Neutral Citation Number: [2022] EWHC 2877 (Admin)

Case No: CO/2659/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2022

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

ALEXANDER NIKOLOV	**Appellant**
- and -	
REGIONAL PROSECUTOR'S OFFICE – PAZARDZHIK (BULGARIA)	**Respondent**

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Amanda Bostock (instructed by **Lawrence & Co**) for the **Appellant**
Tom Hoskins (instructed by **CPS**) for the **Respondent**

Hearing date: **12 October 2022**

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APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

1. On 2 July 2019 District Judge Zani ordered the Appellant's extradition to Bulgaria, which is a Category 1 territory for the purposes of the Extradition Act 2003 (EA 2003).

2. This is an appeal with the permission of Griffiths J on Ground 2 (s 21/Article 3 of the European Convention on Human Rights (ECHR) (prison conditions)) and Steyn J on Ground 3 (s 21/Article 8 ECHR) against the district judge's decision. Ground 1, relating to the validity of arrest warrants issued by Bulgarian public prosecutors, was not pursued following the decision of the CJEU in *PI* (C-648/20 PPU).

3. The Appellant was arrested before 11pm on 31 December 2020 and so the EA 2003 in its unamended form and the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member states of the European Union (the EAW Framework Decision) continue to apply: see *Zabolotnyi v The Mateszalka District Court, Hungary* [2021] 1 WLR 2569, [2]-[3]; *R (Polakowski) v Westminster Magistrates' Court* [2021] 1 WLR 2521, [19]-[24], [32].

Factual background

4. The Appellant's extradition was ordered on a conviction European arrest warrant (EAW) issued in Bulgaria on 8 December 2017 and certified by the NCA on 12 December 2017.

5. The EAW requested the Appellant's return to serve two sentences arising from three offences: (a) in April 2010, the Appellant unlawfully misappropriated an Opel Calibra car by exchanging it for another vehicle (the car offence); (b) from 9 October 2013 to the end of October 2013, the Appellant loaded and unloaded 2,678 cubic meters of wood illegally harvested by another, then, between October 2013 and 2 November 2013, he transported with a truck some of the wood (collectively, 'the harvesting offence').

6. On or around 23 February 2011, in case number 1891/2010, the Bulgarian court sentenced the Appellant for the car offence. The Appellant appeared personally at this sentence. He was sentenced to two years' imprisonment suspended for five years.

7. On 25 March 2016, in case number 1364/2014, the Bulgarian court sentenced the Appellant for the harvesting offence to a 'probation penalty' including a residence requirement and probation meetings for one year and six months. The Appellant appeared personally at this sentence. Nothing was done at this point in relation to the suspended sentence for the car offence, eg, it was not activated.

8. On 14 April 2016, the probation penalty in case 1364/2014 was enforced and the Appellant was informed of his obligations and the effect of any breach thereof.

9. At some point in 2017 the Appellant left Bulgaria to come to the UK, prior to the completion of the probation penalty in case 1364/2014. I am told that was to seek work. The EAW indicates there were just 16 days left of the 18 month period of the probation penalty when he left Bulgaria, and that is the basis on which I will proceed, although the evidence was not entirely consistent. However, whenever it was, his departure from Bulgaria put him breach of the conditions of his probation penalty. The Appellant told the district judge that he had had the permission of his probation officer to leave Bulgaria, but the district judge rejected this, and I obviously cannot go behind that finding of fact.

10. On 7 September 2017, a state-wide search for the Appellant was declared.

11. On 17 October 2017, in case number 727/17, the Regional Court replaced the remaining 16 days of the probation penalty in case 1354/2014 with eight days' imprisonment**.** Under Article 68(1) of the Bulgarian Penal Code, this required the Appellant to also serve the two year suspended sentence of imprisonment imposed in case 1891/2010 even though, by then the period of suspension had come to an end (in 2016). That two year sentence came into effect on 25 October 2017, with all the time to serve. The Appellant did not appear personally at this sentence, but was instead represented by an attorney.

12. Article 68(1) provides:

> "(1) If by the expiry of the probation period fixed by the court the sentenced person commits another intentional crime of general nature, for which punishment is imposed on him even after the above period, that person shall serve also the suspended sentence."

13. So, once imprisonment was passed for the harvesting offence due to the Appellant's departure from Bulgaria, he became liable to serve the two year term even though, as I have said, the suspension period had ended.

14. On 23 November 2017, an arrest warrant replaced the search for the Appellant and, as outlined above, the EAW was issued on 8 December 2017.

15. The following matters are therefore clear: (a) in 2011 the Appellant was sentenced to two years' imprisonment, suspended for five years for an offence committed in 2010; (b) during that five year period, in 2013, he committed the harvesting offence; (c) in 2016 he was given a probation penalty of 18 months for the harvesting offence; (d) the two year suspended sentence was not then activated, despite that conviction, and in due course, in 2016, the five year suspension period expired; (e) he left Bulgaria in 2017 in breach of his probation conditions, but only 16 days before they would have come to an end in any event; (f) as a consequence, in 2017 his probation penalty was revoked and replaced with eight days' imprisonment; (g) under Bulgarian criminal law, as a result of that eight day sentence, his two year sentence was activated, and for which his extradition is now sought.

16. A Chronology (taken from Ms Bostock's Skeleton Argument) is appended to this judgment.

17. The district judge accepted that the harvesting offence was not an extradition offence because the condition in s 65(3)(c) (imprisonment must be for four months or more) was not satisfied in relation to it. The Appellant was therefore rightly discharged on that offence, and extradition was ordered for the car offence only.

18. In short, therefore, what has happened in this case is that a very minor breach of probation conditions, themselves imposed for an extremely trivial offence – not itself extraditable - have resulted in the Appellant now facing extradition to serve a sentence of imprisonment, after a significant period in the UK during which he has lived a blameless life.

Submissions

19. In relation to Ground 2, Ms Bostock submitted that a specific and precise assurance was required from Bulgaria about the conditions in which the Appellant would be held before this court could be satisfied that there was not a real risk of a breach of Article 3 by reason of overcrowding in Bulgarian prisons She referred me to the three decisions of this Court in *Kirchanov v Bulgarian Judicial Authority*, reported at [2017] EWHC 827 (Admin); [2017] EWHC 1285 (Admin); and [2017] EWHC (Admin) 2048, where the topic was explored and various forms of Bulgarian assurance were considered. An assurance was received from Bulgaria concerning the Appellant on 11 October 2022, the day before the hearing. It appears that it had only been requested by the CPS very recently, despite this appeal having been lodged in July 2019. Ms Bostock said that, given its lateness, I ought not to accept the assurance, and especially not as Jay J had made orders in January and April 2022 requiring Bulgaria to respond to the Article 3 argument, and it had not done so.

20. In any event, she said that the assurance was not sufficient to dispel the risk of an Article 3 violation. She said that the assurance did not amount to a promise that in the future the Appellant *would* be detained in Convention-compliant conditions, but merely that *at present* he would. She said the assurance was the same as that which had been rejected as inadequate by this Court in *Kirchanov (No 2)*.

21. In relation to Ground 3, Ms Bostock said that the district judge's judgment was marked by a number of factual errors about the sequence of sentencing events set out above; that he had wrongly concluded that the Appellant was a fugitive when he was not; that his determination that extradition would not, in those circumstances, be a disproportionate interference with the Appellant's rights (and those of his family) under Article 8 was wrong (which is the test on appeal: see *Surico v Public Prosecutor of the Public Prosecuting Office of Bari, Italy* [2018] EWHC 401, [25]-[31]) and that given the errors I, myself, now had to carry out the required balancing exercise of factors in favour of, and against, extradition; and that if I did so, I could only reach the conclusion that extradition would be a disproportionate interference with Article 8.

22. For the Respondent, I did not require Mr Hoskins to address me on Ground 2/Article 3. I am satisfied, for the reasons I will briefly set out at the end of this judgment, that I should receive the assurance (despite its lateness), and that it is sufficient to dispel any risk of a breach of Article 3.

23. In relation to Ground 3, Mr Hoskins accepted that some errors had crept into the district judge's judgment in places, but that he had been right to conclude that the Appellant was a fugitive, applying *Wisniewski v Regional Court of Wroclaw, Poland* [2016] 1 WLR 3750, and that, overall, the judge had been right on his Article 8 conclusion, or at least not so wrong that I could properly allow the appeal.

Discussion

Ground 3

24. I propose to deal with Ground 3 first. For the following reasons, I have concluded that on the particular facts of this case: the judge was wrong to have rejected the Appellant's argument on Article 8; he should have answered the s 21/Article 8 question differently; that had he done so he would have discharged the Appellant; and thus that the appeal must be allowed: s 27(3), EA 2003.

25. The principles in relation to Article 8 in extradition cases are contained in *Norris v Government of the USA (No 2)* [2010] 2 AC 487; *H(H) v Italy Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338; and *Polish Judicial Authorities v Celinski* [2016] 1 WLR 551. No other case need be cited.

26. In *H(H)* Baroness Hale summarised the effect of the decision in *Norris* at [8]

> "8**.** We can, therefore, draw the following conclusions from *Norris*: (1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life. (2) There is no test of exceptionality in either context. (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition. (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back. (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved. (6) The delay since the crimes

> were committed may both diminish the weight to be attached to the public interest and increase the impact upon private 363and family life. (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

27. So, the public interest in extradition always carries great weight, but the weight to be accorded to it will vary according to the nature and seriousness of the crime involved. This was again emphasised by Baroness Hale at [31]; by Lord Judge at [111] (where he set out a number of passages to this effect from *Norris)* and at [121[; by Lord Kerr at [141]; and by Lord Wilson at [161[-[162] and [167].

28. Also of note are the passages in *H(H)* addressing the Article 8 rights of children in extradition cases: see in particular Baroness Hale at [9-15], [24-25], [33-34], [44-48], [67-79], [82-86]; Lord Mance at [98-101]; Lord Judge at [113-117] and [123-132]; Lord Kerr at [144-146]; and Lord Wilson at [153-156] and [170]. The interests of children in such cases are 'a primary consideration' but not '*the* primary consideration', still less '*the* paramount consideration'.

29. *Celinski* requires district judges to conduct a 'check-list' approach listing the factors in favour of extradition; the factors against extradition; and then to reach a reasoned conclusion, weighing those factors, on whether or not extradition would be a disproportionate interference with the Article 8 rights that are in play. The Appellant and his wife have a young child, and so his rights under Article 8 are engaged as well as those of the Appellant and his wife.

30. Ms Bostock was right to say that the judge fell into error at [5] when he said that the 'terms of the suspended sentence regarding the matter for which extradition is currently sought', were that the Appellant was to (a) remain under regular and obligatory probation supervision of 18 months; (b) not to re-offend; and (c) remain at a fixed address. The 18 month period related to the harvesting offence, on which the Appellant was discharged (at [4] of the judgment).

31. Paragraphs 6 and 7 also contain errors.

32. In [6] the judge said that the Appellant had breached the terms of his two year suspended sentence by committing the harvesting offence, and that he was given an additional 16 day period of custody which was later reduced to eight days custody. That is wrong. Nothing was done in relation to the two year sentence when he committed the harvesting offence and it is therefore difficult to say that he breached a suspended sentence in any meaningful way. And he was not sentenced to 16 days, reduced to eight days imprisonment for the harvesting offence. As the Further Information dated 10 May 2019 makes clear, what happened was that the 16 days he had left on his probation penalty was replaced with eight days' imprisonment.

33. In [7(i)] the judge said that the Appellant had come to the UK in breach of his suspended sentence. He did not. By the time he came to the UK, the suspension period had ended and he was not in breach of its terms. He was in breach of the

probation penalty – which was not a suspended sentence. The judge also said that by coming to the UK the Appellant had 'triggered' the activation of the eight day sentence for the second (ie, harvesting) offence, and the two year suspended term. He was again wrong, on the first part. There was no 'triggering' of the eight day term, which implies it had already been imposed. When the Appellant left Bulgaria, it had not been imposed. As I have explained, what happened was that when it was determined that he was in breach of the probation penalty, then - and only then – was the eight day term imposed.

34. Paragraph 20, where the judge rejected the suggestion that only 16 days of the probation penalty were left to go when he left for the UK, is also erroneous. Box B of the EAW confirms the period of 16 days.

35. I am unable to agree with the judge's conclusion at [18] and [46] that the Appellant was a fugitive in relation to the car offence. When he left Bulgaria it was not to put himself beyond the reach of the authorities for punishment for that offence. There was, at that point, no punishment to be served. It was only later, when he was already in the UK, that the two year sentence was activated.

36. In *Wisniewski*, [59]-[60], Lloyd-Jones LJ (as he then was) said:

> "59 … Rather than seeking to provide a comprehensive definition of a fugitive for this purpose, it is likely to be more fruitful to consider the applicability of this principle on a case by case basis. Similarly, a process of sub-categorisation involving 'quasi-fugitives' and 'fugitives not in the classic sense' is unlikely to be helpful.
>
> 60. How does this work in relation to a breach of a suspended sentence? Mr Hardy submits that the district judge in each of the cases before us was entitled to find that the appellant had left Poland voluntarily with the inevitable consequence that he or she would not comply with his or her obligations pursuant to a suspended sentence, which in turn would inevitably result in its activation. Accordingly, he submits, the district judge was right to hold that each appellant was precluded from relying on the passage of time bar to extradition. In one respect this seems to me to suggest too stringent a test; the activation of the sentence need not be an inevitable consequence of the appellant's conduct. I consider that a person subject to a suspended sentence who voluntarily leaves the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence may as a result be implemented, cannot rely on passage of time resulting from his absence from the jurisdiction as a statutory bar to extradition if the sentence is, as a result, subsequently activated.

37. The fact is that when he left Bulgaria the Appellant was not in breach of any obligation relating to the car offence, and was not subject to a suspended sentence, which as I have said had come to an end. The *Wisniewski* principles therefore do not apply in this case. It would in my judgment stretch the definition of a fugitive too far to say that, in these circumstances, the Appellant was a fugitive in relation to that offence. It seems to me likely that the judge's confusion earlier in the judgment about the sequence of events led him into error. I agree the Appellant was a fugitive in relation to the harvesting offence, but he cannot be extradited for that.

38. It therefore falls to me to re-conduct the Article 8 balancing exercise. In so doing, I have little hesitation in concluding it would be a disproportionate interference with the Appellant's Article 8(1) rights and those of his family. Obviously, I accept there is a public interest in extradition. That is an ever-present factor. Its weight varies according to the facts, as *HH* makes clear, and given the circumstances of this case, its weight is significantly lessened. That is because, as I have explained, the trigger for the extradition was the most trivial infraction of probation conditions, themselves imposed for a trivial and non-extraditable offence. But for that very minor breach of the law, the Appellant would not now be facing extradition. That is not a factor the judge recognised in his *Celinski* check-list at [45]. There are other powerful factors against extradition, including the 12 years that have passed since the car offence was committed (and I do not accept the judge's description of it as 'serious': it seems to me to have been comparatively minor dishonesty), and the six years since the suspension period came to an end. It is now nearly three and half years since the district judge's judgment, some of which delay is unquestionably the fault of the Respondent. The Chronology shows that there were failures by the Respondent to supply information that had been requested for the purposes of this appeal. Mr Hoskins on behalf of the Respondent accepted, very fairly, that there had been defaults by his client and that requests for information had been sent by the CPS to Bulgaria only at a very late stage and shortly before the hearing. The Appellant and his partner now have a young child and their lives and plans for further children have been affected in a profound way by these proceedings and the time they have taken. I have had a measured regard for this last factor, which Ms Bostock explained to me in detail, but which I do not need to set out expressly in this judgment.

39. Overall, therefore, for these reasons, the appeal succeeds on Ground 3 and is allowed. The order for extradition is quashed.

40. In relation to Ground 2/Article 3, suffice it to say that despite Ms Bostock's efforts I am satisfied that the assurance offered by Bulgaria would have been sufficient to safeguard the Appellant's Article 3 rights in prison in terms of the space he would be afforded. It was late, and should have been supplied sooner than it was, as the Chronology makes clear. However, I did not accept her submission that I should reject it because of its lateness, as little purpose would have been served by so doing, as proceedings would likely simply have re-started had I discharged the Appellant on Article 3 grounds. However, given I have allowed the appeal on Article 8, I do not think I need say any more about this ground of appeal.

CHRONOLOGY

	DATE	ACTION
1.	April 2010	Sentence A offence committed – 'misappropriation of car' (the car offence)
2.	23/02/2011	Sentence A imposed – 2 year's suspended for 5 years
3.	Oct 2013	Sentence B offence committed – handling stolen firewood (the harvesting offence)
4.	25/03/16	Sentence B 'came into force' – 18 month community order
5.	17/10/17	16 days remaining of the Sentence B community order replaced with 8 days' imprisonment - Sentence A activated as a result
6.	8/12/17	European Arrest Warrant issued
7.	12/12/17	European Arrest Warrant certified by the NCA
8.	17/04/19	Appellant arrested in the UK
9.	02/07/19	Extradition ordered by a District Judge
10.	08/07/19	Appeal lodged
11.	02/08/19	Perfected grounds served raising inadequacy of assurance
12.	10/01/20	Permission granted on Article 8 and stayed on Article 3 – Steyn J
13.	26/2/21	*Chechev & another v Bulgaria [2021] EWHC 427 (Admin)* – A.3 ruling
14.	09/09/21	Appellant confirms Article 3 remains in issue – updated grounds filed advising again of assurance inadequacy particularly re being outdated. No response from Respondent.
15.	03/12/21	Court (not having uploaded the Appellant's submissions confirming Article 3 remains in issue) lists the appeal to be heard on Article 8 alone for 25/01/22
16.	06/01/22	Counsel for the Appellant contacts the court to enquire about progress on Article 3 issue. An Administrative Court lawyer, apologises and confirms the email and submissions 'were never uploaded to the case records' and no note was made of receipt.
17.	07/01/22	Hearing on 25/01/22 vacated with the agreement of all parties to allow a papers permission decision on Article 3.
18.	18/01/22	Jay J orders a response from the Respondent on Article 3– none provided.
19.	07/04/22	Jay J again orders a response from the Respondent on Article 3 – none provided.

20.	26/5/22	Permission granted on Article 3 – Griffiths J