



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 114

[2018 No. 498]

**The President
Whelan J.
McCarthy J.**

BETWEEN

THE ATTORNEY GENERAL

AND

DANIEL MULLAN

RESPONDENT

APPLICANT

JUDGMENT of the Court delivered on the 12th day of April 2019 by Birmingham P.

1. This is an appeal from a decision of the High Court (Donnelly J) of 14th December 2018, committing the applicant to prison to await the order of the Minister for Justice & Equality for his extradition to the United States of America pursuant to s. 29 of the Extradition Act 1965. The applicant's extradition is sought so that he may be prosecuted in the Federal Courts of the United States for four alleged offences: sexual exploitation of a child, transportation of a minor with intent to engage in sexual activity and two counts of possession of child pornography.

2. The applicant says that there are two fundamental issues to be decided in the appeal:

(i) Was the High Court correct as a matter of law to permit the applicant's extradition?

(ii) Even if the answer to that question is yes, was the High Court correct to require him to pay the costs of the application?

3. It is said that the applicant's grounds of appeal can be conveniently divided into five categories:

(i) Health Issues.

(ii) Public Interest/Proportionality.

(iii) A Section 15 Point.

(iv) The Committal to Prison.

(v) Costs.

(i) Health Issues

4. The High Court Judge is criticised for focusing all her attentions on issues relating to sight and mobility/ability to walk and it is said that in doing so, failed to see the wider picture and simply failed to have adequate regard to the collective and cumulative effect of his various medical conditions and ailments. The applicant submits that the High Court erred in law in that it should have not made the impugned order in all of the circumstances given his multiple health difficulties. There was evidence, he says, before the High Court that he was suffering from:

(a) blindness;

(b) inability to walk;

(c) morbid obesity;

(d) chronic lower vertebral compression and excruciating and constant pain;

(e) chronic venous engorgement of the legs;

(f) atrial fibrillation;

(g) chronic infection and autoimmune compromise;

(h) peripheral neuropathy;

(i) cirrhosis;

(j) hypothyroidism;

- (k) muscular degeneration;
- (l) chronic cardiac failure;
- (m) anxiety; and
- (n) cellulitis.

The complaint is made that the Judge in the High Court focused on issues relating to sight and mobility/ability to walk, but failed to consider the whole picture and failed to recognise that the cumulative effect of the many medical difficulties present required that extradition be refused.

(ii) Public Interest/Proportionality

5. It is not disputed that the offences charged are serious, but it is said that insufficient attention was paid to the fact that they were also offences contrary to Irish law which could be prosecuted here. It is contended that extraditing a 79-year old Irish citizen in very poor health is disproportionate and not in the public interest.

(iii) Section 15 Point

6. The applicant contends that section 15 must be interpreted in light of the overall statutory framework. He says that it envisages that where the alleged offence is an offence under Irish law, then there should have been consideration given as to whether to prosecute in this jurisdiction or not. He unsuccessfully sought to achieve a situation where this received consideration. It was submitted that the net effect of the absence of such consideration is that the Minister's discretion to refuse his extradition has been unfairly abrogated.

(iv) Committal to Prison

7. It is said that the discretion the Minister would ordinarily have under s. 15(2) of the 1965 Act to refuse extradition in respect of alleged offences that are also offences under Irish law has been rendered ineffective by reason of the failure on the part of the DPP/Attorney General to even consider the applicant's prosecuting the applicant in this jurisdiction.

(v) Costs

8. The applicant says that the costs order was erroneous, that the order was made even though the applicant was an unwilling participant in the extradition proceedings. Before this Court, though not before the High Court, the applicant has argued that Article XVII of the Extradition Treaty between Ireland and the United States is in point. This article provides as follows:

"(i) The Requesting State shall bear all expenses arising out of the translation of documents and the transportation of the person sought from the place of the extradition proceedings to Requesting State. Notwithstanding any law to the contrary, the Requested State shall bear all other expenses arising out of the request for extradition in the proceedings."

The applicant says that the effect of this article is to prevent Ireland, as the Requested State, seeking to recoup any expenses incurred from Mr. Mullan. Indeed, it is suggested that the effect of the article goes further and that it is arguable that the State is obliged to meet all costs incurred by Mr. Mullan.

9. The respondent says that the most striking feature of the applicant's approach to the appeal is that it ignores s. 29(5) of the Extradition Act 1965 (as amended) which provides for a right of appeal on a point of law only. The respondent says that the applicant, Mr. Mullan, is simply inviting this Court to reach a different conclusion to the one that the Trial Judge did on the basis of the same evidence.

10. Insofar as the health ground is concerned, the respondent says that for the appellant to succeed on this ground, it would have been necessary for him to establish that, if extradited, he would be subjected to torture, inhuman, or degrading treatment. No such evidence, it is said, was put before the Court. To the contrary, detailed evidence was put before the Court that the US prison system was in a position to, and would provide, appropriate and adequate facilities.

11. So far as the proportionality public interest point is concerned, it is said that the Trial Judge applied well-established legal principles and that the conclusion reached was entirely appropriate. In a situation where the applicant's extradition was sought so that he could face trial in respect of sexual crimes relating to minors, then the public interest was served by his surrender. On the other side, as the High Court Judge had observed, the applicant had put forward little in terms of private life issues.

12. So far as what is described as a section 15 point is concerned, the respondent says that there has been a complete failure by the applicant to engage with relevant legal authorities in the substantive extradition proceedings. It is said that this was particularly surprising given that the failure to bring these authorities to the attention of the High Court Judge dealing with the leave application was the subject of significant criticism from Donnelly J (see *Mullan v. DPP* [2018] IEHC 585 at para.81).

Discussion

13. I have significant reservations that the grounds that the applicant has sought to pursue by way of appeal constitute an appeal on a point of law. Section 29(5) provides that no appeal shall lie from an order of the High Court under this section, except on a point of law, and in my view, that section is potentially a significant difficulty for the applicant. However, in a situation where the grounds pursued are limited in number and have been argued in full, I think, notwithstanding my doubts, that it is better to express a view on the merits of the issues that have been raised.

14. In relation to the issues regarding the applicant's health, I find myself in agreement with the High Court Judge that the evidence in that regard put forward by the applicant was scant. It seems to me that the state of the evidence leaves the applicant far short of reaching the threshold required by cases such as *Attorney General v. Davis* and *Minister for Justice v. Rettinger* [2010] 3 IR 783. The fact of the matter is that Mr. Mullan has spent a significant period of time in custody in this jurisdiction and the Irish prison system has been able to cope. There is no reason whatever to believe that the US Federal prison system would not be able to cope as well. The very detailed information put before the High Court by Ms. Janet Buntz from the US Regional Health Service Administration, United States Department of Justice, Federal Bureau of Prisons, North Eastern Region, provides further reassurance in that regard.

Public Interest Proportionality

15. The fact that Ireland is a signatory to an international agreement with the United States means that there is always a degree of public interest in facilitating the putting of an individual on trial. However, the extent of that public interest is not constant, but will

vary from case to case. Here, the public interest in extradition is enhanced if regard is had to the seriousness of the offences on which it is sought to put Mr. Mullan on trial and the nature of those offences, being sexual offences directed at a minor. I would agree with the observations of the trial Judge that on the side of private life, the applicant has put forward very little. While he is an Irish citizen, as well as a citizen of the United States, his primary connection to Ireland has been that he has been a prisoner in this jurisdiction. I am satisfied that the Judge was quite entitled to conclude that it would not be contrary to the public interest or disproportionate if extradition proceeds.

Committal

16. This ground of appeal really follows on from and arises out of the arguments in relation to section 15. It is said that the discretion that the Minister would ordinarily have under s. 15(2) of the 1965 Act to refuse extradition in respect of offences that are also offences under Irish law, has been ousted by the failure to give consideration to the prosecution of the appellant. In a situation where I do not believe there is any substance in the arguments advanced in relation to s. 15, it follows equally that I do not see any substance in the point made in relation to committal. Section 15(2) provides:

“[e]xtradition may be refused by the Minister for an offence which is also an offence under the law of the State if the Director of Public Prosecutions or the Attorney General has decided either not to institute or to terminate proceedings against the person claimed in respect of the offence.”

It is a provision which becomes relevant in certain circumstances after the High Court, or on appeal, this Court, has made a decision to commit an individual to prison to await surrender. In this case, the condition precedent for it to have any application has not been satisfied.

17. The applicant makes a further argument. He says that, here, there is present an “interwoven tapestry” and that if regard is had to the tapestry that has been weaved, that extradition should be refused. The elements of the tapestry to which he would point, as I understand it, are the fact that the applicant, an Irish citizen, was extradited from the United States, served a significant sentence in this jurisdiction, and that at the end of that sentence, there was a request that he should be extradited and returned to the United States to face trial. It is said that it is in that context that the arguments in relation to his health, the arguments about disproportionality and the fact that there was an option to put him on trial in this jurisdiction, which was not even considered, have to be assessed. For my part, I do not see the interwoven tapestry argument as altering the situation and I remain of the view that the Judge was entitled to come to the conclusion that none of the factors present, either viewed individually and in isolation, or viewed cumulatively and collectively, required a refusal to extradite.

Costs

18. I am satisfied that the appellant has failed to establish that the High Court erred in ordering that the unsuccessful respondent to the application for committal to await surrender should pay the costs of the proceedings. The fact that Mr. Mullan had no wish to be involved in extradition proceedings is not determinative of the issue. The ordinary rule is that costs follow the event. The manner in which this litigation, in its widest sense, has been conducted by Mr. Mullan militates against any departure from the general rule. Linked judicial review proceedings were initiated and leave was sought and obtained in a situation where relevant recent authorities were not brought to the attention of the Court at the ex parte stage. For my part, I do not believe that Article 17 of the Treaty has any relevance. Article 17 apportions responsibility between the contracting parties, essentially on the basis that the Requesting State, whether that be the United States, as in this case, or Ireland, bears all expenses arising out of the translation of documents and the transportation of the person from the place of the extradition proceedings to the Requesting State, in this case, the United States, bears all the other expenses. The Article of the Treaty has no relevance to how a Court should deal with an application for costs in proceedings before it.

19. In summary, I am not prepared to uphold any of the grounds of the appeal, and for my part, would uphold the decision of Donnelly J. and dismiss the appeal.