Neutral Citation Number: [2022] EWHC 344 (Admin)

Case No: CO/1507/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 17th February 2022

Before:

MR JUSTICE FORDHAM

- -

Between:

JAY OWEN BARTLEY	**Appellant**
- and -	
PUBLIC PROSECUTOR'S OFFICE, COURT OF APPEAL OF EASTERN CRETE (GREECE)	**Respondent**

- -
- -

Stephen Fidler (Solicitor Advocate) for the **Appellant**
The **Respondent** did not appear and was not represented

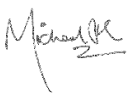
Hearing date: 17/2/22

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 in a Coronavirus remote hearing.

MR JUSTICE FORDHAM:

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The Appellant is aged 26 and a British national. He is wanted for extradition to Greece. That is in conjunction with an extradition arrest warrant ("ExAW") issued on 4 March 2020 and certified on 21 May 2020. It relates to an index offence described as "murder" or as "complicity to homicide". He was convicted in November 2019 in his absence and sentenced to 10 years imprisonment. Extradition was ordered by DJ Robinson ("the Judge") on 19 April 2021 after an oral hearing 10 days earlier.

Mode of hearing

2. The mode of hearing was by Microsoft Teams. Mr Fidler was satisfied, as was I, that that mode of hearing involved no risk of prejudice to the interests of his client. Having a remote hearing (and at 10am) enabled him to discharge an important function which he had identified to the Court by email, relating to another hearing scheduled outside London today. That promoted the efficient dispatch both of this Court's list but also of the case-load of a criminal court, dealing with cases in the context of the pandemic, including dealing with any backlog or avoidance of a backlog. I am quite satisfied that a remote hearing, in all the circumstances, was appropriate. The Respondent had already indicated that it was not intending to participate. The open justice principle was secured in all the usual ways. The case, together with its start time and its mode of hearing, was published in the cause list from yesterday afternoon onwards; together with an email address usable by any member of the public or press who wished to observe this public hearing.

The ground of appeal

3. The ground of appeal, which is renewed to this Court, following the refusal on the papers of permission to appeal by Dove J on 1 November 2021, concerns article 3 ECHR, prison conditions and assurances.

The appeal proceedings in Greece

4. An important side issue has arisen, with which I will deal at the outset. The Judge was asked to adjourn consideration of this case until after an appeal hearing in Greece had been determined by the appeal court there. What was (and still is) said on the Appellant's behalf is that the success on the appeal would overturn the basis for the ExAW, which would then fall away. The Judge refused that adjournment request, in April 2021, saying that the "existence of an appeal" in Greece was "not a sufficient reason to adjourn". The Judge was satisfied that "unless and until the extradition request is withdrawn" it was in the "interests of justice" to proceed to deal with the case on its substantive legal merits. The Judge also explained that the adjournment was likely to be for an unknown period, in that no listing date for the appeal had been given. Dove J, in refusing permission to appeal on the papers, said that an extant appeal was "no basis for discharge". An application to adjourn this hearing was made on the papers, in light of the appeal hearing which is understood to be scheduled for June 2022. The Respondent is known to resist any adjournment or delay.

5. Based on a letter from the Greek lawyer dated 15 February 2022 the application, in writing, for an adjournment was put in a more limited and immediate way. That letter referred to the Greek lawyer's intention to make an interim "application", to suspend the Appellant's sentence, pending the Greek appellate court's consideration in June 2022 of the substantive appeal. The lawyer's letter said that the first hearing at which such an interim application could be dealt with would be on 2 March 2022. The question that was raised in the latter was whether this hearing could be adjourned for effectively 2 weeks, pending that hearing of that "application", if made. The Administrative Court Office responded explaining that an application notice (and the requisite fee) would be needed, both for an application for an adjournment, and for an application to rely on the putative fresh evidence from the Greek lawyer. No application notice was forthcoming. At today's hearing Mr Fidler has not advanced an argument inviting an adjournment. In my judgment he is right not to do so. There is no basis on which, in my judgment, it could be appropriate to adjourn this hearing and defer dealing with the substantive legal merits. My reasons are essentially the same as were given by the Judge when he refused the adjournment, then put in terms of awaiting the substantive appeal; and then again given by Dove J.

6. What Mr Fidler has said today is different and constituted a "fallback" position. He said if – contrary to his main submissions – the Court were refusing permission to appeal today, and therefore dismissing the appeal, the course he would then invite would be that the appeal be "dismissed with effect from 2 March 2022". That would allow the imminent opportunity for the Greek lawyer to seek the interim suspension of the 10 years sentence so as to achieve by way of an interim order the withdrawal of the EAW.

7. I find it difficult to understand the appropriateness of an 'interim holding position' which would lead to the withdrawal of an EAW, pending an appeal hearing a few months later, at which the appeal would stand to be allowed or refused. If the substantive appeal were refused and the 10 year sentence remained, there would then (presumably) need to be new action to rely on it for the purposes of extradition. In circumstances where I have not asked for enlightenment, I will put those perplexing implications entirely to one side and assume that the consequence of a hearing on 2 March 2022 could have precisely that effect if it is successful.

8. I say at the outset that I would not be prepared, as a "fallback" position, to dismiss the appeal but only "with effect from 2 March 2022". If it is right to dismiss the appeal it is because there is no legal merit, even arguably, in the grounds on which in law extradition can be resisted. I would not in this case be prepared, even for a short period, to defer the execution of the process in those circumstances. If in those circumstances an application is made (and as at 15 February 2022 it was being described by the Greek lawyer as an "intended" application), and if it is listed and heard on 2 March 2022, and if the consequence is that the sentence falls away in the interim, pending the appeal, all of that on the face of it can and should take place with the Appellant having been surrendered under the legal process of extradition. The Greek lawyer contemplates such a situation. Reference is made in the letter to 'filing' an application, even 'after the surrender of the requested person to Greece'. But if the application has already been 'filed' no difficulty as to 'filing' could arise. What is said by the lawyer is that it will be "far more difficult" for the appeals court to grant suspension and "set the defendant free" after his surrender to Greece, given that the appeal hearing is only 2 ½ months away. Again, I find that difficult to follow. But it does not, in my judgment, begin to

provide a reason why the Appellant – if in law he has no basis for resisting extradition – should have by Order of this Court a continued period in the UK so as to 'strengthen his hand' on an 'interim application' in Greece.

9. If there is a durable basis for the Appellant to remain here it must lie in the substance of the Article 3 prison conditions ground of appeal.

Article 3 (prison conditions)

10. As to the law relating to Article 3 prison conditions and assurances, the Judge dealt with this in a way which was unimpeachable. The Appellant's appeal documents rightly recognise that the law was correctly set out by the Judge.

11. Prison conditions and Greece have been the subject of a series of cases in this court they include Marku v Greece [2016] EWHC 1801 (Admin), Owda v Greece [2017] EWHC 1174 (Admin) and most recently Sula v Greece [2022] EWHC 230 (Admin). There is also a pipeline case in which requested persons were discharged, and assurances came too late, called Neli & others CO/4075/2021 (see Sula at §20).

12. In the present case the Judge focused on two Greek prisons, namely Alikarnassos and Chania. That was based on a finding by the Judge that the Respondent's further information meant that the Appellant was "likely to be held" at one or other of those prisons. As the Judge went on to record, further information had also stated that the Appellant would not be detained at Korydallos or Nafplio, two prisons in respect of which UK courts had previously required assurances. Mr Fidler accepts that – by reference to authorities which neither of the parties have put before this Court for the purposes of this application for permission to appeal – it was right in principle for the Judge to focus on the prisons where the Appellant was "likely to be held", and he accepts that it is not arguable that the Judge interpreted the further information incorrectly, in identifying the two prisons as the relevant "likely" prisons (Alikarnassos and Chania).

13. In addressing those two prisons, the Judge explained – on the basis of the evidence before him including the then up-to-date statistical position – that Chania did not give rise to a relevant risk, on legally appropriate evidence, calling for any assurance. Alikarnassos, on the other hand, did. In relation to Alikarnassos the Judge's finding of Article 3 compatibility of extradition rested on two points. (1) The first was that there was the capability within the Alikarnassos prison to holding the Appellant in a cell satisfying the familiar 3m² minimum floor space "requirement". (2) The second was that the Greek authorities, in further information dated 25 January 2021 (properly understood), had given a specific assurance guaranteeing that the Appellant would, including if detained at Alikarnassos, have that requirement met.

14. I interpose this. As to the second point (the assurance) the further information from the Respondent to the CPS dated 25 January 2021, written specifically in the Appellant's case, referred to "the requirement set by you concerning the 3 sq m personal space for the detainees at the Alikarnassos and Chania Detention Establishments, as far as the square meters of space corresponding to each detainee are concerned". It included this:

> ***The Directorate of Detention Establishment Management where these presents are served, which is responsible for issuing the required administrative acts for the transfer of detainees to the Detention Establishments, is kindly requested to take cognizance of the case and any***

> ***further action of its own, in order the requirements set by the Authorities of the United Kingdom to be ensured for the whole period of above-named requested person's stay in the Greek Detention Establishments.***

15. The basis for accepting that there was in the further information an assurance in the case of the Appellant ("the RP") of the requisite nature and effect was set out by the Judge in clear and careful terms in §§35-37 which I set out here:

> ***35. As to whether there is a real risk of a breach in the RP's individual case the court now has the benefit of the subsequently-issued assurance of 25 January 2021. I have considered this in the light of the Othman and Zagrean criteria. The assurance is provided at senior level by the Secretary General for Anti-Crime Policy. It identifies that the Directorate of Detention Establishment Management is responsible for issuing the required administrative acts for the transfer of detainees to detention establishments; copies that Directorate in to the assurance; and asks it to take cognizance of the case, and any further action of its own, in order to ensure the UK's requirements are met for the whole per period of the RP's detention in Greece.***
>
> ***36. The assurance is issued by senior authority of a Member State of the European Union which is bound by the European Convention on Human Rights and which sets standards for and monitors cell sizes. As stated above it is clear from the various figures that both prisons would be capable of providing cell conditions, in which the RP could be held, which did not infringe permissible space standards. If the assurance is fulfilled the RP would not be held in impermissible conditions. There is no reason to believe the assurance has not been given in good faith and there is a sound basis to believe it will be fulfilled. Greece provides access to the CPT for inspections and monitoring. There is no evidence that she does not comply with assurances. The assurance should be approached on the basis of mutual trust and confidence.***
>
> ***37. I am quite satisfied therefore that the assurance allays any concerns of the court that this RP would face a real risk of impermissible treatment at either prison. There is no such risk.***

Mr Fidler accepted that, beyond reasonable argument, that that was an unimpeachable interpretation of the language of the further information dated 25 January 2021. He accepted that, beyond reasonable argument, the Judge was rightly recognising an "appropriate" assurance in terms meeting the legal standards which the Judge had correctly earlier set out.

16. The argument put forward by Mr Fidler, against that backcloth, is as follows. He submits that permission to appeal should be granted, or alternatively the application for permission to appeal adjourned for further information, so that the court has a properly up-to-date and legally sufficient picture.

17. First, Mr Fidler emphasises that the Judge was considering the position on prison capacity data as at April 2021. He submits that it is relevant that we are now in February 2022. He put before the court updated statistics relating to prison capacity and current occupancy at Alikarnassos. He submits that this current updated picture calls for fresh further information from the Respondent, in order to ensure that Article 3 compatibility of extradition is secure. The problem with that submission, in my judgment, beyond argument, is that the Judge accepted in this case that the prison capacity and occupancy statistics even in April 2021 gave rise to the need for a specific assurance. Mr Fidler is able to say that that is even more the case now. But the Judge's Article 3 compatibility conclusion was not a function of statistics as to occupancy. It was a function of the two points which I have emphasised: (1) that there was the capability within Alikarnassos to provide the Appellant the "requirement" of the 3m² minimum floor space, and (2) that there was a specific and legally compliant assurance that that is what would be

delivered in his case. The new statistics do not impugn either of those points. They emphasise the importance of those points. But the judge's analysis already did that.

18. Ultimately, therefore, the critical question relates back to the January 2021 further information and the assurance which the Judge held was to be identified within it. As to that, Mr Fidler submits that the further information is itself more than a year old. He emphasises changes in the time since then. He submits that "time has moved on". He refers to the other case-law known to be in the pipeline. And he submits that, at least arguably, what the Court needs in the present case is an up-to-date assurance. This argument rests squarely on the date of the further information identified as containing the assurance. It is not said, as I have explained, that the substantive content of that further information has wrongly been treated by the Judge as being of a clear and appropriate assurance meeting the applicable legal standards.

19. In my judgment, it is not reasonably arguable that that assurance – by reason of the date which it bears – has become outdated or overtaken by events. What is said in the January 2021 further information is not time-limited. It is referable to the present case, and to the surrender of the Appellant in the present case. It is so referable, just as is the November 2020 further information, containing the assurance that the Appellant would not be detained at Korydallos or Nafplio. That November 2020 further information is even older than the January 2021 further information. What has been said by the Greek authorities has a continuing and enduring focus and effect. The whole point of assurances is that, when they meet the appropriate legal standards, they are statements relating to guaranteed future actions, which are enduring. Nor, in my judgment, is there any need or basis to adjourn the application for permission to appeal in order to require fresh further information from the Respondent, or to pose questions or insist on a further assurance. The assurances given in this case, and identified by the Judge, were addressed by the Respondent in its submissions of 25 May 2021. It was there explained, by reference to the contents of the assurance provided dated 25 January 2021, why the Judge was right to analyse the quality and reliability of that assurance in line with the principles in the authorities. The Respondent's position is that it is clear that the assurances given provide the necessary Article 3 protection. There is nothing, in my judgment, from the lapse of time or any change of circumstances – including other case law relating to prisons at Thessalonica and Nigrita – which serves, even arguably, to undermine the Judge's conclusions and the Article 3 security which they provide; nor to give rise to any concern so as to adjourn or require further information or assurance.

Conclusion

20. It is for all those reasons that I refuse the renewed application for permission to appeal. I will formally refuse permission to adduce the fresh evidence on the basis that in the circumstances it is not capable of being decisive. I will also refuse the application to defer, until 2 March 2022, the dismissal of this appeal.

17.2.22