Case No: CO/3656/2004

Neutral Citation Number: [2004] EWHC 2019 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Friday 20th August 2004

Before:

MR JUSTICE HENRIQUES AND MR JUSTICE STANLEY BURNTON

- -

Between:

THE OFFICE OF THE KING'S PROSECUTOR, BRUSSELS — **Appellant**

- and -

EDDISON RODRIGO CANDO ARMAS

-and-

BOW STREET MAGISTRATES' COURT — **Respondents**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

John Hardy (instructed by **the Crown Prosecution Service**) for the **Appellant**
Steven Powles (instructed by **Bindman & Partners**) for the **First Respondent**

- -

Judgment

Mr Justice Stanley Burnton:

Introduction

1. This is the judgment of the Court.

2. This is an appeal by the Office of the King's Prosecutor, Brussels, under section 28 of the Extradition Act 2003, against the decision of Deputy Senior District Judge Wickham made on 26 July 2004 to discharge the First Respondent, Eddison Rodrigo Cando Armas, whose extradition was sought by the Appellant. We were told that this is the first appeal against an order of a person's discharge at an extradition hearing under the 2003 Act. It raises procedural issues under sections 28 to 31 of the Act and an important substantive issue as to the relationship between section 65(2) of the Act and subsequent subsections. Precisely the same substantive issue arises under section 64.

The facts

3. Mr Cando Armas is a citizen of Ecuador. He has been living in this country for some time. On 28 May 2004 he was arrested on the authority of a European Arrest Warrant dated 25 May 2004. The warrant was translated into English; it contained the statements and information required by section 2 of the Act and was certified by the NCIS, the designated authority, in accordance with section 2(7) and (8). The territory to which extradition was sought, namely Belgium, is designated as a category 1 territory under section 1. The warrant was accordingly a certified Part 1 warrant.

4. The warrant stated that Mr Cando Armas had been summoned for his trial and convicted and sentenced in his absence on 6 May 2003 to 5 years' imprisonment for 3 offences, described as follows:

> "Cando Armas is a member of an organised gang which is responsible for the systematic illegal immigration of Ecuadorean citizens towards Europe. This organisation was directed from London by Cando Armas. Once arrived in Belgium, Cando Armas took care of accommodation and fake passports for the illegal Ecuadorean immigrants. If necessary, the illegal immigrants were escorted to Great Britain.
>
> The above-mentioned facts took place between 1/9/2001 and 12/10/2001, within the district of Brussels.
>
> Nature and legal classification of the offence(s) and the applicable statutory provision/code:
>
> Art. 77 al 1-80 Law if 15.12.1980 (foreigner – assistance) Art. 322-323 al 2 SWB (penal code) (criminal conspiracy – commit criminal offences as instigator or leader)

> Art. 193-198-213-214 SWB (Forgery – fake up of a passport and use of a false passport)."

5. European Arrest Warrants are in a standard form, which is annexed to the Framework Decision of the Council of the European Union of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). The form includes a list of offences identical to that contained in Schedule 2 to the Act, known as the European Framework List, with a tick box against each. The list is headed by the instruction:

   > "If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State: …".

6. The original warrant was in Flemish, and 3 of the boxes had been ticked. None had been ticked in the English translation.

7. Mr Cando Armas was brought before Bow Street Magistrates' Court on 28 May 2004 when the initial hearing required by section 7 of the Act took place. The District Judge fixed the date for the extradition hearing as 15 June, but it was on that date adjourned to 2 July and then on 2 July to 26 July 2004, as we understand it to enable those acting for Mr Cando Armas to enquire as to the circumstances of an earlier unsuccessful attempt to extradite him on the same charges. The effective hearing took place on 26 July 2004 before Deputy Senior District Judge Wickham. As appears below, she decided that the alleged conduct of Mr Cando Armas did not constitute an extradition offence within the meaning of section 65 of the Act, and she therefore ordered his discharge.

The requirement of an extradition offence

8. It is a precondition of extradition under Part 1 of the Act that the defendant is either (in broad terms):

   (a) accused in a category 1 territory, or is alleged to be unlawfully at large after having been convicted (but not sentenced) by a court in a category 1 territory, of an extradition offence; or

   (b) alleged to be unlawfully at large after having been convicted by a court in a category 1 territory of an extradition offence and sentenced for the offence.

   If (a) applies, Section 64 of the Act determines whether the conduct of which the defendant is accused or of which he was convicted (but not sentenced) constitutes an extradition offence; if (b) applies, section 65 determines whether he was convicted of and sentenced for an extradition offence. Although different sections apply, the requirements of an extradition offence are identical under both sections.

9. Section 65 is as follows:

“Extradition offences: person sentenced for offence

(1) This section applies in relation to conduct of a person if—

(a) he is alleged to be unlawfully at large after conviction by a court in a category 1 territory of an offence constituted by the conduct, and

(b) he has been sentenced for the offence.

(2) The conduct constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—

(a) the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom;

(b) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list;

(c) the certificate shows that a sentence of imprisonment or another form of detention for a term of 12 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.

(3) The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—

(a) the conduct occurs in the category 1 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;

(c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.

(4) The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—

(a) the conduct occurs outside the category 1 territory;

(b) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct;

(c) in corresponding circumstances equivalent conduct would constitute an extra-territorial

offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment.

(5) The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—

(a) the conduct occurs outside the category 1 territory and no part of it occurs in the United Kingdom;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;

(c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.

(6) The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—

(a) the conduct occurs outside the category 1 territory and no part of it occurs in the United Kingdom;

(b) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct;

(c) the conduct constitutes or if committed in the United Kingdom would constitute an offence mentioned in subsection (7).

(7) The offences are—

(a) an offence under section 51 or 58 of the International Criminal Court Act 2001 (c. 17) (genocide, crimes against humanity and war crimes);

(b) an offence under section 52 or 59 of that Act (conduct ancillary to genocide etc. committed outside the jurisdiction);

(c) an ancillary offence, as defined in section 55 or 62 of that Act, in relation to an offence falling within paragraph (a) or (b);

(d) an offence under section 1 of the International Criminal Court (Scotland) Act 2001 (asp 13) (genocide, crimes against humanity and war crimes);

(e) an offence under section 2 of that Act (conduct ancillary to genocide etc. committed outside the jurisdiction);

(f) an ancillary offence, as defined in section 7 of that Act, in relation to an offence falling within paragraph (d) or (e).

(8) For the purposes of subsections (3)(b), (4)(c) and (5)(b)—

(a) if the conduct relates to a tax or duty, it is immaterial that the law of the relevant part of the United Kingdom does not impose the same kind of tax or duty or does not contain rules of the same kind as those of the law of the category 1 territory;

(b) if the conduct relates to customs or exchange, it is immaterial that the law of the relevant part of the United Kingdom does not contain rules of the same kind as those of the law of the category 1 territory.

(9) This section applies for the purposes of this Part."

10. It can be seen that section 65 lays down a number of requirements to be satisfied if the conduct of the defendant is to be held to constitute an extradition offence, contained in subsections (2) to (6) respectively.

11. On behalf of Mr Cando Armas, it was submitted to the District Judge that if he had been convicted of 3 offences within the European framework list; that only section 65(2) applies to such offences; that, as appears from the warrant, part, if not all, of his conduct occurred in the United Kingdom, so that the requirements of that subsection were not satisfied; that subsection (3) required all of the alleged criminal conduct of the defendant to have occurred in Belgium, which was shown by the warrant not to be satisfied; and therefore his conduct did not constitute an extradition offence. The District Judge accepted this submission. According to the agreed note of her decision, she said:

> "I shall start at the end. The category 1 territory must issue a certificate which shows that the conduct falls within an offence within the European Framework list.
>
> I find that the conduct in this case does fall within that list. I find this notwithstanding the absence of ticks in the relevant boxes in the English version of the Part 1 warrant.
>
> As this is a case under the European Framework list I find that sub-section (a) of subsection 65(2) bites and for the conduct to amount to an extradition offence it is necessary that no part of the conduct alleged can have occurred in the United Kingdom.
>
> Mr de Wolf, the King's prosecutor in Belgium, clearly states in the European Arrest Warrant that: "The organisation was directed from London by Cando Armas". The rest of the paragraph deals with the actions of the illegal immigrants in

> question rather that of Mr Cando Armas. The conduct complained of in this case therefore occurred in the United Kingdom.
>
> I therefore find that the application fails under that subsection.
>
> I am also asked to consider subsection (3) of section 65. However, I do not find that this subsection applies in this case. If it was intended to apply in a case of this nature it would have stipulated that the conduct constitutes an extradition offence under the subsection if "some" of the conduct occurred in the category 1 territory.
>
> I find that subsection (3) is mutually exclusive of subsection (2). The request must therefore fail.
>
> Consequently I order the discharge of Mr Cando Armas."

Appeals under the Act: requirements as to time

12. Section 28 of the Act provides for an appeal to the High Court on a question of law or fact by the authority that issued the warrant against a decision to discharge the defendant. Section 28(5) stipulates that notice of an appeal under that section must be given within 7 days of the order for the defendant's discharge. In the present case, notice of appeal was filed on 29 July, well within that time limit.

13. Section 31(3) requires the High Court to begin to hear the appeal before the end of the "relevant period" as defined by rules of court. The applicable rules of court are to be found in CPR Part 52 and the Practice Direction supplementing it. Paragraph 22.6A of PD 52 provides that the High Court must begin to hear the substantive appeal under section 28 within 40 days of the person's arrest. That period of 40 days expired in early July, i.e., before the decision under appeal. However, paragraph 22.6A(4) provides that the High Court may extend the period of forty days if it believes it to be in the interest of justice to do so. The statutory authority for the power to extend the relevant period is to be found in section 31(4), and subsection (5) provides that the power to extend may be exercised even after the end of the relevant period.

14. Section 31(7) provides that if subsection (3) is not complied with, and the appeal is under section 28, the appeal must be taken to have been dismissed by decision of the High Court. However, that provision applies to the relevant period as extended under subsection (4): otherwise, the power to extend that period would be illusory.

15. Mr Hardy, on behalf of the Appellant, sought an extension of the relevant period in order to enable the appeal to be heard and determined. Mr Powels sensibly did not oppose the application. The problem in this case was the period between Mr Cando Amas's arrest and the extradition hearing, which exceeded the period originally permitted by section 8 of the Act. As mentioned above, the delay in the extradition hearing was given in order to assist the Respondent. For that reason, and because without an extension of the relevant period the right of appeal under section 28 would

have been nugatory, it was clear to us that it was in the interests of justice to extend the relevant period, and we did so.

Does section 65(2)(b) apply to the offences referred to in the warrant?

16. Before us, Mr Powels was equivocal on the question whether section 65(2)(b) was satisfied in relation to Mr Cando Armas: his submission depended on our approach to the interpretation of subsections (2) and (3). He suggested that because none of the boxes in the English translation of the warrant had been ticked, section 65(2)(b) was not satisfied. The District Judge held that the offences of which Mr Cando Armas had been convicted were framework offences, notwithstanding the absence of any ticks in any of the tick boxes in the English translation of the warrant.

17. We are clear that the District Judge was correct in holding that the absence of ticks in the English translation of the warrant was irrelevant. In the first place, the certificate which must show that alleged conduct of the defendant is a framework offence is that of the appropriate authority of the category 1 territory (section 65(2)(b)). In the present case the certificate was the document in Flemish signed on behalf of that authority rather than the English translation. Secondly, whether section 65(2)(b) applies does not depend solely on the list of tick boxes: if the certificate shows that the alleged conduct falls within the European framework list, it matters not that the applicable tick box has not been ticked. In the present case, it is clear from the description of the offences in the warrant that it is alleged that Mr Cando Armas committed 3 framework offences, namely trafficking in human beings, facilitation of unauthorised entry and residence and forgery of administrative documents (i.e. passports) (which were ticked in the original warrant) as well as participation in a criminal organisation (which was not). Accordingly, section 65(2)(b) applies.

The interpretation and scope of section 65(3)

18. It is common ground, and indeed obvious, that Part 1 of the Extradition Act 2003 was enacted in part in order to carry out the obligations of the United Kingdom under the European Council Framework Decision referred to above. We refer, for example, to the heading to Schedule 2 (European Framework List) and the identity of the list of offences it contains with that in Article 2 of the Framework Decision, and the omission from conduct to which section 65(2) applies (i.e. framework offences) of any requirement of criminality under the law of the United Kingdom: c.f. Article 2.2 of the Framework Decision. The warrant in the present case is a European arrest warrant as defined in the Framework Decision.

19. Article 2 of the European Framework Decision is so far as relevant as follows:

> "1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a

> detention order has been made, for sentences of at least four months.
>
> 2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:
>
> [There follows the list of offences set out in Schedule 2 to the Act.]
>
> 3. …
>
> 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."

20. Article 3 of the Framework Decision sets out a number of mandatory grounds for non-execution of a European arrest warrant. Article 4 sets out optional grounds for non-execution of the European arrest warrant: we refer to Article 4.7 below.

21. Mr Hardy, on behalf of the appellant, submitted that the District Judge's interpretation of section 65(3) led to absurd results that Parliament could not have intended. He gave the example of a person who buys a shotgun in Dover intending to join his co-conspirators in their aim of murdering the Mayor of Calais. His conduct would be outside both subsections (2) and (3). Parliament could not have intended that result. In support of his submission, he referred us to extracts from Hansard for 1 May 2003, setting out the debate in the House of Lords on the Second Reading of the Extradition Bill, as it then was, and the statement of Baroness Scotland of Asthal, the Minister of State of the Home Office, during the debate on the Bill in the Grand Committee of the House of Lords on 1 July 2003, when the Bill was amended by inserting the words "and no part of it occurs in the United Kingdom" in sections 64(2) and 65(2).

22. In his excellent skeleton argument, Mr Powels submitted that section 65(2) was intended to fulfil this country's obligations under the Framework Decision in relation to framework offences, and that the succeeding subsections of that section are concerned with non-framework offences. In relation to framework offences there is no requirement of double criminality: and that feature is matched by the provisions of section 65(2). He submitted that the exclusion of framework offences committed in part in the United Kingdom was enacted pursuant to Article 4.7 of the Framework Decision, which provides:

> "4. The executing judicial authority may refuse to execute the European arrest warrant:

…

7. Where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(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."

Thus there is no breach of the Framework Decision if this country refuses to extradite a person accused of an offence constituted by conduct that occurred partly in the United Kingdom and partly in the category 1 territory. Mr Powels submitted that the provisions of Article 4.7 are also reflected in section 65(4) and (5) of the Act.

23. Mr Powels accepted that his interpretation of the Act creates an anomaly, in that "extradition may be refused for someone accused of a framework list offence (part of which is committed in the United Kingdom) if the requirements of section 64(4) or (5) are satisfied"; but he submitted that this anomaly followed from the clear and unambiguous wording of the Act. He submitted that if section 65(3) applies to a framework offence comprised in part by conduct that took place in the category 1 territory and partly in the United Kingdom, the exclusion in section 65(2) of offences any part of which was committed in the United Kingdom would be ineffective. He pointed out that the accused in the example given by Mr Hardy might be prosecuted in this country for conspiracy to commit murder pursuant to section 1A of the Criminal Law Act 1977. Lastly, he submitted that "the conduct" in that subsection means "all the conduct" alleged to constitute the extradition offence, and that subsection (1) makes it clear that the conduct in question is that of the accused person only, and not that of any co-conspirators of his. It was this last submission that was accepted by the District Judge.

24. We do not find the construction of the Act easy. We start from the facts that Part 1 of the Act is a comprehensive code for the extradition of accused persons to Category 1 territories and that it was intended to implement the provisions of the Framework Decision. The object of the Framework Decision was to facilitate extradition between Member States of the European Union: we refer to the recitals and to Article 1.2. The list of framework offences includes offences of the most serious kind. Many of them are by their nature often committed by conduct occurring in the territory of more than one Member State: terrorism, trafficking in human beings, illicit trafficking in narcotic drugs and weapons, illicit trafficking in endangered species and in cultural goods are some examples. We are reminded of the speech of Lord Slynn in *Re Al-Fawwaz* [2001] UKHL 69, [2002] 1 AC 556 at [37], when giving reasons for not regarding the jurisdiction of a state seeking extradition as being limited to its territory:

"… It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug

> smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal."

It is not coincidence that all of the offences to which Lord Slynn referred are now framework offences. We also refer to Lord Bridge of Harwich in *R v Governor of Ashford Remand Centre, Ex p Postlethwaite* [1988] AC 924, 947, cited by Lord Hutton in *Re Al-Fawwaz* at [64]:

"I also take the judgment in that case [*In re Arton (No 2)* [1896] 1 QB 509, 517] as good authority for the proposition that in the application of the principle the 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.'"

25. It would be highly regrettable if trans-national offences were not extraditable offences simply because a (possibly minor) criminal act in the totality of criminal conduct occurred in this country. For example, if the decision of the District Judge is correct, a person involved in drug trafficking, importing drugs into Belgium, who in the course of his criminal conspiracy came for a day to London and made a telephone call to Belgium to arrange a collection of drugs imported into Belgium by his co-conspirators cannot be extradited under section 64(2), because a part of his criminal conduct occurred in the United Kingdom. His offence is not within subsection (3), because not all his conduct occurred in Belgium; subsection (4) does not apply, because some of the conduct occurred within Belgium; subsection (5) in inapplicable, because the conduct occurred within the category 1 territory and part of it occurred within the United Kingdom; subsection (6) similarly is inapplicable; and so is subsection (7). It may be that the offender could be prosecuted in this country; but if the principal criminal activities and consequences occurred in a category 1 territory, it will normally be appropriate for him to be tried there, and particularly so if his co-conspirators are to be tried there. This result is so absurd that we would strain not to interpret the Act as producing it.

26. In our judgment there is nothing in section 64 or in section 65 expressly to exclude the application of subsections (3) to (6) to framework offences. The word "also" in subsections (3) to (6) does not of itself indicate that each subsection is exclusive of every other subsection. We see no reason to confine them to non-framework offences, and in our judgment they are not. Subsections (2) to (6) form a list, and conduct constitutes an extradition offence if any one of them applies to it.

27. We have reached this conclusion without reference to the extracts from Hansard to which Mr Hardy drew our attention. We consider the application of subsections (2) to (6) of section 65 to framework offences to appear sufficiently clearly from the words of the statute.

28. Turning to section 65(3), we accept that the ordinary meaning of “the conduct” is “all the conduct”. But if that is what “the conduct” means, it is impossible to see why Parliament inserted the words “and no part of it occurs in the United Kingdom” in subsection (2): if all the conduct occurs in the categfory 1 territory, it is unnecessary to stipulate that none of it occurs in the United Kingdom. The same formulation is found in subsection (6).

29. We think it necessary if possible to arrive at an interpretation of section 65 that does not preclude the extradition of a person who commits a crime in a category 1 territory simply because some of his criminal conduct also occurred in the United Kingdom or in another category 1 territory. If “the conduct of a person” means “all the criminal conduct”, then extradition under Part 1 of the Act for offences committed partly in one country and partly in another is very difficult and the position illogical. We referred above to a hypothetical drug dealer. Framework offences may be committed in part in more than one category 1 territory, as where some arrangements are made by a person in Belgium and in Germany pursuant to a criminal conspiracy to import drugs into Belgium, and his extradition is sought from the United Kingdom to Belgium. If “the conduct” in subsection (2) means “all the conduct constituting the offence”, it is inapplicable; subsection (3) is inapplicable, because some of the conduct occurred in Germany; subsection (4) is not satisfied, because some of the conduct occurred in Belgium; and subsection (6) is not satisfied, for the same reason.

30. However, if “the conduct” in section 65(2) to (6) means “such of the conduct as constitutes a criminal offence (under the law of the category 1 territory)”, this highly undesirable conclusion is avoided and a more practical interpretation arrived at. The drug dealer active in Germany and in Belgium carried out acts in Belgium that constituted the offences of drug trafficking (a framework offence) and the illegal importation of drugs into that country. It is irrelevant that as part of the conspiracy he also did acts in Germany (or the United Kingdom). Section 65(2) is satisfied. So is subsection (3). In this case it is unnecessary to consider subsection (4) or (5), but the same interpretation applies there and in subsection (6). The terms of Article 4.7 of the Framework Decision, which is permissive in terms, do not require a different conclusion.

31. Regrettably, sections 64 and 65 of the Act have not been drafted with the need to deal with trans-frontier offences taken expressly or clearly into account. We have reached our conclusion because of the need to arrive at a workable interpretation that addresses the nature of framework offences and indeed much crime in the modern world.

Disposition

32. The District Judge decided that “the conduct” in section 65(3) means “all the conduct”. It is unclear from her judgment whether she considered that some of the criminal conduct of Mr Cando Armas had occurred in Belgium. The interpretation of section 65(3) was the relevant question for the purposes of section 29. For the reasons we have set out above, we consider that her interpretation was mistaken. If Mr Cando Armas’s criminal conduct occurred in Belgium, there was an extradition offence

under subsections (2) and (3); if not, neither provision applied. Counsel were agreed that if we disagreed with the Deputy Senior District Judge's interpretation of section 65(3), the case would have to be remitted to her. The case will be remitted to the Deputy Senior District Judge for her to decide in the light of our judgment.