Neutral Citation Number: [2021] EWHC 2042 (Admin)

Case No: CO/1566/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2021

Before:

MR JUSTICE CHAMBERLAIN

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Between:

MODESTAS BUIVIS	**Appellant**
- and –	
DEPUTY PROSECUTOR GENERAL (REPUBLIC OF LITHUANIA)	**Respondent**

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MARY WESTCOTT (instructed by **Birds Solicitors**) for the **Appellant**
CATHERINE BROWN (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates: 13 July 2021

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The appellant is sought pursuant to a European Arrest Warrant ("EAW") issued on 27 October 2017 and certified on 8 November 2017. The EAW seeks the appellant's surrender to face trial for one offence of possession of a counterfeit driving licence said to have been committed on 4 May 2011.

2 The appellant's initial hearing before Westminster Magistrates' Court was adjourned because he was facing proceedings for burglary. He pleaded guilty to that charge at Luton Crown Court in April 2018 and was sentenced to 5 months' imprisonment. He was released from custody on 27 July 2018.

3 Extradition proceedings took place after that. There was an extradition hearing before District Judge Bouch ("the judge") on 11 February 2019. The appellant did not attend and absconded. He was not arrested until February 2020. The judge prepared her judgment on 5 March 2019 but did not hand it down until 2 March 2020.

4 Since his arrest, the appellant has spent some 4 ½ months in custody on remand and a further period of about a year on a monitored curfew.

5 There are two grounds of appeal, which overlap. The first is that the judge should have found that extradition would be disproportionate for the purposes of s. 21A(1)(b) of the Extradition Act 2003 in the light of the relative lack of seriousness of the conduct alleged to constitute the offence and/or the likely penalty that would be imposed. This ground proceeds with the permission of Fordham J, granted on 27 October 2020.

6 The second is that the judge should have concluded that extradition would be incompatible with the appellant's rights under Article 8 of the European Convention on Human Rights ("ECHR") and/or that I should now reach that conclusion on the basis of fresh evidence not before her. Permission for this ground is to be considered on a "rolled up" basis.

7 An application for permission to apply for permission to appeal on a further ground, based on the contention that the appellant faced a real risk of being detained in Lithuania in conditions that would breach Article 3, was not pursued. That application was abandoned.

Proportionality: s. 21A(1)(b)

<u>The law</u>

8 In *Peikauskas v Lithuania* [2021] EWHC 1537 (Admin), a permission decision, I summarised the applicable law in this way:

> "5… s. 21A(1)(b), read with s. 21A(2) and (3), requires the judge to consider whether the extradition would be disproportionate, taking into account (a) the seriousness of the conduct alleged to constitute the extradition offence, (b) the likely penalty that would be imposed if the appellant was found guilty of

> the extradition offence and (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the appellant.
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> 6. The leading case is *Miraszewski v Poland* [2014] EWHC 4261 (Admin), [2015] 1 WLR 3929, where at [31] Pitchford LJ said that the court may, depending on its evaluation of the factors, conclude that extradition would be disproportionate if (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances. At [36], it was noted that seriousness was to be judged in the first instance against domestic standards, but taking into account the views of the requesting State, if offered. As to likely sentence, the judge is entitled to draw inferences from the EAW and can draw on domestic sentencing practice.
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> 7. In *Kalinauskas v Prosecutor General's Office, Lithuania* [2020] EWHC 191 (Admin), the appellant was sought for a drugs offence for which the sentencing range in England and Wales was between a low-level community order and 26 weeks' custody. Supperstone J (with whom Irwin LJ agreed) held that, because the appellant had been in custody awaiting extradition, by the time of the appeal he had served in excess of any sentence that could be imposed on him. Extradition was therefore disproportionate and he was discharged."

Submissions for the appellant

9 Ms Westcott, for the appellant, noted that, at [36] of his judgment in *Miraszewski*, Pitchford LJ had also said 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". For example, 7 years' imprisonment was the maximum sentence for theft, but no-one would think that maximum very helpful in assessing the seriousness of an offence of shoplifting.

10 In the EAW, the description of the conduct alleged against the appellant was in these terms:

> "On 4 May 2011, at about 10:00 hr., in the Republic of Lithuania, Klaipeda, in Uosto Frontier Station, Malku Ilankos Border Crossing Point, while being in the service car Mitsubishi Pajero belonging to Coast Guard District which was taking him to the po1ice office, Modestas Buivis was in possession of a knowingly forged driver's licence. It was established that Modestas Buivis has been deprived of the right to drive from 1 July 2008 to 1 September 2012. In the forged driver's licence it was indicated that the licence was issued on 15 May 2010, which means that Modestas Buivis was well aware that he has a knowingly forged driver's licence, and was using that licence for a rather long period of time, i.e. from 15 May 2010 to 4 May 2011. Besides, he disposed of this false document by throwing it away in the abovementioned service car, which also shows that he was aware of the criminal liability for such conduct."

11 Ms Westcott says that the conduct alleged is simple possession of a forged document. There is no conduct alleged to support the inference that the appellant had used it, whether to drive or for any other purpose. She relies on *Rinkevicius v Prosecutor General's Office, Lithuania* [2018] EWHC 145 (Admin), where Ouseley J allowed an appeal in a case where the appellant was sought for a single offence of forgery of administrative documents, which carried a maximum sentence of three years. At [11], he concluded that in a case where s. 21A was raised, it was for the issuing authority to show that the offence was not excluded by that section. At [12], he noted that "the language of the Act concerns the likely sentence and is not related to the maximum sentence in any direct way". At [19], he considered the seriousness of the conduct and the likely sentence together, concluding that "although extradition may be ordered for a non-custodial sentence or for measures that include a fine and probation, looking at what is alleged here and what is evidenced, it would be disproportionate for the appellant to be extradited".

12 Ms Westcott also relied on *Kalinauskas,* to which I referred in *Peikauskas*.

13 Since there was no indication in the papers from the Lithuanian authority of the likely sentence, it was necessary to consider English sentencing authorities. The closest analogy was the offence of possessing a false identity document with improper intention contrary to s. 4 of the Identity Documents Act 2010 ("the 2010 Act").

14 In *Hoxha* [2012] EWCA Crim 1765, the defendant was stopped while driving and produced a forged Albanian driving licence. He had been driving habitually using this forged licence. He was not of good character. The Court of Appeal quashed a sentence of 8 months' imprisonment and substituted one of 4 months' imprisonment.

15 In *Picchi* [2014] EWCA Crim 2771, the defendant was found in possession of a false Italian driving licence and a genuine Italian identity card. A sentence of 4 months' imprisonment (consecutive to another sentence) was quashed and a sentence of 2 months' imprisonment substituted.

16 In *Mehmeti* [2019] EWCA Crim 751, the defendant was stopped while driving and presented a false Portuguese driving licence. The defendant was not of good character. A sentence of 10 months' imprisonment after credit for plea was too long and was quashed. A sentence of 6 months' imprisonment after credit for plea was substituted.

17 Finally, in *Coskun* [2019] EWCA Crim 2135, the appellant sent a forged Belgian driving licence to the DVLA as part of an application for a UK licence. He was charged with an offence under s. 6 of the 2010 Act, which did not require proof of improper purpose. Nonetheless, there was an overlap between the offences under ss. 4 and 6 and a sentence of 4 months' imprisonment was not manifestly excessive or wrong in principle.

18 On the basis of these authorities, Ms Westcott said that, applying the English authorities in the absence of any information from Lithuania about the likely sentence, a sentence of about 4 months' imprisonment is likely. This is less than the appellant has already served on remand.

Submissions for the respondent

19 For the Lithuanian authority, Ms Brown submitted that the only question under s. 21A(3)(b) was "the likely penalty that would be imposed". This meant that the question whether that penalty exceeded the time already spent on remand was not, strictly, a matter for consideration under s. 21A at all.

20 More generally, Ms Brown submitted that a review of sentencing decisions from England and Wales showed that it was not possible to say that the sentence would be less than 4 ½ months. A higher sentence might be imposed depending on the view taken by the court about the use to which the false licence had been put and the extent to which his burglary conviction in England aggravated the sentence.

Discussion

21 The principles relevant to this case are as follows:

(a) In assessing, for the purposes of s. 21A(3)(a), the seriousness of the conduct for which extradition is sought, the court should apply domestic standards in the first instance (although it will respect the views of the requesting state if they are offered): *Miraszewski,* [36].

(b) In this regard, the maximum sentence tells one very little. What matters is "the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim": *ibid*.

(c) The principal focus of s. 21A(3)(b) ("the likely penalty that would be imposed") is on the proportionality of extraditing someone who is not likely to receive a custodial sentence in the requesting state: *Miraszewski,* [37].

(d) Looking purely at the language of s. 21A(3)(b), particularly taken with s. 21A(2), there is some force in the respondent's submission that the court should focus narrowly on the penalty actually imposed, rather than on whether there will be time left to serve after that spent on remand in the executing state is deducted. However, there is an argument to the contrary based on a purposive reading of s. 21A(3)(b): there is a diminished public interest in extraditing someone who is not likely to serve any time in custody in the requesting state. The Divisional Court's decision in *Kalinauskas* is only consistent with the view that time spent on remand is relevant. This is not clearly wrong. I must therefore follow it.

(e) Crim PR PD 50A.5 contains a table of offences which are presumed not serious absent exceptional circumstances. The offence in *Rinkevicius* was said at [3] to be closely analogous to one of these (obtaining a bank loan using a forged or falsified document).

(f) However, the fact that an offence is not in the list in Crim PR PD 50A.5 does not mean that it *is* serious, just that the court must assess its seriousness without making any presumptions.

(g) It is permissible to consider s. 21A(3)(a) and (b) together "as they go hand in hand": *Rinkevicius,* [19].

22 The table in Crim PR PD 50A.5 includes certain minor road traffic, driving and related offences. It does not, however, include the offence of possession of a false driving licence. Nor do I consider that that offence is, in and of itself, so trivial that extradition for it should fail the test of seriousness in s. 21A. All depends on the circumstances. The domestic sentencing authorities relied upon by Ms Westcott show that the offence may attract a custodial penalty of several months depending on matters such as the use to which the false document is put and the offender's previous convictions.

23 In this case, Ms Westcott submits that the conduct alleged is "pure possession", there being no allegation that the appellant used the driving licence to drive. In my judgment, that is too narrow a reading of the EAW. It is true that it is not said that the appellant was apprehended while driving or that he produced the false licence attempting to pass it off as a genuine one. But it *is* said that he had been deprived of the right to drive. On the basis of this, together with the dates on the false driving licence, the Lithuanian authorities infer that he was "was using that licence for a rather long period of time, i.e. from 15 May 2010 to 4 May 2011".

24 Whether all this will be established to the satisfaction of the Lithuanian court will no doubt depend on what evidence is called before that court (including by the appellant himself) and what conclusions it considers justified on the basis of that evidence. For the purposes of this extradition appeal, however, I do not think it would be right to proceed on the basis that the court will regard this is a case of possession of a false document *and nothing more*. If the court concludes that the appellant had been using a false driving licence to drive whilst disqualified for the best part of a year, it might very well regard the offence as moderately serious, rather than trivial.

25 The focus of s. 21A(3)(b) is on the "likely" penalty. An analysis of the cases referred to by Ms Westcott show a range of 2 months' imprisonment to 6 months' imprisonment after credit for a guilty plea (which would equate to 9 months' imprisonment after trial). All depends on the circumstances, including the findings as to the use made of the document. An English court would be unlikely to treat a burglary committed much later as aggravating an offence of this kind committed in 2011. But the Lithuanian court may regard the fact that he was "deprived of the right to drive from 1 July 2008 to 1 September 2012" as an aggravating factor. The same is true of the fact that, as the judge found, he was a fugitive from Lithuanian justice.

26 Taking all these matters into account, I cannot say, as Supperstone J did in *Kalinauskas*, "I am left in no doubt that if the appellant was to be sentenced now for offending, he would be immediately released": see at [20]. To my mind, this is an important factor in the proportionality balance under s. 21A. Taking into account all the information in the EAW, the judge was entitled to reject the submission that extradition would be disproportionate. (I reach that conclusion notwithstanding her reference to the licence having been thrown from the car, which does not appear to be correct, but which is also a factor of minor significance.)

Article 8

27 The judge recorded the evidence before her in relation to Article 8 at [28]-[30] of her judgment, much of which came from a proof of evidence. At [65], she referred to *Norris v Government of the USA (No. 2)* [2010] UKSC 9, [2010] 2 AC 487, *HH v Italy* [2012]

UKSC 25, [2013] 1 AC 338 and *Celinski v Poland* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551.

28 At [66], the judge set out the factors in favour of extradition, one of which was that the appellant was accused of "a serious offence". At [67], she set out the factors against extradition as follows:

> "(a) The RP has a partner and child in this country. He also has a child who lives in Ireland that he has suggested that he supports financially. I do not accept that the RP is financially supporting any of his family members as I have set out above. However, I accept that any separation from his partner and child will be distressing for them all."
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> (b) The alleged offence took place over seven years ago. However, I am satisfied that the RP put himself out of reach of the JA by leaving Lithuania and failing to attend for questioning when required to do so."

29 At [68], the judge noted that the appellant had failed to attend court and that there was "no evidence from his partner or family members setting out the impact of extradition upon them". She continued as follows:

> "Hardship, both emotional and financial, will be suffered as is almost always the case. I note that the RP, his partner and child were separated during the RP's time on remand and then whilst serving a five months sentence of imprisonment. There is no cogent evidence before me to satisfy me that they were not able to manage during this time, I am therefore satisfied that they will be able to manage in the future."

30 To my mind, subject to one point, the judge carried out the balancing exercise required by Article 8 in an impeccable way. Her characterisation of the offence as "serious" perhaps put matters too high. The offence was at worst moderately serious, but that point could not realistically have made any difference to the Article 8 balancing exercise on the material before her. An appellant who chooses neither to attend his extradition hearing nor to adduce any evidence as to his family circumstances can hardly complain if, as here, the judge rejects his Article 8 claim for want of evidence.

31 Some of the fresh evidence now relied upon does not satisfy the requirements of s. 27(4)(a) of the 2003 Act as interpreted in *Hungary v Fenyvesi* [2009] EWHC 231, but the circumstances of this case are exceptional because I am hearing an appeal in July 2021 from a judgment which (through no fault of the judge) was prepared in March 2019, though not handed down until a year later. In those circumstances, it is appropriate for me to consider at least the parts of the fresh evidence which update the court as to the appellant's current family position. In relation to that, I must strike the Article 8 balance myself bearing in mind both the findings of fact made by the judge and the new evidence.

32 I have concluded that, even in the light of the new evidence, extradition would not constitute a disproportionate interference with the Article 8 rights of the appellant or his family members in this case. As to the public interest in honouring extradition arrangements, I rely on what I have said at [22]-[26] above. The offence is certainly not at the high end of the spectrum of seriousness, but the Lithuanian court may conclude,

depending on the evidence and its assessment of the circumstances in which the offence was committed, that it was an offence of moderate seriousness justifying a sentence of imprisonment. It is quite possible that this sentence will exceed the 4 ½ months already served.

33 As to the factors against extradition, the fresh evidence establishes that the appellant enjoys a close relationship with his son and that the latter is likely to suffer emotional distress if the appellant is extradited. It also establishes that the appellant's son and ex-partner may suffer a degree of financial hardship. However, the extent of the appellant's involvement in his son's care should not be overstated: he visits 2 or 3 times per week. This is not a case where the appellant in any meaningful sense shares responsibility for the care of his son.

34 Although a great deal of time has passed since the date on which the alleged offence was committed, the judge found the appellant to be a fugitive. The weight to be given to the delay is therefore much diminished. It is also relevant that this is not a case where the appellant has stayed out of trouble since coming to the UK. His conviction and sentence for burglary shows that he has been prepared to commit crime much more recently, knowing the effect this might have on his ability to look after his son.

35 The uncertainty caused by Brexit is, no doubt, a matter of significant concern for the appellant and his family. If extradited, it is uncertain whether he would be readmitted. I accept that this uncertainty is a factor which must be weighed in the balance. But it is not such as to outweigh the public interest in the UK's honouring its international extradition commitments, even when taken with the inevitable emotional impact of extradition on the appellant's son and the financial impact on his son and former partner.

36 Finally, I have considered the evidence as to the appellant's health condition. This does not establish that the appellant has a condition for which he is currently receiving treatment, nor that, if such treatment is or might in the future be required, it would not be available in Lithuania.

37 Taking all of the fresh evidence into account, extradition would not constitute a disproportionate interference with the appellant's Article 8 rights. The contrary is not arguable. I shall therefore refuse permission on this ground.

Conclusion

38 As regards proportionality under s. 21A(1)(b), the appeal is therefore dismissed. As regards Article 8, permission to appeal is refused.