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04/09

RULING
IN THE COUNTY COURT FOR THE DIVISION OF BELFAST
IN THE MATTER OF THE EXTRADITION ACT 2003 ('the Act')

IN THE MATTER OF ARTURO VILLANUEVA ARTEAGA
'The Requested Person'

REQUESTING STATE – THE KINGDOM OF SPAIN

Burgess J

[1] On 27 February 2009 a judge of the Fourth Division of the Criminal Court of the National High Court of Spain issued a European Arrest Warrant for the arrest and extradition of the Requested Person. On 18 April 2009 an officer of the Serious Organised Crime Agency, which is the Agency designated in this country for these purposes, issued a certificate under Section 2(7) of the Act. In effect this recognised the Kingdom of Spain as a country to which the provisions of Part I of the Act apply.

[2] The offence alleged is explained in outline terms in the Warrant, but it is then set out under the heading

> "Description of the circumstances in which the offence(s) was(were) committed, including the time, place and degree of participation in the offence(s) by the Requested Person":

It then states

> "MEMBER OF AN ILLEGAL TERRORIST ORGANISATION
>
> According to investigations carried out, Arturo Villanueva Arteaga is a member of the Basque Terrorist Organisation ETA, an organisation which uses violent means in order to achieve that the Basque Country Navarre be separated from and gain the status of an independent State along with part of Southern France. For that purpose ETA has set up

several sub-organisations each one performing a specific mission: one of those subdivisions is JARRAI, of which Villanueva is a member. Following ETA's strategy of fighting for the breakdown of national unity and according to documents that were seized, he carried out violent and coercive actions from 1994 to 2000, such as a course of conduct directed to disturb the public peace through the use of violent means in the streets, he set street furniture and buses on fire, made arson attacks against courts and government facilities, carried out attacks against private individuals and police, organised campaigns to discredit judges and police, he encouraged that institutions be persecuted by citizens, Basque business be coerced and forced to pay money if they do not want to suffer damages. During the period 1992 and 1999 6,263 actions of street violence were committed in the Basque Country in which the JARRAI organisation was involved, organisation of which Villanueva is a member. It must be highlighted that many members of JARRAI were sentenced by a Ruling of Spanish Supreme Court dated 19 January 2007. Some of those members have not been tried since they fled abroad, like Villanueva. The mentioned Ruling declared that the JARRAI Organisation is a terrorist group".

[3] In the same paragraph under a separate heading entitled "NATURE AND LEGAL CLASSIFICATION OF THE OFFENCE(S) AND THE APPLICABLE STATUTORY PROVISION/CODE" it states:

> "ILLEGAL ASSOCIATION MEMBERSHIP, WHERE THE ASSOCIATION IS A GANG ORGANISATION OR TERRORISM GROUP, ARTS. 515 AND 516 OF THE SPANISH PENAL CODE"

[4] The Requested Person was arrested on foot of the Warrant on 22 April 2009 and appeared before me, the appropriate judge nominated under the provisions of the Act, on the same day. He was granted bail and the matter was then timetabled towards a hearing on the basis that the Requested Person was objecting to being extradited.

[5] For the sake of completeness, and subject to representations made by Mr Barry McDonald QC on behalf of the Requested Person as to the role of such additional information, I was asked by the instructing solicitors for the Requested Person to seek further clarification from the Spanish Court. This was contained in an email on 17 June 2009 in which I sought the following information:

> (i) Is it alleged that the Requested Person was involved in specific acts or offences, or it is alleged that he was a member of the group between the dates stated in the Warrant namely between 1994 to 1999/2000? and

(ii) Could we be advised of the date upon which JARRAI was declared a terrorist organisation? It would appear that that was sometime in January 2007 following a Ruling of the Spanish Supreme Court on 19 January 2007.

[6] By an email reply to this enquiry through the auspices of Ms Lynn Barrie in Madrid I received the following reply:

> "In answer to your communication by fax dated 24 June 2009 the Court states the following:
>
> With respect to the first question "Is it alleged that Mr Villanueva committed several acts or offences, or it is alleged that Mr Villanueva was a member of the organisation between the dates set out in the EAW, namely between 1994 and 1999,2000?
>
> We reply that, according to the charges of the Public Prosecutor, Mr Villanueva was a member of JARRAI in the years 1994 to 2000 and carried out various violence and coercive actions as a member of that Organisation between the dates referred to."
>
> With respect to the second question "Can you advise on the date on which JARRAI was declared a terrorist organisation?", the JARRAI Organisation was declared a terrorist organisation by a final judgment of the Supreme Court on 19 January 2007. It is specified that Mr Villanueva was not prosecuted in the judgment made by this Court on 20 June 2005 and confirmed by the Supreme Court on 19 January 2007 he having fled the Spanish Territory prior to that trial".

[7] A further letter was received from the Judge Rapporteusc in Madrid dated 2 September 2009 where at paragraph 4 it states:

> "Membership of a terrorist organisation is a crime in Spain for over thirty years: therefore if it demonstrated during the trial the belonging of the Requested Person to JARRAI, he will be convicted, if not, he will be acquitted.
>
> That JARRAI had been declared a terrorist organisation in the sentence dated 2007.1.19, does not mean that the facts (sic) committed by its members before that date are legal, since all persons who were convicted as members of such organisation

committed facts (sic) between 1992 and 2000, dates on which membership of a terrorist organisation or group was a crime."

[8] The thrust of the preliminary point originally raised by the legal representatives for the Requested Person was that any extradition would be incompatible with Article 7 of the European Convention on Human Rights, that is:

> "Article 7
> (1) 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 …"

Article 7 therefore prohibited retrospective criminalisation of acts and omissions.

The argument put forward on behalf of the Requested Person was that his alleged membership of the JARRAI organisation was before the time that the organisation was declared illegal. I do not require to go into this at this stage since the argument before me on 5 October changed into a separate argument which will be the subject of this Ruling.

[9] On 4 October 2009, the day before the hearing, a skeleton argument was received on behalf of the Requested Person stating that there was in fact a point to be decided even before any argument on the Article 7 issue namely - Is there before the court a Warrant within the meaning of Part I of the Act? It was argued that the Warrant in the present case

- Does not contain the requisite information:
- The information in a Warrant cannot be "eked out" by any additional information: and
- In any case the additional information received merely serves to confirm that the Warrant is not only defective but mistranslated and misleading insofar as the English version suggests that the particulars that it does contain refer to conduct alleged against RP (as opposed to JARRAI).

[10] The European Arrest Warrant is a measure of the European Union introduced by Council Framework Decision 2002/584/JHA on 13 June 2002. It is a measure to simplify extradition procedures between Member States of the European Union. It is based on the principle of mutual recognition by the Member States of decisions in other Member States and, in broader terms, of the mutual trust which Member States have in the justice systems of each other.

[11] As it is obliged to under the Treaty on European Union, the United Kingdom gave effect to the European Arrest Warrant. It did this in the Act Part I, which covers extradition to so called Category I Territories of which the Kingdom of Spain is one. That the Act derives from the Framework Decision is relevant to the approach to be adopted to its interpretation, that is it should be interpreted in the light of the wording and purpose of the Framework Decision. In the case of *Dabas –v- Spain* [2007] 2 AC at page 31 the court confirmed that there is imposed on National Courts

> "the same interpretative obligation to construe national law so far as possible to attain the result sought to be achieved by Framework Decisions as the ECJ in *Marleasing SA –v- Comercial Internacional de Alimentacion SA* case C-106/89 [1990] ECR 1-4135 had previously imposed upon national courts to achieve the purpose of directives."

[12] Article 8 of the Framework Decision is headed "Content and Form of the European Arrest Warrant". It states that the Warrant shall contain information, set out in accordance with the form contained in the annex, relating to matters such as the identity and nationality of the offender, the offence, and then Article 8(1)(e):

> "A description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the Requested Person …"

[13] The Act addressed this requirement by the provisions of Section 2 which provides (so far as is material to this case) as follows:

> "2(2) A Part I Warrant is an Arrest Warrant which is issued by a judicial authority of a Category I Territory and which contains:
>
> (a) .. the information referred to in subsection (4) ..
>
> (4) the information is:
> …
> (c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged constitutes the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the Category I Territory under which the conduct is alleged to constitute the offence."

[14] In *Ector –v- National Public Prosecutor of Holland* [2007] EWHC 3106 (Admin) Mr Justice Cranston commented as follows:

> "Reference to the Annex to the decision does not take us any further. In other words, the Council Framework Decision requires the Warrant to set out a description, not in legal language, of how the alleged offence is said to have occurred. In particular, the description must include when and where the offence is said to have happened, and what involvement the person named in the Warrant had. As with any European instrument, these requirements must be read in the light of its objectives. A balance must be struck between, in this case, the need on the one hand for an adequate description to inform the person, and on the other hand the object of simplifying Extradition procedures. The person sought by the Warrant needs to know what offence he is said to have committed and to have an idea of the nature and extent of the allegations against him in relation to that offence. The amount of detail may turn on the nature of the offence. Where dual criminality is involved, the detail must also be sufficient to enable a transposition exercise to take place."

[15] Mr Justice Cranston then went on at paragraph 8 in referring to the provisions of Section 2(4)(c) of the Act as follows:

> "That language … is not obscure. It could be given a plain and ordinary meaning … Whether in requiring "the conduct alleged to constitute the offence", the subsection goes beyond the European Framework Decision and so needs to be read consistently with it, we can leave to another day. For my part, I have no doubt that it can be so read. What is clear is that there is no need to put any gloss on the language: for example that the language somewhere denotes the specificity or lack of it demanded in the particulars for a Count in an Indictment. In making that point, in a decision of this court, Auld LJ added the valuable point that allowance needs also to be made that the description in a European Arrest Warrant can often be expected to have been translated."

[16] In *Fofana –v- Thubin* [2006] EWHC 744 (Admin), Auld LJ stated as follows:

> "39. Provided that the description in a Warrant of the facts relied upon as constituting an Extradition offence identifies such an offence and when and where it is

alleged to have been committed, it is not, in my view, necessary or appropriate to subject it to requirements of specificity accorded to particulars of, or sometimes required of, a count in an indictment or an allegation in a civil proceeding in this country. Allowance should be made for the fact that the description, probably more often than not, was set out in a language other than English, requiring translation for use in this country, and that traditions of criminal "pleading" vary considerably from one jurisdiction to another. As Law LJ observed in *Pahar*, at paragraph 8, when emphasising the need for conduct said to constitute the Extradition offence to be specified in a Warrant:

> "The background to the relevant provisions made in the 2003 Act is an initiative of the European Law and .. in the proper administration of those provisions that fact is to be borne firmly in mind .. the court is obliged, so far as the statute allows it, to proceed in a spirit of co-operation and comity with other Member State parties to the European Arrest Warrant Scheme …".

[17] For the purposes of this Ruling I proceed on the basis of the language in the Warrant itself supplemented, where it may be, by the replies received in response to the application for further information by the court. I do so on the basis that the Request for information was made on behalf of the Requested Person for clarity rather than expansion of the information that had been provided. In doing so I have taken into account:

(a) By Article 15 of the Framework Decision it is provided:

> "(2) If the executing judicial authority finds the information communicated by the Issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3-5 and **Article 8** be furnished 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.
>
> (3) The Issuing Judicial Authority may at any time forward any additional useful information to the "Executing Judicial Authority" and

(b) The strictures of Lord Hope in *Dabas –v- Spain* at para 50 where he states with specific reference to Section 2(2) of the Act:

> "I wish to stress however, that the judge must first be satisfied that the Warrant with which he is dealing is a Part I Warrant within the meaning of Section 2(2). A Warrant which does not contain the statements referred to in that subsection cannot be eked out by extraneous information. The requirements of 2(2) are mandatory. If they are not met, the Warrant is not a Part I Warrant and the remaining provisions of that Part of the 2003 Act shall not apply to it".

[18] I now turn to the facts of this case and consider the question posed on behalf of the Requested Person - whether the Warrant contains the requisite information required by the Act. I turn first to the offence which is alleged in the Warrant before turning to decide the question as to whether or not sufficient and relevant information has been given. In the Warrant, the terms of which I have set out above, the offence is specifically stated as:

> "Member of an illegal terrorist organisation".

At the end of the same paragraph where the nature and legal classification of the offence is stated it provides:

> "Illegal association membership, where the association is a gang, organisation or terrorist group, Articles 515 and 516 of the Spanish Penal Code".

[19] In the particulars while reference is made at one point to the Requested Person being a member of ETA at a later point it refers to JARRAI as a sub organisation of ETA and it is of JARRAI that the Requested Person is a member. Sufficient information is then given to allow me to conclude that it is membership of JARRAI that is being alleged. That is confirmed in the reply of 2 July 2009 and at paragraph 4 of the letter from the Judge Rapporteuse dated 2 September 2009.

[20] However in the particulars a specific reference is also made to the Requested Person personally carrying out violent and coercive actions from 1994 to 2000. Those actions are however set out without reference to where these are alleged to have taken place, the specific targets of such alleged attacks, the dates of such alleged attacks or any other information which would, in my opinion, allow anyone reading the document to be aware of exactly what the allegation or allegations are being made against him personally – that is over and above those

which are attributed to him by reason of his alleged membership of the Group JARRAI. In relation to the actions of JARRAI the particulars state that "during the period 1992 and 1999 6,263 actions of street violence were committed in the Basque country in which the JARRAI organisation was involved, an organisation of which Villanueva is a member."

[21] The court could on the face of the wording in the Warrant proceed for the purpose of this application purely on the grounds that the offence for which the Requested Person is sought to be extradited is membership of a terrorist organisation. However for the purposes of completeness I will deal with the allegations in the particulars in relation to alleged acts undertaken personally by the Requested Person.

[22] A number of authorities were handed into the court, all of which make it clear that each case is fact specific. However two of these cases are of interest in that they point to the deficiencies in the information and particulars in the Warrant as to the allegation of membership of JARRAI. These are:

(i) *Farnesi –v- Court of Livorno, Italy* [2009] EWHC 1199 (Admin). In this case investigations were being carried on against GM in relation to disclosed trafficking in cloned credit cards from England to Italy. Mr Farnesi was found in possession of eight forged credit cards in the name of FM on 4 July 2007 upon arrival in Italy. Investigations showed a Mr Fawaz had given Mr Farnesi these cards and Mr Fawaz was identified as "the point of reference in England". It was said that Fawaz had travelled to Greece to open a new market in forged credit cards. At para 4.1 Sir Anthony May went on to state:

> "Descriptive details are then given of the criminal association established for the purpose of committing an unspecified number of frauds importing forged credit cards for the use in Italy. Fourteen named individuals are alleged to have been involved, including Mr Farnesi as responsible for local sales of organisation and Mr Fawaz is one of the "technical experts". Mr Fawaz is charged with importing huge amounts of counterfeited American Express cards from England. Others, including Mr Farnesi, on 4 July 2007 are charged with being in possession of particular numbers of counterfeit credit cards. On four specific dates between 11 February 2007 and 7 August 2007 Mr Fawaz is said to have delivered or sent the forged credit cards, which were then seized. The

offences are alleged to have been committed at least from March 2007 and were still ongoing in Livorno and other European countries."

Having listened to argument Sir Anthony May went on at paragraph 9.1 to reject the arguments that the particulars given were inadequate.

"9.1 First of all the various conspirators are named. Secondly the nature of the conspiracy is clear. The time period beginning March or thereabouts 2007 is given and ends with the date of the Warrant itself, and the dates of four specific manifestations of the conspiracy are given specifically. The place were the alleged facts are said to have taken place is clear enough. That is that the conspiracy centred in Italy, including Pisa and that the participation of these appellants included being in England for Fawaz and between England and Italy, including Pisa, for Mr Farnesi. **The part played by each of the two appellants is described both generally and with specific reference to their alleged part in the conspiracy**." *(the underlining is mine).*

(ii) In *Ektor –v- National Public Prosecutor of Holland* (see above) the warrant set out five offences for which the Dutch Authorities sought the Requested Person: human trafficking: people smuggling: falsification or forgery of travel documents: abduction of minors from custody: and participation in a criminal organisation.

The offences were described in outline in the Warrant, but the Warrant then contained the description of facts in the following terms:

"The person named above is suspected amongst other things of carrying out human trafficking together with others (including the exploitation of others, which amongst other things includes enforced prostitution), people smuggling (including aiding and abetting the bringing of illegal persons into the Netherlands), the removal of underage children from the lawful authorities, falsifying and forging of travel documents and/or participation in a criminal organisation, which organisation is alleged to have been participating in said offences in the Netherlands during the period from1 January 2006 up to and including 24 October 2007. At the time when the offences were being committed Hallatu ("Gilbert Solomon") was (mostly) in England. Gilbert conspired to commit the offences detailed.

> The organisation, of which the suspect is a member, is involved amongst other things in recruiting minors in Nigeria. These are then brought to Western Europe, especially the Netherlands. These minors then register as asylum searchers with the Dutch Government which then, in accordance with Dutch Law, proceeds to place them in refuges for underage people.
>
> Then, by using threats of violence against those minors or members of their family with threats of Voodoo, the organisation forces these minors to leave the refuge for minors, after which they generally end up in Spain or Italy as illegal prostitutes. **The suspect played an important and directing role in the transport of minors, arranging false documents, maintaining contact between the various members of the organisation and directing one or more of them, including in the Netherlands**. The criminal organisation suspected of being a wide-reaching criminal network, operating on a national and international level." *(again the underlining is mine).*

[23] In argument for the appellant (Requested Person) it was stated that the Warrant did not contain sufficient details as to the precise conduct of the Requested Person in that the Warrant simply stated the suspect played an important and directing role but did not tell the court how this was done. There was then argument that no detail had been given regarding "arranging false documents" or delay as to how the children were transported. At paragraph 10 Mr Justice Cranston said:

> "10 In my view this European Arrest Warrant satisfies the requirements of Section 2(4)(c) of the Extradition Act 2003. The appellant had been under no misapprehension as to why he is being sought by the Public Prosecutor of the Netherlands. In the light of how this court must interpret the requirements of Section 2(4)(c), I cannot accept Mr Lloyd's submissions that the details are too vague or are contradictory. The Warrant makes quite plain the nature and scope of the conspiracy to which the appellant is alleged to be a party. The Warrant indicates the role of the appellant within that conspiracy, namely that he played a directing role in the transportation of underage children, that he arranged false documentation and that he acted as an intermediary in maintaining the links between various members of the conspiracy. The time period of the conspiracy is set out from 1 January 2006 until the time of his arrest. The Warrant specifies the route by which the underage children were

> trafficked. They were recruited in Nigeria then brought to Western Europe, and particularly to the Netherlands. It specifies how those children began as asylum seekers, how they ended up in refuges and how they were frightened into fleeing those refuges by violence and Voodoo. Finally, it specifies that the children generally ended up in Spain or Italy as prostitutes. …"

[24] Dealing with the offence stated in the particulars to the Warrant what is deficient in the particulars is either the evidence whereby it is alleged that the Requested Person is a member of that organisation other than by a general statement that he committed a number of offences about which no details are given as to when they occurred – for example

- the nature of disturbance of the public peace and in what streets it is alleged this occurred:
- where street furniture and buses were set on fire:
- where arson attacks against courts were carried out:
- which private individuals and police it is alleged that he carried out attacks: or
- the nature of the campaigns to discredit judges and the police.

This is not improved upon by the reply of 2 July where reference is made to carrying out "various violent and coercive actions" as a member of that organisation between the dates referred to in the reply. No further detail is given in the letter of 2 September 2009 – although I accept this was directed to the issue as to whether or not JARRAI was an illegal organisation prior to the date of the decision of the Spanish Supreme Court.

[25] I have therefore concluded that the particulars given are general and lack any specificity as to the actions of the Requested Person which evidences his alleged membership of the organisation such as attending meetings: giving interviews: being involved in the organisation of the Group (and if so, how) and other outward manifestations that might allow the court to come to a view that the element of membership of the Group is particularised with proper specificity.

[26] For the sake of clarity I accept that the time period of the activities of JARRAI are properly set out and that it would be open to the court to decide that the scale of their activity (running into over 6,000 incidents) may be sufficient to allow the Requested Person to have sufficient particularity as to the activities of the Group. But that is not the point on which my decision is made. It is the question of particularity as to his membership of that Group which is missing.

[27] I said I would return to the question of the specific acts attributed to the Requested Person based on the wording in the Warrant and the general statement in the email of 2 July. In fact I have covered this in my comments above. There is an overlap between the available evidence to substantiate membership and the evidence available to show what specific offences have been committed by the Requested Person. For the same reason therefore this would not meet the requirements of Section 2(4)(c) of the Extradition Act.

[28] I therefore accede to the application that the Warrant is invalid.