Neutral Citation Number: [2021] EWHC 3424 (Admin)

Case No: CO/2022/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

16th December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

GEZIM TROKA	**Appellant**
- and -	
GOVERNMENT OF ALBANIA	**Respondent**

- -
- -

Martin Henley (instructed by AM International Solicitors) for the **Appellant**
Daniel Sternberg (instructed by CPS) for the **Respondent**

Hearing date: 16/12/21

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 for the parties, 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 an application to reopen an appeal in an extradition case. The Appellant is aged 47 and is wanted for extradition to Albania. That is in conjunction with index offending which involved the "exploitation for prostitution" of a young woman with what the Albanian courts recognised as "aggravating" circumstances. That offending took place over a period between 1994 and 2000. It took place in Greece and Italy. At one point the Appellant was convicted and served a prison sentence in Italy in mid-1995 in relation to some of his conduct, but the index offending described in this case continued in the ensuing years. The matters culminated in Albania in a conviction and a 6 year custodial sentence.

2. The date of the first instance decision in Albania involving the conviction and sentence was 7 October 2008. The date of an appeal court in Albania dismissing an appeal was 30 September 2009. Those dates became significant in this case because of a 10-year limitation period about whose start-date there was, at one time, a dispute. It came to be accepted that the start-date was the appeal dismissal date (30 September 2009).

3. The index offending is the subject of an Extradition Request issued on 20 April 2018 and certified by the Secretary of State on 30 April 2018.

Mode of hearing

4. The mode of hearing today was by a fully remote hearing using Microsoft Teams. This case was to have been an in-person hearing at the Royal Courts of Justice. I acceded to a request which explained cogent Covid-related reasons concerning one of the individuals concerned with this case. The request justified taking the step of eliminating the risk from travelling to, or being present in, a court room, in the present circumstances relating to the pandemic and the guidance about conduct in light of it. Both Counsel were satisfied, as am I, that the remote mode of hearing involved no prejudice to the interests of their clients. The open justice principle was secured in the following ways. The case and its start time were published on the Court's cause list. There was an error in the cause list, published yesterday afternoon, which described this case as being an in-person hearing. It was possible to correct that error online this morning and the case appeared in the cause list, online, as a remote hearing. There was reference in the cause list to an email address, albeit that it refers to "members of the media" wishing to attend. It did not prove possible in this case to have the usual email address of my clerk published alongside my hearing on the cause list. We took some additional steps in the circumstances. We fixed a poster on the door of the court room in case anyone attended for this hearing. The poster alerted them to the fact that the hearing was happening by Teams and gave my clerk's direct dial phone number so that they could contact her to let her know that they had wished to observe. Had that happened, I would have dealt with it and made sure that any individual wishing to observe this hearing was able to do so by accessing the Teams link, even if that meant a delay. We also took steps to ensure that the regular law reporter attendees were informed this morning that this was a remote hearing and not in-person, in case any of them wished to attend. The hearing has been recorded and this judgment will be released in the public domain. I am satisfied that insofar as there has been any impairment of open justice (and I do not believe there has been any impairment), it is

justified by the circumstances, and that appropriate counterbalances have been actioned.

Limitation period and start-date(s)

5. The limitation period that is at the heart of the legal arguments advanced in the application to reopen is "Article 68" of the Albanian statute of limitations. It provides: "the sentence shall not be executed if from the day it became final have elapsed … 10 years for sentences containing between 5 to 15 years imprisonment". The important question that arises is at what point the sentence comes to be "executed". As I have explained, it came to be common ground that the date on which the sentence in this case "became final" was 30 September 2009 and not 7 October 2008.

The procedural history

6. This case has a lengthy and complicated procedural history which I need do no more than summarise. The Appellant was arrested on 2 August 2018 and has been on remand in relation to these extradition matters ever since that date. That means the period of remand is, up to the present time, some 3 years 4 months. The Appellant had an oral hearing on 18 March 2019 before DJ Tempia ("the Judge"), who gave a judgment on 22 March 2019. That judgment addressed a limitation period point being raised by the Appellant, by reference to the passage of time, as a bar to extradition. The argument was that it was unjust to extradite having regard to the passage of time. That was because the service of the sentence was now time-barred. The reason why it was time-barred, it was argued, was because the start-date was the 7 October 2008 date, and so the 10-year limitation period had expired on 7 October 2018. The Respondent contested those arguments. One point that was made by it was that the wrong start-date was being used. The Judge agreed, finding that the correct start-date was 30 September 2019. Another point being made by the Respondent was that, on the basis of further information which had been supplied on 20 February 2019, the sentence had begun to be "executed" upon the Appellant's arrest on 2 August 2018. The consequence of that second argument was that it did not matter who was right about the start-date, because – on either start-date – the "execution" of sentence had begun before any expiry of the limitation period. The Judge set this all out very clearly, summarising the further information about the "execution" of the sentence starting from the day of detention in the UK, and making a finding as follows: "I also accept … that [the Appellant] is already serving that sentence, as per the further information which states that the sentence starts from the day he is detained in the UK in respect of his extradition". The Judge went on to say that that information also explained that the entire period of incarceration would be calculated towards the serving of sentence in Albania, and that the Appellant's team had not adduced any evidence to support their assertion that he was no longer liable to serve the sentence.

7. Against that backcloth, the "limitation period" point was originally raised in grounds of appeal to this Court which accompanied the Appellant's Notice on 22 May 2019. As at that stage, if the earlier start-date (7.10.08) argument were being maintained then the Appellant would have been saying that he could not now face any sentence. If the later start-date (30.9.09) were being accepted then the points being made would have related to the date on the horizon, of 30 September 2019, and the limited period of time until its arrival. Either way, it would have been open to the Appellant to contest the further information on which the Judge had relied, and the finding made in reliance on it, and

to rely on the limited period left to be served from the 6-year sentence. In any event, as Mr Henley rightly recognises, the application for permission to appeal was then refused on the papers on 10 September 2019 when the 30 September 2019 date was looming large; and it then came before Holman J at an oral hearing on 15 October 2019, when that date had passed. The limitation period point was never raised. It had been dropped in Perfected Grounds of Appeal which had been put forward on 7 June 2019. Mr Henley's characterisation is that there was an "ambiguity" in the further information (20.2.19) and that he was in "error" in not advancing the limitation point when he took the case on, immediately prior to the Perfected Grounds of Appeal. It is honourable of him to adopt that characterisation, which advances the interests of his client on this application. But I cannot accept that characterisation. The Judge had made a clear finding, based on clear further information, which engaged with the question of "execution". It did so under a topic which related to the limitation period. What the further information (20.2.19) said was this: "We would like to call attention of the British authorities [to] the fact that the execution of the sentence starts from the day of [the Appellant's] detention in the United Kingdom in view of his extradition". That was within a topic addressing the claim on "reaching the statute of limitations for the execution of [the Appellant's] sentence".

8. What happened was that Holman J granted permission to appeal to this Court on the only ground then being raised. It was one which had not been raised by the previous lawyers before the Judge. That was a "dual criminality" point, which succeeded in part before Laing J, whose judgment on 16 January 2020 was followed through to the subsequent part-discharge of the Appellant by the Judge on 18 August 2020. There were then related issues concerning "specialty" that were canvassed at the level of both this Court and the Westminster magistrates' court and with the Secretary of State at that stage. An application to re-open the appeal, on issues relating to specialty, was made on 2 September 2020 and refused by Laing J on 12 October 2020. At no stage during that process was the limitation point sought to be resurrected, including by reference to any lack of clarity in the further information on which the Judge had relied, or by reference to any arguable unsustainability of the Judge's finding based on that further information.

Dr Rado

9. What happened next was this. In another case called Bardhoshi CO/4772/202 an expert affidavit (of Dr Klodian Rado) relating to Albanian law had been filed with this Court, written on 27 March 2020. On 29 January 2021 the requesting State in that other case – ie. the Albanian authorities – had sought expedition of the appeal to this Court. That was because of a concern, linked to that evidence of Dr Rado, that the limitation period was soon going to expire, notwithstanding that the individual had been detained here on remand, rendering that requested person non-extraditable. What happened subsequently in Bardhoshi was that the requesting state in that case appreciated that there was an extant appeal against the sentence, which meant that the start-date for the limitation period had not even begun, since the start-date would be the date of any dismissal of that appeal. When information about Bardhoshi came into the hands of the Appellant, and then of his legal representatives, consideration was given to the implications of all of this for the present case. I am told, and I accept, that this was all taking place from March 2021 onwards.

10. The same expert (Dr Rado), who had given the report in Bardhoshi, was commissioned to give a report specific to the present case. I am told, and I accept, that that was privately funded work and that some time was needed for the Appellant to be able to gather together the funds to pay for it. Dr Rado duly wrote a report in this case on 5 August 2021. That report discusses the further information (20.2.19) in the present case. It expresses the opinion, by reference to the citation of legislation and authority, that the limitation period under Albanian law would have expired in the present case on 30 September 2019, notwithstanding the arrest and detention of the Appellant (2.8.18), and notwithstanding that the sentence had begun to be served. The view expressed is that the 10-year limitation period is a hard-line which survives "execution" of the sentence, through prison imprisonment being served, and which specifically survives the arrest in the context of extradition in another state.

The application to reopen

11. Based on that evidence of Dr Rado, the application to reopen the appeal has been advanced. It is given legal shape by Mr Henley by reference either to (i) Article 8 ECHR (proportionality) or (ii) the submission that the Extradition Request (20.4.18) in this case is "no longer valid". The essence of the argument is the same, viewed in either of these ways. It is this. The limitation period having expired (30.9.19), notwithstanding the previous arrest and remand (2.8.18), there is "now no sentence to serve" in Albania. For the purposes of Article 8 Mr Henley cites Wysocki [2010] EWHC 3430 (Admin) at paragraph 35.

12. Mr Henley has also, belatedly, made a submission to the effect that on the expert evidence of Dr Rado qualifying remand, in any event, would count as 150%. That is to say, every two days would count as three towards reducing the sentence. He submits that the consequence of that new point is that the equivalent of around 5 years qualifying remand have now been served; and the equivalent of the entirety of the sentence, he submits, would have been served in August 2022. I can put that to one side because, in my judgment there is no basis at all that that feature could breathe life into an Article 8 ECHR point so as to cross the threshold of the substantive tests for justifying reopening an appeal under rule 50.27 of the Criminal Procedure Rules. In my judgment, for the purposes of those tests, the application must squarely stand or fall on the point, which is set out in the application, namely that the sentence has already fallen away in its entirety: not because the time has been served; but because the limitation period has expired.

13. Mr Henley recognises the rigours of the rule 50.27 threshold for reopening an appeal. As to timing, he submits that the explanation which I have outlined has given good reason for the timing of the application and why the point was not taken earlier. He submits that the Appellant's representatives have raised it "as soon as was practicable after becoming aware of [it]" (rule 50.27(2)(a)), it having been prudent not simply to raise it but first to explore it by obtaining an expert report. There is force in that submission, though it does need to be seen against the backcloth of the point not having been raised at all of the earlier stages. Mr Henley says that there is a justification for the timing, arising out of the fact that the point was not appreciated, nor was it is force, until Dr Rado's affidavit in Bardhoshi came onto the radar. Mr Henley says (as is his characterisation described above) that the picture was not clear before the Judge or on the earlier further information. He says it became clear through the views now expressed in the August 2021 report of Dr Rado as a distinguished legal expert. He

emphasises that (as I have explained) this same expert's views had at one point been relied on, as a reason for seeking expedition in Bardhoshi, by the Albanian authorities themselves.

14. As to substance, Mr Henley says that the test of "real injustice" and the test of "exceptional circumstances" (rule 50.27(3)(b)(i) and (ii)) are both made out on the facts and in the circumstances of the present case. He submits that Dr Rado's expert evidence is very clear and unequivocal. He says it is really a "straightforward" position. He emphasises that Dr Rado has explained reasons why the earlier further information (20.2.19) about the limitation period was wrong. He contrasts the Respondent who, having been asked a series of questions for the assistance of this Court, questions which would have grappled head-on with the contents of Dr Rado's expert report, have come back with a response (9.11.21) which fails to engage with that report all or with the particular features of this case. That further information (9.11.21) makes two points of direct relevance to the issue. The first is that the further information states: "we adhere to the previous responses to your request regarding this extradition". The second point made is that the allegations of the Appellant and his Counsel, regarding the statute of limitations and the execution of the sentence, would be matters for a decision of the Albanian court and should be addressed to that court by the Appellant and his legal representatives.

15. The Respondent resists the application to reopen the appeal on the basis that the criteria in rule 50.27 are not made out.

Discussion

16. I turn to the key features in relation to the application. In my judgment, focusing on the substance of the position – and so even if one puts to one side the sequence of events and the long lapse of time and the various opportunities which were not taken to raise this point at earlier stages – this case does not fall within the substantive criteria in rule 50.27. In my judgment, this is not a case in which it is "necessary for the court to reopen" the determination of the appeal "in order to avoid real injustice". In my judgment, moreover, this is also not a case where the "circumstances are exceptional" so as to make it "appropriate to reopen" the decision. I accept, in the Appellant's favour, that there is "no alternative effective remedy" (rule 50.27(3)(b)(iii)) but that cannot avail him in light of the conclusions on the other criteria.

17. The starting point is that this clearly is a "second bite" at an issue previously raised. The Judge did address the question of the limitation period. Moreover, as I have explained, the Judge specifically addressed not simply the question of which was the right start-date, but whether the further information (20.2.19) showed that the "execution" of the sentence for the purposes of Article 68 had begun on to August 2018. That finding was on the point which is at the heart of the legal argument now being put forward (more than 2½ years later). It is being put forward by reference to evidence (from Dr Rado) that was not produced earlier. But the observations about applications to reopen not being an opportunity to take a "second bite" at a failed ground arise in the context of further evidence being put forward: see USA v Bowen [2015] EWHC 1783 (Admin) at paragraphs 4 and 9. The latter paragraph goes on to emphasise the "importance of finality" in extradition cases and describes there being an "equally high importance in the finality of litigation" as there is "an overwhelming public interest in the proper functioning of extradition arrangements and in honouring extradition

treaties". Next, for the reasons I have already given I do not accept that the position was left "unclear" by the Judge's finding nor as to its basis.

18. But what, in my judgment, is fatal to the attempts to advance this ground of appeal through the reopening of the appeal in the present case, is the line of authorities relating to disputes about limitation periods and how they operate on a correct understanding of the relevant requesting state's law. The cases are: Battistini v Italy [2009] EWHC 3536 (Admin); then Bendik v Slovakia [2010] EWHC 1821 (Admin); and Mohammed v France [2013] EWHC 1768 (Admin). What those cases emphasise is that the Court will not become embroiled with disputed questions as to the application, under the requesting state's law, of limitation periods; such questions being for the courts of the requesting state to determine; at least unless the position is very clear cut. In Battistini the Appellant was seeking to rely on fresh expert evidence: see paragraph 13. The Divisional Court said at paragraph 15 that there was a "prior question", namely "whether this court should become involved in adjudicating upon these inconsistent interpretations of Italian law". Maurice Kay LJ said this:

> ***… it seems to me fundamental that in a European Arrest Warrant case it is wholly inappropriate for this court to proceed to adjudicate upon arrival interpretations of Italian law. All this is a matter for the Italian courts in accordance with the principles expounded by Lord Brown in Gomes. Quite simply, we should not get involved.***

That approach was applied in Bendik at paragraph 7, and in Mohammed where (at paragraph 12) Foskett J said of a point relating to the operation of the requesting state's limitation period:

> ***… a point of this nature may be available in response to a request for extradition, albeit in the rarest of circumstances … [A]s it seems to me, the clearest possible evidence of bad faith would be required, coupled with unequivocal evidence that the sentence was indeed time-barred.***

19. If those passages are reflecting a general reticence to become embroiled in a disputed question as to the operation of a foreign limitation period in extradition cases, per se, the reticence must in my judgment be at least as strong – and in principle ought to be far stronger – where the Court is being asked to reopen the case by reference to criteria set out in rule 50.27 which involve deliberately very high thresholds.

20. Mr Henley has two answers to the Battistini line of authorities. His first answer is that, in the present case, he is able to point to "straightforward" evidence, or what Foskett J described as "unequivocal evidence". That is because he has got an expert report which is emphatic. Dr Rado's report has grappled with the contents of the Respondent's further information (20.2.19). By contrast, the Respondent's latest information (9.11.21) has not grappled with Dr Rado's report. The report includes citation of authority and in particular an Albanian High Court decision. Absent anything approaching a satisfactory response from the Respondent there is a "straightforward" and "unequivocal" position. In any event, this is a situation – says Mr Henley – where the Court should require of a respondent a substantive response to questions, which response has not yet been forthcoming notwithstanding that such questions have squarely being asked. All of these features put this case within the "straightforward", clear and "unequivocal" category.

21. Mr Henley's second answer is that the Battistini line of authorities is distinguishable from the present case. He says that because the present case is a "Part 2" extradition case, whereas the three cases in the line of cases were all "Part 1" (EAW) cases, which means they are not a reliable and applicable guide to the correct approach for the present case. Mr Henley submits that the reticence described in these cases is attributable to the mutual trust and confidence applicable only in the context of Part 1 (EAW) cases. He submits that it would not extend to Council of Europe countries including Albania (still less would it extend beyond the Council of Europe).

22. I will deal with Mr Henley's second answer first. It is true that all three cases were Part 1 (EAW) extradition cases. It is also right to remember – in Mr Henley's favour – that in Battistini at paragraph 15, in the passage which I have already quoted, Maurice Kay LJ did say "it seems to me fundamental that in a European arrest warrant case it is wholly inappropriate …" But the fatal difficulty, as convincingly pointed out by Mr Sternberg for the Respondent, is that what Maurice Kay LJ went on in that same passage to say was that: "All this is a matter for the Italian courts in accordance with the principles expounded by Lord Brown in Gomes". Earlier in the judgment (paragraph 7) those "principles" had been set out. The passages from Gomes v Trinidad and Tobago [2009] UKHL 21, quoted at paragraph 7, were a passage (paragraph 35 of Gomes) describing the position regarding "Council of Europe countries" which "present no problem"; and a passage (paragraph 36 of Gomes) about the "extradition process" in principle, and the "mutual trust and respect" arising out of "international cooperation". Gomes was itself a case which concerned Trinidad and Tobago. Mr Henley, in reply, submitted that those passages were obiter in Gomes, and that Lord Brown had not been addressed in that case as to the consequences of his approach in relation to Council of Europe countries. He also emphasised that Gomes was not a case about the operation of a limitation period in the requesting state. But, in my judgment, none of that can help him. The point is this: Battistini *was* a case about operation of a requesting state limitation period; Battistini applied a principle; the principle which the Battistini court recognised was appropriate was the one it derived from the passages from Lord Brown in Gomes; and those passages were not about Part 1 (EAW) cases. In those circumstances, it is impossible to say that the principled approach in Battistini is somehow restricted to Part 1 cases and countries. In any event, even if it were simply a matter of "comity" – and bearing in mind the high thresholds that have to be met for reopening an appeal – in my judgment, the reticence can be no less than is expressed in those cases.

23. I turn to Mr Henley's first answer. I cannot accept his submission that this Court has a "straightforward" evidential picture, by reference to the points which Mr Henley has emphasised and I have summarised. It is true that Dr Rado's report is clear, it cites Albanian authority, and it engages with the further information. It is also true that the latest further information (9.11.21) does not engage with Dr Rado's report. But two things remain.

24. The first is that the *logic* of the report that has been put forward by Dr Rado is this. If the Appellant had gone back to Albania before the expiry of the limitation period, and if he had begun to serve his sentence in Albania before that date, he would then have had to be released on 30 September 2019 by reference to the operation of the Article 68 limitation period. That is because Dr Rado is saying that the expiry of the limitation period is unaffected by the "execution" of the prison sentence having commenced. Mr

Henley accepted that it would be "unusual" for a limitation period to operate in that way. He rightly recognised that that appeared to be the logic of what was being said on the face of Dr Rado's expert report. In my judgment it is plainly much more than "unusual". It is worth remembering that this is a limitation period which bites in relation to sentences between 5 and 15 years imprisonment. If it were right that the effluxion of 10 years of time, from the start-date (from sentence or, if appealed, from unsuccessful appeal), meant in Albanian law that the sentence is at an end, notwithstanding that the sentence had before that 10-year point been "executed" and was being served, it would have this consequence. It would mean that sentences above the 10 years could not be served, and someone with say a 12 or 15 year sentence would always be entitled to be released 10 years from sentence or appeal, by reason of the limitation period. That simply cannot be right. Article 68, I repeat, speaks of whether "execution" has taken place before the expiry of the ten years.

25. But putting all of that to one side the second thing that remains is this. There is a clearly stated position by the Respondent, through further information (20.2.19) considered by a judge, and accepted by a judge. As I have explained, that information was addressing the "limitation period" and it clearly states that the "execution" starts on the arrest and remand here. As I have explained, "execution" is the relevant term for the purposes of the limitation period provision. The latest further information (9.11.21) has clearly stated the Respondent's "adherence" to that previously stated position. The Respondent has gone on, as I have explained, to emphasise that it should be for the Albanian court to determine any argument being put forward. That, as it happens, is precisely the point being made in the Battistini line of three authorities to which I have referred. There is no getting away from it, in my judgment, that – at its highest – there is, based on fresh expert evidence, a situation on the point of substance in which the Respondent has itself a clearly-identified position. There is therefore disagreement. It is, in my judgment, this is very far from a clear-cut straightforward or unequivocal evidenced position in the light of the material before the Court.

26. Finally Mr Henley submitted that the injustice in this case arises – if it is right that the sentence has expired on 30 September 2019 – from the fact that the Appellant should then be discharged, and indeed should have been discharged at the end of September 2019. He relies on what he describes as "unlawful detention" since that date. He recognises that there is no question of unlawful detention or damages in this jurisdiction, since the Appellant has at all times been lawfully detained. The point about unlawful detention is viewed in terms of what Dr Rado says is the correct position under Albanian law. All of those points are, of course, parasitic on starting from the position that Dr Rado's position is correct and should be being adopted by this Court. As I have explained the principled position is that a dispute on that topic is not a basis for reopening the appeal, still less by reference to the high threshold tests which apply.

Conclusion

27. In the light of all those circumstances, and for those reasons, this case falls short of the two substantive criteria under rule 50.27. The application to reopen the appeal is therefore dismissed.

Postscript

28. By way of postscript I will make clear, as Mr Henley rightly invites me to do in the Order which I will make, that an alternative application which he made is also dismissed. That was an application for an extension of time to appeal on human rights grounds pursuant to section 108 of the Extradition Act 2003. That alternative was put before the Court so that the Court had different ways of dealing with this matter, if it was satisfied that there was substance in the case. Mr Henley described them as "belt and braces". He accepted that he could not be in a better position through the new alternative route (section 108). I will formally dismiss that other application. I also record the fact that Mr Henley told me that there is an extant asylum claim in this case and relied on that so far as any suggestion is concerned as to 'using arguments to delay extradition' (see Bowen at paragraph 7(ix)). I have not found against him in relation to matters of timing or sequence, but solely by reference to the substance of the point being put forward and the substantive criteria arising under the rule.

16.12.21