Neutral Citation Number: **[2018] EWHC 441 (Admin)**

Case No: CO/3863/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/18

Before:

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE NICOL

- -

Between:

THE PUBLIC PROSECUTOR'S OFFICE OF THE APPEAL COURT OF EASTERN CRETE, GREECE — **Appellant**

- and –

LEAH LOUISE ANDREW — **Respondent**

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- -

Richard Evans (instructed by **Crown Prosecution Service Extradition Unit**) for the **Appellant**
Malcolm Hawkes (instructed by **McMillan Williams Solicitors Limited**) for the **Respondent**

Hearing date: 6 March 2018

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Judgment Approved

Lord Justice Hickinbottom:

1. This is an appeal under section 28 of the Extradition Act 2003 ("the 2003 Act") against the decision of District Judge Kenneth Grant of 17 August 2017 to discharge the Respondent, Leah Andrew, from a European Arrest Warrant issued by the Appellant Greek judicial authority on 20 October 2016 and certified by the National Crime Agency on 29 November 2016. The Appellant seeks the Respondent's extradition to serve the balance of a five year sentence imposed after a conviction at trial by way of appeal rehearing *in absentia* for a single offence of infanticide committed on 21 July 2008.

2. At the first instance trial, at which she appeared and was legally represented, the Respondent was found not guilty by a four to three majority verdict from the mixed jury of three judges and four lay jurymen. Under the Greek Criminal Procedure Code, after such a majority verdict, the prosecution has a right to appeal, the appeal being by

way of full rehearing, again before a mixed jury of seven. At the appeal in this case, the Respondent neither appeared nor was she represented. She was unanimously convicted; and sentenced to a term of five years' imprisonment, of which, taking into account time served on remand, the balance to be served is just over four years.

3. Greece being a designated category 1 country, Part 1 of the 2003 Act applies. The District Judge discharged the Respondent under section 21, on the basis that extradition would amount to a disproportionate interference with the rights of her and her family under article 8 of the European Convention on Human Rights ("the ECHR"). Other challenges to extradition were dismissed, and the only substantive issue before this court is whether the District Judge erred in concluding that extradition would breach article 8.

4. However, Mr Hawkes on behalf of the Appellant has raised a preliminary issue on her behalf. He submits that the Appellant's Notice was served out-of-time, so that this court has no jurisdiction to entertain the appeal.

5. Leave of the court is required to appeal against an extradition order or an order for discharge. Notice of application for leave to appeal "must be given in accordance with the rules of court before the end of the permitted period, which is seven days starting with the day on which the order… is made" (sections 26(4) and 28(5) of the 2003 Act). So far as appeals by a judicial authority in a Part 1 case are concerned, that time limit is confirmed by CrimPR rule 50.19(3)(a).

6. That time limit is rigid and generally incapable of extension (Mucelli v Albania [2009] UKHL 2; [2009] 1 WLR 276). However, from 15 April 2015, section 160(1)(c) of the Anti-social Behaviour, Crime and Policing Act 2014 added a new section 26(5) to the 2003 Act, as follows:

> "But 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."

Save for that limited exception in respect of appeals by a requested person against an extradition order, the seven day time limit for giving notice of appeal in a Part 1 case remains rigid. Notably for the purposes of this case, unless a requesting judicial authority gives notice within the requisite time limit, this court has no jurisdiction in relation to the appeal.

7. The form of the notification is set by rules of court, until 6 October 2014 the Civil Procedure Rules, and since that date Criminal Procedure Rules (see section 174 of the Anti-social Behaviour, Crime and Policing Act 2014). Particularly relevant to this appeal is CrimPR rule 50.19(1)(a)(i) and (ii), which provides that "a party who wants to appeal to the High Court must serve an appeal notice on… in every case (i) the High Court officer, (ii) the other party,…". Prior to October 2014, the form of notification was governed by paragraph 22.6A of CPR 52 PD, which, in similar terms, required the appellant's notice to be "filed and served before the expiry of 7 days". In Mucelli, the House of Lords (Lord Rodger of Earlsferry dissenting) held that section 26(4) which concerns appeals by requested persons (and, by extension, the similarly worded section 28(5), which concerns appeals by requesting judicial authorities) required the appellant's notice to be both served, as well as filed, within the seven day period; and, as I have already indicated, that that time limit was clear and unqualified, and could not be extended by the court, the 2003 Act providing no basis to invoke general powers under the (then) CPR to extend the time limits. In cases such as

Pomiechowski v Poland [2012] UKSC 20; [2012] 1 WLR 1604, the courts have taken what might be regarded as a generous view as to what constitutes adequate notification of an appeal to a respondent; but the rigours of Mucelli, both with regard to the need to notify the court and the respondent of an appeal, and the need to do so within seven days, remain undiminished, and the case has been consistently applied and approved.

8. CrimPR rule 4.6 deals with "Service by electronic means". So far as material to this appeal, it provides:

> "(1) This rule applies where—
>
> …
>
> (b) the person to be served is legally represented in the case and the legal representative—
>
> (i) has given an electronic address….
>
> (2) A document may be served—
>
> (a) by sending it by electronic means to the address which the recipient has given;…
>
> (3) Where a document is served under this rule the person serving it need not provide a paper copy as well."

9. By CrimPR rule 4.11(1), a document served by being handed over to the relevant individual or to identified persons within an organisation or to a custodian of an individual in custody is served on the day it is handed over. However, rule 4.11(2), so far as relevant to this appeal, provides that:

> "*Unless something different is shown*, a document served on a person by any other method 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 2.30pm that day (4.30pm that day, in an extradition appeal case in the High Court)…" (emphasis added).

Therefore, unlike rule 4.11(1), rule 4.11(2) is introduced and governed by the words, "Unless something different is shown…". Mr Evans properly accepted that those words must be given some content; and thus a document sent by (e.g.) email is not served simply when it is sent. However, if a document in an extradition appeal is sent by email before 4.30pm, then the rule imposes a presumption that it is served that day. If it is sent after 4.30pm, then there is a presumption that it is served the following day. But, by the opening words of rule 4.11(2), it is clearly intended that those presumptions are rebuttable and may be rebutted by evidence as to when, in fact, it was received. In the course of the hearing, Mr Evans accepted that proposition. In my view, he was quite right to do so.

10. In this case, the District Judge handed down his decision discharging the Respondent on 17 August 2017. It is common ground that the Appellant was therefore required to serve any notice of appeal on or before 23 August 2017.

11. At the time of the hand down, Counsel for the judicial authority was unable to indicate whether there would be an appeal, so a further hearing was fixed for 24 August 2017 at which the judicial authority would confirm whether it intended to appeal or not.

12. The judicial authority decided to appeal. The evidence as to how service of notification of the appeal upon the Respondent's solicitors was effected appears in the statement of Sophia Esenwa, a Specialist Prosecutor in the Extradition Unit of the Crown Prosecution Service ("the CPS"), dated 19 February 2018. The Appellant's bundle was split into two parts. On 22 August 2017, she sent two emails to the Administrative Court Office, timed at 10.19 and 10.22 respectively, each with one part of the bundle attached. The attachments were very large, one being 18MB. She copied the emails with their attachments to the email address for Mr Bergstrom of the Respondent's solicitors, an email address which had been given to her for the purpose of serving any notice, namely william.bergstrom@mcmws.cjsm.net. She also copied the emails and attachments to chirag.patel@mcmws.cjsm.net, whose email address was on the CPS system as having been provided in previous proceedings for service of documents. Ms Esenwa believed that Mr Patel was also working in the Respondent's case. "Cjsm" in the email address root is a reference to Criminal Justice Secure eMail ("CJSM"), which is, as its name suggests, a centralised electronic communication platform, established by the Ministry of Justice in 2003, to enable criminal justice practitioners and organisations to correspond securely with one another.

13. With regard to the emails Ms Esenwa sent to the Respondent's solicitors on 22 August, she did not receive any non-delivery notification, but nor did she receive any confirmation from Mr Bergstrom (or, indeed, Mr Patel) that the email had been received. She did receive confirmation from the Administrative Court Office that day that they had received the emails and attachments, and had issued the appeal. Ms Esenwa subsequently received a sealed copy of the Appellant's Notice date stamped 22 August 2017.

14. However, the evidence is that the emails sent to Mr Bergstrom and Mr Patel were not received that day. Each has prepared a statement. Mr Bergstrom says that he attended court for the hearing on 24 August 2017, one day outside the seven day period for service; and he told the Appellant's legal representative that his firm had not received any notification of the judicial authority's intention to appeal, and that any notice would now be out of time. The lawyer confirmed that there would be an appeal, and Mr Bergstrom re-checked his email accounts (including his secure account), and there was nothing of any relevance in any of his in boxes. He explains that his secure email in box has a relatively low storage capacity and is easily filled up if a very large email with attachment comes through. Later, he deleted some emails, and on 25 August 2017, he received one email from the Appellant, which was the second part of the Appellant's bundle. That email had indeed apparently been sent on 22 August. He then emailed the CPS to ask for a further copy of the first part of the bundle, which he had still not received. On 1 September 2017, nothing further having come in, he emailed the CPS again; and they responded by sending further emails with both parts of the bundle.

15. Mr Patel says that he too received nothing before 24 August 2017, but received one very large file in relation to the case on 31 August or 1 September 2017. As he saw

that Mr Bergstrom had also been sent the file, he simply deleted it without looking at it.

16. There is no reason to disbelieve any of this evidence, both as to the sending of the Appellant's documents or their receipt; and neither Mr Evans nor Mr Hawkes suggested that we should. I accept the substance of it all.

17. The fact that the emails were sent on 22 August 2017, but not received that day – nothing was received until 25 August, and the Respondent's legal advisers did not receive all the Appellant's documents until 1 September 2017 – appears to be readily explicable. Secure emails can be data heavy. The guidance in respect of CJSM indicates that the maximum email size that can be sent via the system depends upon the capacity of the outgoing and incoming servers; but, it states:

> "The maximum size email you can send by Secure eMail is 10MB…. Some organisations set lower file size limits so you may find that while your system can send (and receive) emails which are over 4MB, the organisation you are sending to may not be able to receive them."

It also states that:

> "You can request delivery, read and non-delivery reports to be returned to you when you send a Secure eMail, providing your existing email service and the recipient's system support that functionality – some systems are set up to block these reports.
>
> However, absence of a non-delivery report should not be taken as confirmation that important emails have reached the addressee and it is best practice to confirm they have arrived."

In fact, the storage capacity for Mr Bergstrom's secure email inbox was only 25MB. Given that one of the two emails was 18MB in size, it is unsurprising that they did not go through promptly or properly.

18. That the evidence therefore clearly shows, and I readily find, that, as at the close of 23 August 2017 (the last day for service of notification of an appeal to the Respondent), the Respondent had not received any part of the Appellant's appeal documents and was unaware that an appeal was proposed or had been filed.

19. Mr Evans, however, did not concede that in these circumstances notice of application for leave to appeal was therefore not given in accordance with the mandatory requirements of section 28(5) of the 2003 Act and of CrimPR rule 50.19. Of course, he accepted the authority of Mucelli, as he must; but he submitted that the position had changed in October 2014 when the CrimPR replaced the CPR as the relevant procedural rules, so that Mucelli was distinguishable and the court could now extend the time limit in section 28(5) (and that in section 26(4)) under CrimPR rule 50.17(6)(a), which provides that, in relation to extradition matters: "The High Court may… shorten a time limit or extend it (even after has expired)…". However, that general power is expressly restricted by the immediately following words: "… unless that is inconsistent with other legislation". Mucelli construed section 26(4) and 28(5) as imposing absolute time limits in respect of service of serving a notice of appeal, on both the court and the other party as required by the then-prevailing rules. The general power in rule 50.17 cannot have been intended to displace that construction of the statutory provisions in any way. Indeed, the note attached to that rule itself makes clear that: "The time limits for serving an appeal notice are prescribed by the

Extradition Act 2003: see rule 50.19". The general power to extend time in CrimPR rule 50.17 does not assist the Appellant any more than did the general power to extend time under the CPR assist the appellant in Mucelli.

20. In my judgment, this case is indistinguishable from Mucelli, which still applies with undiminished force; and the Appellant's failure to serve the Respondent with notification of an appeal within the mandatory seven day period required by section 28(5) of the 2003 Act and CrimPR rule 50.19(3)(a) is fatal to the jurisdiction of this court to entertain an appeal.

21. I would emphasise to all parties to extradition proceedings that, where they serve an appellant's notice other than by handing over, the CrimPR effectively impose upon them the burden of ensuring that the notice has been received by both the court and the respondent within the statutory seven day period. That requires the respondent as the receiving party to cooperate in informing the serving party that it has received notification of an appeal – and to respond to a specific request from the serving party as to whether they have or have not received such notification – preferably by return and in any event promptly. Without an acknowledgment of receipt, the serving party risks facing the contention, backed by appropriate evidence, that the notice was not received (and, thus, not served) in time. For the reasons I have given, that is fatal to an appeal by a judicial authority under section 28; and, although under section 26(5) there is a discretion to extend time for service of an appellant's notice by a requested person, that discretion is limited. Therefore, if any party fails to obtain acknowledgment of receipt, they face a significant risk of being shut out from proceeding with an appeal to this court.

22. In the circumstances, it is unnecessary and would be clearly inappropriate for me to venture any comments on the merits of the appeal. For the reasons I have given, in my view the court does not have jurisdiction to entertain this appeal. Given that permission to appeal has been granted and the terms of section 29(1) of the 2003 Act, subject to my Lord, Nicol J, I would dismiss the appeal on that basis.

Mr Justice Nicol:

23. I agree.