APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 3
HCA/2021/15/XC

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Appeal

under section 26 of the Extradition Act 2003

by

KEVIN McGOURTY

Appellant

against

THE LORD ADVOCATE (representing the Republic of Ireland)

Respondent

Appellant: Jajdelski; Dunne Defence
Respondent: O'Rourke QC; Crown Agent

12 January 2022

Introduction

[1] On 29 July 2019 the High Court of Ireland ("the issuing judicial authority") issued a European Arrest Warrant (the "EAW") for the arrest of the appellant. The EAW relates to six charges against the appellant, all involving conduct towards a former partner. The

charges are of harassment, theft, criminal damage to property, trespass, and breach of a safety order granted under domestic violence legislation. The Republic of Ireland ("Ireland") is a category 1 territory for the purposes of the Extradition Act 2003 and the EAW is a "Part 1 warrant" and an "arrest warrant" in terms of section 2 of that Act.

[2] The EAW was executed and the appellant was arrested. He was brought before the sheriff of Lothian and Borders (the "appropriate judge" in terms of section 67(1)(b) of the 2003 Act) to answer the EAW. The initial hearing took place on 22 July 2020, at which time the appellant was granted bail. Thereafter, after various procedural and preliminary hearings, a number of extradition hearings were adjourned and discharged. The matter came before the sheriff for an extradition hearing on 1 July 2021.

[3] Throughout the proceedings the respondent has represented the issuing judicial authority. The appellant has not consented to his extradition.

The extradition hearing

[4] Ultimately, the only ground upon which extradition was opposed by the appellant was that he maintains that it would breach his article 3 ECHR rights. The contention was that there is a real risk that he would be subjected to prison conditions in Ireland which amount to inhuman or degrading treatment or punishment. The primary submission was that there is a real risk of a breach because it is possible that he would be placed in a cell where he and another prisoner or other prisoners would have to slop out. The secondary submission was that there is a real risk of a breach by being placed in a cell with toilet facilities which are not fully partitioned to ceiling height.

[5] The principal information upon which the appellant relied was a report dated 24 November 2020 by the Council of Europe European Committee for the Prevention of

Torture and Inhuman or Degrading Treatment or Punishment (the "CPT") to the Government of Ireland on a visit to Ireland between 23 September 2019 and 4 October 2019. Section B of the report discussed prisons. The appellant founded upon paragraphs 30 and 65:

> "30. A long-standing concern of the CPT has been the continued existence of the practice of slopping-out within the Irish prison system, which the Committee has repeatedly stated is degrading not only for the persons using the chamber pot but also for the persons with whom the prisoner shares a cell and also debasing for the prison officers who have to supervise the slopping-out procedure. It is therefore positive that with the opening of Cork Prison the number of prisoners now having to slop-out has been reduced from around 360 to 60 prisoners between 2014 and October 2019. The opening of the new accommodation block at Limerick Prison should more than halve the remaining numbers, leaving only prisoners in E Block at Portlaoise to slop-out. This is a significant achievement which the CPT welcomes.
>
> **The CPT trusts that the Irish authorities will eradicate "slopping out" completely from the Irish prison system.**
>
> At the same time, the CPT notes that as of October 2019 1,802 prisoners (i.e. 45% of the prison population) share cells and have to use the toilet in the presence of other prisoners. The CPT considers that all in-cell toilet facilities should be fully partitioned up to the ceiling to provide a degree of privacy and dignity for prisoners sharing the same cell.
>
> **The CPT recommends that steps be taken to ensure that all multiple occupancy cells are equipped with fully partitioned toilet facilities.**
>
> …
>
> **5. Conditions of detention**
> a. material conditions
>
> 65. The cellular accommodation in the prisons visited can generally be considered of a good standard for prisoners held in a single occupancy cell. At Cork, Cloverhill, Midlands and Mountjoy Prisons, single occupancy cells were of an adequate size (between 8m² and 11m²), suitably equipped (bed, desk, chair, shelving unit, a call bell and a partially screened toilet and a sink) with sufficient lighting and ventilation. At Arbour Hill, the cells were rather cramped, measuring only 6m² including an unscreened toilet and sink, and access to natural light was limited on the ground floor; however, these deficiencies were offset by the open regime within the establishment. On the other hand, the conditions in the cells with double (Arbour Hill, Cork, Cloverhill and Midlands Prisons), triple (Cloverhill Prison) and quadruple (Midlands Prison) occupancy provide less good accommodation. In

> particular, the multiple occupancy cells, including at the new build Cork Prison, did not have fully partitioned sanitary annexes. In Cloverhill Prison, the vast majority of cells (119) are designated as triple occupancy despite the fact that they are only 11m², including the semi-partitioned toilet. This means prisoners are not offered 4m² of living space each. Further, the four committal cells on Wing E2 were dilapidated, malodorous and dirty and need to be refurbished. The cells on Wing C1 were in a similarly poor state. At Midlands Prison, the CPT's delegation took note of the ongoing refurbishment of all broken cell windows.
>
> **The CPT recommends that, at Cloverhill Prison, a programme of ongoing maintenance and refurbishment be undertaken and that efforts progressively be made to ensure that cells of 11m² (including the sanitary facility) accommodate no more than two prisoners. Further, toilets in multiple-occupancy cells should be fully partitioned up to the ceiling.**"

[6] The sheriff was also referred by the parties to *Ananyev* v *Russia* (2012) 55 EHRR 18; *Muršić* v *Croatia* (2017) 65 EHRR 1; *Aranyosi and Caldararou* (C-404:15 and C-659:15)[2016] 3 WLR 807; *Simpson* v *Governor of Mountjoy Prison* [2019] IESC 81; and *Saadi* v *Italy* (2009] 49 EHRR 30.

[7] The sheriff continued the case to 15 July 2021 to consider his decision. On that date he noted that it was firmly established that if a prisoner had less than 3 m² of personal space there was a strong presumption of an infringement of article 3. He expressed the view that where a prisoner has to slop out, particularly where the cell is shared with other prisoners, that would also raise at least a strong presumption of an article 3 infringement. He continued the hearing to 29 July 2021 in order that an assurance could be obtained from the Irish authorities that the appellant would not be detained, either on remand or, if convicted, after conviction, in a cell which would require him to slop out.

[8] In relation to the appellant's second submission, the sheriff was not persuaded that any assurance was required. He observed:

> "The other circumstances mentioned by Mr Dunne [the appellant's solicitor] do not seem to me, either singly or cumulatively, to demonstrate a real risk that the appellant's art 3 rights will be infringed."

Those circumstances were principally that the appellant could be in a cell with other prisoners where (i) he had less than 4m^2 personal space; and (ii) toilet facilities were not fully partitioned to ceiling height. However, Mr Dunne also made mention of the fact that the appellant might be held for a time in one of the cells in Cloverhill which were in need of refurbishment.

[9] No assurance about slopping out was received prior to the continued hearing of 29 July 2021, and on that date the sheriff further continued the hearing until 26 August 2021. By the time of that continued hearing a letter dated 30 July 2021 from the Office of the Director of Public Prosecutions, Dublin, had been obtained. The letter was signed by the senior principal prosecutor who was the head of the international unit. It stated:

> "We are advised by the Irish Prison Service that, on committal to Cloverhill Remand Prison (the primary committal prison for all cases such as this), the requested person will have in-cell sanitation. There is no 'slopping-out' in Cloverhill Prison. The size of the cells vary on each landing, however no cell is smaller than 9.36 square metres."

Since the letter did not deal with sentenced prisoners the sheriff further continued the hearing until 9 September 2021. By that date a further letter from the Office of the Director of Public Prosecutions dated 8 September 2021 had been obtained. The letter was signed by the deputy chief prosecutor, head of the prosecution support services division. It stated:

> "The Irish Prison Service has confirmed that Mr McGourty will not be placed in conditions where he is required to 'slop-out' - either on remand or in the event that he is committed to a term of imprisonment."

[10] On 9 September 2021 the sheriff was satisfied on the material before him that the appellant would not require to slop out. He ordered his extradition to Ireland.

[11] No issue was raised by the appellant on 9 September 2021 or at any earlier hearing about the form or source of either of the assurances.

[12] At the hearing on 9 September 2021 the appellant tendered a devolution minute which contended that it was incompatible with the appellant's article 3 rights to extradite him without obtaining a further assurance in respect of toilet privacy in shared cells. The sheriff refused that minute.

The application to this court

[13] In terms of section 26(1) and (3) of the 2003 Act a person who is ordered by the sheriff to be extradited may appeal to the High Court on a question of law or fact if the High Court grants leave to appeal. The applicant seeks leave to appeal, and if leave is granted he asks the court to allow the appeal. Section 27 of the 2003 Act provides:

> "**27 Court's powers on appeal under section 26**
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> (1) On an appeal under section 26 the High Court may—
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> (a) allow the appeal;
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—

(a) order the person's discharge;
(b) quash the order for his extradition."

[14] The first proposed ground of appeal is that the sheriff erred in law by failing to direct his request for assurances to the issuing judicial authority. The assurances were not the result of such a request. The second proposed ground of appeal is that the sheriff erred in law in failing to request an assurance that if the appellant was in a shared cell he would have toilet facilities which were partitioned all the way to the ceiling.

The sheriff's appeal report

[15] The sheriff observed that no issue was raised before him about the assurances which were obtained or the procedure adopted to obtain them. He continued:

> "[11] In terms of procedure, I asked the Crown to obtain an assurance, the Crown approached the prosecution authority in Ireland, and two senior prosecutors were able to give assurances based on information supplied to them by the Irish Prison Service. It may be that the ultimate source of the information would be the same whatever the transmission route of that information from (*sic*) Irish Prison Service to me. In any event, it was not suggested before me that the information was inaccurate. It was not suggested before me that Ireland had any history of giving assurances which could not be relied upon. On the information before me from the CPT report, only a tiny fraction of the Irish prison population was liable to be incarcerated in a prison cell which required slopping-out. The assurance sought was not one which was either difficult to give or difficult to satisfy… In the circumstances I was satisfied that there was no real risk that the appellant's article 3 rights would be infringed were he extradited to Ireland."

[16] In relation to the second proposed ground of appeal the sheriff commented that in *Muršić* v *Croatia* a Grand Chamber of the European Court of Human Rights stated at paragraph 139 of the judgment:

> "139 In cases where a prison cell - measuring in the range of 3-4m² of personal space per inmate - is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of art.3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements …".

At paragraph 14 of his report the sheriff noted that the language which the CPT used in paragraph 30 of its report when discussing slopping out was noticeably different from that used when discussing partitioning of toilet facilities in shared cells. Whereas it "trusted that the Irish authorities would eradicate slopping out completely", it merely "recommended" that toilet facilities in all multi-occupancy cells should be fully partitioned. The sheriff decided that not having partitioning right up to the ceiling in cells where a number of prisoners each had 3-4 m² personal space did not amount to inhuman or degrading treatment or punishment. None of the cases upon which the appellant relied indicated that it did.

The appellant's submissions

[17] Counsel for the appellant submitted that the appeal raises two discrete questions of law. The test for leave is whether the grounds are arguable (*Czerwinski* v *Lord Advocate* 2015 SCCR 340). Since both grounds are arguable, leave should be granted. Moreover, the court should be satisfied that the grounds are well founded and the appeal should be allowed. The court should order the appellant's discharge and quash the order for his extradition.

The first ground of appeal

[18] Counsel submitted that the sheriff had erred in law in obtaining the assurances in the way which he had. Since before he received the assurances the sheriff found himself in the position that the information before him was insufficient to allow him to decide whether the appellant should be extradited, he was obliged to make a request in terms of article 15(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) ("the Framework Decision") that the necessary supplementary information be supplied to him as a matter of urgency. article 15 provides:

"*Article 15*

Surrender decision

> 1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
>
> 2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of 28 urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.
>
> 3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

While article 15(2) refers to the information provided by "the issuing Member State" being insufficient, and it did not expressly specify to whom the request ought to be made, it was clear from the jurisprudence of both the Court of Justice of the European Union and the European Court of Human Rights that an article 15(2) request could only be made to the issuing judicial authority. As examples of that counsel directed the court's attention to *Mantello* (C-261/090), 16 November 2010, Grand Chamber, paragraphs 48-49; *Aranyosi and*

Caldararou, paragraphs 94-98; *Bob-Dogi* (C-241:15), 1 June 2016, paragraphs 64-66; *Piotroski* (C-367:16), 23 January 2018, paragraphs 60-61; *Criminal proceedings against LM* [2019] 1 WLR 1004, paragraphs 76-79; and *Criminal proceedings against ML* [2019] 1 WLR 1052, paragraph 63.

[19] Counsel acknowledged that the point was a highly technical one, but there were good reasons for the rule. It was a safeguard against illegitimate political interference. In some countries there might be a conflict between what an issuing judicial authority and political authorities might say. It was not suggested (i) that there was any question of that having occurred here; or (ii) that the information in the assurances was in fact inaccurate; or (iii) that there was any other reason to think that they could not safely be relied upon.

[20] Counsel accepted that there was no authority which supported the proposition that it was impermissible for the sheriff to have regard to information or assurances not obtained or endorsed by the issuing judicial authority. Moreover, he acknowledged that *ML* indicated that such material could be relied upon. He suggested that it was unclear whether the relevant material in *ML* had been a response to an article 15(2) request which had been made to the issuing judicial authority. He accepted that if it had not, then this ground of appeal could not succeed. He also acknowledged that Fordham J had rejected the proposition which he advanced in this ground of appeal in *Ogreanu* v *The Italian Judicial Authority* [2020] 1 WLR 4080, at paragraphs 30-40.

The second ground of appeal

[21] It was accepted that inadequate partitioning of toilet facilities in a multi-occupancy cell was not sufficient on its own to be a breach of article 3 ECHR (*Szafrański* v *Poland*, paras 27-29; *Shumba* v *France* [2018] EWHC 3130 (Admin), para 21). However, where there

was overcrowding and a prisoner had only 3-4m² personal space in a multi-occupancy cell, lack of toilet privacy might give rise to a breach of article 3. The information available to the sheriff indicated that the appellant might share an 11m² prison cell with two other prisoners; and that although toilet facilities would be partitioned from view the partitions would not reach the ceiling. In those circumstances the sheriff was bound to make an article 15(2) request seeking an assurance that the appellant would not be held in a cell with other prisoners where he had less than 4m² personal space and there was not partitioning of toilet facilities to ceiling height. His failure to seek that assurance was an error of law. The sheriff had also erred in law in suggesting that the CPT report had not considered lack of toilet partitioning to ceiling height to be as objectionable as slopping out.

The respondent's submissions

[22] Senior counsel submitted that neither ground is arguable, and that leave should be refused. Even if the grounds are arguable, since they are not well-founded the appeal should be dismissed.

The first ground of appeal

[23] Article 15(2) of the Framework Decision does not prescribe that a request for necessary supplementary information has to be addressed to the issuing judicial authority. Where the Framework Decision requires that something be given to or done by the issuing judicial authority it specifies that. It was noteworthy that article 15(3) dealt with "additional information" not "necessary supplementary information".

[24] In any case, even if an article 15(2) request for necessary supplementary information had to be made to the issuing judicial authority, it did not follow that the executing judicial

authority was unable to take account of information or assurances obtained following a request to other organs of the issuing member state.

[25] The Framework Decision operates on the basis of mutual trust and recognition between member states. Where an assurance has been given or endorsed by the issuing judicial authority, the executing judicial authority must rely upon it unless there are specific indications that prison conditions would subject the person to be extradited to inhuman or degrading treatment or punishment in breach of article 4 of the Charter or article 3 of ECHR (*Criminal proceedings against ML*, para 110; *Zabolotnyi* v *Mateszalka District Court, Hungary* [2021] 1 WLR 2569, para 34). Where an assurance has been given by the issuing state but it has not been given or endorsed by the issuing judicial authority, the executing judicial authority may still have regard to it but should evaluate it by carrying out an overall assessment of all the available information (*ML*, para 114). In *ML* the assurances were given by the Hungarian Ministry of Justice. They were not provided or endorsed by the issuing judicial authority. Nor had they been produced in response to an article 15(2) request. Nevertheless, the court held that the executing judicial authority was entitled to have regard to them and to assess whether they could be relied upon. That was what the sheriff had done here. It was not suggested to him that the information provided in the assurances was inaccurate. Nor was it suggested that Ireland had previously provided assurances which had proved to be unreliable.

The second ground of appeal

[26] The absence of partitioning to ceiling height does not amount to a violation of article 3. Whereas the CPT report expected the "eradication" of slopping out, it had merely recommended full height toilet partitioning. The Strasbourg jurisprudence is to the effect

that, where personal space is 3-4m² per inmate, a violation of article 3 may be found if that is coupled with other aspects of inappropriate physical conditions such as lack of access to outdoor exercise; lack of natural light or air, or ventilation; inadequate room temperature; inability to use the toilet in private; or compliance with basic sanitary and hygienic requirements (*Muršić* v *Croatia*, para 139). The evidence in the CPT report indicated that Irish prisoners have access to outdoor exercise, natural light and air, ventilation, and that cells which do not use slopping out comply with basic sanitary and hygienic requirements, including a semi-partitioned toilet. Before the sheriff the only material matters the appellant had founded upon were that personal space could be less than 4 m² and that toilet facilities may not be partitioned right up to the ceiling. Passing reference had also been made to some cells being in need of refurbishment. The sheriff had not erred in finding that those conditions did not reach the threshold of an article 3 breach. He did not require to seek an assurance in relation to toilet partitioning.

Decision and reasons

The first ground of appeal

[27] This ground of appeal is not well founded. The sheriff had assurances from the requesting state in relation to slopping out. It would be surprising if he was not able to take them into account. We are satisfied on the authorities that he was able to. That is clear from *ML*. In that case the relevant assurances were given by the Hungarian Ministry of Justice. They were not provided or endorsed by the issuing judicial authority. Counsel for the appellant accepted that if it is clear that those assurances were not a response to an article 15(2) request made to the issuing judicial authority then the first ground of appeal could not succeed. In light of that concession, and since we are content that the assurances

were not a response to such a request (see *ML* paragraphs 27-28 and 106), the first ground of appeal falls away.

[28] In any case, we are satisfied from *ML* (i) that when an assurance is given or endorsed by the issuing judicial authority the executing judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 (para 112); and (ii) that the executing judicial authority may have regard to assurances even if they have not been given or endorsed by the issuing judicial authority, but that such assurances must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority (para 114).

[29] We are satisfied that the sheriff did carry out such an overall assessment. He had regard, rightly, to the fact that there was no suggestion that the assurances were not accurate, and to the fact that it was not contended that Ireland had any history of failing to comply with assurances. It was open to the sheriff to place reliance upon the assurances. There was nothing to indicate that he ought not to.

[30] In those circumstances it is unnecessary to express a view on the correct interpretation of article 15(2). Article 15(2) does not expressly provide that a request under it requires to be made to the issuing judicial authority. However, the frequent references in the jurisprudence of both the Court of Justice of the European Union and the European Court of Human Rights to article 15(2) requests being made to the issuing judicial authority may indicate that such a requirement ought to be inferred. That said, we recognise, as Fordham J observed in *Ogreanu* v *The Italian Judicial Authority* at paragraph 36, that the case law in this area is apt to speak of the issuing judicial authority, or the requesting judicial authority, or the requesting state, and indeed sometimes these expressions seem to be used

interchangeably in the same decision. The construction point is an interesting one, but it is not one which is a live issue in the present case given that we have decided that the sheriff was entitled to place the reliance which he did on the assurances. We prefer to reserve our opinion on this question until a case arises where its determination is required.

The second ground of appeal

[31] We are not persuaded that the sheriff erred in law.

[32] In our view he was correct to conclude that the CPT report viewed slopping out as a graver problem than the lack of full-height partitioning of in-cell toilets. That is the ordinary and natural reading of the report. Moreover, the case law on article 3 suggests that making prisoners in multi-occupancy cells slop out is often likely to be inhuman or degrading treatment or punishment in breach of article 3. That falls to be contrasted with the case law relating to inadequate partitioning of toilet facilities in such cells, which indicates that that condition is not sufficient on its own to be a breach of article 3 of ECHR (*Szafrański* v *Poland* paras 27-29; *Shumba* v *France* [2018] EWHC 3130 (Admin), para 21).

[33] We are not convinced that the sheriff required to seek an assurance from the respondent that the appellant would not be held in a multi-occupancy cell where his personal space would be less than 4 m^2 and where the toilet facilities would not be fully partitioned to ceiling height. In our opinion the sheriff was entitled to conclude that being held in a cell with 3-4m^2 personal space with a toilet which was semi-partitioned did not reach the threshold of a breach of article 3, and therefore that the suggested assurance was not required.

[34] Counsel for the appellant also sought - faintly - to suggest that those two factors were not the only relevant material factors bearing on prison conditions. On any view, they were

certainly the key factors upon which the appellant founded, although some lesser reliance seems to have been placed on the reference in paragraph 65 of the CPT report to committal cells and some other cells at Cloverhill being in need of refurbishment. In relation to the latter matter counsel for the respondent indicated that since the CPT visit some remedial work had been carried out. Be that as it may, in our opinion it is plain from paragraph 14 of the sheriff's report that he considered all of the circumstances relied upon by the appellant, and that he was entitled to conclude that neither singly nor cumulatively did they reach the level of severity required to be inhuman or degrading treatment.

The section 27(2) requirement

[35] Section 27(2) provides that the court may allow the appeal only if certain conditions are satisfied. Counsel for the appellant did not explain which ones were satisfied in respect of each proposed ground of appeal.

[36] So far as the first ground of appeal is concerned, even if the appellant's argument were sound it is difficult to see how either the conditions in subsection (3) or those in subsection (4) would be met. On that hypothesis, when on the basis of the material before him the sheriff found himself in need of assurances (as he did), he would be obliged to make an article 15(2) request to the issuing judicial authority. There is no reason to think that the resulting assurances would have differed in any material respect from the assurances which the sheriff obtained. We fail to see how it is that the condition in section 27(3)(b) or the conditions in section 27(4)(b) and (c) may be said to be satisfied. With the second ground of appeal, only the conditions in section 27(3) require to be considered. The appellant maintains that the sheriff ought to have sought a further assurance that the appellant would not be held in a multi-occupancy cell where the toilet facilities were not fully partitioned to

ceiling height. However, if the sheriff had done that it is far from clear that the upshot would have been that he would have been required to order the appellant's discharge (section 27(3)(b)). Satisfactory assurances might well have been obtained.

Conclusions and disposal

[37] For the foregoing reasons we are not satisfied that either ground of appeal is arguable. The application for leave to appeal is refused.

[38] Had we been persuaded that the grounds passed the threshold of arguability, we would have granted leave but, for the reasons already given, we would have dismissed the appeal.