Neutral Citation: [2016] IEHC 267

THE HIGH COURT

Record No. 2016 218 SS

IN THE MATTER OF AN ENQUIRY UNDER ARTICLE 40.4.2º OF THE CONSTITUTION OF IRELAND

BETWEEN/

THOMAS CORCORAN

APPLICANT

AND

GOVERNOR OF CASTLEREA PRISON

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

Part 1

Background

1. Mr Corcoran was arrested in the United Kingdom on 8th February, 2016, on foot of a European arrest warrant being issued by Ireland. The warrant related to a charge against Mr Corcoran of an offence contrary to s.15 of the Misuse of Drugs Acts 1977–84 and also an intended charge of an offence contrary to s.13 of the Non-Fatal Offences Against the Person Act 1997. Mr Corcoran consented to his return to Ireland and was admitted to bail by the United Kingdom authorities on condition that he abide by a curfew, sign on at a police station, wear an electronic tag, and always have with him, and be contactable by the police at all times on, a mobile phone.

2. On 12th February last, Mr Corcoran met the United Kingdom police at Heathrow Airport, and was returned to Ireland. On his return to Ireland he was charged with the s.13 offence. The following day he was brought before a sitting of Sligo District Court. At that hearing, it was indicated to the court that the State intended to execute four bench warrants in relation to certain road traffic matters that had not been the subject of the European arrest warrant. Mr Corcoran's solicitor immediately objected to this on the basis that Mr Corcoran had been returned to Ireland in order to be dealt with in respect of certain specified matters that were the subject of the warrant. The learned District Judge ruled against Mr Corcoran's solicitor in this regard.

3. Matters then progressed to a bail application entered for Mr Corcoran by his solicitor. Upon this application being made, the State objected to bail on the basis that Mr Corcoran was a flight risk and would not show up for trial. This objection was based on Mr Corcoran's history as the repeated subject of bench warrants and his history of having absconded to the United Kingdom. The State did not accept that its concerns in this regard would be allayed by the imposition on Mr Corcoran of such conditions as a curfew and constant availability by mobile phone.

4. During the course of the application, Mr Corcoran gave evidence that he was unaware of the existence of any warrants against him other than the European arrest warrant. He also gave evidence that his move to the United Kingdom had been prompted by a belief that his life was under threat in Ireland. This evidence was not challenged in cross-examination.

5. After hearing the bail application, the learned District Judge refused bail on the basis that Mr Corcoran was a flight risk. He also observed that (a) had Mr Corcoran not consented to his return to Ireland, he would likely have been held in custody in the United Kingdom, and (b) were Mr Corcoran to be released on bail and flee to the United Kingdom, legal difficulties would present were Ireland to issue a further European arrest warrant. Objection has been taken by Mr Corcoran to the observations referred to at (a) and (b).

6. Following the District Court proceedings, this Article 40 application was brought, it being alleged that Mr Corcoran was being detained unlawfully for the following reasons: (1) because he was being prosecuted and detained, *inter alia*, in respect of offences which did not form the subject-matter of the European arrest warrant, and (2) because of the observations made by the learned District Judge and referred to at (a) and (b) above.

Part 2

The Doctrine of Specialty

A. Overview.

7. The doctrine of specialty is a doctrine of international law that protects a state making a surrender of an individual from abuse of the sovereign act of extradition. Violation of the doctrine of specialty occurs when, post-surrender, the requesting state charges and prosecutes, or aims to prosecute a person surrendered for a crime not agreed to during the surrender proceedings.

8. It was suggested during the course of the within proceedings that specialty is more appropriately regarded as a policy which informs the majority of extradition agreements rather than a rule as such. The court respectfully does not accept this contention. A quick historical aside explains why. In the 1870s, at a time when Ireland was a part of the United Kingdom, the status of the doctrine of specialty was a matter of high diplomatic tension between the United Kingdom and the United States. The United Kingdom insisted that the doctrine of specialty was a free-standing rule of international law whereas the United States, for a time, insisted that it had no application unless expressly included in an extradition treaty. During Disraeli's administration, extraditions between the two states

even ceased for a short time. But in *U.S. v. Rauscher* 119 U.S. 407 (1886), a case admittedly not opened to the court in this application, the United States Supreme Court accepted that extradition treaties reflected the pre-existing and still-subsisting doctrine of international law, viz. the doctrine of specialty. So since the late-19th century, it has been recognised by the Great Powers, including a Great Power of which this state was then part, that the doctrine of specialty is a doctrine of international law.

9. On this side of the Atlantic, the doctrine of specialty has not generally been perceived to confer enforceable legal rights on the surrendered person. Why so? Principally because while abuse of extradition proceedings constitutes a good cause of complaint between the affected governments, such complaints have traditionally been perceived not to form a proper subject of investigation of the courts, however, much the courts might regret any such abuse arising. To hold otherwise, it has traditionally been perceived, would, in a case like the present, permit a person accused of a crime to put the Irish Government on trial for its dealings with a foreign power. However, it seems to this Court that it is arguable that there are at least four reasons why the doctrine of specialty does in fact confer personally enforceable rights on a person the subject of a request or order for discovery, though (a) the court is mindful in this regard of Charleton J.'s observation in *Oltech Systems (Ltd.) v. Olivetti UK Limited* [2012] IEHC 512, para.8, albeit expressed in a very different context, that "*[E]xperience demonstrates that there is little that cannot be argued*", and (b) the court would note that its comments in this regard are obiter, as, for a reason that will be identified later below, the court does not have to determine in these proceedings whether any of those four reasons hold true as a matter of Irish law. Those four reasons are the following:

> (1) the surrender of a party to this jurisdiction pursuant to a European arrest warrant affords the courts of Ireland personal jurisdiction over that party. Without that personal jurisdiction, a court is generally powerless to proceed. So that party must have a right to challenge the court's jurisdiction…and if s/he cannot invoke the rule of specialty in this regard, that would constitute a denial of his ability to challenge the court's exercise of personal jurisdiction;
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> (2) a surrendering state depends entirely on the state to which surrender is made to conform faithfully with its obligations under the European arrest warrant process. Two consequences appear to flow from this: (i) a country implicitly protests any prosecution to which it did not consent; and (ii) as it is impracticable for a surrendering country to monitor every trial that follows a surrender, each surrendered person should surely be treated as having been implicitly vested with the right to challenge a breach of a doctrine that informs that process.
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> (3) the fact that the doctrine of specialty is designed to protect the interests of a surrendering state does not have as a necessary logical consequence that the person who is the subject of the process of surrender maintains no right to protest a violation of the process by the country that has sought the surrender.
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> (4) applying the doctrine of specialty only to the state that makes the surrender places an unreasonable burden on a surrendered person to ensure that the state making the surrender protests any violations of e.g., the doctrine of specialty.

10. The reason the court does not have to adjudicate on the correctness or otherwise of the foregoing as a matter of Irish law, indeed the reason the specialty issue alleged to present in these proceedings no longer falls to be decided in the within proceedings, is because when this application came on for hearing before the court, the State indicated that the only offences for which Mr Corcoran would be prosecuted would be those in respect of which his surrender was sought and made.

Part 3

The Decision as to Bail

11. At the bail application before the District Court, the Gardaí objected to bail on the basis, *inter alia*, that Mr Corcoran was a flight risk. It is not disputed that there was any unfairness arising in the hearing. At the end of the hearing, the transcript provided to this Court indicates that the learned District Judge offered the following rationale as the basis for declining bail:

> *"[U]nfortunately I must deny bail. I believe that the Defendant is very much a flight risk. The position shortly is that [the]…warrants were issued quite some time ago and the Defendant absconded, left the jurisdiction, and in effect has set up home in Great Britain where he now is living with his fiancée and his children. He is collecting social welfare. He is living with his family there...and, effectively…domiciled in Britain….[C]ertainly he is resident in Britain and has no intention in the immediate future of returning to Ireland. He was going to come back, he says, for his wedding, but he has no intention of returning to Ireland in the immediate future. So effectively he is resident in Britain, that is where his children are, that is where his fiancée is, that is where his family is.*
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> *Now the next question is why he would not be a flight risk. The State had to go through the entire paraphernalia of the law in order to get him back here. Much is made of the fact that on 8 February he was arrested and brought to court… [and] that he did not contest the warrant. Well, the reality is he would either contest the warrant, in which case almost certainly he would have been denied bail…because I would have thought it an essential part of the bail conditions that he would meet with the Garda at the airport and arrange to come back….But the further complication now arises that there is every incentive for the Defendant now to abscond because if he absconds it sets at nought the entire procedure to date and a full and, in my opinion, robust legal argument could be made that it is not appropriate to go through all of this rigmarole to bring him back and I think legal difficulties might be raised in relation to a second arrest warrant in that it possibly could be argued that having been released here it is not open to the State here to proceed yet again with a second European warrant. In those circumstances I must deny bail".*

12. It is clear from the first sentence of the above-quoted text, that the learned District Judge concluded that Mr Corcoran was a flight risk and that he was denying him bail for that reason. The learned District Judge then elaborates on his rationale in the first paragraph. And, if the court might observe, the rationale which the learned District Judge offers in that first paragraph for Mr Corcoran's being a flight risk is entirely convincing. Objection is taken on behalf of Mr Corcoran to: (a) the fact that the learned District Judge could not have known that Mr Corcoran would be refused bail in England if he contested the warrant; and (b) the observations as to whether a second arrest and surrender process would be viable. Neither (a) nor (b) appear to the court to colour in any way the learned District Judge's key finding which was that the whole focus of Mr Corcoran's life is in the United Kingdom;his fiancée is there, his children are there and, by Mr Corcoran's own account, his foreseeable future is there. Such perceived flight risk is a classic basis on which to refuse bail. And to the extent that any error does arise in the learned District Judge's succeeding comments, these are not sufficient to deprive him of jurisdiction. As Charleton J. observes in *Roche (Dumbrell) v. The Governor of Cloverhill Prison* [2014] IESC 43, paras.21 and 25:

"21. There are many instances where, within jurisdiction, a court may fall into an error of interpretation or base its decision on a mistaken view of the law. This does not in consequence remove jurisdiction. There are legal structures in place to deal with such commonplace situations….

25. At all times it had been the intention of the court seised with the trial of the offence against the appellant that while in Ireland he should be bound by stringent conditions attached to his bail. In the result, that is what happened albeit by a misconstruction of the existing order. That being so: this appellant then had an appropriate remedy. An immediate right to invoke the full and original jurisdiction of the High Court was open to him should it be considered that some possible advantage would be available to him on putting his circumstances afresh before that Court. Given the wide breadth of powers in respect of bail available to any judge of the court before which an accused is to be tried, and bearing in mind the ready availability of review in respect of any such order, it is difficult to conceive of circumstances when resort to Article 40 is either appropriate or necessary."

13. Counsel for Mr Corcoran correctly indicated that the comments at para.25 of Charleton J.'s judgment are *obiter* because the Supreme Court had concluded that there was no want of jurisdiction. And he is correct that *Dumbrell* does not reverse the decision of the Supreme Court in *McDonagh v. Governor of Cloverhill Prison* [2005] 1 I.R. 394 that Article 40 relief may be sought in instances where, to borrow from the wording of Ó'Dálaigh C.J. in *State (McKeever) v. Governor of Mountjoy Prison* (Unreported, Supreme Court, 19th December, 1966), as relied upon by McGuinness J. when giving judgment for the Supreme Court in McDonagh, at 402, there are *"irregularities or…procedural deficiencies…such as would invalidate any essential step in the proceedings leading ultimately to…[an applicant's] detention".* Indeed, it is notable that Charleton J., despite the strength of his observations, does not altogether close the door to the possibility of Article 40 proceedings, confining himself to the rigorous but not absolute observation that "[I]t is difficult to conceive of circumstances when resort to Article 40 is either appropriate or necessary." But whatever the niceties of the rules on precedent and whether a particular observation of a Supreme Court judge is part of the ratio of a case, or is merely *obiter*, the reality of court-life is that lower courts, this Court included, naturally pay careful heed to all that is said at Supreme Court level – such is the lustre of that court – and to the guidance given by its members as to the proper interpretation and application of our laws, regardless of the precise precedential character of what is stated. And the clear message coming from the Supreme Court at this time, notwithstanding the decision in *McDonagh*, is that while Article 40 relief may be available, when it comes to the type of circumstances contemplated by Charleton J. in Dumbrell, such availability does not have as a necessary consequence in all instances that such relief is either appropriate or necessary – though even with this 'chill breeze' blowing from the direction of the Supreme Court, it must fairly be acknowledged that it remains almost inevitable that more Article 40 applications will continue to be brought than it is eventually established ought not to have been brought, if only because oftentimes no-one can tell that a particular Article 40 application is inappropriate or unnecessary until the High Court has resolved whatever legal issue is considered to present. In the meantime, a prisoner and her or his counsel may have what they perceive to be perfectly good grounds for considering a particular Article 40 application to be both appropriate and necessary.

14. Whether or not the within application was appropriate or necessary, so far as the rationale offered by the learned District Judge for refusing bail to Mr Corcoran is concerned, the court sees nothing in it that denied the learned District Judge of jurisdiction and which would thereby have rendered unlawful Mr Corcoran's continuing detention. Nor, the court would add, does it perceive there to be any error on the face of the District Court order such as would justify Mr Corcoran's release.

Part 5

Conclusion

15. For the reasons stated above, the court finds Mr Corcoran's continuing detention to be lawful.