

AGJ



C-237/15-1

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COURTS SERVICE
An tSeirbhís Chúirteanna

19th May 2015

Court of Justice of the European Communities
Registry
L-2925 Luxembourg

RE: MINISTER FOR JUSTICE AND EQUALITY -V- FRANCIS LANIGAN
2013 1 EXT

Dear Registrar


I wish to inform you that the High Court has decided to refer to the Court of Justice of the European Communities for a preliminary ruling certain questions arising in a case pending before the Court. I enclose herewith the Reference by Ms Justice Murphy which includes the facts of the case, the national law and the questions for reference. The Court has requested that the Urgent Preliminary Ruling Procedure be applied.

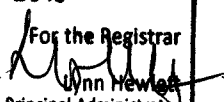
The Applicant is represented by Eileen Creedon, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8.

The Respondent is represented by Pdraig O'Donovan & Co Solicitors, Abberley Law Centre, High St, Tallaght, Dublin 24

If you require further information or assistance please do not hesitate to contact me.

Yours faithfully


Kevin O'Neill
Principal Registrar

Registered at the Court of Justice under No. <u>991908</u>
Luxembourg, <u>22.05.2015</u>
Fax/E-mail: _____
Received on: <u>22.05.15</u>
For the Registrar  Lynn Hewlett Principal Administrator

THE HIGH COURT

Record No: 2013/1 Ext

BETWEEN:

MINISTER FOR JUSTICE and EQUALITY

Applicant:

-and-

FRANCIS LANIGAN

Respondent:

Reference by the High Court to the Court of Justice of the question of the effect of non-compliance with the time limits stipulated in Article 17 of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

The High Court has decided to refer to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") the question of the effect of a failure to comply with the time limits stipulated in Article 17 of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) when read in conjunction with Article 15 of the said Framework decision and the question of whether such failure gives rise to any rights to/for an individual who has been held in custody pending a decision on his/her surrender for a period in excess of the time periods specified.

I. The Proceedings

This referral arises in the context of proceedings in the case of *Minister for Justice and Equality v. Francis Lanigan (2013/EXT 1)* which is before the High Court in Ireland. The respondent, Francis Lanigan, is an individual who has been arrested on foot of a European Arrest Warrant issued by District Judge John Meenan of the Magistrates' Courts in Dungannon in County Tyrone, Northern Ireland in the United Kingdom of Great Britain and Northern Ireland (the Issuing State). His surrender is sought pursuant to the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). The respondent is sought for prosecution purposes in the Issuing State for the offences of murder and possession of a firearm with intent to endanger life. The applicant, the Minister for Justice and Equality, is the Central Authority for Ireland as envisaged by Article 7 of the Framework Decision and, thus, is the agency of the Irish Government responsible for acting as the Central Authority and dealing with requests for surrender under the Framework Decision in that capacity. The body responsible for making a decision on the respondent's surrender is the High Court in Ireland, the Executing Judicial Authority of the Irish State under the Framework Decision.

The respondent has been held in custody since 16th January, 2013 pending a decision on his surrender, for reasons which will be further outlined below. The respondent is opposing his surrender to the issuing state and has argued, *inter alia*, that the delay in the European Arrest Warrant proceedings means that the application for his surrender should be refused by the High Court.

The 60 day period from the date of the arrest of the respondent, as set out in Article 17(3) of the Framework Decision, expired on or about the 17th March, 2013.

Thereafter, the 90 day period stipulated by Article 17(4) of the Framework Decision expired on or about the 16th April, 2013. No final decision was given by the High Court on the case by that stage.

II. Relevant Provisions of the Framework Decision

Article 15 of the Framework Decision provides as follows:

“Surrender Decision:

- 1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.*
- 2. If the executing judicial authority finds information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, **taking into account the need to observe the time limits set in Article 17.***
- 3. The issuing judicial authority may at the same time forward any additional useful information to the executing judicial authority. (Emphasis added).”*

Article 17 of the Framework Decision provides:

“Time Limits and Procedures for the Decision to execute the European Arrest Warrant

1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute a European arrest warrant.

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.”

III. The transposition of the Framework Decision into Irish law

(i) The European Arrest Warrant Act, 2003

The Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) (hereafter the “Framework Decision”) does not have direct effect in Irish law. It was implemented in Irish law by means of the European Arrest Warrant Act, 2003 (the “2003 Act”). A copy of the 2003 Act, as amended, is annexed to this reference. Insofar as the procedures relating to this application are concerned the following sections of the 2003 Act are relevant. Section 13 of the 2003 Act provides:

“(1) The Central Authority in the State shall, as soon as may be after it receives a European arrest warrant transmitted to it in accordance with section 12, apply, or cause an application to be made, to the High Court for the endorsement by it of the European arrest warrant, or a true copy thereof, for execution of the European arrest warrant concerned.

(2) If, upon an application under subsection (1), the High Court is satisfied that, in relation to a European arrest warrant, there has been compliance with the provisions of this Act, it may endorse the European arrest warrant for execution.

(3) A European arrest warrant may, upon there being compliance with subsection (2), be executed by any member of the Garda Síochána in any part of the State and may be so executed notwithstanding that it is not in the possession of the member when he or she executes the European arrest warrant, and the warrant or the true copy of the warrant, as the case may be, endorsed in accordance with subsection (2), shall be shown to and a copy thereof given to, the person arrested at the time of his or her arrest or, if the warrant or true copy, as the case may be, is not then in the possession of the member, not later than 24 hours after the person's arrest.

(4) A person arrested under a European arrest warrant shall, upon his or her arrest, be informed of his or her right to—

(a) consent to his or her being surrendered to the issuing state under section 15,

(b) obtain, or be provided with, professional legal advice and representation, and

(c) where appropriate, obtain, or be provided with, the services of an interpreter.

(5) A person arrested under a European arrest warrant shall, as soon as may be after his or her arrest, be brought before the High Court, and the High Court shall, if satisfied that that person is the person in respect of whom the European arrest warrant was issued—

(a) remand the person in custody or on bail (and, for that purpose, the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence),

(b) fix a date for the purpose of section 16 (being a date that falls not later than 21 days after the date of the person's arrest), and

(c) inform the person that he or she has the right to—

(i) consent to his or her surrender to the issuing state under section 15,

(ii) obtain, or be provided with, professional legal advice and representation, and

(iii) where appropriate, obtain, or be provided with, the services of an interpreter.”

Section 16(1) of the 2003 Act provides:

“Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under section 13 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—

- (a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued;*
- (b) the European arrest warrant, or a true copy thereof, has been endorsed in accordance with section 13 for execution of the warrant;*
- (c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012),*
- (d) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and*

(e) the surrender of the person is not prohibited by Part 3.”

Section 16(9) and s. 16(10) of the 2003 Act, as amended by s. 10 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012, are of particular significance to this reference in that they relate to the time limits laid down in Article 17(3) and 17(4). Sections 16(9) and 16(10) respectively, provide as follows:

“(9) If the High Court has not, after the expiration of 60 days from the arrest of the person concerned under section 13 or 14, made an order under subsection (1) or (2) or subsection (1) or (2) of section 15, or has decided not to make an order under subsection (1) or (2), it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reasons therefor specified in the direction, and the Central Authority in the State shall comply with such direction.

(10) If the High Court has not, after the expiration of 90 days from the arrest of the person concerned under section 13 or 14, made an order under subsection (1) or (2) or subsection (1) or (2) of section 15, or has decided not to make an order under subsection (1) or (2), it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reason therefor specified

in the direction, and the Central Authority in the State shall comply with such direction.”

(ii) The decision of the Supreme Court in *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518

Neither the Framework decision nor the 2003 Act specifies the consequences of failure to adhere to the 60 day and/or 90 day time limits in Article 17 of the Framework Decision. The effect of such a delay was considered by the Supreme Court of Ireland in the case of *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518, the full text of which is appended to this reference. In that case, the applicant had been arrested pursuant to a European arrest warrant issued by the competent judicial authority in the United Kingdom. The applicant in that case was brought before the High Court and remanded in custody pursuant to s. 13(5) to the date fixed for the purposes of s. 16. The applicant was subsequently remanded in custody to several adjourned dates. The applicant made an application for *habeas corpus* in which he contended that the High Court, as executing judicial authority, was bound to a 60 day time limit in which to make a decision on whether to surrender the applicant under s. 16, after which time, the applicant was entitled to be released from custody. The High Court deciding the *habeas corpus* application held that the applicant was in lawful custody. The applicant appealed to the Supreme Court.

As the head note of the case records, the Supreme Court held, in dismissing the appeal:

“1. that there was no entitlement to immediate release in circumstances where the court failed to make a decision within the specified period. Such a

consequence would have to be spelled out clearly and unambiguously given the primary obligation on participating member states to execute the European arrest warrant.

2. That, upon the expiration of the specified 60 day period, the duty upon the court to execute the warrant had not come to an end but continued.

3. That the 60 and 90 day time limits were with a view to internal discipline within the member states and not with a view to conferring individual rights.

4. That the principle of conforming interpretation required a national court, when applying national law, to interpret it as far as possible in the light of the wording and purpose of the framework decision in order to attain the purpose which it pursued unless to do so would be contra legem.”

The Supreme Court was thus mindful of its obligation, as expressed by Fennelly J. at paragraph 60 of the judgment “*to interpret the national law in light of the wording and purpose of the directive*” (*von Colson and Kamann v. Land Nordrhein-Westfalen (Case 14/83)* [1984] E.C.R. 1891, para. 26). However, an important factor affecting such interpretation was noted by Fennelly J. at paragraph 65:

“It has to be acknowledged, at once, that the legislation presents unusual problems of interpretation. The European arrest warrant is itself a novel instrument. It was adopted in the wake of the devastatingly tragic events of the 11th September, 2001. The drafting is extraordinarily loose and vague, particularly in the manner in which offences are defined. The court, on this appeal, has to consider an Act of the Oireachtas which implements a framework decision adopted pursuant to the provisions of Title VI of the

Treaty on European Union. However, Ireland has not made the declaration which is necessary under Article 35 of the Treaty on the European Union before the Court of Justice can exercise the interpretative jurisdiction envisaged by that Article. Hence, this court decides this question without any guidance from that court. The Court of Justice may, of course, be asked, on a reference from another member state, to rule on the interpretation of the 60 day period.”

Therefore, in considering the Supreme Court’s decision in *Dundon* it is necessary to have regard to Protocol (No. 36) on Transitional Provisions of the Treaty on the Functioning of the European Union, Article 10 of which provides:

- “1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.*
- 2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as*

set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.”

Thus, pursuant to Article 10, it was not open to the Supreme Court to refer the question to the Court of Justice, at the time of their decision in *Dundon* in 2005. However, the relevant transitional period having expired in December 2014, it is now open to the High Court in these proceedings to do so. While the High Court is bound by decisions of the Supreme Court, in light of Fennelly J.’s comments, as outlined above, the High Court considers that the interpretation of the Court of Justice would be instructive, and appropriate, the decision of the High Court in European Arrest Warrant cases being final save in limited circumstances.

IV. The proceedings before the High Court to date

The respondent, Mr. Francis Lanigan, is the subject of a European Arrest Warrant issued by District Judge Meenan of the Magistrates’ Courts in Dungannon in County Tyrone, Northern Ireland in the United Kingdom of Great Britain and Northern Ireland (the Issuing State) on the 17th December, 2012. The respondent is sought for prosecution purposes for alleged offences of murder and possession of a firearm with intent to endanger life respectively in the Issuing State. It is alleged that on the 31st May, 1998 in Dungannon, County Tyrone in the Issuing State, the respondent murdered a Mr. John Stephen Knocker by shooting him and had a firearm unlawfully in his possession at the same time with intent to endanger life.

The European Arrest Warrant was endorsed by the High Court on the 7th January, 2013 for execution by An Garda Síochána (the Irish Police Force). Thereafter, the respondent was arrested on foot of the EAW on the 16th January, 2013. The respondent was brought before the High Court on that date and evidence of the respondent's arrest was given to the Court. The respondent did not consent to his surrender. European Arrest Warrant cases in Ireland are dealt with by means of an Extradition List which is presided over by a High Court Judge and takes place each Tuesday during legal terms. The function of the Extradition List is to ensure that proceedings are advanced and hearing dates are set in cases in which respondents oppose their surrender so that the Court can determine whether all necessary conditions are in place to allow it to make an order for surrender, pursuant to s. 16 of the European Arrest Warrant Act, 2003 (in accordance with s. 13(5)(a) of the Act). The case was adjourned to the Extradition List in the High Court on the 29th January, 2013. Thereafter it was adjourned from time to time for a variety of reasons including the making of an unsuccessful bail application; the replacement of the respondent's legal team; an application for legal aid under the State's Custody Issues Legal Aid Scheme; the filing of Points of Objection and grounding affidavits on behalf of the respondent; the non-availability of the respondent's counsel; the seeking of additional information from the issuing state by the applicant in respect of the respondent's averment that his life would be at risk if he were surrendered to the requesting state. On 30th June, 2014, eighteen months after his arrest, the hearing of the application for the respondent's surrender commenced before Murphy J. of the High Court. The hearing lasted for three days, during which the respondent raised a number of procedural and evidential issues relating to the operation of the Framework decision in the context of Irish law. Essentially, the respondent sought rulings from the Court

that the surrender hearing is adversarial; that the normal rules of evidence in an adversarial hearing apply; that the Court could not act on information received from the Issuing State unless it was proved on affidavit and that the respondent had a right to cross-examine any deponent proffered by the applicant.

On 17th November, 2014, Murphy J. delivered judgment on the preliminary issues raised in the case. She determined that European arrest warrant proceedings were not subject to the ordinary procedural and evidential rules governing Irish proceedings, noting that *“the process on which the court is engaged is a distinct process created by the Council Framework Decision of the 13th June, 2002, providing for surrender procedures between Member States of the European Union”*. Murphy J. further found that information received from an Issuing State can be considered by the Court, acting in its capacity as Executing Judicial Authority, and noted:

“The Framework decision envisages the exchange of information upon which the issuing and receiving states can act. This is a novel concept in our jurisprudence. Our courts are conditioned to act on ‘evidence’ not ‘information’. It is not surprising that it has taken time for our common law system to adjust to such a concept. The Framework decision encourages communication between member states and their differing legal systems.”

Murphy J. noted that the respondent had placed evidence before the Court to the effect that his life might be endangered if he were surrendered. She noted that

“before a surrender can be ordered, the court must be satisfied that his right to life under our Constitution and Article 2 of the European Convention on Human Rights will be protected so far as is practicable”. She therefore ordered that:

“The applicant engage with the, to date, uncontroverted, evidence of the respondent that in the event of his surrender his life would be at risk. The Court seeks information addressing the specific concerns expressed. The information may be presented to the court otherwise than in affidavit form but it must be presented in a way that the court can be satisfied of the provenance and authenticity of the information and that the information relates to this specific case.”

Arising from that judgment additional information was sought from the Issuing State concerning issues which had arisen in light of the preliminary ruling. The additional information from the Issuing State was made available to the High Court by the 8th December. The respondent issued papers at that point seeking a referral of questions of law to the European Court of Justice. The initial referral sought by the respondent related to the preliminary issues which had already been determined by the Court. The Court ultimately refused that application on the grounds that it had already determined those issues.

On 15th December, 2014, further legal argument was heard before the High Court, most of which related to issues already determined by the Court. In the course of that hearing Counsel for the respondent argued *inter alia* that the application for surrender should be dismissed on the grounds of excessive delay. In addition, the respondent

made an application to refer a question to the Court of Justice dealing with the issue of delay. A bail application was also made by the respondent and bail was granted on certain terms to him by Murphy J.. However, the respondent has not taken up that bail.

On 12th January, 2015, the case again came before the High Court. The applicant opposed the raising of an objection in relation to delay at such a late stage in proceedings and also contended that the Supreme Court had already decided the issue of delay in *Dundon v. Governor of Cloverhill Prison*. The respondent contended that since the 1st December, 2014, the option to make a reference had become available to the Irish courts and therefore the interpretation in *Dundon* was no longer binding on the High Court. The matter was adjourned to the 18th January, 2015. On 18th January, 2015, the High Court reiterated its ruling that European arrest warrant proceedings constituted a distinct process in which normal procedural and evidential rules did not apply and consequently refused to refer any questions on those issues to the ECJ. However the Court did decide to refer a question of law to the Court of Justice for its preliminary ruling on the matter of delay only, noting:

“It appears to the Court that our system cannot function within the limits set out in Article 17. The consequences of that inability are a matter of real substance and the Court, independently of the parties, would wish to have the assistance of the ECJ in interpreting Article 17 as the outcome could affect the Court’s ultimate decision in this case.”

The matter was adjourned from time to time to allow for drafts of the preliminary question to be furnished to the High Court by the parties, and for submissions to be made in respect of those drafts. On 20th April, submissions were made on the drafts of the respective parties and a final decision on the preliminary reference was reached by the High Court on 18th May, 2015.

V. **The question referred**

The High Court, in light of the foregoing, and considering that an answer to these questions is necessary for its decision in the matter before it, refers to the Court of Justice for preliminary ruling pursuant to Article 267 TFEU, the following questions:

- (1) What is the effect of a failure to observe the time limits stipulated in Article 17 of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) read in conjunction with the provisions of Article 15 of the said Framework decision?
- (2) Does failure to observe the time limits stipulated in Article 17 of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) give rise to rights on the part of an individual who has been held in custody pending a decision on his/her surrender for a period in excess of those time periods?

Urgent Procedure

The High Court requests the Court of Justice to apply to this reference for a preliminary ruling the accelerated procedure pursuant to Article 107 of the Rules of Procedure, given that the present reference “*raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union*”. In accordance with the requirements of Article 107(2), the High Court notes that the respondent in the current proceedings has been in custody since 16th January, 2013. The High Court further notes that it is minded to follow the decision of the Supreme Court in *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518, however in light of the comments of Fennelly J. and his express assertion at paragraph 65 that the Court “*decides the question without any help from th[e] Court [of Justice]*”, it wishes to take the opportunity to ascertain the views of the Court of Justice before doing so.