An Chúirt Uachtarach

The Supreme Court

MacMenamin J
Dunne J
Charleton J
Baker J
Hogan J

Supreme Court appeal number: S:AP:IE:2021:000093
[2022] IESC 21
Court of Appeal record number: 2020/144
[2021] IECA 219
High Court record number 2016/203 EXT
[2020] IEHC 344

Between

The Minister for Justice and Equality
Applicant/Respondent

- and -

Liam Campbell
Respondent/Appellant

Judgment of Mr Justice Peter Charleton delivered on Monday May 9th 2022

1. These brief comments concur with the principal judgment of Baker J and are offered in support of her analysis. Extradition, or in European law terms, surrender for criminal proceedings or imprisonment following a trial and absconding within the European Union, occurs when a requesting state seeks to have returned to its territory a suspect against whom proceedings are contemplated or who has already been convicted and who has escaped serving the relevant sentence. Here, the concern is not with a sentenced offender who has absconded but, rather, the degree to which proceedings must have advanced before our courts may surrender a person suspected of participating in a crime. Traditionally, extradition has only been for trial and not to enable a requesting state to question a person suspected of an offence. A person cannot be extradited for the purpose of facing an examination by a magistrate whereby, as in many civil law systems in Europe, those involved as witnesses or as persons of interest may be examined in order to determine if there is a sufficient case for trial and to prepare the dossier for the court of trial which will form the basis of the process whereby an accused may be convicted or acquitted. Under European law we refer to the 'issuing state', which under treaties of extradition would have been the 'requesting state'; of itself implying almost automatic compliance in the country to which the issued warrant is addressed.

Extradition and surrender

2. Ordinarily, extradition, as a state to state arrangement, is a matter of political action where the function of the courts is as to proof of technical compliance with the underlying treaty or with the Extradition Act 1965. Hence, s 15(1) of the 1965 Act enables the Minister for Justice and Equality to decline to extradite a suspect to the requesting state even though the courts have enabled extradition and no prosecution in Ireland against that person is to proceed; *Marques v Minister for Justice and Equality* [2019] IESC 16. That, however, is not the legal basis of the European Arrest Warrant, introduced through mutual agreement among European countries and formulated as a justice measure of mutual obligations in 2002 as 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States and statements made by certain Member States on the adoption of the Framework Decision, now in amended form in Official Journal L 190, 18/07/2002 P 0001 – 0020. That legal basis is not that of political action in handing over a suspect. Rather, in European law, surrender is mandatory if the conditions in law are met. That obligation is necessitated by membership of the European Union and participation in the scheme of surrender as promulgated.

3. Once the conditions of minimum seriousness and double criminality are met, (some crimes such as child pornography, terrorism and dealing in munitions bypassing that rule) the suspect must be surrendered to that other requesting European state. Article 1.1 provides that an EAW is "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order." While Article 1.3 provides that the obligation to surrender does not modify "fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union", the obligation on receipt is unequivocal in Article 1.2:

> 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.

4. That obligation is precisely enacted in s 10 of the European Arrest Warrant Act 2003, as amended, and is in similarly unequivocal language:

> Where a judicial authority in an issuing state issues a relevant arrest warrant in respect of a person —
>
> (a) against whom that state intends to bring proceedings for an offence to which the relevant arrest warrant relates,
> (b) who is the subject of proceedings in that state for an offence in that state to which the relevant arrest warrant relates,
> (c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the relevant arrest warrant relates, or
> (d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the relevant arrest warrant relates,
>
> that person shall, subject to and in accordance with the provisions of this Act, be arrested and surrendered to the issuing state.

5. It is wholly exceptional for the High Court to refuse surrender on foot of an EAW. While akin to extradition, the entire point of the Framework Decision is to enable surrender as between states which enjoy, as between themselves, a sufficient degree of confidence in each other's legal systems that transfer for trial becomes a swift and routine process; joined cases C-404/15 and C-659/15 [2016] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen*. As of December 2001, Ireland made a statement that this jurisdiction would "in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the purpose of bringing that person to trial" or to execute a custodial sentence. Melding several disparate legal systems into harmonised functioning, even in an area as straightforward as the surrender of suspects, has, however, proven to be fertile soil for contentions that the transfer as between countries infringes rights of the suspect. Sometimes, what is imbedded as a necessary element of the fair disposal of an accusation against a person in one legal system may be presented as a violation of rights that are elsewhere assumed to be inviolable. And that has been the argument in this case, as in so many before.

6. Reading s 10, the first two paragraphs, on basic statutory construction principles that every word and every subsection and section must be presumed there for a purpose, there are two different situations: that of surrender because a requesting state "intends to bring proceedings for an offence to which the relevant arrest warrant relates"; and that of surrender of a suspect who is, in apparent contrast, merely a person "who is the subject of proceedings in that state for an offence in that state to which the relevant arrest warrant relates". A flat contradiction is then to be found in s 21A which limits surrender to the first situation by providing that "the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state" though, once a judicial request for surrender has been issued, it is to "be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved." Section 21A was not part of the 2005 Act as promulgated but was introduced in March 2005 by s 79 of the Criminal Justice (Terrorist Offences) Act 2005. Reading the provisions in the context of each other, a suspect may not be surrendered unless the issuing state intends to bring proceedings for an offence upon a decision to charge and try him or her for that offence.

7. It is an established principle of European Union law, that, in order for Directives and Framework Decisions to be given full effect, national bodies and courts must interpret domestic law in the light of these provisions. The principle of conformity of interpretation requires that domestic law be interpreted in such a way so as to give effect to, and not undermine, the goals and objectives of European instruments. It was applied in the joined cases of C-397/01 and C-403/01 *Pfeiffer and others v Deutsches Rotes Kreuzm Kresverband Waldshut eV* [2004] ECR 2004 I-08835, where the ECJ, in response to a preliminary reference from a German court, stated that German labour law had to be read in conformity with the provisions of the Working Time Directive, consolidated into Directive 2003/88/EC. The Directive set weekly working time at a maximum of 48 hours on average, while German law allowed more than this; emergency workers were being expected to work between 49 and 54 hours per week. The CJEU noted that this was capable of a conforming interpretation.

8. The CJEU however has recognised that there are limits to the requirement of conforming interpretation. Relevant here is the restriction that national law cannot be interpreted in such a way so that it is rendered *contra legem*. This was the case in Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR 2005 I-05285 whereby, despite the binding nature of the Framework Decision and the requirement that national authorities give effect to its provisions through interpretation, national law cannot be interpreted *contra legem*. National law, therefore, cannot be interpreted in such a way that goes against its clear wording or meaning, simply because this would be in conformity with the provisions of EU law.

9. The respondents in this case have contended that Article 21A of the 2003 Act can be read in conformity with the relevant Framework Decision which enshrines the goal of surrender between contracting states. This would go a step beyond what is capable under the principle, and would render the interpretation of national law *contra legem*. Article 21A is a domestic provision clearly at odds with the objectives of the Framework Decision; it cannot therefore be interpreted in the light of it.

10. The stark contrast between the declaration by Ireland in December 2001 of the implementation of our obligations only "for the purpose of bringing that person to trial", similar to what the Framework Decision requires, which is surrender "for the purposes of conducting a criminal prosecution" and s 21A allowing only surrender where the issuing state intends to bring proceedings for an offence upon a decision to charge and to try him or her for that crime, is apparent. Our obligation under the European treaties is clearly wider than the constricting limitation introduced by our domestic law.

11. But, it is that domestic law which requires construction in this appeal.

Preliminary measures

12. In our system, being put on trial for a criminal offence, being put in charge of the jury sworn to render a true verdict in accordance with the evidence, the process of testing evidence, of consequent advocacy and the final issuance of a simple decision of guilty or not guilty is a stressful process. Historically, the law provided prior procedures whereby that public event might not come to pass even though the authorities had determined that there was a sufficient case. Consulting Blackstone, *Commentaries on the Laws of England,* Book the Fourth, Public Wrongs (23rd edition, London, 1854), brings the seriousness of the trial process into focus. An indictment was historically "a written accusation of one or more persons of a crime or misdemeanour, preferred to, and presented upon oath by, a grand jury"; p 400. Moving to 1922, the date of the official return of independence, it is noted that the then current edition of *Archbold's Pleading, Evidence and Practice in Criminal Cases* (26th edition, London, 1922) p 71-72 stated that grand juries had four functions: of presentment of indictments made "of their own knowledge and information without the intervention of any prosecutor or the examination of any witnesses"; of voluntary bills, meaning accusations made by those people who wished a serious charge to be brought; of bill after a preliminary examination by magistrate; and of bills sent after a magistrates enquiry but which were vexatious. The editors note the continuing power of any person to bring an accusation before a grand jury, which could, without notice to the accused, prefer a bill of indictment, thereby undermining his or her character and thus putting him or her on trial.

13. Historically, the grand jury, traditionally twice the size of a trial or petty jury, comprised male figures of property in an area who met to enquire into what was brought before them or which occurred of their own supposed knowledge of crime in that locality; "free and loyal men who have no suit against anyone, and are not sued themselves, nor have evil fame for breaking he peace or for the death of a man or other misdeed", Bracton, *On the Laws and Customs of England*, vol 2 p 235. Upon enquiry by them, indictments could be laid; that would be a *billa vera* while rejection was termed an *ignoramus*, meaning that the grand jury had considered an accusation and had found no sufficient basis for returning a bill; see generally Catherine Naylor, 'The Grand Jury – A Bulwark Against Tyranny or an Instrument of Oppression' [2011] ILT 183. And while this essentially private process could be subject to abuse and was continually reformed by legislation, *Archbold* p 67-78, no bill of indictment was supposed to have been laid without what in modern terms might be called reasonable cause. The standard in 1841 was described as "sufficient presumptive evidence" or "a strong and pregnant presumption"; p 9 of Naylor. For a person to induce a grand jury to prefer a bill of indictment falsely might render them liable to at least tortious liability. Hence, RFV Heuston, *Salmond on the Law of Torts* (17th edition, 1977, London) p 412 summarises: "It is the wrong known as malicious prosecution to institute criminal proceedings against anyone if the prosecution is inspired by malice and is destitute of any reasonable cause." Disturbing what is not now a current protection in law uncovers the idea that from a quasi-prosecutorial body, grand juries ensured some degree of fundamental protection against abuse that grew over time.

14. This is reflected in the Fifth Amendment of the Constitution of the United States which uses the institution of the grand jury as a filter against not only malicious prosecutions but also sets the standard whereby trials should only take place on the basis of a minimum standard:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15. If the Government have substantial exculpatory evidence, even though the accused is not present, this must be presented for the consideration of the grand jury; generally see Kevin K Washburn, 'Restoring the Grand Jury' (2008) 76 Fordham L Rev 2333. Hence, a grand jury acts as "a kind of buffer or referee between the Government and the people"; *United States v Williams* (1992) 504 U.S 36, 47. In a more than residual way, this protection against prosecution save where there is cause remains with Irish criminal procedure. Grand juries in Ireland came to be superseded by a judicial examination prior to a return for trial being made; generally see Peter Osborne, 'The Preliminary Examination of Indictable Offences' [1995] Ir Crim LJ 5(1) 1. As a matter of reform, the secret nature of grand jury proceedings and their consideration of only one side led to judicial pre-trial examination by magistrates through the Indictable Offences (Ireland) Act 1849 and the Petty Sessions (Ireland) Act 1851. By the Courts of Justice Act 1924 s 27, grand juries were abolished. But preliminary examination continued under that statute and the right of an accused to have a judge examine the file to enquire was there a

sufficient case endured and became part of the right of trial in due course of law under Article 38 of the Constitution; *The People (Attorney General) v Boggan* [1958] IR 67, see Ó Dálaigh CJ at 88.

16. Hence, the Criminal Procedure Act 1967 continued the initiation of all indictable criminal proceedings before the District Court and for an examination by the District Judge of the book of evidence, the taking of any depositions on oath, if requested, at the behest of the prosecution or of the defence, and that there should be a return for trial, to which the accused could consent, or which the accused could contest on the basis that no case had been made out on that enquiry. Under the amendment introduced by the Criminal Procedure Act 1999 s 9, motivated perhaps by the delays inherent in this procedure, s 4A of the 1967 Act requires the District Court to return the accused for trial on indictment, but this return is subject to a continued right to request a preliminary examination. Hence, the accused under s 4E (1) at "any time after the accused is sent forward for trial … may apply to the trial court to dismiss one or more of the charges against the accused." That must be done if, under s 4E (4), "it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates".

17. In addition, there is another protection. Section 6(1) of the Prosecution of Offences Act 1974 forbids communications with the Director of Public Prosecutions as to the execution of the office of prosecution in the name of the people of Ireland under Article 30.3 of the Constitution "for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings." But, that does not apply where, by s 6(2), to "communications made by a person who is a defendant or a complainant in criminal proceedings or believes that he is likely to be a defendant in criminal proceedings, or" a social worker or family member, as so defined. What all of this goes to demonstrate is that there can be an intention to charge, there can be a charge, there can be a return for trial, there can be an indictment and yet the process of trial is not rendered inevitable.

Language

18. What may be as challenging as the interaction as between radically different criminal systems as to their procedures is the communication of concepts through translation from one language to another; here Lithuanian to English. Hence, in an admirably detailed warrant, participation is defined by the Lithuanian authorities as including conspiracy to commit an offence, smuggling is unimpeachably defined in terms familiar to the common law, terrorism as "seeking to make an explosion" or as putting "explosives" in a public place, and possession of munitions in very similar terms to our own Firearms Act 1964 as amended. In describing what happened, reference is made to conspiracy and to obtaining munitions and to events whereby the requested person made arrangements for obtaining "a big quantity of firearms, ammunition, explosive devices and substances (automatic riffles, sniper guns, projectors, detonators, timers, trotyl" from others and with others named. This is understood as rifles, as missiles or projectiles, and as TNT explosive.

19. In a not dissimilar way, having been asked all the right questions in an expert way by John H Davis of the Central Authority, the Vilnius Regional Prosecutor's Office by letter of 10 May 2017, close to five years ago now in what is supposed to be a speedy procedure, one smoothly running on agreed rails of legal certainty, stated:

- that the prosecutor had "a sufficient amount of data";
- that this allows for a conclusion that "there is a high probability that a Bill of Indictment would be drawn up against Liam Campbell";
- that a trial would proceed only on "data obtained in accordance with the procedure prescribed by law";
- that Liam Campbell would be, as a procedure, given the chance to answer to the relevant data, in other words to provide any sufficient explanation whereby the prosecution might no longer appear necessary.

20. Seized upon here is the notion that it is, to use the argument advanced, only highly probable that there will be a prosecution. To deploy for this purpose the language of sections 10 and 21A of the 2003 Act, it is contended that Lithuania does not intend to bring proceedings for an offence upon a decision to try Liam Campbell for those offences.

Precedent

21. Leaving aside the commitment by Ireland in the Framework Decision, and in the statement of December 2001, to return those sought by an issuing state "for the purposes of conducting a criminal prosecution" and what is encompassed in that ample concept as our obligation in European law, and taking for the purpose of disposing of the argument the contention that there must be an intention to bring proceedings for an offence and to charge and try the requested person, this point is already decided. It is particularly important that what has been held to be the law should not be again debated, save on a sufficient basis, in the context of obligations in European law. Here, this Court is asked to overturn existing authority, namely, *Minister for Justice v Bailey* [2012] 4 IR 1 to the extent that that decision approves *Minister for Justice v Olsson* [2011] 1 IR 384. According to O'Donnell J in the latter, at [33], speaking for the entire Court, refusal is only possible when a court "is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued" since then "the warrant could not be for the purposes of conducting a criminal prosecution." The burden of proving that is on the accused under s 21A (2).

22. There may be a firm intention in this country, whereby the Gardaí have prepared a case, done an extensive investigation and the Director of Public Prosecutions has preferred a charge, to prosecute an individual. Still, that prosecution may be derailed by an application under s 4E of the 1967 Act or through the consideration of further material under s 6 of the 1974 Act; that does not mean that the test in s 21A and s 10 of the 2002 Act would not be met. It is. In this jurisdiction, the prosecution may enter a *nolle prosequi*, apparently an unassailable procedural step entirely within the province of the Director of Public Prosecutions, witnesses may die, the trial court may find such fundamental unfairness as to require the trial to be stopped, because of extreme delay or the destruction of genuinely vital evidence, or the judge may find before the trial starts that the offence is not supported by sufficient evidence. Hence, in this country, when a charge is preferred or intended, yes, it is highly probable that there will be a trial, but that can change for all kinds of legitimate reasons that are there for the protection of the accused and for the integrity of the system in serving victims of crime and the community. Furthermore, the 1967 Act, as amended, allows for further notices of additional evidence, even during the trial, and at common law where evidence emerges

on the defence case that could not reasonably have been anticipated, or otherwise in situations in the judge's discretion, the prosecuting side may move to rebuttal. The 1922 Archbold at p 206 states:

> Whenever evidence has been given by the defence introducing new matter which the crown could not foresee, counsel for the prosecution may be allowed to give evidence in reply to contradict it. The matter is one within the discretion of the judge at the trial …This discretion is not confined to cases where evidence has been given by the defence on matters which the crown could not foresee. … Where evidence in rebuttal is given, counsel for the defence is entitled to comment on the evidence so called. … Evidence may also be called to meet evidence of good character given for the defence.

23. Hence, it is wrong to hold up our system as radically differing from one where, as a matter of fairness, a decision having been made to prosecute and on the basis of sufficient evidence, further investigation may yield more relevant data, or the course of the trial or exigencies of proof may require additional material. The rule is that stated in *Olsson*: s 21A is met where a decision to charge and try is not contingent on a further investigation producing sufficient evidence; and that, in accordance with *Bailey*, on the state of domestic Irish law, in contrast to our European obligations which are clearly wider, the High Court cannot surrender on a warrant for the purpose of conducting an investigation into an offence. That is the precedent.

Overturning a precedent

24. In non-constitutional matters, a prior decision of the Supreme Court should be followed by that Court, and cannot be overturned by any lower court, unless it is demonstrably wrong and, furthermore, that it is in the interests of justice to depart from the previously held position. Hence, in *Mogul of Ireland Limited v Tipperary (NR) County Council* [1976] IR 260, this Court was asked to reconsider its previous decision in *Smith v Cavan and Monaghan County Councils* [1949] IR 322 but declined. Although not irrevocably bound by an earlier decision, *Attorney General v Ryan's Car Hire* [1965] IR 642, the Court should follow such a decision unless it was shown to be clearly wrong or incorrect, and moreover, the decision has not become "inveterate" or become the basis of a shared understanding of the law. As Henchy J stated at 272-273:

> A decision of the full Supreme Court (be it the pre-1961 or the post-1961 Court), given in a fully-argued case and on a consideration of all the relevant materials, should not normally be overruled merely because a later Court inclines to a different conclusion. Of course, if possible, error should not be reinforced by repetition or affirmation, and the desirability of achieving certainty, stability, and predictability should yield to the demands of justice. However, a balance has to be struck between rigidity and vacillation, and to achieve that balance the later Court must, at the least, be *clearly* of opinion that the earlier decision was erroneous. In *Attorney General v. Ryan's Car Hire Ltd.* the judgment of the Court gave examples of what it called exceptional cases, the decisions in which might be overruled if a later Court thought them to be clearly wrong. While it was made clear that the examples given were not intended to close the category of exceptional cases, it is implicit from the use in that judgment of expressions such as "convinced" and "for compelling reasons" and "clearly of opinion that the earlier decision was erroneous" that the mere fact that a later Court, particularly a

> majority of the members of a later Court, might prefer a different conclusion is not in itself sufficient to justify overruling the earlier decision. Even if the later Court is clearly of opinion that the earlier decision was wrong, it may decide in the interests of justice not to overrule it if it has become inveterate and if, in a widespread or fundamental way, people have acted on the basis of its correctness to such an extent that greater harm would result from overruling it than from allowing it to stand. In such cases the maxim *communis error facit jus* applies…

25. It is unnecessary to do no more than note in passing that in constitutional matters the risks inherent in the erroneous interpretation of the Constitution and the changing nature of the concepts inherent in the fundamental law may require an authority to be revisited; *Jordan v Minister for Children and Youth Affairs & Ors* [2015] 4 IR 232, 306, O'Donnell J]. There is no basis for overturning *Olsson* or *Bailey*. That standard is not met. Further, on the evidence, the accused has not demonstrated that the Lithuanian authorities require him as part of an investigation. Rather, as a matter of fairness, if his account is given as to any aspect of this affair, such as alibi contentions, that will become part of the judicial assessment whereby the trial decision may be undermined.

Result

26. In the result, the reasoning of Baker J is supported and the order proposed by her to surrender the person sought on the judicial warrant from Lithuania is adopted as correct through this concurrence.