

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use:

Supreme Court record number of this appeal

Subject matter for indexing

Leave is sought to appeal from

The Court of Appeal

COURT OF APPEAL

2016 338

CIVIL

**IN THE MATTER OF SECTION 16(6)(b) OF THE EUROPEAN
ARREST WARRANT ACTS 2003 AND 2012 AND IN THE MATTER
OF ART. 40.4 OF THE CONSTITUTION**

Between:-

JULIAN MYERSCOUGH **Applicant/Appellant**

-AND-

GOVERNOR OF ARBOUR HILL **Respondent**

Date of filing : **10th day of January 2017**

Name(s) of Applicant(s)/Appellant(s) : **Julian Myerscough**

Solicitors for Applicant(s)/Appellant(s) : **Cahir O'Higgins & Co., Solicitors,**

Name of Respondent(s) : **The Governor of Arbour Hill**

Respondent's solicitors:- **The Chief State Solicitor.**

Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?

No.

Are you applying for an extension of time to apply for leave to appeal? **No.**

1. Decision that it is sought to appeal

Name(s) of Judge(s) **Court of Appeal-Civil
Birmingham, Sheehan and Edwards JJ.**

Date of order/Judgment **Judgement 25th November 2016
Order 16th December 2016 (perfected 17th January 2017)**

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name: **Julian Myerscough**

Original status **Applicant/Appellant**

Solicitor

Name of firm **Cahir O'Higgins & Co., Solicitors,**

Email: **info@coh.ie**

Address: **Kingsbridge House, 17-22 Parkgate Street, Dublin 8.**

Telephone no: **01 8744744 / 087 9060133**

Document Exchange no. **DX 186001**

Postcode: **Dublin 8.**

Ref.

How would you prefer us to communicate with you? **E-mail**

Counsel

Name: **Michael Forde SC**

Email; **catherinefordebl@gmail.com**

Address: **Law Library, Four Courts, Dublin 7.**

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Postcode: **Dublin 7.**

Name: **Kieran Kelly BL**
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Telephone no: **01 8175340 / 087 2359307.**
Document Exchange no. **811134**
Postcode: **Dublin 7.**

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name: **Governor of Arbour Hill Justice and**
Original status **Respondent.**
Solicitor **Hugh Dockry**
Name of firm: **Chief State Solicitor**
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How would you prefer us to communicate with you? **E-mail**

Counsel

Name: **Sean Gillane SC**
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Name: **Siobhán Ní Chualacháin BL**

Email: **siobhan.nichualachain@lawlibrary.ie**

Address: **Law Library, Four Courts, Dublin 7.**

Telephone no: **01 817 5363**

Document Exchange no; **814001**

Postcode: **Dublin 7.**

4. Information about the decision that it is sought to appeal

It is sought to appeal the entire decision and order - the rejection of this statutory Art. 40.4 application, the refusal to make an Art. 267 reference to the Court of Justice and the refusal to make a recommendation under the Custody Issues Scheme.

In summary: On 29th February and 11th March 2016 Donnelly J. ordered the intending Appellant's [hereinafter "the Appellant"] detention and surrender to the U.K. under the European Arrest Acts 2003 and 2012 ["EAW Act"] and refused leave to appeal respectively. On 27th June the Minister obtained a stay from Twomey J. on the part of her order (required by s. 16(4)(a) of the EAW Act) that, unless the Appellant is surrendered within the prescribed 25 day time-limit, he should be brought back to the High Court, where it could be ordered that he be released. On 27th June McDermott J. rejected the challenge herein to his further detention beyond that time-limit, which it was claimed contravened parts of s. 16 of the EAW Act and also requirements of the Framework Decision as explained in the *Lanigan* case (Case 237/15 PPU) [2016] Q.B. 272 paras 58-61 with reference to the pre-surrender stage. On 25th November the Court of Appeal rejected the appeal, refused a reference on one of the questions raised, did not address a request for a reference on the other question raised, and on 16th December refused to recommend legal-aid.

There are highly material facts that are not recorded in the Court's judgement, given within weeks of the appeal being heard. These put what occurred to date in a very different light from what the judgement would suggest, inter alia

- i. No proper notice was given to the Appellant's solicitors of the Minister's intended application for a stay before Twomey J., which proceeded and was heard in their absence, with the Appellant's counsel alone arriving at the court after Twomey J. had risen to consider what at that stage had been an ex parte application.
- ii. At 2p.m. on 14th June, just as McDermott J. was about to hear the return application, the Respondent handed the Appellant's representatives the Governor's certificate, which contained several documents. Whereupon the Appellant's counsel sought an adjournment. But McDermott J. would allow one hour and no more.

Had that refusal been appealed, in the ordinary course it would be many months before the appeal was heard and determined.

- iii. When at a directions hearing on 7th October the Appellant's solicitors applied for a copy of the DAR of the entire hearing before Twomey J., the normal practice of the Court is to authorise the DAR to be taken up. But the Respondent objected to it being made available on the grounds that the Appellant exercising his right to appeal was an abuse, and the Court rejected the application on the grounds that it intended to first hear the Respondent's motion to strike out the appeal on that basis and, depending on the outcome of that, would revisit the application for the DAR.
- iv. The Respondent had already issued that motion and the Court ordered that it be heard on 27th October. On that day the Court did not accede to the motion but, against the Appellant's protest about insufficient time for preparing, directed that the appeal be heard on 2nd November, the October bank-holiday weekend intervening.

Orders and findings

Dismiss appeal. Refuse release and recommendation for Legal-aid (Custody Issues) scheme.

5. Reasons why the Supreme Court should grant leave to appeal

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and/or why in the interests of justice it is necessary that there be an appeal to the Supreme Court.

- 1. It appears to becoming the practice of State Respondents in Art 40.4 proceedings to endeavour to force on the trial of the case on the return day, as soon as the requisite certificate has been served on Applicants, as occurred here. This judgement endorses that practice. Even if legitimate in the national law (we contend it is not), the question is whether it contravenes Art 47 of the Charter in conjunction with Art. 5(4) of the European Convention. Although the facts are somewhat different, the same issue of principle is raised in one of the earliest *Lanigan's* pending leave application [2016] S:AP 000141, where it is stated and is equally applicable here *inter alia*

“Such a radical departure from due process contravenes EU Charter law norms of fundamental fairness. Were this precedent to be allowed stand, it forms the basis for State Respondents forcing on premature hearings of Art. 40.4 proceedings, when Applicants are not yet in position to present their case, effectively neutering habeas corpus in many instances.”

Without conceding the point here, it is important to note that if reasonable opportunity is given to Applicants' representatives to consider the contents of the jailor's certificate and prepare their case, they may ultimately conclude that the claim is unsustainable and advise against proceeding to trial, thereby saving

valuable court time and public expense. Applicants who are rail-roaded into a premature trial are almost invariably bound to appeal against so unfair a process. Accordingly, it is in the interests of the economical administration of justice generally as well as of Applicants for Art. 40.4 relief that, on the return day, adequate time and facilities are afforded to prepare their case. A decision by this Court to this effect should put an end to the practice as condoned by the Court of Appeal here and also in *Lanigan's* case.

2. An Art. 267 reference was requested on a question about allowing so short a time to prepare for the trial and also for the appeal. But the judgement does not address the request, let alone give a reason for an implicit refusal. For this reason alone, this Court should grant leave to appeal on this point, so that the Appellant's E.U. law right *inter alia* to at least have an application for a reference properly considered is vindicated.
3. Assuming but not accepting that the interpretation placed on Twomey J.'s order is correct, another significant issue of *inter alia* EU law arises – the Minister obtaining a discretionary unconditional stays on the obligation to bring a prisoner back to court where surrender has not or cannot be effected within the prescribed time-frame, so that the court may order release, bail or otherwise. Before s. 16 of the EAW Act was amended, this matter was before this Court on at least three occasions, where it was held that the continued detentions were unlawful: *O Fallúin* [2007] 3 I.R. 414, *Rimsa* [2010] IESC 47, *Voznuka* [2013] IESC 33 etc. The Appellant contends that the this issue is also one of EU law and is far from being *acte clair*, as the Court of Appeal held it was.
4. This Court has already heard an appeal concerning the previous legal aid regime, *Attorney General –v- O'Connor* etc., judgement reserved. In this envisaged appeal the Court will have an opportunity to consider for the first time (it appears) its replacement, the ad-hoc Legal Aid (Custody Issues) Scheme, and determine whether, at the conclusion of the case, a court may impose additional requirements on a person seeking legal aid that the terms of the scheme do not envisage – and refuse a recommendation for non-compliance with these.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

The Court of Appeal erred in fact and/or in law as follows

- i. Holding that the one hour only adjournment allowed by the trial judge to “*prepare[the] case, including thorough disclosure of information*” was fair, and by implication, complied with the Convention and 47 of the Charter.

Elaboration: This was ground of appeal no. 1(1) and concerns whether on the return date to an Art. 40.4 application, once the jailor delivers his certificate to the prisoner's representatives, are they entitled to at least one day's adjournment to

prepare his case, *inter alia*, his counsel have time to consider the contents of the certificate, decide whether the proceedings should continue in light of its contents and, if yes, draft written submissions on any significant legal points and assemble a book of authorities. By allowing one hour only to do this, the Appellant contends that McDermott J. misconstrued Art. 40.4, contravened Arts. 5(4), 6(1) and 13 of the European Convention in conjunction with Art. 47 of the E.U. Charter, and flouted the general principle that, in proceedings of this nature, Applicants “*should be accorded adequate time and facilities to prepare their case, including through disclosure of information...*” : principle 32 of the Report of the U.N. General Assembly Working Group on Arbitrary Detention U.N. Doc. WGAD/CAP, 1/2015, 55, I.L.M. 365 (2016).

Apart entirely from EU Law, there are decisions of the High Court supporting the approach contended for by the Appellant. : “forthwith” contemplates the pre-return stage and does not mean that, as soon as the return is served, the trial must commence within one hour of then where the Appellant requests longer to prepare his case. This also is the proactice in habeas corpus in England. But the Court of Appeal here (and also in the earliest *Lanigan* application for leave to appeal *S:AP 2016 000141*) endorses forcing on the trial within one hour of the return being made and served. This ground of appeal was not simply that more time was needed to get the DAR of Twomey J., as para 21 of the judgement would suggest: see pp 10 – 14 of the Appellant’s written submissions, which is not considered at all in the reserved judgement, with no reason given for disregarding it.

- ii. On 27th October insisting that the appeal be heard on 2nd November, allowing the Appellant an unprecedented and insufficient “*time and facilities to prepare [his] case including through disclosure of information*”

Elaboration: This is broadly the same point with reference to the appeal hearing. There were no circumstances that made it necessary to hear the appeal at such exceptional short notice. No such circumstances are recorded in the judgement to warrant such haste. The Respondent had already issued a motion to strike-out the appeal, which the Court ordered be heard on Thursday 27th October and, depending on the outcome of that if the appeal was to proceed thereafter, for the purpose of ascertaining whether the DAR should be ordered. On that day the Court did not accede to the motion but, against the Appellant’s protest about insufficient time for preparing, it directed that the appeal be heard on Wednesday 2nd November, the October bank-holiday weekend intervening.

- iii. Disregarding entirely the request for Question 2 to be referred under Art 267 and, by inference, refusing to do so without any reason being furnished.

Elaboration: This was a ground of appeal no. 2 and equally applies to how this issue was not dealt with by the Court of Appeal. The underlying issue is that identified in grounds i and ii above: not affording adequate time to prepare the case for trial and for the appeal also. The Appellant contends that, under *audi alterem*

partem, the judgement should record why a reference was sought on a question and, in the circumstances here, why in summary it was not being granted. This failure contravenes *inter alia* the Appellant's entitlement to a reference on the above questions.

- iv. Holding that the Appellant was lawfully detained notwithstanding the expiry of the prescribed period for detention and the Respondent's failure to bring him back before the High Court for it to consider the circumstances consequent upon that time expiring.

Elaboration: This was ground of appeal no. 1 (iii). The structure of s. 16 of the EAW Act distinguishes between surrender and detention for that purpose, as explained by Fennelly J. for this Court in *Ó Fallúin* [2007] 3 I.R. 414 at 418 para 17. The obligation in s. 16(4)(c) to bring the prisoner back to court once the period expires is mandatory and cannot simply be suspended indefinitely by granting a discretionary stay. And because (unlike s. 16(3A)), s. 16(4) and (5) are not made "*subject to subsection 6*", the existence of an appeal or a habeas corpus complaint are not a bar to having to comply with that obligation, which (at the pre-surrender order stage) was commented on by the Advocate General in the *Lanigan* case [2016] Q.B. 252 paras. 174-178. Because s. 16 is a self-contained code for the immediate post-surrender circumstances, as a matter of straightforward statutory construction, the *expressio unius* canon and the "conforming interpretation" obligation, the detention was unlawful.

- v. In para 64 of the judgement having incorrectly stated the very basis for Question 1, refusing to make the Art 267 reference sought.

Elaboration: This relates to the immediately preceding ground and explanation.

- vi. Misconstruing its appellate function and deciding one aspect of the case on the basis of affidavit evidence that was not before the High Court and that had not been the subject of an application or a ruling to admit as "new evidence," but was part of a motion to strike-out that in the event the Court declined to determine.

Elaboration : Basing that part of its judgement on that affidavit was particularly unfair in light of that court's earlier refusal to order the release of DAR of the hearing to which it purported to relate. At a directions hearing on 7th October the Appellant's solicitors applied for a copy of the DAR of the entire hearing before Twomey J., and the normal practice of the Court is to authorise the DAR to be taken up. But the Respondent objected to it being made available on the grounds that the Appellant exercising his right to appeal from McDermott J. was an abuse. The Court rejected that application on the basis that it intended to first hear the Respondent's motion to strike out the appeal on that basis and, depending on the outcome of that, would revisit the application for the DAR. But, instead it set the short hearing date, refused to order the DAR and interpreted Twomey J.'s order without its benefit.

vii. Not addressing

- (a) matters of uncontradicted fact that were of particular significance to the issues in dispute.
- (b) most of the contentions made for the Appellant in inter alia a carefully drafted 24 page written submission and oral argument.

Elaboration: A fair hearing by a court of justice requires that all significant issues of law and fact be addressed in its judgement, especially when reserved, at least where E.U. law issues are involved.

viii. Refusing a recommendation for legal-aid.

Elaboration : The requirements stipulated in the Legal Aid (Custody Issues) Scheme were fully met and, unless there was evidence that these were not sufficient to prevent abuse, the Court had no authority to add on additional requirements. Absent such evidence, stipulating the financial eligibility requirements is exclusively the function of the Minister, who devised this ad hoc non-statutory scheme that does not comply with the requirement in Art. 11(2) of the Framework Decision of legal aid “*in accordance with the national law*”. That the Court of its own motion or at the request of a prison governor may add additional requirements after the case has been heard introduces a major uncertainty into the scheme that undermines the very objective of having a legal aid scheme for cases of this nature and is not compatible with Art. 11(2).

Kieran Kelly BL
Michael Forde SC

7. Other relevant information

Neutral Citation of judgement appealed against: **Court of Appeal [2016] IECA 357**

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

What order are you seeking if successful? **Set aside Order of the Court of Appeal, remit or release the Applicant together with a recommendation under the Legal Aid (Custody Issues) Scheme.**

Order being appealed: **Order of 16th December 2016 as perfected on 17th January 2017**

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution.

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention.

Because the European Convention on Human Rights Act 2003 does not extend to judicial proceedings, a declaration that the procedure in the High Court and the Court of Appeal contravened the Convention cannot be sought under the Act. The Appellant's only Convention remedy is an application to the Court in Strasbourg.

Are you asking the Supreme Court to: depart from (or distinguish) one of its own decisions? **No**

make a reference to the Court of Justice of the European Union? **Yes**

There appears to be three questions. Two relate to compatability with the Framework Decision – the consequences of the surrender and “bring back again” orders being stayed and also of legal-aid being refused notwithstanding compliance with an ad hoc scheme. The third relates to the drastically restricted time allowed to prepare for the trial of the Art. 40.4 (Convention Art. 5(4)) and for the appeal.

Will you request a priority hearing? **Yes**
If Yes, please give reasons below:

This is an EAW case and the Applicant has already been in custody for 16 months.

Signed: _____

Cahir O'Higgins

Solicitor for the applicant/appellant

Please submit your completed form to:

**The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin**

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal. This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.