Neutral Citation Number: [2010] IEHC 182

THE HIGH COURT

2007 195 Ext

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40 OF THE CONSTITUTION OF IRELAND

BETWEEN:

VASILE COVACIU

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr Justice Peart delivered on the 11th day of May, 2010

On this application the applicant seeks his release from detention in very unusual circumstances deriving from the disturbance to air travel to and from this country in recent weeks due to the presence in and around Irish airspace of volcanic ash following the eruption of a volcano in Iceland.

Had these difficulties not presented themselves around the date for which his surrender had been arranged, namely 22nd April 2010, he would in all probability already have been surrendered to the Romanian authorities under a European arrest warrant, following the unsuccessful outcome of his appeal on the 12th April 2010 from an order made by the High Court on the 23rd May 2008.

Prior to the 22nd April 2010, and because the Romanian authorities had informed the Central Authority here that it could not effect surrender on the 22nd April 2010 as planned due to the volcanic ash difficulties being experienced, a new date by which surrender would be implemented was agreed between them, namely the 5th May 2010.

Before proceeding further I should set forth the relevant statutory provisions, namely section 16(5) and section 16 (7) of the Act:

> *"16. -- (5) Subject to subsection (6), subsection (7) and section 18, a person to whom an order for the time being in force under this section applies shall be surrendered to the issuing state not later than 10 days after—*
>
> *(a) the order takes effect in accordance with subsection (3) (inserted by section 76(d) of the Criminal Justice (Terrorist Offences) Act 2005),*
>
> *or*
>
> *(b) such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority in the State and the issuing state.* (my emphasis)

It is important to note that surrender must take place therefore not later than ten days after two possible alternative dates (a) or (b). I shall return to that question in due course. But thereafter, once surrender has not occurred within either of those time-frames in (a) or (b) the High Court may order the further remand of a respondent for a further period necessary to effect his surrender.

On the afternoon of the 21st April 2010, the Minister for Justice, Equality and Law Reform made an application to me under section 16 (7) of the Act for a further remand of the applicant until the 5th May 2010 on the basis that this was necessary in order to effect his surrender.

I have already expressed the view that the correspondence by fax between the Romanian authorities and the Central Authority here should be considered to constitute an agreement on a new date for surrender, namely the 5th May 2010.

On that application, Counsel for Mr Covaciu submitted that the amendment made to s. 16(7) of the Act by the provisions of the Criminal Justice (Miscellaneous Provisions) Act, 2009 (commenced by statutory instrument on the 25th August 2009) had no application to a surrender on foot of a warrant which was issued prior to that commencement date. Counsel for the Minister took a contrary view. I decided on that application that it was unnecessary to express a view on that particular question in view of the conclusion I was reaching in relation to the application made.

I gave my decision on the following day the 22nd April 2010 to the effect that it was unnecessary to bring an application for a further remand of the applicant herein since the Committal Warrant made by the Supreme Court following its dismissal of the appeal was sufficient to authorise the detention of the respondent (stating, as it does, that he is to be detained by the Governor "pending the execution of the said order of the High Court) and in the light of the provision contained in s. 16(5)(b) as set forth above. It seemed to me that since a new date for surrender had been agreed between the Central Authority and the Romanian authorities for the 5th May 2010, the effect of the clear wording of s. 16(5)(b) is that his surrender must take place "*not later than 10 days after … such date as may be agreed"* i.e. not later than 14th May 2010.

I referred also to the fact that, again, in accordance with how s. 16(7) is worded the application for a further remand appears to be something to occur if the person "is not surrendered to the issuing state within the relevant period specified in subsection (5)", suggesting as it seems to that the time must have passed before the application is made. That is what the section says, though it begs the question as to the status of the person's detention between the expiry of the time under subsection (5) and the actual

making of the application under s. 16(7) for a further remand.

Section 16(7) in its amended form provides:

> *"(7) Where a person (to whom an order for the time being in force under this section applies) is not surrendered to the issuing state within the relevant period specified in subsection (5) and the surrender is not prohibited by reason of subsection (6) the High Court may remand the person in custody or on bail for such further period as is necessary to effect the surrender unless it considers it would be unjust or oppressive to do so."*

It seems to me that the words "is not surrendered" mean in this context "has not been surrendered" and that by reference to the ordinary meaning of such words they cannot be stretched to mean "cannot be surrendered" or "will not be surrendered" or even "may not be surrendered".

Its predecessor had provided:

> *"(7) A person (to whom an order for the time being in force under this section applies) who is not surrendered to the issuing state in accordance with subsection (5) shall be released from custody immediately upon the expiration of the 10 days referred to in that subsection unless, upon such expiration, proceedings referred to in subsection (6) are pending."*

In any event, that was the decision which I arrived at on the 22nd April 2010, and I made no order on the application for a further remand of the present applicant since in my view the warrant of the Supreme Court was sufficient to cover the period of time provided for in S. 16 (5) (b) of the Act. My comments about as to the inapplicability of s. 16(7) until after the expiration of the alternative times referred to in s. 16(5)(b) must therefore be seen as obiter comments.

These issues have again arisen because following my decision on the application for a further remand, the present applicant sought an inquiry into the lawfulness of his detention under Article 40.4.2 of the Constitution on the basis that the warrant of the Supreme Court was not sufficient to detain him beyond the 21st April 2010. The grounds put forward for such an argument are the very same as those already set forth above, and immediately a question arose on the *ex parte* application for an inquiry as to whether the question of the lawfulness of detention was already decided in effect by my decision on the s. 16(7) application, and whether therefore it was proper to even direct an inquiry under Article 40. Questions of *res judicata*, issue estoppel and even abuse of process could be engaged. From the Minister's point of view, the Central Authority had by seeking to make an application under s. 16(7) of the Act sought to ensure that between the 21st April 2010 and the 5th May 2010 the applicant was in lawful detention. This Court decided as it did, effectively declaring that his continued detention was lawful given the provisions of s. 16(5)(b) of the Act. In addition, it is important that an inquiry ought not to be directed when arguable grounds for unlawfulness are not shown, as the existence of Article 40 proceedings prevents surrender being implemented since under s. 16 (6) of the Act it is so provided, and such proceedings while disposed of very promptly in the High court can be the subject to an appeal to the Supreme Court and further time will inevitably taken for the disposal of such an appeal, during which surrender is prohibited.

It was really not until this point was reached that the case of *Minister for Justice, Equality and Law Reform v. Rimsa* was adverted to by either party and the Court. That was a case where similar issues arose following the making of an order of surrender, and where due to the claimed unavailability of flights from and to the issuing state within 10 days from the making of the order, surrender did not take place during that period. Article 40 proceedings were launched, and in his judgment Mr Justice Hedigan decided that where a new date for surrender was agreed the detention of the respondent was covered by reason of the provisions of s. 16(5)(b) of the Act. That decision was the subject of an appeal to the Supreme Court who ordered the release of the respondent from custody by means of an ex tempore decision indicating that its reasons would be given later. Unfortunately those reasons have not yet been given.

Of some relevance also is that before the Supreme Court on that same occasion was an appeal against finding by this Court that the provisions of s. 16(5) in so far as they permitted the further detention of a respondent beyond the 10 days from the making of the order for surrender did not offend against the Constitution. Again, it is not possible to say whether the Supreme Court released Rimsa because s. 16(5)(b) was not to be construed as permitting his continued detention until the new date for surrender, or whether it was because the section was unconstitutional. At that time, s. 16(7) had not been amended, and it is possible to speculate that providing for a new s. 16 (7) of the Act to replace the former, the Oireachtas was addressing whatever difficulties had led to the release in Rimsa by making provision for an application for a further remand in the event that surrender did not occur within the period provided for in s. 16(5)(a) or (b), whatever that might be. But I have already adverted to the less than clear wording of s. 16(7) as to when such an application is to be made.

I mention all of this because the Rimsa situation causes some uncertainty in relation to s. 16(5) of the Act in circumstances where we cannot be certain as to the basis of the Supreme Court's conclusion that in Rimsa he was unlawfully detained. As I have said, that question was not really addressed on the application which I heard for a further remand under s. 16 (7) on the 21st April 2010.

On the *ex parte* application for an inquiry under Article 40.4.2 in the present case one option would have been to refuse to order an inquiry on the basis that I had in effect already decided the question. That would have allowed an opportunity for the applicant to make an ex parte appeal to the Supreme Court against my refusal. In the event that the Supreme Court was satisfied, especially given the *Rimsa* decision, that an inquiry should be conducted, it would presumably remit the matter to the High Court for a hearing. During all of this time the applicant could not be surrendered.

It seemed to me sensible to allow an inquiry, in view of the uncertainty created by the *Rimsa* decision, and hear the application on notice to the respondent herein, and to hear such submissions as may be made by each party. Any decision which I make can of course also be the subject to an appeal, leading inevitably to the postponement of surrender until such time as the appeal concludes.

Michael O'Higgins SC for the applicant has provided helpful written submissions and has spoken to those. In the time available to me I will not set out his submissions in exhaustive detail. But it is submitted that the Framework Decision has expressly in Recital 8 and Recital 9 reserved to the judicial authority in the requested state any decision on a person's surrender, and has limited the role of a Central Authority to "practical and administrative assistance". Accordingly, it is submitted, it is beyond the aims and objectives of the Framework Decision that a person could be held in custody for an undefined period of time beyond the initial ten day period from the making of an order for surrender merely because the Central Authority here agrees upon a new date with the issuing state. In so far as s. 16(5) appears to permit this to occur, it is submitted that the section fails to properly give effect to the provisions of Article 23 of the Framework Decision which provides:

> *Article 23* ***Time limits for surrender of the person***

1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.

3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

4. ……

5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.

It is paragraphs 2 and 3 which are focussed upon in this application. In particular reference is made to the requirement in paragraph 3 that in the event of some circumstances beyond the control of the Member States concerned, "the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date". It has been submitted that this provision requires not that the Central Authority here would agree a new date with the issuing judicial authority but that the High Court would do so. Even if the Central Authority at a practical and administrative actually makes the telephone calls or writes the letters on behalf of the High Court by way of practical assistance, it is submitted that it nevertheless is required that the question of a further remand of the respondent must be determined by the High Court as the executing judicial authority, and for that reason an application under s. 16(7) must be made and granted and that without it the further detention of a respondent is unlawful.

I should say in passing at this point that on the previous application Mr O'Higgins had made a submission that s. 16(7) was inapplicable to this case as its introduction in the amended form post-dated the warrant in this case. He has relied from that submission in the present application and submits that such an application should have been brought and such an order obtained. As it happens, the application was brought as already explained, but this Court, for the reasons given already, declined to make the order on the basis that it was unnecessary to do so.

Mr O'Higgins accepts of course that the Framework Decision does not enjoy direct effect and that in the event of a conflict arising between it and the Act which seeks to give effect to it, the provisions of the Act must prevail, since by reference to the well-known decision in Pupino the Court is required to give an interpretation conforming with the objectives and aims of the framework Decision, but only in so far as it can do so without acting *contra legem*. It is submitted that the aim of the Framework Decision is that any decision on surrender, including any decision which postpones that occurrence and/or which leads to the further detention of the person must be the subject of the High Court's consideration, and that it is reasonable therefore to interpret s. 16(7) as being engaged in spite of s. 16(5)(b) and that even though s. 16(7) speaks in terns suggesting that the time must have already passed, it would be absurd and would lead to an unlawful detention for whatever time passed between the expiration of the period referred to in s. 16(5) and the application being made for a further remand under s. 16(7). Such an interpretation, in his submission, is not contra legem, and fulfils the aims and objectives of the Framework Decision.

He has referred also to the provisions of s. 10 of the act which mandates surrender but "subject to and in accordance with the provisions of this Act and the Framework Decision", and has referred to the judgments of the Supreme Court in *Dundon v. Governor of Cloverhill Prison* [2006] 1 I.R. 518 in relation to how any conflict between the Framework Decision and the Act should be resolved.

Jeremy Maher SC for the respondent on this application has submitted firstly that the role played by the Central Authority in agreeing a new date for surrender for the purposes of s. 16(5)(b) is not in conflict with the Framework Decision and in that regard has referred to Article 7 thereof.

He draws attention also to the fact that the Central Authority did as a matter of fact bring this Court's attention to the new date so agreed when it sought to obtain an order for the further remand to enable surrender to take place on or before the 5th May 2010. In that way, even though the Court saw fit not to make the order sought for the reasons already outlined, the Court was fully appraised of the situation and though not making the order sought, can clearly be seen as giving its 'imprimatur' to the fact of a further period of detention, and in that way has been involved in the matter.

Mr Maher submits that s. 16(5) and Article 23 of the Framework Decision are not in conflict, and also that the Central Authority in fulfilling its role as provided for in the Act may agree the date for surrender, and that the Court is not required to get involved in the actual arrangements being put in place. It is submitted that Article 23.3 specifically envisages that there may be exceptional circumstances which are beyond the control of Member States and which may require an extension of time for surrender taking place outside the 10 days referred to, and that s. 16(5) is consistent with that objective, as is the new provision in s. 16(7). There can be no doubt, in his submission, that the arrival of volcanic into the atmosphere over Ireland at the relevant time is a circumstance beyond the control of Member States and that any extension of time for surrender necessitated as a result of this is permissible and envisaged by the Framework Decision.

It is submitted that it is not now open to the applicant to submit that s. 16(7) is applicable in this case in circumstances where he made the opposite submission on the application made under that provision on the 21st April 2010.

Conclusions:

I do not make any point about the fact that the applicant no longer relies upon his previous submission that s. 16 (7) as amended is inapplicable in this case. That application was made at very short notice to the applicant's side, and inevitably submissions needed to be prepared very hastily. It is understandable in such circumstances that a view might be revised and it would be unfair in my view to refuse to hear a different submission on the present application.

It is possible that the reasons for the Supreme Court's release in Rimsa would speak to whether or not this Court was correct that the detention of the applicant until not later than the 5th May 2010 in the present case was covered by s. 16(5) (b) of the Act and that no further order of this Court was required under s. 16(7) of the Act. It follows therefore that there is at least a possibility that instead of concluding as I did and by not considering an application under s. 16(7) to be necessary I fell into error. But as I have stated Rimsa was not argued to any extent at all on that application.

But if I was incorrect in so concluding, it follows that the Court would have had to consider firstly whether such an application was possible prior to the 15th May 2010 (i.e. 10 days after the new agreed date), or whether in the light of the absurdity to which that would give rise, a purposive interpretation is that an application can be made in anticipation of the fact that surrender cannot be achieved within the period provided for in s. 16(5). If I concluded that such was the case, and I would be of the view that such a conclusion should be reached, I would have been completely satisfied that the arrival of volcanic ash was a circumstance which was beyond the control of the Member States, and that a new date could in those circumstances be agreed for the purposes of Article 23 of the Framework Decision and s. 16(5) of the Act.

The Central Authority here sought such an order under s. 16(7). This Court considered at the time that it was unnecessary. As I have said, if it had been deemed necessary, it is an order that would have been made in the circumstances where that need arose.

It follows in my view that even if Mr O'Higgins is correct and that an order under s. 16(7) ought to have been made, its absence in those stated and unusual circumstances does not lead to a requirement that the applicant should be released. Though an order was not in fact made, it could have been if this Court had taken a different view as to the need for it. The further detention of the applicant was required given the need to agree a new date. The prevention of surrender within 10 days from the making of the order is something foreseen by and provided for in Article 23.3 of the Framework Decision. Sections 16(5)(a) and (b) as well as the new provision in s. 16(7) of the Act ensure that the objective and aim of the Framework Decision in this respect is provided for and fulfilled.

In such circumstances, even if an order ought to have been made on the 21st April 2010 for the further remand of the applicant and the warrant of the Supreme Court was insufficient to detain him further, it is clear that such an order could and would have been granted. In such circumstances there has been no fundamental breach of the applicant's constitutional right to liberty such as requires that he be released from detention, and I would adopt in that regard the passage from the judgment of O'Higgins CJ in *The State (McDonagh) v. Frawley* [1978] I.R. 131.

For these reasons I am satisfied that his detention is in accordance with law, and I refuse the application.