Neutral Citation Number: [2010] IEHC 324

THE HIGH COURT

2010 816 SS

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 BUNREACHT NA HÉIREANN 1937

Between:

MICHAEL MCDERMOTT

Applicant

-and-

GOVERNOR OF CLOVERHILL PRISON,

IRELAND AND THE ATTORNEY GENERAL

Respondents

-and-

HUMAN RIGHTS COMMISSION

Notice Party

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 27th July 2010:

1. This judgment is given in respect of an habeas corpus application moved under Article 40.4.2° of Bunreacht na hÉireann. This application was made shortly after the delivery of the judgment in *O'Sullivan v. Chief Executive of the Irish Prison Services* (Record No.: 2010 / 323 SS) and on both sides involved the same Counsel as in that case. The grounds advanced on this application substantially reproduced the submissions in O'Sullivan. The applicant challenged the constitutionality of s. 16(12) of the European Arrest Warrant Act 2003 ("EAWA 2003") as amended by s. 12(f) of the Criminal Justice (Miscellaneous Provisions) Act 2009 ("CJ(MP)A 2009"), which permits an appeal to the Supreme Court, in respect of a s. 16 order, only if, in accordance with the amendment, the High Court so certifies. Insofar as the arguments advanced in this replicate those in O'Sullivan, my decision and rationale remain the same, namely that s. 16(12) as amended is constitutional and does not infringe the applicant's right to a fair trial, as part of the overall right of access to the courts, and apply *mutatis mutandis*.

2. However, a number of additional submissions were made on this application, which were not advanced in *O'Sullivan*; these were:

> i) Whether the refusal to provide support under the Attorney General's Scheme is a breach of the applicant's rights under the Framework Decision;
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> ii) Whether s. 16(12) is proportionate under EU law and/or the European Convention on Human Rights ("ECHR"); and
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> iii) Whether, if a declaration of incompatibility is granted, the applicant must be released.

Before continuing, I should firstly set out the background to this case, which is different to that of *O'Sullivan* and note that the Notice Party did not participate.

Background:

3. The surrender of the applicant is sought pursuant to two European Arrest Warrants ("EAWs") which were issued by the City of Westminster Magistrates on the 18th December 2009 and the 12th February 2010, in respect of charges of conspiracy to supply drugs and conspiracy to launder money. On the 9th February 2010 the applicant was arrested at Dublin Airport, and on the following day he made an application for legal aid under the Criminal Justice (Legal Aid) Act 1962. On the 3rd March 2010, an application for bail was refused. At that hearing a statement of means was received, which indicated that he relied upon social welfare and which detailed his weekly stipend in that regard. Evidence was, however, also given of multiple flights undertaken by him, both transatlantic and to and from Morocco over a period of time. Further the State asserted that the applicant was in fact in full-time employment as a sea captain, and that he owned a ship elsewhere. Given this evidence he was, at least *prima facie*, simply not a person who would be entitled to a recommendation under the Scheme; accordingly a full hearing would be required in relation thereto. On the 12th March 2010 grounds of objection to the applicant's surrender were filed on his behalf.

4. On the date set for its hearing, the 23rd April 2010, the application for a recommendation was abandoned and, from the transcript, it would appear that the points of objection relative to the Attorney General's Scheme were dropped, by consent. The reasons for adopting this course were not indicated, at that or any point, by the applicant.

5. On the 29th April 2010, the s. 16 application came on before Peart J. The applicant's primary ground of objection was that the Attorney General's Scheme is an inappropriate safeguard of his rights under the ECHR, and therefore is in breach of such rights. Secondly, it would not be an *ius tertii* to make this complaint in relation to the Scheme. In this regard the applicant placed reliance upon the Court's decision in *Minister for Justice, Equality and Law Reform v. O'Connor* (Peart J., High Court, Unrep., 18th March 2010) (Record No: 2007/107 EXT). However, as pointed out by the respondent, that decision in fact ran contrary to the contention that the Scheme was inadequate protection; as a result the applicant, ultimately, could only seek to rely upon the fact that the matter had been certified to the Supreme Court. It should be recalled that the applicant, as of the hearing date, was not making any application, nor was he indicating an intention to apply later, under the Attorney General's Scheme. Instead he merely sought to impugn its sufficiency under Article 11(2) of the Framework Decision which requires:

> *"A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State."*

In support he submitted that although he was represented by lawyers, such was done on a *pro bono* basis: the State could not therefore rely on his representation in this regard, since it was done only out of the charity of his counsel, and not because of any support by the State. The applicant also raised two further points of objection, although not argued at hearing, firstly, in relation to specialty, this by virtue of the fact that he was charged with conspiracy offences, and secondly in relation to the State's failure to make a Declaration under former-Article 35(2) of the Treaty on European Union ("Declaration under Article 35(2) TEU").

6. Considering these matters, Peart J. rejected the contentions in relation to both the conspiracy argument and the Declaration argument; each point having been decided by him in other cases, and him having no reason to conclude otherwise in this case. In relation to the argument relating to the Attorney General's Scheme, Peart J. noted that the applicant had applied in the usual way, and this had been indicated on the file. However, on objection being taken to the making of a recommendation, the matter was listed for further inquiry. The application, as noted, was however then abandoned by the applicant. Whilst acknowledging that his representation was on a *pro bono* basis, this did not alter the fact that, in circumstances where he had indicated that he would not be seeking a recommendation thereunder, the applicant did not have *locus standi* to argue the adequacy of the Scheme. The arguments put forth, therefore, were *jus tertii* in circumstances where the result could be of benefit to some other party, but not to the party in the cause before the Court. It was thus not open to the applicant to argue the adequacy or otherwise of the Scheme on a purely theoretical basis. Peart J. distinguished this case from that of *Minister for Justice, Equality and Law Reform v. O'Connor* (Peart J., High Court, Unrep., 18th March 2010), where a Certificate to Appeal had been granted on two points of law, namely:

> *"1. The respondent's right to '… be provided with professional legal advice and representation" arising from Article 11.2 of the Framework Decision has been denied to him, and,*
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> *2. If so, whether the respondent's surrender is prohibited under Part III of the Act or the Framework Decision, even though as a matter of fact solicitor and counsel represented him on the application for his surrender, but limited to arguing the issue raised as to the adequacy of the Attorney General's Scheme."*

The learned Judge then continued by directing the applicant's surrender pursuant to s. 16 EAWA 2003 and held that the warrants were in compliance with s. 10 EAWA 2003, in conjunction with Article 11(2) of the Framework Decision. Furthermore, he refused an application for a Certificate of Appeal to the Supreme Court under s. 16(12) EAWA 2003, drawing attention to the differences identified between this case and that of *O'Connor*, and in particular the issue of the applicant's standing to challenge the Attorney General's Scheme. The within application was then formulated in or around the 13th May 2010, and on the following day, this matter was returned for hearing before me, pursuant to Article 40.4.2° of the Constitution.

The Attorney General's Scheme:
7. Before continuing I should note that I have read and considered the transcripts of the aborted application under the Attorney General's Scheme, the s. 16 application and the ex tempore judgment delivered by Peart J. on the 29th April 2010. I would respectfully agree with his conclusions in relation to the applicant's standing with regards to the Attorney General's Scheme. In circumstances where he was afforded the opportunity of applying and in fact did, but later abandoned such, he cannot thereafter be heard to complain that the Scheme is inadequate in circumstances where there is no prospect of him applying for it. Such would clearly be a *jus tertii*, and, even at first glance, can be distinguished from the *O'Connor* case with regards to the issue of standing.

8. The Attorney General's Scheme does not apply to everyone. It is simply there to ensure that those who do not have adequate means are afforded representation. The obligation of the State under the Framework Decision is to ensure that those whose surrender is sought have access to legal advice. The fact that the applicant is represented on a *pro bono* basis does not change the fact that he is not applying for the Scheme, and in those circumstances he could not have standing to challenge its adequacy; the Court cannot entertain theoretical challenges. Furthermore, it is not possible for the applicant to complain that his rights to representation have been infringed in circumstances where he withdrew his application for such aid.

9. In those circumstances I would reject the contention that the applicant has *locus standi* to challenge the adequacy of the Attorney General's Scheme. I have thus not proceeded to consider any arguments in relation to its adequacy or otherwise under the Framework Decision. Furthermore I would note that in any event, although admittedly of little comfort to the applicant herein, this matter has already been appealed to the Supreme Court, and thus I would be satisfied that a second Certificate on the same ground would not have been appropriate in this case.

Proportionality:
10. The applicant also contends that, further to such points as were raised in O'Sullivan, since the EAWA 2003 is based upon European legislation, the principle of proportionality must apply to its terms and application. In particular, the applicant argues that the prerequisite to the granting of a Certificate under s. 16(12), namely:

> *"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"*

is contrary to Article 34.4.4° of the Constitution, Article 19(1) of the Treaty of European Union ("TEU"), Article 47 of the European Charter of Fundamental Rights ("CFR"), and Article 13 of the ECHR.

11. As noted, I have already dealt extensively with the constitutionality of s. 16(12) in the judgment of *O'Sullivan*. The only remaining issue is therefore its compatibility with the ECHR and the CFR. It should be noted that in *O'Sullivan* I found, albeit *obiter*, that the section was in compliance with both of these. However the applicant herein argues that this matter was not fully canvassed before the Court in *O'Sullivan*, and in particular, the issue of proportionality was not considered. The applicant argues that it is essential to know what the section was intended to remedy so that the means of its implementation may be judged as to proportionate.

12. The relevant provisions which the applicant seeks to rely upon are:-

> *TEU:*
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> *Article 19(1):*
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> *"…Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."*
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> *CFR:*

Article 47:

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

ECHR:

Article 13:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

13. As stated in *O'Sullivan*, these provisions envisage virtually the same thing: an effective remedy before a national court. I am quite satisfied, for the reasons set forth therein, that there is an effective remedy in this case, having regard to the nature of the s. 16 application, and the safeguards built into it. Furthermore, it is clear from the decision of the Court that s. 16(12) does not in any event exclude an appeal to the Supreme Court. I would therefore be of the opinion that, *ex facie* and *de jure*, the section does not breach any of the above articles.

14. Nonetheless, the applicant has contended that the principle of proportionality must be read into any assessment of whether the law is in breach of the above articles. This supposition is, in my opinion, flawed. In order for the principle of proportionality to come into play, the Court must first have found that a law in some way, to some extent infringes a right. The onus in this regard ultimately rests upon the asserter of that right, and, as stated, I do not consider that onus to have been overcome in this case. If the law in some way breaches a right, then it must be considered whether this infringement is proportionate to the end or objective to be achieved. However, in absence of such a finding there can be no question of considering proportionality; there must be *prima facie* infringement (see Craig, "*EU Administrative Law*" (2006), Chapters 17 and 18). As noted in Craig & de Búrca, "*EU Law (4th Ed.)*" (2008) at p. 550:

"The paradigm application of proportionality in relation to the four freedoms entails the case where a prima facie breach of one of the four freedoms has been found to exist, and the Member State then seeks to raise a defence based on the relevant Treaty article."

15. The situation at present can be easily distinguished, for example, from the circumstances of *Blehein v. The Minister for Health & Children, Ireland and A.G.* [2008] IESC 40 where s. 260 of the Mental Treatment Act 1945 was found unconstitutional and disproportionate having regard to the right of access to the Courts; in that case it was clear that there was a *prima facie* breach of the right. Denham J. referred to the prior decision of Finlay C.J. in *Murphy v. Green* [1990] 2 IR 566 where he stated at p. 572:

"Section 260 of the Mental Treatment Act, 1945, is prima facie a curtailment of the constitutional right of every individual of access to the courts."

The learned Judge also noted the decision of Costello P. in *Heaney v. Ireland* [1994] 3 IR 593 at 607, where he stated:

"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. …"

Thus, having so noted, Denham J. went on to consider that although the objective of the Mental Treatment Act 1945 was a legitimate one, nonetheless it did not pass the test of proportionality since:

"It … does not impair the rights involved as little as possible, and so the effect on rights is not proportionate to the object to be achieved." ([2008] IESC 40, para. 18)

16. As can be seen therefore, there must be some overriding of a right, before proportionality comes into consideration. It is true that it will often not be difficult to find *prima facie* infringement which then calls for justification (see e.g. *Cox v. Ireland* [1992] 2 IR 503; *In Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305; *Heaney v. Ireland* [1996] 1 IR 580; *Rock v. Ireland* [1997] 3 IR 484; *Murphy v. I.R.T.C.* [1999] 1 IR 12; *J. & J. Haire & Co. v. The Minister for Health* [2009] IEHC 562 – to name but a few). However in the present circumstances, such is not the case, since it is clear that the applicant has had all justiciable matters considered and determined by the Court, and the provisions of s. 16(12) do not remove such right. Similarly, as noted in O'Sullivan, the section does not exclude all appeals, and there is no question, in my mind, but that the right to appeal to the Supreme Court on constitutional matters is left untouched by the section.

17. In those circumstances there is no need for me to embark on any exercise which would involve the consideration of proportionality, or the reasons for the amendment to s. 16(12) EAWA 2003. I therefore reject the applicant's arguments in their entirety in this regard.

The Declaration of Incompatibility:

18. In light of the above findings, I do not consider it necessary to specifically rule in relation to the effect of a finding of incompatibility on the applicant's detention. However I would note, albeit *obiter*, that even if such were granted it could not give rise to the automatic release of the applicant. The European Convention of Human Rights Act 2003 provides explicitly the consequences of a declaration of incompatibility in s. 5. Section 5(2)(a) is clear that such declaration *"shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made".* Before a law will be declared invalid it must first be laid before each House of Oireachtas (s. 5(3)). It thus follows that even if such a declaration were made, this would not entitle the applicant to be released, nor would it entitle him to an unrestricted appeal.

Conclusion:

19. In light of the foregoing, and adopting and applying the entirety of the judgment of this Court in *O'Sullivan v. Chief Executive of the Irish Prison Service*, *mutatis mutandis*, the Court finds that the applicant does not have *locus standi* to challenge the adequacy of the Attorney General's Scheme, such challenge being a *jus tertii*, and in circumstances where s. 16(12) EAWA 2003 is not a *prima facie* breach of any of the applicant's rights, there is no need to enter into a consideration of its proportionality. I therefore refuse the applicant's application for *habeas corpus*.