Michaelmas Term

[2014] UKPC 38

Privy Council Appeal No 0077 of 2014

JUDGMENT

Dean Dixon (Appellant) vKingdom of Spain (Respondent)

From the Supreme Court of Gibraltar

before

Lord Mance

Lord Wilson

Lord Carnwath

Lord Toulson

Lord Hodge

JUDGMENT DELIVERED BY

LORD MANCE

ON

10 November 2014

Heard on 16 October 2014

Appellant	Respondent
John Restano QC	Reginald R Rhoda QC
Rowan Pennington-Benton	Johann Fernandez
Charles Bonfante	
(Instructed by M.A. Law)	(Instructed by Penningtons Manches LLP)

LORD MANCE:

Introduction

1.
By a European arrest warrant dated 11 December 2013, the respondent seeks the appellant's surrender to face criminal proceedings under article 149 of the Spanish Penal Code, Organic Law 10 of 1995 as amended in 2004 ("the Penal Code 1995"). In the warrant the box ticked to identify an offence punishable in Spain with a maximum sentence of at least three years is that referring to "assault with grievous injury". Various challenges by the appellant to the validity of the warrant were

rejected both by the Additional Stipendiary Magistrate in a ruling dated 22 May 2014 and on appeal by the Supreme Court (Butler J) in a judgment dated 18 June 2014. The appellant now appeals to the Board with leave granted by Butler J, but limited to "the question whether the intended charge against the appellant is the correct charge under Spanish law and whether the appellant's surrender violates section 8(4) of the Constitution".

2.
The facts on which the charge is based occurred as long ago as 7 August 1992. They involved an alleged assault on Malcolm Stephen Peel with a stick in La Linea de la Concepcion, causing him very severe head injuries. The appellant is reported to have admitted the assault, but explained that he was under the influence of LSD, which might bear on his state of mind. He spent 11 months in Spanish custody immediately after the incident and a further 22 months in custody in Gibraltar during the period between the issue in 2006 and setting aside (on grounds presently irrelevant) of a previous European arrest warrant (Dixon v Government of Spain 2007-09 Gib LR 244). These matters formed part of the subject matter of challenges mounted below, where the delays were discounted as being largely due to the appellant absconding from the Spanish equivalent of bail or being a fugitive. They are no longer relied on or relevant. The limited questions now before the Board arise from the fact that the appellant is being charged under the 1995 Penal Code in respect of an offence allegedly committed in 1992.

3.
The Spanish Constitution (article 9.3) permits the retroactivity of penal provisions favourable to the accused, and the First Transitional Provision of the Penal Code 1995 provides that "Once this Code enters into force, if its provisions prove more favourable to the accused, they are to be applied". Article 149 of the Penal Code 1995 provides (in the translation with which the Board was provided):

"1,- He who causes another, through any means or procedure, the loss or inability of an organ or main limb, or any of the senses, impotency, sterility, or serious deformity, somatic or psychological is punishable with imprisonment from six to twelve years."

The basic penalty applicable under article 149 is a sentence of 6 to 12 years. But article 152.1 (set out in evidence given by a lawyer, Mr Jorge Tenorio, obtained by the appellant) provides:

"1. He who through serious imprudence inflicts some of the injuries contemplated in the previous article[s] will be punished:

….

(ii) with a sentence of imprisonment of one to three years, in the case of the injuries in article 149.

(iii) a prison sentence of six months to two years, in the case of the injuries in article 150."

The bracketed letter "s" indicates a plural obviously omitted in the translation put before the Board.

4.
The previous penal code contained in Decree 3096 of 14 September 1973 as amended by L.O. 30 of 21 June 1989 provided (again in the translation provided):

"Article 418. He who purposely mutilates or inhabilitates another of an organ or main limb, deprives him of sight or hearing, or partial or total inability to work, a serious somatic or physical disease or an incurable mental incapacity will be punished with a lesser sentence of imprisonment.

Article 420. He who through any means or procedure, causes the other, injuries that impairs his bodily integrity or his physical or mental health, shall be punished by a lesser sentence of imprisonment, so long as the injuries require for his well-being medical assistance and medical treatment or surgery. …"

The sentence applicable under article 418 was until 1995 from 12 to 20 years, which was reduced in 1995 to from 8 to 15 years. Under article 420 the sentence applicable was and is from 6 months 1 day to 6 years.

5.
The European Arrest Warrant Act 2004 was enacted to give effect in Gibraltar to the United Kingdom's international obligations under Framework Decision of 13 June 2002 (2002/584/JHA), article 33(2) of which provides that "This Framework Decision shall apply to Gibraltar". The Framework Decision operates currently in the United Kingdom in general, and Gibraltar in particular, only at the international level: see Assange v Swedish Prosecution Authority [2012] UKSC 22. [2012] 2 AC471. The 2004 Act provides:

"**Exceptions to duty to surrender.**

26. A person shall not be surrendered under this Act if-

(a) his surrender would be incompatible with Gibraltar's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May 1994; or

(b) his surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 27(1)(b) applies); …"

6.
Although Mr Restano QC for the appellant suggested that section 26(a) might be meaningless, since Gibraltar did not as such have any obligations under the Human Rights Convention, the Board considers it to be clear that section 26(a) must be understood as referring to the United Kingdom's obligations under the Convention in respect of Gibraltar.

7.
Article 7(1) of the Human Rights Convention provides:

"**No punishment without law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

8.
The Constitution provides:

"8.-(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

….

(12) In this section -

‘criminal offence’ means a crime, misdemeanour or contravention punishable under the law of Gibraltar; ….”

9.
Before the courts below, the legal positions under article 7 of the Convention and under section 8(4) of the Constitution appear to have been equated in the submissions advanced. But a distinction is now drawn, though an analysis of article 7 is taken as background to the challenge under section 8(4). Mr Restano takes as his starting point cases indicating that, in the context of a decision to remove a person from the jurisdiction to another country, a real risk of a violation (or at least of a “flagrant” violation) of the essence of article 7 of the Convention in that other country precludes such removal: R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323, para 45 per Lord Steyn; Arranz v Spanish Judicial Authority [2013] EWHC 1662 (Admin).

10.
However, he does not deploy that principle under section 26(a) of the Act. He accepts, quoting his written case, that the fact “that article 149 of the 1995 [Penal Code] did not exist in 1992 would not violate the first sentence of article 7(1) as a similar offence existed at the time in the form of either article 418 or 420 of the 1973 [Penal Code]”. As to the second sentence of article 7(1), he also accepts that there is no risk of a breach, because the maximum punishment available under article 149 is less than the maximum punishment available under article 418. In short, whatever sentence might be passed on the appellant in Spain for wilful breach of article 149, it could not exceed the maximum of 20 years in 1993 (or 15 years now) available under article 418. And whatever sentence might be passed on him for any non-wilful breach of article 149, it could not exceed the 6 year maximum provided by article 420. In this connection, Mr Restano accepts the analysis of article 7 adopted in Scoppola v Italy (No 2) (Application No 10249/03), 17 September 2009 and R (Uttley) v Secretary of State for the Home Department [2004] UKHL 38, [2004] 1 WLR 2278, especially per Lord Phillips at paras 18-21.

11.
The appellant’s case turns in these circumstances upon deploying the principle identified in para 9 above in relation to the provisions of section 26(b) of the Act, read with 8(4) of the Constitution. Taken by itself, article 8(4) is, by virtue of article 8(12), only concerned with crimes, etc punishable under the law of Gibraltar. But Mr Restano submits that, since section 26(b) of the European Arrest Warrant Act 2004 is expressly concerned with the question whether the surrender of an alleged offender to another Member State would contravene the Constitution, it must have envisaged an enquiry, similar to that envisaged by the principle identified in para 9 above, into the question whether such surrender would involve a real risk of conviction, in the State issuing the warrant and requesting surrender, for an offence which did not there exist when the events relied on occurred. The Board did not understand the Attorney General to take issue with the correctness of this submission, which it will assume for the purposes of what follows.

12.
The appellant’s further submission on this basis is that, although the appellant’s surrender is now requested under article 149, the act for which he is wanted did not, at the time it took place, constitute “such an offence”, that is an offence of the same kind as that charged under article 149 (and in consequence that the Spanish authorities are intending to pursue him on an inapplicable or incorrect basis). In the courts below, it was apparently accepted by the respondent that, if it was clear

on the evidence that the Spanish authorities were seeking to pursue the appellant for an offence “not known to Spanish law” or “for which there was clearly no evidence whatsoever”, the Gibraltar courts would not be obliged to order surrender. The Board need not consider this sort of extreme or abusive position. The courts below were clearly right to consider that it does not apply. The basic scheme of the 2004 Act is mechanistic. It involves the receipt of a warrant in respect of, and specifying, an offence committed or alleged to have been committed abroad (sections 2 and 7(1)(c)) by a person against whom the issuing State intends to bring proceedings for such offence (section 6(a)). It then contemplates an order for the surrender of such person, if not by consent under section 11, then under section 12 upon the court being provided with the warrant and being satisfied of three conditions. They are, first, that the person wanted is the person before the court, second, that his surrender is not prohibited by the provisions of Part 3 (i.e. sections 26 to 37) and, third, that the warrant has been issued in accordance with the Act (section 12).

13.
In the present case, the appellant does invoke a provision of Part 3, namely section 26(b). This is an additional precaution, not present in the Framework Decision but inserted by the Gibraltar legislature into the 2004 Act to provide protection for a person whose surrender is requested. Assuming as the Board is, without deciding, presently prepared to do, that section 26(b) is engaged by a real risk of breach of section 8(4) of the Constitution, it is open to such a person to require that possibility to be considered, if necessary investigated further (whether by the court seeking from the Spanish authorities under section 13 further documentation or information “to enable it to fulfil its functions” or by hearing other evidence) and finally adjudicated upon by the Gibraltarian court.

14.
The courts below took the view that whether article 149 was less favourable to the appellant and what the consequences might be, if it was, were complex matters which could and should more appropriately be left to the Spanish courts. If this suggests that it was not part of the Gibraltar courts’ function to determine whether there was a real risk of breach of section 8(4) of the Constitution, the Board disagrees. Assuming that section 26(b) is engaged by a real risk of breach of section 8(4), the Gibraltar courts must consider whether a real risk has been shown. But, as will appear, the Board considers that the question whether there is or would be a real risk of breach of section 8(4) is one which can be resolved on the evidence put before the Gibraltarian courts, without need for further evidence or investigation.

15.
The Board starts with an argument which might be advanced, to leave matters to the Spanish courts and at the same time to show thereby that there was no such real risk. If a charge under article 149 lays the appellant open to a conviction which would not, on the basis of whatever he did, have been possible before 1995, then article 149 cannot be more favourable to the accused than the pre-1995 provisions. On this hypothesis, it would seem to follow, from the Spanish law provisions set out in para 3 above, that the appellant should, if surrendered to Spain, be acquitted there of the charge under article 149 to face which he was surrendered. But this is not an objection which featured or was the subject of any focus in the respondent Kingdom’s submissions before the Board. The Spanish prosecutors have confined themselves to a charge under article 149, and have adduced evidence that it is more favourable to the appellant than previous provisions. In that light, a suggestion that there would be no real risk of conviction in Spain under article 149, even if it is less favourable, and so no need to enquire whether a charge under article 149 is more favourable, might have appeared to them unattractive and potentially problematic. Further, surrender remains a radical measure, which can

uproot and lead to a lengthy period in custody, and this is so however great the mutual trust that must exist between different European jurisdictions within the European Union. Surrender might itself possibly even engage arguments under section 26(a). In any event, the respondent's case has not been put in a way which the Board considers requires it in the circumstances to consider any of these aspects further.

16.
The Board turns to the submissions which were made on the central issue, whether the charge intended under article 149 involves a real risk that the appellant will be pursued for acts which did not in 1992 constitute "such an offence". The European Arrest Warrant issued in respect of the appellant relies, and relies only, on a comparison between article 149 of the Penal Code 1995 and article 418 of the pre-1995 Code. It asserts by reference to that comparison that the appellant now faces a charge more favourable than that which he would in 1992 have faced. Mr Restano makes two linked submissions. First, the respondent must be held to the comparison which it itself drew, and, making that comparison, article 149 is not more favourable, because it is not limited to wilful injury, as article 418 was by the word "purposely". Second, section 8(4) requires a precise correspondence between the crime now charged and that which previously existed, and there was prior to 1995 no crime corresponding with that contained in article 149, again because article 418 was limited to wilful injury, whereas article 149 is not.

17.
The first submission is in tension with the appellant's case that section 8(4) is a constitutional safeguard, introduced by the Gibraltar legislature, the application of which it was and is incumbent on a court faced with an objection to surrender to investigate as necessary and to evaluate on the evidence. An objection of this nature cannot be precluded by a statement in the warrant itself. But it follows that, in considering whether article 149 is more favourable, a court is not confined to the way in which the warrant puts the position, but should look at all the evidence. As to the second submission, the Board sees nothing in the language of section 8(4) or in common sense to compel a conclusion that there should be no surrender unless article 149 had a single analogue in the pre-1995 Code. All that section 8(4) can at most require is that article 149 should reflect an offence or combination of offences which existed under the pre-1995 law. So long as it goes no further, there can be no risk of the appellant being convicted under article 149 of offences which did not previously exist. In the present case, it is clear that it goes no further. On the basis that it covers both wilful and non-wilful acts, article 149 reflects provisions which previously existed in articles 418 and 420, read together. No possible objection of adverse retrospectivity can exist to the combination in one single article of offences previously split across two separate articles.

18.
There was discussion before the Board as to the extent to which the Spanish prosecuting authorities had committed themselves to pursue the appellant only on the basis that he was guilty of wilful conduct, which would have fallen previously within article 418. In evidence dated 1 April 2014, the State Prosecutor, Mr Emilio Rodriguez, said that "The action outlined in article 149 is wilful", and that it reflected that outlined in article 418. If he intended to suggest that article 149 is limited to wilful injury, the Board accepts the appellant's case that it is not: see the terms of article 152.1.(ii) of the Penal Code produced by Mr Tenorio as set out in para 3 above. If article 149 were limited to wilful injury, then of course it would be directly comparable with article 418 and the appellant's case would fall away. If the Spanish prosecuting authorities do limit their case to wilful injury, that can of course only be to the appellant's potential benefit in Spain. But, if it is open to them to expand it to cover

non-wilful conduct, that, for reasons already indicated in paras 10 and 17 above, gives rise to no objection to surrender under the combination of section 8(4) of the Constitution and section 26(b) of the 2004 Act. The Board is not in a position to express, and need not express, any view as to how far the Spanish prosecuting authorities may have tied themselves irrevocably to a case of wilful injury.

19.
For the reasons given, the Board will humbly advise Her Majesty that the appellant’s appeal be dismissed.