THE COURT OF APPEAL

CIVIL

Appeal No.: 2015/482

Peart J.
Irvine J.
Mahon J.

BETWEEN:

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

- AND -

FRANCIS LANIGAN

RESPONDENT

JUDGMENT OF MR JUSTICE PEART DELIVERED ON THE 16TH DAY OF MARCH 2016

1. On the 4th September 2015 an order was made by Murphy J. for the surrender of the respondent to the United Kingdom, and specifically Northern Ireland, pursuant to s. 16(1) of the European Arrest Warrant Act, 2003 as amended ("the Act") on foot of a European Arrest Warrant. For the purposes of the present judgment only a limited amount of factual background is relevant as the Minister's motion to this Court now seeks to strike out the appeal lodged against that order for surrender, on the grounds, firstly, that having on the same date been refused leave to appeal under s. 16(11) of the Act, this Court has no jurisdiction to hear the appeal, and secondly, that it is unsustainable and/or is bound to fail, and/or is an abuse of process.

2. Section 16(11) of the Act provides as follows:

> *"(11) An appeal against an order under subsection (1) or (2), or a decision not to make an order may be brought in the Supreme Court 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."*

3. As stated, the High Court refused a certificate, but the appellant nevertheless lodged and served an uncertified appeal against the order for surrender made on the 4th September 2016, resulting in the present motion. It is clear from the Notice of Appeal lodged that the order dated 4th September 2016 which is the subject of this uncertified Notice of Appeal is that by which surrender was ordered, and not the second order of the same date under s. 16(11) refusing to certify a point or points of law of exceptional importance for the purpose of an appeal. All the grounds of appeal as stated therein relate to the order for surrender.

Some background

4. The kernel of the appellant's objection to the making of the order for his surrender to Northern Ireland is his fear that if returned to prison in Northern Ireland his life will be threatened. He swore an affidavit setting out clearly the basis for his fear, as did a solicitor who corroborated what the appellant himself stated in this regard. The Minister did not seek to contradict that evidence by any affidavit in response. The trial judge was satisfied on a prima facie basis that the appellant had established that there would be a substantial risk to his life if surrendered, but exercised the Court's powers under s. 20 of the Act in order to obtain information from the issuing Authority as to the ability of the Northern Ireland Prison Service to provide adequate protection to his life and wellbeing while in prison.

5. Certain information was provided in letter form in response to requests made on the Court's behalf by the Central Authority. Information was sought both in relation to the ability of the prison service in Northern Ireland to protect the appellant upon surrender, and secondly to address an issue of delay. A letter from the Northern Ireland Prison Service dated 10th April 2014 was produced in relation to the first question, and the Court was given a copy of its letter requesting the information. Upon receipt of these letters the trial judge had some concerns about the response received in that it appeared to be a form of circular about protection measures for prisoners, and not specifically addressing the appellant's individual circumstances. Some other concerns were raised as well. Eventually on the third day of the s. 16 hearing, an affidavit was sworn by John Davis, an official in the Central Authority which exhibited the correspondence, and provided some explanations in relation to the concerns raised by the trial judge. She continued to have some concerns as to provenance and these are set forth in the transcript note of her decision in this regard on 17th November 2014, and as appears at page 33 of that transcript, she decided to again seek further information pursuant to s. 20 of the Act. She stated that the additional information could be presented to the Court otherwise than on affidavit provided that the Court could be satisfied as to the *"provenance and authenticity of the information and that the information relates to the specific case".* She adjourned her consideration of the points of objection until such time as this information was received.

6. The Central Authority wrote again to the Central Authority in the U.K. seeking the information requested by the trial judge, and in response information was provided by an Assistant Chief Constable in the PSNI. She was satisfied as to the provenance and authenticity of the information provided. Upon an indication that the trial judge was so satisfied, Counsel for the appellant raised objections as to its admissibility as evidence. In addition the appellant sought an Order for Discovery in relation to communications between the Central Authority and the authorities in the U.K. and in addition sought a reference to the CJEU under Article 267 TFEU in relation to "questions touching on whether or not Ireland, in giving effect to the Framework Decision, was obliged to depart from national rules of practice, procedure, evidence and the conduct of trials having regard to Article 12 of the Framework Decision", and

also in relation to the time limits provided for in Article 17 of the Framework Decision. The Court acceded to a request for a reference in relation to Article 17 time limits only, and refused the other applications. That reference was made on the 17th May 2015, and the CJEU gave its judgment on 16th July 2015. Without going into the decision in any detail, it suffices for present purposes to state that the resulting judgment did not avail the appellant in relation to delay.

7. In addition, the appellant renewed his application for bail given the delays that were being encountered in relation to the s. 16 application. Bail was granted, and was taken up eventually following an appeal to the Supreme Court which reduced the amount of the independent surety required.

8. But throughout this process the appellant has maintained his objections to the admissibility of the material and information supplied by the issuing authorities pursuant to requests made under s. 20 of the Act. He maintains that in the form in which it is received and presented to the court it does not amount to admissible evidence. It was submitted in the High Court, and on this motion, that if it is correct that EAW proceedings are not adversarial in nature, and that the Framework Decision and the Act envisage that less formal procedures can occur short of the strict rules of evidence characteristic of an adversarial hearing, and that material can be presented to the Court in an informal manner that would not be otherwise permissible, then s. 20 of the Act is unconstitutional. These points were raised prior to the determinations made by the trial judge as appear in the transcript of her ruling on 17th November 2015.

9. When the trial judge ruled against the appellant on these matters on 17th November 2015 and sought the further information she required, the appellant commenced plenary summons proceedings on 1st December 2015 (Record Number: 2015 No. 6374P) for the purpose of challenging the constitutionality of s. 20 of the Act. A Statement of Claim was delivered immediately thereafter. However, the State defendants did not deliver their defence to that statement of claim until 17th July 2015. There was therefore no opportunity for the appellant to have that constitutional challenge heard and determined in time for the resumption and conclusion of the s. 16 application for surrender. The trial judge heard further submissions on the s. 16 application on the 2nd September 2015, and gave a written judgment that same day, finding in favour of making the Order for Surrender. It is clear from the trial judge's judgment delivered on the 2nd September 2015 that the appellant had launched a wholesale attack on s. 20 of the Act and the admissibility as evidence of material and information received.

10. As for the particular ground of objection to surrender based on section 37 of the Act and what the appellant maintained was a real risk to his life if surrendered, the trial judge considered at length all of the material provided to her in response to the s. 20 requests and concluded that the same was admissible in response to the appellant's evidence concerning the risk to his life. She concluded that she was satisfied that *"the Northern Ireland authorities can and will take all reasonable measures to safeguard the life of the respondent if he is surrendered to their custody"*.

11. Following delivery of judgment, Counsel for the appellant requested that No Order for Surrender be perfected until such time as his challenge to the constitutionality of s. 20 was heard and determined, and made the point that the reason why those proceedings had not by that date already been determined was because the State defendants had delayed in the delivery of their defence. The trial judge refused to postpone the perfection of the Order for Surrender which was duly perfected on 4th September 2015, as was the order refusing to certify an appeal.

12. The appellant refers to the provisions of s. 16(1) which, as amended by s.76 of the Criminal Justice (Terrorist Offences) Act, 2005 states, as relevant:-

> *"16.(1) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under section 13 or such later date as it considers appropriate, make an order directing that the person be surrendered ……". [emphasis added]*

13. While this provision is usually seen as one that permits the original hearing date fixed under s. 13 following the arrest of the person to be adjourned to a later date in order to allow time for a proper preparation of the s. 16 application, it is submitted nevertheless that on the facts of the present case it would have permitted the postponement of the making of the Surrender Order even though in its written judgment the Court has decided that one must be made, in order to allow time for the plenary summons proceedings to be determined before the Surrender Order is perfected.

Legal Submissions

14. The Minister's submissions on this motion are straightforward and based on a reading of the words of s. 16(11) of the Act. It is submitted that when the section provides that an appeal may be brought against an order made under s. 16 "if and only if" the High Court certifies a point of law of exceptional public importance *etc.* it means just that, and in circumstances where such a certification was refused by the High Court, that it is not permissible for an appeal to be lodged, and therefore that the Court of Appeal has no jurisdiction to hear it, and it should be struck out. I leave aside for the moment any submissions made that in any event the appeal should be dismissed on the grounds that it is unsustainable and/or bound to fail, and/or that it is an abuse of process.

15. The appellant's submissions are less straightforward. It is submitted that some of the grounds in the uncertified appeal raise issues affecting the constitutionality of certain sections of the Act, in particular s. 20 which, it is submitted, if the trial judge is correct permits reliance to be placed on material falling short of admissible evidence, and s. 16(11) which, if it mandates a certificate before an appeal may be brought, infringes the constitutional right of appeal as provided for in Article 34.4.4 of the Constitution which provides:-

> *"No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution".*

16. It is submitted accordingly that no certificate is necessary in order to bring the present 'uncertified appeal' in so far as it relates to constitutional grounds relied upon therein. These issues are, it appears, the subject of the plenary proceedings not yet determined. The appellant accepts that in addition to those grounds, the notice of appeal contains non-constitutional grounds.

17. It is submitted also that the present motion to strike out this uncertified appeal should not be acceded to, if the Court was inclined to so conclude, until the High Court has reached a determination on the question of the constitutionality of s. 16(11) of the Act, and that there was no reasonable basis for the trial judge not to exercise a discretion as to the date on which any s. 16 (1) order would be made by postponing the making of such order until such time as the constitutional challenge was determined.

18. If this Court is minded to strike out the uncertified appeal so that the appellant is surrendered to the authorities in Northern Ireland before he has had his constitutional challenge determined, then the appellant requests that the Court, as the Court of final instance in this matter, would first make a reference for a preliminary ruling to the CJEU under Article 267 TFEU *"on the grounds that*

he would have been improperly denied his right of defence/audi alteram partem required by the Framework Decision in conjunction with the Charter". I am satisfied that a reference for such a preliminary ruling is not necessary for the purposes of determining the motion before this Court.

19. I should perhaps add that the basis for the unconstitutionality of s. 16(11) – restricted right of appeal – within the plenary proceedings is set forth in written submissions as being firstly that it is a peculiarity of s. 16(11) and other similar provisions in other legislation here that it is the judge whose decision is sought to be appealed who must decide whether or not to permit an appeal, whereas in other jurisdictions leave to appeal is brought to the appeal court itself, which avoids the unfairness involved in having to apply for leave to the trial judge. In that regard, it is contended that it is clear from the reasoning of the trial judge in this case that the reason why she refused to certify grounds for appeal was that she considered that she was correct in her conclusions.

The grounds of appeal in the Notice of Appeal filed
20. The grounds of appeal set forth in the uncertified notice of appeal which on this motion the Minister seeks to have struck/dismissed are as follows:

> *"The learned judge erred in law and/or in fact as follows:-*
>
> *1. Ordering the surrender at a time when, to her knowledge, there existed a legitimate dispute between the same parties about the constitutionality of relevant provisions of the E.A.W Acts 2003 and 2012 pending in the High Court (2014 No. 6374 P) in contravention of, inter alia, s. 37(1)(b) of the Act. She formed the erroneous view that, in light of the matters that she had considered and her conclusion that the Minister had established a sound basis for surrender, section 16(1) of the Act obliged her forthwith to make a surrender order and that she had no discretion to delay making that order pending the outcome of the constitutional challenge, as commenced on 1 December 2014, to which no defence was delivered until 17th of July 2015.*
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> *2. In so radically purporting to construe relevant provisions of the EAW Acts, as to deem it to require adjudications by way of what in substance is an inquisitorial process, where inter alia there are no requirements about the admissibility of documentary evidence, documentation may be relied on without any opportunity to subject its author(s) to cross-examination and in substance the Judge may advise the State-party's proofs, and in several other respects, contravening inter alia:-*
>
> *(i) the separation of powers in the Constitution, impermissibly trespassing on the legislative function, and*
>
> *(ii) the right to a fair hearing in the Constitution and in Art. 47 of the EU Charter on Fundamental Rights.*
>
> *3. Failing to address at all numerous key propositions of national and EU law advanced for the appellant, contravening the said rights to a fair hearing.*
>
> *4. Treating as evidence what in law is not evidence while, at the same time, entirely disregarding relevant documentation furnished to her by the appellant, including Northern Ireland newspaper reports consistent with his evidence about the threat to his life, if surrendered.*
>
> *5. Refusing to refer three questions concerning procedures to the C.J.E.U under Art. 267 of the T.F.E.U. (being the final court, in light of her refusal to certify under s. 16(11) of the EAW Acts).*
>
> *6. Such further or other grounds as may be permitted."*

21. I have set out these grounds of appeal in full given the appellant's reliance upon Article 34.for.4 of the Constitution, and on certain comments of McKechnie J. in *O'Sullivan v. Irish Prison Service* [2011] ILRM 350, particularly those on p. 379 where he confirmed that an appeal may be brought without a certificate *"where the matter involved the constitutionality of, in this case, the EAWA 2003 or amending legislation"*, given the provisions of Article 34.4.4 of the Constitution.

22. This is a motion to strike out the uncertified appeal on the basis that this Court lacks any jurisdiction to hear it given the limited right to appeal to this Court provided by s. 16(11) of the Act as amended, and given the refusal by the trial judge to give the required certificate. The appellant says that no certificate is required given the fact that the appeal raises issues as to the constitutionality of the procedures under the Act, and in particular s. 20 and s. 16(11) itself. But I am satisfied that this is incorrect. It is true that the appellant contends for example that some of the procedures fall short of being constitutionally fair procedures, but that is not a challenge to the constitutionality of any of the provisions of the Act. It is appeals *"which involve questions as to the validity of any law having regard to the provisions of this Constitution"* which are outside the grasp of s. 16(11) of the Act and require no certification. The grounds which I have set forth contain no challenge to the validity of the Act or any of its provisions. It follows inexorably that the appeal sought to be brought by the Notice of Appeal that was lodged is not a valid Notice of Appeal since the appellant's application for a certificate in respect of the identified points of law said to arise from the decision of the trial judge was refused.

23. The fact that the trial judge decided against postponing the perfection of her order under s. 16(1) until after the determination of the plenary proceedings commenced by the appellant for the purpose of challenging parts of the Act having regard to the Constitution is not something which this Court should take into account in deciding whether or not the appeal lodged without a certificate granting leave to appeal is valid. The only question is whether such a certificate is required given the nature of the grounds of appeal contained in the Notice of Appeal lodged. In my view it is required, and in those circumstances I would make the order sought on the ground that this Court lacks jurisdiction to hear the appeal.