

THE HIGH COURT

2008 397 JR

Between:

Frank Agrama

Applicant

and

The Minister for Justice, Equality and Law Reform,

District Judge Catherine Murphy and District Judge Bridget Reilly

Respondents

Judgment of Mr Justice Michael Peart delivered on the 30th day of October 2009

The background to these proceedings, and the present application by the applicant for an order for discovery of certain documents is that following the receipt by the Minister of a Request for Mutual Assistance dated 17th July 2006 ("the first Request") from a Public Prosecutor in Milan, Italy, in which assistance was requested in obtaining evidence in the State in connection with certain criminal proceedings instituted against the applicant in Italy, the Minister exercised his power under Section 51 (2) of the Criminal Justice Act, 1994 ("the Act") to nominate a judge of the District Court (the second named respondent) "to receive such of the evidence to which the request relates as may appear to the judge to be appropriate for the purpose of giving effect to the request".

Following that nomination, the first named respondent has, through illness, become unavailable to deal with the application, and that Request has not proceeded further in the District Court as a result.

Subsequently, a second Request dated 11th January 2008 ("the second Request") was received by the Minister, and another judge of the District Court (the third named respondent) has been nominated by the Minister pursuant to s. 51 (2) of the Act to deal with that Request.

The charges against the applicant which are outlined in the First Request have to a large extent become statute barred by passage of time under a new Statute of Limitations law in Italy which passed into law after the date of the first Request. Those charges which are now statute-barred are no longer being pursued by the Italian prosecutor. The second Request is in substitution for the first Request, though a letter dated 26th May 2009 from the Chief State Solicitor's Office to the applicant's solicitor states that "*the second Letter of Request substituted only the unexecuted part of the first Letter of Request*". The same letter had sought to clarify that certain documents had already been transmitted to the Italian authorities, namely certain categories of documents to be acquired from National Irish Bank, following an application pursuant to s. 51 of the Act on the 21st February 2007.

The second Request relates to new charges, relating to later years, and which are not caught by the said Statute, but appear to arise from the same factual matrix which lay behind the charges in the first Request. That is relevant to the present application for discovery.

The matter for the decision of this Court at the moment is whether the applicant is entitled to an order for discovery of certain documents as set forth in a letter from the applicant's solicitors dated 13th October 2008 seeking voluntary discovery of four categories of documents as set forth therein. No such voluntary discovery has been forthcoming on foot of that request for voluntary discovery.

Once the applicant became aware of the first Request, his solicitors wrote to the Chief State Solicitor by letter dated 29th May 2007 in which they set forth details of what the applicant considers to be "*misrepresentations, inconsistencies and omissions*" contained in that Request. These are set out in considerable detail in this letter, and I will not detail them here. But the letter concluded as follows:-

"In our submission the foregoing representations which are misleading and untrue must have influenced you in deciding to accede to the Request and to appoint the District Judge to receive the evidence of Mr Kenny.

In our submission the placing of such a misleading request before you represents a serious abuse of process envisaged by the Convention, and negates and sets at nought the safeguards identified by Ms. Justice Denham in Brady v. Haughton as referred to in the letter accompanying this letter with respect to Mr Agrama's entitlement to address District Judge Murphy.

In the light of the true facts set forth herein, we call upon you to revisit the consideration of the Letter of Request and to withdraw the designation of District Judge Murphy.

We look forward to hearing from you and reserve our client's rights with respect to judicial review (also identified by Ms. Justice Denham as a safeguard in the process)."

That letter was replied to on the 7th June 2007, inter alia, by confirming that it had been forwarded to the investigating Magistrate in Milan and that the Chief State Solicitor would revert when instructions had been received from him regarding the contents of the said letter. The applicant's solicitor wrote again reiterating their client's concerns and assertions as stated in the said letter dated 27th May 2007. In fact no further response was given to that correspondence.

By letter dated 11th March 2008, the Chief State Solicitor wrote indicating that an application was listed again in the District Court on the 9th April 2008 and that it would be based on the second Letter of Request dated 11th January 2008. That letter contains no reference to the concerns expressed in relation to the contents of the first Request. The applicant's affidavit grounding his application

for leave to seek reliefs by way of judicial review in which he states that following his solicitor's letter dated 29th May 2007 to the Chief State Solicitor he believed that the concerns expressed in that letter relating to the first Request were still under consideration and that no further step would be taken until a substantive response was forthcoming. He states that the second Request makes no reference to the first Request and seems to involve largely a repetition of the first request with some additions, and contains almost precisely the same documentation requested in the first Request. He suggests that the Minister could not validly act upon the second Request without addressing the unanswered allegations which he had made in relation to the first Request. He refers to the dismissal of the charges which had become statute barred, and the introduction of a new charge on the 19th November 2007 alleging fraudulent tax returns filed by the company, Mediaset, for the years 2001-2003, which charge had not been part of the first or second Letter of Request, and was contrived in order to keep alive the Mediaset proceedings even though all of the original charges had been dismissed. He considers this to have been an abuse of process and it appears that his Italian lawyers have filed an appeal to the Italian Supreme Court in that regard.

The applicant also exhibits a copy of a letter dated 4th April 2008 from his solicitors to the Chief State Solicitor outlining his concerns relating to the nomination by the Minister of the third named respondent to take evidence on foot of the second Request and requesting a withdrawal of that nomination, and a response to his solicitor's letter, to which no response had been received by the date of swearing of that affidavit, albeit only on the 6th April 2008. He believes that the Minister is obliged to consider his complaints before nominating a judge to take the evidence, where an abuse of process is alleged, and that he has received no response indicating that he has done so. In such circumstances it is submitted that the nomination is unlawful.

Statement of Opposition:

The Minister pleads a denial of any obligation on the part of the Minister to consider whether or not a Letter of Request contains a fair, accurate and true statement of the material facts underlying the Request before exercising his statutory power to nominate a judge to hear evidence pursuant to s. 51 of the Act, and that this power is premised on having received a Request, and on being satisfied of the matters set forth in s. 51 (2) of the Act, namely that there are at least reasonable grounds for suspecting that an offence has been committed under the law of the requesting State, and that there are in existence either proceedings or an investigation in respect of that offence, and that the accuracy, truthfulness and fairness of the statement of material facts contained in the Request is a matter for the courts of the requesting State.

It is denied also that the Minister is obliged to carry out any form of inquiry into whether the Request is vitiated by fundamental misstatements and misrepresentations, and it is asserted that the Minister is entitled to assume the authenticity and accuracy of the Request. Other traverses are also pleaded.

Replying affidavits:

James Clerkin, a principal officer in the Minister's office has referred to the receipt of the second Request and to the covering letter which accompanied that Request which is exhibited. That covering letter dated 11th January 2008 encloses the second Request and requests the Minister not to proceed any further on foot of the first Request, and states that the second request "*should be seen as substituting the earlier Letter of Request ...*". He goes on to state that following the receipt of this Request the Minister considered same and was satisfied that there were reasonable grounds for suspecting that an offence under the laws of Italy had been committed and that an investigation into the said offence or offences was being carried out there, and that the form inquiry into the facts underlying the Request which the applicant seeks is not one which the Minister can undertake, and that he is not obliged to do so pursuant to the statutory scheme and the International Scheme of Mutual Assistance, and that he cannot be in a position to question the conduct of a foreign investigation. He goes on to state that it is a matter for the nominated judge to consider the appropriateness or otherwise of the evidence to be taken for the purpose of the Letter of Request i.e. whether or not the matters sought by the foreign prosecuting authorities are relevant for the purposes of the investigation in the requesting State.

Mr Clerkin refers also to the letter dated 4th April 2008 from the applicant's solicitors and states that no sufficient was afforded to the Minister to respond to that letter ahead of the applicant's application for leave to seek reliefs by way of judicial review on the 7th April 2008, and that he could have chosen instead to attend at the District Court on the 9th April 2008 and seek an adjournment of the application to hear evidence, but chose not to do so.

The issues:

The central issue which will have to be determined at the substantive hearing of the application for judicial review reliefs is whether or not the Minister is precluded from exercising his powers under s. 51 of the Act unless he satisfies himself that the Letter of Request contains a fair, accurate and true statement of the facts justifying the Request, particularly in circumstances where the applicant, as in this case, has made representations in that regard.

If that issue is decided against the applicant and it is concluded that the Minister is under no such obligation and may lawfully exercise the power to nominate a judge if satisfied only in relation to the matters set forth in s. 51 (2) of the Act, the Court will not have to go further by considering whether or not in this case, the Minister could have reasonably have exercised his powers under s. 51 of the Act, in the light of the concerns expressed by the applicant through his solicitor's letter dated 4th April 2008, and/or as previously notified in a similar letter in relation to the first Request, without responding to those concerns.

Only if it is decided that the Minister is obliged to consider whether the Request contains a fair, accurate and true statement of the facts justifying the Request, before making a nomination will it be necessary to consider the nature of the complaints made by the applicant, what steps the Minister took in relation to the matters raised, whether the Minister gave consideration to it and so forth.

This Court on the present application for discovery is not required to reach any conclusion on these issues, nor should it express any view upon them. The only matter for conclusion is whether the documents which have been sought by way of discovery are relevant and necessary for the determination of the issues in respect of which the applicant has been granted leave, and in the light of the grounds upon which that leave has been granted by the order dated 7th April 2007.

Leave was granted to seek the reliefs contained in the Statement of Grounds on all the grounds contained in paragraph (e) thereof. Those grounds refer to the discretionary nature of the power in s. 51 of the Act, and that it is exercisable only if the Minister receives a valid letter of request "that is a letter of request that contains a fair, accurate and true statement of the material facts justifying the request". Other grounds are that any decision taken on foot of an invalid, misleading or otherwise irregular letter of request cannot be lawful, that when exercising his discretion the Minister must act rationally, lawfully and fairly having due regard to the rights of the target subject of the Letter of Request, the Mutual assistance and the provisions of s. 51 of the Act, and that "*in circumstance where (as is the case here) [the Minister] has been put on notice of fundamental irregularities in a letter of request received from a requesting State, [he] is obliged to bring those alleged irregularities to the attention of the relevant authority in the requesting State and to take into account those alleged irregularities in deciding whether or not to accede to the request.*"

The grounds include also state that *"despite representing that he would respond to the substance of the allegations concerning the first Letter of Request [the Minister] failed to respond or otherwise deal with said allegations"*..

There are of course other grounds which I do not feel it necessary to set forth in detail, including that the second Letter of Request *"constitutes an abuse of process in circumstances where it was issued in an attempt to bypass the infirmities in the first letter of request, in circumstances where [the Minister] has failed to adequately or at all address the Applicant's complaints in relation to the first letter of request."*

Paul Gardiner SC for the applicant has submitted that it is still unclear to what extent the first letter of request is being operated upon, given that the letter dated 26th May 2009 from the Chief State Solicitor's Office to the applicant's solicitor states that *"the second Letter of Request substituted only the unexecuted part of the first Letter of Request"*. Nuala Butler SC has indicated that the covering letter which accompanied the second Request makes the position clear, namely that the second request is in substitution for the first Request, and that the applicant can be under no misapprehension or confusion in that regard, and refers to the background of the original charges becoming statute-barred as set forth above, and submits that it is clear that the first request is no longer live. Mr Gardiner submits that given the contents of the letter dated 26th May 2009 the applicant is entitled to, and must, pursue his reliefs not only in relation to the second request but also the first Request. He refers to the lack of any substantive response to the applicant's concerns and allegations in relation to the first Request, and submits that given the similarity between the contents of the first and second Requests, the complaints made have relevance to both, as do the steps which the Minister may or may not have taken in order to address those concerns with the requesting authority, and the failure to respond to the applicant's solicitor in relation thereto.

In these circumstances it is submitted that the documents which are sought by way of discovery are both relevant and necessary to determine the issues in relation to the reliefs for which leave has been granted and on the grounds set forth in the Statement of Grounds. In so far as the Minister has a discretion under s. 51 of the Act, he submits that it is incumbent upon the Minister to put all his cards on the table and disclose material related to the actions which he took in relation to the applicant's complaints in order to determine whether the Minister took all or any appropriate steps in that regard and so that the rationality and reasonableness of his actions can be adjudicated upon at the substantive hearing.

Conclusion:

The categories of documents in respect of which discovery is sought by the applicant are as follows:-

1. All documents relating to contact with or from the Italian prosecutor or his office, in relation to Letters of Request of 17th July 2006 and 11th January 2008.
2. All documents relating to contact with and from the Italian prosecutor or his office in relation to the applicant's complaints concerning the said Letters of Request.
3. All documents relating to the Minister's consideration and the Chief State Solicitor's consideration of the complaints raised by the Applicant in relation to the said Letters of Request and the nomination of the District Judges to gather evidence thereunder.
4. All documents relating to contact from the Italian Prosecutor or his office in relation to being a notice party to the Judicial Review proceedings.

The 4th category above is no longer relevant since the prosecutor has not sought to be joined as a notice party. It is the first three categories which are relevant for consideration.

It seems to me that in order to dispose fairly of the issue raised in these proceedings as to whether or not the Minister is obliged when deciding to exercise his powers under s. 51 of the Act to be satisfied that a Request contains a fair, accurate and true statement of the facts justifying the request, is a general issue and a matter of legal interpretation only and does not depend on the particular facts of this case.

If he is found not to be so obliged, then the remaining reliefs lose much of their relevance. However, the applicant has been given leave to seek the remaining reliefs, and the grounds set forth include abuse of process, irrationality and unlawfulness generally. I am satisfied that if those reliefs are to be pursued effectively by the applicant, the documents set forth at 1 – 3 above are both relevant and necessary. Without sight of them, the ability of the applicant to argue the issues raised and for which he has been given leave is greatly diminished. There may well be arguments to be made in relation to privilege attaching to some or all of these communications, if they exist, but that is not something which arises at the moment.

I will therefore order discovery of those three categories of documents.