THE HIGH COURT

[RECORD NO. 2013 295 EXT]

[RECORD NO. 2014 8 EXT]

[RECORD NO. 2017 291 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ARTUR CELMER

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 23rd day of March, 2018

Introduction

1. This judgment concerns the application by Fair Trials Europe to be appointed *amicus curiae* to these proceedings which concern the application for surrender to the Republic of Poland of the respondent on foot of three European Arrest Warrants. By Notice of Motion, they also seek to be joined as *amicus curiae* to the referral to the Court of Justice of the European Union ("CJEU") under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") and to participate in the formulation of the substantive reference sought by the respondent within these proceedings.

2. In its judgment of 12th March 2018, this Court concluded that it was necessary to refer questions to the CJEU in respect of the issues raised. The case was adjourned to 16th March 2018 for submissions regarding the questions proposed. It was stated in the judgment, and again by the Court and the parties on 16th March 2018, that this was a case where the Court would request the CJEU to adopt the urgent procedure. The respondent is in custody.

3. On 16th March 2018, the respondent produced a draft referral for the Court's consideration, and the minister produced alterative questions for the Court's consideration. It was agreed that the matter would be adjourned to 21st March 2018 for the purpose of each party making final submissions on the draft and the questions. Such an approach was designed to assist in expediting the referral.

4. On 20th March 2018, subsequent to a verbal notification to the Court Registrar of the possibility of an application being made, at 18:21 an email was forwarded to the Court Registrar and to the minister enclosing the notice of motion and the affidavit sworn by Ralph Bunche who is the regional director of Fair Trials Europe based in Brussels.

5. During the course of the hearing in relation to the details of the referral to the CJEU, counsel for the proposed *amicus curiae* moved his application. The minister opposed the application and the respondent stated he was not adopting any position in respect of it, but counsel later made an observation on the submissions of the minister.

The basis for the application

6. The affidavit of Mr. Bunche states that Fair Trials Europe is a non-governmental organisation based in London, Brussels, and Washington D.C.. The organisation works to pursue matters of fair trials according to internationally recognised standards of justice. Fair Trials Europe is a registered public foundation in Belgium. It pursues its mission by helping people to understand and exercise their fair trial rights; by addressing the root causes of injustice through its legal and policy work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights. The affidavit sets out Fair Trial's capacity and expertise as a prospective *amicus curiae*. It appears that they have long advocated for improved protection of human rights in the context of cross-border judicial co-operation systems such as the European Arrest Warrant ("EAW"). Fair Trials has contributed to the development of reform proposals, provided training for lawyers, prosecutors and judges working on cross-border cases, and provided a forum for the exchange of significant judicial decisions and judicial co-operation between EU Member States, contributed expertise to national court cases and extradition in the United Kingdom, Sweden, the Czech Republic and Belgium, and recently served as an *amicus curiae* on questions related to the EAW before the European Court of Human Rights in a case of *Prisacaru v. Belgium and Romania* (case no. 8339/15).

7. Fair Trials have been involved over the past two years in a major project monitoring the situation of persons surrendered between EU Member States. This project focuses on post-surrender treatment in a number of countries in the EU and includes an assessment of the manner in which Member State courts are applying the recent case law of the CJEU in particular as it relates to risk assessments to be made by executing courts on the fundamental rights implications of surrenders, pursuant to the CJEU's judgment in the joined cases of *Aranyosi and Caldararu* (Joined Cases C-404/15 and C-659/15) [2016] E.C.L.I. 198.

8. Fair Trials proposes to draw upon its expertise to provide assistance to the Court in determining the questions to be referred based on:

> (i) the principle of mutual recognition in EU Law and in particular the EAW;
>
> (ii) EU law and ECHR standards in related to extradition, the right to a fair trial, judicial independence and the rule of law, and;
>
> (iii) the practical application of these standards across Europe to provide assistance to the court in determining the questions to be referred to the CJEU in the case.

9. The proposed intervention is based upon the following statement as to how it would seek to assist the court. Fair Trials states that it would seek to supply the following:

> "(a) Presentation of the relevant EU law, as interpreted by the CJEU, regarding aspects of the right to an effective remedy and fair trial, including judicial independence, encompassed in Article 47 of the EU Charter.

(b) Presentation of the relevant EU Law, as interpreted by the CJEU, regarding the operation of the EAW, the delineated grounds for delay in executing or non-execution of an EAW, and application of the principle of effective judicial protection of individual rights through Article 1(3) of the EAW Framework Decision.

(c) Analysis of the EU law standards presented and suggestions of specific questions which could be referred to the CJEU related to the grounds for non-execution of EAW's in light of risks of the right to a fair trial, including judicial independence".

Submissions on behalf of Fair Trials Europe

10. Counsel for the proposed *amicus curiae* submitted that the matter was one for the discretion of the court and accepted that it was a discretion to be exercised sparingly. He submitted that the main question was a question of utility; that is whether the court will be assisted by the intervention. He referred to two separate decisions in respect of these matters. The first decision is that of the High Court entitled *Data Protection Commissioner v. Facebook Ireland Ltd and Maximilian Schrems* [2016] IEHC 414. The second decision is that of the Supreme Court *IRM & Ors v. Minister for Justice and Equality & Ors* [2018] IESC 7.

The law

11. In Data Protection Commissioner v. Facebook Ireland Ltd, McGovern J. stated that:

> "The parties were largely in agreement as to the legal principles which apply. In *H.I. v. Minister for Justice, Equality and Law Reform* [2004] 3 I.R. 197, the Supreme Court held that the court may appoint an amicus curiæ pursuant to its inherent jurisdiction. In *O'Brien v. Personal Injuries Assessment Board (No. 1)* [2005] 3 I.R. 328, Finnegan P. identified a number of matters which the court ought to consider when deciding whether to exercise its discretion in favour of appointing an *amicus curiæ*. The first is whether the applicant has "a *bona fide interest and is not just acting as a meddlesome busybody*"; secondly, whether the case has a "*public law dimension*" and that the applicant "*has not just a sectional interest, that is the interest of its members, but a general interest which should be respected and to which regard should be had"*; and, thirdly, whether "*the decision may affect a great number of persons*".

12. McGovern J. also stated that the jurisdiction was to be exercised sparingly. It was also noted that the Court had to additionally take into account the limited circumstances in which an *amicus* may be appointed in a court of trial as distinct from an appellate court.

13. McGovern J. also observed that the reluctance of courts to admit a party as an *amicus curiae* if they have a strong view or vested interest seems to have diminished somewhat in recent times. It was acknowledged that in many cases where a party applies to be accorded the status of *amicus curiae*, it is precisely because they have a significant interest in the issue in question. The important matter to recognise is that an *amicus curiae* is there to assist the court and not to become a party to the action.

14. In *IRM v. Minister for Justice and Equality* [2018] IESC 7 which concerned an application to join an *amicus curiae* to a pending appeal, the Supreme Court (O'Donnell J.) stated:

> "There is little dispute about the applicable law governing this application. It is accepted that permitting a person to intervene in proceedings and address the court as an *amicus curiae* is a matter within the discretion of the court. The fundamental question to be addressed in each case is whether the Court is likely to be assisted significantly by the intervention offered. It is also acknowledged that the fact that a party has no official recognition and is not conferred with public functions in a particular area, and may moreover have partisan views on a topic, are factors which tend against permitting against intervention. It is also accepted fairly on behalf of the applicant that those factors are present in this case. However it is also the case that significant expertise and knowledge are important factors, and realistically it must be acknowledged that any party who is sufficiently interested to seek to intervene may well have strong views about the outcome he, she or it wishes to contend for. The court must weigh all those factors, in the context of the issues arising in the case, and the disposition and attitude of the parties. Furthermore, it is right to recognise as the State parties do in their affidavit, that non governmental organisations, and voluntary organisations play an important role in civil society, albeit it is also observed that the fact that such organisations occupy a role of public debate should not be conflated with an entitlement to be necessarily joined to proceedings such as the present".

15. In the *Data Protection Commissioner* case, McGovern J. stated the proceedings involved public law but were not in any real sense a *lis inter partes*. One of the reliefs sought by the plaintiff was a reference to the European Court of Justice. The applicants had argued in that case that because there was no factual dispute or lis inter partes, the usual rule excluding the involvement of an *amicus curiae* at the first instance hearing did not apply. In that case, it was submitted therefore that when the issues raised were almost certain to involve a reference to the CJEU, it was essential that any party who has a right to be heard as an *amicus curiae* should be heard in the proceedings before the High Court. McGovern J. held that that was a reasonable view. He thereafter determined each individual issue as regards the applicants to be joined as *amicus curiae*. He joined many of them on the basis of the added value that they would be able to bring to the case. He did however reject the application for separate representation of certain bodies such as the Irish Council for Civil Liberties and the American Civil Liberties Union, on the basis that he was not satisfied that they can bring a new perspective to the proceedings or assist the court beyond the way in which the parties to that case and some of the other amicii curiae could do.

Conclusion

16. Article 96 of the Rules of Procedure of the Court of Justice of the European Union only permit parties to be involved before the CJEU if they are involved in the proceedings before the court of first instance. Counsel for the minister submitted that there must be the gravest doubt whether a person or entity could be appointed an *amicus curiae* to the court at the point where the reference was made. Counsel for the respondent, having indicated that he was taking no position, made a submission that the Court should not decide this on the basis of a timing issue but should decide it on the basis of a substantive issue.

17. I am of the view that if the only reason for joining a party as an *amicus curiae* was to ensure that they could make representations to the CJEU, this would not be an appropriate exercise of the High Court discretion. That is because in those circumstances, the person or entity would not truly be appointed to assist the High Court in its determination, but would be appointed to assist the CJEU in its determination. As the fundamental question is whether the High Court is likely to be assisted significantly by the intervention offered, the answer therefore is that the High Court will not be significantly assisted, if the only assistance is to be provided to the Court of Justice of the European Union.

18. The *Data Protection Commissioner* case can be distinguished because although the issues were likely or even certain to involve a reference to the CJEU, the proceedings were still pending before the High Court for a determination on that and other issues. The statement at para 16 by McGovern J. that "when the issues raised in the proceedings are almost certain to involve a reference to the CJEU, it is essential that any party who has a right to be heard as an *amicus curiae* should be heard in the proceedings before the High Court" must be understood that McGovern J was clarifying the position as an exception to the general rule against joining an *amicus curiae* at first instance.

19. That does not dispose of the present application however, as the proposed *amicus curiae* wishes to make submissions on the questions to be submitted. The proposed *amicus curiae* have set out the scope of their intervention and the questions they wish to raise. Their proposed questions have come about because of the particular lens through which the *amicus curiae* have chosen to view the issues involved in this case. I do not say that in any way to criticise the proposed *amicus curiae* but simply to highlight that the eleventh-hour intervention is not conducive to the proper and efficient conduct of these proceedings.

20. If the Court were to permit the proposed *amicus curiae* to be joined, the Court would have to set aside further significant time for the determination of whether those particular issues arose out of the arguments at the hearing and the judgment of the Court. In the context of the urgency of this matter, that is a factor that strongly militates against joining them as *amicus curiae*.

21. Furthermore, the Court does not consider that it is likely to be assisted significantly by the intervention of the proposed *amicus curiae* at this time. The Court has made its determination on the issues that were raised before it; both of the parties were invited to, and have had the opportunity of commenting on the proposed questions for the CJEU. It is important also to state that each of the parties was represented by senior counsel, two junior counsel and solicitor. The Court is not satisfied that the proposed *amicus curiae* will bring a perspective to this issue of the questions to be referred that will not be provided, or has not been provided, by the parties to date.

22. Therefore, while the Court accepts that the proposed *amicus curiae*, as a non-governmental organisation focusing on fair trials and in particular cross-border fair trial issues, has an important role to play in civil society, in the context of the present proceedings and the stage those proceedings have reached, the Court is satisfied that it should not exercise its discretion to join the *amicus curiae*.