Neutral Citation: [2015] IEHC 574

THE HIGH COURT

Record No: 2015 1415 SS

IN THE MATTER OF ART. 40.4 OF THE CONSTITUTION AND IN THE MATTER OF SECTION 16(6)(b) OF THE EUROPEAN ARREST WARRANT ACTS 2003 AND 2012

Between:-

FRANCIS LANIGAN

Applicant

- and –

GOVERNOR OF CLOVERHILL PRISON, MINISTER AND JUSTICE AND EQUALITY, IRELANDAND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice Max Barrett of 17th September, 2015.

PART I: INTRODUCTION AND BACKGROUND.

1. Mr Lanigan challenges the lawfulness of the order that the court (Murphy J.) made on 4th September, remanding him in custody pending his surrender to the United Kingdom pursuant to s.16 of the European Arrest Warrant Act 2003, as amended (the "Act").

2. Mr Lanigan is wanted for trial in Northern Ireland on a count of murder and a related charge of unlawful possession of a firearm. A detained person, he is entitled to apply for enquiry under Article 40 of the Constitution. The court has before it a certificate from the Governor of Cloverhill Prison certifying in writing the grounds for detention of Mr Lanigan and exhibiting the relevant order for detention. There is nothing wrong on the face of the order, yet Mr Lanigan persists in his application. The reason he does ultimately depends upon the decision of the Supreme Court in *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 1, where it was stated as follows by Denham C.J., at para.66:

> *"An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2°unless there has been some fundamental denial of justice. In principle, the remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2°may arise where there is a* ***fundamental denial of justice, or a fundamental flaw****, such as arose in State (O) v. O'Brien [1973] 1 I.R.50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court." [Emphasis added].*

3. For reasons considered hereafter, Mr Lanigan claims in effect that there has been *"a fundamental denial of justice, or a fundamental flaw"*that affords him the opportunity of remedy under Article 40.

4. During the course of the hearing of this application, mention was made, in addition to the *FX* case, to the decision of the Supreme Court in *Ryan v. Governor of Midlands Prison*[2014] IESC 54. There, Denham C.J., for the Supreme Court, affirmed the correctness of that court's decision in FX, and, following a consideration of that and other case-law, indicated as follows, at para.18:

> *"[T]he general principle of law is that if an order of a court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application to seek leave for judicial review. In such circumstances, the remedy of Article 40.4.2°arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."*

5. Notwithstanding that the decision in *Ryan* is consistent with that in *FX*, it is in reliance on *FX* that Mr Lanigan truly sought to proceed, and thus it is by reference to the terminology of that case that thisCourt now proceeds. However, the same result would in any event be achieved were the court to utilise the terminology employed by the Chief Justice in *Ryan*.

6. Mr Lanigan contends that insofar as the Act has introduced a so-called 'inquisitorial' and *sui generis* form of procedure,it permits what he contends is a departure from fundamental norms of fair procedure and/or unfairly restricts rights of appeal, and thus is repugnant to the Constitution and contravenes the European Convention on Human Rights and the EU Charter on Fundamental Rights and Freedoms. In consequence, Mr Lanigan contends, his present detention pursuant to the Act is unlawful.

PART II: MISCONCEIVED PROCEEDINGS.

7. Mr Lanigan's application is essentially flawed in its construction and substance. The essential flaw is this: all of his pleadings constitute a collateral challenge to, and impermissible parallel attack upon, the conduct of the European Arrest Warrant proceedings, the jurisdiction of the High Court in those proceedings, and the judicial and procedural integrity of those proceedings. Shortly put, his application comprises an attempt to re-litigate much if not all that transpired before Murphy J., using the shield of Article 40 as a means of concealing the essential flaw in the foundation of his case. But even that shield is inadequate. In FX the Chief Justice offered as an example of a *"fundamental denial of justice, or…fundamental flaw"* that would justify the High Court granting Article 40 relief in the context of a High Court order for detention, the situation that presented in *State (O)v. O'Brien*: there a juvenile was sentenced to a term of imprisonment that was not open to the Central Criminal Court to impose. Nothing of that sort presents here: the shield does not work; the whole foundation of these proceedings is fatally flawed; and Mr Lanigan's application must therefore fail.

PART III: GENERAL ALLEGATIONS OF UNCONSTITUTIONALITY

AND DENIAL OF HUMAN RIGHTS.

8. Mr Lanigan contends that:

> (i) parts of the Act are unconstitutional, contravene the European Convention on Human Rights and also the EU Charter on Fundamental Rights, and also that there is a breach of Article 267 of the Treaty on the Functioning of the European Union arising.
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> (ii) if he is surrendered to the United Kingdom pursuant to the order made by Murphy J. (a) he will have been denied a right to a reference under the Treaty on the Functioning of the European Union (such a reference having been sought of, but refused by, Murphy J.), (b) he will have been denied his right of access to the courts since surrender would render such constitutional proceedings as he seeks to bring moot, and (c) if he were successful in such proceedings he would have been surrendered in breach of s.37(1) of the Act.
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> (iii) Murphy J. was aware that Mr Lanigan intended to make the above-mentioned arguments as to the constitutionality, etc. of the Act, and should have deferred making the surrender order until the court had ruled on such arguments and

that her judgment does not offer any reason for her decision not to defer making that order.

9. Point (ii) has been overtaken somewhat by the fact that the court heard Mr Lanigan's constitutional law contentions as part of the challenge to the lawfulness of his detention made in the within Article 40 proceedings. Subject to that, the court considers that each of the contentions at (i) to (iii) fails for the reasons stated in para.7 and for such other reasons as are identified hereafter. There is, to borrow from the phraseology of the Chief Justice in FX no *"fundamental denial of justice, or a fundamental flaw"* identified in this application which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court.

PART IV: ALLEGED ABANDONMENT OF

FUNDAMENTAL NORMS OF PROCEDURE.

10. In her judgment in *The Minister for Justice, Equality and Law Reform v. Piotr Sliczynski* [2008] IESC 73, 10, Macken J observed: *"It is a well established principle of European Arrest Warrant law that the scheme provided for under the Framework Decision, and in turn under the Act of 2003, is a scheme sui generis"*. Mr Lanigan contends that this *sui generis* and inquisitorial procedure established by the Act has seen the abandonment of fundamental norms of fair procedure. In this regard, counsel for Mr Lanigan contended a number of times during the hearing of the within application that: (a) the procedures established under the Act sit uneasily with historical practice in Ireland, and (b) there has been a trend in some European Union member states increasingly to favour adversarial procedures where inquisitorial procedures were hitherto preferred.

11. As to (a), so be it, if so. Our forebears were not possessed of infinite wisdom. That our State, pursuant to its membership of the European Union, and as part of achieving closer union with other member states, would depart from historical ways of doing things, does not have as a necessary consequence that the new ways of doing things are inferior to the old, let alone that they are unconstitutional. The inferiority or superiority of the old over the new is not for this Court to decide. As to whether the 'new' presents with any legal flaws, the court finds no such flaw presenting. No deficiency that contravenes constitutional or natural justice has been identified by Mr Lanigan. Any deficiency that was suggested to arise, e.g. the alleged failure to allow cross-examination at the arrest warrant proceedings (on a matter in respect of which it appears there was no dispute) could and should have been raised with Murphy J. – a point to which the court returns in Part X below.Further, the court does not consider that the Act, the processes to which objection has been taken by Mr Lanigan, or indeed the conclusions reached by this Court in the within judgment, represent in any respect a departure from the observation of Walsh J. in *East Donegal Co-operative v. Attorney General* [1970] I.R. 317, 341, as referred to by counsel for Mr Lanigan, that when it comes to the presumption of constitutionality of legislation:

> *"[T]he presumption...carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."*

12. The court notes in passing that the presumption of constitutionality applies with particular force to legislation in which the Oireachtas seeks to reconcile personal rights with the claims of the common good. (*Ryan v. Attorney General* [1965] I.R. 294). A similarly protective view should arguably be taken of efforts by the Oireachtas or by the Government to reconcile the obligations of membership of the European Union with those imposed by the Constitution. Regardless, there are perhaps few areas where the common good presents more starkly than in the context of legislation such as the Act whereby it is sought to simplify and 'speed up' the procedures extant between European Union member states whereby European Union citizens who have committed a serious crime in one member state can be returned to same so as to face justice.

13. As the court does not consider any deviation from the principles of constitutional justice to arise by virtue of the *sui generis* process established under the Act, nothing falls to be restrained or corrected by the court in this regard. Again, there is, to borrow from the phraseology of the Chief Justice in FX no *"fundamental denial of justice, or a fundamental flaw"* identified in this application which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court.

PART V: RESTRICTION OF RIGHT TO APPEAL.

14. Mr Lanigan contends that the Act unfairly restricts his right of appeal. Section 16(11) of the Act provides that:

> *"An appeal against an order under subsection (1) or (2) or a decision not to make such 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."*

15. There is nothing unusual, never mind unconstitutional, about the just-quoted provision. Restrictions on the right of appeal are expressly contemplated by Article 34of the Constitution. Section 16(11) of the Act is but a statutory manifestation of the licence allowed the Oireachtas by the People through the medium of Article 34.There is, to borrow from the phraseology of the Chief Justice in FX, no *"fundamental denial of justice, or a fundamental flaw"* effected by or pursuant tos.16(11) which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court.

PART VI: NEMO IUDEX IN CAUSA SUA.

16. Counsel for Mr Lanigan contends that s.16(11) of the Act contravenes the principle *nemo iudex in causa sua* ('no one should be a judge in his own cause'). But where is the 'cause' in which the offending judge is involved? She or he is not party to the proceedings. Yet counsel in effect is suggesting that once judgment is rendered, a judge, to use a colloquial phrase, now has 'skin in the game' and can no longer be trusted to act impartially. Such a suggestion ignores, or mistakenly sets at nought, the declaration that each judge makes, on appointment, under Article 34 of the Constitution, to act *"without fear or favour…towards any".* This declaration embraces any 'fear' (if such there be)of appellate court judges who might prefer a different interpretation of the law to that favoured by the trial court judge. It also embraces 'favour' towards oneself. And where in any event is this to stop? Judges often make all kinds of incidental decisions in the course of proceedings. If counsel is correct, the moment they do so, they have necessarily become partial and the possibility of endless recusals arises. But counsel is wrong. *Lex non cogit ad impossibilia*. Our laws do not require the impossible; counsel contends for the ideal; and in this world the ideal, though always to be strived for, can never be attained. Yet again there is, to borrow from the phraseology of the Chief Justice in FX no *"fundamental denial of justice, or a fundamental flaw"* identified in this regard which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court.

PART VII:AUDI ALTERAM PARTEM

17. Counsel for Mr Lanigan complained that during the proceedings before Murphy J., the court requested that the State provide certain further information without first hearing counsel for Mr Lanigan on whether such information should be sought. This, it is contended, constitutes a *"fundamental denial of justice, or a fundamental flaw"* that justifies the challenge to a High Court order which these Article 40 proceedings entail because, allegedly, it breaches the principle of *audi alteram partem* ('listen to the other side'). The court notes that precisely this step is allowed under s.20(1) of the Act. It is, with respect, breathtakingly wrong to contend that a judge who, pursuant to the obligations arising for the court under the Act, requests in open court that she or he be provided with further information (in *sui generis* proceedings where the court is required to be satisfied of certain matters) has not listened to the other side. If the other side considers that it has not for some reason been listened to, then they should say so, but if they fail to do so or fail to succeed on the point it does not follow that a right arises to ventilate the point anew in Article 40 proceedings that have little substance and make less sense. There has been no breach of the principle of *audi alteram partem* and thus there is, to borrow from the phraseology of the Chief Justice in FX, no *"fundamental denial of justice, or a fundamental flaw"* identifiable in the foregoing which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court.

PART VIII: REFERENCE TO THE COURT OF JUSTICE

18. Mr Lanigan contends that this Court ought to refer to the Court of Justice of the European Union various questions that Murphy J. declined to refer. His argument in this regard is that (i) by virtue of Murphy J.'s refusal to grant a certificate of appeal, the High Court has now become, in reality, a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, and (ii) consistent with Article 267 of the Treaty on the Functioning of the European Union, a referral must therefore be made to the Court of Justice. There are at least three difficulties with this contention:

> (1) Mr Lanigan has already commenced an appeal against the decision of Murphy J. before the Court of Appeal. This being so, he cannot have it both ways; he cannot claim that the High Court has become, in reality, a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law when he is in fact pursuing an appeal from the decision of the very body which he claims to be a 'court of last instance'.
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> (2) if the court is correct as to (1), no issue of compulsory reference arises and one is into the area of discretionary reference. In this regard, so far as the issues in respect of which a reference was sought of Murphy J. are concerned, Mr Lanigan has his answer: Murphy J. did not consider it necessary to make a reference. It is not for this Court to second-guess her decision whether in the within application or otherwise.
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> (3) if the decision of Murphy J. refusing a certificate of appeal has transformed the High Court into a 'court of last instance' andthe facts of this case yield the exceptional jurisdiction recognised in FX (and sothis is a case in which a High Court order may be challenged in this Article 40 application), the court considers that no reference requires to be made by it to the Court of Justice in any event. The reason for thecourt's conclusionin this regard is as follows. It is trite law that a national court is not required to make an Article 267 reference, even a reference that is ostensibly compulsory, where: the question of European Union law is irrelevant; the provision has already been interpreted by the Court of Justice; the correct application of European Union law is so obvious as to leave no room for reasonable doubt. This is so basic a premise of European Union law that the court considers it may take judicial notice of same without regard to precedent. However, supporting precedent, if sought, is to be found in the renowned decision of the European Court of Justice in *CILFIT and others v. Ministero Della Sanità* [1982] ECR 3415. In the within proceedings, the court considers that the questions of European Union law raised are irrelevant and that the correct application of European Union law is so obvious that there is no room for reasonable doubt as to same.

PART IX: ACTS DONE OR NECESSITATED BY

MEMBERSHIP OF THE EUROPEAN UNION

19. The court has indicated that it does not accept that the *sui generis* procedure established by the Act presents with the unconstitutionality contended for by counsel – and so there is no *"fundamental denial of justice, or a fundamental flaw"* arising which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order made by the High Court.However, even if the court is wrong in its analysis in this regard, any such error on its part does not benefit Mr Lanigan. This is because of the protections afforded by Article 29.4.6° of the *Constitution* to laws enacted, acts done or measures adopted by the State that are *"necessitated by the obligations of membership of the European Union"*. Although Art.29.4.6° was raised at the proceedings, no case-law was cited, though mention might usefully have been made of leading authorities of relevance such as *Campus Oil v Minister for Industry and Energy* [1983] I.R. 82, *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329, *Lawlor v. Minister for Agriculture* [1990] 1 I.R. 356, and *Greene v. Minister for Agriculture* [1990] 2 I.R.17.

20. The applicability of Art.29.4.6° having been argued, but the relevant case-law not having been argued, the court confines its observations in this regard to the following. There are perhaps two schools of thought identifiable in our jurisprudence as to how to approach Art.29.4.6°. One is that it effectively schedules the Community treaties to the text of the Constitution. This approach is perhaps the more consistent with the principle of harmonious interpretation. However, a second, prevailing approach is that the constitutional immunity afforded by Article 29.4.6° encompasses laws, acts or measures that sit within a penumbra that extends beyond, but not too far beyond, the strict requirements of European Union law. When counsel point to (a) Recital (12) of the Framework Decision and note that it encompasses certain non-mandatory language, or (b) to Article 15 of the Framework Decision **[1]** and note that it uses mandatory language, it seems to the court that both sides miss the fact that a penumbra exists within which the protection of Article 29.4.6° still falls to be applied, even though one may have moved beyond, but not too far beyond, the strict requirements of European Union law. There is nothing in the complaints made by Mr Lanigan in respect of the Act which suggests to the court that the Act has strayed beyond this penumbra.

[1] *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.*

21. The court considers, for the reasons aforesaid, that the *sui generis* procedure established by the Act enjoys protection, by virtue of Article 29.4.6° of the Constitution, from the challenge to its constitutionality made in the within application. Such a conclusion is consistent with either school of jurisprudence currently presenting in the context of Art.29.4.6° and referred to above.

PART X: ESTOPPEL AND THE RULE IN HENDERSONV. HENDERSON.

22. It seems to the court that the matters of which Mr Lanigan purports to seek relief in the within proceedings were issues which, with the possible exception of the Article 267 (obligatory reference) argument, he could or should have raised in the European arrest

warrant proceedings before Murphy J. Insofar as the matters complained of were raised and ruled upon, he is estopped from raising such matters now. Insofar as the matters complained of were not raised, the attempt to do so seems a fairly blatant contravention of the venerated rule in *Henderson v. Henderson* (1843) 3 Hare 100. Additionally there is, to borrow from the phraseology of the Chief Justice in FX, no *"fundamental denial of justice, or a fundamental flaw"* arising in this application which would justify the High Court departing from the rules of estoppel and the rule in *Henderson v. Henderson* and granting a remedy in these Article 40 proceedings in respect of a detention order made by the High Court.

PART XI: A PROCEDURAL POINT

23. Counsel for the State made some objection to the fact that the court allowed Mr Lanigan to make points in reply which he had not raised in initial argument before the court. However, in an Article 40 application it is for the court to order its processes in accordance with the constitutional requirements as to fairness of procedures. Even the most basic notion of fairness appeared and appears to the court, in the context of an application ostensibly concerned with something of such critical importance as the lawfulness of a man's detention, to require that the applicant be allowed to make the best case possible in this regard and not to be unduly ham-strung by standard court process, which process is ultimately but the servant of Justice, not her master. As the court also thereafter allowed the State to make all such points as it wished to make concerning the matters raised by Mr Lanigan in reply, there can be no lasting complaint in this regard. If there is, the court, for the reasons just stated, considers it to be mis-founded.

PART XII: CONCLUSION.

24. This application is ostensibly an application to determine the lawfulness of the continuing detention of Mr Lanigan. For the reasons stated above, there is nothing in the argument or evidence before the court that offers a basis on which the court could conclude that Mr Lanigan's present detention is unlawful. There is no *"fundamental denial of justice, or a fundamental flaw"* presenting in this application which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court. Having regard to all of the foregoing, Mr Lanigan's application must fail.