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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 2003

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Between:

MAREK POTOČEK

Appellant/Requested Person

-v-

DISTRICT COURT OF TRNAVA, SLOVAK REPUBLIC

Respondent/Requesting State

_____

Mr Berry QC, with Mr Devine, (instructed by Finucane Toner) for the appellant
Dr McGleenan QC, with Ms McDermott, (instructed by the Crown Solicitor's Office) for the respondent

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Before: Treacy LJ and McFarland J

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McFARLAND J (giving the judgment of the Court)

Introduction

[1] This appeal is against the decision of Her Honour Judge Smyth of 1 October 2020 to order the surrender of Potoček to the Slovak Republic ("Slovakia"). Leave was granted by Mr Justice O'Hara on one ground, namely the learned trial judge's interpretation of Section 64 of the Extradition Act 2003.

[2] The case relates to whether or not the robbery for which Slovakia seeks Potoček's surrender is an extradition offence as defined by section 64. Potoček will be surrendered for the offence of murder and the only relevance is whether or not,

applying the provision of speciality in extradition law, he can be dealt with for this additional offence on his return. As Mr Berry conceded, it is a largely academic point, with modest practical implications.

[3] The allegation is that on 15 July 2015 Potoček, acting with another, intending to steal, was responsible for an attack on a lady in Prague. The lady was rendered unconscious and she was then abducted and driven away in her motor vehicle. At some point, still within the Czech Republic, the lady was killed, with her body disposed of.

[4] Potoček is wanted on an accusation warrant to face charges of murder and robbery. Had there been a request from the Czech Republic there would be little difficulty. Slovakia seeks his surrender as he is a Slovak citizen, and under Slovak law it claims jurisdiction over its citizens for offences of this nature committed abroad.

[5] The relevant parts of section 64 of the Extradition Act 2003 provide as follows:

> *"(1) This section sets out whether a person's conduct constitutes an "extradition offence" for the purposes of this Part in a case where the person –*
>
> *(a) is accused in a category 1 territory of an offence constituted by the conduct, or*
>
> *(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3), (4) or (5) are satisfied.*
>
> *(4) The conditions in this subsection are that –*
>
> *(a) the conduct occurs outside the category 1 territory;*
>
> *(b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom;*
>
> *(c) the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment."*

[6] Slovakia is a category 1 territory, so the issue is whether Potoček's alleged conduct satisfies the conditions of subsection (4). Her Honour Judge Smyth determined that it did both in the context of the murder and the robbery, as both offences are punishable under Slovakian law with imprisonment of at least 12

months.

Interpretation of the Extradition Act 2003

[7] It is well established that a national court, when interpreting European framework decisions and related domestic legislation should do so in light of the wording and purpose of that framework decision in order to attain the result which the framework decision pursues (see the CJEU decision in *Pupino* (2005 Case C-105/03) and the House of Lords decision in *Dabas v High Court of Justice in Madrid, Spain* [2007] AC 31 at [5]).

As the CJEU has stated in *Jozef Grundza* (2017 C-289/15) at [32]:

> *"in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it forms part."*

[8] In fact, this approach of liberal interpretation of extradition arrangements, is long established. Lord Russell CJ in *Re Arton (No. 2)* [1896] 1 QB 509 at 517, when discussing the approach to problems created by comparing offences as defined in English and French law said that "*these treaties ought to receive a liberal interpretation, which means no more than they should receive their true construction according to their language, object and intent.*" More recently Lord Bridge in *ex parte Postlethwaite* [1988] AC 924 in dealing with the request by Belgium under a 1901 treaty, for the extradition of an alleged participant in the riot at the Heysel Stadium, said at 947B that a court should not "*unless constrained by the language used, interpret any extradition treaty in a way which would hinder the working and narrow the operation of most salutary international arrangements.*"

[9] This teleological, or purposive, approach requires examination of the purpose of the Framework Decision of 13 June 2002 (2002/584/JHA) ("the 2002 Framework Decision"). Although the term "extradition" is retained by many as a word of convenience to describe current arrangements within the European Union, it was formally abolished by the 2002 Framework Decision, and replaced by what is a surrender process between judicial authorities of member states, described in it as "*free movement of judicial decisions in criminal matters …… within an area of freedom, security and justice*" (see Recital 5). This is, in turn, based on a "*mutual recognition of judicial decisions*" and a "*high level of confidence between states*" (see Recitals 2 and 10). It implemented the "*principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation*" (see Recital 6).

[10] The relevant provisions of the 2002 Framework Decision, which preserve the concept of dual criminality under extradition law, are Articles 2(4) and 4 (7)(b):

> *Article 2(4) – "For offences other than those covered by*

paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described"

Article 4(7)(b) - "The executing judicial authority may refuse to execute the European arrest warrant … where the European arrest warrant relates to offences which … (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

Section 64(4)

[11] For subsection (4) to apply, it must be shown that in corresponding circumstances, equivalent conduct would constitute an extra-territorial offence under Northern Irish law. Northern Irish law does not recognise robbery as an extra-territorial offence (unless committed in the Republic of Ireland). It does recognise the offences of murder and manslaughter (see section 9 of the Offences Against the Person Act (1861)).

[12] Slovakia argues that the facts surrounding the alleged robbery could readily be substituted into an offence of unlawful act manslaughter under Northern Irish law, and the surrender would be consistent with the correct interpretation of Articles 2(4) and 4(7) of the 2002 Framework Decision.

[13] The offence under Northern Irish law of unlawful act manslaughter can be committed when a person commits an unlawful act and a death results. The *mens rea* is an intention to commit the unlawful act which would expose the victim to a risk of harm, and the defendant is reckless as to that risk. Unlawful act manslaughter, if committed abroad, can be prosecuted in Northern Ireland.

[14] The purpose of the dual criminality rule is to protect an accused person from what Lord Millet in *Al-Fawwaz* [2001] UKHL 68 described as the "*the exercise of an exorbitant foreign jurisdiction*".

[15] Two decisions of the CJEU have provided some assistance both in relation to the interpretation of the 2002 Framework Decision, and in relation to a framework decision of 27 November 2008 (2008/909/JHA) ("the 2008 Framework Decision") which relates to enforcement in the European Union of custodial sentences. It reflects an identical approach to the provisions of the 2002 Framework Decision, with identical provisions.

[16] In *Openbaar Ministrie v A* (2015 C-463/15 PPU) the court was considering

Article 2 (4) and 4 (1) of the 2002 Framework Decision. Article 4 (1) relates to a preserved right not to execute a warrant if the offence does not constitute an offence in the executing state. A had been sentenced in Belgium for an offence of carrying a prohibited weapon. This was an offence in the Netherlands but could not be punished with a custodial sentence. The CJEU held that it was sufficient that the offence under Belgium law was also an offence under Dutch law, notwithstanding the non-availability of a custodial sentence which Belgium was seeking to enforce. This approach is explained at [28] and [29] as follows:

> *"[28] This finding is corroborated by the general background of Framework Decision 2002/584 and by the objectives that it pursues.*
>
> *[29] As is clear from the first two paragraphs of Article 2, this Framework Decision focuses, with regard to offences in respect of which a European arrest warrant may be issued, on the level of punishment applicable in the issuing Member State (see, to that effect, the judgment in Advocaten voor de Wereld, C-303/05, EU:C:2007:261, paragraph 52). The reason for this is that criminal prosecutions or the execution of a custodial sentence or detention order for which such a warrant is issued are conducted in accordance with the rules of that Member State."*

[17] The case of *Grundza* (see [7] above) considered the 2008 Framework Decision with its identical provisions to the 2002 Framework Decision in relation to dual criminality. Grundza was a Slovak citizen sentenced by a Czech Republic court with a request that the sentence be served in Slovakia. The issue was that the offence was "obstructing the implementation of an official decision" and Slovakia did not recognise such an offence although there was a similar offence of "thwarting the implementation of an official Slovak decision", but that did not include a foreign decision. The CJEU held that the offences need not be identical ([34]) and there needed to be flexible approach by the executing authority both as regards "*constituent elements of the offence and its description*" (at [36]) and concluded that:

> "*as the condition of double criminality is an exception to the general rule of recognition of judgments and enforcement of sentences … the scope of the grounds for refusing to recognise a judgment or enforce a sentence, on the basis of lack of double criminality, as provided for in Article 9(1)(d) of Framework Decision 2008/909, must be interpreted strictly in order to limit cases of non-recognition and non-enforcement.*" (at [46])

[18] There is therefore a need to apply a strict interpretation to provisions that would otherwise prevent recognition of the request by Slovakia for Potoček's surrender. Although the wording of section 46(1) and (2) refers to "extradition

offence", the wording of sub-section (4)(b) is "in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under [UK law]". It refers to the circumstances and conduct rather than the label attaching to the offence. This reflects the wording of Article 2(4) of the 2002 Framework Decision when it refers to an offence "*whatever the constituent elements or however it is described*".

[19] The interpretation is not approached in the following manner – Slovakia wishes to prosecute Potoček for robbery, robbery is not an extra-territorial offence in the UK, therefore section 64 (4) does not apply. The correct approach is to ask - whether equivalent conduct is an extra-territorial offence in the UK? The conduct in this case is the alleged attack on the deceased, her being rendered unconscious, the theft of her property and her subsequent death. The issue is not how the prosecuting authorities in the UK would deal with the matter, it is whether that conduct amounts to an extra-territorial offence. Unlawful act manslaughter is such an offence, and section 9 of the Offences Against the Person Act 1861 renders such an offence liable to prosecution in the UK, notwithstanding it was committed outside the UK.

[20] The English decision of *Kalinowski v Circuit Court in Todz, Poland* [2019] EWHC 3734 can be distinguished. In that case, Kalinowski had stabbed a man in Slovenia, and Poland requested his surrender from the UK. The Divisional Court declined to surrender, and allowed the appeal from the Magistrates' Court. That decision was based on an attempt to equate the conduct to the offence of attempted murder. There was no evidence to suggest an intention to kill which would be an essential element of the *mens rea* of that offence. The facts in Potoček's case are different, in that unlawful act manslaughter does not require such specific intent, and all the constituent elements of both the *actus reus* and *mens rea* of that offence are clearly evident from the narrative provided in the warrant.

[21] We are satisfied that Her Honour Judge Smyth applied the correct test in determining this question, and that section 64(4) is satisfied. In the circumstances, we dismiss the appeal. Potoček will be surrendered to Slovakia in relation to both offences referred to in the warrant.