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Judgment

Title: The Minister for Justice & Equality -v- Lipinski

Neutral Citation: [2018] IESC 8

Supreme Court Record Number: 66/16

Court of Appeal Record Number: 2015 342 CA

Date of Delivery: 13/02/2018

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: Appeal dismissed

THE SUPREME COURT

Record No. 66/2016

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

In the Matter of the European Arrest Warrant Act 2003

Between/

The Minister for Justice and Equality

Applicant/Respondent

and

Arkadiusz Piotr Lipinski

Judgment of the Chief Justice delivered the 13th February, 2018

1. Introduction

1.1 This Court has already delivered a judgment on this appeal on the 22nd May 2017. A panel consisting of the current formation of this Court together with the now retired Denham C.J. and Laffoy J. unanimously determined that it was necessary to refer questions of European law to the Court of Justice, under Article 267 of the Treaty on the Functioning of the European Union, arising out of the proper interpretation of Article 4a of Council Framework Decision 2002/584/JHA as amended by Council Framework Decision 2009/299/JHA ("The Framework Decision").

1.2 The facts of this case are fully set out in my judgment delivered on that occasion (*Minister for Justice and Equality v. Lipinski* [2017] IESC 26) and it is unnecessary to set them out again. Furthermore, the legal issues which arose on this appeal and the reasons why this Court felt it necessary to refer questions to the Court of Justice are also set out in that judgment.

1.3 However, after those questions had been referred to the Court of Justice, there were further procedural developments which it is necessary to address.

2. The Process after the Reference

2.1 The judgment and order of reference of this Court was transmitted to the Court of Justice on the 14th June 2017. On the 31st August 2017, the Registrar of this Court received a letter from the Registrar of the CJEU, enquiring whether, in the light of judgments delivered by the Court of Justice in *Tadas Tupikas* (Case C-270-17 PPU) and *Sławomir Andrzej Zdziasek* (Case C-271/17 PPU) it was considered necessary for this Court to obtain the answers to the specific questions raised in the reference in these proceedings.

2.2 On the 21st September 2017, the Registrar of this Court indicated to the Court of Justice that the above referenced judgments of that Court appeared to dispose of at least some of the questions raised in the preliminary reference, and that it was therefore not necessary to maintain the reference in relation to those questions. The questions concerned will be referred to shortly but were answered by the judgment of the Court of Justice in *Sławomir Andrzej Zdziasek*. It was further suggested that, pending a further hearing before this Court to hear submissions from the parties regarding maintaining a reference in relation to any remaining questions or indeed reformulating any remaining issues, it might be appropriate for the CJEU to suspend further action on the reference, in order to allow this Court to reach a conclusion regarding any potential remaining issues. A further oral hearing took place before this Court on the 31st October 2017 during which the parties made submissions regarding the question of whether it was necessary to continue with the reference to the CJEU in the light of existing and pending cases before that Court.

2.3 On the 20th November 2017, the Registrar of this Court indicated to the Court of Justice by further correspondence that, having considered further submissions from the parties in this case and in light of the CJEU's pending judgment in *Samet Ardic* (Case C-571/17 PPU), this Court confirmed that any outstanding questions in the context of this

reference were likely to be answered by the judgment in *Samet Ardic*.

2.4 On the 22nd December 2017, the Court of Justice gave its judgment in the case of *Samet Ardic*. Thereafter, the matter was put in for mention before me to enable the parties to indicate their position in the light of the judgment of the Court of Justice in *Sławomir Andrzej Zdźaszek* and also *Samet Ardic*. The position of the parties was that it was considered appropriate that this Court should give judgment on this appeal but that the parties did not wish to make any further submissions to the Court as it was felt that the position in European law was now clear as a result of the relevant decisions of the Court of Justice.

3. Discussion

3.1 The Court has therefore considered the issues which arose on this appeal in the light of the decision of the Court of Justice in *Sławomir Andrzej Zdźaszek* and in *Samet Ardic*. As is clear from the previous judgment of this Court there were, in substance, two sets of issues which required to be determined.

3.2 The first concerned the fact that the evidence suggested that Mr. Lipinski, while represented on the occasion of the original appeal against the order providing for his conviction and imprisonment, was not actually present at the hearing of that appeal. However, the European arrest warrant in his case did not expressly seek to invoke the provisions of the Framework Decision and its Irish implementing measures which allows for surrender notwithstanding the absence of the accused in certain circumstances including where the accused is represented. On the other hand, it was, in substance, clear, on the facts, that the circumstances permitting surrender were present because Mr. Lipinski was fully represented at and aware of his appeal. The potential difficulty stemmed from the fact that the European arrest warrant document did not contain that information, as the Framework Decision standard form suggests that it should.

3.3 This issue was, however, subsequent to the decision of this Court to make a reference on this appeal, the subject of a decision of the Court of Justice in *Sławomir Andrzej Zdźaszek* which made it clear that a court could and should assess whether the objective factors, permitting surrender in the absence of actual presence of the accused at a relevant hearing, were present even though the European arrest warrant document did not contain an appropriate reference to those facts. Thus, it became clear that this aspect of the case made on Mr. Lipinski's behalf could not succeed in the light of the judgment of the Court of Justice in *Sławomir Andrzej Zdźaszek*.

3.4 The issue which remained for consideration was the second question which was the subject of a reference on this appeal. As appears from the earlier judgment on this appeal, Mr. Lipinski initially obtained the benefit of what, in Irish law, might be considered to be the Polish equivalent of a suspension of part of his sentence. However, that suspension was subsequently revoked because of the failure of Mr. Lipinski to comply with the terms attached to it and, thus, the original sentence was restored. Mr. Lipinski was not present at the hearing which led to the revocation of the suspension and the re-imposition of the initial sentence. Indeed, it was the very fact that Mr. Lipinski had left Poland and come to Ireland, and thus did not comply with the probation type obligations imposed on him, which led to both the revocation of the suspension and the difficulties in notifying him of the hearing leading to that revocation.

3.5 The issue which therefore arose was as to whether his absence at the hearing which led to the re-imposition of his original sentence could be said to breach the *in absentia* requirements of the Framework Decision and thus preclude his surrender.

3.6 However, the judgment of the Court of Justice in *Samet Ardic* is clear in that regard.

The ruling of the Court is in the following terms:-

“Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of ‘trial resulting in the decision’, as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.”

3.7 It is clear, therefore, that a hearing at which a suspension of sentence is revoked on grounds of infringement of conditions attaching to that suspension is not considered to be part of a “trial resulting in the decision” for the purposes of the Framework Decision unless the revocation decision changes “the nature or the level of the sentence initially imposed”. If the consequence of the revocation is to alter the sentence originally imposed then different considerations may apply. However, it is clear on the facts of this appeal, and I did not understand counsel for Mr. Lipinski to argue otherwise, that the sole consequence of the revocation order made by the Polish courts in this case was to reinstate the original sentence without variation.

3.8 It is clear, therefore, that the decision of the Court of Justice in *Samet Ardic* has clarified the second issue sought to be raised on behalf of Mr. Lipinski in a manner unfavourable to him so that that ground too must fail.

4. Conclusions

4.1 For the reasons set out in this judgment it is clear, therefore, that, subsequent to the decision of this Court to make a reference to the Court of Justice, the issues which this Court sought to raise have been definitively determined by the Court of Justice in other proceedings being *Sławomir Andrzej Zdziaszek* and *Samet Ardic*. Those issues have been determined in a manner unfavourable to the arguments which Mr. Lipinski sought to advance.

4.2 It follows that Mr. Lipinski’s appeal must fail.