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**DIXON v. GOVERNMENT OF SPAIN**

SUPREME COURT (Dudley, Ag. C.J.): August 1st, 2008

*Criminal Procedure—European arrest warrant—under European Arrest Warrant Act, s.43(1) rules of court to be made with statement of “relevant period” within which offender’s appeal to be heard—if no rules made, European Arrest Warrant Act, s.43(6) requires appeal to be allowed*

The Government of Spain sought the surrender of the appellant from Gibraltar to Spain in respect of charges of grievous bodily harm.

The appellant allegedly attacked the victim in 1992, causing him grievous bodily harm. The appellant had been remanded in custody but released on the condition that he would report to the Spanish court twice a month. Upon release, he did not comply with his reporting conditions and left Spain to come to Gibraltar. The Spanish Government issued a European arrest warrant for the arrest and surrender of the appellant for the purpose of prosecuting him for the offence. The Magistrates’ Court ordered the surrender of the appellant. The parties asserted that there were English rules applicable to this case by virtue of the Supreme Court Rules, r.6 and the Criminal Procedure Act, s.4.

On appeal, the appellant submitted, *inter alia*, that (a) the proceedings were in breach of s.43(1) of the European Arrest Warrant Act 2004 because there were no rules of court in place, without which the court could not hear the appeal and the “relevant period” within which the Supreme Court should have begun to hear the appeal had not been prescribed; (b) the breach of s.43(1) meant that the “relevant period” could not be extended under s.43(4) of the Act since there was no defined time

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to extend; and (c) it followed that the breach of s.43(1) meant that the Supreme Court could not hear the appeal before the end of the “relevant period” in breach of s.43(3) and this engaged s.43(6) of the Act which provided that in the event of such a breach, the appeal “must be taken to have been allowed.”

In reply, the Attorney-General on behalf of the Government of Spain submitted that (a) although there had been a failure in that the rules of court had not been made, it had not been brought about by the respondent and the effect of the failure should be dealt with proportionately between the parties, taking account of their conduct during the proceedings; (b) s.43 needed to be read as a whole, especially the provision allowing for repeatedly extending time since extensions to the time-limit would, most likely, have been granted; and (c) in the interests of justice generally, the appeal should be dismissed.

**Held**, allowing the appeal:

(1) The decision of the Magistrates’ Court would be quashed and the appellant discharged. The absence of the rules of court and the statement of the “relevant period” within which the appeal should have been heard breached the mandatory requirement of s.43(1) of the European Arrest Warrant Act. Since s.43(1) had not been complied with, there was no “relevant period” within which the appeal could be heard and by s.43(6) the appeal “must be taken to have been allowed” (para. 13).

(2) The English rules could not apply. The proceedings were criminal and appellate in nature and could not therefore be governed by r.6(1) of the Supreme Court Rules which applied English rules to “original civil proceedings.” Similarly, although the procedure here was similar to a case stated, the proceedings were not an appeal by way of case stated and could not be governed by the English rules by virtue of the Criminal Procedure Act, s.4 (paras. 9–10).

**Legislation construed:**

Criminal Procedure Act 1961, s.4: The relevant terms of this section are set out at para. 9.

European Arrest Warrant Act, 2004, s.43: The relevant terms of this section are set out at para. 5.

Supreme Court Rules 2000, r.6(1): The relevant terms of this sub-rule are set out at para. 8.

*D. Hughes* for the appellant;

*R.R. Rhoda, Q.C., Attorney-General*, and *Ms. K. Khubchand, Crown Counsel*, for the respondent.

1 **DUDLEY, Ag. C.J.:** On June 12th, 2006 a judge sitting in the Examining and First Instance Court in La Línea de la Concepción, Spain issued a European Arrest Warrant (“EAW”) in respect of the appellant

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which was executed and the appellant (“Dixon”) was arrested by the Royal Gibraltar Police on July 26th, 2006. Following a hearing on December 5th, 2006, the learned Stipendiary Magistrate directed that Dixon be surrendered to Spain pursuant to s.12 of the European Arrest Warrant Act (“the Act”). It is apparent, therefore, that this case has been plagued by delays which are wholly unacceptable but it is, however, for present purposes unnecessary to inquire into these.

**Background**

2 The EAW was issued for the arrest and surrender of Dixon for the purpose of prosecuting him for the offence of grievous bodily harm allegedly committed in 1992. It is alleged that on August 7th, 1992, Dixon assaulted Malcolm Stephen Peel by striking his head with a stick, as a consequence of which Mr. Peel suffered injuries “comprising cranial encephalic trauma with open multiple cranial fractures and brain damage of the right hemisphere.”

3 Dixon was, at the time, remanded in custody in Spain but pursuant to an order of the Spanish court dated July 18th, 1993, he was released on the condition that he report to the Spanish court on the 1st and 15th day of every month. It is asserted for Dixon that, when released, he was never informed of these reporting conditions. It is an assertion I have difficulty in accepting. At some stage, Dixon left Spain and came to Gibraltar.

**The grounds of appeal**

4 The order of the learned Stipendiary, as I understand it, is challenged on the basis that—

(i) s.7(1)(c) of the Act requires the EAW to specify “the nature and classification” of the offence in the issuing state and that the warrant states this to be art. 149 of the Spanish Criminal Code 1995; that the alleged offence pre-dates the said Code and therefore any proceedings would have to be under the Penal Code in force in 1992; that the EAW is therefore defective;

(ii) the understanding given by the Spanish court as regards specialty is inadequate;

(iii) the surrender would constitute a contravention of the right to a fair hearing within a reasonable time pursuant to s.8(1) of the Gibraltar Constitution and/or an abuse of process; and

(iv) in the absence of rules of court as required by s.43 of the Act the appeal must be deemed to have been allowed.

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**Section 43—rules of court**

5 The absence of rules of court raises matters of general importance and therefore I shall deal with this issue first. Section 43 of the Act provides—

**“Appeal to Supreme Court: time limit for start of hearing.**

(1) Rules of court must prescribe the period (the relevant period) within which the Supreme Court must begin to hear an appeal under section 38 or 40.

(2) Rules of court must provide for the relevant period to start with the date on which the person in respect of whom a European arrest warrant is issued was arrested under the European arrest warrant.

(3) The Supreme Court must begin to hear the appeal before the end of the relevant period.

(4) The Supreme Court may extend the relevant period if it believes it to be in the interests of justice to do so; and this subsection may apply more than once.

(5) The power in subsection (4) may be exercised even after the end of the relevant period.

(6) If subsection (3) is not complied with and the appeal is under section 38—

- (a) the appeal must be taken to have been allowed by a decision of the Supreme Court;
- (b) the person whose surrender has been ordered must be taken to have been discharged by the Supreme Court; or
- (c) the order for the person’s surrender must be taken to have been quashed by the Supreme Court.

(7) if subsection (3) is not complied with and the appeal is under section 40 the appeal must be taken to have been dismissed by a decision of the Supreme Court.”

6 It is not in issue that no rules have been made pursuant to the Act. Although there are rules governing appeals under the English Extradition Act 2003, which are to be found at para. 22.6A of the Practice Direction supplementing CPR, r.52, the parties agree that the English rules do not apply.

7 Notwithstanding the agreement of the parties, given that the issue raises a matter of general importance, I shall, albeit briefly, set out the reasoning of the parties. Section 15 of the Supreme Court Act provides:

“The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or

any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”

8 Rule 6(1) of the Supreme Court Rules provides:

“Where no other provision is made by these rules or by any Act, rule or regulation in force in Gibraltar, and subject to the express provisions of these rules, the rules of court that apply for the time being in England in the High Court shall apply to all *original civil proceedings* in the court.” [Emphasis supplied.]

9 Extradition and, by analogy, European arrest warrants are proceedings which are criminal in nature and even if they were capable of being characterized as civil, are not original proceedings but rather have come to this court by way of appeal. Therefore the English rules cannot be said to be incorporated by virtue of the statutory provisions. The relevant provisions of s.4 of the Criminal Procedure Act provide:

“Subject to the provisions of this and any other Act, criminal jurisdiction shall, as regards practice, procedure and powers, be exercised—

. . .

- (b) by the Supreme Court in its appellate jurisdiction, in conformity with the law and practice for the time being observed in England in the Criminal Division of the Court of Appeal or, in the case of an appeal upon a case stated, the Divisional Court of Queen’s Bench, so far as, in the opinion of the Chief Justice, the same may be applicable . . .”

10 Whilst appeals under the English Extradition Act 2003 are made to the Administrative Court of the Queens Bench Division and may have procedural similarities with a case stated, they are not by way of case stated and therefore s.4 does not allow for the incorporation of them in the English rules. I have no hesitation in agreeing with counsel’s view that the English rules dealing with appeals under the Extradition Act 2000 have no application and are not capable of being relied upon for the purposes of the Act.

11 Although Mr. Hughes makes his submission on the point somewhat convoluted, fundamentally his argument is this: (a) that s.43(1) requires that there be rules of court providing for a period within which the court must begin to hear an appeal; (b) that absent such rules, the court cannot properly hear the appeal; (c) that sub-s. 43(4), which provides for the extension of time, cannot be engaged because what does not exist cannot be extended; and (d) that therefore because there cannot be said to be

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compliance with sub-s. 43(3), sub-s. 43(6) is engaged and the appeal “must be taken to have been allowed.”

12 The Attorney-General argues that (a) whilst there has been a significant failure in that the mandatory rules have not been brought into force, it is not a failure brought about by the respondent and therefore the effect of the failure should, as far as possible, be dealt with proportionately between the parties and that the conduct of the parties in the progress of this appeal should be taken account of; (b) that s.43 needs to be looked at as a whole and in particular the provision allowing for repeatedly extending time; and (c) that in the present case it is highly probable that extensions would have been granted and that, considering the interests of justice generally, the appeal on this ground should be dismissed.

13 I regret that I disagree with the Attorney-General. Albeit a technical argument, and is one which, on one view, prevents the Spanish courts from dealing with very serious allegations (particularly when it appears that Dixon has absconded from Spain), it is, in my view, an argument with substance. It is apparent that the making of rules is mandatory and in my view, failure to have rules in place has the undesirable effect that sub-s. 43(3) cannot be complied with and that there sub-s. 43(6) is engaged and the appeal must be taken to have been allowed.

14 In the circumstances the appeal is allowed and the order for the appellant’s surrender is quashed. Having allowed the appeal on this ground, I need not consider the remaining grounds.

*Appeal allowed.*