S26

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Judgment

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Composition of Court:	Denham C.J., O'Donnell Donal J., Clarke J., MacMenamin J., Laffoy J., Dunne J., O'Malley Iseult J.
Judgment by:	Clarke J.
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THE SUPREME COURT

[Record No: 66/2016]

Denham C.J.
O'Donnell J.
Clarke J.
MacMenamin J.
Laffoy J.
Dunne J.
O'Malley J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003

Between/

The Minister for Justice & Equality

Applicant/Respondent

and

Arkadiusz Piotr Lipinski

Respondent/Appellant

Judgment of Mr. Justice Clarke delivered the 22nd May, 2017.

1. Introduction

1.1 The net issue which arises on this appeal stems from the fact that a sentence imposed by the relevant Polish court, when part-served, was initially suspended but, by a subsequent order, reinstated without notification being effected of the hearing which led to that reinstatement. The issue is whether, in all the circumstances, those facts preclude the surrender of the respondent/appellant ("Mr. Lipinski") on foot of an otherwise valid European Arrest Warrant.

1.2 In a judgment delivered on the 17th June, 2015 the High Court (Donnelly J.) found in favour of the applicant/respondent ("the Minister") and ordered the surrender of Mr. Lipinski (*Minister for Justice & Equality v. Lipinski* [2015] IEHC 458). Mr. Lipinski appealed from that decision to the Court of Appeal. By a judgment delivered on the 12th May, 2016 by Peart J. (speaking for the Court of Appeal) the appeal was dismissed. See *Minister for Justice & Equality v. Lipinski* [2016] IECA 145.

1.3 Thereafter Mr. Lipinski applied for and was granted leave to appeal to this Court by a determination dated the 4th July, 2016 (*Minister for Justice & Equality v. Lipinski*) [2016] IESCDET 96). As appears from that determination the issues or grounds on which leave to appeal was granted was as follows:

> *"(a) That the Court of Appeal erred in deciding that s.45 of the 2003 Act, substituted by s.23 of the 2012 Act, was not engaged where a person, such as the applicant, was present for the hearing concerning his guilt or innocence, and the imposing of his sentence, but was not present for, or notified of, the application to activate the suspended sentence?*
>
> *(b) In the circumstances set out in para (a), would an order for the surrender of the applicant violate the applicant's rights under Article 38.1 of the Constitution of Ireland; Article 47, 48 and 53 of the Charter of Fundamental Rights & Freedom, and Article 6 ECHR?"*

1.4 However, at the hearing of the appeal it was accepted by counsel on both sides that there was, in reality, only one issue being whether, on a proper construction of the relevant legal materials, surrender could be ordered in the particular circumstances surrounding various hearings in Poland involving Mr. Lipinski.

1.5 Against that backdrop it is necessary briefly to outline the facts which were not really in controversy.

2. The Facts

2.1 On the 7th December, 1998 Mr. Lipinski was sentenced to a term of imprisonment of 15 years following his conviction on fifteen charges for offences which appear to broadly correspond to the Irish offence of assault causing harm. Mr. Lipinski was present for that trial and conviction together with the sentencing hearing. The term of fifteen years imposed by the trial court was reduced on appeal to one of ten years. Mr. Lipinski was not physically present for that appeal but was represented and was aware that the appeal was being heard.

2.2 On the 20th September, 2004, the Regional Court in Bydgoszoz V Penal Division

made an order for the conditional release of Mr. Lipinski and the suspension for a period of three years of the balance of his sentence which remained then un-served. One of the conditions of that release was that he should remain under the supervision of a probation officer. A second condition related to a requirement to notify any change of address to that probation officer.

2.3 It would appear that Mr. Lipinski failed to comply with those conditions and instead left Poland and came to Ireland in July, 2006. On that basis the matter came before the Regional Court in Warsaw XI Penal Division on the 29th December, 2006 as a result of which an order was made quashing his conditional release or parole. That order had the effect of making him liable to serve the remaining part of his original sentence as reduced on appeal. Mr. Lipinski was not notified of and did not appear at the hearing leading to the quashing of his conditional release. It is against that factual backdrop that the legal issue which this Court has to determine arose.

3. The Legal Issue

3.1 It is necessary briefly to address Council Framework Decision 2002/584/JHA ("the 2002 Framework Decision"), its amending Framework Decision being Council Framework Decision 2009/299/JHA ("the 2009 Framework Decision") together with their Irish implementing measures being s.45 of the European Arrest Warrant Act, 2003 ("s.45") together with amendments to s.45 as originally enacted brought about by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012.

3.2 There are some minor differences in the wording of the relevant provisions of the Irish implementing measures, being s.45 in either its original or amended form, as compared with the equivalent provisions of the Framework Decisions (again whether the 2002 Framework Decision or the 2009 amending Framework Decision). Article 4a of the Framework Decision in its current form refers to non-appearance in person at "the trial" whereas s.45 refers to non-appearance "at the proceedings". However, it does not appear to me that any such differences could be material to the proper construction of the legislation as a whole. Having regard to the principle of conforming interpretation it is clear that the Irish implementing measure, being s.45, would require, in any event, to be interpreted in a manner consistent with the Framework Decisions. On that basis the question really turns on the relevant provisions of the current Framework Decision being the 2002 Framework Decision as amended by the 2009 Framework Decision.

3.3 The relevant provision is to be found in Article 4a. It is clear that the Article in question contains what might be described as a substantive provision followed by exceptions. It should also be noted in passing that the measure is not obligatory in the sense that it is left to each member state to decide whether to adopt the regime specified in the Article which, of course, limits the possibility of surrender in respect of cases decided in the absence of the accused. However Ireland has, by enacting s.45, opted in to that regime and no question, therefore, arises from its discretionary nature.

3.4 As already noted the provision permits, with exceptions, the refusal of execution of a European Arrest Warrant in certain specified circumstances. Those specified circumstances lie at the heart of the issue which arises on this appeal. The relevant provisions of Art. 4a are as follows:-

> *"1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:*

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

(c) after being served with the right decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows for the merits of the case, including fresh evidence, to be re-examined and, which may lead to the original decision being reversed;

and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant."

3.5 In addition the annex to the Framework Decision in its amended form requires the European Arrest Warrant to specify first whether the person actually appeared in person at the trial resulting in the relevant decision and if not a specification of which of the various exceptions to the general rule requiring appearance in person, which can be found in sub. paras. (a), (b), (c) or (d), are said to have applied. The European Arrest Warrant in this case did not specify that any of those permissible exceptions to actual attendance in person occurred but rather specified that Mr. Lipinski had appeared in person at the trial resulting in the relevant decision. Clearly, in so specifying, the requesting court was of the view that the trial to which reference is made was the trial leading to the original sentence imposed on Mr. Lipinski and the partly successful appeal. If that is a correct view then the substantive provision would be met and the

question of the existence of any of the potential exceptions would not arise.

3.6 It follows, and was agreed by counsel on both sides, that the appeal, therefore, turns solely on the question of whether Mr. Lipinski's case comes within the substantive provision preventing surrender in *in absentia* cases. If it does, then his surrender cannot be directed for none of the exceptions are relied on. If it does not then, that being the only issue remaining, there would be no barrier to his surrender.

3.7 The legal issue, therefore, comes down to a very narrow one. In the circumstances of this case can it be said that the substantive provision is met.

3.8 Against that background it is necessary to return to the wording of Article 4a. That wording requires that the European Arrest Warrant in question must be "*issued for the purpose of executing a custodial sentence or a detention order*" but applies where the relevant person did not appear "*at the trial resulting in the decision …*". The key questions are connected. What is the "*trial*" leading to the "custodial sentence or detention order" for the purposes of Article 4a in the context of the sequence of events which pertain in Mr. Lipinski's case? As noted earlier that sequence involved an initial trial, conviction and sentence which was reduced on appeal. For ease of reference I will refer to that process as the original order. There was thereafter the order leading to his release on a form of parole. I will refer to that as the suspension order. Finally there was the revocation of that suspension order which had the effect of re-imposing the original sentence. I will refer to that as the revocation order.

3.9 Against that background it is appropriate to turn briefly to the contentions of the parties.

4. The Position of the Parties

4.1. While a number of subsidiary issues were canvassed in argument the key dispute between the parties came down to the proper interpretation of Article 4a for the purposes of determining what "*trial*" could be said to have led to the custodial order sought to be executed by means of the European Arrest Warrant in this case. On the Minister's case it was said that the effect of the suspension order and its quashing by the revocation order simply led to the reinstatement of the original order. On that basis it is said that the custodial order whose execution is now sought is the original order. That is said to be backed up by the fact that it is the original order which is specified in the European Arrest Warrant as being the order whose execution is sought. It being accepted that Mr. Lipinski was present for the original trial and order it follows, on the Minister's case, that Article 4a has no application.

4.2 On Mr. Lipinski's behalf it is argued that it is impossible to ignore both the suspension order and the revocation order. It is said that the current status of the original custodial order is dependent on both subsequent orders. For example it is said that it would, of course, be wholly inappropriate to issue a European Arrest Warrant if the suspension order was still in force. The purpose of a European Arrest Warrant, under Article 4a, is to allow for the execution of a "*custodial sentence*". If any custodial sentence stood suspended then it could not be executed and no legitimate basis for using the European Arrest Warrant procedure would exist. The only reason why, on Mr. Lipinski's case, there is a custodial order currently in being against him in Poland is because the suspension order has been quashed by the revocation order. On that basis it is said that it is necessary to look either at the revocation order alone or, alternatively, all three orders in order to determine the proper legal basis on which Mr. Lipinski can, as a matter of Polish law, be imprisoned. It being common case that Mr. Lipinski was not notified of the hearing leading to the revocation order, it is said that that hearing must either be "*the trial*" or at least part of "*the trial*" for the purposes of Article 4a and, on that basis, it is said that Article 4a is engaged.

4.3 In one sense it might be said that the dispute between the parties concerned whether it was appropriate to adopt either a broad or a narrow interpretation of the term "trial" and the definition of the order which required to be executed in order to provide for a custodial sentence. The narrow definition would confine the trial and order to the original sentence as varied on appeal. The broad definition would include each of the steps which led to the current justification, as a matter of Polish law, for Mr. Lipinski's incarceration including, in particular, the revocation order.

4.4 If the narrow definition is considered to be appropriate then it is clear that Mr. Lipinski was present at the trial leading to the order which is sought to be executed. No issue concerning a surrender would therefore arise. If the broad interpretation is correct then it follows that Mr. Lipinski was not present at at least a highly material part of the trial leading to the relevant order. In those circumstances the substantive requirement of Article 4a would be met and, in the absence of any reliance being placed on any of the exceptions, his surrender could not be allowed.

5. Discussion

5.1. Various additional arguments were called in aid by both sides in favour of adopting either the broad or narrow definition respectively contended for. Attention was drawn on behalf of the Minister to certain jurisprudence of the European Court of Human Rights which appears to suggest that Article 6 trial rights do not fully arise in the context of a hearing designed to remove a suspension of a sentence. In addition the Minister draws attention to the fact that difficulties might be encountered for the practical operation of the European Arrest Warrant system if persons who abscond from the country of sentence, and therefore cannot be found, are, by virtue of their very absconsion, in breach of the terms of some form of conditional release potentially justifying the re-imposition of a suspended sentence. Clearly in order for a European Arrest Warrant to be issued requesting the return of the person concerned there would have to be in place an active custodial sentence order at the time when the European Arrest Warrant is issued. But if the very reason why the relevant person was potentially subject to the revocation of a suspension of sentence was the fact that they had disappeared in such a way that they could not be notified, how then, argued the Minister, could the system work for the relevant prosecuting authorities could not procure a reactivation of the original sentence with notice in such circumstances.

5.2 On the other hand counsel for Mr. Lipinski drew attention to the fact that it would not be difficult for a member state to put in place mechanisms which would allow for the potential of an appeal or retrial of any revocation order made and thus enable surrender to take place under the exception specified in Article 4a(1)(c). It was noted that there might be issues concerning time limits in that context for, if time ran from the date on which the revocation order was made, even though the relevant person was unaware of the hearing and order in the first place, difficulties might be encountered. However counsel did argue that it would not be particularly difficult for any member state to put in place an appropriate regime which would enable the reactivation of a custodial order while at the same time allowing an opportunity to the person concerned to exercise a right of retrial or appeal in respect of the issues which gave rise to the reactivation in a manner that allowed such rights to be effectively exercised. For example a time limit which commenced when the person was actually notified of the existence of the revocation order could not be the subject of any criticism and would appear to meet the requirements of Article 4a(1)(c).

6. Decision

6.1 It does not seem that the material question of the proper interpretation of Article 4a addressed earlier is *acte clair*. This Court being a court of final appeal, it follows that there must be a reference of that issue to the Court of Justice of the European Union

under Article 267 of the Treaty on the Functioning of the European Union.

6.2 It is, therefore, necessary to make such a reference in all the circumstances of this case.

7. Conclusions

7.1 For the reasons set out in this judgment I would hold that there should be a reference to the Court of Justice of an issue of European law. There is annexed to this judgment the text of the proposed order of reference.

7.2 It should be emphasised that, in accordance with the jurisprudence of the CJEU, it is for this Court to determine the issues to be referred and the text of the order of reference. It is proposed, however, to afford the parties a period of one week in which to make any written observations which they wish on the text of the draft order of reference annexed. Any such observations should, therefore, be filed with the registrar of the Supreme Court not later than close of business on Monday the 29th May next. I should emphasise that those submissions should not be directed to the question of whether there should be a reference at all or to whether the broad issue sought to be referred should form the basis of the reference. Rather any observations, if the parties desire to make them, should be directed to the detail of the text of the order of reference. Thereafter the Court will settle the precise terms of the order of reference which will be submitted to the CJEU.