

THE HIGH COURT

Record No. 2005 36EXT

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

BETWEEN

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

APPLICANT

AND

MICHAEL FALLON AKA MICHÉAL Ó FALLÚIN.

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered on the 9th day of September, 2005

1. On 5th and 6th September, 2005, a hearing under s. 16 of the European Arrest Warrant Act, 2003 was held for the purpose of determining whether the High Court should make an order directing that the respondent be surrendered to the United Kingdom pursuant to a European arrest warrant issued by District Judge Workman at Bow Street Magistrates' Court on 21st June, 2004. This judgment is being given on the issues argued in the course of that hearing. In the course of the hearing, it became apparent that there were potentially other issues, in relation to which further evidence might be necessary. The necessity of further evidence depended upon my decision on the issues being argued and hence I agreed to give judgment on those issues.

Factual and Procedural Background

2. On 16th December, 2003, at Bow Street Magistrates' Court a warrant of arrest was issued in respect of the respondent in relation to an alleged offence of conspiring with others named therein to defraud the United Kingdom Passport Agency by the provision of false passport applications contrary to common law. That warrant was sent to Ireland and received in the Garda Commissioner's Office in December, 2003. It was then intended to be executed in Ireland pursuant to the provisions of Part III of the Extradition Act, 1965. It was endorsed by an Assistant Commissioner on 2nd January, 2004, and the respondent was arrested on such warrant endorsed by the Assistant Commissioner on 8th January, 2004, and brought before the High Court.

3. The respondent was subsequently granted bail and remanded on bail to the High Court on successive dates the last of which was 29th June, 2004.

4. There were a number of warrants from the United Kingdom which had been received by the Garda Commissioner's Office prior to 1st January, 2004, which were endorsed by the Assistant Commissioner on 2nd January, 2004, and subsequently executed. One such warrant related to a Thomas James O'Rourke. In proceedings relating to the warrant executed against Mr. O'Rourke a challenge was made to the validity of the warrant having regard to the coming into effect of the European Arrest Warrant Act, 2003, on 1st January, 2004. It was contended that s. 50 (1) of the Act of 2003 repealed Part III of the Act of 1965 and as the warrant in question had not been "produced to the Commissioner" prior to 1st January, 2004, it could not be dealt with in accordance with Part III of the Act of 1965 having regard to s. 50 (2) (b) of the Act of 2003. That challenge was ultimately upheld in a decision of the Supreme Court given on 13th May, 2004, *O'Rourke v. Governor of Cloverhill Prison* [2004] 2 IR 456. The warrant was held to be unlawful and Mr. O'Rourke released.

5. It appears that following such Supreme Court decision, an application was made on consent, to the High Court in the proceedings then pending against the respondent herein to withdraw the application for an order under s. 47 of the Act of 1965 and to discharge the respondent. Such order of the High Court was made on 22nd June, 2004.

6. In the mean time on 21st June, 2004, the European arrest warrant, the subject matter of the present proceedings, was issued by Bow Street Magistrates' Court. It was transmitted by fax to this jurisdiction on that date. On 17th June, 2005, an application was made to the High Court pursuant to s. 13 of the Act of 2003 for endorsement for execution in the State. I was informed that Peart J. who heard the application was not satisfied on the evidence then before him that such application had been made "as soon as may be" after receipt by the Central Authority in the State of the European arrest warrant. Following the filing of an affidavit of Charles Wallace, solicitor, of 4th July, 2005, dealing with the delay, the European arrest warrant was endorsed pursuant to an Order of Peart J. on 5th July, 2005.

7. On 6th July, 2005, the respondent was arrested on the European arrest warrant and has since that date been remanded in custody and is detained at Cloverhill Prison. He made an unsuccessful application for bail to Peart J. He also made an unsuccessful application for release pursuant to Article 40.4 of the Constitution. The judgment in that application was delivered by Peart J. on 10th August, 2005.

8. The respondent has not consented to surrender to the United Kingdom. The respondent has sworn an affidavit dated 3rd August, 2005. A notice of objection has been filed on his behalf. An affidavit of Peter Cauldwell, Barrister of England and Wales has also been filed on his behalf.

Objections to surrender

9. The grounds upon which it is contended on behalf of the respondent that this court should not make an order for surrender under s. 16 of the Act of 2003 may be summarised as follows:

1. The European arrest warrant issued on 21st June, 2004, is based upon the warrant of arrest issued by Bow Street Magistrates' Court on 16th December, 2003 ("the 2003 Warrant"). The 2003 Warrant was executed in this jurisdiction on 8th January, 2004. The respondent was remanded before the High Court in Ireland following arrest pursuant to the 2003 Warrant. On the 21st June, 2004, the 2003 Warrant having been executed was no longer a valid warrant to arrest. From these facts it is contended in the alternative:

(a) The European arrest warrant was not "duly issued" within the meaning of s. 10 of the Act of 2003 and is invalid.

(b) It was not issued in accordance with the Framework Decision.

(c) To surrender the applicant in response to an invalid European arrest warrant or a European arrest warrant issued in reliance upon an invalid warrant of arrest is in breach of the respondent's constitutional right to liberty not to be deprived thereof save in accordance with law and accordingly his surrender is precluded by s. 37(1) (b) in Part 3 of the Act of 2003.

2. The European arrest warrant herein was not endorsed for execution in accordance with s. 13 of the Act of 2003 by reason of the delay between 21st June, 2004, and 17th June, 2005, in making the application to the High Court for endorsement.

3. The Court is precluded by s. 42 of the Act of 2003 (as amended) from making an order for surrender.

10. I propose firstly to deal with the second and third grounds raised as if they were to be determined in the respondent's favour would make unnecessary the determination of the more complex legal issues raised by the first ground.

Delay

11. The submission on behalf of the respondent in relation to the delay of in excess of one year between receipt of the facsimile copy of the European arrest warrant and the application to the High Court under s. 13 of the Act of 2003 was based primarily on the provisions of s. 16 (1) (b) of the Act of 2003. This stipulates as one of the conditions to be satisfied if the court is to make an order for surrender is:-

"(b) the European arrest warrant, or a facsimile or true copy thereof, has been endorsed in accordance with s. 13 for execution of the warrant."

12. On behalf of the applicant it was accepted that having regard to the terms of s. 16 (1) (b) that the Court, on hearing the application under s. 16, is entitled and indeed obliged to reconsider compliance with s. 13 (1) notwithstanding the order already made by Peart J. on 5th July, 2005, under s. 13 (2) for endorsement of the European arrest warrant. However it was contended that the court should pay significant regard to the fact that Peart J. was satisfied following enquiries made and a consideration of the affidavit of Mr. Charles Wallace explaining the delay that the Central Authority had complied with the time requirements specified in s. 13 (1). This provides

"13-(1) the Central Authority in the State shall, as soon as may be after it receives a European arrest warrant transmitted to it in accordance with s. 12, apply, or cause an application to be made to the High Court for the endorsement by it of the European arrest warrant, or a facsimile copy or true copy thereof for execution of the European arrest warrant concerned."

13. Prior to endorsement for execution of the European arrest warrant under s. 13 (2) of the Act of the 2003 the High Court must be satisfied that there has been compliance with the provisions of the Act. This includes the requirement of s. 13 (1). Having considered the affidavit of Mr. Wallace, Peart J. was so satisfied. On behalf of the respondent it is not suggested that the facts as stated by Mr. Wallace are in anyway inaccurate. Rather it is suggested that they should not be accepted as an explanation for the delays involved and that it was both feasible and incumbent upon the Central Authority to make the application at an earlier date.

14. Having considered the submissions made on behalf of the respondent in relation to the explanations given in Mr. Wallace's affidavit I have determined that notwithstanding such submissions, having regard to the legal difficulties outlined therein throughout the second half of 2004 and the first half of 2005 in relation to the implementation of the 2003 Act, the Dundon case then preceding before the Supreme Court and the amendments made to the 2003 Act by the Criminal Justice (Terrorist Offences) Act, 2005, which came into effect on March 8th 2005, that there was compliance with the provisions of s. 13 (1) in this application and hence I am satisfied that the European arrest warrant was enclosed in accordance with s. 13 for execution.

Section 42 of Act of 2003

15. Section 42 of the Act of 2003 precludes the court from making an order for surrender if *inter alia* "the Director of Public Prosecution or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence."

16. Counsel on behalf of the applicant submits that the onus is on the respondent to establish the facts necessary to establish that the court is precluded for making an order for surrender by reason of s. 42. It is unnecessary for me to decide that issue on the facts of this application.

17. In the course of the hearing an affidavit has been filed on behalf of the applicant from Mr. Kenneth Ruane, solicitor in the office of the Chief State Solicitor in which he exhibits a letter from an officer of the Director of Public Prosecution confirming that the Director is not considering whether proceedings for an offence should be brought against the respondent. He also confirms that no proceedings are in being against the respondent as referred to in s. 42 (b) of the Act of 2003. The respondent has not sought to challenge the information in the letter from the officer of the Director of Public Prosecution. Hence I am satisfied that the court is not precluded by s. 42 of the Act of 2003 from making an order for surrender.

Inquiry into alleged invalidity of warrants

18. The submission on behalf of the respondent in relation to the invalidity of the warrants is based upon the evidence given on affidavit by Peter Cauldwell, Barrister of England and Wales, in relation to the law of England and Wales. In that affidavit he states in relation to the position in England.

"4. The Extradition Act of 2003 is the law of England and Wales that gives effect to the Council Framework Decision of 13th June 2002.

5. Section 142 of the Extradition Act, 2003 permits an appropriate judge to issue a European arrest warrant, known in the Act as a "Part 3" warrant. The judge is only entitled to issue such a warrant if a domestic warrant has been issued for the arrest of that person and there are reasonable grounds for believing that the person has committed an extradition offence, or, if the person is unlawfully at large after conviction of an extradition offence by a court in the United Kingdom.

6. A domestic English arrest warrant is executed when the person named therein is arrested in accordance with the command in the warrant. Such a warrant is valid until executed. After the warrant has been executed, the warrant has served its purpose and it can no longer be regarded as an enforceable order.

7. If an arrest warrant issued at Bow Street Magistrates Court of 16th December 2003 was forwarded to and executed in Ireland on 8th January 2004, by arresting Mr. O Fallúin, the subject thereof, and bringing him before the High Court in Ireland, that warrant was thereby executed, spent and thereafter was no longer an enforceable order.

8. As a matter of English law, the warrant of 16th December, 2003, could not have been validly executed against Mr. O Fallúin after 8th January, 2004. It was spent. It was no longer a valid warrant to arrest and was not a valid basis upon which to issue a Part 3 warrant on 21st June, 2004. The Part 3 warrant the subject of the within proceedings was not lawfully issued."

19. On behalf of the applicant it was firstly contended that this court should not now inquire into the validity either of the European arrest warrant or the 2003 warrant at the date of issue of the European arrest warrant. It was submitted that if this court decided that it should consider the validity of either such warrants that the court should investigate further the position under English law. I indicated in the course of the hearing that having regard to the time limits and the vacation period that I would proceed with the hearing and determine the first issue and that if I did decide to inquire into and consider the validity of either the European arrest warrant or the 2003 warrant as at 21st June, 2004, that I would permit and indeed request the Minister to obtain further relevant evidence of English law. Further, it is common case between counsel for the respective parties that there are no special provisions either in the European Framework Decision or the Act of 2003 as to the proof of English law. It must in accordance with the normal rules be proved and determined by this court as fact.

20. I have considered carefully the submissions (both oral and written) made by counsel on behalf of the applicant as to why on the facts herein the court should not inquire into the validity of the European arrest warrant issued on 21st June, 2004, nor the 2003 warrant. In those submissions counsel for the applicant did not contend that there was an absolute prohibition against a court in a hearing under s. 16 of the Act of 2003 considering the validity of an order made by a judicial authority in an issuing state. Rather it was submitted, in reliance on the Supreme Court decisions relating to extradition, that the general rule is that the court ought to refrain from making inquiries as to the validity of such orders but that such general rule is subject to an inherent power to enquire where it is necessary to do so to protect fundamental or constitutional rights of the respondent. Further, that such inherent power may only be invoked in exceptional circumstances and that on the facts of this case no such exceptional circumstances existed. Counsel also set out cogently practical difficulties which may exist if the courts in this jurisdiction inquire into the validity of orders made in another jurisdiction.

21. I accept the submission in relation to the general rule. However I have concluded that I must reject so much of the submission which is to the effect that on the facts of this application the admitted inherent power of the court to enquire into the validity of the European arrest warrant of 21st June, 2004, and the validity of the 2003 warrant as of that date should not be exercised. I have formed the view that this court is now, on the evidence and admitted facts currently before the court, bound to make such an inquiry. I have formed this view primarily for the following reasons.

22. The jurisdiction being exercised by this court in a hearing under s. 16 of the Act of 2003 is a jurisdiction conferred by that Act. The court in exercising the jurisdiction must apply the provisions of the Act when construed in accordance with the Constitution. Also, as is well established in cases such as *Howard v. The Commissioners for Public Works in Ireland* [1994] 1 IR 101 the duty of the court is to give effect to the intention of the legislature as expressed in the statute considering it as a whole and in its context. The intention, and therefore the meaning of the statute is primarily to be sought in the words used in it.

23. The Oireachtas has enacted the Act of 2003 (as amended) for the purpose of implementing the States obligations under the Framework Decision. It is the Act of 2003 as amended which must be applied by this court. There is nothing in the Act of 2003 as amended which precludes this court from inquiring into the validity of the European arrest warrant issued in the United Kingdom on 21st June, 2004, or the validity of the 2003 warrant as of that date. On the contrary s. 10 of the Act of 2003 provides:

"10 – Where a judicial authority in an issuing State duly issues a European arrest warrant in respect of a person –

...

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing State."

24. Counsel for the respondent, correctly in my view, drew attention to the use of the word "duly" by the Oireachtas. The situation in which a person is to be surrendered to the issuing State is not simply where a judicial authority in an issuing State "issues" a European arrest warrant but is confined to those situations in which such judicial authority "duly" issues a European arrest warrant. Counsel for the respondent submitted that the intent of the Oireachtas in using the word "duly" should in accordance with the normal or ordinary meaning of the word such as in the Oxford concise dictionary i.e. "in accordance with what is required or expected" be construed as evidencing an intent that only where a European arrest warrant is issued in accordance with what is required by the Framework Decision the stipulated consequences in this jurisdiction should follow. I accept such construction.

25. My attention was drawn to the presumption contained in s. 4A of the Act of 2003 as amended. This provides "it shall be presumed that an issuing State will comply with the requirements of the Framework Decision, unless the contrary is shown." The use of the future tense in this section creates some uncertainty as to whether that presumption is intended to apply to the issue of a European arrest warrant as it will inevitably have taken place prior to its arrival in this State. However nothing turns on this for the purposes of this application. Even if the presumption in s. 4A does apply to the issue of a European arrest warrant it clearly indicates an intent by the Oireachtas that a respondent may demonstrate to the court that there has not been compliance by the issuing State with the requirements of the Framework Decision. If it does not apply then it appears to me that the use of the word "duly" in s. 10 means at minimum that if a respondent puts before the court evidence which, if accepted, establishes as a matter of probability that the European arrest warrant was not issued in accordance with the requirements of the Framework Decision or the requirements of the Framework Decision as implemented in the issuing State then this court is bound to inquire whether such European arrest warrant has been duly issued. The averments made by Mr. Cauldwell raise such an issue in this application.

26. Counsel for the applicant sought to rely upon certain of the provisions in the Council Framework Decision of 13th June, 2002, and in particular Article 1.2 thereof and Recital 10 thereof. Article 1.2 provides "Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision." Recital 10 thereof states "the mechanism of the European arrest warrant is based on a high level of confidence between Member States..." I do not consider that such provisions can alter the intent of the Oireachtas as expressed by the words used in s.10 of the Act of 2003.

27. There is a second and distinct reason for which I have concluded having regard to the express terms of the Act of 2003 (as amended) that I am obliged to now inquire into the validity of the European arrest warrant issued on 21st June, 2004, and the validity of the 2003 Warrant on that date. Section 16 (1) (e) requires this court to be satisfied that the surrender of the person is not prohibited by Part 3 of the Act of 2003. Section 37 (1) (b), which is contained in Part 3 of the Act of 2003 provides:

"(1) A person shall not be surrendered under this Act if –

...

(b) his or her surrender would constitute a contravention of any provision of the Constitution..."

28. Article 40.4.1 of the Constitution provides:

"No citizen shall be deprived of his personal liberty save in accordance with law."

29. The respondent herein has been arrested and deprived of his personal liberty by the execution of the European arrest warrant. If he is to be surrendered to the authorities in the United Kingdom pursuant to the European arrest warrant he will continue to be deprived of his liberty in reliance upon the European arrest warrant. If this court were now to order the surrender of the respondent to the United Kingdom authorities pursuant to the European arrest warrant and it is a warrant which was not duly issued within the meaning of s. 10 of the Act of 2003 it appears to me that this court would be acting in breach of the rights of the respondent under Article 40.4.1 of the Constitution and hence his surrender is prohibited by Part 3 of the Act of 2003.

30. Finally counsel for the applicant submitted that having regard to the reasoning in the judgment of Peart J. on 10th August, 2005, on the application under Article 40.4 of the Constitution by the respondent herein that I should decline to inquire into the validity of the European arrest warrant issued on 21st June, 2004 or the validity as of that date of the 2003 Warrant. It is important to note that the affidavit of Mr. Cauldwell was not before Peart J. Further, the submission made to him on behalf of the respondent appears to have been slightly different and primarily based upon the determination by Denham J. in her judgment in *O'Rourke v. Governor of Cloverhill* that the warrants in that case which had similarly been indorsed by the Assistant Commissioner on 2nd January, 2004, were "void" and "not lawful".

31. It is also important to note that Peart J. in his judgment expressly assumed that the 2003 Warrant, after the arrest of the respondent on 8th January, 2004, remained valid in the United Kingdom. At p. 5 thereof he stated:

"There can be no question but that if on any date subsequent to the Supreme Court decision in *O'Rourke* the applicant in this case had set foot in the United Kingdom he could have been validly arrested on foot of the warrant dated 16th December, 2003. It remained valid I am sure as far as the UK authorities are concerned, and they therefore based the issue of the European arrest warrant on it. Alongside that reality from the UK perspective, sits the judgment of Denham J. in *O'Rourke* in which she has described the warrants therein (and, by extension that in the present case) as "void" and "not lawful".

However, it must in my view, and of course I say this with all the respect due to the learned judge's judgment, be the case that the learned judge cannot have intended to express such a view in a way which impugned and condemned the inherent integrity of the warrant as a warrant in the United Kingdom other than in the context of it being a warrant under or for the purposes of the repealed Part III of the 1965 Act. In other words, the voidness and unlawfulness was as an endorsed warrant under Part III of the 1965 Act so that any arrest on foot of it could not be lawful."

32. The evidence presently before this court from Mr. Cauldwell is that as a matter of English law the 2003 warrant was no longer a valid warrant to arrest after its execution on 8th January, 2004.

33. Finally Peart J. was not considering the matter in a hearing under s. 16 of the Act of 2003. It does not appear that he was asked to consider the requirements of s. 10 or s. 16 or Part 3 of the Act of 2003. Insofar as I have reached a different conclusion to that reached by him as to the circumstances in which a court in this jurisdiction should inquire into the issue as to whether a European arrest warrant has been duly issued I have done so for the reasons set out above.

34. Having regard to this conclusion I will now adjourn the balance of the hearing to allow the applicant and the respondent if he so wishes to obtain further evidence in relation to the issues of English Law or of compliance with the requirements of the Framework Decision (or the Framework Decision as implemented in the United Kingdom) in relation to the issue of the European arrest warrant on 21st June, 2004.

35. It appears to me desirable that any additional evidence of English Law or of compliance with the requirements of the Framework Decision (or the Framework Decision as implemented in the United Kingdom) in relation to the issue of the European arrest warrant on 21st June, 2004, be obtained upon an agreed set of facts as to precisely what occurred in this jurisdiction in relation to the 2003 Warrant at the end of 2003 and during 2004.

36. I will hear Counsel as to the necessary timing of the adjournment or any other directions desirable.