Republic of Germany v. Ebke, 2001 NWTSC 2

Date: 2001 01 15
Docket: CR03881

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE FEDERAL REPUBLIC OF GERMANY

RESPONDENT

-AND-

WALTER LOTHAR EBKE

APPLICANT

Application for disclosure by fugitive in preparation for extradition hearing.

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z.VERTES

Heard at Yellowknife, Northwest Territories
on December 18, 2000.

Reasons Filed: January 15, 2001

Counsel for the Applicant:	Wes Wilson
Counsel for the Attorney General of Canada (on behalf of the Respondent):	Shelagh Creagh & Debra Robinson

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE FEDERAL REPUBLIC OF GERMANY

RESPONDENT

-AND-

WALTER LOTHAR EBKE

APPLICANT

REASONS FOR JUDGMENT

[1] The applicant, Walter Lothar Ebke, is sought by the Federal Republic of Germany for extradition. In preparation for his extradition hearing, Ebke has applied for further disclosure from the Attorney General of Canada (representing Germany). The disclosure requests relate to the request for extradition, the arrest of Ebke on a provisional arrest warrant pursuant to the *Extradition Act*, S.C. 1999, c.18, and the issuance of a search warrant pursuant to the *Mutual Legal Assistance in Criminal Matters Act*, S.C. 1988, c.30 (4th Supp.). Ebke says that further disclosure is required so that he may advance certain constitutional challenges, to defend against the extradition application, and to respond to the return on the search warrant.

[2] It is not necessary on this application to go into great detail about the factual background to this case. Ebke, who is not a Canadian citizen but who has been a resident of Yellowknife for several years, was arrested on May 18, 2000, on a provisional arrest warrant issued *ex parte* by me. The warrant was issued on the request of the Attorney General, representing the requesting state, and on the basis of an arrest warrant issued by the Preliminary Proceedings Judge of the Federal Court of Justice of the Republic of Germany on March 9, 2000.

[3] The German warrant directs that Ebke be arrested and held in pre-trial detention pending further investigations. It states that he is "strongly suspected" of having been a member of a terrorist criminal organization between 1985 and 1993 and of participating in bombings in Berlin in 1987 and 1991, all of which apparently are crimes punishable under the German Penal Code. On November 28, 2000, the Minister of Justice of the Canadian government issued an "authority to proceed" to the Attorney General, pursuant to s.15(1) of the *Extradition Act*, seeking an order of this court committing Ebke for extradition.

[4] The issue of disclosure necessarily raises constitutional questions. In the domestic criminal law context, the Crown has an obligation to disclose all relevant information in its possession. This obligation is an aspect of the fundamental right to a fair trial protected by s.7 of the Charter of Rights and Freedoms: *R. v. Stinchcombe,* [1991] 3 S.C.R. 326. To what extent the same obligation applies in the extradition context has been the subject of numerous recent decisions: *United States v. Dynar* (1997), 115 C.C.C. (3d) 481 (S.C.C.); *United States v. Kwok* (1998), 127 C.C.C. (3d) 353 (Ont. C.A.); *United States v. Turenne,* [1999] 8 W.W.R. 405 (Man. Q.B.); *United States v. Cheema* (1999), 65 C.R.R. (2d) 234 (B.C.S.C.); *Ho v. Australia* (January 26, 2000), Vancouver CC990288 (B.C.S.C.); *Germany v. Schreiber*, [2000] O.J. No. 2618 (S.C.J.); *United States v. Akrami,* [2000] B.C.J. No. 2000 (S.C.). They more or less came to the same conclusion. While there is a disclosure obligation it is much more attenuated in the extradition context than in domestic criminal law.

[5] This application is not the place for a detailed review of the jurisprudence regarding the scope of Charter protections in the extradition context nor the extent of Charter jurisdiction enjoyed by an extradition judge. Section 25 of the *Extradition Act* provides:

> For the purposes of the Constitution Act, 1982, a judge has, with respect to the functions that the judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a superior court judge.

The Supreme Court of Canada has held that this section, and its predecessor in the previous Act, does not incorporate the plenary Charter jurisdiction otherwise enjoyed by a superior court judge. The Charter jurisdiction of an extradition judge is limited to the functions that the judge is authorized to perform under the Act: *Argentina v. Mellino* (1987), 33 C.C.C. (3d) 334 (S.C.C.), at 349-350.

[6] This question is not without controversy. In *United States v. Cazzetta* (1996), 108 C.C.C. (3d) 536, the Quebec Court of Appeal held that the predecessor to s.25, which employed the same wording, should be given a broad meaning not limited solely to issues related to the extradition judge's role in determining the sufficiency of the evidence produced. Leave to appeal this decision to the Supreme Court of Canada was denied: 110 C.C.C. (3d) vi (note). The holding in *Cazzetta*, however, was expressly not followed by the Ontario Court of Appeal in three subsequent cases: *Kwok (supra); United States v. Shulman* (1998), 128 C.C.C. (3d) 475; and *United States v. Cobb* (1999), 139 C.C.C. (3d) 283. That court, in relying on the Supreme Court of Canada judgment in *Dynar (supra),* which was decided after *Cazzetta*, held *Cazzetta* to be wrongly decided. The three Ontario cases are, as of the writing of these reasons, on reserve before the Supreme Court of Canada.

[7] It is, of course, not for me to resolve this controversy (and no one asked me to). For purposes of disclosure it is enough if I refer to the *Dynar* judgment.

[8] In *Dynar*, the Supreme Court, relying on the Court's earlier judgments in *Mellino (supra*), *Canada v. Schmidt*, [1987] 1 S.C.R. 500, and *Re McVey*, [1992] 3 S.C.R. 475, reaffirmed that the jurisdiction of the extradition judge is derived entirely from the statute and the relevant treaty. There must be a statutory source for attributing a particular function to the extradition judge. As a result, the role of the extradition judge is a "modest one", limited to the determination of whether or not the evidence is sufficient to justify committing the fugitive for surrender. There is no doubt that the Charter applies to extradition proceedings. The Act, the applicable treaty, and the exercise of the judicial and executive functions must all conform to Charter principles. The extradition hearing itself must be conducted in accordance with the principles of fundamental justice. But these principles do not necessarily correspond as between the domestic criminal law forum and the extradition process. Justices Cory and Iacabucci, writing on behalf of the majority in *Dynar,* stated (at 523-524):

> Even though the extradition hearing must be conducted in accordance with the principles of fundamental justice, this does not automatically entitle the fugitive to the highest possible level of disclosure. The principles of fundamental justice guaranteed under s.7 of the Charter vary according to the context of the proceedings in which they are raised. It is clear that there is no entitlement to the most favourable procedures imaginable: *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 361-62, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193. For example, more attenuated levels of procedural safeguards have

> been held to be appropriate at immigration hearings than would apply in criminal trials. See *Chiarelli v. Canada* (Minister of Employment and Immigration), [1992] 1 S.C.R. 711, 72 C.C.C. (3d) 214, 90 D.L.R. 94th) 289. The same approach is equally applicable to an extradition proceeding. While it is stated in *Idziak v. Canada* (Minister of Justice), [1992] 3 S.C.R. 631, at p. 658, 77 C.C.C. (3d) 65, 97 D.L.R. (4th) 577, that the committal hearing in the extradition process is "clearly judicial in its nature and warrants the application of the full panoply of procedural safeguards", it was held that the extent and nature of procedural protection guaranteed by s. 7 of the Charter in an extradition proceeding will depend on the context in which it is claimed (at pp. 656-57).
>
> The context and purpose of the extradition hearing will shape the level of procedural protection that is available to a fugitive. In *Kindler v. Canada* (Minister of Justice), [1991] 2 S.C.R. 779 at p. 844, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, the position was put by the majority this way:
>
> > While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.

[9] The Court, while it did not deal conclusively with the level of disclosure to which a fugitive is entitled, did go on to state (at 524-525):

> It follows that it is neither necessary nor appropriate to simply transplant into the extradition process all the disclosure requirements referred to in *Stinchcombe,* supra, *Chaplin*, supra, and *O'Connor*, supra. Those concepts apply to domestic criminal proceedings, where onerous duties are properly imposed on the Crown to disclose to the defence all relevant material in its possession or control. This is a function of an accused's right to full answer and defence in a Canadian trial. However, the extradition proceeding is governed by treaty and by statute. The role of the extradition judge is limited and the level of procedural safeguards required, including disclosure, must be considered within this framework.
>
> ...
>
> Any requirement for disclosure that is read into the Act as a matter of fundamental justice under s.7 of the Charter will therefore necessarily be constrained by the limited function of the extradition judge under the Act, and by the need to avoid imposing Canadian notions of procedural fairness on foreign authorities.

[10] In this case, Ebke's counsel attempted to base each disclosure request on some function attributable to my statutory responsibilities as the extradition judge. He did not attempt to claim some broad disclosure right akin to the criminal law context. Therefore, it is with that perspective that I turn to each specific request.

The Diplomatic Note:

[11] The applicant seeks disclosure of what his counsel referred to as the "diplomatic note", that being the initial request for extradition from the requesting state. He filed, as exhibits, a collection of such notes which were disclosed in other proceedings under the previous *Extradition Act*. These notes, more or less, state what the person is sought for and provide identifying information about the person sought.

[12] Counsel submitted that both issues, that is to say the offences alleged against the fugitive and the identity of the fugitive, are relevant to the extradition hearing, specifically the double criminality and identification tests set out in s.29(1)(a) of the Act. He also argued that nothing in the material produced to date correlates specifically to some of the offences identified in the authority to proceed. For example, the authority lists two charges each of aggravated assault and conspiracy to commit aggravated assault. There are no specific equivalents in the German arrest warrant. Hence, in counsel's submission, it is necessary to know on what charges Ebke is wanted so as to know what conduct may be relevant for purposes of the extradition hearing. Counsel argued that an extradition judge must only consider evidence of conduct that has some connection to the foreign charges: *United States v. Commisso*, [2000] O.J. No. 468 (C.A.).

[13] In my opinion, the "diplomatic note", or the original request for extradition, is not producible. I conclude this for a number of reasons.

[14] First, it is the Minister of Justice who has the responsibility of dealing with extradition requests at the first instance. The Act provides that the Minister is responsible for dealing with requests for extradition (s.7) and a request for extradition must be made to the Minister (s.11). The extradition treaty between Canada and Germany, executed in 1979, provides that a request for extradition shall be communicated through the diplomatic channel (Article XIII). It is thus a government to government communication for the Minister to assess, in terms of its efficacy, and for the Minister to act on by issuing the requisite authorization to proceed. Nowhere in the Act or the treaty is there any role assigned to the court to review these ministerial

responsibilities. Therefore this document is not relevant to any function the court must perform.

[15] Second, there is strong authority for the proposition that the request for extradition need not be filed as an exhibit at the extradition hearing: *Re Von Einem* (1984), 14 C.C.C. (3d) 440 (B.C.C.A.); see also *Born-With-A-Tooth v. Canada* (1988), 84 A.R. 137 (C.A.); and *United States v. Ding* (June 3, 1996), Vancouver CA 020385 (B.C.C.A.). If it need not be before the court for consideration on the extradition hearing, then it is not relevant to the issues on that hearing.

[16] Finally, disclosure of the initial extradition request is not something required in the context of the test to be met at the extradition hearing. Section 29(1)(a) of the Act requires the judge to determine if there is evidence of conduct that would be criminal under Canadian law. What must be established is that the act or conduct of the fugitive would, if it had occurred in Canada, constitute a crime according to the law of Canada. The issue of whether the act charged is one under the law of the requesting state is something for that state's officials to assess: see *Re McVey (supra).* This is somewhat contrary to the above-noted holding in the *Commisso* case. Here the purported equivalent Canadian crimes are listed in the authority to proceed and the German offences are noted on the German arrest warrant. There is no demonstrable need to disclose the request for extradition for Ebke to be able to address the relevant issues on the extradition hearing.

[17] With respect to the issue of identification, there are specific evidentiary provisions in the *Extradition Act* to address this (s.37).

[18] The fact that the request for extradition may have been disclosed in other cases and at other times does not affect my opinion. This specific request is denied.

<u>The Arrest Warrant</u>:

[19] The applicant also seeks disclosure of the notes and occurrence reports prepared by the Canadian police officers involved in Ebke's arrest here on the provisional arrest warrant. He wants all excerpts relating to the arrest itself and the planning for the arrest. Ebke's counsel has filed a motion seeking a stay of proceedings on the basis that the provisional arrest warrant should not have been issued since the German warrant, which formed the basis of the arrest, was for investigation purposes only (something for which we do not arrest people in Canada) and that the manner in which

the arrest was conducted was unreasonable. Counsel for the Attorney General submitted that any issue respecting Ebke's arrest has been resolved by his appearance in this court and the granting of bail. Ebke's counsel replied that bail is no cure for an illegal arrest and that the Charter protection against arbitrary arrest (s.9) and the right to have the validity of the initial detention determined (s.10) apply to everyone, including the subject of an extradition request.

[20] Leaving aside the question of whether an extradition judge has the jurisdiction to order a stay of proceedings (something to be argued at a later date), the question to address on this disclosure application is whether I have jurisdiction to review the validity of the provisional arrest warrant that I issued *ex parte* on May 18, 2000. The relevant portions of the *Extradition Act* are found in sections 3, 12 and 13:

> 3.(1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on - or enforcing a sentence imposed on - the person if
>
> (a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and
>
> (b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,
>
> (i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and
>
> (ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.
>
> ...
>
> 12. The Minister may, after receiving a request by an extradition partner for the provisional arrest of a person, authorize the Attorney General to apply for a provisional arrest warrant, if the Minister is satisfied that

> (a) the offence in respect of which the provisional arrest is requested is punishable in accordance with paragraph 3(1)(a); and
>
> (b) the extradition partner will make a request for the extradition of the person.
>
> 13.(1) A judge may, on *ex parte* application of the Attorney general, issue a warrant for the provisional arrest of a person, if satisfied that there are reasonable grounds to believe that
>
> (a) it is necessary in the public interest to arrest the person, including to prevent the person from escaping or committing an offence;
>
> (b) the person is ordinarily resident in Canada, is in Canada or is on the way to Canada; and
>
> (c) a warrant for the person's arrest or an order of a similar nature has been issued or the person has been convicted.

[21] The first requirement for the issuance of a provisional arrest warrant is the exercise of a discretionary power by the Minister. The Minister must be satisfied that the offence for which the fugitive is wanted is punishable by the requesting state by imprisonment of two years or more. Arguably the Minister must also be satisfied that the fugitive is sought "for the purpose of prosecuting the person". There is much force to the argument that (a) the validity of the foreign warrant or the status of any foreign proceedings cannot be examined by the extradition court judge (as per *Pacificador v. Philippines* (1993), 83 C.C.C. (3d) 210 (Ont. C.A.), at 215); and (b) the Minister has sole authority to determine the "purpose" of the request for extradition, and specifically whether the fugitive is sought for the purpose of prosecution (as per *Schreiber (supra)* at paras. 66, 73 & 87-88).

[22] I do not want to be seen as deciding this question since it was not fully argued on this hearing. If it is the applicant's intention to argue that sections 12 and/or 13 are constitutionally impaired because they permit arrest on mere suspicion and for investigative purposes, and not just for prosecution as we would commonly use that term, then he should be allowed to fully develop the jurisdictional argument. (There was an affidavit submitted from Ebke's counsel in Germany attesting to the fact that no indictment has been filed against Ebke.) It is enough at this point to say that an individual's s.7 Charter rights are engaged in any state action that has the result, or may

result in, the deprivation of that individual's liberty. It is not limited to purely criminal matters: see *New Brunswick v. J.G.*, [1999] 3 S.C.R. 46 (at para. 65).

[23] The second step in the provisional arrest process is the issuance by a judge of a warrant on the *ex parte* application of the Attorney General. This is a discretionary power and the judge must be satisfied that there are reasonable grounds to believe that it is "necessary in the public interest" to arrest the person. What may comprise the "public interest" is not identified. Ebke's counsel wants to argue that it should include the necessity of the fugitive being subject to actual or imminent prosecution in the requesting state.

[24] As an initial observation, it seems to me that a motion to set aside a judge's discretionary order in which it is asserted that it was palpably wrong for the judge to conclude that there were reasonable grounds to issue the order is always available to the person against whom such an order is made. More particularly, there is well-recognized authority that an *ex parte* order may always be reviewed by the judge who made it: *R. v. Wilson*, [1983] 2 S.C.R. 594. This rule should be no different when an extradition judge is asked to review the validity of his or her own order issued within that judge's jurisdiction. The fact that the warrant has already been executed may limit the scope of the relief available now but it does not preclude an examination of the validity of the warrant itself.

[25] If, as I have concluded, I have jurisdiction to review the validity of the arrest warrant that I issued, then the applicant should receive disclosure relating to the actions of the police subsequent to the issuance of the warrant. I therefore direct that the police officers' notes and relevant portions of the occurrence reports dealing with the arrest of Ebke and preparation for the arrest be disclosed.

The Search Warrant:

[26] The applicant has also filed a motion challenging the validity of the search warrant issued pursuant to the *Mutual Legal Assistance in Criminal Matters Act*. The process for such a warrant is again partly a Ministerial responsibility and a judicial one. The Minister must assess and approve the request from the requesting state for a search and seizure. The Minister then must provide the Attorney General with "any documents or information necessary to apply" for a warrant (s.11). The Attorney General then applies *ex parte* to a judge who may issue the warrant if satisfied under oath that there are reasonable grounds to believe that (as per s.12):

> (a) an offence has been committed with respect to which the foreign state has jurisdiction;
>
> (b) evidence of the commission of the offence or information that may reveal the whereabouts of a person who is suspected of having committed the offence will be found in a building, receptacle or place in the province; and
>
> (c) it would not, in the circumstances, be appropriate to make an order under subsection 18(1).

The reference to s. 18(1) in subclause (c) above is to the facility to issue orders for the gathering of evidence.

[27] Once a search warrant is issued and executed, the police must file a report for use at a hearing to consider the execution of the warrant (s.14). At that hearing, the judge may order the return of the items seized or that those items be sent to the requesting date (s.15). That hearing has not yet been held and part of the justification for this disclosure request is to prepare for that hearing.

[28] Among the documents appended to the Information to Obtain a Search Warrant in this case were the Minister's Approval of Assistance and confirmation as to the creation of an administrative arrangement (as required by s.6 of the Act). Referred to in the documents from the Department of Foreign Affairs confirming the arrangement is a "Note No. RK 102/00" from the German embassy. This Note, entitled "Verbal Note", was also attached to the Information. This Note contains the following sentence:

> The Embassy of the Federal Republic of Germany presents its compliments to the Department of Foreign Affairs and International Trade and refers to the Embassy's Note 100/00 and the thereto attached documentation requesting provisional arrest of Walter Lothar Ebke in view of his possible extradition.

The referred-to Note 100/00, and any documentation attached thereto, was not included in the Information to Obtain.

[29] The applicant seeks disclosure of Note 100/00 and whatever documentation was attached. His counsel submitted that this note likely sets out the parameters of the assistance requested. Therefore, it is necessary to examine that document in order to ascertain if the warrant accords with it. Counsel for the Attorney General countered

that, while Note 102/00 “refers” to Note 100/00, it does not expressly “incorporate” it, and so it is not disclosable. Counsel further submitted, in effect, that any document that goes from government to government is not disclosable unless the Attorney General chooses to disclose it. While there may be some merit to this last-mentioned submission, in terms of Crown or public interest privilege, I prefer to approach this issue on a different basis.

[30] As discussed above with respect to disclosure of the “diplomatic note”, the Minister has the responsibility to assess the request for assistance. It is the Minister who sets the terms of any administrative arrangement. The Minister decides what information will be conveyed for purpose of the warrant application. The judge, on the other hand, decides whether or not to issue the warrant based on the Information placed before him or her on the application. So, in accordance with the division of responsibilities outlined in the Act (just as in the *Extradition Act*), it is not within the issuing judge’s jurisdiction to go behind that Information and review the Minister’s decisions.

[31] Further, any review as to the validity of the warrant is focussed on the question of whether it could have been issued. If the Information placed before the issuing judge is found to be deficient, and the Attorney General chooses not to try to amplify that Information by additional evidence that bears on the existence in fact of reasonable and probable cause in the knowledge of the authorities at the time the warrant was sought, then the warrant may be found invalid. But the initial assessment is made on the basis of the Information that was before the issuing judge: see *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.), at 188.

[32] In my opinion, disclosure of the requested Note is not reasonably necessary for the applicant’s challenge to the search warrant. Further, I doubt if I have jurisdiction to order disclosure of it. Therefore this request is denied.

[33] On November 20, 2000, I issued a publication ban on the evidence to be presented at the extradition hearing. For sake of clarity, these reasons are not subject to that ban.

J. Z. Vertes
J.S.C.

Dated this 15th day of January, 2001
at Yellowknife, Northwest Territories.

Counsel for the Applicant:	Wes Wilson
Counsel for the Attorney General of Canada (on behalf of the Respondent):	Shelagh Creagh & Debra Robinson