

## THE HIGH COURT

Record No. 2005 36EXT

## IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 (AS AMENDED)

BETWEEN

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

APPLICANT

AND

MICHAEL FALLON AKA MICHÉAL Ó FALLÚIN

RESPONDENT

**First Supplemental Judgment of Ms. Justice Finlay Geoghegan delivered on the 14th October, 2005.**

1. This judgment is supplemental to a judgment I delivered herein on 9th September, 2005, on a preliminary issue in the hearing under s. 16 of the European Arrest Warrant Act, 2003 (as amended).

2. In that judgment I decided that on the facts of this application the court should enquire into the issue as to whether the European arrest warrant issued by Bow Street Magistrates' Court on 21st June, 2004, was duly issued. As appears from that judgment I reached the decision on the evidence of English law then before the court by the affidavit of Peter Cauldwell, Barrister of England and Wales. That affidavit had been filed by the solicitors for the respondent.

3. I then adjourned the balance of the hearing under s. 16 of the Act of 2003 to allow the applicant and the respondent, if he so wished, to obtain further evidence of English law or of compliance with the requirements of the Framework Decision (or the Framework Decision as implemented in the United Kingdom) in relation to the issue of the European arrest warrant on 21st June, 2004. As appears from the penultimate paragraph of my first judgment I indicated that it appeared desirable that such additional evidence of English law be obtained on an agreed set of facts as to precisely what occurred in this jurisdiction in relation to a warrant issued on 16th December, 2003, at Bow Street Magistrates' Court ("the English domestic warrant") at the end of 2003 and during 2004. Subsequent to the delivery of the judgment I gave directions as to the time within which an affidavit of English law should be filed and delivered by the applicant; the time within which any further affidavit of English law should be filed and delivered by the respondent and also the time within which either party if they so wished should serve a notice of intention to cross-examine the English deponents.

4. An affidavit of Clive Victor Nicholls Q.C., sworn on 22nd September, 2005, was filed by the applicant. This was filed and delivered some days outside the time limit specified. When the matter was mentioned before me on 4th October I allowed the respondent a further period to file a further affidavit of Peter Cauldwell, Barrister, if he so wished. I also fixed a new time within which the parties were to determine whether they wished to cross-examine the deponents as to English law.

5. On Tuesday 11th October, I was informed by counsel for the respondent that it was not intended to file any further affidavit from Mr. Cauldwell and was informed by both counsel that it was not intended to cross-examine the deponents as to English law and that the balance of the hearing could proceed.

6. On consent, I permitted the filing of an affidavit sworn by Mr. O'Donovan, solicitor for the respondent, on 11th October. That affidavit exhibits a copy of the endorsed 2003 English warrant and the related certificate and affidavit, the originals of which are on the High Court file in proceedings 2004 No. 2 Ext. between Attorney General, applicant and Michael Anthony Fallon, respondent. That original warrant is endorsed by Mr. Joe Egan, Assistant Commissioner of the Garda Síochána, authorising the execution of the warrant in the State by a member of An Garda Síochána. It is also endorsed with a signature of a Sergeant Martin O'Neill, confirming that he executed the warrant by arresting the respondent and bringing him before the High Court on 8th January, 2004.

**Scope of inquiry by the Court**

7. For the reasons set out in the first judgment I determined that, because of the affidavit evidence of Mr. Peter Cauldwell, this Court should enquire as to whether the European Arrest Warrant was duly issued on 21st June, 2004, i.e. was issued in accordance with the requirements of the Framework Decision or the Framework Decision as implemented in England and Wales. The affidavit evidence of Mr. Cauldwell only suggests one reason for which this might not be so. It is that as a matter of English law the 2003 warrant could not have been validly executed against the respondent after 8th January, 2004, and hence was not a valid basis upon which to issue the European Arrest Warrant on 31st June, 2004.

8. Mr. Nicholls Q.C. and Mr. Caldwell are in agreement that the Extradition Act, 2003 gave effect to the Council Framework Decision in England and Wales. Further, that s. 142 of the Extradition Act, 2003 provides for the issue of a European Arrest Warrant. This states:

"(1) The appropriate judge may issue a Part 3 warrant in respect of a person if –

- (a) a constable or an appropriate person applies to the judge for a Part 3 warrant, and
- (b) the condition in subsection (2) is satisfied.

(2) The condition is that a domestic warrant has been issued in respect of the person and there are reasonable grounds for believing –

- (a) that the person has committed an extradition offence, or
- (b) that the person is unlawfully at large after conviction of an extradition offence by a court in the United Kingdom."

9. Further, Mr. Nicholls and Mr. Cauldwell appear to be in agreement that the condition in s. 142(2) of the Extradition Act, 2003 that a domestic warrant "has been 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. The only reason for which Mr. Cauldwell suggests that the 2003 domestic warrant was not in force on 21st June, 2004, was by reason of its execution in Ireland by the arrest and bringing before the High Court of the respondent on 8th January, 2004. Mr. Nicholls disputes this. His evidence is that the question as to whether the 2003 domestic warrant was executed for the purposes of English law depends upon English statute. That statute he identifies as s. 125 of the Magistrate Courts Act, 1980. Further, for the reasons set out in his affidavit which to which I refer below he states that, the 2003 domestic warrant was never executed within the meaning of s. 125 of the Act of 1980.

10. It is common case between the parties that there are no special provisions in relation to the determination of the relevant English law. Accordingly, in accordance with the normal conflict of laws rules, it falls to be determined by this Court as a question of fact. There is a dispute between the affidavits of Mr. Cauldwell and Mr. Nicholls. Both Counsel submit cross examination is not necessary to resolve the dispute albeit contending for different resolutions. I have concluded it is possible for the Court to be satisfied as to the English law applicable to the 2003 domestic warrant on the affidavits filed.

11. In reaching this conclusion, I have taken into account that this application should not be considered by the court as simply adversarial proceedings between the parties. They are proceedings to which the principles set out by the Supreme Court in *The Attorney General v. Parke* (Unreported, Supreme Court, 6th December, 2004) in the judgments of Murray C.J. and Denham J. apply. In his judgment in that case (which concerned an application under s. 47 of the Extradition Act, 1965 (as amended) ) Murray C.J. stated at p. 7 thereof:

"It seems to me clear that proceedings of this nature cannot be viewed through the prism of adversarial proceedings as usually viewed in proceedings *inter partes*. For example, all the factual matters on which the High Court judge must be satisfied for the purpose of determining whether or not an order should be made pursuant to s. 47 could not be done simply by means of a mere consent or admission unless such admissions are themselves evidence of a fact or the consent is expressly authorised by statute. It is the judge himself or herself which must be satisfied.

In other words the Court hearing an application for extradition is put on an inquiry and the proceedings have an inquisitorial nature. This is so even though the responsibility for bringing before the Court the necessary material or evidence necessary to demonstrate to the Court that all factual elements required by the statute, including evidence where necessary as to foreign law, lies with the State."

12. Notwithstanding the inquisitorial nature of the hearing in accordance with this approach it appears to me, permissible for this Court in resolving the conflict between Mr. Nicholls and Mr. Cauldwell to take into account the fact that the respondent was given the opportunity to file a further affidavit from Mr. Cauldwell dealing with the affidavit of Mr. Nicholls and that he has not sought to file any such further affidavit. For the reasons set out in the first judgment the Court has in this application departed from the general rule that it ought to refrain from making inquiries as to the validity of orders of foreign courts and by reason of exceptional circumstances is inquiring into the issue as to whether the European arrest warrant herein has been duly issued. Those exceptional circumstances included the evidence of English law from Mr. Cauldwell.

13. There is agreement between the deponents that under English law "a domestic English warrant is executed when the person named therein is arrested in accordance with the command in the warrant".

14. The 2003 domestic warrant is headed "Bow Street Magistrates' Court". The warrant is addressed to the Constables of the Metropolitan Police. The command in the warrant is "You, the Constables of the Metropolitan Police are hereby required to arrest the accused and to bring the accused before the above Magistrates' Court immediately". The 2003 domestic warrant was sent to Ireland for execution in December, 2003. In Ireland it was endorsed for execution in Ireland pursuant to Part III of the Extradition Act, 1965 (as amended). The form of endorsement by the Assistant Commissioner on 2nd January, 2004, was "I, Joe Egan, Assistant Commissioner of the Garda Síochána, hereby authorise the execution of this warrant in this State by any member of the Garda Síochána".

15. Both deponents appear to take the view that the endorsed warrant was executed in Ireland once the respondent was arrested and brought before the High Court (see para. 7 of Mr. Cauldwell's affidavit and the final sentence in para. 11 of Mr. Nicholl's affidavit). Mr. Nicholls mistakenly assumes that he was brought before the District Court rather than the High Court but nothing turns on this.

16. Where the deponents disagree is whether such execution of the endorsed warrant in Ireland in January, 2004 means as a matter of English law that the English 2003 domestic warrant was executed and for that reason no longer in force on 21st June, 2004. Mr. Cauldwell's view that the English 2003 domestic warrant was thereby executed and no longer valid is stated in paras. 7 and 8 of his affidavit insofar as relevant in the following terms:

"7. If an arrest warrant issued at Bow Street Magistrates' Court was forwarded to and executed in Ireland on 8th January 2004 by arresting Mr. Ó Fallúinn, the subject thereof, and bringing him before the High Court in Ireland, that warrant was therefore executed, spent and thereafter was no longer an enforceable order.

8. As a matter of English law, the warrant of 16th December 2003 could not have been validly executed against Mr. Ó Fallúinn after 8th January 2004. It was spent. It was no longer a valid warrant to arrest ..."

17. Mr. Nicholls expresses the view that paras. 7 and 8 of Mr. Cauldwell's affidavit are in error and that they confuse the warrant endorsed in Ireland for execution in Ireland by the Garda Síochána with the domestic warrant issued in England for execution by the constables of the Metropolitan Police in England. The conclusion of Mr. Nicholls is stated in para. 11 of his affidavit:

"... The English domestic warrant (as opposed to the endorsed warrants) was not executed in English law until the delivery of the accused into the hands of constables of the Metropolitan Police, his arrest by them in England and his being brought before the Bow Street Court, although the endorsed warrants upon which he was arrested in Ireland would have been executed in Ireland once the accused was arrested and brought before the District Court (see section 45(2) of the Irish 1965 Act)."

18. Mr. Nicholls sets out his reasons for that conclusion in paras. 8, 9 and 10 of his affidavit in the following terms:

"8. The question whether the domestic warrant of 16th December 2003 was executed for the purposes of English law depends on English statute. For the reasons set out below that warrant was never executed within the meaning of section 125 of the 1980 Act. The provision in English law governing the execution of domestic warrants is section 125 of the Magistrates' Courts Acts 1980. It provides as follows:

'125. Warrants (1) A warrant of arrest issued by a justice of the peace shall remain in force until it is executed or withdrawn or it ceases to have effect in accordance with rules of court.

(2) A warrant of arrest, warrant of commitment, warrant of detention, warrant of distress or search warrant issued by a justice of the peace *may be executed anywhere in England and Wales by any person to whom it is directed or by any constable acting within his police area.*' [emphasis added]

9. It is plain, therefore, that a domestic English warrant is not 'executed' within the meaning of section 125 of the 1980 Act unless and until is (i) executed in England and Wales, and (ii) by the Constables of the Metropolitan Police to whom it was addressed and directed. Further, a warrant is not executed simply by the act of arrest (which must take place in England or Wales) but additionally by the accused being brought before the court in the UK (see terms of the warrant in para 5 above).

10. For the reasons set out above the domestic English warrant issued at Bow Street Court on 16th December 2003 was not 'executed' within the meaning of section 125 of the 1980 Act. It was not executed by the arrest of the Respondent in Ireland by officers of the Garda Síochána and his being brought before the Irish court."

19. Notwithstanding the apparent contradiction in the views expressed by Mr. Cauldwell and Mr. Nicholls as to whether the English domestic warrant of 16th December, 2003, was, as a matter of English law executed by the arrest of the respondent in Ireland in January, 2004 as authorised by the endorsed warrant and his being brought before the Irish High Court, I am satisfied to find on the affidavits that on 21st June, 2004, the English domestic warrant was not executed in English law. My reasons for this finding are as follows.

20. Mr. Cauldwell agrees that a domestic English arrest warrant is executed when the person named therein is arrested in accordance with the command in the warrant. The command in the English 2003 domestic warrant is to arrest the respondent and bring him before Bow Street Magistrates' Court. Mr Nicholls at para. 9 of his affidavit states expressly that a warrant is not executed by the simple act of arrest but that the accused must also be brought before the UK court named in the warrant. It is undisputed that the respondent has not been brought before Bow Street Magistrates' Court. Mr. Cauldwell in paras. 7 and 8 of his affidavit gives no explanation of the reasons for which he considers arrest in Ireland and being brought before the Irish High Court was an arrest in accordance with the command in the English 2003 domestic warrant. He also has not sought by a further affidavit to dispute the express and reasoned averments of Mr. Nicholls.

21. Mr. Nicholls gives a reasoned explanation for which he has formed the view that the English domestic warrant was not executed in English law based upon the relevant English statute. The respondent has not put any evidence before the court, nor is the court aware of any reason for which it should not rely upon the applicability of s. 125 of the Magistrate Courts Act, 1980 and the requirement that the respondent be brought before Bow Street Magistrates' Court before the English domestic warrant can be considered to have been executed in English law. Accordingly the Court is satisfied that in English law the English domestic 2003 warrant was not executed by the events in Ireland in January, 2004.

22. Counsel on behalf of the respondent sought to make one further submission as to why the English domestic warrant should not be considered to be in force on 21st June, 2004, in reliance upon s. 125(1) of the Magistrate Courts Act, 1980. He submitted that this Court should find that the English domestic 2003 warrant had been "withdrawn" within the meaning of s. 125(1) of the Act of 1980 by the Attorney General in Ireland seeking to strike out the 2004 proceedings in Ireland. Since the hearing I have pursuance of this Court's inquisitorial obligations obtained the Order made by the High Court on 22nd June, 2004, in the 2004 extradition proceedings. The order makes no reference to any withdrawal of any warrant. It provides insofar as relevant that "the matter herein do stand struck out" and it also provided for the return of sum paid in respect of bail granted to the respondent to the relevant surety. Those proceedings were proceedings under s. 47 of the Extradition Act, 1965 (as amended). That section provided for the making of an order by the court that a respondent be delivered into the custody of a member of the police force of the place in which the warrant under which he had been brought before the High Court was issued. The proceedings were an application by the Attorney General for an order to that effect. In the absence of any evidence of an intention to withdraw the English domestic 2003 warrant, it does not appear to me that the above facts relating to the order made in the 2004 extradition proceedings are such that this Court is under an obligation to carry out any further enquiry as a result of the submission sought to be made by counsel for the respondent.

23. Accordingly, on the facts before this Court, I have concluded that the English warrant issued by Bow Street Magistrates' Court on 12th December, 2003, was in force on 21st June, 2004, and that the European arrest warrant issued by Bow Street Magistrates' Court was duly issued within the meaning of s. 10 of the Act of 2003.