Neutral Citation Number: [2011] IEHC 121

THE HIGH COURT

2010 92 EXT

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

- AND -

RAFAL GORKA

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 29th day of March 2011

Introduction:

The respondent is the subject of a European Arrest Warrant issued by the Republic of Poland on the 1st of December 2009. The warrant was subsequently endorsed by the High Court for execution in this jurisdiction and it was duly executed on the 4th of January 2011. The respondent did not consent to his surrender to the Republic of Poland and the Court was requested by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter referred to as "the 2003 Act") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court has acceded to the applicant's request and on the 22nd of March 2011 made an Order pursuant to s. 16 of the 2003 Act directing that the respondent be surrendered.

A discrete issue arose in the course of this Court's consideration of the s.16 issue concerning whether or not the Court could or should take account of additional information provided by the issuing judicial authority at a late stage of the proceedings. It was urged upon the Court by the counsel for respondent that in the circumstances of the case it should not do so. I ruled against the respondent on this issue but indicated that as an important issue had been raised I would give my reasons for doing so in a reserved judgment. The Court's reasons are set out in this judgment.

Relevant background details:
The European Arrest Warrant in this case was a sentence type warrant where the respondent's surrender was sought by the issuing state for the purpose of having him serve out the balance of three separate sentences imposed upon him by the District Court in Tarnów on the 22nd of April 2004, the 3rd of November 2004 and the 13th of December 2004 respectively. These sentences related to six offences in all that were prosecuted under three different Polish court file reference numbers.

The sentence imposed on the 22nd of April 2004 requiring the respondent to serve 1 year and 6 months in custody, and in respect of which the entire custodial period remains to be served, relates to two offences prosecuted under file reference number II K 110/04.

The sentence imposed on the 3rd of November 2004, requiring the respondent to serve 1 year and 6 months in custody, and in respect of which 1 year, 3 months and 4 days remains to be served, relates to two offences prosecuted under file reference number II K 757/04.

The sentence imposed on the 13th of December 2004, requiring the respondent to serve 2 years in custody, and in respect of which 1 year, 6 months and 29 days remains to be served, relates to two offences prosecuted under file reference number II K 500/04.

The applicant was put on formal proof of all the requirements necessary to permit the Court to make an order under s.16. However, the principal substantive grounds upon which the respondent opposed his surrender was his contention that there was a lack of correspondence in the case of three of the six offences set out in the European Arrest Warrant with offences in this jurisdiction.

The matter proceeded to hearing before me on Thursday the 10th of March 2011 and I indicated in the course of an ex-tempore ruling that I was disposed to uphold the respondent's objection in respect of two of the offences, namely those offences covered by file reference no II K 757/04. It is not necessary to particularise the offences in question for the purposes of this judgment.

The Court further indicated that in the circumstances it would propose severing the two non-corresponding offences from the European Arrest Warrant but that as regards the remaining four offences the Court was satisfied as to correspondence. Moreover, the Court was satisfied that the warrant was otherwise in order; that the minimum gravity threshold had been met in respect of the remaining matters; that no s. 45 undertaking was required; that the Court was not required to refuse to surrender the respondent under ss. 21A, 22, 23, or 24 of the 2003 Act; and that the Court was not prohibited by Part 3 of the 2003 Act, or the Framework Decision (including the recitals thereto) from surrendering the respondent.

It then remained for the Court to make a formal s.16 order, and in particular to make an order remanding the respondent to a prison there to remain pending his surrender, and, pursuant to s. 16(4) of the 2003 Act to inform the respondent of the matters specified in s. 16(4)(a) and s. 16(4)(b) respectively. However, before any formal s. 16 order was in fact made by the Court, and in response to an enquiry from the Court as to whether the respondent was intending to waive the 15 day period provided for in s. 16 (3) of the 2003 Act, the respondent's Counsel, Mr Remy Farrell B.L., indicated to the Court that he had recently received instructions to the effect that the respondent was the subject of certain domestic criminal proceedings which were possibly ongoing. However, he stated

that the exact position was uncertain and would require to be clarified. He further stated that he had appraised the applicant's counsel of such information as he was in possession of and he acknowledged that in the circumstances the applicant might well wish to make an application under s.18(3) of the 2003 Act to have the respondent's surrender postponed. He stated that if a s.18(3) application were to follow, and be acceded to, such postponement would render the 15 day deferral period provided for in the s.16 (3) provision redundant, and the provisions of s.18(4) would apply instead.

The Court then enquired of the applicant's counsel, Ms Melanie Greally B.L., as to the applicant's position. Counsel indicated that she had only recently learned of the possibility of domestic proceedings from Mr Farrell, that she was uncertain as to the exact details and status of those domestic proceedings, and that she had no specific instructions with regard to the issue. However, Counsel added that in her experience it was the almost invariable practice of the applicant to seek a s. 18(3) postponement where domestic criminal proceedings remained to be concluded or a domestic prison sentence remained to be served in whole or in part.

The Court then indicated to the parties that it was disposed in the circumstances, and of its own motion, to adjourn the s.16 application for a short period to enable the exact position with respect to any relevant domestic criminal proceedings to be clarified, and to enable Counsel for the applicant to seek specific instructions concerning a possible s. 18(3) application. Neither side demurred with respect to this suggestion. That being the case, counsel were then invited to suggest a date suitable to both of them when the matter might be concluded. The 22nd of March 2011 was agreed upon and the Court adjourned the matter to that date. The respondent was remanded on continuing bail to the adjourned date.

During the period of the adjournment, and in accordance with the Court's wishes, steps were duly taken by the parties to clarify the position with respect to possible ongoing domestic criminal proceedings, or any domestic prison sentence remaining to be served in whole or in part. As a result of this process of clarification the Court was informed, when the matter was resumed on the 22nd of March 2011, that it could proceed to conclude the s.16 hearing, and that in the event of it being disposed to surrender the respondent the applicant would not in fact be making any application for a postponement of the respondent's surrender on s. 18(3) grounds.

The Court was then invited by the applicant to revisit its ruling that there was a lack of correspondence in relation to the offences covered by file ref no II K 757/04 on the basis that additional information was now available. It emerged that the applicant had, during the period of the adjournment, requested further information from the issuing judicial authority in the hope of addressing the lacunae identified by the Court in its ruling on the 10th of March 2011. The issuing judicial authority, namely the Regional Court in Tarnów, 2nd Criminal Division, had been written to by the Irish Central Authority on the 11th of March 2011 with a request for specific additional information, and a faxed reply was received later on the same date.

Counsel for the respondent indicated that he was strenuously opposed to a re-visitation by the Court of its earlier ruling in any circumstances, and he urged that the Court should not be prepared to receive, or to have regard to, the additional information contained in the fax of the 11th of March 2011. However, he very fairly conceded that, in the event of the Court being disposed to re-visit the issue and take account of the late additional information, the Court was likely to conclude that the lacunae that had caused it to initially uphold his objection based on lack of correspondence no longer existed.

Summary of the parties submissions

Counsel for the respondent submitted that it would be inappropriate for the court to revisit the issue of lack of correspondence in circumstances where it had previously made a clear finding and had given a ruling in Court. While he acknowledged that the Court had jurisdiction to revisit the issue for so long as it retained seisin of the case and was not *functus officio*, he submitted that this was a jurisdiction to be exercised sparingly both in the interests of justice and in the interests of legal certainty. He submitted that in circumstances where the applicant had closed his case the respondent was entitled to expect that, when his counsel stood up to respond to that case, there would be certainty as to the case he was required to answer.

Counsel for the respondent further indicated that he wished to draw the Court's attention to, and to rely upon, the decision of the High Court in *Magee v O'Dea* [1994] 1 I.R. 501. This was a case involving an inquiry under article 40.4.2° of the Constitution that arose in the following circumstances in context of an extradition case.

A warrant for the arrest of the plaintiff was issued on the 12th January, 1993, by a judicial authority in England in relation to the murder of a British army sergeant at Derby, England, and backed for execution within the State by the defendant. On the 9th January, 1993, the plaintiff was arrested in Limerick and detained in relation to an unconnected offence of failing to give his name when so requested pursuant to s. 30 of the Offences Against the State Act, 1939, and brought before a special sitting of the District Court when he was remanded in custody until the 14th January, 1993, on the said charge. On the 14th January, 1993, at 10.15 a.m., the plaintiff was introduced to a solicitor who would act on his behalf. The charge under the Act of 1939 was struck out and on leaving the court, the plaintiff was arrested on foot of the extradition warrant and returned to court where the case was called within minutes. The District Court Judge did not advise the plaintiff or his solicitor of the possibility of an adjournment in order to prepare a defence. After the evidence was heard the District Court Judge withdrew but returned to recall a witness of his own motion for re-examination in relation to the identity of the plaintiff without informing either the state solicitor or the defence solicitor of his intention or seeking submissions in that regard. The District Court Judge made an order pursuant to s. 47 of the Extradition Act, 1965, directing that the plaintiff be delivered into the custody of the Derbyshire constabulary. The plaintiff sought an enquiry under Article 40 of the Constitution into the validity of his detention on various grounds. The High Court (Flood J) ordered the plaintiff's release on the grounds *inter alia* that in the circumstances the District Court Judge should have advised the plaintiff of the possibility of an adjournment in order properly to prepare his defence and further that while a judge has a right to call or recall a witness of his own motion this practice should be used sparingly to avoid an appearance of partiality and the defence should have been advised of the District Court Judge's intention and asked for submissions in that regard. Consequently, the procedure in the District Court fell short of the constitutionally acceptable standards of fairness and the District Court order made on foot of those proceedings was invalid and the plaintiff was not being detained in accordance with law.

Counsel for the respondent placed particular emphasis on certain passages from Flood J's judgment. It is appropriate to quote these but I think it may be helpful to set out a slightly more extensive quotation than that which counsel relies upon. I will underline the portion on which counsel has placed specific emphasis:

> "Barrington J. in *The State (McFadden) v. The Governor of Mountjoy Prison (No. 1)* [1981] I.L.R.M. 113 having cited with approval a passage from the judgment of Gannon J. in *The State (Healy) v. Donoghue* [1976] I.R. 325, 335 and 336 says at p. 118 of the report:—

> "But in extradition proceedings the freedom of the person sought to be extradited is also 'put in jeopardy' and that is why I have emphasised the reference to 'the right to have an opportunity for preparation of the defence'."
>
> Clearly, the very nature of the documents involved require some degree of checking and detailed consultation between the plaintiff and his adviser in relation to the question as to who could give evidence of identity and from what source. In circumstances where the District Court Judge is well aware that the solicitor consulted has only been engaged within minutes before the matter has come before the court it seems that fair procedures demand that he should invite the solicitor concerned to take an adjournment to enable him to properly investigate and prepare his defence.
>
> Further, our system of justice is an adversarial system. The State presents its case and, as this is a *quasi* criminal matter, should establish the necessary proofs beyond reasonable doubt. I accept that a judge has a right to recall, or in fact call, on his own motion, a witness. All the authorities would suggest that this is a practice which should be sparingly used, and in particular, sparingly used in criminal matters, where the onus of proof is a strict onus of proof, as otherwise it may appear that he is descending into the arena and becoming partisan.
>
> In this instance, clearly the presiding District Court Judge, at the conclusion of the evidence was not satisfied on the question of identity and, without reference to any participant, returned to court, recalled evidence on identification and appears to have filled any lacunae that existed in the evidence.
>
> It seems to me that the speed with which the matter was dealt with, the absence of any attempt on the judge's part to ensure that all valid considerations could be given to various aspects of the matter by the defence solicitor and his action in failing to advise *inter alia* the plaintiff's solicitor of his intention to recall evidence of identity, all appear to me to amount to unfair procedures in a matter where strict proof is required. I do not suggest that there was personal unfairness on the part of the District Court Judge concerned but it would appear, however, to use the phrase used by Barrington J. in *McFadden's* case at p. 119 of the report, "that the procedure followed fell short of the constitutionally acceptable standards of fairness, with the result that the order made by the learned District Justice on foot of those proceedings is invalid and the prosecutor is not being detained in accordance with law."

While Counsel for the respondent readily acknowledges that the s.16 procedure under the European Arrest Warrant Act, 2003 is not an adversarial procedure he contends that it is also not an inquisitorial procedure. He contends that it is a *sui generis* procedure with has some adversarial and some inquisitorial features. Moreover, he concedes readily that Flood J's observation in the *Magee* case to the effect that the standard of proof in extradition matters is proof beyond reasonable doubt may have been *per incuriam*, and accepts that in so far as this court is required to be determine that the requirements of s.16 are met that it must make appropriate enquiries and be duly "satisfied". (In that regard the Court notes that Macken J in *Minister for Justice, Equality & Law Reform v McGrath* [2006] 1 I.R. 321 at p. 334 has stated:

> "this is not an inquiry in which there is an onus on the applicant to prove beyond reasonable doubt that the respondent is the person sought to be surrendered. Nor is it appropriate, as was stated by Denham J. in the above case, to adopt the civil standard of proof "on the balance of probabilities", although this might be closer to what is apt. In my view the obligation on the court is to take full account of the warrant and the accompanying materials and affidavits filed and make all appropriate inquiries which I consider necessary, including, pursuant to the framework decision, requesting further information from the issuing authority"

The reference to the "above case" in this quotation is a reference to an extradition case, namely *Attorney General v Parke* to which I will be referring in due course.)

In substance, his contention was that there is a sufficiently adversarial dimension to the s.16 procedure to require the Court to exercise great restraint in exercising its jurisdiction to revisit an issue which it has previously determined, and he submitted that it would be inappropriate for the Court to do so in the present case. When asked by the Court as to whether in the circumstances of present case a re-visitation of the issue would cause his client specific prejudice in terms of his ability to respond, or if he would have any other difficulty in dealing with the matter, he conceded that he would not be specifically prejudiced or have such difficulty.

Finally, Counsel for the respondent very fairly drew the Court's attention to the Supreme Court case of *Attorney General v Parke* [2004] IESC 100, and in particular to the judgment of Murray C.J. delivered on the 6th of December 2004 in which he states:

> "What the ingredients of a foreign offence are is a question of fact to be determined by the High Court judge on the evidence and material before the Court, including documents tendered pursuant to s. 55 of the Act of 1965. Once the ingredients of the foreign offence have been determined then it is a question of law for the High Court to determine whether there is a corresponding offence in Irish law and what that offence is. In addition to the word "*determine*" other key words used in the passages which I have cited above are "*identify*", "*inquiry*" and "*discover*" in relation to the task of the judge concerned when ascertaining whether there is a corresponding offence in Irish law. Those passages underline the inquisitorial dimension of the proceedings. To my mind that issue of law is not a question of proof in these proceedings. Of course before any steps are taken by the State in connection with the extradition of a person the relevant State authorities must be of the view that it is sought in respect of an offence for which there is a corresponding offence in Irish law and should assist the court by submitting what, in its view, constitute the corresponding offence. But any view of the State is not determinative."

Mr Farrell B.L. fairly concedes that this quotation is against his submission that there is a sufficiently adversarial dimension to the present proceedings to cause the Court to exercise restraint in agreeing to receive and act upon late additional information in the interests of fairness and to avoid an appearance of partiality. However, he asks the Court to note that it is a decision in the extradition context rather than the European Arrest Warrant context, and it is not therefore a binding precedent that the court is bound to follow. (Of course, the same can be said of the *Magee* decision upon which he does rely)

Counsel for the applicant, Ms Greally, has urged upon the Court that an s. 16 hearing is a predominantly inquisitorial procedure, and that this Court should regard it as being strongly persuasive that the Supreme Court in *Parke* has characterised as inquisitorial an analogous procedure under s. 47 of the Extradition Act, 1965 as amended. She contends that the parties to the s. 16 procedure are not engaged in an adversarial contest and there is no question of the judge being perceived as having preferred one side's case over the other side's case. Neither side has a case as such. It is for the Court to determine on all the evidence available to it whether the requirements of s. 16 have been met. The Court can, and should, consider all and any relevant evidence coming into its hands for so long as the inquiry remains open and the Court remains seized of the issue. Moreover, it is significant that apart from the fact that he was disappointed about the re-opening of the issue, the respondent could not point to any specific prejudice.

The Court's decision and the reasons therefor

The Court was not persuaded by the respondent's arguments, and in the exercise of its discretion agreed to receive the late additional information produced in this case, and to act upon it by re-opening, and considering afresh in the light of that additional information, the issue as to whether there was a lack of correspondence in relation to the offences covered by file ref no II K 757/04.

In the Court's view, and as is emphasised in *Minister for Justice, Equality & Law Reform v McGrath* [2006] 1 I.R. 321; *Minister for Justice, Equality & Law Reform v Sliczynski* [2008] IESC 73; *Minister for Justice, Equality and Law Reform v Sawchuk* (Unreported, High Court, Edwards J., 4 February 2011), and other cases, the proceedings herein which are *sui generis* in nature are more in the nature of an inquiry than an adversarial contest. While acknowledging that the decision of the Supreme court in *Attorney General v Parke* was rendered in the extradition context rather than in the European Arrest Warrant context I consider that it is strongly persuasive that the nature of the s. 16 procedure is predominantly, if not entirely, inquisitorial, and I do not believe that on this issue the *Parke* case can be otherwise distinguished on any meaningful basis. The Court is concerned for so long as it has seisen of the case with determining primarily by way of enquiry whether the requirements of s.16 have been met. In this case, as in the *Parke* case, correspondence, or a possible lack thereof, was an issue in the case. As was stated by Murray C.J. in the *Parke* case this Court was required in the first instance to enquire into and ascertain as a matter of fact what were the ingredients of the foreign offences at issue in the warrant, and then having done that it was further required to determine whether as a matter of law there was a corresponding offence or offences in Irish law. This is not a procedure where a burden of proof has to be discharged by the applicant, and in which if the applicant fails to come up to "proof" the respondent is entitled to some relief akin to the "direction" ruling in adversarial criminal proceedings or the "non-suit" ruling in adversarial civil proceedings. The parties are primarily present for the purpose of assisting the Court in ascertaining the true state of facts. They are, of course, interested parties, and their entitlement to be there and to participate stems partly from their interest in the outcome, and partly from the requirement that the procedure should be fair and transparent and in accordance with the rules of natural justice as they apply to this unique procedure. At the end of the day, however, the view of either side as to the facts, or as how the law should be applied to the facts, is not determinative. Moreover, for so long as a proceeding is ongoing any issue remains open for further consideration or re-visitation by the Court if further or additional information comes to hand. A respondent is entitled to no expectation of the procedure other than that the Court will fairly, and to the best of its ability on the available evidence, determine the relevant facts and correctly apply the law to those facts.

While the respondent in this case was perfectly entitled to express concern about the Court's proposed re-opening of an issue on which it had previously expressed a view, his complaint would only have legitimacy if he could point to some unfairness to him or some potential for injustice by virtue of that step being taken in the course the an-going s.16 procedure. He can point to no such unfairness or no such injustice in the circumstances of this case.

In conclusion I am satisfied for the reasons stated that in all the circumstances of this case, where a s.16 procedure was ongoing, where the Court had retained seisen of the matter and was not *functus officio*, where it was not unfair to either the applicant or the respondent to do so, or potentially unjust to do so, the Court was entitled to, and indeed it was appropriate that it should, both receive and act upon the additional information received, particularly having regard to the clear imperatives contained in s. 10 of the European Arrest Warrant Act 2003.