Neutral Citation Number: [2011] IEHC 514

THE HIGH COURT

2008 37 EXT

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

BRENDAN MCGUIGAN

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered the 9th day of December, 2011.

Introduction

The respondent's rendition is sought by the Republic of Lithuania on foot of a European arrest warrant issued by a competent judicial authority in that country on 12th February, 2008, so that he may be prosecuted in Lithuania for offences involving terrorism, including illicit trafficking in weapons, munitions and explosives and the making of preparations for the commission of a serious or grave crime. The European arrest warrant in question was subsequently endorsed by the Irish High Court for execution in this jurisdiction. The respondent was arrested by Sgt. James Kirwan at Coolfore, Ashbourne, Co. Meath on 28th February, 2008 in execution of the said warrant, following which he was brought before the High Court in accordance with s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003").

The respondent does not consent to his surrender to the issuing state and has filed points of objection in which he raises a variety of legal issues, including (but not confined to) the contention that the Court is prohibited by virtue of s. 37 of the Act of 2003 from surrendering him on the basis that, if surrendered, the respondent will face breach of certain of his constitutional and human rights, including his right to bodily integrity, his right to human dignity, and his right to receive a fair trial. The respondent bases his contentions in this regard on (a) alleged poor conditions and ill-treatment of detainees in Lithuanian places of detention, and (b) alleged fundamental defects in the criminal justice system in the requesting state. In support of these allegations, the respondent filed three affidavits sworn on 28th January, 2009, 2nd October, 2009 and 18th May, 2011, respectively, by a Lithuanian lawyer, Ms. Ingrieda Botyriene. Four additional affidavits affirmed on 6th November, 2008, 4th February, 2009, 20th May, 2011 and 18th October, 2011, respectively, by an academic lawyer and professor of criminal justice, Professor Rod Morgan of the University of Bristol in the United Kingdom, were filed in support of the respondent's allegations.

The applicant relies upon:

a. the European arrest warrant itself;

b. an affidavit sworn on 4th December, 2008 by a Mr. Anthony Doyle, an official in the office of the applicant, exhibiting, *inter alia*, certain additional information supplied by the Prosecutor General's Office of the Republic of Lithuania;

c. further additional information supplied by the Prosecutor General's Office of the Republic of Lithuania dated 13th January, 2009;

d. an affidavit sworn on 11th February, 2010 by a Mr. John Davis, another official in the office of the applicant, exhibiting yet further additional information supplied by the Prosecutor General's Office of the Republic of Lithuania, and;

e. further additional information supplied by the Prosecutor General's Office of the Republic of Lithuania dated 30th September, 2011

A full hearing of the case pursuant to s. 16 of the Act of 2003 is due to take place in early 2012 and is expected to last several days.

The matter comes before the Court at this stage in the context of a motion filed by the respondent on 26th November, 2009, which originally sought:

"1. An order granting leave to the respondent to adduce by way of oral testimony the evidence of Ingrida Botriena for the hearing herein … [on such trial date(s)] …as shall be fixed by the Court;

2. Such further directions as the Court may require;

3. An order providing for the costs of this application."

The respondent filed no affidavit in support of this motion and, in fact, did not proceed with it immediately. The motion was, it seems, adjourned generally until in recent weeks the respondent sought the leave of the Court to re-enter it and proceed with it. The Court acceded to an application to re-enter the motion and listed it for hearing on the afternoon of 25th October, 2011.

At the commencement of the hearing on 25th October, 2011, the respondent sought the further leave of the Court to substitute an amended Notice of Motion dated 24th October, 2011 for the Notice of Motion originally filed. The Court, albeit with some reluctance, permitted the respondent to make the proposed substitution in the interests of justice.

The amended Notice of Motion dated 24th October, 2011 (with amendments in italics) seeks:

> "1. An order granting leave to the respondent to adduce by way of oral testimony the evidence of Ingrida Botriena and *Professor Rod Morgan for the hearing herein on a date to be nominated by this Honourable Court*;
>
> 2. *An order under s. 20(4) of the European Arrest Warrant Act, 2003 providing that oral evidence be heard in the application herein including in respect of any material or evidence relied on by the applicant to challenge the evidence of the said deponents.*
>
> 3. Such further directions as the Court may require;
>
> 4. An order providing for the costs of this application."

The amended Notice of Motion was grounded upon a short affidavit sworn by Conor MacGuill, Solicitor, on 21st October, 2011 in which he states:

> "3. I say and believe that the findings of Prof Morgan and Ms Botyriene provide substantial grounds for findings as a matter of a high degree of probability that if surrendered, the respondent would be subjected to inhumane and degrading treatment in custody in the requesting state; and would be denied the minimum required standards of fair procedure in the criminal proceedings he would face in the requesting state. I say and believe that the position put forward in the Chief Prosecutor's last letter -- on which the applicant appears to rely in order to challenge the respondent's evidence, states as follows: "Summarising the above, we think that the affirmations declared in the affidavits of lawyer Ingrida Botyriene and Prof Rod Morgan are tendentious, inaccurate, contravening the laws of the Republic of Lithuania as well as the existing practice of criminal investigation and trial."
>
> 4. I say and believe that since it appears that essential evidence relied on by the respondent is denied or challenged or undermined by material put forward by the applicant, in the circumstances of this case the interests of justice require that oral evidence be heard."

After a hearing lasting nearly two hours, the Court refused to accede to the respondent's application. The Court indicated that it would give detailed reasons for its decision in a written judgment to be delivered later. The Court now gives its detailed reasons.

The Respondent's Motion
There are two parts to the respondent's motion. First, he seeks the leave of the Court to adduce oral evidence from his own expert deponents, namely Ms. Ingrida Botriena and Professor Rod Morgan, respectively. Secondly, he requests the Court to direct the applicant to adduce oral evidence "in respect of any material or evidence relied on by the applicant to challenge the evidence of the [respondent's] deponents" i.e. Ms. Ingrida Botriena and Professor Rod Morgan. The Court will deal with each part separately.

However, before doing so it is desirable to set out the relevant statutory provisions governing the adduction of evidence, and in particular the adduction of oral evidence, in proceedings under the Act of 2003.

The Relevant Statutory Provisions
The relevant statutory provisions are s. 20(3) and s.20(4), respectively, of the Act of 2003.

> "20.—(3) In proceedings under this Act, evidence as to any matter to which such proceedings relate may be given by affidavit, declaration, affirmation, attestation or by a statement in writing that purports to have been sworn—
>
> (a) by the deponent in a place other than the State, and
>
> (b) in the presence of a person duly authorised under the law of the place concerned to attest to the swearing of such a statement by a deponent,

howsoever such a statement is described under the law of that place.

> (4) In proceedings referred to in subsection (3), the High Court may, if it considers that the interests of justice so require, direct that oral evidence of the matters described in the affidavit or statement concerned be given, and the court may, for the purpose of receiving oral evidence, adjourn the proceedings to a later date."

Issue 1 : Request for Leave to Adduce Oral Evidence from Respondent's Deponents.
In support of the respondent's request for the leave of the Court to adduce oral evidence from his own deponents, Mr. Giollaíosa Ó Lideadha S.C., submitted to the Court that in light of the evidential burden borne by the respondent, as set out in the judgments of the Supreme Court in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] I.E.S.C. 45, the interests of justice require it.

In response, Mr. Maurice Collins S.C., representing the applicant, submitted that the respondent has failed to demonstrate why the Court should depart from the normal rule and how the interests of justice require oral evidence from Ms. Botyriene or, for that matter, Professor Morgan. It was submitted that their evidence is already set out in a number of detailed affidavits filed on behalf of the respondent herein which will be available to the Court. No limitation has been placed at any stage on the number of affidavits the respondent was permitted to deliver from those persons or as to the range of issues they could address and it is not clear what, if any, additional evidence they are in a position to offer or why such additional evidence should not be provided in affidavit form in the ordinary way.

It was further submitted that, in considering an application seeking to adduce oral evidence, this Court ought to adopt a restrictive approach. It was urged that it is clear from the terms of ss. 20(3) and (4) that where a respondent seeks to put material before a Court in support of an objection to surrender, then the general rule is that this should be done by way of affidavit. That is, of course, consistent with the underlying objective of expedition as expressed in recital (5) and Article 17 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)), as well as s. 16 of the Act of 2003 and in particular ss. 16(10) and (11). It was submitted that it is for the respondent here to demonstrate why the Court should depart from this general rule. The respondent has failed to do so

Decision on Issue 1

The Court has carefully considered the respondent's request in the light of what is contained in s. 20(3) and s. 20(4) of the Act of 2003. In the Court's view, the meaning of those provisions is clear and they are unambiguous in their terms. Counsel for the applicant is correct in his submission that the legislation contemplates that, as a general rule, a respondent intending to adduce evidence in proceedings under the Act of 2003 must do so by "affidavit, declaration, affirmation, attestation or by a statement in writing that purports to have been sworn." However, by way of exception to the general rule, the High Court "may, if it considers that the interests of justice so require, direct that oral evidence of the matters described in the affidavit or statement concerned be given, and the court may, for the purpose of receiving oral evidence, adjourn the proceedings to a later date."

The critical words are "if it considers that the interests of justice so require." A party seeking to adduce oral evidence must satisfy the Court that the interests of justice require that the normal rule should be departed from. In the Court's view, the party seeking to adduce oral evidence needs to identify something inherent in the nature of the evidence itself such that the Court would benefit from receiving that evidence orally rather than in written form. In the Court's view, what requires to be demonstrated is the existence of a serious conflict of evidence, typically as to a matter of fact, which remains unresolved despite being engaged with by the parties in the course of the written evidence submitted, and which the Court could only resolve by hearing oral evidence. So, for example, if a deponent was asserting a critical matter of fact, which was seriously disputed, and about which there was no supportive or corroborative evidence, it might be necessary for the Court to hear oral evidence in the interests of justice. The establishment, or non-establishment as the case might be, of the facts in dispute would be likely in such circumstances to depend upon the Court's view of the credibility and reliability of the deponent. The Court might consider that it would be in a better position to assess both the credibility and reliability of the deponent's evidence if it could observe and listen to him giving evidence *viva voce*, both in chief and under cross examination. In such circumstances the reception of oral testimony would be justified, and indeed required, in the interests of justice. However, where, as in the present case, the Court is required to evaluate expert testimony where the witness has expressed an opinion or opinions on a matter said to be within the scope of his or her expertise, the Court is much less likely to receive any benefit from receiving the proposed witness' evidence, and particularly his or her evidence in chief, orally rather than in writing.

The respondent in the present case has not, at this time, been able to identify any inherent matter in the proposed evidence to be given by either Ms. Ingrida Botriena or Professor Rod Morgan such that the Court would benefit from receiving that evidence orally rather than in written form. All that has been put forward is a concern at the seemingly peremptory dismissal of the views of those deponents expressed in letters from the Prosecutor General's Office of the Republic of Lithuania by way of additional information. While it is true that by virtue of the Supreme Court's judgments in *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] I.E.S.C. 73 such information is receivable by this Court without a requirement for formal proof, and that the authors of additional information cannot be required to submit to cross-examination, the fact that the author of additional information is not available to be tested or cross-examined is something that a respondent may legitimately comment upon, and the Court may take it into account in assessing the weight to be attached to the evidence in question. However, the mere fact that the applicant has submitted additional information which contains a seemingly peremptory dismissal of the views of the respondent's deponents does not establish a requirement, in the interests of justice, that the respondent's deponents should give oral testimony.

The Court is also of the view that, quite apart from the merits of it, the respondent's application is premature in any event. It is clear that what s. 20(4) of the Act of 2003 contemplates is the making of an application for the adduction of oral evidence in the course of a hearing, typically a s.16 hearing, where the proceedings have reached a point where it has become clear that the Court is faced with a conflict in the evidence that can only be resolved by hearing oral evidence. It is for this reason that the subsection goes on to state "and the court may, for the purpose of receiving oral evidence, adjourn the proceedings to a later date." The present case has not yet proceeded to a hearing, and accordingly the motion before the Court is premature.

Issue 2 : Request to Direct Applicant to Adduce Oral Evidence in respect of Evidence relied on by him to Challenge Evidence of Ms. Botriena and Professor Morgan.
The respondent requests the Court to direct the applicant to adduce oral evidence "in respect of any material or evidence relied on by the applicant to challenge the evidence of the [respondent's] deponents" i.e. Ms Ingrida Botriena and Professor Rod Morgan. In the written submissions filed in respect of this motion on behalf of the respondent, and amplified in oral submissions at the hearing of the motion, it has been urged upon the Court that:-

> "since essential evidence relied on by the respondent is denied or challenged or undermined by material put forward by the applicant, the respondent will ask the Court to consider making an order that oral evidence be given on the relevant matters, on the grounds that the interests of justice so require."

Again, counsel for the respondent points to s. 20(4) of the Act of 2003 as providing the jurisdictional basis for the Court to give the direction sought. It is then further urged that:-

> "there is a heavy onus on the Respondent to prove the case he makes. Where there is a direct conflict on the evidence essential to the Respondent's case, unless the conflict is resolved in the Respondent's favour, the Respondent is liable to be surrendered to the requesting state despite having put before the Court evidence to the effect that his fundamental constitutional and human rights will thereby be breached. It is respectfully submitted therefore that where a serious issue as to a likely breach of such rights has been raised in evidence and that evidence is challenged, the circumstances arise for consideration as to whether the interests of justice require oral evidence to be heard."

In response, counsel for the applicant relies upon the above-mentioned decision of the Supreme Court in *Sliczynski* as well as the decision of this Court in *Minister for Justice, Equality and Law Reform v Sawczuk* [2011] I.E.H.C. 41.

Decision on Issue 2
The Court reiterates the point already made above that although the Supreme Court has made it clear in *Sliczynski* that additional information supplied in response to requests made pursuant to s. 20(1) and/or s. 20(2) of the Act of 2003, or even supplied by the issuing state and/or the issuing judicial authority on an unsolicited basis, is receivable without formal proof and is *prima facie* admissible in proceedings under the Act of 2003, it remains open to a respondent to comment upon the weight to be attached to such material and to suggest that, in the particular circumstances of the case, little weight ought to be afforded to it. However, this Court is completely satisfied that it has no power or jurisdiction to compel an applicant to call oral evidence, or even to submit written evidence either in solemn form or on oath. It is entirely a matter for an applicant as to what evidence is adduced in support of any particular application under the Act of 2003.

The position is that the Court is obliged in the first instance to proceed on the presumption that factual information provided by an issuing state, or issuing judicial authority, is correct having regard to the mutual trust and confidence that underpins the European arrest warrant system. Like all presumptions, that presumption is capable of being rebutted where the respondent adduces cogent

evidence tending to rebut it. Moreover, that presumption cannot extend to unsupported expressions of opinion as to the reliability or credibility of evidence adduced by a respondent or gratuitous commentary as the motivation of a respondent and/or his deponents in putting forward particular evidence. Issues as to truth, credibility, reliability, and motivation are matters for this Court alone to assess. It is perfectly legitimate for a respondent, faced with a seemingly peremptory dismissal of the views of his expert deponents in additional information relied upon by an applicant, to comment on any lack of engagement by the applicant's informants, to comment on the respondent's inability to test the views of the applicant's informants, and to suggest that such views should carry little weight in the circumstances. It will be a matter for this Court to attach or apportion such weight, if any, as it thinks appropriate to any material relied upon by either party. However, the mere fact that the applicant has submitted additional information which contains a seemingly peremptory dismissal of the views of the respondent's deponents does not confer upon this Court a jurisdiction to compel or require the applicant's informants to give oral testimony or submit to cross-examination. While counsel for the respondent was prepared to concede that for sound public policy reasons a judicial authority could never be compelled to give solemn or sworn evidence on which they might be subject to cross-examination, he urged nonetheless that the Court could direct the applicant to submit solemn or sworn evidence by persons other than the issuing judicial authority with a view to such deponents being made available, if required, for cross-examination. The Court is satisfied that it has no such jurisdiction.

Conclusion
The respondent's application is premature in so far as the first issue is concerned, and misconceived in so far as the second issue is concerned, and must be dismissed.