[2024] IESC 40

AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2024:000047

S:AP:IE:2024:000048

S:AP:IE:2024:000049

[2024] IESC 40

O'Donnell CJ.

Dunne J.

Hogan J.

Collins J.

Donnelly J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

- and-

PATRICK SPARLING

Appellant

AND

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

-and-

DANIEL O'BRIEN

Appellant

AND

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

-and-

JAMES COFFEY

Appellant

Order for Reference to the Court of Justice of the European Union for a Preliminary Ruling pursuant to Article 267 TFEU dated the 31st day of July 2024

Subject Matter of the Dispute

1. The surrender of each of the above appellants is sought by the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to three related Trade and Co-Operation Arrest Warrants ("TCAW") in accordance with the provisions of Title VII of the Trade and Cooperation Agreement ("TCA"). On 6 December 2022, the three TCAWs were issued by the judicial authority sitting at Portsmouth Magistrates Court seeking the surrender of the appellants. All three warrants were endorsed for execution by the High Court (Naidoo J.) on 16 January 2023 pursuant to s. 13(2) of the European Arrest Warrant Act, 2003, as amended ("the 2003 Act"). The TCA warrants are attached to this Order of Referral at Appendix 1.

2. The appellants were subsequently arrested and brought before the High Court. All three appellants are now on bail pending the determination of these proceedings.

3. As set out in the TCAWs, the issuing judicial authority intends to prosecute each of the appellants for 39 fraud-type offences, alleged to have been committed by them in their capacity as joint owners and directors of the company 'Stanton Roofing and Building Limited'. In each instance of alleged fraudulent conduct detailed at Part (e) of the TCAW, the appellants are alleged to have falsely misrepresented the extent to which roof repairs and replacements were required, and to have carried out unnecessary remedial works for which they significantly overcharged the property owners concerned.

4. Each appellant objects to his surrender on the ground that surrender would violate the provisions of Article 625(2) TCA because they would be required to serve sentences of six months imprisonment for contempt of court in relation to breaches of a Restraint Order. These Restraint Orders were issued in March 2021 by Reading Crown Court under section 41 of the Proceeds of Crime Act, 2002 ("the 2002 Act"), to ensure that

the appellants' assets and those of Stanton Roofing and Building Limited would be available as compensation for the alleged injured parties in the event of convictions being returned. The orders prohibited the disposal of assets related to the assets of Stanton Roofing and Building Limited, the appellants' bank accounts and their motor vehicles. The Restraint Orders obliged the appellants to disclose and provide necessary details of all assets in or outside England and Wales. On 5 August 2021, Reading Crown Court (HH Judge Burgess KC) determined that each of the appellants had breached the terms of the restraint orders contrary to s. 41(7) of the 2002 Act.

5. The information about the sentences imposed for contempt of court is contained at Part (f) of each TCAW. Of particular note, each TCAW states: "Breach of the Restraint Order is not a criminal offence, thus cannot constitute an extradition offence and is therefore not included within the list of extradition offences. The finding by HHJ Burgess KC that the defendant breached the Restraint Order and thus committed contempt of court does not constitute conviction, hence this warrant remains an accusation warrant only".

6. The central issue that arises in this case is whether Article 625(2) prohibits the surrender of these appellants because a person who is surrendered "may not be prosecuted, sentenced or otherwise deprived of liberty for an offence committed prior to that person's surrender other than that for which the person was surrendered". The relevant provisions of Article 27 of the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA) ("the Framework Decision"), provides for the same principle in virtually identical wording.

7. Article 27 para 2 of the Framework Decision provides:

> "Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an

offence committed prior to his or her surrender other than that for which he or she was surrendered."

8. Article 625(2) of the TCA provides:

> "Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of liberty for an offence committed prior to that person's surrender other than that for which the person was surrendered."

The Relevant Provisions of National Law

9. The relevant provisions of national law applying to a TCAW are set out in the 2003 Act. The 2003 Act was enacted to give effect to the provisions of the Framework Decision and was amended to include surrender procedures between Ireland and the UK pursuant to the obligations under the TCA. Therefore, s. 22 of the 2003 Act, when enacted, gave effect to the "rule of specialty" provisions in Article 27 of the Framework Decision and now gives effect to Article 625.

10. Section 22(1) provides:

> "In this section, except where the context otherwise requires, "offence" means, in relation to a person to whom a relevant arrest warrant applies, an offence (other than an offence specified in the relevant arrest warrant in respect of which the person's surrender is ordered under this Act) under the law of the issuing state committed before the person's surrender, but shall not include an offence consisting, in whole, of acts or omission of which the offence specified in the European arrest warrant consists in whole or in part."

Section 22(2) provides:

"Subject to this section, the High Court shall refuse to surrender a person under this Act if it is satisfied that –

> *(a)* the law of the issuing state does not provide that a person who is surrendered to it pursuant to a relevant arrest warrant shall not be proceeded against, sentenced or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence, and
>
> *(b)* the person will be proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence."

The full provisions of s. 22 will be provided in Appendix 2 to this referral.

High Court Proceedings

11. The appellants' primary objection was that surrender would breach the rule of speciality. Further information was sought from the National Crime Agency in the United Kingdom about the proceedings leading to the Restraint Orders and the circumstances in which the sentence was imposed (including their failure to appear at the hearing in respect of the alleged breach of the Order) and also enquired about a right of appeal in respect of the contempt order sentence. The National Crime Agency furnished a lengthy reply which is included in Appendix 3 to this reference.

12. The appellants' principal contention was that surrender to the issuing state would subject them to a sentence for which their surrender was not being sought, namely, the six-month sentence of detention imposed by the Reading Crown Court, thereby breaching the rule of specialty set out in s. 22(2) of the 2003 Act and Article 625 TCA. To this end, the appellants advocated for a broad, purposive interpretation of 'offence'

in s. 22(2), which had regard to the actual penalty imposed by the offence notwithstanding that such misconduct was not classified by the issuing state as a criminal offence. The appellants further submitted that the jurisprudence of the European Court of Human Rights ("ECtHR"), which applies an autonomous European Convention on Human Rights ("the Convention") meaning when classifying offences within domestic legal systems for the purpose of engaging Article 6 fair trial rights, should inform the High Court's purposive interpretation of the 2003 Act, the TCA, and the Framework Decision.

13. In a judgment dated 8 April 2024, the High Court (Greally J.) (*Minister for Justice & Equality v Sparling & Ors* [2024] IEHC 219) dismissed the appellants' objection to surrender. She held that under both the Framework Decision and the TCA, it is a prerequisite of a valid arrest warrant that the conduct of which the person is accused or has been convicted constitutes a criminal offence under the law of the requesting state. She was satisfied that UK law did not treat these as criminal offences. Accordingly, she was satisfied that the sentences imposed in the UK did not come within the ambit of the rule of specialty in Article 625(2) TCA or in s. 22 of the 2003 Act.

14. Greally J. addressed the appellants' objection to surrender based on alleged breaches of the Charter of Fundamental Rights of the European Union ("the Charter") and the Convention and whether surrender would therefore be contrary to s. 37 of the 2003 Act. A copy of s. 37 is included in Appendix 4 to this Order for Referral. She considered that the right to liberty under Article 5(1)(b) of the Convention was not an unqualified right. The fact that surrender might result in the deprivation of liberty did not bring the appellants within the ambit of s. 37 or engage Convention rights, as considered by the ECtHR in *Woolley v The United Kingdom* (App No. 28019/10). In that case, the ECtHR found that the United Kingdom had not "deliberately misled the Swiss authorities" and

there was “no improper or unfair manipulation of the processes of extradition” (*Woolley*, para 84). Similarly, Greally J. considered that in the present case, there had been no opacity or opportunism on the part of the issuing judicial authority, the appellants were afforded an opportunity to offer a defence to the contempt charges under the Proceeds of Crime Act, 2002, and the appellants had access to legal advice. The trial judge concluded that the detention orders imposed by the Reading Crown Court fell squarely within the terms of Article 5(1)(b) of the ECHR and further, the Charter afforded no additional protection insofar as the rights to liberty and an effective remedy were concerned.

15. Accordingly, Greally J. was satisfied that surrender was not prohibited by Part 3 of the 2003 Act or any other provision of that Act. An order for surrender to the UK in respect of each of the three appellants was made pursuant to s. 16(1) of the 2003 Act.

The Appeal

16. The appellants were granted leave to appeal to the Supreme Court on 5 June 2024 ([2024] IESCDET 64).

17. The appeal came before the Supreme Court on the 16 July 2024. Having heard the parties on whether the issue was *acte clair*, the Supreme Court ruled that the appeal raised an issue about the interpretation of the provisions of Title VII of the Trade and Co-operation Agreement and in particular Article 625(2) which it was appropriate to refer pursuant to Article 267 TFEU.

The arguments of the parties at the appeal

17. At the hearing, the appellants contended for an autonomous meaning of the word ’offence’ in Article 625(2). The appellants accept that in the UK contempt proceedings

are not viewed as constituting criminal offences but argue that this characterisation is not determinative and that on an autonomous view of the nature of the offence and the sentence imposed it was criminal in nature.

18. In contending for an autonomous interpretation of 'offence' for the purposes of EU law, the appellants submit that as the specialty provisions of Article 625 of the TCA were adopted to protect the fair trial rights under Article 47 of the Charter of those surrendered out of the Union, this Court must interpret the TCA and the definition of "offence" therein in light of the Charter. The appellants further rely on Article 52(3) of the Charter in support of their contention that the caselaw of the ECtHR must be followed by this Court when interpreting the meaning of 'offence' in Article 625 TCA and s. 22 of the 2003 Act. The appellants rely on jurisprudence of the ECtHR, which applies an autonomous definition to the phrase 'criminal charge' for the purposes of engaging Article 6, independent of the categorisations employed by the national legal systems of contracting states.

19. In particular, the appellants rely on the decision in *Engel & Ors v Netherlands* (App nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (1976) 1 EHRR 647 and the three criteria articulated therein at paras 82-83 for the purposes of ascertaining whether an individual is the subject of a 'criminal charge' within the meaning of Article 6(1) of the Convention:

> "[I]t is first necessary to know whether the provisions defining the offence charged belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point …
>
> The very nature of the offence is a factor of greater import …

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring."

20. The appellants state that the first criterion of domestic classification serves only as a starting point for the Court's analysis. They submit that the second and third criteria are "alternative and not necessarily cumulative", and it may be sufficient for the purposes of Article 6 to find that an offence is, by its nature, 'criminal' from the point of view of the Convention, or that it renders a person liable to a sanction which belongs generally to the 'criminal' sphere (citing *Lutz v Germany* (App no. 9912/82) 19 EHRR 182 87/16, para 55). The appellants note that while contempt of court proceedings are usually considered by the ECtHR to fall outside the ambit of Article 6 because they are more akin to the exercise of disciplinary powers, the nature and severity of the penalty for contempt can render such an offence capable of attracting Article 6 protections (*Kyprianou v Cyprus* (App no. 73797/01) (2007) 44 EHRR 27). The appellants cite the case of *Benham v United Kingdom* (App no. 19380/92) (1992) 22 EHRR 293, in which it was held that notwithstanding the classification of a failure to pay poll tax as a 'civil' offence, the applicant had been charged with a criminal offence for the purposes of engaging the protections Article 6. Similarly, it is contended that the meaning of 'offence' for the purposes of the TCA requires the adoption of the *Engel* criteria and an autonomous interpretation as a matter of Union law. It is submitted that s. 22 of 2003 Act cannot be construed as permitting the UK to determine what constitutes an offence by reference to its own domestic law for the purpose of specialty.

21. The respondent argues that the Article 6 issue is not an appropriate comparator. The ECHR represents an agreement between contracting states that there will be certain fair trial rights where criminal charges are at issue and therefore it is necessary to have a

common understanding of what is meant by a criminal offence. The surrender provisions of the Framework Decision and of the TCA are entirely different. The importance of the identification by an individual state as to whether acts constituted a crime or not is reflected in the fact that dual criminality must be established for offences which do not come within the list offences in Article 2 para 2 Framework Decision and Article 599 paras 3 and 4 TCA. The respondent submitted that the importance of the classification of the acts in either the issuing state or the executing state is also vital to the operation of the rule of specialty.

22. Without conceding the point, the respondent recognises that if the word 'offence' should be afforded an autonomous meaning under EU law when applied to the rule of specialty, then application of the final part of the *Engel* criteria may be problematic from the respondent's point of view, given that it would appear to indicate that the proceedings here involved the determination of a criminal charge. This is because a six month sentence, although only three months thereof will be served, is longer than any other period of deprivation of liberty which the ECtHR has accepted as not amounting to a criminal charge.

The Decision to Refer

23. This appeal raises an issue about the interpretation of the provisions of Title VII of the Trade and Co-operation Agreement and in particular Article 625(2) that necessitated a referral in circumstances where, to the best of the knowledge of the parties and this Court, that issue has never been decided by the Court of Justice. This Court views the case as raising important questions as to the application of the rule of speciality (whether provided by Article 625 TCA or Article 27 Framework Decision) where the issuing state's law does not characterise the conduct giving rise to a deprivation of liberty as a criminal offence or the proceedings leading to such deprivation of liberty as criminal

proceedings. This Court considers that this issue could arise in the context of contempt of court provisions in other jurisdictions (especially in other common law jurisdictions) which may permit a deprivation of liberty (whether for coercive or punitive reasons related to a failure to comply with a court order) in circumstances where that jurisdiction does not categorise the deprivation of liberty as arising from a criminal conviction or the conduct giving rise to the deprivation of liberty as amounting to a criminal offence.

24. This Court considers that the surrender provisions of the TCA and the Framework Decision are directed towards surrender for the purpose of criminal prosecutions and the serving of criminal sentences/detention orders. This is apparent from, for example, the references to criminal prosecution within Article 598(a) TCA and Article 1.1 Framework Decision. It follows that the reference to 'custodial sentence/detention order' in those Articles must be sentences/detention orders consequent on criminal prosecution and conviction. It is therefore apparent that the reference in Article 599(2) and Article 2(4) Framework Decision to "offence" can only mean a criminal offence under the law of the executing state. Those sub-paragraphs deal with the establishment of double criminality for certain offences (those not subject to the list of offences set out in Article 599(3) TCA and Article 2(2) Framework Decision) in which the acts must amount to criminal offences in *both* the *issuing state* and the *executing state*. Thus, for the purposes of establishing double criminality, it appears that 'offence' cannot be given an autonomous meaning but must depend on the law of the relevant member states.

25. The rule of speciality does not provide an absolute bar against a person being proceeded against for previous offences or previously imposed sentences/detention orders after surrender to the issuing state Article 625(3) and (4) TCA and Article 27(3) Framework Decision provide for the circumstances in which prosecution can take place which includes where the consent of the executing judicial authority is granted. However, the

possibility of seeking such consent for the imposition of the penalty of deprivation of liberty will not arise where the 'offence' is not regarded as a criminal offence within the definition of the law of the issuing state. Where the sentence or deprivation of liberty has been lawfully imposed in the issuing state, the rule of law in that state may require that such sentences are to be served in the issuing state. On the other hand, it is also important to ensure that any deprivation of liberty is compliant with the rule of law in the executing state and that law may prevent surrender for offences, which are criminal according to the law of the executing state, other than those on the TCAW. Moreover, constitutional and other international obligations may prohibit surrender where a person will be subject to a deprivation of liberty which has followed procedures which *prima facie* at least may violate fundamental rights to fair trial and an effective remedy.

26. This Court is satisfied that there are no grounds to doubt the accuracy of the statement in the TCWA that, as a matter of UK law, that this breach of the restraint order does not amount to a criminal offence. Therefore, the starting point for further consideration of this matter is that, as a matter of UK law, none of these appellants will be required to serve a sentence of imprisonment in respect of a criminal offence if surrendered but they will nonetheless be liable to be imprisoned for six months in respect of the contempt of court.

27. In Ireland the law of contempt is described as ancient; as old as the common law itself. It is seen as a bedrock of the rule of law. It is well recognised in this jurisdiction that there is a distinction between civil and criminal contempt. In general, civil contempt, in the form of breach of court orders, is coercive in purpose; its purpose is to ensure that parties to proceedings or those with notice of courts' orders obey and abide by those orders. In general, the purpose of criminal contempt is to be punitive in motive; it is to uphold the law generally and the authority of the courts. Historically, criminal contempt

was most often found in cases of egregious behaviour *in facie curiae*. Importantly however, it has been recognised by the Supreme Court that in certain limited and specific cases of civil contempt there can be a punitive element where the conduct or behaviour of the person, in addition to having an *inter partes* element, is grossly offensive to the administration of justice and requires vindication of the authority of the court.

28. While this Court accepts that, like in the UK, there may be situations of civil contempt of court where definite periods of imprisonment may be imposed for a purpose other than purely coercive, this Court has not heard sufficient argument from the parties to decide whether, in similar circumstances to those applying in the UK, this contempt of court would be considered criminal or civil contempt. That issue may not need to be decided in this case if, in answer to our questions on this preliminary reference, the Court of Justice decides that for the purposes of Article 625(2) TCA, 'offence' is to be given an autonomous meaning or a meaning within the law of the issuing state only.

29. In the present case, this Court is satisfied that in so far as these appellants were dealt with by Reading Crown Court in respect of the Restraint Orders, the full extent of procedural rights required by Article 6 and Article 13 of the Convention was provided to each of them. They were dealt with before an independent and impartial tribunal, they were notified of the 'charge' against them, they were notified of the time and place of the hearing, they were legally represented and they had a right to appeal. As to a right to an effective remedy in the issuing state, these appellants had open to them the possibility of an appeal against the sentence.

30. It is in those circumstances that this Court seeks the opinion of the Court of Justice on the questions listed below.

The Questions Referred

1. Do the provisions of Title VII of the Trade and Cooperation Agreement dealing with '*Surrender*' apply only to criminal prosecutions and/or custodial sentences/detention orders imposed in respect of criminal offences?

2. In Article 625(2) TCA, which provides that except for cases covered by paras 1 and 3 of Article 625 "a person surrendered may not be prosecuted, sentenced or otherwise deprived of liberty for an offence committed prior to that person's surrender other than that for which the person was surrendered", does '*offence*' mean (1) a criminal offence as defined by the law of the issuing state or (2) a criminal offence as defined by the law of the executing state or (3) does it have an autonomous meaning in European Union law?

3. If '*offence*' in Article 625(2) TCA bears such an autonomous meaning, what are the criteria for determining what constitutes such an '*offence*'?

4. Are Article 47, Article 48, Article 49 and Article 50 of the EU Charter of Fundamental Rights (which refer to '*effective remedy/fair trial*' (Article 47), '*charged*' (Article 48), '*criminal offence*' (Article 49) and "*criminal proceedings for an offence*" (Article 50)) and/or Article 6 and Article 13 of the European Convention on Human Rights (which refers to "*any criminal charge*" and "*effective remedy*") of relevance in that context?

5. Does Article 625(2) TCA preclude surrender in a situation where a person has been sentenced to 6 months deprivation of liberty for a contempt of court but where surrender has not been sought for the purpose of serving that sentence because the law of the issuing state classifies the contempt of court as civil contempt and does not consider it to constitute a criminal offence or matter?