THE COURT OF APPEAL

Record No. 2023/4

Edwards J. **Neutral Citation Number [2023] IECA 2**

Donnelly J.

Binchy J.

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2^0 OF THE CONSTITUTION, AND IN THE MATTER OF AN APPEAL:

Between/

DANAS KAIRYS

Applicant/Appellant

- and –

THE GOVERNOR OF CLOVERHILL PRISON

Respondent

JUDGMENT of the Court delivered (*ex tempore*) by Mr Justice Edwards on the 5th of January, 2023.

Introduction:

1. This is an appeal against the judgment and order of the High Court (Stack J.) of the 4th of January 2023, to whom a complaint was made pursuant to Article 40.4.2^0 of the Constitution by or on behalf of the applicant/appellant (hereinafter the appellant), that the appellant was being unlawfully detained, and which following an *ex-parte* inquiry conducted forthwith into the said complaint, refused to order the person, i.e., the respondent, in whose custody the appellant was detained, to produce the body of the appellant before the High

Court on a named day and to certify in writing the grounds of his detention, and to further, upon the body of the appellant being produced before the High Court, and after giving the respondent an opportunity of justifying the detention, to order the release of the appellant from such detention unless satisfied that he is being detained in accordance with the law.

2. Briefly put, the appellant's complaint is that the High Court judge erred in closing the inquiry she had opened at the end of the *ex-parte* stage, and in failing to require the respondent at a second stage hearing to produce the appellant before the court and justify the appellant's continued detention, notwithstanding that the High Court judge was satisfied at the conclusion of the *ex-parte* stage that the application was misconceived, and in effect unstateable, and had expressed herself as having *"no doubts about the lawfulness of the detention of the applicant."*.

Background to the application

3. The appellant is a Lithuanian citizen whom it is contended has established residency and has put down roots in Ireland. The appellant is wanted in the Republic of Lithuania to serve the outstanding balance of a sentence of three years and seven months imposed upon him in respect of 13 offences of which he was convicted by a court in that state. The Panevezys Regional Court in Lithuania issued a European arrest warrant (EAW) on the 2nd of May 2016 seeking the rendition of the appellant to the Republic of Lithuania so as to have him serve the outstanding portion of his sentence. That warrant was endorsed for execution in this jurisdiction on the 13th of June 2016 and the appellant was arrested and brought before the High Court on the 30th of March 2021 on foot of same.

4. The appellant unsuccessfully contested his surrender before the High Court, and that is the subject matter of the judgement of Burns (Paul) J. issued on the 31st of January 2022 and bearing the neutral citation [2022] IEHC 57. Amongst the points relied upon by the appellant was his contention that he should not be surrendered because of the failure of the

Irish State to implement Council Framework Decision 2008/909/JHA of the 27th of November 2008, on the application of the principle of mutual recognition of judgments in criminal matters, imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. Following the dismissal of the appellant's objections to his surrender, the High Court duly made an order pursuant to s.16 of the European Arrest Warrant Act 2003 directing that the appellant should be surrendered to such person as was duly authorised by the Republic of Lithuania to receive him.

5. The appellant then unsuccessfully applied to the High Court judge for a certificate allowing him to appeal the order for his surrender on the basis that the case involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to an appellate court. The appellant later persuaded the Supreme Court to accept the case and the Supreme Court's determination in that regard bears the neutral citation [2022] IESCDET 75. The appellant also secured a stay on the s.16 order pending the outcome of the appeal. The matter was in due course heard before the Supreme Court which dismissed the appellant's appeal, giving its reasons for doing so in a judgment (delivered by Baker J. on behalf of that court) on the 22nd of December 2022, and which bears the neutral citation [2022] IESC 53.

6. Following the dismissal of the appellant's appeal to the Supreme Court, the High Court (Hyland J.) on the following day, namely the 23rd of December 2022, lifted the stay on the s.16 surrender order that had been made on the 31st of January 2022 and remanded the appellant in custody to Cloverhill prison, to be detained there for a period of not less than nine days from the date of the order and a further period not exceeding 10 days pending surrender. Arrangements were then made by the respondent with the Lithuanian authorities for the handing over of the appellant to such person as was duly authorised by the Republic of Lithuania to receive him on the 6th of January 2023.

7. On the 4th of January 2023 a complaint was made to a judge of the High Court, (i.e. Stack J.) on behalf of the appellant pursuant to Article $40.4.2^0$ of the Constitution, that the appellant was being unlawfully detained. As she was required to do, the High Court judge opened an inquiry, and as is usual in the first stage thereof, heard submissions *ex parte* as to what the basis of the complaint was. This was notwithstanding the fact that the appellant had put the respondent on notice of his intended application although he was not procedurally required to do so. The High Court was made aware of this but did not consider it necessary to hear counsel for the respondent.

8. The application was grounded upon an affidavit of the appellant's solicitor, Siobhan Hegarty-Blacklock, sworn on the 4th of January 2023. Much of this affidavit sets out the background to the proceedings, including referencing the EAW proceedings before the High Court and the Supreme Court. The gravamen of the complaint of unlawful detention is then to be found in paragraphs 7 and 8 of that affidavit which state:

> "7. I am advised and I believe, Applicant's (*sic*) continued detention (after the making of the High Court order on 23 December 2022 in the EAW proceedings) in Cloverhill Prison (or, indeed, in any other facility in the State) for the purpose of surrendered to Lithuania on foot of the conclusion of the EAW proceedings, equates to an unlawful expulsion from the State as 'expulsion' is understood to mean in Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 (hereinafter 'the Citizenship Directive').
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> 8. I am advised and I believe, the proposed (EAW proceedings) surrender/expulsion of applicant from the State to Lithuania, is prohibited by the Citizen Directive because articles 16 and 18 of the Citizenship Directive protect the applicant from that surrender/expulsion; more specifically: that protection from surrender/expulsion flows from the fact that the applicant has resided legally in the

state for a continuous period of five years in accordance with the conditions laid down by the Citizenship Directive."

9. The High Court judge having read the grounding affidavit, and having heard the submissions of counsel, came to the view that the application was fundamentally misconceived, and that it was unnecessary and would indeed be inappropriate to allow the matter to proceed beyond the first *ex parte* stage of the procedure (which she labelled as the "conditional" stage, borrowing terminology from the rules of court relating to the traditional *habeas corpus* procedure, terminology which is not strictly correct (although nothing turns on it) in the context of the broadly analogous present day procedure used in this State, namely the inquiry under Article 40.4.2^{0} of the Constitution.) She said:

> *"At the conditional stage, the threshold is low and one of the most important duties of a High Court judge is to ensure that enquiries as to lawfulness of detention are conducted whenever a legitimate doubt is raised as to the lawfulness of a person's detention. For a person in custody one of their most important rights is of access to a Court and for that purpose to lawyers to ensure that the lawfulness of their detention can be appropriately reviewed and, if necessary, that they should be released. However, I had no doubt here as to the lawfulness of the Applicant's detention as I feel that the only point being made as to the lawfulness and validity of the order of this Court of the 23rd December 2022, is misconceived.*
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> *The Applicant is being surrendered to serve a sentence under the 2003 Act. Provisions of that Act apply not just* [to] *EU citizens but also to Irish citizens who have even stronger rights than EU citizens as they are completely immune from any deportation or removal from the State in the ordinary course, that is the essence of citizenship. At the end of the sentence, the Applicant's right to enter and reside in this*

State on foot of the Citizenship Directive will fall for a determination at that point. It may well be, I do not need to give it consideration at this stage, it may well be that it is not affected in any way by his service of a sentence in Lithuania and that he will return in the same way that an Irish citizen would return to this country after serving a lawful sentence imposed abroad which is recognised as being enforceable via the surrender procedures operated under the 2003 Act.

Residency rights, where there is an Irish or an EU citizen do not give immunity, of any kind, from a lawful order for surrender made by this Court as executing judicial authority. That order of the Court, as executing judicial authority, concerns the service of a sentence and not a right of residence. It is well established the mere physical presence in the State does not constitute residence for the purposes of the Citizenship Directive or, indeed, the Immigration Acts, the converse is equally true, physical removal from the State does not equate to expulsion under the Citizenship Directive. I, therefore, have no doubts about the lawfulness of the detention of the Applicant on foot of the order of this Court of the 23rd December and there is nothing, in my view, to justify a conditional order under Article 40 and I, therefore, somewhat usually but I am clear in this view, I, therefore, refuse the application for a conditional order."

10. The appellant has now appealed to this court.

The Appellant's case

11. In the appellant's expedited Notice of Appeal, the grounds of appeal pleaded are that:

"1. The appellant is being held in unlawful detention in Cloverhill Prison for the purposes of being expelled from the state on foot of an Order of the High Court dated 23 December 2022.

2. The appellant's detention is unlawful by reason of the fact that he is possessed of a permanent Right of Residence in a Member State of the European Union, to wit Ireland, pursuant to Article 16 of European Union Directive 2004/38 ("Citizenship Directive").

3. The argument was advanced before Ms Justice Stack that the appellant was possessed of an Article 16 Right of the Citizenship Directive: permanent Right of Residence in the State.

4. Ms Justice Stack erred in refusing to direct that holding of any enquiry into the lawfulness (or otherwise) of the detention of the Appellant in Cloverhill Prison.

5. Upon being informed that the Appellant was pursuing an immediate appeal to the Court of Appeal (of the refusal to direct the holding of any enquiry) Ms Justice Stack (when requested by the Appellant's counsel) refused to grant a stay on the Appellants expulsion pending consideration of the merits of the Appellant's case by the Court of Appeal."

12. The respondent, on whom the expedited Notice of Appeal was served, has filed a Notice of Opposition in which she joins issue with the appellant on all of his said grounds of appeal.

13. At the oral hearing this afternoon before this Court, counsel on behalf of the appellant sought to reiterate a point that had been made by him in the High Court, namely that his client was prepared and willing to serve every minute of the sentence that had been imposed upon him, provided that he could serve it in Ireland. He contended that the circumstances of his client's case were therefore unique. He was not in the same situation as the usual person who was the subject matter of a European arrest warrant and who was contending that he should not have to serve his sentence. He had accepted from the outset that his client could

provide no answer on the merits to the claim for his rendition on foot of the EAW. However, he was a person who, counsel would contend, has a permanent right of residence under the Citizenship Directive conditional on serving his sentence in this jurisdiction, and that to surrender him to Lithuania in those circumstances would amount to an unlawful expulsion.

14. During the course of the hearing counsel for the appellant acknowledged that the case that he was seeking to make flies in the face of existing case law from the Court of Justice of the European Union ("CJEU"), and in particular the decision in *TR, Case No C-416/20 PPU.* In that case the CJEU was concerned with articles 8 and 9 of EU Directive 2016/343, dealing with certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings in the context of EAW proceedings. In that case the respondent in the EAW proceedings had sought to prevent his surrender to Romania to serve a sentence on the basis that it would contravene protections in the Directive even though the EAW itself had contained all of the relevant information to satisfy Article 4a of Framework Decision 2002/584/JHA. The respondent was unsuccessful in persuading the CJEU of the merits of his case, that court holding at paragraph 47 of its judgment that:

> *"47. Reliance on the provisions of a directive in order to prevent the execution of a European arrest warrant would make it possible to circumvent the system established by Framework Decision 2002/584,* ***which provides an exhaustive list of the grounds for non-execution.****"* *(emphasis added)*

15. Counsel for the appellant conceded in exchanges with the court that if he was right in his argument he would have to persuade the CJEU to depart from the views expressed by it in paragraph 47 of its judgment in *TR.* To achieve that he was asking this Court to seek a preliminary ruling from the CJEU as to whether his client has indeed a permanent Right Of Residence under the Citizenship Directive, conditional upon him serving his sentence of imprisonment in this jurisdiction, and if so, as to whether surrendering him to Lithuania in

response to the EAW seeking his surrender would amount to an expulsion in breach of the Citizenship Directive.

16. Counsel for the appellant was confronted by the Court with the proposition that the only reliefs that can be granted in the context of an inquiry under Article 40, were either an order directing the release of the detained person where it is considered that his detention is unlawful, or an order refusing to release him where the court is satisfied that his detention is lawful. Counsel for the appellant was unable to provide any satisfactory basis for suggesting that it could be appropriate for a court seized of an Article 40 inquiry, to seek a preliminary reference from the CJEU in circumstances such as those postulated by him. Moreover, he was unable to offer any satisfactory explanation for not having made an application for a preliminary ruling in the proceedings before the High Court, much less for his failure to bring forward the case that he now seeks to make based upon the Citizenship Directive in the context of the surrender proceedings before the High Court, and seeking a preliminary ruling in those proceedings.

17. In the proceedings before the High Court counsel for the appellant was confronted by Ms Justice Stack with the question as to whether his client was claiming a greater entitlement under the Citizenship Directive than that enjoyed by an Irish citizen resident in Ireland, but whose surrender might have been requested by another member state on foot of an EAW, to serve a sentence for an offence committed by him in that other member state while he was temporarily abroad. Counsel for the appellant was unable to provide a satisfactory answer to that highly relevant query. The question was again posed to him at the appeal hearing by a member of the Court of Appeal bench and he replied that his client was an EU citizen and therefore had greater rights than an Irish citizen. We do not see how that follows at all and do not consider that the explanation provided amounts to either a satisfactory or cogent answer to the query posed.

The Court's Decision

18. We are satisfied that the High Court judge was entirely correct in regarding the appellant's application as being misconceived. Indeed, we are satisfied that it is unstateable.

19. We do not consider that there is any entitlement on the appellant's part to resist his surrender on foot of the Citizenship Directive. The Citizenship Directive does not impact at all on an EAW. There is nothing in EU law to suggest that EU citizens have the ability to resist rendition or extradition on grounds outside of the EAW Framework Decision by virtue of their residency rights. The provisions of the European Arrest Warrant Act 2003 apply not just to the citizens of other EU states who happen to be resident, whether permanently or temporarily in Ireland, but to Irish citizens. Irish citizens enjoy rights to resist expulsion, but it has never been suggested that Irish citizens are immune from rendition or extradition to another country where their surrender or extradition has been lawfully sought. It is untenable to suggest that a Lithuanian national enjoys immunity from surrender to Lithuania on foot of an EAW because he enjoys rights in Ireland pursuant to the Citizenship Directive whereas an Irish national who is the subject of a similar EAW could be surrendered to Lithuania.

20. We consider that there is a valid order for the detention and surrender of the appellant. There is no basis for impugning that order and our approach in regard to it must be guided by long-established jurisprudence such as that enunciated in *FX v. Clinical Director of the CMH* [2014] 1 IR 280 and *Ryan v. Governor of Midlands Prison* [2014] IESC 54. There is nothing on the face of Hyland J.'s Order of the 23rd of December 2022 (which is exhibited with the affidavit of the appellant's solicitor) or anything else which suggests invalidity. Further, there is nothing to suggest that there has been any denial of justice or fundamental flaw in the process by means of which the underlying section 16 order was made. The appellant had every opportunity to make his case before the High Court and the Supreme Court and singularly failed to bring forward the point that he now seeks to rely upon based upon the

Citizenship Directive. In the latter regard, we echo the criticisms made of him in that regard by the High Court judge yesterday.

21. In conclusion, we are completely satisfied that the High Court judge was correct in closing her inquiry at the end of the *ex parte* stage and in refusing to require the respondent to produce the body of the appellant and to certify and justify the grounds of his continued detention. She was in no doubt whatsoever as to the lawfulness of the appellant's detention. She gave cogent reasons for the views that she had arrived at and the orders made by her were entirely appropriate in our assessment.

22. In the circumstances we dismiss the appeal and we will hear short submissions from the parties with respect to any issues as to costs, or ancillary matters.