THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 9

Record No: CA 2016/594

Ryan P.
Mahon J.
Edwards J.

THE MINISTER FOR JUSTICE & EQUALITY

Respondent/Applicant

V

PIOTR PAWEL SKIBA

Appellant/Respondent

Judgment delivered on the 12th day of January, 2017 by Mr. Justice Edwards

Relevant facts

1. The appellant/respondent (hereinafter "the appellant") is the subject of a European Arrest warrant issued by the Republic of Poland and dated the 21st of March 2016 which seeks his rendition for the purpose of requiring him to serve two sentences of imprisonment, one of nine months duration, and one of one year and six months duration, following his conviction for certain offences before the courts of the issuing state.

2. The appellant unsuccessfully contested his surrender in proceedings before the High Court at a hearing for the purposes of s. 16 of the European Arrest Warrant Act 2003 (the Act of 2003); and on the 1st of December 2016 the High Court (Donnelly J) made an order for his surrender under s. 16(1) of the Act of 2003. The appellant was remanded in custody to await his actual surrender.

3. The default position under the Act of 2003 is that a surrender order made under s. 16(1) comes into effect fifteen days after it is made (per s. 16(3)) and actual surrender must take place within a further 10 days (per s. 16(3A)). There is however provision in the legislation (in s. 16(5)) which allows for a new surrender date to be fixed exceptionally outside of the 10 day default period provided for in subs. (3A), where the High Court is satisfied that requires that, because of circumstances beyond the control of the State or the issuing state concerned, the person was not surrendered within the time for surrender under subs (3A) or, as the case may be, will not be so surrendered.

4. The primary order made by Donnelly J on the 1st of December 2016, which authorised the surrender of the appellant under s.16(1) of the Act of 2003, was accompanied by ancillary orders under s. 16(4)(c)(i) and (ii), respectively, of the Act of 2003, also made by her. Those ancillary orders covered two contingencies and directed: (i) that should the appellant not be surrendered before the expiration of the time for surrender under subsection (3A) he should be brought before the High Court once again as soon as practicable after that expiration; or (ii) if it appeared to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that the appellant would not be surrendered on the expiration of the time for surrender provided for under subsection (3A) he should come before the High Court once again before that expiration.

5. The order for surrender having been made on the 1st of December 2016, the Irish Central Authority for the European Arrest Warrant made arrangements with the relevant Polish authorities in early course thereafter, and in the normal way, for an actual surrender of the respondent to be effected on the 22nd of December 2016, which was within the 10 day default period provided for in subs. (3A) of the Act of 2003. Again, as is usual in this country, the envisaged mode of actual surrender was that the appellant would be placed on a commercial airline flight from Dublin Airport to a destination in Poland which was scheduled to depart on that date, and that he would be accompanied on the flight by police officers from the issuing state who would have travelled to Ireland in advance for the purpose of so accompanying him. It is understood that tickets were purchased for that purpose on the 9th of December 2016.

6. However, the appellant's surrender did not take place as planned. On the nominated date the appellant was duly brought from Cloverhill Prison by members of the Garda Siochána extradition unit to Dublin Airport. There the Gardai rendezvoused with their Polish counterparts. The appellant, and the Polish police who were to chaperone him on the journey, were then checked in for the flight to Poland. Having done so the entire party comprising the appellant, the Gardai and the Polish police officers, proceeded to the assigned departure gate. From here it was intended that they would cross the tarmac as a group to the relevant aircraft, and that the appellant and the Polish police officers, taking leave of the Gardaí at that point, would then board the aircraft. However, before that could happen the appellant indicated that he was not prepared to proceed beyond the departure gate. As Sergeant Kirwan put it, in his evidence in later proceedings before the High Court, "*at that point Judge he refused to go and it became apparent that he wasn't going to go except by using more than minimal force Judge and the Captain of the plane Judge decided at that point that he didn't want him on his plane*."

7. In the circumstances the attempt to surrender on that date was abandoned at that point, and the appellant was returned to Cloverhill Prison overnight. On the following day, the 23rd of December 2016, the respondent/applicant (hereinafter "the respondent"), in purported pursuance of the ancillary direction given by Donnelly J under s.16 (4)(c)(ii) of the Act of 2003 brought the appellant back before the High Court. The Christmas court vacation had commenced at this point and this was a vacation sitting before Humphreys J.

8. Subsection 5 of s.16 of the Act of 2003 is in the following terms:

> *Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall—*
>
> > *(a) if satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered—*
> >
> > *(i) with the agreement of the issuing judicial authority, fix a new date for the surrender of the person,*

and

(ii) order that the person be detained in a prison (or, if the person is not more than 21 years of age, in a remand institution) for a period not exceeding 10 days after the date fixed under subparagraph (i), pending the surrender, and

(b) in any other case, order that the person be discharged.

9. Evidence was led on behalf of the respondent from the aforementioned Sgt Kirwan of the Garda Siochána Extradition Unit concerning what had occurred on the previous day in connection with the abortive attempt to effect a surrender of the appellant. Following this evidence, of which we have a full transcript, counsel for the respondent duly applied to the Court for orders under s. 16(5)(a)(i) and (ii) respectively of the Act of 2003. This application was opposed and in effect the court was being requested by counsel for the appellant to discharge his client under s. 16(5)(b).

10. Notwithstanding the appellant's objections, which will be summarised later in this judgment, the High Court judge expressed himself to be satisfied on the evidence adduced before him that, because of circumstances beyond the control of the State the appellant would not be surrendered within the time for surrender provided for under s.16(3A). In the circumstances he was prepared to grant the orders sought and fixed the 5th of January 2017 as a new surrender date, the issuing judicial authority having indicated in advance its agreement to the proposed new date. The appellant was further remanded in continuing custody pending his surrender.

11. This appeal is against the said judgment and order of the High Court (Humphreys J.) dated the 23rd of December 2016 granting the application of the respondent for orders under s. 16(5)(a) (i) and (ii).

The objection to the fixing of a new date.
12. On the hearing of this appeal counsel for the appellant has re-iterated a complaint made by him before the court below that there was insufficient evidence before the High Court to enable that court to be satisfied that surrender within time was not going to be possible "*because of circumstances beyond the control of the State, or the issuing state concerned*", and that essentially the judge's finding was against the weight of the evidence. It was submitted that as this Court (ie the Court of Appeal) has previously expressed itself satisfied that the intention of the Oireachtas in enacting subs. 5 (and also subs. 5A, although it has no relevance to the present case) of s. 16 of the Act of 2003 was to faithfully transpose Article 23 of the *Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States* (2002/584/JHA. ; O.J. L190/1 of 18.7.200) as amended ("the Framework Decision"), the subsection required to be interpreted and in applied in conformity with the said Article 23 of the Framework Decision, as mandated by *Criminal proceedings against Pupino (C-105/03)* [2005] E.C.R. I-5285; [2005] 2 C.M.L.R. 63. It was submitted that the manner in which Article 23 is intended to be operated is the subject of a detailed recent opinion by Advocate General Bobek of the Court of Justice of the European Union ("the ECJ")delivered on the 27th of October 2016 in the case of *Minister for Justice and Equality v Thomas Vilkas,* Case C-640/15. (We were further informed that a judgment of the Grand Chamber of the ECJ in the same case is scheduled for delivery on the 27th of January 2017). It was submitted that in evaluating whether the circumstances as they existed were truly "*beyond the control*" of the relevant parties the High Court ought to have adopted the approach commended by Advocate General Bobek in paragraph 68 of his said opinion.

13. The *Vilkas* case involved a preliminary reference by us, the Court of Appeal, to the ECJ seeking guidance on the interpretation of Article 23 of the Framework Decision. It requires to be stated immediately that the facts in *Vilkas* were markedly different from those in the present case, involving, as they did, a second application to the High Court to have a new date fixed, a new date having previously been fixed pursuant to s.16(5)(a)(i) of the Act of 2003. Nevertheless, counsel for the appellant contends, the guidance offered by the Advocate General is of general application to all cases in which Article 23 of the Framework Decision is engaged

14. In the course of his opinion, the Advocate General had said (at para 68 thereof):

> *"68. Concerning the first element of force majeure, the behaviour of the requested person can be considered as a 'circumstance beyond the control in the sense of Article 23(3) if it cannot be foreseen and is external to the control of the Member State alleging them. Aggressive behaviour at the time of surrender may therefore be considered as an unforeseen and extraneous event only if the factual elements at the disposal of the authorities in no way hinted at such a scenario occurring. When assessing the likelihood of such a scenario, due consideration must be given by the national authorities to the specific factual background of each individual case, including considerations such as: the crimes for which the person is requested or has been convicted; behaviour during detention; previous records; and any other elements related to his background that may emerge from the national file."*

15. However, in the curial part of his ex tempore judgment in the present case Humphreys J stated (inter alia):

> *"Well, I'm not going to apply paragraph 68 of the Advocate Generals opinion because in my view that is a departure from the normal understanding of force majeure. So I'm going to give it its normal meaning. The respondent refused to get on the plane, that's a circumstance outside the control of the Minister. So because I'm satisfied that the failure to effect the surrender was because of circumstances beyond the control of the state. I'll fix the date of the 5th January for the surrender of the Respondent and order him to be detained …"*

16. It has been contended that the High Court judge's express refusal to follow the interpretation commended by the Advocate General in his opinion (which was admittedly not binding) was an error in itself; and it has been further contended that this error directly led the judge into the further error of making a finding that surrender could not be effected within the default statutory time limit due to circumstances beyond the control of the State, in the absence of any evidence to support that finding.

17. At the hearing before the High Court, that court had received evidence that on the 12th of December 2016 a phonecall had been made by the appellant's solicitor to Sgt Kirwan advising him that the appellant had a fear of flying. Sgt Kirwan's evidence was that he advised the appellant's solicitor to speak to a representative of the Chief State Solicitor's office. He himself had then informed the relevant authorities of what had transpired during this phone call.

18. In the course of giving evidence before the High Court Sgt Kirwan expressed himself to have been sceptical of the claimed fear of flying. He observed that at the time when the surrender order was made no indication had been given to Donnelly J concerning the alleged fear of flying. Moreover, no medical evidence had been proffered in support of the claimed fear. He was then asked if there had been occasions in the past, occasions on which persons were being surrendered, where they had exhibited nervousness about, or a claimed fear of, flying and he responded:

> *"Yes Judge, many occasions, I've dealt with hundreds of surrenders by air Judge, 99.9% of them going according to plan and I have met many people when I've met them at the airport they have said they have never been on a plane before and they would have been quite anxious and it is normal enough but they didn't have any problem boarding them on the plane."*

19. In the course of his submissions to the High Court judge, counsel for the appellant contended that the phonecall from the appellant's solicitor had been sufficient to put the State on notice of a potential problem, and specifically to render it foreseeable that the appellant might refuse to board the aircraft. Accordingly, his argument went, it could not then be credibly contended that there were circumstances "*beyond the control*" of the relevant parties. It was submitted that the evidence did not establish that.

20. Moreover, in further support of that contention, counsel for the appellant had in addition sought to rely upon a course of correspondence, admitted in evidence by agreement with the respondent, between the Irish Central Authority and the authorities in Poland, the catalyst for which had been the information communicated by the appellant's solicitor.

21. It may be helpful to review this correspondence in some detail. It commences on the 12th of December 2016 (the date on which Sgt Kirwan had been telephoned by the appellant's solicitor) with a letter from the Central Authority marked "urgent" and addressed to the issuing judicial authority. It was in the following terms:

> *"I refer to previous correspondence.*
>
> *Solicitors acting for the respondent have advised that their client has expressed a fear of flying.*
>
> *Accordingly alternative arrangements for his surrender, not involving commercial aircraft, will be required.*
>
> *The respondent has expressed a fear of flying and there is a risk that he will resist boarding a commercial aircraft resulting in the pilot refusing to allow him on board, which has happened in the past.*
>
> *In the circumstances, please make alternative travel arrangements to collect the respondent between the 16th and 25th of December 2016 (dates inclusive). If due to circumstance beyond the control of the issuing state this is not possible then a date for the purpose of extending the time for his surrender should be proposed by the issuing judicial authority (Sad Okregowy w Kielce) for agreement in accordance with Art 23 .3 of the Framework Decision and the respondent will have to be collected within ten days of that date."*

22. This letter was responded to by an e-mail dated 16th December 2016 from NCB Warsaw / SIRENE Poland. (The acronym NCB Warsaw refers to the Europol National Crime Bureau Unit at Warsaw, while the acronym SIRENE (which stands for Supplementary Information Request at the National Entries) Poland refers to the Polish branch of the Schengen Information System network supporting co-operation and coordination between law enforcement agencies in the EU member states). These agencies jointly perform functions in Poland broadly corresponding to those of the Garda Siochána Extradition Unit in this jurisdiction, and in particular operate a "Convoy Unit" for transporting extraditees in the context of surrender arrangements. The e-mail noted that:

> *"… your authority informed that the subject has expressed a fear of flying. Taking above into consideration, on behalf of our Convoy Unit, please kindly inform us if there is an appropriate medical documentation confirming the subject's fears (phobias) of flying or whether the only information is information which has been provided by his solicitors only."*

23. This was followed up by a letter from the issuing judicial authority to the Irish Central Authority also dated 16th December 2016 which made a request for "*relevant medical documentation concerning the drugs (phobia related) for Piotr Pawel Skiba's travelling by air*".

24. Then on the 19th of December 2016 the Irish Central Authority wrote again to the issuing judicial authority stating:

> *I refer to your correspondence dated 19/12/2016.*
>
> *This office is not in possession of any medical documentation concerning the respondent's expressed phobia.*
>
> *As previously informed, Solicitors acting for Mr. Skiba have advised that their client has expressed a fear of flying.*
>
> *In view of the respondent's expressed fear of flying, there is a risk that he may resist to board a commercial aircraft, resulting in the pilot refusing to allow him on board. Accordingly, arrangements for his surrender, not involving commercial aircraft, appear to be warranted.*
>
> *There is a concern now that he has expressed that he has a fear of flying, if he were to refuse to board a commercial flight it might then be difficult to persuade the High Court to extend the time for surrender on the basis of circumstances beyond the control of the member states./*
>
> *That is because it could be argued on his behalf that it was reasonable to foresee that he would not voluntarily board an aircraft and therefore the reason he was not surrendered was not as a result of something beyond the control of the states in question as alternative arrangements should have been in put in place.*
>
> *As matters stand, the respondent must be surrendered to the Polish police on or before 25/12/2016. If due to difficulty in arranging for an alternative means of surrender excluding commercial aircraft this is not possible, then a date for the purpose of extending the time for his surrender should be proposed by the issuing judicial authority (Sad Okregowy w Kielce) for agreement by the High court in accordance with Art 23 .3 of the Framework Decision. The respondent will have to be collected within ten days of that date."*

25. Counsel for the appellant suggested that as this correspondence contained an express acknowledgment by the Irish Central Authority, as early as the 12th of December, 2016, that a risk that the appellant would resist boarding the aircraft was foreseen, and as it had suggested to the Polish authorities that alternative arrangements should be made to transport the appellant other than by air, and a decision was made to attempt to transport the appellant by air regardless, it could not be said that what transpired on the 22nd of December 2016 had represented circumstances outside of the control of the relevant authorities.

26. On the contrary, it is said, what the evidence had in fact established was that the problem that arose at Dublin Airport on the

22nd of December 2016 was reasonably foreseeable as being a risk once the appellant's solicitor had notified Sgt Kirwan of the appellant's phobia; that it was in fact foreseen; and that it was ignored. It was not a case of there being insufficient time to make alternative arrangements, or of there being a difficulty with resources. Rather, there had been a conscious decision to attempt to proceed with the original plan to repatriate the appellant by air, notwithstanding that the risk that the appellant would resist boarding the aircraft had been foreseen. The problem that in fact arose was therefore said to have been entirely avoidable. Counsel for the appellant has continued to maintain that position before this Court. In those circumstances, he has submitted that the High Court's finding that there were circumstances beyond the control of the relevant authorities was not just unsupported by the evidence actually adduced, but in fact contradicted.

The response to the objection raised

27. In responding to the appellant's complaints, counsel for the respondent has contended that whether or not the Irish Central Authority, upon having been notified that the appellant had a fear of flying, perceived there to be a risk that the appellant might refuse to board the aircraft is not particularly material. The Central Authority was not the person required by the statute to make the relevant assessment. It was for the High Court judge to assess, on the evidence before him, whether he was satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the appellant would not be surrendered within the time limited by s.16(3A).

28. Counsel for the respondent accepted that the judge was required to approach the matter of that assessment with due diligence. However, she contended, what Advocate General Bobek had in fact been commending at paragraph 68 of his opinion was a requirement for a heightened due diligence in the case of an application for the approval of a new surrender date on a second or subsequent occasion, which was the situation that had given rise to the reference in the *Vilkas* case but which was not the situation here.

29. Counsel submitted that the only evidence before the High Court judge, beyond the factual description of what had happened at Dublin Airport on the 22nd of December 2016, was Sergeant Kirwan's testimony concerning the communication that had been received from the appellant's solicitor. In that communication, the extent or degree to which the appellant might be affected by said alleged fear of flying was not stated; nor was it stated that the appellant would be unable to travel by air or that he might refuse to board an aircraft; nor was any indication given that the appellant's fear of flying had ever prevented him from flying in the past. Moreover, no medical evidence had been adduced in support of the claimed fear of flying. The authorities were not told that the appellant had a phobia in the medically pathological or psychological sense, or how it might manifest itself or affect him. The information communicated was limited to advising Sgt Kirwan that the appellant had a fear of flying.

30. Further, Sergeant Kirwan had legitimately expressed scepticism of the claim of fear of flying. He had made the valid point that the issue was raised very late in the day, and without any detail or supporting evidence. In addition, he had had previous experience of hundreds of persons being surrendered by air with the overwhelming majority of them going according to plan, and with the persons concerned boarding the aircraft without resistance. This was entirely credible evidence. Many people are nervous of or have a fear of flying but most people are prepared to undertake flights notwithstanding their nervousness or fear. It was submitted that cases in which the fear exists to such a degree as to be phobic and to make the sufferer resistant to boarding an aircraft are rare. Due diligence demanded that any claimed fear of flying communicated to the authorities be assessed with reference to the details provided concerning the degree to which the claimed fear affected, or was likely to affect, the sufferer, how it had affected him in the past, and any professional or medical help availed of, or being availed of, in respect of it. There were simply no details provided in this case beyond the bald statement, made very late in the day, that the appellant has a fear of flying. The information in that regard was peculiarly within the knowledge of the appellant and his advisors. The onus was therefore on them to proffer and adduce such evidence to the authorities. Despite this the appellant did not offer any evidence himself, nor was any extrinsic supporting material furnished.

31. In addition, neither the appellant nor his solicitor gave any evidence at the hearing before Humphreys J. The suggestion that the information communicated on the 12th of December by the appellant's solicitor was as bald and non-specific as the respondent suggests was never challenged and appears to be accepted.

32. The Court was entitled, and indeed was obliged, to take all of that into account. Accordingly, counsel submitted, the High Court judge's decision had been the result of the application of reasonable and normal due diligence in the assessment of the evidence before him. It was not a situation requiring heightened due diligence such as might arise where a previous attempt to effect transport by air had failed due to disruptive behaviour by the appellant. The Court's decision was therefore amply justified on the evidence it had before it.

Decision

33. I find myself in agreement with counsel for the respondent's argument. Yes, the High Court judge was obliged to exercise due diligence is assessing the claim of force majeure or "*circumstances beyond the control*" of the relevant authorities, but there is no reason to believe that he did not do so. However, he had no grounds for applying an approach of heightened due diligence. The argument advanced by counsel for the appellant is premised on the proposition that once Sgt Kirwan had been informed that the appellant had a fear of flying that it was reasonably foreseeable that he would resist boarding the aircraft or create such disruption as to precipitate in a pilot refusing to allow him to board. I would beg to differ. A matter such as fear of flying is very easily asserted, but before action on foot of it could reasonably be justified there would have to be some assessment of the level of the theoretical risk involved. Very many people have a fear of flying and would prefer to travel by sea or overland despite the additional time involved in doing so. However, in most cases the fear does not operate to such a degree as to prevent them from taking flights. By the same token, a small percentage of people do have a fear so profound as to represent a phobia that operates to inhibit them from taking flights. In assessing the possible implications of an asserted "fear of flying" an assessor would naturally look to see if the assertion was particularised and supported in any way, e.g., by the provision of details by the person himself concerning how he had been affected historically, by third party accounts of how he had been affected, and optimally by relevant expert or professional testimony if any such material was available. However, absent any such support, a bald assertion could, it seems to me, do no more than flag a remote and theoretical possibility, rather than a reasonably foreseeable risk to be actively responded to.

34. Much reliance was placed by the appellant on the Central Authority's reaction to the information communicated. I consider that the two letters written by the Central authority, on the 12th of December 2016 and on the 19th of December 2016, respectively, have to be considered together. They do not indicate, as counsel for the appellant suggests they do, an acceptance by the Central Authority that it was reasonable to foresee that he would not voluntarily board an aircraft. Rather, they indicate acceptance that such a proposition "*could be argued on his behalf*". That position may well have been adopted out of a concern on his part to be seen to have ostensibly taken on board certain of the Advocate General's remarks in the early aftermath of the promulgation of his opinion, but in circumstances where all the nuances of that opinion may not yet have been fully appreciated.

35. Arguably, the Central Authority could be said to have over-reacted to the information received, in the absence of details of the degree to which the appellant suffered from the claimed fear or concerning how he had been affected by it up to that point in time. However, as counsel for the respondent correctly points out, how the Central Authority may have viewed the risk is not determinative of anything. Rather, the person required under statute to assess whether the circumstances advanced as constituting *force majeure* or "*circumstances beyond the control*" of the relevant authorities, were properly to be so characterised, was not the Central Authority but the High Court judge in the court below.

36. I am satisfied that the High Court judge's assessment was in fact conducted with due diligence, and was consistent with the relevant evidence actually before him.

37. I would therefore dismiss the appeal.