

THE HIGH COURT
IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED

[2011 No. 297 EXT.]

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-and-

THOMAS O'CONNOR

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 12th day of January, 2015.**Introduction**

This is the Court's ruling upon an application by the respondent for this Court to seek a preliminary ruling from the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union (hereafter "T.F.E.U."). The High Court acquired jurisdiction to make such references for the first time on the 1st December, 2014, that date being five years from the coming into force of the Lisbon Treaty, on which date Article 10(3) of Protocol No. 36 to that instrument came into force.

On the 3rd December, 2014, the Court was asked by counsel for the respondent to forward the following questions to the Court of Justice of the European Union:

- "1. Is the *ad hoc* Attorney General's scheme sufficient to guarantee 'assistance by a legal counsel' v '*beneficier de services d'un conseil*' – 'in accordance with national law' v '*droit national*' envisaged by Article 11(2) of the Framework Decision on a European arrest warrant?"
2. Does the reasoning to be given, for rejecting the proposition that this ad hoc scheme is not a sufficient guarantee, comply with Article 47 of the E.U. Charter on Fundamental Rights, in particular, the implied requirement to give reasons for rejecting the arguments for insufficiency, as summarized in written submissions dated 29th May 2014?
3. On account of the mootness principal in Irish law and Mr. O'Connor's invitation to the Minister to waive any mootness objection that may be raised, did Mr. O'Connor get a fair hearing as envisaged in Article 47 of the Charter?"

These were later recast or reformulated by counsel for the respondent in written submissions to the Court as follows:

- "i) Does Article 11(2) of the Framework Decision on the European arrest warrant 'impose no obligation...to provide legal aid, whether as of right or otherwise' in cases involving indigent respondents who cannot afford to pay for appropriate legal representation?"
- ii) If such an obligation exists, is a discretionary ad hoc administrative legal aid scheme, with virtually no criteria as to how it shall be administered and which is never granted until the surrender proceedings have ended, a sufficient discharge of this obligation?"
- iii) In light of the inordinate delays in the conduct of these proceedings since July 2012, should surrender be refused in view of art. 17 of the Framework Decision?"
- iv) Has this Court jurisdiction to refer the above questions?"

The applicant does not accept that the Court has jurisdiction in the circumstances of the case to make the reference that the respondent seeks, and accordingly opposes the application. The basis of the applicant's objection is that the Court had already rendered its decision before any request was made for a preliminary reference, and that the Court is bound to follow the authority of *McNamara v An Bord Pleanála and others* [1998] 3. I.R. 453, in which it was held by the Supreme Court that the advice of the European Court must be sought before the national court has made its final decision, and that once the national court has delivered its final judgment, its decision has been made, and it has no further function in the matter.

The relevant chronology

Judgment was reserved both in this case, and in a related plenary action on the 30th May, 2014. On Tuesday the 2nd December, 2014, the Court announced its decision, namely that it was not going to uphold the respondent's objection to his surrender, and that it intended to make an order pursuant to s.16(1) of the European Arrest Warrant Act 2003 to surrender the respondent to such person as was duly authorised by the issuing state to receive him. The Court indicated that it would give detailed reasons for its decision in its written judgment which, though completed, required proof reading and some minor additional editing before the Court was prepared to release it. The Court indicated that the judgment would be made available in unapproved form on Thursday the 4th December, 2014.

At 1 p.m. on the 3rd December, 2014, counsel for the respondent in the proceedings sought leave to file in court a notice of application requesting the aforementioned preliminary reference. Although the respondent had been aware since the previous day of the Court's decision, he was not yet aware of the reasons for the Court's decision. Accordingly, the respondent's application was made pre-emptively, and this explains the reference in question two as initially formulated to "the reasoning to be given". The application was adjourned to the 11th December, 2014, on the basis that the applicant required time to consider the position, and so as to allow the respondent to consider the Court's reasons for the decision it had announced on the previous day, which would be

made available on the following morning.

On the 4th December, 2014, the Court released a 59 page unapproved judgment to the parties, which stated in detail the reasons for its decision not to uphold the respondent's objection to his surrender.

On the 11th and 17th December, 2014, respectively, the Court heard submissions from the parties concerning whether or not it had jurisdiction to make the requested reference, and if so, whether it was appropriate that it should do so. Counsel for the respondent argued that if, as the respondent contended, the Court did indeed have jurisdiction, then it had no discretion as to whether to refer a question of European Law, which arose in the proceedings. Rather, the Court was obliged to do so. In that regard, reliance was placed, *inter alia*, on *CILFIT v Ministero della sanità (case 283/81)* [1982] E.C.R. 3415 and on *European Commission v United Kingdom* [2014] Q.B. 988.

Decision

The Court is grateful to counsel on both sides for their submissions and assistance with respect to this issue. Having carefully considered what was argued by each side, the Court has concluded that it does not in fact have jurisdiction to make the requested reference in the particular circumstances of this case.

The Court has considered the case of *McNamara v An Bord Pleanála and others* [1998] 3. I.R. 453 in detail and is satisfied that it is binding on this Court. The principal judgment of the Supreme Court was that of Keane J., (as he then was), with which Hamilton C.J., Barrington J., Murphy J. and Lynch J. agreed. In his judgment, Keane J. considered the import of Article 177 of the Treaty of Rome, as amended by Article G (56) of the Treaty on European Union (which has been replaced by Article 267 T.F.E.U.). Keane J. said at pp. 465-466:-

"Article 177 of the Treaty of Rome, as amended by Article G (56) of the Treaty on European Union, is as follows:

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:-

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, the court or tribunal shall bring the matter before the Court of Justice.'

Barr J. said that at p. 457:-

'In the light of the wording of Article 177 I am satisfied that a ruling of the Court of Justice, being for the benefit of a national court, must be made while the case in question is pending before the latter, *i.e.* prior to its final judgment.'

I have no doubt that Barr J. was correct in so holding. The purpose of the procedure is to enable a national court to obtain any guidance as to European Union law which it may require in order to decide the case pending before it. When the national court has given judgment, there is no case pending in respect of which any such question can be referred."

It is clear to this Court that the reference to final judgment refers to the decision on the substantive issue in the case, and it is not to be more narrowly construed as referring to delivery of the Court's statement of the reasons for its decision.

This Court rendered its decision in the present case on the 2nd December, 2014. It gave the detailed reasons for its decision in a written document entitled "Judgment of Mr. Justice Edwards" released on the 4th December, 2014. However, the judgment document setting forth the Court's reasons did not alter or change in any way the decision in the case, which had been announced on the 2nd December, 2014, before any application had been made for a preliminary reference. I am satisfied that the decision announced on the 2nd December, 2014, represented this Court's final judgment in the sense intended by the relevant treaty provisions.

Article 267 T.F.E.U., and its predecessor Article 177 of the Treaty of Rome, contemplates a reference by a national court in circumstances where it is necessary "to enable it to give judgment", *i.e.*, to decide the case. If the Court has already rendered its decision, even if it has not yet explained its reasons for so deciding, the need for a reference is redundant. That is the position here. If the respondent had made his application sooner, *i.e.*, on the 1st December, 2014, the Court could have deferred an announcement of its decision, and it might well have been persuaded after hearing the parties that it was indeed obliged to refer a question or questions concerning the interpretation of article 11.2 of the Framework Decision, and/or whether that provision has been effectively transposed in this jurisdiction, to the Court of Justice of the European Union. Regrettably, the application was not made in time. The Court rendered its decision on the 2nd of December 2014, and with that it ceased to have any jurisdiction thereafter to seek a preliminary reference in respect of the subject matter of that decision.

In the circumstances, the Court dismisses the respondent's application as misconceived.