**An Chúirt Uachtarach**



**The Supreme Court**

Dunne J

Charleton J

Baker J

Woulfe J

Hogan J

Supreme Court appeal number: S:AP:IE:2021:000029

[2021] IESC NN

Court of Appeal record number: 2021/37

[2021] IECA 79

High Court record number 2017/No 54 EXT

[2021] IEHC 31

**Between**

**The Minister for Justice and Equality**

**Applicant/Respondent**

**- and -**

**Andrius Sciuka**

**Respondent/Appellant**

**Judgment of Mr Justice Peter Charleton delivered on Monday 13 December 2021**

1. Woulfe J would hold that the postponement of the surrender of Andrius Sciuka to Lithuania, extradition having been ordered on foot of a European Arrest Warrant, was lawful, whereas Hogan J takes the opposite view. This judgment gives reasons for concurring with Hogan J.

2. Having been scheduled for surrender to Lithuanian authorities in Dublin Airport on 5 February 2021, the requesting state sought a postponement due to the rampant Covid-19 pandemic. This was the highpoint in much of Europe for the disease which has caused perhaps 5 million deaths worldwide. Postponement of a surrender order is a serious matter under Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, since this is required to take place within 10 days after the High Court has made an extradition order. Delay is exceptional, possible on humanitarian grounds (s 18 of the European Arrest Warrant Act 2003 and Article 23 of the Framework Decision) and because of circumstances beyond the control of the requesting and requested authorities mutually. Woulfe J would hold that the letter from the Lithuanian authorities indicating the closure of the usual air route of Ireland-Germany-Lithuania is sufficient evidence to postpone surrender in this instance. He would further hold that judicial notice was properly taken of the raging pandemic in ordering postponement and that protection from this disease, easily picked up when travelling, was a humanitarian ground justifying the surrender being put back. As Hogan J notes, delay is an exceptional step and justifiable only on serious grounds; further holding that the letter from the travel agent appended to the communication from the requesting state was insufficient.

3. Where both judgments concur is in placing the duty on the Minister to put before the High Court sufficient evidence to establish the existence either of a beyond control situation or humanitarian considerations justifying delay. Woulfe J’s analysis enables judicial notice to be taken of the disruption caused by the seething spread of the disease and its unpredictable and mutating variants as the reason for the unavailability of flights to Germany, thereby enabling the High Court to rely on its own judicial notice of travel difficulties; Hogan J disagrees.

**Judicial notice**

4. A disconnect occurs on reading Davitt J’s judgment in *The State (William Taylor) v Circuit Court Judge for Wicklow* [1951] IR 311, 322, between his impeccable reasoning that a judge “is entitled to bring to the determination of any issue his own knowledge relevant thereto, not his private or particular knowledge as an individual but his general knowledge as a lawyer and a Judge” and the issue that arises in the mind at how knowledge shifts with the changing habits of generations. Whereas his example of the relationship between Robinson Crusoe and Man Friday has passed into a term of general speech, in reality young readers may no longer be given this book and hence know little about the origin of the concept of footsteps in the sand. His second example of “the frozen snake in the fable” would not readily draw to mind the concept of ingratitude and ingrained nature; as Aesop recounts the tale, a farmer finds a frozen snake on his land, brings it into his home and carefully enables it to thaw, only to be bitten when the reptile reverts to character as well as to life. What was commonplace currency at one time may dissipate with the passing of the generations. But, as Professor John T McNaughton states, Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy, (1969) 14 Vanderbilt Law Rev 778 at 786:

the one distinguishing characteristic of judicial notice is the concept that the tribunal has the right, in appropriate instances, to inform itself as to a material matter by methods in addition to the reception of formal evidence, and it is implicit that the information may be obtained by resort to sources other than those adduced by the litigating parties."

5. Judicial notice may be only taken of such “facts which are so well-known or notorious as to render proof unnecessary”; Powles, Waine and May, *Criminal Evidence* (6th edition, London, 2015) 5.08. An oft-cited example is that Christmas day is on 25 December, but even there with the shifting cultural landscape means that for those following the Julian calendar it is on 7 January. The doctrine of judicial notice is there to enable only the facts in dispute between litigants to be focused on and to leave what is clear and obvious as a background not requiring specific mention. Perhaps subsidiary to that is that courts should require essential proof only and not lapse into pernickety demands as if judges lived outside the real world; EM Morgan, Judicial Notice (1944) 56(3) Harv L Rev 269. Hence, Professor Morgan states:

In an adversary system such as ours, where the court is bound to know the law and the parties to make known the facts, it is particularly important that the court prevent a party from presenting· a moot issue or inducing a false result by disputing what in the existing state of society is demonstrably indisputable among reasonable men [and women].

6. Just as the hearsay doctrine has a specific exception for notorious facts and for public records, thus readily ascertainable facts from sources of generally impeccable reliability can establish, for instance, the course of a road, a watercourse or a railway line; Henchy J in *Minister for Defence v Buckley* [1978] IR 314, finding that a map referred to in relevant statute could be relied upon as *prima facie* evidence in the absence of contrary evidence as to its accuracy. Notoriety, however, is not to be equated with conclusivity. Wigmore, *Evidence* (3rd edition, Boston, 1940) at p 535 states that where judicial notice is taken of a fact, “the opponent is not prevented from disputing the matter by evidence, if he believes it disputable.” Such a dispute would rarely arise as the judicial notice doctrine concerns backdrops to facts in issue as opposed to the disputed facts. Hence, Davitt J in *The State (William Taylor) v Circuit Court Judge for Wicklow* at p 320 rightly rested the doctrine of judicial notice “upon foundations of common sense, experience, and convenience rather than on any more logical or scientific principles.” To again quote Professor Morgan’s exposition, at 291:

Resort to the basic reasons for judicial notice marks the limits of the matters noticed and of the field of application in litigation. There is no part of the process of administering justice in a rational system in which the administering agency may properly disregard what is so widely accepted as true as not to be the subject of reasonable dispute or what can 'be immediately and accurately demonstrated to be true by resort to easily accessible sources of indisputable accuracy.

7. A short journey through the caselaw confirms this. If a fact in issue is where the land border is on this island, on a customs charge of exporting pigs to Northern Ireland, proper proof will be required; *AG v Kirk* [1955-56] Ir Jur Rep 57. Similarly, foreign laws and legislation may be accepted by the parties to establish a relevant legal status, but otherwise must be proven; *O’Callaghan v O’Sullivan*[1925] 1 IR 90. But: that international airports generally rigorously check passports (*MSM v Refugee Appeals Tribunal* [2015] IEHC 330); that land and property prices declined markedly in consequence of the financial events of 2008 (*Bank of Scotland v Shovlin* [2012] IEHC 35); that heroin is an addictive drug (*The People (DPP) v Byrne* [2012] IECCA 72); that trams have the kind of doors known to everyone using them (*Byrne v Londonderry Tram Co* [1902] 2 IR 457); that racehorse yearlings generally fetch prices a multiple beyond what a plaintiff may claim (*Waters v Cruikshank* [1967] IR 378); that the State had repaid loans provided by the International Monetary Fund (*Dowling v Minister for Finance* [2018] IECA 300); that a particular river was tidal at a point (*Ingram v Percival* [1979] 1 QB 548) – all these have been accepted as facts that come into a case without specific proof. Most texts give a set of examples. In 2021, what living with this latest coronavirus disease since Saint Patrick’s Day in 2020 has established notoriously includes that the virus is infectious, that mutations have increased the reproduction rate, that people who catch it often lose taste and smell, that people of very high body mass index are in particular danger, as are the very old and those with supressed or challenged immune systems. In terms of approach, judicial notice is not about procedure or limited by what the parties put before the judge, rather as Professor Morgan notes, at 270:

In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so .... He may reach a conclusion in accord with the overwhelming weight of available data or against it . . .. In all of this he is entitled to the assistance of the parties and their counsel, for he is acting for the sole purpose of reaching a proper solution of their controversy. But the parties do no more than to assist; they control no part of the process.

8. But judicial notice is a principle enabling the use, as opposed to the proof, which the principle bypasses, of facts. What matters is that the judge uses his or her general experience as a person and not because of a particular study of land borders, of motor engines, of the history of transport, of livestock or anything beyond what living and being aware of events teaches members of the community, perhaps even local community matters of notoriety; *Reynolds v Llanelly Associated Tin Plate Co* [1948] 1 All ER 140. But, if a judge had an issue as to whether some fact might be disputed, as opposed to being beyond dispute as notorious, then a question to the court or witnesses such as “is the river not tidal there?” or “would anyone get more than about a third of the 2006 price for a house in that area in 2012?” might be appropriate. The whole point about judicial knowledge is that it is evidence that is a known backdrop to what the parties have in dispute among them in the court case as opposed to a fact that is sprung on the litigants out of the blue.

9. Thus the limit of judicial knowledge is drawn at what the community generally knows, at notorious facts and generally indisputable information, but does not extend into arcane study requiring expert testimony, facts centrally disputed by the parties and the occurrence or existence of what is not commonplace knowledge.

**This case**

10. Actually, here, the doctrine of judicial notice hinders rather than helps the Minister. Yes, there was a pandemic and it undoubtedly disrupted travel among countries. Certainly, as variants emerge even now in the structure of the Covid-19 virus some countries are banning, and have banned in the past, non-essential travel. But is not transferring a prisoner important, at least, if not essential? Definitely, there were air routes which ceased to operate. But the shutting of one usual and preferred route of travel did not mean that a surrendered person might not travel to another major hub by air and take a train or bus from there. Did trains and buses cease to travel in Ireland or in Europe during the pandemic? General knowledge would suppose restrictions but not the mothballing of these forms of transport. This is the point at which the Minister failed to establish her case. People travel a lot and are used to changing their arrangements. Simply saying, in a context as serious as this and against a backdrop of legislation setting strict time limits, that one route is shut establishes nothing in and of itself. Two final comments are required.

**Humanitarian considerations**

11. Firstly, what is a humanitarian consideration can include a situation beyond the control of the requesting and requested country. One may be a subset of the other, but not necessarily, and it would be an unhappy use of the law to start drawing unreal boundaries as between them or to refuse applications on the basis that one was pleaded as opposed to the other in seeking a postponement. Both Woulfe J and Hogan J describe the situations that the concept of humanitarian considerations embrace. That is a general concept that includes, but is not limited to, “substantial grounds for believing that” travel or surrender in a particular situation “would manifestly endanger the requested person's life or health” but could extend to a need for treatment before travel or perhaps a grave personal or family crisis. The general concept is not to be limited. It can be that exposing someone especially vulnerable who is not vaccinated to travel might be that but, again, the world is learning that absent an underlying condition that vaccination means that Covid-19 is highly unlikely embrace morbidity or to set off a long term condition. A *force majeure* situation as between requesting and requested states is that surrender is “prevented by circumstances beyond the control of any of the Member States”, just that, as opposed to the law requiring some such catastrophe as the outbreak of war; s 18 European Arrest Warrant Act 2003 and Article 23 of the Framework Decision.

**Inquisitorial hearing**

12. Secondly, this process of cooperation in the surrender of those suspected of crime, or those who have absconded from serving sentences, is one of cooperation. This concept in extradition law, whereby the judge has the task of examining the papers, as well as s 20 of the 2003 Act, granting the judge the power to seek information, renders this process inquisitorial. The process is not dependent on what the parties put up to the judge but on the judge doing the enquiry into the validity of the request; is there a request from a judicial authority, is this an offence known to our law, is there minimum gravity in the offence or sentence, does an issue of breach of rights occur? The judge is required to address the requested person and tell him or her of the rights: that the suspect may consent to return, that the suspect is entitled to legal aid, that the suspect is to be facilitated with any necessary translation; 2003 Act s 13(4).

13. While this system of inquiry as opposed to adjudication as between contending parties is not usual, the approach of inquisition is what is required. This responsibility means that the judge must read the file and become satisfied as to correspondence and as to the validity of a request, and it also means that the parties are merely there to assist. Of course, that does not mean that counsel for the requested person may not come up with a point and advocate for the judge to accept it. If further information is needed, the judge, as in any case, should ask the parties what the situation is, but an issue, which may amount to a deficit in proof, may be remedied at the judge’s own motion through requiring further documents or intelligence and not be determinative of the application. Perhaps an example helps: the Minister contends in a particular instance that a situation is *force majeure*, but the judge thinks otherwise; the judge thinks it is a humanitarian reason for delay; this is not a pleading point, where setting out a proposition means that not meeting that proposition undermines a case. No: the duty of the judge is to inquire and to make up his or her own mind and the judge is not limited in that enquiry as to what the parties put before the court by way of adversarial analysis.

**Result**

13. In consequence, the reasoning of Hogan J is preferred.

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