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Supreme Court of Ireland Decisions

Ruling

Title:	Minister for Justice and Equality -v- O'Connor
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Ruling by:	O'Donnell Donal J.
Status:	Approved
Result:	Motion dismissed

SUPREME COURT

Supreme Court No.:64/2015

O'Donnell J.
McKechnie J.
MacMenamin J.

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

Between/

The Minster for Justice and Equality

Applicant/Respondent

AND

Thomas O'Connor

Appellant/Respondent

Ruling of O'Donnell J. delivered the 3rd of July, 2017.

1 Article 34.4.6° of the Constitution provides that the decision of the Supreme Court shall in all cases be final and conclusive. This is a provision which litigants and their lawyers should respect and abide by whatever their views of the decision: it is in any event a provision which this Court, which is established under the Constitution, is obliged to uphold.

2 In this application, the moving party, Mr. Thomas O'Connor, seeks an order which, on its face, directly contravenes the provisions of Article 34.4.6°. That is, he seeks an order setting aside the order of this Court of the 30th March, 2017, and an order remitting the case to the High Court to allow matters to be argued therein which it is said, were the subject matter of the Supreme Court decision. In a judgment which I delivered on the 30th March, 2017 ([2017] IESC 21), this Court unanimously dismissed the appellant's appeal from the order of the Court of Appeal, which in turn had rejected an appeal from the decision of the High Court that Mr. O'Connor be surrendered to the Untied Kingdom pursuant to the European Arrest Warrant Act, 2003. The stated object of this application is, as already touched on, to permit a hearing which is listed before the High Court on the 4th July, 2017, to hear and determine what might be described as the "Brexit" issue, and to also consider a number of other issues which the appellant wishes to now raise, including issues which either were, or could have been, the subject of his original objection to surrender which was rejected in each court culminating in the decision of this Court of the 30th March, 2017. *Prima facie* that is a decision to which Article 34.4.6° applies. It follows furthermore that in seeking to have matters remitted to the High Court for determination, the applicant in effect seeks to set aside not just the judgment and order of this Court, but also that of the Court of Appeal and the order of the High Court of surrender, and moreover to treat the judgments delivered therein as not having occurred.

3 It is well known that this Court accepts that there is an exceptional jurisdiction to set aside one of its own decisions: In *Re Greendale Developments Ltd. (No.3)* [2000] 2 I.R. 514. This exceptional jurisdiction arises only when it can be said that there has been some fundamental failure of justice so as to in effect deprive the apparent judgment of the quality of a decision to which Article 34.4.6° applies. One example might where the panel determining the appeal contained a member who was disqualified from hearing the appeal. It has been held, and must be obvious, that this is an exceptional jurisdiction and requires something truly fundamental. It should follow that parties should not initiate such an application lightly.

4 The surrender of the applicant, Mr. O'Connor, is sought under an EAW to serve his sentence imposed in the United Kingdom in respect of tax fraud offences and also to be tried on failing to answer his bail. It is said on his behalf that there was a previous unsuccessful attempt to secure his surrender which failed when the application was withdrawn during an appeal to this Court. It is also now said that on that occasion one member of this Court made a remark as to the finality of that determination. There has been an exceptional level of confusion in this case and I regret that it is necessary to emphasise here that I am merely recording what is now said on behalf of the applicant, and this recounting of these assertions, should not be understood as necessarily accepting that the facts set out are correct either as to the precise detail or the appropriate nuance of any aspect of the matter. In any event, a second EAW was issued

and was the subject of these proceedings.

5 The applicant also argues that the matters touched on above gave rise to valid objections to the EAW, including an allegation that surrender was precluded by reason of the earlier proceedings and that there had been inordinate delay in the issuance of the second EAW. I refer to these as "the substantive points". As I understand it, these points while initially raised were not pursued before Edwards J. in the High Court ([2014] IEHC 640) in these proceedings.

6 In the High Court, counsel on behalf of Mr. O'Connor took one point which can be characterised as preliminary and procedural. It was argued that the fact that legal aid was available under what used to be called the Attorney General's Scheme and is now the Custody Legal Aid Scheme, was insufficient to comply with the requirements of Regulation 11(2) of the Framework Decision. The applicant's advisors took the course of both withdrawing from the scheme, and then limited their argument to the question of what might be described as the legal aid point: first the requirement of the interpretation of Regulation 11(2), and second, the question whether as a matter of national law, the distinction between the Custody Legal Aid Scheme, and the Legal Aid Scheme in Criminal Matters created by the Criminal Legal Aid Act 1962, was a breach of the Article 40.1 guarantee of equality. It was contended in this Court, that the lawyers were obliged to withdraw from the Custody Legal Aid Scheme if they wished to make these arguments. It was contended that this was because of the decision of this Court (also unanimous) in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 IR 384. As a matter of law, it is very difficult to see how it could be seriously contended that acceptance of the Custody Legal Aid Scheme would preclude a person from arguing that it failed to sufficiently implement the Framework Decision or was otherwise incompatible with the Constitution. For reasons set out in the judgment which I delivered in this matter on the 30th March, 2017, such an argument was also a plain misreading of what had been said in *Olsson*. It is very difficult to credit that this contention could be seriously advanced. However, the further step taken was, if anything, more baffling. The only point taken in opposition to the EAW was the legal aid point; the substantive points were not advanced. It is hard to see how even the most tortured theory of standing could lead a party to advance one point in opposition to surrender, but fail to advance others.

7 While many points taken in opposition to a EAW can be said to be technical or legal, the argument in relation to legal aid was one which had very little claim to any vestige of practical merit. From the point of view of an individual respondent, it must be a matter of supreme irrelevance whether the legal aid which is being made available to him is provided under a statutory scheme implementing what has been held to be a constitutional guarantee, or a non-statutory scheme subject to binding legal assurances, and again held by this Court to implement in some respects a constitutional guarantee. In either case, the same counsel and solicitor will appear at the expense of the State. Neither the arguments made nor the enthusiasm with which they are advanced will depend upon the legal aid scheme under which the lawyers are paid. Accordingly, the only benefit of pursuing the argument in relation to the Custody Legal Aid Scheme, could be delay. Indeed there was so little practical merit in these points that it was notable that even the dissenting judgment in the Court of Appeal, delivered by Hogan J., which did consider that there was some unconstitutional distinction between the schemes, did not however consider that any such unconstitutionality should lead to a refusal to surrender the applicant.

8 The High Court found that there was no unconstitutional inequality, and also that the argument that legal aid was required by the Framework Decision could not succeed because this Court had held in *Olsson* that the Framework Decision did not require legal aid, merely that legal assistance be available on the same terms in accordance with

national law. It is important to note that at the time *Olsson* was decided, no reference could be made to the ECJ on the interpretation of the Framework Decision and this Court was accordingly required to make its own interpretation of the Framework Decision. This feature plays a significant part in the background to these proceedings and indeed this application.

9 The Court of Appeal held by a majority (Ryan P. and Irvine J.) ([2015] IECA 227) that there was no such unconstitutional inequality. Hogan J., as already mentioned, considered that there was some relatively minor differentiation and distinction which nevertheless amounted to an unconstitutionality, but would not have refused surrender on that basis. On the Framework Decision point, all members of the Court considered that they were bound by *Olsson*. Therefore, the issue of whether the Custody Legal Aid Scheme satisfied a requirement for legal aid under the Framework Decision simply did not arise. Hogan J. did consider that in the absence of the authority of *Olsson* the matter might have been arguable, but acknowledged that even so, the position taken in *Olsson* was consistent with that which appeared to be the view of the Union legislator and indeed the Member States.

10 This Court granted leave to appeal from the decision of the Court of Appeal on two grounds:

> (i) Whether there is an inequality under Article 40.1 of the Constitution by virtue of the fact that persons facing surrender under a European Arrest Warrant are entitled to legal aid only by virtue of a discretionary administrative scheme, whereas similarly situated persons (in particular persons facing surrender to International Criminal Court) have the right to legal aid based on a statutory footing; and if this does amount to unconstitutional inequality, whether this would render an order of surrender in the present EAW proceedings inconsistent with the Constitution;
>
> (ii) Whether in the EAW proceedings, it is necessary or appropriate to refer a question of European law to the Court of Justice concerning the fact that legal representation for the purpose of defending an application for surrender under the 2003 Act is provided by means of an administrative scheme rather than (as in for example the relevant provisions in respect of the International Criminal Court) as a statutory scheme.

11 In the judgment and order of the 30th March, 2017, this Court ruled against the applicant on both points. No issue now appears to arise on the equality issue which, having regard to the division of opinion in the Court of Appeal, was the major issue argued in the case, and it need not be considered further. On the second issue, it will be noted that the question raised was whether a reference to the ECJ was necessary. It does not appear that the applicant was able to point to a single decision of any Member State court or any observation of the European Court of Justice, or indeed any academic commentary supporting the interpretation of the Framework Decision for which he contends, and which he argues necessitates a reference to the European Court of Justice. To determine that latter issue, it would be necessary to consider whether the tentative expression of views by Hogan J. in the Court of Appeal amounts to a sufficient doubt to trigger the necessity for a reference to the ECJ. For reasons already adverted to, such a process would have involved an elaborate legal argument with no practical consequences and considerable delay. The Court did not however reach the point where it was necessary to make a decision on that point. It observed that *even if* this was *assumed* to be correct, that is, that contrary to *Olsson* the Framework Decision was held to require that legal aid be available, this could not avail the applicant, because legal aid

under the Custody Legal Aid Scheme in EAW cases, was not made available purely as an administrative scheme by grace and favour, but rather as an entitlement at law. Thus, applying the classic test, it was not necessary to decide the issue raised and consequently unnecessary to consider if there was a sufficient arguable case to require a reference to the European Court of Justice. Accordingly the appeal was dismissed.

12 This however was not the end of the saga. In a separate judgment, this Court dismissed an appeal in *Minister for Justice, Equality and Law Reform v. Wharrie* [2016] IESC 63, which concerned a case where the surrender of an individual to the UK was sought. In *Minister for Justice, Equality and Law Reform v. Wharrie*, the appellant sought to raise a new question, not considered or determined in the High Court, concerning the implications of the exit of the United Kingdom from the European Union. In its ruling, the Court had recorded the position of the Minister who is the respondent in all EAW cases, that the fact that the appeal was determined would not prevent a person, subject to an EAW to the United Kingdom from raising an objection at the point of surrender, that such surrender was no longer required or permissible because of the imminent departure of the United Kingdom from the European Union, and consequently its possible departure from the mechanism of the European Arrest Warrant. This is what is called in shorthand the Brexit point. This is an issue which could only be advanced after the Brexit referendum and indeed Article 50 TEU was triggered. Indeed, it is arguable that the issue would only arise truly after departure was complete, and when it is known the terms upon which such departure is made. However, that is a matter which cannot be addressed in this application. It is enough that the Minister has sensibly recognised that in any such case the argument may be raised notwithstanding the fact that an order for surrender has been made.

13 The applicant in this case has now sought to raise some argument in relation to Brexit. It was sought to raise this point by an application under Article 40 of the Constitution. The High Court considered the matter should be addressed by plenary proceedings. Such proceedings were commenced, and indeed the judge dealing with the application under the EAW has suggested it can be dealt with by permitting an objection under section 16 of the EAW Act in the light of the observations of this Court recording the concession of the Minister set out above. This approach appears sensible, but in any event it is clear that, however constituted, the point is to be addressed before the High Court. We have now been informed that that hearing has been fixed of the 4th July, 2017. This however has not prevented the applicant from appealing the refusal of relief under Article 40. That appeal is to be heard before the Court of Appeal, also early this month. This proliferation of proceedings points to the desirability of providing as much clarity in this matter as is possible. It is clear that the applicant is not being inhibited in advancing his point (whatever it may be) on the impact of Brexit. What this present application is about is that it appears because the applicant wishes to argue more grounds, some of which were, and all of which could have been raised in these proceedings.

14 The applicant has submitted a document setting out the matters which he seeks to raise before the High Court in addition to any Brexit point. Among these matters are points relating to the failure of the first EAW, and what is described as the inexcusable and unconscionable delay and neglect on the part of the UK and the State's executive and judicial authorities in dealing with the endeavour since 2007 to have the respondent surrendered. In other words, these are the substantive points which it is now sought to revive. Simply put, part of the object of this application seeks to release the applicant from the consequences of a decision which appear to have been deliberately, if surprisingly, taken at the time of original objection to the EAW.

15 It must be obvious that quite apart from this troubling feature of the case, this application faces fundamental problems. Even if this Court were to consider that there was an argument which should be entertained for setting aside its judgment (and

recognising the height of the hurdle in that regard), the only proper consequence of such an extraordinary order would be that the matter would be re-entered and argued before this Court. There could be no basis for, and no power to, set aside the previous decisions of the High Court and the Court of Appeal. Furthermore, it could not be permissible that if the order of this Court was set aside, that the issue before this Court would be argued in the High Court.

16 This is itself a fundamental objection to the application, but for the sake of completeness and clarity for other courts before whom these matters are ventilated, it is desirable to consider some of the other points raised. It is suggested that this Court has by its decision on the 30th March overruled *Olsson*. In the notice of motion issued on this application reference is made to "the apparent overruling of *Barlow* and *Olsson*". The decision in *Barlow & ors v. Minister for Agriculture, Food and Marine & ors* [2016] IESC 62 will be addressed shortly. In relation to *Olsson*, the suggestion that it has been overruled by the judgment of the 30th March, 2017, in this matter is wrong. Olsson concerned an argument that the Custody Scheme was an inadequate implementation of the Framework Decision. An observation was made in *Olsson* to the effect that the Framework Decision itself imposed no obligation on a request to provide legal aid, only to permit legal assistance. In effect, the appellant in this case seeks to argue that *Olsson* in this regard was wrong, and the certified question raised the issue whether a reference to the ECJ was necessary in that respect. The decision of this Court was that it was not necessary to so decide (and by definition, unnecessary to seek a reference). The decision therefore did not overrule *Olsson* either expressly or by implication: rather it held it was not necessary to consider that point (and therefore to consider whether a reference is necessary) because legal aid was in any event provided under the Custody of Legal Aid Scheme. *Olsson* decided that legal aid was not required by virtue of the Framework Decision itself. It did not however decide that legal aid could not be provided. Both *Olsson* and *O'Connor* together make clear that legal aid when it is made available in EAW cases, is provided, as a matter of national law, both as of right and by law.

17 At the hearing of this application, counsel also asserted that "the nature of the leave which was given did not permit the merits to be determined". He continued: "I ought to be given the opportunity to argue the merits". The point it appears which is being made, and it is genuinely difficult to discern, is that had the applicant anticipated the outcome of the case he might have made a different argument. However that cannot be a basis for setting aside the judgment. It is important to understand the fundamental nature of the jurisdiction which is sought to be invoked in this case. A decision of the Supreme Court can only be set aside in exceptional circumstances, including where something fundamental has gone wrong with the appeal. If the applicant had concerns about the scope of the leave, it was open to him to bring an application to the Court to seek to expand or otherwise refine the issue raised on leave. But it is very clear that this complaint cannot possibly justify an application under the *Greendale* jurisdiction. The applicant may have wished to argue what he describes as "the merits" but if, as it appears he accepts, the leave granted did not permit such an argument, the fact that the "merits" were not addressed in the judgment at the Supreme Court is hardly a departure from some fundamental obligation which would require the decision of the Supreme Court to be set aside.

18 It is even more difficult to understand the complaint made about the decision in *Barlow*. Notwithstanding what was set out in the Notice of Motion, it appears that it is now suggested that rather than overruling *Barlow*, the decision of this Court "obliquely cast doubt upon *Barlow* and *Olsson*". However formulated, this is a very significant proposition. Even if the Court did cast doubt upon *Barlow*, or even more extraordinarily overrule it (and for reasons I will shortly address neither of these contentions are or could be correct), it is hard to see how that of itself could give rise to any possible

application under the *Greendale* jurisdiction. The applicant did not rely upon *Barlow*, but could have, since the judgment in *Barlow* was delivered nearly two weeks before the argument in this case concluded. Even if an inconsistency or incompatibility existed between the two decisions, (and again it is necessary to emphasise that this will be addressed), that in itself would not justify an application to set aside this judgment.

19 It is plain however, that this Court did not overrule or cast doubt upon *Barlow*. *Barlow* was a decision as to the interpretation of Article 10 of the Irish Constitution. In the context of the natural resources of the State, it was held that when the Constitution referred to any alienation of such resources being made by law, it was referring to a statute law. The applicant here sought to derive from Barlow a principle that when any instrument (including an instrument of the European Union which falls to be interpreted by European law) refers to "law" or "national law", such references are to be interpreted as either a statute or, rather strangely, anything required to be laid before Parliament. The issue here was quite different to that in *Barlow*. It raised no issue under Article 10 of the Constitution. Instead the case considered whether legal aid pursuant to the Custody Legal Aid Scheme was being made available by law, and as of right.

20 Finally, the applicant sought an Article 267 TFEU reference. When requested to identify the question which arose on this application and not the decision of the 30th March, 2017, counsel contended that the process followed, was not compliant with Article 14 of the Framework Decision which provides that "where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State". It is truly difficult to understand how it can be contended that any issue arises under Article 14 in relation to this separate application. The applicant has been heard in the High Court, Court of Appeal and again in this Court. He has been heard on this application, and on his application under Article 40.1 of the Constitution. He will be heard in the coming days both on his Brexit point in the High Court, and it appears on his appeal on the Article 40.4 issue, in the Court of Appeal. Finally on the hearing of this appeal, counsel acknowledged that he had not formulated the question which he considered should be referred under Article 267. It is difficult for the Court to accept that any referable issues arise in such circumstances.

The Brexit Issue

21 It is important to recognise the fact that the Minister has acknowledged that the applicant in this case is entitled to raise an issue in relation to Brexit, and it appears that will be heard in the coming days. Nothing in this judgment is intended to restrict the applicant's entitlement to argue that point or indeed the High Court's power determine how any such hearing should proceed. On the hearing of this application, counsel on behalf of the Minister accepted expressly that the applicant was entitled to raise the Brexit issue. However, it is very plain that the applicant seeks to go much further. The applicant has submitted two written submissions to this Court, and has included his summary of submissions to be made to the High Court on the re-entered s.16 application. Those submissions summarise the issues which the applicant seeks to contend as follows:

> "i Brexit, and its impact on E.A.W.s to the UK.
>
> ii Article 11(2) of the Framework Decision and the Attorney General's Schemes compliance with it.
>
> iii Delay and the Supreme Court's indication that fresh E.A.W. proceedings

should not have been commenced.

Iv The constitutionality and Charter compatibility of that part of s.16 of the E.A.W. Act that, by implication, renders proceedings under it "inquisitorial, non-adversarial and *sui generis*". This ground does not arise unless Mr. O'Connor fails on the others and most likely will require a separate plenary hearing."

22 It is I hope sufficient to observe that this application was not necessary to allow the applicant to address the point in relation to Brexit, even though it appears to be formulated in the most general and unsatisfactory of terms. The question described as "Article 11(2)" appears to be the matter considered in these proceedings. The third issue of delay and the alleged "Supreme Court's indication" are clearly the substantive issues which were not prosecuted. Finally, the question of constitutionality and Charter compatibility of that part of s.16 of the EAW Act did not appear to have been raised before or mentioned in these proceedings. It is disquieting that the applicant seems to contend further that he is both entitled to raise this issue, and that it may require a separate plenary hearing.

23 It is desirable that the Court should exercise greater restraint, and seek more clarity, than have been exhibited in the making of this application. I consider that nothing in this application raises even an arguable case that might satisfy the *Greendale* criteria. It follows that the application to set aside the judgment and order of this Court is directly contrary to the provision of Article 34.4.6° of the Constitution. The application must be dismissed.