Neutral Citation Number: [2021] EWHC 3258 (Admin)

Case No: CO/1219/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL
2nd December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

GEORGI IVANCHEV LAZAROV	**Appellant**
- and -	
PROSECUTORS OFFICE IN VARNA (BULGARIA)	**Respondent**

- -
- -

The Appellant in person
The Respondent did not appear and was not represented

Hearing date: 2/12/21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge,
after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Proceeding in the Appellant's absence

1. This case was listed for an oral hearing today, with a 30-minute time estimate, the hearing to start at 10:30am in Court 2. I have seen emails including one dated 1 October 2021 from the Appellant's former solicitors, informing the Court that the Appellant would like to continue with his appeal, would be representing himself and would need a Bulgarian interpreter. They then gave a postal address and an email address. I have seen an email sent by the Court to that email address on 10 November 2021, notifying the Appellant: that the renewal hearing had been listed for today, 2 December 2021,for 30 minutes; and that the time of the hearing would be published in the cause list available from 2:30pm the day before. The cause list that was duly published yesterday afternoon gives the time and place of this hearing. A further email which I have seen confirms that the same notice of today's renewal hearing was also sent by first-class post to the home address that having been given by the solicitors. When this case last came before a Judge on 29 October 2021, Whipple J agreed to adjourn the renewal hearing – then fixed for 2 November 2021 – to be relisted, on at least 14 days' notice to the Appellant, recognising that this was appropriate in circumstances where he acts in person and had requested that adjournment. An interpreter has duly attended today. She confirms that she has been bought for a one-hour slot. The Court's 30 minute slot is now nearing its end. It is now 10:53. I have another case this morning which has been listed to begin at 11:15. The court clerk has been outside to call this case on, twice, and the interpreter has kindly also assisted by going outside the court room and looking around to see if she was able to find the Appellant.

2. In these circumstances, and having pre-read the papers which have been filed in Court in this case, I am satisfied that it would be appropriate for me to determine the application for permission to appeal in this case – now – and on those materials. It is always important to bear in mind, in situations like this, that the Court 'does not know what it does not know'. I do not know what has happened to the Appellant that has led to the consequence of his absence today. I have in mind that there is a safeguard in extradition cases under the Criminal Procedure Rules, whereby an application can be made to reopen an appeal to avoid a serious injustice in exceptional circumstances. The existence of that safeguard is a relevant feature as part of the legal landscape. If there were some compelling reason that the Appellant were able to demonstrate which he wishes to contend justified such an application being made and considered, where the case has been determined in his absence, that course would be open to him. As it seems to me, it is appropriate to record that some very cogent basis would be needed for any such application. I will take steps to ensure that this judgment is put into an approved written form and sent by email to the address which has been given by the solicitors for the Appellant. I make clear that I have seen no email from the Appellant in response to communications to him, still less any email suggesting any difficulty with attending this hearing. It is always possible that there may have been attempts to contact the Court that I have not been made aware of. But, having made enquiries through the court clerk, there does not appear to be any more recent email traffic.

Background

3. The question which is before me at this oral renewal hearing in extradition proceedings is this. Is it reasonably arguable that the Judge was wrong in concluding that extraditing

the Appellant to Bulgaria would be compatible with the Article 8 ECHR rights of himself and members of his family? The background is as follows. The Appellant is aged 41. He is wanted for extradition to Bulgaria in conjunction with a conviction EAW issued on 12 April 2017 and certified seven days later. He was arrested on 27 May 2017 and detained until 7 July 2017, since when he has been on bail with an electronically monitored curfew 10pm to 6am. There are Article 3 ECHR prison assurances. The index offending to which the EAW relates concerns the growing and possession of cannabis, between May 2011 and September 2012, described as having involved 7.6 kg of grown cannabis with a value equivalent at the time to €23.5k. The Appellant was convicted in his absence but with a future retrial right. He had come to the United Kingdom in June 2013 with his partner and her two daughters. He had become aware of the conviction and there were appeal proceedings in Bulgaria, only finally determined in 2017. Extradition was originally ordered by a decision which was subsequently quashed, in October 2018, by way of judicial review. After a rehearing on 4 March 2019, DJ Blake ("the Judge") ordered the Appellant's extradition on 20 March 2019, for reasons explained in a judgment of that date. The attempt to appeal the Judge's order has never passed the permission to appeal stage. Permission to appeal was refused on 15 August 2019 on the papers and on 16 October 2019 Holman J issued directions relating to the renewal application which had been filed. In the event, the lawyers acting for the Appellant raised an Article 3 (prison conditions) issue, and a section 2 (independence of the issuing authority) issue, each of which were appropriate for a stay pending lead cases being determined. A stay was ordered by this Court in December 2019. A Position Statement helpfully filed on 1 October 2021 by the Appellant's Counsel recorded, correctly, that the Article 3 and section 2 points had been resolved and had fallen away, but that the Appellant wished in person to pursue the renewal on Article 8 ECHR grounds.

The Appellant arrives and makes submissions

4. I interpose at this point that, having started giving this ex tempore judgment in this case, at 11:03 the Appellant has now come into the courtroom. I am therefore going to pause, having begun to describe the background. I am going to address the Appellant, through the interpreter, and allow him to address me.

[At this point, the Appellant addressed the Court]

5. I have been told by the Appellant that the reason why he arrived after 11:00 for his hearing was that he had been unable to find the court room quickly enough. I decided that the fair thing to do was to allow him some time to compose himself, having told him that I was willing to hear him and that I would take into account what he wanted to say to me. I am satisfied that it is appropriate that I can resume this judgment, having only set out the background before his arrival. I am now able to continue, in the light of what the Appellant has just told me in his oral submissions. I am able to take those matters into account, alongside everything that I have read in the papers.

6. It makes sense, in those circumstances, if I summarise at this point in this judgment the points that have now been made this morning orally by the Appellant. He has explained to me that, at the beginning of the case, he had thought that his time on electronic tag, which is now almost 4½ years, would be deducted from his sentence. He has described the fact that, at a previous hearing, the question was raised about what period would be allowed. He was aware that the Bulgarian authorities were going to be asked that

question. He says he was told by his solicitors "about a month ago" that there would be "no deduction" for the period on curfew on electronic tag. That corresponds (broadly) with the Appellant's solicitors coming off the record, as they requested on 1 October 2021 and as was ordered on 8 October 2021. Having said that, the topic had in fact been addressed two years earlier by way of further information filed by the Respondent dated 4 November 2019, to which I will need to return. The Appellant has asked me to bear these matters in mind in my decision. He has also emphasised the following matters. He served two months (51 days) in prison on remand in this country. That was the period following his arrest on 27 May 2017 and up to his release on conditional bail (with electronic tagging) on 7 July 2017. The offence to which the extradition relates dates back to 2011 and 2012. That is 10 years ago. He has had eight years in this country. His family are here with him and he takes care of them. They would be left without support if he was extradited. He has nobody in Bulgaria. He is a completely different person since coming to this country. On the basis of those points, and the points that have been made in the papers which I had pre-read, the Appellant is asking me to give permission to appeal, so that a substantive appeal can be heard by this Court. Having recorded those oral submissions, which I do take into account and to which I will return, I am going to now go back to pick up the rest of the background which I had been describing in this judgment when the Appellant arrived.

Background (continued)

7. The Article 8 ECHR ground of appeal – which is the relevant framework for me to consider the points that have been made this morning and which I have just summarised – was a ground of appeal that had originally featured in March 2019 grounds of appeal and had been the subject of Holman J's directions (16 October 2019). When the Appellant's lawyers filed amended grounds of appeal on 18 November 2019, the Article 3 and section 2 grounds were advanced, but Article 8 was not. I am nevertheless satisfied that it is appropriate, in the interests of justice, to consider the viability of the Article 8 ground on its legal merits, and that it would not be appropriate or just in all the circumstances to treat that ground as abandoned and precluded.

8. In his judgment, the Judge identified the relevant features in the Article 8 'balance sheet' exercise. He concluded that the public interest considerations in support of extradition heavily outweighed those capable of weighing against it. The Judge recognised the impact that extradition would have for the Appellant, for his wife and for his stepdaughters (who were then aged 29 and 21), who would have to find employment, which the Judge found there was nothing to prevent in the case of any of them. He recognised that the family living together also included a grand-child (then aged six). The strong public interest considerations in support of extradition arose in the context of the three-year custodial sentence which the Appellant was wanted to serve in Bulgaria. The Judge recognised that the Appellant had been here since June 2013, that he was working here and supporting his family here, that he had just one criminal offence in the UK, namely an offence of fly tipping in August 2016 for which he received a £3,500 fine. It needs to be remembered that the judge was considering the position in March 2019. We are now more than 2½ years on.

Deductibility of the tagged-curfew under Bulgarian law

9. Holman J's directions on 16 October 2019 required the Respondent specifically to address the applicable position under Bulgarian law so far as concerned the period of

51 days qualifying remand (27 May 2017 to 7 July 2017), and the period of electronically tagged curfew since 7 July 2017. As I have explained, that is one of the topics that the Appellant has raised with me at this hearing this morning in his oral submissions. That question arose in the context of an argument being advanced, at that stage, by the Appellant in person but which was subsequently adopted by his lawyers on 5 November 2019. The argument was that the combined effect of the 51 days qualifying remand together with the then 2 years 116 days of bail on electronically-monitored curfew, could have a significant effect on the length of the sentence remaining to be served, if information from the Respondent confirmed that the tagged-bail stood to be deducted from the 3-year sentence. Holman J recorded that the Appellant himself believed that the tagged curfew period would be deducted, as he has confirmed to me today was his understanding. If so, went the argument, the outstanding sentence now remaining to be served would be "small" at the time when Holman J was seized of the case. At the current time there would be no sentence remaining to be served. That is because the now 4 years 4 months of tagged curfew together (to be added to the 51 days of qualifying remand) would be more than the three-year sentence. That would have entitled the Appellant to be discharged from his extradition.

10. This question was the one subsequently answered by the further information dated 4 November 2019, to which I referred earlier. The Appellant's lawyers had clearly not seen that document on 5 November 2019, when they successfully applied to come back on the record. That application was expressly in order to pursue the point identified by Holman J about whether the time remaining to be served was "small". The further information had, however, plainly been seen by the lawyers by 18 November 2019. On that date, their amended grounds of appeal abandoned Article 8 and made no reference to qualifying remand or tagged curfew. The Respondent's further information (4.11.19) explained that, under Bulgarian law, the 51 days custody would all be deducted from the three years to serve. But it also explained that the Appellant's long period of tagged bail with the electronically monitored curfew would not be deducted. An explanation was given in the further information about how 'house arrest' counts in Bulgarian law as a 50% deduction (two days 'house arrest' counting as one day custody) and that time spent on what is called 'probation' counts as a one-third deduction (three days 'probation' counting as one day custody). The further information explained that the tagged bail with the electronically monitored curfew could have constituted qualifying 'probation' (one-third) in Bulgarian law, but only if it was referable to 'punishment by way of probation', which does not arise in this case. It was quite clear from that information that it could not be – and cannot be – said that the outstanding sentence was or is "small". Indeed, as at today the Appellant has been on the conditional tagged bail for 4 years 4 months. Even if that were qualifying 'probation' counting one-third, it would serve to operate as a deduction of something under 18 months as at today. It would do so in addition to the deductible 51 days for qualifying remand. All of that would be set off against the sentence of three years. But in fact, as the Appellant has explained this morning is his own understanding, and was the understanding of his previous legal representatives, there would be no deduction for the tagged curfew at all, as explained in the further information.

Article 8 ECHR

11. I accept, in the Appellant's favour, that the very long period of tagged-curfew is a relevant consideration to the question of Article 8 ECHR proportionality, even though

it doesn't reduce the sentence as a matter of Bulgarian law as had previously been the argument. There are authorities which say that it can still be taken into account as a factor in the Article 8 analysis, and I have done so.

12. The Judge referred in the 'balancing act' to the public interest consideration which concerns the United Kingdom not being, or being seen to be, a "safe haven" for "fugitives" from foreign criminal justice. However, the Judge's judgment did not, in terms, set out any specific finding that the Appellant had left Bulgaria and come to the United Kingdom in June 2013 as a "fugitive". The EAW records that he was convicted in his absence. His proof of evidence describes him learning of the conviction and pursuing an appeal through Bulgarian lawyers. The various Respondent's submissions that are before the Court – in the materials that I have read – do not spell out the basis, still less by reference to the criminal standard, for a finding of fugitivity. For the purpose of today's application for permission to appeal I assume in the Appellant's favour that he would not stand to be treated as a fugitive on a substantive appeal in this Court.

13. The most favourable approach that I can take to the Appellant is to posit this Court considering "afresh" the Article 8 balancing exercise on a fully up-to-date and informed basis, including by reference to the points that have been made at today's hearing, and with no finding of fugitivity. That is the approach that I take.

14. The insurmountable difficulty is this. I am quite sure that there is no realistic prospect that, adopting such an approach, this Court at a substantive appeal would conclude that extradition of the Appellant is a disproportionate interference with his Article 8 rights or with those of his family members or any of them. As he has emphasised in what he has told me today, the Appellant is the bread-winner for the family. There will be a significant impact for him, his partner, his stepdaughters and his granddaughter if he is extradited. The passage of time since the index offending in 2011/2012 is significant. However, it has to be seen in the context of the having been a pursuit of appeal proceedings in Bulgaria which were finally determined only in 2017, the Appellant being arrested on the EAW that year (May 2017), and of the time since then being attributable to events in the proceedings, including the stay while points of principle were resolved in other test cases. The Appellant and his family members have roots in the UK and ties here, including to one another. The Appellant is a person of substantially good character since his arrival here in June 2013, with the single offence attracting a non-custodial sentence and dating back more than 4 years. He has been on a very substantial 4 year 4 month period of tagged-bail with the electronically monitored curfew which is a relevant feature of the case for Article 8 purposes, as I have explained. But the ultimate problem is that the various features of the case which weigh in the balance against extradition are plainly and decisively outweighed by the strong public interest considerations which weigh in support of extradition. These concern this country honouring its treaty obligations and acting with mutual respect for the conviction and sentence of the Bulgarian courts, extraditing the Appellant to face his responsibilities under the sentence which those Bulgarian courts have imposed and upheld, all in the context of offending of sufficient seriousness to justify the substantial custodial term imposed by those courts. There will be hardship for the Appellant and for the other family members left behind in the UK, as he has emphasised in what he has told me this morning. But the problem, in my judgment, is that it does not begin – including in combination with the other features of this case – to outweigh the strong public interest in extradition. The conclusion which the Judge reached, back in March

2019, on that issue remains plainly the correct one, applying the relevant legal principles, as I must. In those circumstances and for those reasons this renewed application for permission to appeal is refused.

2.12.21