Neutral Citation Number: [2010] IEHC 493

THE HIGH COURT

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

2010 2297 SS

BETWEEN:

ALBERT JARZEBAK

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 16TH DAY OF DECEMBER 2010:

On the 5th November 2010 I heard an application for the surrender of the applicant to Poland on foot of two European arrest warrants. He was arrested on 11th March 2010 on the first warrant and in July 2010 on the second warrant.

Upon his arrests the applicant, through counsel, applied for a recommendation under the Attorney General Scheme for the discharge of costs of his representation and in due course submitted a certificate of means which disclosed that he had not the means to discharge those fees himself. While the application was being prepared for eventual hearing the applicant was remanded from time to time on bail, and in due course an application was made by junior counsel for the recommendation to cover second counsel, and second counsel was allowed.

At the hearing before me on the 5th November 2010, the applicant was represented by solicitor, as well as by junior and senior counsel. An interpreter was present also who was seated beside the applicant during the course of the hearing and provided interpretation for the applicant during the course of the application.

At the conclusion of the hearing, this Court reserved its judgment and remanded the applicant on bail to 24th November 2010 for judgment. By that date, however, judgment was not ready for delivery, and he was further remanded on bail to the 30th November 2010, on which date judgment was handed down, following which an order was made under section 16 (1) of the European Arrest Warrant Act, 2003 for his surrender to the authorities in Poland and for his committal to prison pending the implementation of his surrender to Poland. That order took effect on the 14th December 2010, after which the surrender of the applicant may take place in accordance with the timeframe provided for in section 16 and subject to any extension which may be applied for under Article 23 of the Framework Decision.

On the 15th December 2010, the applicant, who had by that time and on a fee-paying basis, instructed a different solicitor, who in turn instructed different senior and junior counsel, applied to this Court for leave to appeal against the orders made on the 30th November 2010.

I will return to the fact that on the present application the respondent is discharging his own legal fees, but Giollaiosa O'Lideadha SC commenced the application for leave to appeal and the present application by bringing this fact to the attention of the Court at the outset as there might otherwise be concerns arising from the fact that upon his arrests a statement of means – or 'no means' perhaps is more accurate – was provided, which led to the recommendation for the Attorney General Scheme being applied for and granted.

It was indicated by Mr O'Lideadha at the outset of that application, that in the event of it being unsuccessful it was the applicant's intention to make an application for his release pursuant to Article 40.4.2 of the Constitution on the basis that the applicant had not given his agreement to his previous legal team not pursuing one of the points of objection pleaded in his Points of Objection, namely a point related to prison conditions in Poland, and that if it had been explained to him in language which he understood that this point was not going to be pursued on the section 16 application, he would not have agreed to that course and would have insisted that they do so. I will return to that issue in due course.

At the hearing of the application for his surrender to Poland, Senior Counsel for the then respondent had informed the Court at the outset that the objections being pursued by the applicant were confined to those under section 11 of the Act, namely as to the sufficiency of the information contained in the warrant related to the offences alleged and the degree of participation of the applicant in those offences.

I heard the application for leave to appeal in the evening of the 15th December 2010, and at the conclusion decided that the decision made by the Court did not involve a point of law of exceptional public importance; but that even if it did, it was not in the public interest that an appeal be taken to the Supreme Court. In the immediate aftermath of that decision, Mr O'Lideadha proceeded with the applicant's complaint in relation to the unlawfulness of his detention. Remy Farrell BL, instructed by the Chief State Solicitor's Office was present in Court at this time as the Minister for Justice, Equality and Law Reform had been put on notice of the application for leave to appeal.

The grounding affidavit:

The applicant's application for release pursuant to Article 40 was grounded upon an affidavit sworn by his newly instructed solicitor, Michael Finucane.

He deposes that having taken up the applicant's file from the previous solicitors it appeared that there are no notes of attendances of consultations with the applicant on what are stated to be crucial decisions, an that file is exhibited. He states that the applicant has instructed him that in the course of preparing for the hearing of the application for his surrender he was not objectively assessed in relation to his ability to understand the English language and therefore the ability to understand the nature of the proceedings and the case being made on his behalf. He is instructed also that save for one occasion the applicant did not receive the services of an interpreter for consultations, but it appears that for one such consultation that he had interpretation through a friend of his who attended that consultation with him. He complains also that he was not furnished with translations of any correspondence by his solicitor and nor was he given a Polish translation of the Points of Objection being raised on his behalf.

Mr Finucane goes on to state that he has been informed by the junior counsel who represented the applicant that an interpreter was in fact present on more than one occasion for consultations, and further that the respondent never indicated that he did not understand the nature and content of advices given at consultations, and that the said junior counsel is satisfied that the applicant understood what was said at those consultations.

Mr Finucane then refers to the existence in the Points of Objection of a point related to the risk that if surrendered the applicant would be subjected to inhuman and degrading treatment, and that surrender is prohibited by s. 37 of the Act of 2003, as well as Articles 3 and 8 of the European Convention on Human Rights, and section 3 of the Human Rights Act, 2003. He goes on to state that he is instructed that the applicant did not agree to withdrawing the objection on these grounds, and, again, that the applicant had not received any Polish translation of the Points of Objection, and consequently did not understand either the purpose of that objection or the contents of the points of objection.

Mr Finucane states that junior counsel on the application for surrender has stated that the issue of not proceeding with the objection on this ground was explained to the applicant, and further that the applicant understood and agreed that the point would not be pursued at the hearing. At this point I would note that at no time during the months leading up to the hearing of the application for surrender was any grounding affidavit filed in support of that objection, and I would comment that in the absence of such an affidavit there could be no factual basis on which the point could be meaningfully argued, and in such circumstances it was entirely appropriate that the point would not be advanced in argument, as it was bound to fail *in limine*.

It is also relevant to say that the European arrest warrants in this case are for prosecution and not for the purpose of serving a sentence already imposed, as was the position in the *Rettinger* case which has dealt with this particular point of objection previously.

Mr Finucane's affidavit states that by failing to ensure that the applicant was aware of the objections being made on his behalf and in failing to provide an interpreter in respect of each consultation at which instructions were being sought, the applicant's previous solicitor failed to properly represent him before this Court. He states also that in seeking to establish the applicant's ability to give instructions and understand these proceedings, he obtained an assessment of the applicant from an accredited I.T.I.A. and interpreter with a Master's degree in the English language, a Mr Adam Brozynski. His assessment is not exhibited, but Mr Finucane states that Mr Brozynski classified the applicant's ability to conduct business in the English language as "post-beginner/elementary", and has exhibited a sheet of paper which sets out a number of levels or categories of language abilities including that of "post-beginner/elementary" which is a level which indicates an ability to understand "*a few everyday expressions of simple functions in known situations, and can produce some single words and sets of phrases in response, or can make requests using, for example, a single word + please… [but]little grasp, except in reading, where (s)he can recognise the existence of a few basic structural contrasts … even if not always certain exactly what they mean, [and] can substitute items in one or two structural patterns in writing, but not manipulate the patterns any further*."

It is submitted in this grounding affidavit that given the inability of the applicant to deal with complex legal issues and give instructions through English it was essential that all consultations, correspondence and legal documents be furnished in Polish, and that in circumstances where this did not occur the applicant should not be surrendered pursuant to the order for surrender made on the 30th November 2010. It is submitted therein also that there was a fundamental defect in the steps leading to the applicant's detention on foot of the said order and that his detention lacks the fundamental attributes which under the Constitution should attach to it, and that his detention is unlawful.

That was the only grounding affidavit before the Court on the hearing of this complaint. Having heard the application late in the evening on the 15th December 2010, I indicated that I would give my decision on the following day. Immediately prior to giving an ex tempore judgment, Mr O'Lideadha handed into court two further affidavits, one sworn by the applicant in the Polish language, and another from a Polish interpreter who exhibited a copy of that affidavit in the English language.

Before summarising the legal submissions made on the 15th December 2010, I should refer to the contents of this affidavit. Largely it confirms what was deposed to by Mr Finucane, but it explains and clarifies certain matters. He states that what Mr Finucane stated with regard to one occasion at a consultation where a friend assisted him with interpretation is inaccurate, and he states in that regard in paragraph 5:

> *"…… (a) on a number of occasions a friend whose English is better than mine attended such consultations and that I asked that friend to explain what was being discussed but I believe that that friend did not understand the legal matters discussed and that I did not receive an accurate or reliable explanation;*
>
> *(b) while that friend was clearly not an interpreter, I believe that it was clear that the friend was present for the purpose of assisting me to understand the legal matters being discussed;*
>
> *(c) all consultations were conducted in English but when my friend was present there was some communication between us in Polish;"*

At Paragraph 6 he states that on a number of occasions in consultations with his solicitor and counsel he stated that he did not understand matters that were being discussed, but he accepts that he did not ask for an interpreter. He goes on to state that he did not understand the purpose or content of the points of objection, and that while he was always aware of the very bad conditions in prisons in Poland, he had no appreciation or understand that this could be an important factor that could cause the High Court to refuse the application for his surrender, and that if he had been so aware he would have given instructions that the matter be put forward effectively.

He repeats that he never agreed to this point not being put forward, and that he was not consulted in that regard. While he states that this was not discussed with him, he nevertheless accepts that he did not raise the issue of prison conditions in Poland with his advisers or ask them to get reports or information in respect of same, and also that it was only after he consulted Mr Finucane that

he understood the importance of the issue, and that had he understood this matter sooner he would not have agreed to his objections being put forward only on the technical issues arising from the contents of the warrant.

The funding of this application:

The applicant's affidavit deals with the Statement of Means which he provided upon arrest and which based the Recommendation for the Attorney General Scheme. He states that the statement of means was signed by him on the 22nd March 2010. He accepts that he signed it but says "I accept that I signed the document but I did so on the understanding that I was giving power of attorney to my solicitor to represent me in the European arrest warrant proceedings". He says that he did not understand that that the document was an assessment of his means to pay for legal aid, and nor did he understand that by signing it he was representing that he did not have sufficient means to meet the costs of his legal representations. Neither does he recall the form being completed, and that if he had understood that his "ability to fund his legal representation was being queried" he would have confirmed that he had access to funds in order to do so. He states that these funds come from a legitimate business in this State and that the business is conducted amongst the Polish community. He does not state the nature of that business, but it can be inferred I suppose that a good knowledge of English is unnecessary for the purposes of that business, whatever it is.

Mr O'Lideadha has stated that Mr Finucane had ascertained prior to acting that the funds were not the proceeds of crime.

Submissions:

Mr O'Lideadha has made it clear at the outset that the applicant does not allege that his previous legal team was incompetent. The complaint being made is that his lawyers at the time failed to explain the points of objection to him in a language he could understand and did not consult him in relation to the decision not to pursue the objection based on prison conditions in Poland. As a result it is submitted that the hearing of the application was fundamentally defective, and that as a consequence the applicant's detention is unlawful and he should not be surrendered on foot of the order for surrender, and must be released from unlawful custody.

Mr O'Lideadha accepts that not everything needs to be translated for the applicant but that it is necessary in relation to important matters, if his hearing is to be seen as complying with principles of fundamental fairness. In effect it is submitted that by not arguing the point of objection relating to Polish prison conditions, the applicant effectively had no representation on that issue and was entitled to have such representation.

Reliance has been placed on the judgment of McGuinness J. in the Supreme Court in *Martin McDonagh v. The Governor of Cloverhill Prison* [2005] 1 I.R. 394. In that case in the District Court, the District Judge had on a bail application refused bail but the stated reasons for refusal were made without any relevant evidence to support them, and it was held also that the remarks made by the District Judge in refusing bail were improper and entirely wrong in principle. The applicant for bail in that case had been given no advance notice of the nature of the objection being relied upon by the prosecution. The facts are clearly very different to the present case, but Mr O'Lideadha relies on the conclusion of the learned judge at p. 405 that in that case "*the procedural and other deficiencies of the hearing before the District Judge in this case were indeed such as would invalidate essential steps in the proceedings leading ultimately to the applicant's detention, or to use the words of Henchy J. in The State (Royle) v. Kelly [1974] I.R. 259, the detention of the applicants was wanting in the fundamental legal attributes which under the Constitution should attach to it.*"

Mr O'Lideadha has relied also upon the judgment of Keane CJ in the Court of Criminal Appeal in *The People (DPP) v. David McDonagh* [2001] 3 I.R. 411. That is a case where the applicant was convicted of murder and received a life sentence, following which he sought leave to appeal on two grounds, one of which is relevant to the submissions which the present applicant makes. That ground is summarised in the head-note to the reported judgment as follows:

> "*… it was submitted that the preparation for and/or the conduct of the applicant's defence by his legal advisers was seriously inadequate and thereby deprived the applicant of his constitutional right to a trial in due course of law as guaranteed by Article 38.1 of the Constitution. In this regard, the applicant relied upon the failure of his legal advisers to interview certain witnesses, the advice given to the applicant not to give evidence in his own defence and the failure of his legal team to serve an alibi notice pursuant to s. 20 (1) of the Criminal Justice Act, 1984. It was further submitted that the defence was seriously prejudiced by the fact that the senior counsel originally retained by the applicant handed over the defence brief at such a late stage as to deprive the applicant of an opportunity of retaining a replacement of his choice. Further, the senior counsel to whom the case was handed over did not have an opportunity to meet with the applicant or discuss the case with the other members of the defence team until the morning of the trial.*"

Having considered the matters raised it was concluded that "*the conduct of the defence either at the trial or in the steps preparatory thereto was not of such a nature as to create a serious risk of a miscarriage of justice.*" What had occurred, even if it was open to some criticism or that with hindsight the matter might have been handled differently, "*it could under no circumstances be described as 'flagrantly incompetent advocacy or contrary' or contrary to the promptings of good reason and good sense or a course taken in defiance of proper instructions*".

That case, unlike the present one, was related to a full criminal trial. Nevertheless, Mr O'Lideadha relies upon the principles stated in that case, and on the fact that in that case it was clear that the applicant had been fully consulted by his legal team and had agreed to the tactics proposed to be adopted. In that regard he points to the fact that the present applicant has stated that because he failed to understand what was being discussed at consultations he did not understand that the prison conditions issue was being dropped, or indeed that it had such significance on the application.

The principles in McDonagh on which the applicant relies appear at p. 425 of the judgment of Keane CJ. It is stated in that regard:

> " *It has already been noted that, when delivering the judgment of the court on the hearing of the second interlocutory application in this case, Murray J. said that the conduct of the trial, including steps taken preliminary to the trial by an accused's legal advisers could, in exceptional circumstances, give rise to a ground of appeal. That view is clearly consistent with the requirement of Article 38.1 of the Constitution that no person is to be tried on any criminal charge 'save in due course of law'. A criminal trial, in which the defence of the accused was conducted with such a degree of incompetence or disregard of the accused's interests as to create a serious risk of a miscarriage of justice, could not be regarded as a trial in 'due course of law'. That would apply as much to the steps taken by the accused's legal advisers prior to the trial as it would to the conduct at the trial itself.*

That is not to say, however, that what might properly be regarded as an error by the accused's legal advisers is, of itself, sufficient to justify the setting aside of the verdict and the ordering of a retrial. As was pointed out by Rougier J. giving the judgment of the English Court of Appeal in R. v. Clinton [1993] 1 WLR 1181 at p. 1188:

> *"It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict…".*

It was also said, in that case, that the circumstances in which a court is entitled to set aside the verdict of a jury when the grounds consist wholly or substantially of criticisms of the conduct of the defence at the trial, or of the preparations for the trial, must of necessity be "extremely rare". In particular, where counsel has fully discussed the case with his or her client, and has made careful and considered decisions as to how best the defence should be conducted in his or her client's interests, an appellate court should not intervene simply because it appears that counsel might have been mistaken in the view he took. This, it was said in R. v. Clinton … applied particularly to the decision as to whether or not to call the defendant, which is one of the issues that has arisen in this case. It was however held that, exceptionally, where the decision in question was taken either in defiance of or without proper instructions or when all the "promptings of reason and good sense" pointed the other way, it might be open to an appellate court to set aside the verdict."

Remy Farrell BL for the Governor respondent to the present applicant had already represented the Minister for Justice, Equality and Law Reform on the applications for surrender on foot of the two warrants in question, and had opposed the subsequent application for leave to appeal, and was therefore present when the applicant's complaint as to the lawfulness of his detention was moved.

Mr Farrell made submissions to the effect that while the Court must under the provisions of Article 40 hear the complaint, the Court was not obliged in all cases to proceed to conduct an inquiry, and urged that the Court in the present case should decline to do so. He questioned the appropriateness of the respondent first indicating to the court on the application for leave to appeal that if that application was unsuccessful, the respondent would consider whether to make an application for release under Article 40 of the Constitution, and urged that such an application could not simply be an alternative to appeal, since it raised a question of whether or not his detention was or was not lawful – a question entirely separate from the question of whether the decision of this Court to surrender the respondent involved a point of law that was worthy of appeal to the Supreme Court.

Mr Farrell also pointed to the fact that the order on foot of which the respondent was detained was made on the 30th November 2010 and that by the time the present application had been made a period in excess of two weeks had passed. That order had taken effect on the 14th December 2010 after which at any time the surrender of the respondent could be effected. Mr Farrell adverted to the fact that Mr Finucane had been instructed in this matter by at latest the 10th December 2010 since he had written to the Chief State Solicitor's Office on that date. A period of five days had been allowed to elapse before bringing either the leave to appeal application or this application for the respondent's release. Mr Farrell has suggested that given the basis for contending that detention is unlawful (i.e. that the hearing which led to the order detaining the respondent being made was fundamentally flawed because the Polish prisons point was not argued) what the respondent is seeking in reality is the setting aside of the order for surrender and a re-hearing of the application for his surrender, and that in reality it is not a contention that the order holding the respondent is one that was not lawfully made. It is submitted that under the provisions of section 16 of the Act of 2003 there is no basis for a re-hearing of the application – only an appeal and the Court has already refused leave to appeal. In such circumstances, Mr Farrell submits that the present application represents an abuse of process, and that the Court ought not to entertain it.

As to the substantive arguments put forward by the applicant, Mr Farrell firstly identifies an essential distinction between the cases referred to by the applicant and the present case, namely that the former relate to substantive criminal trials, whereas the present case is one where an order was made for the surrender of the applicant to Poland on a European arrest warrant. That distinction apart, he also submits that the alleged frailty in the hearing in this case, if there be such, and he submits there is none, is far removed from the sort of matters which were complained of in *Martin McDonagh v. The Governor of Cloverhill Prison* [supra], where the District Judge, on a bail application, had made very particular and inappropriate remarks, and there had been no relevant evidence to ground the refusal of bail, leading to the conclusions of McGuinness J. to which Mr Lideadha referred. Mr Farrell submits that while in that case there had clearly been a want of fundamental fairness, the case is of little if any assistance to the applicant herein given the very different nature of the complaint.

As to the reliance placed upon *The People (DPP) v. David McDonagh* [supra], again Mr Farrell points to the obvious fact that the present case does not involve a complaint in relation to how lawyers represented an accused person at a criminal trial as such. Neither in his submission are the facts as disclosed on this application anywhere near as significant or weighty as the facts referred to in that case, and which were in any event held not sufficient to warrant a retrial.

Mr Farrell submitted also that in a situation where the nature of the reliefs which this court could grant on the present application (i.e. for release from custody) would not in any way address the concern actually raised, and where there is no jurisdiction for the setting aside of the order made, or to order at least a re-opening of the application for surrender so that the prisons issue could be ventilated, the Court should not entertain this application for an inquiry in any substantive way, and that to venture further into this complaint by ordering an inquiry would amount to an abuse of the processes of the Court.

Finally I should refer to the fact that Mr Farrell regarded it as curious that at the outset of the application for leave to appeal and the present application, Mr O'Lideadha should refer to the fact that the present legal team is engaged on a private fee-paying basis by the respondent in contrast to the situation following the respondent's arrest whereby he applied to have the cost of his legal representation paid pursuant to the Attorney General's Scheme. Mr O'Lideadha appears to have done so since in relation to the latter the respondent had submitted a statement of means basically stating that he had no means with which to discharge legal fees, and the respondent may have feared that the Court might draw adverse credibility inferences from this change of circumstances and that it might impact on the reliance that this Court might place on the respondent's instructions to Mr Finucane and his evidence in so far as they is any relating to his alleged lack of understanding of the significance of the prisons issue.

As to the facts of the present case, Mr Farrell submits that all the applicant is urging upon the court as a basis for unlawful detention is that he had inadequate translation at some consultations with his lawyers, such that he failed to understand properly the significance of an issue that was contained in the Points of Objection, namely that relating to prison conditions in Poland. Mr Farrell points also to the entirely hearsay nature of Mr Finucane's grounding affidavit, who was not the solicitor on record for the applicant at the surrender application hearing. He submits that it is not proper or appropriate that at some stage after the conclusion of the hearing or the making of the order for surrender, the applicant should suddenly be heard to complain about the level of his understanding of what was said at consultations and at the hearing, and that if such was permissible, the entire system would be permitted to break down whereby persons who were provided with an interpreter and who had been informed of their right to have an

interpreter at all stages of the proceedings return to court after the matter has concluded in an effort to have the order set aside on the basis that they had not sufficiently understood what was going on. It is submitted also that the present application is entirely inappropriate because the present respondent, namely the Governor of Cloverhill Prison, is not a person who was involved in any way in the hearing of the application for the order for surrender and cannot respond to what is stated in the applicant's grounding affidavit or that of his solicitor.

Conclusions:

The basis put forward by the applicant for his release from custody is that, for the reasons already set forth in some detail, the process which has led to the order for surrender being made is so lacking in fundamental fairness as to undermine the applicant's constitutional rights to fair procedures. The paucity of case-law in relation to cases which have been found to have reached the level of unfairness needed to warrant the setting aside of a criminal conviction and the holding of a retrial, especially on the basis of some want of professional expertise or incompetence is testament to the very exceptional and egregious circumstances which are required to be present before an appellate court, or perhaps even the same court by way of some sort of review of its own processes, would set aside a conviction or other order.

In my view the present facts fall so far short of this exacting threshold as to warrant this Court reaching a conclusion *in limine* that this complaint, having been heard as required under the Constitution on the evidence put forward by the applicant, should not proceed further to an inquiry, as the Court can be completely satisfied based on the evidence put forward and the submissions made by Counsel for the applicant that the difficulties in or lack of translation during consultations, as alleged, has not resulted in an unlawful detention of the applicant.

The respondent who was arrested on foot of a European arrest warrant is not to be regarded as or equated with a passive bystander in the procedures which follow thereon. Upon his arrest he is advised, as required by section 13 of the Act of 2003, inter alias that he is entitled to an interpreter and also to obtain or be provided with professional legal advice and representation. Each of these entitlements is repeated to the respondent by the High Court Judge before whom he is brought immediately upon his arrest. In this case the respondent never at any stage of the proceedings brought it to the attention of the Court that he was not being provided with adequate interpretation either at consultations or otherwise. His instructions to Mr Finucane and which were deposed to by Mr Finucane in his grounding affidavit were that he was provided with interpretation only at one consultation. He later resoled from that position in his own affidavit, and concedes that at a number of consultations he was accompanied by a friend who assisted with translation, and he accepts also that at no stage did he himself raise any issues regarding prison conditions in Poland. I have set forth his averments in this regard already.

Mr Finucane seems to suggest that there is some obligation upon the instructed solicitor to have an assessment of the client's ability to understand English carried out. In my view there is no such obligation. It goes without saying that it would not be appropriate for solicitor and counsel to conduct a consultation in circumstances where there was no interpretation available and where it was clear that what was being discussed was not being understood by the client. But that is not the situation in the present case. It appears that counsel instructed on behalf of this applicant for the application for surrender is of the view that there was interpretation available at consultations and that the respondent appeared to understand what was being discussed, albeit with the help of either an interpreter as such or an accompanying friend. It also appears to be accepted by the applicant that he himself neither informed the legal team that he did not understand what was being discussed and also that he himself never raised any issues in relation to prison conditions. It also appears from Mr Finucane's affidavit that counsel discussed the fact that the prison issue was not being pursued on the application for surrender and that he understood what was being said in that regard and agreed to this course of action.

It is also worth noting that even in his affidavit grounding this application the applicant says nothing about what issues he wished to raise in relation to prison conditions. This is not a case where the applicant has already spent time in prison in Poland either on these charges or on any other charge. His surrender is sought only for prosecution and not so that he can serve a sentence already imposed.

As I have said already, the respondent is not a mere passive observer in the application for his surrender. He was entitled to require interpretation at all stages, and indeed seems to have been provided with this, as well as expert and experienced counsel. Not only had he junior counsel with extensive experience in the law relating to applications for surrender on a European arrest warrant, but he was permitted to engage senior counsel also, again a counsel with considerable experience and expertise in this area. If there were matters which he did not understand there was nothing which could have prevented him from bringing that fact to the attention of his legal team or indeed to the court. In my view, he cannot blame anybody but himself if he failed to speak up in this regard.

This was not an application which proceeded with great haste from start to finish. He was arrested many months before the hearing proceeded to a hearing. His arrest on the first warrant was in March 2010 and on the second in July 2010. There was ample time afforded to him and his legal team to bring forward whatever objections were considered to be open to the respondent in opposition to the applications for surrender.

Taking all the facts at face value as evidenced in the affidavit of Mr Finucane and the affidavit of the applicant himself, I am completely satisfied that the applications for surrender proceeded in a fair manner and in a manner which afforded to the respondent all his entitlements to interpretation and professional legal representation. I am satisfied from that evidence that while Points of Objection included the issue regarding prison conditions, the fact that this point was not pursued at the hearing was something which was discussed with the applicant, and there is no basis for the suggestion at this late stage that he did not understand that the matter was not being pursued. If he had some doubt or lack of understanding about any of this, it was up to him to make that known, even at the conclusion of the hearing and before judgment was given. But it is not open to the respondent to seek advice from another solicitor and counsel after the judgment has been delivered and the orders for surrender made, and then seek his release under Article 40 of the Constitution. There is no invalidity in the detention of the respondent. A lawful hearing took place and the orders made were lawful. There is no basis on the evidence for any suggestion that the lawyers representing him at the hearing were incompetent. In fact, that suggestion is not being made. Mr O'Lideadha has made that clear, and that the complaint is that in effect the respondent was not legally represented on the prison issue at all since it was not urged at all on the application, and that had the respondent been properly aware that this course was being adopted he would not have given his consent to that course. That in my view is not a ground that can possibly lead to an order for the release of the applicant from custody on the basis of some fundamental defect in the process which led to his detention.

In such circumstances, I concluded that there was no proper basis for conducting any further inquiry into the lawfulness of detention

following the complaint in that regard having been heard, and I dismissed the application *in limine* as being an abuse of process.