Neutral Citation: [2016] IEHC 333

THE HIGH COURT

[2016 No. 344 SS]

IN THE MATTER OF SECTION 16(6)(B) OF THE EUROPEAN ARREST WARRANT ACTS 2003 AND 2012

AND IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

JULIAN MYERSCOUGH

APPLICANT

AND

GOVERNOR OF ARBOUR HILL PRISON

RESPONDENT

AND

MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 14th day of June, 2016

1. This is an application for an inquiry under Article 40.4.2 of the Constitution, in which the applicant challenges his present detention following the making of an order for his surrender to the United Kingdom authorities by the High Court (Donnelly J.) on 29th February, 2016, pursuant to the provisions of s. 16(1) of the European Arrest Warrant Acts 2003 and 2012 ("the EAW Acts"). An application was made to the court under s. 16(11) for leave to appeal that order on a point of law of exceptional public importance and because it was desirable in the public interest. This application was refused on 11th March, 2016.

2. The applicant contends that the appeal provision whereby the judge who has determined that the applicant be surrendered is also vested with authority to determine whether she ought to permit an appeal to be taken against her order and judgment under s. 16(11) is repugnant to the Constitution and consequently invalid. As a result, the applicant claims to be entitled to his release under Article 40.

3. On 29th February, at the time of the making of the surrender order, Donnelly J. informed the applicant that he had a subsisting right to initiate an application for an inquiry into the lawfulness of his detention under Article 40.4.2 of the Constitution as provided in section 16(4)(a).

4. On 21st March, an application was made to the High Court (Haughton J.) for an inquiry under Article 40 on the grounds that s. 16(11) was repugnant to the Constitution and that the applicant was denied a right of appeal against the order and judgment directing his surrender. Aspects of the grounds advanced on this application had previously been considered in *O'Sullivan v. Irish Prison Service* [2010] 4 I.R. 563, in which a similar application had been refused. For that reason, Haughton J. adjourned the application to 22nd March, and directed that the respondent and notice parties be put on notice of the application and the grounds thereof. The learned judge then gave directions as to the exchange of affidavits and submissions in respect of the issues in the case and adjourned the application for the inquiry to a further date.

5. On 23rd March, an application was made to Twomey J. for a stay on the order directing the applicant's surrender "pending the final determination of the related proceedings bearing High Court record number [2016 No. 344 SS]…" and a stay on such part of the order of surrender as was made pursuant to s. 16(4)(c) pending the determination of those proceedings.

6. As part of the order directing the applicant's surrender the court having recited that he had been informed of his rights under s. 16(4), further directed:-

> "(a) that if the respondent is not surrendered before the expiration of the time for surrender under s. 16(3)A of the European Arrest Warrant Act 2003, as amended, he is to be brought before the High Court again as soon as practicable after that expiration; or
>
> (b) if it appears to the Central Authority in the State that because of circumstances beyond the control of the issuing State concerned that the respondent will not be surrendered on the expiration referred to at (a) he is to be brought before the High Court again before that expiration…"

7. In addition to the complaint made concerning the unavailability of a right of appeal, the applicant complains that the stay granted on 23rd March, was contrary to the provisions of s. 16(3)(A) and that the court ought not to have granted a stay on the order for surrender. The proper procedure was to bring the applicant before the court which had directed his surrender so that the time for his surrender might be extended pending the determination of the application under Article 40. It was submitted that since the purpose of the applicant's detention is to ensure his surrender in accordance with the Act, the stay, because it was not granted under the statutory procedure and framework contemplated by s.16, was unlawful and/or *contra legem.*

Statutory Provisions

8. Section 16(1) of the EAW Acts vests power in the High Court to order the surrender of a person to a State which has issued a warrant upon such date as is fixed by the court or such later date as it considers appropriate. Section 16(4) provides:-

"4. Where the High Court makes an order under subsection (1) or (2), it shall, unless it orders postponement of surrender under section 18:-

(a) inform the person to whom the order relates 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;

(b) order that that person be detained in a prison (or if the person is not more than 21 years of age, in a remand institutions) for a period not exceeding 25 days pending the carrying out of the terms of the order; and

(c) direct that the person be again brought before the High Court –

(i) if he or she is not surrendered before the expiration of the time for surrender under subs. (3A) as soon as practicable after that expiration, or

(ii) if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing State concerned, that person will not be surrendered on the expiration referred to in sub-paragraph (i), before that expiration.

5. Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall:-

(a) if satisfied that, because of circumstances beyond the control of the State or the issuing State concerned, the person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered:-

(i) with the agreement of the issuing judicial authority, fix a new date for the surrender of the person; and

(ii) order that the person be detained in a prison (or, if the person is not more than 21 years of age in a remand institution) for a period not exceeding ten days after the date fixed under sub-paragraph (i) pending the surrender;

(b) in any other case, order that the person be discharged…

6. Where a person:-

(a) lodges an appeal pursuant to subsection (11); or

(b) makes the 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 appeal or complaint are pending…"

9. The right of appeal against an order directing a person's surrender is set out in s.16 subs. (11):-

"11. An appeal against an order under subsection (1) or (2) or a decision not to make such an order may be brought in the Supreme Court if, and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

The Appeal

10. On 11th March, the High Court declined to grant a certificate under s. 16(11) in respect of the following proposed grounds set out in the schedule to the court's order:-

"1. In proceedings under the European Arrest Warrant Acts 2003 and 2012, should the unchallenged and uncontroverted evidence of a respondent who is objectively qualified (here a criminal law lecturer), be accepted where there is no contrary evidence proffered by or on behalf of the issuing State.

2. Is it permissible in light of s. 37 of the European Arrest Warrant Acts 2003 and 2012, or at all, to surrender a respondent under a European Arrest Warrant so that he might be sentenced in a requesting State in circumstances where, and at his trial leading to that proposed sentence, he was not permitted to call or cross examine a policeman described as a key prosecution witness, and/or is it so permissible to surrender in circumstances where the requiring State has not adequately, or at all engaged with the respondent's averments as to the centrality of that witness.

3. Is there a minimum threshold: in proceedings under the European Arrest Warrant Acts 2003 and 2012, having regard to the principle of mutual trust and respect, is it permissible to remedy perceived defects in a European Arrest Warrant and/or otherwise rely upon third party correspondence, hearsay assertions and/or counsels unused drafts, whether solicited or unsolicited."

The Judgment of the High Court

11. On 25th February, 2016, Donnelly J considered and delivered judgment on each of the issues raised in these proposed grounds and directed the applicant's surrender.

12. It had been submitted on behalf of the applicant that he had not been convicted as alleged in the warrant seeking his surrender. He stated in his grounding affidavit:-

"Further, I have not been convicted, as alleged, in the warrant. This is not a pedantic objection, either I have been convicted or I have not. No certificate of finding has been produced."

13. The learned judge dealt with this matter and the applicant's contention that his testimony in this regard should be regarded as expert testimony as follows:-

> "There is no requirement to have a certificate of finding: that has never been the law. That has been clear from Altravicious as concerned a domestic warrant but there is certainly no requirement to provide the documentation to back up that matter.
>
> His counsel on his behalf has tried to construct an argument that because a date, under the heading of 'Convictions', was 16 December, 2010, in relation to the previous matter and they are in accordance with the sentence, when in fact he was convicted before that means that conviction in the UK is only to be regarded as occurring on the date of the sentence. It is a surprising submission as it is not grounded upon the evidence of the respondent, as I said, he simply makes the bare assertion. In any event, that is simply a record produced, as it says, for a particular purpose and it would not come anywhere near the type of evidence required to set aside the statement on the warrant, that he has been convicted of these matters. As I say, this is not a case where, he is not contesting that the jury came back with verdicts against him but he is making a legal type argument that this does not amount to a conviction in the United Kingdom. It simply does not get off the ground, that argument.
>
> Even if one was to accept that somehow he had put something forward as a legal basis for that, the question arose as to the consideration of him as an expert. I would question his qualifications as an expert witness and this is not to question whatever qualifications that he may have but it is simply to question his qualifications as an expert witness in this case. One would expect where somebody is, in the first place, putting themselves forward as an expert witness, that they give details of their expertise. Both of his affidavits are singularly lacking in that regard. He says, he believes that he is qualified to make comments in respect of the law, but really just does not set out any basis for that at all and that is simply not good enough in a legal case before the court.
>
> Even if I do accept, and I am not saying that I do not accept it, when accepting his statement in the bail application that he was a law lecturer and a law lecturer for quite some time, this would not necessarily make him an expert for all purposes. What of lecturers in public international law, generally, or international law, generally, or human rights law or contract law, what if he has no qualifications regarding criminal law. As I say the fact that he is a law lecturer does not make him an expert for every purpose of the law.
>
> It was put forward on behalf of the Minister that he was not independent and could not be accepted as an expert. I accept that it is desirable that a person be independent, however, on its own, I do not think lack of independence disqualifies a person from being considered an expert; however, it does affect the weight. Here, whatever he says in terms of his assertion, as I say, that he has not been convicted, in my view it is entirely self serving and I reject it in the face of what has been stated, not just in the warrant but also in subsequent matters that he was convicted and he was convicted on 30th September. Any matter he has put forward simply does not set that at naught."

14. It is clear from this extract from the judgment that the learned trial judge did not accept there was any adequate evidence to establish that the applicant could be accepted or regarded as an expert witness upon whom reliance could be placed in the course of these proceedings. That was a finding of fact which she was entitled to make on the evidence before her.

15. The learned judge in her ruling refusing the certificate addressed the first ground which was advanced on the basis that the unchallenged and uncontroverted evidence of the applicant on the matter must be accepted when there was no contrary evidence proferred from the issuing State. This proposition was described as "breathtaking" in its scope and the learned judge added:-

> "I do not think it was a case that was necessarily unchallenged or uncontroverted. It was simply asserted that it was not in any way relevant or accepted in relation to the matter and there was a clear reference in the case to what kind of evidence has to be accepted.
>
> This Court does not have to accept evidence on affidavit by a respondent just because it has been so stated. This Court has to consider all of the presumptions that apply as respect, as regards how an issuing State will behave if somebody has surrendered….so it is in that context that this Court has to assess a respondent's evidence and it is always a matter for this Court to assess it. It is not necessarily a matter for the Central Authority to seek other evidence to counter it, or indeed for this Court to use its powers under section 20. So it was up to this Court to assess the evidence and it could not possibly be accepted and is not the law in an extradition case that simply because something is put on affidavit and there is no counter affidavit or counter papers that it has to be accepted. That is not even the law in a civil case. That is clear and is always a matter for the court to accept the matter."

The learned judge was satisfied that the law was "absolutely clear" on this point.

16. The second question raised the issue whether under s. 37 of the European Arrest Warrant Acts 2003 and 2012, it was permissible to surrender the respondent so that he might be sentenced in a requesting state when at its trial, he was not permitted to call or cross examine a policeman who was described by the prosecution as a key prosecution witness or where the issuing State has not adequately addressed or engaged with the respondent's (the applicant herein) averment as to the centrality of that witness to the trial. In addressing that matter in her ruling on 25th February, Donnelly J. stated:-

> "The issue has arisen because he said he could not cross examine a Detective Sergeant Ling in the course of the trial. The reality, however, is that, there has been no attempt to engage with what is required to be shown before the court can refuse to surrender a person on the grounds of a breach of a fair trial. It has been acknowledged time and again in these courts and indeed the European Court of Human Rights that a person's extradition will only be refused on an Article 6 if what are effectively exceptional circumstances where there is a real risk of them being subjected to a flagrant denial of justice. There have to be substantial grounds for believing that on surrender, he is at real risk of being subjected to a flagrant denial of justice….
>
> …I accept…. that the court can look back at the trial process. However, the court does so with the assistance of a presumption that the trial process was fair. Here there is ample evidence to show that he has had a hearing into the issue regarding the availability of this witness for the trial.
>
> As a matter of law, there has been no attempt on his behalf to demonstrate that every witness sought by an accused must be called or must be available to be called, that is not the law in this jurisdiction and it is not a universal principle. What one must have is a process whereby that can be adjudicated upon. The court in the UK is best equipped to deal with it. I note also that he has made no attempt to say that [he] cannot appeal this aspect.

> Furthermore, I will just observe that Detective Sergeant Ling appears from the material provided by this respondent today, not to have been the police officer who actually first examined the relevant computer material and found them, rather his evidence appeared to relate to the categorisation of those images and his attendance at interview. Be that as it may, regardless of whether this is the case or is not the case, as the entire matter of the evidence put before me shows that, as Fennelly J. said in the Stapleton case and to use that on the facts of this case it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent has to be tried…..It is clear that issues regarding the availability of a particular witness, the reason why he is not available, his importance to the trial, his importance in terms of the prosecution, in terms of damaging a prosecution case or advancing a defence case, and whether a fair trial can occur, can only really be dealt with by the trial court. In this case, as I have said there has been no attempt to say that he had no opportunity to appeal that and that is a factor that is said to be relevant in the Marjas [case] as well. As I say, I am wholly satisfied that there is no merit in this point about Article 6."

17. On the application for a certificate of appeal in respect of this point, the learned judge stated:-

> "It is appalling[ly] wrong to phrase a question [o]n this basis when it simply ignores the repeated judgments of this Court, and indeed the Supreme Court, in relation to how issues regarding rights under s. 37 must be dealt with and what the test is, and that test has been set out repeatedly. It is a matter for this Court to assess evidence placed before it in light of those principles that apply and the presumptions that apply, and where the onus is on a respondent to put forward cogent evidence of flagrant denial of a breach of his fair trial rights.
>
> So [in] my view, this proposition was barely statable to begin with and it is completely unstatable now. It is not, in any sense in the public interest or indeed a case of exceptional public importance to put this forward."

18. The third issue raised poses the question whether there was a minimum standard in proceedings under the EAW Acts having regard to the principle of mutual trust and respect. The question raised was whether it was permissible:-

> "to remedy perceived defects in a European Arrest Warrant and/or otherwise rely upon third party correspondence, hearsay assertions and/or counsels on used drafts, whether solicited or unsolicited."

19. The learned judge addressed the third question as follows:-

> "In relation to the final matter, again this is clearly not a novel point. It has been dealt with by the Supreme Court already in Slyzinski. It is also a situation where the legislation has made provision for defects in the European Arrest Warrant under section 45(c). Furthermore, in this particular case, I dealt with this and in a particular way and made certain rulings in relation to the matters. There is no issue being put forward here which shows that there was any matter of public importance and that it was desirable in the public interest to have this issue determined in any other way that has not been determined either clearly by the Supreme Court or indeed by recourse to the Act itself. It is simply not a matter that breaches a level of exceptional public importance or that it would be desirable in the public interest."

The application for the certificate was therefore refused.

20. I have set out these matters in some detail because it is helpful to understand the present case against the reality of its history to date including what was in issue at its various stages. It is not this court's function to determine the correctness of the learned trial judge's determination. However, it is useful to consider whether there is any substance to the applicant's assertions and submissions on this application. The applicant complains that he was denied an effective right of appeal which was of significance and importance to the facts and legal issues in his case and that he therefore has standing and a factual and legal basis to challenge the constitutionality of section 16(11). I am entirely satisfied that no issue of any substance was raised before the learned trial judge that gave rise to any arguable or stateable ground of appeal much less one that would reach the statutory threshold to warrant a certificate under section 16(11). The extensive evidence advanced on this application does not establish that the applicant had a basis upon which to advance an arguable or potentially successful appeal had he been subject to an untrammelled right to appeal and had no leave to appeal been required. Any such appeal was likely to fail. I am satisfied that this conclusion is relevant to and one of the factors to be considered when determining the existence of "arguable grounds" for an inquiry under Article 40 at this initial stage.

The Right of Appeal and s. 16(11)

21. The main ground advanced by the applicant is that by virtue of the very high threshold required to be met under s. 16(11) the section is an unconstitutional interference with his right to appeal. This point was considered in O'Sullivan v. Irish Prison Service [2010] 4 I.R. 562. It was held that s. 16(12) of the European Arrest Warrant 2003 (the equivalent of s. 16(11) the subject matter of these proceedings) was not repugnant to the Constitution.

22. McKechnie J. first determined that in an application under Article 40 the onus of proof lay on the State to prove that the applicant was detained in accordance with law but that this onus did not extend to proving the constitutionality of the law under which an applicant was detained which enjoyed the presumption of constitutionality.

23. The right to appeal was considered under two headings which are also the subject of the challenge in these proceedings namely, the right of access by the applicant to the courts and whether the applicant is discriminated against by reason of the high threshold applicable under section 16(11).

24. Article 34.4.3 of the Constitution provides:

> "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

25. McKechnie J. considered whether the substantive right of access to the courts and justice enjoyed by the applicant was compromised by the high threshold set under section 16(12). He stated:

> "59. In relation to the right of access, it should immediately be said that the amendment in dispute cannot be classified as an "exception" to appellate jurisdiction, as understood by reference to Article 34.4.3. I would respectfully agree with the respective characterisations of exclusions and regulations in *Smith Kline & French Laboratories (Aust) Ltd. v. Commonwealth [*1991] HCA 43, (1991) 173 C.L.R. 194 and in particular the characterisation of a requirement of special

> leave as a regulation, rather than an exclusion. It does not remove an appeal, in all forms, from the Supreme Court; it regulates, by condition, the right of appeal."

26. The court acknowledged that the threshold set for an appeal under s. 16(12) was substantial though not insurmountable. The nature of the jurisdiction exercised by the High Court under the 2003 Act was considered. McKechnie J. noted:

> "62. … It must be remembered that surrender proceedings are not determinative of guilt or innocence - that is a matter for the requesting state. The High Court in this jurisdiction, as executing authority, ensures compliance in respect of that part of the process, which it has authority over. This includes being satisfied that the documentation is Framework compliant, and that the established safeguards have or can be met. When this jurisdiction is performed it must surrender the person … it has no discretion in this matter. The rationale for this comes directly from the Framework Decision and is based on mutual co-operation and trust between the judiciary of the member states. It must be presumed that once surrendered a detainee will be accorded the protection of his substantive rights in a manner equivalent or similar to that in this jurisdiction. Nonetheless, this is a presumption, and if an applicant can show that should he be surrendered, certain of his rights will be infringed, this may prevent his surrender as outlined in s. 37 of the Act of 2003. At the s. 16 hearing, the applicant is entitled to be heard before the court with the aid of counsel, should such be desired, and he is given the fullest opportunity to challenge the European arrest warrant and his surrender thereunder. This has successfully been done in many cases. It should also be noted that although there is potentially only one hearing, it is before the High Court. … A hearing before the High Court therefore shows the serious and substantial nature of proceedings under s. 16 of the European Arrest Warrant Act 2003 and a desire by the legislature that they be dealt with in a weighty and authoritative manner."

The court also noted that even in the absence of a certificate for leave to appeal, judicial challenge was still possible insofar as the applicant still had a right to apply to the High Court for an inquiry under Article 40.4.2 of the Constitution. During such an application surrender may not be made under the Act. In addition Article 34.4.4 provides that no law may be enacted excepting from the appellate jurisdiction of the Supreme Court cases involving questions as to the validity of any law having regard to the provisions of the Constitution. The court was satisfied that absent any express words seeking to remove that jurisdiction a certificate would not be required under s. 16(12) to appeal a decision concerning the constitutionality of the European Arrest Warrant Acts.

27. The court therefore concluded that the European Arrest Warrant regime did not "unduly infringe the applicant's constitutional right of access to the court" because:

"(i) The hearing is in the High Court;

(ii) The parties are or may be represented;

(iii) It is in part a supervisory or facilitating judicial hearing;

(iv) despite this, there are express safeguards to ensure that an applicant's rights will not be infringed when surrendered; and furthermore;

(v) some appeal or further judicial scrutiny is possible.

It followed therefore that the High Court was in a position to determine all matters relating to the surrender of an applicant and that the s. 16 procedure allowed "all justiciable questions involving the administration of justice [to be] heard and determined" before the High Court."

The applicant in this case has not offered any basis upon which this Court might choose not to follow the reasoning of McKechnie J. in respect of the right of access.

28. McKechnie J. also rejected the submission that s. 16(12) was discriminatory in that the applicant claimed that he was treated less favourably in being surrendered to the United Kingdom than he would if he was being extradited to a non-European country for example the United States of America or Australia. It was submitted that the applicant was being treated less favourably than another person in a suitably similar position without justification (*Re. Article 26 and Re. the Employment Equality Bill 1996*, [1997] 2 I.R. 321). The court was not satisfied that the applicant was in the same position as a person who might be extradited to a jurisdiction outside the European Union and the framework applicable to surrender.

29. The learned judge concluded that there were clear distinctions to be drawn between the surrender process under the European arrest warrant regime and extradition. He stated:

> "70. … The principles upon which each rests are materially different: one driven by executive motivation, the other by mutual judicial trust and respect. The European arrest warrant regime was developed to solve many notable and renowned problems which developed with the extradition system which existed previously. The former regime, and indeed the one which still regulates our relationship with the vast majority of States worldwide, was technical, slow, and lacked reciprocal judicial trust and respect. Without the latter it is incumbent on both the State and its courts to apply a heightened level of scrutiny in relation to those being extradited; many of the world's legal systems do not uphold the same principles or rule of law or democracy which we enjoy here. The risk of wrongful conviction or mala fides prosecution is therefore much greater outside of the European Union. Even with our more developed neighbours, procedural safeguards and concepts of justice and punishment may be at significant variance with our own. A more thorough investigative procedure is therefore both justified and required so as to safeguard the rights of those whose extradition is sought."

He noted that the surrender system was designed to overcome issues of complexity of procedure and delay. In particular the learned judge noted a statement of the European Commission set out in its proposal for the Framework Decision (COM (2001) 522, p. 26) which anchored the European Arrest Warrant regime on the idea of citizenship of the Union:

> "Since the European arrest warrant is based on the idea of citizenship of the Union as provided in Articles 17 to 22 TCE, the exception for a country's nationals, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union, irrespective of his or her nationality."

30. Amongst the differences between surrender and extradition were the fact that surrender involves no hearing on the merits of the prosecution, pending or anticipated in the requesting jurisdiction and the removal of the executive from a role in the surrender process. A special relationship exists between member states of the Union which involves increased judicial cooperation and a great level of trust that other member states will act in accordance with the highest and fundamental principles of the Union including the rule of law and freedom. If differences existed between the two systems these were entirely justified having regard to the ultimate objectives of the European Arrest Warrant Scheme under the Framework Decision.

31. Two further aspects of the right to appeal under the 2003 Act were considered. Firstly the court rejected the submission that the Oireachtas was not entitled to introduce differing procedural legislative schemes to deal with different areas of law and litigation. McKechnie J. concluded that when deciding the procedural regime for one area of litigation the Oireachtas was not obliged to take into account how it has dealt with the matter in other areas. He concluded that there was no legitimate basis for a complaint of discrimination in the appeal process. He also rejected the proposition that a person in one member state could complain that he is being discriminated against by virtue of different procedural rules or regulations in another. He noted:

> "… it must be borne in mind that procedural laws are, in general, peculiar to each member state. There are significant differences between the organisation of the courts in this jurisdiction and others in the Union. There are also differences in how courts may approach matters; particularly considering differences between the adversarial system in this jurisdiction and the inquisitorial one in most other member states. It would almost certainly be impossible to craft procedural regulations which would happily fit into all member states' systems; that is indeed why these matters are left up to member states to properly outline. Furthermore, member states will naturally be in a better position than the European Union to implement those procedural regulations, having regard to the nuances of their national systems and constitutional requirements."

He therefore concluded that the fact that the right to appeal to the Supreme Court was limited in a different way to other member states in its implementation of the Framework Decision was not sufficient to ground a complaint of discrimination.

32. It is submitted on behalf of the applicant that the equality argument addressed by McKechnie J. in *O'Sullivan* was based on the use of Part II of the Extradition Act 1965 as a comparator. It is suggested that there are other and closer comparators notably s. 25(6) of the International Criminal Court Act 2006 In particular it was submitted that the appeals procedure set out in that Act was a more appropriate comparator with the European Arrest Warrant Acts in respect of the disparity in appeal regimes and might lead the court to conclude that the disparity between the two regimes was discriminatory and called for justification by the state parties. Section 25(6) of the International Criminal Court Act 2006 provides that an appeal shall lie to the Supreme Court against a surrender order under the Act "only on a point of law" a different type of limited appeal.

33. The applicant relies upon the decision of the Court of Appeal in *Minister for Justice and Equality v. O'Connor* [2015] IECA 227 in support of this proposition. In that case the applicant claimed that he was discriminated against contrary to the provisions of Article 40.1 of the Constitution in respect of the provision of legal aid under the Attorney General Scheme available to the applicant in respect of his proposed surrender. This was in contrast to accused persons whose constitutional right to legal aid was vindicated by the provision of legal advice and representation pursuant to the provisions of the Criminal Justice (Legal Aid) Act 1962 as amended and those whose surrender was sought by the International Criminal Court who had a statutory right to legal aid under s. 23(6) of the 2006 Act. Irvine J. delivering the judgment of the court (Ryan P. concurring) stated her agreement with Hogan J. (dissenting) that persons facing a request for surrender under the EAW Acts and the 2006 Act were of "an equivalent class for the purpose of constitutional argument in respect of the legal aid issue". The court did not agree that the applicant's Article 40.1 rights had been breached because of the absence of a statutory legal aid scheme under the EAW Acts. Uniformity in the delivery of legal aid was not required. The State had discretion as to how it would fulfil its constitutional obligations for those entitled to legal aid. The applicant was not in a position to establish by evidence that the *ad hoc* scheme was a less effective method than a statutory scheme. There was no evidence that as a matter of substance those who availed of the ad hoc scheme had been any less effective in vindicating their rights under the EAW Acts than under the statutory scheme available under the 1962 Act or the 2006 Act.

34. Hogan J. reached a different conclusion. He stated:-

> "56. It must equally be concluded that, so far as this issue is concerned, there are no real differences of substance between the cases of persons facing trial in a domestic court or facing surrender under the 2006 Act on the one hand and those facing surrender under the 2003 Act on the other. It could hardly be correct that, for example, the legal aid entitlements of a requested person facing surrender to London on fraud charges should rest on the terms of a purely administrative scheme with all its attendant uncertainties (even if - as must be accepted - that scheme is invariably applied in a positive manner once there is a judicial recommendation to this effect) whereas such a person facing trial in Dublin on exactly the same charges would have a statutory entitlement to legal aid in the manner specified by the 1962 Act.
>
> 57. No meaningful distinction, moreover, can be drawn for this purpose between surrender requests made under the 2003 Act and those made under the 2006 Act. Indeed, it may be noted that this is tacitly acknowledged by Article 16(4) of the Framework Decision when, dealing with multiple requests for surrender, it provides that:
>
> "This Article shall be without prejudice to the member states' obligations under the Statute of the International Criminal Court".
>
> 60. It is of course, absolutely correct to state that surrender under the EAW procedure is sui generis. To the extent, therefore, that the substance of the procedure under the 2003 Act is governed by EU law it would be inappropriate to import purely national rules regarding evidence and pre-trial procedure into that system: see, e.g. *Minister for Justice, Equality and Law Reform v. Sliczynski* [2008] IESC 73, per Macken J."

35. Hogan J. acknowledged that the EAW procedure provided for a system of surrender based within the European area of Justice and Home Affairs which was based on mutual trust and respect. Thus the surrender procedure could not properly be compared with a system of extradition to third countries as acknowledged by McKechnie J. in O'Sullivan. He briefly referred to the right of appeal in passing when reaching his conclusion as follows:-

> "62. While fully accepting the differences as articulated by McKechnie J. in *O'Sullivan* between surrender under the EAW procedure as compared with the extradition arrangements contained in the 1965 Act, I do not think that these differences are dispositive so far as the equality issue presented in this case is concerned. It is one thing for the Oireachtas to prescribe different appellate procedures in the case of surrender applications under the 2003 Act as compared with

> extradition under the 1965 Act. It is quite another to have starkly different arrangements regarding the legal aid entitlements of persons who, depending on their circumstances, are facing either trial in the State or surrender under the 2003 Act or the 2006 Act or extradition under the 1965 Act. The legal aid entitlements of the accused persons or the persons facing surrender goes to the substance of the entire fairness of the relevant legal procedures and these arrangements have considerable implications for personal liberty".

The learned judge was not satisfied that the difference between statutory and non-statutory arrangements could be dismissed as purely theoretical even if they were likely to be modest in practice. The applicants facing surrender or extradition had the same need for legal aid as if facing trials and similar charges in the State or facing surrender under the 2006 Act. Therefore he concluded that the fundamental precept of equality before the law contained in Article 40.1 had been breached.

36. The applicant in this case seeks to apply the principles underlying the majority and minority judgments in *O'Connor* to the facts of this case. However, Hogan J. in his dissenting judgment acknowledged that there was a difference between prescribing different appellate procedures in the case of surrender applications under the 2003 Act as compared to extradition under the 1965 Act or indeed, one might add, the 2006 Act and what he termed a starkly different arrangements regarding legal aid entitlements under each of those statutes. These, he regarded as going "to the substance of the entire fairness of the relevant legal procedures" which had considerable implications for personal liberty. I am not satisfied that the differences in the right of appeal identified by McKechnie J. or now relied upon in respect of the 2006 Act could be said to effect the substance of the entire fairness of the relevant legal procedures applicable under the surrender provisions of the EAW Acts. The right of appeal under the 1965 Act is unlimited and the right of appeal under the 2006 Act is limited to a point of law. The right of appeal in respect of the 1965 Act when used as an appropriate comparator was insufficient to persuade McKechnie J. that there was an unconstitutional discrimination between proposed extraditees under that Act and those who might be surrendered under the EAW Acts. It is now suggested that the restriction of an appeal against a surrender order under the 2006 Act "only on a point of law" creates an unconstitutional discrimination when compared with an appeal which requires the leave of the High Court on the basis of a point of law of exceptional public importance and which is in the public interest to take. It would appear therefore that the applicant accepts that some restriction on the right of appeal as against that available under the 1965 Act is acceptable and is not discriminatory under Article 40.1.

37. It is important to recall that the EAW regime is sui generis. In that regard as also noted by McKechnie J. the Council Framework Decision on which the European Arrest Warrant regime is based does not provide for a right of appeal. McKechnie J. stated in *O'Sullivan:*

> "In general, the only right of appeal recognised internationally is that stated in Article 2.1 of the Seventh Protocol of the European Convention on Human Rights 1950 which provides:-
>
> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law" […]

When looking at the Council Framework Decision of the 13th June, 2002, on the European arrest warrant and the surrender procedures between member states, one can see that it is wholly silent on the issue of appeals. Article 14 says:-

> "Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing member state"

Thus, far from elevating any right of appeal as a mater of judicial or legal philosophy, or political objective, to a great level of importance, the Framework Decision does not speak on the matter. It leaves to the member state the execution of this particular obligation in relation to surrender, which is to be dealt with in accordance with the law of that member state."

38. I am not satisfied that the applicant has established on the basis of the supposed new comparator advanced in respect of the 2006 Act that there is now an arguable case for the release of the applicant on the basis that the judgment of McKechnie J. in *O'Sullivan* ought not now to be followed. As noted by the learned judge there are many statutory provisions in which there are restricted rights of appeal set out which have been part of our appellate structure for many years. The European arrest warrant regime itself does not require a right of appeal though it set out specific rules requiring access to legal representation. Clearly, the right to an appeal was not regarded as part of the substantive access to justice required under the Framework decision. There is a clear distinction between the fundamental importance and nature of the right to legal aid in the European arrest warrant regime as canvassed in the O'Connor case and acknowledged by Hogan J. and the regulation of the right to appeal by the Oireachtas under Article 34 in the specific context of that regime.

39. Furthermore, the applicant has failed to establish any injustice or prejudice arising from the determination of Donnelly J. in refusing leave in this case that might provide a basis upon which to construct the argument advanced. The grounds proposed are weak and in large measure unstateable. The applicant was given every opportunity in the course of this application and by reason of the adjournment of the initial application for an inquiry by Haughton J., to expand upon and raise any argument or precedent that might persuade the court otherwise. I am satisfied in the circumstances to apply the judgment of McKechnie J. in O'Sullivan and the principles set out therein and that the applicant has not established an arguable ground for an inquiry on this basis.

40. The applicant also claims that he, unlike the applicant in *O'Sullivan,* is a national of another EU member state which gives rise to a question of indirect discrimination contrary to European Union law. No evidence is advanced to the court to support this proposition. It is suggested that some evidence might be obtained to support it if discovery were granted in relation to the preponderance of applicants who are the subject of surrender and/or the limited right of appeal under the EAW Acts. I am satisfied that the European Arrest Warrant Acts apply to all persons irrespective of their nationality. The suggestion that some distinction ought to be drawn between the O'Sullivan case and this applicant on the basis that Mr. O'Sullivan was an Irish national and that this applicant is a national of another member state is in my view irrelevant and untenable. Both are citizens of the European Union. Both are subject to the same statutory provisions which operate in this jurisdiction and there is no distinction drawn in the application of those provisions on the basis of their nationality or their citizenship of the European Union or otherwise. The same appellate rules are also applied to those who are non-EU citizens. I do not consider any arguable ground arises on this basis.

Bias

41. The applicant complains that the present appellate provision enables a trial judge to refuse leave from motivations such as a failure to comprehend the significance of a point of law or a conviction that a decision that it is sought to challenge is correct or a belief that appealing would be a waste of scarce time and resources. It is submitted that it is unfair that the judge who has heard and determined the appeal "has a veto over whether his (her) own decision may be appealed". In addition it is submitted that a judge

in one case may refuse a certificate under the appellate rule but in another it may be granted. It is said that this occurred in the case of *Minister for Justice v McGuinness* [2011] IEHC 289 in which a certificate to appeal was refused where the issue was the compatibility of the ad hoc legal aid scheme with European Union law. It is said that in the O'Connor case leave was granted on this point.

42. In *O'Sullivan* McKechnie J. addressed these points in detail at paras. 82 to 88 inclusive of the judgment. The learned judge rejected the proposition that s. 16(12) breached principles of fairness. The section was silent as to which judge should hear a certificate application and he concluded that even if it could be said that it was inherently biased for the same judge to determine the certificate application as decided the s. 16 application, such a finding could not invalidate the legislation but would merely require an alteration in the ordinary practice currently associated with the regime. A different judge would hear the application. He then considered the issue of objective bias. In particular emphasis was placed on the fundamental difference between the decision to surrender under s. 16 and the appeal application. The learned judge stated:-

> "87. … it must be borne in mind that the issues called for decision were of a fundamentally different nature as between the s. 16 application and the appeal application. In the latter circumstance, he [the trial judge] was being asked the objective question of whether the judgment gave rise to "a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court". It must be made clear that he was not being called upon to make any further determination of the strength of the applicant's case, nor was he being called upon to re-affirm the correctness or otherwise of his earlier decision. The question which he faced, realistically, was whether there would be a public benefit in allowing an appeal to the Supreme Court so that a point of law may be settled and/or clarified by that court. The judge will have no interest in whether his decision would be successfully appealed; indeed even if he has suspicions, one way or the other, he may feel it desirable or necessary to resolve some ambiguity within it. I therefore have no doubt but that a judge is capable of coming to a decision thereupon in an impartial manner. These are matters that any reasonable person under the established test would be presumed to know.
>
> 88. Given that the reasonable person would know that the judge in this case was being asked a fundamentally different question and would have no interest in the outcome of the appeal, I cannot see that it would give rise to a reasonable apprehension of bias. The decision in *E.P.I. v. Minister for Justice* [2008] IEHC 432, [2009] 2 I.R. 254 is clearly distinguishable since in that case the judge had effectively expressed an opinion in the interlocutory application as to the strength of the applicants' case. The applicant would therefore, at the full hearing, have to put forward his case in the knowledge that the judge had certain reservations as to the strength thereof. This is not the case presently. I am therefore satisfied that there could be no reasonable apprehension of bias on the part of Peart J., nor was there anything improper in him hearing the application for a certificate to appeal. Furthermore, as stated, in circumstances where the legislation is silent as to which judge should hear the matter, it could not be read into the section that this was a requirement. In fact I could see no impediment, if proper objection was taken, in another judge hearing the application. Although inconvenient, some rare and unusual circumstances may call for this. In any event, … it would not be possible to strike down the section on this ground even if I was satisfied that there might be a reasonable apprehension of bias from the trial judge also being the certificate judge."

43. I see no reason to depart from the determination of the learned judge on this point. There is no basis upon which to do so on the well established rules applicable to such a potential departure. Furthermore, I am not satisfied that there is any basis upon which to conclude that the section is invalid simply because one High Court judge may determine in a particular case that a certificate should not be granted in respect of a point of law but that another judge might reach a different conclusion in another case.

44. The respondents also rely upon the judgment of Barrett J. in *Lanigan v. Governor of Cloverhill Prison* [2015] IEHC 574 (unreported, High Court, 17th September, 2015). Barrett J. expressly considered the constitutionality of s. 16(11) and determined as follows:-

> "There is nothing unusual, never mind unconstitutional, about the just-quoted provision. Restrictions on the right of appeal are expressly contemplated by Article 34 of the Constitution. Section 16(11) of the Act is but a statutory manifestation of the licence allowed the Oireachtas by the People through the medium of Article 34. There is, to borrow from the phraseology of the Chief Justice in FX, no "fundamental denial of justice, or a fundamental flaw" effected by or pursuant to s.16(11) which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court."

45. The applicant submits that this decision was *per incuriam* and that the issue was not properly before the learned High Court judge. This case is now on appeal. The affidavits in this case suggest that the grounds of appeal include a number of objections based upon the state of the proceedings and pleadings when the learned judge heard the matter and whether the issue was properly before the court. I express no view on this matter save to observe that the conclusion stated by the learned judge is entirely consistent with that of McKechnie J. in *O'Sullivan.*

46. For all of the above reasons I am not satisfied that an arguable ground has been made out by the applicant for the initiation of an inquiry by this Court under Article 40 of the Constitution into the lawfulness of his detention on the basis that s. 16(11) is repugnant to the Constitution and therefore invalid.

The Stay

47. On the 23rd March, 2016, the day after the court directed the exchange of affidavits and submissions within a time frame in the Article 40 inquiry which was then adjourned, an application was made to the High Court, Twomey J. for a "stay" on the surrender order pending the determination of the Article 40 proceedings.

48. Under s. 16(4)(a) the High Court shall inform the applicant of his right to make a complaint under Article 40.4.2 of the Constitution following the making of an order for his surrender. Section 16(3) states that the order under s. 16 shall take effect upon the expiration of 15 days beginning on the date of the making of the order. Surrender must take effect not later than 10 days after the order takes effect under subs. 3(A). Section 16(4)(b) requires the court to order the applicant's detention in a prison for a period not exceeding 25 days pending the carrying out of the terms of the order and s. 16(4)(c) requires the court to direct that the applicant be again brought before it if he has not surrendered before the expiration of the period set under subs. 3(A) as soon as practicable after that expiration. The applicant must be brought before the High Court if it appears to the Central Authority that he will not be surrendered on the expiration of the period set out in subs. 3(A) before the expiration of that period. Section 16(5) provides for the setting of a new date for surrender where a person is brought back before the court pursuant to subsection 4(c).

49. Section 16(6) provides that where a person makes a complaint under Article 40.4.2:-

> "He or she shall not be surrendered to the issuing State while proceedings relating to the appeal or complaint are pending."

An appeal has been brought against the order of Twomey J. which is now pending before the Court of Appeal.

50. The application for the stay was made with very little notice to the applicant. It was an urgent application insofar as the time limit on the order for surrender was running. Both sides were heard on the application.

51. I am satisfied that where an application for an inquiry under Article 40 of the Constitution is initiated, as a matter of law the applicant should not be surrendered. The length of time which an application under Article 40 may take is not determinable at the time of the making of the application. Section 16(6) is understandably not subject to time limits having regard to the nature of the jurisdiction under the Constitution and the various types of application and grounds for same that may be initiated (including challenges to the constitutionality of a statute). In the circumstances the High Court had jurisdiction to ensure that the applicant's position was secured and that no action could be taken on foot of the order to surrender pending the determination of the Article 40 application. In the circumstances it appears to me that it was in the interests of justice that the stay be granted and the applicant's rights be fully protected pending the determination of the inquiry (see *The State (Quinn) –v- Ryan* [1965] I.R. 70).

52. I am not satisfied that the statutory provisions in relation to the time limits applicable to surrender and the applications which must be brought in relation to the extension of such periods are relevant in the context of an application under Article 40. Those time limits are for the purpose of securing the surrender and implementation of the order for surrender or indeed the discharge of the applicant in appropriate circumstances from that order. It seems to me that having regard to the urgency of the situation created by the application under Article 40 in respect of the running of the time concerning the order of surrender, it was entirely appropriate for the High Court to grant a stay on that order. The court notes that a similar application for an inquiry under Article 40 on the same basis as that in the *Lanigan* case in which Mr. Justice Butler imposed a stay on an order for surrender was refused by this Court (Noonan J.). I am not satisfied that the grounds in support of this aspect of the application are arguable.

Conclusion

53. For all of the above reasons I am satisfied that the applicant has not demonstrated an arguable case upon which to order an inquiry into the lawfulness of his detention. I am mindful of the very extensive argument made on this application which has enabled the court to have a far more extensive understanding of the arguability of the issues raised by the applicant than is normally available on an initial application for an inquiry under Article 40. It has enabled me to examine the underlying propositions advanced on this application which I have found to be unsustainable on the established legal authorities (*Application of Woods* [1970] IR 154) and on the facts of this particular case.