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Judgment

Title: Minister for Justice and Equality -v- O'Connor

Neutral Citation: [2018] IESC 19

Supreme Court Record Number: 131/17

High Court Record Number: 2011 297 EXT

Date of Delivery: 12/03/2018

Court: Supreme Court

Composition of Court: Clarke C.J., O'Donnell Donal J., MacMenamin J., Dunne J., O'Malley Iseult J.

Judgment by: Reference - Supreme Court

Status: Approved

Result: Referral to the Court of Justice of the EU

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THE SUPREME COURT

Appeal No. 131 of 2017

**Clarke C. J.
O'Donnell J.
MacMenamin J.
Dunne J.
O'Malley J.**

In the matter of the European Arrest Warrant Act 2003 (As amended)

And

**In the matter of Thomas Joseph O'Connor
Between/**

The Minister for Justice and Equality
Applicant/Respondent
And

Thomas Joseph O'Connor
Respondent/Appellant

Judgment and Order of Reference dated the 12th day of March 2018

1. Introduction

1.1 The Supreme Court has decided to refer to the Court of Justice questions arising out of the impact, if any, on the operation of the system of European arrest warrants, arising from the fact that the United Kingdom of Great Britain and Northern Ireland has given notice under Article 50 of the Treaty on European Union ("TEU") of its intention to withdraw from the European Union ("Brexit").

1.2 In essence, the issue which has arisen before the Supreme Court gives rise to a question which has not been considered before by reason of the fact that no member state has, to date, withdrawn from the Union. The question concerns the impact of legal measures adopted within the framework of Union law which have the potential of impacting on the rights and obligations of citizens of the Union beyond the anticipated date of withdrawal of a member state in circumstances where those rights may fall in practice to be enforced solely within the legal order of the departing member state.

1.3 The Supreme Court notes the many decisions of the Court of Justice which establish that the Union is based on the rule of law and in particular the provisions of Article 19 TEU which entrusts the responsibility of ensuring judicial review in the Union legal order not only to the Court of Justice but also to national courts. (See most recently case C – 64/16 *AssociaçãŁo Sindical dos Juizes Portugueses*, Article 267 TFEU and the obligation to refer identified in the CILFIT jurisprudence). On that basis, it is arguable that, when taken in conjunction with Article 267 TFEU, the rule of law in the European context includes the entitlement of a person who enjoys rights or entitlements under Union law to have any issue arising as to the proper interpretation of those rights and entitlements, insofar as they may impact on that person's situation, ultimately determined, in any case of doubt, by the Court of Justice.

1.4 In those circumstances, the issue which arises concerns whether European law (whether to be found in the Treaties or the Charter) contains a necessary implication that otherwise valid measures mandated by Union law should not be adopted where those measures create a risk of placing a person affected by the measures concerned outside the scope of the effective application of rights and entitlements guaranteed by Union law, and in particular the entitlement to request the Court of Justice to rule definitively on any issues of Union law which may arise concerning such rights and entitlements.

2. The Facts

2.1 A European arrest warrant was issued on the 13th June 2011 by the United Kingdom seeking the surrender of the respondent/appellant ("Mr. O'Connor"). This warrant was endorsed by the High Court for execution in this jurisdiction on the 22nd June 2011 in accordance with national law. There had been a previous warrant seeking Mr. O'Connor's surrender on substantially the same basis. However, for reasons not now

relevant, surrender on foot of that warrant did not occur.

2.2 Mr. O'Connor commenced constitutional proceedings in which it was contended that the form of legal aid provided in Ireland was insufficient to meet the guarantee of equality before the law, as required by Article 40.1 of the Constitution of Ireland. In addition, Mr. O'Connor contested his surrender on foot of the relevant European arrest warrant within the normal procedures provided in that regard by national law. Each of the two strands of his proceedings failed so that the Supreme Court ultimately dismissed his appeals on the 30th March 2017.

2.3 At Mr. O'Connor's request, his surrender was postponed for humanitarian reasons, but on the 5th May 2017 Mr. O'Connor sought to re-open the question of the legality of his surrender by reason of the Brexit issue which is now before the Supreme Court. The High Court ultimately determined that the Brexit point did not prevent Mr. O'Connor's surrender and, on the 25th July 2017, determined that he should, therefore, be surrendered.

2.4 From that decision Mr. O'Connor was given, having regard to the importance and urgency of the issue raised, leave to appeal directly to the Supreme Court.

3. The Issue before the Supreme Court

3.1 From the above history it is clear that the Irish courts have already determined that, leaving aside the Brexit issue, there is no basis for refusing the surrender of Mr. O'Connor. It follows that the sole issue remaining is the Brexit issue. Unless Mr. O'Connor's argument on that point is well founded it follows that his surrender must be ordered.

3.2 Mr. O'Connor's surrender is sought for two reasons. First, he is already the subject of a sentence of imprisonment. Mr. O'Connor was convicted in the United Kingdom on the 26th October 2006 of two tax fraud offences, and was sentenced on the 29th January 2007 to serve two concurrent sentences of four years and six months respectively. Second, as Mr. O'Connor absconded while on bail awaiting sentence for the above offences, his surrender is sought so that he might be prosecuted for the offence of failure, without reasonable cause, to surrender to the Custody of the Crown Court, contrary to s. 6(2) of the Bail Act 1976.

3.3 It follows that, if Mr. O'Connor is now surrendered, it is highly probable that he will remain in prison in the United Kingdom after the 29th March 2019, being the date on which the United Kingdom is scheduled to withdraw from the European Union.

3.4 While not fully relevant to the current application for Mr. O'Connor's surrender, it should be noted that Mr. O'Connor was briefly held in custody in Ireland in the context of the previous warrant to which reference has been made. However, it is said on behalf of Mr. O'Connor that an issue may arise as to whether, having regard to Article 26 of the Framework Decision on the European arrest warrant ("the Framework Decision"), he may be entitled to credit in respect of the period thus served in custody. It is argued that any entitlement which he may have in that regard arises as a matter of European law which would, ordinarily, require, in the event that there was any issue as to his entitlement thereto in that regard, potentially a reference to the Court of Justice for a ruling.

3.5 The background to Brexit is clear. On the 29th March 2017, notification was given by means of a letter from the Prime Minister of the United Kingdom to the President of the European Council. The effect of that notification is to cause the United Kingdom to withdraw from the European Union (in accordance with the provisions of Article 50 of

the TEU) as of the 29th March, 2019.

3.6 It follows that it is highly probable that the United Kingdom will withdraw from the European Union on the 29th March 2019. There may be transitional arrangements put in place to govern the situation which is to apply immediately thereafter and there may ultimately be agreed arrangements entered into between the European Union and the United Kingdom governing the future relations between those parties in areas such as those covered by the Framework Decision. However, as of today's date, there is no clarity as to whether such arrangements will be entered into and if so the nature of the relevant measures which will be adopted. In particular, there is no clarity as to whether the entitlement of a European citizen, who is within the jurisdiction of the United Kingdom, to have relevant issues of European law, in the event of dispute, ultimately determined by the Court of Justice, will continue in place after the withdrawal of the United Kingdom.

3.7 In one sense the position of both parties to the appeal before the Supreme Court is clear and straightforward.

3.8 The Minister argues, correctly so far as it goes, that current Irish law, being the European Arrest Warrant Act 2003, requires Mr. O'Connor's surrender. The Minister further argues, again correctly so far as it goes, that Mr. O'Connor's surrender should only be refused in the event that there is an overriding obligation deriving from European Union law which would require the Irish courts to interpret Irish legislation in a way which would preclude the surrender of Mr. O'Connor because of the Brexit issue.

3.9 On that issue the Minister argues that the law must be considered as it is today and not as it may become in the future after the withdrawal of the United Kingdom. On the basis of that argument it is said that the United Kingdom is, today, a member of the European Union and that there is no specific or generally implied measure of Union law, whether to be found in the Treaties, the Charter or the Framework Decision, which would require that Mr. O'Connor not be surrendered.

3.10 On the other side, Mr. O'Connor argues that his surrender will inevitably mean that he will be imprisoned as a result of the implementation of an order made within the framework of Union law, in a state which will no longer be, during the currency of his custody, a member of the Union. In the light of that fact and in the light of the uncertainty as to the legal measures which will be in place after the withdrawal of the United Kingdom, it is argued that there can be no guarantee that any rights which Mr. O'Connor may enjoy under European law will, in a practical way, be capable of enforcement as a matter of Union law.

3.11 In between those two positions, the Court also explored, at an oral hearing, the possibility that an intermediate position might be correct. The starting point for that consideration stems from the underlying argument made on behalf of Mr. O'Connor which derives from the fact that, after the withdrawal of the United Kingdom from the European Union, he will almost certainly be incarcerated in a prison in a non-member state of the European Union in circumstances where there is currently uncertainty as to the legal regime which will apply.

3.12 In that context it is, of course, clear that Mr. O'Connor would have access to the courts of the United Kingdom for the purpose of assessing the legality of any aspect of his continuing imprisonment. It may well be that the courts of the United Kingdom, even after the departure of the United Kingdom from the European Union and even in the absence of any specific measures of United Kingdom law adopted which confer rights by reference to Union law, may regard Mr. O'Connor's rights and entitlements as being governed by Union law by reason of the fact that he would have been surrendered to

the United Kingdom under a Union law measure. In addition, Mr. O'Connor was only able to point to two aspects of the regime which would apply to him where Union law might theoretically be engaged. The first is the so-called rule of speciality which is given concrete form in Union law in Article 27 of the Framework Decision. The second is the question of whether, having regard to the proper interpretation of the Framework Decision, he may be entitled to credit for the period spent in custody as a result of the earlier warrant seeking his surrender. Undoubtedly, Mr. O'Connor would have access to the courts of the United Kingdom to obtain any order which might be appropriate in respect of either or both of those questions should they arise. Mr. O'Connor's argument, however, is that, in the event of there being a dispute about any such matters and in the absence of any measures being adopted which would confer a relevant jurisdiction on the Court of Justice, he would be deprived of the opportunity of having those matters of European law definitively determined by the Court of Justice.

3.13 However, it is possible that the question of his surrender might require an assessment of whether either or both of those matters gives rise to a real or significant risk of injustice rather than creating a merely theoretical possibility. In that context the third possible answer to the so-called Brexit issue may be that surrender should be ordered unless the relevant court in the requested state, having carried out an appropriate analysis, concludes that there is, in the circumstances of the situation of the person concerned, a real or substantial risk that rights and entitlements will actually be interfered with, rather than a merely theoretical risk which would arise by virtue solely of the fact that it is possible that the rights and obligations concerned may fall to be enforced by the national courts of the requesting state in circumstances where it may be the case that the Court of Justice will be deprived of any jurisdiction to rule on such questions.

3.14 The Supreme Court does not consider that the answers to the questions raised by the Brexit issue in these proceedings are clear, not least because the situation which has arisen is unprecedented with it following that there is no directly relevant jurisprudence of the Court of Justice. The Supreme Court considers that there may well be merit in the argument put forward on behalf of the Minister to the effect that the law as it stands today should be enforced with the consequence that Mr. O'Connor's surrender should be ordered. However, the Supreme Court cannot rule out the possibility that there may be an implied right conferred on Mr. O'Connor, by the Treaties and by the Charter, deriving from his status as a European citizen, not to be subjected to a measure of European law which will continue in force in circumstances where there may be a doubt as to the effectiveness of any remedy which he might enjoy under European law.

3.15 Likewise, the Supreme Court cannot rule out the possibility that it may be necessary, in order to determine whether Union law would preclude Mr. O'Connor's surrender in all the circumstances, to carry out an appropriate analysis of the likelihood or significance of the risk that he may actually suffer prejudice.

3.16 Against that background the Supreme Court proposes to refer the following questions to the Court of Justice:-

(1) Having regard to:-

(a) The giving by the United Kingdom of notice under Article 50 of the TEU;

(b) The uncertainty as to the arrangements which will be put in place between the European Union and the United Kingdom to govern relations after the departure of the United Kingdom; and

(c) The consequential uncertainty as to the extent to which Mr. O'Connor would, in practice, be able to enjoy rights under the Treaties, the Charter or relevant legislation, should he be surrendered to the United Kingdom and remain incarcerated after the departure of the United Kingdom,

Is a requested Member State required by European Union Law to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be required under the national law of the Member State,

(i) in all cases?

(ii) In some cases, having regard to the particular circumstances of the case?

(iii) In no cases?

(2) If the answer to Q.1 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether surrender is prohibited?

(3) In the context of Question 2 is the court of the requested Member State required to postpone the final decision on the execution of the European arrest warrant to await greater clarity about the relevant legal regime which is to be put in place after the withdrawal of the relevant requesting Member State from the Union

(i) in all cases?

(ii) In some cases, having regard to the particular circumstances of the case?

(iii) In no cases?

(4) If the answer to Question 3 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether it is required to postpone the final decision on the execution of the European arrest warrant?

4. Expedited Procedure

4.1 The Supreme Court requests that the Court of Justice consider determining the present case pursuant to the expedited procedure set out in Article 105(1) of the Court's Rules of Procedure. The Supreme Court is mindful of the fact that the Court of Justice has consistently ruled that the words "the nature of the case" as set out in Article 105(1) refer not to the type of case but rather to the individual circumstances of the case in question. It is true, in that context, that Mr. O'Connor is not currently in custody. The Supreme Court is also mindful of the fact that the Court of Justice has consistently ruled that the understandable desire to bring certainty to the area of European law in question cannot provide the exceptional circumstances justifying the use of the expedited procedure and is further mindful of the fact that it has also been consistently held that the fact that there may be a large number of cases dependent on the ruling of the referring court likewise does not provide the necessary exceptional circumstances.

4.2 However, the Supreme Court would wish to draw attention to the fact that a significant number of European arrest warrants are, for understandable reasons, received in Ireland from the United Kingdom. In 2017, 207 such warrants were received , and in 2018 , 39 had been received as of the 19th February.

4.3 The Supreme Court has also been informed that there are currently six cases before the High Court where the relevant party is remanded in custody in circumstances where the Brexit point has been raised as a basis for suggesting that the Court should not order surrender. In one such case the person concerned has sought, but has been refused, bail.

4.4 Given that the Supreme Court has considered it necessary to refer the questions set out above to the Court of Justice, it may readily be inferred that many, if not most, persons whose surrender is sought to the United Kingdom will raise the Brexit point. Once raised the High Court will either be required to defer a final decision on surrender pending the outcome of this reference or, if the High Court proceeds to reach a conclusion, it will almost inevitably follow that leave to appeal to the Supreme Court would be sought and granted and the finalisation of the appeal would have to be deferred until the result of the reference was known.

4.5 In the light of the above information it also seems almost inevitable that custody issues will arise in respect of at least a significant proportion of those whose surrender may be sought. While, as noted above, a custody issue does not arise in this case, it seems inevitable that, in the very near future, and in particular in the absence of the Court of Justice adopting the expedited procedure, a further case will come before the Supreme Court which would also require to be referred to the Court of Justice but where the person concerned was in custody.