

## THE HIGH COURT

Record Number: 2005 No. 39 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT/RESPONDENT

AND  
ROBERT FRANCIS STAPLETON

RESPONDENT/APPLICANT

**Judgment of Mr Justice Michael Peart delivered on the 23rd day of November 2005**

1. The surrender of the respondent (the applicant in the present motion for discovery) is sought by the UK authorities so that he can face trial on indictment in respect of thirty offences, all of which can be loosely categorised as fraud charges. The dates on which these offences are alleged to have been committed are between 20th May 1978 and 30th September 1982. The company involved went into liquidation in 1983. The amount alleged to be involved is in the order of Stg. £3 million.

2. It appears that by the time an investigation had been commenced by the authorities in 1985 the respondent and his wife had already left that jurisdiction in 1984 and gone to reside in Spain, where, it is averred, they lived openly and within the knowledge of their bankers, their auditors, and their friends.

3. The applicant would contend that the purpose of the family going to Spain was because there were at that time no extradition arrangements in place between Spain and the UK, but the respondent has averred that the reason for the change of residence was because of a serious ailment from which his son was suffering and for which a warm climate was thought to be beneficial.

4. It is a fact also that the respondent's wife, when on a visit from Spain to the UK at the end of November 1985 was arrested by the UK police and was charged with an offence arising out of the same background as the charges now sought to be prosecuted against her husband. It appears that for a time at least his wife was held as a "Category A" prisoner – a category which he states is reserved for "violent, dangerous or suspected terrorist detainees" – which the respondent herein says resulted in her being subjected to inhuman and degrading treatment. That has relevance to some of the documentation sought in the present application. There is no affidavit from the respondent's wife in this regard.

5. It appears also that in December 1986 the respondent's wife was convicted of the offence with which she was charged and received a suspended sentence of 18 months imprisonment. The respondent did not return to England for his wife's trial, and he states in that regard that his concern and that of his wife was that if they were both detained in custody, there would have been a substantial risk that their children would have been taken into care. He says that he was never a fugitive since no charges were ever preferred against him prior to his departure to Spain, and he states also that no warrant was ever issued for his arrest until that alleged to have issued on the 14th January 2004, and on foot of which a European Arrest Warrant issued dated 20th July 2005. He points to the fact that the domestic warrant issued some twenty eight years after the earliest of the offences charged.

6. In 1990 the respondent states that the family moved to Madrid from Valencia where they had been living, and they ultimately decided to move to Montpellier in France because they had been assured that research hospitals there were "amongst the finest in Europe" since his son's health had continued to deteriorate according to his affidavit. Again he states that they continued to live openly in France under their own names until December 1994 where they again lived openly. Following his return to Ireland he states that he collected Social Welfare benefits, set up two businesses and made appropriate returns and he says that the UK authorities could as easily in 1994 have located him here as they did in 2005.

7. The respondent has filed Points of Objection, as he is entitled to do, under the Rules of Court pertaining to applications for surrender under the European Arrest Warrant Act 2003, as amended. In fact following the filing of Points of Objection, amended Points of Objection were filed on the 24th October 2005. A number of issues are raised therein, but for the purpose of this application by the respondent for discovery of documents, three Points are relevant – namely (1) that the surrender of the respondent would be incompatible with this State's obligations under the European Convention of Rights and Fundamental Freedoms and the Protocols and in particular the prohibition on inhuman and degrading treatment or punishment under Article 3 thereof; (2) the right to fair trial under Article 6 thereof; and (3) that by reason of the passage of time from the date of commission of the alleged offences he could not be proceeded against in this State if they had been committed here.

8. There are other Points of Objection to which it is unnecessary to refer for present purposes.

9. By letter dated 12th October 2005 the respondent's solicitor wrote to the Chief State Solicitor as required by O. 31, r.12(4) RSC seeking voluntary discovery of a number of documents which are set forth with the necessary particularity therein both as to the nature of same and as to the reason for their necessity. The documents sought are as follows:

- 1. The Transcript of the respondent's bail application here following his arrest pursuant to the European arrest warrant. The respondent states that this document is required "to assist in determining the basis for the delay in seeking the arrest of [the respondent]".*
- 2. The transcript of the trial of the respondent's wife in the UK to which I have referred. The respondent states that this document is necessary to show that certain evidence was excluded at his wife's trial and to which he has referred in paragraph 13 of his grounding affidavit, being the evidence of three named witnesses from the UK Export Credit Guarantee Department and Lloyd's Bank respectively, and that therefore the same evidence is likely to be excluded from his trial if surrendered and that this would result in an unfair trial.*
- 3. The transcript of evidence from his wife's Committal hearing in 1985 at which the witnesses referred to in (2) above gave evidence. He states that this transcript will "demonstrate the unlawful and improper exclusion of that testimony from [his wife's] trial, the recurrence of which at his trial will be a breach of his entitlement to a fair trial.*
- 4. All documentation concerning communications between the Lincolnshire Constabulary and the Lincoln Echo newspaper concerning the respondent's whereabouts at any time between 1985 to date. He states that these are necessary in relation to the establishment of delay.*

5. All communications between any United Kingdom Police Authority and HM Prison Service "to confirm who took the decision to treat [his wife] as a Category A prisoner. This is stated to be necessary to ground the claim that the respondent will would be likely to be subjected to inhuman and degrading treatment if surrendered.

6. All communications between the United Kingdom Police Authorities and the Crown Prosecution Service to confirm who took the decision to oppose bail for his wife, and this is stated to be necessary for the same reason as in 5 above.

7. All documentation held by either An Garda Siachana, the UK Police authorities, or the UK Security Services in relation to the respondent's whereabouts from 1986 to date "to include all intelligence in relation to the alleged operation by the respondent or his children of a Swiss Bank Account, and these documents are stated to go to the issue raised as to delay.

8. All documents between the Dept. of Foreign Affairs, the Passport Office, the Dept of Justice, the Irish Embassy in London, in France and in Spain as well as "any other relevant state organisation or any police force or security service in the United Kingdom concerning the respondent or his family. Again these documents are said to go to the issue of delay.

9. Certain unedited tapes of a three day interview, an edited transcript of which was furnished to the respondent at his bail application on the 16th September 2005. The reason stated for the necessity of these tapes is given as "that a highly edited and prejudicial transcript has been furnished by the State which we believe and will argue is inadmissible.

10. David Kean BL appears for the respondent in the proceedings, who is seeking discovery, and George Birmingham SC has appeared for the applicant in the proceedings. I shall continue to refer to the parties in this way, even though the respondent is the 'applicant' as far as the present motion is concerned.

11. In order to succeed in his application for discovery the respondent must satisfy the Court that the documents sought to be discovered are not only relevant to the application for his surrender to the United Kingdom, but also necessary. I would add that as far as "necessary" is concerned, the discovery should be shown to be reasonably necessary – absolute necessity may be too high a requirement. It is important to note that this relevance and necessity is in relation to the present application for his surrender under s. 16 of the European Arrest Warrant Act, 2003, as amended, and not to any trial on the charges which he may ultimately face if surrendered.

12. Under s. 16 of that Act, there are a number of specific matters set forth in the section upon which the Court must be satisfied before the Court is permitted to make an order for the respondent's surrender. There is no need to set out these in detail. If that were an end of the matter, these applications would be relatively simple and quick to process and determine. Indeed this simplicity and speed is one of the stated objectives in the Framework Decision for the introduction of the new surrender arrangements to replace the previous arrangements.

13. But the Framework Decision at Recital 13 thereof states:

*"(13) This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."*

14. This reference to "due process" certainly enables a respondent to pursue in an appropriate case an application for discovery by satisfying the requirements for such an order to be made.

15. Secondly, the Framework Decision in Article 1.3 provides:

*"This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."*

16. This latter provision is reflected in Part III of the 2003 Act – Prohibition on Surrender. Section 37 provides:

37.— (1) A person shall not be surrendered under this Act if –

(a) this or her surrender would be incompatible with the State's obligations under –  
(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies,

(c) there are reasonable grounds for believing that

(i) ...

(ii) ...

(iii) were the person to be surrendered to the issuing state –

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment." (my emphasis) Section 40 of the 2003 Act provides:

"40 .— A person shall not be surrendered under this Act where –

(a) the act or omission constituting the offence specified in the European arrest warrant issued in respect of him or her is an offence under the law of the State, and

*(b) the person could not, by reason of the passage of time, be proceeded against, in the State, in respect of the second-mentioned offence."*

18. By virtue of s. 37 and s. 40 of the 2003 Act, and the Framework Decision itself, it is clearly open to a respondent whose surrender is sought to satisfy the Court to the required degree that his surrender is prohibited under Part III by reason, *inter alia*, of the passage of time (for example a delay by the requesting authority since the date of the alleged offences), and/or by reason of there being established some reasonable grounds for believing that if surrendered he or she would be subjected to inhuman and degrading treatment.

19. As I have already indicated, the respondent in the present case seeks to invoke Part III provisions in order to urge that in his case his surrender is prohibited on the basis of passage of time, and also on the ground that there are reasonable grounds for believing that if surrendered he will be subjected to inhuman and degrading treatment, and he seeks discovery of the documents to assist him in that task, as well as in support of the submission that he will not receive a fair trial – the latter being a right which he enjoys under the Constitution as well as under the Convention, and of course it must follow that if this Court was satisfied on reasonable grounds that if surrendered the respondent would not receive a fair trial, then the Court would be bound under Part III of the 2003 Act to refuse his surrender, even if there are procedures available in the requesting state by which an application to prohibit his trial could be made based on the asserted risk that his trial would not be fair. The respondent would be entitled to have his constitutional rights under the Irish Constitution or the Convention vindicated in this jurisdiction, rather than being required to have them vindicated in the requesting state.

20. The question to be decided upon this application is whether any of the documentation and material sought to be discovered is relevant and necessary for the purpose of assisting the respondent in his objections to his surrender.

21. In relation to the respondent's assertion that he will be likely to be subjected to inhuman and degrading treatment if surrendered to the United Kingdom, this fear is based only on the fact that for a short time after her arrest she was treated as a Category 'A' prisoner. That category involves a higher level of security. That happened in 1985 – twenty years ago, and it appears some documentation dated November 1985 already in the respondent's possession that the police had some fears at the time of his wife's remand to the Crown Court that she would try and escape, and that her husband, the respondent herein, was connected with what is described in the affidavit of Derek Canton as "a political affiliated organisation", and that he might resist arrest and that he may be in possession of a firearm. At any rate the respondent has averred that his wife was so categorised for a time. I express no view on the substantive objection based on the fear of inhuman and degrading treatment since that will be a matter for the hearing of the application under s. 16 itself. But I cannot see that the documents sought at paragraphs 5 and 6 of his solicitor's letter dated 12th October 2005 can be seen as necessary or even reasonably necessary to that contention. There is no denial that his wife was treated as a Category 'A' prisoner first of all. I fail to see why, for example, the documentation requested at paragraph 5, namely as to who took the decision to treat his wife as a Category 'A' prisoner back in November 1985 is relevant to the question as to whether there is now in 2005 grounds for believing that he will be treated as a Category A prisoner if surrendered. The same comment relates to the name of the person who opposed his wife's bail application in 1985. I would just comment also that of course the fact that the respondent may even be justified in fearing that he will be designated as a Category 'A' prisoner if surrendered, does not of itself create a presumption that such a category involves inhuman and degrading treatment. The tapes referred to at paragraph 9 of the respondent's solicitor's letter are also not necessary to support this ground of objection.

22. In relation to the objection based on delay, or passage of time as it is referred to in the 2003 Act, the respondent seeks the Transcripts of his own bail application here in September 2005, the police communications with the Lincoln Echo newspaper regarding the respondent's whereabouts in 1985, as well as documentation held by An Garda Síochána or the UK authorities in relation to his whereabouts from 1986 to date, and in relation to the alleged operation of a Swiss bank Account. Under the delay objection he also seeks the documentation set forth in paragraph 8 of the said letter, namely communications between the various diplomatic agencies referred to concerning him or his family. I am satisfied that while such documentation may well have some relevance if it concerned the seeking of and the whereabouts of the respondent, it cannot be regarded as necessary for the respondent in order to plead the delay in this case. In well-worn terminology, the respondent is engaging upon a fishing expedition in relation to that material. In my view that respondent is well able to explain where, why and how he was living in various locations during the relevant in his attempt to demonstrate that he did not contribute to the delay which occurred. It is he who has the onus of satisfying the court that an inordinate length of time has passed, and that this passage of time is not one which has been caused by any action or inaction on his part, and that it is the requesting state which is culpable in that regard. No doubt those authorities will seek to submit that the respondent's motive in moving to Spain, and then to France and then to this State was other than he suggests, but the respondent does not need access to the documentation sought by him. He may well be curious to know what, if any, inquiries those authorities made from time to time in order to try and trace him, but it will be his own evidence which will be crucial as to the question whether he did or did not conceal his whereabouts, by for example, living in a clandestine fashion designed to impede a search for him by any authority. While the documentation may have relevance, the respondent has not in my view established any basis for submitting successfully that the documentation is necessary.

23. The respondent's other objection is on the basis that he will not, if surrendered, receive a fair trial. This is based primarily on an assertion that the trial of his wife in 1986 was unfair since the trial judge excluded the evidence of three named witnesses to which I have referred, and he assumes that the same ruling will be made in his own trial. Mr Kean has submitted that if it can be shown that this evidence was improperly excluded, this Court should not surrender the respondent since it would be safe to assume that the same evidence would also be improperly excluded in the respondent's trial, and that accordingly the Transcript is necessary so that the Court can arrive at a conclusion as to whether the exclusion of that evidence was improper.

24. The respondent did not attend his wife's trial, but Mr Canton has averred that the trial judge ruled that certain evidence was not relevant to the trial of the respondent's wife, on the basis that the evidence of the witnesses in question related to matters which post-dated the date of the offences alleged against her, but that this evidence was in fact admitted by the trial judge in relation to what he refers to as "the second trial" of a Mr Coles, who was a co-accused of the respondent's wife and who was convicted also. The Transcripts sought in relation to these witnesses' evidence at her Committal hearing, as well as the Transcript of his wife's trial itself cannot possibly be necessary for the purpose of asserting a real risk of an unfair trial. There is no issue taken by the applicant herein about the fact that the evidence of these witnesses was excluded at her trial. Neither does there seem to be any issue of relevance raised as to the nature of that evidence. It is the fact of the exclusion of the evidence from his wife's trial which forms the basis of the respondent's contention that the trial judge will also exclude that evidence from his trial, and he seeks to assert that he will therefore not have a fair trial. Again I am making no finding as to the substance of his belief that he cannot have a fair trial on this basis. The respondent has the onus of establishing as a matter of probability that he cannot receive a fair trial. But in spite of the fact that there appears to a factual connection between the charges brought against his wife twenty years ago and the charges brought against him now, the transcripts cannot be necessary to the respondent, particularly where there is not dispute raised as to whether or not these rulings were made and the evidence excluded. It is accepted that it is what happened, and the significance

which may attach to that is something which will no doubt be a matter for debate and submission at the hearing of the application herein in due course. Again relevance may well exist, but not the required element of necessity.

25. For these reasons I refuse the application for discovery.