[2013–14 Gib LR 721]

DIXON v. KINGDOM OF SPAIN

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Mance, Lord Wilson of Culworth, Lord Carnwath of Notting Hill, Lord Toulson and Lord Hodge): November 10th, 2014

Criminal Procedure—arrest—European arrest warrant—European Arrest Warrant Act 2004, s.26(b) assumed to be engaged by real risk of breach of s.8(4) of Constitution (defendant at real risk of being convicted of offences not previously existing)—for Gibraltar courts therefore to determine whether such real risk shown

Criminal Procedure—arrest—European arrest warrant—surrender under European arrest warrant not precluded on basis that defendant at real risk of being convicted of offences not previously existing (s.8(4) of Constitution) if offence previously contained in two articles of Penal Code and now contained in one, provided new provisions go no further than old

The respondent applied to the Magistrate's Court for the surrender of the appellant from Gibraltar to Spain in respect of charges of committing assault with grievous injury.

The appellant had allegedly assaulted a man in La Línea in 1992, inflicting very severe head injuries. The appellant reportedly admitted the assault, but explained that he had been under the influence of LSD at the time. After he fled to Gibraltar, the Spanish authorities issued a European arrest warrant for his arrest and surrender.

The arrest warrant stated that the appellant was to face proceedings under art. 149 of the 1995 Spanish Penal Code, an offence which carried a sentence of 6–12 years. Although the 1995 Code was not in force at the time of the alleged assault, the Spanish Constitution allowed retroactivity of penal provisions where they were beneficial to the accused. Article 418 of the pre-1995 Code, which the arrest warrant stated was comparable with art. 149, carried a sentence of 12–20 years, later reduced to 8–15 years, which meant the appellant now faced a more favourable charge than he would have done under the earlier provisions.

The arrest warrant's validity was challenged on various grounds, most of which were rejected both by the Magistrate's Court, and again on appeal to the Supreme Court (Butler, J.). The appellant was granted leave to appeal to the Board, but the appeal was limited to the question of whether the intended charge against the appellant was the correct charge

under Spanish law, and whether his surrender violated s.8(4) of the Constitution.

The appellant submitted that he should not be surrendered, as (a) the European Arrest Warrant Act 2004, s.26(b), which prohibited the surrender of a person if doing so would breach any provision of the Constitution, was engaged when there was a real risk of a breach of s.8(4) of the Constitution, which stated that no person should be (i) convicted of a criminal offence which did not exist at the time the acts relied upon were committed; or (ii) subjected to a greater penalty than was available at the time the acts relied upon were committed; (b) the respondent must be held to the comparison it itself made—that a charge under the Spanish Penal Code 1995, art. 149 was more favourable to the appellant than under art. 418 of the pre-1995 Code; and (c) the charge under art. 149 presented a real risk of breach of s.8(4) of the Constitution, which required a precise correspondence between the crime now charged and that which had previously existed, and there had been, prior to 1995, no crime which corresponded with art. 149 because art. 418 was limited to injury inflicted "purposely," whereas art. 149 was applied to injury caused "through any means or procedure."

The appellant also suggested that the European Arrest Warrant Act 2004, s.26(a), which precluded surrender if it were incompatible with "Gibraltar's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms," might be meaningless, since Gibraltar did not as such have any obligations under the ECHR.

The Board also considered the provisions of art. 420 of the pre-1995 Code, which applied to injuries caused "through any means or procedure."

Held, dismissing the appeal:

(1) There was no constitutional bar to the appellant's surrender to the Spanish authorities. There was nothing in the language of s.8(4) of the Constitution, or in common sense, that compelled the conclusion that surrender was precluded unless the offence charged under art. 149 of the 1995 Code had a single, precise analogue in the pre-1995 Code. There was no real risk of the appellant being convicted of offences which did not previously exist as long as the new provisions went no further than the old. The court was not confined, when considering whether art. 149 was indeed more favourable than art. 418, to dealing with it in the way in which the warrant had put the position—it was entitled to consider all the evidence. Article 420 of the pre-1995 Code, which covered non-wilful acts, when read with art. 418 reflected the provisions now contained in art. 149. There could be no objection on the basis that the offence had previously been contained in two articles but was now contained in one (para. 17).

(2) The Board was prepared to assume, the respondent having taken no objection, that under the European Arrest Warrant Act 2004, s.26(b) was engaged by there being a real risk of a breach of s.8(4) of the

Constitution. It was therefore for the Gibraltar courts to determine whether such a real risk had been shown (paras. 11–14).

(3) The Board was neither required nor in a position to decide how far the respondent had committed itself to a case based on wilful acts only by specifying that art. 149 was the equivalent of art. 418, rather than of arts. 418 and 420; (a) if art. 149 were limited to wilful acts (which the Board accepted it was not), the appellant's case would fall away as arts. 149 and 418 would be directly comparable; (b) if the respondent had limited itself to a case based only on wilful acts, that could only be to the appellant's advantage; and (c) if it were open to the respondent to pursue its case based on non-wilful conduct, it had already been decided that there could be no objection to surrender on the basis that offence had previously been contained in two articles but was now contained in one (para. 18).

(4) It was clear that the reference in the European Arrest Warrant Act 2004, s.26(a) to "Gibraltar's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms" was referring to the United Kingdom's obligations under the European Convention in respect of Gibraltar, since Gibraltar itself had no direct obligations under the Convention (para. 6).

Cases cited:

(1) *Arranz* v. *Spain*, [2013] A.C.D. 114; [2013] EWHC 1662 (Admin), referred to.

(2) *Assange* v. *Swedish Prosecution Authority*, [2012] 2 A.C. 471; [2012] 2 W.L.R. 1275; [2012] All E.R. 1249; [2013] 1 C.M.L.R. 4; [2012] UKSC 22, referred to.

(3) *Dixon* v. *Spain*, 2007–09 Gib LR 244, referred to.

(4) *R. (Ullah)* v. *Special Adjudicator*, [2004] 2 A.C. 323; [2004] 3 W.L.R. 23; [2004] 3 All E.R. 785; [2004] H.R.L.R. 33; [2004] UKHRR 995; [2004] Imm. A.R. 419; [2004] UKHL 26, referred to.

(5) *R. (Uttley)* v. *Home Secy*., [2004] 1 W.L.R. 2278; [2004] 4 All E.R. 1; [2005] 1 Cr. App. R. 15; [2005] 1 Cr. App. R. (S.) 91; [2004] H.R.L.R. 42; [2004] U.K.H.R.R. 1031; (2004), 17 B.H.R.C. 379; [2005] 1 Prison L.R. 234; [2004] UKHL 38, referred to.

(6) *Scoppola* v. *Italy*, E.Ct.H.R., September 17th, 2009 (Application No. 10249/03); (2010), 51 E.H.R.R. 12, referred to.

Legislation construed:

European Arrest Warrant Act 2004, s.26: The relevant terms of this section are set out at para. 5.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.8: The relevant terms of this section are set out at para. 8.

Penal Code 1973, Decree 3096/1973 (September 14th, 1973), as amended by L.O. 30/1989 (June 21st, 1989), art. 418: The relevant terms of this article are set out at para. 4.

art. 420: The relevant terms of this article are set out at para. 4.

Penal Code 1995, L.O. 10/1995 (November 23rd, 1995), as amended by L.O. 3/2011 (January 28th, 2011), art. 149: The relevant terms of this article are set out at para. 3.

J. Restano, *Q.C.*, *R. Pennington-Benton* and *C. Bonfante* for the appellant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, and *J. Fernandez*, *Crown Counsel*, for the respondent.

1 **LORD MANCE,** delivering the opinion of the Board: By a European arrest warrant dated December 11th, 2013, the respondent seeks the appellant's surrender to face criminal proceedings under art. 149 of the Spanish Penal Code, Organic Law 10/1995, as amended in 2004 ("the Penal Code 1995"). In the warrant, the box ticked to identify an offence punishable in Spain with a maximum sentence of at least three years is that referring to "assault with grievous injury." Various challenges by the appellant to the validity of the warrant were rejected both by the Additional Stipendiary Magistrate in a ruling dated May 22nd, 2014, and on appeal by the Supreme Court (Butler, J.) in a judgment dated June 18th, 2014. The appellant now appeals to the Board with leave granted by Butler, J., but limited to "the question whether the intended charge against the appellant is the correct charge under Spanish law and whether the appellant's surrender violates s.8(4) of the Constitution."

2 The facts on which the charge is based occurred as long ago as August 7th, 1992. They involved an alleged assault on Malcolm Stephen Peel with a stick in La Línea de la Concepción, causing him very severe head injuries. The appellant is reported to have admitted the assault, but explained that he was under the influence of LSD, which might bear on his state of mind. He spent 11 months in Spanish custody immediately after the incident, and a further 22 months in custody in Gibraltar in the period between the issue of a previous European arrest warrant in 2006 and its setting aside on grounds that are presently irrelevant (*Dixon* v. *Spain* (3)). These matters formed part of the subject-matter of challenges mounted below, where the delays were discounted as being largely due to the appellant absconding from the Spanish equivalent of bail or being a fugitive. They are no longer relied on or relevant. The limited questions now before the Board arise from the fact that the appellant is being charged under the 1995 Penal Code in respect of an offence allegedly committed in 1992.

3 The Spanish Constitution (art. 9.3) permits the retroactivity of penal provisions favourable to the accused, and the First Transitional Provision of the Penal Code 1995 provides that "once this Code enters into force, if its provisions prove more favourable to the accused, they are to be

applied." Article 149 of the Penal Code 1995 provides (in the translation with which the Board was provided):

> "1. He who causes another, through any means or procedure, the loss or inability of an organ or main limb, or any of the senses, impotency, sterility, or serious deformity, somatic or psychological, is punishable with imprisonment from six to twelve years."

The basic penalty applicable under art. 149 is a sentence of 6–12 years, but art. 152.1 (set out in evidence given by a lawyer, Mr. Jorge Tenorio, obtained by the appellant) provides:

> "1. He who through serious imprudence inflicts some of the injuries contemplated in the previous article[s] will be punished . . .
>
> (ii) with a sentence of imprisonment of one to three years, in the case of the injuries in art. 149;
>
> (iii) with a prison sentence of six months to two years, in the case of the injuries in art. 150."

The bracketed letter "s" indicates a plural obviously omitted in the translation put before the Board.

4 The previous Penal Code, contained in Decree 3096 of September 14th, 1973, as amended by L.O. 30 of June 21st, 1989 provided (again, in the translation provided):

> "*Article 418*. He who purposely mutilates or inhabilitates another of an organ or main limb, deprives him of sight or hearing, or partial or total inability to work, a serious somatic or physical disease or an incurable mental incapacity will be punished with a lesser sentence of imprisonment . . .
>
> *Article 420.* He who through any means or procedure, causes the other, injuries that impairs his bodily integrity or his physical or mental health, shall be punished by a lesser sentence of imprisonment, so long as the injuries require for his well-being medical assistance and medical treatment or surgery . . ."

The sentence applicable under art. 418 was, until 1995, 12–20 years, which was reduced in 1995 to 8–15 years. Under art. 420, the sentence applicable was and is from 6 months 1 day, to 6 years.

5 The European Arrest Warrant Act 2004 was enacted to give effect in Gibraltar to the UK's international obligations under Framework Decision of June 13th, 2002 (2002/584/JHA), art. 33(2) of which provides that "this Framework Decision shall apply to Gibraltar." The Framework Decision operates currently in the United Kingdom in general, and Gibraltar in particular, only at the international level (see *Assange* v. *Swedish Prosecution Authority* (2)). The 2004 Act provides:

"**Exceptions to duty to surrender.**

26. A person shall not be surrendered under this Act if—

(a) his surrender would be incompatible with Gibraltar's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May 1994; or

(b) his surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 27(1)(b) applies) . . ."

6 Although Mr. Restano, Q.C. for the appellant suggested that s.26(a) might be meaningless, since Gibraltar did not as such have any obligations under the Human Rights Convention, the Board considers it to be clear that s.26(a) must be understood as referring to the United Kingdom's obligations under the Convention in respect of Gibraltar.

7 Article 7(1) of the Human Rights Convention provides:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

8 Section 8 of the Constitution provides:

"(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed . . .

(12) In this section—

'criminal offence' means a crime, misdemeanour or contravention punishable under the law of Gibraltar . . ."

9 Before the courts below, the legal positions under art. 7 of the Convention and s.8(4) of the Constitution appear to have been equated in the submissions advanced. But a distinction is now drawn, though an analysis of art. 7 is taken as background to the challenge under s.8(4). Mr. Restano takes as his starting point cases indicating that, in the context of a decision to remove a person from the jurisdiction to another country, a real risk of a violation (or at least of a "flagrant" violation) of the essence of art. 7 of the Convention in that other country precludes such removal (see

Lord Steyn in *R. (Ullah)* v. *Special Adjudicator* (4) ([2004] 2 A.C. 323, at para. 45), and *Arranz* v. *Spain* (1)).

10 However, he does not deploy that principle under s.26(a) of the Act. He accepts, quoting his written case, that the fact that "art. 149 of the 1995 Penal Code did not exist in 1992 would not violate the first sentence of art. 7(1), as a similar offence existed at the time in the form of either art. 418 or 420 of the 1973 Penal Code." As to the second sentence of art. 7(1), he also accepts that there is no risk of a breach, because the maximum punishment available under art. 149 is less than the maximum punishment available under art. 418. In short, whatever sentence might be passed on the appellant in Spain for wilful breach of art. 149, it could not exceed the maximum of 20 years in 1993 (or 15 years now) available under art. 418. And whatever sentence might be passed on him for any non-wilful breach of art. 149, it could not exceed the 6-year maximum provided by art. 420. In this connection, Mr. Restano accepts the analysis of art. 7 adopted in *Scoppola* v. *Italy* (6) and *R. (Uttley)* v. *Home Secy.* (5), especially *per* Lord Phillips ([2004] 1 W.L.R. 2278, at paras. 18–21).

11 The appellant's case turns, in these circumstances, upon deploying the principle identified above in para. 9 in relation to the provisions of s.26(b) of the Act, read with s.8(4) of the Constitution. Taken by itself, s.8(4) is, by virtue of s.8(12), only concerned with crimes, *etc*. punishable under the law of Gibraltar, but Mr. Restano submits that since s.26(b) of the European Arrest Warrant Act 2004 is expressly concerned with the question of whether the surrender of an alleged offender to another Member State would contravene the Constitution, it must have envisaged an enquiry (similar to that envisaged by the principle identified in para. 9), into the question of whether such surrender would involve a real risk of conviction, in the State issuing the warrant and requesting surrender, for an offence which did not there exist when the events relied on occurred. The Board did not understand the Attorney-General to take issue with the correctness of this submission, which it will assume for the purposes of what follows.

12 The appellant's further submission on this basis is that, although the appellant's surrender is now requested under art. 149, the act for which he is wanted did not, at the time it took place, constitute "such an offence," that is, an offence of the same kind as that charged under art. 149 (and in consequence that the Spanish authorities are intending to pursue him on an inapplicable or incorrect basis). In the courts below, it was apparently accepted by the respondent that, if it was clear on the evidence that the Spanish authorities were seeking to pursue the appellant for an offence "not known to Spanish law" or "for which there was clearly no evidence whatsoever," the Gibraltar courts would not be obliged to order surrender. The Board need not consider this sort of extreme or abusive position. The courts below were clearly right to consider that it does not apply. The

basic scheme of the 2004 Act is mechanistic. It involves the receipt of a warrant in respect of, and specifying, an offence committed or alleged to have been committed abroad (ss. 2 and 7(1)(c)) by a person against whom the issuing State intends to bring proceedings for such offence (s.6(a)). It then contemplates an order for the surrender of such person, if not by consent under s.11, then under s.12 upon the court being provided with the warrant and being satisfied of three conditions. They are, first, that the person wanted is the person before the court, second, that his surrender is not prohibited by the provisions of Part 3 (*i.e.* ss. 26–37) and third, that the warrant has been issued in accordance with the Act (s.12).

13 In the present case, the appellant does invoke a provision of Part 3, namely s.26(b). This is an additional precaution, not present in the Framework Decision but inserted by the Gibraltar legislature into the 2004 Act to provide protection for a person whose surrender is requested. Assuming, as the Board is presently prepared to do (without deciding), that s.26(b) is engaged by a real risk of breach of s.8(4) of the Constitution, it is open to such a person to require that possibility to be considered, if necessary investigated further (whether by the court seeking from the Spanish authorities under s.13 further documentation or information "to enable it to fulfil its functions" or by hearing other evidence) and finally adjudicated upon by the Gibraltar court.

14 The courts below took the view that whether art. 149 was less favourable to the appellant and, if so, what the consequences might be, were complex matters which could and should more appropriately be left to the Spanish courts. If this suggests that it was not part of the Gibraltar courts' function to determine whether there was a real risk of breach of s.8(4) of the Constitution, the Board disagrees. Assuming that s.26(b) is engaged by a real risk of breach of s.8(4), the Gibraltar courts must consider whether a real risk has been shown. But, as will appear, the Board considers that the question whether there is or would be a real risk of breach of s.8(4) is one which can be resolved on the evidence put before the Gibraltar courts, without need for further evidence or investigation.

15 The Board starts with an argument which might be advanced, to leave matters to the Spanish courts and at the same time to show thereby that there was no such real risk. If a charge under art. 149 lays the appellant open to a conviction which would not, on the basis of whatever he did, have been possible before 1995, then art. 149 cannot be more favourable to the accused than the pre-1995 provisions. On this hypothesis, it would seem to follow from the Spanish law provisions set out in para. 3 above that the appellant should, if surrendered to Spain, be acquitted there of the charge under art. 149 to face which he was surrendered. But this is not an objection which featured or was the subject of any focus in the respondent's submissions before the Board. The

Spanish prosecutors have confined themselves to a charge under art. 149, and have adduced evidence that it is more favourable to the appellant than previous provisions. In that light, a suggestion that there would be no real risk of conviction in Spain under art. 149, even if it is less favourable, and so no need to enquire whether a charge under art. 149 is more favourable, might have appeared to them unattractive and potentially problematic. Further, surrender remains a radical measure, which can uproot and lead to a lengthy period in custody, and this is so however great the mutual trust that must exist between different European jurisdictions within the European Union. Surrender might itself possibly even engage arguments under s.26(a). In any event, the respondent's case has not been put in a way which the Board considers requires it in the circumstances to consider any of these aspects further.

16 The Board turns to the submissions which were made on the central issue, whether the charge intended under art. 149 involves a real risk that the appellant will be pursued for acts which did not in 1992 constitute "such an offence." The European Arrest Warrant issued in respect of the appellant relies, and relies only, on a comparison between art. 149 of the Penal Code 1995 and art. 418 of the pre-1995 Code. It asserts by reference to that comparison that the appellant now faces a charge more favourable than that which he would have faced in 1992. Mr. Restano makes two linked submissions. First, the respondent must be held to the comparison which it itself drew and, making that comparison, art. 149 is not more favourable, because it is not limited to wilful injury as art. 418 was by the word "purposely." Secondly, s.8(4) requires a precise correspondence between the crime now charged and that which previously existed, and there was prior to 1995 no crime corresponding with that contained in art. 149, again because art. 418 was limited to wilful injury, whereas art. 149 is not.

17 The first submission is in tension with the appellant's case that s.8(4) is a constitutional safeguard, introduced by the Gibraltar legislature, the application of which it was and is incumbent on a court faced with an objection to surrender to investigate as necessary and to evaluate on the evidence. An objection of this nature cannot be precluded by a statement in the warrant itself. But it follows that, in considering whether art. 149 is more favourable, a court is not confined to the way in which the warrant puts the position, but should look at all the evidence. As to the second submission, the Board sees nothing in the language of s.8(4) or in common sense to compel a conclusion that there should be no surrender unless art. 149 had a single analogue in the pre-1995 Code. All that s.8(4) can at most require is that art. 149 should reflect an offence or combination of offences which existed under the pre-1995 law. So long as it goes no further, there can be no risk of the appellant being convicted under art. 149 of offences which did not previously exist. In the present case, it is

clear that it goes no further. On the basis that it covers both wilful and non-wilful acts, art. 149 reflects provisions which previously existed in arts. 418 and 420, read together. No possible objection of adverse retrospectivity can exist to the combination in one single article of offences previously split across two separate articles.

18 There was discussion before the Board as to the extent to which the Spanish prosecuting authorities had committed themselves to pursue the appellant only on the basis that he was guilty of wilful conduct, which would have fallen previously within art. 418. In evidence dated April 1st 2014, the State Prosecutor, Mr. Emilio Rodriguez, said that "the action outlined in art. 149 is wilful," and that it reflected that outlined in art. 418. If he intended to suggest that art. 149 is limited to wilful injury, the Board accepts the appellant's case that it is not: see the terms of art. 152.1(ii) of the Penal Code produced by Mr. Tenorio as set out in para. 3 above. If art. 149 is limited to wilful injury, then of course it would be directly comparable with art. 418 and the appellant's case would fall away. If the Spanish prosecuting authorities do limit their case to wilful injury, that can of course only be to the appellant's potential benefit in Spain. But, if it is open to them to expand it to cover non-wilful conduct, that, for reasons already indicated in paras. 10 and 17 above, gives rise to no objection to surrender under the combination of s.8(4) of the Constitution and s.26(b) of the 2004 Act. The Board is not in a position to express, and need not express, any view as to how far the Spanish prosecuting authorities may have tied themselves irrevocably to a case of wilful injury.

19 For the reasons given, the Board will humbly advise Her Majesty that the appellant's appeal be dismissed.

Appeal dismissed.