THE HIGH COURT

Record No. [2016] No. 126 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

VYTAUTAS POTELIUNAS

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Donnelly delivered this 22nd day of March, 2017.

1. This is an application for a stay pending an application for leave to appeal to the Supreme Court. As a result of the amendment to the Constitution, brought about by the Thirty-third Amendment, a party is entitled to seek leave to appeal directly to the Supreme Court from an order granting or refusing surrender made pursuant to s. 16(1) of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").

2. Pursuant to the provisions of s. 16(11) of the Act of 2003, an application for a certificate for leave to appeal must be made to the High Court before an appeal can be taken to the Court of Appeal. That certificate may only granted if the High Court is satisfied that the order or decision involves a point of law of exceptional public importance and that it is in the public interest that an appeal should be taken to the Court of Appeal. If the certificate is granted and an appeal is lodged, the person cannot be surrendered to the issuing state while proceedings relating to the appeal are pending pursuant to s. 16(6) of the Act of 2003. Given that there may be a time lag between the granting of the certificate and the lodging of an appeal, then it may be necessary to apply for a stay. In this case, an Order of surrender was made by this Court on 3rd March, 2017 and perfected on 3rd March 2017. On 13th March, 2017, the respondent indicated his intention to seek a certificate of the High Court for the purpose of appealing that Order to the Court of Appeal and requested that the matter be heard on 16th March, 2017. The issue of time limits was not addressed at that hearing but it now appears to the Court that, pursuant to the provisions of Order 86A Rule 9 of the Rules of the Superior Courts, the respondent was out of time to lodge an appeal to the Court of Appeal. In any event, this Court refused to grant a certificate for leave to appeal on the basis that neither of the two statutory tests had been met. At the end of that hearing at 1pm on 16th March, 2017, counsel for the respondent engaged in the following exchange with the court:

> *Counsel: "I may be making an application in due course, if he [the respondent] does decide to appeal to the Supreme Court, we may be asking for a stay or continuing bail or something along those lines subject to instructions."*
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> *The Court: "It is subject to instructions but you may have to address the court on the issue of bail at that stage as to whether I have jurisdiction to give bail in those circumstances, or to affect the matter in any other way, or whether in fact you may have to go the Supreme Court for any further stay."*
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> *Counsel: "All subject to instructions."*

3. It appears that it was not until 5pm on Friday, 17th March, 2017, St. Patrick's Day, that an e-mail was sent to the Chief State Solicitor indicating an intention to apply for leave to appeal to the Supreme Court. It appears that this e-mail was not responded to until Monday, 20th March, 2017, when it was indicated that a stay would have to be sought. The respondent only filed his application to the Supreme Court, yesterday, Tuesday, 21st March, 2017. The respondent says that this was because his solicitors made a mistake, as they thought they required the Order refusing a certificate for leave to appeal before they could file the appeal with the Supreme Court.

4. In any event, no application for a stay was made at any point over the weekend or on the Monday, despite the stated intention to seek leave to appeal. No real explanation for that state of affairs has been given to the Court. It is well known that an application for a stay can encompass a stay for a limited time to permit an appeal to be lodged and thereafter may or may not include the time for the appeal to be heard.

5. The Order of surrender came into effect on Saturday, 18th March, 2017, and the respondent was liable to be surrendered at any point from then. When counsel for the respondent moved his initial application for the stay, he did so on the basis that he had a right of appeal to the Supreme Court and that a stay should be granted.

6. Counsel for the minister submitted that a stay should not be granted as there was no basis for the appeal and that, in any event, time had begun to run and arrangements had been made for the respondent's surrender. It was later clarified that flights had been booked.

7. Counsel for both parties were asked to address the Court on the law as it relates to stays. The case-law on this subject generally has been added to by the Supreme Court in two particularly relevant cases, namely *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 and *Charles v. Minister for Justice and Equality, Ireland and the Attorney General* [2016] IESC 48. Those cases concerned the position with regard to applications for stays or injunctions in judicial review cases arising out of immigration cases. Neither party took issue with the same provisions applying here. Save for some considerations which must be taken into account in the case of extradition matters, they are the criteria which apply.

8. It is important to state that the Court does not accept (nor was it really pressed by the respondent) that the Court must grant a stay in every case where there is an application for leave to appeal to the Supreme Court. It is not mandatory. The provisions of s.16 of the Act of 2003 do not require a stay on surrender in the event of an appeal to the Supreme Court pursuant to the provisions of Article 34.5.4 of the Constitution, unlike the appeal under s. 16(6) of the Act of 2003 (which is taken after the grant of a certificate by the High Court). The constitutional provision for appeals is subject to such regulations as may be prescribed by law. The law provides that the application for leave to appeal "does not operate as a stay of execution or of proceedings under the decision appealed from, except insofar as the Court of Appeal or (as the case may be) the High Court orders". That is provided for in Order 58 Rule 10 of the Rules of the Superior Courts. The Order goes on to provide at Rule 27 that no application for interlocutory relief (including any relief by way of a stay or security for costs) may be made to the Supreme Court before the determination of the application for leave to appeal.

9. It is clear from the above that under the Constitution, the right to appeal may be regulated and the new Rules made pursuant to the new legal Order provide that the application for leave to appeal is not to operate as a stay. The High Court must make a decision with respect to a stay on the Order for surrender. Those decisions with regard to stays must be made on the basis of the established jurisprudence.

10. The respondent has brought to the attention of the Court the decision in *Myerscough v. The Governor of Arbour Hill Prison* [2016] IECA 357. He relied in particular on the finding of McDermott J. in the High Court that: "*33. It seems to me, therefore, that the provisions of the Constitution and the statute when read consistently with one another must mean that the applicant and the courts are under a duty to ensure the proper vindication of the right of access of the applicant to the High Court, Court of Appeal and/or Supreme Court, as appropriate, and that the approach adopted by the Minister in respect of seeking and maintaining the stay to date is calculated to and intended to assist in the vindication of the applicant's rights under s. 16(6) and the decisions of the Supreme Court in relation to the right of access under Articles 34 and 40 of the Constitution to the appropriate courts before surrender takes place*.'

11. That paragraph must be understood in the context in which it arose. In that case, the minister sought a stay in light of the habeas corpus application that had been made by that applicant and the fact that no application was made to lift the stay in the immediate aftermath of the refusal of the application. The use of the phrase "proper vindication" of the right of access of the application shows that the High Court must determine what amounts to the proper vindication of the right of access.

12. The respondent also relies upon the finding of the Court of Appeal in Myerscough where it is stated at para. 57 that "*[t]he stays were granted to facilitate the bringing of an application for an inquiry under Article 40.4.2 of the Constitution. Both Irish constitutional law and EU law guarantee the right to bring such an application and to be so facilitated*."

13. That is the ratio of the case; that the law provides for enquiries under Article 40.4.2 of the Constitution and to be so facilitated. In my view, this does not mean that a stay must be granted simply because there is an application for leave to appeal. It simply means that facilitation for the exercise of the right must be made.

14. Furthermore, as the Supreme Court in *Okunade* identified at para. 103, the requirement for applicants for judicial review to meet the tests set out did not amount to an impermissible interference with the right of access to the courts.

15. For the reasons set out, the Court concludes that the respondent was correct not to press the case that he was automatically entitled to a stay pending the determination by the Supreme Court of his application for leave to appeal.

16. The Supreme Court identified in Okunade at para. 104 (and repeated it in Charles) the following test in respect of stays or injunctions in judicial review applications:

> *"As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-*
>
> *(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*
>
> *(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-*
>
> > *(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;*
> >
> > *(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,*
> >
> > *(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also,*
> >
> > *(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.*
> >
> > *(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,*
> >
> > *(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."*

17. In both Okunade and Charles, the Court stated that the above test was to be applied in respect of immigration cases but that the particular circumstances of immigration cases means that some of these tests may be applied in a different way. For example, in Charles, Clarke J. stated at para. 3.6 that the fact that damages will rarely provide an adequate remedy, in the context of at least many public law challenges, demonstrates that the same broad principles may be applied in a different way in different contexts.

18. The respondent relies upon the decision in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61 which said that a broad interpretation should be given to the tests upon which leave to appeal may be granted. This is because the decision of the High Court is the only opportunity that a requested person has as of right to challenge his surrender. The Court is of the view that this should be the approach of the Court to applications for a stay pursuant to Article 34 of the Constitution.

19. The first issue is whether the appeal is arguable. The minister submits that it is not. Counsel submits that the grounds of appeal demonstrate that there is no point of law of general importance at issue or that it is in the interests of justice to appeal. The minister also argues that the appeal will not be successful.

20. The Court is conscious that the test of arguability is not the same as whether a case or an appeal is likely to be successful. The Court has already made its own conclusions on the merits of the case and another conclusion rejecting that the case involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal be brought to the Court of

Appeal. The criteria for obtaining leave to appeal to the Supreme Court are different from the criteria under which the High Court considers the grant of a certificate to appeal.

21. I have considered carefully the documentation relating to the appeal to the Supreme Court and, with a great deal of hesitancy, I conclude that it reveals that there is a fair question to be tried in terms of whether the respondent has reached the threshold of a general point of importance and indeed in relation to the interests of justice. I do so on the basis that this appears to be the first case where there has been a direct appeal from the High Court concerning a s.16 order of surrender. The parameters of those criteria in light of the Tokarski decision may indeed be something that the Supreme Court may or may not decide to address in its determination on this appeal.

22. With respect to the substantive issue regarding the appeal, in light of the finding I have made as to arguability with regard to the tests under Article 34 of the Constitution, I do not believe I need to make any further finding.

23. I must now consider where the greatest risk of injustice would lie. I have also to be conscious here that the respondent would be liable to proceedings in Lithuania if he is surrendered before the hearing of his appeal and the appeal would either be moot or be of little if any value to him if he should thereafter succeed on appeal. However, I do not consider that this means that a stay must inevitably be ordered. It is still necessary to consider where the greatest risk of injustice will lie. As the respondent has set out in his grounds of appeal, there is a public interest in surrendering people to face trial in other countries. There is also a duty on the State to deal with matters under the Act of 2003 in an expeditious manner. I have to give all appropriate weight to the orderly implementation of measures which are *prima facie* valid.

24. In this case, this Court has decided that the respondent's surrender is not prohibited. He has had an opportunity to fully contest his surrender but his argument has been rejected. He has, in the view of this Court, made out no reason as to why his case involves a point of law of exceptional public importance and that it is in the public interest to allow his appeal.

25. Furthermore, the Act of 2003 puts in place a scheme with regard to its orderly operation. After the order for surrender is made, a person cannot be surrendered for 15 days and there is then a 10 day period in which the surrender must take place, subject to further order. The fact that the appeal to the Court of Appeal must be made within 10 days of the perfected order is a reflection of the fact that time is of the essence as regards appeals. In the ordinary course, any application for a certificate under s. 16 of the Act of 2003 should be made within that 10 day period as otherwise it may be that it is not desirable in the public interest that an appeal which is out of time be allowed.

26. In relation to the 28 days in which to appeal to the Supreme Court, it is apparent that this time frame is longer than the 25 days which is the outer limit of the time in which to surrender a person once the order has been made. If a respondent makes no attempt to seek leave to appeal (or to seek a stay) within that time, it will be obvious that on day 26 (barring a lawful delay to his surrender), it will not avail him at all to lodge such an application. Therefore, the time frame for appeal to the Supreme Court has to be engaged with in light of the provisions of s. 16 of the Act of 2003.

27. In that regard, a respondent must bear in mind that the time limits as regards the order taking effect and the making of surrender are for the purposes of the orderly operation of the particular scheme of surrender and that there is a public interest in ensuring the operation of that system. An injustice may arise where surrenders are stopped at the last minute. In this case, there is no real excuse for the delay in waiting so long to seek a certificate for leave to appeal the decision to the Court of Appeal. In submissions to the court, the respondent was unclear as to whether the delay was because he wished to seek further information about Lithuanian law to deal with the lacuna in his proofs that this Court had indicated or if it was because he did not have instructions. It appears to the Court that it may have been both. In relation to the application for the stay in respect of the Supreme Court, no reason has been given justifying the lack of an application for a stay.

28. The Court also finds that there was no justification in not seeking that stay on at least Thursday, 16th March, 2017. The respondent submitted to the Court that an appeal was being contemplated but was subject to instructions. It is unclear why no attempt at that stage to ask for a stay was made. The only possible excuse is that this was a procedure which was new and there was a doubt as to what approach should be taken. Counsel for the respondent is highly experienced in extradition law and it is surprising that he did not seek a stay, given his familiarity with issues of stays generally in extradition law.

29. Furthermore, the Court makes it clear that it was inexcusable to send an e-mail at 5pm to the Chief State Solicitor on St. Patrick's Day, which also happened to be the day before the expiration of the 15 days before which the surrender order could not take effect. It was perfectly obvious that this person was highly unlikely to be receiving e-mails on that particular day. Furthermore, no indication was given in that e-mail that a stay was sought or that arrangements should not be made. No effort was made to contact the extradition Gardaí who make the arrangements for surrender so as to ensure that at the very least the Gardaí could make contact with whatever person from the Chief State Solicitors office that they could in the meantime. This is questionable behaviour from experienced solicitor and counsel. It clearly put their client at risk of being taken into custody over the weekend and possibly being surrendered. It also raised the real likelihood of a stay being refused in the particular circumstances.

30. In respect of the final issue, the Court is entitled to place all due weight on the strength or weakness of the applicant's case. This is a case where the Court has considered the issues before it and is therefore able to make a determination with respect to the strength and weaknesses of the case. As the Court has said above, there is an arguable case that the respondent will be given leave to appeal. If a person whose surrender has been ordered, has an otherwise arguable case, it is appropriate that due weight be given to the consequences for them if surrender is to take place before the appeal has been heard. Therefore, the Court should be hesitant in the case of an extradition matter to refuse a stay even if the applicant's case on appeal is not strong. However, the Court is required to weigh in the balance the public interest in the orderly operation of the scheme for surrender which operates under the Act of 2003.

31. Taking all of the above into account, the Court concludes that because, to the Court's knowledge, this is the first time that this procedure has been utilised, the Court is not prepared to visit a penalty on this respondent for what may be an unfortunate oversight of his solicitor or counsel. The balance of justice does not require me to refuse the stay in this case despite the fact that arrangements have been put in train for the respondent's surrender.

32. The Court takes this opportunity to state that the implications of the provisions of Article 34.5.4 of the Constitution must be considered by the minister and respondents in all future cases. The Court will disseminate this judgment to assist in that process and expects that early attention to the question of appeals and stays will be given by all parties. Ignorance of the necessity to apply for an early stay will not weigh so heavily in the balance as it has done here.

33. The Court will hear the parties on the effect of the granting of this stay and the terms of such stay.