

Case No: CO/6185/2004

Neutral Citation Number: [2004] EWHC 2986 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London,
WC2A 2LL

Wednesday, 15 December 2004

Before :

LORD JUSTICE TUCKEY

MR JUSTICE FIELD

Between :

AUGUSTO PINTO

APPLICANT

- v -

**(1) THE GOVERNOR OF HM PRISON
BRIXTON**

**(2) THE FIRST SECTION OF THE FIRST
CRIMINAL COURT OF LISBON**

Respondents

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

Mr J Hardy (instructed by **Tuckers**) appeared on behalf of the **Applicant**
Miss A Ezekiel (instructed by **Treasury Solicitor for HM Prison Brixton** and the **CPS Acting**
for the Government of Portugal) appeared on behalf of the **Respondents**

J U D G M E N T (As Approved by the Court)

1. **LORD JUSTICE TUCKEY:** This is an application for habeas corpus by Augusto Pinto who was arrested on 18th November 2004 on the authority of a European arrest warrant issued by the First Criminal Court of Lisbon. The applicant challenges the validity of the warrant and therefore all steps taken under the Extradition Act 2003 which were initiated by it, including his remand in custody by Bow Street Magistrates' Court pending an extradition hearing.
2. The applicant is a Portuguese national and was serving in Portugal a sentence of imprisonment which had been imposed on him in Italy. That sentence was for offences of murder (25 years) and concealment of a body (2 years), but it is not clear from the warrant when those sentences were imposed or whether they are consecutive or concurrent.
3. At all events it appears that the applicant was transferred to Portugal at the end of 1996 and then was released at some time, on what the warrant describes, as "a precarious prolonged exit". After these words the warrant says "... not having himself, on its term, presented at the State Prison of Vake de Judeas."
4. The warrant was issued in Portugal on 5th November 2004. Part 1 of the 2003 Act applies to such a warrant. This part of the Act substantially implemented the Council of the European Union's Framework Decision of 13th June 2002, the intention of which was to introduce "a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice."
5. Section 2(2)(b), (5) and (6), and section 63 of the Act, define a Part 1 warrant of the type with which we are concerned by describing what it should contain. So far as is relevant such a warrant must contain a statement that the person in respect of whom it is issued is alleged to be unlawfully at large from a prison in the imprisoning territory, and particulars of the offence of which he is convicted, and the sentence imposed under the law of the convicting territory.
6. On receipt of the warrant in this case, on 10th November, NCIS (the appropriate authority) certified that it had been issued in Portugal by an authority which had the function of issuing warrants (section 2(8)). This gave power to execute the warrant (section 3(2)) and on arrest the applicant was required to be brought before the appropriate judge (section 4(3)). At the initial hearing at Bow Street Magistrates' Court on 19th November the district judge had to decide whether the applicant was the person named in the warrant (section 7(2)). Having decided that he was (section 7(5)) he had to fix a date on which the extradition hearing was to begin (section 8(1)(a)) and remand the applicant in custody or on bail (section 8(1)(d)). The applicant was remanded in custody to 6th December, the date fixed for the start of the extradition hearing. This hearing was subsequently adjourned pending the outcome of these proceedings.
7. Sections 9 to 25 of the Act deal with the extradition hearing and set out various steps which the judge must follow. Sections 26 to 34 deal with appeal. A statutory right of appeal is given to the High Court against an order of extradition (section 26) or discharge (section 28) and the court's powers on such appeals are confined by section 29. Section 34 says:

"A decision of the judge under this Part may be questioned in legal proceedings only by means of an appeal under this Part."

So it is clear that orders to which sections 26 and 28 apply can only be challenged by statutory appeal. The statute is, however, silent as to what, if any, other challenges can be made to acts or decisions to which sections 26 and 28 do not apply.

8. On behalf of the applicant, Mr Hardy's submission is simple. He says the warrant was fundamentally deficient because it did not state that the applicant was unlawfully at large from a prison or, less importantly, the date and particulars of his conviction, when the sentences were imposed, or whether they were concurrent or consecutive. This was therefore not a valid Part 1 warrant so the applicant's arrest under it was unlawful, as were all the subsequent statutory steps which it set in train, including his remand in custody pending the extradition hearing. The challenge is not to any decision of the judge but to the judge's jurisdiction to do anything under the invalid warrant. The appropriate remedy, he says, is habeas

corpus, the right to which is not taken away by section 34.

9. In support of his submissions Mr Hardy relied on the decision of Crane J in *R (on the application of) Bleta v Secretary of State for the Home Department* [2004] EWHC 2034 (Admin), in which the court had to consider a request for extradition under Part 2 of the Act. Section 70(4) of the Act required the request to state that the person was alleged to be unlawfully at large after conviction by a court in the requesting state. The Secretary of State had issued a certificate under section 70 that the request was valid. This led to a warrant being issued for the claimant's arrest. The claimant applied by judicial review to quash the certificate on the ground that the request was invalid because it did not contain the required statement. The court did so. Crane J said that it would only be in a clear case that the Secretary of State should conclude, in the absence of the statement by the requesting state, that the person sought is not only at large but unlawfully so. It was not for the court to fill the gap where the requesting state could so easily and obviously do so by making the required statement.
10. Miss Ezekiel, on behalf of the issuing judicial authority, submitted that it was clear from the warrant that the applicant was unlawfully at large. It was not necessary for it to say so expressly. Its mere issue was sufficient to indicate that this was the case. *Bleta* could be distinguished because it concerned Part 2 of the Act. A Part 1 warrant itself requested the arrest and surrender of the person concerned under the harmonised process envisaged by the Council Framework Decision. Unlike *Beta*, where there was doubt as to whether the claimant was ever liable to immediate arrest, the effect of a Part 1 warrant is clear.
11. I do not accept these submissions. I agree that it is not necessary for the warrant slavishly to follow the language of the statute, but it must in some way make it clear that the person concerned is at large and unlawfully so. Here the statement that the applicant was on "a precarious prolonged exit" suggests that he was lawfully at large at one time. The words which follow may have been intended to say that he did not return to prison when he was required to do so and so is now unlawfully at large, but they do not say this clearly. It cannot be inferred from the mere fact that the warrant was issued that the person concerned is unlawfully at large. Miss Ezekiel's submissions overlook the fact that it is not the mere issue of the warrant which sets the process in train in the United Kingdom but the issue of a warrant which complies with the conditions prescribed by sections 2 and 63 of the Act.
12. The Framework Decision, and the pro forma European arrest warrant attached to it, do not require a statement that the person concerned is unlawfully at large, but that is an additional requirement which is prescribed by our legislation; a requirement, we are told, which has its roots in earlier extradition legislation. So this extra requirement is a potential trap for our unwary European partners, of which they should obviously be made aware.
13. I need not say anything further about *Bleta* except that it obviously assists the applicant's case here and I do not think that it can be distinguished on the point at issue in this case.
14. In view of my conclusion about Mr Hardy's main criticism of the warrant, it is not necessary to deal with his subsidiary criticisms, although, on the face of it, I think they are well-founded.
15. Lest it should be thought that what I have said is over-technical, I refer to what was said by the House of Lords recently in *R (Guisto) v Governor of Brixton Prison* [2003] UKHL 19, at paragraph 41, where Lord Hope said:

"... it is a fundamental point of principle that any use of the procedures that exist for depriving a person of his liberty must be carefully scrutinised. Lord Atkin's declaration in *Liversidge v Anderson* [1942] AC 206, 245: 'that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act' has lost none of the force which it had when it was delivered over sixty years ago. When, in *re Farinha (Antonio da Costa)* [1992] Imm AR 174, 178 Mann LJ said that the courts must be vigilant to ensure that the extradition procedures are strictly observed, he was making precisely the same point. The importance of this principle cannot be over-emphasised."

16. Miss Ezekiel accepted that the 2003 Act had not taken away the right to apply for habeas corpus and, as I understood her, conceded that such relief could be granted in this case if we did not accept her submissions about the validity of the warrant. But, she submitted, challenges to the validity of a Part 1 warrant should be made to the appropriate judge in the Magistrates' Court, preferably at the initial hearing, but in any event during the extradition hearing. Any decision made by the judge could then be the subject of a statutory appeal.
17. Mr Hardy, on the other hand, submits that the appropriate judge has no jurisdiction to decide upon the validity of the warrant. The steps he has to follow are laid down in some detail and they do not include any requirement for him to consider the validity of the warrant.
18. This is a point of some general importance which I feel we should not resolve on this application upon which we are having to give a largely ex tempore judgment because of its urgency. I should like to accept Miss Ezekiel's submissions because there is much to commend them. The 2003 Act was obviously designed to streamline and simplify the extradition process. Applications for habeas corpus and judicial review obviously disrupt the statutory scheme, but looking at the Act the powers of the judge during the initial hearing are closely defined and there is no statutory appeal from any decision he makes at such a hearing. Again the steps the judge has to follow during the extradition hearing are laid down by the Act, but here at least a decision as to the validity of the warrant which led to an order for extradition or discharge, could be made the subject of a statutory appeal.
19. I do not think I should venture further than this. It is preferable that the issue I have identified should be resolved in a case in which it actually arises. But in this case, for the reasons which I have already given, I think the application for habeas corpus should be granted.
20. **LORD JUSTICE FIELD:** I agree.