Neutral Citation Number: [2021] EWHC 223 (Admin)

Case No: CO/2619/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

In the matter of an appeal against the Applicant's extradition, ordered on 20th July 2020, pursuant to section 26 of the Extradition Act 2003.

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2021

Before:

Sir Ross Cranston
Sitting as a judge of the High Court

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Between:

TEODOR ANDREI OPREA	**Applicant**
- and -	
THE CONSTANTA TRIBUNAL (A ROMANIAN JUDICIAL AUTHORITY)	**Respondent**

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Myles Grandison (instructed by **Sonn Macmillan Walker**) for the **Applicant**
Hannah Burton (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 5 February 2021

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JUDGMENT

Sir Ross Cranston:

INTRODUCTION

1. This is a renewed application for permission to appeal the decision of District Judge Snow, dated 20th July 2020 to order his extradition to Romania pursuant to section 21(3) of the Extradition Act 2003 ("the 2003 Act"). The application was refused on papers by Fordham J on 15 October 2020. By order of Mrs Justice Eady this is a rolled up hearing so that if permission is granted, the substantive hearing should follow immediately.
2. The one ground of appeal is that the District Judge fell into error in concluding that the applicant would be entitled to a retrial in compliance with sections 20(5) and (8) of the 2003 Act, and had he decided that question differently he would have been compelled to order the applicant's discharge. The applicant was not represented before the District Judge and he did not deal with the matter, which was not raised before him. In accordance with the approach Mrs Justice Elisabeth Laing in *Troka v Government of the Republic of Albania* [2020] EWHC 408 (Admin) I have considered the matter *de bene esse*.

THE EAW

3. The Constanta Tribunal, Romania ('Respondent') seeks the applicant's extradition in relation to a European Arrest Warrant ('EAW') issued on 1st April 2020 and certified by the National Crime Agency on 6th May.
4. Under the EAW, Box B states that the decision on which the warrant is based is the sentence 608/9.05.2019 of the Constanța Tribunal, made final on 17 September 2019 upon decision 456/17.09.2019. Box C states that the applicant is sought in order that he may serve a sentence, categorised as "hospitalization in an educational center (sic) for a period of 1 year."
5. The sentence was imposed, explains Box E, following a conviction for an offence of theft which took place on 18th August 2015. The applicant is said to have taken various items from a sun lounger at the beach of the Vega hotel in Mamaia Resort, Constanta County when he was 17 years' old, 3 mobile phones, a pair of men's sandals, a bath towel and 160 RON.
6. Box E states that the applicant was initially sentenced to an educational measure of daily assistance for a period of 6 months by way of criminal sentence no. 1278/29.09.2017 of the Constanta Tribunal, made final on 27 October 2017 as no appeal was lodged. The applicant did not observe the conditions imposed as part of the non-custodial educational measure, with bad faith. Consequently, Box E explains, the Court ordered the replacement of the non-custodial sentence with the educational measure of hospitalisation in an education centre in sentence 608/09.05.2019.
7. Box D of the EAW states that the applicant was not present at his trial. He was summoned by warrant at an address given by the Romanian Directorate for Personal Records and Database Management in Iasi county, and also at the address he provided during the criminal investigation in Brasov county but it could not be executed. He had travelled to the UK but the telephone number given to the police – it is unclear by whom - did not answer when called in January 2019. He was represented by a lawyer at the trial. Criminal sentence no. 608/09 was sent to his address in Brasov county he had given but returned with a message that he no longer lived there. It was attached to the door of his Iasi address.
8. Box D states the he is entitled to a retrial as follows: he will be served with the decision on surrender, informed of his retrial rights and "thus it may lead to the dissolution of the initial decision".

THE DISTRICT JUDGE'S JUDGMENT

9. The District Judge explains that the applicant was not represented at the hearing.
10. In the course of considering section 14 of the 2003 Act the District Judge sets out the relevant evidence of the applicant**.**
    a) He was taken to the police station in Romania on the same day of the offence and admitted committing the offence.
    b) He had no experience of the criminal justice system in Romania and did not know what would happen upon his release.
    c) He was contacted by the police in September 2015 when he believes he was told that his case would be referred to court. He spoke to a "duty lawyer" who told him that the case would go to court but everything would "be fine". He was not placed under restrictions on his liberty.
    d) He did not remain in contact with his lawyer.
    e) He moved to the United Kingdom in March 2016.
    f) In April 2019, he spoke to his mother who indicated that he had been required to comply with the requirements of a 6 month non-custodial education order, but this had been replaced by a term of 1 year in an education centre. His mother spoke to a lawyer on his behalf, who told her that "everything would be alright" and that if he could provide an employment contract confirming he had work in the United Kingdom then "everything would be fine". His grandmother provided the contract.
    g) He remained in contact with his lawyer until August 2019, when an issue with respect to payment of the lawyer's fees had arisen and the lawyer stopped accepting calls. He heard
    nothing further until his arrest on the EAW. He hoped everything would be "okay" and believed that if he did not return to Romania for a year the sentence would become time barred and would no longer be enforceable…
    m) During cross examination, Ms Burton tells me, and I accept, that the applicant accepted being aware that the case was ongoing when he left Romania but had not thought to tell the Romanian Authorities where he was going.
11. In relation to Ms Burton's submission that the applicant was seeking to evade justice by leaving Romania in the knowledge that proceedings were ongoing, the District Judge said at paragraph [31] of his judgment:

> "I bear in mind his youth at the time and his lack of experience of the criminal justice process. I have found the EAW and further information difficult to penetrate and reconcile. In the light of his lack of experience of the criminal justice system and youth I accept the [he] was guilty of wishful thinking rather than attempting to evade justice….I am satisfied that ['he] is not a fugitive from justice."

FURTHER INFORMATION

12. There had been further information before the District Judge dated 25 May 2020. It explained:
    i. During the trial phase, at hearings on 10 May 2017, 7 June 2017, 19 June 2017 and 20 June 2017, the applicant was not present but was assisted by an ex officio lawyer;
    ii. He had given a statement during the criminal investigation specifying that he wanted subpoenas and procedural documents to be sent to Sercaia village, no.91, Brasov county;

iii. He was legally summoned at the address available in the record of the Directorate for Personal Records and Database Management and to the Brasov county address.

iv. Attempts were made to summons the applicant via telephone, but the telephone numbers provided by him during the investigation were not connected to the network.

v. At a hearing on 6 December 2017, before the judge assigned to execute sentence no. 1278/29.09.2017, which had become final on 27 October 2017, the applicant was absent but assisted by an ex officio lawyer, Ghita Andreea Elena. A warrant for his arrest was issued at the address in Brasov country but the police found no one at the address. A neighbour confirmed that he had lived there for a while.

vi. The Romanian probation applied to have the non-custodial sentence converted to a custodial sentence, since he had not complied with his obligation to notify of any change of address, and was not complying with the terms of the non-custodial sentence, and that was done by way of criminal sentence no. 608/9.05.2019.

vii. The applicant was summoned to a hearing on 25 January 2019 at the address in Iasi county, where he was previously accommodated as a lodger to obtain an identity card.

viii. To execute the warrant for the applicant's arrest, the police contacted his grandmother. She stated that he had gone to work abroad. She provided his telephone number, but when on 23 January 2019 he was contacted he did not answer. At the hearing on 25 January 2019 he appointed a lawyer, Mircea Gherasim, 'bearing in mind the next hearings'.

ix. At the next and last hearing on 19 April 2019 his lawyer submitted to the case file an employment contract between the applicant and Wealmoor Limited dated 29 March 2017. The Court doubted its authenticity and noted that he had knowledge of the trial, had appointed his lawyer, but he was not present before the court and did not provide a justification for his absence.

x. There was an appeal filed by his lawyer on 17 May 2019 against sentence no. 608/2019. During the hearing on 10 September 2019, he was absent but represented by an ex officio lawyer. Notice of its decision 456/17.09.2019 was sent to the address in Brasov county but returned with a note to say that he had left the area. It was also sent to the address in Pascani municipality in Iasi County by posting it on the front door.

xi. The Further Information observes that from the moment he was heard as a defendant, he did not appear before judicial bodies, nor did he comply with the requirement to notify of any change of address in writing within 3 days.

13. Further information dated 11 January 2021 gives details of how he was summoned to each of the hearings. It is admissible in accordance with the Divisional Court's judgment in *FK v Germany* [2017] EWHC 2160 (Admin). It states that:

i. At the hearing on 25 January 2019 the applicant was absent but he was assisted by a lawyer of his choice, Ursea Diana who replaced Mircea Gherasim.

ii. At the hearing on 1 March 2019 he was absent but he was assisted by the lawyer of his choice, Mircea Gherasim according to the power of attorney which had been submitted to the file.

iii. At the hearing on19 April 2019 he was absent but he was assisted by his lawyer of choice, Mircea Gherasim The court postponed the sentence until 9 May 2019 when sentence 608/2019 was issued.

14. In answer to a question about what Box D of the EAW said about retrial rights, and the time frame for the applicant requesting this, the Further information of 11 January 2021 also said:

"Whereas the convict Oprea Teodor Andrei was assisted by attorney of choice Mircea Gherasim in criminal file 110. 15622/212/2018 with the criminal sentence 110. 608/2019 being issued (facts also resulting from the response letter issued on May 25, 2020), the provisions in art. 466, paragraph 2, Criminal Procedure Code are applicable, stating:

> (2) The person convicted not summoned for the trial and not made aware by any official means of the trial, respectively although made aware of the trial, is absent on solid grounds from the hearing and cannot notify the court, shall be considered as judged in absentia. The person appointing an attorney of choice or a proxy shall not be considered judged in absentia, if the attorney is present at any time during the trial, nor shall the person who, after the conviction sentence is communicated according to law, fails to submit an appeal, waives the appeal or withdraws such appeal (underling in original)"

LEGAL FRAMEWORK

15. Section 20 of the 2003 Act applies to cases where the requested person has been convicted and provides as follows:

> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
> (7) If the judge decides that question in the negative he must order the person's discharge.
> (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—
> (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
> (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

16. The burden of proving each of the elements of section 20 rests upon the requesting state to the criminal standard. It is well accepted that section 20 should be interpreted in line with Article 4a of the Framework Decision 2002/584/JHA (as amended) ("the Framework Decision"). The Court of Justice of the European Union in Zdziaszek (Case C-271/17PPU) held that Article 4a applies to the trial resulting in decision both in respect of the final finding of guilt, and the final determination of the sentence.
17. In *Szatkowski v. Regional Court in Opole* [2019] EWHC 883 (Admin), the Divisional Court at paragraph [22] endorsed and adopted the propositions set out by Hickinbottom J in *Stryjecki v District Court Lublin, Poland* [2016] EWHC 3309 (Admin) as applicable to section 20(3) of the 2003 Act. These were as follows:

> "(1) It is for the requesting judicial authority to prove, to the criminal standard, that the requested person has deliberately absented himself from his trial.
> (2) Trial is not a reference to the general prosecution process, but rather the trial as an event with a scheduled time and venue which resulted in the decision.
> (3) The EAW system is based on trust and confidence as between territories. Consequently, where the EAW contains a statement from the requesting judicial authority as required by paragraph 4a(1)(a) of Council Framework Decision 2002/584/JHA, that will be respected and accepted by the court considering the extradition request, unless the statement is ambiguous (or, possibly, if there is an argument that the warrant is an abuse of process). If the statement is unambiguous, the court will not conduct its own examination into those matters, nor will it press the requesting authority for further information. (4) If the statement in the EAW is ambiguous or confused (a fortiori, if there is no statement at all), then it is open to the court considering the request to conduct its own assessment of whether the requested person was summoned in person or, by other means, actually received official information of the scheduled date and place of that trial, on the evidence before it, the burden being borne by the requesting authority to the criminal standard.
> (5) Summoned in person means personally served with the relevant information. If there has not been such service, generally the requesting authority must unequivocally establish to the criminal standard that the person actually received the relevant information as to time and place. It is insufficient for the requesting authority to show merely that the domestic rules as to service of such a summons were satisfied, if it is not established that the person actually received the trial information.
> (6) Establishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person has deliberately absented himself from his trial.
> (7) However, where the requesting authority cannot establish that the person actually received that information because of a manifest lack of diligence on the part of the requested person, notably where the person concerned has sought to avoid service of the information so that his own fault led the person to be unaware of the time and place of his trial, the court may nevertheless be satisfied that the surrender of the person concerned would not breach his rights of defence."

18. In *Tyrakowski v. Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin) Julian Knowles J, and in *Dziel v. District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin) Ouseley J raised the issue of the consistency of all of Hickinbottom J's propositions with earlier decisions, including what Sharpe LJ and I said in the Divisional Court in *Romania v Zagrean* [2016] EWHC 2786 (Admin), paras [80]-[81]. In view of the decision of the Divisional Court in *Szatkowski*, however, these seven propositions must be regarded as authoritative. In *Bialkowski v. Poland* [2019] EWHC 1253 (Admin) Kerr J helpfully said at paragraph [27] that it was possible to reconcile any difference in approach

> "in that Hickinbottom J was simply making the point that the requesting state does not prove that an accused deliberately missed his trial just by proving that he acted evasively in an attempt to avoid receipt of trial information documents. However evasive the accused's conduct, the requesting state must still prove that it took the steps that would acquaint a non-evasive accused with the time and place of trial."

19. I also find helpful what Singh LJ said at para 49 in *JK v District Court of Lublin, Poland* [2018] EWHC 197 (Admin), by reference to Mr Justice Julian Knowles' judgment in *Tyrakowski Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin), that what is required is ultimately an answer to the question whether the requested person has knowingly

waived his right to a trial; questions of manifest lack of diligence, can be taken into account, but are evidential matters which go to answering that ultimate question.

DISCUSSION

20. With characteristic thoroughness Ms Burton analysed what is not a straightforward factual and legal picture to ground her submission that the applicant deliberately absented himself in relation to both the decision giving rise to criminal sentences no. 1278/29.09.2017 and no. 608/09.05.2019. In her submission the applicant on his own evidence was aware of the criminal investigation and that the matter would go to court - he had admitted the offence to the authorities and asked that subpoenas and procedural documents be sent to an address specified by him, as well as providing a telephone number. Nonetheless, he left for this country without notifying the authorities of his new address and consequently the Romanian authorities were unable to contact him. Ms Burton referred to the words of the Divisional Court in *Deputy Public Prosecutor of the Court of Appeal of Montpellier v Wade* [2006] EWHC 1909 (Admin), that "deliberately absenting yourself does not necessarily have overtones of deliberately evading justice …".

21. Further, Ms Burton submitted, the Romanian authorities took significant steps to try and ascertain his whereabouts for him to attend his trial and to execute the non-custodial sentence, but to no avail. He was summoned at the address he had provided during the investigation and also that recorded with the Directorate for Personal Records and Database. The authorities tried to summon him via telephone as well. Therefore it was clear, she submitted, that the authorities took steps which would have acquainted a non-evasive defendant with the information to enable them to attend their trial.
22. In all the circumstances, the Judicial Authority had established beyond all reasonable doubt that the applicant was deliberately absent from the first set of proceedings; he knowingly made a decision not to engage. As to the second set of proceedings, the applicant became aware of them and instructed a lawyer to represent him, and to present documentation on his behalf in the form of the employment contract. He was not contactable for the proceedings via the telephone number his grandmother had provided. However, by instructing his lawyer to attend and by not attending himself, Ms Burton submitted, the applicant evidently made a decision not to be present at the hearings in question.
23. The difficulty these submissions face is the District Judge's factual findings. He had the EAW and the Judicial Authority's Further information of May 2020. The judge then heard the applicant give evidence. He recorded the applicant's evidence that he had been taken to the police station on the same day of the offence and admitted committing the offence. Nonetheless, at paragraph [31] of his judgment he found that in the light of the applicant's lack of experience of the criminal justice system and youth there was the possibility that he was guilty of wishful thinking rather than attempting to evade justice. Albeit made in the context of a decision on whether the applicant was a fugitive, I cannot conclude that in light of the District Judge's finding about wishful thinking and not attempting to evade justice that he deliberately absented himself and tacitly waived his right to attend his trial for the first sentence, notwithstanding his failure to notify the authorities of a change of address and his current contract details when he left for this county in 2016.
24. Since the applicant had not deliberately absented himself, the next question is whether he is entitled to a re-trial which complies with section 20(8) of the Act upon his return. Ms Burton very fairly conceded that the EAW is based on the second sentence, in other words the enhanced 12 month sentence, and that the Further information in January this year went to this second set of proceedings leading to it. Implicit in the answer to Question 4 about those

proceedings, which I have quoted, is the suggestion of the Judicial Authority that because the applicant instructed a lawyer at that point, under the Romanian Penal Code he loses the right of a rehearing. The EAW raises the possibility of the first decision, the conviction, being "dissolved", but the ambiguity in relation to that, and the suggestion as to the solidity of the second set of proceedings on which the conviction is based, creates sufficient doubt in my mind as to the existence of his right to a retrial or rehearing.

CONCLUSION

25. Consequently, I grant permission, allow the appeal and discharge the applicant.