Neutral Citation Number: [2008] IEHC 188

THE HIGH COURT

Record Number: 2005 No: 13 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
SIMON MARTIN ROSS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 13th day of June 2008

1. The matter arising for decision on the present application for the release of the respondent following the making of an order by the Supreme Court on the 15th November 2007 and his committal to Wheatfield Prison to await his surrender to the United Kingdom on foot of a European arrest warrant, is whether on the hearing of the application for his release the cross-examination of certain deponents of affidavits filed on the application should be permitted, namely Ms. Claire Riley of the Crown Prosecution Service, London ("CPS"), Ms Melanie Cumberland BL, a barrister who has sworn an affidavit of English law on behalf of the CPS, and Mr John King BL, who has sworn an affidavit as to English law on behalf of the respondent.

2. The determination of that question inevitably involves some consideration of the issues arising on the substantive application as they were argued in relation to this discrete issue, and in so far as I need to express a view in relation to the issues giving rise to the substantive application for the purpose of reaching my conclusion in relation to the need for such cross-examination to take place, I do so conscious that on the substantive application itself further arguments and submissions will inevitably be made. I therefore wish to state that any views which I may express on the substantive issue are made in the knowledge that those views may alter when determining finally the substantive application for the respondent's release.

Background

3. On the 17th February 2005 the UK authority issued a European arrest warrant and transmitted same to the Central Authority here so that it could be endorsed for execution and so that the respondent could be arrested on foot thereof for the purpose of seeking an order for his surrender. That surrender was sought so that he could face prosecution in the UK for the offences set forth in the warrant, the details of which are not relevant for present purposes.

4. An important feature of this European arrest warrant for the purpose of the present application is that in accordance with the prescribed form for such a warrant contained in the Framework Decision, paragraph (b) thereof headed "*Decision on which the warrant is based*" was completed by stating that it was based on a warrant for the arrest of the respondent issued from Hendon Magistrates' Court on the 14th January 2003.

5. The respondent was duly arrested here on foot of the European arrest warrant on the 18th April 2005, and was remanded on bail from time to time until the application for his surrender was determined by this Court on the 15th November 2005. On that occasion surrender was refused, whereupon the applicant appealed the decision to the Supreme Court.

6. The Supreme Court heard that appeal on the 8th February 2007, and delivered its judgment on the 15th November 2007. Following delivery of judgment the order of this Court was set aside, and surrender of the respondent to the UK and his committal to prison pending the implementation of that surrender. was ordered pursuant to s. 16(1) of the Act.

7. Following the committal of the respondent to await his surrender, the respondent's solicitor was contacted by the Chief State Solicitor's office that an issue had arisen in relation to whether the underlying domestic warrant, namely that made at Hendon Magistrates' Court on the 14th January 2003 ("the domestic warrant") was still in force. The matter was mentioned in the Supreme Court on the 27th November 2007 in the light of this development. On that occasion the Supreme Court was informed by Counsel for the applicant that between the date on which the Supreme Court heard the appeal and the date on which it gave its judgment on the 15th November 2007 the domestic warrant had been cancelled. While the reason for that cancellation was not known at that stage, it appears by now that a mistake had been made, and that a fresh domestic warrant had been issued on the same day, namely 27th November 2007. The position therefore was that when the Supreme Court delivered its judgment and ordered the surrender of the respondent there was no domestic warrant in existence in the UK for the arrest of the respondent. Counsel for the respondent submitted that the appropriate course was for the Supreme Court to either set aside its order or to direct an inquiry into the lawfulness of the respondent's detention thereunder pursuant to Article 40.4 of the Constitution. Counsel for the applicant (the Minister) submitted that existence of a domestic warrant was not vital to the validity of the European arrest warrant and that same was still in force.

8. The Supreme Court considered the position and the submissions of the parties and decided that the issue of whether the cancellation of the domestic warrant, and therefore its non-existence at the time the order for surrender was made on the 15th November 2007 resulted in the unlawful detention of the respondent pursuant to its Committal Order, was a question which should be determined in the High Court at first instance, since there was no jurisdictional problem with the High Court determining that question. A stay was placed on the order for surrender.

9. On application to this Court on the following day, the 28th November 2007, this Court heard the preliminary application for an inquiry into the lawfulness of the respondent's detention, and allowed the respondent to be released on bail pending the determination of the substantive application.

The present application for leave to cross-examination deponents

10. I will set out the relevant detail from the affidavits filed on behalf of the parties, and whose deponents are sought to be cross-examined.

1. Affidavit of Clare Riley

11. Ms.Riley works for the Crown Prosecution Service in London ("the CPS") and states that after the surrender of the respondent was refused by the High Court on the 15th November 2005, the CPS was not told that an appeal against that refusal had been lodged in the Supreme Court. She states that on the 17th July 2007 the Metropolitan Police carried out their standard policy of reviewing all outstanding warrants, and that a decision was taken by them that due to the refusal of surrender this warrant could be withdrawn. She makes the point that this decision was not taken by the CPS or the issuing judicial authority, and that the decision to withdraw the domestic warrant was not communicated to the CPS, the issuing judicial authority or the Fugitives Unit. On application to Hendon Magistrates Court on the 17th July 2007, the Court was informed that surrender had been refused and the warrant was ordered to be

withdrawn.

12. Ms. Riley then states that a new warrant can be issued at any time, and that in the present case such a new warrant was issued from that Court on the 27th November 2007, and that the CPS intends to pursue the prosecution of the respondent, that the evidence is still available, that there is still a realistic prospect of a conviction, and that it was never the intention of the CPS to discontinue the proceedings.

13. She goes on to aver that under s. 142(2) of the Extradition Act, 2003 in the UK a European arrest warrant may only be issued if there is a domestic warrant in respect of the person sought to be surrendered, and that in the present case there was at the time this European arrest warrant was issued in January 2003 such a domestic warrant in existence, and that it remains valid until such time as it is withdrawn, and that there is no provision in the UK Act that a European arrest warrant is rendered invalid by the withdrawal of the underlying domestic warrant.

2. Affidavit of John King BL

14. Mr King is a barrister practicing in criminal law in London. He has been asked to advise as to relevant UK law on behalf of the respondent, and in particular in relation to the continuing validity of the European arrest warrant in this case following the withdrawal of the domestic warrant in July 2007. He exhibits the relevant Part of the UK Act, and refers to the fact that under s. 142 (2) of that Act one of the conditions to be fulfilled for the issue of a European arrest warrant is that there be a domestic warrant in existence. He accepts that there is no provision under the UK Act which states that the withdrawal of the domestic warrant invalidates the European arrest warrant, or any decided case in that regard, but expresses the opinion that "this must be the case" and that the point has yet to be decided. He is of the opinion that since a valid domestic warrant is a pre-condition to the issuing of the European arrest warrant, it follows that its continued existence is essential to the continuing validity of the European arrest warrant. He refers to the fact that there is no provision in the UK Act for the withdrawal of a European arrest warrant, whereas there is statutory provision for the withdrawal of a domestic warrant, and he opines that it was not thought necessary to include a mechanism for the withdrawal of the former since the power to withdraw the latter is sufficient to achieve the same result.

15. Mr King also makes reference to the fact that the offences against the respondent are stated in the certificate attached to the European arrest warrant not to be offences referred to in Article 2.2 of the Framework Decision. He disputes that these offences are not within those categories of offence for reasons which he sets out, and states that the fact that they were stated not to fall within the list, when they could have been, renders the warrant invalid.

16. In my view, this point is not relevant on this application since the question of whether all the requirements under the Act here have been satisfied (including in relation to correspondence) has already been finally determined. Mr King refers to a judgment of Lord Bingham in *Office of the King's prosecutor, Brussels v. Armas and others* [2005] UKHL 67, but it would appear that he does so in the context of his opinion expressed that the certificate contained in paragraph (f) of the warrant is wrong and that this invalidates the warrant *ab initio*. As I have said, I am not concerned with that opinion since surrender has been ordered by the Supreme Court which was clearly satisfied that all the requirements of s. 16, and the Act generally and the Framework Decision itself, have been complied with.

Affidavit of Melanie Cumberland BL

17. Ms. Cumberland who is an experienced barrister in the area of extradition law in England has averred that she has been asked to advise whether the withdrawal of the Hendon Magistrate's domestic warrant on the 17th July 2007 rendered invalid the European arrest warrant issued on foot of same. She was also asked to advise in relation to the point made by Mr King in his affidavit regarding the certificate provided in respect of these offences not being within the list contained in the Framework Decision. The latter part of her affidavit is not relevant for the purposes of this application for release of the respondent for the reasons already stated.

18. With regard to the first question, however, she states, having set out the history of relevant events, that under the relevant English provision in s. 142 of the English 2003 Act, a magistrate may issue a European arrest warrant if certain conditions are satisfied, among which is that "a domestic warrant has been issued in respect of the person, and there are reasonable grounds for believing that the person has committed the offence or that the person is unlawfully at large after conviction. She states that the purpose of requiring that a domestic warrant has been issued is so that the judge can be satisfied that "criminal proceedings are afoot in England and Wales in respect of the requested person", in order to ensure that the criminal proceedings for which extradition is sought are subject to judicial scrutiny, thereby guarding against the issue of a European arrest warrant on an arbitrary basis. She goes on to state that once issued, the warrant has independent legal effect which is unrelated to the continued existence or validity of the underlying domestic warrant of arrest. She opines that the present warrant was properly issued when it was issued.

19. She also opines that there is no provision in the English Act which renders such a warrant invalid if it transpires that the domestic warrant has been withdrawn or is for any other reason invalid. She refers to relevant provisions which permit the withdrawal of a European arrest warrant, and takes issue with Mr King's averment that there are none such. Her statement in this regard refers to a situation where a requesting issuing judicial authority seeks to withdraw its European arrest warrant, and where such a warrant is withdrawn, the Act provides that the person must be discharged. She goes on to state that there is no requirement, within the Framework Decision itself which provides either on a mandatory or optional basis for the non-execution of the European arrest warrant because the underlying domestic warrant has been withdrawn or otherwise invalidated. She states that this fact reflects the spirit and intention of the Framework Decision which requires all parties to conduct the proceedings in a spirit of good faith and comity, and that it is to be presumed that if the requesting authority no longer wishes to pursue proceedings against the respondent it will withdraw the European arrest warrant, and that the withdrawal of the domestic warrant in this case is irrelevant in that regard. She refers to the fact that the withdrawal of the domestic warrant in this case arose due to a miscommunication as I have already described. She states that the issue of the fresh warrant on the 27th November 2007 indicates that the issuing judicial authority wishes to prosecute the respondent, and she believes that there is no reason why the application for his surrender should not continue.

Affidavit of Det. Constable Jan Taylor

20. For completeness I should state that a further affidavit has been sworn on behalf of the issuing judicial authority, namely by Det. Constable Jan Taylor. This affidavit deals with certain factual matters relevant to the question of the continuing validity of the European arrest warrant after the withdrawal of the domestic warrant. However, so far as I am aware from the papers provided to me, and from the Court file, no Notice to Cross-Examine Det. Constable Taylor has been served, and therefore I do not need to consider whether he should be permitted to be cross-examined.

The parties' submissions

21. Although the applicant (The Minister) has himself served a Notice to Cross-Examine in respect of the respondent's deponent, Jon King BL, Robert Barron SC for the applicant submits that the Court should not authorize such cross-examination of any of the

deponents in question since the question of whether the domestic warrant must exist at all times following the issue of the European arrest warrant is a matter to be determined under English law. He refers to the fact that it has been averred by Mr King on behalf of the respondent that this point has yet to be decided in the English courts. Mr Barron has referred to the judgment of Fennelly J. in *Minister for Justice, Equality and Law Reform v. Stapleton*, Unreported, Supreme Court, 26th July 2007 where the learned judge, referring to the principle of mutual recognition underpinning the arrangements for surrender contained in the Framework Decision, stated that "*the principle of mutual recognition applies to the judicial decision of the judicial authority of the issuing Member State in issuing the Arrest Warrant*". In the context of the present case, that judicial decision in question is that by which the European arrest warrant was issued, and perhaps also the order by which the fresh domestic warrant was issued by the Magistrate at Hendon Magistrates' Court on the 27th November 2007.

22. Mr Barron referred also to the judgment of the Chief Justice *in Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 IR. 148 in which the issue was whether the respondent was entitled to be provided with a copy of the domestic warrant in order to assist him in rebutting the presumption that the European arrest warrant in that case had been "duly" issued in the requesting state for the purpose of s. 10 of the Act. He referred also to the judgment of Finlay Geoghegan J. in *Minister for Justice, Equality and Law Reform v. O'Fallúin,* Unreported, High Court, 9th September 2005. In that case, the learned judge concluded that the use by the Oireachtas in s. 10 of the Act of the words "duly issues" in respect of a European arrest warrant meant that on the evidence and admitted facts of that case, the Court was bound to inquire into the validity of the European arrest warrant, but that in doing so, the Court should do so by reference to the Act itself, when construed in accordance with the Constitution. In a further judgment in the same matter dated 14th October 2005, Finlay Geoghegan J. for the reasons stated therein found that the European arrest warrant issued in England had been "duly issued" in that jurisdiction. She had before her competing affidavits of English law, but there was no application for leave to cross-examine the deponents. However, in so far as the respondent might seek to rely on these judgments, Mr Barron submitted that they are confined to a question arising in relation to s. 10 of the Act, and that accordingly they are not relevant to the issue of whether the withdrawal of the domestic warrant in the present case invalidates the European arrest warrant issued on foot of it.

23. Mr Barron highlights that in the present case, in any event, the issue is not whether or not at the time the European arrest warrant was issued on 17th January 2005 there was or was not a valid domestic warrant in existence, since there is no doubt about that, and that the question arising in this case is whether *the subsequent event* of the domestic warrant being withdrawn has the effect of undermining and invalidating the European arrest warrant. He submits that there is no other provision contained in the Act other than the reference to "*duly issues*" in s. 10 thereof which suggests some form of inquiry should be embarked upon by this Court as to whether or not the European arrest warrant is valid, and he refers to the numerous judgments of both this Court and the Supreme Court which have highlighted the principle of mutual recognition of judicial decisions and the high level of trust and confidence existing between member states of the European Union which underpin the arrangements for the European arrest warrant in the Framework Decision.

24. Mr Barron submits that it is unnecessary for this Court to hear any cross-examination of these deponents in order to determine the question at the heart of this application, and that the question must be decided by reference to the wording of the Act here and by reference to the interpretation of that Act in conformity with the objectives of the Framework Decision, and not by reference to English law.

25. Aileen Donnelly SC on the other hand submits that the Supreme Court in its ruling on the 27th November 2007 has expressly stated that the issue should be determined by the High Court. She identifies two issues, namely whether the withdrawal of the English domestic warrant renders the European arrest warrant invalid under English law, and secondly, whether under the Irish 2003 Act the withdrawal of the domestic warrant was a bar to the respondent's surrender being ordered.

26. Ms. Donnelly submits that just as Finlay Geoghegan did in the *O'Fallúin* case referred to, this Court must decide on the validity of the European arrest warrant as a matter of English law. In that case the question was whether the English domestic warrant was spent by the time the European arrest warrant was issued, since the respondent had been arrested here previously under the previous arrangements for surrender between this State and the United Kingdom under Part III of the Extradition Act 1965, as amended. It was contended that the arrest on foot of it meant that the domestic warrant had been executed and that its life ended at that point. As a matter of English law, the learned judge decided that this was not the case. She had before her competing affidavits of English law in this regard, and referred to the fact that neither deponent was sought to be cross-examined, and Ms. Donnelly submits that in so stating the learned judge was clearly not foreclosing on the possibility that in some circumstances such a cross-examination would be possible were it considered necessary.

27. Ms. Donnelly refers in particular to a passage in the judgment of Finlay Geoghegan J. in *O'Fallúin* dated 14th October 2005 where she referred to the fact that the two UK lawyers who had sworn affidavits as to English law "*appear to be in agreement that the condition in s. 142(2) of the Extradition Act, 2003 that a domestic warrant 'has been duly issued in respect of the person' means not only that a domestic warrant has been issued but also that the domestic warrant remains in force at the time of the application for the European arrest warrant*". She seeks support from this passage for her submission that the corollary is that the absence of a domestic warrant at any time after the issue thereof invalidates it.

Conclusions

28. I have concluded that cross-examination of these deponents should not be ordered because, unlike the case of O'Fallúin which has been referred to, albeit that no cross-examination was sought in that case, the issue in this case is not whether at the time the European arrest warrant issued from the issuing judicial authority there was in existence a valid and enforceable domestic warrant for the arrest of the respondent. In the present case, an undisputedly valid European arrest warrant issued in England, which was transmitted to the Central Authority here, following which it was endorsed for execution here by the High Court, and on foot of which the respondent was duly arrested and brought before the High Court as required. The issue is not one arising under s. 10 of the Act.

29. If the issue was one similar to that in *O'Fallúin*, I would not foreclose on the possibility that where there were conflicting affidavits of foreign law, it might be necessary to grant an order for leave to cross-examine the competing foreign lawyers to determine, if the issue was raised appropriately, whether prior to the issue of the European arrest warrant, there was a valid domestic warrant in existence. But the principle of mutual recognition of orders made by judicial authorities in another Member State is at the heart of the Framework Decision, and the jurisprudence in this area has moved on since the time *O'Fallúin* was decided. That is stated by way of an observation only.

30. I would also say with particular reference to the present case, though it could apply also to a case such as *O'Fallúin* that the comity of courts as well as the established principle of mutual recognition of judicial decisions among Member States of the European Union means that a court in this jurisdiction ought not, except in a rare and exceptional circumstance, reach a conclusion in relation to such a judicial decision which is tantamount to quashing it on the basis that under the law of the country from where it issued it

was an invalid order. In this regard also I would say in the present case that the question of the continuing validity of the European arrest warrant must be judged in accordance with the Act here, properly interpreted in the light of the Framework Decision. It is a question of Irish law. For this reason alone, I find it unnecessary for cross-examination of these experts in English law to be cross-examined in order to address the differences of opinion which divide them.

31. It must also be borne in mind that what the respondent seeks to do effectively in the present case is to quash the UK European arrest warrant on the basis that its continued existence as an instrument for seeking his surrender to the UK had come to an end in July 2005 when the domestic warrant was withdrawn and that the issuing of the fresh domestic warrant on the 27th November 2007 is insufficient to bring it back to life. If that be the case it is a classic situation where relief by way of an order of *certiorari* could be sought by the respondent before the courts in England. The fact that he is residing in this jurisdiction is no bar to his right of access to the English courts. I see no reason why he is not in a position to bring an application for *certiorari* there to quash the European arrest warrant issued, as it has been, by a Magistrate judge. He has not done so. If it be contended that it is an invalid warrant under English law, there is a procedure there to test that point before the courts there and have the issue decided. A successful application for *certiorari* would have the effect that the warrant would have to be withdrawn by the issuing judicial authority. There is procedure for doing this under the English Act, as has been averred to by Melanie Cumberland. The Courts here should not lightly, if at all, usurp the English courts' jurisdiction to scrutinize and if necessary quash a European arrest warrant issued by an inferior court, namely Bow Street Magistrates Court. I have no lawful basis for believing that a judicial authority in the UK would seek to act other than in good faith and in accordance with law, including its obligations under the Framework Decision.

32. Subject to hearing further argument on the substantive application, it seems to me that until such time in the present case as the European arrest warrant is withdrawn, by the issuing authority, whether following a quashing of it or not, this Court is entitled to acknowledge it at this stage as a valid European arrest warrant on the basis of mutual recognition. When it was issued it met the requirements of the Irish Act. Unlike the O'Fallúin case, there is not even any particular provision of the Act here which can be argued to give this Court an entitlement to scrutinize the continuing validity of the warrant under UK law.

33. As I heralded at the outset of this judgment, it was inevitable that in addressing the discrete issue for determination herein I would trespass into the area of expressing views which touch upon the question to be finally determined. The views I have expressed are expressed for the purpose of the decision not to permit cross-examination of the deponents concerned. They are confined to that, and I leave open the prospect of further argument on the areas which I have touched upon. One way or another such cross-examination is not in my view necessary.