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Supreme Court of Ireland Decisions

Judgment

Title:	Minister for Justice and Equality -v- O'Connor
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Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., McKechnie J., Clarke J., MacMenamin J., Dunne J., Charleton J.
Judgment by:	O'Donnell Donal J.
Status:	Approved
Result:	Appeal dismissed

SUPREME COURT

High Court Record No. 2011/297 Ext &

2012/1195P

Court of Appeal No. 2015/48

Supreme Court No. S:AP:IE:2015/000064

Denham C.J.
O'Donnell J.
McKechnie J.
Clarke J.
MacMenamin J.
Dunne J.

Charleton J.

BETWEEN/

The Minister for Justice and Equality

Applicant/Respondent

AND

Thomas O'Connor

Respondent/Appellant/Plaintiff

Judgment of O'Donnell J. delivered the 30th of March 2017

1 Although this appeal concerns both a European Arrest Warrant and plenary proceedings, it concerns in truth one issue: the application of the Legal Aid Custody Issues Scheme in European Arrest Warrant cases. It has been the subject of a comprehensive High Court judgment (Edwards J.) (2014] IEHC 640) and three judgments in the Court of Appeal (Ryan P. and Irvine J., Hogan J dissenting) ([2015] IECA 227) in which the majority of the Court of Appeal upheld the High Court judge's decision. Those judgments are readily available. It is accordingly only necessary to identify the relevant facts which set the background to the legal argument advanced in these appeals.

2 The appellant, Thomas O'Connor, was convicted in the United Kingdom of tax fraud and his surrender is now sought by the United Kingdom authorities to serve the sentence imposed upon him, and also for prosecution on a charge of absconding and breach of bail conditions. A single ground was advanced as an objection to the European Arrest Warrant which was the absence of what was described as a "statutory legal aid scheme". The basis for the claim is that the State has provided for the availability of legal aid for European Arrest Warrant cases through what used to be known as the Attorney General's Scheme, and is now the Legal Aid Custody Issue Scheme which came into force on the 1st January, 2013. The plenary proceedings contend that the 2003 Act is unconstitutional on a number of grounds. In the dissenting judgment of Hogan J. in the Court of Appeal, most focus was directed to the contention that the existence of a non-statutory scheme of legal assistance was a breach of Mr. O'Connor's Article 40.1 guarantee of equality before the law in that a person charged with substantive offences, for example fraud, in the Irish courts, would be entitled to apply for, and if he or she satisfied the conditions, obtain legal aid pursuant to statute namely the Criminal Legal Aid Act 1962. In the case of a person sought for trial in the International Criminal Court, s.23(5) and (6) of the International Criminal Court Act 2006 provide for the grant of legal aid under the Criminal Justice (Legal Aid) Act 1962 in cases where a person is sought under a warrant of the International Criminal Court. In the case of European arrest warrants however, the scheme is administrative and non-statutory.

3 The High Court dismissed the challenge to the EAW and also dismissed the plenary proceedings. Edwards J. considered that he was bound by the decision in this Court in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 IR 384, to the effect that Article 11.2 of the Framework Decision provided for a right of legal assistance in accordance with national law, and did not itself require the grant of legal aid. While identifying a number of respects in which legal aid under the scheme could be said to differ from the legal aid available under the 1962 Act, he concluded there was no breach of Article 40.1 of the Constitution.

4 In relation to the equality claim, there were three features of the scheme which were said to treat an applicant unequally when compared either to the person accused of a criminal offence in the Irish courts, or a person whose surrender was sought under the International Criminal Court Act 2006. First, it was said that it was an administrative scheme rather than legal aid provided by statute. Second, provision was made in the 2013 scheme for application at the outset of the case but for

certification only at the close of proceedings. This may have mirrored recent practice, but the published version of the immediately preceding version of the Attorney General's scheme provided for the recommendation to be made also at the commencement of proceedings. Finally, the scheme was administrative in nature, and was not binding on the Attorney General prior to the coming into force of the 2013 Scheme, or on the Legal Aid Board which administered it thereafter. The Attorney General or the Legal Aid Board respectively could refuse to honour any recommendation made by the courts. On the latter point, evidence was given in this case echoing evidence and assurances given in the *Olsson* case that the Board would consider itself bound in any EAW case to honour a recommendation made.

5 In the High Court, Edwards J. rejected this claim. However, he certified a ground of appeal in the EAW proceedings as follows:

> "Is it correct that Article 11.2 of the Framework Decision (on the European Arrest Warrant) in conjunction with Article 47 of the EU Charter and the general principles of EU law imposes no obligation to provide legal aid, whether as of right or otherwise for indigent respondents in EAW cases that do not have the skill to represent themselves?"

6 In relation to the constitutional challenge, as already observed, Edwards J. acknowledged that there was a disparity of treatment but considered that the fundamental features of the scheme particularly in the light of the assurances given were such that there was no breach of any right to equality of treatment.

7 The Court of Appeal dismissed the appeal. On the certified point, the Court was unanimously of the view that it was bound by the decision in *Olsson*. Furthermore, although that court was now in a position to make a reference to the CJEU (which had not been a possibility in the *Olsson* case), the Court considered that it would be inappropriate to make any such reference. The Court was divided however on the constitutional claim. The majority (Ryan P. and Irvine J.) considered that no sustainable claim of unequal treatment could be made. Hogan J dissented. On the European law point, he acknowledged that the view of European legislators appeared to coincide with the view taken in *Olsson* but he considered that there was nevertheless an argument as to the entitlement to legal aid. However, given the fact that the Court was bound by *Olsson*, he did not consider it appropriate to make any reference. In relation to the constitutional claim, he acknowledged that the point was a narrow one. Ryan P. had considered that no declaration of invalidity could be granted even if the plaintiff was correct, because the 2003 Act was not unconstitutional simply because it did not make any provision for legal aid. Hogan J. considered that it was open to the court to make a more nuanced declaration identifying a constitutional breach by reason of a legislative lacuna while refusing to invalidate the Act. He acknowledged that the practical effect of the differing treatment between the different regimes "may not be great". However, he considered that it was impossible to avoid the conclusion the person whose surrender was requested under the 2003 Act was not being treated equally before the law in the manner required by Article 40.1 so far as their entitlements to legal aid was concerned. At paragraph 54 of his judgment, he explained his decision:

> "In the case of persons whose surrender is sought under the 2003 Act, their entitlement to legal aid rests on the operation of an extra-statutory scheme as leavened by judicial practice and commitments given by State officials, whereas in other essentially similar cases the entitlement is governed and regulated by law, *i.e*., legislation enacted for this purpose by the Oireachtas."

8 He considered that the requested person was at a greater disadvantage in securing appropriate legal services and that subtly weakened his or her right to object or complain if dissatisfied with the level of legal services actually provided. He considered that while as injustices caused by unfair differentiation go, the practical impact of the differentiation in this case was probably modest, but nevertheless it was real. He therefore adopted the language of Henchy J. in the extradition case of *McMahon v. Leahy* [1984] I.R. 525 at p.541, that there was "an unequal treatment. . . of citizens who, as human beings, are in equal condition in the context of the law involved".

9 Although Hogan J. accepted the appellant's arguments as to the law, he nevertheless declined to make a finding that the 2003 Act was itself unconstitutional, and would not have made an order

refusing to surrender Mr. O'Connor. He considered that it was sufficient to grant a declaration that the failure on the part of the Oireachtas to ensure that a person facing a surrender request under the 2003 Act had the same rights by law to legal aid as they would if facing trial on indictment in this State, amounted to a breach of Article 40.1. In particular he considered it was not necessary to go further than this and specifically he considered that this did not require granting an order restraining the surrender of the plaintiff on foot of the EAW request. That he felt would represent a disproportionate interference with the operation of the 2003 Act and would tend to undermine the mutual trust and goodwill inherent in the European Arrest Warrant procedure.

10 This Court granted leave to appeal and identified two issues:

(i) Whether there is inequality under Article 40.1 of the Constitution by virtue of the fact that persons facing surrender under a European Arrest Warrant are entitled to legal aid only by virtue of a discretionary administrative scheme, whereas similarly situated persons (in particular persons facing surrender to the International Criminal Court) have the right to legal aid based on a statutory footing; and if this does amount to unconstitutional inequality, whether this would render an order of surrender in the present EAW proceedings inconsistent with the Constitution;

(ii) Whether in the EAW proceedings, it is necessary or appropriate to refer a question of European law to the Court of Justice concerning the fact that legal representation for the purpose of defending an application for surrender under the 2003 Act is provided by means of an administrative scheme rather than (as in for example the relevant provisions in respect of the International Criminal Court) as a statutory scheme.

11 Discussion

It may be useful to consider the plenary proceedings first. There was debate on a number of preliminary issues, which can be dealt with at the outset. It is noteworthy that the appellant in this case had only argued one ground of objection to the EAW and had not sought legal aid under the Custody Legal Aid Scheme. Counsel argued that the appellant could not accept legal assistance under the 2013 scheme and therefore make more elaborate objections to the EAW because he would be deprived of locus standi to advance the constitutional challenge and the objection to the EAW. Thus, counsel sought to argue that the objection raised to the EAW was preliminary only. In this regard, he contended that a reading of *Olsson* supported the argument that acceptance of legal assistance under the 2013 scheme would deprive him of standing to challenge its constitutionality.

12 This argument appears to be misconceived. It was clearly set out in *Olsson* and in any event follows as a matter of principle, that a person the subject of a request for surrender has locus standi to challenge the scheme under which legal aid is made available to him. It may be more correct to say in this case that if the appellant accepted the 2013 scheme that that would have weakened the argument on a practical rather than legal level, since it would have been apparent that from Mr. O'Connor's point of view at least there was little, if any, practical difference as to his representation. But this is a consequence of the point raised, and cannot be avoided by suggesting that there was some legal reason to limit the case made. In any event, there is no substance to the argument that the appellant was entitled to make objection in a piecemeal fashion. Accordingly, the Court must approach the case on the basis that only one ground of objection was raised.

13 Second, counsel for the appellant laid heavy emphasis on the novelty of the remedy proposed by Hogan J. and argued that if the Court came to the conclusion that there was indeed a failure to afford Mr. O'Connor what was required of the Constitution, then the Court could not make the surrender order sought.

14 There may be circumstances in which a court considering the constitutionality of a statute or scheme, may be justified in adopting less intrusive remedies than a blanket declaration of the invalidity of a statute which may be of both general application and public benefit. In this case, the issue arose because what was challenged was not a provision of the Act, but rather an absence from it. It is conceivable that in such circumstances a court might stop short of invalidating the Act, and instead make a declaration that insofar as the legal regime did not make available some feature

required by the Constitution, it could not be operated. However, I cannot agree that if a court concluded that the plaintiff had a constitutional right which was breached by the process adopted in determining the EAW request, that the court's discretion would extend to ordering the surrender notwithstanding the unconstitutionality. This claim arises in the context of a surrender under the European Arrest Warrant Act 2003 which specifically provides at s.37 that a person shall not be surrendered if such surrender would among other things, constitute a contravention of any provision of the Constitution. In the circumstances, if the Court concluded that there was a breach of Article 40.1 in the manner in which legal aid was provided, it would in my view follow that any surrender pursuant to such a process would constitute a contravention of the provisions of the Constitution, and the Court could not order such a surrender. It is important therefore to consider the argument that the differences between the Legal Aid (Custody) Scheme of 2003 and the Criminal Justice (Legal Aid) Act 1962, are such as to amount to a breach of Article 40.1. Such a claim if correct would in addition have implications beyond the field of EAWs.

15 The development of the law on legal aid in Ireland cannot be understood solely by reference to the terms of the legislation, or the scheme. The predecessor of the 2013 scheme was the Attorney General's Scheme. That can in turn be traced to the matters recorded in the *Application of Woods* [1970] 1 I.R. 154. There, a prisoner sought to challenge his detention. Counsel for the Attorney General who appeared on the appeal, offered the court an assurance that the applicant would be entitled to legal representation paid for by the State. Mr. Justice Walsh recorded the exchange as follows:

> "I think it right, however, to take this opportunity to mark as a notable contribution to the cause of personal liberty the undertaking on behalf of the Minister for Finance and of the Attorney General given in respect of this application and of every application for habeas corpus made henceforward, to defray the cost of solicitor and counsel for applicants who are not in a financial position to engage such professional representation whenever the High Court or this Court, as the case may be, considers it proper that solicitor and counsel should be assigned by the court concerned to make submissions in support of the application." (p.166)

While the court was careful not to stop short of suggesting that legal aid was required to be available in every case involving the liberty of the citizen, and was not provided in *Woods* case itself, it is difficult to avoid the conclusion that the scheme was understood, at least in part, to be required to meet the State's constitutional obligations. Because the matter arose the way it did, it was itself not the subject of detailed argument and a judgment, and therefore the argument was not fully developed. However, it is difficult to conclude that in some cases at least, the provision of legal aid was more than merely a generous gesture on behalf of the State, but rather was a constitutional obligation.

16 In the field of criminal law more broadly, the 1962 Act was of course a very considerable advance. However, it was framed in quite narrow terms. In particular it provided that a person had to request legal aid. In practice this significantly limited a number of cases in which it was made available. In the landmark case of *The State (Healy) v. Donoghue* [1976] I.R. 325, this Court made it clear that legal aid must be available to a person who is not able to pay for their own representation and when the case is of sufficient seriousness, such as if they are at risk of imprisonment, and furthermore an accused person must be informed of this right. Henchy J. made it clear that the provision of legal aid was a constitutional obligation derived from the basic fairness of procedures, and the 1962 Act was only a statutory vindication of that right, and was inadequate at that. Since *The State (Healy) v. Donoghue*, it is clear that the entitlement to legal aid in criminal cases is constitutionally based and not dependent on the particular language of the statute. As Henchy J. observed at pp. 354-355 in *The State (Healy) v. Donoghue*:

> "But as this Act is designed to give practical implementation to a constitutional guarantee, the judicial function in respect of the Act would be incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled. . . Having regard to the scope and purpose of the Act of 1962 and the solemnly declared duty of each judge to uphold the Constitution and the laws, it is implicit that it is the duty of each District Justice not simply to grant legal-aid certificate when an application is made for

> one on satisfactory statutory grounds but also to see that an accused who appears, from the circumstances disclosed by a due hearing of the case, to be qualified for one is informed of his right to apply for it. . .”

This led to a number of later cases, most notably *Carmody v. Minister for Justice, Equality and Law Reform* [2010] 1 IR 635, where the Constitution was held to require a broader entitlement to legal aid than was provided for by statute.

17 There is a high degree of similarity between the provision of legal aid under the 1962 Act and the 2013 scheme. Both permit the choice of a private lawyer rather than a State provided service. Furthermore, counsel will be paid on the basis of parity with counsel retained by the prosecution or the State body resisting the application. In each case, there is a formula for determining fees due to the solicitor. In the case of criminal legal aid in trials, the legal entitlement is derived from both the statute and the Constitution. In those cases to which the 2013 scheme applies, the law is to be found in a detailed administrative scheme and underpinned by the Constitution. The scheme could not be arbitrarily withdrawn and a claim to legal aid pursuant to the scheme could be enforced by an action. In the same way, a claim to an entitlement to legal aid in an appropriate case, would be enforced by proceedings. In the *Olsson* case, this Court concluded that accordingly, in EAW cases given the assurance provided, legal aid under the 2013 regulation was being provided not as a matter of discretion but as of right.

18 There is therefore a high degree of similarity between the provision of legal aid in cases to which the 1962 Act applied, and those to which the 2013 scheme applies. Indeed this was recognised by Hogan J. in his judgment. Nevertheless he concluded that there was still a breach of Article 40.1, and counsel for the appellant argues that this conclusion was correct, with the consequence that surrender should not be permitted under the Act.

19 From the point of view of the person subject to surrender, and whose rights are involved, it is difficult to see that the differences in this case which have been subject to so much scrutiny are of any impact whatsoever. The same legal representation is provided, and once provided, it is irrelevant to the client whether it is available under administrative scheme legally enforceable at law, or pursuant to statute and the Constitution. The fact that the application must be made at the outset of the case and a recommendation is now made at the end of the case is also of no impact on the client since in the unlikely event that a recommendation was not made that the client will have received representation, and the only people affected will be the legal representatives. It is perhaps difficult to see why this administrative arrangement is maintained but the fact that the application/representation system is put in place does not itself amount to an unconstitutionality. If however a recommendation was refused on grounds that would not disentitle someone to legal aid in a criminal case, that might give rise to some question, but that possibility would not justify the blanket challenge in this case.

20 The argument that the differences between the two routes to the provision of legal representation at the cost of the State amounts to a breach of Article 40.1 is surprising. Article 40.1 requires equality, not identity, of treatment. In particular Article 40.1 forbids unequal treatment as human persons. The narrow construction given to that phrase dominated the interpretation of Article 40.1 in the decades following *Quinn’s Supermarket v. The Attorney General* [1972] I.R. 1, but has long since been qualified. However, it would be an overcorrection if the phrase was ignored entirely. It suggests, surely, that differences of treatment referable to immutable human characteristics such as race, gender or sexual orientation or matters of intimate personal choice intrinsic to a person’s sense of themselves as a human person such as religion or marital status, are to be carefully scrutinised. That however does not arise here. Article 40.1 is of course relevant in other contexts where no such potential ground can be invoked. In the case of *McMahon v. Leahy* referred to in the appellant’s submissions, it was invoked because of the potential disparity and treatment between the applicant in that case and a co-accused. It was not suggested that this was based on any discriminatory ground. But there, the difference in treatment was in the context in which occurred as substantial it could be: it was proposed to surrender the applicant in response to an extradition request in circumstances where a person accused of the same crime, had been entitled to avail of the political offence doctrine at the time when it had been widely construed, and resist surrender. Here however it might be said that while the differences themselves are not of such substance, that nevertheless a fundamental

right is involved that is a right of fair procedures in the administration of justice under Article 34 and Article 40.3, and the trial in course of law under Article 38, and that even small differences of treatment are impermissible.

21 There are many cases presented as equality claims that are sometimes better looked at as claims to individual rights, and where the analysis of such claims through the prism of equality sometimes obscures rather than illuminates the issue. The essence of an equality claim is the sense of injustice that someone experiences when a person similarly situated is being treated differently and normally more favourably and in particular if the circumstances are suggestive of a discriminatory ground related to a persons human personality. It is very difficult to believe that the plaintiff/appellant here experienced any such sense of injustice if indeed he was aware, that in a criminal trial or in the case of a person sought for surrender for trial at the International Criminal Court, that the legal representation available would be made available under a different legal route. Furthermore, claims which only raise equality concerns are open to the at least theoretical argument that the remedy can be an equalising up or down. If equality is the only test, then it is permissible as Professor Higgins in *Pygmalion* did, to treat everyone badly, as long as they were treated equally badly. Here however, it could not be argued that it would be permissible to simply remove legal aid altogether from defendants in criminal trials and persons whose surrender was sought under EAW or indeed for trial in the International Criminal Court. That would be equal treatment, but it would be something much less than the Constitution requires.

22 It is I think useful to consider the underlying right in issue in this case. Is there any breach of fair procedures in this case because the legal representation is made available under an administrative scheme of some antiquity with some particular procedures? Plainly there is not. It is difficult then to see how there could be a breach of the entitlement to equality before the law unless another person in a directly similar situation was provided with markedly superior services, and particularly if the basis of the distinction was questionable. Here however, once legal representation was made available at the cost of the State, it is not a breach of the Constitution that such legal representation is made available through a different route in other cases.

23 The Framework Decision

The point certified by the High Court for appeal and which was considered by the Court of Appeal, raised the question whether the observations made in *Olsson* that Article 11.2 of the Framework Decision did not require legal aid, but merely legal representation provided in accordance with national law, were correct. More acutely, the issue raised was whether a reference under Article 267 was required now that such references might be made in EAW matters which were not the case at the time that *Olsson* was decided. However, that question cannot truly be said to arise for determination in this case. First, even if it is correct that the Framework Decision itself imposes no requirement or obligation to provide legal aid, that does not mean that legal aid is not required under national law by reason of the Constitution or the ECtHR or indeed the EU Charter of Fundamental Rights. If so, then it would be provided in EAW cases and indirectly would also be provided under the Framework Decision since that requires legal representation in accordance with national law. Furthermore, the issue does not in any event arise for determination in this case because legal aid is available to EAW respondents. If the State sought to withdraw such legal aid from respondents, then the question would arise whether that was permissible under the Framework Decision, but it would also raise even more fundamental questions as to whether such a course would be permissible under the Constitution, the Convention or the Charter. However, the State has not done this or threatened it: in fact it has done the opposite. Therefore, it cannot be said that the issue certified is necessary for a determination in this case.

24 The issue on which leave was granted to this case is slightly different and raises the question whether an administrative scheme is sufficient compliance with the Framework Decision. I doubt that this issue arises properly in this case and resolution of it might also involve a consideration of the status of legal aid which is not otherwise required in this case. However, for the reasons already set out earlier in this judgment, legal aid in EAW cases is not made available merely through an administrative scheme at the discretion of the State, but as of right, enforceable in law. It has not been established that any issue of European law arises in the fine distinctions that exist between the

provision of legal aid under the 2013 regulations and the 1962 Act.

25 Finally, the development of the law on the provision of legal aid as a matter of history has been a largely beneficial collaboration between statutory enactment, constitutional interpretation, and executive and administrative decisions. However, that piecemeal development and combination of sources may only lead to confusion, and litigants, lawyers and judges should not have to read a series of reported cases to understand the circumstances in which legal aid may be made available. Furthermore, whatever the historical justification for the separate development of the provision of legal aid for cases involving liberty, it is open to doubt that the distinction serves a useful purpose and may indeed lead to misunderstanding or worse. Accordingly there may be merit in placing the entire area on a comprehensive statutory footing. This however does not have any impact on the outcome of the case. The appeal must be dismissed.

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