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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 AN APPLICATION UNDER THE EXTRADITION ACT 2003

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Between:

ZYDRUNAS VAINAUSKAS

Appellant;

and

REPUBLIC OF FRANCE

Respondent.

_____

BEFORE: McCLOSKEY LJ AND McALINDEN J

McCloskey LJ (delivering the judgment of the court)

[1] Zydrunas Vainauskas (the "*Appellant*") appeals against the order made by the Recorder of Belfast on 25 October 2019 whereby Belfast County Court, pursuant to a European Arrest Warrant ("EAW"), acceded to the application of the Republic of France for the extradition to that territory of the Appellant, a person of Lithuanian nationality aged 42 years.

[2] The "Part 1 Certificate" dated 06 June 2019 made pursuant to section 2(7) of the Extradition Act 2003 (the "*2003 Act*") identifies the issuing authority as the "*Public Prosecutor in Rennes County Court, France …*" and certifies that "*…this is a judicial authority of a Category 1 territory which has the function of issuing arrest warrants*". Herein lies the sole issue to be determined in this appeal. Elaborating, the authority is described in the EAW as:

"*Prosecution Department of the Republics Attorney in Rennes.*"

The "*decision on which the warrant is based*" is formulated in these terms:

"*Arrest warrant ...issued by* [the] *Vice President in charge of the investigation at the Rennes High Court.*"

[3] The alleged offending of the Appellant is described as the theft of car catalytic converters which were then conveyed to other countries, particularly Poland, "… *to extract valuable materials and sell them*". The Appellant is alleged to have played an active role in the operation in "…. *driving the vehicles, active participation in the various thefts (fuels, trailers), transport and sale of stolen catalytic converters*". Seven specific acts of theft committed during the period September 2017 to December 2018 are alleged.

[4] There are two grounds of appeal:

(i) The learned judge erred in finding that the EAW was properly issued in accordance with Article 1 and Article 6 of the Framework Decision 2002/584** with regard to whether the Deputy Public Prosecutor of Rennes is an 'issuing judicial authority'. (**Hereinafter the "*Framework decision*")

(ii) The learned judge erred in finding that the extradition of the Appellant would not breach Article 5 ECHR, contrary to section 21A of the Extradition Act 2003, as the Deputy Public Prosecutor of Rennes is not a "competent legal authority" for the purposes of Article 5 ECHR.

[5] The initial listing of this appeal on 26 November 2019 gave rise to an adjournment, thankfully of short dimensions, by reason of the expedited proceedings in three conjoined cases (Cases C-566/19 PPU and Others) which were pending before the Court of Justice of the European Union (the "*CJEU*"). The adjournment decision coincided with the publication of the opinion of the Advocate General on 26 November 2019. The CJEU, with commendable expedition, promulgated its decisions on 12 December 2019. The Appellant's appeal was, in consequence, relisted before this court on 20 December 2019.

[6] In the three conjoined cases, the respondent Member States were France, Belgium and Sweden respectively. In the case against France the main question for the court was whether the French Public Prosecutor's Office had a status affording it a sufficient guarantee of independence in the function of issuing an EAW, in a context where judges attached to this authority perform this function. The court answered this question in the affirmative. In thus deciding, it reasoned that an "*issuing judicial authority*" is capable of including authorities of Member States which, although not necessarily judges or courts, participate in the administration of criminal justice and act independently. The critical requirement is the existence of statutory rules and an institutional framework capable of guaranteeing that the authority in question is not, in the matter of issuing an EAW, exposed to any risk of directions or instructions from the executive. The relevant arrangements in France

satisfy this test. This notwithstanding that the French authority is responsible for conducting criminal prosecutions and the French Minister for Justice is empowered to issue to this authority general criminal justice policy instructions. Thus judges attached to the French Public Prosecutor's Office have the status of a valid "*issuing judicial authority*" as required by the Framework Decision.

[7] The CJEU resolved a second issue, arising out of its earlier case law according to which the decision to issue a EAW must, when made by an authority which is not a court but participates in the administration of justice, be capable of being the subject of court proceedings in the issuing Member State in order to satisfy the requirements of effective judicial protection. The court held, firstly, that the existence of such proceedings is not a condition for the classification of the issuing authority as a judicial authority. It decided, secondly, that it is for the Member States to ensure that their legal orders effectively safeguard the requisite level of judicial protection by means of their domestic procedural rules. The requirements inherent in effective judicial protection are satisfied by the availability of judicial review of the conditions for the issuing of the warrant and in particular its proportionality in the issuing Member State. The Court held that the French system satisfies these requirements as its arrangements permit the proportionality of the EAW issuing decision to be judicially reviewed before, or practically at the same time as, the adoption of the decision, as well as subsequently.

[8] The decision of the CJEU in the aforementioned three conjoined cases is determinative of the first ground of appeal, which was not pursued in consequence. We turn to consider the sole surviving ground of appeal.

[9] Article 1 of the Framework Decision provides in material part:

> "*The European Arrest Warrant is* ***a judicial decision*** *issued by a Member State …*"

[Our emphasis]

Article 6(1) provides:

> "*The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European Arrest Warrant by virtue of the law of that State.*"

Article 6(2) regulates the executing judicial authority in precisely the same terms. Article 6(3) states:

> "*Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.*"

Recital (8) is worthy of note:

> *"Decisions on the execution of the European Arrest Warrant must be subject to sufficient controls which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender."*

As is Recital (10):

> *"The mechanism of the European Arrest Warrant is based on a high level of confidence between Member States."*

And Recital (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…."*

Also Recital (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."*

[10] Section 21A of the 2003 Act provides:

> *"(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D") –*
>
> *(a) whether the extradition* ***would be*** *compatible with the Convention rights within the meaning of the Human Rights Act 1998;*
>
> *(b) whether the extradition would be disproportionate.*
>
> *(2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.*
>
> *(3) These are the specified matters relating to proportionality –*

(a) the seriousness of the conduct alleged to constitute the extradition offence;

(b) the likely penalty that would be imposed if D was found guilty of the extradition offence;

(c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.

(4) The judge must order D's discharge if the judge makes one or both of these decisions –

*(a) that the extradition **would not be** compatible with the Convention rights;*

*(b) that the extradition **would be** disproportionate.*

(5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions –

*(a) that the extradition **would be** compatible with the Convention rights;*

*(b) that the extradition **would not be** disproportionate.*

(6) If the judge makes an order under subsection (5) he must remand the person in custody or on bail to wait for extradition to the category 1 territory.

(7) If the person is remanded in custody, the appropriate judge may later grant bail."

(8) In this section 'relevant foreign authorities' means the authorities in the territory to which D would be extradited if the extradition went ahead."

[Our emphasis]

The highlighted words are the critical ones. The corresponding provisions of section 21 are in the same terms.

[11] Article 5 ECHR is one of the protected Convention Rights under the machinery of the Human Rights Act 1998. It provides, so far as material:

> "1. *Everyone has the right to liberty and security of the person. None shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: …*
>
> *(c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so …*
>
> *(f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*"

No other provision of Article 5 featured in this appeal.

[12] In his skeleton argument Mr Joseph O'Keefe (of counsel), on behalf of the Appellant, develops this ground in the following compact way:

> "*Article 5 ECHR is applicable to the judicial decision to issue EAW given that it is a decision which interferes with the liberty of the subject of the EAW and it is a decision which should only be made by a 'competent legal authority', which does not include a public prosecutor. Given that the EAW in this case was issued by a deputy public prosecutor, it is respectfully submitted that it was issued in breach of Article 5 ECHR with the effect that extradition is, therefore, barred pursuant to section 21 of the Extradition Act 2003.*"

Mr Stephen Ritchie (of counsel) representing the requesting State, responds in equally concise terms in his skeleton argument:

> "*A competent legal authority is defined in Article 5(3) as a judge or other officer authorised by law to exercise judicial power before whom a person arrested must be brought promptly. It is submitted that the competent legal authority will be the investigating magistrate, not the prosecutor.*"

[13] The Recorder disposed of this issue at [17] of his judgment in these terms:

> "*The European Court of Human Rights held in* ***Medvedyev v France*** *that the French Public Prosecutor is not a competent legal authority for the purposes of the Convention. This is of*

little relevance to this case. The court is concerned with the meaning of 'issuing judicial authority' as set out in the Framework Directive and as interpreted by the CJEU and not the meaning of 'competent legal authority' as set out in the Convention and as interpreted by the ECtHR. The Convention requires anyone arrested to be brought before a competent legal authority without delay. The requested person after he was arrested in Northern Ireland was brought without delay before this court, a recognised competent legal authority, and has been detained by order of this court. Should he surrender to France there is adequate evidence that he will be produced before a judge in Rennes, another competent legal authority. His Convention rights have therefore been respected and will continue to be respected after surrender."

[14] In *Medvedyev v France* [Application No 3394/03], the ECtHR noted in its judgment dated 10 July 2008 at [61] that the relevant provisions of the French legal system did not

> "*…. place the detention under the supervision of a judicial authority ...* [adding]…
>
> *It is true, as the government pointed out, that measures taken under the* [applicable French law] *are taken under the supervision of the public prosecutor …*
>
> *It must be acknowledged, however, that the public prosecutor is not a 'competent legal authority' within the meaning of the Court's case law given to that notion: as the applicants pointed out, he lacks the independence in respect of the executive to qualify as such ….*"

A violation of Article 5(1) ECHR was found accordingly.

[15] Mr O'Keefe drew to our attention the following passage in the decision of the United Kingdom Supreme Court in *Assange v Swedish Prosecution* [2012] UKSC 22 at [74]:

> *"Miss Rose submitted that this line of authority conclusively established the meaning of "judicial authority" in the Framework Decision. This was coupled with the submission that those two words had to be given the same meaning wherever they appeared in the Decision. I consider that both submissions are unsound. The article 5 authorities apply to the stage of pre-trial proceedings at which the suspect has to be afforded the opportunity to challenge his detention. They have direct application to the stage of the execution of an EAW for*

> *which articles 14, 15 and 19 of the Framework Decision make provision. At this stage the "competent judicial authority" must have the characteristics identified in the Strasbourg decisions relied upon. Those decisions do not, however, apply to the stage at which a request is made by the issuing State for the surrender, or as the English statute incorrectly describes it, the extradition, of the fugitive. That is not a stage at which there is any adversarial process between the parties. It is a stage at which one of the parties takes an essentially administrative step in the process. That is a step that it is appropriate for a prosecutor to take."*

Mr O'Keefe criticised Lord Phillips' characterisation of the EAW issuing decision as an essentially "*administrative*" step. We would observe that the *Assange* appeal was decided by a majority of five to two, Lord Phillips delivering the main judgment of the majority and is binding on this court. Our decision does not turn on this passage in any event.

[16] We consider that the Appellant's Article 5 ECHR ground of appeal must fail, essentially for the reasons given by the Recorder, to which we would add the following. First, Article 5(1)(c) ECHR has no application to the circumstances of the Appellant as the appeal to this court does not challenge an order or other measure depriving him of his liberty. The authority which deprived the Appellant of his liberty is the Police Service of Northern Ireland ("PSNI"). The conduct of this agency does not fall within the ambit of this appeal. The Appellant's remedy in this respect is to bring a human rights claim against that agency under the Human Rights Act 1998. Furthermore, and in any event insofar as Article 5(1)(c) has any application, there is no suggestion that the arrest or detention of the Appellant was other than lawful and, moreover, it was plainly effected for the purpose of bringing him before Belfast County Court, the "*competent legal authority*" in this discrete context.

[17] Second, and in any event, this case is clearly embraced by Article 5(1)(f) as the arrest and detention by the PSNI were "*… of a person against whom action is being taken with a view to deportation or extradition*". The Appellant's attempt to fit his case within Article 5(1)(c) is unsustainable.

[18] Third, we return to the wording of section 21A(1) of the 2003 Act and, in particular, the words "*would be*". We consider it clear that the task which this subsection requires the adjudicating court of the requested State to undertake is forward looking in nature. The question for that court is whether acceding to the surrender request of the requesting State would result in an infringement of the requested person's Convention rights. The language of section 21A(1) confounds any suggestion that the court's task extends to reviewing past acts and conduct entailing the arrest and detention of the requested person. Furthermore, and in any event, the deputy public prosecutor of Rennes did not arrest or detain the Appellant. Rather that agency's role, via the EAW, was confined to requesting that the United Kingdom surrender the Appellant to France.

[19] Fourth, the Appellant's Article 5 ECHR contention is unsupported by any decided case. On the contrary, the leading cases belonging to this territory generally all concern the possibility of future, post-extradition breaches of Convention rights. See for example:

> Soering v United Kingdom (1989) 11 E.H.R.R. 439 at para 91 –
>
> > *"In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."*
>
> R (Ullah) v Special Adjudicator [2004] 2 AC 323 at para 24 –
>
> > *"While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment."*
>
> HH [2012] 3 W.L.R. 90 at para [87]:
>
> > *"Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."*

[20] Mr O'Keefe submitted that the application of sections 21 and 21A is not limited to post-extradition events, but encompasses also preceding events in the extradition process. He relied on *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 where, in an Article 6 ECHR context, Lord Nicholls stated at [24]:

> *"While the Strasbourg jurisprudence does not preclude reliance on Articles other than art 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to art 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: Soering, para 91; Cruz Varas, para 69; Vilvarajah, para 103. In Dehwari, para 61 (see para 13*

> *above) the Commission doubted whether a real risk was enough to resist removal under art 2, suggesting that the loss of life must be shown to be a "near-certainty". Where reliance is placed on art 6 it must be shown that a person* ***has suffered or risks suffering a flagrant denial of a fair trial in the receiving state:*** *Soering, para 113 (see para 10 above); Drodz, para 110; Einhorn, para 32; Razaghi v Sweden; Tomic v United Kingdom. Successful reliance on art 5 would have to meet no less exacting a test. The lack of success of applicants relying on arts 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states."*

[our emphasis]

[21] In our judgment, given the argument canvassed the key words in this passage are "*Where reliance is placed on art 6*…". Stated simply, in an Article 6 case evidence of previous breaches of the requested person's Article 6 rights will be taken into account in evaluating any future, post-extradition, risk of further breaches. In an Article 5 case, previous breaches of this Convention right could, similarly, be weighed in evaluating the risk of post-extradition breaches. Furthermore, the focus is squarely on events in the requesting, and not the requested, State. A breach of the Appellant's Article 5 rights in his past arrest and detention in this country, even if established, would be irrelevant in the determination of the surrender request of the requesting State. The "*exacting test*" to which Lord Nicholls refers is the demonstration of a risk of a "*flagrant*" breach of the requested person's Article 6 rights, in order to satisfy the "stringent test" which the ECtHR has devised for such cases. His Lordship points out that the same test applies in Article 5 cases. We conclude that this passage in *Ullah* provides no support for the Appellant's case.

[22] There is, therefore, an assortment of reasons impelling the court to conclude that the sole surviving ground of appeal has no merit. The application for leave to appeal is granted in respect of the second ground only and the appeal is dismissed accordingly. The Applicant's costs will be taxed as an assisted person.