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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

DIVISIONAL COURT

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IN THE MATTER OF THE EXTRADITION ACT 2013

BETWEEN:

DENKO ZHEKOV DINEV

Appellant/Requested Person;

and

BULGARIA

Respondent/Applicant

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Before: Treacy LJ, Maguire LJ and Keegan J

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Mr Sean Devine (instructed by Gillen & Company Solicitors) for the Applicant/Appellant
Mr Stephen Ritchie QC (instructed by the Crown Solicitor's Office) for the Respondent/Requesting State

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KEEGAN J (delivering the judgment of the court)

Introduction

[1] This is an application for leave to appeal an order of His Honour Judge Miller QC (the trial judge) dated 23 March 2021 ordering the extradition of Denko Zhekov Dinev (the requested person) to Bulgaria (the requesting state) pursuant to a European Arrest Warrant under the Extradition Act 2013 (the Extradition Act). Leave to appeal was refused by Mr Justice McFarland as single judge. The application has been renewed before this Divisional Court.

[2] The appeal notice of 1 April 2021 was amended by agreement to include the one ground of appeal which is now pursued, namely that extradition would be disproportionate and in breach of the Article 8 rights of the requested person. That argument was made as the requested person has served a considerable part of a 12 month sentence which is the basis of this conviction warrant.

Factual Background

[3] The European Arrest Warrant was issued by the Regional Prosecutor's Office Dimitrovgrad Bulgaria, on 10 May 2019 to execute a sentence of one year's imprisonment imposed by an Appeal Court on 27 November 2015 for a crime of assault. This assault was committed by the requested person in Bulgaria on 19 March 2013 against a forestry official who was injured when confronted by the requested person who was in possession of illegally obtained wood. The original sentence imposed by the criminal court was one of 3½ years, however that was reduced on appeal to the one year sentence which we have referred to. The requested person has four convictions in Bulgaria for driving offences, using forged documents and assault.

[4] It is common case that the requested person came to Northern Ireland in January 2016 approximately 2 months after the Appeal Court ruling. He therefore fled from the jurisdiction of Bulgaria and there is no dispute that he is a fugitive. Once in Northern Ireland the requested person began a life here and obtained employment. He lived with his partner, family and children aged 19, 17 and 13. He is also reported to suffer from asthma but other than that there is no particular issue raised in the evidence about his family life. The warrant was executed on 20 August 2020 when the requested person was arrested at home in Craigavon and he has subsequently been in custody.

Decision of the Trial Judge

[5] His Honour Judge Miller heard the case on 26 February 2021. The requested person was represented by a different counsel at that stage who provided legal submissions along with Mr Ritchie on behalf of the requesting state. The judge also had the benefit of an affidavit from the requested person and his partner and he heard oral evidence from both. The matter was adjourned pending a decision of the Court of Justice of the European Union (CJEU) which raised a query about the status of the prosecuting authorities in Bulgaria. Ultimately, this did not trouble the court but there is a chain of email correspondence whereby the judge allowed for further legal submissions.

[6] It is unfortunate that formal legal submissions were not filed on the point now at issue or substantively on the Article 8 point. However, we note that counsel at the time did raise these issues with the judge and opposing counsel in an email which we replicate:

> "In respect of *Chechev v Bulgaria* [2021] WLR attached to Mr Ritchie's email, Mr Dinev submits that this authority further supports Mr Dinev's assertion that this honourable court is required to make orders for his discharge forthwith, because Mr Dinev has 'already served in actual custody the large part of his sentence' (deemed the crucial factor in the aforementioned judgment at paragraph 62) in conditions which have been far more extreme than those that would have been endured by Mr Dinev had the requesting state sought extradition prior to onset of the coronavirus pandemic, which the requesting state was always at liberty to do. For example, Mr Dinev gave oral evidence that he has been denied all in person visits by anyone (friends, family and legal representatives) since being detained in HMP Maghaberry more than 6 months ago. Mr Dinev acknowledges that this honourable court shall await further information. The court has already heard Mr Dinev's entirely believable oral evidence that he is so afraid of the Bulgarian mafia breaking more than just his leg that he would consent to serving a full year in HMP Maghaberry if that were to prevent his extradition to the requesting state, notwithstanding his unambiguous rejection of his conviction by the Bulgarian courts. The requesting state's application does not allow for such an outcome. It follows that Mr Dinev's simple submission is that he cannot consent to judgment being adjourned indefinitely by this honourable court for the nature of enabling the requesting state to attempt to supplement his application after the hearing proper, and the onus lies on the requesting state to provide clearer information to this honourable court as to the expected date of the Divisional Court's judgment in *Aleksandrov*. If that judgment provides the basis for the requesting state's adjournment application."

[7] At the lower court the requested person opposed his extradition on the basis that his Article 3 convention rights would be violated if he were returned to Bulgaria on account of prison conditions in that country. A supplementary aspect of this Article 3 point relied upon was that he was at risk of harm from non-state agents in the form of Bulgarian mafia. So it was argued that if returned to the requesting state his Article 3 convention rights would be breached and that the court should, therefore, pursuant to Section 21 of the Extradition Act declare his extradition to be incompatible with those rights. The requested person also argued that extradition would be unjust and oppressive in violation of Section 25 of the Extradition Act given his asthma. In his written ruling the trial judge decided that the two

substantive objections raised by the requested person were not made out. He did not specifically deal with any Article 8 considerations.

Proceedings in this court

[8] This appeal focused on a different area from the point argued in the lower court which focused on Article 3 rights and Section 21 and Section 25 of the Extradition Act. It is obvious that whilst evidence was given about family life that Article 8 did not feature at the lower court and there is only an oblique reference to it. It is not productive to deal with this omission any further because by agreement it was accepted that this court should now deal with the Article 8 issue which is raised, namely whether or not it is disproportionate to effect extradition in this case because of the time now served as part of the sentence.

[9] Before considering this substantive argument we record that fresh evidence was produced to this court principally from the requested person in the form of an updated affidavit. We also received an update from the Bulgarian authorities filed by the requesting state. There was no objection to this material being received by the court and although it was at a very late stage we have received and considered this evidence. We have taken this course given that convention rights are in issue, the scope of Section 27 of the Extradition Act (the text of which is set out at paragraphs [14] and [15] herein) and because we are conducting our own balancing exercise. See *Victoras Michailovas v The Republic of Lituania* [2021] NIQB, at paragraphs [140]-[149] where the role of the appellate court is examined.

[10] The first piece of fresh evidence is an affidavit of Ruairi Gillen, solicitor for the requested person. This highlights two new issues, as Mr Dinev asserts that he has not been able to apply to the Home Office under the EU Settlement scheme which permits non-UK nationals to remain in the UK after 30 June 2021. The affidavit states that the application scheme closes on 30 June and if there is no application a person may be removed from the UK as an over-stayer. Paragraph [7] of the affidavit states that the applications are made online. It is represented that if an applicant cannot apply online a paper form needs to be obtained from the Home Office Resource Centre, the forms are individual and can only be submitted if the person applying has received the form from the Home Office. It is clear from this affidavit that the solicitor has worked hard on behalf of the requested person to progress this issue, however as yet the process has not been completed. The second issue raised in this affidavit relies on UK Foreign Office advice on travel to Bulgaria.

[11] There is indirect reference to a third issue which is not new in that reference is made to Mr Dinev's apprehension about returning to Bulgaria given the current issues with coronavirus and the poor prison facilities that he says exist there. Mr Gillen also refers to Mr Dinev's view that that there are backlogs in the criminal justice system in Bulgaria which he says would mean that even though he would only have had to serve 6 months in custody, it is likely that the application for release would take some time to complete if he were sent back to Bulgaria. The

affidavit concludes with Mr Dinev's view of the adverse impact of custody on his family, both in relation to his youngest child, his daughter, and also his wife and sons who it is asserted have had to work extra shifts to try to make up the shortfall in family income due to the absence of his wage.

[12] The second category of additional evidence is from the respondent to this appeal and it is comprised in an email sent by the requesting state of 31 May 2021. This provided clarification from the state as to the extradition warrant and sentencing practice in Bulgaria. It states as follows:

> "Dear colleagues
>
> Further to your message dated 28 May 2021 in regard to the Bulgarian national Dinev f/ns Dinko Zenkof, DOB: 19/12/1979 and on behalf of the Regional Prosecutor's Office in Dimitrovgrad and the Bulgarian Supreme Prosecutor's Office of Cassation, please inform the Crown Solicitor's Office of the following stand of the Regional Prosecutor's Office in Dimitrovgrad:
>
> The Republic of Bulgaria is currently accepting prisons and people subject to extradition, following protective and preventative measures for Covid-19. Further, please be informed that the Regional Prosecutor's office in Dimitrovgrad wishes to proceed with the application listed before the High Court. Moreover, according to the Bulgarian legislation the duration of the time spent by any prisoner in custody, even if it is more than the half of the imposed sentence, it does not guarantee a right to the sentenced person to be released in advance. This is an optional penal procedure at the discretion of the competent Bulgarian Court and depends on the results from the correctional process. The sentenced person has the right to initiate such procedure by filing a request before the Bulgarian court, but filing a request does not guarantee him a positive result, just an option for judicial review of the request based on the correctional process. As an issuing authority the Regional Prosecutor's office in Dimitrovgrad cannot waive its power to claim the extradition of the W/P only, because the rest of the sentence the W/P has to serve is decreasing."

Consideration

[13] The parties accept the relevant legal principles in relation to Article 8 cases found in the judgment of Lord Thomas in *Poland v Celinski* [2016] 1 WLR 551

paragraphs [15]-[17]. The *Celinski* case emphasised that each case turns on its own facts and decisions of the administrative court in relation to Article 8 are often cited but should rarely, if ever, be necessary to utilise on an appeal as cases are invariably fact specific. This point has been reiterated in this jurisdiction in *Gorny v Poland* [2018] NIQB 50. The *Celinski* case also referred to the need when considering Article 8 to undertake an exercise balancing the pros and cons of extradition before deciding whether extradition would be disproportionate in the particular circumstances of the case. The ultimate question for this court is whether or not the extradition judge was wrong in determining that the extradition warrant should be granted.

[14] The court is required by the legislation to consider certain factors which are set out in section 27 of the Extradition Act. This prescribes the court's powers on appeal under Section 26 which are to allow the appeal or to dismiss the appeal pursuant to section 27(b):

> "(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied."

[15] It is the conditions which have been the focus of the case.

> "(3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge.
>
> (5) If the court allows the appeal it must—

(a) order the person's discharge;

(b) quash the order for his extradition."

[16] At paragraphs 27 and 28 of his skeleton argument Mr Ritchie highlighted the various factors in favour and against extradition. During the course of argument Mr Devine commented and supplemented these factors as did the court. We have therefore considered the following balance sheet.

[17] These factors have been identified in favour of extradition:

(a) The offence of assault is not trivial.

(b) The applicant has a criminal record in Bulgaria.

(c) The sentence was not initially suspended by the court.

(d) The requested person is a fugitive, having left Bulgaria in January 2016, two months after the Appeal Court sentenced him to imprisonment for one year.

(e) He has not led a blame free life in Northern Ireland.

(f) The public interest in honouring extradition arrangements and preventing Northern Ireland from becoming a safe haven for fugitives carries great weight.

(g) Extradition operates a system of mutual trust and co-operation between states to ensure offenders serve due sentences.

(h) It is not for the courts of this country to second guess the courts of other member states in relation to conditional release or other circumstances of the sentence.

[18] The factors which have been identified as against extradition are:

(a) The applicant will have served 9½ months of a 12 month sentence by the time his appeal has been heard.

(b) He has been employed here since January 2016.

(c) He lives here with his wife and three children.

(d) He has found custody visits difficult and has had no face to face visits.

(e) Travel to Bulgaria is uncertain given Brexit issues and he has a difficulty in applying for EU Settled Status.

(f) Hardship on his family because of a loss of primary income.

(g) The pandemic effect as Bulgaria is an amber country.

(h) The applicant is an asthmatic.

[19] Initially, Mr Devine also sought to raise Article 3 points about prison conditions in Bulgaria but wisely he did not pursue this line given that it was comprehensively dealt with by the trial judge.

[20] The one case that has been specifically referred to in support of the applicant's argument is *Chechev and Vangelov v Bulgaria* [2021] EWHC 427. It is important to note that in *Chechev* there were no contrary arguments made and as counsel have said this is not a binding authority and each case must be considered on its own facts. However, we make some comment on this case given that it dealt with the issue of a service of a sentence as one ground of appeal. Lord Justice Singh deals with this in paragraphs [73]-[80] of the judgment. There the court concluded that the balance was tipped in favour of the requested person as he had already served a large part of his sentence. The court stated that in Bulgarian law he would be entitled to apply to be released at the half-way point although this would not be a matter of right since the decision would be a discretionary one. However, that court was prepared to say that the likelihood was therefore that, even if he were to be returned in the next four months or so, he would be released from custody almost immediately.

[21] We note that in *The Republic of Poland v RP* [2014] NICA 59, when considering the issue of time served in custody the Lord Chief Justice said at paragraph [22]:

> "We accept that the public interest in extraditing the defendant was not diminished by the fact that he had already been in custody for half his sentence period. The decision as to his release date was for the Polish courts to make and it was also for them to identify the conditions on which he was to be released. The public interest in honouring the capacity of the Polish courts to make those decisions remained significant."

[22] From a review of the cases we have been provided with it is also clear that the length of time served may come into the balance. In some of the cases when release is imminent extradition has been refused. In any event, each case depends on its own facts and given that extradition cases should be heard without delay there should be a natural limit on when this issue will arise.

Result of the balancing exercise

[23] We have considered the various factors for and against extradition. Of the factors in favour of extradition we start with the fact that the requested person is a fugitive. That is a powerful factor in favour of extradition. There is also a strong public interest in mutual co-operation and respect for member states in extradition. The authorities put before us are quite clear that it is not the purpose of this court to consider custodial arrangements in another jurisdiction. Therefore, we do not consider it appropriate to make any prediction as to discretionary release as occurred in *Chechev* as that rests with the Bulgarian court.

[24] On the other side of the scales, there is an interference with Article 8 rights to family life of the requested person, however given the evidence that is before the court of family life continuing in Northern Ireland for Mr Dinev's partner and his three children we do not consider that this interference is of particular strength. The other issues in relation to the requested person's health are not substantiated to any real effect.

[25] We have considered the new argument in relation to travel to Bulgaria. Having done so we think that this is contra indicated by the recent correspondence from the Bulgarian authorities and is a practical matter rather than a substantive bar to extradition.

[26] In relation to the EU Settlement Scheme point we note that the requested person's partner and family have successfully applied and in our view this is a matter which is open to the requested person to perfect. As such, it is not in our view, something that would tip the balance in favour of the requested person.

[27] This case centres to the net issue as to whether or not the serving of three quarters or so of the sentence is enough to tip the balance against extradition. In our view it is not. This is unlike a case where there would be immediate release. There remains about a quarter of time to serve. As we have said it is for the Bulgarian authorities to determine whether or not there could be conditional release. The purpose of extradition is to accord mutual trust and co-operation to states in the pursuit of offenders and to discourage fugitives from justice avoiding serving sentences of imprisonment where they have been convicted. These are matters of high public interest. We consider that in this case the balance is in favour of extradition and it is not tipped in favour of the requested person by any of the arguments made.

Conclusion

[28] Accordingly, we consider that the decision of the learned trial judge was not wrong and we refuse leave to appeal.