High Court of Ireland Decisions

Judgment

Title:	The Minister for Justice and Equality -v- Imran
Neutral Citation:	[2017] IEHC 245
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[2017] IEHC 245

THE HIGH COURT

Record No. 2016 No. 169 EXT

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

MOHAMMED IMRAN

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Donnelly delivered this 14th day of March, 2017.

1. The background to this case is quite unusual. The United Kingdom ("U.K.") authorities issued a European arrest warrant ("EAW") for the surrender of the respondent on 24th August, 2016. He is sought for prosecution for one offence of dangerous driving causing death. The respondent initially filed points of objection, but later changed his mind and sought to consent to his surrender. Despite the respondent consenting to his surrender under s. 15 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), the Court is precluded from ordering such surrender if it is prohibited by virtue of the provisions of s. 15 of the Act of 2003.

2. Under the provisions of s. 15 of the Act of 2003, surrender may only be ordered if, *inter alia*, the surrender of the requested person is not prohibited by Part 3 of the Act of 2003. Among the sections contained in Part 3 of the Act of 2003 is Section 41.

3. The relevant part of s. 41 of the Act of 2003 is subsection 1 which provides:-

> "A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State."

4. In the present case, the respondent has already pleaded guilty to an offence of dangerous driving and has been sentenced to and has served 21 months imprisonment in the United Kingdom. He is now being sought in respect of an offence of dangerous driving causing death arising out of the exact same circumstances for which he received the 21 month sentence of imprisonment, with the further added feature that it is now alleged that, eleven years later, the woman who was injured in that crash has died as a result of injuries received.

5. The respondent intends to make an argument in the U.K. that his trial is prohibited on the basis of double jeopardy. However, he states that he wishes to consent to his surrender under the EAW as much of the focus of his life is in the U.K. and he wishes to deal with this matter in that jurisdiction.

6. When this case first came on for hearing, the Court was not satisfied that it could simply disregard the issue of double jeopardy and the Court asked for submissions in relation to that matter. The parties requested time for written submissions and the matter was put back again. On the resumed date, having part heard the case, the Court suggested that in light of the attitude being adopted by the respondent, it might be possible to organise a voluntary return to the United Kingdom. The Court sought to know the attitude of the U.K. authorities in relation to this suggestion so as to ensure that if the procedure was put in place, the respondent could be met in the U.K. and arrested immediately.

7. The Crown Prosecution Service in the U.K. may have misunderstood what was at issue in the proceedings in this jurisdiction, as they replied with quite a lengthy and unnecessary statement of the facts alleged against this respondent. Contained within their statement, was their unequivocal belief that this respondent would seek to avoid arrest should his passport be returned to him. In those circumstances, the Court was of the view that it must proceed to hear the case as the Court could not be satisfied that the respondent would be available to the U.K. authorities should his passport be given back to him. The High Court, as an executing judicial authority, has a duty to ensure that a respondent is available for surrender should such surrender be ordered and it cannot dispense with bail conditions which are necessary to ensure that a respondent will turn up for the application for surrender and the surrender itself, should it be so ordered.

8. Section 41 of the Act of 2003 implements Article 3(2) of the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedure between Member States ("the 2002 Framework Decision"). Article 3(2) provides for grounds for mandatory non-execution of the European arrest warrant. The executing judicial authority is required, *inter alia*, to refuse to execute the EAW "if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no

longer be executed under the law of the sentencing Member State".

9. Section 41 of the Act of 2003 was the subject matter of a considered judgment by the High Court (Edwards J.) in the case of the *Minister for Justice and Equality v. Guz* [2012] IEHC 388. That judgment was delivered on 31st day of July, 2012. The offences in that case were driving offences of much less seriousness than the offences for which this respondent was convicted in the first place and is sought for prosecution in the second place. However, the facts do not differ in terms of their legal significance. The respondent in Guz had already been convicted of a drink driving offence arising out of an accident that occurred on 9th March, 2005. He was sought under an EAW for prosecution for an offence against safety in communication which was in essence a dangerous/careless driving type offence. Edwards J. reviewed the position as regards what is known in the common law context as the plea of autrefois convict, but also the closely related concept of ne bis in idem, which he stated "*finds expression in both article 3(2) of the Framework Decision and Article 41 of the Act of 2003*" (para. 77, Guz).

10. Edwards J. also considered the relevant cases under Article 54 of the Convention Implementing the Schengen Agreement of 14th June 1985 ("the Schengen Agreement"). Most importantly, however, he considered the case of *Mantello* (Case C-261/09) [2010] ECR I-11477. In *Mantello*, the Court of Justice of the European Union ("CJEU") was dealing with an Italian EAW which was for execution in Germany. It related to a situation where the requested person had been convicted for an offence concerning drug trafficking in Italy and was now wanted there for another offence arising out of the investigation into the first set of offences. The CJEU held that the referring court's questions must be considered to relate more to the concept of "finally judged" than to that of the "same acts". The CJEU held at para. 55 that where an "*issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision*.".

11. Having considered the *Mantello* decision, Edwards J. held at para. 82 as follows:-

> *"The difficulty that the Court has in the present case is that in transposing Article 3(2) of the Framework Decision the Oireachtas appears to have gone beyond what it was required to do by the Framework Decision. If s.41 of the Act of 2003 had followed the wording in the Framework Decision, this Court would simply have had to apply Mantello. However, the Oireachtas has gone further and has referred in s.41(1) of the Act of 2003 to acts or omissions which constitute "in whole or in part" the offence in question. This is considerably more restrictive (in the sense of potentially capturing more cases) than is the reference to "same acts" that appears in Article 3(2) of the Framework Decision. Having reflected at length on the matter the Court has arrived at the conclusion that the objection based upon ne bis in idem must be upheld in this case having regard to the wording of s. 41(1) of the Act of 2003. In the circumstances the Court is prohibited from surrendering the respondent on foot of this warrant.".*

12. That is a very clear statement of the legal position. It clarifies that the phrase "in whole or in part" is not the same as a reference to the "same acts". It would be to apply the Act of 2003 contra legem to attempt to give it a meaning that would permit

surrender where the offence alleged constitutes *in whole or in part* an offence for which there had been a final judgment.

13. Faced with that position, counsel for the minister made an attempt to distinguish Guz on the basis that the High Court never considered the argument that there were limitations to the applicability of the principle of *ne bis in idem* under Article 3(2) of the 2002 Framework Decision upon which s. 41 of the Act of 2003 is based. The purported limitation is that the ne bis in idem principle only applies to judgments delivered in a member state other than the issuing state. Counsel relied upon the submissions that were made to the Supreme Court by the minister in the case of *Minister for Justice, Equality and Law Reform v. Renner - Dillon* [2011] IESC 5. The Supreme Court did not decide or refer to that argument in its decision, but decided it on the basis that the U.K. authorities had stated that the requested person had not been finally judged in accordance with U.K. law.

14. The argument that was made in the case of Renner - Dillon was that Article 3(2) of the 2002 Framework Decision was not a provision which affected the substantive criminal law, i.e. it was not a measure aimed at approximation of laws, rather it was aimed at the approximation of certain surrender procedures. In those circumstances, it was submitted that Article 3(2) of the 2002 Framework Decision could not be regarded as requiring member states to alter their domestic rules in relation to retrial of offences subsequent to acquittal or conviction. The purpose of Article 3(2) of the 2002 Framework Decision was solely aimed at regulating the consequences of acquittal or conviction as between member states. The rationale underlying Article 3(2) of the 2002 Framework Decision was to ensure that a person who has either been acquitted or convicted (and presumably served whatever sentenced was imposed) would be able to travel freely within the E.U. without fear that he or she will be tried again in another member state that might purport to exercise jurisdiction in relation to the same offence. Reference was also made to Article 54 of the Schengen Agreement.

15. It is perhaps not surprising that the submissions in *Renner - Dillon* which have been relied upon by the minister in this case did not refer to the *Mantello* case. That appears to be because the *Mantello* judgment was only delivered shortly before the Supreme Court hearing in Renner - Dillon.

16. In *Mantello*, the issue as to whether Article 3(2) was only effective between member states or whether it applied to the situation of offences being tried within the issuing state, was clearly a live one. This argument was addressed in the opinion of Advocate General Bot. In his opinion, it made no difference whether the earlier final judgment was handed down in the national legal order of the issuing member state or of a third member state. This was because Article 3(2) gives no reason to suggest that it only referred to decisions from third member states, but also because of the fundamental nature of the principles such as ne bis in idem which forms part of all member states' legal systems. In essence, Advocate General Bot held that both the issuing and the executing judicial authorities were responsible for the observance of the *ne bis in idem* principle. His opinion is not binding.

17. The CJEU did not address that part of the argument in its decision directly. In the view of this Court, however, the CJEU implicitly rejected the argument because it ruled as if Article 3(2) covered the situation at hand. It would not have been necessary to make any decision as regards the concepts at issue, namely "same acts" or "finally judged", if Article 3(2) was not applicable by virtue of the fact that the issuing member state and the member state where the final judgment was allegedly made were one and the same.

18. Similarly, the Supreme Court decision in Renner - Dillon must also be understood as rejecting the argument, because the Supreme Court relied on the specific finding of the

CJEU that this was not a final judgment. In that regard, the concept of final judgment only has a relevance where Article 3(2) was being relied upon. The Supreme Court clearly had the option of ruling on the basis that Article 3(2), and more particularly Article 41, did not apply, but it did not do so. In the view of the Court, this is an implicit acceptance that Article 41 of the Act of 2003 does apply.

19. In those circumstances, the CJEU, the Supreme Court and indeed the High Court have all applied Article 3(2) to the situation where the double jeopardy issue stems from proceedings within the issuing member state. In those circumstances, there is no reason to distinguish the case of *Guz*.

20. Furthermore, should it have been necessary to so decide, this Court agrees with the rationale of Advocate General Bot that it is inherent in Article 3(2) that it applies to decisions made in the issuing member state. Article 41(1) also refers to final judgment having been given "in the State or a Member State". There is nothing in that phrase that rules out the fact that "a Member State" does not include the issuing Member State. Indeed, s. 2 of the Act of 2003 provides that "Member State" means "a Member State of the European Communities (other than the State) or Gibraltar." Nothing in the submissions of the minister alters the clear meaning of s. 41(1) as indicated by the ordinary meaning of the words used therein.

21. The case of Guz established that where the offence for which surrender is sought has already been, in whole or in part, finally determined in this State or any other member state, the surrender must be refused. Therefore, in circumstances where the respondent has already been found guilty of dangerous driving, final judgment has been given at least in part in respect of the offence of dangerous driving causing death arising out of the same acts of driving. This is as a result of the particular manner in which the Oireachtas has implemented the 2002 Framework Decision. It is not a finding that the respondent cannot be tried under U.K. law for this offence as that is a matter for the United Kingdom. It is also not a finding that a person in the same circumstances could not be tried in this jurisdiction. It is merely a finding that this respondent cannot be surrendered even with his consent to surrender, to the U.K. on foot of this European arrest warrant.

22. It is highly surprising that, if the Minister for Justice or indeed her predecessor were of the view that a person in the situation of the present respondent should be liable to surrender to another member state, no amendment to s. 41 of the Act of 2003 was moved before the Oireachtas. If this is viewed as a lacuna in the law, it was one which was clearly flagged in the Guz decision in July 2012. The absence of an amendment to the legislation appears to indicate that the executive and the legislature intended to operate an entirely different procedure with respect to the principles of double jeopardy than that required by the 2002 Framework Decision. It is not the only occasion that the Oireachtas chose to legislate in a manner apparently at odds with the provisions of the 2002 Framework Decision. This Court is obliged to follow the Irish law implementing the 2002 Framework Decision, as to do otherwise would be to make a determination which is not permitted by law. Irish law has been clear since 2012 and the Court must refuse the surrender of the respondent in this case.

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