



THE COURT OF APPEAL

Record No 2021/93

Neutral Citation number: [2021] IECA 173

Birmingham P.

Edwards J.

Kennedy J.

RICHARD GALLAGHER

Appellant

-v-

**THE MINISTER FOR FOREIGN AFFAIRS,
IRELAND AND THE ATTORNEY GENERAL**

Respondents

AND

THE MINISTER FOR JUSTICE AND EQUALITY

Notice Party

JUDGMENT (*ex tempore*) of Mr Justice Edwards delivered on the 10th of June, 2021.

Introduction

1. This is an appeal against the judgment ([2021] IEHC 240) and Order of the High Court (Hunt J.,) of the 26th March 2021 refusing to grant the appellant relief by way of judicial review. Leave to apply for judicial review was granted during a telescoped hearing, in circumstances where the respondents and notice party were on notice of the application,

but the court declined to grant substantive relief. The applicant (i.e. the appellant) was, however, granted a recommendation for the purposes of the Legal Aid -Custody Issues Scheme.

2. In brief outline this was a challenge to the *vires* of a statutory instrument, i.e., SI 719/2020, the European Arrest Warrant Act 2003 (Designated Member States) (Amendment) Order 2020, made and promulgated by the Minister for Foreign Affairs designating the United Kingdom of Great Britain and Northern Ireland (“the UK”) for the purposes of the European Arrest Warrant Act 2003 in the case of European arrest warrants satisfying following two conditions:

- a. that the European arrest warrant has been issued by a judicial authority in the UK; and
- b. that the person in respect of whom the European arrest warrant is issued is arrested before 11:00 pm on 31 December 2020 for the purposes of the execution of the European arrest warrant.

3. Such a statutory instrument was necessary to give effect to Article 62 (1) (b) of the agreement on the withdrawal of the UK from the European Union signed at Brussels and London on the 24th of January 2020 and which entered into force on the 1st of February 2020 (“the withdrawal agreement”).

4. The statement of grounds sought a declaration that the operative provision within the said statutory instrument, namely Article 3 thereof, had been made ultra vires the powers of the Minister for Foreign Affairs and that it was invalid and of no effect. An order of *certiorari* quashing the said provision was sought in the alternative.

5. The Notice of Appeal filed by the appellant is ambiguous in that on the one hand it indicates that this is a partial appeal only, in as much as the appellant only contests the determination by the High Court that the making of SI 719/2020, i.e., the European Arrest

Warrant Act 2003 (Designated Member States) (Amendment) Order 2020 was *intra vires* the powers of the Minister for Foreign Affairs; yet on the other hand it seeks the substantive relief that was refused by the High Court. Despite the ambiguity in the paperwork this does appear to be in truth a full appeal.

Background to the matter

6. The appellant is the subject of a European arrest warrant (“EAW”) issued by a judicial authority in the UK which seeks his surrender to Northern Ireland for the purposes of standing trial in relation to an assault allegation dating from 2 August 2009 and arising from an incident said to have occurred in Strabane, County Tyrone.

7. The EAW issued on the 10th of July 2020. The appellant was arrested on the 7th of December 2020 and there was a surrender hearing for the purposes of s. 16 of the European Arrest Warrant Act 2003 (“the Act of 2003”) on the 10th of February 2021. At that hearing counsel for the notice party sought to rely on SI 719/2020. Counsel for the appellant submitted that SI 719/2020 was of no effect as it had been made *ultra vires* the powers of the first named respondent. Arising from this, the s. 16 hearing was adjourned to allow these judicial review proceedings to be commenced.

The Designating Orders

8. In the High Court in the matter currently before us, there was evidence of the making of two designating orders, purportedly to give effect both to the transition arrangements envisaged by the withdrawal agreement and to cater for post – transition period arrangements when the UK would become a “third country” for the purposes of the EAW system.

9. The EAW system envisages the application of EAW arrangements to a third country where an agreement exists between the EU and the third country allowing for that. The EU and the UK have entered into a Trade and Cooperation Agreement (TCA) which, *inter alia*, provided for the continuation of EAW arrangements between the UK as a third country and

EU member states after the expiration of the transition period at 11.00pm on the 31st of December 2020.

10. Provision already existed in Irish law for the application of EAW arrangements to third countries by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012. However, following the conclusion of the TCA it was necessary that the UK would be designated as a third country with effect from 11.00pm on the 31st of December 2020.

11. The evidence was that the first named respondent simultaneously promulgated two statutory instruments; namely SI 719/2020, for the purpose of designating the UK for the limited purposes mentioned at paragraph two above in respect of EAW steps and actions taken during the currency of the withdrawal agreement, i.e. up to 11.00pm on the 31st of December 2020; and SI 720/2020, the European Arrest Warrant (Application to Third Countries) (United Kingdom) Order 2020, for the purpose of designating the UK as a third country with effect from 11.00pm on the 31st of December 2020.

12. The appellant's case for relief by way of judicial review raises a net point. He says that at 11.00pm on the 31st of December 2020, the United Kingdom exited the transitional arrangement previously covered by the withdrawal agreement. At that exact time, the first named respondent simultaneously declared the United Kingdom to be both "a member state" and "a third country". He says it cannot be both.

13. The respondents vehemently disagree with this characterisation of what was done, and with the objection put forward by the appellant.

14. We received detailed written submissions from both sides setting out their respective arguments, and were grateful to receive these.

Decision

15. We have no hesitation in rejecting the arguments put forward by the appellant. It is quite clear to us that SI 719/2020 and SI 720/2020 are mutually exclusive in their application and that they were intended to complement each other. There is no question of the first named respondent having designated the UK to be both a member state and a third country at the same time. SI 719/2020 relates to EAW steps and actions taken during the currency of the transition period. Although the transition period ended at 11.00pm on the 31st of December 2020, that fact does not imply that the withdrawal agreement ceased to have all effect and impact at that time and on that date. The withdrawal agreement continues and the effect of s.98 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019, as we interpret it, is to make clear that acts done, and steps taken, during the transition period will, by virtue of the withdrawal agreement, continue to have validity and implications for ongoing proceedings and events that extend beyond the expiry of the transition period. SI 720/2020, on the other hand, which operates prospectively from 11.00pm on the 31st of December 2020, only governs the new third country relationship. There is no overlap in truth or in fact. SI 719/2020 was necessary to ensure the continuing validity and legality of EAW procedures commenced but not completed during the transition period. It does not have the effect however of designating the UK as a member state post 11.00pm on the 31st of December 2020.

16. In so far as the appellant contends that his case falls under the TCA, we are satisfied that that is not the case.

17. We find no error on the part of the High Court judge and in the circumstances, we must dismiss the appeal.

Birmingham P: I agree with the judgment of Edwards J.

Kennedy J: I also agree.