High Court of Ireland Decisions

Judgment

Title:	Minister for Justice and Equality -v- Dunne; Minister for Justice and Equality -v- J.McK; Minister for Justice and Equality -v- Courtier; Minister for Justice and Equality -v- Johnston; Minister for Justice and Equality -v- R.O'N.; Minister for Justice and Equality -v- R.T.L.; Minister for Justice and Equality -v- A.W.; Minister for Justice and Equality -v- L.B. No. 3
Neutral Citation:	[2018] IEHC 283
High Court Record Number:	2017 345 EXT; 2015 254 EXT; 2018 76 EXT; 2017 122 EXT; 2016 20 EXT; 2016 72 EXT; 2017 132 EXT;2017 116 EXT; 2017 315 EXT
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Judgment by:	Donnelly J.
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[2018] IEHC 283

THE HIGH COURT

RECORD NO. 2017 345 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

JAMES DUNNE

RESPONDENT

AND

RECORD NO. 2015 254 EXT

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

J.McK

RESPONDENT

AND

RECORD NO. 2018 76 EXT

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

CECIL COURTIER

RESPONDENT

AND

RECORD NO. 2017 122 EXT

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

PAUL JOHNSTON

RESPONDENT

AND

RECORD NO. 2016 20 EXT

2016 72 EXT

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

R.O

RESPONDENT

AND

RECORD NO. 2017 132 EXT

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

R.L.T

RESPONDENT

AND

RECORD NO. 2017 116 EXT

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

A.W

RESPONDENT

AND

RECORD NO. 2017 315 EXT

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

L.B

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Donnelly delivered on 14th day of May, 2018

1. On 10th May 2018, the first case above came before me for hearing. The minister submitted that this was a case in which an Article 267 of the Treaty on the Functioning of the European Union ("TFEU") reference to the Court of Justice of the European Union ("CJEU") should be made on issues arising from the impending withdrawal of the United Kingdom of Great Britain and Northern Ireland ("the UK") from the EU (hereafter called "the Brexit issue") despite the fact that the Supreme Court had already made such a reference in *Minister for Justice and Equality v. O'Connor* (Supreme Court [2017] IEHC 518). The minister's contention was made primarily on the basis that this was a custody case and would be likely to be dealt with as part of the Urgent Preliminary Ruling Procedure of the Court of Justice of the European Union.

2. I raised the issue as to whether it was possible for this case to make a second/separate referral. I also raised the point that there were other cases in respect of which people were in custody solely on UK European Arrest Warrants ("EAW") but whose cases were adjourned pending the decision of the Supreme Court (post referral to the CJEU) on the Brexit issue. Eight cases were listed before me in which it was thought that people were only in custody in respect of these matters. It turns out that I was mistaken as to one of these respondents; he is in custody serving a sentence. Despite that sentence being finished in August, I am not certain that he would meet the criteria of urgency for the CJEU, but more importantly I consider his case less urgent than the others before me. Therefore, I am not going to consider the case of the respondent R.L.T any further.

3. In relation to the request for a preliminary reference, each of the respondents joined in with the request for a reference. The submissions of counsel for the minister were followed and adopted by counsel for each of the respondents, save in one case which I refer to later.

4. It is important to restate the history of the *O'Connor* proceedings. This Court rejected the submission in *O'Connor* that his surrender was either prohibited because of the UK impending withdrawal from the EU or should be adjourned to await the outcome of the negotiations or that it was necessary to refer the case to the CJEU. Leave to appeal was not granted. The Court granted a stay on the surrender in the event of an application to the Supreme Court. The Supreme Court ultimately gave leave to appeal in order that it might refer the issue of Brexit to the CJEU.

5. Mr. O'Connor was sought for prosecution and he was not in custody. It appears that the Supreme Court sought an expedited procedure from the CJEU, i.e. there was no application for the urgent procedure. The minister's submission is that no date has been given yet for this hearing and that it is likely to take a considerable period of time before that case is heard and determined.

6. There appear to be three types of mechanism for an accelerated procedure in a reference for a preliminary ruling under Article 267: these are priority procedure, expedited procedure and urgent procedure. In reality therefore, there are four mechanisms through which the request for a preliminary ruling may come before the CJEU: the first being in effect an "ordinary" or "standard" procedure, while the others are accelerated procedures. The Supreme Court requested the O'Connor case be heard

in an expedited manner in accordance with Article 105 of the Rules of Procedure.

7. I have been informed that there is a significant difference in the time periods in which requests for a preliminary ruling may be dealt with.

8. Article 267(4) mandates "…with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

9. Therefore, there is no mandate imposed upon the CJEU to act without delay in the O'Connor case because he is not in custody. If this Court is to refer a case, there would be such a mandate. Furthermore, in *Samet Ardic* (Case C-571/17 PPU),the CJEU determined that one of the criteria for urgency is deprivation of liberty(see para 58):

> "Secondly, as regards the criterion relating to urgency, it is necessary, in accordance with the settled case-law of the Court, to take into account the fact that the person concerned in the case in the main proceedings is currently deprived of his liberty and that the question as to whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings. Moreover, the situation of the person concerned must be assessed as it stood at the time when consideration was given to whether the reference should be dealt with under the urgent preliminary ruling procedure (judgments of 10 August 2017, *Tupikas*, C 270/17 PPU, EU:C:2017:628, paragraph 45 and the case-law cited, and of 10 August 2017, *Zdziaszek*, C 271/17 PPU, EU:C:2017:629, paragraph 72 and the case-law cited)".

10. The minister placed before me a number of statistics from the textbook of *Preliminary References to the European Court of Justice* by Morten Brober and Neils Fenger (2nd Ed, Oxford University Press, 2014). The minister refers to the difference between 2.1 months and 16.1 months.

11. I am not entirely sure that the distinction therein is between urgent procedure and expedited procedure as counsel appeared to suggest. This is because there is, at page 396, another reference to a difference between 4.5 months and 16.8 months. That appears to refer to a difference between expedited and the priority procedure.

12. I am aware from a chapter in *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Eds Kieran Bradley, Noel Travers, Anthony Whelan, Hart Publishing, 2014) by Advocate General Melchior Wathelet, that the 2012 report of the CJEU states that the urgent procedure took 53.33 days, the expedited 151.36 and the priority procedure 570.05 days. However, Advocate General Wathelet appears to suggest that since the introduction of the expedited and urgent procedure, priority now is 515.78 (as at the date of that publication).

13. It is clear from the authors of these textbooks that the accelerated procedures have definitely resulted in much earlier hearings and that depending on which figure is relied upon, the expedited procedure takes either twice or three times as long as the urgent procedure.

14. Counsel for the minister has also submitted that there is no Irish law prohibiting two references and that even if there was such a law, it would be overridden by any EU law to the contrary.

15. In respect of EU law, it is submitted that the authors of the above textbook on Preliminary References have noted that while it is common for courts to adjourn outstanding cases pending the hearing of a reference that has already been made, there are situations where more than one reference will be made. Apparently, the English

courts have not been dissuaded from making a reference because similar issues are already before the CJEU. Also, Courts can make a reference where slightly different issues are raised.

16. In my view, it is of particular importance that the Supreme Court in this jurisdiction acknowledged that another reference could also be sent in a case involving a person in custody. At the end of their reference in *O'Connor*, the Supreme Court stated:

> "In the light of the above information it also seems almost inevitable that custody issues will arise in respect of at least a significant proportion of those whose surrender may be sought. While, as noted above, a custody issue does not arise in this case, it seems inevitable that, in the very near future, and in particular in the absence of the Court of Justice adopting the expedited procedure, a further case will come before the Supreme Court which would also require to be referred to the Court of Justice but where the person concerned was in custody."

17. The minister has submitted that this Court would not be usurping the function of the Supreme Court in making this reference. I agree with that submission. It is correct on the face of Article 267(2) that any domestic court or tribunal of a Member state can decide a question is necessary. I do consider it necessary because the case will involve a person in custody awaiting a decision on the Brexit issue and it is necessary because the other reference will not be dealt with as a matter of urgency. I also believe I am not usurping the Supreme Court because they have anticipated a custody case being sent over in the absence of an early hearing in that case. I am also of the view that it is neither necessary nor desirable for me to make a final determination in any of the cases before me so that the case could go to the Supreme Court. An application for leave to appeal and in light of the ruling of the Supreme Court, it would appear that this court would have to grant leave. There would then have to be an appeal to the Court of Appeal and then an application for a leap frog appeal to the Supreme Court. That would take time.

18. Having made a decision in principle that I should make a referral, I now must decide the case that I should refer. Counsel for one of the respondents submitted to me that all cases must go forward. That is not correct. It is also unnecessary to send more than one case forward. Furthermore, it is important not to overload the CJEU, which would be the effect of numerous references on what is essentially the same point.

19. I am of the view that the L.B. case is not ready to proceed. I have been told that there is a bail matter to be re-entered before me and also an appeal to the Supreme Court. Therefore, it may not be necessary to send this over and given the urgency, it is important that a case is selected in which custody is assured. Furthermore, counsel wished to make further submissions about a referral to the CJEU with respect to 22 separate issues. These would require considerable time for this Court to adjudicate either their relevance or necessity and that case does not therefore have the necessary urgency.

20. In relation to the Dunne case, it is true to say that this is a matter that is urgent and which had recently come before the Court. He is wanted to serve 6 months in custody of a sentence that was imposed upon him (a sentence that has a part custodial and part licence requirement). He is also wanted for prosecution for being unlawfully at large. I have however considered that even the time taken on the urgent procedure for his case would bring him perilously close to having served his sentence by the time this was sent over and if there was to be any delay by virtue of the holidays. It is also the case that his short sentence as against the time for referral is a matter I have to take into account when considering bail and I have not made a final determination on his bail yet.

21. Furthermore, I also think that it is of vital importance that a person with a presumption of innocence has their case expedited. In other words, on the face of the EAW, Mr. Dunne has a valid sentence to serve. I have heard nothing to doubt the validity of that sentence when it was imposed. If in custody, he will be serving that sentence during this period of time when the UK are still a member of the EU and the custodial part of his sentence will have finished prior to the Brexit issue being finalised. The justice of the case would demand that a person with a presumption of innocence is entitled to have their case expedited to an even greater extent than a person who is sought in respect of an apparently valid sentence.

22. Of the remaining cases, only Mr. Johnston also has an element of a custodial sentence. He is also a part conviction and part prosecution case. In my view, there are other issues in that case which require to be dealt with before the Court could make a final determination as to whether the Brexit point was even necessary to resolve.

23. The others are all prosecution only cases. Most of those cases have been adjourned pending the determination of the Brexit issue hearing without any determination on other issues that may arise. The R.O case however has been heard virtually to finality. I have only an outstanding matter of making a decision on Article 3. I have carefully considered that matter and I am of the view that the Brexit issue is so bound up with the presumptions of compliance, and in effect the mutual trust, that full and final consideration of that issue could only be given when the issue of Brexit is resolved. Furthermore, the charges alleged against Mr. R.O are also of the gravest seriousness. He also has an entitlement to innocence. He has not applied for bail in circumstances where highly experienced solicitor and counsel have made the correct decision that there was no point in applying for bail given the seriousness of the offences, the lack of an address, the lack of a surety and the lack of any cash lodgement that could be made. In short, they would have wasted court time if such an application had been made.

24. Therefore, I am going to refer the R.O case to the CJEU.

25. As time is of the essence, I will now ask for submissions on the shortest possible timescale for this referral to be made.