

THE HIGH COURT

[No. 128 EXT. 2019]

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

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PETRONEL PAL

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of April 2020

1. This is a ruling on whether to certify the following questions for the purpose of an appeal by the respondent pursuant to section 16(11):
 - (1) What factual circumstances, if reversed, should the High Court take account of for the purpose of considering whether there is reciprocity for the purpose of section 44 of the European Arrest Warrant Act, 2003?
 - (2) Is the fact that the law of the issuing state asserts extra-territorial jurisdiction on a similar basis to Ireland of relevance for the purpose of section 44?
 - (3) In circumstances where a specific and precise risk of a breach of Article 3 has been established, is it permissible to surrender a requested person in the absence of a specific and precise undertaking that he will not be exposed to such a risk?
 - (4) In circumstances where a specific and precise risk of a breach of Article 3 has been established, is it permissible for the executing judicial authority to infer the terms of an undertaking in respect of such a risk where the issuing judicial authority has refused to provide a specific and precise undertaking concerning such a risk?

Certification Applications

2. Section 16(11) of the European Arrest Warrant Act, 2003 provides:

"(11) An appeal against an order under subsection (1) or (2) or a decision not to make such an order may be brought in the Supreme Court if, and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

The section must now be interpreted in accordance with s. 75 of the Court of Appeal Act 2014.

3. The correct approach to be followed for certification applications was described by Edwards J in *Minister for Justice v. Kasproicz* [2013] IEHC 531 as follows:

*"The general approach to be taken is that identified by Clarke J. in *Arklow Holidays v. An Bord Pleanala* [2007] 4 I.R. 112 as being appropriate in considering, as in*

that case, whether to grant leave to appeal a decision of the High Court to the Supreme Court under s. 50(4) (f) of the Planning and Development Act, , but also bearing in mind the remarks of Murray J. (nem diss) in the Supreme Court in Minister for Justice and Equality v. Tokarski [2012] IESC 61 (Unreported, Supreme Court, 6th December, 2012) concerning particular considerations that arise under s. 16(11) of the Act of 2003 that do not arise in some other areas of the law where there are similar restrictions on an appeal, such as in asylum and planning and development law, and which therefore create the imperative for a broad approach to the interpretation of that provision."

4. The general approach identified in *Arklow Holidays Ltd v. An Bord Pleanála* [2007] 4 IR 112, was set out by Clarke J at para 4 as follows:

- "(i) there must be an uncertainty as to the law in respect of a point which has to be of exceptional importance; see for example Lancefort v. An Bord Pleanála [1998] 2 I.R. 511;*
- (ii) the importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case; see Kenny v. An Bord Pleanála (No. 2) [2001] 1 I.R. 704. It is the case that every point of law arising in every case is a point of law of importance; see Fallon v. An Bord Pleanála [1992] 2 I.R. 380. That, of itself, is insufficient for the point of law concerned to be properly described as of "exceptional public importance";*
- (iii) the requirement that the court be satisfied "that it is desirable in the public interest that an appeal should be taken to the Supreme Court" is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance; see Kenny v. An Bord Pleanála (No. 2) [2001] 1 I.R. 704. On that basis, even if it can argued that the law in a particular area is uncertain, the court may not, on the basis, inter alia, of time or costs, consider that it is appropriate to certify the case for the Supreme Court; see Arklow Holidays Ltd. v. Wicklow County Council [2004] IEHC 75, (Unreported, High Court, Murphy J., 4th February, 2004)."*

5. The general approach has been modified to some degree by the observations of Murray J in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61. The learned judge stated:

"There is no right of appeal against an order of the High Court in a case such as this unless the court that makes the order certifies, pursuant to s. 16 of the Act of 2003, as amended, that its own decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal against that decision should be taken to this Court. This is a severe limitation on the scope of judicial remedies available to those seeking to assert rights in matters arising within the scope of European Union law. Unlike at least some of the other areas of the law where there are similar restrictions on an appeal, such as in asylum and planning and development law, there is no prior independent

administrative process. The process in those other areas is quasi judicial and intended to be a complete and definitive determination of the interests of the parties concerned, subject only to judicial review of that process. Although even then it is the court which has made the decision that decides whether there should be an appeal from its own decision. In matters arising under the European Arrest Warrant Act there is just one judicial determination at first instance with no right of appeal, as such, except insofar as it is granted by the same court on the basis of the criteria set out in section 16. In this instance the learned High Court judge has, it would seem, and in my view correctly, taken a broad approach to the interpretation of that section and granted leave to appeal even though, since s.45 has been amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition Act, 2012, the issue is unlikely to arise again.”

6. I am satisfied that applications under s. 16(11) involve a somewhat wider approach than that applicable to planning and asylum cases. The latter are more concerned with judicial review of self-contained and completed administrative decision-making processes incorporating rights of appeal at different stages whereas the former are more concerned with one substantive application of the 2003 Act and the Framework Decision prior to the execution of the warrant.

Section 44 – Questions 1 and 2

7. The respondent submits that there is uncertainty as to the law regarding s.44. It is said that in *Minister for Justice v. Bailey* [2012] 4 IR 1, the only case which has come before the Supreme Court in which the substance of section 44 was considered, both the majority and minority judgments made reference to the difficulty in interpreting section 44.
8. It is submitted that this court relied primarily on the judgment of Denham J in reaching its decision. The respondent notes that while Denham J’s judgment provides some support for the proposition that a national of the requesting state might be surrendered for an extraterritorial murder, the judgments of Hardiman J and Fennelly J do not. Both judges, it is said, framed their observations by reference to the view that the issue for consideration was whether a non-Irish citizen could be prosecuted for an extraterritorial murder.
9. The respondent’s submission is that *Bailey* does not speak to the circumstances of the case, rather it solely considers the situation in relation to a non-Irish citizen. The respondent seeks an answer as to precisely what reversed circumstances the court should take into account for the purpose of the section 44 test and submits that *Bailey* did not address this particular issue.
10. The respondent submits that the distinction in the present case is entirely predicated on the basis that the respondent is a citizen of the requesting state. That basis is only relevant under section 44 if the court is prepared to reverse that particular circumstance as opposed to the circumstance of the respondent being a non-Irish citizen. It is

submitted that there is little in the wording of section 44 and article 4(7)(b) to assist the court in determining which factual circumstances to reverse.

11. The respondent submits that there is uncertainty regarding the principle of reciprocity, which both the Supreme Court in *Bailey* and this court relied on. The respondent submits that there was some divergence between Fennelly J and O'Donnell J on this point and that the CJEU has yet to give guidance on this point. The respondent submits that the appellate court may now make a preliminary reference to the CJEU, an option that was not available to it at the time of the *Bailey* case. While it is accepted by the respondent that this court can find support in the majority judgements of *Bailey* for its interpretation of the principle, the respondent submits it is unclear that support for this interpretation can be found in or derived from either the terms of section 44 or Art.4(7)(b) of the Framework Decision.
12. It is submitted by the respondent therefore, that the question relating to s.44 is not confined to the facts of this case and is of relevance to other cases, given that the Supreme Court has yet to state in positive and clear terms the extent of the hypothetical exercise and the role of reciprocity. The respondent also notes that the fact that the applicant in *Bailey* has sought the surrender of Mr. Bailey once more, where s.44 has not been amended since, is strongly indicative that the conclusions of the Supreme Court will be subject to further argument. That is an issue which I do not propose to consider other than to note that it is advanced as an example of how the issue may present as a live issue in future litigation concerning s.44.
13. It is submitted on behalf of the applicant that the issue was settled by the *Bailey* case and that no issue of law arises: the court has simply applied the decision. It is said that the argument advanced by the respondent in respect of the murder charge is theoretical and, even if correct, does not transcend the facts of this case in respect of any matter of principle, much less one of exceptional public importance.
14. I am satisfied that the questions raised at 1 and 2 constitute points of law of exceptional public importance taking the wide view appropriate to such applications as articulated by Murray J in *Tokarski*. Section 44 has been described in the various judgments in *Bailey* as presenting a difficult problem of construction. I accept that the facts of this case differ from *Bailey* and that there are arguments, which the court has not accepted in its judgment that could, if accepted, lead to a different result not just in respect of the murder charge in this case but could have wider consequences in respect of applications for surrender in like cases in the future concerning the interpretation of s.44 and perhaps Article 4(7)(b) of the Framework Decision. For the reasons advanced by the respondent, I am disposed to certify that the court's decision in respect of the matters set out in questions 1 and 2 are points of law of exceptional public importance and that it is desirable in the public interest that an appeal be taken under s.16(11).

Prison Conditions in Romania – Questions 3 and 4

15. The respondent submits that in circumstances where a specific and precise risk of a breach of Article 3 has been established, there is uncertainty as to whether it is

permissible for the court to surrender a requested person where the undertaking provided is not specific and precise. Furthermore, the respondent submits that there is uncertainty as to whether the court can infer from the terms of such an undertaking when the issuing judicial authority has refused to provide a specific and precise undertaking concerning such a risk.

16. The respondent submits that the issuing judicial authority in this case has refused to provide a specific and precise undertaking and that the court has inferred from the terms of the undertaking that the respondent will not be surrendered to Iasi prison.
17. The respondent submits that any undertaking that is given must be clear in its terms and absolutely explicit. The respondent refers to *Othman (Abu Qatada) v. United Kingdom* ECHR Case 8139/09 (171/12) amongst other ECHR caselaw in this regard.
18. The respondent does not accept that *ML Case-220/18 PPU* is authority for the proposition that an explicit assurance is not required. That case concerned whether the issuing state was required to give undertakings in relation to all of the prisons in its territory, not whether a precise undertaking in relation to one specific prison is required.
19. It is submitted by the respondent that the public nature and interest arising in relation to these questions is manifest.
20. I am not satisfied that any point of law arises from the two questions posed on this aspect of the court's decision. The court's judgment sets out in detail the relevant and established legal principles under Article 4 (Article 3 of the Convention) which it has applied to the facts of the case. The court focussed on the actual and precise conditions of detention that would apply if the respondent were to be surrendered and to that end sought and obtained additional information from the issuing authorities. The assessment made in respect of that fundamentally important issue was "specific and precise" and was based on the reality which was established on the evidence and materials available. The court was satisfied in accordance with the standard of proof required in respect of matters relevant to Article 4 and conscious of the absolute protection provided by Article 4, that surrender would not give rise to a real or substantial risk to the respondent of being subjected to inhuman or degrading treatment.
21. The fact is that the respondent if convicted and sentenced will be imprisoned in Margineni Prison and the court has an assurance that he will not be imprisoned in any prison which is not Article 4 (Article 3) compliant: the court is satisfied that this includes Iasi Prison. This is a factual assessment within the principles set in the cases cited and quoted in the body of the court's judgment. The pathway which the court had to take to procure that information was somewhat more protracted and less smooth than it might have expected but the court's concerns were addressed to its satisfaction on the receipt of what ultimately was an amount of information accompanied by assurances concerning the place in which he would serve his sentence and a guarantee that any other prison to which he might be transferred would be Article 4 compliant.

22. I am not satisfied that the grounds advanced based on domestic jurisprudence which antedates the 2003 Act case-law and Framework Decision and the application of EU law and jurisprudence concerning assurances in older extradition cases is of assistance in this case.
23. I am also satisfied that the decision in *Othman (Abu Qatada) v United Kingdom ECHR Case 8139/09(17/1/12)* concerns an application in circumstances which are wholly different from the facts of this case. The overarching assurances given in this case emanate from a Member State's issuing authority and were furnished to the court in the course of a procedure which derives from EU law, the Framework Decision and the Charter of Fundamental Rights to which Ireland and Romania subscribe. The court was satisfied to accept that if convicted and sentenced the respondent will be held in a maximum safety or security facility in Margenini Prison. If transferred to any other prison he will be held in a prison which is Article 4 compliant. The court was satisfied to accept these assurances following an extensive analysis of the case. There has been extensive engagement by the Romanian authorities with the Council of Europe and the ECtHR in investing and improving its prison facilities, conditions and infrastructure. The assurances given ultimately addressed the courts concerns.
24. I am not satisfied that any of the grounds required by s. 16(11) for the certification of a point of law by way of appeal have been satisfied in respect of question 3 and 4.