



SUPREME COURT

Respondent's Notice

Supreme Court record number	S:AP:IE:2017:000130
Court of Appeal Record No. 2017/737, High Court Record No. 2014/743JR	

Mark Finnegan	V	Superintendent of Tallaght Garda Station and the Governor of Wheatfield Prison
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Date of filing	30th August 2017
Name of respondent	Superintendent of Tallaght Garda Station and the Governor of Wheatfield Prison
Respondent's solicitors	Chief State Solicitor's Office
Name of appellant	Mark Finnegan
Appellant's solicitors	Michael J. Staines & Co.

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Superintendent of Tallaght Garda Station and the Governor of Wheatfield Prison
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The respondent was served with the application for leave to appeal and notice of appeal on date
24 th August 2017

The respondent intends :	
<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
<input type="checkbox"/>	not to oppose the application for leave to appeal
<input type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
<input type="checkbox"/>	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	
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Respondent's Representation

Solicitor				Alison Morrissey	
Name of firm	Chief State Solicitor's Office				
Email	alison_morrissey@csso.gov.ie				
Address	Osmond House, Little Ship Street,	Telephone no.	014176204		
		Document Exchange no.	186001		
Postcode	Dublin 8	Ref.	2014/05797		
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	Remy Farrell SC		
Email	rfarrell@lawlibrary.ie		
Address	Law Library, Four Courts	Telephone no.	018175222
		Document Exchange no.	301059
Postcode	Dublin 7		

Counsel			
Name	Anthony McBride		
Email	counsel@anthonymcbride.ie		
Address	Law Library, Four Courts	Telephone no.	0868264357
		Document Exchange no.	814228
Postcode	Dublin 7		

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

Not applicable

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

No.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

The applicant has identified three issues which he contends are of general public importance such as to merit an appeal. It is proposed to deal with each in turn.

Must the arrest of an escapee comply with constitutional principles of fair procedures?

The question posed by the applicant is framed in a highly abstract manner and is entirely decoupled from the facts of the case. The applicant failed to identify any *procedure* attaching to the act of arrest of an escaped prisoner that might attract such procedural rights. On the contrary the Gardai are obliged to arrest such an escapee. There is no procedure or process that is engaged in by the Garda in question that permits of any outcome other than arrest. Questions of fairness can only be judged in the context of a specific procedure or process. Here there is no such procedure or process. As such the argument advanced by the applicant was doomed to failure.

The applicant advanced a number of authorities in support of his position. However, it is quite clear that the authorities in question spoke to circumstances where there was a process that arguably triggered procedural rights of various sorts. The case of *Dutton v District Judge O'Donnell & Ors* [1989] IR 218 concerned a delay in the process of issuing a committal warrant following an appeal. Clearly this was a step in the criminal process and as such attracted procedural rights. In *Dalton v Governor of the Training Unit* (Supreme Court, Denham J, 29th February 2000) it was considered that the execution of a committal warrant must be done in accordance with principles of constitutional and natural justice. Again such a step is part of the criminal process and, as such, can be contended to attract the protection of basic procedural rights. Critically the act of executing a committal warrant is an act which the Executive alone can take. In *Cunningham v. Governor of Mountjoy* [1987] ILRM 33 it was held that procedural rights arose in the context of a decision to arrest following a revocation of temporary release – a process or procedure which necessarily permitted of the possibility of non-revocation.

Perhaps most surprisingly the applicant placed considerable emphasis on the case of *Long v Assistant Commissioner O'Toole* [2001] 3 IR 548. This was an extradition case where there had been considerable delay in executing the warrant and an issue arose as to whether it would be unjust or invidious to order surrender in such circumstances. Leaving aside the fact that the courts have since moved away from the approach to delay in extradition cases adopted in that decision the actual determination on the issue of delay was made within the rubric of Section 50(2)(bbb) of the Extradition Act, 1965. As such there was an explicit process in play.

The applicant in the present proceedings has sought to shoe-horn the wholly different circumstance and context of an escaped prisoner into a diverse body of case-law that concerns fundamentally different procedures and processes. Indeed it is the most striking feature of the present case that there is no procedure or process to which the mooted procedural rights might attach.

In the circumstances it cannot credibly be contended that an issue of general importance arises here. Whilst it is acknowledged that the applicant has quite properly sought to identify relevant authorities that reached different conclusions the fact remains that the context of

those decisions was entirely different. In that regard the issue of context is central to any consideration of fairness.

Quite apart from such considerations which necessarily apply at a relatively high level of abstraction it is contended that the underlying facts of the case make it impossible for the applicant to succeed. The signal feature of the case is that the applicant is an unlawful escapee. As such he frustrated the operation of a lawful sentence of imprisonment by means of a unilateral criminal act of escape. As such the reliance on such authorities as *Dalton* is wholly misplaced. The applicant cannot credibly compare a (unilateral) failure on the part of the State to execute a committal warrant with a decision of the applicant to abscond during the currency of his sentence.

Can an escapee be arrested no matter the length of the delay nor the state of knowledge of the State authorities?

This is not a question that actually arises on the applicant's case. Rather it is little more than the posing of a rhetorical question as a device by which the countervailing outer limits of the argument may be elucidated. It is quite plain on the evidence that the State authorities were, for the much greater part of the period in question, unaware of the fact of the applicant's escape. This was due to a failure to note same on the PULSE system.

What is equally plain on the evidence is the fact that the applicant was very much aware of his status during the period in question. The Court of Appeal concluded that he had taken steps to evade detection during the period in question.

The question posed by the applicant also begs other questions for which the applicant notably fails to offer any answer: if the length of time and state of knowledge on the part of the State authorities is to be considered then who is to consider it? The Gardai carrying out the arrest? The prison governor? In other words the applicant, by implication at least, suggests the existence of a process in the extreme scenario where there is a very lengthy delay coupled with knowledge of the escapee's status and whereabouts whilst at the same time he fails to actually outline or posit what that process might look like. The applicant's argument fails to acknowledge the most striking and basic aspect of the case – namely that he is the one who decided to abscond from his sentence and that he clearly knew that he was subject to immediate arrest and re-incarceration if detected.

Is it appropriate for the Court of Appeal to prefer the affidavit evidence of the respondent over that of the applicant where the court of trial was not asked to resolve a contest of fact and where there has been no cross examination?

It is simply wrong to assert that the High Court was not asked to resolve a contest of fact. On the contrary there was a manifest conflict of fact before the High Court which it did not consider necessary to attempt to resolve because of the approach it took to the legal issues in the case. The Court of Appeal was entitled to take an entirely different approach in circumstances where it departed from the approach to the legal issues in the case.

Moreover, in the context of a consideration as to whether any question of general importance arises here it is of note that the applicant makes no attempt to cite any disputed authority in relation to this. The law concerning whether or not an appellate court is entitled to depart from the view taken of affidavit evidence is well settled – see *Hay v O'Grady* [1992] I.R. 210; *S.M.R. v Minister for Justice* [2008] 2 I.R. 242; *Koulibaly v Minister for Justice* [2004] IESC 50. In addition the applicant fails to engage with the fact that as the applicant in the proceedings at first instance he bore the burden of proof. As such the fact that he did not seek to cross examine the state deponents had potential consequences for the case he sought to make – see *Molloy v. DPP* [2000] IEHC 89. In circumstances where a number of Gardai

deposed to their interactions with the applicant and his attempts at evasion the failure of the applicant to seek to resolve that issue of fact at first instance by way of cross examination cannot be seen as anything other than a tactical decision. The decision not to cross examine the relevant deponents entitles an appellate court to take a different view of the affidavit evidence in circumstances where it is in as good a position as the court of trial to make such an assessment.

The applicant has failed to identify any actual issue of law relating to this question, much less one of general importance.

Is an appeal in the interests of justice?

In circumstances where the applicant has failed to identify any point of law of general importance it is contended that an appeal is not in the interests of justice.

The applicant points to “serious disruption to his family life” that would be entailed in his being required to serve the remainder of his sentence. Whilst it is doubtful that the disruption to his family life could be characterised as serious on the evidence it is acknowledged that some disruption will follow. However, this is no more than the disruption to family life that is inherent in any sentence of imprisonment. The fact that the applicant has begat children in the period since he absconded is not a matter he can call in aid in circumstances where he was fully aware of his status throughout the period in question.

On the contrary it is contended that the much greater interest lies in the enforcement of lawful sentences which have been frustrated by the unilateral act of a prisoner absconding.

5. Respondent’s reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc. in sequence) concisely the Respondent’s grounds of opposition to the ground(s) of appeal set out in the Appellant’s notice of appeal (Section 6 of the notice of appeal):

1. The Court of Appeal was correct and did not err 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 was correct and did not err in failing to apply the so-called “*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. Further the existence of such

a principle is not conceded, or the Respondents plead that it does not apply in or extend to the particular circumstances of this case for the reasons already set out above.

3. The Court of Appeal did not err by 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 alleged 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. Such a proposition on the part of the Appellant is unsound and is not conceded.
4. The Court of Appeal was correct and did not err in finding that the authorities relied upon by the Applicant each involved a decision-making process or discretion.
5. The Court of Appeal did not err 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. The Respondents rely on their submissions hereinbefore in this regard.
6. The Court of Appeal did not err 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 did not err in failing to give any or any adequate weight to the personal circumstances of the Applicant and his current arrangements and/or to apply the principle of proportionality in seeking to balance competing interests in light of the real effects of the acknowledged delay in this case. The Respondents rely on their submissions hereinbefore in this regard.
8. The Court of Appeal was correct in all the circumstances of the case that the arrest and detention of the Appellant was in accordance with law.
9. The Respondents will rely on all their own grounds of appeal to the Court of Appeal, including that the Appellant's case is barred on the principle *ex turpi causa non oritur actio*.
10. The Respondents oppose each of the Orders sought by the Appellant and each of the grounds of appeal set forth by him.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

**Remy Farrell SC
Anthony McBride**

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

No.

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:

Given that the proceedings concern issues of personal liberty it is desirable that they be determined as soon as possible. The respondents have undertaken not to take any steps to execute the outstanding sentence pending the determination of the appeal.

Signed: Maria Brown

Maria Brown

Chief State Solicitor

(Solicitor for) the respondent

Please submit your completed form to:

The Office of the Registrar to the Supreme Court

The Four Courts

Inns Quay

Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.