IN THE SUPREME COURT OF GIBRALTAR

Criminal Appellate No 8 of 2007

IN THE MATTER OF A EUROPEAN ARREST WARRANT ISSUED BY THE DEPUTY PUBLIC PROSECUTOR AT THE MARSEILLES COURT FOR THE ARREST OF DOLORES AUDREY FLETCHER

AND IN THE MATTER OF AN APPEAL TO THE SUPREME COURT OF GIBRALTAR AGAINST THE DECISION OF THE STIPENDIARY MAGISTRATE TO SURRENDER HER TO FRANCE

BETWEEN:

AUDREY FLETCHER

Appellant

-and-

THE GOVERNMENT OF FRANCE

Respondent

Mr C Nicholls QC with Mr S Bossino for the Appellant

Mr R Rhoda QC with Mr J Fernandez for the Respondent

JUDGMENT

<u>DUDLEY J</u>: On the 19th February 2007 the Public Prosecutor to the Marseilles Court of First Instance sent to the Central Authority in Gibraltar a letter requesting the arrest of the Appellant (hereinafter "Fletcher"). The letter purported to deal with the issue of specialty, to which to which I shall have cause to turn to in due course. Annexed to the letter were certified copies of a French Arrest Warrant dated 9th February 2007 issued by the Vice President of the Judicial Investigation Department of the Marseilles Court of First Instance (hereinafter "the French Warrant") together with a certified copy of a European Arrest Warrant also dated 9th February 2007 issued by the Deputy Public Prosecutor to the Marseilles Court of First Instance, requesting Fletcher's surrender (hereinafter "the European Arrest Warrant"). Essentially the warrants disclose 3 charges, namely, (i) illegal importation / possession / transportation of 3461 Kilograms; (ii) smuggling the cannabis as part of an organised gang and (iii) criminal conspiracy.

Fletcher was arrested in Gibraltar on 12th March 2007 and brought before the Magistrates' Court. This is an appeal from the decision of the learned Stipendiary Magistrate of 5th July 2007 ordering the surrender of Fletcher to the French judicial authorities pursuant to the provisions of the European Arrest Warrant Act (hereinafter "the Act").

The surrender of Fletcher to the French authorities is on the face of Mr Nicholls' skeleton opposed on 4 distinct grounds, namely:

i That the European Arrest Warrant Act is ultra vires the Gibraltar Constitution Order. Given the decision of the Court of Appeal in *Dean Dixon v Superintendent for Her Majesty's Prison for Gibraltar (Civil Appeal 2 of 2007)* this is not an argument which is being pursued. but given that decision is the subject of appeal to the Judicial Committee of the Privy Council, a reservation of right is asserted.

ii That upon the material before the court the Respondent does not seek the surrender of Fletcher for the purposes of trying her but rather for the purpose of questioning her.

iii That the information relating to the circumstances of the offence provided in the European Arrest Warrant is lacking in conviction and fails to satisfy the requirements of s 7(1)(e) of the Act. Whilst it is not wholly apparent given the numbering used in the skeleton argument whether or not this is a distinct argument, as I understood Mr Nicholls' submissions, essentially it is said that the information relating to the offence can be relied upon and assists in reaching the conclusion that Fletcher's surrender is requested for the purposes of questioning her.

iv That there is no "undertaking" as required by s 7(3)(a) that the surrender is sought for the purpose only of her being charged with and tried for the offences concerned. Mr Nicholls whilst not abandoning this ground did not make any oral submissions and left the matter on the basis of the written submissions in his skeleton.

The Law

The European Arrest Warrant legislation comes about consequent upon *Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the surrender procedures between Member States* (hereinafter "the Framework Decision").

Framework Decisions are binding upon Member States as to the result to be achieved but leave to national authorities the choice of form and method. *(Article 34(2) Treaty on European Union).*

The policy underlying the Framework Decision is I think to be found at Recital 5 which 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…Traditional cooperation relations which have prevailed up till now between Member States should be replaced by 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."

Of particular relevance for present purposes Article 1 which provides:

"1. The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

The arrest and surrender *for the purpose of conducting a criminal prosecution* Section has been given effect in Gibraltar through section 6(a) of the Act which provides:

"6. 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 European arrest warrant relates;…
that person shall, subject to and in accordance with the provisions of this Act be arrested and surrendered to the issuing State."

and section 7(3) which provides:

"(3) Where a European arrest warrant is issued in the issuing State in respect of a person who has not been convicted of the offence specified therein, the European arrest warrant shall be accompanied by–

(a) …
(b) a statement in writing of the issuing judicial authority that–
    (i) proceedings against the person have commenced and a decision to try him for the offence concerned has been made; or
    (ii) a decision to commence proceedings against the person and try him for the offence concerned has been made, by a person who in the issuing State, or part thereof, performs functions the same as or similar to those performed in Gibraltar by the Attorney General."

In the present case it is I think apparent from the material before me, particularly exemplified in the letter from the French prosecutor dated 14th September 2007, to which I shall return to in due course, that proceedings against Fletcher have commenced and that therefore what falls to be determined is whether a decision to try her has been made.

The language by which the United Kingdom Parliament has given effect to the Framework Decision is somewhat different. The relevant parts of section 2 of the Extradition Act 2003 provide:

"(2)(a) the statement referred to in subsection (3) and the information referred to in subsection (4),
(3) The statement is one that –
(a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and
(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence."

In *Dabas v High Court of Justice of Madrid [2007] UKHL 6* Lord Hope at paragraph 39 refers, I think with approval, to the opinion of Mrs Advocate

General Kokott in *Criminal proceedings against Pupino Case C-105 /03 [2006]All ER (EC)* who at paragraph 36 states:

> *"In summary, it follows from art 34(2)(b) EU and from the principle of loyalty to the European Union that every framework decision obliges national courts to bring their interpretation of national laws as far as possible into conformity with the wording and purpose of the framework decision, regardless of whether those laws were adopted before or after the framework decision, so as to achieve the result envisaged by the framework decision."*

Later at paragraph 43 Lord Hope states:

> *"…As my noble and learned friend lord Bingham of Cornhill said in Office of the King's Prosecutor, Brussels v Cuando Armas [2006] 1 All ER 647 at [8], the interpretation of Pt 1of the 2003 Act must be approached on the assumption that Parliament did not intend the provisions of Pt 1 to be inconsistent with the Framework Decision or to provide for a lesser degree of cooperation by the United Kingdom than the Framework Decision requires."*

The foregoing in my view supports the proposition that in determining what amounts to *a decision to try* a purposive approach is required in which account must be taken of the Framework Directive. I also draw the conclusion that both the United Kingdom Parliament and the Gibraltar Parliament must have intended to make their legislation Framework Decision compatible and that therefore there can be no qualitative difference between the criteria in the English 2003 Act and the Gibraltar Act. It follows therefore that despite the difference in language there is in my view no substantive distinction between, *"a decision to try"* and *"accused"*. It therefore follows that English authorities are particularly relevant.

In *Re Ismail [1999] 1AC 320,* albeit in the context of the United Kingdom 1989 Extradition Act Lord Steyn at pages 326 and 327 dealt with the meaning of "accused" person on the following terms:

"The starting point is that "accused" in section 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition…It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring of an indictment…

It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of 'accused' ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an accused person is satisfied…the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution."

In *Dabas v The High Court of Justice Madrid Spain, Neutral citation No: Admin 971,* in the Divisional Court, Latham LJ at paragraph 12 expressed the view that in considering the meaning of "Accused" in the 2003 Act the approach should be that adumbrated by Lord Steyn in *Re Ismail*.

The material before the court.

The official translation of the letter from the Deputy Public Prosecutor to the Marseilles Court of First Instance dated 19th February 2007 reads:

> *"I am sending you this European arrest warrant directly so that the wanted person may be apprehended and brought to France, before the examining magistrate … and indicted on the counts mentioned, thereby allowing her to be prosecuted."*

The accompanying European Arrest Warrant is in its standard form. The pro-forma wording in the preamble to the warrant provides:

> *"This warrant has been issued by a competent authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."*

The weight which to be given to this preamble in determining the purpose for which the Defendant is wanted in France requires some consideration.

In *Boudhiba v Central Examining Court No5 [2006] EWHC 167 (Admin)* In the Queen's Bench Divisional Court Smith LJ at paragraph 21 dealing with preamble said:

> *"I accept that there is some ambiguity in those words in that they do not make clear whether the person sought has yet been convicted. However, they would not be applicable if the decision to prosecute had not yet been taken. In any event, such ambiguity as there was is removed on the following page where it is made clear that the decision on which the warrant is based is the order of commitment … and that there is not yet an enforceable judgment in existence. On the page following, there is a statement that the maximum sentence that can be imposed for the offence is 15 years' imprisonment. I would accept Mr Lawson's submission that that was enough in itself to make it plain that the appellant was an accused person and that proceedings had begun.*

In *Dabas v The High Court of Justice Madrid Spain [2006]EWHC 971 (Admin)* in the Queen's Bench Divisional Court Latham L.J. at paragraph 14 of his judgment dealing with the preamble stated:

> *"…whilst I accept that the proforma wording in the preamble to the warrant is not necessarily determinative of the issue of whether or not the requirements of section2(2)(a) (b) have been met, it seems to me that the court could only properly conclude that they did not mean what they say if the context throws clear doubt upon their prima facie meaning"*

Albeit that the difference in approach between Smith LJ and Latham LJ may be slight, given that the liberty of the individual is at stake I respectfully prefer the approach of Latham LJ and therefore adopt the view that whilst the preamble establishes prima facie that *"a decision to try"* has been taken, this conclusion is displaced where the remainder of the material before the court *"throws clear doubt"*.

In determining whether in the present case the remainder of the material throws such clear doubt as to the purpose for which Fletcher's surrender is sought, it is necessary to examine and contrast elements in the letter from the Deputy Public Prosecutor with the domestic French warrant which underpins the European Arrest Warrant.

The passage, set out above, in the letter dated 19th February 2007 from the Deputy Public Prosecutor above is a translation from the French language where, as I understand it, the words *"…and indicted"* is a translation from the French *"et qu'elle soit mise en examen".*

In contrast, relevant passages of the French Domestic warrant reads:

> *"We, the undersigned…*
>
> *pursuant to inquiry concerning Dolores Yvonne Fletcher…*
>
> *Implicated in charges of:*
>
>> *Illegally importing, possessing and transporting 3461 kilos and 240 grams of cannabis resin.*

Smuggling…

Criminal Conspiracy…

These offences having been committed in French soil…"

The phrase *"implicated in charges of"* is a translation from the French *"mise en cause de chefs de"*

Subsequent to the lodging of this appeal further material has been generated. Namely, a letter dated 14th September 2007 from the French prosecutor, Isabelle Poinso; an affidavit filed on behalf of the Respondent exhibiting two legal opinions of Ms Dreyfus-Schmidt and two affidavits filed on behalf of the Appellant sworn by M. Stephan Bonifassi which also deal with French law.

Useful to set out in detail the translation of the relevant paragraphs of the letter of the prosecutor. For ease of reference where appropriate I set out in bold the words in the original letter in the French language which are of particular relevance in this case:

> *"…the Examining Magistrate decided to issue an arrest warrant, following the opinion of the Procureur de la Republique in charge of the judicial enquiry in this case, based on serious concurring evidence gathered against Mrs Fletcher, which is stated in the body of the European Arrest Warrant.*
>
> *Mrs Fletcher is not only "implicated"* ***("mise en cause"),*** *she is no longer solely "suspected", since the arrest warrant issued against her prohibits the police from placing her in custody to question her. On the other hand a simple suspect may be placed in police custody.*
>
> *She has a particular status insofar as the charges gathered against her necessitate that she be turned over to France so that she can explain herself to the Examining Magistrate.*
>
> *It is only after the first-appearance interview that the Examining Magistrate can decide whether or not to indict her* ***(met en examen)*** *on the charges being claimed against her, based on her statement and the documents she may submit.*

> *If Mrs Fletcher is not turned over to France, the Examining Magistrate will close the file and refer Mrs Fletcher's case directly to the Criminal Court of Marseilles; the arrest warrant issued against her by the Examining Magistrate will, in such an event, be equivalent to an official indictment* ***(mise en examen officielle).*** *Her possibilities of defending herself and presenting her arguments will therefore be less extensive if she cannot be interviewed by the Examining Magistrate who, in the course of judicial enquiry, examines the matter to either establish the charge and to disprove the charge and may conduct the enquiries necessary to verify her statements.*
>
> *The Examining Magistrate needs to see Mrs Fletcher so as to further his enquiry into the case…"*

As regards the evidence of French law, I have not had the benefit of hearing oral evidence but have been limited to assessing it on the basis of the material filed. Whilst it may be that something has been lost in translation, fair to say that I find the opinions of Ms Dreyfus Schmidt of very limited assistance. According to her *"mise en cause"* status does not exist in French law. That assertion is in stark contrast to the reference to this status in the prosecutor's letter, and also and more significantly the reference to *"mise en cause"* in the domestic warrant. I struggle to accept that a judge would issue an arrest warrant making reference to a status which does not exist. I therefore find that I cannot give any weight to her evidence.

In some contrast the affidavit of Stephane Bonifassi provides what I perceive to be cogent evidence of French Law. Essentially M. Bonifassi asserts that Ms Fletcher is *mise en cause,* (this is consistent with that formulation in the domestic warrant) which according to him means that there is evidence *"rendering it likely that she has committed an offence"* but that she has not been charged *"mise en examen"*. That the decision as to whether or not she is to be *"mise en examen"* would only be taken by the *juge d'instruction* after she appears before him and having been afforded the opportunity to give evidence. If the *juge d'instruction* upon the evidence before him determined that there was *"serious or corroborative evidence that she has committed an* *offence"* she would be declared *mise en examen.* Whilst M. Bonifassi agrees with the prosecutor that in the event that Ms Fletcher is not surrendered by the time that the *juge d'instruction* finishes his investigation the French Warrant will be considered a *misse en examen* he expresses the view that this would not be an automatic outcome but rather that the judge would have to decide whether or not on the material before him she is to be indicted. That irrespective of whether or not Fletcher is surrendered, that the decision as to whether or not she is to be indicted should, as M. Bonifassi says, require an actual decision by the *juge d'instruccion* as opposed to it arising in a quasi administrative fashion, certainly appears logical.

In essence Mr Nicholls' submissions are to the effect that Fletcher is not *"mise en examen"*, and that taking account of the evidence of M. Bonifasi it cannot be said that a decision to try her for the offences has been taken. It is argued that at this stage of the French proceedings she is required merely for the purposes of questioning that therefore the statutory requirements have not been met and she should not be surrendered.

Mr Nicholls also seeks to support his argument by submitting that the information relating to the circumstances of the offence as required by section 7(1)(e) of the Act and set out at section E of the Warrant is inadequate. Although in his skeleton he possibly treats this as a separate ground, in his oral submissions the argument was modulated in that he did not rely upon the particulars in terms of their sufficiency for the purposes of meeting the requirements of sub-section (e) but rather for the purpose of supporting his fundamental proposition that the request for Fletcher's surrender is for questioning rather than prosecution. This is a point that I can dispose of briefly.

In *Office of the King's Prosecutor, Brussels v Cando Armas and another [2005]UKHL 67* Lord Scott at paragraph 52 dealing with the principles underlying the Framework decision, stated:

> *"The principle underlying these changes is that each member state is expected to accord due respect and recognition to the judicial decisions of other member states. Any inquiry by a member state into the merits of a proposed prosecution in another member state … becomes, therefore, inappropriate and unwarranted."*

In *Vey v The Office of the Public Prosecutor of the County Court of Montlucon, France [2006] EWHC 760 (Admin),* in the Queen's Bench Divisional Court, an absence of information as to the circumstances of the alleged offence led to a determination that the warrant was invalid. Apparent from the judgments in that case that the material in that warrant was palpably lacking. In some contrast in the present case I find the circumstances as described in the European arrest warrant wholly adequate. Indeed, in my view the factual matrix upon which it is asserted that there is *"strong circumstantial evidence to her [Fletcher] having directly participated in this illegal importation of narcotics"* is substantial.

Fundamentally therefore the issue to be determined is whether on the evidence before me and particularly the evidence of M. Bonifasi; the reference to *misse en cause* in the domestic warrant and the letter from the Deputy Public Prosecutor dated 14th September 2007 there is clear doubt as to whether *a decision to try* Fletcher has been taken.

Although *Vey* was decided upon the basis of insufficiency of particulars, the appeal was primarily concerned with the issue of whether the appellant in that case was *mise en examen* and therefore whether she was required for questioning or for prosecution. In this regard Moses LJ expressed tentative views and undertook the intellectual exercise of highlighting arguments without reaching any conclusion. In taking account of *Vey* I must exercise caution in that the views expressed arise from the evidence of French Law which was tendered in that case, I of course must decide this appeal on the evidence before me. However, with regard to inquiring into the status of the person sought, Moses LJ had this to say at paragraph 55:

> *"Analysis of whether she has that status [mise en examen] does not seem to me to offend the principle prohibiting the courts in the United Kingdom from enquiring into the merits of a proposed prosecution in France. Rather, such an analysis is necessary in order to determine whether it has been established that extradition is sought for the purpose of being prosecuted. Resolution of that issue is not easy when the process of questioning may itself be part of a judicial criminal procedure"*

In ascertaining the status of Fletcher and consequently the purpose for which she is sought by the French authorities I must consider the material before me in the round, avoiding undue technicalities and reach a conclusion as to whether the presumption which arises by virtue of the preamble to the warrant is to be disturbed. Moreover, I must adopt a purposive approach in interpreting the Act but only to the extent that the text permits.

Mr Nicholls' submissions are certainly logical, my concern however is that they are also somewhat technical, and therefore essentially much turns on the prism through which the material and the Act is considered. There are also strong competing objectives, namely, the protection of the liberty of the subject as against the free movement of judicial decisions within the European Union. But, whilst the arguments are evenly balanced, ultimately there can be little doubt that Fletcher is not *"mise en examen"*, and apparent both from M. Bonifasi's evidence and the Deputy Prosecutor's letter that the decision whether or not to indict her has not in fact been taken. It therefore follows that in my view there must be clear doubt as to whether strictly a *decision to try* her has been taken.

The appeal is therefore allowed. The Stipendiary Magistrate's order is quashed and Fletcher is discharged.

This may of course be something of a pyrrhic victory for Fletcher in that in all likelihood absent her surrender, and given the apparent cogency of the evidence, she will become *misse en examen officielle*, and then there will, I think, be no issue that a decision to try her has been taken. In the circumstances, mindful that the matter may very well come before the Magistrates' Court once again right that I deal with the issue of speciality.

Speciality

Section 7(3)(a) of the Act requires that a warrant be accompanied by an *"undertaking in writing of the issuing judicial authority"* that surrender is sought only in respect of the offence concerned.

In the present case it is said that the warrant is not accompanied by an undertaking in writing but that rather what is proffered, by the Deputy Public Prosecutor in her letter of 19th February 2007, is a statement of existing fact as opposed to an undertaking in respect of future actions. The relevant passages in the translation read:

> *"She cannot be prosecuted, held or sentenced other than for the offences listed in the text of the appended European arrest warrant and she cannot be sought, prosecuted, sentenced or held for any other indictable offence committed before her surrender by your authorities and other than those indicated in the said warrant.*
>
> *She cannot be handed over to another state which might want her within the scope of another European arrest warrant for some other indictable offence committed prior to her surrender by your authorities.*

> *Similarly, she cannot be extradited to any third state without the consent of your enforcement authorities."*

In arguing that there is a distinction between a statement and an undertaking reliance is had on section 8 which deals with the transmission of warrants and which at subsection (11) provides:

> *"In this section 'undertaking' includes a statement under section 7(3)(b)."*

It strikes me that whilst it is undoubtedly an ingenious argument, it is one which is technical in the extreme and runs counter to the purposive approach which extradition legislation is to be afforded. Moreover, I accept the Attorney's submission to the effect that one must look at substance rather than form and that the statement / undertaking must be seen in the context of the Framework decision which at Article 27(2) subject to exceptions which do not arise provides:

> *"... a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered"*

With respect, I think the matter was well put by the Learned Stipendiary at page 6 of his ruling when he states:

> *"The letter is clear in its terms that if surrendered Ms Fletcher 'cannot' be tried sentenced or held for any other indictable offence other than those indicated in the warrant. To ask the court to read into this a duplicitous intent is to fly in the face of not just the spirit of the [framework decision] but also the long established basis on which extraditions have been carried out. It was conceded by Mr Nicholls that were France to change her laws in such a manner that specialty arrangements would be breached that would put France beyond the pale in these matters."*

Orders accordingly. I shall hear the parties as to costs.

Anthony Dudley
Acting Chief Justice

19th February 2008