Neutral Citation Number: [2020] EWHC 2597 (Admin)

Case No: CO-2801-2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2020

Before :

MRS JUSTICE WHIPPLE DBE

- -

Between :

DJUBAIRO SEIDI	**Appellant**
- and -	
TRIBUNAL JUDICIAL DA COMARCA DE LISBOA, PORTUGAL	**Respondent**

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Ms. Mary Westcott (instructed by **Lawrence & Co. Solicitors**) for the **Appellant**
Mr Stuart Allen (instructed by **CPS**) for the **Respondent**

Hearing date: 22/09/20

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Approved Judgment

Mrs Justice Whipple :

Introduction

1. This is an appeal with permission of the single judge against the decision of DJ (MC) Branston, sitting in the Westminster Magistrate's Court on 12 July 2019, that the appellant should be extradited to Portugal.

2. Extradition was ordered on the basis of a European Arrest Warrant issued by the Judicial Authority on 14 January 2019 and certified by the National Crime Agency on 29 January 2019. It was a conviction warrant.

3. The appellant now advances two grounds of appeal:
   a. first, under s 20(3) of the Extradition Act 2003, that the judge was in error in concluding he was deliberately absent from his own trial; and
   b. secondly, pursuant to s 21 of the Act and Article 8 ECHR, that extradition to Portugal would breach his human rights.

4. The Judicial Authority resists both grounds of appeal and seeks to uphold the judge's ruling.

Ground 1: Section 20(3) Extradition Act 2003

5. The legal principles are not disputed.

6. Section 20 of the 2003 Act provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial."

7. In this case, s 20(3) applies because the appellant was not present for his trial. The issue is whether he "deliberately absented" himself from trial.

8. In order to understand the meaning of that phrase, Ms Westcott for the appellant cites recital (8) and Article 4a of the 1992 Framework Decision (2002/584/JHA) (as amended by Council Framework Decision 2009/299/JHA), which provides:

> 'Article 4a
> Decisions rendered following a trial at which the person did not appear in person
>
> 1.The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
> (a) in due time:

> (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and
> (ii) was informed that a decision may be handed down if he or she does not appear for the trial;
> or
> (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; ….'

9. The CJEU considered the meaning of this provision in Case C-108/16 *Openbaar Ministerie v Pawel Dworzecki* at [41]-[49] emphasising the requirement that the Judicial Authority must demonstrate that the requested person "actually received" official information relating to the date and place of his trial. At [51] the Court recognised that the conduct of the requested person may be relevant and that:

> "particular attention may be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him".

10. A leading domestic authority is *Cretu v Romania* [2016] EWHC 353 (Admin) where at [31] the Court confirmed that a trial in absentia could be acceptable if the state had "diligently but unsuccessfully given the accused notice of the hearing".

11. These passages have been examined recently in *JK v Poland* [2018] EWHC 197 (Admin) where the Court (Singh LJ sitting with Julian Knowles J) noted two points in particular:

> "[49] …. First, the burden lies on the requesting state to prove to the criminal standard that the respondent person did deliberately absent himself from his trial. Secondly, what is required is ultimately an answer to the question whether the requested person has knowingly waived his right to a trial. Questions of manifest lack of diligence, for example, can be taken into account, but are evidential matters which go to answering that ultimate question."

12. The Respondent, by Mr Allen, relies on *Dziel v Poland* [2019] EWHC 351 (Admin) for its summary of the relevant law and for the conclusion (by Ouseley J) that:

> "[28] … A person will be taken to have deliberately absented himself from his own trial where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him. This includes breaching his duty to notify them of his changes of address, deliberately ignoring the court process. In such circumstances, there is no need for the further questions in s20(4) and onwards of the Extradition Act to be considered. Extradition follows."

13. Even if none of the exceptions in the list at Article 4a(1) apply, an executing judicial authority may take into account "other circumstances" that enable it to be assured that the

surrender of a person will not be a breach of his fair trial rights (*Romania v Zagrean* [2016] EWHC 2786 (Admin) at [80]).

14. In a little more detail, and so far as relevant, the facts are as follows. The single conviction was for tax embezzlement. Box (b) of the EAW gives details. The appellant was one of two managing partners of a company involved in the construction sector. That company's services were subject to VAT. Between October and December 2007, the appellant failed to account for tax due in the amount of €25,199.05 on the company's services. The appellant was sentenced to one year and three months' in custody, all of which remains to be served.

15. The appellant was convicted of unrelated drugs offences on 20 October 2008 and was sentenced to 4 years and 6 months. He was, by his account, released from prison on 17 August 2012.

16. The appellant's home address in Portugal, where he lived with his family for many years, was Rua Antonio Nobre no 8.

17. The appellant had signed a "Statement of Identity and Residence". In the third further information provided to the Court, the Judicial Authority had said this about the Statement of Identity and Residence:

> "[2] The defendant provided Statement of Identity and Residence, which is a measure of coercion in which the defendant indicates an address for which he wants the notifications are carried out in the procedure. The defendant signed this document, in which is said that all future notices will be made to this address, and in case the address changes is obliged to notify the change to the Court. The defendant's notification concerning the date of the trial was made to the address by this one indicated, the postal services have placed the letter at this address, without incident, because is joined to record a "proof of deposit". That is, document that proves that the letter was placed in the defendant's mailbox."

18. As now appears from the fourth further information submitted by the Judicial Authority, the appellant signed that Statement of Identity and Residence on 27 October 2011.

19. The sentencing remarks of the Court were attached to the third further information. Those refer to the appellant's home address at Rua Antonio Nobre no 8, that also being the registered address of the company. The sentencing remarks record the appellant's previous criminal record. He was convicted of breach of fiscal trust in 2002 for which he was sentenced on 29 March 2007 to 14 months imprisonment suspended for three years, of drug trafficking in 2008 for which he was sentenced on 20 October 2008 to 4 ½ years imprisonment, and of tax fraud in 1999 for which he was sentenced on 23 April 2010 to 1 year's imprisonment which was suspended for a year. It was noted in those sentencing remarks that the appellant had not attended his hearing on the index offence of VAT evasion despite "being regularly summoned".

20. The EAW itself asserts at Box D – by a tick in the relevant box - that he "actually received" official information of the scheduled date and place of trial in such a manner that it was unequivocally established that he was aware of the trial and informed that a decision may

be handed down if he did not appear. That section of the EAW was supplemented in answer to the question how the relevant condition was met with the answer: "simple letter with proof of deposit". Box D cited the decision of 22 October 2018 as the "enforceable judgment", so it was not itself determinative of the issue of notification of trial.

21. In the first further information provided by the Judicial Authority, the following explanation was given in answer to a question asking for more details about the simple letter with proof of deposit referred to in the EAW:

> "By simple letter with proof of deposit, which was referred to the address provided in the Statement of Identity and Residence, communicated by the requested person to the Court to communicate with him." [sic]

This passage was translated into English by the Judicial Authority, and the translation is not perfect. But it seems clear enough that the letter informing the appellant of his trial was sent to the address the appellant himself had provided in the Statement of Identity and Residence. And the third further information, to which I have already referred, confirms that there is a proof of deposit to show that this occurred.

22. The trial took place on 22 May 2013 (fourth further information).

23. The appellant was sentenced in his absence to a term of 15 months imprisonment, a term which took account of his previous record of offending. Judgment in his case was given on 29 May 2013 (and signed on 7 June 2013).

24. By his own account, the appellant travelled to the UK on 13 September 2013. He did not tell the Portuguese authorities that he was leaving; he did not give the Portuguese authorities any different address for correspondence, contrary to his obligations in the Statement of Identity and Residence.

25. Once in the UK, he obtained work with a food company for whom he has worked ever since. In 2015, he was joined in the UK by his wife and other members of his family. Between 2013 and 2015, his wife and family had lived at the family address at Rua Antonio Nobre no 8.

26. On 31 January 2018, the British police visited the appellant at his home address in Great Yarmouth where he lives with his family. They gave him documents concerning the decision of the Portuguese Court.

27. After that, the appellant appealed his sentence by the Polish court but his appeal was rejected.

28. The Judicial Authority has confirmed that the appellant became unlawfully at large on 22 October 2018. This was the date on which the Judicial Authority issued a "res judicata" in relation to the offence of which the appellant had been convicted in 2013. The EAW cites this as the "enforceable judgment" at box D. By this date, he had exhausted all his appeal rights against that sentence.

29. The appellant was arrested in Great Yarmouth on 8 March 2019. He appeared at Westminster Magistrates Court on 9 March 2019. His extradition hearing was heard on 27

June 2019. The judge heard evidence from the appellant. On 12 July 2019, the judge handed down judgment, dismissing the appeal and ordering extradition.

30. The judge considered the effect of the Statement of Identity and Residence. He said this:

> "[31] The judicial authority has confirmed that Mr. Seidi provided a Statement of Identity and Residence, which is noted to be a measure of coercion. He provided the address to which he wanted notifications to be sent. The document stated that all future notices would be made to that address. It also informed Mr. Seidi that, in case his address was changed, he was obliged to notify the change to the court. From this information, I conclude that Mr. Seidi was made aware of the investigation and court process concerning the allegation of tax fraud. Though he denies signing such a document and denies knowing anything about proceedings until January 2018, I am satisfied on the material provided to me by the judicial authority that his claims of ignorance are inaccurate. I apply principles of mutual trust and respect for the Portuguese judicial authority and its evidence.
>
> [32] The judicial authority's records show that Mr. Seidi's registered address was no.8, Rua Antonio Nobre, Vale de Amoreira, Moita. Mr. Seidi and his wife conformed that this was their address and had been their address for at least 10 years. This address was found by the convicting court to be the fiscal address of the company. Mr. Seidi denied in evidence knowing why his address was registered for tax or fiscal purposes. I found his denials not to be credible.
>
> […]
>
> [34] Mr. Seidi was summonsed and informed of the date of trial by letter deposited at the address provided to the court by him. There is proof of deposit at that address. Indeed, the sentencing court's judgment discloses that Mr. Seidi and his co-defendant were regularly summonsed. Mr. Seidi denied that he received any court documents at that address. Mrs. Seidi denied that any such correspondence arrived at that address during the period 2013 to 2015 when her husband was in the UK and she remained at home. I find such denials not to be credible. I accept the judicial authority's evidence in this regard."

31. Thus the judge rejected large parts of the appellant's account and the appellant's wife account in support of her husband. In addition to these paragraphs, the judge stated in terms that he rejected the appellant's case that he had come to the UK without being aware that

proceedings were outstanding against him (para [55]), and that he was not satisfied that the appellant was honest in his denials of knowledge of the summons to his trial (paragraph [56]). Accordingly, the judge found that the appellant was a fugitive from justice (at [57]).

32. As to the fact that he was convicted in his absence, the judge said this:

> "[92] Mr. Seidi was not convicted in his presence. However, as I have indicated, I am satisfied that he deliberately absented himself from his trial. The judicial authority has proved to me that Mr. Seidi was subject to coercive measure in the proceedings, namely that he signed a statement of identity and residence. The judicial authority has proved to me that Mr. Seidi was under an obligation to notify a change of address to the authorities but did not. The judicial authority has proved to me that Mr. Seidi was correctly summonsed at his former address. I am satisfied that he deliberately ignored his obligations. He is a fugitive."

33. Ms Westcott submits that the Judge was wrong in his assessment of the appellant's "deliberate absence" because there was insufficient material before the lower court to prove, to the criminal standard, that the appellant knowingly waived his right to a trial. She argues that the evidence provided by the Judicial Authority is unclear. Specifically, no copy of the Statement of Identity and Residence has been produced, and it is unknown which address the appellant offered in that Statement; further, it is not clear what guidance accompanied that Statement and whether the appellant was told in terms that correspondence to that address would be treated as served on him personally, and that a trial in his absence could take place if he did not respond to correspondence sent to that address. Further, it is not proven that the "simple letter" was ever actually received by the appellant: it is not known on what date that simple letter was sent and the proof of service only shows that it was left at the address provided by the appellant (noting again that we do not know which address that was), so that the Judge could not be sure that the letter ever reached him personally. The appellant was not at his home at Rua Antonio Nobre no 8 for some periods between the date on which he signed the Statement and the date of his trial, because he was in prison until July 2012.

34. The appellant positively asserts that he was not aware of his trial, and he is no fugitive. His conduct in returning to Portugal in 2015 and renewing his Portuguese ID card at the consulate since then are not the actions of a man on the run from the Portuguese authorities.

35. The Judicial Authority, by Mr Allen, submits that the judge's conclusion that the appellant had deliberately absented himself from his trial cannot be impeached. That conclusion was reached on the basis of evidence before the Court, including evidence from the appellant himself which the Judge rejected as untrue. This Court should not interfere with the Judge's adverse credibility finding.

36. In my judgement, the judge was entitled to conclude, on the evidence before him, that the appellant had deliberately absented himself from trial.

37. Ms Westcott says that there are gaps in the evidence which render the judge's conclusion flawed. I do not accept that. As well as written evidence in the EAW and the further information provided, the judge had oral evidence from the appellant; the appellant's wife's evidence was admitted unchallenged. The judge was entitled to draw inferences, meaning

common sense conclusions, from all that evidence. This was to take into account "all the circumstances" as the court is required to do (see *Dworzecki* at [50]). So, as an example, the judge concluded at [31] that the appellant was aware of the investigation and the court process concerning the allegation of tax fraud even though this was not expressly stated in the information provided by the Judicial Authority. This was an inference based on the evidence provided by the Judicial Authority, in the context of principles of mutual trust and respect for the Judicial Authority which the domestic court must respect. The inference was justified. That being so, the appellant's denial of any knowledge of these proceedings or the accompanying investigation was rejected as untrue.

38. This is just an example of how the judge reached his adverse credibility conclusion. Other examples on similar lines could be given. The point is that the issue of law (was the appellant deliberately absent from his trial?) was ultimately an issue of credibility: could the appellant be believed when he asserted that he was unaware of his trial? The judge did not accept the appellant's evidence as true. . He gave sound reasons for rejecting his account.

39. That then provides the answer to the first ground. The Judicial Authority did give the appellant notice of the trial date, by "simple letter" deposited at the address that the appellant had himself provided, by means of the Statement of Identity and Residence which is a "measure of coercion".

40. Ultimately, as Mr Allen accepts, we can never know whether the appellant "actually received" the notice of trial (in the sense of seeing and reading it); or whether he chose to ignore the simple letter or possibly, even, failed to put in place reasonable measures at his home address to ensure that any such letter was brought to his attention. But if the latter, that was a manifest lack of diligence on the part of the appellant. He knew, from having signed the Statement of Identity and Residence, that he would be notified at the address he gave and the onus was on him to ensure that he did see and read letters delivered to him at that address.

41. The conclusion that the appellant was deliberately absent from his trial was justified. This ground of appeal fails.

Ground 2: section 21 Extradition Act 2003 / Article 8 ECHR

42. The legal approach to cases containing a challenge under s 21 / Art 8 is not disputed. It is summarised in Ms Westcott's skeleton (paragraphs 55-59). She cites *Norris v Government of the United States of America* [2010] UKSC 9 and *HH v Italy* [2003] 1AC 338, and on the issue of fugitive status she relies on *Wisniewski v Poland* [2016] EWHC 386 (Admin), and *De Zorzi v France* [2019] EWHC 2062 (Admin).

43. The appellant has a number of dependents in the UK. He has a wife (who only recently has started to work part time), a younger sister now aged 20, his oldest daughter who is now 18, his younger sister now aged 17, his middle child now 15, and his youngest child now aged 3. The family live in rented accommodation in Great Yarmouth.

44. He says that he is the breadwinner for the family, and his work allows his wife to stay home to care for his young son, if she had to work then there would be no one to care for him. The family is reliant on his income. They will lose their home if he is not able to support them. If he is extradited, the impact on his family will be very serious. Further, the appellant himself suffers from health problems (hypertension, type II diabetes and blood pressure problems). This is all set out in a series of witness statements which were before the lower Court, as well

as updating evidence which was put before this Court for me to consider "de bene esse". I reserved the question of formal admissibility of that evidence.

45. Ms Westcott submits that on a proper analysis, the appellant was not a fugitive, and that for that reason or indeed generally, the judge was wrong in concluding that the article 8 balance (following *Celinski*) favoured extradition. She says that the best interests of the children should be a primary consideration. She submits that the appellant has not ever had an opportunity to put his mitigation before the Court, and there is no indication that he will now be able to do that; further, that to face imprisonment in the midst of a pandemic, when he has health problems, would impose an additional burden which must weigh in the balance in his favour. He has already been on conditional bail for around 18 months and his previous convictions are very old, they are spent, and would not have carried custodial terms if committed in this jurisdiction. The Judge, she says, underplayed the devastating impact on this family of extradition. The appellant's wife is ill with anxiety at that prospect.

46. Mr Allen submits that the balance drawn by the judge included all the correct factors and the judge came to a sustainable (and correct) conclusion which this Court should not disturb.

47. The judge conducted an entirely orthodox balancing exercise. He approached that on the basis that the appellant was a fugitive from justice. For reasons I have already covered, that conclusion is not open to successful challenge on appeal. That meant that arguments about delay carried little weight. And factors favouring the public interest carried greater weight. The judge took account of the appellant's personal circumstances and the impact on others. It may be that the details of some of the family arrangements and the personal difficulties suffered by the appellant and his wife have changed a little since the decision was handed down; some aspects of the appellant's difficulties have got worse since the decision was handed down (it is right that we are now in a pandemic and that the appellant is not a well man, he may be more vulnerable to the infection; it may be that his wife is now more anxious; that the care of his young son will now be a particular problem). But in a case like this, such changes of detail of this order would not be capable of displacing the judge's conclusions on where the balance lay. The judge recognised the likely impact of extradition on innocent family members, as do I.

48. I find no reason to interfere with the judge's conclusion on s 21 / art 8. This ground of appeal fails.

49. It is not necessary for me to rule on the admissibility of the fresh evidence. That issue does not arise.

Conclusion

50. This appeal is dismissed. I thank counsel for their helpful submissions.