THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 388

[2015/427]

Finlay Geoghegan J.
Hogan J.
Hanna J.

IN THE MATTER OF ARTICLE 40.4 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 16(6)(b) OF THE EUROPEAN ARREST WARRANT ACT 2013 (AS AMENDED)

BETWEEN

JAROSLAW OWCZARZ

APPLICANT/APPELLANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 14th day of December 2016

1. This is an appeal taken by the applicant from the decision of the High Court (Haughton J.) delivered in August 2015 where in an ex tempore ruling he refused to direct an inquiry into the legality of the applicant's detention, an application having been made for that purpose by the applicant pursuant to Article 40.4.2 of the Constitution. It is appropriate to record that both the initial application and this appeal were made on notice to the Governor who appeared on both occasions through solicitor and counsel to oppose the application.

2. The background to this Article 40.4.2 application lies in the order made by the High Court (Donnelly J.) on 28th July 2015 whereby she ordered pursuant to s. 16(1) of the European Arrest Warrant Act 2003 (as amended)("the 2003 Act") that the applicant be surrendered to the Republic of Poland. Section 16(4)(b) of the 2003 (as inserted by s. 10 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012) provides that where an order for surrender is made pursuant to the High Court under s. 16(1), it shall (subject to exceptions not here relevant) then order that "that person be detained in a prison…for a period not exceeding 25 days pending the carrying out of the terms of the order."

3. The applicant was then committed to custody in Cloverhill Prison by order of the High Court in accordance with these provisions. He was subsequently admitted to bail pending the outcome of the present appeal.

4. Pursuant to s. 16(11) of the 2003 Act (as amended by s. 12 of the Criminal Justice (Miscellaneous Provisions) Act 2009)("the 2009 Act"), an appeal lies from that decision to this 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."

5. By virtue of s. 74(1) of the Court of Appeal Act 2014, the reference in this sub-section to the Supreme Court should now be understood as being a reference to the Court of Appeal. Effectively, therefore, no appeal lies from the surrender decision unless the High Court grants the appropriate certificate pursuant to s. 16(11) of the 2003 Act. The applicant did indeed apply for such a certificate for leave to appeal, but such was refused by Donnelly J.. At the hearing of the appeal before this Court, counsel for Mr. Owczarz, Dr. Forde S.C., contended that the applicant would have had good grounds for appeal, save that he could not now advance that appeal in the absence of leave from the High Court in view of the statutory restriction contained in s. 16(11) of the 2003 Act.

6. Two days after the decision of the High Court refusing leave to appeal the applicant issued a plenary summons (2016, No. 6216P) in which he sought a declaration that s. 16(11) of the 2013 Act is unconstitutional. An amended statement of claim was delivered on 21st January 2016 and the defendants delivered their defence on the following day. I feel bound to observe that, in view of the obvious urgency of these plenary proceedings, it is somewhat surprising that to date no steps have, apparently, been taken to ensure that this matter is speedily heard and determined by the High Court.

7. It would seem that the essence of the applicant's constitutional challenge is that s. 16(11) of the 2003 Act fails to respect constitutional norms by:-

> (i) allowing the High Court judge to decide in effect whether or not there should be an appeal from her own judgment, thus infringing the rule against objective bias, and
>
> (ii) by curtailing the right of appeal in a manner which amounts to a disproportionate interference with the right of access to the courts, thus negating the substance of any constitutionally conferred right of appeal.

There is also a generalised plea that the sub-section infringes the EU Charter of Fundamental Rights, but this plea has not been particularised. It would be inappropriate in the context of this appeal to express any view on the merits of any such constitutional challenge and I expressly refrain from doing so.

8. Under the legislative scheme provided for by the 2003 Act, where an order for surrender is made by the High Court under s. 16(1), then the early surrender of the respondent is envisaged, unless, of course, leave to appeal is granted pursuant to s. 16(11). Section

16(6)(b) of the 2003 Act (as substituted by s. 12 of the 2009 Act) provides, however, that where the respondent:-

> "(a) appeals an order [for surrender] made under this section, or
>
> (b) makes a complaint under Article 40.4.2 of the Constitution,

he or she shall not be surrendered to the issuing state while proceedings relating to the appeal or complaint are pending."

9. In effect, therefore, for so long as a complaint under Article 40.4.2 of the Constitution is pending, then by virtue of this statutory provision, no surrender order can take effect. As it happens, this appeal was heard on Monday, 5th December 2016, so that a period of almost sixteen months has elapsed since the initial application to the High Court was first made. In the interval the applicant has been on bail awaiting the outcome of the present appeal.

10. It seems clear that the Oireachtas intended that the protection afforded by s. 16(6)(b) of the 2003 Act was predicated upon the assumption that any application under Article 40.4.2 would be directed at securing the release of the applicant and that any such application would be properly within the scope of those constitutional provisions. It is, of course, clear that when hearing an application under Article 40.4.2 the High Court "must reach a single decision, namely, whether the detention of the person is or is not in accordance with law": see *In re D* [1987] I.R. 449, 457, *per* Finlay C.J. There is also authority for the proposition that the Article 40.4.2 procedure should not be invoked when, in reality, some other remedy is desired: see *Cahill v. Governor of Military Detention Barracks, Curragh Camp* [1980] I.L.R.M. 191. As Finlay P. said in that case ([1980] I.L.R.M. 191, 201), the Article 40.4.2 procedure – with its many special and unique features all designed *in favorem libertam* – should not be "debased" or allowed "to become a vehicle by way of special, informal and expeditious procedure for the pursuit of other remedies."

11. Can it be said, therefore, that even if the applicant were to succeed in his constitutional challenge, it would follow that he was in unlawful detention? It is plain that this could not be so. If the applicant were to succeed in his plenary proceedings so that s. 16(11) of the 2003 was found to be unconstitutional, the net effect of this would simply be that he would be free to appeal to this Court in accordance with Article 34.4.1 of the Constitution and that he would enjoy an untrammelled right of appeal for this purpose. But this would not change his present legal status in the slightest, as it is only if he were to succeed on any such appeal against the making of any such surrender order under s. 16(1) of the 2003 Act (and the consequential order that he be detained in custody under s. 16(4)(b) of the 2003 Act (as amended)) that he would then be discharged from custody.

12. The applicant, therefore, faces a double hurdle in order to secure his release from detention. But the most important point here is that even if his present constitutional challenge were to succeed, it would not render his detention unlawful. That, however, is the very object which Article 40.4.2 is exclusively designed to determine. If (as here) it is clear from the only ground advanced by the applicant that it could not, even if successful, render his custody unlawful, then it is plain that the Article 40.4.2 proceedings are misconceived.

13. It is not the case, however, that the applicant is potentially without a remedy. If a plaintiff contends that he is liable to suffer significant harm by reason of the operation of a statutory provision which he contends is unconstitutional, then he is free to seek an interlocutory injunction in the plenary proceedings restraining the operation of the statutory provision question: see *Pesca Valentia Ltd. v. Minister for Fisheries* [1985] I.R. 193. Were any such application to be brought – and I refrain from any expressing any view whatever on this matter – the plaintiff would, of course, have to satisfy the standard *Campus Oil tests (Campus Oil Ltd. v. Minister for Industry and Commerce (No.2)* [1983] I.R. 88) in relation to fair question to be argued, balance of convenience etc.

14. This, of course, is unlike the position which obtains pursuant to s. 16(6)(b) of the 2003 Act where an applicant against whom a surrender order has been made under s. 16(1) can obtain the equivalent of an interlocutory order restraining surrender as of right by making an application under Article 40.4.2. This legislative scheme presupposes, of course, that any such application under Article 40.4.2 is itself a legitimate one in the sense that the application represents a genuine challenge to the legality of the applicant's current custody. Where (as here) it is clear that the Article 40.4.2 complaint is not a legitimate one in this sense, it is inappropriate that a surrender order should be postponed in this fashion through the expedient step of merely making an application under Article 40.4.2 when the real remedy of which any person in the applicant's position might wish to avail lay elsewhere.

15. This very issue was also recently addressed by this Court in *Lanigan v. Governor of Cloverhill Prison* [2016] IECA 293, another case where an applicant facing surrender under the 2003 Act had elected to make a complaint under Article 40.4.2 and thereby benefit from the automatic stay provided for by s. 16(6)(b) of the 2003 Act. In *Lanigan* the applicant qua plaintiff had also sought to challenge the constitutionality of certain provisions of the 2003 Act in separate plenary proceedings. In the Article 40.4.2 proceedings, however, the applicant had simply sought an order directing that the plenary proceedings be heard with expedition and that he be released on bail in the interim and no free standing ground directed at a challenge to the legality of that custody had been advanced at all.

16. In his judgment Peart J. concluded that:

> "It is difficult to escape the conclusion that in this case the use of Article 40.4 of the Constitution was simply a device to delay surrender, given the effect of s. 16(6) of the Act and that in truth the appellant had no case to legitimately make that his detention was not in accordance with law."

17. These words are also entirely apt to cover the circumstances of the present case.

Conclusions

18. For the reasons just stated, it is plain that the complaint which was advanced in these Article 40.4.2 proceedings was not a legitimate one in the sense I have just described, since it is clear that even if the applicant was correct in his submission regarding the constitutionality of s. 16(11) of the 2003 Act, it would not render his detention unlawful. It follows, therefore, that the application which was made to Haughton J. for an inquiry under Article 40.4.2 into the legality of the applicant's custody was misconceived, since no ground had been advanced in that application which bore directly on the legality of that custody.

19. In these circumstances I consider that the appeal should be dismissed.