Neutral Citation: [2017] NIQB 77 | *Ref:* **MOR10383**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/8/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

JOHN JOSEPH O'CONNOR

Appellant;

-v-

GREECE

Respondent.

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(Extension of time for leave to appeal)

Before: Morgan LCJ, Gillen LJ and Burgess J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is a purported appeal by the proposed appellant, an Irish citizen, against an extradition order made by His Honour Judge Devlin on 11 December 2015. His extradition was sought on foot of a European Arrest Warrant, issued on 11 March 2013 by a court in Athens and certified by the National Crime Agency on 16 October 2013. It alleged that he had made available a refrigerated truck to transport over 200 KG of raw hemp (cannabis) from Greece to Northern Ireland. The appellant resisted the application principally on the basis that the prison conditions to which he would have been exposed in Greece would have given rise to a real risk of inhuman and degrading treatment contrary to Article 3 ECHR but he also raised a forum bar.

[2] When the trial judge had given his ruling the appellant, who was present, instructed his solicitor to appeal and the appellant's solicitor announced orally that the appellant would be lodging an appeal against the order. On 16 December 2015 the appellant's solicitor lodged an application for leave to appeal on the Article 3 and forum bar grounds. The time limit prescribed by section 26(4) of the Extradition Act 2003 expired on 17 December 2013. At a bail application on 18 December 2015 a lawyer for the appellant informed the court that the application for leave to appeal had been lodged.

[3] In an affidavit filed on 15 January 2016 the appellant's solicitor stated that there was an oversight on his part in failing to serve a copy of the application for leave to appeal on the Crown Solicitor's Office ("CSO"). His oversight came to his attention during a conversation with counsel as a result of which he served a copy of the application on the CSO on 4 January 2016. Subsequent to the decision of the learned trial judge on 1 March 2016 the Committee for the Prevention of Torture issued their report on a visit to Greece examining prison conditions between 14 and 23 April 2015. If the appellant has a valid appeal this court has indicated that this new evidence is admissible pursuant to section 27(4) of the 2003 Act as it was not available at the time of the extradition hearing and may have resulted in the appropriate judge deciding that if the appellant were returned to Greece there was a real risk of ill-treatment contrary to Article 3 of the Convention.

The relevant appeal provisions and case law

[4] Section 26 of the 2003 Act provides for an appeal to the High Court where a judge orders a person's extradition.

> "(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order….
>
> (3) An appeal under this section section—
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> (a) may be brought on a question of law or fact, but
>
> (b) lies only with the leave of the High Court.
>
> (4) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made.
>
> (5) 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."

Order 61A(3) of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that a copy of the application for leave to appeal is served on the proposed respondent within the 7 day period.

[5] The jurisdiction to entertain an application for leave to appeal outside the seven-day period in section 26(5) was introduced by the Antisocial Behaviour, Crime and Policing Act 2014. Prior to that the Supreme Court had decided in Mucelli v Government of Albania [2009] 1 WLR 276 that an appellant had to both lodge a notice of appeal in the High Court within the seven-day period and also serve a copy of the notice on the respondent within the same period. That time limit was not capable of extension. Subject to what is said below we accept that the decision in Mucelli means that the notice of application for leave to appeal must be both lodged in court and served on the respondent within the seven-day time limit prescribed by section 26(4).

[6] The absence of any power to extend the time limit was, on occasion, found to give rise to injustice, particularly where those in respect of whom orders were made were unrepresented. On 8 September 2010 the Home Secretary ordered a review of the United Kingdom's extradition arrangements and the report on 30 September 2011 ("the report") considered the appeal provisions. It was recommended that in the interests of certainty and finality the time-limit for the giving of notice of appeal should be extended to 14 days with no power to extend time and that a valid notice of appeal should:

(i) purport to be a notice of appeal (and not notice of an intention to appeal);

(ii) identify the appellant;

(iii) identify the decision under appeal; and

(iv) identify the grounds of appeal.

The report further recommended that a first instance court should provide the defendant with a form explaining the right of appeal, the time-limit and what must be done in this period. It also recommended that the appeal should only be allowed to proceed with the leave of the extradition judge or the court which would consider the appeal.

[7] Shortly thereafter the Supreme Court again considered the appeal issue in Pomiechowski v District Court of Legnica, Poland and another [2012] 1 WLR 1604. Lord Mance gave the leading judgement. The court declined to depart from its earlier ruling in Mucelli. At paragraph [18] the court concluded that in light of the short period permitted to initiate an appeal a generous view could and should be

taken of what constituted a notice of appeal. The Supreme Court rejected, therefore, the submission that to be valid a notice of appeal had to set out the grounds of appeal. That may render the notice an irregularity but such an irregularity could be cured.

[8] Lord Mance noted that the report had identified the time limits as an unsatisfactory feature of the appeals process. He concluded that the remedy proposed in the report of extending the time-limit from 7 to 14 days would be capable of generating considerable unfairness unless further relief was available. The report had rejected the option of an interests of justice test which would have addressed the possibility that the very essence of the right to appeal might be impaired in individual cases.

[9] He examined the relationship between litigants and their legal advisers in this area at paragraph [36]:

> "It has been held, in the public law context of removal from the jurisdiction of an alien, that a litigant must answer for the failings of his legal advisers, with the result that he was unable to obtain the reopening of an adjudicator's decision on the ground of such advisers' negligent failure to inform him of the hearing: *R v Secretary of State for the Home Department, Ex p Al-Mehdawi [1990] 1 AC 876* . Any other decision would, it was said, come "at the cost of opening such a wide door which would indeed seriously undermine the principle of finality in decision-making": per Lord Bridge of Harwich, at p 901e. In Ex p Al-Mehdawi there was however a residual discretion in the Secretary of State to refer the matter back to an adjudicator. In contrast, in an asylum context where no such residual discretion existed, the Court of Appeal in *FP (Iran) v Secretary of State for the Home Department [2007] Imm AR 450* held ultra vires immigration rules deeming a party to have received notice of a hearing served on the most recent addresses notified to the relevant tribunal and requiring the tribunal to proceed in the party's absence if satisfied that such notice had been given. The solicitors acting for the asylum seekers in FP (Iran) had failed to give the tribunal new addresses to which the asylum seekers had been moved by the National Asylum Support Service. Distinguishing Ex p Al-Mehdawi, the Court of Appeal held that there was "no universal surrogacy principle" which (reformulated) rules "would have to depart from in

> order to operate justly": para 46. The rules were framed so as to be "productive of irremediable procedural unfairness". Both the appellants were "among those affected by this deficiency, because both have lost the opportunity to be heard through the default of their legal representatives and not through their own fault": para 48. This decision (reached in the context of aliens) turned on common law principles regarding access to justice, though reference was made by analogy to the position under the European Convention for the Protection of Human Rights and Fundamental Freedoms ."

Finally in paragraph [39] he concluded that there was no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time-limits for appeals. It intended short and firm time limits but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time.

[10] The government did not accept either the recommendation in the report to extend the appeal period to 14 days or the implicit suggestion in Pomiechowski that it should introduce a wider interests of justice test. The nature of the dispensing power in section 26(5) was considered by the Divisional Court in England and Wales in Szegfu v Court of Pecs, Hungary [2016] 1 WLR 322. There is much in this judgment with which we agree.

(i) The burden of establishing that everything reasonably possible was done rests on the appellant.

(ii) Given the nature of the test it is clearly necessary for an appellant to give a comprehensive explanation covering the entire period of delay.

(iii) That will normally require the appellant and his solicitor to provide an affidavit explaining what the appellant did to ensure that the application for leave to appeal was served as soon as it could be. Those affidavits should be provided at the leave stage and attached to the notice of application for leave to appeal.

(iv) The statutory language does not permit consideration of the merits of the appeal. That is the principal difference which a wider interests of justice test would have introduced.

[11] Between paragraphs [15]-[18] the court in Szegfu considered whether the statutory test was concerned with the personal conduct of the appellant alone or whether it encompassed delay generated by his legal advisers. It rejected the submission that the use of the word "person" in section 26 (5) demonstrated that Parliament's intention was to limit the enquiry to the personal conduct of an appellant. It noted that the word "person" was used twice and that the context of its

use in the earlier part of the subsection did not require personal conduct by the appellant. We agree that a linguistic analysis does not require an interpretation of the subsection which points exclusively towards conduct on the part of the applicant personally. Either interpretation would be consistent with the words used.

[12] The key to the conclusion reached in Szegfu was the suggestion in the Supreme Court in Pomiechowski that strict time limits were capable of denying the very essence of the right to appeal. There was a particular problem of unrepresented persons being remanded in custody and having no realistic opportunity of getting legal advice in time to mount an appeal within seven days. We agree that this issue was a significant concern.

[13] The court went on to conclude that once solicitors had been instructed it could be said that the essence of the right of appeal had been denied if their default resulted in the application not being pursued in time. The court concluded that the vice which Parliament was dealing with did not call for such a distinction to be made. That conclusion proceeds from the assumption that the purpose of the provision was to exclude injustice arising from the absence of representation for those in respect of whom orders were made.

[14] We do not accept that interpretation. There is nothing in the statutory wording to require it and it could give rise to irremediable procedural unfairness. It is not much of a remedy to a person extradited to prison where he faces the risk of inhuman and degrading treatment to know that he may be able to launch an action against his solicitor in due course. Secondly, the court in Szegfu did not address paragraph [36] of Pomiechowski which reviews the surrogacy principle and supports the view that it is not a universal rule. Thirdly, in our view Lord Mance's analysis of the injustice that can arise from absolute and inflexible time limits for appeals did not seek to confine the possibility of injustice to unrepresented litigants.

[15] We note that the court in Szegfu was also concerned that conflicts between appellants and solicitors were likely to lead to delay which was inimical to the scheme of the 2003 Act. We agree that expedition in these cases is required. Our experience, however, is that such conflicts whether arising in criminal, administrative or civil work can be effectively controlled by judicial management. We do not consider that such concerns should affect our conclusions.

Conclusion

[16] We are conscious that we are interpreting a statutory provision applicable in the United Kingdom in a way which is in conflict with the view of the Divisional Court in England and Wales. For the reasons given we have decided that we should follow our own course. The issue between the parties in this case was the applicable law. There was no dispute about the fact that the appellant had instructed his solicitors to appeal, that they had indicated orally on the day of the judgement that he intended to pursue the appeal, that the solicitors indicated during the bail application on 18 December 2015 that they had lodged the application for leave to

appeal and that the appellant himself would have had no reason to think that the application had not been pursued in accordance with the Rules. Accordingly we are satisfied that the appellant did everything reasonably possible to ensure that the notice was given as soon as it could be given.

Addendum

[17] In light of the issues raised in this application we consider it appropriate that a Practice Direction should issue dealing with the hearing of extradition applications before the appropriate judge. This will provide that where extradition is ordered the judge should inform the requested person that the time limit for appeal is 7 days. A form should be provided to the requested person in his own language immediately after the decision explaining the time limit, how to lodge an appeal, how to serve a copy and the necessary content for an application for leave to appeal. If the requested person is represented by solicitors and has instructed them to appeal he should seek confirmation that the appeal has been lodged and served and if he does not receive that confirmation within the 7 day period he should immediately lodge and serve notice of his application himself. We believe that such a Practice Direction will minimise the risk of any injustice.