[2013] UKPC 16
Privy Council Appeal No 0042 of 2012

JUDGMENT

French (Appellant) *v* Public Prosecutor of the Central Department of Investigation and Prosecution in Lisbon Portugal (Respondent)

From the Supreme Court of Gibraltar

before

Lord Hope
Lady Hale
Lord Kerr
Lord Wilson
Lord Hughes

JUDGMENT DELIVERED BY LORD WILSON ON

13 June 2013

Heard on 25 April 2013

Appellant
Christopher Marsh-Finch

(Instructed by Creed Lane Law Group)

Respondent
Lewis Baglietto

(Instructed by Clyde & Co)

The judgment of the Board is delivered by **LORD WILSON**.

1. Mr French ("the appellant") appeals against an order of the Supreme Court of Gibraltar (The Hon Mr Justice Black) dated 16 April 2012, by which it dismissed the appellant's appeal against an order of the Magistrates' Court of Gibraltar (Mr Charles Pitto, Stipendiary Magistrate) dated 23 March 2012. The order of the Magistrates' Court was that the appellant should be surrendered to the State of Portugal pursuant to a European arrest warrant which on 9 December 2011 had been issued by the respondent, the Public Prosecutor of the Central Department of Investigation and Prosecution in Lisbon.

2. The basis of the warrant was that the State of Portugal proposed to interrogate and, subject thereto, to prosecute the appellant for an offence of being involved in the trafficking of narcotic drugs, namely 6082 kilos of hashish, from Morocco into Portugal.

3. Various grounds of opposition to execution of the warrant were raised on behalf of the appellant in the Magistrates' Court and on the appeal to the Supreme Court. The latter permitted one, but only one, of the grounds to be raised in a further appeal to the Board. The other grounds have been the subject of an unsuccessful application to the Board for permission to appeal, the result of which has been some delay in the despatch of the appeal.

4. The ground of the appeal to the Board surrounds the period of time which elapsed between the date of the appellant's arrest in Gibraltar (18 January 2012) and the date of the order for his surrender to the State of Portugal (23 March 2012). That is a period of 65 days. The appellant argues that, in that the period exceeded 60 days, the order for his surrender was unlawful and that therefore he was and is entitled to be released from custody in Gibraltar in which, to date, he has remained.

5. The period became extended to 65 days in the following circumstances:

(a) On 20 January 2012 the appellant first appeared in the Magistrates' Court. The court acceded to his application for an adjournment so that he could obtain legal advice. No date was then fixed for the hearing of the respondent's application.

(b) On 26 January and 2 February 2012 there were further hearings in the Magistrates' Court. At the earlier hearing the appellant indicated

his intention to contest the application. On both occasions the matter was adjourned but, again, no date was fixed for the hearing.

(c) On 10 February 2012 the court informed the parties that it had fixed a date for the hearing, namely 27 February. The court told them that the fixture was provisional in that it depended upon the expected vacation of another fixture on that date.

(d) On 17 February 2012 the court informed the parties that the expected vacation of the other fixture on 27 February had not occurred and it indicated that, instead, the hearing would take place on 22 March 2012.

(e) On 20 March 2012 the appellant, by counsel, filed supplemental written submissions in which, for the first time, he alerted the court to the alleged requirement that the hearing should be completed within 60 days of his arrest, being a period which by then had elapsed.

(f) On 22 March 2012 the Magistrate duly conducted the hearing and on the following day he gave judgment and made the order for surrender.

6. Subject to certain exceptions which are not in point in this case, the law of the European Union as a whole applies to Gibraltar: section 3, European Communities Act. Article 355(3) of the Treaty on the Functioning of the European Union, which replicates in almost identical terms Article 299(4) of the Treaty establishing the European Community, states that "The provisions of the Treaties [i.e. also including the Treaty on the European Union] shall apply to the European territories for whose external relations a Member State is responsible". Gibraltar is a European territory for whose external relations the U.K. is responsible. In that the treaty recognises Gibraltar as being a jurisdiction separate from the U.K., to which EU law applies, it is for the Parliament of Gibraltar to transpose EU law into local law when required to do so.

7. The genesis of the arrangements between members of the EU for mutual implementation of European arrest warrants was the Council Framework Decision of 13 June 2002 (2002/584/JHA). The Decision (as the Board will call it) was adopted by the Council pursuant to Article 34(2) of the Treaty on the European Union in the form which that treaty took prior to the Treaty of Lisbon. Article

34(2), within Title VI, which was headed "Provisions on police and judicial cooperation in criminal matters", provided:

> "The Council shall take measures and promote cooperation...contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:
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> ...
>
> b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;"
>
> ...

In that there has been no repeal, annulment or amendment of the Decision since the entry into force of the Treaty of Lisbon on 1 December 2009, its legal effects continue: Article 9 of Protocol No 36 to that treaty. But its effects are limited. As a matter of international obligation, Member States are required to legislate in such a way as to achieve the result which the Decision aims to achieve. But the law derives from the consequential domestic legislation rather than from the Decision. The residual legal significance of the Decision was addressed by Lord Mance in *Assange v The Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471, at paras 201 to 218. His was a dissenting judgment but there was no disagreement with his exposition in those paragraphs; and in her dissenting judgment Baroness Hale offered a similar analysis at paras 173 to 176. It is enough, by way of bald summary, to say that Lord Mance recognised the presumption at common law that domestic legislation should be read consistently with the Decision as an expression of international obligation but that he did not accept the application of the more muscular "principle of conforming interpretation" of the domestic legislation in accordance with the Decision which had been propounded by the Grand Chamber of the European Court of Justice in *Criminal Proceedings against Pupino*, Case C-105/03, [2006] QB 83. Nothing in the present appeal turns on this difference of interpretative approach.

8. Paragraph 5 of the recitals to the Decision provides:

> "The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of

surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures."...

9. Article 15 of the Decision, entitled "Surrender decision", provides:

> "1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered."

Paragraph 2 of Article 15 entitles the requested judicial authority to ask the issuing state to furnish further information "as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17".

10. Article 17, entitled "Time limits and procedures for the decision to execute the European arrest warrant", warrants quotation almost in full:

> "1. A European arrest warrant shall be dealt with and executed as a matter of urgency.
>
> 2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.
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> 3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.
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> 4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.
>
> 5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the

material conditions necessary for effective surrender of the person remain fulfilled.

...

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level."

11. Article 23, entitled "Time limits for surrender of the person", provides that, where an order is made for a person's surrender to the issuing state, he shall, in the words of para 1, "be surrendered as soon as possible on a date agreed between the authorities concerned". Paragraph 2 provides, in principle, for surrender within 10 days of the final order. Paragraphs 3 and 4 provide for extended time limits for surrender when circumstances beyond the control of the member states or serious humanitarian reasons so dictate. Paragraph 5 provides:

"Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released."

12. Article 31(2) enables member states to conclude bilateral or multilateral agreements which further facilitate the procedures for surrender pursuant to European arrest warrants, "in particular by fixing time limits shorter than those fixed in Article 17".

13. Article 33(2) provides:

"This Framework Decision shall apply to Gibraltar."

14. In order to give effect to the Decision the Parliament of Gibraltar passed the European Arrest Warrant Act 2004 ("the Act").

15. Section 10 of the Act provides that, as soon as practicable after a person's arrest under a European arrest warrant, he shall be brought before the Magistrates' Court, which shall (a) remand him in custody or on bail, (b) fix a date for the

hearing of the application for an order for his surrender and (c) inform him of his right to be provided with legal advice.

16. Section 12(4) of the Act provides that, where it decides not to make an order for surrender, the court shall give reasons for its decision and "the person shall, subject to [an exception], be released from custody". The section also provides as follows:

> "(6) If the magistrates' court has not, after the expiration of 60 days from the arrest of the person concerned under section 9, made an order under this section or section 11, or has decided not to make an order under this section, it shall direct the Central Authority in Gibraltar to inform the issuing judicial authority of the reasons therefore specified in the direction, and the Central Authority shall comply with such direction.
>
> (7) If the magistrates' court has not, after the expiration of 90 days from the arrest of the person concerned under section 9, made an order under this section or section 11, or has decided not to make an order under this section, it shall direct the Central Authority to inform the issuing judicial [authority] of the reasons therefore specified in the direction, and the Central Authority in Gibraltar shall comply with such direction."

17. In section 26 of the Act Parliament provided, by way of an exception to any duty to order surrender, that a person shall not be surrendered if to do so would be incompatible with Gibraltar's obligations under the European Convention on Human Rights ("the ECHR") or would constitute a contravention of any provision of the Constitution of Gibraltar. In so providing Parliament acted in accordance with Article 1(3) of the Decision, which it is unnecessary to set out.

18. Section 3(1) of the Constitution of Gibraltar provides that no person shall be deprived of his personal liberty "save as may be authorised by law" in specified cases, including, at (i), "for the purpose of effecting the...extradition or other lawful removal of that person from Gibraltar". The effect of section 18(8)(a) of the Constitution is to require a court to take into account the judgments of the European Court of Human Rights ("the ECtHR") in addressing the right to personal liberty conferred by section 3.

19. The submissions of the appellant can be encapsulated as follows:

(a) There was an initial breach of section 10(b) of the Act, when, at the first hearing on 20 January 2012, the Magistrates' Court failed to fix a date for the hearing which would be required in the event that he were to refuse to consent to his surrender. The breach did not, of itself, entitle him to release from custody but it demonstrates a lackadaisical approach which lends colour to the court's subsequent defaults.

(b) Interpretation of the Decision is crucial to a proper understanding of the Act.

(c) The phraseology of Article 15(1) of the Decision is clearly mandatory, namely that the court "shall" decide, within the time limits set out in Article 17, whether the person is to be surrendered.

(d) The phraseology of Article 17(1) of the Decision is, as one would expect, equally mandatory, namely that the warrant "shall" be dealt with and executed as a matter of urgency.

(e) Article 17(3) carries the mandate into a more specific provision, namely that the final decision "should" (not "may") be taken within 60 days of the arrest.

(f) Article 17(4) provides for an extension of the 60 days to 90 days only if two conditions are met, first that the warrant "cannot" be executed within 60 days and second that the court "shall immediately" inform the issuing authority of the fact that it cannot be so executed and of the reasons for the delay.

(g) These provisions inform the proper interpretation of section 12(6) of the Act. 60 days from the date of the appellant's arrest expired on 18 March 2012, whereupon, not having yet made an order, the court was obliged by the subsection to direct the Central Authority in Gibraltar, namely the Governor (see section 5(1)), to inform the respondent of the reasons for the delay specified in its direction. If one asks when, according to the subsection, the court is obliged to make the direction to the Governor, the answer is to be found in Article 17(4) of the Decision, namely "immediately".

(h) Neither of the conditions set by Article 17(4) was met. The pressure on court lists caused by the perceived demands of other cases did not

mean that the court 'could not' decide whether to execute the warrant within 60 days. Nor did the court make the requisite direction to the Governor whether immediately or indeed at all: in this respect the court was in breach of section 12(6) of the Act as well as in default of the second condition set by Article 17(4) of the Decision.

(i) Even if the Act has failed to provide expressly that, in the above circumstances, the appellant became entitled to his release on 18 March 2012, section 3(1) of the Constitution conferred that entitlement upon him because the deprivation of his liberty became no longer authorised by law.

20. The Board concludes that the appellant's submissions are unsound.

21. Section 12(6) of the Act clearly identifies the consequence of a failure to decide whether to execute the warrant within 60 days of a person's arrest. The consequence is not his entitlement to release. It is that an obligation is cast upon the court to make a direction to the Governor. The subsection does not precisely identify the time within which the court's direction should be made but it is reasonable for the appellant to assert, including by reference to Article 17(4) of the Decision, that it should be made immediately. On that basis the court committed what, in the light of the time-scale, was a minor breach of its obligation to make the direction. But, again, there is nothing in section 12(6) to indicate that the consequence of its breach was the appellant's entitlement to release.

22. Section 12(7) of the Act puts beyond doubt the conclusion to be drawn from section 12(6) that, even following the expiry of 60 days, the proceedings are to continue and thus that the court retains its entitlement under section 10(a) to remand the person in custody. For section 12(7) makes clear that the only effect of the expiration even of 90 days is an obligation on the court to make a further direction to the Governor. Where, as in section 12(4), the Parliament of Gibraltar wanted to require that the person be released from custody, it made provision for release in express terms.

23. In failing to provide for the person's release from custody in the event of the court's failure to decide whether to execute the warrant within 60 days of his arrest, was Parliament in breach of Gibraltar's international obligations in relation to the Decision? As has already been noted, a framework decision does not even purport to be binding in relation to "the choice of form and methods", which would include the methods by which a judicial authority chooses to address its obligation to decide whether to execute a warrant. The use of the word "shall" in

Article 15(1) and 17(1) of the Decision represents heavy encouragement to speed. But Article 17(4) makes clear that, if within 60 days the court "cannot" make the decision (that word no doubt falling to be construed with reasonable liberality in accordance with common sense), the period may be extended to 90 days but the issuing authority must be informed. Indeed Article 17(7) recognises that exceptional circumstances may preclude the making of a decision even within 90 days. There is thus absent from Article 17 any provision for automatic release after 60 (or indeed 90) days; on the contrary, para 5 of Article 17 requires the court, for so long as it has not made its decision, to ensure that conditions necessary for effective surrender of the person, often no doubt entailing his continued remand in custody, remain fulfilled. These features of Article 17 are in stark contrast with the provision in Article 23(5) that if, following an order, surrender is delayed beyond the time limits set out in earlier paragraphs, the person shall be released from custody.

24. To its Proposal for a Framework Decision on the European arrest warrant and surrender procedures between member states dated 25 September 2001, 2001/0215 (CNS), the Commission of the European Communities annexed a draft of the Decision in which, by Article 20, the decision whether to execute the warrant was to be taken "as soon as possible and in any case no later than 90...days after the arrest". The draft proceeded to provide, by Article 21(1), that "if no decision on the surrender of the requested person is taken within the period provided for in Article 20, the arrested person shall be released immediately..." But it is noteworthy that the Decision contained no provision analogous to the draft Article 21(1). It is inconceivable that the omission was accidental.

25. Article 34(4) of the Decision obliged the Council in 2003 to conduct a review of the practical application of the Decision by member states. The review, No 15009/03, was dated 19 November 2003. It stated, at para 3(1)(f):

> "Whilst Article 23(5) of the Framework Decision provides that the expiry of time limits for surrender (basically 10 days after the final decision with possible postponement) entails release of the person in custody, the Framework Decision does not provide explicitly for consequences of violation of the time limits for the final decision (Article 17). Most Member States seem to be of the opinion that the time limits in Article 17 of the Framework Decision are of a non-mandatory, but indicative nature. For that reason, the majority of Member States will not foresee a non-observation of these time limits as a ground for provisional or final release from detention or as ground eligible to affect the validity of proceedings or judgements.

> It should be noted that Article 17(5) of the Framework Decision provides that as long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled."

26. In *Dundon v The Governor of Cloverhill Prison* [2006] 1IR 518 the Irish Supreme Court determined issues similar to, yet also wider than, those now raised before the Board. The UK had issued a European arrest warrant in relation to the appellant. On 11 February 2004 he was arrested in Ireland and remanded in custody. On 14 May 2004, following various adjournments of which some had been at his request, the High Court made an order for his surrender. The period from 11 February 2004 to 14 May 2004 was 93 days. On 16 March 2005, thus following a significant further delay, the Supreme Court dismissed his appeal. He forthwith issued fresh proceedings in which, by reference to his rights under the Irish Constitution, he challenged the lawfulness of his continued detention after the expiry of 60 days following his arrest.

27. Ireland transposed the Decision into its law by the European Arrest Warrant Act 2003. In all relevant respects section 16(10) and (11) of the Irish Act is in terms identical to those of section 12(6) and (7) of the Act, set out in para 15 above. There is nothing in the judgments in the *Dundon* case to indicate that the court of first instance (namely, in Ireland, the High Court) had made the direction to the Irish Central Authority upon the expiry either of 60 days or of 90 days following arrest, as required by the subsections. But the Supreme Court held that section 16(10) did not automatically entitle the appellant to release on the expiry of 60 days (nor, by analogy, did section 16(11) have that effect on the expiry of 90 days) from the date of his arrest.

28. In the *Dundon* case the issues went wider than in the appeal before the Board because of the terms of section 10 of the Irish Act, which provides:

> "Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person –
>
> (a) against whom that state intends to bring proceedings for the offence to which the... warrant relates, or
>
> (b) ...

> that person shall, subject to and in accordance with the provisions of this Act *and the Framework Decision* be arrested and surrendered to the issuing state." [Italics supplied]

Section 6 of the Act is in identical terms to those of section 10 of the Irish Act save for the absence of the four italicised words. Their presence in the Irish Act emboldened the appellant in the *Dundon* case to argue that, even if the terms of section 16(10) and (11) of that Act were not strong enough to secure the success of his appeal, the effect of section 10 was to bring the whole of the Decision into Irish law and that an overall reading of the Decision entitled him to release. He also seems to have stressed that, whereas section 16(10) and (11) place time limits of 60 and 90 days on the making only of the decision by the High Court, Article 17(3) and (4) of the Decision requires that the "final" decision be made within those limits; and, by reference thereto, he appears also to have relied upon the significant further delay between the making of the order for his surrender and the hearing of his appeal.

29. The terms of section 10 of the Irish Act required the Supreme Court in the *Dundon* case to appraise the Decision in detail. Before the Board, however, the appellant stresses the absence of reference in the judgments of the Supreme Court to Article 15 of the Decision and, in particular, to the word "shall". Nevertheless it is clear that reference to that word would not have deflected the judges from their unanimous conclusion that, largely for the reasons set out above by the Board, not even the Decision, even assuming that the effect of section 10 had been to make it part of the law of Ireland, entitled the appellant to release. Denham J, at p534, described the time limits of 60 days and 90 days in Article 17(3) and (4) of the Decision as "exhortation"; and Geoghegan J, at p541, explained that they were set "with a view to internal discipline within the member states and not with a view to conferring individual rights in individual cases". Although it therefore has less need to grapple with the Decision than did the Irish Supreme Court, the Board respectfully agrees with its analysis of it.

30. The Board adds a post-script analogous to that added by the Irish Supreme Court to its disposal of the *Dundon* case. The absence of a right of automatic release upon expiry of the periods set by section 12(6) and (7) of the Act in no way precludes a right of release for a person remanded in custody under section 10 of the Act in the event of excessive delay on the part of the courts of Gibraltar (including of the Supreme Court in the event of an appeal and of the Board in the event of a further appeal) in reaching a final decision whether to execute a European arrest warrant. The Acting Chief Justice was no doubt sensitive to this point in providing, by Rule 2 of the European Arrest Warrant (Appeal) Rules 2008 (LN 2008/090), that the Supreme Court must begin to hear an appeal against an order for a person's surrender within 90 days of his arrest, being a rule with which,

albeit by the narrowest of margins, the Supreme Court complied in the present case. The right of release in the event of excessive delay arises under Article 5(1)(f) of the ECHR, which provides that no one shall be deprived of his liberty save "in the following cases and in accordance with a procedure prescribed by law ... (f) the lawful...detention... of a person against whom action is being taken with a view to ... extradition". In *Chahal v United Kingdom* (1996) 23 EHRR 413, the ECtHR held, at para 113, that, if proceedings by way of challenge to an order for a person's deportation were not prosecuted "with due diligence", i.e. if the duration of them was "excessive", it could not be said that action "is being taken" within the meaning of para 1(f), Furthermore, in *A v United Kingdom* (2009) 49 EHRR 625, it held, at para 164, that, if the length of the detention exceeded what was reasonably required for the purpose pursued, it would also fail to be "in accordance with a procedure prescribed by law". So for each of these reasons a person's continued detention in such circumstances would violate his rights under Article 5. Nothing in the Act overrides Gibraltar's obligation to uphold the rights of persons under the ECHR: this is both the direct effect of section 26 of the Act (see para 17 above) and the indirect effect of section 3(1) of the Constitution (see para 18 above). Inevitably however the appellant has not sought to suggest that the delays in the present case have been such as to engage Article 5(1).

31. The Board will therefore humbly advise Her Majesty to dismiss the appeal and (subject to any contrary submissions filed and served within 14 days of the date of delivery of this judgment) to order the appellant to pay the respondent's costs of and incidental to it.