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Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**08/05/14**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

FERMIN VILA MICHELENA

Appellant;

-v-

THE KINGDOM OF SPAIN

Respondent.

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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal pursuant to Article 26 of the Extradition Act 2003 from the decision of the Recorder of Belfast, His Honour Judge Burgess, made on 5 October 2012, ordering the extradition of Fermin Vila de Michelena to the Kingdom of Spain. He is sought in Spain on foot of four European arrest warrants in connection with terrorism-related offences alleged to have been committed in or about 2001. Mr MacDonald QC and Mr Devine appeared for the appellant and Mr Ritchie for the respondent. We are grateful to all counsel for their helpful written and oral submissions.

The warrants

[2] The appellant was arrested on 26 June 2010 on foot of an arrest warrant dated 1 June 2010 alleging one offence of terrorist murder, one offence of seventeen terrorist injuries, one offence of terrorist havoc, one offence of possession of explosives for terrorist purposes, one offence of theft of a vehicle for terrorist

purposes, and one offence of forgery of official documents for terrorist purposes. He appeared before Belfast County Court on 28 June 2010 and was remanded in custody. It was argued that the particulars on this warrant were inadequate. The trial judge offered to deal with the particularity point as a preliminary issue but the appellant wished to have the opportunity to gather extensive evidence as a result of which the final hearing did not take place until 2012.This arrest warrant was subsequently withdrawn on 1 October 2010 but four further arrest warrants were issued, the details of which are summarised below.

[3] On 16 September 2001 the appellant was arrested on foot of a warrant dated 28 June 2010 issued by Judge Merelles alleging 18 offences of terrorism, one offence of terrorist havoc, one offence of forgery, and one offence of theft of a vehicle. The particulars of the warrant alleged that on 8 May 2001 the appellant and Ana Belen Gurruchaga (Ana) stole a motor vehicle, placed explosives in it and drove it to the headquarters of a bank where they detonated the car bomb.

[4] On the same date the appellant was also arrested on foot of a warrant dated 14 July 2010 issued by Judge Gutierrez alleging one offence of terrorist murder, one offence of theft for terrorist purposes, one offence of terrorist damages, and 20 offences of attempted terrorist murder. The particulars of the warrant alleged that the appellant, Ana, Aitor Garcia Aliaga (Aitor) and others stole a motor vehicle on 19 March 2001 and constructed a car bomb which was driven to the Ministry of Justice and detonated by the appellant and Aitor as a result of which a member of the national police force was killed.

[5] On 10 March 2011 he was arrested in relation to a warrant dated 1 December 2010 issued by Judge Gomez alleging the offences contained in the first warrant dated 1 June 2010 which had been withdrawn. This warrant contained further particulars of the alleged offences. It was alleged that the appellant agreed with Ana, Aitor and others to carry out a bomb attack on an army general on 28 June 2001 as a result of which he was killed and others were injured. It was alleged that the appellant provided the necessary infrastructure for the attack. The warrant stated that the appellant was a member of the ETA Command Group as evidenced by statements made by other members of the organisation such as Aitor and by the fact that his fingerprints were found in an apartment used by the group.

[6] On 25 May 2011 the appellant was arrested in respect of a warrant dated 17 March 2011 issued by Judge Merelles alleging one offence of participation in an armed gang, one offence of possession of weapons of war with terrorist purpose, one offence of possession of explosives with terrorist purpose, one offence of theft of vehicles, and four offences of conspiracy for terrorist murder. It was alleged that the appellant was a member of a terrorist cell operating in Madrid between April and October 2001 which engaged in attack planning in relation to a number of public figures. This resulted in an explosion on 6 November 2001 as a result of which many people were injured although it is accepted that the appellant was not directly involved. The cell used an apartment in Madrid for the purpose of storing explosives

and other infrastructure items. The appellant's fingerprints were found in the flat together with explosives and other terrorist material. The warrant states that the evidence against the appellant also includes statements made by Ana and Aitor who have already been convicted.

[7] No issue was taken by the appellant in relation to the offences being extradition offences for the purposes of the Extradition Act 2003 or with the execution of the warrants. At his first appearance on 28 June 2010 the appellant's evidence was that he had left Spain in or about September 2003 and come to Northern Ireland in or about 2007. He had not been questioned in respect of the alleged offences and so was not fleeing to avoid prosecution.

[8] The appellant resisted extradition to Spain principally on the basis that the case against him depended on evidence extracted by torture and/or inhuman or degrading treatment so that it would be unconscionable for the court to permit the request for extradition to proceed. The evidence which the appellant contended was so obtained was the statements of Ana and Aitor. Secondly, the appellant contended that this extradition was barred by reason of extraneous considerations in that the warrants were issued for the purpose of prosecuting or punishing him for his political opinions as a supporter of Basque independence. If extradited it was contended that he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his political opinions.

[9] Thirdly, it was contended that there were strong grounds for believing that if extradited he would be denied his right to a fair trial. In particular those representing him at his trial would be inhibited from making allegations of torture because it was contended that lawyers were prosecuted for making allegations of torture on their client's behalf and the court of trial would not be an independent or impartial tribunal. Fourthly, it was submitted that if extradited he would suffer arbitrary treatment in relation to Spain's dispersal policy whereby prisoners were kept in prisons many hundreds of miles from their family.

[10] The Recorder concluded that the evidence suggesting the use of torture related to those who were being investigated when held incommunicado. He was satisfied on the evidence that the appellant would not be the subject of investigation or held incommunicado. He would enter an ordinary prison and would not remain under special police custody if extradited. He also noted that the evidence before the Spanish court was that Aitor made statements to the police before a judge which ratified earlier statements and that no statement or record of any complaint by him was produced. The evidence of Ana was that she was struck several times on arriving in police cells but that afterwards she was not struck during her detention. The Recorder found those actions reprehensible but did not accept that they constituted evidence of torture. He noted that further allegations were made by Ana in subsequent statements but no appeal was ever lodged against her conviction. In any event he concluded that there were in place vigorous procedures for the

exclusion of any such evidence where torture had been proved and he was satisfied that the judiciary generally in Spain would apply those procedures.

[11] In relation to the other matters upon which the appellant relied the Recorder concluded that the offences alleged against the appellant were identified in the Spanish criminal code and broadly included in all of the legislation of all of the countries who were signatories to the Framework Decision. He found that the evidence indicated that allegations of torture were made from time to time and that there was no evidence of a lawyer being arrested by virtue of the making of such an allegation in court. There was evidence of some lawyers being arrested in relation to their activities outside court but there was no evidence that lawyers were inhibited in the conduct of cases in court. He further concluded that there was no evidence to support the view that the judges were likely to be anything other than a fair and impartial tribunal. He noted that there was no case taken to the European Court based on the inhibition of lawyers in promoting a defence based on torture or bias on the part of the judiciary. Finally, he concluded that there was no evidence that there was a dispersal policy targeted at any particular group. He accepted the evidence that there was a common practice that lawyers as well as relatives and friends were entitled to and did visit defendants who were held in custody.

The evidence

[12] There were essentially four sources of evidence available to the court. The first comprised expert evidence from Professor Bowring and Professor Rouget commenting on both their experience of detention in Spain and in particular the reports compiled by international bodies looking at allegations of torture. The second source of material was primarily from the appellant's lawyer in Spain, Mrs Izko. She set out her experience and views in relation to both the police and judiciary. Dr Iturralde supported this aspect of the case by commenting on her experience of the restrictions on medical examinations in respect of those detained and held incommunicado. Another lawyer, Mrs Abia, recounted the inhibitions she perceived when representing detainees in the course of questioning because of the prohibition on participation in the questioning.

[13] The third source of material were statements and allegations made by Ana and Aitor consequent upon their detention. The appellant's case was that any statements obtained from these two people in the course of investigation were obtained by torture and were likely to be admitted in evidence against the appellant. The fourth source of evidence was that of the Spanish judges who responded to requests made by the Recorder and this court.

[14] The expert evidence focused in particular on the report to the Spanish government by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment arising from their visit between 22 and 26 July 2001. The Committee interviewed a number of persons detained in or about that time on suspicion of terrorist related offences. Some of them alleged that they had

been ill treated while held in the custody of the National Police and the Civil Guard. Medical evidence consistent with the allegations of ill-treatment was received. The allegations included blows to various parts of the body and in some cases asphyxiation by placing a plastic bag over the head and electric shocks. The Committee invited the judiciary to encourage judges to adopt a more proactive approach in respect of their supervisory function in relation to the security of detainees.

[15] There was particular concern in relation to those held incommunicado. In those cases access to a lawyer was not guaranteed from the beginning of the period of detention and there was also concern that although the detainee had the right to be examined by a state appointed forensic doctor the corresponding right to be examined by a doctor of the detainee's own choice which was available to detainees generally was not available to those held incommunicado. As a result the detection of ill-treatment was inhibited.

[16] In February 2004 a Special Rapporteur from the UN Commission on Human Rights visited Spain to report on allegations of torture or ill-treatment relating to detainees held on terrorism charges. He noted that the complaints arose particularly in relation to detainees held incommunicado as suspected members or supporters of ETA. He concluded that the system of detention in practice allowed torture or ill-treatment to occur in relation to persons held incommunicado in connection with terrorist related activities but concluded that torture or ill-treatment was not systematic in Spain.

[17] Further visits established that Spain has taken steps to improve the guarantees for individuals held in incommunicado detention. A protocol has now been provided for visits by a doctor trusted by the detainee although the CPT noted that this was not applied uniformly. An individual held in incommunicado detention may be examined by another doctor affiliated with the public health system as well as by a forensic doctor. A further measure has been implemented which requires the video recording of the entire period that individuals spend in incommunicado detention in police stations. The CPT has continued to call for an end to incommunicado detention and in particular the inability to consult a lawyer throughout the period of such detention.

[18] A second theme to the expert evidence was the dispersal policy operated in relation to prisoners in Spain. The government has taken the view that rather than concentrate terrorist prisoners in particular prisons it should disperse them to prisons throughout Spain. It is contended that in relation to Basque prisoners this tends to remove them from access to their families and consequently adversely affects the prospects of rehabilitation.

[19] Mrs Izko is a lawyer retained to represent the interests of the appellant if he is returned to Spain. She has considerable experience in representing those accused of terrorist crimes. She maintained that the fundamental evidence on which the

accusation against the appellant was constructed was the statements of Ana and Aitor. She maintained that both had reported being tortured in police stations during their incommunicado detention. She contended that both had denied the content of the statements in all subsequent court appearances. She stated that there was a systematic failure to investigate complaints of torture in criminal proceedings. She noted the international encouragement to end incommunicado detention and the effect of the dispersal policy.

[20] In a subsequent statement she referred to the politicisation of the judiciary and accused the Spanish Audiencia Nacional of collusion between the executive and the judiciary. The basis for this assertion was the lack of investigation of allegations of torture and the use of statements taken under torture in trials of those accused of terrorist crimes. She contended that the definition of terrorism had been widened by judicial decision. She also relied on the recommendation of the Special Rapporteur on the Promotion and Protection of Human Rights suggesting that terrorist cases might fall within the jurisdiction of ordinary territorial courts rather than being dealt with solely by the Audiencia Nacional.

[21] Associated with this evidence was that of Ms Abia who was a duty lawyer who participated in interrogations conducted in detention centres. She indicated the limited basis upon which the lawyer could intervene in the interrogation. It was also suggested in a separate document that those lawyers who raised issues of torture at detention centres were themselves at risk of arrest as a result. None of the examples identified supported that assertion and the evidence of Mrs Izko suggested that such allegations were made not infrequently without any indication of an adverse consequence for the lawyer. There was further evidence of general background but we did not consider that it advanced the issues in the appeal further.

[22] Mrs Izko asserted that both Ana and Aitor were tortured during the period of detention between 6 and 10 November 2001 as a result of which they made statements on the basis of which they were convicted. Aitor appeared before Central Trial Court No 4 on 10 November 2001. At that hearing he ratified the statements that he had made to the police in the preceding days detailing his extensive involvement in a terrorist cell which carried out various terrorist attacks. He had been seen by the forensic doctor during his detention and denied that he had been ill-treated. He confirmed at the hearing that he agreed with everything that the forensic doctor had said. Although it was asserted by Mrs Izko that he subsequently maintained that he had been ill-treated there is no statement or other evidence of any kind adduced to support that assertion.

[23] Ana appeared before the same court on the same date. She said that she told the police doctor that she did not need to be examined during his visits each morning and afternoon although the doctor had provided items in relation to personal hygiene. She said that she was only struck several times on arriving at the police cells and that afterwards she was not struck any more during her detention. She explained that there had been some chaffing on her wrists caused by handcuffs

placed on her. She had not expressly ratified the statements made by her which implicated her in a wide range of terrorist activity carried out by or on behalf of ETA but relied on her constitutional right to silence.

[24] In her case a statement was then lodged with the court on 26 December 2001 in which she alleged ill-treatment by way of threats, stamping on the soles of her feet, hitting her about the head and pursuing persistent interrogation. She asked that the reports drawn up by the police doctor during her detention be included in the case. The material available in respect of her detention suggested that there was no medical evidence to suggest ill-treatment. She wished this statement to be available for her general practitioner to make any report tending to support her claims. No such report was contained within the papers. The statement did not indicate why she indicated to the court on 10 November 2001 that the only ill-treatment had been on arrival at her police cell and gave no indication as to the circumstances in which she made any of the alleged admissions.

[25] The evidence of the requesting judges was that the appellant would never be held incommunicado if he was surrendered to Spain but would be properly brought before the court to take a statement if necessary. If remanded in custody he would enter an ordinary prison and would never remain under Special Police Custody. The judges asserted that Spain was a signatory to the relevant international conventions and that evidence obtained which directly or indirectly violated fundamental right liberties would have no effect whatsoever.

[26] In light of submissions on behalf of the appellant dealing with the absence of any information in relation to the trial process surrounding Ana and Aitor we requested further information from the Spanish authorities and further submissions from the parties which were received in November 2013. These came to the attention of the court in February 2014. The papers established that Ana and Aitor were arrested apparently in the course of planting a bomb. Aitor had a detonating device, Ana was the driver of the vehicle and each of them was armed with a pistol. The apartment which was used as a base for the extensive terrorist operations was searched as result of which explosives and other terrorist material was recovered. The fingerprints of the appellant were found in the flat and he was named by Ana and Aitor as one of the terrorist group involved in the activities.

[27] A record of the trial outcome was contained within the papers served by the Spanish authorities in answer to the questions raised by this court. That disclosed that the statements made by Ana and Aitor were admitted in evidence against them. The court noted that Aitor had ratified the statements in front of the examining magistrate on 10 November 2001 and no complaint of ill-treatment was made on his behalf in the course of the trial. In respect of Ana the court noted that she had not ratified her statements before the examining magistrate but she did not give any evidence contesting her responsibility for the crimes. The court took into account that there had been a complaint of ill-treatment, no evidence to support it and

evidence from police and medical examiners tending to rebut any suggestion of ill-treatment.

Consideration

[28] The principal issue in this case concerns the risk that if returned to Spain the prosecution will seek to establish the appellant's guilt by reliance upon evidence obtained by torture. In particular the relevant evidence consists of the statements of Ana and Aitor allegedly admitting their responsibility in relation to an extensive range of terrorist activity. Both of those statements implicate the appellant and the prosecution will also rely upon fingerprint evidence obtained from the apartment which the terrorists used as a base.

[29] The principles which apply in a case of this sort were reviewed by the ECHR in Abu Qatada v UK [2012] ECHR 8139/09. We do not understand these principles to be the subject of any real dispute between the parties. At paragraph 261 of the judgment the Court stated that it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such a risk is established it is for the Government to dispel any doubts about it. At paragraph 263 the Court comes to the unexceptional conclusion that the use at trial of evidence obtained by torture would amount to a flagrant denial of justice.

[30] In that case the statements which it was anticipated would be used in the applicant's trial had been admitted to establish the guilt of those witnesses in relation to alleged terrorist activity. The witnesses had set out detailed grounds alleging detention and ill-treatment for six days. It was established that videotapes of the interrogation had been destroyed by the interrogators who refused to indicate the identity of the person who had given authority to destroy the material. A statement of complaint witnessed by a lawyer had not been accepted by the court. A medical report on the defendants found bruising and scarring on their bodies consistent with the allegations which had been made and further evidence was called from family members in relation to those injuries.

[31] In this case the only evidence alleging ill-treatment of Aitor is the statement to that effect by Mrs Izko. We have no reason to doubt that the statement was made to her but there is no explanation for the material demonstrating that Aitor denied that he had been ill-treated when interviewed on 10 November 2001 and had indeed ratified his evidence in front of the examining magistrate. No statement of any kind from Aitor was produced either to the trial court in Madrid or to this court. No medical evidence other than that from the Spanish authorities indicating that he had no complaints was produced. The only possible support for this allegation is the finding in the international inspections that on occasions evidence of torture was detected at this time among some of those detained on terrorist offences. It is of

significance that the reporters identified medical evidence which supported those allegations.

[32] Ana asserted that she had been struck a couple of blows on the head at the time of her arrest but was not otherwise ill-treated during her detention when interviewed on 10 November 2001. As indicated she subsequently submitted a statement at the end of December 2001 alleging treatment that properly could be found to be torture. There is no explanation at all within the papers as to why Ana did not make that case before the examining magistrate. It is clear that she was perfectly prepared to indicate some ill-treatment. In the statement she made in December 2001 she referred to the possibility of medical evidence to support her allegations. No such evidence was produced. The trial record indicates that although the statement was available to the court it was not supported by evidence. In her case as in the case of Aitor no appeal was lodged. It is the position of the Spanish authorities that allegations of ill-treatment are from time to time made without justification in order to support a political view of the Spanish authorities.

[33] The appellant relies upon certain cases in which the ECHR has found breaches of Article 3 as a result of the failure of the Spanish authorities to investigate allegations of ill-treatment involving injuries noted in the course of detention and about which complaint was made to the examining magistrate. In those cases there was identifiable evidence both by way of video and witnesses which the Court considered should have been taken into account by the Spanish court. In this case the interviewing officers and medical officers all gave evidence in the trial and there is nothing in the papers to suggest that anything was not produced.

[34] We have carefully examined the materials in this case. The allegations of torture in this case are either completely unsupported or untested and uncorroborated. In each case the allegation is directly contradicted by what the witnesses said to the examining magistrate on 10 November 2001. No explanation for that contradiction has been offered. Nor has any explanation been offered for the decision not to support these allegations by evidence at the trial. We recognise the difficulty that can arise in proving such allegations and take that into account in assessing whether there are substantial grounds for believing that there is a real risk that such evidence would be introduced against the appellant in this case. Having reviewed the evidence we are not satisfied that the appellant has established such substantial grounds.

[35] The Spanish authorities have indicated in their evidence that the courts in Spain would exclude any evidence obtained by torture. Mrs Izko asserts that the Audiencia Nacional has colluded with the executive. It is contended that the courts in Spain cannot be trusted to exclude such evidence. There is no support for that proposition in the international inspections. There is no material indicating a finding in any national or international court that evidence obtained by torture had been admitted by the court in any trial in Spain. We have not been able to ascertain any basis for this assertion. For all of those reasons we do not accept that the appellant

has established that if returned to Spain there are substantial grounds for believing that he would be exposed to a real risk of a flagrant denial of justice.

[36] We do not consider that there is any merit in the other grounds advanced on behalf of the appellant. We accept that he would not be held incommunicado if returned to Spain and that there is no risk of him being exposed to torture or similar treatment. The offences charged are extradition offences and are not based on political opinions. We do not accept that there is any evidence of interference with the appellant's Article 8 rights as a result of the dispersal policy. This applicant has not resided in Spain since 2003. There is no evidence of his family ties or background. He will be entitled to receive visits from family and friends. The appellant has not adduced evidence to support the view that his detention would be a disproportionate interference with his family life.

Conclusion

[37] For the reasons given the appeal is dismissed.