

THE HIGH COURT

Record Number: 2006 No. 112 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

**AND
MOHAMMED IQBAL**

RESPONDENT

THE HIGH COURT

Record Number: 2006 No. 5448P

BETWEEN

MOHAMMED IQBAL

PLAINTIFF

AND

**THE ATTORNEY GENERAL, AND THE MINISTER FOR JUSTICE,
EQUALITY AND LAW REFORM**

Judgment of Mr Justice Michael Peart delivered on the 24th day of April 2007

1. The first entitled proceeding is an application under section 16 of the European Arrest Warrant Act, 2003, as amended, for the surrender of the respondent to the United Kingdom on foot of a European arrest warrant.

2. In the second proceedings, commenced by way of Plenary Summons, the plaintiff (the respondent in the first proceeding) seeks three declarations as follows:

"A. A declaration that the Council Framework Decision dated the 13th June 2002 was not properly ratified by the Oireachtas as required by the Constitution, and/or that the European Arrest Warrant Act, 2003, as amended, which purports to reflect and implement the Framework Decision is invalid and of no effect.

B. A declaration that Section 16 of the European Arrest Warrant Act, 2003 is unconstitutional and in particular is contrary to the provisions of Articles 38.1 and 40.3 of the Constitution.

C. A declaration that the surrender of the plaintiff pursuant to the European Arrest Warrant Act, 2003 would be contrary to the Constitution and contrary to law."

Application under Section 16 of the Act

3. The surrender of the respondent is sought pursuant to a European arrest warrant which issued from a competent judicial authority in the United Kingdom on the 18th August 2006. It was duly endorsed here by the High Court for execution, and the respondent was arrested on foot of same on the 13th September 2006, and forthwith thereafter brought before the High Court as required by section 13 of the Act. He has been remanded from time to time pending the determination of the application for his surrender.

4. No issue has been raised as to the identity of the respondent arrested, and I am satisfied from the affidavit evidence of Sgt, Anthony Linehan, the arresting Garda officer, that he is the person in respect of whom the European arrest warrant herein has been issued.

5. His surrender is sought so that he can be prosecuted in the United Kingdom in respect of two offences of indecent assault and three charges of rape. As far as correspondence is concerned, the offence is one of the offences which pursuant to Article 2.2 of the Framework Decision in respect of which double criminality does not have to be verified. In respect of the offences of indecent assault are concerned, I am satisfied from the recitation of the facts giving rise to those offences in the warrant that if the same acts were committed in this State they would give rise to an offence of sexually assault here under section 2 of the Criminal Law (Rape) (Amendment) Act, 1990. The offences set forth in the warrant each satisfy the minimum gravity requirement.

6. Section 45 of the Act is not relevant to this application since it is not a case which has already been dealt with *in absentia*.

7. There is no reason under sections 21A, 22, 23 or 24 of the Act to refuse surrender. Indeed, there has been no attempt by the respondent to rebut the presumptions in respect of these sections.

8. I am also satisfied that there is nothing in Part III of the Act or the Framework Decision itself which prohibits surrender, and that subject to dealing with the issues raised in the Plenary proceedings, the Court is required to make the order sought under section 16 of the Act. A number of Points of Objection were raised in Points of Objection by the respondent but are not pursued in this application. The issues being relied upon are confined to the declaratory reliefs sought in the Plenary proceedings.

The Plenary proceedings

9. As set out above the plaintiff in these proceedings contends that the European Arrest Warrant Act, 2003 as amended ("the Act"), and which has given rise to his arrest and the application for his surrender to the United Kingdom is unconstitutional on the basis that the Council Framework Decision dated 13th June 2002 (2002/584/JHA) which the Minister for Justice, Equality and Law Reform agreed to on behalf of the Irish Government and to which effect is given by the Act, differs in some respects from that to which both Houses of the Oireachtas gave their prior approval on the 11th December 2001, as required under Article 29.4.6 of the Constitution, and that as a consequence the Act is not constitutional. A declaration as set forth at A above is sought in that regard.

10. The plaintiff also contends by way of a separate submission that section 16 of that Act is unconstitutional on the basis that it is a requirement of that section that in the event of an order for surrender being made in respect of the plaintiff he must, by virtue of section 16(4) of the Act be committed to a prison pending his surrender being effected pursuant to the order made, without the possibility of being allowed to remain on bail between the making of such an order and his surrender being effected. It is submitted that this is an unconstitutional deprivation of liberty, especially given a situation where the plaintiff following his arrest under section 13 of the Act was remanded on bail, as permitted by the Act, and has complied at all times with all the terms of that bail. The plaintiff

seeks a declaration as set forth at B above in this regard. I shall deal with these two reliefs in reverse order for the sake of convenience.

Section 16

11. The arguments put forward to support seeking this declaration are the same as those argued in the cases of *Minister for Justice, Equality and Law Reform v. Draisey*, unreported, High Court, 24th November 2006 and *Minister for Justice, Equality and Law Reform v. Butenas*, and in which I have decided that the words of the section were specific and clearly shows an intention on the part of the legislature that once an order for surrender is made under the section the respondent is to be committed to a prison pending his actual surrender being effected. Unlike the provisions of section 13 of the Act applicable where the respondent is arrested and brought before the Court, and where the Act provides that the person can be remanded either in custody or on bail pending the hearing of the application for surrender, section 16(4) makes no such provision. I have concluded that the intention of the Oireachtas is clear from the plain and ordinary meaning of the words used in the section, particularly where in section 13 of the Act, it is provided that bail may be granted pending the hearing of the section 16 application, and that the Court is therefore specifically mandated to commit to a prison without the possibility of the respondent at that point being allowed to remain on bail until the point of his actual surrender, and even though such actual surrender may not, without the consent of the respondent, take place sooner than 15 days following the making of the order.

12. I have further concluded that such a provision, even though one which deprives the respondent of his or her liberty for a period of time, is a measure which is a proportionate one for the purpose of ensuring that once an order for surrender is made the respondent will be available for surrender at the appropriate time and so that the State can comply with its international obligations under the Framework Decision. A measure of appreciation must, in my view, be permitted to the Oireachtas in its determination of what is reasonably required for that purpose. I have no reason to be of a different view at this time, and for the same reasons as outlined in *Butenas*, I therefore refuse the declaration sought at B in the Indorsement of Claim on the Plenary Summons.

The constitutionality of the Act

13. The starting point for the plaintiff's submission that the Act is unconstitutional on the basis that the version of the Framework Decision which is appended to and given effect to by the Act differs from the text of the proposed Framework Decision to which the Oireachtas gave its prior approval, are the following sub-paragraphs of Article 29.4 of the Constitution which provide:

“4° The State may ratify the Treaty on European Union signed at Maastricht on the 7th day of February, 1992, and may become a member of that Union.

5° The State may ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Amsterdam on the 2nd day of October, 1997.

6° The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5° of this section and the second and fourth Protocols set out in the said Treaty but *any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.*”(my emphasis)

14. The plaintiff submits that an agreement with other member States to adopt a Framework Decision amounts to an exercise of an option or discretion by the State and that as such it requires the prior approval of both houses of the Oireachtas. Michael Forde SC for the plaintiff has referred to the text of the proposal for the Framework Decision in question which was laid before the Oireachtas on the 11th December 2001, debated on the following day and to the fact that while it is substantially the same text as that which was finally adopted by the Council of the European Union on the 13th June 2002, it is identical, and that therefore the Oireachtas has not therefore given its “prior approval” to the adopted text which was given effect to by the passing of the European Arrest Warrant Act, 2003.

15. It is the plaintiff's submission that if there were to be any changes made to the proposal to which the Oireachtas gave its approval on the 12th December 2001, the new draft proposal should have been brought back before the Oireachtas prior to its adoption in order to comply with the provisions of Article 29.4.6 of the Constitution. This was not done. Dr Forde submits that if it is acceptable that some draft of a proposal receives approval by the Oireachtas, but is later altered and adopted without prior approval by the Oireachtas of the alterations, it sets the constitutional requirement of prior approval at naught, and that the Oireachtas may therefore be presented with a *fait accompli*. In Dr Forde's submission it does not matter that the alterations may be seen as minor since if any latitude at all is permissible the principle that the document approved may be later changed without a further prior approval, is established, thereby emasculating the constitutional provision.

16. Dr Forde has referred to passages from the Dáil Debates for the 12th December 2001 in order to establish what occurred. Anthony Collins SC for the defendants has submitted that this is impermissible. While it is clear that Dáil Debates cannot be referred to for the purpose of assisting in the ascertainment of the intention of the Oireachtas when passing certain legislation, when attempting to interpret that legislation, there is a distinction between that exercise and what is occurring in this case where the debates are being referred to by Dr Forde simply to establish what occurred as opposed to divining the meaning to be attached to a particular section or Act. Without reaching any final or concluded view on the matter, and I am not to be taken as having done so, I have allowed in this case the relevant debates to be referred to solely, and in the unusual circumstances of the issues arising for decision herein, for the purpose of establishing the factual basis for the submissions being made. No exercise of statutory interpretation as such arises.

17. It is clear that when this proposal was debated in the Dáil on the 12th December 2001, the question arose as to the potential for difficulty should any negotiations between Member States which might take place subsequent to Oireachtas approval give rise to alterations to the draft proposal being considered. It is clear from what was stated on behalf of the Government by the Minister for Justice, Equality and Law Reform that it was accepted that if there were any changes made which were “substantive” rather than “a minor linguistic change”, the altered document would have to come back to the Oireachtas before being finally agreed to by the Government. On the other hand the Minister also stated that the document before the Dáil was “likely to be the final shape of the decision”, thus at least anticipating that there may be some changes to be made before the final document achieved the agreement of all Member States.

18. Dr Forde has referred to the actual differences between the approved text and the final document which was given effect to by the Oireachtas by the Act. He submits that the changes are more than minor linguistic changes, and that they are at least in a few instances, changes of substance such as would require prior Oireachtas approval. He does not accept that by the enactment of the Act the Oireachtas can be seen as having retrospectively given its approval to the altered and adopted Framework Decision, and that there is no power given to the Oireachtas by the Constitution to give retrospective approval. In his submission, nothing short of prior approval for the final text is sufficient in order to meet the requirement of Article 29.4.6 of the Constitution.

19. Dr Forde questions why, in circumstances where the Framework Decision was not finally adopted by all Member States until the 13th June 2001, the opportunity was never taken to come back to the Oireachtas with the final document for its approval prior to that date.

20. The textual changes which have been made in the final version of the Framework Decision which has been adopted by the European Council and annexed to the Act are numerous, but in the main give rise to no change of substance. For example, in Recital 10 of the Preamble to the in the version adopted by the Oireachtas on the 12th December 2001 it is stated that ".....implementation of that mechanism may be suspended only in the event of a severe breach by one Member State of the principles set out in Article 6(1) of the Treaty on European Union...." whereas in the final version adopted by the Council the word "severe" has been replaced by the words "serious and persistent". Another example is in Recital (12) of the Preamble where in the version approved by the Oireachtas, it is stated that nothing in the Framework Decision is to be interpreted as prohibiting refusal of surrender where there is reason to believe that a warrant has been issued for the purpose of prosecuting or punishing a person "on account of his or her sex, race, religion, ethnic origin, nationality, political opinion or sexual orientation....." Whereas in the text adopted by the Council and annexed to the Act, the word "language" is added between the words "nationality" and "political opinion" and, in fact also the words "opinion" has become "opinions". A further example is that in the proposal approved by the Oireachtas Article 1 refers to the European arrest warrant being a "court decision" whereas the adopted text refers to a "judicial decision".

21. There are numerous other such changes to which Counsel has referred and these are visible in the transcript should it be necessary to look at all of them at any other time, but Dr Forde has referred to and laid emphasis on a couple of alterations which he says are significant changes. One of these is in relation to the list of offences in Article 2.2 in respect of which double criminality does not require to be verified. In the list set forth in the text approved by the Oireachtas there is the offence described as "counterfeiting the euro", and another described as "motor vehicle crime". In the text adopted by the Council these offences have become and "trafficking in stolen vehicles" respectively. He submits that these changes are not simply textual or linguistic changes but change the document in a substantive way. In relation to "counterfeiting currency, including the euro", for example, he submits that under this wording double criminality is to be presumed in relation to counterfeiting all currencies, say, for example, what he called the "super-dollar" – whereas in the text before the Oireachtas double criminality was to be presumed only in respect of the euro. Given the fact that the United Kingdom was signing up to this Framework Decision it seems perfectly understandable that more than the Euro would be covered so that, for example, sterling or other currency belonging to countries who were not part of 'Eurozone' would be included. However, the fact remains, in Dr Forde's submission, that this is a substantial change of significance, and not merely a change of words to convey the same meaning as before.

22. Another change said to be a significant or substantial change is what appears at Article 23 of the version annexed to the Act, compared to what was in Article 18 of the version approved by the Oireachtas, under the heading "Time limits for surrender of the person". In the former text at 18.2 it states: "He shall be surrendered no later than ten days after *the decision* to execute the European arrest warrant" (my emphasis), whereas in the final text annexed to the Act this appears as "*He or she* shall be surrendered no later than 10 days after *the final decision* on the execution of the European arrest warrant" (my emphasis).

23. Dr Forde makes it clear that he is not impugning what occurred in the Houses of the Oireachtas on the 12th December 2001 when the resolutions were passed approving "the exercise by the State of the option or discretion provided by Article 1.11 of the Treaty of Amsterdam to take part in the adoption of [the Framework Decision] a copy of which proposed measure was laid before Dáil Éireann on 11th December 2001".

24. His complaint is as to the constitutionality of the Act passed much later on the 28th December 2003 which has given effect to a Framework Decision which, in his submission, had not received the prior approval of the Oireachtas, since what was approved was a different document. He has referred to the judgment of Barrington J. in *The State (Gilliland) v. Governor of Mountjoy Prison* [1987] IR. 201 and to that part of the judgment where the learned judge deals with the issue as to whether the Extradition Treaty between this State and the United States, being an international agreement involving a charge on public funds, was binding on this State in the absence of approval of Dáil Éireann of the terms thereof in accordance with the provisions of Article 29, s.5, sub-s.2 of the Constitution. The fact in that case was that whereas the Treaty has been laid before the Dáil as required by Article 29, s.5, sub-s.1, it had not been approved by the Dáil as required by Article 29, s.5, sub-s.2. This absence of Dáil approval of the terms of the Treaty was found to mean that the Treaty was not binding on the State. Dr Forde submits that, in a similar way in the present case, though not identical of course, the requirement to seek prior approval to the text of the Framework decision actually adopted and later annexed to the Act giving effect to it, has not been fulfilled and that the legislation is therefore not constitutional.

25. Dr Forde submits that Article 29.4.6 was adopted so that when a Government Minister casts his or her vote for a particular measure such as a Framework Decision, as in the present case, he or she does so with the benefit of a democratic mandate from the people of Ireland expressed on their behalf by their elected representatives in the Oireachtas, and that their mandate is confined to the terms which received that democratic approval, and that it follows that if some other document or text of a document is agreed to which goes beyond or outside that to which the people have through their representatives given approval, then it cannot be validly and constitutionally given effect to by domestic legislation.

26. Anthony Collins SC for the defendants in the plenary proceedings makes a number of points which he urges should be taken sequentially, and that if the Court is satisfied that the first submission is a good one, there should be no need to address the other three submissions which he wishes to make. Similarly even if the Court finds that the first submission must fail, but that the second submission is successful, the Court should not proceed and make determinations in respect of the third and fourth submissions.

The first submission – justiciability

27. Mr Collins submits that, consistent with the doctrine of the separation of powers the Court should refrain from any consideration of the manner in which the Oireachtas proceeded when it passed, through both Houses, the resolution approving the proposal for the Framework Decision on the 12th December 2001, and that the Court should not enter upon any consideration of the materials which were before the Oireachtas on that occasion. He characterises the plaintiff's proceedings as an attempt to get this court to make a determination that the Oireachtas acted unlawfully on that occasion due to a want of material before the Oireachtas in the form of the final text of the proposal. He submits that this raises no issue which is justiciable, and that this Court cannot oversee the manner in which the Oireachtas does its work. He goes on to say that once the Act is enacted it is not permissible for this Court to be asked to examine and determine whether the Oireachtas correctly followed its own procedures when it passed the Act. He characterises the plaintiff's argument in the present case, and for the purpose of this submission, as being that the Oireachtas did not have sufficient material before it on the 12th December 2001 when it passed the resolutions, and he states that this is not a question which can be justiciable before this Court, by reference to the respect accorded to that body by this Court by virtue of the separation of powers. He accepts however that the Oireachtas must adopt legislation which is in compliance with the Constitution and that the Courts can review whether or not the Oireachtas has complied with the requirements of the Constitution.

28. It should be recalled at this point, and as I have already mentioned, that Dr Forde has made it clear that he is not attacking or impugning what the Oireachtas did on the 12th December 2001. His point is slightly different, namely, that on that date a document was approved in accordance with Article 29.4.6 of the Constitution, but that a later document which did not receive that prior approval was given effect to by legislation, and that the constitutional requirement of prior approval for same was not complied with before that final text was adopted.

29. In support of his submission as to justiciability, Mr Collins has referred to the judgment of Kelly J. in *Controller of Patents v. Ireland* [2001] 4 IR. 229, and to that of O'Flaherty J. in *O'Malley v. An Ceann Comhairle* [1997] 1 IR. 427. He has referred also to *Curtin v. Dáil Éireann* [2006] 1 IRLM 99 wherein, *inter alia*, it was held that "the Courts would not, in a clear case, permit even the Oireachtas to default on its constitutional obligations". However the Chief Justice went on to state that such a clear case would be one where there was a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligations, accompanied by bad faith or recklessness.

30. Since the plaintiff is not seeking to impugn how the Oireachtas proceeded on the 12th December 2001 it is not necessary to address this particular submission in relation to that occasion. The plaintiff accepts that what happened on that occasion is beyond reproach, and that the resolution which was passed approving the proposal then presented to each House of the Oireachtas was one properly passed. If what was approved on that occasion was the same text as is now annexed to the subsequent Act giving effect to it, the plaintiff would have no case whatsoever. I can pass from this first submission to the second submission.

Second submission – prior approval was obtained under Article 29.4.6 of the Constitution

31. The meat of this case really is whether, when the Oireachtas subsequently came to passing the Act in December 2003 giving effect to the Council Framework Decision adopted on the 13th June 2002, it did so in circumstances where that Framework Decision had not received the approval of the Oireachtas prior to its adoption as required by Article 29.4.6 of the Constitution. This is not a question of how prior approval was given, but rather was prior approval given as required, although Mr Collins has stated in his oral submissions that the exercise involves the Court investigating the material upon which the Oireachtas gave its approval. Mr Collins has stated that it is clear that the resolutions passed constitute prior approval and that the constitutional requirement in that regard was complied with.

32. This question in my view does not involve the question of justiciability in the same way as raised in the submission just dealt with, since this Court, as happened in *State (Gilliland) v. Governor of Mountjoy Prison* [supra] can determine that a requirement of the Constitution has or has not been complied with by the Oireachtas, and this is to be distinguished from the Court making a determination in relation to how the Oireachtas has conducted itself internally in relation to its own procedures, and thereby interfering in the workings of another organ of state in breach of the doctrine of the separation of powers. In his oral submissions, Mr Collins accepted that where the Constitution mandates that something be done by the Oireachtas, and it is not done, then there can be grounds for the Courts to intervene but that caution must be exercised in this regard.

33. Mr Collins has referred extensively to the judgment of the Chief Justice in *Curtin v. Dáil Éireann* [supra] and to the emphasis placed on the presumption that legislation is in accordance with the Constitution unless and until the contrary is clearly shown, and that this applies with equal strength to resolutions passed by the Oireachtas even though they do not themselves constitute legislation.

34. This is not a case, such as *Gilliland*, where there was a complete failure to observe a requirement of the Constitution by seeking the approval of the Dáil for the terms of a Treaty which was provided for a charge on public funds. As I have stated, the question is whether there was what can be regarded as prior approval by the Oireachtas to the Framework Decision given effect to by the Act passed in December 2003. Mr Collins is correct to a certain extent that this involves the Court determining that the resolutions passed on the 12th December 2001 were sufficient to cover the final altered text, and that such an exercise is not justiciable. But in my view the Court can deal with the issue somewhat differently and in so doing, stay well away, as it must, from encroaching upon the exclusive legislative domain of the Oireachtas in deference to the separation of powers. This Court will not embark on any exercise involving an examination of how the Oireachtas went about its business on the 12th December 2001. As has been made clear in cases such as *TD v. Minister for Education* [2001] 4 IR 259, and *Curtin v. Dáil Éireann* [supra] that is something which, excepting a case in which there might be seen to be a clear disregard of a constitutional obligation, the Courts will not do. The plaintiff is not even asking the Court to do so since he is not seeking to impugn that resolution at all, as Dr Forde made clear.

35. When one comes to the passing of the Act on the 28th December 2003 giving effect to the Framework Decision, the position is clear. On that occasion the members of the Oireachtas had the option to express any concerns which they might have had that the Framework Decision which they were being asked to give effect to by the passing of the proposed legislation was not one that had received their prior approval before it was adopted on the 13th June 2002. I have been provided with no evidence of what happened in the Oireachtas on the 28th December 2003, and in the absence of some evidence of a clear disregard for its constitutional obligations, this Court must and will assume that the Act passed is a constitutional Act and that any majority of members who voted for the legislation to be passed were satisfied and entitled to be satisfied that what they were giving effect to was substantially the same instrument which had been voted upon on the 12th December 2001. It is not for this Court to examine in minute detail, or indeed at all, any textual or indeed other differences between one text and another. This Court must assume that the Oireachtas was satisfied that the resolution which was passed by each House on the 12th December 2001 was the constitutionally mandated prior approval for the exercise of the option or discretion which was the Framework Decision being given effect to on the 28th December 2003.

36. I do not feel it is necessary to express any view on what if any margin of appreciation may or may not be permissible between the text of a document approved by resolution and the final text. A plaintiff seeking to establish that the Oireachtas has acted unconstitutionally has an exceptionally high threshold to surpass as far as discharging the onus of proof that there has been a clear, conscious and deliberate disregard of a constitutional obligation. In *Gilliland* it was a simple matter of fact that the terms of the Treaty in question had not received approval even though it had been laid before the Dáil. There was of course no suggestion of a deliberate and conscious disregard of the constitutional obligation to do so. The present case is very different. The Oireachtas on the 12th December 2001 did as it is required to do and passed a resolution giving its approval to the exercise of the option or discretion to adopt the Framework Decision. Prior to giving effect to the adopted Framework Decision the Oireachtas retained the capacity, being the exclusive law-making organ in the State under the Constitution, to decide before giving effect to it, that what was adopted on the 13th June 2002 was not what had been approved by prior resolution. This Court cannot look behind the fact that the Act was passed.

37. What I have stated is sufficient to dispose of the issues raised in this regard by the plaintiff and I dismiss the proceedings.

38. I therefore make the orders sought under section 16 of the Act for the surrender of each of the respondents to the issuing state.

