Hilary Term
[2022] UKSC 4
On appeal from: [2017] NIQB 77

JUDGMENT

Public Prosecutors Office of the Athens Court of Appeal (Appellant) *v* O'Connor (Respondent) (Northern Ireland)

before

Lord Reed, President
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
2 February 2022

Heard on 13 December 2021

Appellant
Dr Tony McGleenan QC
Ben Thompson BL
(Instructed by Crown Solicitor's Office (Belfast))

Respondent
Mark Mulholland QC
Joseph O'Keeffe BL
(Instructed by Tiernans Solicitors (Newry))

LORD STEPHENS: (with whom Lord Reed, Lord Hamblen, Lord Leggatt and Lord Burrows agree)

Introduction

1. This appeal raises a question of statutory interpretation in respect of section 26(5) of the Extradition Act 2003 ("the 2003 Act"), and specifically the question whether a distinction can properly be drawn between the actions of a person who has done everything reasonably possible to give notice of application for leave to appeal to the High Court against an extradition order within the time-limit and the actions of that person's legal representative who has not.

2. Section 26(5) of the 2003 Act was inserted by section 160 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). Section 26(5) provides:

> "But where a person gives notice of application for leave to appeal after the end of the permitted period, the High Court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given."

3. The Divisional Court in England and Wales in *Szegfu v Court of Pecs, Hungary* [2015] EWHC 1764 (Admin); [2016] 1 WLR 322 (Burnett LJ, Cox J) (at paras 15-18) indicated, obiter, that the correct interpretation and application of section 26(5) permitted no distinction between the conduct of the person, and the conduct of their legal representative. The legal representative's conduct was to be attributed to the person with the consequence that if the legal representative had not done everything reasonably possible to ensure that the notice was given as soon as it could be given, the High Court should not entertain the application for leave to appeal.

4. In this case the Divisional Court in Northern Ireland (Morgan LCJ, Gillen LJ and Burgess J) in their judgment dated 15 August 2017 ([2017] NIQB 77; [2020] NI 113), whilst conscious that they were interpreting a statutory provision applicable in the United Kingdom in a way which was in conflict with the view of the Divisional Court in England and Wales, held that there was nothing that required such an interpretation. As a result, the Divisional Court in Northern Ireland found it was not necessary to hold a person responsible for any failings on the part of their legal representative and proceeded to entertain the application for leave to appeal.

5. Thus, it now falls to the Supreme Court to determine whether section 26(5) should be interpreted to allow or exclude a distinction between the actions of a putative appellant and those of their legal representative. Whichever is the true interpretation of section 26(5) the same interpretation would also apply to sections 103(10) and 108(7A) of the 2003 Act.

Background to this Appeal

6. On 11 March 2013, the Court of Appeal of Athens, Greece ("the Requesting State") issued a European Arrest Warrant requesting the extradition of John Joseph O'Connor, an Irish citizen, for the purposes of conducting a criminal prosecution against him concerning seven serious criminal offences relating to drug trafficking. This European Arrest Warrant was certified by the UK National Crime Agency on 16 October 2013.

7. Mr O'Connor resisted the application for his extradition principally on the basis that the prison conditions to which he would be exposed in Greece would give rise to a real risk of inhuman and degrading treatment contrary to article 3 of the European Convention on Human Rights ("ECHR"). He also raised a forum bar.

8. The prison to which it was proposed he should be returned was Korydallos Men's Prison. Mr O'Connor relied on evidence from Professor Rod Morgan and on reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") as to the conditions in that prison.

9. On 11 December 2015 in Belfast Recorder's Court, His Honour Judge Devlin ordered the extradition of Mr O'Connor. When HHJ Devlin had given his ruling, Mr O'Connor, who was present, instructed his solicitor to appeal and the solicitor announced orally in court, in the presence of the legal representatives of the Requesting State, that an appeal would be lodged against the order. Orally informing the court and the Requesting State of an intention to appeal is of course insufficient. Rather, section 26(4) of the 2003 Act requires notice of application for leave to appeal to be given in accordance with rules of court within what is described as "the permitted period" of seven days starting with the date on which the extradition order is made. The permitted period described by section 26(4) for Mr O'Connor to give notice of an application for leave to appeal expired at midnight on 17 December 2015.

10. Pursuant to Order 61A of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules"), on 16 December 2015 Mr O'Connor's solicitor lodged the notice of application for leave to appeal ("the notice") at the court within the seven-day

permitted period. However, due to an oversight, the solicitor omitted to serve it on the Crown Solicitor's Office ("the CSO") (on behalf of the Requesting State) until about three weeks later. His oversight came to his attention during a conversation with counsel as a result of which he served a copy of the notice on the CSO on 4 January 2016. It is accepted that the failure to serve the notice on the CSO was due to the fault of the solicitor.

11. On 11 December 2015, upon ordering Mr O'Connor's extradition, HHJ Devlin had remanded Mr O'Connor in custody. At a bail application on 18 December 2015, at which Mr O'Connor was granted bail, his lawyer orally informed the court, in the presence of the legal representatives of the Requesting State, that the notice had been lodged.

12. There is no dispute about the fact that Mr O'Connor had instructed his solicitors to appeal, that they had indicated orally on the day that HHJ Devlin made the extradition order that Mr O'Connor intended to pursue an appeal, that the solicitors indicated during the bail application on 18 December 2015 that they had lodged the notice and that Mr O'Connor himself would have had no reason to think that the application had not been pursued in accordance with the Rules. In short Mr O'Connor had personally done nothing wrong but rather had done everything reasonably possible to ensure that the notice was given as soon as it could be given.

13. However, applying *Mucelli v Government of Albania; Moulai v Deputy Public Prosecutor in Creteil, France* [2009] 1 WLR 276 ("*Mucelli and Moulai*") as approved by this court in *Pomiechowski v District Court of Legnica, Poland* [2012] 1 WLR 1604 ("*Pomiechowski*"), the notice was not "given" within the permitted period of seven days as it had not been served on the Requesting State by serving it on the CSO. Under the original version of the 2003 Act, this failure to serve on the CSO within the seven-day period would have been fatal - it would have meant that the appeal was irredeemably out of time and, accordingly, could not proceed.

14. Following the introduction of the new subsection 26(5) by section 160 of the 2014 Act, however, it was open to Mr O'Connor to argue, and he did argue, that the High Court should not refuse to entertain the application for leave to appeal solely because his solicitor had failed to serve it on time, but should entertain the application on the basis that Mr O'Connor had done everything reasonably possible to ensure that the notice was given as soon as it could be given.

15. Following various adjournments, the Divisional Court in Northern Ireland dealt with the application for leave to appeal in two judgments. First, on 15 August 2017 Morgan LCJ, delivering the judgment of the court ([2017] NIQB 77), held that the fault

of Mr O'Connor's solicitor should not be attributed to him. Accordingly, the court had jurisdiction to entertain the substantive application for leave to appeal as Mr O'Connor had done everything reasonably possible to ensure that the notice was given as soon as it could be given. Second, the Divisional Court (Morgan LCJ and Burgess J) by its judgment dated 13 October 2017 ([2017] NIQB 88), having considered additional fresh evidence in the form of a CPT report dated 1 March 2016 on conditions in Greek prisons, held that there were substantial grounds for believing that there was a real risk that if extradited Mr O'Connor would be subjected to inhuman or degrading treatment in breach of article 3 ECHR and that the Requesting State's assurances were not sufficiently specific to remove that real risk. Accordingly, the substantive appeal was allowed so that pursuant to section 27(5) of the 2003 Act the order for Mr O'Connor's extradition was quashed and he was discharged.

16. On 26 October 2017 the Requesting State made an application to the High Court pursuant to section 32(3) of the 2003 Act for leave to appeal to the Supreme Court solely from the first judgment of the High Court dated 15 August 2017 and for certification by the High Court that there was a point of law of general public importance involved in that judgment. There was no application for leave to appeal from the substantive judgment dated 13 October 2017. However, if an appeal against the first judgment succeeded, it would follow that the Divisional Court should not have entertained the substantive appeal for leave to appeal and had no jurisdiction to make any further order. Consequently, a successful appeal against the first judgment would mean that the order for Mr O'Connor's extradition ought not to have been quashed and he ought not to have been discharged. In turn this would mean that the order of HHJ Devlin which ordered Mr O'Connor's extradition should stand, despite the subsequent finding based on fresh evidence that there were substantial grounds for believing that there was a real risk that if extradited he would be subjected to inhuman and degrading treatment.

17. On 16 June 2018 the Divisional Court of Northern Ireland refused leave to appeal to this court but certified the following question:

> "In an appeal against an extradition order pursuant to section 26 of the Extradition Act 2003 where the notice of appeal was not served in accordance with the Rules of the Court by the Requested Person's (appellant's) solicitor within the specified seven day limit, can the court entertain the application on the basis that a distinction can properly be drawn between the actions of the Requested Person (then appellant) as the 'person' who has done everything reasonably possible to give notice and the default of his

solicitor who has not or should the approach of the Divisional Court in *Szegfu* [2016] EWHC 1764 be followed?"

18. On 11 March 2019, a panel of the Supreme Court (Lord Kerr, Lord Carnwath and Lord Lloyd-Jones) granted permission to appeal on the basis of an undertaking contained in the CSO's letter dated 14 January 2019 that, regardless of the result of the appeal, Mr O'Connor would not be arrestable on foot of the European Arrest Warrant in the United Kingdom.

Features of the original version of the 2003 Act, the mischief which Parliament was addressing and the amended provisions of the 2003 Act

19. There are several features of the original version of the 2003 Act relevant to this appeal.

20. First, the time-limits for the exercise of a right of appeal to the High Court under both Parts 1 and 2 of the 2003 Act are short, reflecting the justified need for speed and certainty in extradition proceedings. This feature of short time-limits for the exercise of a right of appeal applied to both extradition to category 1 territories - in practice other member states of the European Union party to Council Framework Decision 2002/584/JHA of 13 June 2002 introducing the European Arrest Warrant, to which Part 1 gives effect - and category 2 territories, in relation to which a different and more traditional scheme applies. The time-limit applicable to category 1 territories is particularly short being seven days (sections 26 and 28 of the 2003 Act). The time-limit applicable to category 2 territories is somewhat longer being 14 days (sections 103 and 105). The 14-day time-limit also applies to the right of appeal under Part 2 if the Secretary of State orders extradition (sections 108(4) and 110(5)).

21. The short period for giving notice of appeal is also consistent with the obligation in section 35 in respect of a category 1 territory and section 117 in respect of a category 2 territory that, if no notice of an appeal is given before the end of the seven-day period or 14 day period, the person must be extradited before the end of the required period - which as originally enacted was either ten days under section 35 or 28 days under section 117 starting with the day on which the judge or the Secretary of State makes the order.

22. Second, the short time-limits applied irrespective of whether the appeal was by the individual (sections 26, 103 and 108) or by the authority issuing the warrant (sections 28, 105 and 110).

23. Third, the short time-limits were inflexible so that a failure to comply was irredeemable there being no power for instance to extend time or to dispense with service of the appeal notice (*Mucelli and Moulai* at paras 25, 38, 75 and 79). If the time-limits were not met, the High Court could not proceed with the appeal (*Mucelli and Moulai* at paras 3, 28, 31, 40, 89, 92 and 96). This feature applied to extradition to both category 1 and category 2 territories and to both the right of appeal given to individuals (section 26 for category 1 territories and section 103 for category 2 territories) and to the authority issuing the warrant (sections 28 and 105). Furthermore, it applied in relation to the right of appeal under Part 2 if the Secretary of State ordered extradition (sections 108(4) and 110(5)).

24. Fourth, an appeal to the High Court was as of right there being no requirement to obtain leave to appeal (sections 26(1), 28(1), 103(1), 105(1), 108(1) and 110(1)).

25. After the enactment of the 2003 Act, it became apparent that the short and inflexible time-limits were capable of causing substantial injustice depriving those subject to an extradition order of an appeal through no fault of their own. This carried the potential for grave consequences if their extradition exposed them to, for instance, a real risk to their lives or to torture or inhuman or degrading treatment. The potential for injustice was demonstrated in the facts of several individual cases and was the subject of repeated adverse judicial observations. The judicial observations and several cases were referred to in the report presented to the Home Secretary on 30 September 2011 of the panel chaired by the Rt Hon Sir Scott Baker which reviewed the United Kingdom's extradition arrangements ("A Review of the United Kingdom's Extradition Arrangements" ("the Scott Baker report")) discussed further at paras 33 and 34 below. Those cases and that report identified the mischief which was addressed by Parliament in enacting the 2014 Act. That Act, whilst maintaining the short time-limits, introduced flexibility in relation to the time-limits if the person established that he did everything reasonably possible to ensure that the notice of application for leave to appeal was given as soon as it could be given. It is appropriate to set out the facts of some of those cases to demonstrate not only how the potential for substantial injustice arose but also that the potential was not confined to circumstances in which the person subject to an extradition order was not legally represented. It is also appropriate to set out some of the adverse judicial observations.

26. I start with the judicial observation made by Lord Rodger of Earlsferry in his dissenting speech in *Mucelli*. At para 7 he described the potential for substantial injustice by virtue of the short and inflexible time-limits on the exercise by requested persons of rights of appeal as "striking". He also stated:

> "Busy practitioners with many demands on their time may, quite understandably, fall down from time to time …"

He continued that this was vividly illustrated in Mr Moulai's case in which the appellant's notice was duly filed within the permitted period but was served by fax on the Crown Prosecution Service ("the CPS") just after 4pm on the last day of the permitted period. This trivial matter led the CPS to contend that the service was out of time and that the appeal was accordingly ineffective. However, the potential for injustice can also be illustrated by reference to the facts in *Mucelli*.

27. Mr Mucelli had been tried and convicted in Albania in his absence on charges of murder and possession of firearms. At the extradition hearing the district judge sent his case to the Secretary of State for his decision whether he was to be extradited, pursuant to Part 2 of the 2003 Act. Mr Mucelli was represented by a solicitor whom he instructed to appeal against the district judge's order contending that the judge erred in finding that he had deliberately absented himself from his trial and also erred in finding there was an adequate guarantee that he would be afforded a retrial if extradited. The Divisional Court (Richards LJ and Aikens J) in their judgment, ([2008] 1 WLR 2437), formed a favourable view, at para 28, as to those grounds of appeal, so that if they had jurisdiction, they would have held that the district judge was wrong to send the case to the Secretary of State and ought, on the contrary, to have ordered Mr Mucelli's discharge. However, the favourable view formed on those grounds of appeal could only avail Mr Mucelli if he was able to overcome the procedural obstacles in his path created because, although his solicitor had filed the notice of appeal at the High Court within the 14-day permitted period laid down by section 103(9) of the 2003 Act, those solicitors had failed to serve the notice on the CPS (on behalf of the Government of Albania) until after the expiry of that period. The Divisional Court considered that they could not extend time for service but there was power under CPR rule 6.9 to dispense retrospectively with service on the respondent. However, they declined to exercise that power for several reasons including the strength of the principle telling against its exercise so as to circumvent the statutory time-limit. So, Mr Mucelli was unable to overcome the procedural obstacles and the appeal was dismissed for want of jurisdiction.

28. On appeal to the House of Lords, it was held that the requirement in sections 26(4) and 103(9) of the 2003 Act that notice of appeal against an extradition order be "given" within specified periods meant (Lord Rodger of Earlsferry dissenting) that the notice of appeal had to be both filed in the High Court and served on all respondents to the appeal within those periods and that, since the notice of appeal had been filed but not served within the 14-day period required by section 103(9) of the 2003 Act, the appeal to the High Court was irredeemably out of time. It was also held that the Divisional Court was wrong in thinking that they had the power to dispense with

service. Accordingly, the appeal could not proceed, but even if it had been in time "further material evidence" which the Government of Albania applied to put before the House of Lords led it to doubt that the Divisional Court would have reached the same favourable view in relation to Mr Mucelli's substantive appeal. However, the point remains that before the Divisional Court Mr Mucelli, who was at all times represented by a solicitor, was deprived of what that court assessed as a valid appeal, based on his solicitor's fault in not serving the notice on the respondent within the permitted period.

29. Another case in which there was clear potential for substantial injustice caused by virtue of the short and inflexible time-limits was the decision of the Divisional Court in *Halligen v Secretary of State for the Home Department* ([2011] EWHC 1584 (Admin)), which decision was subsequently appealed to this court as one of the cases involved in the *Pomiechowski* appeal. Mr Halligen was detained in prison. He instructed his solicitors to appeal his extradition order, but they failed to give notice of appeal within the permitted period. The Divisional Court held that it had no jurisdiction to hear the appeal, but this finding led the court to criticise the injustice involved. Stadlen J giving the judgment of the court, with which Laws LJ agreed, stated at para 31:

> "It would seem to offend the basic principles of fairness that a person served with a notice of extradition should be deprived of a statutory right of appeal through no fault of his own."

This case illustrates that substantial injustice can occur even if the person subject to an extradition order is legally represented.

30. A further example of the potential injustice caused by the strict and inflexible time-limit is provided by the case of *R (Mann) v City of Westminster Magistrates' Court* [2010] EWHC 48 (Admin). In that case the defendant had been convicted in Portugal following a trial which he argued was grossly unfair. His lawyers in Portugal had failed to file, within the required time-limit, the documents required to appeal against the conviction. He was permitted to leave Portugal under an Order for Voluntary Departure. Several years later, he was then subject to extradition proceedings in the United Kingdom. Following the order for extradition, his lawyers failed to file and serve the notice of appeal within the required seven-day period. Accordingly, the High Court had no jurisdiction to entertain the appeal and Moses LJ said at para 17:

> "… Parliament, in enacting the strict statutory scheme relating to Part 1 extraditions in the 2003 Act, … [cannot] possibly have envisaged one man being deprived of proper

> legal assistance by two sets of lawyers in two separate jurisdictions on two distinct occasions. Yet I accept this court is powerless to act. It has no jurisdiction."

The decision in the Divisional Court is another illustration of substantial injustice even if the person subject to an extradition order is legally represented.

31. Yet another factual illustration of the potential for substantial injustice and of trenchant judicial criticism is provided by *Szelagowski v Regional Court of Piotrkow Trybunalski Poland* [2011] EWHC 1033 (Admin). The permitted period for Mr Szelagowski to file and serve a notice of appeal against an extradition order expired on 13 April 2010. On that date his then solicitors sent an employee with six appeal bundles, each of which was supposed to contain the notice of appeal among other documents, to the Administrative Court Office where three bundles were to be filed, and then to the CPS, where one copy was to be served. There was no dispute that a notice of appeal was filed and that a bundle was served on the CPS on 13 April 2010. However, it transpired that the bundle served on the CPS did not contain any notice of appeal. Applying *Mucelli*, the Divisional Court held that it did not have jurisdiction to hear the appeal. Sullivan LJ stated (at para 18):

> "I merely observe that this case demonstrates how a rigid statutory time-limit which cannot be extended under any circumstances can work injustice in practice."

The decision is another illustration of how substantial injustice could occur even if the person subject to an extradition order was legally represented.

32. The judgment in *Bergman v District Court in Kladno, Czech Republic* [2011] EWHC 267 (Admin) illustrates that there were further problems for persons who were in custody without legal representation. Mr Bergman was ordered to be extradited to the Czech Republic. He previously had legal representatives, but at the time of receiving the extradition order on 21 September he was not represented. The seven-day permitted period for giving notice of appeal expired on 27 September 2010. On 24 September 2010, a draft notice of appeal was served on the CPS, but it was unsealed and incomplete. On 27 September, a fully completed notice of appeal was filed at the court office just before 5pm. It was sealed five minutes later and faxed back by the court staff. However, Mr Bergman did not receive the sealed copy of the document until many days later, due to the Prison Service failing to pass it to him in custody. Accordingly, it was not possible for him to serve the complete and sealed copy of the notice of appeal on the CPS within the permitted period. The court, applying *Mucelli*, held that it had no jurisdiction to hear the appeal. Irwin J stated at paras 9 and 10:

> "9. In almost every other circumstance, the court would be able to look behind the formalities and try and see if any alteration was needed. However, in this regime one is not able to do so. There is no appeal; there can be no appeal; I am not able to extend any time-limit to permit an appeal.
>
> 10. I record my concern that unrepresented litigants who are in custody will often find it very hard to comply with the necessary requirements, despite every effort on the part of the court staff. Therefore, it is not a question of me dismissing an appeal: there is no appeal to dismiss."

33. On 14 October 2010 a panel chaired by the Rt Hon Sir Scott Baker was appointed by the Secretary of State for the Home Department to conduct a review of the United Kingdom's extradition arrangements. The panel presented the Scott Baker report to the Home Secretary on 30 September 2011. Part 10 of that report identified the short and inflexible deadlines for appeals as being an unsatisfactory feature having led to a number of appeals under Part 1 of the 2003 Act being ineffective for want of jurisdiction. In arriving at that conclusion the report recorded at paragraph 10.3 that the panel had received several representations that the short and inflexible deadlines produced unfair results and that a number of judges had highlighted the unfairness in their judgments. The report identified those cases as being *Halligen*; *Szelagowski* and *Bergman*. The report proceeded in paragraph 10.4 to refer to the case *of R (Mann)*. Having identified that this was a "stark example of the potential injustice caused by this strict time-limit" even in a situation where the person is legally represented, the report then stated in paragraph 10.5 that:

> "There are further problems for defendants who are in custody and unrepresented. They may have great practical difficulty in completing a notice of appeal, filing it with the court, paying the required fee and serving a copy of the notice (whether or not this is sealed) on the Crown Prosecution Service."

It is clear that the mischief identified in the report caused by the application of the short and inflexible time-limits was not confined to injustice arising from the absence of representation for those in respect of whom extradition orders had been made.

34. The report identified two possible mechanisms for alleviating potential injustice. The first was to extend the time-limit for Part 1 from seven to 14 days. The second was for the court to be given discretion to extend the time-limit in the interests of justice.

The Scott Baker report recommended that in the interests of certainty and finality the time-limit for the giving of notice of appeal should be extended to 14 days with no power to extend time and that a valid notice of appeal should:

(i) purport to be a notice of appeal (and not notice of an intention to appeal);

(ii) identify the appellant;

(iii) identify the decision under appeal; and

(iv) identify the grounds of appeal.

The Scott Baker report further recommended that a first instance court should provide the defendant with a form explaining the right of appeal, the time-limit and what must be done in this period. It also recommended that the appeal should only be allowed to proceed with the leave of the extradition judge or the court which would consider the appeal.

35. After the Scott Baker report was presented to the Home Secretary and before the Government responded, further concern was expressed by this court in *Pomiechowski* [2012] 1 WLR 1604 as to the application of short and inflexible time-limits. Lord Mance stated at para 37 that the statutory provisions regarding the permitted periods for appeals may in individual cases impair "the very essence of the right" of appeal and also stated at para 39 that there was no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time-limits for appeals. It intended short and firm time-limits but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time.

36. The government accepted the recommendation contained in the Scott Baker report that there should be a requirement for leave to appeal but did not accept the recommendation to extend the time-limit for Part 1 from seven to 14 days. Rather the government proceeded on the basis that there should be an element of flexibility in relation to the permitted periods for an individual to exercise his right to apply for leave to appeal. Parliament thereafter enacted section 160 of the 2014 Act which enabled flexibility by inserting sections 26(5), 103(9) and 108(7) into the 2003 Act. A similar formula is used in each of those sections, in effect providing that where a person gives notice of application for leave to appeal after the end of the permitted

period, the High Court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given.

37. Section 26, as amended, now provides:

> "(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.
>
> (2) But subsection (1) does not apply if the order is made under section 46 or 48.
>
> (3) An appeal under this section -
>
> (a) may be brought on a question of law or fact, but
>
> (b) lies only with the leave of the High Court.
>
> (4) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is seven days starting with the day on which the order is made.
>
> (5) But where a person gives notice of application for leave to appeal after the end of the permitted period, the High Court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given."

Surrogacy principle

38. The imputation of the fault of a client's legal representative to the client has been termed the surrogacy principle. That principle was considered by the House of Lords in *R v Secretary of State for the Home Department, Ex p Al Mehdawi* [1990] 1 AC

876, 898, by the Court of Appeal in *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13 and by this court in *Pomiechowski*. It is sufficient for the purposes of this appeal to affirm that there is "no universal surrogacy principle" (see para 46 of *FP (Iran)* and para 36 of *Pomiechowski*). In other words, it is incorrect to say that in all circumstances the fault of a client's legal representative is imputed to the client.

Szegfu v Court of Pecs, Hungary

39. The flexibility introduced by section 26(5) of the 2003 Act was considered by the Divisional Court in England and Wales in *Szegfu v Court of Pecs, Hungary* [2016] 1 WLR 322. The court stated at para 11 that "The words of the test itself are clear and need no judicial gloss." The court continued by identifying several factors in the application of the test.

40. The first, at para 12, is that the burden of establishing that everything reasonably possible was done rests on the appellant and that, given the nature of the test, it is clearly necessary for an appellant to give a comprehensive explanation covering the entire period of delay. This will normally require the appellant and his solicitor to provide an affidavit explaining what the appellant did to ensure that the application for leave to appeal was served as soon as it could be.

41. Second, at paras 13-14, the statutory language does not permit consideration of the merits of the appeal. That is the principal difference which a wider interests of justice test would have introduced.

42. Third, at paras 15-18, the court considered whether the statutory test in section 26(5) was concerned with the personal conduct of the person alone or whether it encompassed delay generated by his legal advisers. The court rejected the submission that the use of the word "person" in section 26(5) demonstrated that Parliament's intention was to limit the enquiry to the personal conduct of an appellant. It noted that the word "person" was used twice and that the context of its use in the earlier part of the subsection did not require personal conduct by the appellant. The court noted that in *Pomiechowski* Lord Mance had accepted that the strict time-limits were capable of denying "the very essence" of the right to appeal. However, the court in *Szegfu* went on to conclude that once solicitors had been instructed it could not be said that the essence of the right of appeal had been denied if their default resulted in the application not being pursued in time. The court concluded that the vice which Parliament was dealing with did not call for such a distinction to be made so that the fault of the legal representatives could be attributed to an applicant for leave to appeal. These observations were obiter as on the facts in *Szegfu* no question of

attribution of delay arose as the delay was the fault of the applicant rather than the fault of his legal representatives (see paras 29-30).

43. However, the application of the surrogacy principle as explained in *Szegfu* was part of the ratio of the High Court judgment in *Petrovics v Judicial Authority of Hungary* [2016] EWHC 3663 (Admin); [2016] JT 1, paras 11-13, and in the Divisional Court judgments in *Debicki v Regional Court Lupsk, Poland* [2015] EWHC 3521 (Admin), paras 25-31 and *Gawryluk v District Courts of Lomza and Bialystok, Poland* [2020] EWHC 3679 (Admin), paras 11-13 and 24-28. Furthermore, this aspect of the decision in *Szegfu* has been referred to, albeit not as part of the ratio, in the judgments in *Baia Mare Court, Romania v Varga* [2019] EWHC 890 (Admin); [2019] ACD 63, paras 5-7; *Lagocki v Regional Court of Szczecin, Poland* [2015] EWHC 3641 (Admin), para 72; and in *Regional Court in Poznan, Poland v Czubala* [2016] EWHC 1653 (Admin), para 3. *Szegfu* was also cited in argument in *Puceviciene v Prosecutor General's Office of the Republic of Lithuania* [2016] EWHC 1862 (Admin); [2016] 1 WLR 4937.

The judgment dated 15 August 2017 of the Divisional Court in Northern Ireland

44. As indicated in para 4 above, the Divisional Court in Northern Ireland interpreted section 26(5) of the 2003 Act so that it is not necessary to hold the person responsible for any failings on the part of their legal representatives. Morgan LCJ, giving the judgment of the court, recognised that in *Szegfu* the court rejected the submission that the use of the word "person" in section 26(5) demonstrated that Parliament's intention was to limit the enquiry to the personal conduct of an appellant. Morgan LCJ, having noted that the word "person" was used twice in section 26(5) and that the context of its use in the earlier part of the subsection did not require personal conduct by the appellant, agreed that a linguistic analysis did not require an interpretation of the subsection which points exclusively towards conduct on the part of the applicant personally. He stated that either interpretation would be consistent with the words used.

45. At para 13 Morgan LCJ stated that the court in *Szegfu* concluded that once solicitors had been instructed it could not be said that the essence of the right of appeal had been denied if their default resulted in the application not being pursued in time. Morgan LCJ considered that the court in *Szegfu* had concluded that the vice which Parliament was dealing with did not call for such a distinction to be made and that this conclusion proceeded from the assumption that the purpose of the provision was to exclude injustice arising from the absence of representation for those in respect of whom orders were made. Then, at para 14, Morgan LCJ set out reasons for adopting a different interpretation to the one adopted by the court in *Szegfu* as follows:

> "14. We do not accept that interpretation. There is nothing in the statutory wording to require it and it could give rise to irremediable procedural unfairness. It is not much of a remedy to a person extradited to prison where he faces the risk of inhuman and degrading treatment to know that he may be able to launch an action against his solicitor in due course. Secondly, the court in *Szegfu* did not address para 36 of *Pomiechowski* which reviews the surrogacy principle and supports the view that it is not a universal rule. Thirdly, in our view Lord Mance's analysis of the injustice that can arise from absolute and inflexible time-limits for appeals did not seek to confine the possibility of injustice to unrepresented litigants."

46. Accordingly, as Mr O'Connor had done everything reasonably possible to ensure that the notice was given as soon as it could be given, the Divisional Court in Northern Ireland proceeded on the basis that it had jurisdiction to entertain the application for leave to appeal.

47. Finally, at para 17, Morgan LCJ indicated that to minimise the risk of any injustice there should be a practice where extradition is ordered by the appropriate judge, that:

> "the judge should inform the requested person that the time-limit for appeal is seven days. A form should be provided to the requested person in his own language immediately after the decision explaining the time-limit, how to lodge an appeal, how to serve a copy and the necessary content for an application for leave to appeal. If the requested person is represented by solicitors and has instructed them to appeal he should seek confirmation that the appeal has been lodged and served and if he does not receive that confirmation within the seven-day period he should immediately lodge and serve notice of his application himself."

The correct interpretation

48. Section 26(1) of the 2003 Act identifies the "person" as being the person who is subject to an extradition order. In section 26(5) the word "person" appears twice. On both occurrences of the word it must refer, and refer only, to the individual who is subject to an extradition order, as indicated by section 26(1), and to no one else.

However, it is natural to assume that the individual can give the relevant notice by means of an agent because there is no reason why he or she should be required physically to serve or file the notice in person rather than using an agent to do so on their behalf. Indeed, it would be impossible to deliver the notice personally if the individual is in prison. On the other hand, in the second occurrence of the word, the requirement of doing everything reasonably possible is imposed by the language of the provision only on "the person" and there is no evident reason to understand it as also being imposed on the individual's agent or legal representative.

49. I also consider that this interpretation of section 26(5) is supported when consideration is given to the mischief which was sought to be addressed by Parliament when section 26(5) was inserted into the 2003 Act by enacting section 160 of the 2014 Act. The mischief was apparent from the judgments and judicial observations referred to in paras 25-32 above and was also identified in the Scott Baker report, see paras 33-34 above, namely the potential for substantial injustice being inflicted by the application of short and inflexible time-limits. It was not confined to excluding injustice arising from the absence of legal representation for those in respect of whom extradition orders had been made. So, I respectfully disagree with the Divisional Court in *Szegfu* at para 18, that the vice with which Parliament was dealing was the particular problem of unrepresented persons being remanded in custody and having no realistic opportunity of getting legal advice in time to mount an appeal within seven days. Furthermore, I agree with the Divisional Court in this case that Lord Mance's analysis in *Pomiechowski* (at paras 36 and 37) of the injustice that can arise from absolute and inflexible time-limits for appeals did not seek to confine the possibility of injustice to unrepresented litigants. Accordingly, in addition to what I consider to be the natural reading of section 26(5), I conclude on the basis of the mischief which Parliament was addressing that the true interpretation of that section is that there should be jurisdiction to entertain an application for leave to appeal if the person ordered to be extradited had himself done everything possible to ensure that the notice was given as soon as it could be given even though his legal representative had failed to do so. It was not the purpose of the legislation to perpetuate the potential injustice which can result from fault of the person's legal representative.

50. I also agree with the Divisional Court in this case that the interpretation of section 26(5) adopted in *Szegfu* is not required by the application of the surrogacy principle, because, as indicated at para 38 above, the surrogacy principle is not universal.

51. Furthermore, I agree with the Divisional Court in this case that the procedural unfairness of attributing the fault of the legal representative to the person is in practice irredeemable. As the Divisional Court stated (para 14), "It is not much of a remedy to a person extradited to a prison where he faces the risk of inhuman and

degrading treatment to know that he may be able to launch an action against his solicitor in due course." There is of course a particular concern where the unfairness visited on persons who have done nothing wrong is that through the lack of an appeal mechanism that if extradited, they could be at a real risk to their life contrary to article 2 ECHR or of being subjected to torture or inhuman or degrading treatment contrary to article 3 ECHR. So, a consideration of the mischief which Parliament was seeking to address by enacting section 160 of the 2014 Act included relief from irredeemable injustice resulting from fault of the person's legal representative.

52. Accordingly, I depart from the interpretation of section 26(5) of the 2003 Act adopted at paras 15-18 of *Szegfu*. My departure from *Szegfu* is limited to the application of the surrogacy principle. I agree with the other matters contained in the judgment, see paras 40-41 above. Furthermore, I consider that the outcome in *Szegfu* was correct as the fault in that case was the fault of the putative appellant, there being no fault on behalf of his legal representatives.

53. Finally, I would endorse the suggested practice proposed by Morgan LCJ set out at para 47 above.

Conclusion

54. The answer I provide to the certified question, at para 17 above, is that in circumstances where notice of application for leave to appeal was not given within the permitted period, the court can entertain the application if the person ordered to be extradited had himself done everything reasonably possible to ensure that the notice was given as soon as it could be given, even though his legal representative had failed to do so.

55. Accordingly, I would dismiss the Requesting State's appeal against the order of the Divisional Court dated 15 August 2017.