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

No. CO/1591/2019

Royal Courts of Justice

Thursday, 18 June 2020

[2020] EWHC 2466 (Admin)

Before:

MR JUSTICE KERR

B E T W E E N :

VIRGILIU IONUT POPA — Appellant

- and -

PRESIDENT OF THE
TULCEA COURT, ROMANIA — Respondent

MR MARTIN HENLEY (instructed by Sharma Law) appeared on behalf of the Appellant.

MR DAVID BALL (instructed by the CPS Extradition Unit) appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared from Skype conference recording)

MR JUSTICE KERR:

1 This is an appeal founded on article 8 of the European Convention on Human Rights. Permission was initially refused on the papers by Julian Knowles J but was granted, at an oral hearing, by Laing J.

2 The appellant is wanted by the respondent in Romania to serve a sentence of one year, 11 months and 10 days for driving without a licence and failing to provide a specimen of breath or blood.

3 Leave was granted on 17 September 2019. The decision appealed against followed a hearing at Westminster Magistrates' Court before District Judge Zani on 4 April 2019. His judgment was given the same day.

The Facts

4 The appellant is from Romania. On 20 March 2011, in Romania, he drove a vehicle without a licence, was involved in a collision and subsequently refused to provide a sample of breath or blood. The District Judge below set out in his judgment that in evidence before him the appellant accepted that on that date, 20 March 2011, he was stopped by police having collided with another vehicle.

5 The judge noted that the appellant, in his evidence, accepted that on that date he did not have a licence authorising him to drive and accepted that he refused requests to provide a specimen of breath or blood, and he accepted that on that date he was taken to a police station.

6 The next event in the chronology is over a year later, on 10 August 2012. In Romania, on that date, the appellant signed a document in which he agreed to notify the prosecuting authority of any change of residence during the criminal trial process. In further information provided over and above the European Arrest Warrant ("EAW") the respondent's evidence included the following:

> "According to Article 70(4) of the Criminal Procedure Code … [Mr Popa] had the obligation to inform the Romanian Judicial Authorities of the change of his domicile address …
>
> The convict, [Mr Popa], signed the minute of 10.08.2012 in which he was informed 'the accused or the defendant is also informed of the obligation to announce in writing within 3 days any change of dwelling during a criminal trial'."

7 The subsequent EAW, to which I am coming, includes an indication that the appellant was not present at his later trial "being gone for work in England". The appellant did, indeed, come to this country. He did so in 2013.

8 He told the District Judge that he thought that was in December 2013 but the judge thought it probable that, as the appellant had stated in an earlier document in which he provided personal information, it was in March or April 2013, shortly after visiting a police station in Romania in connection with this matter.

9 Thus, it is known that the appellant visited a police station in Romania in the spring of 2013 and that later the same year, either a short time later or about six months later, he came to this country. There is an indication that in the middle of 2014 he was working in this country as a carpenter; the later EAW indicates that.

10 His trial eventually took place in Romania on 3 December 2014. He was tried in his absence, but represented by a lawyer, an arrangement made by his brother. On 17 December 2014, judgment was given and he was convicted and sentenced. As I have said, the sentence was of one year, 11 months and 10 days for the two offences.

11 According to paragraph 17 of the judgment of the District Judge, police in 2014 attended the address that they had for him in Romania, which was the home of his mother and brother. He gave evidence to the District Judge that that was how he had learned of his conviction and sentence.

12 The appellant then appealed to the Appeal Court of Constanta in Romania, again represented by a lawyer, this time a different lawyer, arranged with help from his family. He, for his part, remained in this country. The appeal was unsuccessful and was dismissed

by the Appeal Court in Constanta on 9 April 2015. Under Romanian law, the sentence thereupon became final and enforceable. Accordingly, the same day a warrant was issued by the court in Constanta for the capture and imprisonment of the appellant.

13 A short time later, on 17 April 2015, the Romanian police established that the appellant was in this country, if they did not already know. A few days after that, on 20 April 2015, the EAW in this case was issued by the local court in Tulcea before which the appellant had been convicted at first instance. Although the National Crime Agency certified the warrant on 11 May 2015, the appellant was not arrested until some years later.

14 On 3 October 2018, his son was born. A few months after that, on 14 January 2019, he was arrested pursuant to the EAW at his place of work in Luton. He was remanded on conditional bail the next day. After an initial hearing before the District Judge, followed by further information being obtained about the appellant's sentence, the effective hearing took place before District Judge Zani on 4 April 2019. The sole issue was Article 8 of the European Convention.

15 The judge, having found the facts, determined that the appellant "was clearly well aware of the ongoing proceedings throughout and, accordingly, he must be regarded as a fugitive from justice from the date when he was convicted to date". That is paragraph18 of the judgment. The judge went on to carry out the usual balancing exercise in respect of article 8, listing factors in favour of and against extradition.

16 He concluded that it would not be disproportionate under article 8 for the appellant's extradition to be ordered and gave his reasons, which amounted in substance to giving more weight to the importance of the UK's international extradition obligations and the fact that the appellant was "unlawfully at large" than to his domestic circumstances. The judge noted that this was not a sole carer case and that the appellant's partner was the main carer for his young son.

The Appeal

17 I can only allow the appeal if I am satisfied that the decision of the District Judge is wrong. Mr Ball cited much case law – which, with respect, I need not set out here – in support of his proposition that such is also the position in article 8 appeals. He emphasised that it is not for me to conduct the balancing exercise *de novo*. However, the appellant applied two days

ago to admit fresh evidence, prepared three days ago, about his young son, born on 3 October 2018. The boy is now just over one and a half years old.

18 The ground of the application is that the evidence is relevant and admissible and should be considered on appeal by this court. If I were to look at that evidence, which was not available to the District Judge, it would, I suppose, follow that I would of necessity have to revisit the balancing exercise carried out by the District Judge, since he was unable to put that evidence in the balance.

19 The fresh evidence shows, if it is to be taken at face value, that the appellant's son is somewhat late in developing receptive and expressive language, although he has no medical diagnosis; and that he has a developmental age of one year and certain difficulties which would benefit from attention.

20 In my judgment, that evidence ought not to be admitted because it is not probative on any issue that could arguably be capable of affecting the outcome of the balancing exercise. The boy is simply too young to be a factor of significant weight in that exercise. If the appellant is sent back and starts his sentence this month, and if he serves all of it and not only part of it, he will still be out by June 2022, when his son will still be only four years old. Moreover, as the judge found, it is the appellant's partner and not he who is the main carer for the boy.

21 I come to the substance of the appeal. The appellant focuses his submissions on three areas. The first is delay from the time of the offences in March 2011 to trial in December 2014. Mr Henley submits that there is an unexplained delay through to the interview of the appellant in spring 2013 and then a further delay through to the trial in December 2014. He submitted that the judge was wrong to conclude that the timing of the appellant's exit from Romania and arrival in this country was significant, given that he voluntarily attended at interview in spring 2013 and had been free to travel to this country when he did, and not restricted or prohibited from doing so.

22 For the respondent, Mr Ball submitted that the delay is not unexplained. The appellant remained in the sights of the prosecuting authorities at regular intervals since the offences occurred in 2011. He was in contact with the authorities in August 2012, when he signed the document agreeing to notify any change of residence. He was interviewed again in March or April 2013. He did not fall off the radar of the prosecuting authorities.

23 Mr Ball reminded me that it is not for this court readily to take the view that delay is culpable or unexplained. He referred me to *Germany v Singh* [2019] EWHC 62 (Admin) at [35]; *La Torre v Republic of Italy* [2007] EWHC 1370 (Admin) at [37] per Laws LJ; to Richards LJ's observation at [13] in *Zielinski v District Court Legnica* [2007] EWHC 2645 (Admin): "[i]t would be wrong for the court to assume culpability unless the delay is excessive and the court should not be quick to find delay as culpable"; and to the judgment of Collins J in *Wolack v Poland* [2014] EWHC 2278 (Admin) at [8]-[10].

24 Mr Ball submitted that the judge was well aware of the chronology, had it firmly in mind and did not misunderstand it.

25 The appellant, through Mr Henley, submitted that there was no evidence that could enable the judge to be satisfied to the criminal standard that the appellant had withheld his address in the UK from the Romanian authorities. Mr Henley emphasised the short period that elapsed between the conviction becoming final and sentence enforceable on 9 April 2015 and the request for an EAW barely a week later. He submitted that when the appellant left for the UK it was not clear that he would even be charged at all and that he did so lawfully.

26 He relied on two authorities which he said supported his contention that the judge's finding of fugitive status from conviction onwards was wrong. They were *Pillar-Neumann v Austria* [2017] EWHC 3371 (Admin) per Hamblen LJ [67]-[70] and *De Zorzi v France* [2019] EWHC 2062 (Admin); although in both those cases the requested person had begun residence in the foreign state concerned before any criminal investigation had commenced and, in the case of Ms De Zorzi, before even the commission of the offences of which she was later accused.

27 Mr Henley submitted that the appellant began to establish family life in this country in 2013 and had done so for some two years before the possibility of him becoming a fugitive had arisen. He had not sought to use the UK as a safe haven.

28 Mr Ball, for the respondent, submitted that the judge's finding of fugitive status was unassailable because it had been the appellant's own evidence below that he had no recollection of ever signing a document requiring him to notify the authorities of a change of residence and it would be far-fetched to suggest that he might have done so where he did not claim even to be aware of being under an obligation to do so. The judge had found the

appellant's credibility to be poor and was, submitted Mr Ball, entitled to find that the appellant was well aware of the ongoing proceedings.

29 He pointed to the distinctions between the facts in *Pillar-Neumann* and in *De Zorzi*, to which I have already alluded, and relied on the observations of Lloyd Jones LJ in *Wisniewski v Poland* [2016] EWHC 386 (Admin) at [8], [59] and [62], which essentially develop the notion that a fugitive is a person who knowingly places himself beyond the reach of a legal process and thereby deprives himself of the opportunity to invoke the passage of time during any period in which he is a fugitive.

30 The last area of submissions was that of the seriousness of these offences. Mr Henley submitted that in this country the offences would each be triable in a magistrates' court only and could not be visited with a sentence of more than the maximum that can be imposed there, six months' imprisonment, with such offences frequently being dealt with by a non-custodial sentence.

31 Indeed, Mr Henley submitted that the offence of driving without a licence is not imprisonable and he described that offence as "trivial", and the refusal of a breath or blood test as "a matter of no great gravity". The relative lack of gravity of these offences coupled with the delay meant, submitted Mr Henley, that the judge's balancing exercise was flawed and wrong and that it was wrong to find his extradition would be compatible with his and his family's right to family life.

32 Mr Ball, for the respondent, emphasised, on the basis of the well-known *Celinski* case – *Poland v Celinski* [2016] 1 WLR 551 – and the observations of the then Lord Chief Justice, Lord Thomas, at [13], that the English court should be very wary of engaging in any comparison of the relative seriousness of offences in the requesting state and in this country and should shy away from any temptation to examine the longevity of any sentence and to compare it with that which might have been imposed in this country.

33 Mr Ball also pointed out that the appellant had not been of good character when convicted and sentenced in Romania because he had a previous conviction in Spain for driving without a licence and another one in Denmark for an offence of dishonesty involving burglary.

34 Coming to my reasoning and conclusions, I can deal with matters quite shortly. I do not, for my part, find any great merit, with respect to Mr Henley's eloquent submissions, in any of the points that he has made.

35 First, in relation to delay, I accept the invitation of Mr Ball not to engage in the issue of culpability of any delay. In the present case a number of years did elapse between the offending and the initial conviction and sentence, followed by its confirmation on appeal. The delay was of a few years but it was not inordinately long.

36 The period between offending and trial was punctuated by occasional, roughly annual, known developments in the criminal process. There are likely to have been other steps that are not documented but the chronology features one or two events each year occurring which are relevant to the progress of the case towards trial and conviction. I am not in a position to say that the delay was culpable.

37 It is also relevant that in the middle of the period between the offending and the conviction, the appellant left Romania for this country. It is true that he was not precluded by law from doing so, but I do not consider that the judge was wrong to find that the appellant knowingly left unperformed his obligation to notify the Romanian authorities of his change of residence. It would be strange if he had performed that obligation in circumstances where he denied any obligation to do so and it was open to the judge to reject his evidence that he was unaware of that obligation.

38 The finding at paragraph 18 of the judgment that the appellant was aware of the ongoing proceedings is clearly correct. I do not find any misdirection or error in the judge's conclusion that the appellant was a fugitive from justice from the date when he was convicted. The judge did not make that finding in respect of any period earlier than the date of his conviction. He did not find that the appellant became a fugitive from 2013, on arrival in this country. Once convicted, albeit subject to appeal, the appellant was placed in the position where he was not cooperating with any implementation of the sentence on him.

39 That state of affairs continued after this conviction and sentence were upheld on appeal in April 2015. The factual position could not be more different from that in the *Pillar-Neumann* case and the *De Zorzi* case. In both those cases, as I have said and as Mr Ball pointed out, the requested person had been resident in the executing state from a time that predated even the start of any criminal investigation and, in the *De Zorzi* case, from a time even before the offence of which she was accused.

40 As for the seriousness of the offending, I reject the invitation of Mr Henley to engage in a comparison between the manner in which the Romanian justice system treated these

offences and the manner in which they might or would be treated before a district judge in this country. As Mr Ball pointed out, and as is usual in these extradition cases, my knowledge of the detail of the offending is virtually non-existent. I know no more than the bare facts (i) that a collision occurred (ii) that the appellant was driving without a licence (iii) that he was suspected of having consumed alcohol and (iv) that he refused to provide a specimen of breath or blood. I also know of his two previous convictions.

41 It is right that there is no evidence of any injury to the other driver or anyone else, but the fact that a collision occurred would in this country be regarded as an aggravating factor, unless it had occurred wholly without fault on the appellant's part. The point is that I just do not know how serious this offending was. For example, I have no knowledge of the manner in which the appellant drove on that day in March 2011, nor how much alcohol he may have consumed or be thought to have consumed. The sentence, though not trivial, is not one of huge length.

42 For all those reasons, I find no error of law or approach in the decision of the District Judge. There can be no independent or separate criticism of his conduct of the balancing exercise which he performed without fault. For those reasons, the appeal fails and is dismissed.

CERTIFICATE

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** This transcript has been approved by the Judge **