Neutral Citation Number: [2023] EWHC 149 (Admin)

Case No: CO/1357/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2023

Before :

THE HONOURABLE MR JUSTICE DOVE

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Between :

Mykhailo Kozak	**Appellant**
- and -	
BUDA Central District Court, Hungary	**Respondent**

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- -

Mr Malcolm Hawkes (instructed by **Taylor Rose**) for the **Appellant**
Ms Miriam Smith (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 14th December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE DOVE

Mr Justice Dove :

1. This is the appeal against the decision of the Deputy Senior District Judge of 8th March 2021 ordering the extradition of the Appellant to Hungary pursuant to a European Arrest Warrant ("EAW") issued on 22nd November 2018, and certified on 7th December 2018. It is an accusation warrant and the Appellant's surrender is sought in relation to a single allegation described in the EAW in the following terms:

> "On 9th July 2015 an unknown person (ie the person "of unknown identity" but "known as Tibor Papp") attended the Government Office of Budapest in District 20 and persuaded the clerk, who was acting as an official, to participate in issuing a false Hungarian Private Passport containing his photograph but the personal data of Tibor Papp. During the application, and for the purpose of recording false information in the passport, the person gave the clerk a naturalisation document certifying Hungarian citizenship and an official card certifying residence, both of which were issued to Tibor Papp. Based on these documents, the clerk recorded the false information with the photograph of the Applicant in the certified public records. Based on this passport application, the Hungarian Authorities proceeded to issue false passport number BH1578386 containing the photograph of the Applicant and the personal information of Tibor Papp".

2. What the implication in the allegation of the use of the word "persuaded" may be has not been clarified. On any view, however, the Appellant and the Official in the Government Office of Budapest collaborated in order to issue a false passport to the Appellant in a false name.

3. This case has a complex procedural history, and has been very significantly delayed whilst awaiting cases being resolved in respect of aspects of the Appellant's case. It is unnecessary to delve into those matters in any great detail. It is however germane to note that the Appellant has been in custody since he was arrested under the EAW on 28th September 2020. He has, therefore, been detained for over 2 year 3 months prior to the determination of this appeal. This has not been through the Appellant's choice. Bail applications have been made on the Appellant's behalf, but they have not met with any success leading to his continuing presence in custody on remand. After, as has been noted above, the case was significantly delayed by the pursuit of grounds which has ultimately proved to be fruitless the matter comes before the court following the amendment of the grounds and the grant of permission by Cavanagh J on 6th July 2022. The amended grounds upon which Cavanagh J granted permission were that the Appellant was entitled to argue that his extradition would amount to a breach of section 21A of the Extradition Act 2003 on the basis of proportionality, as well as, secondly, a breach of article 8.

4. There is no dispute between the parties that the District Judge's consideration of the question of proportionality under section 21A of the 2003 Act was insufficient and inadequate, and therefore this aspect needs to be readdressed through remaking the decision in the context of this appeal. In any event, the time that has passed with the Appellant being on remand presents a very different picture to that which was before

the District Judge. Again, it is common ground that if the Appellant succeeds in relation to his argument under section 21A of the 2003 Act then there will be no need for the court to go on to deal with the article 8 points. I propose therefore to address the arguments related to section 21A first. That the question of proportionality under section 21A requires separate assessment under the terms of the Extradition Act 2003 in relation to an accusation warrant is confirmed in the case of *Miraszewski v Poland* [2014] EWAC 4261 at paragraph 29.

5. The Appellant seeks permission to adduce evidence from Dr Huszti. I propose to consider Dr Huszti's evidence de bene esse and in the light of my assessment seek to establish whether it passes the relevant tests in relation to section 29(4) of the 2003 Act and the well-known case of *Fenyvesi.*

6. The requirements of proportionality under Section 21A of the 2003 Act are set out as follows:

> "21A Person not convicted: Human Rights and Proportionality.
>
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D") –
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> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b) whether the extradition would be disproportionate.
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> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality –
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
>
> (4) The judge must order D's discharge if the judge makes one or both of these decisions –
>
> (a) that the extradition would not be compatible with the Convention rights;
>
> (b) that the extradition would be disproportionate."

7. The leading authority in relation to the application of Section 21A of the 2003 Act is *Miraszewski* which addressed the separate questions contained within Section 21A(3) as follows in the leading judgment of the Divisional Court given by Pitchford LJ:

> "Subsection (3)(a) – seriousness of the conduct alleged
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> 36. I have already considered the general approach to seriousness in paragraphs 30 – 33 above. Section 21A(3)(a) requires consideration of "the seriousness of the conduct alleged to constitute the extradition". I agree that, as Mr Fitzgerald QC argued, paragraphs (a), (b) and (c) of subsection (3) all assume an approximate parity between criminal justice regimes in member states that embrace the principles of Articles 3, 5 and 6 of the ECHR and Article 49(3) of the Charter of Fundamental Rights of the European Union. In my view, the seriousness of conduct alleged to constitute the offence is to be judged, in the first instance, against domestic standards although, as in all cases of extradition, the court will respect the views of the requesting state if they are offered. I accept Mr Summers QC's submission that the maximum penalty for the offence is a relevant consideration but it is of limited assistance because it is the seriousness of the requested person's *conduct* that must be assessed. Mr Fitzgerald QC's identification of 7 years imprisonment as the maximum sentence for theft in England and Wales makes the point. Some offences of theft are trivial (see the Lord Chief Justice's Guidance); others are not. In my view, the main components of the seriousness of conduct are the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim. I would not expect a judge to adjourn to seek the requesting state's views on the subject.
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> *Section 21A(3)(b) – the likely penalty on conviction*
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> 37. Section 21A(3)(b) requires consideration of "the likely penalty that would be imposed if D was found guilty of the extradition offence". Since what is being measured is the proportionality of a decision to extradite the requested person under compulsion of arrest, I consider that the principal focus of subsection (3)(b) is on the question whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state. The foundation stone for the Framework Decision is mutual respect and trust between member states. The courts of England and Wales do not treat as objectionable the possibility that sentence in the requesting state may be more severe than it would be in the UK. Raised in the course of argument was the case of a member state that imposed minimum terms of imprisonment for certain offences by reason of the particular exigencies of the crime in the territory of that state. Appropriate respect for the sentencing regime of a member state is required under subsection (3)(b); the UK has itself

imposed minimum terms of custody as a matter of policy. However, in the extremely rare case when a particular penalty would be offensive to a domestic court in the circumstances of particular criminal conduct, it is in my view within the power of the judge to adjust the weight to be given to "the likely penalty" as a factor in the judgement of proportionality.

38. It would be contrary to the objectives of the Framework Decision to bring mutual respect and reasonable expedition to the extradition process if in every case the judge had to require evidence of the likely penalty from the issuing state. Furthermore, the more borderline the case for a custodial sentence the less likely it is that the answer would be of any assistance to the domestic court. Article 49(3) of the Charter of Fundamental Rights of the European Union requires that the severity of penalties must not be disproportionate to the criminal offence. The EAW procedure has since 2009, when the Charter came into effect, been the common standard for members of the Union. In my judgment, the broad terms of subsection (3)(b) permit the judge to make the assessment on the information provided and, when specific information from the requesting state is absent, he is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood. In a case in which the likelihood of a custodial penalty is impossible to predict the judge would be justified in placing weight on other subsection (3) factors. However, I do not exclude the possibility that in particular and unusual circumstances the judge may require further assistance before making the proportionality decision.

39. While the focus of subsection (3)(b) is upon the likelihood of a custodial penalty it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate. If an offence is serious the court will recognise and give effect to the public interest in prosecution. While, for example, an offence against the environment might be unlikely to attract a sentence of immediate custody the public interest in prosecution and the imposition of a fine may be a weighty consideration. The case of a fugitive with a history of disobeying court orders may require increased weight to be afforded to subsection (3)(c): it would be less likely that the requesting state would take alternative measures to secure the requested person's attendance.

Section 21A(3)(c) – less coercive measures

40. Section 21B of the Extradition Act 2003, inserted by section 159 of the Anti-Social Behaviour, Crime and Policing Act 2014, enables either the requesting state or the requested person to apply to the court for the requested person's return to the requesting state temporarily or for communication to take place

> between the parties and their representatives. Section 21A(3)(c) is concerned with an examination whether less coercive measures of securing the requested person's attendance in the court of the requesting state may be available and appropriate. His attendance may be needed in pre-trial proceedings that could be conducted through a video link, the telephone or mutual legal assistance. The requested person may undertake to attend on issue of a summons or on bail under the Euro Bail scheme (if and when the scheme is in force) or the judge may be satisfied that the requested person will attend voluntarily and that extradition is not required.
>
> 41. It would be a reasonable assumption in most cases that the requesting state has, pursuant to its obligation under Article 5 (3) ECHR, already considered the taking of less coercive measures. I accept the submission made by Mr Summers QC that there is an evidential burden on the requested person to identify less coercive measures that would be appropriate in the circumstances. Where the requested person has left the requesting state with knowledge of his obligations to the requesting state's authorities but in breach of them, it seems to me unlikely that the judge will find less coercive methods appropriate. On the other hand, as the Scott Baker report recognised at paragraph 5.153 there may be occasions when the less coercive procedure is appropriate. If the requested person fails to respond to those alternative measures the issue of a further warrant and extradition could hardly be resisted."

8. The parties' submissions in relation to each of the questions were as follows. In relation to the seriousness of the offence the Appellant emphasises, reliant upon *Miraszewski* at paragraph 36, that it is the conduct that is relevant, not simply the maximum sentence in Hungary, which in relation to the offence for which the Appellant is wanted is recorded as 5 years. It is submitted on behalf of the Appellant that his conduct in this case was in effect as an accessory to the forgery of the passport in a false name. Whatever is to be implied from the use of the word "persuaded", the court can be sure of that he did not act in this offence alone. The Appellant submits that the closest offence in the UK to that with which he stands accused in Hungary would be Forgery of a Passport under section 36 of the Criminal Justice Act 1925 for which in this jurisdiction the maximum sentence is 2-years' imprisonment or a fine. Whilst the Respondent in its submissions refer to the use of the passport as a dimension of the seriousness of this offence, that is not part of the conduct which is alleged against the Appellant which was limited to the forgery of the passport.

9. By contrast, the Respondent contends in its submissions that a key aspect of the proportionality exercise in this case is an assessment of the seriousness of the offence which is involved and for which the Appellant is wanted. The Respondent submits that it is part of the conduct in this case that the Appellant recruited a government official, and persuaded that official to betray her duties and the trust placed in her, in order to obtain the forged passport for his benefit. It is emphasised by the Respondent that these actions were planned and enabled him to travel when he was not entitled to do so. He

was afforded a false identity a result of this conduct and this was, therefore, a serious offence.

10. Turning to the second issue it is a key plank of the Appellant's submissions that he has now, in effect, served a sentence far in excess of that which would be likely if he were to be convicted in Hungary. In that latter connection it is to be noted that whilst the Appellant did not give evidence, and only provided a proof of evidence to which he did not speak, nonetheless it is admitted on his behalf that he accepts his guilt in relation to this offence. Returning to the question of the likely penalty in this case the Appellant submits that he has already served more than the maximum sentence for the equivalent offence in this jurisdiction of Forgery of a Passport. The Appellant draws attention to other authorities in England and Wales which demonstrate that in relation to like offences such as Use of a False Passport all of the sentences imposed and considered appropriate by the Court of Appeal Criminal Division were well short of 2 years.

11. In addition, as set out above, the Appellant places reliance upon the report of Dr Huszti which is dated 10th June 2022. Part of the context of the Claimant's reliance upon Dr Huszti as an expert in relation to criminal proceedings in Hungary is that the Appellant sought public funding for an expert to be instructed, but that was refused by an Order of this Court on 31st May 2022. In paragraph 3 of that Order the observations of the Divisional Court in *Miraszewski* at paragraphs 37 and 39 were recorded, leading to the conclusion in paragraph 4 of the Order that an expert report was not required in order to enable the judge to consider the likely penalty that would be imposed if the Appellant were to be found guilty of the extradition offence. Following that refusal, the Appellant sought to use his own funds to obtain the expert evidence of Dr Huszti.

12. Dr Huszti is a criminal lawyer in Hungary of 10 years standing. In the opinion which he has provided he sets out his experience of dealing with cases involving the offence with which the Appellant is charged, and his conclusion that usually a fine rather than imprisonment would be the sanction which the court would impose. Dr Huszti notes that under the Hungarian Criminal Code up to 2 years of that imprisonment can be suspended for up to 5 years. Paragraph 8 of the Hungarian Criminal Code states that when imposing a term of imprisonment the average of the lower and upper limits of the penalty would be imposed, and thus applying that to the present offence which has a potential for 1-5 years of imprisonment (as well as other long custodial disposals), if he were sentenced to imprisonment that would be 3 years imprisonment, and the Appellant could be released on parole after he served two thirds of the term of imprisonment. Thus he could be released after serving 2 years of imprisonment. Dr Huszti goes on to qualify his opinion by explaining that he has never during his entire 10-year career experienced anybody who received such a serious sentence in a case of this kind. He expresses his opinion that the worst sentence which could be imposed would be one of 2 years imprisonment suspended for 3-5 years, but that the most likely sentence would be a fine. Both of those types of sentence would be accompanied with the Appellant's expulsion from Hungary.

13. The Appellant relies on other authorities in which this issue has arisen. The Appellant draws attention to the case of *Kalinauskas v Lithuania* [2020] EWHC 191 where, at paragraph 20, the Divisional Court recorded that they were in no doubt that the Appellant had served in excess of any likely sentence as a result of being held on remand and that his extradition was therefore disproportionate. In the case of *Lucki v Regional Court in Bydgoscz (Poland)* [2022] EWHC 818 (Admin), at paragraph 9,

Holman J sought to reach a conclusion in relation to the likely penalty which might be imposed by drawing together all of the strands of the evidence which were available to him, including the evidence concerning the likely sentence that courts in this jurisdiction would impose. He arrived at the view that the Appellant had already served on remand the equivalent of a sentence which was likely to be in excess of that which might be imposed upon him on return. In this case, as set out above, the Appellant submits that the Appellant has already served more than any penalty likely to be imposed upon conviction.

14. In the Respondent's submissions it was accepted that the Appellant had already served more time on remand than any sentence which might be imposed by a court within this jurisdiction. Nonetheless it was submitted that on the basis that the maximum sentence for the offence with which the Appellant is charged is 5 years, a sentence of imprisonment was the likely outcome in this case. In addition, the Respondent's sought to rely upon the Appellant's conviction for possession of a false Italian driving licence on 14th December 2009 at the West London Magistrates Court for which a fine was imposed. Although it is accepted that this offence is a spent conviction, nonetheless the Respondent contends that the justice of the case requires it to be taken into account.

15. Moreover, the Respondent contends that the court cannot second guess the outcome in the Hungarian courts and must afford their processes due respect. The early release provisions are discretionary and not mandatory as they are in domestic law. In relation to Dr Huszti's report the Respondent submits firstly, that it did not specifically direct itself to the passport offence with which the Appellant is charged and secondly, that it did not provide any specific example or authorities to substantiate Dr Huszti's opinion or enable it to be tested. Thus, it was submitted by the Respondent, Dr Huszti's report is not decisive and should not be admitted.

16. Turning to the question of less coercive measures, the Appellant submits that applications have been made for less coercive resolutions in this case, but the Respondent has refused to accept that approach. The Appellant contends that less coercive means could have been adopted bearing in mind the length of time which the Appellant has served on remand.

17. In response the Respondent submits, based on paragraph 41 of *Miraszewski* set out above, that the burden in respect of less coercive measures is on the Appellant and that he has failed to discharge this by identifying what those measures might be.

18. In reaching my conclusions in relation to proportionality I propose to address, as the parties did in their submissions, each of the questions set out in Section 21A(3) in turn. Starting with the question of the "seriousness of the conduct alleged to constitute the extradition offence" I do not consider that an offence of this kind involving a public official, and forgery of identification documentation is a trivial matter. In my view, this is a potentially serious offence, although obviously in the entire spectrum of criminal offending some way from the top end. I accept the Appellant's submission that it is the conduct first and foremost which must be the subject of this assessment, and that the conduct alleged does not include the use of the passport in question. Nevertheless, the potential harm to the integrity of the regulation of immigration, and other regulatory contexts in which the identity of an individual is important, must form part of the background of the reason why the conduct concerned is criminalised. As has already been observed the importuning of a government official to provide the Appellant with

this forged and false identity document is an aspect of the seriousness of the offence. I consider that the seriousness of the conduct alleged is therefore an important part of the appraisal of proportionality, but I am unable to accept that it is in effect a trump card in relation to the overall evaluation of proportionality.

19. I turn then to the question of "the likely penalty that would be imposed if D was found guilty of the extradition offence". Initially I make the evaluation excluding the material provided by Dr Huszti. The assessment needs to commence with the consideration of what is known about the likely outcome in Hungary, and what information there is before the court as to Hungarian sentencing practice. The maximum sentence for this offence is known and it is 5 years. However, the maximum sentence is designed to cover a wide range of offending and culpability and a broad spectrum of the circumstances of offenders. Applying the observations contained in paragraph 36 of *Miraszewski* the maximum sentence, whilst relevant, is of limited assistance because the question posed relates to the requested person's conduct in the context of that offence.

20. The only other relevant information about circumstances in Hungary is document entitled "Information Pack for British Nationals detained or imprisoned in Hungary" which is published by The Foreign, Commonwealth and Development Office. It is not warranted as definitive, and intended to be a guide which is "general and factual". That material contains information about the possibility of being released early on parole and it notes that parole is not a right but subject to approval by a judge, and is contingent upon service of a proportion of the term of imprisonment which is itself dependent upon the level of security of the prison in which it is served. From this general information it is possible to conclude therefore that the opportunity exists for early release within the Hungarian system. There is, therefore, extremely limited information before the court to assist with Hungarian sentencing practice and in order to answer this question.

21. As set out in paragraph 38 of *Miraszewski* in circumstances where information from the requesting state is absent the Judge "is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood". When undertaking this assessment, the evidence as to likely sentence in a domestic context is very clear. Indeed, it is in my judgment very significant to note at the outset that it is accepted on behalf of the Respondent that the Appellant has already served on remand a sentence in excess of any sentence that might be imposed by a domestic court for offending of this kind. Moreover, the authorities in relation to similar offences which are referred to above also underline this proposition.

22. In the absence of any very clear evidence as to what Hungarian sentencing practice would be in relation to this offence beyond the provision of a maximum sentence, and some very general material on the opportunity to obtain parole, in my view very significant weight has to attach to the fact that the Appellant has already served time on remand which in my judgment greatly exceeds any sentence which might be imposed in a domestic context. In short in relation to the question posed by section 21A(3)(b) I am confident that I am entitled to conclude on the basis of the available evidence, giving particular attention in the circumstances to the position were he to be sentenced for an offence of this kind before a court in this jurisdiction, that this Appellant has served in excess of a sentence were he to be found guilty of the extradition offence.

23. Turning to the question of less coercive measures it is clear that the possibility of less coercive measures has been explored on behalf of the Appellant, but that the Respondent has not been attracted to the use of those less coercive measures. In the circumstances some weight must attach to this factor in support of the extradition of the Appellant. I am bound to do this in circumstances where the Respondent has given thought to whether less coercive measures would be appropriate but rejected that notion. This is a factor which needs to be weighed in the balance in favour of extradition when making the proportionality assessment.

24. It is, of course, important to emphasise that in relation to assessments of proportionality of this kind no two cases are alike, and the decision in this case depends critically upon the specific circumstances which it involves. Drawing the threads together, for the reasons set out above the seriousness of the conduct in this case is a factor which clearly weighs in favour of extradition to a significant extent, together with further weight in support of extradition on the basis that less coercive measures are not a possibility. That said, for the reasons which I have set out above, in my judgment particularly significant weight in the specific circumstances of this case must be given to the lengthy period which the Appellant has already spent incarcerated on remand, and the fact that this period on remand is very likely to exceed any sentence of imprisonment which might be imposed for the extradition offence. Balancing these factors out I have concluded that it would not be proportionate for the Appellant to be extradited. Plainly, each of these cases depends very critically on the particular factual framework within which they arise. Bearing in mind the particular factual framework and the availability of evidence on relevant issues in this case, I have reached the conclusion on the basis of the evidence that extradition would be disproportionate.

25. It follows from this that the evidence of Dr Huszti would not be decisive were it to be admitted because without his evidence I have already concluded that extradition would be disproportionate. Had his evidence been taken into account it would be obvious that it would have provided further material bolstering the conclusion that extradition in this case would be disproportionate. On the basis that it is not needed in order to decide the case there is no justification for admitting it. As I have already observed, I do, however, note that it is supportive of the conclusion I have reached in relation to the particular circumstances presented in the present case.

26. For all of these reasons I have concluded that in the particular circumstances of this appeal it is appropriate that the appeal should be allowed, and the District Judge's decision overturned to enable the Appellant to be discharged from these extradition proceedings.