

THE HIGH COURT

Record Number: 2006 No. 3 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
KIERAN THOMAS DRAISEY

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 24th day of November 2006

1. The European arrest warrant issued in this case on the 7th December 2006 from a judicial authority in the United Kingdom, and was duly endorsed for execution by the High Court on the 17th January 2006, and was executed by the arrest of the respondent on the 8th February 2006. He was duly brought before the High Court following his arrest and was remanded from time to time until the hearing of this application under s. 16 of the European Arrest Warrant Act, 2003, as amended.

2. The warrant relates to six offences in total covering kidnapping, false imprisonment, assault occasioning actual bodily harm, and making a threat to kill. The first two offences, kidnapping and false imprisonment are offences found in Article 2.2 of the Framework Decision, and as such are offences in which pursuant to that article, double criminality/correspondence does not have to be verified. The remaining offences of assault causing actual bodily harm and making a threat to kill are submitted by the applicant to correspond respectively to offences here of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, and an offence contrary to s. 5 of the same Act. I am satisfied that correspondence is made out in respect of these offences. All these offences satisfy the minimum gravity requirement.

3. I am also satisfied that the European arrest warrant complies with the requirements of the Act.

4. I am also satisfied that the person before the Court is the person in respect of whom the European arrest warrant has been issued.

5. I am satisfied that the Court is not required to refuse to order surrender by anything within the provisions of sections 21A, 22, 23, or 24 of the Act, and subject to considering the submissions as to delay which have been put forward by Paul Coffey SC on the respondent's behalf, I am satisfied that the surrender of the respondent is not prohibited by Part III of the Act.

6. This is another case like a number which have come before the Court in recent times where prior to the hearing under s. 16 Points of Objection have been filed raising a number of points which are intended to be argued, but where at the hearing all but one are in effect dropped by not being argued. The first issue not addressed in argument was that "the respondent should not be extradited as the dates of the alleged offences are too wide to constitute any specific criminal offence". There was never any room for such an argument in this application under s. 16, whatever might be the scope for such an argument prior to the commencement of the trial.

7. A second point raised within the first point is that there was "undue delay in relation to the execution of the warrant". That point was not pursued and one might wonder how it could have been seriously contended when the warrant is dated 7th December 2005, and was executed on the 8th February 2006 following the endorsement of same by the High Court on the 17th January 2006.

8. The third point not pursued was that "the surrender of the respondent herein would constitute a contravention of the Constitution and in particular articles 38.1 and article 40.1 thereof". Article 38.1 provides that "no person shall be tried on any criminal charge save in due course of law". No facts were asserted which could ground such an objection. It is difficult to see how such an issue could have relevance to an application for surrender under the Act, save in some exceptional circumstance which would have to be firmly grounded on evidence and not mere assertion or speculation. In this case there was never even that suggestion. Article 40.1 provides that "All persons shall, as human persons, be held equal before the law." Again no facts are asserted as to the manner in which that inequality exists in this case. I am at a loss to know what it could ever have meant at any stage in the context of this application. The final issue raised was simply that "the applicant is required to prove the relevant corresponding offences". That is something which does not have to be raised before the Court is required to deal with it. The Court must be satisfied that there is correspondence in respect of any offences which are not set forth in Article 2.2 of the Framework Decision, given the provisions of s. 38(1) of the Act. I appreciate that before the applicant has indicated what offences are said to so correspond, it is difficult to set forth with precision what issue might be raised regarding correspondence, but it is fair to say that in the present case there could have been little mystery as to what offences here would be said to correspond to the offence of assault causing grievous bodily harm, and threat to kill. In those circumstances, such an issue is clearly inserted in a purely formulaic manner, in case something might arise.

9. I would again urge practitioners acting for respondents in these applications to observe the terms of O.98, r.5(2) RSC (S.I. 23/2005) which provides:

"Points of Objection shall contain a statement in summary form of the grounds and of the material facts on which the person relies to resist the execution of the European arrest warrant but not the evidence by which such material facts are to be proved."

10. This clearly mandates more than mere pleas which are contained pleadings. The evidence of facts asserted in the Points of Objection will have to be sworn to in an affidavit unless by leave of the Court oral evidence is given. That is foreseen in this rule. But the possibility of providing evidence on affidavit does not mean that formulaic Points of Objection may be filed, failing almost completely to inform either the Court or the applicant what precise issues are being raised and on what basis. Such a failure to adhere to the rule has the capacity not only to waste the time of the Court both in advance of and during an application, but also the time and effort of the applicant and the applicant's advisers. That has an implication for the cost of these applications both in terms of Court time and legal costs for the applicant and the respondent.

11. In one case to date I have disallowed the costs of such a Points of Objection out of the provision of costs under the Attorney General's scheme in order to promulgate a message for future cases. The Supreme Court has recently commented (*ex tempore*) adversely in relation to such Points of Objection in another case (*Minister for Justice Equality and Law Reform v. McCann*). I would again urge all concerned to adhere to the letter and spirit of the rule, so that the Courts can ensure that applications are dealt with on foot of meaningful and rule-compliant Points of Objection.

12. In the present case the only ground pursued in argument is that which is set forth in the Points of Objection as:

"It is submitted that by reason of the lapse of time the alleged offences (sic) the respondent should not be extradited. It is submitted that it would be unjust, oppressive or invidious to deliver up the respondent and that it would be in breach of his constitutional rights, in particular his right to a trial in due course of law and also in breach of the guarantee of equality."

13. Essentially Mr Coffey has grounded his submission on prosecution delay between the date of the alleged offences (the earliest such date being September 1995 and the latest being December 1998) and the bringing of charges on or about the 14th January 1999. It appears that the first complaint by the victim was made sometime towards the end of 1998. A domestic warrant for his arrest issued on the 31st December 2000, and it is upon this warrant that the European arrest warrant the subject of the present application was issued. Relevant to the issue of delay raised is some general background to the alleged offences.

14. The victim of these alleged offences is a lady with whom the respondent lived for some years up to 1995 according to his first grounding affidavit. He had previously been married and was divorced. He has averred that access to his children was withdrawn following separation, and he says that the charges were brought some three years and nine months after this separation. It would appear from other affidavit evidence that it was following the making of an order at Warrington Crown Court on the 13th November 1998 prohibiting him from being allowed access to his two children that it is alleged that he issued the threat to kill his former partner, which is the subject of one of these charges.

15. He states also that he was assaulted by a police officer during an incident in 1998 but that is denied by the officer concerned in an affidavit sworn by him. He has exhibited some evidence in this regard such as some photographs of injuries which he sustained and a medical report in respect of an eye injury which he says was inflicted during that incident. The respondent was in fact convicted of assault arising out of the assault which he said was perpetrated upon him. In any event he states that he returned to Midleton, Co. Cork in 1999 on account of the stress and pressure he says was exerted on him by the police and that he had to attend hospital as an out-patient in that regard. He says that he resided with his mother in Midleton and signed on at Midleton Garda Station whilst he was in receipt of social welfare payments. He avers that his partner from whom he was separated knew at all times of his whereabouts here, as she had holidayed here and had been a guest at his mother's house.

16. He goes on to say that he met another lady and that they now have a son, and that he is in receipt of sickness benefit and visits a local doctor each week, and that he has lived openly there since 1999, has obtained a mortgage and built a life for himself. He is very concerned for his four year old son who he cares for, and submits that an order for his surrender would be unduly oppressive and invidious.

17. An affidavit from a barrister in the Crown Prosecution Service, Tom Sweeney states that he has been informed by the police concerned that the delay which occurred following the making of complaint by the alleged victim in this case was due to the fact that the respondent's whereabouts were unknown at the time. He goes on to say that the lapse of time between 31st January 2000 and the extradition being sought in December 2005 *"reflects the fact that [the respondent's] whereabouts were only traced to Ireland during April 2005", and that he is informed "by the police that they then began to take action to identify [the respondent's] specific address in Ireland in order that his extradition could be sought."* He then states that this specific address was discovered in April 2005 and that the police immediately contacted the Crown Prosecution Service so that his extradition could be sought.

18. The respondent has sworn a second affidavit in which he gives some further detail of various addresses in this country at which he resided from time to time depending on where his employment was located at any particular time. But he states that the complainant would at all times have been aware of his mother's address in Midleton, and he never concealed his whereabouts, and also that one of his brothers lives close to her in England and that he would have occasion over the years to speak to her in relation to the respondent.

19. It is against that background that Mr Coffey makes his submission that the delay since the offences are alleged to have been committed is such that the surrender of the respondent ought not to be ordered. He highlights the fact that Police Officer Halliday has stated in his affidavit that he was informed in early 2000 that the respondent had returned to this country, that the respondent's whereabouts could easily have been ascertained and that when eventually the European arrest warrant was issued and endorsed for execution, there was no difficulty in locating and arresting him. He suggests that in spite of the averments by Mr Halliday, it is clear that no serious effort was made from 2000 to 2005 to try and locate the respondent and that no evidence has been provided as to exactly what efforts were made in that regard.

20. It is submitted therefore that it has been a period of eight years now since the complainant first made her complaints and that it is eleven years since the date of the first of the alleged offences.

21. I am not satisfied that the delay in the issue of this European arrest warrant has been fully explained. No issue has been taken with the respondent's averment that his whereabouts in this country was at all times something which was either known or easily found out if any sort of appropriate enquiry had been made. The way in which the delay is explained is vague and unspecific. It is merely stated that the respondent's whereabouts were only traced to this country in April 2005. He does not say what if any efforts were made and what difficulties, if any were encountered upon those enquiries being made. In that sense I regard the delay as being unexplained.

22. However, the mere existence of unexplained delay is not of itself sufficient to justify refusal of surrender, no matter whether one of the view that such an issue should still be determined by reference to the criteria which existed under applications pursuant to s. 50(2)(bbb) of the Extradition Act, 1965, or whether in view of its repeal by the European Arrest Warrant Act 2003, as amended, the question of lapse of time/delay needs to be approached in a way that is unconstrained by the requirement for not alone an exceptional lapse of time, but "other exceptional circumstances" before being able to consider questions of oppression, invidiousness and injustice.

23. If one is to consider this case on the basis of the s.50 criteria, I would have to conclude that while there has been an exceptional lapse of time in the sense that it is lengthy and unexplained, I would not be of the view that there are "other exceptional circumstances" to add to the lapse of time. Nothing exceptional exists in that respect. No suggestion is made by the respondent, for example, that his capacity to defend the case against him has been impaired by the delay. No particular prejudice is asserted. It is certainly a fact that the passage of time involved has enabled him to start a new life here. He appears to have worked here over a long period and has a young son here who he cares for. But such matters are not of an exceptional. In fact it would be more unusual if these features were absent from the case. I also cannot regard the incident in which he alleges that he was assaulted by a member of the police in the United Kingdom, as amounting to an exceptional circumstance, even though he is asserting that the reason why he did not appeal the conviction he received arising out of the incident in question was that he was terrorised by the police. That allegation is nowhere near substantiated. It is merely asserted. It follows that under the s. 50 criteria the Court would have no basis

on which to move to the final consideration of whether it was unjust, oppressive or invidious to surrender him.

24. Looking at the matter from outside those criteria, and on more general constitutional grounds so that it is considered purely under s. 38 (1)(b) of the 2003 Act, or even s. 40 thereof, it must be pointed out that there is absolutely no element of prejudice asserted on affidavit, besides perhaps some sort of prejudice to be simply implied from the length of time which has passed since the offences are said to have been committed in 1995 and 1998. Given the recent pronouncements in judgments of the Supreme Court on the question of delay, and the necessity even in cases of substantial delay to establish real prejudice, it seems clear that if he were facing trial in this country his trial would not be prohibited on grounds of prosecutorial delay, since no prejudice has been asserted, much less established. In such circumstances, there is no possibility that this Court can find that in the present case the surrender of the respondent is prohibited by anything in Part III of the Act. It cannot be said that it would be oppressive or invidious as submitted by the respondent.

25. Being satisfied therefore in respect of all the matters required to be satisfied before making the order under s. 16 of the Act, I order the surrender of the respondent pursuant to the terms of that section.