[2018] IEHC 687

THE HIGH COURT

[RECORD NO. 2013 295 EXT]

[RECORD NO. 2014 8 EXT]

[RECORD NUMBER 2017 291 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ARTUR CELMER (NO.6)

RESPONDENT

AND BY ORDER

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Ms. Justice Donnelly delivered on the 28th day of November, 2018.

Introduction

1. The respondent seeks a certificate for leave to appeal against the order and decision of this Court of the 19th November, 2018, directing his surrender on three European Arrest Warrants to such other person as is duly authorised by the Republic of Poland to receive him. The Minister opposed the application. The Irish Human Rights and Equality Commission ("the IHREC") did not make submissions on this application.

2. The relevant statutory provision is s. 16(11) of the European Arrest Warrant Act 2003 ("the Act of 2003") (as now substituted by s.10 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012), which states: "

> *"An appeal against an order under subsection (1) or (2) or a decision not to make such an order may be brought in the [Court of Appeal] 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 [Court of Appeal]."*

3. The respondent asked this Court to certify the following as points of law of exceptional public importance, which he submits are desirable in the public interest to be decided at appellate level:

> a. Whether a substantial risk of a breach of the Respondent's right to trial before an independent tribunal amounts in itself to a substantial risk of breach of the essence of the Respondent's fair trial rights?
>
> b. Whether the decision of the Court of Justice of the European Union in LM adopted the jurisprudence of the High Court of England and Wales on Article 6 of the European Convention on Human Rights such that the test thereby established for refusal of surrender permits an executing judicial authority to order surrender on the basis that a lack of independence on the part of the tribunal may be sufficiently mitigated by other features of a fair trial?
>
> c. Whether evidence of an indirect link between the powers and statements of the Minister for Justice and court rulings, such that the views of the former could influence the latter, must be discounted as an "insufficient" basis to be satisfied of a substantial risk of breach of the Respondent's fair trial rights?
>
> d. Where an executing judicial authority is satisfied that there are systemic and generalised violations of the independence of the judiciary in the requesting Member State, and that those violations will affect the level of court before which the Respondent would be tried were he surrendered, what evidential standard is required to enable the executing judicial authority to determine whether there is a substantial risk of a breach of the Respondent's fair trial rights?

The Law on Applications for a Certificate

4. Although the case concerned whether to grant leave to appeal a decision of the High Court to the Supreme Court under planning legislation, the general approach to be taken is that identified by Clarke J. in *Arklow Holidays v. An Bord Pleanala* [2007] 4 I.R. 112. The Court has also to bear in mind the remarks of Murray J. (*nem diss*) in the Supreme Court in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61 when he stated:

> *"In matters arising under the European Arrest Warrant Act there is just one judicial determination at first instance with no right of appeal, as such, except insofar as it is granted by the same court on the basis of the criteria set out in section 16. In this instance the learned High Court judge has, it would seem, and in my view correctly, taken a broad approach to the interpretation of that section and granted leave to appeal…"*

5. It is also useful to set out the relevant portions of the judgment of McMenamin J. in *Glancre Teoranta v An Bord Pleanala* [2006] IEHC 250 in which he set out the applicable principles:

> *"I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.*
>
> > *1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.*

2. The jurisdiction to certify such a case must be exercised sparingly.

3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.

4. …

5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.

6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (Raiu).

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".

8. Normal statutory rules of construction apply which mean inter alia that "exceptional" must be given its normal meaning.

9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

6. A further valuable statement of principle concerning applications for leave to appeal, is that of Finlay Geoghegan J. in *Raiu v Refugee Appeals Tribunal* (Unreported, 26th February, 2003) as follows:

> *"I do not consider it appropriate for the High Court to take into account the strength of the grounds of appeal when considering an application for a certificate under s. (5)(3)(a) as submitted by counsel for the respondents. The strength of the grounds of appeal is relevant to the probability or otherwise that the decision of the High Court is correct. It might also be relevant to the importance of the decision of the High Court. However, it is not the decision of the High Court which s. (5)(3)(a) requires to be of exceptional public importance. Rather it is the point of law involved in the decision. Hence, it appears to me that this court must consider the point of law involved in its decision rather than its determination of that point of law. The point of law, irrespective of how it is decided, must be of exceptional public importance. Accordingly, the strength of the grounds of appeal against the decision of the High Court, which involves the point of law, does not appear relevant."*

7. To that principle must be added the views of Hogan J. in *M.A.U. v Minister for Justice, Equality and Law Reform* [2011] IEHC 59, where Hogan J. stated:

> *"Given the burden of work which the Supreme Court is required to discharge, it cannot be regarded as being desirable in the public interest that that Court should be expected to adjudicate upon an issue which is clear-cut almost to the point of being beyond argument. If (as here) the issue of the construction of the sub-section is straightforward and determined by the plain meaning of the relevant statutory words, then it is not in the public interest that the Supreme Court should be required to determine this point."*

The submissions

The first and second questions

8. It was slightly surprising that although a week has passed since the decision in this case, no written submissions were provided to this Court by either party. Any specific considerations that might apply to an application for a certificate where there has already been a referral to the CJEU were only addressed in passing by the parties. Counsel for the Minister made an overarching submission that this Court should have regard to the fact that there had already been a referral. Counsel for the respondent highlighted the fact of the referral as demonstrating the exceptional public importance of the issue.

9. The respondent submitted that his four questions raised two different points. Broadly speaking, these concerned the wider issue of whether a trial before a court, which is affected by systemic and generalised deficiencies in the independence of the judiciary, would breach the essence of the right to a fair trial and that the specific matters affecting this respondent over and above these generalised deficiencies which gave rise to a real risk of the breach of his fair trial rights.

10. The respondent submitted that because of the nature of the issues arising in this case, these were points of law which were of exceptional public importance. It was also in the public interest to have these issues resolved at appellate level as it clearly affected a number of cases.

11. Counsel for the Minister submitted that in substance the question asked at number (a) is whether a right to trial before an independent tribunal is coterminous with the essence of a right to a fair trial. He submitted that no material was placed before this Court by the respondent in that regard during the hearing. He also submitted that the decision of the Court of Justice was clear: the right to a trial before an independent judiciary was an aspect of the right to a fair trial. If the right to a trial before an independent judiciary was coterminous with a right to a fair trial, counsel submitted that the CJEU would have answered the questions asked of them by this Court differently.

12. In answer to this submission, counsel for the respondent said that it was not his suggestion that the right to a fair trial was wholly coterminous with independence of the judiciary. It was a question of whether a right to a trial before an independent court was the essence of the right to a fair trial. Counsel pointed to the absence from the CJEU decision in *Minister for Justice and Equality v L.M* (Case C-216/18) of any consideration of the case law from the ECtHR on Article 6. He submitted that the only cases considered by the CJEU in its decision were previous decisions of the Court of Justice. Counsel submitted that particularly strong reliance was placed on the Portugeese case *Associaco Sindical dos Juizes Portugueses* (Case C-64/16). In his submissions, these were

unquestionably issues of law and of exceptional public importance.

The third and fourth questions
13. Counsel for the respondent submitted that this ruling had to be seen in the context of the overall structures in place regarding the independence of the judiciary. There could be repercussions personally for judges which depended on their judicial decisions. He submitted that in the present case the comments were such that the people in power were signaling their interest in the case. That could give rise to an unfair trial because of this indirect link. Counsel submitted that short of a statement of actual bias by a judge, it would be difficult to see how an individual could ever claim a prospective breach of his right to a fair trial if this type of indirect link was held not to be sufficient. Counsel submitted that question (d) was a more general way of phrasing the issue than set out at question (c).

14. Counsel for the Minister submitted that this was a challenge to the reasoning of the Court and that it was not the type of situation for which a certificate could be granted under s. 16(11) of the Act of 2003. He submitted it was not a point of law. Even if he was incorrect in that submission and a deficiency in the reasoning was a point of law, it was difficult to see how this particular point arose because the Court cannot be said to have "discounted" the matter. On the contrary the Court considered the matter and rejected it in its context. There was very little evidence presented by the respondent which was specific to his case or even regarding the Deputy Minister. In fact, the evidence all pointed towards this not having any significant impact. As regards the standard of evidence that had been raised by the IHREC, it was not an issue between the parties. The standard has clearly been dealt with by the courts in this jurisdiction previously.

15. Counsel for the respondent took issue with the characterisation of the question as an assessment of evidence. He submitted that it was a point of law for a court to say that evidence of a particular quality and in particular evidence of an indirect link was insufficient to meet the test. That is a matter of law and not an assessment of the evidence.

Decision on Questions (a) and (b)
16. In the course of oral submissions, counsel for the respondent conceded that the second question was infelicitously phrased and that his question should replace the word "adopted" with "is consistent with" the jurisprudence of the High Court of England and Wales on Article 6. Leaving aside the very live issue as to how this question is said to arise from the judgment (the respondent pointed to paragraphs 24, 69 and 105 in his submission that this was a finding of this Court), there is no basis for holding that a question is of exceptional public importance when it asks whether CJEU conclusions are consistent with the jurisprudence of another Member State. Such a point is entirely irrelevant to any issue that the Irish Courts have to determine.

17. In his first two questions, the respondent is seeking to raise the issue of the interpretation of the decision of the CJEU. In my view, the questions undoubtedly seek to raise the issue of whether the right to a trial before an independent tribunal is coterminous or synonymous with the essence of the right to a fair trial. This is an issue of law. If, however, an issue of European law has been decided by the CJEU, it cannot be said that it is a matter of exceptional public importance that this be appealed. That is because the CJEU decision represents the ultimate view on the interpretation of European law and an appellate court will also be bound by that decision.

18. The submission in the present case is different however. The respondent disputes the interpretation of the decision of the CJEU in *L.M.*. It would seem of exceptional public importance to ensure that matters which have been referred to the CJEU are understood and applied properly in the courts of this state. Moreover, the underlying issues at stake in these proceedings are of exceptional public importance, covering as they do, the operation of the European Arrest Warrant and an exception to the principle of mutual trust upon which those warrants must be executed.

19. The main concern of this Court is whether it is desirable in the public interest that an appeal be taken where this Court has made a determination applying what in the Court's view were the clear legal principles identified by the Court of Justice. In the course of applying those principles, an issue was raised before the Court by the IHREC. The respondent did not dispute that the test was one of a "flagrant denial of justice". Instead, the respondent's focus was that to put him on trial before a court that suffered from systemic and generalised deficiencies was to deny him the essence of a fair trial.

20. This Court dealt with that argument in the course of its judgment (see in particular paras 64, 65, 66 and 67). It is apparent from the judgment, that this Court was of the view that the decision of the CJEU was clear. This was particularly so in light of the referral that this Court had sent to the CJEU which had raised the issue of whether individual assessments that went beyond systemic breaches, should or could be required to be demonstrated by a requested person. The nature of the procedures which the CJEU indicated had to be undertaken, were also a clear indication that the CJEU did not hold that a breach of the independence of the judiciary (even at the court level affecting the trial of the respondent) was itself a breach of the essence of the right to a fair trial.

21. If a point is so clear as to be beyond argument, then it is not desirable in the public interest to permit an appeal. The Court of Appeal is particularly burdened with work and it is not desirable that it would be overburdened with deciding an issue which has already been definitively decided by the Court of Justice of the European Union. The respondent's argument was that the absence from the CJEU decision of any reference to ECtHR case law, and that Court's focus on CJEU case law on the independence of the judiciary, meant that the CJEU's views as to the essence of the right to a fair trial was not clear. Therefore, the issue this Court must now determine is whether the decision of the CJEU is so clear that no issue of interpretation arises from it.

22. The difficulty for this Court is to weigh in the balance its own views as to the clarity of the CJEU's decision against the requirement that this Court's decision on an application for a certificate under s. 16(11) of the Act of 2003 should not concern itself with the strength of the appeal. If a respondent's argument reaches the level that it is possible that the Court's interpretation of the CJEU's answer to the questions referred is incorrect, then it must be in the public interest to have an appeal to the Court of Appeal. Naturally, that issue must be considered with objectivity. The Court cannot engage in an assessment of its own judgment, instead the focus must be on the possibility of another view as to the interpretation prevailing.

23. Bearing the above in mind, and considering the matters raised by the respondent, I conclude that it cannot be said that the interpretation of the CJEU's decision is so clear cut as to have reached the point that "it is beyond argument". Therefore, I am of the view that it is desirable in the public interest that the interpretation of the CJEU's decision on the central point be decided at appellate level.

24. For the reason I have set out above, I do not consider that question (b) reaches the standard necessary. I also do not consider that the manner in which question (a) has been phrased reaches the kernel of the question to be decided. I consider that the following question would meet the test:

> *Is the decision of the Court of Justice of the European Union in L.M. to be interpreted as meaning, where there are systemic and generalised deficiencies in the independence of the judiciary which affect the level of court in the Member State before which a person requested for surrender pursuant to a European arrest warrant will be tried in the event of being surrendered, that those deficiencies are sufficient, on their own, to establish substantial grounds that there is a real risk of a breach of the essence of the requested person's right to a fair trial?*

25. The above question may be subject to further submissions by counsel for the Minister and the respondent.

Decision on Questions (c) and (d)
26. Dealing with question (d) first, the respondent has posited that this is a more general way of asking the question that he has posed in question (c). Question (c) raised the issue of the comments of the Deputy Minister for Justice. Given the manner in which question (d) is phrased, it is difficult to understand the submission that it is simply asking the same question in a more general way. Instead, question (d) raises the issue of "evidential standard" with a broad sweep.

27. The use of the phrase "evidential standard" is perhaps an unusual one. In the context where a point of law of exceptional public importance must be demonstrated to justify a certificate enabling an appeal, it cannot be a question of what evidence must be produced to satisfy the executing judicial authority that there is a real risk of a breach of the individual's fair trial rights. As the respondent implicitly acknowledged in his submissions, an assessment of the *evidence* would not amount to a point of law. The question then must be directed at either the standard of proof or the burden of proof in extradition/surrender cases.

28. Neither the standard of proof nor the burden of proof was made an issue by the respondent. That is made clear in the judgment. The standard of proof was raised by the IHREC. This Court dealt with that issue at paragraph 9 of the judgment as follows:

> *"The Court is grateful to the IHREC for their detailed submissions, but the Court does not consider, in light of the arguments submitted by the parties in this case, the issues raised and the evidence before the Court, that it is necessary to address any further the possibility that the Rettinger standard of proof may, or does, vary according to the circumstances of the particular case."*

29. At paragraph 10 of *Celmer (No. 5),* this Court dealt with the burden of proof in similar terms. I also pointed out that the respondent had placed evidence before the Court. I then referred to the decision in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45. Although it concerned an issue of of inhuman and degrading treatment under Article 3 ECHR the burden on the respondent to adduce evidence this is a burden which applies to all claimed breaches of rights under the Constitution or European Convention. At that point in the judgment in *Celmer (No. 5)* there is a reference to a burden resting upon a requested person to adduce evidence capable of proving the substantial grounds that the person would be exposed to treatment contrary to Article 3 of the Convention. More properly, that should have stated substantial grounds that the person would have been exposed to a real risk of such ill-treatment. The reference to real risk had been set out earlier in paragraph 7 of the judgment. The real risk standard was then applied throughout the judgment of the Court in *Celmer (No.5).*

30. In light of those specific findings in the judgment of the Court, question (d) is not one that truly arises from the decision of the Court. This is because neither the standard of proof nor the burden of proof was put at issue by the respondent. Much more fundamentally, the Court did not make any finding other than that the well-known standard of proof and burden of proof as laid down by the Supreme Court in *Minister for Justice and Equality v Rettinger* was applicable to its determination in the proceedings. In those circumstances, there is no uncertainty in the law as regards that standard of proof or the burden of proof. The standard and burden of proof were identified in the judgment and applied. The Court, therefore, rejects that this is a point of law of exceptional public importance. Furthermore, where the evidential standard was not in issue between the parties, where the standard actually applied has not been identified even at the hearing of this application for a certificate by the respondent as an incorrect standard of proof and where the Supreme Court has spoken authoritatively about that standard, it would not be desirable in the public interest to certify a point as to that evidential standard.

31. The remaining issue is whether question (c) reaches the standard required by s. 16(11) of the Act of 2003. It is important to recall the context in which the Court made the reference to an indirect link at paragraph 114 of its judgment. That context was the making a specific and precise assessment of the respondent's situation. The real risk to a right to a fair trial has to be assessed in light of the evidence adduced.

32. None of the evidence adduced raised a real risk specific to this respondent of an unfair trial over and above the general concerns as to the independence of the judiciary (see paragraph 117). At paragraph 116 the Court referred to the evidence from the Polish experts relied upon by the respondents. Their evidence was to the effect that the concerns as to this respondent exist at a generalised level and that, despite the comments of the Deputy Minister, there is no specific concern to his risk that can be discerned at present over and above the general concerns as to the independence of the judiciary.

33. It is also important to recall the information provided by Judge Gacierek who at paragraph 111 is quoted as saying that these statements of the Deputy Minister "should be perceived as a typical rhetoric of politicians currently in power, who build their position among voters based on illegitimate and unjust attacks on courts and judges." In particular, at paragraph 114, it is stated that Judge Gacierek "did not see a direct effect of such statements or of the way of appointing court presidents on court rulings in this or other cases."

34. After dealing with the indirect link, the Court's judgment goes on to deal with the remaining evidence in the case. It is clear from the judgment that there was nothing in the evidence that raised any concern that because of these comments he was at specific risk of receiving an unfair trial. The reference to indirect link is a reference to the generalised deficiencies in the independence of the judiciary.

35. The respondent submitted that the finding about insufficiency of an indirect link was a finding of law and not an assessment of the evidence. Given the context for that finding and the ultimate finding of the Court on the issue of the specific risk to this respondent, it is clear that the question posed does not arise from the judgment as either a point of law or more particularly a point of law of exceptional public importance. Moreover, there is nothing in the Court's decision that forms the basis for a question that an indirect link is to be discounted in the context of the test. The judgment makes clear that any information about an indirect link, was insufficient for the reasons that the Court had already set out. The question posed does not have any regard to the basis of the Court's decision, namely, that on a specific assessment of the respondent's circumstances based upon the totality of the evidence (including the clear evidence provided by the respondent), no real risk to his fair trial was demonstrated.

36. The position therefore is that question (c) is no more than a cherry picking from the specific and precise assessment that the

Court carried out as to the specific circumstances of the respondent. The information from Judge Gacierek upon which question (c) is based, was assessed in the judgment alongside his other information (and that of others, including the experts relied upon by the respondent), that there was no specific risk to him of an unfair trial arising out of those comments. No point of law of exceptional public importance arises therefore in respect of this question.

ADDENDUM

37. After hearing further submissions from counsel for the Minister and for the respondent, the following question was certified by the Court pursuant to s. 16(11) of the Act of 2003:

> *"Is the decision of the Court of Justice of the European Union in L.M. to be interpreted as meaning, where there are systemic and generalised deficiencies in the independence of the judiciary which affect the level of court in the Member State before which a person requested for surrender pursuant to a European arrest warrant will be tried in the event of being surrendered, that those deficiencies are sufficient, on their own and in the absence of evidence of deficiencies in other safeguards for a fair trial, to establish substantial grounds that there is a real risk of a breach of the essence of the requested person's right to a fair trial?*