



Supreme Court of Ireland Decisions

You are here: [BAILII](#) >> [Databases](#) >> [Supreme Court of Ireland Decisions](#) >> Minister for Justice and Equality v O'Connor [2018] IESC 47 (09 October 2018)
URL: <http://www.bailii.org/ie/cases/IESC/2018/S47.html>
Cite as: [2018] IESC 47

[\[New search\]](#) [\[Help\]](#)

Judgment

Title: Minister for Justice and Equality v O'Connor

Neutral Citation: [2018] IESC 47

Supreme Court Record Number: 131/17

High Court Record Number : 2011 297 EXT

Date of Delivery: 09/10/2018

Court: Supreme Court

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

Judgment by: Clarke C.J.

Status: Approved

Result: Other

THE SUPREME COURT

**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 delivered by the Chief Justice, Mr. Justice Clarke, on the 9th October 2018

1. Introduction

1.1 The lengthy previous history of these European Arrest Warrant proceedings is set out in a number of previous judgments of this Court (*Minister for Justice and Equality v. O'Connor* [\[2017\] IESC 21](#); [\[2017\] IESC 48](#) and [\[2018\] IESC 3](#)). As appears from the most recent of those judgments, an application was brought on behalf of the Respondent/Appellant ("Mr. O'Connor") seeking to have a previous order providing for his surrender to the United Kingdom vacated on the basis of an argument which derived from the United Kingdom's imminent departure from the European Union ("Brexit"). For the reasons set out in that judgment, this Court considered that it was appropriate to refer certain questions of European law to the Court of Justice of the European Union ("CJEU") under the provisions of Article 267 of the Treaty on the Functioning of the European Union. In that judgment, this Court also made reference to the fact that there were a number of cases in the High Court which were held up pending the decision of this Court in relation to the application. That fact, coupled with the potential impact of the case on other areas of the law and indeed on international relations, led this Court to request that the preliminary reference be dealt with by the CJEU under the urgent preliminary ruling procedure ("PPU procedure"). The CJEU did not accede to that request.

1.2 However, in the meantime, a different case involving at least a similar issue came before the High Court in circumstances where, unlike the case of Mr. O'Connor, the person concerned was in custody. In those proceedings the High Court judge (Donnelly J.) was persuaded that she too should refer almost identical questions to the Court of Justice in order to enable her to resolve the case in question (*Minister for Justice, Equality and Law Reform v. R.O.* [\[2018\] 2 ILRM 199](#)). The High Court also requested that this reference be dealt with under the PPU procedure, on the basis of para. 4 of Article 267 TFEU which refers to the CJEU's obligation to act "with the minimum of delay" in respect of a preliminary reference concerning a person in custody. The CJEU decided to grant the request that the reference be dealt with under the urgent procedure.

1.3 The Court of Justice has recently given judgment in that case (R.O. (Case C-327/18 PPU) [EU:C:2018:733](#)). In substance, the answers given were unfavourable to the case made on behalf of Mr. R.O. to the effect that his surrender should not take place by virtue of the impending Brexit.

1.4 Against that background an issue has now arisen as to whether, in the view of this Court, it continues to be necessary to obtain the answers sought from the CJEU in these proceedings in order to resolve the issue currently before this Court. This judgment is

directed to that question.

2. Recent Procedural History

2.1 As noted above, in the present case the request made by this Court to the CJEU to have the reference dealt with under the PPU procedure was refused, whereas in the *R.O.* case that request was granted. That being so, a stay was placed on the current reference by the President of the CJEU until the Court had delivered its decision in *R.O.* . Following the delivery of that decision, the CJEU contacted this Court by letter dated the 21st September 2018, to inquire as to whether it was intended to maintain the preliminary reference in the present case. In that context, it should be noted that Mr. O'Connor's solicitors contacted the Registry of the CJEU in response to the judgment of the Court in *R.O.* , in effect stating that there were significant differences between the case made on behalf of *R.O.* . and those which Mr. O'Connor would seek to advance, as well as suggesting alleged oversights in the judgment of the CJEU.

2.2 One further matter should be noted. After what might be described as the parallel reference by the High Court to the CJEU had been made in *R.O.* , counsel on behalf of Mr. O'Connor made an application to this Court on the 27th June 2018 which in substance sought that this Court might require the applicant/respondent ("the Minister") to seek to have the reference in these proceedings joined with the reference in *R.O.* . The principal basis put forward by counsel on that occasion was an expressed concern that the arguments which Mr. O'Connor might wish to put forward might not be the same as those which would be advanced on behalf of *R.O.* . In a context where the CJEU had admitted the *R.O.* case into the PPU procedure but had not done likewise in respect of Mr. O'Connor's case, it was anticipated that the CJEU was likely (as transpired to be the case) to give judgment in *R.O.* . before Mr. O'Connor's case. On that basis it was feared that the arguments which Mr. O'Connor might wish to put forward would not be considered before a final decision on the issues of principle was made.

2.3 However, in a ruling delivered on the day in question, this Court indicated that it would be inappropriate to take any step which might have the effect of delaying the *R.O.* . proceedings before the CJEU, which, at the time when the application in question was heard, were already listed for early hearing. The Court took that view not least because Mr. *R.O.* was in custody solely on the basis of his pending surrender to the United Kingdom, such that he was entitled to be released if there were a legal impediment to that surrender. Thus, any delay in the final resolution of Mr. *R.O.* 's proceedings, should they have been favourably decided from his point of view, would have led to him being in custody for longer than was necessary.

2.4 There being no practical way in which it would have been possible for Mr. O'Connor's case to "catch up" with the *R.O.* . case, even if the CJEU were persuaded that it were appropriate to join the cases in some fashion, this Court declined to make any order or give any direction.

2.5 However, that same question, being the issue arising out of what were said to be the separate arguments which Mr. O'Connor wished to make, has now returned to this Court in the light of the position adopted on behalf of Mr. O'Connor when the matter was before this Court to consider what action it should take in the light of the decision in *R.O.*

3. Mr. O'Connor's Case

3.1 In substance, Mr. O'Connor argues that the Court of Justice was wrong in the decision which it made in *R.O.* . or, alternatively, that *R.O.* . cannot be said to provide a definitive determination of the legal issues concerned. This is so, it is argued, having regard to the fact that certain arguments which are sought to be put forward on behalf of Mr. O'Connor were not considered by the CJEU or, if considered, were not determined

in the judgment of that Court.

3.2 On that basis, it is argued that this Court should allow the reference in these proceedings to go ahead in the ordinary way so as to enable Mr. O'Connor to make an argument to the effect that the Court of Justice should revisit the issue.

4. Discussion

4.1 The starting point has to be to observe, as already noted, that the questions posed to the Court of Justice in *R.O* . were substantially identical to the questions posed in this case.

4.2 I am aware of the reasons why the CJEU is reluctant to adopt the PPU procedure save in cases where same is absolutely required in the interests of justice. Unlike the expedited procedure, the process followed in a PPU involves omitting certain parts of what would otherwise be the normal procedure before the CJEU, such that it might be considered to give rise to a situation where it might be more difficult for other member states to intervene effectively in the process. Given that judgments of the CJEU interpret European law for the purposes of all member states there is, of course, a high value on ensuring that all member states have the ability fully to participate in any issues before the CJEU on foot of a preliminary reference which, it might be considered, could affect the position within their own jurisdiction.

4.3 On that basis, I understand the reasons why the CJEU determined to proceed under the PPU procedure in *R.O* . but not in Mr. O'Connor's case.

4.4 However, there will always be difficulties where there are parallel cases involving the same, or substantially the same, issues, but where the precise legal arguments which one party may wish to put forward may differ from those which a party in like position in other proceedings may wish to advance. If all cases are considered together then any court having carriage of the relevant proceedings can consider all points before coming to a conclusion. On the other hand, if the cases are considered consecutively there may be complaint, as here, from a party that a legal issue has been determined in the earlier case without proper consideration of an argument which it wished to advance.

4.5 Most legal systems have techniques in place to minimise such risks but there will inevitably be a possibility, in any legal regime, that issues of principle will come to be determined and settled in earlier proceedings in a way which will materially affect cases which come before the courts at a later stage. This may be so irrespective of whether the decisions in earlier cases may, as is the case in a common law system, be regarded as substantively binding under the *stare decisis* principle, or whether the earlier cases may simply come to establish a settled case law from which courts are not likely to depart in later cases.

4.6 However, it seems to me that there are two critical points to be taken into account in the particular circumstances of this case. The first stems from the fact that the questions posed by this Court are, for all practical purposes, identical to those posed and answered in *R.O* . For the reasons already pointed out in previous judgments of this Court, the current position is that, unless there be a favourable answer to those questions from the perspective of Mr. O'Connor, his application to be allowed to revisit the question of his surrender to the United Kingdom on Brexit related grounds would have to be found against him and the order of surrender executed. But those questions have now been answered, albeit in other proceedings, in a way which is unfavourable to his interests.

4.7 Next, it seems to me that the overriding fundamental principle identified in the jurisprudence of the CJEU in matters such as this is that surrender should be ordered by

a requested State unless, after a proper examination by the courts of the requested State, there is a real risk that the rights of the individual concerned will not be respected, should surrender be ordered. In that regard, reference must be made to the recent jurisprudence of the CJEU, and in particular the decision of the Court in *Aranyosi and Căldăraru* (Cases C – 404/15 and C – 659/15 PPU) [EU:C:2016:198](#) which concerned the alleged incompatibility of detention conditions in the relevant issuing member states with fundamental rights, in particular the prohibition on torture and inhuman or degrading treatment enshrined in Article 4 of the Charter of Fundamental Rights of the European Union ("the Charter"). The CJEU concluded as follows at paragraph 104:-

"It follows from all the foregoing that the answer to the questions referred is that Article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end."

(Emphasis added)

4.8 The Grand Chamber of the CJEU subsequently relied on that decision in its judgment in *Minister for Justice and Equality v. L.M. (Deficiencies in the system of justice)* (Case C-216/18 PPU) [EU:C:2018:586](#) which concerned issues relating to alleged deficiencies in the system of justice and the rule of law of and in the requesting state. The Court stated at paragraph 60:-

"Thus, where, as in the main proceedings, the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State (see, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C – 404/15 and C – 659/15 PPU, [EU:C:2016:198](#), paragraph 88)."

(Emphasis added)

4.9 Finally, reference might be made to the conclusion of the CJEU in *R.O.* itself, where, after reference to the above authorities, it was concluded at paragraph 62:-

"The answer to the questions referred is, therefore, that Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter and the Framework Decision following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union."

(Emphasis added)

4.10 Therefore, a mere theoretical possibility of impairment of rights is not sufficient to override the obligation to surrender.

4.11 The only potential infringement of his rights, deriving from Brexit, suggested by Mr. O'Connor concerned the rule on specialty and the question of credit for time served in prison. However, both of these matters were the subject of information sought in the *R.O.* proceedings by the CJEU from the U.K. authorities and, as appears from the judgment of the Court in that case, answers were given which satisfied the CJEU that there was no real risk of breach of rights. I cannot, therefore, see that there is any basis for this Court holding that there is a real risk that any rights which Mr. O'Connor may have will not be fully respected should he be surrendered to the United Kingdom.

4.12 This Court has already determined the questions which require to be answered by the CJEU in order that the Court be able finally to dispose of Mr. O'Connor's application. Identical questions have now been answered by the CJEU. It follows that, unless there were a real possibility that the CJEU might be persuaded to answer those identical questions in a different way in the reference in this case, there would be no point in inviting the CJEU simply to answer the same questions again.

4.13 The key question advanced to the CJEU was as to whether, in all the relevant circumstances, the effect of Brexit was to prevent surrender either in all cases, no cases or in certain circumstances only. In essence, the answer of the CJEU was to say that it was possible that Brexit might prevent surrender but only where there were substantial grounds to believe that the person concerned was at risk of being deprived of rights recognised by the Charter and the Framework Decision.

4.14 For the reasons already analysed I am not of the view that any such substantial grounds have been substantiated not least because many of the points sought to be relied on in that regard were themselves the subject of debate and decision in *R.O.* It follows in turn, in my view, that Mr. O'Connor's application to this Court would require to be refused unless there was a realistic possibility that the CJEU might be persuaded to give different answers to the questions raised in the reference in this case to those which have already been given in answer to the almost identical questions in *R.O.* It seems to me that it is highly unlikely that this would occur but ultimately that may well

be a matter that the CJEU itself may need to consider.

4.15 In those circumstances, I am not satisfied that it continues to be necessary for this Court to continue to seek the answers to the questions raised in the reference already sent to the CJEU. Against that background it is appropriate to consider what course of action the Court should adopt.

5. The Proposed Course of Action

5.1 What I would propose in those circumstances is that this Court should respond to the letter from the CJEU by enclosing a copy of this judgment and indicating that, in the view of this Court, the questions which this Court has sought that the CJEU should answer in these proceedings have in fact been answered by the judgment of the CJEU in *R.O* . It remains open to Mr. O'Connor to seek to persuade the CJEU that *R.O* . was wrongly decided. However, that possibility should not afford Mr. O'Connor a significant postponement of his surrender unless he can make some immediate and material progress in persuading the CJEU to re-consider the issues which have already been decided in *R.O* .

5.2 In those circumstances, I would propose that this matter be put in for mention in approximately four weeks' time on the understanding that, unless Mr. O'Connor pursues the issues concerned by making further immediate submissions to the CJEU inviting it to remove the stay and continue with this reference, notwithstanding the views of this Court and notwithstanding the decision of the CJEU in *R.O* ., and unless the prospect of the CJEU re-opening the questions raised and answered in *R.O* . remains alive, this Court will consider whether it should dismiss Mr. O'Connor's application and re-affirm the order for surrender already made.