THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2019] IECA 163

[2018 No. 94]

The President
Edwards J.
Kennedy J.

BETWEEN

MICHAEL LYNN

APPLICANT

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR FOREIGN AFFAIRS AND TRADE, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of the Court delivered on the 31st day of May 2019 by Birmingham P.

1. This is an appeal from a decision of the High Court (MacGrath J.) delivered on 23rd February 2018, refusing the applicant certain reliefs that he sought by way of judicial review. There are also two Notices of Motion before the Court: one brought by the Director of Public Prosecutions and the second by the other State respondents seeking to strike out the appeal on the basis that it has become entirely moot.

2. The slightly unusual situation of the substantive appeal and the strikeout motions coming before the Court at the same time arises in circumstances where the two motions had been listed on two previous occasions. On the first occasion, the hearing of the motions did not proceed because it was indicated on behalf of the applicant, who was the respondent to the motions, that he had a considerable volume of documentation, potentially relevant, which he required to have translated from Portuguese into English. The matter was then listed on a second occasion, and once more, did not proceed. On this occasion, counsel on behalf of the Director explained that a very considerable quantity of documentation, some or all of it material translated from Portuguese, had just been received the previous day and had not been read. While he thought it unlikely that the documentation could be of any real relevance, he did not feel it proper that the matter proceed in a situation where documentation which might be referred to had not been read or considered by him. In that situation, the motions were adjourned once more. At that stage, it was also becoming clear that the issues in the substantive appeal seemed to be relatively net and capable of being dealt with expeditiously. Indeed, there seemed to be an emerging consensus that rather than list the two motions for a third time, that the most effective way to manage Court time was to list the substantive appeal and the motions together and allow all issues be addressed simultaneously.

3. The background to the matters that now come before the Court are somewhat convoluted. Thirty-three warrants for the arrest of the applicant, who is a solicitor, were issued by the District Court in Dublin in 2012 in relation to allegations of theft, making false instruments, and using false instruments.

4. On 4th July 2013, the second named respondent; the Minister for Foreign Affairs and Trade, applied in writing to Brazil, seeking the extradition of the applicant from there to the State. This occurred in circumstances where there was no extradition treaty or rendition arrangement between Ireland and Brazil. In the absence of an extradition treaty, or a rendition arrangement, it was necessary for the Irish and Brazilian governments to enter into an ad hoc extradition agreement covering only the particular case of the applicant. This they did. The application for extradition was supported by an affidavit of Mr. Raymond Briscoe sworn on 13th June 2013. He is a senior solicitor and professional officer in the office of the first named respondent. The applicant was arrested on foot of the extradition request and was taken into custody on 29th August 2013. He remained in custody until his return to this State on 1st March 2018. The actual extradition procedure based on the ad hoc agreement with Brazil involved, it would seem, a multi-stage process: an initial judicial phase, and thereafter, a political and administrative phase. At the judicial stage, the person subject to the extradition request could raise objections before the Brazilian courts as to the legality of what was proposed by way of motions and appeals. If such objections were not upheld, the Brazilian government would then be at liberty to hand the applicant over to the Irish authorities, if it were still minded to do so. It is important to appreciate that in the case of extradition, whether on the basis of a treaty or an ad hoc agreement, the decision on whether or not to proceed with an extradition is an entirely political one (unlike in the case of a rendition arrangement such as the European arrest warrant system where it is an entire judicial one). The sole involvement of the courts in extradition is to review the legality of the application. However, even if the courts clear the way for a possible extradition, a political decision is required to actually proceed with it. In those circumstances, assuming the requested state remains happy to proceed, the process moves on to the administrative stage, also referred to as the "handover" stage. As was his right during the judicial phase, the applicant raised a number of objections to his extradition. On 16th December 2014, the Brazilian Supreme Court delivered judgment dismissing the applicant's challenges to the legality of his proposed extradition and clearing the way for the Brazilian government to proceed to extradite the applicant to Ireland in respect of twenty-one charges of theft, if they were still minded to do so.

5. In light of subsequent controversies, it is of note that in the context of certain motions/appeals in the judicial stage of the extradition proceedings, known as "embargos", that Mr. Briscoe, on behalf of the first named respondent, swore an affidavit on 30th April 2015, in the course of which he averred:

> "[t]he Irish authorities guarantee that 'it will deduct from any eventual imprisonment sentence the period of imprisonment

time in Brazil enforced through the extradition request'. If Michael Lynn is surrendered and then subsequently convicted of the 21 offences as stipulated in the extradition request, any time that he has spent in custody/in prison in the Federative Republic of Brazil shall be counted towards his sentence."

Correspondence followed between legal representatives of the applicant and the first named respondent in which the applicant's representatives queried the basis upon which the guarantee in question was provided. In the course of that correspondence, it was stated by the Chief State Solicitor on behalf of the first named respondent on a number of occasions, including 18th November 2016 and also 14th November 2017, that the office was satisfied that what had been stated in para. 8 of the affidavit of Mr. Briscoe of 30th April 2015 represented the correct legal position, and went on to say that in the event that Mr. Lynn was convicted, that the Director would submit to the sentencing Judge that the legal position was as stated in paragraph 8.

6. On 29th January 2018, the date and timeline of events being significant, the applicant sought and was granted leave by order of the High Court to apply by way of judicial review for the following reliefs:

> "(i) A declaration that the respondents or each of them are not entitled to furnish a 'guarantee to the Federative Republic of Brazil' (hereinafter Brazil) to the effect that the applicant, who is the subject of extradition proceedings from Brazil on the application of the respondents and who is in custody in Brazil pending surrender, will, in the event of his return to the State and in the event of any sentence being imposed on him in respect of the matters for which he is surrendered, be given credit in any such sentence for any time served in Brazil in connection with his extradition;
>
> (ii) an Order prohibiting the respondents or each of them from furnishing a 'guarantee to Brazil' to the effect that the applicant will, in the event of his return to the State, and in the event of any sentence being imposed on him in respect of the matters for which he is surrendered, be given credit in any such sentence for any time served in Brazil in connection with his extradition;
>
> (iii) an interim and/or interlocutory injunction and/or stay preventing the respondents or each of them from furnishing a guarantee to Brazil to the effect that the applicant will, in the event of his return to the State, and in the event of any sentence being imposed on him in respect of the matters for which he is surrendered, be given credit in any such sentence for any time served in Brazil in connection with his extradition."

7. In the statement of grounds, which is dated 26th January 2018, it is pleaded that it is *ultra vires* the respondents to purport to give a guarantee to the effect that the applicant will receive credit for time served in Brazil while awaiting extradition in the event of any sentence imposed subsequent to his surrender. It is pleaded that this is a matter for the sentencing Judge alone. It is pleaded that in the absence of a rule of Irish law governing sentencing requiring that such credit be given, it is not open to any emanation of the executive branch of government to lawfully give a guarantee on behalf of the judicial branch of government.

8. By way of a Diplomatic Note dated 8th January 2018, the Brazilian Ministry of Foreign Affairs informed the Embassy of Ireland in Brazil that the applicant was ready to be extradited, as there were no pending legal issues relating to him before the Brazilian judicial system. The note stated, according to the English translation provided, that the transfer of the applicant:

> "[w]ill not take place unless the Requesting State assumes the commitments of '(ii) consider the prison time which was imposed in Brazil due to the extradition process'."
>
> On 25th January 2018, the Embassy of Ireland in Brazil replied to the request. The relevant section of the note is as follows, para. (ii) being that most directly in point:
>
> "(ii) In accordance with the Ministry's note, DCJ1/DESET/2JUST/BRASIRLS, the Embassy has the honour to confirm:
>
> (i) The Irish authorities will only prosecute or punish Mr. Lynn for the offences in respect of which he is being surrendered and will not prosecute or punish Mr. Lynn for any other alleged offences committed prior to the extradition request unless the prior consent of the Brazilian authorities has been obtained.
>
> (ii) The Irish authorities will take into account any period of imprisonment which Mr. Lynn has served in Brazil due to the extradition process.
>
> (iii) The death penalty and corporal punishment are not permitted under Irish law and the commutation of sentencing does not arise as the offences upon which Mr. Lynn's extradition has been ordered and for which he will be prosecuted in Ireland, following surrender, do not give rise to the possibility of a life sentence being imposed.
>
> (iv) Ireland will not extradite Mr. Lynn to another Requesting State in respect of any offence allegedly committed prior to his extradition from Brazil without the consent of the Brazilian authorities.
>
> (v) Under the Irish Constitution, members of the judiciary are mandated to be 'independent in the exercise of their judicial function and subject only to this Constitution and the law'. The Irish judiciary are prohibited under Irish law from considering and/or taking into account any political reasons or political motivations. If Mr. Lynn, following his extradition and prosecution in Ireland, is convicted for the offences upon which his extradition was ordered, a sentencing Court cannot consider any issues relating to politics.
>
> (vi)The Irish authorities will not subject Mr. Lynn to torture or other cruel, inhuman or degrading treatment or punishment."

In an affidavit sworn by Ms. Anne Marie O'Sullivan; Assistant Legal Adviser in the Department of Foreign Affairs and Trade, she avers that the said assurances were given before the institution of the proceedings and that the second to fourth named respondents were entirely unaware that such proceedings were about to be brought by the applicant.

9. By way of a Diplomatic Note dated 31st January 2018, the Brazilian Ministry for Foreign Affairs wrote to the Irish Embassy in Brazil requesting that the Irish State "assume expressly the commitment foreseen in subsection (iii) of Article 6 of Law No. 13445/2017 to commute corporal punishment, life imprisonment or death in deprivation of liberty, respecting the maximum limit of 30 years of imprisonment".

10. By Diplomatic Note dated 8th February 2018, the Embassy of Ireland in Brazil responded to that note, offering assurance that the

applicant would not serve more than thirty years in prison, even if convicted of all of the offences in respect of which his extradition had been ordered. The Diplomatic Note in reply was in these terms:

> "[t]he Embassy has the honour to refer to its Note No. 4/2018 of 25th January 2018 and to inform the Ministry that Mr. Lynn will not serve a term of imprisonment of more than 30 years, even if he is convicted of all the offences in respect of which his extradition has been ordered.
>
> Under Irish law, each offence of theft carries a maximum sentence of ten years imprisonment. The sentencing courts in Ireland are required to identify an appropriate sentence for each offence in light of the fundamental principle of proportionality. This principle requires that every sentence must be proportionate to both the gravity of the offence and the personal circumstances of the accused person. While it is open to the sentencing Court to order that some or all of the sentences imposed for these multiple offences should run consecutively, in such cases, the principle of totality must be observed. This principle means that the cumulative sentences should not exceed the overall culpability of the accused. While long determinate sentences have been handed down in relation to offences involving illicit drugs, the longest such sentence was one of 28 years. This was reduced to 20 years following an appeal taken by the accused on grounds that the sentence of 28 years was excessive. According to the Irish Director of Public Prosecutions Office, this sentence of 28 years was the longest fixed term sentence handed down by an Irish Court. Property offences, such as those the subject of the extradition request, have been the subject of much lower sentences. An Irish lawyer who is convicted of theft and forgery involving property in the amount of €52 million was sentenced in 2013 to a sentence of nine years with a consecutive sentence of seven years (with four years of that sentenced suspended) giving a sentence to be served in custody of 12 years. This is understood to be the longest sentence ever imposed in Ireland for property-related offences.
>
> In Ireland, the prison rules also provide for a remission of sentence of one-quarter of the sentence imposed by the courts.
>
> Having regard to the above sentencing practices and principles adopted by the Irish courts, Ireland can provide a commitment that if convicted, Michael Lynn will not serve more than 30 years in prison."

11. The proceedings which had been launched in this jurisdiction were brought to the attention of the Brazilian authorities by way of a Diplomatic Note dated 9th February 2018. The said Diplomatic Note was in the following terms:

> "[t]he Embassy has the honour to enclose a copy of the Irish High Court Order obtained by Mr. Lynn on 29th January 2018 and who inform the Ministry that on that date, the Irish High Court granted Mr. Lynn leave to bring legal proceedings challenging the Irish State's ability to provide a guarantee that Mr. Lynn would be given credit for time served in Brazil while awaiting extradition if, on return to Ireland, he is convicted and sentenced by an Irish Court. Mr. Lynn also obtained a temporary Order prohibiting the Irish State from providing guarantees in relation to credit for time served in prison in Brazil pending the outcome of his legal challenge. This Order, dated 29th January 2018, was made on an ex parte basis, that is, the Irish State was not informed of the matter beforehand.
>
> The Embassy has the honour to inform the Brazilian authorities that a full hearing of the matter is now scheduled for 21st February 2018 and to further say that the State will be contesting this matter in full."

12. It would seem that the applicant became aware of the communications of 25th January 2018 and 8th February 2018 when his Brazilian lawyer, Dr. Antoniio Nabor Areias Bulhoes, visited the Brazilian Ministry of Foreign Affairs on 21st February 2018. This caused the applicant to seek leave to amend his proceedings, essentially by substituting for the word 'guarantee' the words 'assurance', 'commitment', 'confirmation' or other 'representation'.

13. The applicant also sought to expand his challenge to embrace an objection to the assurance that the applicant would not spend more than thirty years in prison. At the hearing in the High Court, there was general agreement to proceed on the basis that the Court should deal with the amended and expanded reliefs and grounds. In the course of those proceedings, an issue arose as to whether they were, even at that stage, moot. This was in a situation where the Brazilian authorities had sought a commitment from Ireland that the authorities would "consider the prison time which was imposed in Brazil due to the extradition process". It said that the Irish authorities provided the necessary assurance on 25th January 2018 which was some days before the judicial review proceedings were instituted. The approach of the High Court was to accept that it might be the case that some of the reliefs sought were spent or moot, but that in the light of the application to amend, that the Court should accept on a prima facie basis that the applicant had locus standi as a person who might be affected by an alleged unlawful act. The High Court Judge pointed out that while the applicant, in an affidavit sworn on 30th April 2015, relied heavily on the wording employed by Mr. Raymond Briscoe in his affidavit sworn on 30th April 2015, that it was clear that the acts of the Executive, which are the subject matter of challenge and in respect of which declaratory relief is sought, comprise what was included in the letters and communications furnished by the Embassy of Ireland on 25th January 2018 and 8th February 2018. In the High Court, the applicant submitted that there was no rule of Irish law, whether constitutional, statutory, or common law, which mandated that a person surrendered to the State from another State on foot of an extradition request must be given credit for time served awaiting extradition in the foreign State. It is accepted that a different situation applies in respect of European Arrest Warrant surrenders, but it is said this is a self-contained regime. Likewise, it is argued that there is no rule in Irish law limiting the cumulative total of consecutive sentences which may be imposed on a convicted person in respect of multiple offences to a period of thirty years. So, it is said that the respondents do not have the power to give the aforementioned guarantees.

14. The respondents argued that they were entitled to provide the assurances that they did to the Brazilian authorities. The Brazilian authorities had asked for a commitment to "consider the prison time which was imposed in Brazil due to the extradition process" and the assurances given on behalf of the respondents in response to the request was "the Irish authorities will take into account any period of imprisonment which Mr. Lynn has served in Brazil due to the extradition process". Likewise, the respondents argue that the Diplomatic Note of 8th February 2018 constituted an accurate statement of the law and practice. There had never been a determinative sentence in excess of thirty years imprisonment. Any determinative sentence would attract remission, and moreover, the respondents also point out that their note addresses the question of the time to be served in prison rather than the length of any sentence that might be imposed. Persons the subject of a prison sentence are entitled to remission and the Executive is empowered to release a prisoner at any stage.

The High Court

15. The approach of the High Court Judge was to identify the central issue. He took the view that the debate regarding the legal requirement imposed upon the State authorities in respect of bringing to the attention of the Court prior time spent in custody, and the Court's obligation to take it into consideration, was only of significance if it is to be concluded that the Executive or one of its

emanations, in furnishing the communications of 25th January 2018 or 8th February 2018, had sought to interfere with the Court's power of sentencing, or to tie the Court's hand in an unlawful way. He felt that if, on a proper construction of the Diplomatic Notes, they did not affect, trammel or interfere with the jurisdiction and independence of the judiciary, then the arguments relating to the manner in which the sentencing jurisdiction is or may be exercised did not advance the applicant's case. Therefore, in the Judge's view, the central issue was whether the letters and the actions of the Executive sought to unlawfully impinge upon the judiciary in the exercise of its powers, obligations, duties, and discretions at law whether they have constitutional, statutory, or common law basis.

16. In the course of the present appeal, the High Court Judge is criticised for misunderstanding the case advanced by the applicant. It is said that the applicant was never suggesting that any attempt was being made to fetter or trammel the judiciary, but rather, that guarantees or assurances were being given, which those giving them had no authority to give and which were of no effect. The point was not that efforts were being made to fetter or trammel the judiciary, but rather, that no guarantees or assurances could be given as to what an unfettered and untrammelled judiciary would or might do.

17. It may be noted that the case having been heard on 21st February 2018, an Ex tempore judgment was delivered by MacGrath J. on 23rd February 2018. While it is described and headed 'Ex tempore Judgment', it is, in fact, a careful, closely reasoned and comprehensive judgment.

18. Thereafter, the applicant was extradited from Brazil and returned to this jurisdiction on 1st March 2018. He was charged with the offences in issue and brought before the District Court where he was remanded in custody. He was then brought before the Dublin Circuit Criminal Court and a trial date of 13th January 2020 was fixed. At that stage, he was remanded in continuing custody. However, by a decision of the Court of Appeal of 14th June 2018, he was admitted to bail. It is of some interest, in the context of the arguments now advanced about the exposure to a sentence to be served in excess of 30 years, that in seeking bail, he made the case that he ought to be admitted to bail as he would have served a significant portion of any sentence likely to be imposed on conviction. While there is, perhaps, nothing to prevent the applicant making these different arguments, it might be thought that there is some element of riding two horses at the same time.

19. Both respondents then brought Notices of Motion seeking to have the appeal struck out as moot. Essentially, the case being made was that the relief sought was to prevent the giving of guarantees so as to have the effect of preventing the extradition of Mr. Lynn from Brazil. However, the extradition had now taken effect and Mr. Lynn was back in this jurisdiction and, accordingly, the matter was entirely moot. The application to dismiss was opposed by the applicant who pointed to the fact that he had live proceedings before the Brazilian courts and a ruling favourable to him from the Irish courts had the potential to assist him in the Brazilian proceedings. Further, if he were successful in the Brazilian proceedings, that might assist him in the context of the pending prosecution, whether by way of an order prohibiting the trial or otherwise.

20. While recognising the rationale for the two motions seeking to dismiss the appeal and acknowledging that there are powerful arguments to be made in a situation where the substantive arguments have been heard, I would prefer to address these.

21. For convenience, I will refer to the two issues that arise in the substantive appeal as the credit for time served point and the 30-year sentence point.

22. In the case of DPP v. Colbert [2016] IESC 69, in the course of a joint judgment, Charleton and O'Malley JJ observed at para.17:

> "[t]here are a huge number of varied circumstances which can arise in sentencing in relation to prior time in custody and, on appeal, this Court is only dealing with the particular instance now arising. Prior time in custody on an offence should be considered by a sentencing judge when sentencing for that offence. Such time as an accused has spent in custody prior to conviction should be put before the trial judge as part of the prosecution presentation of its case on sentencing. That information should be revealed before the judge decides on the appropriate sentence. The judge should not just be told after pronouncing sentence by way of an application for a sentence to be backdated. Where it is relevant, the sentencing judge should consider what effect on sentence results from time already spent in custody for an offence which an accused is found guilty of or pleads guilty to. As Denham J said in her minority judgment in Cunningham at page 726, sentencing 'includes the concept of justice' as what is involved is 'considering all the facts of a case with a view to determining a just sentence'. The issue is always what sentence is appropriate to the particular offence and the particular offender. Where time has already been spent in custody on a charge, that should be considered in fixing an appropriate sentence."

23. In the course of the High Court judgment, counsel on behalf of the DPP, Mr. Sean Gillane SC, is quoted as saying 'an appeal will be granted for the asking'. In the course of argument, I posed the rhetorical question to counsel for the appellant as to what the position would be if, improbable as it might seem, the Circuit Court Judge dealing with sentence commented "I do not propose to have any regard to or give any consideration to the fact that Mr. Lynn spent a significant period in custody".

24. In this case, further reassurance is provided, if any were needed, by the repeated statement of the DPP, both in correspondence and in open court, that if there is a conviction and a sentencing stage is reached, that counsel on behalf of the Director will be submitting that the Judge, in imposing sentence, is required to take into account the period spent in custody. In those circumstances, it seems to me that it can be said, not just with a high degree of confidence, but in fact, as a matter of absolute certainty, that if the sentencing stage is reached, account will be taken of the time spent in custody.

25. So far as the "greater than 30 years to be served" issue is concerned, a number of points arise. First of all, it seems to me to be appropriate to focus on what the concern of the Requested State is. It appears that Brazilian law takes the position that requiring an individual to spend in excess of 30 years in custody is unacceptable. A period of more than 30 years spent in custody is regarded as analogous to cruel and unusual punishment, though undertakings are separately required in relation to the non-imposition of cruel or inhuman punishment. The response to the request for assurance was met with an exposition of Irish sentencing law and practice. If the question is posed whether one can be absolutely confident that the assurance given will be delivered upon and that Mr. Lynn will not, under any circumstances, be required to spend more than 30 years in custody, including the time spent in Brazil in prison there, there is, it seems to me, only one possible answer.

26. There is no possibility whatsoever of Mr. Lynn being required to spend more than 30 years in custody. That is so for a number of reasons. First of all, there is no recorded case of a determinate sentence of more than 30 years being imposed.

27. The Diplomatic Note referred to the fact that the highest sentence ever imposed was one of 28 years. In fact, sentences of 30 years were imposed on two individuals: Perry Wharrie and Martin Wanden, who were convicted in relation to a massive cocaine

offence. In the case of Perry Wharrie, his sentence was reduced on appeal to one of 17 and a half years [see *DPP v. Wharrie* [2016] IECCA 1]. In the case of Martin Wanden, his appeal only recently came before the Court of Appeal and judgment on the appeal is awaited. The Diplomatic Note correctly points out that much lower sentences are imposed in the case of offences against property. In the most unlikely event that the Circuit Court was to impose a sentence in excess of 30 years, the applicant would, of course, be entitled to appeal against the severity of that sentence. If that happened, the Court of Appeal would be obliged to address issues of proportionality and totality to ensure that the sentence bore an appropriate relationship to sentences imposed in broadly similar cases. In those circumstances, one can say with a very high degree of confidence indeed that there is no possibility of a determinate sentence in excess of 30 years, or consecutive determinate sentences totalling in excess of 30 years being upheld.

28. There is the further point that the concern of the Brazilian authorities seems to be with the duration of the period actually spent in custody. If one has regard to the entitlement to remission and one has regard, also, to the fact that the Executive are entitled to release a prisoner at any stage, then it seems to me that one can say with certainty that there is no question of Mr. Lynn serving a period in custody of more than 30 years. In those circumstances, I have no hesitation in rejecting the arguments in relation to both points, and so I would dismiss the appeal and uphold the decision of the High Court.

29. In a situation where I am dismissing the appeal on the merits, I do not see it as necessary or appropriate to express a concluded view in relation to the arguments about the fact that the appeal is moot, although I have already expressed the view that I regard the arguments in favour of the proposition that the appeal is moot as weighty.