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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **02/06/10**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

BEFORE A DIVISIONAL COURT

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IN THE MATTER of the Extradition Act 2003

_____

BETWEEN:

JOSE IGNACIO de JUANA CHAOS

Appellant:

-and-

KINGDOM OF SPAIN

Respondent:

_____

McCLOSKEY J

I INTRODUCTION

[1] The High Court, constituted as a Divisional Court, is seised of an application by the Respondent to revoke the Appellant's bail, commit him to custody and estreat his recognizance. The issues determined by this judgment are jurisdictional in nature. The main question is whether the High Court is empowered to take the measures requested. If the answer to this question is "no", the ancillary question is whether *any* court or agency is empowered to take measures to secure the Appellant's detention, in the circumstances prevailing. The answers to these questions are not to be found in the Extradition Act 2003 and it became clear at an

initial hearing that the court should endeavour give some guidance. All members of the court have contributed to this judgment.

II RELEVANT FACTUAL MATRIX

[2] In the language of the relevant legislation, the Extradition Act 2003 ("*the 2003 Act*"), Jose Ignacio de Juana Chaos, the Appellant in the substantive proceedings of which this court is seised, is the requested person, while the Kingdom of Spain, the Respondent to the appeal and moving party in the present application, is the requesting State. They are hereinafter described as "*the Appellant*" and "*the Respondent*" respectively.

[3] By order dated 1st March 2010, the Recorder of Belfast acceded to the Respondent's application and ordered that the Appellant be extradited to Spain. By Notice dated 5th March 2010, the Appellant has exercised his right of appeal to this court under Section 26 of the 2003 Act. The appeal is scheduled to be heard on 28th June 2010. The grounds and merits of the appeal are immaterial, for present purposes.

[4] On the date when he made the extradition order, 1st March 2010, the Recorder, exercising his power under Section 21(4) of the 2003 Act, remanded the Appellant on bail. The evidence before the court includes a duly completed "Form 3", bearing the title "Recognizance of Requested Person in a Part 1 Extradition Matter". It is dated 1st March 2010. It has three signatories and there is no dispute that these are, respectively, the Appellant, the Governor (or Deputy Governor) of the relevant prison and the Chief Clerk of the Recorder's Court. The court was informed that no separate bail order of the Recorder is in existence. This is unsurprising, given that, conventionally, orders made in the County Court are not generated automatically but must be specifically bespoken. It is undisputed that the executed recognizance reflects the terms of the Recorder's bail order. It recites, in relevant part:

> "*The undersigned Jose Ignacio de Juana Chaos, of* [address], *the principal party to this recognizance, hereby binds himself to perform the following obligations:*
>
> 1. *To surrender himself to the custody of Police Service for Northern Ireland for the purposes of extradition on a date to be fixed.*
>
> 2. *In the event of your extradition to the Category 1 territory in which the Part 1 warrant was issued, to surrender to the custody of the court if so directed by or on behalf of such court, for the purpose of extradition.*
>
> *And upon condition that:*

(i) *He reports daily to a PSNI station at a time agreed with the police.*

(ii) *He resides at an address provided and given to police.*

(iii) *Curfew from 8.00am until 7.00am to be lifted to enable the Defendant to work in* [a specified café].

(iv) *He presents himself at the door as and when police call.*

(v) *Any passport or national identity card that can be used to travel in Europe be surrendered to the police.*

(vi) *Defendant not to leave the jurisdiction of Northern Ireland*".

While the second of the two "*obligations*" quoted above is unhappily phrased, it is tolerably clear, particularly from the words "*in the event of your extradition to the Category 1 territory*", that it refers to the relevant court of the requesting State, to be contrasted with any court in this jurisdiction.

[5] By Notice of Motion dated 26th April 2010, the Respondent applies to this court for an order revoking the Appellant's bail, committing him to custody and estreating his recognizance. This constitutes the framework within which the present decision is made. It is asserted, without challenge, that since 25th March 2010 the Appellant has failed to comply with the first, second and fourth of the aforementioned conditions. Whether he is also in breach of the sixth condition is unclear at present. Counsel for the Appellant confirmed to the court that the last contact between his client and the solicitors who continue to represent him occurred on 26th March 2010. In short, it is asserted that the Appellant has committed, and continues to commit, fundamental breaches of the Recorder's bail order and this is not disputed.

III RELEVANT STATUTORY FRAMEWORK

[6] Pursuant to Section 67 of the 2003 Act, the Recorder of Belfast is "*the appropriate judge*" for the purposes of the statute. The statutory scheme envisages that there will be an initial hearing before the appropriate judge, followed by a possible interim hearing or hearings, culminating in the substantive hearing. Where the requested person is arrested pursuant to the relevant warrant, he or she must be brought before the appropriate judge within a period of forty-eight hours: see Section 4(2) and (3). The statute prescribes an initial hearing, at this stage and the topic of bail is specifically addressed in Section 7:

> "*(9) If the judge exercises his power to adjourn the proceedings he must remand the person in custody or on bail.*

> *(10) If the person is remanded in custody, the appropriate judge may later grant bail*".

Section 9 contemplates the possibility of an adjournment of the extradition hearing and, in this context, addresses the question of bail in these terms:

> "*(4) If the judge adjourns the extradition hearing he must remand the person in custody or on bail.*
>
> *(5) If the person is remanded in custody, the appropriate judge may later grant bail*".

[7] Section 21 of the 2003 Act addresses the topic of bail again, in the context of the court making an extradition order at first instance. Per Section 21(4):

> "*If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the Category 1 territory*".

[This is the power exercised by the Recorder on 1st March 2010].

Section 21(5) continues:

> "*If the person is remanded in custody, the appropriate judge may later grant bail*".

Notably, the appropriate judge's statutory power to grant bail at the conclusion of the proceedings is linked directly to the making of an extradition order. This power is clearly designed to give effect to the extradition order. It is unconnected with any ensuing appeal pursued by either party. An appeal by the requested person is regulated by Section 26, which 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 may be brought on a question of law or fact.*
> *(4) Notice of an appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made."*

The powers of the High Court in determining an appeal of this kind are contained in Section 27, which provides:

"(1) On an appeal under section 26 the High Court may –
(a) allow the appeal;
(b) dismiss the appeal.
(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
(3) The conditions are that –
(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
(4) The conditions are that –
(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
(b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
(c) if he had decided the question in that way, he would have been required to order the person's discharge.
(5) If the court allows the appeal it must –
(a) order the person's discharge;
(b) quash the order for his extradition."

Notably, Sections 26 and 27 are silent on the issue of bail.

[8] The second type of appeal which may follow the final order of the appropriate judge, at first instance, is an appeal by the requesting state against an order discharging the requested person. Section 28 provides:

"(1) If the judge orders a person's discharge at the extradition hearing the authority which issued the Part 1 warrant may appeal to the High Court against the relevant decision.
(2) But subsection (1) does not apply if the order for the person's discharge was under section 41.
(3) The relevant decision is the decision which resulted in the order for the person's discharge.
(4) An appeal under this section may be brought on a question of law or fact.
(5) Notice of an appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order for the person's discharge is made."

The subject matter of Section 30 is "Detention Pending Conclusion of Appeal under Section 28". It provides:

> *"(1) This section applies if immediately after the judge orders the person's discharge the judge is informed by the authority which issued the Part 1 warrant that it intends to appeal under section 28.*
> *(2) The judge must remand the person in custody or on bail while the appeal is pending.*
> *(3) If the judge remands the person in custody he may later grant bail.*
> *(4) An appeal under section 28 ceases to be pending at the earliest of these times –*
> *(a) when the proceedings on the appeal are discontinued;*
> *(b) when the High Court dismisses the appeal, if the authority does not immediately inform the court that it intends to apply for leave to appeal to the House of Lords;*
> *(c) at the end of the permitted period, which is 28 days starting with the day on which leave to appeal to the House of Lords against the decision of the High Court on the appeal is granted;*
> *(d) when there is no further step that can be taken by the authority which issued the Part 1 warrant in relation to the appeal (ignoring any power of a court to grant leave to take a step out of time)…"*

Thus, in cases where the requesting State is the Appellant, the bail jurisdiction exercisable by the court remains vested in the Recorder (*qua* appropriate judge) until the occurrence of the relevant final event, which, conceivably, may not materialise until some considerable time after the decision of the High Court on appeal. A striking feature of the provisions of Section 28 is that, as regards bail, jurisdiction remains vested in the Recorder throughout the period when the appeal is pending and at least until determination of the appeal.

[9] By Section 29, the two basic powers conferred on the High Court are to allow or dismiss the appeal and, in the case of allowing the appeal, specific provision is made for bail:

> *"(7) If the court allows the appeal it must remand the person in custody or on bail.*
> *(8) If the court remands the person in custody it may later grant bail".*

Compare Section 21(4) and (5). This is the first bail power conferred expressly on the High Court by the statute. Section 32 of the 2003 Act provides for an appeal to the Supreme Court from a decision of the High Court on an appeal under Section 26 or Section 28. The losing party may seek to appeal, subject to certain conditions. In this context, there is a further specific provision relating to bail, per Section 32(1):

> "*The High Court may grant bail to a person appealing under this Section, or applying for leave to appeal under this Section, against the dismissal of his appeal under Section 26*".

This is the second provision in the statute conferring a bail jurisdiction on the High Court. There are no further provisions in the 2003 Act relating to bail, as regards extradition proceedings in Northern Ireland.

[10] In the matter of bail, the 2003 Act contains certain special provisions which relate to England and Wales only. Section 1 of the Bail Act 1976 formerly provided as follows:

> ***"1.*** *Meaning of "bail in criminal proceedings".*
>
> *– (1) In this Act "bail in criminal proceedings" means –*
>
> *(a) bail grantable in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or*
> *(b) bail grantable in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued.*
>
> *(2) In this Act " bail" means bail grantable under the law (including common law) for the time being in force.*
>
> *(3) Except as provided by section 13(3) of this Act, this section does not apply to bail in or in connection with proceedings outside England and Wales.*
>
> *F1(4) . . . . . .*
> *(5) This section applies –*
>
> *(a) whether the offence was committed in England or Wales or elsewhere, and*
>
> *(b) whether it is an offence under the law of England and Wales, or of any other country or territory.*
>
> *(6) Bail in criminal proceedings shall be granted (and in particular shall be granted unconditionally or conditionally) in accordance with this Act."*

By Section 198(2) of the 2003 Act, Section 1(1) of the 1976 Act was extended by the addition of:

"*(c) Bail grantable in connection with extradition proceedings in respect of an offence.*"

The remaining provisions of Section 198 make certain other related amendments to the 1976 Act. Similarly, by Section 200, Section 1 of the Bail (Amendment) Act 1993 was amended, to provide for a prosecution appeal to the Crown Court against the grant of bail by the Magistrates Court in extradition proceedings.

IV CONSIDERATION

[11] It appears to the court that there are three possible sources of a power to detain the Appellant, in the circumstances currently prevailing. These are, respectively:

(a) The inherent jurisdiction of the High Court.

(b) An implied statutory power invested in the Recorder, *qua* appropriate judge.

(c) Part II of the Criminal Justice (Northern Ireland) Order 2003.

Each of these possibilities will be considered in turn.

Inherent Jurisdiction of the High Court

[12] On behalf of the Respondent and moving party, Mr. Ritchie (of counsel) drew the attention of the court to Blackstone's Guide to the Extradition Act, where it is suggested (at paragraph 4.5.5) that the amendments of the Bail Act 1976 do not affect the requested person's right to apply to the High Court under Order 79 – the specific provision in this jurisdiction being Order 79, Rule 9 of the Rules of the Court of Judicature. Thus, it is suggested that if the appropriate judge were to refuse bail to the requested person, the High Court, once seised of an appeal by either party, could grant bail.

[13] The submissions on behalf of the moving party also draw attention to the decision in ***The Queen –v- Home Secretary, ex parte Turkoglu*** [1988] QB 398 where the Court of Appeal affirmed the jurisdiction of a High Court judge to grant bail, as a measure of interim relief, when granting leave to apply for judicial review. In thus concluding, Sir John Donaldson MR stated:

"If I could come back to the general question of jurisdiction, in my judgment bail is to be regarded in civil proceedings - as it is in criminal proceedings - as ancillary to some other proceeding. It is not possible, so far as I know, to apply to any court for bail in vacuo. It is essentially an ancillary form of relief. The problems which have arisen really all stem from the need to find an

underlying substantive proceeding to which bail would be ancillary...

I will now try and look at the problem overall, taking, first, the High Court. In my judgment you cannot apply to the High Court for bail unless the High Court is seised of some sort of proceeding. It may be seised of an application for leave to apply for judicial review or it may be seised of the substantive application. So long as it is seised of either of those applications, you can apply to the High Court and the court can grant or refuse bail. From the order granting or refusing bail an appeal will lie to this court."

This appears to be a reaffirmation of the inherent jurisdiction of the High Court to grant bail. The Master of the Rolls also addressed the question of the powers of the appellate court:

"As far as the Court of Appeal is concerned, it has jurisdiction to entertain a direct appeal against any refusal or grant of bail by the High Court in whatever proceedings it is made, that right and duty coming straight from section 16 of the Act of 1981. In addition, it has inherent jurisdiction to grant bail in proceedings originating in this court, which in practice means on a renewed application for leave to apply for judicial review or, of course, if this court went on to hear the substantive application, although usually it will remit it to the High Court for hearing."

The decision in ***Turkoglu*** has been regularly followed by successive High Courts in this jurisdiction, in judicial review proceedings.

[14] The inherent power of the High Court to grant bail also arose for consideration in ***R –v- Home Secretary, ex parte Sezek*** [2002] 1 WLR 348. Once again, the context was that of an application for judicial review, overlaid by the exercise of detention powers conferred on the Secretary of State by the Immigration Act 1971. The Court of Appeal had to confront the question of whether the High Court had any inherent jurisdiction to grant bail, in circumstances where Parliament had specifically empowered the Secretary of State to detain the subject. Delivering the judgment of the Court of Appeal, Peter Gibson LJ stated:

"16 We own to having some doubts as to whether there is room for an inherent jurisdiction to grant bail in relation to a civil appeal in judicial review proceedings when Parliament has given the Secretary of State the power to detain and the substance of the complaint is the exercise of that power. But in the light of the authorities we accept that the High Court has the power in judicial review proceedings to make ancillary orders temporarily releasing an applicant from detention and that on an appeal in those proceedings this court by virtue of section 15(3) of the 1981

> *Act can make the like order. In our judgment this court is exercising an original jurisdiction and it is not judicially reviewing the decision by the Secretary of State.*"

The context being an application for judicial review, this decision is harmonious with ***Turkoglu***.

[15] It is submitted on behalf of the moving party that, having regard to these decisions, the High Court, in the context of an extradition appeal by the requested person, possesses a residual jurisdiction to deal with questions of bail. Emphasis is placed on the court's acknowledged powers in judicial review proceedings, the contention being that the court should, logically, possess comparable powers in the sphere of extradition appeals. Mr. Ritchie submits that had it been the parliamentary intention, in making the 2003 Act, to restrict the inherent powers of the High Court in respect of bail, express provision to this effect would have been made.

[16] The origins of the inherent jurisdiction of the High Court to grant bail are traceable to its common law power to review the legality of the detention of the citizen through the medium of *habeas corpus* proceedings. In Criminal Procedure in Northern Ireland (Valentine and Hart) it is stated, at paragraph 5.04:

> "*The High Court has inherited the original and inherent jurisdiction of the Court of Queen's Bench to hear an application for bail, which should only be invoked if the Magistrates Court has refused bail …*"

It is suggested in the 1948 edition of Archbold Criminal Pleadings that the High Court exercises the bail powers of the former Court of King's Bench. These were common law powers. Originally, they were exercised by a Writ of *habeas corpus*. This practice evolved and, according to the text :

> "*An application for bail in felony or misdemeanor where the party is in custody shall be in the first instance by summons before a judge at chambers for a Writ of habeas corpus, or to show cause why the Defendant should not be admitted to bail either before the judge at chambers or before a justice of the peace, in such an amounts as the judge may direct*".

As appears from the following passage, the application for a Writ of *habeas corpus* was overtaken by the mechanism of applying by summons to a judge in chambers to show cause why the prisoner should not be admitted to bail before a justice of the peace. In this way, the order of the High Court, made in the exercise of its inherent jurisdiction, became a pre-requisite to the admission to bail of the prisoner by a justice of the peace. It is suggested that this inherent jurisdiction is an aspect of the traditional supervisory powers of the High Court.

[17] It is evident from the 37th and 38th Editions of Archbold, published in 1969 and 1973 respectively, that the power of the High Court to grant bail in England and Wales has traditionally differed from that exercisable by the High Court in Northern Ireland and it would seem that the differences are mainly attributable to statutory intervention. In these texts, the emphasis is on statutory, rather than inherent, jurisdiction. Since the 1940s, in England and Wales there have been successive statutory provisions regulating the jurisdiction of the High Court in the sphere of bail which were not replicated in Northern Ireland. The first notable statutory provision of this character is Section 37 of the Criminal Justice Act 1948, which regulated extensively the jurisdiction of the High Court to grant bail to a person pursuing an appeal from a court of summary jurisdiction to a Court of Quarter Sessions **or** seeking to appeal by case stated from either of the last-mentioned courts to the High Court **or** applying to the High Court for an Order of Certiorari quashing the decision of a court of summary jurisdiction. Section 48 further specifically empowered the High Court to determine the terms of a recognizance, with or without sureties. Section 37(4) provided that rules of court could be made under Section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 relating to recognizances, sureties, the enforcement thereof and recommittal. Notably, the opening words of Section 37(1) were:

> "*Without prejudice to the powers vested before the commencement of this Act in any court to admit or direct the admission of a person to bail …*".

Thus the Section did not purport to reduce or extinguish any such pre-existing powers to grant bail, including any inherent jurisdiction possessed by the High Court. However, its effect was clearly to transform at least part of the pre-existing inherent jurisdiction to statutory regulation.

[18] The jurisdiction of the English High Court to grant bail was the subject of further statutory regulation, by Section 22 of the Criminal Justice Act 1967, which provided:

> "*(1) Where in connection with any criminal proceedings an inferior court has power to admit any person to bail, but either refuses to do so, or does so or offers to do so on terms unacceptable to him, the High Court may admit him or direct his admission to bail or, where he has been admitted to bail, may vary any conditions on which he was so admitted, or reduce the amount in which he or any surety is bound or discharge any of the sureties.*
>
> *(2) The conditions as to the time and place of appearance of a person admitted to bail under this Section which are to be included in a recognizance entered into by him shall be such conditions as the inferior court had power to oppose*".

By Section 22(5), the powers specified above were expressed to be in substitution for the powers conferred on the High Court by Section 37(1)(a), (b) and (c) of the 1948 Act. Notably, the final words of Section 22(5) were:

> "*but except as aforesaid this Section shall not prejudice any powers of the High Court to admit or direct the admission of persons to bail*".

Thus it was recognised, at least tacitly, in two successive statutes that the High Court possessed certain inherent powers to grant bail. The next statutory landmark was the introduction of the Bail Act 1976, which preserved Section 22, albeit in slightly amended form (per Schedule 2, paragraph 37). It is significant that the statutory definition of "*bail*" accommodates the possibility of extant common law powers in this sphere. Per Section 1(2):

> "*In this Act 'bail' means bail grantable under the law (**including common law**) for the time being in force*".

[Emphasis added].

Thus the theme of recognition of the existence of an inherent jurisdiction in this sphere was perpetuated, in a third successive statute.

[19] It would appear that, until 2003, both statutory and inherent powers to grant bail continued to repose in the English High Court. Part 2 of the Criminal Justice Act 2003 ("*the 2003 Act*") effected a series of revisions to the Bail Act 1976. Most significantly, for present purposes, Section 17 provides , in material part :

> *"(2) The inherent power of the High Court to entertain an application in relation to bail where a magistrates' court –*
>
> *(a) has granted or withheld bail, or*
>
> *(b) has varied the conditions of bail,*
>
> *is abolished.*
>
> *(3) The inherent power of the High Court to entertain an application in relation to bail where the Crown Court has determined –*
>
> *(a) an application under section 3(8) of the 1976 Act, or*
>
> *(b) an application under section 81(1)(a), (b), (c) or (g) of the Supreme Court Act 1981 (c. 54)*
>
> *is abolished.*

(4) The High Court is to have no power to entertain an application in relation to bail where the Crown Court has determined an appeal under section 16 of this Act.

(5) The High Court is to have no power to entertain an application in relation to bail where the Crown Court has granted or withheld bail under section 88 or 89 of this Act.

(6) Nothing in this section affects –

(a) any other power of the High Court to grant or withhold bail or to vary the conditions of bail, or

(b) any right of a person to apply for a writ of habeas corpus or any other prerogative remedy.

(7) Any reference in this section to an application in relation to bail is to be read as including –

(a) an application for bail to be granted,

(b) an application for bail to be withheld,

(c) an application for the conditions of bail to be varied.

(8) Any reference in this section to the withholding of bail is to be read as including a reference to the revocation of bail."

Thus Section 17 substantially emasculated but, by virtue of subsection (6), did not extinguish the statutory and inherent jurisdiction of the English High Court in the sphere of bail. Notably, in Bail in Criminal Proceedings (Corre and Wolchover, 3rd Edition) it is suggested that the provisions enacted by Part 2 of the 2003 Act were designed to render English law compatible with Article 5 ECHR (see p. 24). The impact of Article 5 is considered later in this judgment.

[20] In Northern Ireland, there were no statutory measures equivalent to those introduced in England and Wales considered above. Thus the significant statutory erosion of the inherent jurisdiction of the English High Court in the sphere of bail has not been replicated in Northern Ireland. The extent of such inherent jurisdiction as may survive in England and Wales is unclear: see Corre and Wolchover (*op cit*), pp. 399-401. While Donaldson LJ emphasized in ***R –v- Reading Crown Court, ex parte Malik*** [1981] QB 451 that Section 22(5) of the 1967 Act had expressly preserved the inherent jurisdiction of the High Court [at p. 455] *and* while the 2003 Act did not abolish this jurisdiction completely, its residual scope seems limited. While noting the suggestion in the Blackstone publication [paragraph 4.5.5] it is clear from the foregoing that any suggested analogy between the inherent jurisdiction of the English High Court and that of the Northern Irish High Court in the field of bail

must be treated with caution. The proposition in Blackstone is unreasoned and, moreover, it has been observed that the function of Order 79 is simply to regulate the procedure governing the exercise of the High Court's inherent jurisdiction in matters of bail (see ***In Re Maughan*** [2010] NIQB 16 paragraph [4]).

[21] We consider that there are three factors militating against the suggestion that the High Court has an inherent jurisdiction to revoke the Appellant's bail and commit him to custody. The first is that to do so would be contrary to the well established principle and practice whereby powers of this nature are exercised by the court granting bail. It would be unusual and undesirable for jurisdiction to grant bail being exercised by one court, with jurisdiction to revoke being exercised by another. The court is unaware of any decided case supporting the proposition that the High Court has inherent jurisdiction to revoke a person's bail in such circumstances. The existence of such a jurisdiction seems even more unlikely when one considers the diametrically opposing nature and consequences of the grant of bail (on the one hand) and the revocation thereof (on the other).

[22] The second contraindicating factor is that statutory intervention in the sphere of bail in extradition proceedings clearly weakens any suggestion that the High Court possesses a residual, inherent jurisdiction: see paragraphs [6] – [10] above. The third factor is Article 5/1 ECHR (one of the protected Convention rights under the regime of the Human Rights Act 1998), which provides:

> "*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases* ***and in accordance with a procedure prescribed by law ...***
>
> ***(f) the lawful arrest or detention of ... a person against whom action is being taken with a view to deportation or extradition***".

[Emphasis added].

In Convention terms, the question becomes: Does there exist a procedure prescribed by law authorising the detention of the Appellant with a view to giving effect to the Recorder's extradition order?

[23] It is well established in Convention jurisprudence, both Strasbourg and domestic, that the stipulation of "*in accordance with a procedure prescribed by law*" requires the relevant domestic law to be accessible and foreseeable. The Convention requirements, in this respect, are expressed with admirable clarity in Blackstone's Guide to the Human Rights Act 1998 (Wadham et al, 4th Edition), in the following passages:

> "*2.66 The concept of the rule of law is a core concept in the Convention …*

> *No matter how desirable the end to be achieved, no interference with a right protected under the Convention is permissible unless the citizen knows the basis for the interference because it is:*
>
> *(a) set out in an ascertainable law which is*
> *(b) accessible and*
> *(c) certain.*
>
> *2.67 In the absence of such detailed authorisation by the law, any interference, however justified, will violate the Convention. In Strasbourg jurisprudence, a derogation must also have an ascertainable legal basis, that is be 'prescribed by law' or 'in accordance with the law' …* [i.e.] ***there must be an ascertainable legal regime governing the interference in question. It is not acceptable for an interference with a Convention right to occur without any legal regulation***".

[Emphasis added].

[24] It is clear that the requirement of accessibility entails the availability of a published text of the law in question: see ***Silver –v- United Kingdom*** [1983] 5 EHRR 347, paragraph [87]. In domestic jurisprudence, the most notable recent decision belonging to this sphere is ***R (Purdy) –v- Director of Public Prosecutions*** [2009] UKHL 45: see in particular the opinion of Lord Hope, paragraphs [40] – [43]. A brief quotation will suffice:

> "*[40] The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate.*"

Moreover, these Convention values and standards have been applied in the specific sphere of Article 5/1. This is illustrated in ***Winterwerp –v- The Netherlands*** [1979] 2 EHRR 387 where, in rejecting a complaint that the Applicant's detention was not "*in accordance with a procedure prescribed by law*", the European Court stated:

> "*[45] The court for its part considers that the words 'in accordance with a procedure prescribed by law' essentially refer back to domestic law; they state the need for compliance with the*

> *relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary*".

As the European Court has consistently stated, the central purpose of Article 5 is to protect the citizen from arbitrary state conduct (see, for example, ***Bozano –v- France*** [1986] 9 EHRR 297, paragraph 54], which requires the domestic law in question to comply with the general principles of the Convention, including accessibility and forseeability: see ***Amuur –v- France*** [1996] 22 EHRR 533, paragraph [50].

[25] In summary, in Convention terms, in order to qualify as a "*law*" the relevant rule or instrument must satisfy the fundamental requirements of accessibility and foreseeability. The inherent jurisdiction canvassed on behalf of the Respondent in the present context would be unpublished, undefined and unparticularised. Thus it would be manifestly inaccessible. For the same reasons, it would lack the essential quality of foreseeability. We conclude that, given these characteristics, it would not be "*in accordance with a procedure prescribed by law*", contrary to Article 5/1.

Implied Statutory Power

[26] The second possibility is that the "*appropriate court*" (the statutory language) viz. the Recorder possesses an *implied statutory power* to revoke the Appellant's bail and commit him to custody. This is, properly analysed, the solution advocated by Mr Devine (of counsel) on behalf of the Appellant. This suggestion has some initial attraction and finds superficial support in the principles formulated and discussed in Bennion on Statutory Interpretation (5th Edition), p. 487 *et seq.* For example, it is suggested:

> "*Implications arise either because they are directly suggested by the words expressed or because they are indirectly suggested by rules or principles of law not supplied by the words expressed*".

Bennion also discusses the process of "*ellipsis*" (at pp. 488-493). In ***B (a minor) –v- DPP*** [2000] 2 AC 428, Lord Nicholls stated, at p. 464:

> "*'Necessary implication' connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament …*".

This is an elevated hurdle which, in our view, is not overcome in the present instance.

[27] The suggestion of an implied statutory power of the kind mooted is contra indicated by two further considerations. The first is Article 5/1 ECHR, discussed above. In short, a power of this kind would lack the essential qualities of accessibility and foreseeability. The second contra indication is the *nature* of the power. Such a power would entail deprivation of the citizen's liberty. The common law has long recognised liberty as a hallowed right and it possesses a similar ranking in Convention jurisprudence. In ***Aeleko –v- Government of Nigeria*** [1931] AC 662, Lord Atkin stated, at p. 670:

> "*In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive*".

There is no justification in logic or in principle for adopting a less robust approach where the detaining agency is the court, rather than the executive. In ***Re SC*** [1986] 1 All ER 532, Sir Thomas Bingham MR stated, at p. 534:

> "*As we are all well aware, no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of law. This is a fundamental constitutional principle, traceable back to chapter 29 of Magna Carta 1297 …*".

To like effect is the statement of Lord Bridge in ***Khawaja –v- Secretary of State for the Home Department*** [1984] AC 74 , at p. 122:

> "*So far as I know, no case before the decisions under the* [Immigration Act 1971] *which we are presently considering has held imprisonment without trial by executive order to be justified by* ***anything less than the plainest statutory language,*** *with the sole exception of the majority of Your Lordships' House in* ***Liversidge –v- Anderson*** *[1942] AC 206. No one needs to be reminded of the now celebrated dissenting speech of Lord Atkin in that case, or of his withering condemnation of* ***the process of writing into the statutory language there under consideration the words which were necessary to sustain the decision of the majority****. Lord Atkin's dissent now has the approval of Your Lordships' House in* ***IRC –v- Rossminster Limited*** *[1980] AC 952*".

[Emphasis added].

And see also per Lord Scarman , at p.110 .

These robust and authoritative statements of principle seem to us to undermine fatally the contention that the Recorder has an implied statutory power to revoke the Appellant's bail and commit him to custody, exercisable in the present circumstances.

The Criminal Justice (Northern Ireland) Order 2003

[28] This statutory measure represents the third possible source of (or route to) a power to detain the Appellant in the circumstances currently prevailing. Article 3 provides:

> "**3.** – *(1) In this Part bail means bail grantable under the law for the time being in force –*
>
> *(a)in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or*
>
> *(b)in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued.*
>
> *(2) In paragraph (1) –*
>
> *bail does not include bail grantable under section 67 of the Terrorism Act 2000 (c. 11);*
> *law includes common law;*
> *offence includes an alleged offence.*
>
> *(3) For the purposes of paragraph (1) any of the following shall be treated as a conviction –*
>
> *(a) a finding of guilt;*
>
> *(b) a finding under Article 51 of the Magistrates' Courts (Northern Ireland) Order 1981 (NI 26) (remand for inquiry into physical or mental condition) that the person charged did the act or made the omission charged;*
>
> *(c) a finding mentioned in Article 50A(1) of the Mental Health (Northern Ireland) Order 1986 (NI 4) (not guilty by reason of insanity, or unfit to be tried etc.);*
>
> *(d) a conviction of an offence for which an order is made placing the offender on probation or discharging him absolutely or conditionally.*

(4) This Article applies –

(a) whether the offence was committed in Northern Ireland or elsewhere; and

(b) whether it is an offence under the law of Northern Ireland or of any other country or territory."

Per Article 4, a person released on bail has a duty to surrender to custody:

> ***"4.** – (1) A person released on bail shall be under a duty to surrender to custody.*
>
> *(2) In this Part –*
>
> *surrender to custody means, in relation to a person released on bail, surrendering himself (according to the requirements of the grant of bail) –*
>
> *(a) into the custody of the court at the time and place for the time being appointed for him to do so; or*
>
> *(b) at the police station and at the time appointed for him to do so [F2or]*
>
> *[F2(c) into the custody of the governor of a prison at the time and place for the time being appointed for him to do so.]"*

By Article 5, a failure to surrender to custody constitutes an offence:

> ***"5.** – (1) If a person who has been released on bail fails without reasonable cause to surrender to custody, he shall be guilty of an offence.*
>
> *(2) If a person who –*
>
> *(a) has been released on bail, and*
>
> *(b) has, with reasonable cause, failed to surrender to custody, fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable, he shall be guilty of an offence.*
>
> *[F3(3) A person guilty of an offence paragraph (1) or (2) shall be liable –*

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 3 years or to a fine or to both.]"

[29] The topic of arrest and detention is regulated by Article 6, which provides:

> *"**6.** – (1) If a person who has been released on bail **and is under a duty to surrender into the custody of a court** fails to surrender to custody at the time appointed for him to do so, the court may issue a warrant for his arrest.*
>
> *(2) If a person who has been released on bail absents himself from the court at any time after he has surrendered into the custody of the court and before the court is ready to begin or to resume the hearing of the proceedings, the court may issue a warrant for his arrest; but no warrant shall be issued under this paragraph where that person is absent in accordance with permission given to him by or on behalf of the court.*
>
> *(3) A constable may arrest without warrant any person who has been released on bail and is under [F4a duty to surrender into the custody of a court] –*
>
> *(a) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody;*
>
> *(b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions; or*
>
> *(c) in a case where that person was released on bail with one or more surety or sureties, if a surety notifies a constable in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety.*
>
> *[F4(3A) If, on an application made by a constable, a justice of the peace is satisfied that –*
>
> *(a) there are reasonable grounds for believing that a person who is liable to arrest under paragraph (3) is to be found on the premises specified in the application; and*

(b) any of the conditions specified in paragraph (3B) is satisfied,

he may issue a warrant authorising a constable to enter those premises (if need be by force) and search them for the purpose of arresting that person.

(3B) The conditions mentioned in paragraph (3A) are –

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that entry to the premises will not be granted unless a warrant is produced;

(c) that the purpose of a search of the premises may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.]

(4) A person who is arrested under paragraph (3) shall be brought before a magistrates' court as soon as practicable after the arrest and in any event not later than the next day following the day on which he is arrested.

(5) Where the day next following the day on which that person is arrested is Christmas Day, Good Friday or a Sunday, he shall be brought before a magistrates' court not later than the next following day which is not one of those days.

[F4(5A) Paragraphs (4) and (5) do not require a person to be brought before a magistrates' court at any time when he is in hospital and is not well enough.]

(6) Where a person is brought before a magistrates' court under paragraph (4) the court –

(a) if of the opinion that he –

(i)is not likely to surrender to custody, or

(ii) has broken or is likely to break any condition of his bail,may remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions; or

(b) if not of that opinion, shall grant him bail subject to the same conditions (if any) as were originally imposed.

(7) Paragraph (6) is subject to Articles 12 and 13 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 9) (release on bail or remand in custody of child)."

The words highlighted in Article 6(1) above must be considered in the context of the present case, where, by virtue of the order of the Recorder, the obligation imposed on the Appellant is "*to surrender himself to* ***the custody of Police Service for NI ...***"[my emphasis], rather than any court . Furthermore, the word "*or*", where it appears in Article 4(2), is of some significance. Finally, it is not suggested, correctly, that the power of arrest conferred on a constable by Article 6(3) is engaged in the present context.

[30] Applying the framework of Article 3 of the 2003 Order to the present context:

(a) The Appellant is accused of an alleged offence.

(b) The Appellant has been granted bail in connection with proceedings in this jurisdiction for the alleged offence.

(c) The alleged offence was committed outside Northern Ireland and is an offence under the law of some foreign country, per paragraph (4), thereby falling within the scope of Article 3.

Thus, Article 3 is engaged in the present context. Pursuant to Article 4(1), in conjunction with Article 4(2)(b), the Appellant had a duty to surrender himself to the custody of the police, by virtue of paragraph 1 and condition No. 1 of the Recorder's order. It is clear that these two provisions of the order [recognizance] must be considered in conjunction with each other. Moreover, it is appropriate to re-emphasize, as highlighted in paragraph [7] above, that the Recorder's grant of bail to the Appellant was linked directly to his extradition to Spain: it had nothing to do with the appeal to this court which the Appellant determined to pursue subsequently. The terms of the order were designed exclusively to execute the judgment and secure the Appellant's extradition to Spain. Each act of daily reporting to the police would have entailed some, albeit limited, interference with the Appellant's liberty. Under this arrangement, he was liable to be informed at any stage of specific extradition arrangements and to be detained accordingly. It is not disputed that the Appellant has failed to present himself at a police station since 25th March 2010.

[31] In these circumstances, it is arguable that the Appellant is, *prima facie*, and subject to the presumption of innocence, guilty of an offence under Article 5, exposing him to arrest through the mechanism outlined in the following paragraphs.. The situation might be even clearer if the police, at this stage, were to deliver to the Appellant's solicitors and his last known place of abode a formal notification of arrangements to extradite him to Spain. It is unsurprising that this

step would not have been taken when the Appellant appeared to be pursuing an appeal to this court. However, in the events which have occurred, it would appear that the Appellant is no longer prosecuting his appeal.. For the avoidance of any doubt, we conclude that the power to issue a bench warrant for the Appellant's arrest under Article 6 does **not** arise, as the Recorder's bail order did not impose "*a duty to surrender into the custody of a court*", in the language of Article 6(1).

[32] By virtue of Article 5(3) of the 2003 Order, the offence for which the Appellant is liable to be prosecuted is triable both summarily and on indictment. Article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 provides:

> *"26. – (1) A constable may arrest without a warrant –*
>
> *(a) anyone who is about to commit an offence;*
> *(b) anyone who is in the act of committing an offence;*
> *(c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;*
> *(d) anyone whom he has reasonable grounds for suspecting to be committing an offence.*
>
> *(2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.*
> *(3) If an offence has been committed, a constable may arrest without a warrant –*
>
> *(a) anyone who is guilty of the offence;*
>
> *(b) anyone whom he has reasonable grounds for suspecting to be guilty of it.*
> *(4) But the power of summary arrest conferred by paragraph (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in paragraph (5) it is necessary to arrest the person in question.*
>
> *(5) The reasons are –*
>
> *(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);*
>
> *(b) correspondingly as regards the person's address;*
>
> *(c) to prevent the person in question –*

(i) causing physical injury to himself or any other person;

(ii) suffering physical injury;

(iii) causing loss of or damage to property;

(iv) committing an offence against public decency (subject to paragraph (6)); or

(v) causing an unlawful obstruction on a road (within the meaning of the Road Traffic (Northern Ireland) Order 1995;

(d) to protect a child or other vulnerable person from the person in question;

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

(6) Paragraph (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question."

[33] In the circumstances of the present case, Article 26(2) and (3) are potentially applicable. Beyond this the court cannot venture, having regard to the limited evidential framework before it and taking into account that the precise contours and circumstances of the contemplated future event cannot be predicted with certainty. Most courts would be instinctively reluctant to pronounce that the future arrest of any citizen would be lawful. The extent of this judgment is that there may be a basis for lawfully detaining the Appellant in the circumstances currently prevailing. Provided that the necessary statutory conditions are satisfied and if an arrest is viable, it is foreseeable that the police may exercise their power under Article 26 to arrest the Appellant for his failure to surrender to police custody, in contravention of paragraph 1 and condition No. 1 of the Recorder's order dated 1st March 2010, with a view to prosecuting him for an offence under Article 5 of the 2003 Order. Any such arrest of the Applicant will *de facto* and *de iure* operate to extinguish his bail, without any requirement for formal revocation by any court. For the reasons explained above, the court declines to pronounce in advance on the legality of any future detention of the Appellant.

[34] Finally, it should be noted that the operative provisions of the 2003 Order came into operation on 13th June 2003 (per SR 2003 No. 307), while the Extradition Act 2003 received the Royal Assent on 20th November 2003. It is noteworthy that the 2003 Order was first laid in draft before both Houses on 24th March 2003, was considered by the Delegated Legislation Standing Committee on 1st April 2003 and was approved by both Houses on 3rd April 2003. These processes are a reflection of its status as a Northern Ireland Order in Council. This is to be contrasted with the progress through both Houses of Parliament of the Extradition Bill, from its First

Reading in the Commons on 14th November 2002 until Royal Assent on 20th November 2003. The 2003 Order, in draft, was not laid before Parliament until the day immediately before the Report stage and Third Reading in the Commons of the Extradition Bill. This suggests that the legislative trawls which would have been conducted to determine the consequential amendments rendered necessary by the Extradition Bill would not have identified the 2003 Order as requiring amendment, as it did not exist at the material time. This would appear to explain the evident *lacuna* in the 2003 Order, exposed by these proceedings, which should be urgently addressed.

V CONCLUSIONS

[35] The court concludes as follows:

(i) The High Court has no jurisdiction, statutory or inherent, to revoke the Appellant's bail, commit him to custody and estreat his recognizance.

(ii) The Recorder has no implied statutory power to take any of these measures.

(iii) Provided that the relevant statutory provisions are satisfied, and subject to the observations of the court in paragraphs [31] and [33] above, the Appellant may be liable to be detained, and prosecuted, via a combination of Part II of the 2003 Order and Article 26 of PACE.