

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal		S:AP:IE:2017:000130
Subject matter for indexing		

Leave is sought to appeal from	<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
--------------------------------	---	---

[Title and record number as per the High Court proceedings]

Mark Finnegan	V	The Superintendent of Tallaght Garda Station and the Governor of Wheatfield Prison	
High Court Record Nr	2014 No. 742 JR	Court of Appeal Record Nr	2017/137
Date of filing	22 nd August 2017		
Name of Applicant/Appellant	Mark Finnegan		
Solicitors for Applicant/Appellant	Michael J. Staines & Co.		
Name of Respondent	The Superintendent of Tallaght Garda Station and the Governor of Wheatfield Prison		
Respondent's solicitors	Chief State Solicitor's Office		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
<input type="checkbox"/> Yes		<input checked="" type="checkbox"/> No	
If yes, give [Supreme Court] record number(s)			

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name of Judge	Court of Appeal (Hedigan J, Brmingham & Edwards JJ concurring)
Date of order/ Judgment	Judgement- 27 th July 2017. Order – Perfected 17 th August 2017

2. Applicant/Appellant Details

Appellant's full name	Mark Finnegan
-----------------------	---------------

Original status

<input type="checkbox"/>	Plaintiff
<input checked="" type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party



Solicitor			
Name of firm	Michael J. Staines & Co.		
Email	info@michaelstaines.ie		
Address	Lincoln House, Lincoln Lane, Smithfield, Dublin 7	Telephone no.	01 8731366
		Document Exchange no.	
Postcode	7	Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Bernard Condon SC		
Email	bcondon@lawlibrary.ie		
Address	Criminal Courts of Justice Parkgate St Dublin 8	Telephone no.	018172810
		Document Exchange no.	301016 CCJ
Postcode			

Counsel			
Name	Aoife O'Leary BL		
Email	aoleary@lawlibrary.ie		
Address	Criminal Courts of Justice Parkgate St., Dublin 8	Telephone no.	0876493980
		Document Exchange no.	301073 CCJ
Postcode			

3. Respondent Details

Respondent's full name	The Superintendent of Tallaght Garda Station and the Governor of Wheatfield Prison
------------------------	--

Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input checked="" type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	

Solicitor	Alison Morrissey		
Name of firm	Chief State Solicitor's Office		
Email	Alison_morrissey@csso.gov.ie		
Address	Chief State Solicitor's Office Osmond House Little Ship Street Dublin 8	Telephone no.	01 4176204
		Document Exchange no.	186001
		Ref.	
		Postcode	8

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange
<input type="checkbox"/>	Post

<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Other (please specify)

Counsel	
Name	Remy Farrell SC
Email	

Counsel	
Name	Anthony McBride BL
Email	counsel@anthonymcbride.ie

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

It is sought to appeal from the entire decision

A concise statement of the facts found by the trial court:

The Applicant was convicted on the 19th November 2008 of allowing himself to be carried in vehicle without the consent of the owner contrary to section 112(1)(b) of the Road Traffic Act, 1961. On the 27th May 2009, he was sentenced to 16 months imprisonment; he served 2 months in Wheatfield Prison and was then transferred to Shelton Abbey Open Centre on the 28th July 2009. On the 31st October, 2009 the Applicant absconded from Shelton Abbey (by walking out without permission), in circumstances where his brother had been admitted to hospital, and was declared unlawfully at large as a result. In or about 5 years later, on the 10th November 2014, the Applicant presented himself by request at Tallaght Garda Station where he was arrested, taken into custody and lodged in Wheatfield Prison in respect of the sentence imposed on him by Judge O'Shea in 2009.

An Garda Siochana was notified by the authorities in Shelton Abbey that the Applicant was unlawfully at large on or about the 31st October 2009. No steps were taken by or on behalf of either of the Respondents (the State Parties), between the 31st October 2009 and the 1st June 2014, to locate and arrest the Applicant for the purpose of returning him to custody.

Prior to his imprisonment on the 27th May 2009, the Applicant resided at his family home at 22 Bawnlea Drive, Jobstown, Tallaght, Dublin 24 and on leaving Shelton Abbey Open Centre, he resumed residence at the said address and continued to reside there until 2011 at which time he moved to 39 Russell Lawn, Tallaght, Dublin 24 where he continues to reside with his partner. At all times since leaving Shelton Abbey Open Centre, he collected Social Welfare payments in Jobstown, Tallaght. In the period between leaving custody and his arrest in 2014, he became a father and, while the proceedings have been in being, he has had a second child with his partner.

The affidavit of Inspector Peter Burke, sworn on the 10th December 2014 on behalf of the Respondents, stated it "*was really most regrettable that a period of some years elapsed between the date when the Applicant absconded from prison and went unlawfully at large and the date when he was returned to prison. I am at a loss to explain in detail the circumstances in which such occurred...*"

There was some dispute in the affidavits before the High Court in respect of conversations which took place between the Applicant and members of An Garda Siochana in or about the end of August 2014 and in November 2014 as to whether he had denied his identity. At the hearing of the matter in the High Court, the Applicant invited the Court to deal with the matter on the basis of the accepted fact that no steps were taken to secure the arrest of the Respondent until June 2014. The Respondents did not object to the Court dealing with the case on that basis and accepted that the Applicant was readily available to the authorities during the period October 2009 – June 2014 and that no justification for the inaction of the authorities was being put forward. The High Court judge accordingly decided the case on the basis of a delay of 4 years and 7 months i.e. from the 1st November 2009 to the 1st June 2014.

The Applicant was leave to apply for judicial review by Noonan J on the 11th December 2014, was released on bail and remains at liberty pending the resolution of these proceedings.

The relevant findings made in the High Court:

The High Court (Ni Raifeartaigh J) found as follows:

- The authorities relied upon by the Applicant clearly establish that when agents of the State are giving effect to warrants of imprisonment, or exercising related statutory powers, they must do so in accordance with the constitutional principle of reasonable expedition. Ref.: *Cunningham v Gov. of Mountjoy [1987] ILRM 33; Dutton v DJ*

O'Donnell [1989] IR 218; Dalton v Gov. of Training Unit [2000] IESC 49; Long v Assistant Commissioner O'Toole [2001] 3 IR 548.

- There is nothing in the authorities that supports the view that a person who absconds from prison or commits any act of moral turpitude thereby forfeits all claim to constitutional fair procedures by reason of his wrongful act and the State authorities do have a duty to act with reasonable expedition in returning him to prison.
- The exercise of the coercive powers of the State carries with it certain obligations to exercise those powers in accordance with constitutional fairness and this obligation is not cancelled out by the conduct of the prisoner, whether it be by reason of his original criminal conduct, or a subsequent act of default; the obligation to act with reasonable expedition arises from the underlying rights of the individual in matters concerning liberty and trial.
- In a case where an applicant's own conduct may have made it difficult for the gardai to find him, this would have to be factored into the assessment of what would be the reasonable period for returning him to prison. In the present case, all the indications were that the applicant could have been located with the most minimal of efforts on behalf of the gardai.
- In determining whether the delay is unreasonable, the Court should consider not only the length of time, but the reason for the lapse in time. The delay of four and a half years fell clearly and unequivocally on the wrong side of any notional dividing line between acceptable and unacceptable delay, not only because of the length of time involved, but also because the applicant took no steps to conceal his whereabouts, which would have been easily ascertained by the gardai if the most basic of steps had been taken.
- The Court rejected the argument that to grant the relief sought would be tantamount to an act of commutation or remission, which is the exclusive preserve of the executive. The Court has a duty to uphold constitutional rights and principles and is required to prevent the State from implementing a measure in circumstances where to do so would be to breach constitutional fair procedures, in this case, the principle which requires the gardai to act with reasonable expedition in the execution of warrants for imprisonment and/or powers of arrest to return persons to lawful custody.
- The Court rejected the argument made on behalf of the State Parties to the effect that the authorities relied upon by the Applicant could be distinguished on the basis that each of them involved the exercise of a discretion. The cases cited had been decided upon the basis of delay, and not on the basis of how, and whether, executive discretion should have been exercised.
- The serious public interest in ensuring that a serious offender is returned to prison if he absconds is best observed by holding the authorities to account in respect of their constitutional obligation to act with reasonable expedition to return him to prison, rather than finding there is no constitutional obligation of diligence on the part of the authorities at all.

The trial Court made the following order:

A Declaration that the arrest and detention of the Applicant on and from the 10th November 2014 was in breach of constitutional justice and not in accordance with law.

Costs awarded to the Applicant.

Findings of fact and of law of the Court of Appeal:

The Court of Appeal (per Hedigan J, with Birmingham and Edwards JJ concurring) allowed the Appeal and set aside the judgment of the High Court, finding as follows:

- The authorities had in fact given a reason for the delay of nearly five years in

recommitting the Applicant to prison, albeit not one which did the much credit to the same authorities. The simple human error of failing to enter details on PULSE reasonable resulted in the him not being pursued by the Gardai in his area. Neither the Applicant or his offence ranked anywhere but at a relatively modest level of criminality and a nationwide hue and cry did not appear justified.

- In relation to the dispute as to whether from June to November 2014 the Applicant had misled the Gardai as to his identity, it seemed an acceptable course for the High Court to 'stop the clock' in June since it enabled her to avoid an unnecessary resolution of a dispute that was only marginal to the central issue in the case.
- The central issue lay in the years that the Applicant failed to report to the authorities, remaining unlawfully at large. That period constituted a lengthy period of simply ignoring the lawful sentence passed on him in May 2009 which in itself constituted a protracted evasion of justice. Whether it continued from June 2014 to November 2014 or involved misleading the Gardai during that short period is of only marginal significance. That said it did appear from the evidence of the Gardai that between June and November 2014, the Applicant did in fact mislead the gardai. The Court of Appeal was in just as good a position as the High Court to assess that affidavit evidence.
- The State authorities have an obligation to implement any sentence of imprisonment imposed by a court of law which includes a duty to return an escaped prisoner promptly to custody as soon as can be. It is equally clear that a person sentenced to a term of imprisonment has an obligation to serve that sentence. As a consequence of any sentence of imprisonment, a prisoner loses his right to liberty. Moreover, escape from lawful custody is an indictable offence. There is further a clear public interest that a convicted prisoner should serve out any term of imprisonment imposed upon him until its lawful determination.
- It is hard to see how fair procedures could arise in the case of returning an escaped prisoner to custody. The role of the Gardai is to catch such an escapee and hand him over to the prison authorities as soon as quickly as practicable. There is no process, as is the case in the legal authorities relied upon by the Applicant. There is no decision making procedure. The escaped prisoner has already had his trial and the process of returning him to lawful custody requires no judicial intervention. The Gardai have no discretion to exercise. The escapee must be returned to the prison authorities in order to serve out the sentence lawfully imposed upon him. The arrest and imprisonment of the Applicant was made in accordance with law.

The Court of Appeal made the following Order:

Appeal allowed. Judgment of the High Court set aside.

Costs in both Courts awarded to the State Parties.

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

Leave to Appeal to this Honourable Court pursuant to Article 34.5.3 of the Constitution is sought on the basis that the decision of the Court of Appeal involves a matter of general public importance for the following reasons:

1. The first matter of general public importance is whether the exercise of the power to arrest a person who is unlawfully at large for the purpose of returning him to custody must be exercised in accordance with constitutional principles of fair procedures, and whether the State authorities have a duty to act with reasonable expedition in effecting such arrest and return.
2. The Applicant herein relied upon a number of authorities in support of the proposition that the exercise of the coercive powers of the State carries with it the obligation to exercise those powers in accordance with constitutional fairness and, after a careful consideration of the judgments, the Trial Judge found that there is an obligation on the State to act with reasonable expedition, arising from the underlying constitutional rights of the individual to fair procedures in matters concerning liberty and trial rights, and that while those rights are affected in various ways by the fact of a criminal conviction, or a subsequent wrongful act, those rights are not entirely thereby extinguished, and do lead to some corresponding duties on the part of the State in the exercise of its powers.
3. The Supreme Court has previously found that the power to execute committal warrants of imprisonment must be exercised in accordance with principles of constitutional justice and that the application of principles fair procedures meant that delay could operate in such a manner as to render the exercise of a lawful power unlawful *cf Dalton v Gov. of Training Unit [2000] IESC 49 -where the delay in execution of a committal warrant rendered the Applicant's detention unlawful*. The decision of the Court of Appeal herein appears to depart from, or at least modify, that principle without discussion.
4. The second matter of general public importance is whether it is correct in law that notwithstanding *any* delay on the part of the authorities in arresting a person who is unlawfully at large, they may return him summarily to serve out his sentence at any time no matter how many years had elapsed between the act of absconding and the act of returning the prisoner to prison, and no matter how much knowledge of his whereabouts was available to the State authorities.
5. The third matter of general public importance is whether it is appropriate for the Court of Appeal to prefer the affidavit evidence of one side over the other where the trial court had not been asked to resolve the contested issue of fact and where there had been no oral evidence and/or cross examination on the issue.

Leave to Appeal to this Honourable Court pursuant to Article 34.5.3 of the Constitution is sought on the basis that it is necessary in the interests of justice

that there be an appeal to the Supreme Court:

It is now almost 8 years since the Applicant left Shelton Abbey Open Prison and during that time he has become a father and resided with his partner and two children in the Tallaght area. The return of the Applicant to custody at this point in time would cause serious disruption to his family life and it is in the interests of justice that this Honourable Court would determine the important issues arising before the Authorities are permitted to arrest and detain him.

6. Grounds of appeal which will be relied on if leave to appeal is granted:

1. The Court of Appeal erred in law in finding that issues of fair procedures do not apply to the exercise of the power to arrest of a person who is unlawfully at large for the purpose of effecting his return to custody.
2. The Court of Appeal erred in law in failing to apply the well-established principle that when agents of the State are giving effect to warrants of imprisonment, or exercising related statutory powers, they must do so in accordance with the constitutional principle of reasonable expedition.
3. The Court of Appeal erred in fact and in law in failing to have any or any proper regard to the proposition that the public interest in ensuring that a serious offender is returned to prison if he absconds is best observed by holding the authorities to account in respect of their constitutional obligation to act with reasonable expedition to return him to prison, rather than finding there is no constitutional obligation of diligence on the part of the authorities at all.
4. The Court of Appeal erred in fact and in law in finding that the authorities relied upon by the Applicant each involved a decision- making process or discretion.
5. The Court of Appeal erred in law and in fact or in a mixed question of law and fact in seeking to resolve a factual issue at all or in the manner they did in preferring the affidavit evidence of one side over the other, where the trial court had not been asked to resolve the contested issue of fact, and where there had been no oral evidence and/or cross examination on the issue.
6. The Court of Appeal erred in fact and in law in failing to find that the delay in effecting the arrest of applicant rendered the exercise of that power unlawful and his consequent detention otherwise than in accordance with law.
7. The Court of Appeal failed to give any or any adequate weight to the personal circumstances of the Applicant and his current arrangements and thus did not apply

the principle of proportionality in seeking to balance competing interests in light of the real effects of the acknowledged delay in this case.

Bernard Condon SC
Aoife O'Leary BL

7. Other relevant information

Neutral citation of the judgment appealed:

[2017] IECA 222

8. Orders sought

1. An Order, setting aside the Order of the Court of Appeal allowing the Respondents' appeal made on the 27th July 2017, and perfected on the 17th August 2017.
2. An Order, restoring the Order of the High Court (Ni Raifeartaigh J) made on the 7th November 2016 and perfected on the 2nd March 2017.
2. An Order for Costs, to include the costs of the proceedings in the High Court and Court of Appeal

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? Yes No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union? Yes No

If Yes, please give details below:

Will you request a priority hearing? Yes No

If Yes, please give reasons below:

The appeal concerns the lawfulness of the arrest and detention of the Applicant to serve out a sentence imposed on him in 2008. If the Applicant is unsuccessful in his appeal, he will be liable to return to custody.

Signed: C. Hollin of Michael Staker & Coys
Solicitor for the applicant/appellant