**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 406

**[2018 No. 463]**

**The President**
**Edwards J.**
**Kennedy J.**

**BETWEEN**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT/APPLICANT**

**AND**

**MICHAL BARTOLD**

**APPELLANT/RESPONDENT**

**JUDGMENT of the Court delivered on the 11th day of December 2018 by Birmingham P.**

**Introduction**
1. On 9th November 2018, the High Court (Donnelly J.) ordered the surrender of the appellant pursuant to s.16(1) of the European Arrest Warrant Act 2003 (as amended). At the time of doing so, the High Court directed that the appellant be brought before the Court once more if it appeared to the Central Authority of the State that the appellant would not have been surrendered on the expiration of 25 days from the making of the order. The 25 days in question expired at midnight on 3rd December 2018.

2. This case relates to events that occurred on the morning of 3rd December 2018 at Dublin Airport, and to some extent, those that occurred earlier that morning at Cloverhill Prison. The appellant had been detained in custody following the order of 9th November 2018 providing for his surrender to the requesting State. While it will be necessary to consider what occurred at Dublin Airport and before the departure to the airport in greater detail, it suffices at this stage to say that at Dublin Airport, Mr. Bartold conducted himself in such a fashion as to render it impossible for him to be transferred to Poland on a scheduled flight.

**Background**
3. On the afternoon of 3rd December 2018, in a situation where the efficacy of the order providing for the transfer to Poland was due to expire, the State sought an extension period pursuant to s. 16(5) of the Act. In the course of the application, it became clear that if so authorised by the High Court, the proposal was that Mr. Bartold would be transferred to Poland on board a military aircraft on Wednesday 12th December 2018. The order of the High Court, reflecting that, nominated 12th December 2018 as the date of surrender and made provision for a period of detention not exceeding ten days thereafter.

4. On the morning of 10th December 2018, by arrangement, the case appeared for mention in the context of a List to Fix Dates that was being held in the Criminal Courts of Justice. The appellant was seeking a stay on the order of the High Court with a view to appealing the decision. The High Court had refused a stay. The appellant's application was opposed by the State authorities, who indicated that they were opposing the application for a number of reasons. I was taking that List to Fix Dates and I indicated that as I was sitting alone, and because providing time for the hearing of a stay application would determine the issue as to the efficacy of a stay, I would put the matter back to 2pm to be mentioned again before a Court of three Judges. At 2.00pm, slightly to my surprise, though I must say very much to my satisfaction, the Court heard arguments addressed to the substantive issue: was the Judge of the High Court correct or was she incorrect, and so, should the surrender of Mr. Bartold be refused and his release ordered. The appellant provided the Court with written submissions which the Court had the opportunity to consider over lunch and both sides addressed substantial arguments to the Court. For my part, and I know I speak for my colleagues in that regard, I am very appreciative of the diligence and industry of counsel in that regard.

**The High Court Proceedings**
5. So far as the merits of the appeal are concerned, it is necessary to consider in more detail what occurred in the High Court on 3rd December 2018, which, in turn, requires a consideration of what occurred at Dublin Airport and Cloverhill Prison earlier that day.

6. In the course of that afternoon/evening session, the High Court adjourned and sat again at 6.30pm in order to convenience counsel for the appellant, the Court heard from three witnesses: Detective Garda Eoin Kane, Thomas Hogg, an Officer of the Prison Service, and the applicant/appellant, Michael Lech Bartold. In summary, the evidence of Detective Garda Kane was that he was assigned the task of collecting Mr. Bartold from Cloverhill Prison and bringing him to Dublin Airport with a view to having him placed on a flight to Poland. The Detective Garda explained that he arrived at the prison, and after certain delay, met with the prisoner who requested to be allowed to have a cigarette, which was facilitated. Then, they went to Dublin Airport where they met Polish escorts. At that stage, he records Mr. Berthold saying, "I am not flying, I have a medical condition, I can't fly". Detective Garda Kane's evidence was that he recalled that at that stage, he had seen an email in relation to fitness to fly. He accessed the email on his mobile phone which he summarised and interpreted as "fit to fly" and he said to Mr. Bartold that a doctor had certified him as fit to fly. According to Detective Garda Kane, Mr. Bartold denied having seen a doctor. He was shown an email from the doctor and accepted that he had seen one, but said that he had not taken medication. The Detective Garda made contact with the prison and staff there, informed Gardaí of the procedures normally followed when prisoners were leaving the place of detention, but accepted that it appeared that the appellant had not sought or received his medication that morning. At the Boarding Gate, Mr. Bartold, according to Detective Garda Kane, became verbally abusive, began shouting and caused a scene. At the request of ground staff, Detective Garda Kane spoke to the Captain of the plane who said that if Mr. Bartold refused to fly, he was not going to force him, explaining that it was a commercial flight and that misbehaving passengers could not be accommodated. At that point, Mr. Bartold calmed down. There were efforts to contact a doctor at the airport, but without success, and the question of an over-the-counter

medication was canvassed, an option excluded by Mr. Bartold who said he was allergic. The evidence of Detective Garda Kane was that at the moment of boarding, Mr. Bartold became even more abusive, began shouting profanities and shouted that he had a bomb. Defeated, Detective Garda Kane, having been told by airport ground staff that Mr. Bartold would not be flying, and, being aware of the attitude of the flight Captain, had Mr. Bartold removed from the Terminal by a colleague. At that stage, Mr. Bartold's behaviour immediately calmed.

7. In the course of cross-examination, Detective Garda Kane explained that in the course of numerous attendances at Cloverhill Prison in order to collect prisoners, he had become aware that there was an Infirmary in the prisoner collection area, and on numerous occasions over the years, he had seen prisoners presenting themselves there and being provided with medication.

8. In the course of evidence, Mr. Bartold said he suffered from the condition known as Deep Vein Thrombosis (DVT). He had been on medication for that condition for four or five months, namely, blood thinners and anticoagulants, this medication he takes twice a day, morning and evening. He explained that the normal procedure in the prison is that medication is delivered by "medics" with a trolley, but on days that he would be leaving the place of detention, his medication would be at the reception. He claimed that on this occasion, he asked at reception about medication, only to learn that there was none there for him, but instead was told "that [it] will be sorted".

9. The final witness from whom the Court heard was Thomas Hogg, the Prison Officer attached to the Escort Corps of the Prison Service. His duties involved getting prisoners to venues such as the Criminal Courts of Justice. He explained that there was a Dispensary in the Reception area of the prison, staffed by two or three nurses, and that it was the case that many prisoners going to court required medication, specifically referring to some having a need for Methadone. He said that the Dispensary was open every morning and he was in a position to say that he noted that it was open on the morning in question. He had never seen a situation where the Dispensary was closed in the morning in the course of his 13 years of service.

10. Before turning to the decision of Donnelly J, which was an ex tempore one, but delivered after she had taken some time to consider the matter, it is appropriate, given the significance attached to it, to refer to a report obtained by the Central Authorities from Dr. Mullah, a doctor within the Prison Service. This was the document that Detective Garda Eoin Kane had accessed on his phone at Dublin Airport and he read the document from his phone to the High Court and it read as follows:

> "Dear Sir/Madam,
>
> Re: Michal Bartold,
>
> Date of Birth:
>
> Prison Number:
>
> Further to my clinical assessment of Mr. Bartold today, I am of the professional opinion that he is medically fit for air travel. He has a history of DVTs and is prescribed Dabigatran, 150mg daily for life. Depending on the duration of his flight, I would recommend that he is allowed to stretch his legs by standing and walking for a few minutes in the cabin every two hours.
>
> Yours sincerely,
>
> Dr. Mullah"

**Decision of the High Court**

11. Donnelly J. began by explaining that this was an application under s. 16(5) to have a new date fixed for the surrender of Mr. Bartold. A decision had already been made in the High Court under s. 16(1) that Mr. Bartold should be surrendered, and it was noted that the day upon which the s. 16(5) application was heard was the final day on which he could be surrendered. As such, in this particular case, the High Court had to consider whether the circumstances surrounding the failure to execute an order of surrender had been "beyond the control" of this State or the issuing State concerned.

12. Donnelly J. outlined that the test in cases such as these was whether failure to surrender had been "beyond the control" of the States involved. Moreover, it had to be seen in the context of the Framework Decision as an issue of force majeure or, as the Court of Justice had put it in the Vilkas case, it was really a question of whether it was unforeseeable in the circumstances. She said that the issue before her was one that had arisen before on occasions, being a scenario where a person does not get on a flight. She said there was a slight difference in this case to the issue which arose in Vilkas, where the individual in question had a fear of flying, and said that there could also be issues where, on commercial flights, pilots were not prepared to take people who were generally causing difficulties. Donnelly J. said that in general, the State in this jurisdiction had tried to deal with the Vilkas decision by asking in open Court if the person had an issue with flying.

13. In this case, it appeared to Donnelly J. that there had not been a definitive assurance given, one way or another as to the situation. While his medical problem had been raised, it was not in a way that suggested he could not fly, but instead flagging that it might be an issue. She said that the High Court had suggested on a previous occasion that if he had a problem, he could engage with that issue in terms of providing medical information or whatever, but the appellant did not do so, either personally or through his solicitors. The Judge said that in those circumstances, the State, quite rightly in her view, took it upon themselves to get a medical report and she commended the State for doing that in the particular circumstances.

14. The report said that Mr. Bartold was medically fit for air travel. It noted that he had a history of DVTs and was prescribed medication daily for life, and depending on the duration of the flight, it would be recommended that he be allowed to stretch his legs by standing and walking for a few minutes in the cabin every two hours. Donnelly J. said that, essentially, the report said he was fit to fly. It was her view that nothing expressly in the report said that the appellant could not fly without a daily tablet and there did not seem to be any indication that he would not have such a daily tablet.

15. The Judge said in that regard, it was important to note that the State had put in place provision to allow for persons who are in custody, but leaving custody before the usual daily rounds in the prison, to obtain their medication. She referred to the fact that she had heard evidence from Prison Officer Hogg who had explained that there was an Infirmary located at the Reception area in the prison that it is available for the purposes of persons leaving the prison going to Court and that it is available in the morning time. She

quoted Prison Officer Hogg as saying in his 13 years of service, he had never seen it closed at the time that people would be taken out for Court.

16. In the same context, she referred to the evidence of Detective Garda Kane. Donnelly J. said the question she had to ask was: "[i]s it unforeseeable that some sort of glitch would happen, that a glitch would happen that the Infirmary would be closed on a particular morning, or that some Officer would take it upon himself to say 'oh, that will be sorted out later'." She said that even taking Mr. Bartold's case at its highest, she did not believe that that could have been foreseen, and in her view, the State had done everything possible in relation to the case to have the appellant safe to fly. She said in the circumstances where the issue was raised, she did not think that what had occurred was foreseeable, as was suggested, that the State should have realised that Mr. Bartold was someone who was never going to travel and that the authorities should have realised that he would do everything he could to resist flying. Donnelly J. said that in the circumstances of the particular case, she did not see that that was foreseeable and that actions in response should have been taken.

17. Having given her decision in the case, the Judge then added "separately from that, Mr. Bartold's evidence was simply, in the main part, unbelievable". She referred to the fact that he had told Detective Garda Kane that he had never seen a doctor when it was clear that he had. The Judge had little doubt that Mr. Bartold knew well that he was leaving the prison to fly and she did not accept his evidence that he had not been shouting at the airport. She said that in all the circumstances, it was evident that Mr. Bartold's behaviour was geared towards not flying. She was not in any sense sure that he required the particular tablet on the morning in question. In any event, and more importantly, the Judge felt that he deliberately manufactured the situation to prevent flying and that this was something that could not have been foreseen in the circumstances. She said that in those circumstances, the situation that had been reached was one that was beyond the control of the State and that, accordingly, she was going to fix a new date for surrender.

**Discussion**

18. The situation of individuals refusing to board commercial flights is now arising with some regularity in the context of EAW surrenders and also in the deportation area. It is one that has required consideration on a number of occasions by the Superior Courts, and most recently, the issue was the subject of a Supreme Court decision on 5th December 2018, two days after the hearing before Donnelly J, the decision in question is that of Skiba. It, too, was a case involving a surrender to Poland. The case arose in a situation where solicitors for Mr. Skiba contacted the Garda Extradition Unit and informed the Unit that Mr. Skiba had a fear of flying. There followed contact between Irish and Polish authorities, but ultimately, the decision was to proceed with the original plan. The case was complicated somewhat by the fact that the High Court had decided to depart from the Opinion of the Advocate General in the Vilkas case. When, subsequent to the High Court decision, the decision of the Court of Justice became available, the approach there accorded with what had been opined by the Advocate General. In a situation where the option of standing over the decision of the High Court was not available, and where the Court of Appeal had reached views on the facts, but obviously without hearing oral evidence, McKechnie J., whose judgment it was, conducted his own assessment of the facts of the case which resulted in the dismissal of the appeal.

19. In this case, on behalf of the appellant it is said that the Central Authority was aware that there were issues about flight concerns and that Mr. Bartold was on long-term medication. In those circumstances, it was entirely foreseeable that Mr. Bartold would not consent to flying, that if he had not taken his medication, he would resist flying and might succeed in preventing himself being put on the plane. It is said that when considering the question of foreseeability, that criticism is to be laid at the door of the Central Authority.

20. In the course of his judgment in the Skiba case, at para. 90, McKechnie J. said:

> "[t]aking all of the foregoing factors into account, it may fairly be said that the issue of the foreseeability of Mr. Skiba's refusal to board the flight could be decided either way. It is, ultimately, a fine call, and one in which reasonable people could very well differ. In such circumstances, an appellate court would typically be required to defer to the decision of the trial judge provided there was some credible evidence to support the conclusion reached."

He then went on make the point that the trial Judge in that case had adopted a narrower definition of force majeure than did the CJEU, and so, had not assessed the foreseeability of Mr. Skiba's refusal to embark the plane.

21. In my view, the representatives of Mr. Bartold are demanding unrealistic levels of foresight from the authorities. There was nothing in the medical report to say that fitness to fly was dependent on having taken medication before boarding the plane. Even if I am wrong in that regard, there was no reason to believe that Mr. Bartold would find himself boarding the plane without having taken his medication, and indeed, no reason to believe that if he did, that he would react in the way that he actually did, becoming abusive, making a reference to a bomb and so on. In my view, even if the taking of medication has the significance contended for, and I do not believe that is supported by the report of Dr. Mullah, the authorities had put in place a system that worked, day in, day out for prisoners leaving the prison to get their medication. I do not think it is realistic to expect that the authorities would anticipate that the system would break down, whether because of some glitch in the system, or by the actions or inactions of Mr. Bartold, and that he would then follow up with the reprehensible behaviour that he engaged in at Dublin Airport. At para. 90 of the Skiba judgment, McKechie J. referred to fine calls, calls which could be decided either way. Specifically, he mentioned that an appellate court would be expected to defer to a trial court. In this case, the trial court had the advantage of hearing oral evidence. Clearly, and not at all surprisingly, Donnelly J. found Mr. Bartold an unimpressive witness, but she approached the case on the basis of accepting or taking at face value what he said, considering what the situation would be on that basis, coming to a conclusion and then proceeding to record her scepticism about what she had been told by Mr. Bartold.

22. On the facts, putting matters at their lowest, the Judge's conclusions were ones that were clearly open to her. I would, though I do not need to do so, go further and say that I would find it hard to imagine any other conclusion being reached, but I am quite satisfied that this is a case where it is appropriate to support the approach of the High Court. It is important to note that there has been no suggestion at any stage that the High Court was applying the wrong test or anything of that nature. Rather, the contention is that the High Court Judge erred when it came to assessing the factual situation and ought to have concluded that what occurred was foreseeable. As I have already indicated, I am not disposed to interfere with, and indeed, I do not believe I would be entitled to interfere with the findings of fact by the High Court Judge.

23. Accordingly, I would dismiss the appeal.