[2019] IEHC 805

THE HIGH COURT

[2017 No. 58 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

CIARAN MAGUIRE

RESPONDENT

THE HIGH COURT

[2017 No. 59 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

SEAN PAUL FARRELL

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 26th day of November, 2019

1. In each of these cases the applicant seeks Orders for the surrender of the respondents pursuant to European Arrest Warrants *("EAW"s)* issued by the District Judge (Magistrates' Court) sitting at Laganside Court, Belfast Magistrates' Court dated, in each case, 10th March, 2017. The EAWs have been issued for the purposes of placing each of the respondents on trial in respect of offences allegedly committed by the respondents in Northern Ireland, being, in each case, one offence of attempted murder and one offence of possession of explosives with intent. This judgment is concerned with an application for discovery advanced on behalf of each of the respondents.

2. While it is alleged that the offences were committed in Northern Ireland, it is further alleged that, having disturbed one of the perpetrators in the act of planting an explosive device underneath a vehicle parked outside the home of two serving police officers in Northern Ireland, a car chase then ensued during the course of which it is alleged two cars in which the respondents were separately travelling crossed the border into Donegal when the Gardaí took over the chase from the Police Service of Northern Ireland. It is alleged that the Gardaí apprehended the occupants of the vehicles, two of whom were the respondents. One of the respondents, Mr. Maguire, was taken to Letterkenny Garda Station and the other, Mr. Farrell was taken to Milford Garda Station. The clothing of each was seized, and photographs, fingerprints and buccal swabs were taken from each of the respondents. Each of them were also interviewed by An Garda Síochána and statements were taken.

3. Points of objection were filed on behalf of Mr. Maguire on 3rd May, 2017. In his points of objection, Mr. Maguire pleads that his surrender to the authorities in Northern Ireland is expressly prohibited by ss. 37, 38, 42 and 44 of the European Arrest Warrant Act 2003 (as amended) ("*the Act of 2003").* More specifically, it is pleaded that his surrender is prohibited by s. 37 of the Act of 2003 as any such surrender would be in breach of his constitutional rights as enumerated or unenumerated and/or would be in breach of his rights as enshrined in the Convention for the Protection of Human Rights and

Fundamental Freedoms ("*the Convention")* and by the European Convention on Human Rights Act 2003, and it is so prohibited *inter alia* by reason of undue interference with his liberty, and/or his personal and/or his family rights. (Paragraph 4 of the points of objection filed on his behalf)

4. At para. 5 of his points of objection, Mr. Maguire pleads:-

> *"Further, without prejudice to the generality of the foregoing, the respondents' surrender would directly contravene s. 37 of the EAWA because it would breach of (sic) and/or fail to defend and vindicate his rights and entitlements under Articles 38, 40 and 41 of Bunreacht na hÉireann and/or his rights and entitlements inter alia under Articles 2, 3, 5, 6, 7, 8 and 14 of the Convention. In particular but without prejudice to the generality:*
>
> *(i) That for the Court to permit the surrender of the respondent pursuant to s. 16 EAWA to a jurisdiction where evidence taken in violation of his constitutional rights would be tendered against him at his trial, and might be admitted, would constitute a failure on the part of the Court to vindicate his constitutional rights.*
>
> *(ii) If surrendered to Northern Ireland the respondent will not enjoy constitutional protection and his life, liberty and health will be impermissibly exposed and placed in jeopardy. Instead he can be tried in this State.*
>
> (iii) Further, and/or in the alternative, the surrender of the respondent to Northern Ireland would represent an undue and impermissible infringement of his personal and family rights."

Other pleas are also advanced on behalf of Mr. Maguire that are not of relevance to this application.

5. Points of objection on behalf of Mr. Farrell were filed on 5th November, 2017. He too pleaded that his surrender should be refused pursuant to s. 37 of the Act of 2003. In his case he particularised the specific violation of s. 37 of the Act of 2003 insofar as in his points of objection, Mr. Farrell alleges that the conditions prevailing at the place of detention in Northern Ireland to which Mr. Farrell is likely to be committed would be in breach of his human and constitutional rights to health and human dignity, and that he would be subjected to inhuman or degrading treatment at that institution. In further points of objection delivered on his behalf on 27th February, 2019, Mr. Farrell pleads that, if tried for the offences described in the EAW he will be required to give evidence in his own defence, failing which an adverse inference may be drawn by the court based upon his failure to give such evidence if the trial court were satisfied that the case against him was sufficiently strong to require an answer from Mr. Farrell, and that this is contrary to his constitutional right to a fair trial in due course of law pursuant to the provisions of Article 38 of Bunreacht na hÉireann.

6. It is the respondents' belief that evidence taken by the Gardaí when interviewing the respondents will be used by the prosecuting authorities in Northern Ireland if the respondents are surrendered for trial there. Solicitors acting on behalf of the respondents sought information arising from their detention, which requests were refused. Each of the respondents then issued judicial review proceedings against the applicant seeking Orders for mandamus against the applicant requiring disclosure of the information requested. That application was dismissed in each case by decisions of Donnelly J. in this Court delivered on 11th February, 2019. Each of the respondents then appealed those decisions, but their appeals were dismissed by the Court of Appeal (Kennedy J.) in a decision handed down on 1st November, 2019. In their decisions, both Donnelly J. in the High Court and Kennedy J. in the Court of Appeal observed that provision is made in the Rules of the Superior Courts for discovery in European Arrest Warrant cases, where appropriate. I should add that the materials concerned were transmitted by the Gardaí to the Police Service of Northern Ireland in the course of the judicial review proceedings.

7. On 19th November, 2019, a motion seeking such discovery was issued on behalf of Mr. Farrell pursuant to Order 98 of the Rules of the Superior Court in the following terms:-

> *"directing the applicant and/or the Superintendent of Milford Garda Station to make discovery of details of any samples taken or items seized from the Respondent following his arrest on 18th June 2015, copies of any statements made or taken in the course of the investigation, copies of any memoranda of interview, copies of any audio visual recordings made in the course of his detention or any other documents or materials this Honourable Court my (sic) deem appropriate to include and as set out in the letter seeking voluntary discovery on behalf of the Respondent dated 11th November 2019."*

That motion was grounded upon an affidavit of Michael Finucane, a solicitor, dated 18th November, 2019, wherein he exhibits a letter letter of 11th November, 2019, in which he requested voluntary discovery of the same material.

8. Additionally, reliance is placed by Mr. Farrell upon s. 56 of the Criminal Justice Act 2007, subs. 2, which provides:-

> *"A recording referred to subsection (1) of the questioning of a person shall not be given to the person by the Garda Síochána except in accordance with a direction or order of a court made under that subsection or otherwise and Regulation 16 of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (S.I. 74/1997) is hereby revoked."*

9. The letter then requested the applicant to consent to the making of an Order in directing the provision of DVDs made of the interviews between Gardaí and Mr. Farrell.

10. The letter goes on to state that the material requested is needed in order to establish that the rights of Mr. Farrell and the protections provided by law pursuant to the provisions of the Offences Against the State Act, 1939 and the Offences Against the State

(Amendment) Act, 1998 have been strictly observed during the course of his detention pursuant to s. 30 of the Offences Against the State Act at Milford Garda Station in June 2015. The letter then goes on to state:-

> *"This request is made in order to establish that if surrendered to Northern Ireland to face the charges recited on the European Arrest Warrant, it is likely that the nonjury court before which he will be tried will draw inferences adverse to the respondent's defence arising from the contents of the said interviews and from the respondent's exercise of his right to silence either at interview, at trial or both."*

11. In his affidavit grounding this application, Mr. Michael Finucane, solicitor, repeats the reasons given above for requesting copies of documentation and DVDs of interview, and adds that these items are required in order to ascertain that the respondent's constitutional right to silence was observed in the course of his detention and that any exception to that right either in this jurisdiction or in the requesting State, has also been the subject of an adequate warning that an inference could be drawn from the respondent's failure to answer material questions put to him in the course of his being interviewed. It is further averred by Mr. Finucane that where additional adverse inferences may be drawn at trial in Northern Ireland upon the respondent exercising his right to silence that the respondent should have been warned of that possibility during the interviews conducted by the Gardaí.

12. Mr. Finucane then proceeds to refer to the trial of a Mr. Sean McVeigh who has already been tried in Northern Ireland in connection with the same offences. He exhibits the decision of the Judge who heard the case which, he submits, clearly demonstrates that the court may draw inferences from the failure on the part of a defendant to give evidence in his own defence. Mr. Finucane concludes by averring that if surrendered to Northern Ireland, the constitutional right of the respondent, Mr. Farrell, to a fair trial pursuant to Article 38 of the Constitution of Ireland will be infringed significantly.

13. In the case of Mr. Maguire, a motion for discovery issued on the 21st November, 2019, seeking discovery in general terms. The motion is grounded on an affidavit of his solicitor, namely Mr. Robert Purcell of M.E. Hanahoe & Co. Solicitors dated 21st November, 2019. He avers, at para. 5 of his affidavit that:-

> *"[I]f the evidence to be adduced at the respondent's trial in Northern Ireland was procured by Gardaí in breach of his constitutional rights his surrender is statutorily prohibited and it is imperative that he afforded an opportunity to defend and vindicate his rights in this jurisdiction because he cannot successfully raise constitutional violations before the Courts of Northern Ireland. I believe the only courts that can protect his constitutional rights are courts established in this State."*

Later, at para. 12 of his affidavit he states that he believes that the material requested is essential for the fair disposal of the surrender proceedings in circumstances where his surrender is statutorily prohibited under s. 37 of the Act of 2003 if such surrender would

represent a breach of any provision of the Constitution. The material requested is substantially the same as that sought by Mr. Farrell.

14. Order 98 of the Rules of the Superior Court makes express provision for discovery of documents under the Act of 2003. Order 98(8) rules (1) – (3) provide as follows:-

(1) A party to proceedings under the 2003 Act may apply to the Court on notice for an Order directing any other party or other person to make discovery of the documents which are or have been in his possession or power, relating to any matter in question therein.

(2) On an application made under sub rule 1, the Court may, on such terms as it thinks fit, order that the party or other person from whom discovery is sought shall deliver to the opposite party, a list of the documents which are or have been, in his possession, custody or power, relating to the matters in question in such proceedings, or to such matters in question as are specified in the Court's Order.

(3) An Order shall not be made under the Rule if and so far as the Court shall be of the opinion that it is not necessary either for disclosing fairly of the cause or matter or for saving costs.

Submissions

15. Counsel for each of the respondents submits that the material sought by these applications arise out of the pleas made by each of the respondents in opposition to the applications for their surrender, and that material is, in the circumstances of these cases, reasonable and necessary for the proper disposal of the applications. The respondents' constitutional rights will not be protected at trial in Northern Ireland, and in the unusual circumstances of these cases, where evidence has been obtained by An Garda Síochána and transmitted to authorities in Northern Ireland, and is likely to be relied upon by those authorities in the prosecutions of the respondents, it is necessary and incumbent on this Court to ensure that that evidence was seized in accordance with law.

16. While the respondents acknowledge that particulars of the alleged violations of their constitutional rights have not been pleaded in their respective points of objection, this is only because they have not had an opportunity to examine the evidence disclosure of which they seek by these applications. It is argued that they are in a *"chicken and egg situation".*

17. It is further argued on their behalf that while it would have been open to the authorities in this jurisdiction to prosecute the respondents for the offences alleged against them in Northern Ireland, the authorities here have declined to do so. However, if the respondents were put on trial for the same offences in this jurisdiction, they would automatically be entitled to receive the material which they now seek by these applications. They also rely on s. 56(2) of the Criminal Justice Act 2007 and seek specific orders under that section relating to the video evidence of their interviews made by the Gardaí.

18. The respondents also seek to rely upon the fact that it is apparent from the trial of Mr. McVeigh that there is every risk that at their trials in Northern Ireland, inferences may be drawn from their silence should they choose to exercise their right to silence and not respond to evidence which may be tendered against them. Counsel for the respondents submitted that the fact that such inferences may be drawn under the law in Northern Ireland is something that should have been drawn to the attention of the respondents at interview, and this is something they will wish to examine through the videos made of the respondents' interviews.

19. Counsel for the applicant, on the other hand, argues that, so far as the last line of argument of the respondents is concerned, this is a matter that arises properly at the hearing of the applications for the surrender of the respondents and not on an application by the respondents for discovery of documents. That is to say, the question as to whether or not inferences may be drawn from any right to silence which the respondents may exercise, if surrendered to Northern Ireland, and whether or not the drawing of such inferences is a matter which constitutes a violation of their constitutional rights, is a question to be determined at the hearing of the application for their surrender, and has nothing at all to do with an application for discovery of documentation.

20. Counsel for the applicant submits that the respondents have failed to particularise the alleged breaches of their constitutional rights and as a result, there is no linkage between the material which the respondents seek by these applications, and the alleged violations. Accordingly, it cannot be said that the material the subject of the motions for discovery is necessary and reasonable for the determination of the substantive proceedings.

21. Moreover, a failure by the respondents to particularise the alleged violations of their constitutional rights must be seen against the background where one of the respondents, Mr. Farrell, had a solicitor with him throughout his interview by the Gardaí, and the other, Mr. McGuire, was informed of his right to have a solicitor with him, but choose to proceed with the interview without a solicitor. Neither of the respondents has advanced any reason at all as to why they claim that the interviews of them were conducted by the Gardaí unlawfully or in violation of their constitutional rights. In those circumstances they are not entitled to succeed with these applications.

22. Furthermore, as the decision of the Court of Appeal makes clear, any party wishing to assert that his or her surrender should be refused on the grounds of a violation of his or her Convention or constitutional rights, must advance cogent evidence to demonstrate that there are substantial grounds to believe that the respondent, if requested, would be subject to a real risk of a violation of his or her Convention or constitutional rights. It follows that any application for discovery, in order to succeed, must be linked to arguments founded on cogent evidence, and particularised accordingly, and not based upon mere assertion.

23. Finally, counsel for the applicant submits that, as was made clear by both the judgments of the High Court and the Court of Appeal in the judicial review applications brought by the respondents, the scheme for extradition created by the Framework Decision

2002/584/JHA of 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26th February, 2009 (together "*the Framework Decision*") and implemented in this jurisdiction by the Act of 2003, envisages applications for surrender being dealt with expeditiously. The applications for surrender of the respondents do not constitute the trial of a matter in respect of which surrender is required. It is submitted that the respondents, by these applications for discovery, are not only seeking to delay matters, but are seeking to have a trial within trial of the evidence that will be tendered against them in the prosecutions they face in Northern Ireland. The lawfulness of that evidence and the manner in which it was obtained is, it is submitted, a matter to be addressed at the trial of the respondents in Northern Ireland and not by way of any sort of preliminary trial in this jurisdiction.

Decision

24. There are two striking features to these applications. The first is that no allegation of any kind had been made that the evidence gathered by the Gardaí from the respondents was gathered in violation of their constitutional rights. While it is fully appreciated that it is more difficult to do this without sight of the evidence, nonetheless one of the respondents was attended by a solicitor at interview, and it has not been suggested that either of the respondents suffer from any incapacity such as would inhibit them from giving clear instructions to their solicitors as to what happened during the course of the interviews or at any time when evidence was taken from them. It is not unrealistic to expect that if such instructions disclosed any violation of their constitutional rights, such violation would have been relied upon by one or other or both of the respondents in support of one, other or both of these applications.

25. Secondly, aside from the point about the drawing of inferences from the silence of accused persons it has not been argued that the respondents will not obtain a fair trial in Northern Ireland. While it has been argued that they will be unable to rely on Bunreacht Na hÉireann at that trial, which is of course correct, it is significant that the respondents have not pleaded or argued that the rights that they will be entitled to at trial in Northern Ireland are any less than those guaranteed to them by Bunreacht na hÉireann, in particular as regards the gathering and admissibility of evidence. Nor has it been suggested that the respondents will not be entitled to the materials sought after charges are proffered in Northern Ireland (if they are surrendered).

26. I do not accept that the respondents are in a "*chicken and egg situation*". This argument could be advanced in many discovery applications to circumvent the requirement to link the documents or other materials sought to the issues raised by the pleadings. A mere assertion of the most general kind that a right or rights will be violated is not enough to establish that material sought to be discovered is reasonable and necessary for a determination of the substantive hearing. Something more specific is required, otherwise the request amounts to a fishing expedition. I consider that to be the case in relation to these applications.

27. While it has been argued that the applicant has failed to put forward any reason why these requests have been refused, that is not correct. The applicant has done so in making the point that the scheme of the European Arrest Warrant is one that is intended to operate with efficient expedition. While in doing so, it is the duty of the Court to ensure that the rights of the persons whose surrender is sought are protected in accordance with both the Framework Decision and the Act of 2003, the courts must also ensure that the efficient dispatch of these applications is not hampered by unnecessary applications for discovery, or by encouraging an examination of evidence which is more properly the function of the court where the trial is to take place. It must be borne in mind that under the scheme of the Framework Decision, there is an obligation on the courts in the requested State to have trust and confidence in the authorities and the courts of the requesting State that the rights of the person whose surrender is requested will be fully respected and upheld.

28. To grant the applications of the respondents would be to treat differently applications for surrender where the evidence, or some of the evidence relied upon by the prosecuting authorities in the requesting State has been gathered in this jurisdiction, and applications for surrender where none of the evidence has been gathered in this State. This could hardly be correct. The mere coincidence that evidence has been gathered in this State can hardly of itself constitute a ground for ordering discovery of that evidence any more than the Court would be entitled to make a request of the requesting State to see the evidence relied upon by the Prosecutor in that State, and to consider the circumstances in which that evidence was obtained, prior to making a decision on surrender. This decision does not preclude persons whose surrender is sought from seeking discovery in appropriate cases, but where they do they must provide a link between the factual background, the pleadings and the right allegedly violated.

29. The applications for discovery are dismissed for these reasons. Similarly, I do not believe that any good reason has been advanced as to why the Court should make an order under s. 56(2) of the Criminal Justice Act 2007, and I reject that request also. Video recordings of interviews undertaken as part of the investigation process are not required for the purpose of determining the applications for the surrender of the respondents.