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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Ballan's Application [2008] NIQB 140

AN APPLICATION FOR
JUDICIAL REVIEW BY MARC BALLAN

Before Kerr LCJ and Sir Anthony Campbell

<u>KERR LCJ</u>

Introduction

[1] This is an application for judicial review of a decision of His Honour the Recorder of Belfast, Judge Burgess, declining an invitation to reconsider his order directing the extradition of the applicant to Lithuania.

Background

[2] On 26 September 2007 Mr Ballan consented to an extradition order returning him to Lithuania to meet charges in relation to an alleged fraud on an ex-business partner. The consent was made under section 45 of the Extradition Act 2003. He had received legal advice from a solicitor, a Mr McKeague from Reid and Black, solicitors. Mr McKeague has given the following account of his dealings with Mr Ballan: -

> "… prior to consultation with Mr Ballan, I spoke to a member of the Police Service of Northern Ireland and counsel for the Crown Solicitors' Office to confirm if the warrant had been executed appropriately. I then carried out a search on my mobile phone/computer in relation to the status of Lithuania within Europe and ascertained that it was a signatory to the European Convention on Human Rights. I therefore considered from an

early juncture the issue of Human Rights compliance in anticipation of the engagement of such rights in this case.

I then consulted with Mr Ballan who presented with a sound command of the English language. I confirmed that he knew the reason for his detention and went through the documentation with him. I then explained that he had effectively two options available to him, namely to indicate that he was contesting his extradition or alternatively he was consenting. In respect of both I advised him he would have an opportunity to apply for bail and his extradition should he choose to consent would not be immediate. At that stage Mr Ballan expressed his desire to clear his name in Lithuania and advised me he had lawyers there and wished to return and instruct them to defend the accusations that he faced. At that stage given Mr Ballan's clear instructions that he wished to return to Lithuania and effectively engage their criminal justice system I advised him that he could therefore consent to extradition. If Mr Ballan at that stage, as one may expect if a client was fearing return to a country, raised with me issues as to his likely treatment within the Lithuanian judicial system or under their prison regime should he return, I would have advised him to either contest the application or seek an adjournment to obtain further information in support of his contentions about treatment. As I have stated I had already satisfied myself of Lithuania's status as a signatory to the European Convention and Mr Ballan had not raised the humanitarian and human rights issues in relation to his likely treatment upon return, which he now avers. Had he done so it would have been clear to me from his instructions that such rights were engaged and I could have advised him or sought the appropriate advice from counsel on his behalf.

I then secured Mr Ballan's instructions in respect of his personal circumstances to assist in the submissions for his bail application as he wished to deal with matters pertinent to his employment and family before returning to Lithuania."

[3] The following exchange took place between Judge Burgess, Mr McKeague and Mr Ballan on 26 September: -

> "Solicitor: He instructs that he has instructed solicitors in that jurisdiction [Lithuania]. The warrant came as a surprise to him, but he accepts that he will have to go to Lithuania to deal with this matter and therefore in those circumstances he would be consenting to an extradition order.
>
> Judge: You have taken him through his rights in relation to this?
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> Solicitor: I have Your Honour. He will be seeking bail …
>
> Judge: Well, the bail will come as a second matter. If I could just deal with the representation that has been made. Let's just have a look at the warrant so that he knows what would be involved in that. Mr Ballan if I could ask you a certain number of questions. If you … so that I am satisfied … and this is meant in no discourtesy to your legal representatives but the court has to be satisfied about this. Can you hear me clearly? … You understand that you are entitled to make representations before me, challenging the warrant or challenging the request to extradite you?
>
> Mr Ballan: Yes I understand.
>
> Judge: And that indeed if I made a decision to extradite you, you have a right of appeal against that?
>
> Mr Ballan: Yes.
>
> Judge: Do you understand that?
>
> Mr Ballan: Yes.
>
> Judge: And once I would ask for your consent, it would have to be in writing and once you've given me your consent in writing, that's irrevocable, you

can’t change your mind. You understand all of that?

Mr Ballan: Yes.”

[4] On 27 September 2007 Mr Ballan changed solicitors to Kevin Winters & Co. On 3 October 2007 he applied to withdraw his consent on the basis that the legal advice given to him by Mr McKeague was inadequate. After a further hearing on 9 October 2007 the Recorder dismissed this application and on 22 October 2007 Mr Ballan applied for leave to apply for judicial review of that decision. Leave was granted by Weatherup J on 24 October 2007.

[5] In an affidavit filed in the proceedings Mr Ballan averred that he had consented to the extradition because Mr McKeague had informed him that he “had no chance of fighting the extradition warrant and that it was in [his] best interest to consent to the order.” Mr Ballan also stated that he had informed Mr Peter Corrigan, the solicitor from Winters & Co who acts for him in this matter, that because of the corruption of his former business partner there could be a threat to his life if he was returned to Lithuania.

[6] In his affidavit, Mr Corrigan stated that, as a result of instructions received from Mr Ballan in relation to the offence for which his extradition was sought and the “nature of the legal and prison system in Lithuania”, he advised the applicant that “there was a potential for article 2, article 5 and article 6 issues that could prevent his extradition.” Mr Corrigan said that he had been told by Mr Ballan that he had not been previously advised of these potential bars to his extradition and that, if he had been aware of them, he would not have consented to it.

[7] In his application to the Recorder on 3 October 2007 on behalf of Mr Ballan, Mr Corrigan relied on the claim that the applicant’s consent was “not an informed consent” and that he was not aware of his right to challenge the extradition under the various provisions of ECHR. In resisting this application, counsel on behalf of the requesting state asserted that the consent, once given, was irrevocable. The Recorder adjourned the hearing of the application until 9 October and on that occasion Mr Corrigan relied on article 13 of the EU Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States to seek to persuade the judge to reconsider the applicant’s consent. The Framework Decision provides in paragraph 2 of article 13 that each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. Mr Corrigan claimed that this had not happened in the case of Mr Ballan. The Recorder held that

the consent had been given in a form that made it irrevocable and that he had no power to re-open the matter.

[8] The solicitor who had initially appeared on the applicant's behalf, Mr McKeague, accepted that he had not advised the applicant about any possible impediment to his extradition based on potential violations of the Convention provisions referred to by Mr Corrigan. He explained this, however, by stating that his advice to the applicant had been given in light of Mr Ballan's instructions that he desired to return to Lithuania to clear his name. Mr McKeague denied that he had advised Mr Ballan that he had no chance of contesting the extradition order or that it was in his best interest to consent to the order. He conceded, however, that the applicant might not have consented to his extradition if he had been informed of the potential grounds for challenge.

The EU Council Framework Decision

[9] The background to the Framework Decision and the Extradition Act 2003 can be traced to developments within the European Community in the 1990s. Because of technical difficulties and delay in bringing about the extradition of nationals of one member state who had taken refuge in another member state, there was what Lord Bingham of Cornhill described in *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2006] 2 AC 1 as "a movement among the member states of the European Union … to establish, as between themselves, a simpler, quicker, more effective procedure [for extradition], founded on member states' confidence in the integrity of each other's legal and judicial systems." Similar statements are to be found in such cases as *Dabas v High Court of Justice in Madrid* [2007] 2 WLR 254 (at paragraphs 4, 5, 18, 42 and 43) and *In re Hilali* [2008] UKHL 3 (at paragraph 13).

[10] This aspiration to a simpler procedure was reflected in a number of the recitals in the Preamble to the Framework Decision itself including the following: -

> "(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.
>
> …

> (5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.
>
> (6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.
>
> …
>
> (10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.”

[11] The recitals also contain reference to the safeguards that were to be a feature of the new procedure: -

> “(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework

> Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.
>
> This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.
>
> (13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

[12] The ethos established by the Preamble, therefore, was the removal of technical rules impeding extradition and the streamlining of procedures so as to allow for the expeditious transfer of fugitives or suspected persons between member states. This reflected the system of "free movement of judicial decisions in criminal matters … within [the] area of freedom, security and justice" that lay at the heart of the new arrangements. It was recognised, however, that this freedom of movement could not be at the expense of encroachment on an individual's fundamental and human rights.

[13] The twin objectives of making extradition (or, as it is referred to in the Framework Decision, 'surrender') more simple, while respecting the fundamental rights of the person to be extradited, found further expression in Article 1 which dealt with general principles: -

"Article 1

Definition of the European arrest warrant and obligation to execute it

> 1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of

conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

[14] Article 13 dealt with consent to surrender: -

"Article 13

Consent to surrender

1. If the arrested person indicates that he or she consents to surrender, that consent … shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State.

2. Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel.

3. The consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State.

4. In principle, consent may not be revoked. Each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law … A Member State which wishes to

> have recourse to this possibility shall inform the General Secretariat of the Council accordingly when this Framework Decision is adopted and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them."

[15] Again, the two underlying purposes of the Framework Decision are seen to be in play in this provision – it seeks to encourage speedy transfer while ensuring that sufficient safeguards are in place so that fundamental rights are respected. The latter purpose is to be achieved by requiring that the surrender be carried out before a judicial authority; that it must be voluntary and must be made in full knowledge of the consequences; that the person to be surrendered should have the services of a lawyer; and that his consent should be formally recorded. It is to be noted that article 13 (4), while stating that, in general, consent may not be revoked, preserved the opportunity for member states to prescribe a system of revocation but in the event that this occurred, the General Secretariat of the Council should be informed. One may assume, therefore, that it was intended that revocation should only be possible in exceptional circumstances.

The Extradition Act 2003

[16] Sections 9 to 21 of the 2003 Act deal with the extradition hearing. They contain a number of provisions concerning the circumstances in which extradition may not be ordered. They also outline protections for the person who is to be extradited. Notable among these are sections 11 and 21. So far as is material, the first of these provides: -

> "11 *Bars to extradition*
>
> (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of—
>
> (a) the rule against double jeopardy;
> (b) extraneous considerations;
> (c) the passage of time;
> (d) the person's age;
> (e) hostage-taking considerations;
> (f) speciality;
> (g) the person's earlier extradition to the United Kingdom from another category 1 territory;

(h) the person's earlier extradition to the United Kingdom from a non-category 1 territory.

…

(3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.

…

(5) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 21."

[17] The material parts of section 21 are: -

"21 *Human rights*

(1) If the judge is required to proceed under this section … he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued."

[18] Section 26 provides that an order for extradition made under Part I may be appealed to the High Court. The appeal may be brought on a question of law or fact but this provision is expressly disapplied in the case of an extradition order made under section 46 (extradition following consent).

[19] Section 45 deals with consent to extradition. It provides in subsection (3) that a person who consents to his extradition must be taken to have waived any right he would have (apart from the consent) not to be dealt with in the territory to which he is to be extradited for an offence committed before his

extradition. Certain conditions require to be observed for consent to be effective. These include that the consent must be given before the appropriate judge and must be recorded in writing – (subsection (4) sub-paragraphs (a) and (b)). The person to be extradited must also be legally represented unless he has elected not to have counsel or solicitor, has been refused legal aid or has had it withdrawn – (subsections (5) and (6)).

[20] Although article 13 (4) of the Framework Decision contemplated that some member states might make provision for the revocation of consent, the United Kingdom chose not to do so in the 2003 Act. Section 45 (4) (c) provides that consent given under that section is irrevocable. Once an order is made under section 45, the judge must remand the person to be extradited in custody or on bail (section 46 (1)). If the extradition hearing has begun the judge is no longer required to proceed or continue proceeding under sections 10 to 25 (section 46 (5)). The rights which the person to be extradited would have enjoyed under, inter alia, sections 11 and 21 are thereby abrogated. By virtue of section 46 (6) the judge must, within the period of 10 days starting with the day on which consent is given, order the person's extradition.

The issues

[21] Three principal issues arise on the application. The first is concerned with the nature of the requirements of the Framework Decision relating to the giving of consent to surrender. The second issue involves the approach to be taken to the interpretation of the relevant provisions of the Extradition Act. Can it be interpreted so as to give effect to the requirements of the Framework Decision? Finally, it is necessary to consider whether the decision of the Recorder to refuse to examine the circumstances in which the consent of the applicant was given is consistent with the obligation contained in section 6 of the Human Rights Act 1998.

Consent to surrender

[22] The two explicit and central requirements for consent to surrender are that it must be voluntary and that it must be made in full awareness of the consequences. The stipulations that the person consenting should have the benefit of legal advice; that the consent should be given before the executing judicial authority; and that it be recorded in writing are obviously ancillary to the two overarching requirements of voluntariness and knowledge of the consequences.

[23] What then is involved in the notion of voluntariness in this context? Clearly, consent should involve the deliberate agreement or acquiescence by a person of full age, with requisite mental capacity who is not under duress or coercion. In my judgment it must also involve a decision taken on a properly informed basis. If a person consents to surrender when he has been caused to

believe that he has no option but to do so and where there are, in fact, grounds on which legitimate objection could be made, his consent cannot be described as voluntary in any true sense.

[24] This does not mean that a person deciding whether to consent must be made aware of every possible ground, however arcane or esoteric, on which he might withhold consent. But if he gives his consent on an understanding of the facts or legal position which is incorrect and if, had he been in possession of the accurate information, he would not have done so, then I do not consider that his consent can be said to be voluntary.

[25] Full knowledge of the consequences of the decision to consent obviously involves being aware that this will lead to the consenting person's extradition to the requesting state. But it must also entail an understanding of the legal consequences such as those that are prescribed in the Extradition Act. Therefore, it is necessary, for example, that it be appreciated that the consent, once given on a voluntary and properly informed basis, cannot be revoked; that there can be no appeal against a decision to extradite founded on the consent; that there will be no examination of the possible bars to extradition under section 11; and that the judge will not be bound to "decide whether the person's extradition would be compatible with the Convention rights" under section 21.

The approach to the interpretation of the Extradition Act

[26] In *Governor of HMP Wandsworth v Antanas Kinderis, Republic of Lithuania and the Crown Prosecution Service* [2007] EWHC (Admin) 998 Laws LJ dealt with the interpretative approach to be taken to the Framework Decision in the following passage at paragraph 35 of his judgment: -

> "It is clear that the requirement that national law should so far as possible be interpreted in conformity with Community law applies where the Community measure in question is a Framework Decision, such as that involved here, as surely as in the case of any other legislative act of the European Union. So much was held by the Court of Justice in *Pupino* (Case C-105/03) [2006] QB 83. In *Dabas v High Court of Justice in Madrid, Spain* [2007] 2 WLR 254 Lord Brown of Eaton-under-Heywood cited paragraphs 43 and 47 of the court's judgment in *Pupino* (which with respect I need not replicate), and continued:
>
> > '76. Put shortly, *Pupino* imposes upon national courts the same interpretative

> obligation to construe national law so far as possible to attain the result sought to be achieved by framework decisions as the ECJ in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135 had earlier imposed upon national courts to achieve the purpose of directives. And that in turn, as Lord Steyn explained in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 45, is essentially the same strong interpretative obligation which section 3 of the Human Rights Act 1998 imposes (not just on courts, of course, but on all public authorities) to avoid breaches of the European Convention on Human Rights: the requirement 'so far as it is possible to do so' to read and give effect to legislation in a way which is compatible with Convention rights.'"

[27] It follows clearly from the reasoning in these cases, with which I am in respectful agreement, that the concept of consent to surrender and the requirements of voluntariness and full knowledge of the consequences (as those are to be deduced from the Framework Decision) should be imported, if possible, into the interpretation of the relevant provisions of the 2003 Act. There is no impediment, in my view, to this. 'Consent' for the purposes of section 45 *et seq* can and should be taken to mean a consent which has the qualities of voluntariness that I have earlier described in paragraphs [23] and [24] above. The person consenting must be free from duress or coercion. He should be of sufficient age and mental capacity to give his mind freely to the course chosen with sufficient comprehension of the nature of the decision to be taken. He should not be under any misapprehension as to the factual or legal basis on which the decision is taken.

[28] When it was drawn to his attention that the applicant was challenging the voluntariness of the consent that he had given and his lack of understanding of the consequences of that decision, the Recorder ought to have inquired into those claims, in my opinion. He was not precluded from doing so by the circumstance that he had already made an order. If the applicant's claims were correct, he had not given a legal consent. The judge's order, based as it was on the consent's fulfilment of the requirements of the 2003 Act, could not be well-founded if the consent was void. The question of irrevocability is incidental. If the consent was not valid, the question of it being revoked did not arise. It could not be acted upon because it was not an effective consent.

[29] The inquiry that the Recorder was required to conduct need not have been an elaborate one. He had already asked a number of questions of Mr Ballan on 26 September 2007 that went some way to dealing with the issue. But he had not inquired into the question of whether Mr Ballan had been given to understand that he had no option but to consent to the extradition. Nor had there been any investigation of whether the applicant had appreciated that consent meant that there would be no investigation of possible bars to extradition or of whether his extradition would be compatible with his Convention rights.

Was the refusal to examine the circumstances in which the consent was given consistent with the obligation contained in section 6 of the Human Rights Act 1998?

[30] Section 6 (1) of the Human Rights Act 1998 provides: -

> "*Acts of public authorities.*
>
> 6. - (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

[31] By virtue of sub-section (3) (a) 'public authority' for the purposes of section 6 includes a court or tribunal. The Recorder was therefore bound to refuse to order the applicant's extradition if, by doing so, his Convention rights would be violated. It is, of course, possible in certain limited circumstances for an individual to waive a Convention right but it is not suggested that this has happened in the present case. Interesting questions arise as to whether, where a lawful consent has been given under section 45 of the Extradition Act, it would be lawful for a judge to order extradition if he was aware that to do so would be incompatible with the rights of the person to be extradited. It is not necessary to address those questions in the present case, however, since it has not been shown that the extradition of the applicant *would* be incompatible with his Convention rights. It has been mooted that there *may* be Convention rights at play but, unless and until it is shown that these would be violated if the applicant was returned to Lithuania, this issue simply does not arise.

Conclusions

[32] For the reasons given, I consider that the Recorder was obliged to investigate whether the applicant had provided a valid consent for the purposes of section 45 of the Extradition Act 2003. I would therefore make an order of certiorari quashing his refusal to do so. It will now be necessary for him to conduct the inquiry that this judgment has indicated is required.