Neutral Citation Number: [2021] EWHC 3336 (Admin)

Case No: CO/687/2021

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

Royal Courts of Justice

Strand, London, WC2A 2LL

8th December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

GABRIEL CIOBANU **App**

- and -

PUBLIC PROSECUTORS OFFICE AT THE COURT OF PAVIA (ITALY) **Respo**

- -

- -

Ben Cooper QC (instructed by EBR Attridge LLP) for the **Appellant**

Tom Hoskins (instructed by CPS) for the **Respondent**

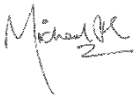
Hearing date: 8/12/21

Judgment as delivered in open court at the hearing

- -

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

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1.
This is a renewed application for permission to appeal in an extradition case. The appellant is aged 35 and is wanted for extradition to Italy. That is in conjunction with a series of seven European Arrest Warrants (EAWs), all issued on the same day on 21 November 2019. Each of them identifies specific criminal offences and the original custodial sentence which was imposed by the relevant Italian court in respect of those offences. Each of them also contains information relevant to the fair trial (past or future) guarantees reflected in section 20 of the Extradition Act 2003 read with Article 4a of the Framework Decision (as to which see Stryjecki v Poland [2016] EWHC 3309 (Admin) at §47).

Aggregation

2.
Extradition is being sought for the Appellant to serve an overall sentence that was "aggregated" by means of a decision made in Italy on 25 March 2019. The effect of that decision was to take what would have been 71 months in total (adding up the constituent original sentences) and to replace it with a single overall custodial sentence of 5 years 4 months and 28 days (ie. 64 months and 28 days). That exercise in "aggregation" involved an overall discount in light of what we would call "totality". It is a familiar feature of extradition cases. Lord Hope discussed it in his judgment (for the House of Lords) in Pilecki v Poland [2008] 1 WLR 7 at paragraphs 30 and 31 (where Italy is mentioned). The 'homogenisation' of the sentences – that is to say, the inability to be able to trace through what each constituent offence attracts in the overall "aggregated" sentence – is reflected in the observation at paragraph 31: "no part of the overall sentence is allocated to any of the individual sentences". "Aggregation" was also discussed by Lord Sumption in his judgment (for the Supreme Court) in Zakrzewski v Poland [2013] UKSC 2 at paragraph 2.

Context

3.
Extradition was ordered in this case by DJ Zani ("the Judge") on 19 February 2021 after an oral hearing on 7 January 2021 at which evidence was given by the Appellant and his Italian law expert Dr Borgna. Permission to appeal was refused on the papers by Eady J on 31 August 2021 in an order which dealt with the four grounds of appeal then being advanced, two of which have survived to be maintained on this renewed application.

Section 20

4.
I deal first with the section 20 grounds of appeal.

Future retrial

5.
The focus for the first line of argument is the content, on the face of three of the EAWs (EAW4, EAW5 and EAW7) which describes right of future retrial in the context of the Appellant having been absent at the original trial. What is set out, on the face of the EAW in each case, confirms verbatim the entitlement described in Article 4a(1)(d) of the Framework Decision. Mr Cooper QC submits that it is reasonably arguable that an ambiguity or uncertainty gateway (see Stryjecki at §50iv) opens up by

reason of that description in this case, so as to call for a judicial factual assessment of whether the requirements of section 20(8) would be guaranteed by the retrial entitlement referred to. Mr Cooper QC has invited my attention to the nature of the expert evidence that was put forward before the Judge. He cites, as his key authority on this part of the case, the decision of Julian Knowles J in Kotsev v Bulgaria [2018] EWHC 3087 (Admin) which emphasised the importance of the standards set out in section 20(8), in particular at paragraphs 42 and 44. In my judgment, that case does not assist the Appellant in the present case, since in Kotsev the gateway opened up on the basis of a description in the EAW which fell short, on its face, of what Article 4a(1)(d) would require: see paragraph 7 of the judgment. It is not, in my judgment, reasonably arguable that in the present case there was the trigger for a further enquiry, by reason of an ambiguity or uncertainty. The absence of reasonable arguability on this first point is reinforced by two further matters. The first is the Respondent's Further Information, to which Mr Hoskins invited my attention, which refers in terms to a guarantee as to being able to call evidence. That was the specific point of deficiency emphasised, by reference to section 20(8)(b), by Mr Cooper QC. My attention had also been invited by Mr Cooper QC to expert evidence said to put into doubt whether there would be any entitlement afforded at all but, so far as that is concerned, there is no uncertainty on the face of the EAW which describes an entitlement in clear terms referable to the express language of Article 4a(1)(d). The second reinforcing point relied on by Mr Hoskins is the analysis of the Divisional Court in the recent case of Dumitrache v Italy [2021] EWHC 958 (Admin), especially at §85. In my judgment there is clearly nothing in the section 20 future retrial points and it is appropriate to grasp that nettle today and say so.

Awareness (where defended by a lawyer)

6.
The next aspect of section 20 that is relied on by Mr Cooper QC concerns the reference in two of the EAWs (EAW3 and EAW5) to the language found in Article 4a(1)(b). Subject to one point, to which I will come, that language is itself also replicated on the face of the EAWs. Limb 1(b) is concerned with the situation where the requested person was "aware of [their] scheduled trial" and was, in their absence, defended at that trial by a lawyer appointed by them or by the state. Mr Cooper QC submits that there is ambiguity for the purposes of the gateway, in the EAW having described the Appellant as "being aware of the scheduled trial". His submission came to this: that it is necessary for the Respondent in the EAW to have spelled out how that 'awareness' came into being, whether by means of a summons (see the first part of Article 4a(1)(a)(i): "summonsed in person") or having actually received official information (see the second part of Article 4a(1)(a)(i): "or by other means actually received official information"). In my judgment, this is a hopeless argument. The structure of Article 4a(1)(a) (the two alternative parts) and Article 4a(1)(b), reflected in the three 'boxes' set out for use in the EAW in the Annex to the Framework Decision, make clear that – as relevant to this argument – there are three different and alternative ways in which fair trial guarantees can have been met in the absence of the requested person at the trial. They are reflected in the separate boxes in the Annex: box 3.1a; box 3.1b and box 3.2. The first (box 3.1a) is the summons; the second (box 3.1b) is the receipt of official information; and the third (box 3.2) is "being aware of the scheduled trial" and being defended by a lawyer at it. If Mr Cooper QC were right, and it were necessary to spell out which of the first or second ways (summons or official information) is relevant and is satisfied, the consequence would be to empty the third way of any content, in circumstances where they are alternatives. In my judgment, no ambiguity gateway is opened up by language in the EAWs which clearly reflects the language of Article 4a(1)(b)) and the relevant box (box 3.2) from the Annex. On this part of the case, Mr Cooper QC submitted that his arguments were supported by the judgment of the Divisional Court in Szatkowski v Poland [2019] EWHC 883 (Admin). But that was a case which concerned an EAW which,

on its face, appeared to rely on both the first (box 3.1a: summons) and the second (box 3.1b: official information) of the three alternative ways to which I have referred. It was in those circumstances that the Divisional Court identified an ambiguity, for the purposes of the gateway, warranting a further judicial enquiry.

Mandate

7.
I said I would come back to an aspect relating to replication of the language of Article 4a(1)(b). In my judgment, this is an important matter and the advantage of today's oral hearing is that I was able to draw it to the attention of Mr Cooper QC, in light of what he was submitting to the Court about the importance of the "mandate" (see Cretu v Romania [2016] EWHC 353 (Admin) at §34iii). As I have explained, the language of Article 4a(1)(b) is faithfully replicated in the two relevant EAWs with one exception. What is said is: "being aware of the scheduled trial, the person had appointed a counsellor of his choice to defend him, or a counsellor had been assigned to him by the State, and was indeed defended by that counsellor at the trial". There is no reference to the Appellant having "given a mandate to a legal counsellor". In those circumstances, the Respondent is not able to mount the same defence as in relation to the other section 20 points, with which I have dealt so far. It cannot say that it has provided the clarity required by the express language which it is prompted to use by the Annex to the Framework Decision (box 3.2) and as is required of by the express terms of Article 4a(1)(b) ("being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial"). In my judgment, it is at least reasonably arguable that the legal counsellor – whether they are appointed by the requested person or whether they are appointed by the State for the requested person – must, in either case, have been "given a mandate" by the requested person. That, as it seems to me, is the natural language of Article 4a(1)(b) and Mr Hoskins, for the purposes of today's permission hearing, did not contest at approach. In my judgment, it is reasonably arguable that the striking failure (or conscious decision) in giving the information on the face of the EAWs not to reflect the "mandate" point required by Article 4a(1)(b) and in box 3.2 is sufficient to open up the gateway and warrant an enquiry that looks beyond the EAW and sees whether the requesting state, to the criminal standard, has identified such a "mandate" as having been given. I cannot accept, beyond reasonable argument, that the reference in the EAWs to "appointed … or assigned" involves certainty in relation to the "mandate".

8.
I accept Mr Hoskins' submission that in the case of one of the two relevant EAWs (EAW6) the material before the Court emphatically demonstrates that there was in fact such a "mandate". That is because the Appellant's own expert report confirms that at a hearing on 1 June 2018 he was "represented by a retained lawyer of his choice". That, in my judgment, beyond reasonable argument, is a complete answer so far as concerns EAW6. But I am going to grant permission to appeal, limited to EAW3, on the point relating to the "mandate" to the lawyer – however appointed – for the purposes of the index offence and conviction which are the subject of EAW3. I refuse permission to appeal in relation to all other aspects of the section 20 argument.

Section 65

9.
The other ground of appeal in this case concerns section 65, read with section 10, of the 2003 Act. It relates to EAW5. This ground takes me back to the "homogenised" and "aggregated" sentence. I am

going to grant permission to appeal on this ground of appeal, as being reasonably arguable. In those circumstances I will make some brief observations as to why.

10.
Two cases have been to the highest court in the land relevant to this topic. The first case was Pilecki. That was a case where there were two EAWs each of which referred to and relied on an "aggregated" sentence covering all of the constituent offences covered by each relevant EAW. That "aggregated" sentence, in the case of each of those two EAWs, involved a sentence in excess of the statutory minimum threshold of four months' custody for extradition offences (see section 65(3)(c)). The House of Lords held that that was legally sufficient for the purposes of satisfying the statutory requirements. It did not matter that an EAW, and an "aggregated" sentence relied on in an EAW, included a constituent offence in respect of which the original domestic sentence had been less than four months in length. The overall aggregate sentence, being equal or more than for months, sufficed for the purposes of this statutory requirement. What the House of Lords was not concerned with was an EAW describing criminal offending attracting an overall aggregated sentence meeting the statutory minimum, but only when put alongside the criminal offending described in another EAW, to which the aggregate sentence also applied. Pilecki concerned aggregation across offending within an EAW, to meet the four months minimum. The central issue which Mr Cooper QC has raised on behalf of the Appellant is whether the logic and reasoning of the Pilecki case can be read across to aggregation across offending in separate EAWs and, only by doing so, meet the four months minimum. The second case is Zakrzewski, which revisited this area but was concerned with the situation where an EAW described constituent index offences each with its own sentence and then, subsequent to the issuing of the EAW, there has been an exercise in aggregation. The Supreme Court held that a development of that nature did not entail invalidity in the EAW for the purposes of the relevant provisions of the statutory scheme. Again, that case was not concerned with the scenario arising in the present case.

11.
The thrust, as I see it, of Mr Cooper QC's argument is this. The contents of an EAW are fundamental: see Zakrzewski at paragraphs 6 and 8. Albeit that a composite approach can be taken to constituent offences within a single EAW (see Pilecki), it does not follow that an 'in the round' approach can be taken to separate EAWs. Although it is true that a single composite EAW would in the present case have been unimpeachable, the fact is that these are seven individual EAWs, each of which requires to be examined pursuant to the provisions of the statutory scheme. The position is illuminated by the analysis of the Polish aggregating sentence, as described by Lord Sumption in Zakrzewski at paragraph 14. What is said there is that "aggregation" means that "the original sentences remain valid but the cumulative sentence determines what period of imprisonment will be treated as satisfying them". If that is the correct analysis for Italian "aggregation", it would explain why EAW5 refers not only to the original three months sentence of custody but moreover says this: "Remaining sentence to be served: Term of imprisonment of 3 months". That is notwithstanding that the EAW, on the same page, makes reference to the order for the "aggregation" of all of the sentences (25 March 2019), as subsequently explained in detail in the Further Information dated 21 September 2020 which spelled out the duration of the overall aggregate sentence and which (I accept) falls to be read as though it were part of the EAW. No authority (or none which I have been shown by either Counsel) addresses this scenario. That is the thrust of the argument.

12.

The point is worthy of determination at a substantive hearing. And it is noteworthy that it arises in an area where the two previous cases on related points – Pilecki and Zakrzewski – have each been considered as having sufficient importance to warrant attention at the highest judicial altitude.

13.
I ought, in fairness to Mr Hoskins, equally to say something about what he says is the knockout answer to this ground of appeal. The essence of the Respondent's response, as I see it, comes to this. Pilecki tells us that it is not necessary to focus on constituent offences for the purposes of identifying the relevant sentence on which extradition is sought. Once that position is arrived at, it is fatal to the statutory interpretation advanced by Mr Cooper QC, and his approach on individual offences and individual sentences. Once the 'in the round' approach is recognised as proper and appropriate, its logic follows through to the situation where there are separate EAWs. Viewed in terms of the analysis in Pilecki, the "purpose for which the surrender of the requested person is sought" (described by Lord Hope at paragraph 25) is by reference to the "length of the sentence". In the present case, the relevant "sentence" is the aggregated sentence to which the EAWs each, on their face, made reference. The "principle of mutual recognition" (described by Lord Hope at paragraph 29) is equally applicable in relation to this, very technical (cf. Zakrzewski at paragraph 4) argument. The absence of any substance in the point can be seen in Mr Cooper QC's concession that a single composite EAW, issued on the same day as these seven EAWs, would have been unobjectionable. What matters (as Lord Hope described at paragraph 34 of Pilecki) is "the sentence for the conduct taken as a whole", which in this case is and should be the global picture under the EAWs. It would be odd and unsatisfactory if the Court were driven to the position of upholding an argument in circumstances where the Respondent could have issued a single EAW, and could simply reissue a single EAW.

14.
Those are the contours of the arguments, in essence, as I saw them. I am satisfied that the point crosses the threshold of reasonable arguability and warrants a definitive answer being given, authoritatively, at a substantive hearing.

Conclusion

15.
I therefore grant permission to appeal, on the basis that it is reasonably arguable that the Judge's conclusions were wrong, in relation to: (i) a specific point arising under the section 20 ground, in relation to EAW3 and the "mandate" to a lawyer; and (ii) the section 65 ground, in relation to EAW5.

Order

16.
Counsel were agreed, in light of this judgment, that I should order as follows (together with directions for the substantive appeal hearing), as I do: (1) permission to appeal on s.10/65 (Ground 3) in respect of EAW5 is granted; (2) permission to appeal on s.20 (Ground 2) in respect of EAW3 is granted; (3) permission to appeal on s.20 (Ground 2) in respect of EAWs 4, 5, 6 and 7 is refused.

8.12.21