

THE HIGH COURT

[2015 No. 239 Ext]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

AND

APPLICANT

S.T.

RESPONDENT

PRELIMINARY RULING of Ms. Justice Donnelly delivered the 25th day of April, 2016.

1. A European Arrest Warrant ("EAW") dated 27th October, 2015 has been issued by the Sheriff of Lothian and Borders at Edinburgh, a judicial authority of the United Kingdom of Great Britain and Northern Ireland ("the UK"), seeking the surrender of the respondent in respect of five offences of unnatural carnal connection and lewd and libidinous practices contrary to common law in Scotland. The surrender of the respondent is sought for the purposes of prosecution. The alleged offences amount to what may be termed allegations of historic sexual abuse. The alleged victims are four young cousins of the respondent. The alleged offences cover periods between 1st January, 1989 and 31st December, 1998.

2. The respondent has raised a number of points of objection; these may be broken down into two areas. The first concerns a failure adequately to describe the offences in s. 11(1A)(f) of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), as well as the implications this may have for the rule of specialty. The other point relates to the delay since these alleged offences were committed including the fact that the respondent was previously questioned by the gardaí, but not prosecuted for alleged offences against the same complainants in respect of matters occurring in Ireland, and the impact these matters have on his right to respect for his private and family life under Article 8 of the European Convention on Human Rights ("ECHR") and on the issue of abuse of process.

Section 16 of the Act of 2003

3. On the basis of the information contained in the EAW and the evidence of Fergus McGroary, member of An Garda Síochána, and on the evidence of the respondent in affidavit, I am satisfied that the person before the court is the person in respect of whom the EAW has issued.

4. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution.

5. I am satisfied that I am not required to consider whether the EAW states the matters required by s. 45 of the Act of 2003 as this is a warrant for prosecution.

6. I am satisfied that I am not required under s. 21A, s. 22, s. 23 or s. 24 of the Act of 2003 to refuse to surrender the respondent.

7. Subject to further consideration of s. 37 and s. 38 of the Act of 2003, I am satisfied that the surrender of the respondent is not prohibited by any other part of Part 3 of the Act of 2003.

Section 38 of the Act of 2003

8. At the outset of the hearing, counsel for the respondent conceded that there was no issue with correspondence. Nonetheless, the Court is obliged to satisfy itself that the requirements under s. 38 of the Act of 2003 have been met. These are not list offences within the meaning of Article 2, para. 2 of the 2002 Framework Decision of 13th June, 2002 on the European Arrest Warrant and the surrender procedures between Member States ("the 2002 Framework Decision"), thus correspondence must be proven. These are offences which carry a maximum penalty of life imprisonment in Scotland and therefore the requirements of minimum gravity have been met.

9. In terms of correspondence and indeed for the purposes of the later arguments of the respondent, it is appropriate to set out in full the allegations against this respondent. At point (e) of the warrant, it states the following:

"This warrant relates to in total; five offences

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;

(001) between 1st January 1989 and 31st December 1993, both dates inclusive at [redacted], ST did penetrate the anus of AM, born 2 April 1980, his cousin, with his penis and did have unnatural carnal connection with him.

(002) between 1st January 1989 and 31st December 1995, both dates inclusive at [redacted] ST did penetrate the anus of TH, born 29 March 1983, his cousin with his penis and did have unnatural carnal connection with him.

(003) between 1st January 1997 and 31st December 1998, both dates inclusive at [redacted] ST did use lewd, indecent and libidinous practices and behaviour towards BH, born 27 June 1989, his cousin, and did lie beside him in the bed there, handle his penis, cause said BH to masturbate him and did attempt to penetrate said BH's anus with his penis.

(004) on various occasions between 1st January 1994 and 31st December 1996, both dates inclusive at [redacted] ST did use lewd, indecent and libidinous practices and behaviour towards RH, born 12 November 1986, his cousin, and handle said RH's penis, cause said RH to handle ST's penis, cause said RH to penetrate ST's mouth with his penis, and ST did penetrate the mouth of the said RH with his penis.

(005) between 1st January 1994 and 31st December 1996, both dates inclusive at [redacted] ST did penetrate the anus of RH, born 12 November 1986, his cousin, with his penis and did have unnatural carnal connection with him."

10. Counsel for the minister has submitted that these are offences of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990 ("the Act of 1990"). Section 2(1) states:

"The offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall be known as sexual assault."

Counsel further directed the Court to s. 14 of the Criminal Law Amendment Act, 1935, which states:

"It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault."

In each of the offences outlined above, the age of the cousin is specified and on the dates covered by the alleged offences, each boy was aged under 15 years. Furthermore, the facts alleged against this respondent amount to matters of sexual assault as there can be no consent to the acts. In the circumstances, the Court is satisfied that each offence corresponds with an offence of sexual assault contrary to s. 2 of the Act of 1990.

Section 11(1A)(f) of the Act of 2003

11. Section 11(1A)(f) of the Act of 2003 provides that the EAW shall specify:

"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 [...]"

12. Counsel for the respondent submitted that in relation to the offences and in particular to offences 1 and 2, that the five or seven year span, being the time frame in which the alleged offences were carried out, does not comply with the specificity required under s. 11(1A)(f) of the Act of 2003. The case is not being made here that the lack of clarity amounts to an unfairness that requires the court to prohibit the respondent's surrender. Indeed, there is a complete absence of any attempt to comply with the requirements set down in *Minister for Justice v. Stapleton* [2008] 1 I.R. 669 and *Minister for Justice v. Brennan* [2007] 3 I.R. 732 for the purpose of establishing that surrender would amount to a flagrant denial of rights. The objection is based upon the failure to give the specificity required under s. 11(1A)(f) of the Act of 2003.

13. Counsel submitted that this type of time span would be unusual in this jurisdiction; this Court observes that it is not unknown in this jurisdiction. Counsel relied on the decision in *Minister for Justice Equality and Law Reform v. Connolly* [2014] IESC 34 in which the Supreme Court stated at para. 54:

"It is a mandatory requirement of the European Arrest Warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought".

14. Counsel for the minister submitted that there is no lack of clarity here. He submitted that the particular place and time period has been indicated, the alleged conduct and the alleged victim has been indicated. Counsel referred to *Minister for Justice and Equality v. Adams* [2012] 1 I.R. 140. In that case, reference had been made to the earlier decision in *Minister for Justice, Equality and Law Reform v. Zych* [2011] IEHC 161 (Unreported, High Court, 13th April, 2011), where Edwards J. had stated:

"It is clear that neither date nor time is of the essence of the offence. The bracketing of the offence as having occurred within a 45 month time frame is akin to the preferring of a sample charge in this jurisdiction in a case of historic sexual abuse where the complainant is unable to specify any date or time with particularity. This court is not concerned with whether, in terms of any trial that may have taken place, the preferring of such a widely framed charge was a fair procedure. The court is not entitled to look behind the conviction. It is solely concerned with correspondence and the description of the offence as having occurred within a 45 month time bracket does not present this court with any difficulty in understanding what is alleged. Accordingly, I would dismiss the objection raised as being of no materiality in terms of the validity of the warrant[...]"

In *Adams*, Edwards J. also held that the alleged lack of specificity with respect to time, date and place was not relevant in the context of those proceedings. Correspondence of offences had been required to be demonstrated and Edwards J. held that he had sufficient information to be satisfied thereon.

15. In this particular case, as has been demonstrated above, there is sufficient information regarding the alleged offences to enable the court to establish correspondence. However, as has been indicated by the Supreme Court, point (e) of the EAW, requiring the details of the offences, is concerned with more than correspondence. In *Connolly*, the Supreme Court (Hardiman J.) stated at para. 40-43 as follows:

"It is in my view absolutely essential that the offence or offences for which the person is wanted is specified. In Minister for Justice, Equality and Law Reform v. Stafford [2009] IESC 83; (Supreme Court, unreported, December 17, 2009 Denham J. (as she then was) said: 'It is required that there be a description of the acts upon which the warrant is based. This is similar to the situation under the Extradition Act 1965 [as amended] and indeed classically in extradition law. A description of the acts, or the acts alleged, are the facts upon which the executing judicial authority may apply the law. By describing the acts the facts are before the court and so a decision may be made as to whether there is, for example, "double criminality".'

The learned judge continued, in the same case (quoting from *Minister for Justice v. Desjatinikovs* [2009] 1 I.R. 618 at 632): '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'. (Emphasis added). This latter point was addressed in *Minister for Justice and Equality v. Cahill* [2012] IEHC 315. Speaking of s. 11 of the Act: 'The objective 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 an extra territoriality, to name but some'."

16. Thus, the court must be certain that the description of the offences set out in the warrant, are sufficient to cover all of the questions which could arise. In this case, for example, no question of extra territoriality can arise as it is clear that there is a precise description of where the offences have occurred.

17. At this juncture, it is appropriate to deal with the further submissions that were made under this general heading of lack of detail and clarity. Counsel for the respondent submitted, with reference in particular to offence number four, that there was no certainty as to the number of offences for which the respondent was sought. In particular, counsel referred to the phrase "on various occasions" in submitting that there could be no certainty as to the number of offences for which the respondent's surrender is sought.

18. Counsel for the minister submitted that no such difficulty arose. The time period had been specified as well as the place and the conduct and the alleged victim. Counsel submitted that as appears from the EAW, it is permissible under Scottish law to have a count which might be considered to violate the rule against duplicity in this jurisdiction. Counsel submitted that any issue of the propriety of charging a person in such a manner is a matter for trial within the jurisdiction of the issuing judicial authority. Counsel submitted that there is no suggestion that the rule of specialty as set out in s. 22 of the Act of 2003 will be violated. In particular, there is no evidence overcoming the presumptions contained therein.

19. In the view of the court, this EAW in so far as it concerns the number and nature of the offences is entirely unlike the situation which obtained in Connolly. In the present case, the Scottish authorities have clearly stated that the warrant relates to five offences. Those offences have been set out in detail above. Offence number four contains within it a reference to multiple occasions and indeed to multiple acts. Any purported duplicity contained within the charge is a matter for the Scottish legal system. The case has not been made by the respondent, for good reason, that duplicity amounts to a flagrant violation of a right to a fair trial and that surrender must therefore be prohibited.

20. Counsel for the respondent urged on the Court that, in circumstances where a sentence of life imprisonment could be imposed in respect of any single offence of the type alleged in the EAW, it is incumbent upon this Court to be satisfied that no violation of specialty will occur. He submitted that the duplicitous allegation gives rise to a risk that the rule of specialty will be violated.

21. The court must assess the rule of specialty in accordance with the provisions of the Act of 2003. The court must accord to the issuing state a presumption that it will comply with the requirements of the 2002 Framework Decision unless the contrary is shown. Nothing has been placed before the court to rebut the presumption that the issuing state will comply with the provisions of the 2002 Framework Decision which include a respect for the rule of specialty. Furthermore, nothing has been placed before the court to rebut the presumption contained in s. 22(3) that the issuing State does not intend to (a) proceed against the respondent, (b) sentence him or detain him for the purpose of executing a sentence or (c) otherwise restrict him in his personal liberty in respect of any offence pre-dating his surrender other than those specified in the EAW. Put simply, there is nothing to suggest that this man would be prosecuted for anything other than the five offences which are listed on the warrant. The reference to multiple occasions or multiple offences come under the framework of offence number four and this Court has no evidence before it to suggest that this offence would be broken down into constituent offences for the purpose of adding additional offences against him on surrender to Scotland.

22. Therefore, this Court is satisfied that the manner in which the offences have been set out in the EAW is sufficient to enable this Court to be satisfied that the rule of specialty will apply. There is unambiguous clarity in respect of the number of offences this respondent will face on surrender to Scotland.

23. The court has to be satisfied that the description in the warrant is also sufficiently clear and unambiguous to allow the respondent know precisely for what his surrender is sought. Furthermore, the description must be sufficiently detailed to permit any issue with regard to double jeopardy being resolved. The Court is satisfied that the manner in which the offences are described by reference to any lengthy period of time over which they apply does not present any difficulty. The respondent is aware that these allegations have been made against him spanning a lengthy period. As the history of the prosecution of alleged historic sexual abuse in this jurisdiction has shown, it is not inherently unfair to permit prosecutions relating to offences dating back thirty or forty years and spanning a considerable period of time. It may in the context of a particular case be unfair to permit such a prosecution to proceed or for the case to be submitted to a jury. That is an assessment in each particular case. The question of difficulty with giving an alibi has not been held in this jurisdiction to amount, of itself, to a reason to prohibit trials of historic sexual abuse allegations. As stated above, issues of fair trial were not urged upon the court, the only issue regarding the manner in which the description of the offences were given related to the clarity of the information. In this case, the mere fact that the alleged offences refer to incidences dating back 27 years and spanning periods of up to 7 years does not amount to a lack of clarity in the provision of information sufficient to comply with s. 11(1A)(f) of the Act of 2003.

24. The Court has given significant thought to the submission that the reference to "on various occasions" in count number four raises, of itself, a lack of clarity which falls foul of s. 11(1A)(f) of the Act of 2003. The Court is in agreement with the submission of counsel for the minister that the court must have regard to the specific nature of the allegation being made. Within offence number four, the parameters of the time are specified - it is, in total, a period of three years. The place is specified. The alleged injured party is specified. Within that time frame, it is alleged that the respondent committed the acts against the alleged victim on various occasions. Counsel for the minister submitted that this is similar to offences with which the court may be familiar from Poland, for example, where individual instances of theft are combined together to form one single offence of theft.

25. As stated above, the Court has no difficulty with an offence being comprised of multiple incidents, but the issue here is that in those other cases where individual instances of theft are alleged, the dates and places of those thefts are identified in the particular EAW. In the present case, dates and places are not so identified. There may indeed be a good reason for that, in that these are cases of alleged historic sexual abuse. This Court is quite cognisant of the fact that in many, perhaps more accurately most, cases of historic sexual abuse, complainants find it quite difficult to be specific about particular dates. Indeed, the reference to a single incident within a seven year time span appears indicative of that. In relation to the offence set out under count number four, however, the court has not been given that information by the issuing judicial authority. Moreover, it is not clear whether it is alleged that on each of the various occasions within the specified time frame, each of the alleged acts took place or if what is alleged that separate acts occurred on separate occasions. Furthermore, the court is not being given information as to how many times it is alleged that the offending behaviour took place.

26. Although it is accepted that in many cases of alleged historic sexual abuse a complainant will not be able to be specific, where specificity is attainable it should be set out. In respect of the matters set out in the EAW, there is a lack of detail with regard to the circumstances surrounding the allegations. In the form of EAW contained in the annex to the 2002 Framework Decision, time, as well as place, is specifically mentioned as part of the circumstances that must be described. Where a very wide time frame is given to cover an allegation, particularly an allegation covering a period of years, there is a correspondingly greater requirement to give greater detail as to the surrounding circumstances of the alleged offence. Those circumstances may illustrate the reason for the wide

time frame. Such illustration will assist the executing judicial authority with respect to all the matters with which it must be satisfied, but it will also give to a respondent the information that he requires as a minimum.

27. In those circumstances, there has not been the required specificity with regard to the allegations contained in the EAW. The court notes that in the Adams case referred to above, a great deal more information was before the court than in the present case. Indeed, it is unusual for an EAW emanating from the UK to contain such sparse information.

28. The court has the power, however, to apply to the issuing state for further information with regard to that particular count. The court proposes to exercise its discretion under s. 20(1) of the Act of 2003 to seek this information with regard to count number four. The court does so having regard to the decision of the Court of Appeal in *Minister for Justice and Equality v. Gherine and Sadiku* [2016] IECA 65 which identifies information concerning the details of the offence as an area in which discretion is often appropriately exercised. I have considered the issue of any further delay but I am quite satisfied that in the context of these proceedings before the High Court, there has been little, if any, delay and that it is appropriate in the interests of justice and necessary for the exercise of the court's functions under the Act of 2003 to seek this information.

Delay

29. The respondent swore an affidavit in which he referred to the delay of up to 27 years since the offences were allegedly committed. He said that he had grown up in Co. Donegal, but had on various occasions lived and worked in Scotland and England. He submitted that it was unfair to seek surrender without providing more accurate details of the date of the alleged offences. He also submitted that it was unfair and an abuse of process to surrender him in circumstances where he was unaware of any allegations being made against him in relation to the complainants until approximately 5 or 6 years ago when he was questioned and interviewed by An Garda Síochána in relation to similar allegations made by two of the complainants. He said that those complainants now live in Co. Donegal and they made allegations to the gardaí in Co. Donegal that he committed offences of a similar nature against them in Co. Donegal many years ago but around the same time as the allegations now contained within the warrant. He said these were investigated by the gardaí and he was interviewed in the course of the investigation. He said he was later informed that the matter was not being proceeded with and the case was at an end.

30. While the respondent stated that he appreciated that the allegations in the warrant relate to offences alleged to have occurred in Scotland, and can be classified as distinct and separate from the previous matters for which he was questioned, he said that it is unfair that he was not being made aware of these allegations and offered a chance to answer the allegations by the police in Scotland. He said he is also unclear if the police in Scotland were aware of the previous allegations and investigation undertaken by the gardaí and its outcome. He said it is unfair that he should be surrendered in those particular circumstances. He said that he would have expected any complaints made to gardaí in Ireland to make reference to matters in Scotland and he said that it is significant that they were not mentioned to the gardaí.

31. With regard to his own circumstances the applicant simply states as follows:

"[...] I have always lived openly and been available for questioning by the Gardaí or the Scottish Police if they wished to speak to me. I say that the offences contained in the warrant are very serious offences which carry a sentence of life imprisonment. I say that due to the circumstances of this case and the delay in the reporting of these allegations I should have been afforded the opportunity of reply to the allegations prior to the issue of a warrant for my arrest. I say that this is disproportionate and a breach of my right to respect for family life to order my surrender on this warrant."

32. Counsel for the respondent submitted that these facts showed that there would be an abuse of process if he was to be surrendered. This was in circumstances where it was at the very least unusual that no mention had been made of allegations in Scotland. He also submitted that the respondent was an Irish national who should not be put to the stress of being surrendered after such a period of delay and in such circumstances where he had previously been questioned in relation to two of the complaints. He accepted that his case was not being supported by any medical reports but submitted that the delay was such that meant that it was unfair that he had been left in a situation where he was being surrendered to Scotland without any information as regards to the reason for such a delay or the circumstances upon which the statements were made.

33. Counsel for the minister submitted that it was not open to the respondent merely to submit that delay meant that he should not be surrendered. Counsel submitted that the respondent was required to put something more into the balance and that had not been shown in this case.

34. In the view of the court, there is no substance to the submission that there has been an abuse of process. When one examines the submission that is being made by the respondent, it is a complaint that two of the complainants, living in Ireland, made a complaint to the gardaí concerning events in Ireland but not in Scotland. Although it is not made explicit in the respondent's affidavit that the complainant's statement to the gardaí made absolutely no reference to any matter in Scotland, I am prepared to accept at face value that that is so in light of the fact that he was not questioned about that in the course of his interview by the gardaí. Although such offences would not be punishable within this jurisdiction, they would form part of the background to the case and of any investigation into offences in this jurisdiction. The respondent's main complaint is that he is concerned that these complaints were made to the Scottish authorities because they were unhappy with the outcome of their Irish complaints. The truth or otherwise of his view on that matter is quintessentially a matter for the trial of this action. It is not a matter which comes under the rubric of abuse of process within the context of the extradition proceedings. A Scottish judicial authority, namely the Sheriff of North Strathclyde at Dumbarton has issued a domestic Scottish warrant for three offences of unnatural carnal connection between male persons and two offences of lewd, indecent or libidinous practices or behaviour towards children against this respondent. Another issuing judicial authority in Scotland has issued the European Arrest Warrant. There is no suggestion that the Scottish authorities are engaged in an abusive process. This point is rejected.

35. As regards the delay, it is undoubtedly true that there has been a significant lapse of time in the case. However, it is long since been recognised that lapse of time or even its more pejorative term 'delay' does not of itself prohibit surrender. Insofar as fair trial is concerned, the respondent has not sought to argue that the delay will lead to an unfair trial. Put simply, the respondent does not meet the tests laid down in *Minister for Justice, Equality and Law Reform v. Stapleton and Minister for Justice, Equality and Law Reform v. Brennan* to prohibit his surrender on the grounds of flagrant denial of justice.

36. The respondent's complaint is a more general one, that it is unfair to surrender him after this period of time. In making such a case, he attempts to bring his case within Article 8 ECHR. It is striking that, although he refers to family life, he does not set out any particular family life that will suffer disproportionately if he is to be surrendered. Furthermore, he does not set out anything in the nature of a medical condition that he has, or indeed anything in relation to his particular circumstances, e.g. particular ties to the community or particular employment, that would render it disproportionate to surrender him. In that regard, the case law as set out in

the *Minister for Justice v. T.E.* [2013] IEHC 323 and *Minister for Justice v. R.P.G.* [2013] IEHC 54 and the twenty two points of principle identified by the High Court (Edwards J.) require evidence of exceptional or particularly harmful or injurious consequences as a result of surrender. There are simply no such consequences put forward here.

37. Although the public interest may vary with respect to each individual case depending on the factors, it is also the case that there is a public interest in extradition in every case. In this case, even though no explanation is given as to the lapse of time in bringing these charges, the court must operate on the basis that there is a public interest in the extradition. The fact that the five offences alleged against this respondent are of the utmost seriousness by virtue of the gravity of the offending alleged therein, the number of complainants and the length of the sentences that may be imposed upon conviction for such offences, indicate a greater than *de minimis* public interest. The court recognises that there may be an occasion where to take a person away from their home country, or indeed their place of long residence, for an alleged offence which occurred 20-27 years ago, at a time when the respondent was aged 15-22 years, without any chance of reply might be disproportionate if the offence was utterly trivial and no public interest was being displayed by reference to such other factors as the reason for the delay. This, however, is not such a case. There are no "particularly injurious, prejudicial or harmful consequences" upon the private and family rights of the respondent if surrendered. The court has no hesitation in finding that the public interest in his surrender outweighs the interference with his rights that would be entailed by the process of surrender. In the particular circumstances of this case, the court has no need to enquire any further into the reason for the lapse of time.

Conclusion

38. The court will utilise its powers under s. 20(1) of the Act of 2003 to seek further information from the issuing judicial authority in the UK (Scotland) in respect of each of the offences set out in the EAW.