

THE HIGH COURT

[Record No. 2005 378SS]

IN THE MATTER OF ARTICLE 40.4 OF THE CONSTITUTION
AND OF THE HABEAS CORPUS ACT, 1972

BETWEEN

KENNETH DUNDON

APPLICANT

AND
THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

NOTICE PARTY

Judgment of O'Sullivan J. delivered the 3rd day of May, 2005

Introduction

1. The applicant seeks his immediate release from the custody of the respondent on the ground that the order made directing his surrender to the Member State (England) pursuant to a European arrest warrant was not made within the time specified by the European Arrest Warrant Act, 2003, ("the Act") and the (European Union) Council Framework Decision of 13th June, 2002.

The key dates

2. The arrest warrant was issued on 29th January, 2004. The warrant was endorsed for execution on 2nd February, 2004.

3. The applicant was arrested on 11th February, 2004, and in due course brought before the High Court so that an order directing his surrender to the English authorities should be made.

4. Certain undertakings required by the Act were not before the High Court and the matter was adjourned. Subsequently undertakings were furnished and an issue arose as to whether they satisfied the requirements of the Act. On 14th May, 2004, the High Court (Ó Caoimh J.) decided that the undertakings did comply with the requirements of the Act and ordered the surrender of the applicant. The applicant appealed and on 16th March, 2005, the Supreme Court (per Denham J.) dismissed the appeal of the applicant and confirmed the order of the High Court. On the same day, application was made to me for an inquiry under Article 40 of the Constitution into the legality of the continued detention by the respondent of the applicant.

5. Counsel have informed me that mention was made in the course of the hearing before the Supreme Court that a further legal challenge would be mounted in relation to time limits and that it was indicated by the Supreme Court that that was a matter for another day. It is clear, accordingly, that those proceedings constitute no impediment to my hearing the instant application.

6. The applicant submits that because neither the order of the High Court nor of the Supreme Court was made within the sixty days specified in the Act and in the Framework Decision, the arrest warrant and all procedures on foot of it have lapsed, without prejudice it is submitted to the possibility of a fresh request being made. The 60 days can in certain circumstances be extended to 90 days but this has not been done in the present case. In any event, the order of the High Court was made after the expiry of ninety days from the date of the applicant's arrest.

The relevant provisions

The Act of 2003

7. I set out the following definitions from s. 2 of the Act:-

'European arrest warrant' means a warrant, order or decision of a judicial authority of a Member State issued under such laws as give effect to the Framework Decision in that Member State for the arrest and surrender by the State to that Member State of a person in respect of an offence committed or alleged to have been committed by him or under the law of that Member State;

'Framework Decision' means Council Framework Decision of 13th June, 2002, on the European arrest warrant and the surrender procedures between Member States, the text of which –

(b) in the English language, is set out in Part B of the Schedule;

""Issuing judicial authority' means, in relation to a European arrest warrant, the judicial authority in the issuing State that issued the European arrest warrant concerned;"

'Issuing State' means, in relation to a European arrest warrant, a Member State designated under s. 3, a judicial authority of which has issued that European arrest warrant;

8. Section 10 in part provides as follows:

10. - Where a judicial authority in an issuing state duly issues a European Arrest Warrant in respect of a person –

(a) against whom that state intends to bring proceedings for the offence to which the European arrest warrant relates,...

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision be arrested and surrendered to the issuing State.

9. Section 16 of the Act in part provides as follows:

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....

(3) An order under this section shall not take effect until the expiration of 15 days beginning on the date of the making of the order.

(4) When making an order under this section the High Court shall also make an order committing the person to a prison... and shall inform the person –

(b) 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.

(5) Subject to *subs. (6)* and *s. 18*, a person to whom an order for the time being in force under this section apply shall be surrendered to the issuing State not later than ten days after –

(a) the expiration of the period specified in *subs. (3)*, or

(b) such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority of the State and the issuing State.

(6) where a person 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 complaint are pending.

(7) subject to *subs. (9)* a person, to whom an order for the time being in force under this section applies, who is not surrendered to the issuing State in accordance with *subs. (5)*, shall be released from custody immediately upon the expiration of the ten days referred in *subs. (5)*, unless, upon such expiration, proceedings referred to in *subs. (c)* are pending.

(8) where the High Court decides not to make an order under this section –

(a) it shall give reasons for its decision, and

(b) the person shall, subject to *subs. (9)* be released from custody.

(10) if the High Court has not, after the expiration of 60 days from the arrest of the person concerned under *s. 13* or *s. 14*, made an order under this section or *s. 15*, or has decided not to make an order under this section, it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reasons therefor specified in the direction, and the Central Authority in the State shall comply with such direction.

(11) this subsection is in precisely the same terms as *subs. (10)* with the exception that the figure 90 replaces the figure 60 in the first line.

(18) – (1) The High Court may, if satisfied that circumstances exist that would warrant the postponement, on humanitarian grounds, of the surrender to the issuing state of a person to whom an order under *s. 15* or *s. 16* applies direct that the person's surrender be postponed until such date as the High Court states that, in its opinion, those circumstances no longer exist.

10. Some provisions of the Counsel Framework Decision of 13th June, 2002, are referred to as follows:-

Amongst the recitals No. 1 makes it clear that extradition procedures should be speeded up in cases of persons suspected of having committed an offence, No. 4 refers to the simplification of extradition procedure between Member States, No. 10 acknowledges the need for a high level of confidence between Member States and specifies that the implementation of the European arrest warrant may be suspended only in the event of serious and persistent breach, No. 11 states that the European arrest warrant should replace all previous instruments concerning extradition and No. 12 acknowledges that the Framework Decision respects fundamental rights and specifically precludes interpreting the Framework Decision in a discriminatory way. Moreover, Member State is not to be prohibited thereby from applying its constitutional rules relating to due process or other aimed fundamental rights.

I refer in more detail to the some provisions of Article 17 of the Framework Decision as follows:

3. In other (i.e. non-consent) cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paras. 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute a European arrest warrant.

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it

shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the counsel with a view to evaluating the implementation of this Framework Decision at Member State level.

11. Article 23 provides, in part, as follows:

2. He or she (i.e. the person requested) shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.
5. Upon expiry of the time limits referred to in paras. 2 – 4, if the person is still being held in custody he shall be released.

Applicant's submissions

12. The submissions made by Michael O'Higgins S.C. for the applicant may be referred to in summary form as follows:-

(a) Section 10 of the Act explicitly requires that the requested person shall be arrested and surrendered to the issuing State "in accordance with the provisions of this Act and the Framework Decision." He made it clear that his case is based not on s. 16 of the Act but on the provisions of the Framework Decision itself. These require at Article 17 that a final decision on the execution of the European arrest warrant should be taken within a period of 60 days after arrest of the requested person. It is common case that the order of Ó Caoimh J. was made more than 90 days after the date of arrest.

Section 16 of the Act deals with the obligation of the High Court in making an order directing the surrender of a requested person and at subs. 10 reflects the 60 day period established in Article 17 of the Framework Decision by requiring that if the order has not been made within that time the requesting authority and Eurojust must be informed. The 90 day extended period in Article 17 is also reflected in a similar way in subs. 11 of s. 16 of the Act. It is clear, however, that because the surrender of a requested person must be done in accordance not only with the Act but with the Framework Decision that therefore the mandatory requirements of Article 17 (3) include not only the reporting obligations set out in s. 16(10) of the Act but also include any limitations contained in Article 17 of the Framework Decision. Those limitations clearly establish a competence to make the final decision within a period of 60 days (or 90 in certain cases, not the present one) but not thereafter. It follows as a necessary consequence that, there being no jurisdiction to make a final decision after the time specified the requested person must be released, the request having lapsed.

This interpretation is not only consistent with a recognition of the applicant's fundamental rights, themselves clearly intended as a matter of interpretation to be respected in the implementation of the framework decision, but it is also consistent with the purpose of that decision which is, *inter alia*, to speed up extradition procedures in cases of persons suspected of committing offences.

(b) It is clear that an individual can pray in aid the provisions of the Framework Decision: for example Article 20 dealing with privileges and immunities provides that the (60 day/90 day) time limits shall not start running where these have been waived unless and from the day when the relevant authority is so informed. It is submitted that this is intended to deal with a situation where a requested individual who enjoys a privilege or immunity might secretly waive the same but not inform the State until the 60/90 day time limit had elapsed and then contend that it was too late to make a surrender order. This concern demonstrates, in turn it is submitted, that the 60/90 day time limits were provisions that an individual (as opposed to a Member State) was entitled to rely upon, if albeit subject to these requirements in specific cases. If the time limits were not intended to benefit an individual there would be, it is submitted, no need for these specific provisions relating to privilege or immunity.

Moreover, it is submitted that Article 17(5) which requires that as long as an executing judicial authority has not taken a final order "it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled" are consistent (only) with an intention that the provision in Article 17 (limiting time for the making of the order to within 60/90 days) exists for the benefit of the requested person in a way that enables him to avail of them in the instant proceedings. Otherwise, these provisions would be a gross violation of his fundamental rights.

(c) It was further submitted that the respondent's reliance (in the context of an "*inclusio unius est exclusio alterius*" argument) on the explicit provision in certain circumstances, not the present ones, for the release of the requested person in both the Act (as in s. 16(7)) and the Framework Decision as in Article 23(5) gives rise to certain difficulties. For example, s. 16(7) provides for the release of a person immediately on the expiration of 10 days following the coming into force of an order directing his surrender to the requesting authority unless proceedings under Article 40 of the Constitution are pending (and also subject to further provisions relating to independent criminal procedures within the state, which are not relevant to this argument). The point made, in this specific context, is that no provision is made for an appeal from the order of the High Court as distinct from an application under Article 40 of the Constitution. That being the case there is clearly a difficulty in the present case where there was such an appeal but no statutory provision analogous to that authorising continued detention in the case of an Article 40 application. In the present case the order of Ó Caoimh J. did, certainly, specify that there should be a stay on his order in the event of an appeal but, at the least, it is submitted that there is uncertainty in relation to these provisions – something which did not apply under the old provisions which gave the court jurisdiction to order the release of a requested person in similar circumstances.

(d) It is submitted that the onus is cast upon the High Court to keep itself informed as to the progress of an application before it under s. 16 of the Act and in particular to conduct an inquiry once the 60 days have elapsed within which it is required to make a final decision.

Respondent's submissions

13. Mr. O'Connell S.C. submitted on behalf of the respondents as follows:

- (a) It should not be forgotten that the High Court has jurisdiction to grant bail to a requested person similar to its

ordinary bail jurisdiction. The applicant in the present case has been refused bail but another might be granted it.

(b) It is clear from recital 10 that the European arrest warrant mechanism can be suspended in the case of a Member State which is in serious and persistent breach of its obligations. This is the context in which Article 17 must be interpreted. The Article imposes time limits and consequential reporting obligations on Member States where these have not been attained. It does not, crucially, provide that where those time limits are not attained the requested person has a right to be released. Such a right is spelt out neither in the Framework Decision nor in the Act itself.

(c) The Act is intended to give effect to the Framework Decision but does not incorporate it in its entirety as part of our domestic law. It does incorporate specific provisions, for example the form of the European arrest warrant itself; but Article 17 is not so incorporated. The judgment of O'Higgins J. in *Sofinetti v. Judge David Anderson & Others* (unreported) High Court, 18th November, 2004, is relied on in this regard.

(d) Nor is the present statute a penal statute. Murray CJ in a recent case described the extradition process as an administrative process. Even if it were a penal statute there is no ambiguity and therefore nothing to be interpreted in favour of liberty of the applicant because of lack of clarity in the relevant provisions.

(e) Even if the Framework Decision is incorporated 'in toto', as part of our domestic law Article 17 notably does not make provision for the release of the requested person in sharp contrast to Article 23(5) which does.

Conclusions

14. It is noteworthy that s. 16 of the Act does not, at least explicitly, specify that in the event that the High Court has not made an order, or a final order, directing the surrender of the requested person within the 60 (or 90) days referred to in subs. (10) and (11) therein, the requested person shall be released, but merely specifies as a consequence that the requesting State and, where appropriate, Eurojust shall be informed and given reasons. It is for this reason, I assume, that the applicant has not based his case on s. 16 of the Act. Wisely, it would seem to me, because s. 16 does indeed address itself to circumstances where a requested person might be released, namely in subs. 8 where it is provided that where the High Court decides not to make an order it shall give reasons and (subject to ongoing independent criminal procedures in this country) "the person shall...be released from custody."

15. In my opinion if s. 16 were to be construed on its own the inevitable interpretation would be that it intends the release of the requested person where the High Court decides not to make an order but where it has reached no decision within 60 (or 90) days the intention is not that the requested person be released but simply that the specified authorities be informed. So far as the legislature is concerned therefore where an order has not been made after the specified periods there is no intention to provide for the release of the requested person.

16. Assuming the applicant is correct in his submission that the provisions of the Framework Decision apply to the processing in this country of the European arrest warrant I turn now to consider what those provisions are.

17. The first article of the Framework Decision itself is headed "definition of the European arrest warrant and obligation to execute it". The obligation to execute the European arrest warrant is spelled out as follows:

"2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."

18. It is further provided that the decision 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.

19. It is worth pausing to recall that the delays, now complained of by the applicant, arose in substantial measure because he appealed, as he was entitled to do, the decision of the High Court dealing with criticisms he had advanced concerning undertakings furnished to that court. These arguments failed in the High Court and failed in the Supreme Court. Inevitably the hearing of these arguments took time and, also inevitably, meant that the final decision of the Supreme Court would occur well outside the 60 (or 90) days contemplated by the Framework Decision and indeed specified in the Act.

20. Against this background, nonetheless, the applicant has submitted that Ireland when it signed up to the Framework Document knew that it could never comply with the mandatory time limits as interpreted by the applicant. It should have procured some form of exception but did not do so and is now fixed with a timetable with which in reality it can never comply.

21. On the other hand it might be thought that the acknowledgement that fundamental rights of requested persons and the principles recognised by Article 6 of the Treaty on European Union indicates an intention that the Framework Decision must be construed so as to facilitate, within the overall process of extradition, the making by a requested person of reasonable argument to the Irish Courts directed to gaining his liberty.

21. Bearing the foregoing in mind I approach the interpretation of the Framework Decision on the basis that while a European arrest warrant must be dealt with as a matter of urgency there is nonetheless in the Framework Decision itself an acknowledgment that the fundamental rights of a requested person which include a right to challenge the legal validity of the process must be respected (to use the word in recital 12) notwithstanding that this might cause delay in an instant case.

22. It is noteworthy that Article 23 which deals with time limits for the surrender of the person concerned *after* the final decision on the execution of the European arrest warrant has been made, does provide for his release if he is still being held in custody beyond the short time limits specified (save in exceptional circumstances which are identified). Such a requirement for release is notably absent from Article 17 which deals with time limits and procedures *before* the making of the final decision.

23. My conclusion is that the parties to the Framework Decision included the time limits before the final decision to express their determination that the extradition process would be speedy and that the Member States would be kept aware of each other's standard of performance in this context. The time limits specified for surrender *after* the final decision are in a different category, namely, they are mandatory in principle with the result that the requested person is intended to be released if they are not complied with.

24. I can see no other reasonable interpretation of the striking difference between these two sets of provisions and indeed given the

potential for delay outside the control of a Member State in conducting the process up to the making of the final decision, it is entirely understandable that the parties to this decision should not have intended the immediate release of a requested person in the event that a final decision is not made by a Member State within the specified period in any particular case. Such a consequence would, in my opinion, have to be spelled out clearly and unambiguously given the primary obligation on participating Member States to execute the European arrest warrant as set out in Article 1.

25. Even assuming, without explicitly so finding, that Article 17 has been incorporated word for word into the Act, I cannot agree that it provides that the consequence of the failure of the High Court to make a final order within the time specified therein (whether 60 or 90 days) is that the applicant is entitled to immediate release.

26. I cannot see that the argument based on Article 20, to the effect that the time (i.e. the 60 or 90 days) ceases to run in the case where privilege or immunity is waived until the relevant authority is informed of such waiver, means that the relevant provisions are inevitably to be construed as for the benefit of the individual as distinct from their being included so as to obtain the general objective of speedy expedition and an information and monitoring requirement where specified targets are not attained. The provision that secretly waived (so to speak) privileges or immunities should not count against the Member States makes as much sense in this context as in the one contended for by the applicant.

27. A further submission by the applicant relates to s. 16(7) of the Act, which where relevant provides that a person shall be released from custody immediately upon the expiration of the ten days following the coming into force of an order of the High Court, save where such order is challenged under Article 40 of the Constitution. Because no provision is made for continued detention in the case of an appeal (as distinct from an Article 40 challenge) it is submitted that here is at least a lacuna and an entitlement on the part of an appealing requested person to immediate release.

28. This submission seems to me to ignore the qualification in subs. 7 which refers to a person "to whom an order for the time being in force under this section applies." A High Court order under appeal is not in any proper sense "in force". Furthermore, the High Court does not take effect until the expiration of fifteen days beginning on the date of the making of the order and the requested person is not entitled to release as of right for a further period of ten days. The usual time for appeal is twenty-one days and if an appeal is lodged then the statutory provisions relating to release contained in subs. 7 do not apply. Whilst one may be able to posit time sequences which do not fit into the above standard provisions, I cannot see anything in s. 16(7) which supports the contention that the Act or the Framework Decision or both should be construed in the manner contended for by the applicant.

29. In the result, I am satisfied that the applicant is in lawful detention and is not entitled to release. It should be clear from the foregoing, in addition, that there is no bar in principle in my opinion to the implementation of the order directing surrender of the applicant to the appropriate English authorities, and (subject to the applicant's right of appeal) I propose to make whatever order is appropriate in that regard.