



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 182

APPEAL NUMBER: 2019/126

**Birmingham P.
Peart J.
Edwards J.**

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003
(AS AMENDED)**

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT/RESPONDENT

- AND -

JOHN ANTHONY DOWNEY

RESPONDENT/APPELLANT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 3RD DAY OF JULY 2019:

1. On the 1st March 2019 the High Court (Donnelly J.) made an order under s. 16 (1) of the European Arrest Warrant Act, 2003, as amended ("the Act") for the surrender of the appellant to the authorities in Northern Ireland on foot of a European arrest warrant dated 31st October 2018 ("the warrant") the Court being satisfied that all the relevant statutory requirements were fulfilled, that there was no reason why his surrender should be refused under sections 21A, 22, 23 or 24 of the Act, and that his surrender was not prohibited by any provision within Part 3 of the Act. The trial judge delivered a written judgment in which she set out in considerable detail her reasons for being satisfied that an order for surrender should be made.

2. Following the hearing of an application for leave to appeal against the said order, the trial judge made a further order dated 8th March 2019 pursuant to s. 16 (11) of the Act certifying that the following question arising from the Court's decision involves a point of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to this Court. The certified point of law was stated in the following terms:

"Where surrender of a person is sought in respect of alleged offences concerning violence of the utmost gravity, is it an abuse of process of the High Court to surrender that person in circumstances where an assurance was given by the authorities in the issuing state which led to the person to act to his detriment which facilitated the gathering of evidence when it has not been established in evidence that the assurance or the continued existence of the assurance was deliberately or intentionally given or maintained for the purpose of misleading the requested person to act to his detriment?"

3. I will refer to the certified point of law as being "the abuse of process point".

4. To understand the context in which the appellant asserts that the seeking of his surrender under the warrant amounts to an abuse of process, it is necessary to set out some factual background.

5. The warrant seeks the appellant's surrender so that he can be prosecuted in Northern Ireland in respect of two alleged offences of murder, and a third alleged offence of aiding and abetting the causing of an explosion likely to endanger life. Those alleged offences relate to an incident which occurred on the 25th August 1972 within the territory of Northern Ireland which resulted in the deaths of two members of the Ulster Defence Regiment when a car bomb exploded, as well as non-life-threatening injuries to army personnel.

6. In her written judgment, the trial judge set out the following extract from the warrant which provides some background information:

"An ammunition technical officer attended the scene and determined that the explosion was caused by a car bomb containing between 100lb – 200lb of an unknown explosive. In a statement he confirmed the bomb was "command wire initiated by 100m of single – strand copper wire, blue and brown plastic covered. Attached to the end of the wire was a battery pack consisting of 6 x 4.5v Ever Ready 126 batteries, and one Ever Ready 1 R 376 battery, wire (sic) in series." A scene of crime officer, Sgt. Hugh McCormack, attended the scene and observed that "The car bomb had been detonated on a footpath . . . causing a large crater in the footpath and road . . . from the edge of the crater to a hillside nearby ran a length of wire attached to a battery power pack . . . the power pack consisted of seven Ever Ready batteries held together by black adhesive tape." Sgt. McCormack is deceased and a hearsay application will be made to adduce his evidence. The battery power pack found at the detonating point was delivered on the 31st August 1972 to Sgt. Gamble, fingerprint department, RUC. Fingerprints of John Anthony Downey (DOB 19/01/1952), Cabra, Cootehill, Co. Cavan were obtained by D/Sgt. Aidan Murray, AGS, on the 10th December 1979. The fingerprints were forwarded to the RUC in 1980 for intelligence purposes. Sgt. Gamble confirmed a positive comparison of a finger imprint found on the black insulating tape, which he marked as "LA 45/72 L" with the left forefinger impression recorded as taken from John Anthony Downey by D/Sgt. Murray. He confirmed they agreed in sequence of ridge detail. Sgt. Gamble is deceased and a hearsay

application will be made to adduce his evidence and related documents. Imprint "LA 45/72 L" has since degraded however photographs taken of the imprint at the time have been confirmed by a fingerprint expert as authentic and of good quality. *The expert confirmed a positive comparison of these photographs with a fingerprint imprint taken by the Metropolitan Police (Met) following Mr. Downey's arrest on 19th May 2013 at Gatwick Airport on suspicion of his involvement in the Hyde Park bombing in 1982. The subsequent prosecution of Mr. Downey in respect of the Hyde Park bombing was stayed as an abuse of process.* The prosecution will seek to adduce the Met fingerprints and, if they are held to have been unlawfully obtained, will rely on the authority of *R. v. McKee & Elliot* [2013] UKSC 32. The prosecution will seek to adduce evidence of bad character, namely: - Evidence pertaining to the conviction of Mr. Downey in 1974 for membership of the IRA and evidence pertaining to the recovery of Mr. Downey's fingerprints and palm prints from locations related to two other terrorist incidents. The DPP NI decided on 27 June 2018 to prosecute Mr. Downey for two offences of murder and one of aiding and abetting an explosion. Mr. Downey resides in ROI and has not been served with papers." [My emphasis]

7. The European arrest warrant relates to offences arising from the 1972 incident. The reference to the Hyde Park bombing in 1982, and to the fact that the appellant's prosecution in respect of offences arising out of the latter incident at Hyde Park was stayed by the Central Criminal Court in the U.K. (Sweeney J.) on the basis that it amounted to an abuse of process is at the heart of the appellant's contention that to surrender him to the authorities in Northern Ireland to face prosecution for offences in relation to the 1972 incident amounts to an abuse of process.

8. Crucial to the finding of abuse of process which resulted in the staying of the prosecution of the appellant in respect of the 1982 Hyde Park bombing charges just referred to, and also to the appellant's resistance to the present application for his surrender on foot of the warrant, is what I will refer to as "the letter of comfort" dated 20th July 2007 which was provided not only to the appellant but to other persons who have been referred to as "on the runs" or "OTRs". This letter of comfort was in the following terms:

"The Secretary of State for Northern Ireland has been informed by the Attorney General that on the basis of the information currently available, there is no outstanding direction for prosecution in Northern Ireland, there are no warrants in existence nor are you wanted in Northern Ireland for arrest, questioning, or charged by the police. The Police Service of Northern Ireland are not aware of any interest in you from any other police force in the United Kingdom. If any other outstanding offence or offences came to light, or if any request for extradition were to be received, these would have to be dealt with in the usual way."

9. As noted by the trial judge at para. 5 of her judgment the evidence by way of affidavit of the appellant before her was that "[the letter of comfort] is one of such letters that were sent to former Republican activists over that time as part of the ongoing Peace Process and in contemplation of the Good Friday Agreement". She also noted at para. 6 that the letter of comfort is headed "Northern Ireland Office, Political Directorate - Rights and International Relations Division" and that it was signed by "Mark Sweeney, head of division", and was addressed to "Mr John Anthony Downey via Gerry Kelly".

10. In reliance on this letter of comfort the appellant had travelled on numerous occasions from this State where he resides, both to Northern Ireland and to other parts of the United Kingdom, as well as to Portugal and to Canada. He did so openly and freely and without interference or incident until on the 19th May 2013 when he was arrested at Gatwick Airport *en route* to Greece for a family holiday. According to the appellant's affidavit sworn on 19th November 2018 he was detained and interviewed by police at Gatwick airport, and his fingerprints and photographs were taken. He was later charged with various offences arising out of the 1982 Hyde Park bombing incident, and was remanded in custody to Belmarsh Prison until he was granted bail in August 2013.

11. As noted already, the prosecution of the appellant in respect of those offences was stayed by the Central Criminal Court (Sweeney J.) on the basis that the prosecution amounted to an abuse of process. In his written judgment (para. 173) Sweeney J. set out a large number of findings of fact including that the assurance contained within the letter of comfort was "wholly wrong" and that in fact "he was wanted by the Metropolitan Police in relation to the Hyde Park Bombing, which involved the causing of an explosion and four murders. Thus, as the prosecution conceded, the defendant was wholly misled". At para. 175 of that judgment, Sweeney J. continued:

"Given the core facts as I have found them to be, and the wider undisputed facts, I have conducted the necessary evaluation of what has occurred in the light of the competing public interests involved. Clearly, and notwithstanding a degree of tempering in this case by the operation of the 1998 Act, the public interest in ensuring that those who are accused of serious crime should be tried is a very strong one (with the plight of the victims and their families firmly in mind). However, in the very particular circumstances of this case it seems to me that it is very significantly outweighed in the balancing exercise by the overlapping public interests in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute, and the public interest in holding officials of state to promises they have made in full understanding of what is involved in the bargain. Hence I have concluded that this is one of those rare cases in which, in the particular circumstances, it offends the court's sense of justice and propriety to be asked to try the defendant."

12. As can be seen from the extract from the warrant which I have set forth at para. 6 above, the fingerprints taken from the appellant at Gatwick airport on 19th May 2013 were found to match a photograph of fingerprints found on black adhesive tape holding together a battery pack used to cause the 1972 explosion in Northern Ireland in respect of which it is now sought to prosecute the appellant if he is surrendered to Northern Ireland.

13. The trial judge considered the submissions of the appellant which were advanced in support of the argument that to surrender the appellant to the authorities in Northern Ireland would amount to an abuse of process *of the High Court* here, and considered also the Minister's submission that the appropriate jurisdiction in which to deal with any question of abuse of process arising from the appellant's reliance upon the letter of comfort is the issuing state, and that it cannot be an obstacle to his surrender.

14. Before reaching her ultimate conclusion that surrender was not prohibited on this ground under Part 3 of the Act, the trial judge correctly noted the distinction between any abuse of process that might arise from the prosecution of the appellant in Northern Ireland for the offences referred to in the warrant, if he is surrendered, and any abuse of process of the High Court here in relation to the application for his surrender.

15. In that regard, the trial judge stated at paras. 79-80 of her judgment:

"79. The Minister's submission as regards abuse of process was similar to that with respect to the consideration of fair trial issues in surrender/extradition proceedings. The Minister submitted that the appropriate jurisdiction in which to deal

with these matters was that of the issuing state. The Minister relied on the fact that in the case of the Hyde Park bombing, the issuing state operated the jurisdiction to stay those proceedings on the basis of the abuse of process. It could not, therefore, be said that there was an egregious defect in the system of justice operating within the issuing state that meant the respondent's surrender had to be prohibited. Furthermore, the Minister submitted that a true examination of the issue of abuse of process could only really be carried out in the issuing state as it was the issuing state which had all of the information.

80. In the view of this Court, it is undoubtedly true that the issuing state is the most appropriate place to deal with the question of an abuse of process as regards the criminal proceedings. The respondent has not asserted that there is any egregious defect in the system of justice in the issuing state that would prohibited [sic] him from relying on such a process to prevent his surrender to that state. That is not the end of the consideration for this Court, however. The real issue in these proceedings is whether it is an abuse of process of this Court to surrender him in light of all the relevant facts. While the judicial authorities in the issuing state will undoubtedly be in a position to exercise control over the criminal proceedings and prohibited trial where there has been an abuse of the process of their courts, it is for the High Court, as executing judicial authority, to determine if there is an abuse of process in surrendering him to face trial in the circumstances of this case."

16. Ultimately, as I have stated, the trial judge expressed herself satisfied that it was not an abuse of process to surrender the appellant to Northern Ireland to face trial, either on the basis of the existence of the letter of comfort, or on the cumulative basis arising not just from the existence of that letter, but the other matters relied upon by the appellant under Part 3 of the Act, each of which was individually rejected for reasons stated in her judgment and which do not arise for consideration on this appeal.

17. In the High Court, each party relied upon the Supreme Court judgments in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17. In that case it was held that there had been an unjust harassment of the respondent amounting to a *de facto* abuse of process as found by the High Court arising from the manner in which requests for his surrender had been processed, and that his surrender to the requesting state should be refused, and that it was not sufficient to simply admonish the responsible parties as concluded by the High Court.

18. But the facts of *J.A.T* are very different to the present case. In that case there was a previous attempt to secure the surrender of the respondent. But there had been a defect found to have arisen in relation to the completion of the first warrant on foot of which the respondent's surrender was sought, in that the issuing judicial authority had ticked the box indicating that his surrender was being sought in respect of offences certified by the issuing authority as coming within certain categories of offences listed in Article 2.2 of the Framework Decision (thereby removing the need to establish correspondence/double criminality). The Supreme Court (*per* Hardiman J. -- [2010] IESC 61) concluded that the issuing authority had incorrectly certified the offences as coming within Article 2.2 of the Framework Decision, and surrender was refused. However the issuing judicial authority later transmitted a second European arrest warrant again seeking the respondent's surrender in respect of the same offences, but for reasons given by Edwards J. in his judgment ([2014] IEHC 320) he was satisfied that there was a *de facto* abuse of process in seeking surrender on foot of the second warrant largely on the basis that the requesting judicial authority had failed to provide any explanation for the defect found to have existed in the first warrant, and in the circumstances the second attempt to have him surrendered was oppressive, and constituted an unjust harassment of the respondent. The Supreme Court on appeal did not interfere with that finding, although as I have stated it did consider that surrender should as a consequence be refused, and that an admonishment was inappropriate and insufficient.

19. It is clear from *J.A.T (No. 2)* that there can be circumstances which justify the High Court refusing an application for surrender on the basis of abuse of process. But it is equally clear firstly that such cases require some exceptional circumstance to justify such refusal, but, and critically, that the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is surrendered. The different question whether there might be an abuse of process were the respondent put on trial for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender. Absent any suggestion that there is no possibility of a fair hearing of any application to have his trial on these offences stayed, and there has been no such suggestion made by the appellant, it is in my view clear that any such question of abuse of process will be a matter to be pursued by the appellant before the courts in the requesting jurisdiction. In that regard, it can be simply noted that the appellant was, as already referred to, successful before Sweeney J. in having his prosecution in respect of the Hyde Park bombing offences stayed on the grounds of abuse of process. That itself is clear evidence that in so far as he wishes to contend that his prosecution for the 1972 offences in Northern Ireland constitutes an abuse of process for the reasons that he advances arising from the existence of the letter of comfort given to him and his subsequent arrest at Gatwick Airport, this is a matter to be determined in the requesting jurisdiction, and not as part of the application here for his surrender.

20. In my view therefore the trial judge was correct in her decision. I would answer the certified question in the negative, and dismiss this appeal.