Neutral Citation Number: [2005] IEHC 284

THE HIGH COURT

Record Number: 2005 No. 1142 SS

IN THE MATTER OF ARTICLE 40.4 OF THE CONSTITUTION, AND THE HABEAS CORPUS ACT, 1782.

BETWEEN

MICHEÁL Ó FALLÚN

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

NOTICE PARTY

Judgment of Mr Justice Michael Peart Delievered on the 10th Day of August 2005

1. The applicant is detained in Cloverhill Prison pursuant to an order of this Court made pursuant to the provisions of s. 13(5) of the European Arrest Warrant Act, 2003, as amended, and following his arrest on the on foot of a European Arrest Warrant issued in the United Kingdom on the 21st June of 2004, which was endorsed for execution in this State by order of this Court made on the 5th July 2005.

2. He claims that his detention is unlawful on the basis that in somewhat unusual circumstances, though on all fours with one other case, namely *O'Rourke v. The Governor of Cloverhill Prison* [2004] 2 I.R. 456, the European Arrest Warrant dated 21st June 2004 is invalid because it is based on a warrant of arrest issued at Bow Street Magistrates Court, London which itself must be regarded as unlawful and void, having regard to what is stated in the O'Rourke case.

3. In that case, the Supreme Court held that since the warrants in question had not been "produced" to the Commissioner before the 1st January 2004 (the date of the coming into operation of the 2003 Act and therefore the operative date for the repeal of Part III of the 1965 Act), although they had been physically received by a member of his office staff, they were not saved by the transitional arrangements as provided by s. 50(2)(a) of the 2003 Act. In those circumstances the warrants in that case, which were UK warrants to be backed here under the old arrangements, were described by Denham J. as "void" and "not lawful". She concluded as follows:

> *"Consequently, I am satisfied that the saver in the Act of 2003, applying the law in the Act of 1965, does not apply. On the evidence before the court, both the production to and the endorsement by, the Commissioner were in January 2004. This means that the applicable law was not that of the Act of 1965. Consequently the warrants were void. I am satisfied that in the light of the clear and unambiguous words of s. 43 of the Act of 1965, it should be interpreted on its plain words to which ordinary meaning should be given. In these circumstances the warrants were not produced to the Commissioner in 2003 and therefore the Act of 1965 does not apply. Consequently the warrants are not lawful."*

4. It is worth noting at this point that at the conclusion of her judgment the learned judge stated:

> *"For the reasons given, I would allow the appeal and order the release of the applicant. Nothing in this judgment should be construed as a bar to procedures under the new legislation. It remains open to the relevant authorities to consider proceeding under the Act of 2003."*

5. That is what they have now done, and have done so by the use of the same warrant. They have not obtained a fresh warrant from Bow Street Magistrates Court.

6. It is a fact that in the present case, the applicant was arrested on the 8th January 2004 on foot of a warrant backed/endorsed by an Assistant Commissioner on the 2nd January 2004, under the old Part III procedures of the 1965 Act. The warrant in question had, just as in the O'Rourke case, been received by the Commissioner's office prior to 1st January 2004 but not "produced" to him until the 2nd January 2004, and therefore suffered from the identical infirmity found to exist in the O'Rourke case. Following the O'Rourke decision on the 13th May 2004, the application for an order for surrender of the applicant on foot of that endorsed warrant was withdrawn and he was discharged by order of the Court.

7. In this regard, I note from a letter dated 21st June 2004 from the Chief State Solicitor's office to the Attorney General that following the decision of the Supreme Court arrangements had been sought to be put in place between Counsel for the applicant and Counsel for the State so that the application for the order under s. 47 of the 1965 Act could be withdrawn and the applicant's discharge obtained. It had been intended to do that on the 15th June 2004, but it appears that the applicant's Counsel was unavailable for that date and so it was arranged that it be done on the 29th June 2005, being a date to which the applicant had been remanded on bail in any event. In fact that application was made on the Attorney General's application on the 22nd June 2004 - a day after the day on which the UK authorities applied for and obtained the European Arrest Warrant on foot of which the applicant was arrested, so that on that date the s. 47 application, though intended to be withdrawn on the next day, was still before this Court. Nothing of importance turns on that.

8. Kieran Kelly BL for the applicant submits that this application for withdrawal of the application following the Supreme Court decision represents an acknowledgement that the warrant dated 16th December 2003 issued by Bow Street Magistrates Court, London, was also "void" and "not lawful", for the same reasons in O'Rourke, and that accordingly it could be a proper basis for the issuing by the UK authorities of the European Arrest Warrant on the 21st June 2004. That being the case, Mr Kelly submits that if the Court had been aware of all these matters on the 5th July 2005 when it ordered the endorsement of the European Arrest warrant on that date, it would have refused to endorse that warrant for execution here on the basis that it was predicated on a "void" warrant from Bow Street Magistrates Court dated 16th December 2003.

9. In suggesting that this Court should not hesitate to find the underlying warrant dated 16th December 2003 to be void, and therefore also the European arrest warrant dated 21st June 2004, Mr Kelly has sought urge the judgment of McLoughlin J. in *State (Hully) v. Hynes* 100 I.L.T.R 145 upon the Court. That was a case in which allegations were made by the prosecutor in habeas corpus proceedings that the English warrant which was backed here and on foot of the prosecutor had been arrested had been fraudulently obtained. It appears that the warrant was backed here on the basis that the offence set out therein was an ordinary criminal offence, and not a revenue offence, the latter being a category of offence which this State (and the United Kingdom) would not act to enforce. The question raised was if the warrant in that form had been obtained by a "trick", as it were by concealing the reality that it was a revenue offence, then the endorsement of it was also a trick, and would fatally infect everything which followed.

McLoughlin J. states at page 174:

> *"There is nothing to show how this warrant came to be in this country and nothing to indicate if any steps were taken to investigate the allegation of fraud in the obtaining of the warrant……."*

10. Mr Kelly relies on the following passage which appears earlier on page 174:

> *"There is nothing very solemn about the judicial act challenged in this case -- the issue an arrest warrant by a magistrate on an ex parte information of a private informer. To declare such an act to be vitiated is not a matter of great consequence, To do so, however, may give rise to this apparent inconsistency that, whereas the Garda Siochana may be justified in executing an English warrant on its face legal, the High Court may declare it to be vitiated and illegal. The answer is that there is no duty on the Garda Siochana to look behind the warrant but there is a constitutional duty imposed on the High Court to do so when relief by way of Habeas Corpus is sought."*

11. If there was deception in the obtaining of that warrant, clearly the effect was to try and achieve the extradition of someone who would otherwise be entitled not to be extradited on the well accepted basis that extradition would not in those days be ordered where the person was sought to face a revenue charge. Such an eventuality perpetrated by a fraud is one against which any person present in this State would be entitled to protection against the deprivation of his/her liberty.

12. That is a great distance from the situation from the present case, where due respect should be given to a judicial act of another sovereign state. There is no suggestion or hint of fraud or underhandedness in the manner in which the European arrest warrant in this case was obtained in the United Kingdom, or the warrant on which it is based, namely that dated the 16th December 2003. The latter was a perfectly correctly and properly obtained warrant for the arrest of the applicant, so that it could be transmitted to this jurisdiction to be backed in the way then pertaining (or so it was thought), so that it could thereafter be executed here by An Garda Siochana. What happened simply was, as in the O'Rourke case, that it had not been "produced" to the Commissioner prior to the 1st January 2004, and could not thereafter operate as a warrant for the purpose of Part III of the 1965 Act, since the latter had been repealed in respect of such a warrant by the 2003 Act, and replaced by the procedures provided for by that Act for a European arrest warrant. An English warrant is a judicial instrument in that jurisdiction having full power and effect there. When it arrived in this jurisdiction under the 1965 Act procedures it was lifeless, empty and, one could say, "void", as far as having any effect in this jurisdiction, until life is breathed into it here by a proper endorsement under Part III. Any action on foot of it prior to that would be "not lawful" and it would not have been rendered a lawful document here until such life had been properly breathed into it. This is the sense, as I see it, and I say this with all possible and due respect to the already clear language of the judgment of Denham J. in O'Rourke, in which the warrants in O'Rourke are stated to be "void" and "not lawful". They had not had that necessary life breathed into them here in order to make them lawful and operative here. They remained lawful as far as their efficacy in the United Kingdom is concerned.

13. There can be no question but that if, on any date subsequent to the Supreme Court decision in O'Rourke the applicant in this case had set foot in the United Kingdom he could have been validly arrested on foot of the warrant dated 16th December 2003. It remained valid I am sure as far as the UK authorities are concerned, and they therefore based the issue of the European arrest warrant on it. Alongside that reality from the UK perspective, sits the judgment of Denham J. in O'Rourke in which she has described the warrants therein (and, by extension, that in the present case) as "void" and "not lawful".

14. However, it must in my view, and of course I say this with all the respect due to the learned judge's judgment, be the case that the learned judge cannot have intended to express such a view in a way which impugned and condemned the inherent integrity of the warrant as a warrant in the United Kingdom, other than in the context of it being a warrant under or for the purposes of the repealed Part III of the 1965 Act. In other words, the voidness and unlawfulness was *as an endorsed warrant* under Part III of 1965 Act so that any arrest on foot of it could not be lawful.

15. The Courts of one sovereign state refrain from attempting to declare unlawful in a judicial review sense the actions of an administrative body in another sovereign state. Similarly they will refrain from doing so in respect of an order made by the court of such a state. This results from the respect which the Courts of one State hold for those of the other - the comity of Courts, and as part of the comity of nations, a principal referred to by Denham J. herself in Attorney General v. Parke unreported, Supreme Court, 6th December 2004, when, referring to the procedure for extradition, she stated:

> *"It is a unique procedure where the court holds an inquiry as to whether the criteria set out in the Extradition Act 1965, as amended, has been met. Further, this law has been established against the back drop that the State has entered into an agreement with the requesting State that there be extradition arrangements between the two States. Thus these cases are founded on the comity of nations and the comity of courts."*

16. That comity, seen in the mutual recognition of the judicial instruments of Member States and spirit of mutual co-operation and trust between Member States, underlies the arrangements agreed upon by the European Council on the 13th June 2002 in the Framework Decision which was given effect to by the 2003 Act. It would only be in most exceptional circumstances of manifest bad faith giving rise to a breach of a fundamental right of a person sought that this Court could consider not recognising the inherent integrity of a warrant from a Member State such as in the present case, as forming the basis of a European arrest warrant. As I am at pains to point out, the warrants in O'Rourke, were unlawful and void as warrants for the arrest of the person under Part III of the 1965 Act because that Part had been repealed at the relevant time of endorsement.

17. The principal of judicial restraint in relation to the administrative acts of another sovereign was touched upon by McGuinness J. in *Adams v. The Director of Public Prosecutions* [2001] 1 I.R. 47 at page 54 when she stated in relation to the prospect of an Irish Court quashing the certificate of the British Home Secretary:

> *"In addition it is surely necessary to consider the possible practical effect of the order sought by the Appellant. Even if the High Court (or this court on appeal) had theoretical jurisdiction to grant an Order of Certiorari directing that the certificate of the third named Respondent be brought up to be quashed, how would such an order be enforced? One has only to pose the question to recognise that the Appellant's position is unsustainable."*

18. In *Buttes Gas and Oil Co v. Hammer and another* (No.2) [1981] 3 All E.R. 616, Lord Wilberforce stated at page 628:

> *"So I think the essential question is whether, apart from such particular rules as I have discussed……there exists in English law a more general principle that the courts will not adjudicate on the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as*

a variety of 'act of state' but one for judicial restraint or abstention……In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the USA, which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."

19. In the American Supreme Court, Chief Justice Fuller stated in *Underhill v. Hernandez* [1897] 168 US 250:

1. The acts of a foreign government done within its own territory cannot be brought into judgment in the courts of this country.

2. Every sovereign state is bound to respect the independence of every other sovereign state; and the courts of one country will not sit in judgment on the acts of a government of another done in its own territory."

20. *Oetjen v. Central Leather Co* [1918] 246 US 297 is another case where at 304 the judgment of the U.S. Supreme Court stated:

"To permit the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."

21. These cases refer to administrative acts, rather than purely judicial acts, but the principle must be equally applicable, I suggest.

22. Article (10) of the Framework Decision refers to high level of confidence between Member States:

"(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principle set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof."(my emphasis)

23. I believe that a close and careful reading of the relevant passages of the judgment of Denham J. in O'Rourke makes it clear that the illegality and voidness of the warrants in that case was solely in the context of them being endorsed warrants pursuant to Part III of the 1965 Act, since that Part had been repealed at the relevant time, and that their validity as UK warrants was not at issue - hence the inescapable conclusion that if the person set foot in the UK at any later date he undoubtedly could have been arrested on foot of them, and no pronouncement of unlawfulness or voidness in this jurisdiction would have interfered I any way with that process. Hence also the learned judge's remark in conclusion that *"it remains open to the relevant authorities to consider proceeding under the Act of 2003"*. That remark is applicable also to the present case, where the authorities in the United Kingdom have proceeded under the 2003 Act and have issued a European arrest warrant. It is that warrant and not the warrant from Bow Street Magistrates Court on foot of which the applicant was arrested following the endorsement of the European arrest warrant (and not the Bow Street Court's warrant). This Court has no basis on which it could be entitled to look behind the Bow Street warrant on which the European arrest warrant is based.

24. Section 12(8) of the 2003 Act provides as follows:

"In proceedings to which this Act applies, a document that purports to be (a) a European arrest warrant issued by a judicial authority in the issuing state……shall be received in evidence without further proof."

25. Section 10 of the Act provides:

"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, or

(b) on whom a sentence of imprisonment or detention has been imposed and who fled from the issuing state before he or she –

(i) commenced serving that sentence, or

(ii) completed serving that sentence'

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."(my emphasis)

26. The applicant has been arrested on foot of a European arrest warrant properly endorsed in this State for execution, and is detained on foot of an order of this Court, having been brought before this Court following arrest, as required by s. 13(5) of the 2003 Act. The fact that the Irish authorities had proceeded under Part III in January 2004 and, having done so withdrew the application for an order under s.47 of the 1965 Act following the decision in O'Rourke, has not prevented the United Kingdom authorities from proceeding again against the applicant under the 2003 Act, albeit on a European arrest warrant based on the same warrant dated 16th December 2003 from Bow Street Magistrates Court.

27. In these circumstances I see nothing unlawful about the detention of the applicant, and I refuse the relief sought.