Neutral Citation Number: [2023] EWHC 429 (Admin)

Case No: CO/1597/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 28 February 2023

Before :

MRS JUSTICE YIP DBE

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Between :

Alin-Ionut STAFI **Appellant**

- and -

Judecatoria Roman, ROMANIA **Respondent**

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Ben Joyes instructed by Birds Solicitors for the Appellant
Hannah Burton instructed by The Crown Prosecution Service for the Respondent

Hearing dates: 14 February 2023

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Approved Judgment

This judgment was handed down remotely at 2pm on Tuesday 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Yip DBE:

1. The appellant, Mr Stafi, appeals against the decision of District Judge Branston on 29 April 2021 to extradite him to Romania to serve a sentence of three years' imprisonment for offences of fraud committed between 2011 and 2013.

2. The appeal was initially pursued on three grounds but proceeds solely on ground 2, namely that the requirements of section 20 of the Extradition Act 2003 ("EA 2003") have not been complied with. Permission to proceed on that ground was granted by Chamberlain J on 11 February 2022. Permission was refused on Ground 1, which raised an argument under section 2 of EA 2003. There is no renewed application for permission on that ground so I say no more about it. Chamberlain J stayed the application for permission on Ground 3, relating to prison conditions in Romania, pending determination of the issues raised by the Divisional Court. Following the decision in *Marinescu and others v Romania* [2022] EWHC 2317 (Admin), the appellant does not seek to pursue Ground 3. I therefore lift the stay and refuse permission on Ground 3.

3. The appellant's extradition is sought pursuant to a European arrest warrant ("EAW") issued by a judge of the Roman Court in Romania on 11 July 2019 and certified by the National Crime Agency on 21 February 2020. The EAW relates to nine offences concerning fraudulent activity committed by the appellant in the course of his employment as a mobile phone salesman. The offences were initially dealt with in four criminal cases. On 14 June 2019, the Roman Court issued penal decision 359, which was final by lack of appeal ("Sentence 359"). Sentence 359 activated and merged sentences which had been imposed on the appellant following trials in the underlying proceedings to arrive at the new sentence of three years' imprisonment, all of which remains unserved.

4. The EAW acknowledged that the appellant was not present at the hearing resulting in Sentence 359 and had not been served with the decision. However, it stated that he would be personally served with it without delay after surrender and would be informed of his retrial and appeal rights, including the right to request a retrial within 30 days.

5. Where a requested person was convicted in their absence, section 20(3) EA 2003 requires the judge to decide whether he "deliberately absented himself from his trial." If he did not, the judge must proceed under section 20(5) to decide whether the requested person would be "entitled to a retrial or (on appeal) to a review amounting to a retrial." If not, the judge must order his discharge, pursuant to section 20(7). Section 20(8) sets out the rights which must be afforded to satisfy section 20(5). If the judge decides that the requested person was deliberately absent or if he finds that he would be entitled to a retrial, he will proceed (pursuant to section 21 EA 2003) to consider whether extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.

6. At the hearing in the court below, section 20 was given limited consideration. It was not the primary argument advanced by the appellant, as it is now. Arguments were advanced on the basis of inconsistencies as to the appellant's presence or absence at some earlier hearings within the four cases, but the District Judge found that he had been represented throughout those proceedings and therefore was not to be treated as absent. Although it was accepted that the appellant had not been present at the Sentence

359 hearing, the District Judge found that the provisions of section 20 were satisfied, on the basis that the EAW stated that he had a right to a retrial. The judgment does not include any consideration of whether the appellant had deliberately absented himself from the Sentence 359 hearing. This was apparently not treated as a live issue as it would be immaterial if the appellant had a right to a retrial, as set out in the EAW.

7. The District Judge therefore turned to consider section 21, concluding (after analysis) that extradition would be compatible with the appellant's Convention rights within the meaning of the Human Rights Act 1998. This conclusion is no longer the subject of challenge on appeal.

8. Following the hearing in the court below, the Roman Court issued a decision on 12 March 2021. In light of that ruling, the respondent now accepts that it cannot maintain that there is a right to retrial. It is unnecessary to decide whether the ruling is fresh evidence and/or whether the appellant should have permission to rely on it as such since it is now common ground that this appeal must proceed on the basis that there is no right to a retrial within the meaning of section 20(5) and (8).

9. Section 27 EA 2003 sets out the conditions for allowing an appeal. Under section 27(3), an appeal may be allowed if "the appropriate judge ought to have decided a question before him at the extradition hearing differently". Section 27(4) applies where "an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing" and that issue or evidence would have resulted in the judge deciding a question before him differently. In both cases, the appeal will be allowed if the judge would have been required to order the requested person's discharge had the question been decided as it ought to have been.

10. The respondent did not assert that the appellant had deliberately absented himself from the Sentence 359 hearing and the District Judge made no finding about that. His conclusion on section 20 was simply underpinned by the understanding at the time that there was a right to a retrial. The judge cannot be blamed for proceeding on an erroneous basis but, given that it is now common ground that there is no right to a retrial, consideration should have been given to whether the appellant deliberately absented himself from the Sentence 359 hearing in June 2019. That is the issue which must now be decided on appeal.

11. If the appellant did not deliberately absent himself from trial, he must be discharged since section 20(5) cannot be satisfied. If he did deliberately absent himself, his extradition must be ordered on the basis of the finding of the court below that extradition is compatible with his human rights. The respondent bears the burden of proving each of the required elements under section 20 to the criminal standard. It follows that it is for the respondent to prove that the appellant was deliberately absent, and not for the appellant to prove that he was not.

12. The issue having been raised in the perfected Grounds of Appeal, the respondent applied to admit fresh evidence, contained in further information dated 16 August 2021. This was the seventh time further information had been served by the respondent, so is referred to as "FI7". Relying on that evidence, it is the respondent's position that the appellant had not notified the authorities of his change of address or that he had moved to this country. The respondent contends that the fresh evidence leads to the conclusion

that the appellant was deliberately absent and therefore that the decision to extradite him should be upheld.

13. The parties also referred to earlier evidence served by the respondent, within FI1-6, each making submissions as to what inferences could be drawn from the evidence before the court below. On behalf of the respondent, Ms Burton initially contended that, even without the fresh evidence, the District Judge could have inferred that the appellant was deliberately absent. However, during the hearing, she realistically accepted that it was difficult to submit that the court could be satisfied to the required standard without reliance on FI7. It follows that, unless the fresh evidence is admitted, the appeal would have to be allowed.

14. At the hearing in the Magistrates' Court, the appellant gave evidence that he did not know about the hearing on 14 June 2019. He was not aware that he had been re-sentenced to an overall sentence of three years' imprisonment. He claimed he did not understand how that had happened as he was under probation supervision and his probation officer had details for him in the United Kingdom. He had been in this country since 2014 but had made trips back to Romania, last travelling there in November 2018. He produced documentary evidence of his flights. The appellant said that he thought all the proceedings had been concluded and finalised in 2018 and that he had complied with all the terms of his supervision and with instructions from his probation officer.

15. A potential difficulty arises from this court being asked to determine the issue of deliberate absence without relevant factual findings having been made in the court below. I did not hear the appellant's evidence. I do not even have a transcript of it. Since deliberate absence was not treated as a live issue, he was not challenged on his evidence about lack of knowledge of the June 2019 hearing in cross-examination. On the question of whether the appellant was a fugitive, the District Judge said:

> "Ms Burton does not submit that Mr Stafi can be proven to be a fugitive from Romanian justice. I agree there is insufficient evidence to show that he is."

16. While Ms Burton argued that it would have been open to the appellant to seek to adduce further evidence in response to FI7, unless and until I admit that evidence, there is nothing to respond to. Bearing in mind the burden of proof, it would be wrong to criticise the appellant for not adducing additional evidence to disprove deliberate absence. It would also be unfair to make a finding against him without providing him with the opportunity to give evidence before the tribunal deciding the relevant facts.

17. Having ventilated this with Counsel at the start of the hearing, it was agreed that I should hear the parties' submissions and determine whether the respondent's evidence should be admitted and, if so, whether the respondent had raised a sufficient case for the appellant to answer on the issue of deliberate absence. If that was my conclusion, I would have to adjourn the appeal to allow the appellant the opportunity to present his evidence on the issue before reaching a final decision.

The respondent's fresh evidence

18. As confirmed in *FK v Germany* [2017] EWHC 2160 (Admin), there is no restriction on the inherent jurisdiction of the High Court on appeal to admit further evidence from a respondent to an extradition appeal. The question is whether it is in the interests of justice to do so. That depends on the circumstances of the case and requires the exercise of judgment. The "availability" of the evidence at the time of the extradition proceedings is a relevant factor, but it is only one of several material considerations.

19. Although accepting that the appellant must be entitled to re-open the section 20 issue following the March 2021 ruling of the Romanian Court and to proceed on the basis that there is no right to a retrial, Ms Burton submits that when considering the respondent's application to rely on fresh evidence, I must do so in the context of this being a response to the appellant's introduction of new material. She argues that it was unnecessary for the respondent to obtain this evidence until the appellant sought to raise the new issue on appeal.

20. On behalf of the appellant, Mr Joyes submits that this is not a case of the respondent simply responding to fresh material from the appellant. The respondent conceded the issue of fugitivity in the court below, effectively also conceding that the appellant was not deliberately absent in June 2019 and instead relied on a right of retrial to satisfy section 20. This has now been shown to be wrong and so, Mr Joyes argues, the respondent seeks to admit evidence that was available at the time of the extradition hearing to put the case on an entirely different basis. It is submitted that this is a highly contentious matter of fact and that it is not appropriate to admit it on appeal when it was not before the District Judge.

21. Box D on the EAW had been completed in relation to Sentence 359 on the basis that there would be a right to a retrial. It was not appropriate for the District Judge to go behind that (see *Cretu v Romania* [2016] EWHC 353 (Admin). There is ambiguity in the material before me as to whether the information within Box D was simply wrong or whether the position has changed in light of the 2021 ruling. Had it been possible to say that the respondent was at fault in providing the court below with the incorrect information, that would have been an important factor weighing against the admissibility of the fresh evidence, but the position is not as clear as that.

22. I have referred to the general difficulty in admitting this evidence and the consequence of the appeal court then being required to weigh all material evidence to reach factual findings. Although prejudice to the appellant can be mitigated by affording him the opportunity to be heard and to adduce evidence in response, this court provides a less appropriate forum for determining contentious issues than doing so at first instance. The necessary adjournment will also cause further delay and expense. Those are relevant considerations in determining whether it is in the interests of justice to admit the fresh evidence.

23. However, none of the above factors are decisive. It is therefore necessary to consider the evidence before deciding on its admissibility and the parties agreed that I should take that approach.

Section 20

24. I was referred to multiple authorities in which the statutory test in section 20(3) EA 2003 has been considered. Many turn on their own facts. The starting point is *Cretu v Romania*, above. In that case, the Divisional Court confirmed that the domestic law was to be interpreted in accordance with the 2002 EU Council Framework Decision which section 20 reflected. The approach in *Cretu* was affirmed and summarised by the Divisional Court in *Romania v Zagrean* [2016] EWHC 2786 (Admin) at [81]:

> "a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware or the date and time of his trial."

25. The court said that this also accords with the decision of the Court of Justice of the European Union (Fourth Chamber) C-108/16 PPU, *Openbaar Ministerie v Dworzecki*, 24 May 2016, in which the CJEU stated that the executing judicial authority can have regard to the conduct of the person concerned, in particular "any manifest lack of diligence … notably where it transpires that he sought to avoid service of the information the court sent."

26. I have considered the authorities since 2016 to which I was referred. I note the helpful review of the case law provided by Kerr J in *Bialkowski v Poland* [2019] EWHC 1253 (Admin) [paragraphs 17-27]. I need not repeat that. More recently, section 20 was considered by Swift J in *Bertino v Italy* [2022] EWHC 665 (Admin), in which he stressed the need to focus on the statutory test and said [33]:

> "The correct enquiry … will be whether, looking at the circumstances of the case overall, it is appropriate to infer that the requested person waived his right to be present at trial."

27. The finding that the appellant was not to be treated as a fugitive is not sufficient to dispose of the issue of whether he deliberately absented himself from the relevant hearing. The test is not the same. See *France v Wade* [2006] EWHC 1909 (Admin) at [15]:

> "In my judgment, deliberately absenting yourself does not necessarily have overtones of deliberately evading justice but the word "deliberately" does involve inquiring into the person's state of mind and it connotes a decision taken in the light of all material information…."

The factual matrix

28. The information in the EAW as to how Sentence 359 came about is far from straightforward. What is clear is that it resulted from the consolidation of the component sentences imposed in relation to the nine offences. This was done through a process of merging, unmerging and remerging the original sentences. Specifically, Sentence 359 brought together two sentences (that were themselves merged sentences), referred to as Sentence 437 and Sentence 55. Those sentences had become final in June 2018 and November 2018 respectively. The sentences underlying the merged Sentences 437 and 55 were imposed in 2013 and 2017. The precise status of Sentences

437 and 55 is difficult to discern from the EAW. There is reference to conditional suspension of the enforcement of imprisonment and to periods of probation supervision. Having considered the EAW and the further information before him and having heard the evidence of the appellant, the District Judge concluded that Sentences 437 and 55 had both been suspended. There has been no attempt to go behind that on appeal.

29. Sentence 359 resulted from a decision following referral by a case manager advisor of the Neamt Probation Department. While the EAW suggests that the referral resulted from "failure to comply with measures from the previous convictions", it is now common ground that Sentence 359 did not result from any failure by the appellant to comply with the terms of his probation supervision. FI7 indicates that "the annulment of the suspension under surveillance occurred as a result of plurality of offences and not because of breaking one of the measures of suspension under surveillance."

30. In the first further information served by the respondent (FI1), it was stated that there were no restrictions on the appellant's movement but that he was required to notify a change of domicile within three days, that obligation having been brought to his attention during the hearing by the police. I note that FI1 suggests that the appellant was a fugitive but that this was not maintained by the respondent before the District Judge and is not asserted now.

31. FI6 was accompanied by a statement from the appellant dated 30 January 2017. Both parties placed reliance on that statement. At the top of the statement, the appellant gave the Romanian address in Neamt which appears in the EAW and which was the address used for service of the summons for the June 2019 hearing. However, within the body of the statement, he informed the Roman Court that he was unable to attend a hearing in February 2017 as he was in England, having been employed there since 2014, and his working conditions pursuant to his contract of employment made it impossible for him to attend.

32. There was no attempt before me to undermine the appellant's unchallenged evidence to the District Judge that he had always complied with his probation officer's instructions and that he had informed the probation service of his address in this country. It was accepted that he had engaged with the criminal proceedings and had attended the hearings up to and including those in 2018.

33. It is right to note that the appellant has offered no explanation as to why he received notification of the proceedings sent to the Romanian address up to 2018 but did not receive the 2019 summons. It might be speculated that the appellant engaged with the proceedings up to the point that it became apparent that he would be required to serve a sentence of imprisonment. However, that was never put to the appellant and remains no more than speculation. The respondent acknowledges that there remains insufficient evidence that he was a fugitive.

34. The new evidence in FI7 sets out that the appellant was required to notify any change of address within 3 days to "the police officer who was performing the activity of criminal prosecution, the prosecutor who was exercising the surveillance and the law court (after its notification by indictment)". It is stated that he "did not comply with this obligation of communicating us his address, he did not come before court and the police did not know about the fact that he changed his address and lived in Great Britain." In a further answer, it is confirmed he did not communicate his British address

to the police nor to the law court. There is no mention of the prosecutor. Mr Joyes submits that one possible reading is that the "prosecutor who was exercising the surveillance" refers to the appellant's probation officer, to whom the British address was communicated.

35. At first blush, it might be thought difficult to interpret the "prosecutor" as referring to a probation officer. However, this must be viewed in the context of the proceedings leading to Sentence 359 apparently having been instigated by the probation service and in circumstances where that service was "exercising the surveillance". Mr Joyes drew parallels with the provisions of Schedule 16 of the Sentencing Act 2020 which places the responsibility of initiating proceedings for breach of a suspended sentence in this country on an "enforcement officer", who will be a probation officer. Part 5 of the Act requires an offender subject to a suspended sentence to maintain contact with his responsible probation officer and imposes a duty on the offender to obtain the permission of the probation officer or a court before changing his residence. Viewed in the context of suspended sentences with probation surveillance, it is at least arguable that "the prosecutor who was exercising the surveillance" refers to the probation service. That could explain why FI7 refers to the appellant being in breach by not notifying the police and the court of his changed address but is silent about notification to the prosecutor. It cannot be assumed that the fact that the respondent has not said that the appellant failed to notify the prosecutor is an oversight rather than confirmation that the appellant only notified one of three authorities he was required to.

36. Ms Burton argues that, even if that is right, on any view the appellant was in breach of his obligations as he did not notify the police or the court of his address. Even if his evidence that he thought the proceedings were concluded in 2018 is accepted, he moved to England in 2014 and did not inform the police or court of his new address then. In 2017, he was still giving his Romanian address to the court.

37. The respondent contends that on the basis of the available evidence, including that in FI7, the court can be satisfied to the requisite standard:

i) The appellant was informed of the obligation to report a change of address to the three bodies.

ii) At a time when he knew that proceedings were ongoing, he did not inform the authorities of his changed address in deliberate breach of his obligations.

iii) But for that breach, the authorities would have had his United Kingdom address and would not therefore have sent notification of the June 2019 hearing to the Romanian address.

iv) The appellant opened himself to the risk that correspondence would go to the Romanian address and he would not receive notification sent in relation to his criminal matters.

v) In failing to keep the authorities updated as to his address he displayed a manifest lack of diligence during the proceedings and it was his own conduct which led to him being unaware of the hearing in June 2019.

vi) The court can therefore be satisfied that he tacitly and unequivocally waived his right to attend the Sentence 359 hearing such that the test in section 20(3) is satisfied.

38. In making those submissions, Ms Burton also referred to *Dziel v Poland* [2019] EWHC 351(Admin), in which Ouseley J dismissed an appeal against an extradition order where the appellant had argued that he was not deliberately absent from trial. He had failed to comply with an obligation to inform the Polish authorities of his change of address. It is notable that the appellant in that case had relied upon a belief that his probation officer would keep the police and prosecution informed. Ouseley J said at [31]:

> "There is nothing in the jurisprudence to suggest that, where a defendant deliberately breaches his obligations to inform the authorities of his change of address so as to prevent the authorities informing him of the date and place of trial, as here, a subsequent trial in his absence is in breach of Article 6. That may be seen as a waiver of the right to attend his trial or as a deliberate decision not to exercise the right to attend his trial."

Ms Burton submitted that this case confirmed that, in principle, failure to notify a change of address is capable of rendering a person deliberately absent.

39. That is undoubtedly right but each case must be considered on its own facts. There are important factual distinctions between this case and *Dziel*. Ms Burton accepted that they were not 'on all fours'. The judge found that Dziel's state of mind when he left Poland would have been "very much to avoid criminal proceedings". He had been sentenced for one offence and had been arrested on another and knew that criminal proceedings would be started for that. He had also been arrested for yet another offence just weeks before he left. During preparatory proceedings he was warned of the consequences of failing to comply with his obligations to notify his change of address. His probation officer was supervising him only in relation to the existing sentence and had not been appointed until after he left Poland. He had taken no steps to find out about the progress of the proceedings which he knew were ongoing.

40. Here Mr Joyes submits that, even taking the prosecution evidence at its highest, there is no evidence that the appellant acted evasively or made a deliberate decision to avoid service. There is no evidence he sought to avoid the receipt of information. On the other hand, the evidence is that he notified one arm of the Romanian authorities (the body that instigated the relevant proceedings) and had told the court that he was living and working in England. His unchallenged evidence in the court below was that he thought the proceedings had concluded in 2018 and that he had complied with all that probation required.

41. It is contended on behalf of the appellant that the respondent's evidence (even taking account of FI7) is not sufficient to discharge the burden of proving deliberate absence for the purposes of section 20(3). Mr Joyes also referred to *Colozza v Italy* (1985) 7 E.H.R.R 516, in which the European Court of Human Rights emphasised the need to consider not only whether the accused could have been expected to be aware of proceedings but also whether the judicial authority's efforts to trace him were adequate. Here, Mr Joyes argued, the appellant could not be expected to know that there were to

be further proceedings and that the authority who instigated those proceedings had his current address.

Conclusions

42. Having carefully considered the submissions advanced on each side, I accept that even if I admit FI7 into evidence, there remains an insufficient evidential basis for the respondent to discharge the burden of proving that the appellant was deliberately absent from the Sentence 359 hearing.

43. Although there are unanswered questions about how he was able to receive notifications at his Romanian address up to 2018 but not in 2019, the fact is that the appellant had engaged with the proceedings after leaving Romania in 2014 and up to the time that he says he believed they were concluded. There is no evidence that he knew that further hearings were likely. The evidence appears to suggest that the probation service noticed that the concurrent nature of the terms under Sentences 437 and 55 led to a position where the appellant could not benefit from suspension under supervision and so formulated the referral to the court. The probation service was therefore the authority responsible for starting the further proceedings and did have the appellant's address.

44. The authorities do not go so far as to suggest that in every case in which a requested person has breached an obligation to notify all relevant authorities of a change of address he will be taken to have deliberately absented himself from any subsequent hearing. Each case must be carefully examined on its own facts to determine whether the statutory test under section 20(3) is satisfied. On the particular facts of this case, I am not persuaded that it would be appropriate to infer that the appellant waived his right to be present at trial on the basis of the respondent's evidence.

45. In those circumstances, I do not need to formally determine the application to rely on fresh evidence or to consider adjourning the matter to hear the appellant's evidence.

46. The District Judge's decision was not wrong on the basis of the issues argued before him. For the avoidance of doubt, the appeal has not been pursued on Grounds 1 and 3, which concerned challenges to the District Judge's reasons. However, it came to light after the extradition hearing that, contrary to what was said in the court below, there is no right to retrial. Therefore, the issue of deliberate absence had to be considered on appeal. Having considered the respondent's fresh evidence on that issue, I conclude that there is an insufficient evidential basis to enable the respondent to prove to the criminal standard that the appellant was deliberately absent from his trial. Since it is now common ground that there is no right to a retrial, the inevitable conclusion is that the District Judge would have been required to order the appellant's discharge under section 20(7) had the question of deliberate absence been raised before him.

47. In those circumstances, I allow this appeal and will quash the order for extradition and order the appellant's discharge.