Neutral Citation [2016] IEHC 484

THE HIGH COURT

Record No. 2010/430 EXT

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PAWEL BLONIARCZYK

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 24th day of June, 2016.

1. Is the High Court, in considering a s. 22 request for consent to further prosecution in the member state to which a respondent has already been surrendered, confined to a consideration of the prohibitions on surrender contained in Part 3 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003")? Prior to answering that question, the court has to determine whether there is scope to deal with the particular factual issue raised within these proceedings under the provisions of Part 3 of the Act of 2003.

2. Counsel for the respondent submitted that the High Court is entitled to have regard, as a stand-alone ground, to the delay occasioned since the commission of the alleged offence and the request being made by the issuing state in determining whether to consent to the said request. Opposing that proposition, counsel for the minister argued that delay may not be considered as a stand-alone ground of objection to consent, and that the court is, in effect, bound to consent to a request for further prosecution subject only to grounds for refusal as set out in Part 3 of the Act of 2003. Counsel for the minister submitted that delay, as a stand-alone ground, was not a ground for refusing consent under the provisions of Part 3 of the said Act.

The request for consent under s. 22 of the Act of 2003

3. On 8th June, 2010, a European Arrest Warrant ("EAW") issued for the arrest of the respondent for the purpose of serving custodial sentences imposed upon him in Poland. On 30th August, 2013, the respondent was surrendered to Poland following an order of the High Court. By letter dated 25th September, 2015, following a decision of the Regional Court in Tarnow dated 22nd September, 2015, a request for consent to prosecute the respondent was made to the High Court.

4. The request sought consent to prosecute him for the alleged offence of burglary of a computer shop on 7th July, 2006, the details of which are set out in the request. The offence in Poland corresponds with an offence in this jurisdiction and carries with it a penalty, in the event of conviction, which exceeds the minimum sentence required by s. 38 of the Act of 2003 and the provisions of the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedures between Member States ("the 2002 Framework Decision").

5. I am satisfied, having read the request and considered the papers and submissions before me that, subject to the provisions of s. 37 of the Act of 2003 and further submissions as to delay as a stand-alone ground, consent to further prosecution is not prohibited under any other section contained in Part 3 of the Act of 2003, or indeed any other section in the said Act.

The point of objection

6. The only point of objection raised by the respondent is as follows:

> *"The delay, comprised as it is of differing periods, between the commission of the offences and any potential surrender date of the Respondent is such that his surrender would be oppressive, in breach of Section 37 of the European Arrest Warrant, Act, as amended and in breach of the Respondent's constitutional rights".*

In reality, however, the real issue urged on behalf of the respondent is that the delay itself, *i.e.* without reference to any other substantive right, is sufficient for this Court to prohibit his surrender. It should also be noted that the reference to surrender in this point of objection was intended to be understood as referring to consent to further prosecution.

The jurisdiction of the Court under s. 22(7) of the Act of 2003

7. Section 22(7) provides as follows: "*The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to –*

(a) proceedings being brought against the person in the issuing state for an offence,

(b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of a person's liberty, in respect of an offence, or

(c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence, upon receiving a request in writing from the issuing state on that behalf."

8. Section 22(8) provides: "*The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under this Act*."

The decision of the Court of Appeal in Sliwa

9. The Court of Appeal in the case of *Minister for Justice and Equality v. Sliwa* [2016] IECA 130 dealt with the interpretation of s. 22 of the Act of 2003. In that case, the respondent argued that because he had already been "*proceeded against*" in respect of other offences to the point of sentence following his surrender, there was a breach of the rule of specialty. Hogan J., on behalf of the Court of Appeal, held as follows;

> *"19. In her judgment Donnelly J. rejected the argument that s. 22(7) should be read by reference to the earlier provisions of s. 22(2), saying:*
>
> > "In the view of the Court, s. 22(7) provides in its plain and ordinary meaning that the Court has the power to consent to the request in each or any of the situations that may apply under the subsection. The restriction on that power is, on the plain and ordinary meaning of the subsection, only limited by subsection 8."
>
> *20. We entirely agree with Donnelly J. that the Oireachtas has made a clear distinction between the position of the*

person facing surrender on the one hand (s. 22(2)) and the person already surrendered (s. 22(7)) on the other. The Oireachtas has accordingly elected to provide for prescriptive rules set out in s. 22(2) in the case of an application of the rule of specialty to the position of the offender first awaiting surrender. These prescriptive rules have not been applied in the case of the person who has already been surrendered. The only prohibition against giving consent specified by the Oireachtas is that contained in s. 22(8). There is, accordingly, simply no basis as a matter of statutory interpretation in seeking to apply the special rules in s. 22(2) applicable to one situation (i.e., the person awaiting surrender) to another (i.e., the person who has already been surrendered).

21. In reaching this conclusion we have not overlooked the submission on behalf of Mr Sliwa that in Strzelecki Denham C.J. had said that a request for consent pursuant to s. 22(7) "is in essence for consent for the surrender to cover the additional offences" and, accordingly, an application for consent should be treated as if it was an application for surrender. In Strzelecki the Chief Justice was simply considering the inclusion of s. 37 in the prohibition in s. 22(8). She was not, however, addressing the separate question of the application of the prohibition in s. 22(2) to a request for consent pursuant to s. 22(7). The judgment does not accordingly support the submission that an application post-surrender for consent to prosecution, conviction or execution of a custodial sentence should in all respects be treated as if it was an application for surrender.

22. It is true that s. 22(7) is permissive and insofar as Donnelly J. may be considered to have suggested in her judgment that the High Court can only refuse surrender in respect of an application under this sub-section by reference to the prohibition contained in s. 22(8), we would respectfully disagree. Indeed, this comment may not have been intended as she was considering the only objections which had been advanced to the High Court in respect of the question of consent. It is, however, unnecessary to consider the circumstances in which the High Court might be justified in refusing to make an order under s. 22(7) independently of s. 22(8). It is sufficient to say that there could, in principle, be no objection to the making of such an order by the High Court in the circumstances of the present case, since by the very act of making this request the Polish authorities have fully – and properly – respected the rule of specialty as contained in the 2003 Act and there is no contention that there has been any breach of the corresponding provisions of Article 27 of the Framework Decision so far as these complaints or petitions are concerned."

The Submissions

10. The respondent submitted that the *dicta* at the start of para. 22 above is quite simple in its import; the Court of Appeal has determined that the High Court, in the assessment of a s. 22 request, is not limited to consideration of the provision in s. 22(8) of the Act of 2003. Section 22(7) is permissive and the High Court is free to consider matters that extend beyond those set out in s. 16(1) of the Act of 2003 for the determination of the surrender of a respondent.

11. On the other hand, counsel for the minister submitted that the first sentences of para. 22 in the judgment are *obiter dicta*. She submitted that what was at issue in *Sliwa* was solely an issue of interpretation, namely whether the provisions of s. 22 (other than subsections (7) and (8)) applied where an issuing state sought consent to pursue an already surrendered respondent. It was submitted that the Court of Appeal considered it unnecessary in the context of the appeal before it to consider the circumstances in which the High Court "*might be justified in refusing to make an order under s.22(7) independently of s.22(8)*" (para. 22 of *Sliwa*). Counsel submitted that it was a point not argued and therefore a point not decided.

12. Counsel for the minister submitted that the Court of Appeal observed that where a request for consent is made under the provisions of s. 22(7), by that very act of requesting consent, the issuing state has respected the rule of specialty and that where there is no contention that there has been a breach of the corresponding provisions of Article 27 of the 2002 Framework Decision, there can, in principle, be no objection to the High Court giving its consent. Counsel herself observed that it may be difficult, however, to reconcile the foregoing observations with the *dicta* that consent may be refused independently of s. 22(8) of the Act of 2003.

13. Reliance was placed by counsel for the minister on the principle of conforming interpretation, which has been accepted by the Supreme Court in a number of cases. Reference was made to Article 27 para. 4 which provides that "[c]onsent shall be given" when the offence for which the request is made is itself subject to surrender in accordance with the provisions of the 2002 Framework Decision and that "consent shall be refused" on the mandatory grounds in the 2002 Framework Decision and "otherwise may be refused only" on the optional grounds.

14. Counsel also relied upon the case of *Doyle v. Hearne* [1987] IR 601 to support the contention that in certain circumstances "in light of the apparent intention of the legislature", the word "may", could be interpreted in mandatory terms. Finally, counsel referred to two decisions of the High Court, heard together, in which it was held that when the provisions of s. 22(7) and (8) were given a conforming interpretation in accordance with the principles laid down in *Criminal Proceedings Against Pupino* (Case C-105/03) [2005] ECR 1-5285, "it is clear that any discretion reposed in the Court is in fact greatly circumscribed and, … that the governing rule is that the Court must give its consent unless there is some impediment to doing so in terms of the mandatory grounds for refusing surrender under Article 3 or one of the optional grounds under Article 4." (See *Minister for Justice and Equality v. Trepiak* [2011] IEHC 287 and also the case of *Minister for Justice and Equality v. Zmyslowski* [2011] IEHC 286). It was submitted that these cases were apparently not opened to the Court of Appeal in *Sliwa*, but are authorities binding on this Court in circumstances where they, unlike *Sliwa*, dealt with this precise issue.

"Delay" as a stand-alone ground

15. Counsel for the respondent also argued that the court was entitled to have regard to the delay occasioned since the commission of the alleged offence and the request being made, as a stand-alone consideration. In this regard, counsel submitted that delay *simpliciter* was a valid reason to refuse to surrender a person under s. 16 of the Act of 2003 pursuant to s. 37 of the said Act. Counsel relied upon *dicta* in the judgment of O'Donnell J. in *Minister for Justice and Equality v. Tobin* [2008] 4 I.R. 42 as authority for the proposition that a delay in seeking the surrender of a person can be so oppressive as to give rise to a ground of objection under s. 37 of the Act of 2003.

16. Counsel for the minister responded that the relevant passage in *Tobin* actually confirmed that consideration of delay was to take place within the context of a consideration of fair trial rights. Counsel pointed to the first sentence of that part of the judgment dealing with delay, which begins at para. 17 as "*[a]lthough delay is not in itself a specific ground for refusal of surrender under either the Framework Decision of the Act of 2003, as amended…*".

The Court's analysis and determination

17. In the case of *Minister for Justice and Equality v. Gotzslik* [2009] 3 I.R. 390, the Supreme Court (Denham C.J.), in the context of analysing whether s. 22 permitted orders of surrender to be made when two separate EAWs had been received from an issuing state, stated "*[u]nder the legislation the court is bound to make an order for surrender on each valid warrant*." (para. 23). Thus, even though the power to make orders of surrender contained within s. 15 and s. 16 is also apparently permissive, in the sense that these sections refer to "may" rather than "shall", the Supreme Court has recognised that the High Court is bound to make an order on each valid warrant.

18. Yet, even that statement by the Supreme Court is subject to exception. For example, in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17, the Supreme Court confirmed that where an abuse of process had occurred, the court would be entitled in an appropriate case to refuse surrender. Such a refusal is not based upon legislative grounds for refusal of surrender, but it is part of the inherent jurisdiction of the court to protect its own processes from abuse. Therefore, to say that the court may only refuse surrender on grounds set out in the legislation is not a complete statement of the powers of the High Court on an application for surrender.

19. The Court of Appeal in *Sliwa*, correctly identified that in giving judgment at first instance the High Court was concerned with the facts of that case, and that in making the statement that the power to consent was only limited by s. 22(8) of the Act of 2003, the High Court went beyond what was necessary. The Court of Appeal also went on to state that it was unnecessary for that court to consider the circumstances in which the High Court might be justified in refusing to make an order under s. 22(7) independently of s. 22(8) of the Act of 2003.

Is refusal of consent required under Part 3 of the Act of 2003?
20. Before this Court is required to consider whether s. 22(7) permits the Court to refuse surrender solely on the ground of delay, it is necessary for the Court to determine if consent should be refused on any other ground coming within the terms of s. 22(8) of the Act of 2003. The respondent has put forward an argument that "delay *simpliciter*" is a ground for refusal of surrender under s. 37 of the Act of 2003. If it be such a ground for refusal of surrender, it is by extension a ground for refusal of consent for further prosecution in the issuing state (pursuant to s. 22(8) of the Act of 2003 as applied by the Supreme Court in *Minister for Justice and Equality v. Strzelecki* [2015] IESC 15).

21. The respondent's argument is circuitous: delay itself is a ground for refusal as delay may amount to a breach of the right to a trial in due course of law. In this sense, delay *simpliciter* is said to be a ground for refusal under s. 37 of the Act of 2003. Yet the simplicity of the argument belies the requirement that for such an argument to succeed, the respondent must demonstrate that there are substantial grounds for believing that there is a real risk that surrender will amount to a denial of fair trial rights. That represents a significant threshold for proof by a respondent. As the Supreme Court (O'Donnell J.) has most recently pointed out at para. 44 in *Balmer v. Minister for Justice and Equality* [2016] IESC 25: "*This is why, in my view, it is correct to speak of s. 37 of the EAW Act as applying only to matters of 'egregious' breach of fundamental principles of the Constitution or when something is so proximate a consequence of the court's order and so offensive to the Constitution as to require a refusal of surrender or return*."

22. It is not the role of the High Court simply to apply Irish constitutional norms to the trial of offences or to sentences in determining whether surrender, or consent under s. 22(7), will breach s. 37 of the Act of 2003. In this case, concerning the right to a fair trial, the court must consider whether the facts in this case establish that there is a real risk of an egregious breach of such a fundamental right. In the circumstances, the court must take into account the presumption in s. 4A of the Act of 2003 that the Polish state will abide by the provisions of the 2002 Framework Decision and accord to the respondent his fundamental rights including that of a right to a fair trial under the relevant provisions of the European Convention on Human Rights ("ECHR"). As against that presumption, the respondent has put forward no evidence of any risk of a lack of a fair trial or of any deficiency in the system of trial in Poland. This Court must conclude that it has not been established that there is a real risk to the fair trial of the respondent by virtue of the supposed delay in this case.

Is delay a stand-alone ground for consideration under s. 22(7) of the Act of 2003?
23. As stated above, the Court of Appeal in *Sliwa* was of the view that s. 22(7) was permissive and that the circumstances in which the High Court may refuse consent had yet to be decided. By reference to the jurisprudence of the Supreme Court concerning grounds to refuse an application for surrender, this Court is of the view that an abuse of process would also be a ground for refusal of consent to further prosecution. In the present case, no abuse of process argument was pressed upon the court. The only submission advanced by the respondent centred on the delay, which it was submitted, demanded an enquiry from this Court as executing judicial authority of the issuing judicial authority as to the grounds for that delay. It is necessary, therefore, to proceed to determine if the respondent's submission is correct, that the court is entitled to consider delay *simpliciter*, divorced from the context of fair trial or indeed any other substantive right, as a ground for refusing consent.

24. The Court of Appeal in *Sliwa* recognised that there may be circumstances in which the High Court is justified in refusing to make an order under s. 22(7) independently of s. 22(8) of the Act of 2003. This Court has identified one such circumstance - an abuse of process. In so far as s. 22(7) is permissive, the Court of Appeal decision in *Sliwa* cannot be understood as meaning that the High Court's jurisdiction in exercising the power to consent, or indeed, in refraining to exercise that power, is a jurisdiction that is open ended or to be exercised on a whim. On the contrary, as with the exercise of all judicial power, it is a power that is subject to limitation by law, whether that law be common law, legislative or constitutional in origin.

25. In the exercise of its power under s. 22(7), the High Court is operating a power granted to it by the Act of 2003 which is "an Act to give effect to Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States". As the Act of 2003 implements the 2002 Framework Decision, "*such legislation must be interpreted to implement the Framework Decision, unless it is* contra legem." (as per Denham J., para. 92, *Minister for Justice and Equality v. Bailey* [2012] 4 I.R. 1 with reference to *Criminal Proceedings Against Pupino*).

26. This Court cannot improve upon the reasoning of Edwards J. in *Trepiak* as to the basis for holding that the discretion (or power) of the High Court to refuse consent under s. 22(7) is not unfettered:

> *"The Court does not agree with the submissions of the respondent to the effect that s. 22 (7) and (8) confer an arbitrary, unfettered discretion on the Court, or that there are no criteria set, or principles laid down, to govern the exercise of the discretion reposed in the Court, and that it is left to the Court alone to decide how the discretion granted is to be exercised. That is simply not the case. The Court does not accept that s. 22(7) and (8) are to be regarded as penal provisions such that they are to be afforded a strict interpretation. Rather, a teleological approach to their interpretation is required and in so far as possible they must, as required by Pupino, be afforded an interpretation that conforms with the Framework Decision. When s. 22(7) and (8) are considered in the light of the Act of 2003 as a whole, interpreted in the light of the Framework Decision (to which instrument the Act specifically provides that regard may be had in interpreting the Act), the Court is satisfied that those provisions are capable of being given a conforming*

interpretation in accordance with the principles laid down in Pupino. When they are interpreted in manner suggested it is clear that any discretion reposed in the Court is in fact greatly circumscribed and, as has been pointed out by counsel for the applicant that the governing rule is that the Court must give its consent unless there is some impediment to doing so in terms of the mandatory grounds for refusing surrender under Article 3 or one of the optional grounds under Article 4.

It should incidentally be emphasised here that when we speak of optional grounds under Article 4 the "option" referred to is not the Court's option, but rather the option of a member state to incorporate some or all of the grounds identified in Article 4 into domestic legislation to be enacted for the purpose of implementing the Framework Decision, which not being directly effective requires to be specifically implemented by each member state. Ireland has, in enacting the Act of 2003 (as amended), opted in to some, but not all, of the optional grounds identified in Article 4."

27. Apart from the further addition of an abuse of process, *Trepiak* represents a powerful analysis for holding that a circumscribed discretion is vested in the High Court pursuant to the provisions of s. 22(7) and s. 22(8) of the Act of 2003. In the view of this Court, the reasoning in *Trepiak* is not at odds with the decision in *Sliwa*. The decision in *Sliwa* contained within it recognition that further consideration would be required before the Court would definitely rule on the extent to which the power in s. 22(7) may be exercised independently of s. 22(8). The decision in *Trepiak* did not refer to an abuse of process; perhaps because abuse of process was not argued. Nonetheless, the reasoning in *Trepiak* is convincing, persuasive and does not contradict *Sliwa* in identifying a limitation on the independent exercise of a power to refuse consent. In the view of the Court, it is an authoritative decision.

Conclusion

28. Abuse of process is a ground which operates outside the wording of s. 22(8), but yet permits the High Court to refuse to give consent in furtherance of the protection of the High Court's own processes. It would take explicit language to remove the authority of the court to exercise such an inherent jurisdiction. However, apart from such a power, the Court is satisfied that the power of the High Court to refuse consent under s. 22(7) is limited to those cases which fall under s. 22(8) for the reasons which are so powerfully and cogently set out by Edwards J. in *Trepiak* above.

29. In these circumstances, the Court finds that "delay *simpliciter*" is not a ground upon which the High Court may refuse consent to a request for further prosecution (or further proceedings) against a respondent who has already been surrendered to the issuing state. The Court observes that, the constitutional rights and the ECHR rights of the individual respondent are fully protected in the process through which the High Court makes its decision under s. 22(7) of the Act of 2003. There is also complete protection from an abuse of process under the procedures operated by the courts under the said Act. In this case, there has been no abuse of process and no breach of the constitutional or ECHR rights of the respondent. In those circumstances, the Court grants consent to the issuing state to prosecute the respondent for the offence set out in the request received from the issuing judicial authority.