Neutral Citation Number: [2019] EWHC 1698 (Admin)

Case No: CO/5032/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2019

Before:

MR JUSTICE JAY

- -

Between:

LUCIE TUMOVA **Appellant**

- and –

COUNTY COURT IN MELNIK, CZECH REPUBLIC **Respondent**

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- -

Graeme Hall (instructed by **Kaim Todner, Solicitors**) for the **Appellant**
David Claxton (instructed by **CPS Extradition**) for the **Respondent**

Hearing date: 25th June 2019

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Approved Judgment

MR JUSTICE JAY:

1. This is an appeal brought with leave under s.26 of the Extradition Act 2003 against the decision of DJ Bouch given on 11th December 2018 ordering the extradition of the appellant to the Czech Republic.

2. Before the District Judge there were two conviction warrants, EAW1 and EAW2. These were both issued on 9th June 2017 and certified by the NCA on 5th November 2018. The appellant was arrested on the same day and granted conditional bail. The hearing before DJ Bouch took place on 26th November 2018 and the only issue raised was under Article 8 of the Convention. The position was that the appellant had come to this country as a fugitive in February 2017. Thereafter, she had found employment and entered into a stable relationship with a British partner. DJ Bouch, having conducted the *Celinski* balance, concluded that the public interest in favour of extradition outweighed the appellant's right to a private and family life under Article 8.

3. There are three grounds of appeal, viz.:

   (1) EAW1 failed to comply with s.2(6)(b) of the Extradition Act 2003 because it is possible that it relates to more than one offence.

   (2) EAW1 also failed to comply with s.2(6)(b) in that the particulars given are insufficiently clear and unambiguous in relation to (i) the description of the offence generally, (ii) the identification or specification of the *actus reus* and (iii) the identification or specification of the requisite *mens rea*.

   (3) The Article 8 balance was improperly carried out by DJ Bouch, either on the basis of what was before her or in the light of (1) and/or (2) above.

4. It may be seen that no appeal is brought against EAW2. This related to the imposition of a term of 6 months' imprisonment in connection with an offence of driving whilst disqualified committed in March 2014. It appears from the face of the warrant that the appellant originally received a suspended sentence in April 2014 but the custodial term was activated in December 2016.

5. According to EAW1, the appellant was born on 22nd February 1983. Under section (e) of the document, the warrant related to one offence contrary to Article 201 of the Criminal Code, endangering the care of a child. The offence is in these terms:

> "Whoever, even by negligence, endangers the intellectual, emotional or moral development of a child by seriously breaching their obligation to take care of them or any important obligation ensuing from parental obligations, shall be punishable …"

6. As for the description of the circumstances in which the offence was committed:

> "During the period from 2006 to 3 June 2011, in the place of her actual residence … she had not been taking proper care of her under-age daughter …, date of birth 27 June 2005, who had

> been put in her parental custody, by not ensuring proper care for her, frequently leaving her at her home alone and without supervision, not allowing for her to get proper rest, since she was having all sorts of visitors during evening and night hours."

7. The procedural history before the County Court in Melnik was also set out in the warrant. Placing this in chronological order:

   (1) On 25th June 2012 the court made an "order to summary punishment" (Ref 14 T 128/2012-32).

   (2) On 31st October 2012 the court "overruled" that order and the appellant was found guilty of the Article 201 offence (as particularised above); she was given a "cumulative prison sentence in the scope of 6 months with a probation period in the scope of 18 months" (Ref 14 T 229/2012-180).

   (3) On 16th June 2014 the probation period "of the conditional sentence" was extended by another 6 months (Ref 14 T 229/2012-220).

   (4) On 19th January 2015 the period was extended by one year and the appellant was placed under the supervision of a parole officer (Ref 14 T 229/2012-240).

   (5) On 19th December 2016 the appellant was made subject to custody in a detention centre because she had failed to meet the requirements of the parole officer (Ref 14 T 229/2012-340).

   (6) On 24th January 2017 the appellant's appeal was rejected.

8. The argument of Mr Graeme Hall on his first ground may be encapsulated as follows. He submitted that the combined effect of *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin) and *M & B v Italy* [2018] EWHC 1808 (Admin) is that the Respondent must prove to the criminal standard that the EAW adequately describes the substance of the allegations against the requested person and, where the request for extradition is made in relation to more than one offence, each offence must be adequately particularised. Mr Hall's point is that it is *possible* that EAW1 specified more than one offence. He relied on the different case reference numbers for the summary punishment order and the "cumulative prison sentence", and on what he said was the natural and ordinary meaning of the epithet "cumulative": at least a reasonably arguable view is that this was an amalgamation of two offences.

9. I cannot accept these submissions. EAW1 asserts that it refers to one offence. The different reference numbers cannot be clearly explained, but it is not possible to draw the inference that the summary punishment order was imposed for a different matter altogether. More importantly, I read "cumulative prison sentence" as meaning: a suspended prison sentence of 6 months which could be activated during the "probation period" of 18 months. We know that the activation period was later extended and that in due course a parole officer was appointed. On any view, in my judgment, the adjective "cumulative" relates to the amalgamated nature of the sentence rather than the offence underlying it. There is absolutely no inkling of there

being more than one offence, no reasonable inference may be drawn that EAW1 somehow conceals a second offence, and the appellant's first ground cannot be accepted.

10. As for the first limb of the appellant's second ground, there is no dispute between the parties as to the relevant law. I have already mentioned *FK*, and in my view reference should be made to the entirety of paras 54 and 55 of Hickinbottom LJ's judgment in that case, which for present purposes it is unnecessary to set out. Mr Hall relied in particular on the judgment of the Divisional Court (Dyson LJ and Walker J) in *Von der Pahlen v Government of Austria* [2006] EWHC 1672 (Admin). I have paid particular regard to paras 21-25 of Dyson LJ's judgment. As in the present case, the real issue for the purposes of s.2(6)(b) is whether adequate particulars had been given of the conduct alleged to constitute the offence.

11. Mr Hall's submission, in a nutshell, is that any meaningful particulars of the Article 201 offence were lacking in EAW. The alleged neglect is said to have taken place over 5½ years, but there is a world of difference between on the one hand leaving a baby and on the other hand leaving a 6-year old unsupervised. The adverb "frequently" is imprecise and unspecific, and does not enable the appellant to understand the substance of the allegation or the court in this jurisdiction properly to undertake the *Celinski* balancing exercise.

12. I recognise that these submissions have some force. However, this was a relatively straightforward allegation, in contrast with the facts of *Von der Pahlen*, and a degree of common sense is required. The child in question was the appellant's daughter who was obviously living alone with her and under her supervision at all material times. The allegation was that the appellant, in breach of Article 201 of the Czech criminal code, "frequently" (i.e. often) left her child alone and without supervision. The gravamen of the allegation is that the appellant frequently had "all sorts of visitors [at home] during evening and night hours": not merely was the child left alone and unsupervised whilst this was happening, this neglect also interfered with the child's rest.

13. As Hickinbottom LJ stated in *FK*, at para 54, the appropriate level of particularisation must depend on the circumstances of the particular case. This was a continuing offence which endured throughout the daughter's early childhood. I agree that the child's needs and circumstances would be changing as she grew up in this environment, but I do not accept that there is anything about the particulars which serves to engender any real doubt as to the substance of the allegation being advanced. I would therefore reject this first limb of the appellant's case on the second ground.

14. The second and third limbs may be taken together. In his Amended Grounds of Appeal Mr Hall advanced the argument that the lack of any meaningful particularisation as to the substance of the offending meant that the *actus reus* is not made out. His focus was on whether his client's conduct was such that the child was *likely* to be caused unnecessary suffering or injury to health. This argument was not repeated in Mr Hall's skeleton argument filed for the purposes of this appeal, but it was not expressly abandoned. It was resurrected in Mr Hall's oral argument before me, and no procedural difficulty arises.

15. In relation to want of particularisation of the *actus reus*, Mr Hall drew attention to the likely equivalent offence under s.1(1) of the Children and Young Persons Act 1933, which provides:

> "If any person … wilfully assaults, ill-treats, neglects, abandons or exposes [a child] … in a manner likely to cause him unnecessary suffering or injury to health … he shall be liable …"

16. The wording "in a manner likely to cause him unnecessary suffering or injury to health" was considered by the High Court of Justiciary in *H v Lees* [1993] JC 238 in the context of a Scottish statute which was in identical terms. The facts of that case were rather different. The parent was intoxicated and incapable in her living room, and when the police arrived her child was "found to be quite safe and healthy and well wrapped up in a cot upstairs at about 1 am". Lord Hope, giving the opinion of the court, concluded that there was no evidence to support the inference that the mother's neglect was likely to cause the child unnecessary suffering or injury to health. No findings had been made as to when the child was likely to require attention whether for feeding, changing or some other reason.

17. The issue in the instant case is whether the inference of probable causation of unnecessary suffering or injury to health is capable of being drawn to the criminal standard from the succinct iteration of the essential facts of the case in EAW1.

18. Mr David Claxton on behalf of the Respondent submits that the inference is irresistible, and I agree. This was not a one-off. The lack of supervision complained of, in other words the neglect, occurred frequently over a number of years. Further, the child's sleep was likely to have been disturbed. Applying a reasonable degree of common sense, I think that it is inevitable that the child's emotional and psychological development was hampered, or at the very least jeopardised.

19. This brings me to the third limb of the first ground, that the *mens rea* has not been adequately particularised. Here, the issue is not whether the *mens rea* element of the offence under Article 201 of the Czech criminal code corresponds with s.1(1) of the 1933 Act (it does not), but whether the *mens rea* required for the purposes of our statute may be inferred from the particulars given in the warrant "as an inevitable corollary of, or necessarily implied from" that conduct: see *Cleveland v USA* [2019] EWHC 619 (Admin), at para 59.

20. The *mens rea* required for the s.1(1) offence has been explained by Lord Diplock giving the leading speech for the House of Lords in *R v Shepherd* [1981] AC 394, at 406D-E:

> "The danger of the statement is that it invites confusion between, on the one hand, neglect and on the other hand, negligence; which calls for consideration not of what steps should have been taken for that purpose in the light of the facts as they actually were, but of what steps would have been appropriate in the light of those facts only which the accused parent either knew at the time of his omission to take them or

> would have ascertained if he had been mindful of the welfare of the child as a reasonable parent would have been."

21. Returning to the particulars contained in EAW1, the relevant facts set out are that the appellant left the child alone and unsupervised on the occasions when she was receiving visitors during evening and night hours; and that this happened often. Looking at Lord Diplock's two-part test, it is difficult to avoid the conclusion that the appellant was aware of all relevant facts, and that this is not a case of attributing to her any additional matters of which she would have been aware had she taken appropriate steps. If the appellant was frequently receiving these visitors at these times, the inevitable consequence must have been that her child was neglected; and the appellant must have appreciated that. Again, the point falls to be made that this was scarcely a one-off event or omission. In my judgment, the requisite *mens rea* is an inevitable corollary of, or to be necessarily implied from, the conduct particularised.

22. The third ground of appeal is that District Judge Bouch erred in carrying out the *Celinski* balance. The complaint is made that the District Judge should not have referred to the fact that the appellant has no family or dependants in the United Kingdom and that they are all in the Czech Republic.

23. In terms of the material before DJ Bouch, I regard this as a hopeless Article 8 challenge. The *Celinski* balance is for the lower court to perform and this court will only intervene on appeal if an error of principle is shown or the conclusion reached is clearly incorrect. Furthermore, the difficulties in establishing that a fugitive's Article 8 rights outweigh the public interest in favour of extradition are clear from high authority: see *Norris v USA* [2010] UKSC 9, [2010] 2 AC 487 and *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338.

24. The appellant had been in this country for less than two years. She has a British partner but all her family, including her child now living with the grandmother, are in the Czech Republic. It is not arguable that extradition in order to serve the entirety of a 12-month prison sentence would be disproportionate.

25. Mr Hall drew to my attention the terms of a third EAW which had subsequently been discharged. This stated that the appellant had been hospitalised in a psychiatric clinic between June 2011 and September 2012. DJ Bouch was not aware of this circumstance. The inference may fairly be drawn that the appellant was suffering from severe mental health problems. However, no evidence is available as to the appellant's continuing mental health difficulties, if any, or as to any need for treatment. Although this factual detail inevitably causes some concern, I do not believe that it takes the appellant's case any further. The fact remains that if there was any force in it, the appellant should have developed it before the District Judge on the back of proper evidence.

26. Had the appellant succeeded on either or both of her grounds, and EAW1 been removed from the equation, it is clear that the *Celinski* balance would have had to be conducted afresh. EAW2 references a 6-month prison sentence for a not particularly serious offence. I recognise that the appellant's case under Article 8 would have been stronger. Nonetheless, even on this hypothesis I would have been slow to conclude that the public interest in favour of extradition should not have prevailed.

27. This appeal must be dismissed.