COURT OF APPEAL

Neutral Citation Number: [2016] IECA 373

RECORD NUMBER: 19/2016

PEART J.
BIRMINGHAM J.
SHEEHAN J.

BETWEEN:

ERIC EOIN MARQUES

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 12th DAY OF DECEMBER 2016:

1. This is an appeal against the order of Donnelly J. dated 16th December, 2015, refusing the appellant's application for reliefs by way of judicial review for reasons stated in her judgment of the same date.

2. On 29th July 2013 members of An Garda Síochána, acting on the authority of the search warrant obtained in the District Court under Section 7 of the Child Trafficking and Pornography Act 1998, entered and searched the appellant's apartment in Dublin. They seized, *inter alia*, is computer which was running at the time, and arrested him on suspicion of having committed certain offences contrary to section 5 of the Act of 1998. He was subsequently released and a file was sent to the Director of Public Prosecutions so that a decision could be made by her as to whether he should be prosecuted for any such offences.

3. The Gardaí had acted on foot of information received from the Federal Bureau of Investigation in the United States of America which had been conducting an extensive investigation into the advertising and distribution of child pornography internationally over the internet. Their investigations led them to the appellant, and to allege that he was the administrator of an anonymous web-hosting service (AHS) which operated on a computer network allowing users to communicate and to host websites anonymously. It is alleged that upwards of 130 such websites were operating throughout the AHS. They believe that this network was facilitating the distribution and advertising of child pornography on a grand scale leading one officer who gave evidence at a bail hearing before the High Court here to describe the appellant *as "the largest facilitator of child pornography websites on the planet"*.

4. Shortly after the search of the apartment and the appellant's arrest by An Garda Síochána on 29th July, 2013, the US authorities communicated a request for the provisional arrest of the appellant on the ground of urgency as they wished to prosecute him there on charges of advertising and distributing child pornography, and of conspiring with others to advertise and distribute child pornography.

5. Following receipt of that request for a provisional arrest an application was made to the High Court pursuant to s. 27 of the Extradition Act, 1965 as amended ("the Act of 1965") for a warrant for the appellant's arrest pursuant to s. 27. That application was granted. A warrant was duly issued, and the appellant was arrested and held in custody pending the determination of the application for his extradition to the United States. Bail was refused. No issue was raised as to the validity of that warrant or the procedures followed.

6. The issues in the judicial review application arise because of the provisions of s.15 of the Act of 1965, as substituted by section 27 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, which provides as follows:

> *"15. - (1) Extradition shall not be granted for an offence which is also an offence under the law of the State if –*
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> *(a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings for the offence against the person claimed, or*
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> *(b) proceedings for the offence are pending in the State against the person claimed.*
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> *(2) Extradition may be refused by the Minister for an offence which is also an offence under the law of the State if the Director of Public Prosecutions or the Attorney General has decided either not to institute or to terminate proceedings against the person claimed in respect of the offence."*

7. It can be seen therefore that section 15 of the Act of 1965 precludes extradition where the act(s) for which extradition is sought

is also an offence in this State, and where he has already been prosecuted in respect of same, or where a decision has not yet been made to prosecute him.

8. No doubt it was for this reason that on 8th November, 2013, the appellant's solicitor wrote a lengthy letter to the DPP outlining the appellant's personal circumstances in great detail, as well as pointing out the grave situation which the appellant would face if extradited, including harsh prison conditions and, in the event of conviction, a sentence of imprisonment of far greater length than he would face if he were to be prosecuted and convicted here for offences under section 5 of the Act of 1998.

9. To allay any fears that the DPP might have that some evidential difficulties might arise which could prevent a successful prosecution here, this letter went on to state that the appellant would enter a plea of guilty in writing to such charges as the DPP might lay.

10. By way of further reassurance to the DPP, this letter suggested that the extradition application could be adjourned by consent to await the conclusion of such a prosecution and sentencing of the appellant here. This suggestion was to remove any suspicion that might exist in the mind of the DPP that the appellant would resile from his plea of guilty at some future date, and perhaps thwart both the prosecution and the extradition application.

11. The DPP responded to this letter by stating that she had made a decision not to prosecute the appellant for any offences here, and stated also that in reaching her decision she had had regard to the DPP Guidelines for Prosecutors and that it is not her practice to give reasons for a decision not to prosecute.

12. The appellant's solicitor sought an elaboration of the DPP's reasons for deciding not to prosecute the appellant here, but no further reasons have been forthcoming. That position has resulted in the present proceedings in which, on appeal, leave was granted to seek the following reliefs by way of judicial review:

> 1. An order of *certiorari* to quash the decision not to prosecute the appellant here for the offences for which his extradition is sought.
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> 2. A declaration that the DPP's decision not to prosecute the appellant amounted in all the circumstances to an abdication of her responsibility as prosecutor.
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> 3. A declaration that the decision of the DPP was made without sufficient regard to relevant considerations, was disproportionate, unreasonable and amounted to a failure to vindicate the constitutional and Convention rights of the appellant.
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> 4. An order of *certiorari* quashing the decision of the DPP, refusing to provide the appellant with reasons for her decision not to prosecute in respect of the alleged offences for which his extradition is now sought by the United States.
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> 5. An order of *mandamus* and/or an injunction by way of judicial review, requiring the DPP to give reasons for her decision not to prosecute the appellant in respect of the alleged offences for which his extradition is now sought by the United States.
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> 6. A declaration pursuant to section 3 of the European Convention on Human Rights Act 2003 that the DPP in failing to prosecute the appellant, has failed to perform her functions in a manner consistent with the obligations of the State under Articles 3, 5 and 8 of the European Convention on Human Rights.
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> 7. A declaration that the failure of the DPP to give reasons for the decision not to prosecute the appellant amounted to a breach of his right to fair procedures as protected by Article 40.3 of the Constitution and has unduly hindered the appellant's right of access to the Courts, as protected by Article 38.1 of the Constitution.
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> 8. A declaration pursuant to section 3 of the European Convention on Human Rights Act 2003 that the DPP, in failing to provide reasons for her decision not to prosecute the appellant, has failed to perform her functions in a manner consistent with the obligations of the State under Articles 3, 5, 6, 8 and 13 of the European Convention on Human Rights.

13. In her judgment, the trial judge described the grounds upon which leave was granted as being "voluminous" but helpfully distilled them to the following:

> a. The decision not to prosecute was unreasonable and could not have related to evidential matters as the appellant was willing to plead guilty.
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> b. It was unclear whether *forum conveniens* and the impact of extradition on the appellant were considered properly or at all by the DPP. The reference to the Guidelines was unclear as they do not apply to what occurs if an extradition issue arises.
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> c. No public interest considerations of sufficient gravity could arise.
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> d. A large number of relevant public interest factors should be taken into account such as the primary duty to ensure that serious offences committed in Ireland are prosecuted here. Other public interest considerations are that there will be significant cost incurred if he is not prosecuted here *e.g.* the Gardaí will have to travel. There will be necessary delay in extraditing him as his contested proceedings will take time
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> e. The jurisdiction most adversely affected by the global impact of the alleged offences is Ireland. Ireland is the *forum conveniens* under the harm principle.
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> f. There is a duty on the Gardaí and the DPP to investigate and prosecute proactively high profile and serious internet crime for deterrent purposes so that Ireland is not seen as a safe haven for such offenders.
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> g. The impugned decision cannot be isolated from the extradition process. In this, it is argued that, if there is no extradition request, then it is undoubtedly the case that the appellant would be prosecuted. The only conceivable ground for refusing to prosecute the appellant is a forum consideration i.e. that the Requesting State is the more appropriate forum.

h. There is a necessity for the DPP to consider the impact of extradition on the appellant. It is argued that the court considers necessity in respect of the interference with family and personal rights. If he is prosecuted there will be no extradition. The DPP is required to address that balance.

i. The decision should be quashed because it is disproportionate to extradite him to a jurisdiction where his rights are less than the rights in this jurisdiction.

j. Reasons are required because the reasoning of the DPP is not readily apparent and there are substantial grounds to conclude that, by failing to prosecute the appellant, she had abdicated her central responsibility. There are substantial grounds for concluding that the DPP has acted disproportionately. The absence of reasons hinders access to the courts and will unduly hinder the appellant's ability to make submissions to the Minister.

14. The trial judge was satisfied that the extradition offences were also offences here under section 5 of the 1998 Act, and therefore prosecutable here should the DPP so decide. She was satisfied that as a consequence the decision not to prosecute the appellant rendered him liable to be extradited to the United States.

15. The trial judge was satisfied also that while the DPP's decision not to prosecute was reviewable, it was reviewable only "if it can be demonstrated that it was reached *mala fides* or influenced by improper motive or improper policy, or other exceptional circumstances" as was stated by O'Donnell J. in *Murphy v. Ireland* [2014] IESC 19. She was satisfied that as elaborated upon by O'Donnell J. in *Murphy*, the law as to such reviewability remained as it was explained by Finlay C.J. in *State (McCormack) v. Curran* [1987] 1 ILRM 225.

16. The trial judge was satisfied also that the appellant had advanced no basis for concluding that the decision not to prosecute was reached *mala fides* or was influenced by an improper motive or improper policy. She went on to consider what was submitted by the appellant to be the unusual/exceptional circumstances of this case in order to bring the case within the "other exceptional circumstances" referred to by O'Donnell J. in *Murphy*.

17. The trial judge concluded that there were no exceptional circumstances and that the DPP's decision not to prosecute the appellant in this case was unreviewable. Her reasons for so concluding are set forth at paragraphs 11.98–11.101 of her judgment as follows:

> "11.98. By and large the circumstances facing [the appellant] are common to a large number of requested persons who face extradition or surrender for offences either committed in this territory or which are offences over which Ireland exercises extraterritorial jurisdiction. There is nothing in the developing case law, including the decision in *Murphy*, which indicates that the decision not to prosecute in this jurisdiction or to give reasons in these types of cases amounts to an exceptional circumstance.
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> 11.99. The fact that the Guidelines do not expressly cater for this situation does not translate this into an exceptional circumstance. The DPP is required to follow the law and prosecute in this jurisdiction where there is prima facie evidence and where it is in the public interest to so prosecute. The Guidelines have no statutory basis and are of general nature to assist prosecutors so that a fair, reasoned and consistent policy underlies the prosecution process. Not every eventuality can be covered in the Guidelines. In the final event, each case must be individually assessed. The Guidelines record that the personal circumstances of a suspect are considered under the heading of public interest. That was the real concern of [the appellant] in this case; that his personal circumstances were not considered. On the basis of the facts and circumstances of this specific case, it is abundantly clear that they were considered by the DPP.
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> 11.100. With regard to the particular circumstances of [the appellant's] case he submitted that, over and above the usual situation, he has offered to plead guilty. That, he submitted, was exceptional. It is an unusual factor but in the view of the court does not amount, either on its own or in combination with all the other factors, to an exceptional circumstance. In *Eviston*, the constitutional right to fairness was, on the particular facts of that case, violated. In *Murphy*, the constitutional right to trial by jury was at stake. No constitutional or Convention right is at issue here. The offer of the plea of guilty, is but one of a number of factual considerations, that the DPP must consider in reaching her decision to prosecute or not to prosecute. It is a factual matter going towards the strength of the evidence. In general, a strength of the evidence factor is unlikely to amount to an exceptional circumstance for reviewing the DPP's decision or requiring reasons. This is because of the test set out in *State (McCormack)* that provided the facts do not exclude the reasonable possibility of a proper and valid decision not to prosecute, the decision is not reviewable. To hold otherwise would be to trample upon the carefully demarcated limits set to the reviewability of the DPP's decision.
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> 11.101. Moreover, even if there had been a full confession the consideration of the public interest where the DPP is best placed to decide on same, would still operate as a significant factor reducing the exceptionality of this circumstance. In other words, there will always be cases where it may appear from the outside that strong evidence exists for a prosecution but where no such prosecution is directed. The restrictions on the reviewability of the DPP protect her from routine review in such circumstances.

18. The trial judge was also satisfied that the appellant was not entitled to the reasons for the decision not to prosecution here. She addressed her conclusions in that regard at paras. 11.81 et seq. of her judgment where she carried out a thorough analysis of the case law to which the appellant had referred and relied upon during his submissions, such as *Meadows v. MJELR* [2010] IESC 3, *Mallak v. MJELR* [2012] IESC 59, *Carlin v. DPP* [2010] 3 IR 547 and *Murphy*. In particular, she concluded that contrary to what had been submitted to her by the appellant, the decision in *Mallak* had not diminished in any way *"the special position of the DPP in terms of the reviewability of her decisions and the requirement to give reasons"*. She was also satisfied that the DPP was not required to give reasons as to why she was not giving reasons.

19. As noted by the trial judge at para. 11.81 of her judgment, it was submitted to her by the appellant that the decisions in *Meadows, Mallak* and *Murphy "form the triumvirate of developing authority in regard to the duty to give reasons"*, and that as explained by Murray C.J. in *Meadows "a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness"*.

20. However, she was satisfied that, despite the decisions referred to, *"the giving of reasons is linked to the limitation of review"*, and had referred earlier in her judgment at para. 11.81 to what Clarke J. stated in *Rawson v. Minister for Defence* [2012] IESC 26 (delivered post-*Meadows* and pre-*Mallak*) as follows:

> *"How that general principle [to give reasons] may impact on the facts of an individual case can be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge"*.

21. I respectfully agree with the very thorough analysis carried out by the trial judge and with her conclusion that the particular decision by the DPP in this case not to prosecute the appellant is not reviewable, and that she is not obliged to give her reasons for making the decision not to prosecute.

22. There is no doubt that since *State (McCormack)* a number of decisions of the DPP have come before the courts by way of challenge, and indeed some have been successful – for example, *Eviston* and *Murphy*. But what is noticeable about those cases, including *State* (*McCormack*), whether successful or not, is that the applicant for judicial review enjoyed some legal right, be it statutory or constitutional, which was affected in some way by the impugned decision, and insofar as it may have been decided that reasons should be given, it was in furtherance of the entitlement to challenge the decision made affecting that right. By way of example, in *Murphy*, the decision removed what was otherwise the applicant's right to a trial by jury. In *State (McCormack)* it was a potential entitlement pursuant to statute to be tried in this State rather than in Northern Ireland. In *Mallak* the applicant was entitled to apply for a certificate of naturalisation under s. 15 of the Irish Nationality and Citizenship Act 1956 (as amended), and upon refusal, to reapply. He was found to be entitled to the reasons for the refusal of his first such application so that he could usefully make a second application. But, in the present case one must look at the appellant's complaint as to the adequacy reasons given for the decision not to prosecute, in the context where, as he conceded, and as is clearly the case, he has no right, be it statutory, constitutional or otherwise, to be prosecuted for an offence here, even where he offers a plea of guilty. There is simply no such right known to the law. It has always been thus, as is stated by Finlay C.J. in *State (McCormack)* when he stated: "the constitutional right of access to the courts is a right to initiate litigation, not a right to compel suit or prosecution". The fact that the DPP is responsible for deciding whether or not to prosecute an offence, and the fact that s. 15 prohibits surrender as provided therein, does not create a right in favour of somebody such as the applicant whose extradition is sought to be prosecuted here for the offence for which that extradition is sought.

23. The decision not to prosecute the appellant affects no recognised right in law. In my view it follows that he has no free-standing right to be given the reasons for the decision not to prosecute. The right to reasons must relate back to the type of decision under scrutiny and to some right actually engaged. If he has no right even to request what he is requesting, he has no right to reasons why his request is refused. This is clear from the authorities to which the Court was referred both in the High Court and on this appeal, and is encapsulated in the short passage already quoted above from Clarke J.'s judgment in *Rawson*. None of the well-known authorities which have been relied upon by the appellant even suggest that a decision made which affects no right to which a person has an entitlement must be explained by the giving of reasons for it.

24. The appellant submitted that even though no right is affected, there nevertheless is an obligation to give reasons for the decision, and pointed to the decision in *Mallak* as an example where reasons were required to be given, even though the applicant had no entitlement to citizenship. However, in my view that submission is misplaced and overlooks the fact that a person in the position of Mr. Mallak had the right to make an application for a certificate of naturalisation, and to renew that application in the event of a refusal. It was his right to make that application for a certificate and to renew his application which was the right engaged in that case, and not any purported right to citizenship itself. In my view that case is distinguishable from the present case where there is no right to be prosecuted.

25. The Court has also had the benefit of submissions by Counsel for the Amicus Curiae for which it is grateful, and which have been fully considered. But for these reasons stated, I am satisfied that the trial judge was correct to refuse to grant reliefs by way of judicial review, and that this appeal should be dismissed.