order of 3 October 2019 was that, once the deadline passed without any assurance having been provided, the Appellant was automatically discharged. However, that is not what the order says. It indicated what the outcome of the appeal would be, but did not go so far as to order the discharge of the Appellant. It was important that it did not do. If (as has subsequently proved to be the case) an assurance was provided but there was a dispute whether it was sufficient, it would be essential that the Court retained jurisdiction to determine that question. Only then (if the assurance was held not to be sufficient) would the Court order the Appellant's discharge and quash the order for his extradition. Accordingly the Appellant's appeal to this Court has not yet been concluded.

38. Mr Josse accepted that the 3 October 2019 order would not have been sufficient, by itself, to have secured the Appellant's release from prison had he been remanded in custody. He agreed that something further would have been required, but confirmation by email from the Court would have sufficed. He also told us that the Appellant remained (and remains) on bail following the expiry of the 17 October 2019 deadline. These concessions reinforce the conclusion we have reached that the appeal before us has not concluded.

39. We would therefore reject Mr Josse's submission that this Court has become *functus officio* and lacks the power to extend time for service of the undertakings. The words of Crim PR 50.17(6) are quite clear and permit us to extend a time limit even where it has expired. While a point must come when Crim PR 50.17(6) can no longer apply and the only available recourse is an application to reopen the proceedings, that point will not be reached while the appeal has not yet been concluded. It is therefore open to us, if we consider it appropriate to do so, to amend the date of 17 October 2019 in the order of 3 October 2019.

40. We did not find the cases relied upon by Mr Josse to be of assistance. He first cited *Seprey-Hozo v Law Court of Miercurea Ciuc, Romania* [2016] EWHC 2902 (Admin). That case was described by Cranston J as a 'novel' application to reopen an appeal under Crim PR r 50.27. It was not a case about extending time. The appellant had been extradited when the application was made. He complained that he was being held in prison in breach of an assurance that had been given. Crim PR 50.27(3)(b) requires the applicant to specify the following matters in an application to reopen an appeal (emphasis added):

a. why it is necessary for the court to reopen that decision *in order to avoid real injustice*,

b. why the circumstances are exceptional and make it appropriate to reopen the decision, and

c. there is no alternative effective remedy.

41. At [20]-[21] Cranston J said:

> "20. Just assume that an extradited appellant, who has exhausted all appeals in this jurisdiction, is unquestionably being held in prison conditions violating Article 3 ECHR and that is in breach of an assurance given by the authorities in the requesting state. I can well accept that would be a real injustice. However, CrPR 50.27(3)(b) requires not only that there be a real injustice as a consideration to reopening an extradition appeal, but that it is necessary for the court to reopen the appeal *in order to avoid* a real injustice. To my mind that requires consideration of whether reopening the appeal will provide a practical remedy for the injustice in that appellant's case.
>
> 21. The remedy under the 2003 Act where an extradition appeal is allowed is to discharge the appellant from the effect of the EAW. Once the EAW has been enforced, and the person extradited, a decision to discharge would have no effect. If the court as a remedy granted a declaration, there is no way of knowing whether the authorities in the requesting state would feel morally obliged to remove the appellant from the non-compliant ECHR prison conditions. Clearly they would have no legal obligation to act. Either way, there is no reason to conclude that reopening the appeal would lead to the avoidance of the real injustice as regards that appellant. The court should eschew gestures."

42. The case says nothing about the power to extend time in the circumstances which have arisen in the case before us.

43. In the decision of the Court of Appeal (Criminal Division) in *R v Cross (Patrick Vernon)* [1973] QB 937, the Court held that it had the power to amend a judgment or order up to the point in time when it was recorded by the officer of the court of trial pursuant to rule 15 of the Criminal Appeal Rules 1968 and the Crown Court manual, but that after that it was *functus officio.* The Court explained the limits of the power to alter a judgment or order, finding (at 940B to 941F) that the Court of Appeal (Criminal Division) had inherent power to alter a judgment or order which it had made until the judgment or order had been finally recorded by the officer of the court of trial in its records pursuant to

rule 15 of the Criminal Appeal Rules 1968 and the directions in the Crown Court Manual.

44. This case was followed by the Court of Appeal (Criminal Division) in *R v Blackwood (Romaine)* [2012] 2 Cr App R 18. In that case, following an appeal against conviction being allowed, the prosecution neglected to apply for the defendant to be retried. By the time the prosecution made the application to the Court of Appeal, the Court had drawn up the order allowing the appeal and communicated it to the Crown Court and the decision had been entered into the Crown Court's CREST system. That is the computer programme on which Crown Court records are kept. It was at that point that the decision of the Court of Appeal became final.

45. Mr dos Santos pointed to Crim PR r 50.29(3)(c)(ii), which requires the High Court in an extradition case to serve the record of its decision on the magistrates' court officer. Arguing by analogy with these two cases, he said that there was no evidence that the order of 3 October 2019 had been served according to this provision. That may be right, but the better view, it seems to us, is that these cases were dealing with a different Court with different rules with no discussion of any power to extend time.

46. We therefore conclude that we do have jurisdiction to extend time and we reject Mr Josse's submission to the contrary. It follows that we also reject Mr Josse's second submission that the Respondent has made the wrong application.

Exercise of discretion

47. We turn to consider whether this is a proper case in which the Court's discretion should be exercised in the Respondent's favour. Crim PR r 50.17(6)(a) expressly permits a deadline to be extended even after it has expired (unless that would be inconsistent with other legislation, but Mr Josse did not suggest that it would be in the present case). The question arises how the Court should approach the exercise of its discretion under this rule, which is in similar terms to the power in CPR r 3.1(2)(a) to grant relief from sanctions in civil cases, but is in a section of the Criminal Procedure Rules dealing expressly with extradition.

48. In civil cases the Court's approach to the exercise of this power is summarised in the commentary in the *White Book 2020* on CPR r 3.1(2)(a):

> " … in such cases, the court decides what, if any, extension of time to allow in accordance with the principles in *Denton v TH White Ltd* [2014] 1 WLR 3926; see (*R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472)."

49. The guidance given in *Denton*, supra, can be summarised as follows: a judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages CPR r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to

need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including CPR r 3.9(1)(a)(b).

50. Mr Josse submitted that a different approach was required in extradition cases. He emphasised the generally strict approach to time limits in such cases, and the strong public interest in the need for finality in extradition cases. He referred us to *R v Yasain* [2015] EWCA Crim 1277, an application to re-open a criminal appeal on the ground that a procedural error had caused a real injustice. Giving the judgment of the Court, Lord Thomas CJ held that the Court of Appeal Criminal Division had the same power to re-open an appeal as the Civil Division did, but that the way in which this power should be exercised was not necessarily the same:

> "38. The way in which the Civil Division approached its power to re-open an appeal is grounded in clear principle. We can see no basis for any distinction between the Civil Division and the Criminal Division as to the principles applicable to the jurisdiction under the implicit powers of an appellate court. The appellate jurisdiction of each is statutory. There is no reason why both do not have the same implicit jurisdiction and the same general basis for that jurisdiction.
>
> 39. However it is necessary, as Lord Woolf explained at paragraph 54 of the judgment in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 to distinguish between the implied or implicit jurisdiction of the court and the way in which that jurisdiction is exercised.
>
> > 'It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.'
>
> 40. The fact that both have the same implicit jurisdiction does not mean that the jurisdiction has necessarily to be exercised in the same way by the Criminal Division as it would be by the Civil Division. For example, in a criminal case there will often be three interests that have to be considered – that of the State, that of the defendant and that of the victim or alleged victim of

> the crime, even though the victim is not a party to the proceedings under the common law approach: see *R v B* [2003] 2 Cr App R 197 at paragraph 27; *R v Killick* [2012] 1 Cr App R 10, [2011] EWCA Crim 1608 at paragraph 48. There is the strongest public interest in finality. The jurisdiction is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission.

51. Lord Thomas went on to suggest that the issue should be considered by the Rules Committee:

> "42. However, although we can decide this appeal in this way and make it clear that this court has an implicit jurisdiction on the same basis as the Civil Division, we consider that it would be appropriate if the Criminal Procedure Rules Committee can formulate a rule similar to that set out in CPR 52.17 but which delineates the factors and circumstances applicable to the Criminal Division. It is in a position to consult widely and to consider a greater range of views than we heard on this appeal. Furthermore it is necessary to formulate principles that would apply either to all types of criminal appeal whether by way of appeal to this court, or by way of case stated or in an extradition appeal or with suitable modifications: see for example the decision of the Divisional Court to re-open an extradition appeal (subject to the specific provisions of the Extradition Act 2003): *Republic of South Africa v Dewani* [2014] WLR 3220, [2014] 3 All ER 266, [2014] EWHC 153 (Admin) at paragraph 17; *McIntyre v United States* [2015] 2 All ER 415, [2014] EWHC 1886 (Admin), [2015] WLR 507 at paragraphs 8-12."

52. *Yasain* was concerned with an application to re-open an appeal (which, in an extradition case, would now be an application under Crim PR 50.27) and not an application for an extension of time. However, we accept that there is force in Mr Josse's submission that the mere fact that this Court has the same power to extend time in an extradition appeal as a civil court has to grant relief from sanctions does not necessarily mean that the power should be exercised in the same way. It is necessary in an extradition appeal to bear in mind the various interests in play, which include the importance of finality in extradition cases, the interests of the requesting state in the prevention and deterrence of crime, the strong public interest (and international obligations) of this country in favour of extradition in appropriate cases, and the need to avoid injustice to or oppression of the requested person. So long as these matters are borne in mind, it seems to us that the *Denton*, supra, guidance provides a principled and structured approach which can and should be applied to the exercise of the Court's discretion to extend time under Crim PR r 50.17(6)(a).

53. In our judgment the CPS's failure to comply with the Court's order that undertakings be provided to the 'Court and the Appellant' by 4pm on 17 October 2019 was both serious and significant. It put the Respondent in breach

of an order that was intended to be definitive as to the outcome of the case. Although there is no evidence about it, the CPS's failure may well have raised the hope in the Appellant's mind that his appeal had been successful.

54. As to the second stage, as we set out earlier, the reason for the default was human error by the CPS lawyer because of her failure to diarise the deadline. That is not an acceptable explanation. It is therefore necessary to proceed to the third stage.

55. As to the third stage, it seems to us that, even bearing in mind the importance of finality and compliance with time limits in extradition cases, the justice of the case requires the Court's discretion to be exercised in the Respondent's favour. That is, first, because although the mistake should not have occurred, it was at the lower end of the scale in terms of culpability by an otherwise conscientious lawyer. It is to be contrasted with the sort of defaults which occur through a party's intentional and conscious choice not to comply with a court order. Second, the Latvian authorities themselves had complied with the request made of them by the CPS and replied speedily to the 6 October 2019 request for further information. Although in general a party is bound by the mistakes of its legal representatives, looking at the justice of the situation overall, it seems to us that it would be unfair to the Latvian authorities to take that approach here when they had replied with commendable speed to the request made of them on 6 October 2019. Third, the CPS's application for an extension of time was made within a reasonably short period of time after the expiry of the deadline. Fourth, it follows that the Appellant was aware within a short time after expiry of the deadline that his extradition was still sought. If the default did raise a hope in his mind that the appeal had been successful, that hope was short-lived. Fifth, there is no evidence that the Appellant has been prejudiced as a result of the delay over and above the inevitable continuing uncertainty as to his position. Sixth, the fact is that even if the Latvian responses had been filed and served on time, the case would not in fact have been disposed of in terms of the order that I made. That is because the Appellant does not accept that they are sufficient. Thus, a further hearing would have been needed in any event. Finally, there is a strong public policy in favour of extradition in appropriate cases.

56. For these reasons, we would grant relief from sanctions and extend time by varying the order made on 3 October 2019 to allow the Respondent until 31 October 2019 to file its responses.

Sufficiency of the Latvian responses

57. The first document received from Latvia is dated 9 October 2019. It is from the 'Department of Imprisonment Institutions'. It is signed by a Ms Trocka. It can be summarised as follows:

    a. health care in prisons for remand and convicted persons is provided depending on the health condition of the imprisoned person, and according to the requirements of the Article 22 of the Law on Procedures for Keeping Persons in Custody; Article 78 of the Sentences Execution Code of Latvia; and Regulations of the Cabinet of Ministers of 2 June 2015 No.276 (Health Care Procedures Regarding the Arrested and Convicted

Persons). These regulations allow for treatment of prisoners with chronic disease at outside institutions, at public expense.

b. the Department, having reviewed the issue, 'informs that medical testing and treatment of persons imprisoned in Latvia shall be conducted according to the diseases treatment guidelines effective in Latvia.'

c. 'That means that in case if Maris Zelenko, born in 1976, will be returned to Latvia and remanded into a prison, then in case of necessity the tactics for his health care will be decided by prison's medical practitioner registered with the Register of Medical Practitioners, and to Maris Zelenko will be provided the medical examinations, monitoring and treatment according to the technologies approved in Latvia, as well as will be prescribed and used medications registered in the Medicinal Product Register of Latvia. The Department informs that in Latvia according to the diseases treatment guidelines is possible to conduct the examinations of patients set out in the request, as well as to provide the treatment according to the medical indications. Nevertheless, the diseases treatment guidelines and medical technologies of Latvia may differ from the guidelines and medical technologies which are accepted and operational in the United Kingdom.'

58. The second document is from Riga Eastern Clinical University Hospital, of which the Latvian Infectology Centre forms a part (its address appears on the letterhead). It is signed by Ms Rozentale, who is described as Chief Medical Practitioner and it was prepared by Ms Agita Jeruma, an Infectious Diseases Specialist with the Latvian Infectology Centre's Infectious Diseases Out-patient Clinic It can be summarised as follows:

a. 'We fully agree with Consultant Physician Dr. Laurence John and Dr. Dawn Friday conclusion that liver disease of patient Maris Zelenko- liver cirrhosis causes the risk to patient's life. Patient with such diagnosis needs regular health examinations and consultations with hepatologist. As patient Maris Zelenko has also the HIV infection, he must regularly consult also with infectious disease specialist and to continue the antiretroviral therapy (ART).'

b. The Appellant was registered with the Latvian Infectology Centre whilst a prisoner in 2007. He was diagnosed with 'HIV I infection A I phase. VHC infection.'

c. The hospital 'provides the consultations of hepatologist and infectious diseases specialist, as well as ultrasound, gastroscopy and alphafetoprotein tests of liver. These tests and consultations of specialists are possible also in other medical institutions of Latvia. Patient may freely choose which medical specialist to undergo the treatment and in which medical institution to conduct the tests.'

d. In Latvia the specific HIV/AIDS therapy with ART medications for patients is fully paid for from public funds. The drugs Truvada and Raltegravir (which were referred to in Dr Friday's evidence) are available in Latvia.

e. ‘In Latvia according to the Regulations of the Cabinet of Ministers of 2 June 2015 No.276 (Riga) "Health Care Procedures Regarding the Arrested and Convicted Persons" the health care for imprisoned persons shall be ensured by the medical staff of an imprisonment institution. In cases when the health care services necessary to an imprisoned person are not available in an imprisonment institution or in Prisons Hospital of Latvia, they can be provided by a medical institution outside the imprisonment institution according to the medical indications.’

59. Reading these two documents together we think it is tolerably clear that they amount to sufficient compliance with what I required in [26] of my 3 October 2019 judgment, as recorded in the order. The first document is simply the prison indicating that the Appellant will receive the medical treatment that he needs as specified by Latvian medical practitioners. The second document is an express recognition by those practitioners at the relevant treatment centre that he needs and will receive the treatment specified by Dr Friday and Dr John, with whom they expressly agree. Taken together, we have concluded that these responses amount to an acceptance and recognition that the Appellant will receive the tests and treatment which the English doctors have specified.

60. Mr Crawford submitted that these responses were impermissibly vague as to the frequency of the testing which the Appellant will receive and said they did not amount to an acceptance that the treatment prescribed by Drs John and Friday would be provided, although they do accept that the Appellant’s liver condition is potentially life threatening. The most recent response from Latvia says this (*sic*):

> “In addition to the information No.1.8-11149 provided by the Administration on 09.10.2019, the Administration informs that health care provided in prisons of Latvia is equivalent to health care in conditions of freedom.
>
> In case of M. Zelenko' s transfer to Latvian prisons, it will be possible for him to perform the necessary examinations, treatments and monitoring for HIV infection and chronic hepatitis C as it specified in the request of the United Kingdom, based on medical technologies approved in Latvia, and the treatment will be applied to medicines registered in the Medicinal Product Register of Latvia in accordance with medical indications.”

61. Plainly, the word ‘perform’ in the second paragraph should read ‘receive’.

62. We consider that we should have regard to this response, despite Mr Crawford’s submissions to the contrary. Given that we have the power to call for further information from an issuing judicial authority where we consider it in the interests of justice to do so (see *FK v Stuttgart State Prosecutor’s Office, Germany* [2017] EWHC 2160 (Admin), [39]-[40]), we consider it in the

interests of justice to consider this response, late though it was. We consider it amounts to an express acceptance of the opinions of Dr John and Dr Friday as to the treatment (including frequency) which the Appellant requires and it reinforces the conclusion we have reached about the adequacy of the 9 October 2019 responses.

63. This ground of challenge fails.

Fresh evidence

64. We turn to the fresh evidence which the Appellant seeks to adduce and rely upon pursuant to *Fenyvesi*, supra. There are two documents: a document dated 20 March 2020 from the Latvian Prison Administration entitled 'Response to COVID'19' and a document from an organisation called 'Europris' dated 17 June 2020, which appears to be an EU-funded NGO which promotes professional prison practice. We were told that the prison administrations of EU member states make up its membership.

65. In the first document the following paragraph is relied upon:

> "Stop the transfer of prisoners to the medical treatment institution outside the LPA imprisonment place with an aim to receive the health care services (planned consultations of doctors, diagnostic examinations and inpatient treatment) (also for the finances of prisoners).

66. In the Europris document the Appellant relies on these paragraphs:

> 'Allow to call the medical emergency which further decides about the transfer of a prisoner outside the LPA imprisonment place, only in the case of acute illness that threaten the prisoner's life and whom the LPA imprisonment place medical staff cannot provide the relevant medical help.
>
> …
>
> According with the Order dated 9 June 2020 of the Latvian Prison Administration, from 10 June 2020 the transfer of prisoners to a medical institution outside the imprisonment place may be resumed in order to receive planned health care services (consultations of specialist specialists, diagnostic examinations and inpatient treatment) on a first-come, first-served basis.'

67. Section 27(4) of the EA 2003 (the full section is quoted above) is relevant:

> "(4) The conditions are that –

> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

68. In *Fenyvesi*, supra, the Court said at [32]:

> "In our judgment, evidence which was "not available at the extradition hearing" means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. If it was at the party's disposal or could have been so obtained, it was available. It may on occasions be material to consider whether or when the party knew the case he had to meet. But a party taken by surprise is able to ask for an adjournment. In addition, the court needs to decide that, if the evidence had been adduced, the result would have been different resulting in the person's discharge. This is a strict test, consonant with the parliamentary intent and that of the Framework Decision, that extradition cases should be dealt with speedily and should not generally be held up by an attempt to introduce equivocal fresh evidence which was available to a diligent party at the extradition hearing. A party seeking to persuade the court that proposed evidence was not available should normally serve a witness statement explaining why it was not available. The appellants did not do this in the present appeal."

69. We accept that the evidence the Appellant relies upon was not available at the extradition hearing, but in our view it fails the second test, that of whether it would have – or does – make any difference.

70. The document from the Latvian Prison Administration, and the paragraph we have quoted, when read together with the second paragraph from the Europris document we have set out, show that initially the transfer of prisoners out of prison for medical treatment was stopped in March, but that it has now resumed. There is no reason to think that what happened in March will affect in any way the Appellant's treatment, especially since he is unlikely to be extradited any time soon, and it can be assumed that restrictions will continue to be eased.

71. The first paragraph from the Europris document, read in context, makes clear what it is referring to is the transfer of prisoners with COVID out of prison. That emerges from the heading immediately before it in the original, 'Placement/treatment of infected detainees'. It therefore has no bearing on the question of the Appellant's medical treatment. The 4 June 2020 Latvian response reported that, in fact, there have been no COVID cases in Latvian prisons.

72. It follows that we refuse permission to rely on this fresh evidence, and thus this ground of challenge fails.

Conclusion

73. We therefore dismiss this appeal. However, we reiterate [5] of the order of 3 October 2019, namely that as and when the Appellant is extradited the CPS and the NCA must ensure that the Appellant's medical records and the reports from Drs John and Friday and sent to the Latvian authorities without delay.