

McMahon HC
McDonald

IN THE MATTER OF THE SUMMARY JURISDICTION ACT 1857

AND IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS)
ACT 1961

AND IN THE MATTER OF AN APPLICATION UNDER PART III OF THE
EXTRADITION ACT 1965 ENTITLED -

DEPUTY COMMISSIONER JOHN PAUL McMAHON
AND DETECTIVE SUPERINTENDENT HUBERT REYNOLDS

APPLICANTS/APPELLANTS

AND

KEVIN ANTHONY McDONALD

DEFENDANT/RESPONDENT

Judgment of Mr. Justice Barrington delivered the 3rd day of
May 1988

This is an Appeal by way of Case Stated in an extradition
matter.

The case is stated by District Justice Oliver A. Macklin,
the President of the District Court, assigned to the Dublin
Metropolitan District, pursuant to Section 2 of the Summary
Jurisdiction Act, 1857, as extended by Section 51 of the Courts

(Supplemental Provisions) Act 1961, on the application in writing of the Appellants who were dissatisfied with the learned President's determination of the above proceedings as being erroneous in point of law.

The issues raised are complex. The Learned President saw fit, at the conclusion of the proceedings, to reserve his Judgment and delivered his reserved written Judgment on the 2nd of October, 1987. The material parts of the Case Stated are as follows:-

"1. At a sitting of the Dublin Metropolitan District Court held at the Four Courts, Dublin 7, on the 16th day of September, 1987, the Defendant/Respondent (hereinafter referred to as the Respondent) appeared before me. The Appellants were represented by Mr. Barry Donoghue, Solicitor, of the Office of the Chief State Solicitor. The Respondent was represented by Mr. Patrick McEntee, S.C. and Dr. Michael Forde B.L. (instructed by Messrs Malocco and Killeen, Solicitors).

2. (i) The proceedings concerned an Application under Section 47 of the Extradition Act, 1965 for an Order of the District Court for the Respondent's Delivery at a point of departure from the State into the custody of a member of the London Metropolitan Police Force. The Application was made on foot of two warrants issued by the Chief Metropolitan Stipendiary Magistrate for the Inner London Area on the 5th day of August, 1987.

(ii) The first warrant alleges the following offence:-

On divers days between the 1st day of January 1986 and the 21st day of May 1987 within the jurisdiction of the

Central Criminal Court for England and Wales, conspired with Elhachchadi Hamou, Magdi Soliman, Collette Raud and other persons dishonestly to obtain Irish passports by deception, namely by falsely pretending that all the personal particulars provided of the applicants for the said passports were true and accurate and that the said applicants were lawfully entitled to the said passports (Contrary to Section 1(1) of the Criminal Law Act 1977 as amended by Section 5 of the Criminal Attempts Act 1981. A true copy of the said Warrant, together with true copies of the supporting Affidavit and certificate are attached hereto and form part of the within Case Stated.

(iii) The Second Warrant alleges the following offence:-

On divers days between the 1st day of January 1986 and the 21st day of May 1987 within the jurisdiction of the Central Criminal Court for England and Wales, being an agent of the Government of the Republic of Ireland, conspired with Elhachchadi Hamou, Magdi Soliman, Collette Raud and other persons corruptly to obtain from any person for himself the said Kevin Anthony McDonald or for any other person a gift or consideration as an inducement or reward for doing an act in relation to his the said Kevin Anthony McDonald's principal's affairs, contrary to Section 1(1) of the Prevention of Corruption Act 1906, namely the provision of an Irish passport to persons not lawfully entitled to the same.

Contrary to Section 1(1) of the Criminal Law Act 1977 as amended by Section 5 of the Criminal Attempts Act 1981. A true copy of the said Warrant, together with true copies

of the supporting Affidavit and Certificate are attached hereto and form part of the within Case Stated.

3. THE FACTS AS PROVED OR ADMITTED OR AGREED AND AS ACCEPTED BY ME WERE AS FOLLOWS:-

(A) (i) At 9.50 p.m. on the 7th day of August, 1987, D/Superintendent Hubert Reynolds of the Garda Technical Bureau, Garda Headquarters, the second named Appellant herein, approached a premises at Fishamble Street, Dublin. The house was up a short driveway. There was a large security gate which was locked. He was accompanied by other Gardai. He got over the gate and approached the house.

(ii) D/Superintendent Reynolds observed that the entrance door was locked and protected by a steel grille which was locked on the outside. He knocked on the grille and identified himself as a member of the Garda Siochana. He informed whoever was present in the house that he had Warrants for the arrest of Kevin Anthony McDonald and that he believed that he was inside the house. A voice just replied: "Yeah".

(iii) D/Superintendent Reynolds called on the man inside to open the door, that there were Gardai outside who were in possession of Warrants. D/Superintendent Reynolds told the man inside that he believed that he was the person he was looking for. There was no reply. D/Superintendent Reynolds repeated his request on four or five occasions. After 10 minutes had elapsed there was no indication that the man inside was going to open the door, so the Gardai proceeded to remove the steel grille from the outside.

(iv) When the Gardai began to prise the grille off on the hinge, the person inside heard the grille being removed and shouted from inside: "Hold it. I will open the door". At that stage the Respondent's brother, who was the owner of the premises, arrived on the scene. The brother called out to "Kevin" to open the door. The person inside replied "Yes" and the door was opened.

(v) The Gardai then entered the premises. There was one occupier. D/Superintendent Reynolds identified this person to me as the Respondent who was present before me in Court. The D/Superintendent asked the Respondent was he Kevin Anthony McDonald and he replied "No Comment". The D/Superintendent identified himself to the Respondent and he arrested Kevin Anthony McDonald on foot of the two Warrants which he had in his possession. The D/Superintendent read over each Warrant to the Respondent and he cautioned him as follows:- "You are not obliged to say anything unless you wish to do so but whatever you do say will be taken down in writing and may be used in evidence". The Respondent said "No comment". The D/Superintendent then handed the Respondent a copy of each Warrant, together with the supporting documents.

(vi) The Garda left the house with the Respondent at 10.15 p.m. They drove to the District Court in the Bridewell. The Court was not sitting at that stage so the Respondent was placed in the Bridewell Garda Station until the Court sat. At approximately midnight the Respondent was brought before Justice Harnett who, having heard evidence of arrest remanded him on bail.

(vii) The D/Superintendent handed into Court the original of each Warrant, together with original Affidavits and original Certificates.

(viii) The D/Superintendent explained that there were approximately 6 other members of the Garda Siochana present. He had no previous look at the premises. There were protective grilles on the premises. He had no reason to believe that the Respondent was residing on the premises but he did have reason to believe that he was staying there. A certain amount of force was used to the premises. The windows were not forced. Only the protective grilles were forced. The outer door being removed in this fashion it was possible to open the inside door. As the grille was locked on the outside, the person inside could not get out without the grille being removed.

(B) (i) Detective Chief Inspector Phillip Connolly of the Serious Crime Squad, New Scotland Yard, London was the officer in charge of the investigation into the alleged fraudulent dealing in Irish Passports at the Irish Embassy in London. He swore the Informations at Bow Street Magistrates Court, London and obtained the Warrants for the arrest of Kevin Anthony McDonald. He identified the original Warrants to the Court and he identified the signature of the Chief Metropolitan Stipendiary Magistrate David Hopkin, on the endorsements on the Warrants. He had never met and could not identify Kevin Anthony McDonald, the person named on the Warrants. However, he could say that the person he was seeking was Kevin Anthony McDonald the person who held the title of Passport Officer at the Irish Embassy in London until April of this year.

(ii) Kevin Anthony McDonald, the person he was seeking, was not, at the time of the alleged offences, a person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians. He agreed that Kevin Anthony McDonald was employed by the Irish Government as a Passport Official at the Irish Embassy in London.

(C) (i) Mr. Justin Harmon is the Personnel Officer at the Department of Foreign Affairs. Prior to taking up that position he had been stationed at the Irish Embassy in London. That was until August, 1986. He had commenced employment in London in August, 1982. During his time in London he had come to know a person called Kevin Anthony McDonald. The said Mr. McDonald held the position of Passport Officer at the Irish Embassy from 1983 to 1986. There is only one person in the Passport Office of the Embassy whose title is Passport Officer. He is an Executive Officer and there is no other person carrying that title in the Embassy. Although he did not meet Mr. McDonald on a regular basis he was very familiar with his appearance and would have no difficulty in identifying him. He then identified to me, the Respondent as the Kevin Anthony McDonald who was the Passport Officer in the Irish Embassy in London until earlier this year.

(ii) The Respondent was not serving under the Crown or under any corporation or any municipal, borough, county or district council, or any board of guardians. He was exclusively employed as a Passport Officer in the Irish Embassy.

4. No evidence was called by or on behalf of the

Respondent.

5. DEFENCE SUBMISSIONS

At the conclusion of the State's evidence, Mr. P. McEntee of Counsel made four submissions as to why I should not make an Order of Delivery. These were as follows:

(1) Arrest-breach of constitutional right.

The arrest of the accused was a deliberate breach of the accused's constitutional rights in that in effecting the arrest Superintendent H. Reynolds and/or the Gardai used force to enter the defendant's temporary residence.

(2) Validity of warrants

Mr. McEntee questioned the validity of the warrants and submitted that the only warrants which could be lawfully endorsed, were warrants for the arrest of a person accused or convicted of offences under the law of that place.

He further submitted:-

PREVENTION OF CORRUPTION ACT, 1906

(a) That in the case of the Prevention of Corruption Act 1906 the offence alleged was that of an Agent, but that Agent is defined for the purpose of the Corruption Act as an Agent of the British Crown or Authority.

(b) That there was no evidence of consent of the British Attorney General to the institution of the prosecution.

(3) Conspiracy - False Pretences Charge

Counsel submitted that the charge in the case of conspiring dishonestly to obtain Irish Passports by deception and by false pretences was brought under a "Catchall Conspiracy Clause" and was not a good charge.

(4) Diplomatic Immunity

Both charges refer to offences which it is alleged took

place within the jurisdiction of the Central Criminal Court for England and Wales. Mr. McEntee submitted that the evidence went to show that what was alleged had happened, had happened in the Irish Embassy where the Defendant was the Passport Officer which would not be within the jurisdiction of the English Central Criminal Court. That the accused was entitled to immunity from Criminal prosecution under the Diplomatic Relations Act 1967 and that while the Irish State could waive immunity, such waiver must always be expressed and that no evidence of waiver had been tendered to the District Court and that consequently the charge was bad.

6 STATE REPLY TO DEFENCE SUBMISSIONS

- (i) Mr. B. Donoghue State Solicitor replied to Mr. McEntee's submission but, in this Case Stated, his replies are confined to the two defence submissions which I upheld.
- (ii) In relation to the submission that an Order of Delivery on the second warrant should be refused because of the failure of the State to prove compliance with Section 2(1) of the Prevention of Corruption Act 1906, Mr. Donoghue replied that the question of whether the consent of the Attorney General or Solicitor General for England and Wales was required to institute proceedings for the offence set out on the Warrant was a matter of English law. There was no evidence of English law before the Court. Mr. Donoghue said that if such consent was required he could inform the Court that the Solicitor General for England

and Wales has in fact consented to those proceedings. He said that there was no onus on the State to prove his consent. The question was one of defence to be raised by the Respondent if and when returned. The presumption of the validity of the Warrant had not been rebutted.

(iii) In reply to the submission that an Order of Delivery should be refused on both Warrants because of the failure of the State to prove that the Respondent's Diplomatic Immunity had been waived, Mr. Donoghue said that the question of whether the Respondent enjoyed Diplomatic Immunity was a matter of English law. There was no evidence as to what the English law position was. The onus was on the Respondent to prove English law in the proper manner. There was no evidence that the Vienna Convention on Diplomatic Relations had been ratified by the United Kingdom. There was no evidence that, if ratified, it was incorporated into domestic law and, if incorporated, in what terms. There was no evidence that the Respondent enjoyed Diplomatic Immunity in England. Mr. Donoghue said that, assuming that the Defendant had Diplomatic Immunity there, he could inform the Court that this immunity had been waived by the Irish Government. He submitted that there was no onus on the State to prove this waiver. The question was one for the Defence of the charges if and when returned.

7 No expert in English law was offered in evidence nor was there any documentary evidence of the consent of the British Solicitor General or of the Irish Government's express waiver to Diplomatic Immunity produced in Court nor was there any application made for an adjournment to produce such evidence.

8 During the course of these submissions a number of authorities were cited to me by both parties. For this reason I decided I would reserve my decision until a later date and I remanded the Respondent on continuing bail until the 2nd October, 1987.

9 On the 2nd October, 1987 I delivered my judgment herein at District Court Number 3, Morgan Place. I refer to a true signed copy of my said judgment which is attached hereto and which forms parts of this Case Stated. For the reasons set out in the said judgment I determined that both warrants were bad. Therefore I discharged the Respondent on both warrants.

THE OPINION OF THE HIGH COURT IS SOUGHT AS TO
WHETHER I AM CORRECT IN LAW ON THE FOLLOWING QUESTIONS
OF LAW:-

- (1) Am I correct in assuming that I have jurisdiction under section 2 of the Summary Jurisdiction Act 1857 as extended by Section 51 of the Courts (Supplemental Provisions) Act, 1961, to state a case, at the request of the Applicants/Appellants for the opinion of the High Court, in the present circumstances of this matter?

(2) (i) Was I correct in deciding that the Respondent's arrest on the 7th day of August 1987 did not contravene his rights under Article 40.5 of the Constitution?

(ii) Was I correct in deciding that the warrant to arrest the Respondent in respect of an offence under Section 1(1) of the Prevention of Corruption Act, 1906, which requires the consent of the Attorney General or Solicitor General before any such offence can be prosecuted, was insufficient on its own to require the delivery up of the Accused, without any documentary evidence being tendered to me that the aforementioned consent by the Law Officer to such prosecutions had been given?

(iii) Was I correct in deciding that both warrants to arrest the Respondent were insufficient on their own to require the delivery up of the accused, without any documentary evidence being tendered to me that the Accused's diplomatic immunity had been duly waived in the manner provided by Article 32 of the Vienna Convention on Diplomatic Relations of 18 April, 1961 (1967) Irish Treaty Series No. 4, which is made part of the law of Ireland by the Diplomatic Relations and Immunities Act 1967?

AS WITNESS my hand this 4th day of February 1988.

Oliver A. Macklin

OLIVER A. MACKLIN

President of the District Court."

The Judgment of the Learned President is as follows:-

"This is an application under Section 47 of the Extradition Act for an order of the District Court for the accused person's delivery at a point of departure from the State into the custody of a member of the London Metropolitan Police Force. The application is made on foot of two Warrants issued by the Chief Metropolitan Stipendiary Magistrate for the Inner London Area on the 5th August, 1987. One charge alleges conspiracy to dishonestly obtain by false pretences and a second charge of corruption contrary to Section 1(1) of the Prevention of Corruption Act, 1906.

It would appear that the District Court's function is limited to satisfying itself that the provisions of part III of the 1965 Extradition Act have been properly complied with.

Having heard the evidence for the State on the 16th September, 1987 and having examined the relevant documents produced (including the original warrants) and heard the submissions of Mr. Barry Donoghue, State Solicitor for the State and Mr. P. McEntee Senior Counsel for the accused person, the defendant was remanded on continuing bail to appear at Dublin District Court on to-day Friday 2nd October. Meantime, I have considered the various cases referred to me by Counsel on the question of Extradition.

I am satisfied:-

1. That the accused person Kevin Anthony McDonald,

who is before the Court, is the person named in the two original warrants dated the 5th August, 1987 and issued by the Chief Stipendiary Magistrate for the Inner London Area.

2. That the said warrants were issued by a Judicial authority in England a place to which part III of the Extradition Act, 1965 applies.
3. That the documents referred to in Section 55 of the Act and the Certificate referred to in Section 55(c) and Section 54(2) of the Act were produced in evidence.
4. That the warrants were endorsed by Assistant Garda Commissioner Mr. John Paul McMahon on the 7th day of August 1987. Counsel for the accused questions the validity of such endorsement.
5. That the said warrants were executed by Superintendent H. Reynolds in Dublin City and that the accused was arrested, taken before the Dublin District Court and remanded on bail on the 7th August 1987.

Before making an Order for delivery of the accused person at a convenient point of departure from the State, into the custody of a member of the London Metropolitan Police Force, I must be satisfied that each of the offences specified in the said warrants correspond with an offence

under the law of this State which is an indictable offence or is a summary offence punishable on summary conviction by imprisonment for a maximum period of at least six months.

I must also be satisfied that the warrants show that an offence has been committed under the law of England.

On the authorities quoted to me it would seem that if the proofs required by part III of the Extradition Act are complied with, the District Court has no option but to make an order for delivery of the accused to the English Police. Section 55 of the Act deals with the proofs which are normally adequate to establish the case. It is however worth drawing attention to the opening words of Section 55 "unless the Court sees good reason to the Contrary." Wyatt .v. McLoughlin Page 396 S.C. 1974.

The accused is not on trial in this Court and I am not concerned with matters of defence.

It is not the business of the Court to attempt to interpret the English law. No expert in English law has been produced in this court by either party.

At the close of the State Case on 16th September Mr. McEntee made four submissions as to why the accused person should not be delivered to the English Police viz:-

(1) ARREST-BREACH OF CONSTITUTIONAL RIGHT.

The arrest of the accused was a deliberate breach of the accused's constitutional rights in that in effecting the

arrest Superintendent H. Reynolds and/or the Gardai used force to enter the defendants temporary residence.

(2) VALIDITY OF WARRANT

Mr. McEntee questioned the validity of the warrants and submitted that the only warrants which could be lawfully endorsed, were warrants for the arrest of a person accused or convicted of offences under the law of that place.

He further submitted:-

- (a) That in the case of the Prevention of Corruption Act 1906 the offence alleged was that of an Agent, but that Agent is defined for the purpose of the Corruption Act as an Agent of the British Crown or Authority.
- (b) That there was no evidence of consent of the British Attorney General to the institution of the prosecution.

(3) CONSPIRACY - FALSE PRETENCES

The second charge in the case of conspiring dishonestly to obtain Irish Passports by deception and by false pretences was brought under "a Catchall Conspiracy Clause" and was not a good charge.

(4) DIPLOMATIC IMMUNITY

Both charges refer to offences which it is alleged took place within the jurisdiction of the Central Criminal Court for England and Wales. Mr. McEntee submitted that the evidence went to show that what was alleged had happened, had happened in the Irish Embassy where defendant was the Passport Officer which would not be within the jurisdiction of the English Central Criminal

Court. That the accused was entitled to immunity from Criminal prosecution under the Diplomatic Relations Act 1967, and that while the Irish State could waive immunity, such waiver must always be expressed and that no evidence of waiver had been tendered to the District Court and that consequently the charge was bad.

CONCLUSIONS

I have considered the submissions of Counsel and the replies of Mr. Barry Donoghue State Solicitor and have come to the following conclusions:-

(1) ARREST - BREACH OF CONSTITUTIONAL RIGHT

I do not consider that the circumstances in the cases quoted on this point - State .v. Trimbole Supreme Court 1985 I.R. page 550 and D.P.P. .v. Gaffney M.I.R. 1986 are on all fours with the circumstances in the present case.

I do not accept that Detective Superintendent H. Reynolds acted improperly in effecting the arrest. The Superintendent was in possession of warrants and before prising off the security grill, he had knocked on the grill on several occasions and had indicated that the Gardai were present and were requesting admission. In any event, the accused ultimately had the premises opened for the Gardai. In the circumstances I do not consider that the Superintendent and or the other Gardai present, were guilty of a breach of the accused's constitutional rights.

(2) VALIDITY OF WARRANTS

2(a) I accept that the accused was not a Crown Agent within the meaning of Section 1(3) at the time of the alleged offence. However, I do accept the submission of

the State Solicitor that while the definition of "Agent" does include a person serving under the British Crown; the expression "Agent" is much wider and it includes any person employed by or acting for another. (Section 1(2)). In my view this would include the accused as a Passport Agent for the Irish Government.

2(b) The second point made by Mr. McEntee does cause me some concern. Section 21 expressly sets out that a prosecution for an offence under this Act shall not be instituted without the consent in England of the Attorney General or Solicitor General. No such evidence has been tendered at the present hearing. It seems to me that if the consent of the British A.G. was not given then proceedings should not have been instituted for a Corruption charge and that in this event the warrant would be bad.

It would have removed all doubt if the consent of the British Attorney General or Solicitor General or a copy thereof had been made available to this Court. If the warrant is bad then the defendant is unlawfully detained in this case on that charge.

Am I to presume that the English law officers consent was given and produced to the Chief Metropolitan Stipendiary Magistrate before issuing the warrant. Furthermore any doubts in respect of the unlawfulness of the detention of the accused are not required to be dispelled by the accused. The onus is not on the Defendant but on the State to dispel any such doubts. I have come to that conclusion bearing in mind the recent decision of the High Court delivered on 5th and 6th May

1987 in the case of McEntyre .v. Justice McMenamin and Justice Hussey. Judicial Review No. 34 of 1987 unreported. In the circumstances I do not intend to make an order for the defendant's delivery out of the State on the Prevention of Corruption Act charge.

(3) CONSPIRACY - FALSE PRETENCES

Counsel for the accused submitted that the second charge was brought under "a catchall conspiracy clause" and that the charge was defective. This charge appears to be ambiguous but I am not prepared to decide the issue on this one submission.

(4) DIPLOMATIC IMMUNITY

I have considered the provisions of the Diplomatic and Immunities Act 1967, the Vienna Convention on Diplomatic Relations and in particular the following articles of said Convention:-

Article 31(1) A diplomatic agent shall enjoy immunity from the Criminal jurisdiction of the receiving State (in this case England).

Article 31(4) The immunity of a diplomatic agent from the receiving State (England) does not exempt him from the Jurisdiction of the sending State (Ireland).

The accused person is being charged in England as an agent of the Government of the Republic of Ireland and not in Ireland. The accused person was described in evidence as the sole Passport Officer in the Irish Embassy in London up to August 1986. No further

evidence of his diplomatic status was given to this Court. Did the accused enjoy immunity from the English Criminal Jurisdiction?

Article 37(2) Members of the administrative and technical staff of the Mission shall - - enjoy the - - immunities specified in Articles 29 to 35 including the immunity under Article 31.

Article 32(1) Immunity from Jurisdiction under Article 37 may be waived by the sending State (Ireland).

Article 32(2) Waiver must always be expressed. I have come to the conclusion that the Defendant at the time of the alleged commission of both of the alleged charges in the warrants before me was entitled to Diplomatic immunity and exemption from the Criminal Jurisdiction of the Central Criminal Court of England. I have no evidence that waiver of immunity was expressed by the Irish State. In the absence of waiver it seems to me that both charges and both warrants are bad. In the circumstances I am not prepared to presume that immunity was waived and order the handing over of the defendant an Irish Citizen to the English Police for trial on such charges.

(c) I consider that the onus of proof is on

the State (McEntyre .v. Justice McMenamin and Justice Hussey Judicial Review No. 34 of 1987 to which I referred earlier).

I consider that requirements of Part III of the Extradition Act must be strictly complied with before an Extradition Order can be made.

(d) Therefore I order that the accused be discharged on both counts.

Oliver A. Macklin "

JURISDICTION TO STATE CASE IN EXTRADITION PROCEEDINGS

The first question which arises for my consideration is whether the Learned President had power under Section 2 of the Summary Jurisdiction Act 1857 as extended by Section 51 of the Courts (Supplemental Provisions) Act, 1961, to state a case, for the consideration of the High Court in the present extradition proceedings?

The short answer, so far as this Court is concerned, is that the matter appears to be governed by the decision of the Supreme Court in Murphy .v. Bayliss (unreported judgment delivered the 22nd day of July 1976). That case held that an appeal by way of Case Stated did lie to the High Court from a decision of the District Court in extradition proceedings and that decision is binding on this Court.

However, in view of the elaborate scholarly submission

presented by Dr. Forde on this matter, and, lest the matter should go further, I feel I should deal with the argument more fully.

Dr. Forde's submission may be briefly summarized as follows.

There was no power under the Summary Jurisdiction Act 1857 to state a case in extradition proceedings. The procedure for executing warrants under the Petty Sessions Act was not a proper extradition procedure and was struck down in the State (Quinn) .v. Ryan 1965 I.R. page 70. At all times from the foundation of this State there were doubts as to whether Ireland was bound by, and entitled to rely upon, treaties ratified by the former United Kingdom for the purposes of giving effect to the provisions of the Fugitive Offenders Act 1870. For these reasons there was no effective system of extradition, as we now know it, in operation when the Oireachtas passed the Courts (Supplemental Provisions) Act in 1961. It can hardly therefore have been the intention of the Oireachtas, by means of that statute, to confer jurisdiction on the District Court to state a case in extradition matters. Moreover, Dr. Forde submits that the British House of Lords held in Atkinson .v. The U.S.A. 1971 Appeal Cases page 197 that the corresponding statutory provisions in England did not confer on examining magistrates power to state a case in extradition proceedings, and this despite the wide wording of Section 87 of the Magistrates' Courts Act, 1952 which provides:-

"Any person who was a party to any proceeding before a Magistrates Court or is aggrieved by the conviction, order, determination or other proceeding of the Court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the

justices composing the Court to state a case for the opinion of the High Court on the question of law or jurisdiction involved."

The reasoning of the majority in the House of Lords however, appears to have proceeded upon the basis that examining Magistrates had no power to state a case in extradition proceedings prior to the Magistrates' Courts Act, 1952; that that Act was a consolidation statute and that therefore there was a strong presumption that it did not alter the pre-existing law. They seem also to have drawn an analogy between committal proceedings and extradition proceedings and to have assumed that, as both were merely preliminary or ancillary proceedings in the trial of a person on a criminal charge, the Order made by the Magistrate could not be regarded as a final Order such as might properly be the subject matter of an appeal by way of Case Stated.

The position under Section 51 of our Courts (Supplemental Provisions) Act, 1961 appears to me to be very different. In the first place that statute is not a mere consolidating statute. With the Courts (Establishment and Constitution) Act, 1961 it is a statute which establishes a new system of Courts under the Constitution and defines their jurisdiction. Moreover, it purports expressly to "extend" the jurisdiction conferred by Section 2 of the Summary Jurisdiction Act, 1857. Subsection (1) of Section 51 reads as follows:-

"Section 2 of the Summary Jurisdiction Act, 1857 is hereby extended so as to enable any party to any proceedings whatsoever heard and determined by a justice of the District Court (other than proceedings relating to an indictable offence which was not dealt with summarily by

the court) if dissatisfied with such determination as being erroneous on a point of law, to apply in writing within fourteen days after such determination to the said justice to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of the High Court."

This appears to me to be a general grant of jurisdiction to the new Court so as to enable any party "to any proceedings whatsoever heard and determined by a justice of the District Court" to apply to the District Justice to state a case. Being a general grant of jurisdiction it can be invoked to challenge any determination of law made by any District Justice in the course of the exercise of any statutory powers from time to time conferred upon him. It is not, in my view necessary, that each statute conferring jurisdiction on the District Court in relation to any matter should incorporate a power authorising him to state a case in relation to any matter of law arising under that statute.

The section of course exempts from the jurisdiction to state a case "proceedings relating to an indictable offence which was not dealt with summarily by the court". The reason for this exemption is presumably that any question of law arising in such proceedings can be dealt with by the Court of trial.

The question then arises whether, assuming the charges in respect of which the Respondent is sought to be extradited are indictable offences in English law, the present extradition proceedings are properly to be regarded as "proceedings relating to an indictable offence not dealt with summarily by the court". In my view they are not to be so regarded. It

appears to me that the analogy between committal proceedings and extradition proceedings is a false analogy. So far as the requesting country is concerned the extradition proceedings may merely be a step in making the accused amenable to the jurisdiction of the Courts of the requesting country but so far as the requested country is concerned the extradition proceedings are not a step in the proceedings; they are the proceedings. Once the District Court has made its Order for delivery at a point of departure from the State it has, subject to any appeal or review, made its final Order.

I am reinforced in this interpretation by the fact that the District Court has power to extradite not only for offences which may be indictable offences in the requesting country but also, in certain circumstances, for offences which may be triable summarily in the requesting country. If Dr. Forde's submission on Section 51 were correct a person being extradited for an offence triable summarily might have an appeal by way of Case Stated to the High Court but a person being extradited on the potentially more serious indictable offence would not have such an appeal.

In all the circumstances I am satisfied that the Learned President had the power to state the present case and I would answer the first question in the Case Stated "yes".

ALLEGED BREACH OF RESPONDENT'S CONSTITUTIONAL RIGHTS

The second question which I am asked to deal with arises out of the circumstances of the Respondent's arrest on the 7th day of August 1987 and the alleged breach of the Respondent's constitutional rights. This is a matter on which the

Appellants were successful before the Learned President and they did not ask to have this question included in the Case Stated. Indeed Mr. Fennelly (on behalf of the Appellants) pointed out that the Appellants accepted the decision of the Learned President on this point as being correct. They were not accordingly dissatisfied with it and would not have been entitled to have this matter included in the Case Stated. Dr. Forde however wished to have the matter raised on behalf of the Respondent. Mr. Fennelly, ultimately ~~changed his mind, and~~ agreed that it would be convenient to both parties if I dealt with this point while dealing with the other points in the Case Stated. On that basis I proceed to deal with it.

The facts concerning the circumstances of the Respondent's arrest are set out in paragraph 3, subparagraph (a) of the Case Stated. From this it would appear that at the time of his arrest the Applicant was staying with his brother at his brother's premises at Fishamble Street, Dublin. The house was up a short driveway. There was a large security gate which was locked. The Gardai got over the gate and approached the house. The entrance door to the house was locked and protected by a steel grille which was locked on the outside. Detective Superintendent Reynolds knocked on the grille and identified himself as a member of the Garda Siochana. He had warrants for the arrest of Kevin Anthony McDonald (the Respondent) and he called out that he had these warrants and that he believed that Kevin Anthony McDonald was inside the house. A voice replied "yeah".

Detective Superintendent Reynolds called on the man inside to open the door, that there were Gardai outside who were in possession of warrants. Detective Superintendent told the man

inside that he believed that he was the person he was looking for. There was no reply. Detective Superintendent Reynolds repeated his request on four or five occasions. After ten minutes had elapsed and when there was no indication that the man inside was going to open the door, the Gardai proceeded to remove the steel grille from the outside.

When the Gardai began to prize the grille off the person inside shouted "Hold it. I will open the door". At that stage the Respondent's brother, who was the owner of the premises, arrived on the scene. The brother called out to "Kevin" to open the door. The person inside replied "yes" and the door was opened.

The Gardai then entered the premises and arrested the Respondent.

The Learned President held that there was no legal or constitutional impropriety in the circumstances of the Respondent's arrest. The Superintendent was in possession of warrants and, before prizing off the security grille, he had knocked on the grille on several occasions and had indicated that the Gardai were present and were requesting admission. In any event the accused had ultimately opened the premises for the Gardai. He might indeed have added that when the Gardai ultimately entered the premises they appear to have done so with the consent of the owner of the premises. In my view the facts do not support a claim of violation of a dwellinghouse contrary to Article 40, Section 5 of the Constitution. Nor do I believe *D.P.P. v. Gaffney* (unreported Supreme Court, 23rd day of February 1987); *D.P.P. v. Lawless* (unreported, Supreme Court, 28th day of November 1985); or *D.P.P. v. McMahon* (1986 Irish Reports 393) are governing authorities for the present

case.

Dr. Forde submits that the Gardai entered the house without any form of statutory authority to effect the arrest. Certainly he submits that the Extradition Act does not give any such form of statutory authority.

Mrs. Denham, however, (on behalf of the Appellants) relies on Section 45 of the Extradition Act 1965 which provides that a warrant endorsed under Section 43 of the Extradition Act may be executed by any member of the Garda Siochana in any part of the State. Gardai in possession of a warrant duly endorsed under Section 43 are therefore, she submits, in at least as strong a position as Gardai in possession of a warrant lawfully issued in Ireland. She relies on the decision of Mr. Justice Blayney in D.P.P. .v. Corrigan (1986 Irish Reports page 290) where (at page 296) he quotes with approval a passage in Ryan and McGee on "The Irish Criminal Process" where they state

"A garda who is endeavouring to effect an arrest either with or without a warrant, may use reasonable force to break down doors of a house to gain admittance, but only if he has unsuccessfully sought prior admission."

I accept this statement of the law and Mrs. Denham's submission based on it.

It appears to me that both the facts and the law support the decision of the Learned President in the present case.

CONSENT OF ENGLISH ATTORNEY GENERAL OR SOLICITOR
GENERAL AND DIPLOMATIC IMMUNITY.

The remaining questions in the Case Stated raise problems which seem to me to be similar in nature.

The Learned President in the course of his judgment noted that "it is not the business of the court to attempt to interpret the English law" but nevertheless he appears to have been drawn into questions of English law in the way he approached the two matters now under discussion. The Prevention of Corruption Act 1906 presents a particular trap for an Irish Court because, being an Act which applied to both Ireland and England, an Irish Court might feel at home in construing it. But nevertheless the construction of it in the context of an English charge is a matter of English law. Secondly, neither charge appears to be a charge of a statutory offence under the Prevention of Corruption Act 1906. Both charges appear to allege a conspiracy and are framed under the Criminal Law Act 1977 as amended by the Criminal Attempts Act 1981. The Irish Courts have not heard any expert on English law in this case. For all we know the consent of the English Attorney General or Solicitor General may be necessary for the institution of the charges in question or the provisions of Section 2, subsection (1) of the 1906 Act may have been amended by some later English statute. These are matters of English law which the Irish Courts are not competent to enquire into without expert advice. The relevant document so far as the Irish Courts are concerned is the certificate of the appropriate English authority that the offences specified in the warrants are indictable offences under the laws of England and Wales.

The same line of reasoning applies in relation to diplomatic immunity. Whether the Respondent does or does not enjoy any form of diplomatic immunity under the law of England is a matter of English law. Because Ireland and the United

Kingdom are both parties to the Vienna Convention on Diplomatic Relations and because the Vienna Convention is scheduled to our Diplomatic Relations and Immunities Act 1967 it is tempting to conclude that the rights of the Respondent in an English Court can be spelled out by reference to the Vienna Convention.

Dr. Forde, I must confess, has shown extraordinary ingenuity in this respect but nevertheless it appears to me that the approach is inherently unsound because the extent to which the Vienna Convention can be invoked before the Courts of England is a matter of English law into which the Irish Courts are not competent to enquire without expert opinion.

The existence of diplomatic immunity or the waiver or non waiver of diplomatic immunity would therefore appear to be, in the circumstances of the present case, a question of English law for the English Courts. As a matter of international law, and as between States, a waiver of diplomatic immunity must be express (see Article 32 sub-article (2) of the Vienna Convention) but the status of the Convention before the Courts of England and the method of invoking it, are questions of English domestic law. It is worth recalling that the Vienna Convention acknowledges, in its preamble, that diplomatic immunity exists "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as missions as representing states". It would be strange therefore if a diplomatic agent could invoke a diplomatic immunity in the Courts of his own country against the police authorities of his own country to prevent his extradition at the behest of those authorities to face charges in the country in which he formerly served.

The formal proofs necessary on an application for extradition are set out in Sections 54 and 55 of the Extradition Act, 1965. The Learned President appears to have

accepted that these formal proofs were in order. See The State (Holmes) .v. Furlong 1967 I.R. page 210 at page 216; The State (Furlong) .v. Kelly 1971 I.R. page 132 at page 143 and Wyatt .v. McLoughlin 1974 I.R. page 378 at page 395.

Section 55 of the Extradition Act, 1965 is to apply in any proceedings "unless the court sees good reason to the contrary". The Learned President appears to have attached significance to these words. But the problem is that if the "good reason to the contrary" depends on some point of English law the Court must have the assistance of an expert on English law to guide it as to what the law of England is. This point is illustrated by the decision of the Supreme Court in Gillespie .v. Attorney General 1976 I.R. page 233. That case is authority for the proposition that where, in proceedings under Part III of the Extradition Act, 1965, it is sought to adduce, in the District Court or in the High Court, evidence to disprove the authenticity or evidential value of the foreign warrant, the Court is bound to receive such evidence provided that it is otherwise admissible.

No such evidence was provided in that case in the District Court and the Learned District Justice duly made an Order for delivery at point of departure. The Plaintiff, however, then instituted High Court proceedings in which he sought to adduce evidence to show that the warrant on which his extradition was sought was a bad warrant in its place of origin. The High Court refused to accept such evidence but the Supreme Court overruled this decision.

Mr. Justice Henchy, delivering the Judgment of the Supreme Court, said, at page 236:-

"Since it is not suggested that any good reason to the

contrary appeared in the District Court, and since the document had been given statutory verification as to signature, it is clear that the District Justice correctly admitted it in evidence in that court as the arrest warrant, as having been duly signed, and as having been issued by a judicial authority in accordance with the law of the place where it issued. As far as the procedure in the District Court was concerned, the District Justice had statutory support for admitting the warrant in evidence and acting on it. Since there was then no good reason to the contrary, the plaintiff could not have contended otherwise in that court; nor did he attempt to do so. So, if the matter rested entirely on the proceedings in the District Court, the point now taken would be of no value.

However, once fresh proceedings were instituted in the High Court, the provisions of s. 55, sub-s. 1, had to be applied afresh in that court. The question then arose whether there was then good reason to the contrary which would prevent the warrant being accepted in that court as having been issued by a judicial authority in accordance with the law of its place of origin. The plaintiff was now attacking the validity of the extradition order, alleging that it was made without jurisdiction because the English warrant which it purported to give effect to had been issued without jurisdiction; the Attorney General has not objected that this point was not pleaded. For the purpose of ruling the point, the court had to see if there was evidence that the Justice of the Peace who issued it had jurisdiction to do so. Section 55, sub-s. 1, provides

that, once the signature on the warrant has been verified in the required manner, the warrant is receivable as evidence that it was issued by the Justice of the Peace in accordance with the appropriate law, unless there is good reason to the contrary.

Counsel for the plaintiff, in order to show good reason to the contrary (that is, a valid reason for holding that the statutory presumption that the warrant was validly issued had been rebutted), sought to put in evidence the opinion of an expert in English law. The judge refused to allow that evidence to be given. I think he was wrong in excluding it. By doing so, the judge debarred himself from operating s. 55, sub-s. 1, properly, for, by rejecting evidence which might have proved as a fact that the warrant was unlawfully issued, he disabled himself from deciding if there was good reason for saying that the presumption of the lawfulness of the origin of the warrant had been displaced. He thereby gave effect to what is, if the point taken is good, a bad warrant.

The view that appears to have been taken by the judge was that s. 55, sub-s. 1, did not apply in the circumstances and that, if he wished to pursue the point taken, the plaintiff should move in England to have the warrant quashed. I take a contrary view. I find nothing in the scheme of the Act of 1965 to suggest that a court here is expected to give effect, for extradition purposes, to a foreign warrant which is shown to have an unlawful origin; or to shift on to the shoulders of the person to be extradited the onus of bringing separate, and probably pointless, proceedings in the courts of the requesting

State for the purpose of having the warrant quashed. In my opinion the intent of the Act is to the contrary. Section 55, sub-s. 1, allows a court to attribute an authenticity and a lawful origin to a warrant with a duly verified signature, but the court is debarred from ascribing that, or any other, probative value to the document if and when good reason to the contrary emerges. This means that when it is sought, in the District Court or in the High Court, to adduce evidence showing that the authenticity or evidential value of the document put forward as the warrant is not what it would otherwise be, the court is bound to receive that evidence if it is otherwise admissible."

This passage indicates one way whereby "good reason to the contrary" may be established, to wit, by expert evidence to show that something which would otherwise be presumed to be valid is not valid. There may be other means whereby "good reason to the contrary" might be shown but it appears to me that one cannot establish "good reason to the contrary", by attempting to construe or determine points of English law which an Irish Court is not competent to construe or determine without expert opinion.

Under these circumstances I would answer the third and fourth questions in the negative.

My replies to the questions posed in the Case Stated would therefore be as follows:-

- (1) Am I correct in assuming that I have jurisdiction under Section 2 of the Summary Jurisdiction Act 1857 as extended by Section 51 of the Courts (Supplemental Provisions) Act, 1961, to state a case, at the request of the

Applicants/Appellants, for the opinion of the High Court, in the present circumstances of this matter?

Answer: Yes

- (2) (i) Was I correct in deciding that the Respondent's arrest on the 7th day of August 1987 did not contravene his rights under Article 40.5 of the Constitution?

Answer: Yes

(ii) Was I correct in deciding that the warrant to arrest the Respondent in respect of an offence under Section 1(1) of the Prevention of Corruption Act, 1906, which requires the consent of the Attorney General or Solicitor General before any such offence can be prosecuted, was insufficient on its own to require the delivery up of the accused, without any documentary evidence being tendered to me that the aforementioned consent by the Law Officer to such prosecutions had been given?

Answer: No

(iii) Was I correct in deciding that both warrants to arrest the Respondent were insufficient on their own to require the delivery up of the accused, without any documentary evidence being tendered to me that the Accused's diplomatic immunity had been duly waived in the manner provided by Article 32 of the Vienna Convention on Diplomatic Relations of the 18 April, 1961 (1967) Irish Treaty Series No. 4, which is made part of the law of Ireland by the Diplomatic Relations and Immunities Act 1967?

Answer: No

DB

John Barry

5/7/88