Neutral Citation Number: [2022] EWHC 3088 (Admin)

Case No: CO/3197/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Friday 2nd December 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

BARTOSZ FEDOROWICZ — **Appellant**

- and -

PROSECUTOR GENERAL'S OFFICE (LITHUANIA) — **Respondent**

- -
- -

George Hepburne Scott (instructed by Lansbury Worthington Solicitors) for the **Appellant**
Stefan Hyman (instructed by CPS) for the **Respondent**

- -

Hearing date: 17/11/22
Written submissions: 20/11/22 and 21/11/22

- -

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

MR JUSTICE FORDHAM:

Introduction

1. This is an extradition appeal which raises a question of statutory interpretation concerning a provision of domestic criminal legislation: section 45(7)(b) of the Serious Crime Act 2015 ("the 2015 Act"). The Appellant is aged 33 and is wanted for extradition to Lithuania. That is in conjunction with an accusation Extradition Arrest Warrant (the "ExAW") issued on 7 June 2021 and certified on 18 June 2021. It is agreed that the appeal must succeed if the Appellant is right on the question of statutory interpretation, which is a hard-edged question of law for this Court to answer.

The Conduct Alleged in the ExAW

2. There is a lot of common ground. Everyone agrees that the conduct described in the ExAW as having taken place in Lithuania did not involve any act or omission on the part of the Appellant. Everyone also agrees that the conduct described in the ExAW as having involved any act or omission on the part of the Appellant took place in Poland. The description of the offence in the ExAW starts with this:

> ***While acting in an organized group, Bartosz Fedorowicz unlawfully acquired, stored and transported a very large quantity of narcotic substances. Bartosz Fedorowicz, who acted in the organized group together with Raimondas Dranginis, Egidijus Mitkus, Mantas Bagugauskas, Tomas Danilevidus, Julius Vaiacinas, Andrejus Motuzas, Tomas Grinius, Tomasz Wojtaszek (who was convicted for the said crime on 27 July 2020 by the Lon le Sonje Court of the Besancon Court of Appeal of the Republic of France) and the persons not identified in the course of the pre-trial investigation, while acting for mercenary reasons, i.e. by pursuing the goal to profit from the criminal activity, between May 2020 and 22 July 2020, the exact time not established in the course of the pre-trial investigation, during the meetings and telephone conversations, agreed to acquire a very large quantity of the narcotic substance cannabis and parts thereof which had been cultivated in the Kingdom of Spain, and unlawfully store and transport the said narcotic substances in the semi-trailer of the tractor unit from the Kingdom of Spain to the Republic of Germany for the purposes of distribution thereof.***

3. The ExAW continues with the description of conduct said to have taken place in Lithuania. It involves a meeting on 3 July 2020 at a car park in Vilnius:

> ***While acting on the basis of the criminal plan, on 3 July 2020, in a car parking lot, address: Gelelinio Vilko g. 6A, Vilnius, a plan of criminal activity was discussed during the meeting between R. Dranginis, E. Mitkus and A. Motuzas, and A. Motuzas received the funds in the amount not established in the course of the investigation for the purposes of commission of criminal activities given by the member of the organised group J. Vaidtinas, and gave the funds over to R. Dranginis. While acting in accordance with the criminal agreement Mantas Bagugauskas bought plane tickets in the name of R. Dranginis from the Warsaw Airport to the Valencia Airport …***

4. The ExAW then describes other conduct. This includes the conduct of the Appellant which involves two things: a meeting on 8 July 2020 in Warsaw; and an instruction given (also in Poland, as Mr Hyman accepts) by the Appellant to an employee:

> ***… whereas R. Dranginis and T. Danilevidus went to the Republic of Poland on 8 July 2020 by vehicle VW Toureg, license plate number KEA565, and during the meeting held with him (Bartosz Fedorowicz) at address: J. G. Benneta 2A, Warsaw, they agreed that the tractor unit with the semi-trailer which belonged to his company "WR INVESTMENT", would transport a very large quantity of the unlawfully acquired narcotic substances cannabis (and parts***

> ***thereof) from the Kingdom of Spain to the Republic of Germany. While acting in accordance with the agreement, Bartosz Fedorowicz instructed the employee of his company Tomasz Wojtaszek to go to the city of Orihuelos in the Kingdom of Spain by the tractor unit, license plate number WL9658L, and the semi-trailer, license plate number SB6597P, where the narcotic substances had to be loaded at the agreed place.***

5. The description of the offence in the ExAW then continues as follows:

> ***While acting in accordance with the developed plan, R. Dranginis used the plane tickets bought for him by M. Baguauskas, and on 8 July 2020 took a flight to the Kingdom of Spain, and while there, met T. Grinius who was waiting for him, used the funds given over by A. Motuzas through J. Vaithanas, and together with T. Grinius unlawfully acquired from the persons not identified in the course of the pre-trial investigation a very large quantity of the narcotic substance that had been cultivated in the Kingdom of Spain and prepared in advance, i.e. 64 kilograms of cannabis (and parts thereof), which was loaded on 17 July 2020 in the city of Orihuelos by the persons not identified in the course of the pre-trial investigation to the tractor unit, license plate number W19658L, and the semi-.trailer, license plate number SB6597P, which belonged to the company "WR INVESTMENT" and was driven by Tomasz Wojtaszek. After that Tornasz Wojtaszek transported the said narcotic substance, i.e. 64 kilograms of cannabis (and parts thereof) which were unlawfully hidden inside the semi¬trailer of the tractor unit, from the Kingdom of Spain to the Republic of Germany until 22 July 2020 when during the inspection in the city of Aries, the customs officers of France detected and seized the said narcotic substance. Thus, he (Bartosz Fedorowicz), while acting in the organized group together with Raimondas Dranginis, Egidijus Mitkus, Mantas BaguKauskas, Tomas Danilevidus, Julius Vaidanas, Andrejus Motuzas, Tomas Grinius and Tomasz Wojtaszek as well as with other persons not identified in the course of the investigation, unlawfully possessed, i.e. acquired, stored and transported a very large quantity of narcotic substances, i.e. 64 kg of cannabis (and parts thereof).***

It concludes:

> ***For such acts, Bartosz Fedorowicz is suspected of having committed the criminal offences defined by Article 7 paragraph 12, Article 25 paragraph 3 and Article 260 paragraph 3 of the Criminal Code of the Republic of Lithuania.***

<u>Section 64 of the 2003 Act</u>

6. The sole and narrow issue which has arisen in this case as a statutory bar on extradition is the question whether the Appellant's extradition to Lithuania would satisfy the mandatory conditions of section 64 of the Extradition Act 2003. For the purposes of applying these provisions, Lithuania is the relevant "category 1 territory". Section 64(1)(2)(4) provide:

> ***64. Extradition offences: person not sentenced for offence.***
>
> ***(1) This section sets out whether a person's conduct constitutes an "extradition offence" for the purposes of this Part in a case where the person – (a) is accused in a category 1 territory of an offence constituted by the conduct …***
>
> ***(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection … (4) are satisfied…***
>
> ***…***
>
> ***(4) The conditions in this subsection are that – (a) the conduct occurs outside the category 1 territory; (b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom; (c) the conduct***

> ***is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment.***

7. Everyone agrees that the Appellant is the "person", that his "conduct" which it is being said "constitutes" the "offence" (s.64(1)(a)(2)) is "conduct occur[ring] outside" Lithuania (s.64(4)(a)) and that the "conditions" which must be "satisfied" (s.64(2)) include that: "in corresponding circumstances equivalent conduct would constitute an extraterritorial offence under the law of the relevant part of the United Kingdom" (s.64(4)(b)). It is also agreed the "law" of the United Kingdom, containing the relevant "extraterritorial offence", is found in section 45 of the 2015 Act. In considering the "corresponding circumstances equivalent conduct" condition of section 64(4)(b) it is therefore necessary to analyse the applicability of section 45 of the 2015 Act. In doing so, it is necessary to treat the conduct said to have happened in Lithuania – the meeting in the car park in Vilnius on 3 July 2020 – as though it had taken place somewhere in England and Wales (as "proxy" for Lithuania). Having done so, everything else can remain as it is. It is necessary to posit the Appellant's own acts and omissions having taken place outside England and Wales. It can be taken that the Appellant's own alleged conduct was all in Poland. Could those actions by the Appellant be a crime in England and Wales, by virtue of section 45?

Section 45 of the 2015 Act

8. Counsel agree that the focus is squarely on section 45(7)(b), on which there are competing suggested interpretations. I will section 45 in full, underlining section 45(7)(b):

> ***45. Offence of participating in activities of organised crime group.***
>
> ***(1) A person who participates in the criminal activities of an organised crime group commits an offence.***
>
> ***(2) For this purpose, a person participates in the criminal activities of an organised crime group if the person takes part in any activities that the person knows or reasonably suspects— (a) are criminal activities of an organised crime group, or (b) will help an organised crime group to carry on criminal activities.***
>
> ***(3) "Criminal activities" are activities within subsection (4) or (5) that are carried on with a view to obtaining (directly or indirectly) any gain or benefit.***
>
> ***(4) Activities are within this subsection if— (a) they are carried on in England or Wales, and (b) they constitute an offence in England and Wales punishable on conviction on indictment with imprisonment for a term of 7 years or more.***
>
> ***(5) Activities are within this subsection if— (a) they are carried on outside England and Wales, (b) they constitute an offence under the law in force of the country where they are carried on, and (c) they would constitute an offence in England and Wales of the kind mentioned in subsection (4)(b) if the activities were carried on in England and Wales.***
>
> ***(6) "Organised crime group" means a group that— (a) has as its purpose, or as one of its purposes, the carrying on of criminal activities, and (b) consists of three or more persons who act, or agree to act, together to further that purpose.***
>
> ***(7) For a person to be guilty of an offence under this section it is not necessary— (a) for the person to know any of the persons who are members of the organised crime group, (b) for all of the acts or omissions comprising participation in the group's criminal activities to take***

> ***place in England and Wales (so long as at least one of them does)*, or (c) for the gain or benefit referred to in subsection (3) to be financial in nature.**
>
> ***(8) It is a defence for a person charged with an offence under this section to prove that the person's participation was necessary for a purpose related to the prevention or detection of crime.***
>
> ***(9) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 5 years.***

The Judge's Approach

9. Extradition was ordered by District Judge Callaway ("the Judge") on 13 September 2021 after an oral hearing on 17 August 2021. The Judge was satisfied that "some, albeit a small part of the activity alleged, occurred in the jurisdiction of [Lithuania]". That was obviously a reference to the meeting on 3 July 2020 at the car park in Vilnius. The Judge treated that as sufficient for the purposes of section 45(7)(b) with its key phrase: "at least one of them".

The Argument in Support

10. Mr Hyman for the Respondent submits in essence as follows. The Judge was legally correct. It is sufficient for section 45(7)(b) if any of "the group's criminal activities" took place in England and Wales (proxy for Lithuania). The phrase "the acts or omissions comprising participation in the group's criminal activities" in section 45(7)(b) is not restricted to the "participation" of "the person" who is being described in the opening words of section 45(7) and who is being described in section 45(1). The drafter did not say "comprising *the person's* participation". The language is broader. It is satisfied by any relevant act or omission, of any person, comprising participation in the group's relevant criminal activities. It follows that the proviso at the end of section 45(7) – "so long as at least one of them does" – is a proviso met if there is any act or any omission by any participant in the organised crime group's relevant criminal activities which takes place in England and Wales. The effect, and indeed the purpose, of section 45(7)(b) is to ensure that there is some relevant "group criminal activity" which has taken place in England and Wales. Applying that logic to the present circumstances, the fact that a conspiratorial meeting took place in a car park in England and Wales (proxy for Vilnius in Lithuania) on 3 July 2020 would be sufficient to qualify as "at least one" act or omission comprising participation in the group criminal activities which has taken place in England and Wales. That would satisfy section 45(7)(b). It follows that participatory acts and omissions of the Appellant, all of which would be being said to have taken place outside England and Wales, would fall within the ambit of section 45(1). In effect, the function of section 45(7)(b) is to qualify section 45(5)(a) so that the relevant criminal activities of the organised crime group can have been carried on outside England and Wales for the purposes of a participating person committing an offence, providing that one such criminal activity (at least one act or omission by at least one participant) has taken place in England and Wales.

Discussion

11. I cannot accept that argument. I agree with the argument of Mr Hepburne Scott for the Appellant. In my judgment, what section 45(7)(b) is straightforwardly doing is ensuring that "at least one" act or omission of the "person" in section 45(1), comprising the

participation by that person in the criminal activities of an organised crime group, has taken place in England and Wales. That is for the following reasons:

i) First, this is a straightforward interpretation which follows the wording and structure of section 45. The section starts with a "person". That person "commits an offence", by being a "person who participates". The point of the rest of the section is to delineate the parameters which govern when it is that this is a "person who participates" and so commits this "offence". Section 45(7) is clarifying when the "person" is "guilty" of the "offence". The "acts or omissions" in section 45(7)(b) are conduct "comprising participation". That means the "participation" of the "person who participates", and thereby commits the "offence"; the same "person" as is the focus of section 45(1) and 45(7). It is "participation" by the "person". The subsection is straightforwardly saying that for a person to be guilty of an offence, as a person who participates in the criminal activities of an organised crime group, it is not necessary for all of the acts or omissions comprising that person's participation in the group's criminal activities to take place in England and Wales, so long as at least one of them does. This is direct and straightforward to apply: asking whether the "person" who is the focus of any investigation or prosecution has done some relevant act or omission in England and Wales.

ii) Secondly, if the drafters had intended subsection (7)(b) to require that at least one of the group's criminal activities – or an act or omission comprising the group's criminal activities – needed to have taken place in England and Wales, so as to qualify section 45(5)(a) read with section 45(3), that would have been extremely easy to achieve. The language was all to hand. Indeed, it is already within subsection (7)(b). The drafters would simply have omitted the words "participation in". They would have said: "it is not necessary (b) for all of the acts or omissions comprising the group's criminal activities to take place in England and Wales (so long as at least one of them does)". That would have been section 45(7)(b) linking to section 45(4)(a), just as section 45(7)(c) links to section 45(3). Instead, the drafters inserted "participation in". That was a clear and explicit link back to "participates" in section 45(1) and section 45(2).

iii) Thirdly, if section 45(7)(b) were describing acts or omissions beyond those of the "person" who is being said to have committed the offence, that would bring in any act or omission of any third party "participating" person, including anyone who "takes part" by an act or omission in England and Wales in an activity which "will help" (section 45(2)(b)). Nothing in the language or structure suggests bringing in a third party participant, who is a different "person". This would replace a test which is direct and straightforward to apply with one which is indirect and far from straightforward: asking the "person" being investigated or prosecuted (whose own acts of participation were all abroad) has participated in a "group's criminal activities" (which could also all have been abroad) in which some other "participating" person did some act or omission in England and Wales "comprising participation".

12. In my judgment, the clear meaning and purpose are straightforwardly to require some territorial aspect in the participative conduct being alleged against the person who is being said to have committed the participatory offence. It follows that the Judge was right that it would suffice if some, albeit a small part of the activity alleged, occurred

in the jurisdiction of Lithuania. But "the activity alleged" needs to be the activity alleged against the "individual"; here, the Appellant. Not even a "small part" of the "activity alleged" against the Appellant occurred in Lithuania. It follows that section 10 dual criminality, based on section 45, was not in law satisfied.

Other Sources

13. Reference was made to the case of R v Dunn [2021] EWCA Crim 439. That was a case in which the defendant's conduct had taken place in England and Wales, and in which the issue did not therefore arise. The judgment records the section 45 offence as having "required only that [the defendant] took some part in the activities of an organised criminal group". What subsection (7)(b) adds is that at least one act or omission of the defendant, within that taking of "some part" in the activities of the organised criminal group, must have taken place in England and Wales.

14. At my invitation, Counsel made helpful post-hearing submissions on the Article by Jarvis and Earis [2015] Crim LR 766 entitled "Participation in the activities of an organised crime group: the new offence". That Article includes extensive discussion of the background to the section 45 offence. The authors also discuss the "conduct element of the offence" and express the view that section 45(7)(b) "makes clear that the activities of the participant can occur outside of England and Wales provided he does something within the jurisdiction that amounts to participation". Counsel made submissions on these sources, which are among those referred to in the article: the UN Palermo Convention Against Transnational Organised Crime (2000) (ratified by the UK in 2006; approved by the EU by Council Decision 2004/579/EC); the EU Framework Decision (24 October 2008); and the UK Government Factsheet on the new s.45 offence (March 2015). Neither Counsel suggested that the UN Convention or EU Framework Decision had a status requiring a conforming interpretation, and Mr Hyman queried whether the UK had opted-into the Framework Decision. I do not see the Factsheet as illuminating as to section 45(7)(b). But the Palermo Convention and EU Framework Decision are noteworthy reference points. Article 5(1)(a)(ii) of the Palermo Convention describes the participatory offence found in section 45 and Article 15(1)(a) of the Convention obliged States Party to adopt measures to establish jurisdiction over that Article 5 participatory offence when "the offence is committed in the territory of that State Party". Article 2(a) of the Framework Decision likewise describes the participatory offence found in section 45 and Article 7(1)(a) required Member States to ensure that their jurisdiction in cases in which the Article 2 participatory offence was committed "in whole or in part within its territory, wherever the criminal organisation is based or pursues its criminal activities". The interpretation at which I have arrived would mean section 45 created the jurisdiction described as mandatory by these provisions. There is certainly no dissonance arising from these reference-point sources, which would lead me to revisit the interpretation which I think arises from the language, structure and discernible purpose of section 45.

The Alternative Argument

15. There was a new fallback argument raised by Mr Hepburne Scott. He submitted that the description in the EAW of the alleged car park meeting on 3 July 2020 could not suffice to constitute an activity which would constitute an offence for the purposes of being a criminal activity of an organised crime group for the purposes of section 45. That was because the description of "a plan of criminal activity" being "discussed"

would not of itself – or sufficiently clearly – constitute conspiratorial agreement to amount to criminal activity. I agree with Mr Hyman that there was nothing in the new point. Read in context, the ExAW was referring to meetings and telephone conversations within the timeframe of May 2022 to 22 July 2020, at which the relevant agreement to acquire, store and transport narcotic substances was being made. The alleged meeting of 3 July 2020 was squarely within that timeframe and that description. Read in context, the reference to that meeting – being one at which a plan of criminal activity was discussed, following which funds were received and distributed and other actions took place – is plainly an allegation of a meeting which was conspiratorial in nature, at which those involved were hatching a plan. I would not have accepted Mr Hepburne Scott's fall-back argument. Nor would there have been any need for the seeking of further information, or allowing time for further information, from the Respondent.

Conclusion

16. This appeal must succeed in light of the outcome on the issue of statutory interpretation, on which it was agreed that its outcome would turn. The appeal falls to be allowed on the basis that the Judge ought to have decided the section 64 question differently and, had he decided it in the way that he ought, would have been required to order the Appellant's discharge.

A new development

17. This judgment was circulated as a confidential draft on 25 November 2022, for hand-down on 2 December 2022. The hearing had taken place on 17 November 2022. The draft judgment had said "the appeal is allowed" (which I have changed at §16 to "falls to be allowed"). It contained one further sentence ("I will order that the Appellant's discharge and quash the order for his extradition"). There was a new development. On 29 November 2022, Mr Hyman emailed the Court and the Appellant's representatives, communicating that the CPS had received information that the domestic arrest warrant had been withdrawn on 21 November 2022, with the Interpol alert and the ExAW both cancelled. Mr Hyman invited me immediately to make an Order discharging the Appellant, which I did. That left the question whether I should hand down this judgment. Mr Hyman suggested that I might "wish to consider" whether I wished to "publish the judgment". Mr Hepburne Scott supported the hand-down of the judgment, making the point that if the ExAW were reissued, the Appellant could lose the protection of this Court's ruling on section 45 and its territorial scope. Mr Hepburne Scott also expressed concern about the sequence of events and invited me to consider an enquiry into what precipitated the withdrawal of the ExAW at this time. Mr Hyman for his part put down the marker, "without seeking to undermine" my decision, that the Respondent "might well" have invited a certificate of a point of law of general public importance with a view to pursuit in the Supreme Court. I am entirely satisfied that publication of the judgment is appropriate. No enquiry is needed. Even in a private law case, circulation of a draft judgment is a key step (see Jabbar v Aviva Insurance UK Ltd [2022] EWHC 912 (QB) [2022] 4 WLR 68). Moreover, the judgment decides a point of law of potential general interest (as the Respondent acknowledges) albeit in the High Court (see Jabbar at §§43-44). This is a public law case, raising an issue of criminal law. The Appellant has succeeded in the case, wishes the judgment to be published (to which there is rightly no active resistance by the Respondent), and should not lose such protection as this judgment constitutes.