

THE HIGH COURT

Record No 2011/300 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

-AND-

David James Cahill

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 19th day of July, 2012**Introduction:**

This case concerns a request by the United Kingdom of Great Britain and Northern Ireland for the rendition of the respondent on foot of a European Arrest Warrant dated the 16th August, 2011 for the purpose of having him serve the balance of a sentence of 11 years imprisonment imposed upon him by Kingston-Upon-Thames Crown Court on the 20th October, 2005 in respect of 19 offences in total, consisting of 12 offences of robbery and 7 offences of having a firearm with intent to commit indictable offence. The European Arrest Warrant in question was endorsed for execution in this jurisdiction on the 6th September, 2011 and it was executed on the 22nd February, 2012. The matter then came before this Court on yesterday's date for the purpose of a contested surrender hearing.

The respondent opposes his surrender on various grounds, including, *inter alia*, on the basis that the European Arrest Warrant does not comply with the requirements of s.11(1)(A) of the European Arrest Warrant Act 2003 (hereinafter the Act of 2003) (which in turn mirrors and gives effect to Article 8 of the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)). In particular, the respondent complains that in respect of each of the 19 offences the warrant fails to set out "*the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence*" as it is required to do both by s.11(1)(A)(t) of the Act of 2003, and by Article 8(e) of the Framework Decision. While Article 8(e) is worded slightly differently to the section in the transposing statute the difference is of no materiality (as has been held by the Supreme Court in *Minister for Justice Equality and Law Reform v Desjatnikovs* [2009] 1 I.R. 618). Just for completeness, it can be noted that the Article 8(e) wording requires that the warrant should contain a description of "*the circumstances in which the offence was committed, including the time, place, and degree of participation in the offence by the requested person*".

This Court is of the view, for reasons which will be elaborated upon later in this judgment, that the respondent's complaint in this regard has substance. Moreover, it appears that this view was shared by the applicant (the Irish Central Authority), who sought additional information from his counterpart in the issuing state, i.e. SOCA (the Serious Organised Crime Agency which acts as the U.K. Central Authority) for the purpose of remedying the apparent deficits contained in the European Arrest Warrant itself. That request was communicated by email dated the 27th June, 2012. However, SOCA did not respond until the day before yesterday (17th July, 2012, the date of the hearing) and the response received was unsatisfactory for reasons which will be elaborated upon below.

The Court has refused an application by the respondent to make an order at this point refusing to surrender the respondent on the basis that the warrant is bad. Moreover, it has acceded to a request from the applicant that the Court should itself, exercising its power to do so under s.20(1) of the Act of 2003, reiterate the request to SOCA for the necessary additional information.

The Court will now set out its reasons for doing so.

Relevant Provisions of the European Arrest Warrant

The offences to which the European Arrest Warrant relates are set out in part E of the warrant in the following manner:

"This warrant relates to in total 19 offences:

- 1 Robbery
- 2 Having firearm with intent to commit indictable offence
- 3 Robbery
- 4 Having firearm with intent to commit indictable offence
- 5 Robbery
- 6 Having firearm with intent to commit indictable offence
- 7 Robbery
- 8 Robbery
- 9 Robbery

- 10 Robbery
- 11 Robbery
- 12 Having firearm with intent to commit indictable offence
- 13 Robbery
- 14 Robbery
- 15 Having firearm with intent to commit indictable offence
- 16 Robbery
- 17 Having firearm with intent to commit indictable offence
- 18 Robbery
- 19 Having firearm with intent to commit indictable offence"

Some brief additional information is provided under the heading "*Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person*".

The following details appear under that heading:

"The offences all took place in 2005, on the 28th April, 30th April, 2nd May, 4th May, 5th May, 7th May, 12th May, 14th May (x2), 17th May, 18th May, 19th May. The robberies were all committed at either off licenses, bookmakers, or shops. In all of the robberies, two or more persons were involved. One would brandish a weapon and the other suspect would assist. On the 28th April, 30th April, 4th May, 15th May, 17th May, 18th May, 19th May a gun is said to have been brandished. On the 5th May, 7th May, and 12th May, a knife was brandished."

Then the following further details appear under the heading "*Nature and Legal Classification of the Qffence(s) and the applicable statutory provision/code*":

"Section 8 of the Theft Act of 1968

Section 18 of the Firearms Act of 1968"

The issuing judicial authority has sought to invoke paragraph 2 of Article 2 of the Framework Decision by ticking the box relating to "*organised or armed robbery*" in part E I of the warrant. Moreover, as part E II has been left blank it is clear that the ticked box procedure is being invoked in respect of all 19 offences.

It has been submitted to the Court by counsel for the respondent, and not disputed by counsel for the applicant, that the information contained in the warrant provides only the skimpiest description of the circumstances of the offences in question and does not differentiate one from the other, other than by means of date. The exact premises concerned in each incident are not identified. The injured parties are not identified. The goods stolen in the course of the various robberies are not specified. The accomplices in each instance are not identified and the specific role said to have been played by the respondent in each instance is not identified.

Moreover, the jurisdiction within which the offences in question are said to have been committed is not identified.

The rationale for the requirements set out in Article 8(e) of the Framework Decision, as substantially reproduced in s.11(1A)(f) of the Act of 2003, has been discussed in a number of judgments, both of this Court and of the Supreme Court, including *Minister for Justice, Equality and Law Reform v. Hamilton* [2008] 1 IR 60; *Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83 (Unreported, Supreme Court, Denham J., 17th December, 2009); *Minister for Justice Equality and Law Reform v Desjatnikovs* [2009] 1 I.R. 618; *Minister for Justice and Equality v. Shannon* [2012] IEHC 91 (Unreported, High Court, Edwards J., 15th February, 2012); and *Minister for Justice and Equality v. Baron* [2012] IEHC 180 (Unreported, High Court, Edwards J., 4th May, 2012).

Briefly, it may be summarized as having three broad objectives, certainly in so far as the Irish courts are concerned.

The first is to enable the High Court, in its capacity as executing judicial authority, to be satisfied that it is appropriate to endorse the warrant for execution in this jurisdiction. In regard to that, Peart J. stated in *Hamilton* that:

"[9] Counsel for the respondent submits that the warrant in this case, on foot of which the respondent was arrested, is not in the form required by the Act of 2003. As already stated, there is a prescribed form of warrant for use in these cases and one of the paragraphs contained in that form is headed:-

"Description of the circumstances in which the offence was committed, including the time and place they were committed and the degree of participation by the requested person."

[10] Counsel for the respondent submits that the way in which this section of the warrant has been completed falls short of containing sufficient information in order to comply with what is required to be inserted by the heading. To deal with this submission, I ought to set out in full what details have been provided in the warrant under that heading:-

'On the 13th August, 2004, the accused, Daniel Hamilton, co-accused, Joseph Hamilton, the deceased, Paul Anthony Donald Whyte and witnesses, Margaret Hamilton and Angela Hamilton, were within Flat 2, 12 Riverford Road, Pollokshaws, Glasgow. Between approximately 12.30 a.m. (sic), the deceased, Daniel Hamilton and Joseph Hamilton were alone in the upstairs bathroom, where an altercation took place. Sometime later, the accused, Daniel Hamilton, left the premises.

Upon investigation, witness, Margaret Hamilton, found the now deceased badly injured within the bathroom. An ambulance was called and the deceased was conveyed to the local hospital. The deceased was not responding to medical treatment and was found to be suffering from a catastrophic brain injury and a depressed skull fracture. He remained unconscious and was taken to the intensive care unit and put on a life support machine. The life support machine was switched off as he did not respond to any medical treatment.

On the 1st October, 2004, at Sheriff Court of Glasgow and Strathkelvin, Glasgow, Scotland, a petition arrest warrant was granted for Daniel Hamilton in respect of the offence of murder"

"[12] In addition, counsel for the respondent submits that there is nothing with in this paragraph which gives any detail to indicate the degree of participation in the crime by the respondent and that this is required to be included by the precise wording of the heading to that paragraph"

"[14] My view of the matter is that the purpose of the warrant is not simply that the respondent might be aware of why his extradition is requested, but that this court, when asked to endorse the warrant for execution, might be satisfied that there is an offence alleged in which the pro posed respondent is implicated in some way. When the application for endorsement of the warrant is made initially under s. 13 of the Act, the court must be satisfied that the warrant is in the proper form before it can endorse it for execution. At that stage, the court itself must be in a position, from the manner in which the warrant is completed, to see in what way the offence alleged involves the person named therein."

In the present case, this Court was prepared to endorse the warrant notwithstanding the skimpy detail provided on the basis that the warrant contained enough (but only just enough) to allow that to be done, and having the comfort of an assurance from counsel for the applicant that the Central Authority would, before any surrender hearing, revert to the authorities in the issuing state seeking further and better particulars of the circumstances of the offences to which the warrant relates.

The second objective is to enable the executing judicial authority to be satisfied as to correspondence in cases in which double criminality is required to be demonstrated. In such cases, the Court must, per *Attorney General v. Dyer* [2004] 1 IR 40 (as approved in the European arrest warrant context in *Minister for Justice, Equality and Law Reform v. Fil* [2009] IEHC 120 (unreported, High Court, Peart J., 13th March, 2009), and applied in many subsequent cases) have regard to the underlying facts as disclosed in the warrant itself, and any additional information furnished, to see if the factual components of the offence specified in the warrant, in their entirety or in their near-entirety, would constitute an offence which, if committed in this State, could be said to be a corresponding offence of the required gravity. In the present case, this Court does not need to concern itself with correspondence in circumstances where the issuing judicial authority has invoked paragraph 2 of Article 2 of the Framework Decision.

The third objective, and the critical one in the circumstances of the present case, is to enable the respondent to know precisely for what it is that his surrender is sought. A respondent is entitled to challenge his proposed surrender and in order to do so needs to have basic information about the offences to which the warrant relates. Among the issues that might be raised by a respondent are objections based upon the rule of specialty, the *ne bis in idem* principle and extra-territoriality to name but some. In order to evaluate his position, and determine whether or not he is in a position to put forward an objection that might legitimately be open to him to raise, he (and also his legal advisor in the event he is represented) needs to know, in respect of each offence to which the warrant relates, in what circumstances it is said the offence was committed, including the time, place, and degree of participation in the offence by the requested person.

This point was emphasised by the current Chief Justice in her judgment in *Desjatnikovs*. Giving judgment for the Supreme Court in that case, Denham J. (as she then was) stated:

"[33]...The Framework Decision addressed the scope of the European arrest warrant in article 2. The list system is a new approach of enhanced cooperation between member states enabling a speedier process of extradition. This is made possible by the mutual confidence which exists between member states.

[34] In contrast to the requirement of correspondence, this new list system does not require double criminality. The executing state is not required to verify double criminality in respect of offences identified on the list of 32 categories of offences, but the offence should be punishable by a penalty as set out in law. The matter of penalty is not in issue in this case.

[35] The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated."

The Request for Additional Information

Doubtless with this jurisprudence in mind, the Irish Central Authority sought additional information from SOCA by means of an email dated the 27th June, 2012 which stated (inter alia):

"Following consultation with out legal advisors, we wish to advise you that difficulties may arise in Court hearings on this matter in relation to the completion of the European Arrest Warrant.

In order to facilitate the execution of the warrant you are requested to provide the following additional information;

- a) Please provide a more comprehensive account of each offence.
- b) Please link the offence number 19 to the incidents in the description so that the Court will be clear what the convictions of the respondent relate to in the description.
- c) Confirm how much of the 11 year sentence remains to be served."

As previously stated in the introduction to this judgment, a response to this request was not received until the 17th of July 2012. No specific criticism is made of the response time in circumstances where the request for additional information does not seem to have

stated that the case was listed for a surrender hearing on the 18th July, 2012. However, be that as it may, the response received is otherwise somewhat unsatisfactory. The direct response consists of a single sentence stating "*Please see the following response from the CPS.*" Below that, on the same page, is the text of an email forwarded from a legal advisor to the CPS to SOCA. The pertinent parts of it state:

"a) The EAW states:

The offences all took place in 2005, on the 28th April, 30th April, 2nd May, 4th May, 5th May, 7th May, 12th May, 14th May (x2), 17th May, 18th May, 19th May. The robberies were all committed at either off licenses, bookmakers, or shops. In all of the robberies, two or more persons were involved. One would brandish a weapon and the other suspect would assist. On the 28th April, 30th April, 4th May, 15th May, 17th May, 18th May, 19th May a gun is said to have been brandished. On the 5th May, 7th May, and 12th May, a knife was brandished.

I am afraid that there will be a delay in recalling the file from CPS archive in order to provide further detail. If there is a particular question/s we can focus on, please do submit them. I am afraid that I am unclear on what detail would assist because the broad facts were all similar: more than one person, including Mr. Cahill, attending commercial premises and making threats to the owners so as to rob them of monies held on their stores. On seven occasions a gun was involved. Mr. Cahill was linked to some of the offences by DNA and CCTV identification.

b) I am not clear as to what significance offence 19 has. Seven of the counts alleged having a firearm with intent to commit an indictable offence (2, 4, 6, 15, 17 and 19) and these relate to the robberies on 28th April, 30th April, 4th May, 15th May, 17th May, 18th May and 19th May respectively.

c) The probation service confirmed at the time of the EAW being obtained that Cahill would be recalled for the full period. Once back in custody, his case would be reviewed by the Parole Board to determine if he should be re-released. If the Board does not recommend release, he would be subject to further reviews by the Parole Board/Public Protection Casework Section. The EAW confirms that this period runs until 27th May 2016."

What is unsatisfactory about the response received is the fact that neither the Central Authority in the issuing state (SOCA), nor the legal advisor to the Crown Prosecution Service, appears to have appreciated that the requirement to provide reasonably detailed circumstances concerning each offence covered by the European Arrest Warrant is expressly stated in the Framework Decision. While the executing judicial authority is entitled to seek additional information where there is a discreet deficiency in the warrant, the executing judicial authority should not have to go back to the relevant authorities in the issuing state to seek information that should according to the Framework Decision have been in the warrant in the first place. If it were required to do so in every case, the system would grind to a halt. Moreover, the need to go back to the authorities in the issuing state should be the exception rather than the rule, in circumstances where one of the major objectives for which the European arrest warrant system was established, and which is reflected in the terms of the Framework Decision, was the creation of a speedy and simplified procedure for securing the rendition of fugitives from justice as between participating member states.

To assert this is not in any way to disrespect the principles of mutual trust and confidence, and of mutual recognition of judicial decisions, that underpin the European arrest warrant system. This Court recognises that even in the simplified rendition system constituted by the European arrest warrant system, there will always be a need in some cases to seek additional information, particularly where the need to do so arises as a result of some peculiarity of domestic law in the executing state of which the authorities in the issuing state could not reasonably have been expected to be aware, or arising out of some factual assertion made by a respondent in seeking to resist his surrender. However, it should not be necessary to have to request information that the Framework Decision clearly mandates should be in a European arrest warrant. It is inimical to the whole notion of speed and expedition that an executing judicial authority should have to revert to the authorities of an issuing state for basic information that should have been contained in the warrant in the first place. This is particularly so in circumstances where the Framework Decision itself establishes time limits (admittedly aspirational and not always achieved) of sixty days ideally, and ninety days where that cannot be achieved.

The Court's Decision

I have concluded that were the Court to seek the required additional information, even at this very late stage of the proceedings, the respondent would not be so prejudiced as to inhibit the Court from taking that step.

Accordingly, the Court exercising its power under s.20(1) of the Act of 2003 will reiterate the request to SOCA for additional information setting out, in respect of each of the 19 offences to which the warrant relates, a description of "*the circumstances in which the offence was committed, including the time, place, and degree of participation in the offence by the requested person*" as is required by Article 8 of the Framework Decision.

The Court's decision to seek additional information, and not to refuse surrender at this point, has been arrived at following a balancing of the public interest in ensuring that fugitives from justice are returned, on the one hand, with the rights of the individual respondent, including his right to know the case that he has to meet and his right to fair procedures generally, on the other hand.

The Court will also of its own motion direct that its judgment in this matter be brought to the attention of EUROJUST and that the assistance of EUROJUST be requested to secure a satisfactory, and timely, response from SOCA.

The s. 16 surrender hearing will be adjourned on a part-heard basis pending receipt of a reply to the Court's s. 20(1) request.