Neutral Citation 2009 [IEHC] 630

THE HIGH COURT

Record Number: 2007 No.118 Ext.

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Perry John Wharrie

Respondent

Judgment of Mr Justice Michael Peart delivered on the 22nd day of January 2009:

The surrender of the respondent is sought by a judicial authority in the United Kingdom under a European arrest warrant which issued there on the 10th July 2007. It was endorsed for execution here on the same date, and on the 26th July 2008, the respondent was duly arrested on foot of it and brought before the High Court, as required by s.13 of the European Arrest Warrant Act, 2003, as amended.

No issue is raised as to the identity of the respondent and I am satisfied in any event from the affidavit evidence of the arresting officer, Sgt. Anthony Linehan that the respondent, who he arrested on that date, is the person in respect of whom this warrant has been issued.

On the 17th May 1989, the respondent was convicted of four offences which are set forth in the warrant as murder, robbery, possessing a firearm with intent to endanger life, and possessing a firearm while committing an offence. In respect of each of these four offences he received a life sentence. He was imprisoned to serve those sentences.

Some sixteen years later, on the 6th April 2005, the Secretary of State authorised the respondent's release on licence, subject to seven conditions which are set forth in the warrant, and he was released on the 20th April 2005 subject to those conditions. There is no need to set out these conditions in detail. The warrant sets out the manner in which some of the conditions have been breached by him, including by leaving his address without prior authorisation, and travelling outside Great Britain without prior permission.

His release on licence has since been revoked by the Secretary of State on the 10th February 2006, and he has been recalled to prison.

That is the background to the present application for his surrender to the United Kingdom so that he can be returned to prison to serve the balance of the four life sentences imposed upon him on the 17th May 1989.

All four offences for which the respondent was convicted and sentenced as described have been marked by the issuing judicial authority as coming within the list of offences in Article 2.2 of the Framework Decision. As such correspondence/double criminality does not require verification. Subject to addressing the submissions made by the respondent against an order for surrender being made, I am satisfied that the minimum gravity requirement is met by the remainder of life sentences to be served.

No undertaking is required to be provided by the issuing judicial authority pursuant to the provisions of s. 45 of the Act, since the trial and conviction did not occur in the absence of the respondent.

A relevant other fact that has occurred since the arrest of the respondent on foot of this European arrest warrant is that while in this jurisdiction the respondent committed a serious drugs offence for which he has already been tried and convicted at Cork Circuit Criminal Court on the 23rd July 2008 and for which a thirty year sentence of imprisonment has been imposed, and which the respondent is currently serving here.

Any order for surrender which may be made by this Court will inevitably be the subject of an application under s. 18 of the Act, to have the order for surrender postponed until such time as the respondent is no longer required to serve any part of that sentence of imprisonment. Even though that sentence is under appeal, and to that extent it is not yet beyond doubt how many years will have to be served in prison here by the respondent, Mr Michael O'Higgins SC for the respondent proceeds with his submissions on the basis that it will inevitably be a very long time before the respondent will be released from this current sentence. That is relevant to the points of objection.

Points of Objection:

1. Lengthy sentence being served here:
The first point of objection arises from the fact that the respondent is serving a very lengthy sentence here for the foreseeable future, and that inevitably any order for surrender will have to be postponed for perhaps twenty years or more. As a result, Mr O'Higgins submits, it will be impossible for the respondent upon his return to the United Kingdom to challenge the making of the revocation order by way of judicial review or otherwise, given the passage of time since its making. Possible grounds for such a challenge have been stated to be the fact that the revocation order was made without any notice to the respondent, depriving him therefore of an opportunity to making submissions against its making, and further that the said order was made without apparently any recourse to a Parole Board recommendation.

Mr O'Higgins, while acknowledging the jurisprudence which has developed in relation to s. 37 of the Act (i.e. Brennan and Stapleton cases), seeks to argue that before this Court may order the surrender of a respondent it must be satisfied that there exist in the requesting state sufficient safeguards for the protection of constitutional and Convention rights of the respondent if and when surrendered. The fact that surrender in all probability will occur many years hence means that at this remove in time this Court can

only speculate as to what the position might be so far ahead in time, and therefore cannot be sufficiently certain that when the time comes for surrender there will be any or any adequate safeguards, and for this reason the Court should desist from making the order sought on foot of the present warrant.

He submits that the more appropriate course would be for the issuing judicial authority to wait until such time as surrender can be implemented within a reasonably short time after the making of any order, rather than proceed with the present application, and thereafter seek an order for postponement. Mr O'Higgins submits that while, if the respondent was to be surrendered soon, there would be remedies open to him by way of judicial review of the revocation order, or by way of review by a Parole Board, this Court cannot presume that in twenty or more years time the same protections would be available.

It is submitted also that as the respondent is now aged about 50 years, he will probably be in his 70s by the time he is surrendered, and that there is no way of knowing now what state of health he might be in at that stage, or what other circumstances might then exist to justify a refusal of surrender if the application for surrender were to be made at that time.

Micheal P. O'Higgins SC for the applicant submits that the Act sets out the procedures to be undertaken, and that the postponement of surrender is specifically provided for in the terms in which s.l8 has been enacted. That section does not place any limit on the period of time for which surrender may be postponed, and he submits that it is within the scheme of the arrangements, and the Act giving effect to them, that where a European arrest warrant has been executed here, the application for surrender must proceed expeditiously to a conclusion; and thereafter, if necessary and appropriate, implementation thereof may be postponed until such time, whenever that may be, as surrender can take place.

Mr O'Higgins submits also that in so far as the respondent may wish to challenge the revocation order by way of judicial review, there is nothing to preclude him from so doing now, should he wish to do so, even though he is in prison in this jurisdiction, and that this Court cannot concern itself with what the situation in the requesting state may or may not be in twenty or so years time, or the state of health of the respondent at that stage.

Conclusion:
This Court's obligation is to operate the surrender arrangements adopted under the Framework Decision, and as given effect to by the European Arrest Warrant Act, 2003, as amended. The Act provides for the postponement of surrender where the person whose surrender has been ordered is at that point serving a sentence imposed upon him here for another offence or offences. Neither the Framework Decision nor the Act makes any provision for postponing the application for surrender itself until such time as such a sentence is either nearing completion or has been completed. It must follow therefore that even, as in this case where the sentence in question will not be completed for twenty years, this Court is required to determine the application for surrender at this stage, and then operate the postponement provisions thereafter.

In so far as it is submitted that there is no possibility that the respondent could, upon such surrender, seek to challenge the revocation order by way of judicial review or otherwise, he is not prevented from doing so now if he so chose. The inconvenience of having to do so from outside the United Kingdom cannot outweigh the entitlement of the issuing state to obtain the order for surrender, albeit one that is postponed until such time as the respondent is not required to serve any part of the sentence which he is currently serving.

Operating the surrender arrangements under the Framework Decision and as given effect to by the Act requires the Court to consider the provisions of s. 37 of the Act in order to ensure that surrender is not ordered where to do so would be incompatible with the State's obligations under the European Convention on Human Rights, or would constitute a contravention of any provision of the Constitution. Mr O'Higgins on behalf of the respondent submits that this Court cannot now know what will be the respondent's state of health in twenty or so years' time, and therefore cannot be certain that his surrender would not contravene a provision of the Constitution or be incompatible with the State's obligations under the Convention. That is of course so. But this Court cannot deal with the application other than on facts and circumstance as they are known at the present time. Speculation as to what future facts and circumstances may or may not exist at the time when surrender may be implemented cannot be a ground for not making the order now and postponing it to a later time. It is at least interesting to note that s. 37 of the Act speaks of "surrender" being prohibited, rather than the making of an order for surrender. While my comments are of course obiter in this regard, it seems to me that it may be possible for the respondent to argue at a time close to when surrender may be implemented in the future, that the facts and circumstances which prevail at that time may prohibit surrender, and that it may not be a bar to such an argument that an order for surrender has already been made many years previously. If I am right, however, that itself is a reason why speculation into the future is not something which this Court can indulge in when making the order for surrender now. It would mean that in no case where a lengthy sentence is imposed here could an order for surrender be made and postponed. There is nothing in the Framework Decision (or the Act) to suggest that there should be such an exception.

2. Punitive element of sentence has been served, with only the preventive element remaining - no preventive element to a life sentence under Irish law - therefore unconstitutional that he should be surrendered.
It will be recalled that following the conviction of the respondent in the United Kingdom in 1989 he received four life sentences, and that he was released on licence in April 2005 having therefore served about sixteen years imprisonment. It is submitted by the respondent that this period of sixteen years which he has served represents the punitive phase of the life sentences, and that any balance of the life sentences for which his surrender is sought represents what is regarded under English law as the preventive phase of the sentences. Put simply, the submission therefore is that because under Irish law preventive detention is unknown and contrary to the Constitution, it would be a breach of s. 37 of the European Arrest Warrant Act, 2003, as amended to order his surrender for the purpose of serving the remaining preventive phase of those sentences.

The life sentence regime as it exists in the United Kingdom is explained in the European arrest warrant itself at paragraph (i) thereof as follows:

> *"The offender has to serve an appropriate minimum period (the tariff) that reflects the punitive element of the sentence. Once this punitive term of imprisonment has expired the offender enters into the risk element of the sentence. He may only be detained if he continues to present a risk to the public. All lifers, who are released, are released under a licence that remains in force for the rest of their lives. The life licence can be revoked at any time if necessary on public protection grounds.*
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> *An independent Parole Board conducts a review of the prisoner's sentence once the punitive element has expired. A judge chairs this panel. An oral hearing can take place to determine whether the prisoner's detention should continue. The Parole Board must decide whether it is necessary for the protection of the public for the prisoner's detention to continue. At this hearing the prisoner has the right to be present, to be legally represented and to call and question*

witnesses.

The Parole Board can direct the release of the prisoner. If it decides that the prisoner should not be released then a further hearing will take place within 2 years to review the prisoner's detention and at regular intervals thereafter. "

An affidavit has been sworn on the respondent's behalf by Phillippa Kaufmann BL, a barrister in London who has specialised in prison law since 1991. She explains in some detail the life sentence regime in the United Kingdom, and the division of same into the punitive and preventive phases. Referring to the power of the Parole Board to release after completion of the punitive phase, she states that the board must do so "if it is satisfied that it is no longer necessary of the protection of the public that the prisoner be detained". She goes on to state that while the legislation is silent as to what particular matters the Board may consider before releasing on licence, she believes that "the issue for the Board to determine is whether the offender continues to present a more than minimal risk of serious harm through serious violent or sexual offending", and that by "serious harm" is meant death or serious personal injury whether physical or psychological".

Dealing with the Secretary of State's power to recall a person to prison by revoking the licence, she states that this can be done either on the recommendation of the Parole Board or without such a recommendation where the Secretary of State considers it expedient to so do in the public interest. In the latter circumstances, she states, the person recalled is entitled to an oral hearing before the Parole Board in order to test whether he/she ought to have been recalled, and re-release may be directed.

Ms. Kaufmann goes on to refer to *Stafford v. The United Kingdom* [2002] 35 EHRR 32 where the applicant had been sentenced to a mandatory life sentence for murder, was released on licence after the punitive phase of the sentence was served, and was later recalled following his conviction for burglary and trafficking in heroin. The Secretary of State refused to release the applicant on the grounds that he presented an unacceptable risk of committing such non-violent offences again. However, the European Court of Human Rights held that his re-detention was not justified where the disclosed risk was of non-violent criminal behaviour unrelated to his previous conviction for murder. It is to be noted in the present case that the recall of the respondent was not made on account of his involvement in any crime for which he was convicted here in July 2008. His recall was ordered following his failure to adhere to all the conditions attached to his release on licence, and, it would appear, principally his failure to keep appointments with the Probation Service on the 20th and 27th January 2006. On the 31st January 2006 the Probation Service prepared a report for the Home Office requesting a recall and a review by the parole board. Thereafter efforts to recall the respondent to prison failed. These facts emerge from a replying affidavit by Melanie Cumberland BL who has sworn an affidavit on behalf of the Crown Prosecution Service in response to that of Ms. Kaufmann.

I do not propose to dwell too much on what each of these deponents states in her affidavit. What is clear from the exposition of the law of the United Kingdom contained therein is that if the respondent had been located following the revocation of the licence, he would have been returned to prison and would have been the subject of a review by the Parole Board of the risk which he presented to the public safety. That review my or may not have led to his re-release. His departure from the United Kingdom, in breach of his licence, and the commission here of an offence which has led to a sentence of thirty ears imprisonment, has prevented his recall to prison for the purpose of such a review. It must be remembered that it is not the case that the Secretary of State can simply recall a person to prison by revoking a licence, and thereby enable him to languish in prison for the remainder of his natural life under the preventive phase of the life sentence. In this case the Secretary of State revoked the licence and recalled him to prison. The affidavit of Ms.Cumberland, which has not been contradicted, makes it clear that in such a case, the person recalled to prison has certain rights and entitlements as one would reasonably expect, such as the right to make representations to the Parole Board, and the right to be given the reasons for his recall. The Parole Board may either confirm the recall to prison or direct his re-release having carried out its review. In addition to such procedures, the respondent has also the free-standing right to challenge the Secretary of State's decision by way of judicial review. That right still exists though to date the respondent has not chosen to do so, albeit from his jurisdiction.

In my view, were the respondent to be surrendered to the United Kingdom with the result that he would be entitled to have his continued detention under the life sentences reviewed in accordance with the relevant procedures described by Ms. Cumberland in her affidavit, it could not be said that his surrender is prohibited by s. 37 of the Act.

I appreciate that the law regarding life sentences in the United Kingdom differs in certain respects from that in this jurisdiction, in so far as there does not exist in this State the concept of a preventive phase of detention following on from the punitive phase, and that a person may be detained only as a punitive measure. It has been submitted by Mr O'Higgins for the respondent that any preventive detention here would be contrary to the Constitution, and he has referred to the judgment of Walsh J. in *People (Attorney General) v. O'Callaghan* [1966] IR 501. That of course was a case decided in the context of bail, and where at p. 516 the learned judge stated that detention because of a perceived risk of offending while on bail "*is a form of preventative justice which has no place in our legal system and is quite alien to the true purposes of bail*". He went on o state:

"In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that. "

Since then of course, the Constitution has been amended by referendum permitting of some erosion of that statement by provisions of the Bail Act, 1997 where, in the case of a person charged with a serious offence, the likelihood of the person committing offences while on bail is a matter which the Court can have regard to when deciding whether or not to grant bail pending trial.

The question arising on this application is whether in the case of the respondent who has served the punitive element of the sentences imposed upon him, it would be a breach of his constitutional rights to be surrendered to the United Kingdom to face the possibility that he would be detained once again to serve a further period of the life sentences where such period would be in respect of the preventative phase of the sentences only, the punitive phase having already been completed.

This question must be considered in the context of the surrender arrangements adopted under the Framework Decision. Those arrangements have been adopted by Member States in the knowledge that the penal systems of member states of the European Union differ in terms of substantive criminal law, trial procedures and systems, as well as sentencing principles and regimes. Significant differences exist. Membership of the European Union carries with it an assumption that such penal systems as exist in each member state meet at least minimum standards guaranteed by the European convention on Human rights and that adequate protections exist to ensure that fundamental rights are respected and capable of being vindicated. A simple example often referred to in this regard is

that in some member states there is no right to trial by jury on a criminal charge. The fact that in this country any person charged with an indictable offence is entitled under the Constitution to be tried by jury is not a reason for refusing to surrender a person for prosecution for such an offence to a country where there exists no right to a trial b jury. To do so would not be a breach of the Court's obligation under s. 37 of the Act.

It seems to me that for the respondent to be surrendered to the United Kingdom so that he can be returned to prison following the revocation of his licence, and where he will be entitled to be represented and heard at a review of the revocation by a Parole Board is not a breach of any provision of the Constitution or the Convention. In spite of the dicta of Walsh J. in People (*Attorney General) v. O'Callaghan*), it is nevertheless the case in this jurisdiction that a person sentenced to life imprisonment may continue to be detained far beyond the time when others might have been released, where a danger to the public safety may be considered to exist and which justifies continued detention. The United Kingdom has in place procedures which meet the guarantees under the Convention, as evidenced by the affidavit of Ms. Cumberland. This Court must give due respect to the penal system existing in the United Kingdom, and it is a matter for the respondent to make his representations at the appropriate time to the Parole Board as to why his breach of his licence ought not to lead to any resumption of imprisonment under the life sentences imposed. This Court cannot second guess what that decision might be, or interfere in that decision making process. The comity of nations and of courts requires that.

3. Respondent not within s. 10 of the Act, since he could not have 'fled' since the punitive element had been served, with only preventive element remaining.
The respondent has sworn no affidavit on this application to indicate what was in his mind by way of his intention when leaving the issuing state to come to this jurisdiction. That is important when considering whether or not the respondent can be considered to be someone who did not 'flee' the issuing state before completing his sentence in the United Kingdom. However, the submission made in this regard is not put on the basis of what his intention may have been, but rather on the basis that because the punitive element of the sentences imposed upon him had been served, as confirmed by the evidence adduced by the requesting authority, he cannot be considered to have fled from anything which can be considered a sentence in this jurisdiction, since as already outlined above, a preventative element of a sentence is not a form of detention known in this State. I have reached certain conclusions in that regard already, albeit in the context of a different point of objection, but the point remains that under the law of the issuing state the respondent had not completed the sentences imposed upon him, since his release was a conditional release only, and that in view of his breach of those conditions he can be recalled to serve the balance of the life sentences, subject to the review procedures available to him by the Parole Board in the issuing state. In my view, the provisions of s. 10 of the Act are such that the circumstances of the respondent are within it. He is a person "*on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he ..... completed serving that sentence*". The fact that the nature of the life sentence regime in the issuing state differs in some respects from that pertaining in this State does not alter that fact.

Having reached the above conclusions, I am of the view that all the requirements of s. 16 of the Act are met, and that there is no reason under Part III of the Act or the Framework Decision why an order cannot be made, and I will therefore make the order for his surrender which is sought on this application. Having done so, I will then address any application which may be made for a postponement of that order until such time as his surrender can be implemented in view of the fact that he is currently serving a lengthy sentence in this jurisdiction.