

THE HIGH COURT

[2021] IEHC 330
[2021 74 P]

CATHERINE GAFFNEY

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Tony O'Connor delivered this 28th day of April 2021

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Introduction

1. The plaintiff prisoner claims that there is an ouster of the Court's jurisdiction to grant bail by s. 27 (2) of the European Arrest Warrant Act 2003 ("2003 Act") in the temporary release circumstances which prevails for her and that the relevant subsection is invalid having regard to the provisions of the Constitution. There is no dispute about the ouster, but rather the central question is when the jurisdiction is ousted.

Background

2. On 25 April 2018, a European Arrest Warrant issued from Northern Ireland ("The EAW") seeking the surrender of the plaintiff for her prosecution in respect of attempted theft and obstruction of a police officer. Following the indorsement of the warrant in this jurisdiction, the plaintiff was arrested and brought to court where she was admitted to

bail. The committal application under s. 16 of the 2003 Act listed for 10 December 2018 did not proceed because the plaintiff had by then started to serve a sentence imposed by Dublin Circuit Criminal Court ("DCCC").

Surrender

3. On 5 February 2019, Donnelly J. ordered the surrender of the plaintiff pursuant to the EAW but postponed the surrender until the expiry of the sentence imposed by the DCCC in August 2019.

Further domestic sentence

4. The plaintiff was sentenced to a further three years' imprisonment by the DCCC for theft – related offences with an estimated release date of 21 June 2021.

First bail application

5. On 29 July 2020, Burns J. who had charge of the EAW list, refused the plaintiff's bail application due to s. 27 (2) of the 2003 Act because the plaintiff was still "required to serve" her domestic sentence.

Outlook women's programme

6. In 2020, the plaintiff was informed by the governor of the prison where she is placed that she would be a good candidate for a community return programme and more particularly, the "Outlook women's programme" which assists those having a history of addiction to reintegrate into the community with structured support.

Difficulty posed by the EAW

7. The plaintiff's solicitor by letter dated 29 July 2020 asked the governor to confirm whether the court can grant bail for the temporary release required by the programme due to the operation of s. 27 of the 2003 Act.
8. The governor replied by letter dated 27 August 2020: -

"It is my understanding that a domestic sentence will not expire, terminate or otherwise cease to exist simply because the person has been granted temporary release. In cases where temporary release is approved, the sentence is still being served by the person, albeit not in a custodial setting".

The governor clarified that practical plans to release the plaintiff into the community could not be progressed because she had to remain in custody pursuant to the EAW.

Second bail application

9. Following receipt of another letter from the governor, the plaintiff applied unsuccessfully to Burns J. on 29 September 2020 for bail. The learned judge said that the plaintiff was still "required to serve" her domestic sentence.

Relisting of bail application

10. On 17 November 2020 the plaintiff's bail application was relisted before Burns J. so that the parties could address the effect of the Supreme Court judgment in *Butenas v. the Governor of Cloverhill Prison & Ors* [2008] 4 IR 189, [2008] IESC 9 ("*Butenas*"). Burns J., after refusing the renewed bail application, advised that he would hear another application if the plaintiff was granted temporary release.

The Constitutional challenge

11. The plenary summons leading to the trial before this Court was issued on the 7 January 2021 and pleadings closed with the reply dated the 1 April 2021 to the defence while written submissions were exchanged as directed in order to have an early hearing in April 2021.

Court of Appeal and bail application

12. Edwards J. on 15 January 2021 dismissed the plaintiff's appeal from the refusal to grant bail in an ex tempore judgment ([2021] IECA 21). The learned judge stated: -

- "9. In the appeal before us, counsel for the [plaintiff] has again urged that application of the *Butenas* approach would allow for an interpretation that the inherent jurisdiction of the High Court to grant bail in circumstances such as the [plaintiff's] has not been ousted by s. 27. In his submission, the wording that had been considered in the *Butenas* case, and yet which was found not to have ousted jurisdiction, was even more explicit and unambiguous than the wording in the section presently under consideration.
10. We respectfully disagree with counsel for the plaintiff. As has been pointed out s. 16 (4) did not explicitly refer to bail, whereas s. 27 does do so. . .".

James Casey decision

13. The defendants' solicitor by letter dated 9 February 2021 advised the plaintiff's solicitors that Burns J. had ruled in an application by a James Casey that s. 27 (2) of the 2003 Act did not apply where temporary release had been granted.

Terms for release

14. In anticipation of the remission of sentence due to the plaintiff, the directorate of the Prison Service, by letter dated 25 February 2021, advised that as the plaintiff is suitable for the community return programme: -
 - "This means that if your client achieves bail on the [EAW] she will be released from the prison on reviewable temporary release in order to engage in unpaid work on a community service site in the Dublin area".

Interpretation for plaintiff

15. The solicitors for the plaintiff then set out in a letter dated 12 March 2021 their view that temporary release had not been granted and that even if the plaintiff was granted

temporary release, she would still be required to “serve a sentence” which would mean that a further bail application would not succeed.

Position of defendants

16. By reply dated 15 March 2021, the solicitor for the defendants clarified the view of the defendants that the ouster of jurisdiction no longer applied because the plaintiff is no longer “required to serve” her domestic sentence within the meaning of s. 27 (2) of the 2003 Act.

The law

Butenas

17. The Supreme Court in *Butenas v. Governor of Cloverhill Prison* [2008] 4 IR 189, [2008] IESC 9, was only concerned with s. 16 (4) of the 2003 Act which requires at the surrender direction stage, to remand the subject in custody pending surrender. The Supreme Court dismissed the appeal from the High Court order (Peart J.) which had refused to grant a declaration that s. 16 (4) was unconstitutional because it precluded the release on bail pending surrender. The judgment outlined the historic jurisdiction of the High Court to grant bail and found that the Oireachtas had to explicitly and unambiguously oust the jurisdiction of the High Court, which it had not done. It is useful to quote para. 58 to explain how the Oireachtas could oust such jurisdiction: -

“It might be added that it has always been acknowledged that there are certain, strictly limited, circumstances in which the State is entitled to make provision for the detention of a person, not convicted of a criminal offence, where bail is not an option. These for example include the detention of persons in connection with the investigation of certain criminal offences pursuant to s. 4 of the Criminal Justice Act 1984, the detention of persons under the Mental Treatment Act 1945 and now the Mental Health Act 2001, the detention of a person who may be a source of infection from an infectious disease under s. 38(1) of the Health Act, 1947, and the detention of certain immigrants under the Illegal Immigrants (Trafficking) Act 1999. It is not inconceivable that circumstances could arise in which the Oireachtas would judge it essential to provide for some limited period of detention without bail as being necessary to ensure that persons were available for surrender to a requesting State in extradition matters. As the Court has found, this is not what the Oireachtas has sought to do in this instance and the issue of proportionality relied upon by the respondents in the proceedings does not arise in the light of the Court’s conclusions”.

Temporary release

18. Temporary release differs from remission of a sentence which effectively ends a sentence without condition. The power to grant temporary release was given to the defendant Minister by the Criminal Justice Act 1960 as has been amended over time (“*the 1960 Act*”). Suffice to say that temporary release may occur at any stage of a sentence; it may be for a few days with a return to prison. It may also mean that conditions can be applied subject to the right to comply with fair procedures in relation to the application of those

conditions. In the plaintiff's case the proposed temporary release means that the plaintiff will not have to return to prison on foot of the domestic sentence because the Outlook women's programme will go beyond her release date in June 2021.

S 27(2) and temporary release

19. The interpretation of s. 27 (2) of the 2003 Act for the plaintiff is to the effect that the plaintiff is still required to serve her sentence within the meaning of s. 27 (2) (ii) of the 2003 Act even if the assurance of temporary release for the remainder of her sentence is realised. Defence counsel points to an anomaly created by that interpretation when one considers s. 18 (1) (c) of the 2003 Act that enables the High Court to postpone a surrender of a person with a term of imprisonment in the State. In other words, it is submitted that a person with a life sentence who is released on licence by the Minister, could have his surrender permanently postponed under s. 18 (c) of the 2003 Act if the interpretation put forward by the plaintiff is adopted by the Court.

Power to grant temporary release

20. Section 2 (3) (b) of the 1960 Act provides that the Minister may not grant temporary release "Where the release of that person from prison is prohibited by or under any enactment whether passed before or after the passing of this Act . . .". The submission for the plaintiff that she cannot be granted temporary release is somewhat surprising when one considers that the proposed grant of temporary release will benefit the plaintiff. Why should the plaintiff undermine the Minister's intention to grant temporary release?

Discussion

21. The submission that counsel has an obligation to inform Burns J. of this provision is fine, but I cannot conclude that a judge hearing a further EAW bail application for the plaintiff in her present circumstances will deny bail because of the timing of the temporary release. The trial of these proceedings is unfortunate from the viewpoint of finality.
22. In short, it will remain open for a prisoner who is assured of temporary release like the plaintiff and is denied bail by reason of s. 27 (2) of the 2003 Act due to the anticipated application of s. 2 (3) (b) of the 1960 Act to litigate the constitutional issues which were broadly touched upon at the hearing of these proceedings.
23. The rule of judicial restraint dissuades me from embarking on a consideration of such issues mentioned by counsel for the plaintiff.
24. Resonating for the Court in this respect is the passage from Henchy J. in *Cahill v. Sutton* [1980] IR 269 at pp. 282 – 284 (as cited recently by Clarke C.J. at para. 7.10 in *Friends of the Irish Environment CLG v. the Government of Ireland & Ors.* [2020] 2 ILRM 23, [2020] IESC 49):

"This general, but not absolute, rule of judicial self-restraint has much to commend it. It ensures that normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first-hand

reality to what might otherwise be an abstract or hypothetical legal argument. The resulting decision of the court will be either the allowance or the rejection of the challenge insofar as it is based on the facts adduced. If the challenge succeeds, the impugned provision will be struck down. If it fails, it does not follow that a similar challenge raised later on a different set of facts will fail: see *Ryan v. the Attorney General* [1965] IR 294 at p. 353 of the report. In that way the flexibility and reach of the particular constitutional provision invoked are fully preserved and given necessary application.

. . .

There is also the hazard that if the courts were to accord citizens unrestricted access, regardless of qualification, for the purpose of getting legislative provisions invalidated on constitutional grounds, this important jurisdiction would be subject to abuse”.

Decision on interpretation of s. 27 (2)

25. Apart from acknowledging the “double construction” rule and the presumption of constitutionality for the 2003 Act, there is an air of unreality to some of the submissions for the plaintiff.
26. Firstly, I am not satisfied that Burns J. would criticise or question the plaintiff for renewing her bail application given the contents of the letter dated 25 February 2021 from the Directorate of the Prison Service which postdates her earlier bail application to Burns J.
27. Further, I fail to understand how the positions taken in the James Casey application (for which a 55-page transcript of a hearing on 16 December 2020 and a 27-page transcript of another hearing on 21 December 2020 have been exhibited), can be considered by me when interpreting s. 27 (2) (iii) of the 2003 Act. Different parties and counsel appeared in that application. In addition, I am not privy to the understandings which may have arisen in what may or may not be similar circumstances to those of the plaintiff.
28. More significantly, it appears that the plaintiff will not be serving the remainder of her outstanding term of imprisonment if the letter of 25 February 2021 is followed up by way of a bail application. The anomaly arising from the interpretation advanced by the plaintiff and described by counsel for the defendants is apt indeed.
29. The phrase “required to serve” in s. 27 (2) (iii) of the 2003 Act is overlooked in the interpretation advanced for the plaintiff. It also glosses over Article 12 of Council framework Decision (EU) 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States O.J. L190/1 18.7.2002 which provides as follows:

“When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person

should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding”.

30. In simple terms, the plaintiff will not be required to serve the remainder of her term of imprisonment if she succeeds in obtaining bail under the 2003 Act to allow her to complete the Outlook women’s programme.
31. The phrase “unduly formalistic interpretation” used by counsel for the defendants in respect of the interpretation advanced on behalf of the plaintiff, commends itself to the Court.

Ancillary submissions

32. As the proceedings and the hearing before this Court evolved, the original claims and submissions were refined without seeking to affect the plaintiff’s outstanding appeal to the Supreme Court from the judgment of Edwards J. in the Court of Appeal. This Court having found in favour of the defendants’ interpretation on the intended application of s. 27 (2) of the 2003 Act concludes that it is not necessary or desirable to adjudicate on these other submissions. The rule of judicial self-restraint is applied again.

Conclusion

33. In order to facilitate the parties this Court refused the declaration sought on the 15 April 2021 with a summary of its reasons and committed to deliver this more elaborate written judgment. The plaintiff has not succeeded and accordingly it follows that the plaintiff’s claim should be dismissed and the defendants are entitled to their costs. If, however, either party wishes to seek some different order to that proposed they should indicate the alternative orders sought to the other side and registrar within 21 days of their receipt of the electronic delivery of this judgment. A hearing will then be scheduled. If no such indication is received within the 21 – day period, the order of the Court dismissing the plaintiff’s claim including the proposed costs order will be drawn and perfected.

Solicitors for the plaintiff: Fahy Bambury.

Solicitor for the defendants: Chief State Solicitor.

Counsel for the plaintiff: Ronan Munro SC and Kate Egan.

Counsel for the defendants: Patrick McGrath SC and Jane Horgan-Jones.