



Neutral Citation Number: [2009] EWHC (89)

Case No: C0/10324/2008

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2009

Before:

LORD JUSTICE SCOTT BAKER

AND

MR JUSTICE MADDISON

Between:

MIHAI SONEA

Appellant

- and -

MEHEDINTI DISTRICT COURT

Respondent

Ms Lisa Freeman (instructed by Azam & Co) for the Appellant
Ms Amy Mannion (instructed by Crown Prosecution Service) for the Respondent

Hearing date: 3 December 2008

Approved Judgment

Lord Justice Scott Baker:

1. This is an extradition appeal against the decision of District Judge Tubbs in the City of Westminster Magistrates Court when she ordered the extradition of Mihai Sonea, the appellant, to Romania pursuant to a European arrest warrant. The issue is straightforward. The warrant was drafted as a conviction warrant and, so it is submitted, should have been drafted as an accusation warrant and is therefore invalid.
2. The appellant is a 33 year old Romanian national and the warrant recites that he was convicted in Romania of attempted first degree murder and sentenced to 10 years imprisonment. The offence is said to have been committed on 19 June 1999. After 4 August 1999 the Romanian authorities were unaware of the appellant's whereabouts but learned from his father that he had left Romania and was believed to be in Spain. This information was later confirmed by the appellant's wife.
3. The appellant was tried in his absence and convicted on 5 November 2003. There appears to have been an appeal on his behalf conducted by a lawyer appointed to represent his interests, and his sentence is said to have "remained definitive" from 10 November 2004. The Romanian court concluded that he knew about the trial because his wife had told him of it on the telephone. Ms Freeman, who has appeared for the appellant, submits that he nevertheless has a right to a retrial in the event of his extradition to Romania. She refers to a letter dated 7 April 2008 from the President of the Criminal Department of the Mehedinti Court and to the judgment of this court in *Da An Chen v The Government of Romania* [2006] EWHC 1752 (Admin) paras 9 – 12. Although I am not persuaded that the matter is entirely free from doubt on the facts on this case, I am prepared to assume for the purposes of the present appeal that he does have the right to a retrial.
4. Ms Freeman's submission is that because the appellant is entitled to a full retrial the warrant should be treated as an accusation warrant rather than a conviction warrant. Because he is entitled to a full retrial he ought to be considered as an accused person rather than a convicted person. She relies on a number of authorities under the Extradition Act 1989, in particular *Hewitson v The Governor of France* [2005] EWHC 135 (Admin), *Foy v The Governor of Brixton Prison and Anr* (unreported CO/3969/1999) and also *R v Governor of Pentonville Prison and Anr ex parte Zezza* [1983] 1 AC 46, which involved the Extradition Act 1870. She submits that the principles of the earlier legislation survived the arrival of the Extradition Act 2003. She refers in particular to the observations of Lord Roskill in *Zezza* at p.55E:

"The English court must inform itself by expert evidence where the application for extradition asserts that the person whose extradition is sought is a convicted person, whether the demand is founded upon a sentence *in contumacia*. That evidence will show whether or not the conviction upon which the demand is founded bears the characteristics of a conviction or sentence "in contumacy", so that the whole matter can be reopened in the event of subsequent surrender and appearance. If it can, then the person concerned must not be treated as a convicted person but as an accused person."

She also relies on Kennedy L.J in *Foy* at para 6:

“Prior to 1989 courts in this country examined the finality of proceedings abroad to see if a fugitive should be regarded as a person convicted or accused, and that process has continued. In *Re Sarig* (20 March 1993 unreported), where the request came from the United States, the conviction of the fugitive in his absence was treated as final because if he were returned the court would have a discretion whether or not to set that conviction to set aside. As Evans L.J put it at 25E:

“The question is, does the applicant have a right to trial of the alleged or admitted extradition crime, notwithstanding the conviction which has been recorded?”

“The same approach was adopted by the House of Lords in *Re Ismail* [1999] 1 AC 320 where Lord Steyn said that “accused” in section 1 of the 1989 Act is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an “accused” person.”

5. These cases, however, all predate the Extradition Act 2003. The only authority relied on by Ms Freeman under that Act is *Caldarelli v Court of Naples* [2008] UKHL 51. In that case Caldarelli had been convicted and sentenced in absentia in Italy for drug offences. An appeal had been lodged by Caldarelli in Italy and was extant. The argument was whether surrender was appropriate when a European arrest warrant appeared to be an accusation warrant with no final and enforceable conviction, but no automatic right to a retrial. The Divisional Court certified the following point:

“Where a fugitive has been convicted and sentenced in his absence in the requesting state, but the conviction and sentence are neither final nor enforceable, may his case be treated as an accusation warrant even though he does not enjoy an unqualified right to a retrial on the merits?”

6. The House of Lords, affirming the decision of the Divisional Court, answered the question in the affirmative. Caldarelli had properly been described as being subject to an accusation warrant. It was common ground between the parties that in Italian law:
- (1) In Italy, a person is not considered ‘convicted’ until the sentence becomes ‘final’. Custody in Italy following surrender would be categorised as ‘pre-trial custody’.
 - (2) The first instance judgment, including the sentence of imprisonment, was neither final nor enforceable where the criminal appeal process was incomplete.
 - (3) Caldarelli had no unqualified right to a fresh hearing on the merits with all the evidence called again.
 - (4) He would be entitled to a retrial if fresh evidence came to light or the Italian court, in the exercise of its discretion, decided to grant a rehearing.

7. It is important to have in mind that the warrant in Caldarelli contained all the attributes of an accusation warrant. Furthermore, all parties were agreed that the warrant was an accusation warrant within the meaning of s.2(2), (3) and (4) of the 2003 Act. Caldarelli was “sought for the purposes of executing the pre-trial custody order issued against him and in order to be judged in subsequent and ongoing proceedings.” The sentence imposed was described as “sentence not yet enforceable as not final.”

As Baroness Hale put it at para 29:

“The crucial distinction drawn in article 1.1 of the Council Framework Decision (2002/584/JHA) is between an arrest warrant issued with a view to arrest and surrender of the requested person “for the purposes of conducting a criminal prosecution” and an arrest warrant issued with a view to the arrest and surrender of the requested person “for the purposes of.....executing a custodial sentence or detention order.”

8. Caldarelli was not being sought for ‘the purposes of executing a custodial sentence’, but rather for ‘the purposes of conducting a criminal prosecution.’
9. The Extradition Act 2003 implements in this country the Council Framework Decision, and the European arrest warrant procedure is designed to implement a new and summary process for extradition between Member States. In my view it is liable to be misleading to pick out observations by judges in cases concerned with earlier legislation. Rather, it is necessary to follow carefully and chronologically the structure of the 2003 Act.
10. The starting point for present purposes is s.2 (as amended). It provides:

“(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.”

(2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains –

- (a) the statement referred to in subsection (3) and the information referred to in subsection (4), or
- (b) the statement referred to in subsection (5) and the information referred to in subsection (6).

(3) The statement is one that –

- (a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and
- (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.

(4) The information is –

- (a) particulars of the person's identity;
- (b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;
- (c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;
- (d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it.

(5) The statement is one that –

- (a) the person in respect of whom the Part 1 warrant is issued is alleged to be unlawfully at large after conviction of an offence specified in the warrant by a court in the category 1 territory, and
- (b) The Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence.

(6) The information is –

- a) particulars of the person's identity;
 - b) particulars of the conviction;
 - c) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;
 - d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence, if the person has not been sentenced for the offence;
 - e) particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offence, if the person has been sentenced for the offence.
-”

- 11. The warrant in the present case, as is required by s.2, contained the necessary statement, in this instance that required by s.2(2)(b) i.e. that it was a conviction warrant.
- 12. The district judge at the extradition hearing is required to decide whether the offence specified in the warrant is an extradition offence (see s.10(2)). If he decides that question in the negative he must order the person's discharge (s.10(3)). If he decides it in the affirmative he must proceed under s.11(s.10(4)). That section requires the judge to decide whether the person's extradition is barred by any of the considerations there stated. If he concludes that none of the bars applies he then has to go on and consider

the tests in s.11(4) and s.11(5). Those are alternatives namely whether the person “is alleged to be unlawfully at large after conviction of the extradition offence” (s.11(4)) or whether the person “is accused of the extradition offence but is not alleged to be unlawfully at large after conviction of it” (s.11(5)). In the former case judge must proceed under s.20 and in the latter under s.21.

13. “Unlawfully at large” is defined in s.68A which provides:

“(1) A person is alleged to be unlawfully at large after conviction of an offence if –

- (a) he is alleged to have been convicted of it, and
- (b) his extradition is sought for the purpose of his being sentenced for the offence or of his serving a sentence of imprisonment or another form of detention in respect of the offence.”

There is no doubt that the appellant in the present case falls within that definition.

14. S.20, which is headed: **Case where person has been convicted**, provides as follows:

“(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.

(2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.

(3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.

(4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.

(5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

(6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.

(7) If the judge decides that question in the negative he must order the person’s discharge.

(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights –

- (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not

sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

- (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

15. S.21 focuses on whether the person’s extradition would be compatible with his Convention rights within the meaning of the Human Rights Act 1998.
16. The structure of Part 1 of the Extradition Act 2003 envisages a step by step approach by the judge. Each step requires consideration of a particular question and its answer determines the next move that the judge is required to make. It is to be noted that it is only when the step by step exercise takes the judge to s.20 that he is required to consider whether the person was convicted in his presence, whether he deliberately absented himself from his trial and whether he would be entitled to a retrial or (on appeal) to a review amounting to a retrial. As Ms Mannion, for the respondent, observes s.20 is only reached where a person has been convicted and if Ms Freeman’s argument is correct none of the steps set out in such detail in s.20 would be relevant.
17. The important s.20 criteria, it seems to me, come into play at the relevant time. As the authors of the second edition of the Law of Extradition and Mutual Assistance point out at para 5.99:
- “Section 20 is intended to ensure that defendants who have been convicted in their absence but who did not have an opportunity to appear at their trial (e.g. because they were unaware of it) are not extradited unless they are guaranteed a fair trial in their presence in the category 1 requesting state. The judge is required to proceed under s.20 if the defendant is alleged to be unlawfully at large after conviction of an extradition offence (s.11(4)).”
18. Ms Freeman’s argument, as it seems to me, puts the cart before the horse. It seeks to extract questions that Parliament has said fall to be dealt with under s.20 and make them issues that determine the nature of the warrant, whereas the legislation clearly sets out a step by step process that the judge must follow.
19. *Caldarelli* was a case under the 2003 Act and everyone agreed that the warrant was an accusation warrant within the meaning of s.2(2), (3) and (4) of that Act. Italian law does not regard a person as ‘convicted’ until the appeal process is at an end and the warrant was, as Lord Carswell said at para 37, rightly categorised as an accusation warrant. Baroness Hale said at para 31 that it was not difficult to conclude the appellant’s extradition was sought as an accused person. Lord Bingham, Lord Carswell and Baroness Hale all referred to the step by step approach required of the judge by the 2003 Act. I can find nothing in the speeches of their lordships to support the arguments of Ms Freeman. The case was fact specific.

20. *Zeza* was another Italian case, but under the 1890 Act. What matters in present case is the framework of the 2003 Act and the steps the legislation requires the judge to take.
21. *Foy*, and *Hewitson* were French cases categorised by the French asking for the extradition of accused persons who, to English eyes might appear convicted. Neither case involved the 2003 Act and neither case assists the appellant's argument.
22. The fact, if it be the case that the appellant has, as I am prepared to assume, an unfettered right to a retrial does not stop the warrant from being a conviction warrant or mean that the judge has gone wrong at any point when going through the 2003 Act. As Lord Bingham pointed out at para 23 in *Caldarelli*:

“Providing as they do for international cooperation between states with differing procedure regimes, the Framework Decision and the 2003 Act cannot be interpreted on the assumption that procedures which obtain in this country obtain elsewhere. The evidence may show that they do not.”
23. The differing procedural regimes in other countries are apparent from many of the authorities. What is essential is that judges dealing with applications for extradition under European Arrest Warrants should follow carefully the step by step approach set out in Part I of the 2003 Act. That in my judgment is the relevant message from their Lordships in *Caldarelli* and that is the course that was evidently followed in the present case.
24. In my view the appellant was rightly sought as a convicted person; the warrant was properly drafted and I would dismiss the appeal.
25. Maddison J.: I agree.