Neutral Citation Number: [2006] IEHC 377

THE HIGH COURT

Record Number: 2006 No. 39 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
ALEKSANDRAS KRASNOVAS

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 authorities in Lithuania on foot of the European arrest warrant issued on the 4th April 2006, which was endorsed here for execution on the 25th April 2006. The respondent was duly arrested on foot of same on the 18th September 2006, and thereupon brought before the Court as required. He was remanded from time to time pending the hearing of this application.

2. The domestic warrant on foot of which the European arrest warrant was issued by a District Court in Lithuania on the 17th January 2005. It is a warrant to arrest the respondent, as described in paragraph (b) of the European arrest warrant.

3. There are three offences referred to in the warrant. Two of them arise out of allegations of breaking into two garages and theft of property, each between the 25th and 26th November 1998, and a third charge arises out of an allegation that on the 4th December 1998, while in a car-park, he broke into vehicles and stole property. He was aged seventeen years at the time of these alleged offences.

Correspondence

4. I am satisfied that the first two offences correspond to the offence of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and that the third offence corresponds to an offence here of theft under s.4 of the same Act. Each offence carries a maximum penalty which satisfies the minimum gravity requirement for the purposes of the Act.

Other requirements of s. 16 of the 2003 Act, as amended

5. Patrick McGrath BL on behalf of the applicant submits that there is no reason shown why the Court should refuse to order surrender by virtue of anything in sections 21A, 22, 23 and 24 of the Act, and that neither is the surrender prohibited by Part III of the Act or the Framework Decision. I share that view subject to considering an issue of lapse of time since the commission of the offences, which Robert Barron SC on behalf of the respondent submits should cause the Court to refuse to surrender the respondent. This is on the basis that it would be unjust, oppressive or invidious to so order, and that it would be a breach of his constitutional right to a trial in due course of law and to equality.

Lapse of time

6. I will set out some background facts which have been sworn to by the respondent in his affidavit filed in support of his Points of Objection. He states therein that he was seventeen years of age when these offences are alleged to have been committed. He was detained for questioning at that time for about two days. He was released from that detention believing that no further action was going to be taken against him, but he says that in 2003 he was told by a friend that the police wanted to again question him, and that he volunteered himself to the local police station, where he was told that the investigation into the third offence was being re-opened. No reference was made to the first and second offences and he did not believe that any proceedings were being taken against him at that stage, and that the matters were being further investigated.

7. He believes that he made no effort to avoid the police in Lithuania, and that he lived with his grandparents at the address set forth in the warrant until 2002 when he rented an apartment nearby, and that he was available for arrest and questioning had the authorities wished to do so. The next thing he heard about the matter according to his affidavit was about six months ago when he learned that the matter had been re-opened and that one of the alleged accomplices had been convicted of these offences and had received a sentence of imprisonment of six *weeks*. Much emphasis is placed on this six week sentence of the alleged accomplice indicating, in the respondent's view, the relatively minor nature of the offences in spite of the potential penalties which the offences can attract. It is submitted that they can therefore be likened to summary offences, and as such the requirement under Irish law to a speedy determination of summary offences as discussed, for example, by McGuinness J. in *Mulready v. DPP* [2001] 1 ILRM. 382, and by O'Neill J. in *DPP v. Arthurs*, unreported, High Court, 21st December 1999.

8. He states in his affidavit that he would have great difficulty preparing a defence to these charges as the events are said to have happened eight years ago, that he has little recollection of his movements at this time, and has little contact with any of the people who are named as being his accomplices in 1998. Another prejudice is said to arise due to the fact that in November 2000 he received a three and a half year sentence for another offence, and that at no time before his release was any effort made to question him in respect of these offences the subject of the present warrant. He believes that it would be unjust and oppressive for him now to stand trial for these.

9. He states that when he was released from prison in 2002 he lived in Lithuania and that he worked repairing boats until he moved to this country in search of work in January 2004. He has worked here, he says, but that following his arrest, he has had only casual work, having been let go from the job he had.

10. The basis of much of Mr Barron's submissions is that to surrender the respondent would breach the respondent's constitutional rights to a trial with reasonable expedition, and that accordingly his surrender should be refused as required by s. 37 of the Act. As I have already mentioned, he submits that given the minor nature of the offences in any event, the requirement for expedition is even greater. Another feature of the respondent's circumstances relied upon is that the Lithuanian authorities appear to have held over these warrants at a time when the respondent was convicted of another offence for which he was convicted in November 2000 and sentenced to three and a half years. It is submitted that such a situation would not be permitted in this country. Mr Barron refers in this regard to the judgment of Barron J. in the *State (Flynn) v. Governor of Mountjoy Prison*, unreported, High Court, 6th May 1987, in which case, when being sentenced on an offence, asked that any outstanding warrants be taken into account. That did not happen, and the learned judge was of the view that the procedures taken by the Gardai were unfair as following the earlier conviction and sentence being affirmed no effort was made by them to obtain the appropriate warrant for some months, and the Court had not been informed of that conviction when dealing with the later offence. The prosecutrix's correspondence to the Gardai in relation to outstanding matters had apparently also been ignored.

11. Mr Barron also relies on the anxiety and stress the respondent has been under since 1998 following been questioned about these alleged offences when he was only seventeen years of age. Given the passage of eight years, the respondent submits that prejudice can be presumed. Mr Barron submits that the Court should consider this lapse of time in the same way as it would have been required to do under the repealed s. 50(2)(bbb) of the Extradition Act, 1965, and in that respect refers to the judgment in Kakis, and that it can be considered in this way in fact even under s. 37 of the 2003 Act. He refers also to cases such as *Ellis v. O'Dea* [1989] IR 530 and *Magee v. O'Dea* [1994] 1 ILRM 541, *Dutton v. O'Donnell* [1989] 1 IR. 218 and others in support of his submission that a person facing extradition should not be surrendered if there is a risk that it could result in a breach of constitutional rights, such as the right to a fair trial or a trial with reasonable expedition. It is accepted that the onus of establishing the reality of such a risk on the basis of a probability rests on the respondent, but submits that the hurdle should not be any higher than it was before the introduction of the 2003 Act.

12. It is submitted that the minor nature of these offences means that it would be all the more oppressive that he should be surrendered after so long to face trial for them, since he is now twenty five years old, has matured and embarked upon an new life here.

13. Patrick McGrath for the applicant rejects any suggestion that the alleged offences should be regarded as minor offences, b y references to the sentence of six weeks imposed on an accomplice. He submits that the offences are offences which correspond, and come within the minimum gravity requirement under the Act, and that is the only matter which should be had regard to.

14. With regard to the rights to a fair trial and the right to fair procedures which Mr Barron submits are at risk of being breached, Mr McGrath refers to the presumption contained in s. 4A of the 2003 Act, as amended. That section provides:

> *"4A. – It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."*

15. In other words, it is submitted that after the respondent is surrendered to the issuing state all his fundamental rights must be observed and respected, and that this will include the rights to fair procedures and a fair trial, and that the respondent has failed to show that this will not happen on the balance of probabilities. In such a situation the onus to rebut the presumption has not been discharged. In this regard, Mr McGrath refers to the judgment of the Chief Justice in *Minister for Justice, Equality and Law Reform v. Altaravicius,* 5th April 2006 where referring to this presumption he stated that where the Court is examining the question as to whether personal rights may be infringed by surrender do so with the benefit of a presumption that the issuing state complies with its obligations, and only where *"there is cogent evidence to the contrary that an issue may arise", and that "a mere assertion raising a possibility of non-compliance…is not sufficient to dislodge the presumption of compliance."*

16. In this regard Mr McGrath submits that this Court simply does not know what reasons there may have been as to why the Lithuanian authorities did not execute the warrants for these offences when the respondent was dealt with in respect of the offence for which he was sentenced in November 2000, and that the onus is on the respondent to provide evidence in that regard. In response, Mr Barron states that the respondent is not contending that the issuing state are acting in bad faith, but rather that there is an unfairness in a situation where matters which occurred eight years ago are being brought back up again against the respondent in a situation where that delay is not explained in any way.

17. With regard to the lapse of time from the date of the alleged offences, Mr McGrath has referred to recent judgments of the Supreme Court in *PM v. DPP* [2006] 2 ILRM 361, *H v. DPP,* unreported, Supreme Court, 31st July 2006, and *KR and PR v. DPP*, unreported, Supreme Court, 7th November 2006. He submits that the result of these decisions is that the manner in which cases of delay are to be considered has been altered so that in future, even in cases of lengthy delay, an essential requirement before a trial will be prohibited is that clear prejudice must be shown to have resulted to the accused person such that there is a real risk that a fair trial will not occur. In this respect, Mr McGrath has submitted that the respondent has not demonstrated in his affidavit any specific way in which his ability to marshall any evidence he may wish to call, and to defend himself has been compromised, or how any trial of the offences may be rendered unfair. In particular he suggests that his affidavit in fact shows that he is in touch with his alleged accomplices and could call them if they could assist his defence.

18. I am satisfied first of all that there is no question of this Court on an application such as this reaching a view that the offences for which surrender is sought are of a minor nature. They are offences for which the issuing state is entitled to seek surrender under the Framework Decision and there is no basis for refusal to comply with that request simply because a person said to have been an accomplice of the respondent received a sentence of only six weeks. The question of any sentence to be imposed in respect of the offences is a matter entirely within the competence of the court in Lithuania, and provided that the offences are such as meet the required minimum gravity, that is sufficient.

19. In so far as the same feature is relied upon in order to place a more exacting test as to lapse of time is concerned, I also reject that submission. The offences are not minor in nature, or what might be termed 'summary offences' here. That is not to say that in a particular case the DPP may not form a view that it may be tried summarily. But that has no relevance to the consideration of the lapse of time since the date of commission. In my view the circumstances are not such that the trial of the offences here would as a matter of probability be prohibited, particularly in the absence of any particular prejudice being made out by the respondent. If there is any prejudice which can be shown by the time the matters come to trial in Lithuania, then such matters can be aired before the trial judge in Lithuania, and the respondent has adduced no evidence to the effect that this is not possible. This Court is entitled to presume that any trial of the respondent will be a fair trial, particularly in the absence of any evidence to the contrary being brought forward by the respondent upon whom the onus clearly rests in that regard.

20. Apart from the stress experienced by hearing that, contrary to what he had assumed to be the case, the Lithuanian authorities were proceeding with the prosecution of these offences, there is nothing asserted by way of prejudice. That stress is nothing of an exceptional nature even if the Court was considering the question by reference to s. 50(2)(bbb) criteria. It is not unusual, or unusually severe. It is I would suggest perfectly normal that the respondent would be disappointed or even stressed to find that something which he thought had gone away was in fact being still pursued in his home country.

21. In relation to the submission that the authorities should have proceeded with these offences more rapidly, so that they could have been dealt with at the time that the respondent was being sentenced for the other offence in November 2000, I am not satisfied that this matter has been factually established. The Court has a statement in the grounding affidavit that such a conviction and sentence occurred in November 2000. There is nothing to back up that statement. In fact there is an ambiguity in the respondent's affidavit as to the period that he was in prison and the time he says that he was living with his grandparents. An explanation was given by his Counsel on instructions from the respondent for this confusion, but it remains a source of some concern to me, though not determinative.

22. Of more importance is the fact that there is no evidence from any Lithuanian lawyer as to what procedural rules apply in Lithuania in relation to matters such as this. It cannot be assumed that in that country it is part of the criminal system that other matters can be taken into account when being sentenced for another offence, so that in effect no additional penalty is suffered for the prior matter, even if it had proceeded through the system more speedily. Neither is there any evidence that the respondent made any effort to have the other matter brought forward so that it could be taken into account, such as occurred in the case to which I have referred, namely *State (Flynn) v. Governor of Mountjoy Prison*. The Court has no evidence about this. He cannot now contend successfully that some constitutional right was thereby breached. He has failed to lay any sufficient evidential basis for any such submission.

23. The Court cannot in an application of this kind, decide that simply because the matter was not brought forward at that time, some constitutional right of the respondent is breached. Legal systems in member states will inevitably be different. Procedures will also differ from state to state. Simply because in this jurisdiction it is expected that all matters will be brought up at a sentencing hearing and taken into account, does not mean that where the same did not happen under the rules of criminal procedure in Lithuania in November 2000, this respondent ought not to be surrendered. I appreciate that his complaint in relation to this is one of delay and that if the Lithuanian authorities had moved faster the matter might have been available for him to have had it taken into account. But he has not sworn as to any efforts that he might have taken in order to address that if he had so wished.

24. As far as the lapse of time plea is concerned, I am completely satisfied, particularly in view of the recent decisions in the Supreme Court (albeit in relation to sexual abuse cases) that in the absence of any specified prejudice being asserted and shown even on the balance of probabilities, there can be no question of the respondent's trial being one which would be prohibited here. The length of delay is not one which even under the former jurisprudence might have given rise to presumed prejudice in the absence of specific prejudice being established. This is not a case where the first he heard of the complaints against him was eight years after the alleged events. He has known exactly what is alleged against him since that time. He was in fact questioned about these offences in their immediate aftermath.

25. He has not demonstrated that there is a real serious risk of any unfairness in his trial, should he have to face a trial. In *H v. DPP*, the Court has restated the test thus:

> *"The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of delay. The test is to be applied in the light of the circumstances of the case"*

26. In the same judgment the learned Chief Justice has stated by way of his conclusion:

> *"In this case the developing jurisprudence as to delay in bringing a prosecution for offences of child sexual abuse was considered by the Court. The Court is satisfied that in general there is no necessity to hold an inquiry into, or to establish the reasons for, delay in making a complaint. The issue for the Court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial."*

27. Clearly the three cases to which the Court has been referred by Mr McGrath where the Supreme Court has looked again at the question of delay and prejudice are cases of sexual abuse going back many years. As to whether this restatement of the law regarding these matters is confined to such cases only or is of general application so as to include cases such as the present one is not clear from the judgments themselves, but for my own part, I see no reason why, in a case which goes back only to 1998 and where the respondent was interviewed about the matters at that time, and is clearly well aware of what they are all about, and where he has not sought to assert any particular prejudice in the capacity to defend himself against the charges, there should be any cause to regard any subsequent trial will be an unfair trial or other than in due course of law.

28. I therefore grant the application sought and make the required order under s. 16(1) of the Act.