

## THE HIGH COURT

Record Number: 2006 No. 30 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND  
TMC

RESPONDENT

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

1. The surrender of the respondent is sought by the United Kingdom authorities on foot of a European arrest warrant dated 7th March 2006, which was duly endorsed by the High Court for execution on the 21st March 2006. Thereafter, on the 31st March 2006 the respondent was arrested and on the same date was brought before the High Court as required by the Act. He has been remanded thereafter from time to time until the hearing of this application for his surrender was ready to be heard.

2. Some delay in the hearing was caused by the contents of the Points of Objection filed herein on the 24th April 2006. The applicant issued a Notice of Motion on the 27th June 2006 seeking orders requiring the respondent to reply to certain particulars raised in a Notice for Particulars following the delivery of those Points of Objection, and, in the alternative, an order striking out certain of the points of objection raised. That application was refused in the High Court, but on appeal to the Supreme Court recently two points of objection were in fact struck out. In any event the matter was ready to be heard before me on the 20th November 2006.

3. The offences alleged against the respondent are rape and indecent assaults on two young girls during a period between March 1989 and June 2001. The offence of rape is one of the Article 2.2 offences in the Framework Decision and has been ticked in the appropriate part of the warrant as being one in respect of which double criminality does not require to be verified. In respect of the charges of indecent assault, I am satisfied that the acts said to ground these charges would if committed here on the date on which the European arrest warrant was issued be offences of sexual assault here under s. 2 of the Criminal Justice (Rape)(Amendment) Act 1990. All the offences charged carry a penalty which meets the minimum gravity requirement under the Act.

4. The domestic warrant was issued on the 26th July 2001 by Greenwich Magistrates Court, because the respondent failed to appear on that date before that Court, as he was required to do under the terms of his bail. He had been interviewed by D/Constable Palmer some days previously on the 23rd July 2001 and was charged with these offences.

5. A point is made by the respondent that his correct name is not in precisely as it appears in the warrant. Because of the need to maintain anonymity in this case so as not to identify in any way the alleged victims of these offences, I will not set out that dispute in detail, except to say in a general way, that I am satisfied that the person before the Court is the person in respect of whom the European arrest warrant has been issued, and in the event of an order for surrender being made the name of the respondent will appear therein as the name which the respondent says is his correct name. The distinction is not major in any event.

6. No undertaking under s. 45 of the Act is required since this is not a case in which any conviction or sentence has been given in absentia.

7. I am also satisfied that there is no reason under sections 21A, 22, 23, or 24 of the Act why the order of surrender should be refused, and equally, subject to addressing submissions made by Aileen Donnelly SC for the respondent, I am satisfied that his surrender is not prohibited by Part 3 of the Act or the Framework Decision.

8. The applicant has filed an affidavit of Anthony Linehan sworn on the 8th May 2006. He was the arresting Garda officer. There are also affidavits on behalf of the applicant which have been sworn by the officer in charge of this case in the United Kingdom, Detective Constable Ken Palmer, and one by Ms. Seth Levine, a barrister in London, who has addressed the concerns expressed by the respondent that if surrendered his health will be in jeopardy. I will deal with that in due course.

9. The respondent in his affidavit sworn on the 23rd May 2006 has stated that he came to Ireland in July 2001 and that he resided first of all in a hostel in Galway, and that between May 2002 and November 2004 he resided in Galway in some rented accommodation, but that since November 2004 he has lived in Waterford City. He goes on to state that in December 2001 while living in Galway he telephoned the Metropolitan Police in Plumstead and left a message for D/Constable Palmer that he was living in Galway in a hostel and that he wished D/Constable Palmer to contact him. He makes no averment that any such contact was made as a result of that alleged call, but goes on to state that in February 2002 he was in a café in Galway when three men entered the café, one of whom is said to have identified himself to the respondent as being "a detective from Mill St. Garda Station, Galway City", but he does not recall the name given. He says that this detective introduced him to two other men as being police officers from the Child Protection Unit in London. He says that one of the two men was introduced as "Tony", but he does not recall the name of the other man. He then gives some detail of the brief conversation which he says took place concerning whether he would return voluntarily to England and that he replied in the negative. It is unnecessary to set out in any more detail what is alleged to have been said. He says that there was no further contact until in January 2005 in Waterford he was visited again by a Garda and two other men whom he believed to be police officers. However, because of his deteriorating eyesight he is unsure if these two men are the same two men who spoke to him in Galway. A similar type of conversation about whether he would return to England on a voluntary basis is said to have taken place. His affidavit contains other averments about his state of health which I will set forth at a later stage.

10. D/Constable Palmer has sworn an affidavit in which he responds to some of the matters sworn to by the respondent. He avers that he is the Officer in Charge of this file and case and that nothing can happen in the case without his knowledge, since he is the person who holds the file, and he has never relinquished control or even possession of the file. He says that following the 'no show' by the respondent on the 26th July 2001 his name was circulated as 'wanted' in the United Kingdom since various intelligence agencies suggested at the time that he was still in that territory. However, he was not found, and a photograph was then posted on the New Scotland Yard website, and an appeal for information on his whereabouts was also made on the BBC Crimewatch programme. Under cross-examination, he stated that this appeal was made on the 24th October 2002. He goes on to state that in March 2004 he received information from D/Sgt. Moran of An Garda Síochána in Galway that the respondent was believed to be living in Galway, and that it was this information which led to the instigation of the extradition proceedings.

11. Referring to a matter stated by the respondent in his "Additional Notice of Objection" filed in May 2006, and in the context of a delay argument, namely that "in February and again in June 2005 [he] was visited in Ireland by a member of An Garda Síochána accompanied by two men believed to be police officers from the Child Protection Unit in London", D/Constable Palmer states that

there have been no interviews with the respondent which were either authorised or attempted by him or any of his colleagues other than an interview which took place in Plumstead Police Station on the 23rd July 2001, and that if there had been any request for mutual assistance, or any attempt to interview the respondent in any jurisdiction he would as the Officer in Charge of the case be aware of it. He also says that in any event there has been no new evidence gathered in the case since July 2001 and consequently there was no need to further interview the respondent.

#### **The delay point**

12. These alleged offences date back to the period 1989 – 2001 as already described. The respondent was interviewed, arrested and charged with these offences on the 23rd July 2001, but having failed to appear in court as required on the 26th July 2006, he came to Ireland and resided in a hostel in Galway City. He has in my view concocted a story about contacting the Metropolitan Police in Plumstead in December 2001 and asking that D/Constable Palmer contact him. He has in my view concocted a story about being visited by two members of the Child Protection Unit and a Garda Detective while in Galway in February 2002. He has in my view concocted a similar tale about being visited in June 2005 by a Garda and two other men believed to be from that unit, while he was living in Galway. Even without the denial by D/Constable Palmer that such visits could ever have taken place without his knowledge, he being the Officer in Charge of the case and who has possession and control of the file in the case at all times since July 2001, these stories have no credibility whatsoever and I do not believe the respondent. Mr Barron called the respondent for cross-examination, but was forced to abandon his attempts to cross-examine the respondent because in a very aggressive and truculent way the respondent indicated very quickly in the witness box that he was unwilling to answer Mr Barron's questions. The respondent's evidence lacks all credibility.

13. That being so the factual and evidential basis for Ms. Donnelly's submissions as to delay falls away. She has bravely attempted to suggest that the fact that the respondent's account of being interviewed by these men in Galway and Waterford matches so well what would occur when arrangements are put in place with regard to mutual assistance, supports the respondent's evidence that it happened. In my view the respondent would need far more to support his stories than that in order to maintain any credibility in this respect. I simply do not believe him. I am satisfied that I have cause for that disbelief based on the inherent unlikelihood that if he left a message for D/Constable Palmer as he says he did, that D/Constable Palmer would have ignored it, the implausibility of these men whose names he cannot recall interviewing him although the man in charge of the case knows nothing about this, and his demeanour and attitude in the witness box. In my view the respondent was obstructive of any attempt to explore the truth and accuracy of what he has deposed to on affidavit.

14. Without the respondent's evidence, the submissions on delay rest solely on undisputed facts such as the fact that these offences are said to have occurred between 1989 and 2001, and that the respondent's health has deteriorated between that time and the present and that the delay and his health have compromised and prejudiced his capacity to defend himself against these charges. Reliance is also placed on the fact that there has been no reason given by the applicant or any witness on his behalf as to why there was a delay from March 2004 when D/Constable Palmer says that he received information from D/Sgt. Moran that the respondent was living in Galway.

15. Ms. Donnelly submits that during this unexplained period of two years delay the respondent suffered stress and anxiety, that his health deteriorated not only regarding his eyesight, but also in relation to diabetes and depression, and that there is a serious risk that he will be unable to receive a fair trial.

16. The respondent's affidavit makes averments as to his state of health both historically and present and he has exhibited some reports from doctors whom he has attended. There is a lengthy report dated 24th April 2006 from Dr Sally Linehan, Acting Consultant Forensic Psychiatrist at the Central Mental Hospital in Dundrum, Dublin 14 which was sought by the respondent's solicitor. In that report she states that the purpose of the report is "to provide an opinion regarding [the respondent's] competence to instruct counsel and to assess for the presence or absence of an underlying mental illness". She conducted two interviews one week apart in April 2006 for the purpose of the report. She also had access to his prison medical record, and an opportunity to speak with the respondent's treating psychiatrist in Waterford, Dr Horgan. Dr Linehan states that due to the limited time available for the preparation of the report she was unable to obtain detailed information relating to his past medical and psychiatric history, and states that this must be taken into account when reading her report. In several instances in her report Dr Linehan refers to a reluctance on the respondent's part to provide information about for example why he came to Ireland in July 2001, why he went to live in Waterford, his marital status, the name of the man said to assist the respondent with his insulin injections, where he was treated in hospital in England following a car accident, details of his in-patient admissions for depression and treatment received, the nature of the charges he is facing. She goes on to say that it was difficult to elicit information from him, that he "repeatedly reported that he could not remember details of his background history". He refused to comply with cognitive testing. She describes him as "a reluctant historian", and at another part of the report as "a difficult and uncooperative historian.. Dr Linehan has not used the phrase "poor historian" which has been used by Dr Horgan in his report which I will come to. Her words are clear. He was reluctant and uncooperative in the matter of giving information to her.

17. Dr Linehan concludes, albeit with the caveat that her assessment was limited by the respondent's reluctance to disclose information. In fact she states explicitly "in my opinion his reluctance to provide information was due to an unwillingness to disclose information rather than an inability to disclose information."

18. She nevertheless concludes that he is not suffering from a severe mental illness, that he is competent to instruct counsel, he understands the distinction between a guilty and a not guilty plea, could challenge a juror and follow proceedings, and that he is fit to attend court.

19. I find Dr Linehan's conclusions as to the respondent's lack of cooperation and unwillingness to provide information to be supportive of my own conclusions as to the credibility to be given to the respondent's evidence.

20. There is a short report also from Dr Karen Fennessy, Consultant Ophthalmic Physician dated 6th March 2006 in which she states that the respondent presented with very poor vision and that he had stated that he was finding it impossible to inject himself with insulin. She states that according to the respondent his left eye has always been weak and that his vision has deteriorated rapidly over the past three years.

21. Dr Richard Horgan of Waterford, a Consultant Psychiatrist has given a report dated 19th April 2006. He states that he did not interview the respondent specifically for this report as he was not available, but he reports that the respondent was referred to him in January 2005. He states that at that time he regarded the respondent as "a poor historian". Ms. Donnelly has submitted that it is not uncommon for a person to be described as a poor historian, and that these comments should be seen as not being judgmental. He reports that he changed the respondent's medication and that he attended on five subsequent occasions as an outpatient. Dr Horgan felt that the respondent had a depressive disorder with some anxiety features, and that reports from University Hospital Galway

confirmed this diagnosis. He gives some further history, and states that the longer the respondent attended his outpatient department "the more clearly it became obvious that this man does have a major personality disorder which is of more significance than of any other psychiatric difficulties". He describes that disorder as being of "a dissocial type" and that he has recurrent depressive features, anxiety features and "possibly some agoraphobic features as well. He states that the respondent has the ability to understand the charges and the consequences, can understand the proceedings in court and is capable of instructing counsel. But he is pessimistic about the long-term prognosis.

22. I should refer also to the affidavit of Seth Levine, who is a barrister of the Middle Temple and is a Crown Prosecutor in the Special Crime Division of the Crown Prosecution Service in the United Kingdom. She is the person who is responsible for this extradition request. She has been asked to comment on facilities which are available to prisoners within the criminal justice system there. She avers that "every provision is made for the proper and humane treatment of all accused persons and serving prisoners". She states also that an accused person who is suffering from a mental health problem which may impair the ability to plead or stand trial, there will be a hearing to determine that issue, and she describes that process. She also describes the powers of the Secretary of State for the Home Department's powers under the Mental Health Act 1983 to transfer the respondent to a secure hospital for medical treatment, and to obtain any necessary reports as to fitness to plead and stand trial. Other powers are set forth such as the power to "section" the respondent under s. 2 of that Act.

### **Conclusions**

23. As far as delay is concerned, I am satisfied that the respondent has contributed in a significant way to this delay by his flight to this country. I do not believe that he made contact with the police in England in December 2001, or that they interviewed him on two occasions. I accept that the first occasion on which they received information as to his whereabouts was in March 2004 when D/Sgt Moran provided information that he was in Galway. The respondent seems to have left Galway by November 2004 and resided in Waterford until his arrest. There is a passage of time between March 2004 until the European arrest warrant was issued in March 2006. That delay is not explained. There would inevitably be some time required to process the paperwork for the preparation of that warrant, but it would be unreasonable, in the absence of a particular explanation, to accept that it could take two years. There appears to have been an inordinate delay in that process. However, I am not satisfied that the lapse of time or passage of time or delay, whichever it is to be termed, is such that the respondent can be said to have been prejudiced to the extent that his surrender should be refused. There has been no breach of his constitutional rights or his Convention rights in this regard and as such his surrender is not prohibited by Part 3 of the Act or the Framework Decision.

24. As far as delay since the date of the alleged offences is concerned, and that delay to create a serious risk of an unfair trial is concerned, the recent judgments of the Supreme Court in *PM v. DPP* [2006] 2 ILRM 361, *H v. DPP*, unreported, Supreme Court, 31st July 2006 make it clear that the reasons for the delay do not have to be inquired into, and that real prejudice must be demonstrated. The respondent pleads that his health has deteriorated in the period of delay, but I am satisfied on the evidence that any deterioration of his health, whilst of course regrettable for him, is not of such significance that his trial will be rendered unfair. If any further deterioration should occur between now and his trial taking place, I am satisfied from the evidence of Seth Levine that, as one would expect to find, adequate facilities and arrangements exist within the United Kingdom prison regime to look after his health concerns and carry out any necessary assessments which may be required to determine his fitness to plead and to stand trial. In any event there is no evidence that his state of health has prejudiced his capacity to defend against these serious charges.

25. I am satisfied that the surrender of the respondent is required and permitted under the Act. All the requirements of section 16 of the Act are complied with, as is the requirement of correspondence and minimum gravity. I therefore make the order sought.