THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 357

Birmingham J
Sheehan J.
Edwards J

IN THE MATTER OF SECTION 16(6)(b) OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED,

AND

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

Record number: 2016/338

BETWEEN

JULIAN MYERSCOUGH

Applicant/Appellant

AND

THE GOVERNOR OF ARBOUR HILL PRISON

Respondent

Judgment delivered on the 25th day of November, 2016 by Mr. Justice Edwards

Introduction
1. This appeal is against the ex tempore judgment and order of the High Court (McDermott J.) dated the 27th of June 2016 determining that the appellant was in fact lawfully detained following an inquiry under Article 40.4.2o of the Constitution of Ireland (Bunreacht na hÉireann) concerning the lawfulness of the applicant's detention in Arbour Hill Prison.

2. Before reviewing the judgment of the High Court judge, and setting out the grounds of appeal against it, it is necessary to set out the statutory provisions that are relevant and also to describe background to the entire matter in a little detail.

Relevant statutory provisions
3. We are concerned in this case with s.16 of the European Arrest Warrant Act 2003, as amended by the Criminal Justice (Terrorist Offences) Act 2005, the Criminal Justice (Miscellaneous Provisions) Act 2009 and the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, respectively ("the Act of 2003 as amended").

4. Section 16 of the Act of 2003 as amended provides (to the extent relevant):

> "16.—(1) Where a person does not consent to his or her surrender to the issuing state the High Court may … make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—
>
> (a) … [not in controversy],
>
> (b) … [not in controversy],
>
> (c) … [not in controversy],
>
> (d) … [not in controversy],
>
> (e) the surrender of the person is not prohibited by Part 3.
>
> (2) [Not relevant]
>
> (2A) [Not relevant]
>
> (3) An order under subsection (1) … shall … take effect upon the expiration of 15 days beginning on the date of the making of the order … .
>
> (3A) Subject to subsections (5) and (6), a person to whom an order for the time being in force under subsection (1) … applies shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect in accordance with subsection (3).
>
> (4) Where the High Court makes an order under subsection (1) … it shall …
>
> (a) inform the person to whom the order relates of his or her right to make a complaint under Article 40.4.2□□of the Constitution at any time before his or her surrender to the issuing state,

(b) order that that person be detained in a prison … for a period not exceeding 25 days pending the carrying out of the terms of the order, and

(c) direct that the person be again brought before the High Court—

(i) if he or she is not surrendered before the expiration of the time for surrender under subsection (3A), as soon as practicable after that expiration, or

(ii) if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that person will not be surrendered on the expiration referred to in subparagraph (i), before that expiration.

(5) Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall—

(a) if satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered—

(i) with the agreement of the issuing judicial authority, fix a new date for the surrender of the person, and

(ii) order that the person be detained in a prison … for a period not exceeding 10 days after the date fixed under subparagraph (i), pending the surrender,

and

(b) in any other case, order that the person be discharged.

(5A) A person to whom an order for the time being in force under subsection (5)(a) applies—

(a) shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect, or

(b) if surrender under paragraph (a) has not been effected, shall be discharged.

(5B) Where a person is ordered, under subsection (4)(b), to be detained in a prison …and is brought before the High Court pursuant to subsection (4)(c), the person shall be deemed to be in lawful custody at all times beginning at the time of the making of the order under subsection (4)(b) and ending when he or she is brought before the Court.

(6) Where a person—

(a) lodges an appeal pursuant to subsection (11), or

(b) makes a complaint under Article 40.4.2□□of the Constitution,

he or she shall not be surrendered to the issuing state while proceedings relating to the appeal or complaint are pending.

(7) [Not relevant]

(8) [Not relevant]

(9) [Not relevant]

(10) [Not relevant]

(11) An appeal against an order under subsection (1) … may be brought in the Supreme Court if, and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(12) [Not relevant]"

The background to the matter

5. The appellant is the subject of a European arrest warrant dated the 1st of October 2015 issued by a judicial authority in the United Kingdom, namely a judge at Ipswich Crown Court. The appellant was convicted by that court of thirteen offences of making indecent images of a child, and three offences of breaching a Sexual Offences Prevention Order, and was on bail pending being sentenced for those crimes. The appellant failed to turn up to court on the 30th of September 2015 when he was required to do so, and was subsequently discovered to have boarded a car ferry from Holyhead to Dublin. In consequence of his absconding the aforementioned European arrest warrant was issued seeking the rendition of the appellant to the United Kingdom so that he might be sentenced for the crimes of which he has been convicted.

6. The appellant was arrested in this jurisdiction on foot of that European arrest warrant and, as was his entitlement, he contested his proposed surrender to the United Kingdom before the High Court which, in this jurisdiction, is the executing judicial authority in all European arrest warrant cases.

7. The appellant was successful in resisting his surrender in respect of the three counts of breaching a Sexual Offences Prevention

Order, but was unsuccessful in doing so in respect of the thirteen counts of making indecent images of a child. Accordingly, on the 29th of February 2016 the High Court (Donnelly J.) ordered his surrender to the United Kingdom pursuant to section 16(1) of the European Arrest Warrant Act 2003 (the Act of 2003) so that he might be sentenced upon his return on those thirteen counts.

8. As is usual the executing judicial authority also made a number of ancillary orders. In particular it was ordered that the appellant be remanded in custody pending his surrender in accordance with s. 16 of the Act of 2003. Having been so remanded, the appellant was expressly advised by the court, as the Act of 2003 requires, of his right to seek an inquiry under Article 40.4.2o at any time before his surrender. In addition, the court gave the directions that it was required to give under s.16(4)(c)(i) & (ii) of the Act of 2003 as amended.

9. Following the making of the s.16(1) order on the 29th of February 2016 the appellant applied to the High Court judge concerned (Donnelly J.), pursuant to s. 16 (11) of the Act of 2003 as amended, for a certificate that her order or decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court. That application was refused on the 11th of March 2016.

10. According to the default statutory rules the appellant was required to be surrendered not later than the expiration of twenty five days (being the s.16(3) fifteen day period plus the s. 16(3A) ten day period) beginning on the date of the making of the surrender order. Therefore barring some court intervention the appellant was to be surrendered on or before the 25th of March 2016.

11. On the 21st of March the appellant applied to the High Court (Haughton J.) for an inquiry under Article 40.4.2o of the Constitution into the lawfulness of his detention at Arbour Hill prison where he was being held. The specified grounds on which that inquiry was being sought were that s.(16)11 of the Act of 2003 as amended was repugnant to the Constitution and that he had been denied a right of appeal against the order and judgment directing his surrender. In the circumstances Haughton J. adjourned the application to 22nd March, and directed that the respondent and notice parties be put on notice of the application and the grounds thereof. He then gave directions as to the exchange of affidavits and submissions in respect of the issues in the case and the matter was further adjourned to facilitate the carrying out of these directions.

12. However, in circumstances where the clock was arguably continuing to run in terms of the twenty five day period, the respondent decided as a matter of prudence to return to the High Court on the following day (the 23rd of March 2016) and to apply for a stay on the s.16(1) surrender order, and also a stay on the requirement to comply with the directions given by Donnelly J under s.16(4)(c)(i) & (ii) of the Act of 2003 as amended, "*pending the final determination of the related proceedings"* (i.e. the Article 40.4.2 inquiry, which was under record no 2016 No 344SS) "*or further Order herein in the meantime*".

13. As this was during the Easter vacation the application was made at a vacation sitting to Twomey J who was the duty High Court judge on the day. It appears from evidence contained in paragraph 7 of an affidavit sworn on the 26th of October 2016 in the present proceedings by Hugh Dockery, who is a solicitor in the Chief State Solicitor's office, who was present in court on that day, that Twomey J. canvassed with counsel from both sides "the issue of the duration of the stay". Mr Dockery states that *"[h]aving concluded that it was not possible to ascertain the date on which the Article 40 proceedings would be determined, he [i.e. the judge] indicated that he would grant a stay until further Order".*

14. The curial part of Twomey J's order as perfected was, to the extent relevant, in the following terms:

> "IT IS ORDERED that
>
> 1. such part of the said Order made herein dated the 29th day of February 2016 (Donnelly, J.) pursuant to Section 16(1) of the European Arrest Warrant Act 2003 (as reflected in the paragraph numbered "(i)" on page 2 of the said Order) be stayed pending further Order herein
>
> 2. such part of the said Order of the High Court made herein dated the 29lh day of February 2016 (Donnelly, J.) pursuant to Section 16(4)(c) of the European Arrest Warrant Act 2003 (as reflected in the paragraphs numbered "(a)" and "(b)" on page 2 of the said Order) be stayed pending further Order herein."

15. The Article 40.4.2 inquiry, Haughton J's directions having been complied with, was ultimately assigned to Mc Dermott J who, having conducted it, determined for the reasons set out in a reserved judgment delivered by him on the 14th of June 2016 [see *Myerscough v The Governor of Arbour Hill Prison* [2016] IEHC 333] that the impugned provision was not unconstitutional and that the appellant's detention was lawful.

16. In addition to the constitutional issue, the appellant had also sought to argue in those proceedings that the Order of Twomey J granting the aforementioned stays was in fact an |order made in the context of the Article 40 inquiry and one that he had no jurisdiction to make. The consequence of that, according to the appellant, was that time had continued to run and had indeed run out rendering his continued detention unlawful. McDermott J rejected that argument holding that the stays were properly granted in the European arrest warrant proceedings.

17. In rejecting the appellant's argument based on the alleged unlawfulness of the stays, McDermott J stated (*inter alia*):

> "50. The application for the stay was made with very little notice to the applicant. It was an urgent application insofar as the time limit on the order for surrender was running. Both sides were heard on the application.
>
> 51. I am satisfied that where an application for an inquiry under Article 40 of the Constitution is initiated, as a matter of law the applicant should not be surrendered. The length of time which an application under Article 40 may take is not determinable at the time of the making of the application. Section 16(6) is understandably not subject to time limits having regard to the nature of the jurisdiction under the Constitution and the various types of application and grounds for same that may be initiated (including challenges to the constitutionality of a statute). In the circumstances the High Court had jurisdiction to ensure that the applicant's position was secured and that no action could be taken on foot of the order to surrender pending the determination of the Article 40 application. In the circumstances it appears to me that it was in the interests of justice that the stay be granted and the applicant's rights be fully protected pending the determination of the inquiry (see *The State (Quinn) –v- Ryan* [1965] I.R. 70).2

18. The Order of McDermott J in the aforementioned Article 40.4.2o proceedings ("the first Article 40.4.2o proceedings") was made on the 14th of June 2016, and following its perfection on the 24th of June 2016 the appellant had up to fourteen days thereafter to appeal against it, if he had wished to do so.

19. On the 24th of June 2016 the present proceedings were initiated ("the second Article 40.4.2o proceedings") on behalf of the appellant. The Minister for Justice and Equality (the Minister) had taken no step to secure the lifting of the stays granted by Twomey J up to that point. Although it is not disposed to in any affidavit, it was suggested in submissions by counsel on behalf of the respondent that in not doing so the Minister was likely to have been mindful of the Supreme Court's "*unqualified condemnatio*n" of precipitous state action in *The State (Quinn) v Ryan* [1965] I.R. 70, a case to which McDermott J had also alluded in his judgment of the 14th of June 2016.

20. On this occasion the application was made to McDermott J seeking a new inquiry under Article 40.4.2o of the Constitution into the lawfulness of the appellant's detention was advanced on the basis that the stays granted by Twomey J had in fact expired on the 14th of June 2016 when it was said the first Article 40.4.2o proceedings had concluded. Once again it was being contended that time had run out, and on this occasion it was said to have run out arguably on the 15th of June 2016 but at the very latest on the 17th of June 2016. Therefore, it was contended, the appellant was not being detained in accordance with law.

21. In his certified return the respondent stated that he holds the appellant in custody in Arbour Hill Prison pursuant to a High Court committal warrant dated 29th February, 2016, as well as the High Court order dated 23rd March, 2016 (which is the order containing the stays) and the Order of 14th June, 2016, as perfected on the 24th June 2016.

22. The High Court considered that the second Article 40.4.2o proceedings raised a net issue as to the correct interpretation of the Twomey J's Order of the 23rd of March 2016. In an ex tempore judgment delivered on the 27th of June 2016 McDermott J concluded that that Order was still extant, and that time had not in fact continued to run. Accordingly, he was satisfied that the appellant was still in lawful detention.

23. The appellant has not appealed the judgment and Order of McDermott J of the 14th of June 2016 in the first Article 40.4.2o proceedings. However, he has now appealed to this Court against the judgment and Order of McDermott J of the 27th of June 2016 in the second Article 40.4.2o proceedings.

The judgment under appeal

24. In the course of his ex-tempore judgment of the 27th of June 2016 McDermott J recited the terms of Twomey J's Order of the 23rd of March 2016, and then commented as follows:

> *"23. It is submitted that the reference in the operative part of that order in respect of the stay on the order of 29th February, 2016, "pending further order herein", refers to the Article 40 proceedings. 1 am not satisfied that that is so. It seems to me that, as a matter of logic, the plain meaning of the order made and the sequence in which the orders were made, the stay is made in respect of the order of Donnelly J. and clearly indicates that it is a stay "pending further order herein". I am satisfied that this relates to a further order within the European Arrest Warrant proceedings which are stayed appropriately under s. 16 of the Act as found in the judgment of 14th June, which to date has not been appealed.*
>
> *24. The submission is made that, in effect, the proceedings in the Article 40 matter, having been concluded, there therefore could be no further stay applicable or extant in relation to the order of Donnelly J.*
>
> *25. No application was made to this Court to exercise any jurisdiction, whether under the European Arrest Warrant Acts or any other basis, to remove the stay which was placed on the order of Donnelly J. by Twomey J.*
>
> *26. No application has been made to the judge sitting in relation to European Arrest Warrant Acts cases by either party to remove the stay.*
>
> *27. The stay, therefore, is and remains applicable to the operative part of the order in respect of the surrender pursuant to s. 16(1) of the Act. It can only be removed by order of the court not by some self-executing event. That is what the order specifically provides. The order is stayed pending further order herein and I do not see how the court can regard the present circumstances as equating to a situation in which the stay has been removed, no application having been made to any court to do so.*
>
> *28. There is no doubt that the application made under Article 40 to this Court came to a conclusion and that 1 have given judgment in the matter. The remaining question, which is a matter for the applicant, is whether he wishes to appeal that judgment. That is a matter entirely for him. The authorities have not yet moved to remove the stay which was granted by Twomey J. following the judgment of 14th June. It is now 27th June.*
>
> *29. The court has been told by counsel for the applicant that there has been no appeal as of yet in relation to the judgment of the court. The court has no difficulty with that but it docs mean that the State should exercise caution in relation to bringing an application before the European Arrest Warrant Court seeking a removal of the stay. In doing so on the basis that there is in existence a right of appeal concerning the judgment of the court in respect of the Article 40 application, it is demonstrating scrupulous regard for the rights of the applicant recognised under the Constitution, in The State (Quinn) v. Ryan and under s. 16(6) of the Act to have access to the courts and full liberty to conclude Article 40 proceedings and vindicate the right to personal liberty before a surrender order becomes effective. That is the purpose of the stay.*
>
> *30. It is clear that if the time expires for the bringing of an appeal and no such appeal is brought, the Minister must move as soon as reasonably possible to bring the matter before the European Arrest Warrant Court with a view to ensuring that the stay is removed and that the surrender is executed forthwith or within such time as may be permissible or permitted by the court if that can lawfully be done under section 16(4)(c)(i). The wording of that subsection is 'as soon as practicable' but it seems to me that speed must be of the essence following the conclusion of Article 40 proceedings.*
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> *31. What is the date of the conclusion of the Article 40 proceedings? It seems to me that, on the authorities, in particular in relation to those which have been considered in respect of the retrospective application of declarations of invalidity under the Constitution, that criminal proceedings are deemed to be concluded either on the expiration of the time for appeal following the making of an order at first instance or on the conclusion of any appeal brought within that time or such extension of time as may have been granted by an appellate court.*
>
> *32. I see no reason to depart from that definition as to when proceedings might be regarded as concluded for the*

purposes of these proceedings and in particular, having regard to the right which is specifically the subject of s. 16(6) and which must be vindicated with due regard for the right of appeal under Article 34 which is vested in the applicant.

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."

The grounds of appeal

25. In his grounds of appeal the appellant complains:

"1. The learned the trial judge erred in law and or in fact as follows:-

(i) In refusing to grant the Applicant at least one day's adjournment, so that his advisors could fully consider the contents of the return made, purportedly justifying the detention, and have an adequate opportunity to fully respond thereto: only a little more that a one-hour's adjournment was granted;

(ii) In holding that Twomey J.'s order of 23rd March 2016

(a) granted other than what was sought by the Applicant therefor, being a stay pending the determination of the section I6(6)(b) / Art 40.4 application [2016 344 SS] or further order 'in the meantime'.

(b) stayed the already concluded EAW proceedings [2015 No. 213 EXT] contrary to what the very recital in that order states;

(c) alternatively, insofar as it purportedly stayed the EAW proceedings, that stay 'pending further order" continued, notwithstanding that those proceedings had come to an end, until some unspecifed further order that could be made therein, inter alia lifting the stay that remained in force contrary to the Framework Decision on the EAW.

(d) Such other grounds as may be urged at the hearing of this appeal."

(iii) In determining, notwithstanding the passage of time and the expiry of the statutory prescribed time-limits, that the Applicant was lawfully detained;

(iv) Such other grounds as may be urged at the hearing of this appeal.

2. In declining to make an Art. 267 reference to the Court of Justice."

The Motion to Dismiss

26. Before dealing with the submissions made in relation to the substantive appeal it should be further recorded that before the matter was listed for hearing, the respondent issued a motion seeking the following reliefs:

1. An Order pursuant to the inherent jurisdiction of this Honourable Court striking out the appellant's appeal on the grounds that it is frivolous and vexatious, an abuse of the process of this Honourable Court and/or is bound to fail;

2. Such further or other Order as to this Honourable Court seems fit; and

3. The costs of this application and of the proceedings.

27. The motion was objected to by counsel for the appellant, in the course of a case management hearing before this Court conducted by Birmingham J sitting alone, with the appellant claiming that it represented an abuse of the process. The Court was asked to dismiss the motion with costs and instead to list the substantive appeal for an early hearing.

28. The Court expressed concern about whether it could in fact curtail, in the manner suggested, the right of an unsuccessful litigant to pursue an appeal, and so declined to allow the motion to proceed immediately. Instead, it fixed an early date for the hearing of the appeal and adjourned the motion to the hearing date but on the understanding that if the substantive appeal proceeded as intended (which in fact it did) the motion would be rendered moot.

Submissions

29. Counsel for the appellant, Dr Forde S.C., has made submissions to us on behalf of his client in respect of two discrete, though connected, matters.

30. First, he requests that this Court should at this point dismiss the respondent's adjourned motion, which is now moot, and he seeks an Order for Costs in respect thereof.

31. In that context he has sought to strongly protest against what he believes was a suggestion in an affidavit of Hugh Dockery, sworn on the 12th of July 2016, and filed in support of the motion to dismiss, that there had been an attempt by a member of the appellant's legal team to mislead McDermott J concerning what had occurred before Twomey J. He is emphatic that there was no such intention and characterises the allegation as "scandalous" and a "libel". He contends that an Order for Costs, which he says should in any case follow the event, could in addition mark this Court's disapproval of such allegation having been made.

32. Secondly, he has made submissions on the substantive issues arising in this appeal and he seeks by way of primary relief that this

Court should allow the appeal, set aside the order of the High Court and order his client's immediate release. In the alternative, he asks that the appeal be adjourned, particularly in relation to ground 1(ii), so that all relevant evidence may be adduced. What I understand him to mean by this is that he would wish to have a transcript of the proceedings before Twomey J on the 23rd of March 2016 made up from the Digital Audio Recording ("the DAR") record and placed in evidence before this Court. He further requests that in the event of this Court having any serious doubt concerning an issue of E.U. law in the course of its deliberations that the Court should seek a preliminary reference from the European Court of Justice (ECJ) pursuant to Article 267 of the Treaty on the Functioning of the European Union. Finally, in the event of being successful, he seeks an Order for Costs in respect of the trial at first instance and a recommendation pursuant to the Legal Aid (Custody Issues) Scheme in respect of the appeal.

33. As to the merits of the substantive appeal, counsel for the appellant has referred the Court to the cases of *O Falluin -v- Governor of Cloverhill* [2007] 3 I.R. 414, *Rimsa -v- Governor of Cloverhill* [2010] IESC 47 (28 July 2010) and *Voznuka -v- Governor of Dochas Centre* [2013] IESC 33. Counsel for the appellant, contends that what occurred in each of these cases amounted to what he characterises as "bungling" by either the State or the requesting authorities which resulted in the wanted person's detention continuing beyond the duration authorised by the Act of 2003. He submitted that in none of these cases did the Supreme Court suggest that it was improper for the prisoner to attempt to take advantage of such official bungling and to seek release. It was contended that the appellant's case is directly analogous.

34. However, at the heart of this appeal is the appellant's contention that the Order of Twomey J dated the 23rd of March 2016 is ambiguous. This argument was based on the fact that while the recitals to the Order as perfected refer to an application for stays "*pending the final determination of the related proceedings*" [the first Article 40.4.2o proceedings] "*or further Order herein in the meantime",* the same document at a later stage refers to stays being granted "*pending further Order herein*". The contention is that it is unclear whether the stays granted by Twomey J were to last only until the final determination of the first Article 40.4.2o proceedings, or until further Order. It is said that the appellant is entitled to the benefit of the alleged ambiguity.

35. Responding to the central claim in the appeal, the respondent disputes that there is any ambiguity in the Order of Twomey J. Counsel for the respondent refers with particularity to the affidavit sworn in these proceedings on the 26th of February 2016 by Hugh Dockery, Solicitor, in which Mr Dockery sets out in detail the procedural history what occurred before Twomey J on the 23rd of March 2016. Mr Dockery states the following in the affidavit at issue:

> "4. After Haughton J had adjourned the Article 40 proceedings, I was advised of the necessity for seeking a stay without delay as the time limit for the surrender of the appellant was to expire at midnight on the 24th of March. Accordingly, I instructed counsel to move an application for a stay on behalf of the Respondent/applicant herein in relation to the two parts of the Order of Donnelly J in question. The applicant's legal team was put on notice of that application, which given the urgency could not be postponed.
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> 5. On the morning of the 23rd March, Junior Counsel on behalf of the Minister moved the application before Twomey J and in so doing she explained the urgency to the Court and informed the Court that she had spoken to Junior Counsel for the appellant in relation to same. I say that she was at pains to Inform the Court that the appellant was objecting to the granting of a stay and that she advised the Court of those objections.
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> 6. The Court had risen to consider its decision when Junior Counsel for the appellant arrived into the Courtroom and the Judge was immediately informed of his arrival. Mr. Justice Twomey then sat again and he heard full submissions from Junior Counsel for the appellant who objected strenuously to the granting of the stay.
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> 7. It was at this point in time that Judge Twomey canvassed the issue of the duration of the stay and whether it should be made until the determination of the Article 40 proceedings or until further Order was made and that on this issue, he heard submissions from both counsel. Having concluded that it was not possible to ascertain the date on which the Article 40 proceedings would be determined, he indicated that he would grant a stay until further Order.
>
> 8. Whilst I am advised by counsel and believe that the issue in this appeal concerns the Interpretation of the actual Order made by Mr. Justice Twomey, insofar as it is suggested that the Appellant did not know or had no way of knowing that the stay was granted until further Order that is plainly incorrect. The form of the Order to be made by Mr Justice Twomey was discussed in Court with counsel, including the Appellant's counsel, and it was very deliberately ordered that the stay would remain in being until further order."

36. Counsel for the respondent contends that in the light of Mr Dockery's evidence, which has not been contradicted, the form of the Order as perfected is readily explicable and it is manifest that there is no ambiguity.

37. When pressed by this Court concerning whether or not the appellant was disputing Mr Dockery's account of what had occurred before Twomey J, counsel was unwilling to say explicitly that Mr Dockery's account was being disputed. The highest that he would put it was that he was unable to say if it was correct or not, but that the DAR record would, if transcribed, put the matter beyond doubt. No account was produced from either the appellant's solicitor, or junior counsel, both of whom were present when the Order was actually made, suggesting that Mr Dockery's account was incorrect. In particular, we are asked by counsel for the respondent to note, neither the appellant' solicitor nor his counsel have sought to engage with the specific averment that "*The form of the Order to be made by Mr Justice Twomey was discussed in Court with counsel, including the Appellant's counsel, and it was very deliberately ordered that the stay would remain in being until further order."*

38. In so far as the appellant prays for an adjournment by way of alternative relief in the event that this Court is minded to agree with the respondent with respect to ground of appeal no 1, the need for an adjournment is said to arise in the following circumstances. On the 27th of June 2016 the appellant's legal representatives were handed a copy of the respondent's certificate justifying the appellant's detention. Annexed to that certificate was, *inter alia*, a copy of Twomey J's Order of the 23rd of March 2016 granting the controversial stays. Counsel for the appellant claims that this was the first time that they had seen Twomey J's Order and that, when McDermott J came out on to the bench, counsel immediately applied for an adjournment to enable the appellant's legal advisors to "*properly prepare and present their case*". McDermott J was only disposed to grant a short adjournment (which the appellant measures as being something in the order of one hour) in all the circumstances and upon the expiry of the time afforded he insisted that the case should proceed.

39. It was argued before this Court that a longer adjournment was required, and that if one had been afforded an application could have been made for a transcript of the DAR record of the proceedings before Twomey J on the 23rd of March 2016. It was impossible to take this step in the short time available. It was argued that this was a highly material departure from fair procedures.

40. It was further argued that in so far as the Constitution creates an imperative for the High Court to "*forthwith enquire*", this relates primarily to the need to open the procedure expeditiously and without delay and to require the detainer to "certify *in writing the grounds…*". However, it was submitted the law does not require that the post certificate stage should proceed with extravagant or extraordinary expedition. An applicant must be allowed an adequate time to engage with and contest, if he wishes to do so, any certificate being relied upon.

41. It was argued that in circumstances where the appellant was prejudiced by the unjustifiable refusal of a longer adjournment on the 27th of June 2016, and the case then went against him, this Court should now of its own motion, and in the interests of justice, direct that the relevant transcript should be made up and adjourn determination of the appeal until it is available and the parties have been afforded the opportunity to make further submissions in the light of its contents (whatever they might be). It is suggested that this is particularly required in circumstances where the respondent has in the meantime refused to consent to, or support, efforts by the appellant, at directions hearings, to obtain the DAR record.

42. In relation to the suggested preliminary reference, it was submitted that the Order of Twomey J must receive an interpretation that is conforming in terms of E.U. Law. It was submitted that the relevant law is that contained in Article 23 of the Framework Decision as interpreted by the E.C.J. in the case of *Lanigan* C-237/15 PPU, EU:C:2015:474. It is suggested that the Order of Twomey J was made without jurisdiction because, contrary to Article 23, as interpreted in *Lanigan*, the result of it was (to quote from the appellant's written submissions) that:

> *"i. there was no ascertainable time-frame for effecting the surrender, not even a provisional date that, on appropriate application may be revived; and*
>
> *ii. there was no (longer) a requirement that this applicant be brought back to the High Court if surrender were unduly delayed."*

43. The appellant asks that *"if this Court is inclined to proceed … on ground 2 and to uphold the Governor's interpretation of Twomey J.'s order, the applicant requests an Art 267 reference to the Court of Justice asking questions broadly identified immediately above, appropriately formulated, and possibly other relevant questions as may be suggested at the hearing of the application for a reference."* The following suggested questions are then proposed:

Proposed Questions

> *i. Where, in accordance with Article 15(1) of the Framework Decision a judicial authority orders a person's surrender but its order, as later amended on the application of the executing Central Authority, purports to stay the due completion of the surrender, but with no provision on or mode for ascertaining when or in what circumstances surrender will or will not be effected, and making no provision whereby the person must at some stage be brought back to the judicial authority to review his continuing detention, does such order comply with the Framework Decision and the Charter, as interpreted inter alia in the Lanigan ease. C-237/15 PPU?*
>
> *ii. An appropriate formulation about the process in the High Court and in this Court to date being Charter compliant.*

Analysis and Decision

44. The respondent's motion to dismiss did not proceed and is now moot. The normal rule is that costs follow the event. However, in circumstances where the motion was adjourned on the Court's own initiative to facilitate a speedy resolution of the entire matter, and where it was in effect overtaken by events and did not ultimately proceed, I am satisfied that it would be inappropriate to award the appellant the costs of the motion.

45. Moreover, in so far as it was urged that the Court should, by means of a discretionary award of such costs, seek to deprecate a perceived unwarranted allegation of misrepresentation, I have not been persuaded that the protest ventilated by counsel for the appellant was at all justified.

46. The background to that matter is that the affidavit of Hugh Dockery sworn in response to the motion to dismiss had stated that, on the 27th of June 2016, which was the return date fixed following the ex parte application for an enquiry under Article 40.4.2o of the Constitution made on the 24th of June 2016, McDermott J had indicated to the respondent's counsel *"that the basis upon which the application had been made on the 24th June and the enquiry ordered was that the stay granted by Twomey J had been made pending the determination of the first Article 40 proceedings and consequently had expired."* Mr Dockery then went on to say *"When the application came back before the Court in the afternoon, the Order of Twomey J were [sic] opened to the Court, in which it is plainly and unequivocally ordered that the relevant parts of the Order of 29th February 2016 be stayed* ***pending further Order herein****. Consequently, the premise upon which the enquiry had been ordered was incorrect and was groundless."* He had then added: *"On being presented with the Order, counsel for the appellant complained that he had not been aware of it, although not only had it formed the basis upon which the enquiry had been ordered but it had been relied upon by the self-same counsel in the first Article 40 proceedings."*

47. Mr Dockery's observation that *"the premise upon which the enquiry had been ordered was incorrect"* was entirely accurate. He made no specific allegation of deliberate misleading of the court. However, he was correct in what he did state. Moreover, altogether counsel for the appellant had sought to explain the discrepancy by contending that he was unaware of the terms of the order as drawn, it was legitimate for Mr Dockery to point out that this was not the first occasion on which the appellant had purported to rely upon Twomey J's Order.

48. I have no hesitation in concluding on the available evidence that it is very unlikely that incorrect information was deliberately put before McDermott J., and that, on the contrary, the reason that incorrect information was put before him was most likely due to an erroneous but *bona fide* misunderstanding of the terms of Twomey J's Order on counsel's part. However, that having been said, it is an understanding that simply should not have arisen, and one that would not have arisen if the appellant's legal advisors had troubled to bespeak a copy of Twomey J's Order as perfected before moving for an enquiry under Article 40.4.2o , in circumstances where it was intended by the appellant to rely on the record of the High Court in support of such an application. Twomey J's Order was made on the 23rd of March, 2016 and the erroneous information in the present proceedings was conveyed to McDermott J on the 24th of June 2016. There was therefore abundant time in which to take up a perfected Order. Moreover, I specifically reject the submission that, in the circumstances of this case, the primary obligation to do so rested on the respondent. There was simply no excuse for the failure to take up the perfected Order and the presentation of incorrect information to McDermott J which subsequently occurred was

directly attributable to that failure.

49. In the circumstances this Court considers that the protest concerning Mr Dockery's comments is misconceived, and that his remarks were entirely justified.

50. Moving then to the substantive grounds of appeal, I am not disposed to uphold ground of appeal no 1(i). There was no failure by McDermott J to afford fair procedures to the appellant. The appellant's advisers had purported to rely on the Order of Twomey J in applying on the 24th of June 2016 for an enquiry under Article 40.4.2o. In doing so, it was their responsibility to have previously bespoken the perfected Order such that they could say precisely what it contained and produce it to the court if required. Of course, errors can be made in the drawing of Orders but in this case it is crucial, it seems to me, that nobody on the appellant's side is prepared to say that the Order as perfected is incorrect or that it fails to accurately reflect Twomey J's speaking order. The High Court is a court of record and it is the record that speaks. There has been no express suggestion of error on the face of the record. No solicitor's attendance note has been produced recording something different. Neither has any note of counsel made in the early aftermath of the hearing on the 23rd of March been produced recording something different. The high water mark of what is said is that the terms of the perfected Order when it was produced came as a surprise to the appellant's legal team. It did not reflect their understanding of the Order that had been made. However they "*cannot say*" if it reflects Twomey J's speaking order or not.

51. Senior counsel for the appellant suggests that the position could have been put beyond doubt if the court had directed the relevant DAR record to have been transcribed. That is correct, but the groundwork needed to be laid. At the very least it required to be suggested to McDermott J that there was reason to believe that there was an error on the face of the record, particularly in circumstances where one member of the team had actively engaged in discussions between the Court and counsel concerning the form of the Order and therefore ought to have been in a position to offer a ready view in that regard. Moreover, if error on the face of the record was going to be asserted one would expect that such an assertion would be capable of being supported by an affidavit exhibiting some contemporaneous or near contemporaneous record suggesting the existence of such an error. It would certainly have been reasonable to seek time to organise for that to be done, if that was indeed the intention. However, it was never stated to McDermott J that there was believed to be an error on the face of the record, much less that time was needed to produce evidence tending to support such a suggestion. Even if the appellant's solicitor and counsel had no notes of what had transpired on the 23rd of March, an undocumented recollection suggestive of error on the face of the record could have been asserted. At no stage was there, nor at any stage since has there been, any such assertion.

52. In the circumstances I ventured to suggest, in the course of exchanges with counsel at the hearing before this Court, that the appellant's request to have the DAR record transcribed, even at this late stage, was intended to facilitate a "fishing exercise". While counsel protested that this was a pejorative characterisation, I am satisfied that it is not and that in the absence of any suggestion of error on the face of the record that it is a fair and accurate characterisation. The record is what speaks and there is no entitlement to seek to look behind it unless there is reason to believe that there is error on the face of the record.

53. In circumstances where no suggestion of error on the face of the record was made to McDermott J, or indeed to this Court; and in circumstances where I am satisfied that the perfected Order of Twomey J was a short document capable of being assimilated both as to its terms and as to its import within a short period of time; it was entirely reasonable for McDermott J to afford only the time that he did afford, and to refuse any longer adjournment.

54. I am also not disposed to uphold grounds of appeal no 1(ii) and (iii). Although the appellant contends that the Order of Twomey J is ambiguous, I am satisfied that that is not the case. I consider that as a matter of overwhelming likelihood the recitals to the Order merely reflect the relief that was applied for in the first instance. However, they do not represent the curial part of the Order. The curial part of the Order is entirely clear. It is admittedly in somewhat different terms to the relief that was initially sought as recorded in the recitals, but the explanation for why the relief ultimately granted was different to that initially sought is manifest from the account of Hugh Dockery as related in his affidavit sworn on the 26th of October 2016, and quoted earlier in this judgment (at paragraph 35 ante).

55. As pointed out already, the accuracy of Mr Dockery's account is not disputed. Twomey J had, in the course of the application before him, canvassed the issue of the duration of the stay. He had apparently been concerned that it was not possible to ascertain the date when the Article 40.4.2o proceedings would be concluded. He had discussed the proposed form of his order with both sides' counsel in open court. Mr Dockery says that following this it was then very deliberately ordered that the stays would remain in being "*until further order.*"

56. In circumstances where the Order of Twomey J is "*acte clair*" in so far as I am concerned, and where I am satisfied that there is no ambiguity whatsoever as to what it says or means, it follows that there has been no "bungling" by the State (to use counsel's characterisation) and that the jurisprudence on which he seeks to rely in support of ground of appeal no 1(ii) and (iii) (i.e., the *O'Falluin, Rimsa* and *Voznuka* cases) has no application in the present case.

57. I am satisfied that there has been no material controversy in this case concerning an issue of EU law, such as would justify this Court in seeking a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. It is in my view beyond question that Twomey J had jurisdiction to grant the stays that he did in the terms that he granted them. The stays were granted to facilitate the bringing of an application for an inquiry under Article 40.4.2o of the Constitution. Both Irish constitutional law and EU law guarantee the right to bring such an application and to be so facilitated.

58. Section 16(6)(b) of the Act of 2003 says (to the extent relevant) that "where a person … makes a complaint under Article 40.4.2o of the Constitution, he or she shall not be surrendered to the issuing state while proceedings relating to the … complaint are pending".

59. Accordingly, the stays were lawfully granted in order to comply with Irish domestic statute law. Moreover, the statute in question was enacted to transpose the Framework Decision, and the specific provision at issue (section 16(6)(b)) is ostensibly consistent with Framework Decision in as much as it reflects relevant provisions of EU law which also guarantee the availability of habeas corpus type relief and envisage that applications for such relief shall be facilitated.

60. In that regard the Framework Decision expressly asserts that it "*shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*".

61. Article 6(3) TEU in turn provides that "*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".*

62. The European Convention on Human Rights in turn expressly guarantees in Article 5(4) that "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*"

63. No proceedings have been taken at any stage suggesting that the Act of 2003, to the extent that it includes a subsection in the terms in which s.16(6)(b) has been enacted, represents an ineffective transposition of the Framework Decision, and, in particular, that it is incompatible with Article 23 thereof. Moreover, it is not open to the appellant to make such a case in the context of the present proceedings which are solely concerned with the lawfulness, or otherwise, of the appellant's detention.

64. To the extent that it is suggested that Twomey J's Order was itself inconsistent with Article 23 of the Framework Decision, and that therefore he had no jurisdiction to make it, I am not satisfied that any basis for so suggesting is made out. It was claimed in argument that the *Lanigan* case, C-237/15, had interpreted Article 23 of the Framework Decision in a manner relevant to this case. The *Lanigan* case involved a preliminary reference concerning whether the time limits in Article 17 of the Framework Decision were mandatory. Contrary to what is asserted the ECJ was not concerned with interpreting Article 23 of the Framework Decision. While the judgment in *Lanigan* does refer to Article 23 for the purpose of contrasting the mandatory nature of the time limits created by that article with the aspirational time limits created by Article 17, it was not concerned in any way with the jurisdiction to stay a surrender order to facilitate a habeas corpus type procedure and it does not appear to me to be of any direct relevance to the issues that this court has had to determine. Neither the terms of Article 23 itself, nor the comments of the ECJ with respect to Article 23 in *Lanigan*, suggest that a preliminary opinion of the ECJ would be of any assistance to us in this case. It is recognised that the time limits created by Article 23 are mandatory once the clock is running. However, the effective facilitation of a habeas corpus type application requires in most instances that the clock should be stopped and a lawful stay operates to stop the clock.

65. While the stays granted by Twomey J were not expressly time limited, they could not be said to have been open ended in truth. Although a precise date could not be predicted by which the Article 40.4.2o proceedings might be concluded it was clearly envisaged by all parties that the State would apply to lift the stays in question in a timely manner once the Article 40.4.2o proceedings were in fact concluded. Moreover, there is an express constitutional requirement that Article 40.4.2o inquiries should be conducted with expedition. The appellant had been represented by counsel when the form of the Order was being discussed and he had participated in that discussion. It was never asserted that the High Court did not have jurisdiction to make the form of Order that it ultimately made, or that it might be regarded as jurisdictionally flawed for vagueness or lack of certainty having regard to the Framework Decision.

66. I am not therefore persuaded that the need for a preliminary reference arises either in the terms suggested by counsel for the appellant or in any other terms. I would therefore refuse the request for a preliminary reference.

Conclusions
67. I would dismiss the appeal on all substantive grounds.

68. My decisions in respect of the claim for costs in respect of the inquiry at first instance and the request for a recommendation under the Legal Aid (Custody Issues Scheme) in respect of this appeal, will be rendered separately after receiving any further submissions from counsel on either side that they might wish to make in the light of this judgment.