THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

59/2016

FRANK AGRAMA

APPLICANT/APPELLANT

-AND-

MINISTER FOR JUSTICE AND EQUALITY AND DISTRICT JUDGE O'NEILL

RESPONDENT

Judgment of the Court delivered on the 22nd day of February 2016 by Mr. Justice Birmingham

1. This is an appeal from the judgment of the High Court (Humphreys J.) of the 8th February, 2016, refusing an application from Mr. Agrama (the appellant) seeking leave to apply for judicial review. The appellant had sought leave to apply for judicial review in respect of a decision of the first respondent (the Minister) of the 18th January, 2016. That decision purported to nominate the second respondent to receive evidence on foot of a letter of request from the Italian authorities, dated the 11th January, 2008, pursuant to the provisions on mutual legal assistance contained in s. 51 of the Criminal Justice Act 1994. The application is not required by statute to be on notice, but that is in fact what happened.

2. The background to the decision of the High Court and to this appeal is complex, indeed tortuous, and it is necessary to refer to that even if only briefly. As O'Donnell J. commented in the course of a judgment (*Agrama v. Minister For Justice* [2015] IESC 94) on a related issue: "a colourful cast of characters and some exotic locations are involved in these judicial review proceedings. . . . [The issues have] generated much correspondence and multiple court applications, hearings and rulings". O'Donnell J. pointed out that the essential fact was that the Italian prosecutors had issued two letters of request to the respondent Minister: (i) on the 17th July, 2006, (the First Letter of Request); and (ii) on the 11th January, 2008, (the "Second Letter of Request"); it with this second letter that the present appeal is really concerned. By these letters, the Italian prosecutor sought the assistance of the Irish authorities in obtaining evidence for an investigation then underway in Italy. The requests were made pursuant to the provisions of the European Convention on Mutual Assistance in Criminal Matters, given effect to in Ireland by the Criminal Justice Act 1994, superseded by more recent legislation.

3. The second paragraph of the Second Letter of Request states:-

> "The request is aimed at investigating a serious and complex fraud which includes offences of money laundering, carried out in the period 1999 – 2005 and which is connected to the purchase of broadcasting rights made by the company Mediaset spa, through the subsidiary companies Mediatrade spa and and RTI spa."

The letter concludes:-

> "I hereby undertake that any information or material obtained in response to this request of mutual assistance will not be used without prior consent of the Irish Department of Justice, Equality and Law Reform, for any other use than the one indicated in this request."

4. The complex background to this matter is set out in simplified, but clear form by O'Donnell J. at paras. 2 and 3 of his judgment, and is also referred to by Humphreys J. in the course of his judgment in the High Court. Hence, it not necessary to repeat that exercise here. At this stage, suffice is to say that there was, what seems to have been, an extensive criminal investigation conducted in Italy in which Mr. Agrama, along with others, was a person of interest. At a date which was keenly in controversy, Mr. Agrama was charged with various offences. The respondents contend that the date of charging was the 9th March, 2010, despite having at one stage identified January, 2010 as the relevant date, while Mr. Agrama says that the date was the 18th October, 2011. It may be that this controversy is explainable by difficulties in translation or, more precisely, difficulties in identifying the step in the Italian criminal process that equates to the charging of an individual in the Irish criminal justice system. Humphreys J. was prepared to proceed on the assumption that the relevant date was the 18th October, 2011. That was a generous assumption; indeed, it might be thought an unduly favourable assumption.

The proceedings precipitating the present application

5. In March, 2008, the Minister appointed Judge Bridget Reilly of the District Court to take evidence for the purpose of the First Letter of Request. That decision of the Minister gave rise to an application by Mr. Agrama seeking judicial review. Leave was granted in those proceedings on the 7th April, 2008. While those judicial review proceedings were in being, Mr. Agrama was charged with a number of offences, being offences of aggravated misappropriation and of tax fraud. It is to be noted that he was not charged with money laundering.

6. On the 8th July, 2014, the appellant along with all the other defendants in the case was acquitted on all charges. So far as the offence of misappropriation is concerned, that was deemed statute-barred, and that acquittal has not been appealed. It would seem therefore to be final. However, that has been far from the end of the matter.

7. In broad terms, in the first judicial review proceedings Mr. Agrama complained that, in relation to the First Letter of Request, the Italian prosecutor (Mr. de Pasquale) had made a series of incorrect assertions, had selectively quoted materials and had not included highly relevant materials to the extent that the request amounted to a serious abuse of process. The Second Letter of Request,

according to Mr. Agrama, seeks pretty much identical material and contains statements which are similarly objectionable.

8. The first set of judicial review proceedings came on for hearing in July, 2011 before Peart J. It appears that progression to that stage had been delayed by disputes pertaining to discovery. In fairness to Mr. Agrama, it may be noted that discovery was ordered in respect of categories of documents where discovery had been resisted, so it would certainly not be fair to view the pursuit of discovery as unnecessarily prolonging the proceedings.

9. In mid October, 2011, Peart J. gave a ruling refusing the reliefs sought in connection with the First Letter of Request. Then, on the 25th January, 2013, Peart J. delivered a judgment dismissing the balance of the first judicial review proceedings. That formal written judgment incorporated the earlier ruling of the 14th October, 2011.

10. Mr. Agrama indicated an intention to appeal and sought a stay on any action being taken on foot of the letters of request pending the determination of the appeal. On the 25th April, 2013, Peart J. acceded to the application for a stay.

11. Of note is that in the course of the appeal to the Supreme Court, Mr. Agrama brought a notice of motion dated the 16th October, 2015, seeking to amend the proceedings in order to include a ground that the evidence was being sought not for the purposes of investigation, but rather for the purposes of a criminal prosecution. That motion was adjourned to the hearing of the Supreme Court appeal, which was heard on the 5th November, 2015. The appeal in the Supreme Court was eventually heard on the 5th November, 2015. It should be explained that the appeal was originally listed for hearing on the 24th July, 2014; however, in a situation where there were acquittals on the 8th July, 2014, the July 24th date was vacated on the grounds that it appeared the matter might be moot. In June, 2015, the Chief State Solicitor informed the solicitors for Mr. Agrama that the Minister took the view that the matter was not moot and that she had been requested by the Italian authorities to seek to proceed on foot of the Second Letter of Request, in light of an appeal against acquittal which had been lodged by Italian authorities in November, 2014. In the course of the hearing on the 5th November, 2015, the Supreme Court indicated that it was refusing leave to amend the grounds of appeal and stated that it would give its reasons in its judgment on the substantive appeal. That judgment, delivered on the 9th December, 2015, dismissed the appeal and upheld the decision of Peart J. The attempt to expand the grounds had been refused essentially because the Supreme Court took the position that it would not permit a ground to be argued which had not been argued in the High Court and which would, if allowed to be argued, require the Supreme Court to hear contested evidence.

12. On the 18th January, 2016, the Minister nominated Judge O'Neill to receive evidence on foot of the Second Letter of Request, thus precipitating the present judicial review proceedings. Judge O'Neill was originally due to hear evidence in this matter on Tuesday the 2nd February, 2016. There is a mutual assistance list on the afternoon of the first Tuesday of every month. However, on the 1st February, 2016, the present judicial review proceedings first came before the High Court. The office of the Chief State Solicitor had been put on notice, and it attended and participated through both solicitor and counsel. The application for leave was part heard on the 1st February, 2016, and it was adjourned over until the 2nd February, 2016, when the judge heard submissions from counsel on both sides before reserving judgment until the 4th February, 2016. On that occasion, Humphreys J. delivered a written judgment refusing Mr. Agrama's application for leave to bring judicial review proceedings. Also, the Minister was released from an undertaking that she had given on the 1st February not to act on foot of the Second Letter of Request. There was to be a further turn. The appellant took the view that certain crucial findings of the High Court judge were made on foot of a statement made by counsel for the Minister during the course of submissions, which, it was said, was inadvertently factually incorrect. As a result, the appellant took the view that the judge in the High Court had been materially misled. The matter came back before Humphreys J. on Monday the 8th February, when he heard submissions from both sides. At 2 o'clock that day, the judge delivered a revised judgment, and it is from this judgment that the present appeal is brought.

13. For completeness sake it should be stated that nomination of Judge O'Neill on the 18th January, 2016, was not the first attempt to nominate him; there had been an earlier attempt which encountered difficulties. The first nomination was dated the 12th January, 2016, but it appeared that witness summons that issued were dated the 6th January, 2016. When this point was raised by solicitors on behalf of Mr. Agrama, the Chief State Solicitor's office wrote on the 18th January, 2016, saying that it was not intended that the matter would proceed as had been planned before Judge O'Neill on the 19th January, 2016. In these circumstances, Arthur Cox confirmed that it did not intend to proceed with the judicial review proceedings. Thereafter, on the 21st January, 2016, the Chief State Solicitors office wrote, enclosing fresh witness summons's, stating that it was now intending to deal with the matter on the 2nd day of February, 2016, at 2.00 p.m.

14. The summary just offered represents a considerable simplification, many would say over simplification of the issues and the sequence of events. However, before turning to the judgment of the High Court and the arguments on this appeal, it is necessary to refer to one aspect of the Italian legal system which has significantly influenced the conduct of the parties in the current controversy. This aspect relates to the manner in which the statute of limitations operates in Italy. The situation was explained in these terms in the course of the Second Letter of Request:-

> "After the formulation of the accusations by this Public Prosecutor and while the preliminary hearing was underway, the Italian Parliament (in December 2005) reduced the period of time after which the Statute of Limitations would come into effect for several offences, including those being examined in the ongoing Mediaset hearing. [The proceedings in controversy]
>
> It must be emphasised that in the Italian legal system the Statue of Limitations is the time within which:
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> - the criminal law suit must be brought against the defendants, and
> - the trial (and any subsequent appeal) must be concluded.
>
> This means that even after the indictment and the beginning of the trial – and even during the trial itself – the Statute of Limitation continues to run. Therefore the expiry of the limitation period can occur during the trial - this is not rare with the new 2005 law – and in this case for some charges (or even all charges) the trial would come to an end."

15. Having referred to that quotation, O'Donnell J. wryly commented at para. 4 of his judgment: "much of what occurs in this case can be understood when viewed in the context of these provisions".

16. One consequence of this provision has been that this appeal has had to be heard against the background of a particular time table. Judge O'Neill is scheduled to hear the matter on Monday the 22nd February, at 2.00 p.m.

17. The appeal in Italy opened on the 20th January, 2016. It is to be taken up on the 7th March, 2016, and the 8th March, 2016, with judgment to be given on the 17th March, 2016.

The High Court proceedings

18. The judicial review proceedings commenced on the 1st February, 2016, and sought a declaration that the decision of the Minister, acting through Principal Officer David Fennell, of the 18th January, 2016, to nominate the second named respondent, Judge John O'Neill, to receive evidence in relation to the Second Letter of Request issued by the Public Prosecutor for the Court of Milan on the 11th January, 2008, was unlawful and/or irrational and/or ultra vires the provisions of s. 51 of the Criminal Justice Act 1994. The Statement of Grounds makes clear that the basis for seeking judicial review is the contention that the real purpose of the further execution of the Second Letter of Request is not the pursuit of an investigation; rather, its purpose is having such documents or evidence as may be received by Judge John O'Neill introduced in evidence in the appeal in Italy against the acquittal of the appellant on the charge of tax fraud.

19. It is said that, in a situation where the Minister had been put on notice and was aware of the fact that the purported reliance on the pursuit of an investigation was not in fact the real reason, the latter being to admit evidence in an appeal, the Minister was not entitled to and/or lacked the jurisdiction to nominate Judge O'Neill, the second named respondent, to receive evidence.

20. In order to appreciate the significance attached to the distinction between evidence sought for the purpose of a criminal investigation and that sought for the purpose of criminal proceedings, it is necessary to have regard to the terms of s. 51 of the Criminal Justice Act 1994. Section 51, insofar as material, provides:-

> "51(1) This section shall have effect where the Minister receives –
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> (a) from a court or tribunal exercising criminal jurisdiction in a country or territory outside the State or a prosecuting authority in such a country or territory, or
>
> (b) from any other authority in such a country or territory which appears to him to have the function of making requests of the kind to which this section applies,
>
> a request for assistance in obtaining evidence in the State in connection with *criminal proceedings that have been instituted, or a criminal investigation that is being carried on*, in that country or territory.
>
> (2) If the Minister is satisfied –
>
> (a) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and
>
> (b) that proceedings in respect of that offence have been instituted in that country or territory or that an investigation into that offence is being carried on there,
>
> he may, if he thinks fit, by a notice in writing nominate a judge of the District Court to receive such of the evidence to which the request relates as may appear to the judge to be appropriate for the purpose of giving effect to the request.
>
> (3) For the purpose of satisfying himself as to the matters mentioned in subsection (2)(a) and (b) of this section the Minister may regard as conclusive a certificate issued by such authority in the country or territory in question as appears to him to be appropriate." (Emphasis added)

21. When dealing with this issue, the High Court judge referred to submissions that had been made to him by counsel on behalf of Mr. Agrama to the effect that "we are involved in a fiction", in the sense that an investigation was purportedly ongoing whereas in reality a prosecution had already commenced, concluded to an acquittal and was by then the subject of a prosecution appeal. The judge identified the point being made as one based on an assertion that there was no criminal investigation in being. He observed that that appeared to him to be a false premise. In principle, an investigation can co-exist with the prosecution, and may be effective even up to the finalisation of criminal proceedings. It may and normally will, he observed, be significantly less effective if carried out after such finalisation. The judge commented that the fact that the prosecution was initiated against the applicant, or that it concluded at first instance, does not derail the investigation or render it a fiction as had been submitted. He therefore concluded that the point being advanced by the applicant, in the context of the application for leave to seek judicial review, was not arguable because it was founded on a fundamental misconception. He commented at para. 24:-

> "The letter of request relates to an investigation, and any evidence gathered can only be used for an investigation, in the absence of ministerial consent under s. 51(5) which does not yet exist."

22. This conclusion by the trial judge, that the point being advanced by the applicant was not arguable because it was founded on a fundamental misconception, is central to the decision of the High Court.

23. The conclusion by Humphreys J. that the point central to the application was unarguable was sufficient to dispose of the application and to see leave refused. However, the judge went on to pose and to answer the questions: (i) Is the complaint raised too late particularly given the first judicial review? (ii) Is the present application a filibuster? (iii) Was there non-disclosure on the part of the applicant?

24. The judge took the view that the issue of investigation versus prosecution, as he characterised it, arose at the latest in October, 2011. That was the date on which he was prepared to assume, in ease of the applicant, that the charge had been laid. That being so, he formed the view that the applicable time limit for bringing judicial review proceedings had expired no later than April, 2012. Accordingly, the application before him was out of time.

25. He also took the view that Mr. Agrama was required to raise the issue in 2011, rather than waiting to raise it for the first time in October, 2015, when it could not conveniently be introduced in the Supreme Court given that it had not been the subject of

argument or a decision at first instance. The judge in effect concluded that Mr. Agrama should either have sought to raise the issue during the course of the first judicial review proceedings, perhaps, by applying to Peart J. at a time when judgment had been reserved, or alternatively by launching separate proceedings.

26. Humphreys J. then went on to address the submission on behalf of the authorities that Mr. Agrama was engaged in a filibuster. It was submitted that this had begun with the first judicial review proceedings, stretching over a nearly eight year period, had continued with the present proceedings and had the prospect of a third judicial review if and when the Minister considered her function under s. 51(5), i.e. consider whether to consent to the use of the evidence furnished for a purpose other than that for which it was initially requested. The judge observed that if through protracted or repeated court proceedings Mr. Agrama could postpone the taking of evidence until after the final conclusion of the Italian criminal proceedings, he would have succeeded without merits in substantially defeating the Minister's entitlement to operate the statute. He saw the balance of justice as overwhelmingly in favour of allowing the Minster and Judge O'Neill to operate the mutual assistance provisions without further interference, going on to observe with some firmness that eight years of challenge was enough.

27. The High Court judge went on to state that he would have refused the application as an abuse of process even if he considered that it was otherwise one for which leave should have been granted, which was not in fact the case, and then proceeded to issue directions as to the procedures to be followed in the event of a third judicial review application.

28. Finally, the judge also addressed the fact that the grounding affidavit did not refer to the date upon which Mr. Agrama was charged, and he categorised this as non-disclosure which related to a fact of such centrality that the application should be refused on that basis alone.

29. In the course of the appeal to this Court, Mr. Agrama has attacked each of the pillars of the High Court judgment. He says that there is a significant difference between the receipt of evidence for the purpose of an investigation and the receipt of evidence for the purpose of admission of evidence during the course of criminal proceedings, a difference which he says was clearly recognised in the judgments of the Supreme Court in *Brady v. Haughton* [2006] 1 I.R. 1. Mr. Agrama contends that while the Second Letter of Request is plainly directed towards an investigation into alleged offences, it is absolutely clear that the evidence is not in fact sought for the purpose of an investigation, but rather for the purpose of admitting that evidence in the course of the appeal against acquittal.

30. It is said that the High Court fundamentally misconstrued the application. Contrary to what the High Court seemed to believe to be the case, it was submitted that there was never any suggestion that it was impossible for an investigation and prosecution to co-exist. Rather, it was submitted that in the case of the applicant there was clear, uncontroverted and indeed incontrovertible evidence that the material sought was not required for the purpose of an investigation, but was required for one purpose, and one purpose only, to be admitted in the appeal against acquittal.

Discussion

31. The circumstances in which this Court has had to hear this appeal are unusual. Judge O'Neill is due to hear the evidence this afternoon. Ordinarily, there would probably be no particular difficulty in vacating and rescheduling that listing. However, in the background is the appeal in Italy which is listed for the 7th and 8th of March, 2016. Again, in other circumstances there might be some scope for flexibility there, but the stage which the Italian appeal hearing has reached and the manner in which the statute of limitations operates in Italy excludes that option.

32. The question arises, therefore, whether this can or should have any impact on the way that this Court should approach its task. In my view, in a situation where to grant leave is in effect and as a matter of practicality to decide the issue, because it would allow one side achieve what it seeks and prevent the other doing what it wants to do, it is appropriate that there should be some recalibration of the traditional approach of *G. v. The Director of Public Prosecutions* [1994] 1 I.R. 374. This is indeed called for. It must be said that it is in fact the case that granting leave would inevitably mean that the evidence sought by the Italian authorities would not be available to them at any time when it would be of use or value. The question of conceding leave and having some form of telescoped leave/substantive hearing has been floated, but I am in no doubt that granting leave is to decide the issue in favour of Mr. Agrama and against the State. It seems to me that in these circumstances leave should be granted only, if at a minimum, substantial grounds can be established.

33. I turn now to what I identify as the core issue, whether it is the case that the material is sought for a purpose other than that stipulated in the letter of request. In my view, the case that is advanced on behalf of the appellant, Mr. Agrama, is based on a fundamental misconception as to the relationship between a criminal investigation and criminal proceedings. The objective of any criminal investigation is that it should result in criminal proceedings. Evidence is gathered during the course of a criminal investigation with the intention that it will in due course be presented as part of the evidence in the criminal proceedings. This is illustrated by the fact that in this jurisdiction day in, day out prosecuting counsel, when advising on proofs before trial, request the gardaí to carry out further inquiries or to provide some additional information. That exercise forms part of the investigation, but it could result in evidence being presented in the course of the trial.

34. The notion that an investigation halts when the criminal process starts is to fundamentally misunderstand the relationship between investigation and criminal proceedings.

35. I appreciate that the appellant disavows any suggestion that it is his view that investigation and proceedings cannot co-exist, but his case is based on the flawed belief that criminal proceedings and investigation are mutually exclusive. In this case, it remains to be seen what evidence, if any, will be adduced in the District Court for onward transmission. One of the two witnesses summoned has indicated that he does not have anything to contribute. The evidence adduced may, or may not, advance the investigation and may, or may not, be viewed as relevant to the appeal stage of the criminal proceedings. If the material is viewed as relevant to the criminal proceedings, there is no doubt the prosecutor will seek to make the evidence available to the appeal court and will take the necessary steps so that that can happen. Indeed, there is no doubt that the expectation is that the evidence adduced in the District Court will ultimately be presented to the Italian appeal court, but that is not at all to say that the evidence is not gathered as part of an investigation. As to what happens in the future, counsel for the Minister has made clear that if the Minister is requested to consent to the use of evidence for other purposes, she will be minded to furnish her consent.

36. I have indicated that in the circumstances in which we find ourselves, I would require Mr. Agrama to go further than establishing merely that his case is an arguable one; in fact, I am satisfied that Mr. Agrama has not made out a case even on the very low threshold of argueability. While Mr. Agrama has asserted that the material is required for the purpose of an appeal and not for the purpose of an investigation, this is a bare assertion not supported by evidence, and indeed contrary to the evidence. Certainly, it is the case that there is an expectation and indeed perhaps an intention that the material from the District Court would form part of the

appeal. But what is wholly lacking is any evidence that the investigation has closed, or any evidence that the taking up of this evidence is outside the scope of the investigation.

Conclusion

37. I am satisfied that, even on the basis of *G. v. The Director of Public Prosecutions,* this is a case where leave should be refused. In those circumstances, it is unnecessary to address issues in relation to delay, abuse of process and non-disclosure in any detail. I will confine myself to observing that Mr. Agrama has shown a determination to mount a dogged and determined resistance, but he is not necessarily to be criticised for that. I am in no doubt about the fact that Mr. Agrama was very aware of the manner in which the statute of limitations operates in Italy and the assistance to him which that potentially offered, but again he is not necessarily to be criticised for that.

38. I would add just one observation in relation to the non-disclosure point. Humphreys J. was careful to make the point that he saw the non-disclosure as being the fault of Mr. Agrama rather than that of his advisers. However, lest it be thought that there was any error on the part of Mr. Agrama's advisers and that this contributed to the fact that leave was not granted, I should say that I would not regard the non-disclosure as material and certainly would not have taken the view that it could have provided a basis for refusing leave. The affidavit was clear about the fact that Mr. Agrama had been charged, and in those circumstances it was open to the other side, if they thought it relevant, to provide information on the date of charge, or indeed open to the judge to ask a question about this issue if he attached significance to it.

39. In summary then, for the reasons stated I would refuse leave to seek judicial review and would uphold the decision of the High Court.