Neutral Citation Number: [2011] IEHC 313

THE HIGH COURT

2010 434 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

AND

CYRIL MC GUINNESS

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 27th day of July 2011

This Court recently considered an application by the applicant for the surrender of the respondent to the Kingdom of Belgium on foot of a European Arrest Warrant issued on the 1st of September, 2010 and endorsed for execution in this jurisdiction by the High Court on the 26th of November, 2010. Following a day and a half long hearing that took place on the 12th and 24th of May respectively, the Court reserved judgment. Judgment was delivered on the 15th of July 2011 and the Court granted the application and made the s. 16 Order sought. The arguments raised and submissions made on both sides are set out in detail in the Court's 26 page judgment, as well as the Court's rulings on the various issues raised.

On yesterday's date, counsel for the respondent attended before me ostensibly for the purpose of seeking a certificate from the Court pursuant to s. 16(12) of the European Arrest Warrant Act, 2003 that the order or decision of the High Court 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 intention to move such an application had been flagged some days previously and, notwithstanding that the Court was at hearing in another matter, the Court had agreed to list the matter at 10.00 on yesterday's date in order that it might be dealt with in a timely manner, particularly as we are approaching the end of the legal year.

At the commencement of the proceedings yesterday the Court was asked to receive, and allow the respondent to proceed on foot of, a Notice of Motion grounded upon an affidavit sworn by his instructing solicitor on the 25th of July 2011, documents which the Central Office had refused to accept for some technical or administrative reason. The Court acceded to this request.

The first relief sought in the said Notice of Motion was that "on account of several of the issues canvassed in the intended notice of appeal, this leave application should be heard and determined by a judge other than the judge whose decision it is sought to appeal …" . In other words I was being asked to recuse myself from hearing the s.16(12) application. The grounds upon which such recusal was requested were set out in the grounding affidavit. The solicitor, Ms Dolan, states:

> "At an early stage in the proceedings, the learned trial judge
>
> (i) Suggested to my Counsel that he had an "agenda" in respect of the Attorney General's Scheme, in a tone that suggested some ulterior motive other than the defence of these proceedings on behalf of Mr McGuinness.
>
> (ii) Made observations that led me and my client to understand that he (the judge) disapproved of counsel's and my approach to Mr McGuinness's defence, i.e. argue only what I may describe the legal point.
>
> (iii) Suggested that he would consider referring the matter and Counsel to the Bar's disciplinary body.
>
> (iv) On it being drawn to his attention that Counsel was confined to the instructions he had, suggested that he would consider referring the matter and myself to the Law Society's disciplinary body.
>
> (v) Questioned Mr McGuinness, who was sitting in the body of the Court, about his instructions to me and Counsel, in a manner that suggested that those instructions be changed.

In the light of the above, compounded by other observations made in the course of the hearing, when it ended both I and my client were of the distinct view that it was not fairly conducted, and it appeared that there was a distinct bias either against him or in favour of the State".

When the question of my possible recusal was raised, effectively as a preliminary issue, I heard submissions from counsel on both sides and then briefly reserved judgment. Having risen I listened to the digital audio recordings concerning the portion of the s.16 hearing to which the complaint relates. This was important having regard to the reference to "tone" in Ms Dolan's affidavit. (For the assistance of any other Court that may be concerned with this matter the recordings in question are those in Court 21 CCJ on the 12th of May 2011 between 15:45 and 16: 15 approx and also on the 24th of May 2011 in the same Court between 12:24 and 12:32 approx.) Moreover, I bespoke written transcripts of the relevant portions of the hearing and these are now to hand and will be made available to the parties.

Having reviewed the audio recordings I formed the view that it was appropriate to recuse myself on the grounds not of bias but of a possible perception of bias arising from one discrete aspect of the matter, and I duly sat and informed the parties of my decision. I said that I would give my reasons the next day in a short written judgment and I now do so.

First, the Court rejects emphatically that it was biased in any way. On the contrary, its sole concern was for the rights and welfare of the respondent whose liberty was in jeopardy. The way in which the European Arrest Warrant system is structured is that one gets only one chance in most cases to resist surrender. There is no automatic right of appeal to the Supreme Court. An appeal is only possible on a point of law where the High Court certifies that the order or decision of the High Court 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. Accordingly, a respondent who wishes to challenge his surrender must argue all points he wishes to raise at the section 16 hearing. Counsel for the respondent made it plain that he and his solicitor were acting on a limited retainer, and that they were only prepared to argue the legal aid/Attorney General's scheme point on his behalf, and that they were "eschewing any responsibility, professional or otherwise, to argue any other points that might arise". It was clear to the Court that there were potentially a number of other grounds on which, in theory at least, the respondent's surrender might possibly have been challenged. Despite this, nothing was volunteered to re-assure the Court that any other possible grounds of objection had even been discussed with the respondent. As far as the Court was concerned the respondent was perfectly entitled to elect to pursue no point other than the legal aid/Attorney General's scheme point but, where his personal liberty was at stake, the Court required to be satisfied that that was an informed choice. It was for this reason that the Court sought to satisfy itself, in the respondent's interests, that he fully understood the implications of the case being presented by his solicitor and counsel on a limited retainer basis.

The Court repeatedly expressed its discomfort with the manner in which the challenge was being confined, and it queried whether it was professional and ethical for counsel and his instructing solicitor to proceed in the manner in which they were proceeding. It was in this context that the Court suggested a possible referral of what seemed to it to be a serious matter to the Bar Council / Law Society for their consideration.

Moreover at a later stage of the proceedings, on the 24th of May 2011, counsel for the respondent suggested to the Court that if, having raised only one issue at the s.16 hearing, the Court ruled against his client on that issue, his client would at a later stage be at liberty to ventilate other issues not raised at the s. 16 hearing by invoking the procedure under Article 40.4.2 of the Constitution. The Court expressed the view, which it does not resile from, that such a strategy was inappropriate and would possibly amount to an abuse of the process.

However, while there is no question of the Court having a bias towards the respondent it is nonetheless satisfied having reviewed the Digital Audio Recording that its suggestion that the issue raised at the s.16 hearing, namely, the legal aid/Attorney General's scheme point, was being raised in pursuit of an "agenda" was unfortunate and may have created the incorrect impression in the mind of the respondent that the Court regarded the point being raised as being inappropriate and/or unmeritorious and that it had prejudged the substantive argument. Nothing could have been further from the truth in point of fact, but I accept that a mistaken impression may have been given. The point in fact being made by the Court was that both solicitor and counsel had a duty to their client to represent his best interests to the best of their ability in circumstances where his personal liberty was at stake and that the case could not legitimately be used as a vehicle for the testing of a discrete legal point in disregard of the client's overall interests. The Court should not have characterised the challenge as being in pursuit of an "agenda" as this may have created a perception of bias, and if that has occurred it is regretted.