Neutral Citation Number: [2024] EWHC 417 (Admin)

Case No: AC-2023-LON-000355

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 27th February 2024

Before:
FORDHAM J

- -

Between:
MIGUEL ANTONIO DA CRUZ OLIVEIRA NOBRE — **Appellant**
- and -
PORTUGAL — **Respondent**

- -
- -

James Stansfeld (instructed by JFH Law) for the **Appellant**
Reka Hollos (instructed by CPS) for the **Respondent**

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Hearing date: 27.2.24

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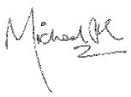
Approved Judgment

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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FORDHAM J

FORDHAM J:

Introduction

1. I announced my decisions in open court with non-confidential non-embargoed reasons to follow in writing. Here they are.

2. The Appellant is aged 50 and is wanted for extradition to Portugal. That is in conjunction with a conviction Extradition Arrest Warrant issued on 28 February 2022 and certified on 25 August 2022 on which he was arrested on 27 September 2022. On 27 March 2023 District Judge Pilling ("the Judge") ordered his extradition in relation to one of the two index offences to which the Extradition Arrest Warrant relates. That was the theft of €121,000 from an employer over a four-year period between January 2007 and January 2011. The Judge discharged the Appellant in relation to the other index offence, an offence of money laundering. She also discharged the Appellant's wife whose extradition had been sought on the same Extradition Arrest Warrant. An Article 8 ECHR issue has been raised on appeal to this Court and, permission to appeal having been refused on the papers, that issue is the subject of an extant renewed application.

Disaggregation and Specialty

3. There has been a substantive development. There is a documented concern as to whether the Portuguese judicial authorities have the power to disaggregate the sentences for the theft and money laundering, and would do so, so as to require the Appellant to serve only the 3 year custodial sentence referable to the theft; rather than the overall aggregated 5 year sentence for theft and money laundering. This engages the Appellant's specialty protection under Article 625(2) of the Trade and Cooperation Agreement. By an Order on 8 February 2024 Sir Duncan Ouseley directed consideration at this oral hearing of the "terms" of a request for information to be sent by this Court to the appropriate judicial body in Portugal, asking whether the Appellant if returned will have to serve 5 years or 3, and if the latter whether there could be any lawful attempt to put him back in custody to serve the other sentence without him being given the chance to leave Portugal. In his reasons for that Order, Sir Duncan Ouseley explained that an authoritative answer to the question which has arisen – which, as he said "needs to be dealt with" – can only be given by the Portuguese court to this Court. He said that assistance in drafting the question or information to be sought would be helpful and expressed the hope that the parties would be able to reach an agreed position. There was a substantial measure of agreement.

Timing

4. But before we get to that, there is a procedural issue. The Judge ordered extradition on Monday 27 March 2023. Section 26(4) of the Extradition Act 2003 provides that notice of application for leave to appeal:

> ***must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made.***

It is established that "given" means "filed and served": see Mucelli v Albania [2009] UKHL 2 [2009] 1 WLR 276, followed in Pomiechowski v Poland [2012] UKSC 20 [2012] 1 WLR 1604.

5. Section 26(5), which came into force in April 2015 after Mucelli and Pomiechowski, provides that:

> ***where a person gives notice of application for leave to appeal after the end of the permitted period, the High Court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given.***

This is frequently, understandably, referred to as a provision allowing an 'extension of time'. But it is really a mandatory disapplication.

6. In the present case, the seventh calendar day "starting with the day on which the order [was] made" was Sunday 2 April 2023. The notice of appeal was filed with the Court at 13:12 on Monday 3 April 2023. It was served on the Respondent by email at 18:02 that same day. From that sequence of events, there erupted a procedural dispute. The questions are these: (i) whether the 18:02 email on Monday 3 April 2023 was outside the section 26(4) statutory "permitted period" of "7 days"; and, if so, (ii) whether the appeal should nevertheless be heard under the mandatory disapplication in section 26(5).

7. Everybody agrees that, when calendar day 7 falls on a non-business day – here, on Sunday 2 April 2023 – the next business day becomes the final of the "7 days" within the statutory "permitted period". That was explained by Lord Neuberger in Mucelli at §84. I will call this situation "Carry-Over".

8. The reason why an extension of time is said to be needed is because of rule 4.11 of the Criminal Procedure Rules (CrimPR). When Mucelli and Pomiechowski were decided, High Court extradition appeals were governed by the Civil Procedure Rules (CPR). Since 2014, they have been governed by the Crim PR. The CrimPR changed on 5 October 2020, and again on 5 April 2023. CrimPR rule 4.11(2)(d) provides (emphasis added) that:

> ***(2) Unless something different is shown, a document served on a person by any other method [them being handed over] is served… (d) in the case of a document served by electronic means (i) on the day on which it is sent under rule 4.6(2)(a), if that day is a business day and if it is sent by no later than… 4.30pm that day in an extradition appeal case in the High Court… (iv) otherwise, on the next business day after it was sent, deposited or such notice was given.***

The point is that an email on 18:02 was after 4:30pm.

Mandatory Disapplication

9. There is, in my judgment, an irresistible case for a section 26(5) disapplication, should one be needed. The reasons are these. (1) The Respondent itself has previously recognised that the period in question is short, and that the position in law is unclear as to whether an extension of time is needed at all. (2) The Respondent has taken the position – and has reverted to the position – that it is "neutral" as to any extension, which means it is not opposed. Although the Respondent says there ought to have been a written application, Sir Duncan Ouseley has made a Court Order which expressly directs that: "No further application is necessary in the circumstances". (3) The authoritative interpretation of "the person did everything reasonably possible" has been settled by the Supreme Court in Public Prosecutor's Office of the Athens Court of Appeal v O'Connor [2022] UKSC 4 [2022] 1 WLR 903 at §49. Applying that

approach, there is no basis for doubting that the requested person has himself done everything possible to ensure that the notice is given as soon as it could be given, even if his legal representatives failed to do so; and it is not the purpose of the legislation to perpetuate a potential injustice which can arise from fault of the person's legal representative. I would invoke s.26(5) without hesitation, if necessary. But is it necessary?

In-Time Anyway

10. In my judgment, there is a more direct answer. It is that no mandatory disapplication is needed. I will explain why.

11. As has been seen, section 26(4) includes the phrase "in accordance with rules of court". CPR rule 6.7 (set out at Mucelli §81) provided that a document transmitted by fax after 4pm was deemed to have been served "on the business day after the day on which it is transmitted". As Lord Neuberger explained (Mucelli §81), it appeared to have generally been assumed that CPR 6.7 'governed' the question of when a extradition notice of appeal was treated as having been given under section 26(4). However, that was not correct. The true position (Mucelli §82) is that:

> ***the reference to rules of court in the section govern the manner, not the time, or service.***

12. As the House of Lords held in Mucelli, the correct interpretation of section 26(4) was that the statutory "permitted period" of "7 days" starting with the day on which the order was made, gave 7 days up until "midnight" on the 7th day. This legally correct interpretation of the statutory period could not be "cut down" by subordinate legislation or rules of court (§82); nor could the rules extend the statutory period (§74).

13. So, in the case of Moulai (see Mucelli at §§12, 87) where the extradition order had been made on 14 March 2008 and the equivalent statutory 14 day "permitted period" in section 103(9) of the 2003 Act ended on 20 March 2008, the notice of appeal had been "given" before the end of the permitted period when it was faxed at 16:02. That was notwithstanding CPR rule 6.7 with its 4pm cut-off. That was because the statutory scheme conferred an entitlement to 'give' the notice of appeal up until "midnight" on the seventh day (Mucelli §90). A rule of court, like CPR 6.7, could not "cut down" on this. See Pomiechowski at §5.

14. Ms Hollos, who appears in this case for the Respondent, accepts that that same logic remains applicable, in any straightforward case where the 7th calendar day is a 'business' day. That is notwithstanding the introduction of section 26(5) in 2015, and notwithstanding the express reference to extradition appeals in CrimPR rule 4.11 since October 2020. That rule has a specific cut-off of 4:30pm for electronic service. However, as Ms Hollos accepts, the Mucelli logic holds. Notwithstanding the reference to "in accordance with rules of court" in section 26(4), criminal procedure rules cannot in principle – any more than could civil procedure rules – cut down the statutory 7 days permitted period, which runs up to "midnight" on the 7th day. This was the approach taken in this court by Cranston J in Poland v Czubala [2016] EWHC 1653 (Admin). That was a case about the seven-day deadline applicable to an appeal by the requesting judicial authority (section 28(5)), but it found that the logic of Mucelli continued to apply notwithstanding CrimPR 4.11 in 2014 and the new section 26(5) in 2015. As it

happens, Czubala is a case about three extradition appeals brought by the requesting state authorities, who were in peril of being out of time.

15. The dispute is as to the position where there is a Carry-Over. This is when the 7th day falls on a non-business day when offices are closed. That will be the case whenever an extradition order is made on a Monday, because the 7th calendar day is the next Sunday, as in this case. It can also arise where the 7th calendar day is a Bank Holiday.

16. The Respondent's position is that, in that particular Carry-Over situation, the statutory permitted period of 7 days to "midnight" is inapplicable. Yes, service is permitted on the next business day (Mucelli §84) but it does not include an entitlement to serve up to midnight. Rather, in this one special situation, rule 4.11 does 'govern' and is a controlling provision. In support of this, Ms Hollos submits as follows. (1) The rationale of Mucelli was to guarantee 7 full calendar days, each of 24 hours, as being permitted by the statute. (2) Lord Neuberger discussed the permissible Carry-Over (Mucelli at §84), derived from Pritam Kaur v S Russell & Sons Ltd [1973] QB 336. But the House of Lords was not concerned with any case of that kind, and this was obiter. The Carry-Over rationale is simply that it would be impossible to give the notice on a non-business 7th calendar day. So, the statutory "permitted period" is construed to extend "into" an 8th calendar day. (3) It is no part of either of these rationales that an appellant should benefit from a full 24 hours on an 8th calendar day. (4) The correct position is that "the rules of court" – referenced expressly in section 26(4) – do govern the cut-off point on the Carry-Over day (the 8th calendar day). The true interpretation of the statutory permitted period, where calendar day 7 is a non-business day, is "into the eight day, subject to any deadline prescribed in rules of court". (5) This was misappreciated by Cranston J in Czubala, on one of the three cases (to which I will return), which was wrong and overgenerous to the requesting judicial authority appellant.

17. I cannot accept these submissions. (1) The judgment of the House of Lords in Mucelli is clear. The statutory "7 days" are 24 hours "days" – that means, up to midnight – but the final day of the "permitted period" must always be a business day. (2) This is clear, consistent and straightforward. (3) This means that timing is identifiable from the language of the statute. It is a function of what the statutory language "permitted period" and "7 days" means. The "rules of court", albeit referred to in the subsection, do not "govern … the time … of service" (Mucelli §82). As to how they govern the "manner", the Supreme Court revisited this in Pomiechowski. (4) Having identified the statutory concept of time as extending to "midnight", and not being capable of being cut down by the rules, Lord Neuberger expressly addressed the Carry-Over. He also stated – in terms – that the where the 7th calendar day is a non-business day, the notice could be validly filed or served "if it is given at any time during the first succeeding day on which the office is open" (§84). The phrase "at any time" reflects the 24 hour "days" in the statute, which he had recognised. It is impossible to suppose that if the notice in Moulai had been on the day after a day 7 non-business day, it would have been out of time by virtue of CPR rule 6.7 because it was later than 4pm. (5) It would undermine the principled basis of Mucelli if the permitted period of 7 days extended to the full 7 days up to midnight, except in the situation which Lord Neuberger expressly addressed, where calendar day 7 was a non-business day. (6) It would undermine the principled basis of Mucelli if the "rules of court" did not "govern the time of service" in the generality of cases, but did do so wherever an order was made on a Monday or where

the seventh calendar day is a Bank Holiday. This gives CrimPR rule a strange 'half-life' where it has not bite except on Carry-Over Day cases. It undermines principle, clarity and certainty. (7) The point has already been decided. One of the three cases with which Cranston J was concerned in Czubala at §§17-18 was a situation was a case in which the 7th calendar day fell on a Bank Holiday (30 May 2016). The requesting state authority's notice of appeal had been filed and served at 16:25 on the next business day (31 May 2016). The then CrimPR 4.11 required that electronic service be no later than 14:30 (§7). Cranston J was persuaded – by Counsel instructed by the CPS – that the Mucelli logic and principle was applicable. This allowed up to midnight on day 7, including the deferred day 7 following a bank holiday. That is this case. I am not convinced that this is wrong. On the contrary, I am satisfied that it is correct. The point was resolved 8 years ago.

Questions for the Judicial Authority

18. I turn to the request for information to be sent by this Court to the appropriate judicial body in Portugal, pursuant to Sir Duncan Ouseley's order. There was a substantial degree of agreement. I am going to Order as follows:

> ***The National Crime Agency shall transmit the following questions to the Respondent, set out below, but recorded in a separate document agreed by the parties, to the Judicial Court of the District of Coimbra, Portugal and request a response by 27 March 2024:***
>
> ***(1) If surrendered to Portugal, will the Requested Person have to serve the five year sentence of imprisonment pursuant to the final judgment of 12 January 2016, or will the Requested Person only be required to serve the three year sentence of imprisonment imposed for the offence of embezzlement, pursuant to the principle of specialty under Article 625(2) of the Trade and Cooperation Agreement?***
>
> ***(2) If your response to Question (1) above is that the Requested Person would only be required to serve the three year sentence of imprisonment imposed for the offence of embezzlement, please specify the provisions of Portuguese law which govern and permit the amendment of the final judgment of 12 January 2016.***

These are two focused questions, referable to this concrete case, relating to the law. They are asked on a tight time frame. They give this Court what it needs.

19. Mr Stansfeld wanted me to ask, in addition:

> ***(3) Please provide examples of any cases (including the case number and relevant court) where a final judgment has been amended because extradition was refused for one of the offences underlying an aggregate sentence.***
>
> ***(4) If the Requested Person will be required to serve the three year sentence of imprisonment only, could any lawful attempt be made to impose the outstanding sentence of imprisonment for offence (2) without providing the RP an opportunity to leave Portugal?***

I decline to do so. Point (4) is unnecessary given (1). Point (3) would require a regional court to examine its court files in other cases, or examine its institutional memory; it would not constitute a 'nationwide' answer; it would be burdensome and disproportionate; and it extends beyond the focused illumination which is necessary.

Deferring Article 8

20. The next question is whether it is appropriate in the circumstances to deal with the reasonable arguability of the Article 8 issue today. On that point there is agreement. Mr Stansfeld for the Appellant has submitted that it is in the interests of justice for the Court to determine the issue of timeliness of the appeal and the request for Further Information and then to adjourn the renewal hearing to await the Respondent's response, so that the renewal hearing on the substantive issues can be conducted on a fully informed basis and address whether both arguments are arguable. The Respondent in a skeleton argument adopts the following position: the Respondent concurs with the Appellant that, "in the interests of justice", once the Court has determined the timeliness of the appeal and settled the questions to be asked in the requested Further Information, the renewal hearing ought to be adjourned pending the response from the Respondent.

21. It follows that it is common ground between the parties that it would be in the interests of justice, in this particular case, to defer consideration of Article 8. In those circumstances, I am not prepared to impose on parties who jointly resist it, ventilation of the arguments relating to the viability of the Article 8 ground of appeal. I make clear that I am not intending to set any precedent. The High Court in extradition appeals will frequently address distinct arguments, notwithstanding that there is deferral, or a stay, for distinct and freestanding reasons. Indeed, I think that is the correct default position. I would have done it in this case, but for the agreement between the parties. As it happens, the time allocated for this renewal hearing was in any event needed for resolving the issues relating to delay and the questions to be asked of the Respondent. The Article 8 argument will need to have its factual and legal merits examined on another day.

27.2.24