

## THE HIGH COURT

Record Number: 2007 No. 200 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND  
CLIVE KAVANAGH

RESPONDENT

**Judgment of Mr Justice Michael Peart delivered on the 13th day of March 2008**

1. The surrender of the respondent is sought by a judicial authority in the Netherlands pursuant to a European Arrest Warrant which issued there on the 11th November 2007. The warrant was endorsed here on the 5th December 2007 and the respondent was arrested on foot of same on the 16th December 2007.

2. There is no issue raised by the respondent as to his identity, and this Court can be satisfied in any event from the affidavit of the arresting Garda, Sergeant Martin O'Neill that the person who he arrested on the 16th December 2007 is the person in respect of whom this European arrest warrant has been issued.

3. The surrender of the respondent is sought by a judicial authority in the Netherlands so that he can be prosecuted in respect of what can be broadly described as a drugs offence, and which has been ticked in the appropriate box in the European arrest warrant under the heading "*illicit trafficking in narcotic drugs and psychotropic substances*".

4. This is an offence within the categories of offences contained in Article 2.2 of the Framework Decision and, as such, is one in respect of which double criminality does not require to be verified. The offence satisfies the minimum gravity requirement under the laws of the issuing state being an offence in respect of which a sentence of imprisonment of 12 years is possible.

5. Subject to addressing the points of objection raised by the respondent in opposition to the application for his surrender, I am satisfied that there is no reason under sections 21A, 22, 23 or 24 of the Act to refuse to order surrender, and I am also satisfied that his surrender is not prohibited by anything in Part III of the Act or the Framework Decision.

6. In his points of objection, the respondent raises a number of matters which, in his opinion, prevent the document, which was endorsed by the High Court as a European arrest warrant, from being properly regarded as such, due to alleged defects or lack of clarity and detail in the document. It is submitted that the document is not in the form required by the Framework Decision, and it is contended therefore that this Court cannot treat same as being a valid European arrest warrant and therefore cannot order the surrender of the respondent on foot of same.

7. It is contended that this warrant does not specify the decision on which the purported warrant is based; that it does not specify any or any adequate place at which the alleged offence took place; that it does not disclose any or any adequate circumstances or degree of participation in the offence by the respondent; that it does not specify any or any adequate nature and legal classification of the alleged offence and the applicable statutory provisions/code: and that it has not been signed by a judicial authority in the Netherlands.

8. For all these reasons it is submitted that the purported warrant could not properly be categorised as a European arrest warrant for the purpose of the application for surrender. I will address the various points of objection individually in due course. Before doing so, I should refer to the provisions of section 11 of the Act, as this sets out what shall be specified in a European arrest warrant. Section 11, as amended, provides as follows:

*"11. (1) a European arrest warrant shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision.*

*(1A) subject to subsection (2A) and, a European arrest warrant shall specify –*

*(a) the name and the nationality of the person in respect of whom it is issued,*

*(b) the name of the judicial authority that issued the European arrest warrant, and the address of its principal office,*

*(c) the telephone number, fax number and e-mail address (if any) of that judicial authority,*

*(d) the offence to which the European arrest warrant relates, including the nature and classification under the law of the issuing state of the offence concerned,*

*(e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of that offence,*

*(f) 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, and*

*(g) (i) the penalties to which that person would, if convicted of the offence and specified in the European arrest warrant, be liable,*

*(ii) where the person has been convicted of the offence specified in the European arrest warrant but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence, or*

*(iii) whether a person has been convicted of the offence specified in the European arrest warrant*

*and a sentence has been imposed in respect thereof, the penalties of which that sentence consists.*

*(2) where it is not practicable for the European arrest warrant to be in the form referred to in subsection (1), it shall include such information, additional to the information specified in subsection (1), as would be required to be provided were it in that form.*

*(2A) if it is not practicable for any of the information to which subsection (1A) applies to be specified in the European arrest warrant it may be specified in a separate document.*

*(3) for the avoidance of doubt, a European arrest warrant may be issued in respect of one or more than one offence."*

9. I will deal with the alleged defects in the warrant in the order in which they are raised in the points of objection:

**Decision on which the purported warrant is based**

10. Paragraph (e) above requires that the warrant shall specify, in the context of the present case, that a warrant for the arrest of the respondent has been issued in respect of the offence alleged. What is contained in paragraph (b) of the warrant under the heading "decision on which the warrant is based" is as follows:

*"1. Arrest warrant or judicial decision having the same effect.*

*Type: suspected of contravening sections 2a, 2b, 10.4, 10.5 and 10a of the Dutch Narcotics Act. Importing into or exporting from Dutch territory, transporting substances (heroin) mentioned in schedule 1 to the Dutch Narcotics Act."*  
(sic)

11. The respondent submits that what is stated in this paragraph is not sufficient to describe the domestic decision upon which the European arrest warrant has been issued, and he highlights in particular the reference to the words "*suspected of contravening...*" in order to indicate that it is unclear from the use of the word "suspected" that the respondent is wanted in relation to any charge for an offence. He submits that it is evident from the text of the warrant that there is merely a suspicion that the respondent may have committed an offence, and that it therefore follows that no decision has yet been made to prosecute the respondent in respect of the charge referred to in the warrant.

12. There seem to be two strands to this particular point of objection. Firstly it is argued that the warrant form has not been properly completed since there is no adequate description of the "*arrest warrant or judicial decision having the same effect*" being the decision on which the warrant is based, since there is no date or indication of the court which made that order. Secondly, the argument is that the manner in which this paragraph has been completed by the issuing judicial authority is indicative of the fact that no decision has yet been made to prosecute the respondent for the charge in question and that therefore this court should regard the presumption contained in section 21(A)(2) of the Act as having been rebutted. That section provides:

*"(2) where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."* (my emphasis)

13. As to the form of the warrant, bearing in mind the way in which the judicial authority has completed paragraph (b) thereof, I am satisfied that what the issuing judicial authority is required to do is to indicate that there is an arrest warrant or judicial decision having the same effect in existence, and to complete the paragraph in a manner which indicates in a general way the nature of the decision in question. It is not necessary in my view that the warrant contain every piece of information which might exist in relation to any particular matter, such as might be required in a criminal trial process, as opposed to an extradition process. The information contained in paragraph (b) assists this Court in being satisfied that the various requirements of the European arrest warrant had been completed. Provided there is sufficient in the warrant under the various headings in order to provide the necessary information in that regard, the warrant is not to be found invalid simply because it may have been possible to insert a greater amount of detail in a particular paragraph.

14. In relation to the second line of submission under this particular heading, namely that the presumption contained in Section 21A of the Act has been rebutted by the fact, appearing in the warrant, that the respondent is merely "suspected of contravening sections..." of the Dutch Narcotics Act, that cannot be so. First of all, the warrant, in its opening paragraph, requests that the person referred to in the warrant be arrested and surrendered "*for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*". In the present case he is quite clearly wanted for the purpose of a criminal prosecution. That paragraph is not to be taken as a mere empty formula simply because it is part of the prescribed form of warrant. This Court is also entitled to presume that a judicial authority in the issuing state will not issue a European arrest warrant for any purpose other than conducting a criminal prosecution or executing a custodial sentence or detention order, since to do so would be to act in breach of the Framework Decision, and this Court is entitled to presume that a Member State, designated for the purpose of section 3 of the Act, will act in a proper and bona fide manner and will not issue a European arrest warrant for purposes other than those for which these arrangements have been adopted by Member States.

15. In addition, the presumption contained in section 21A of the Act cannot be rebutted simply by reference to some possible ambiguity arising from what is a translation of the original document. Some allowance must be made for the fact that this Court is looking at the warrant in terms of a translation. But in any event, the presumption is in existence until such time as the contrary is *proved*. The contrary, in my view, cannot be proved without at a minimum an affidavit from a Dutch lawyer. Such an affidavit might assist in a rebuttal of the presumption if it were to explain in detail the criminal procedures under Dutch law and reach a demonstrated conclusion that the stage at which the respondent is in that process, is a stage before which any decision to prosecute has been taken. Obviously, in the light of any such affidavit, the applicant would be entitled to respond on affidavit. That has not happened in this case. The attempt to submit that the presumption is rebutted fails completely on this ground alone. However, I am completely satisfied that a reasonable reading of the translated warrant confirms that a decision has been made to prosecute this respondent for the drugs offence referred to in the warrant.

16. I should refer to the fact that on this application some additional documentation has been furnished by the applicant. It is not necessary for the court to rely on that additional documentation for the purpose of addressing this particular point of objection.

*Warrant does not specify any or any adequate place at which the alleged offence took place:*

This complaint arises because in paragraph (e) of the prescribed form of warrant the description of the circumstances in which the offence was committed should include *"the time and place of its commission"* (my emphasis), and in the present case, this paragraph contains simply the following sentence: *"involved in taking receipt of 20 kg of heroin between approximately 9.00 hrs and 17.30 hrs on 09 November 2007."*

17. I can accept that the information contained in this paragraph is brief to say the least. Nevertheless, it is not every case which requires an expansive description of what is alleged to have been done by a respondent. In my view the essentials of what is alleged against the respondent are contained within that paragraph, and in so far as the place in which the offence is said to have been committed is not contained within this sentence, it is clear from the contents of paragraph (b) of the warrant to which I have already referred, that it is alleged that the offence was committed within "Dutch territory". In my view it is not necessary that a particular village, town or city be set forth. This particular point of objection is one of a type which was the subject matter of the judgment of Murray C.J. in *Minister for Justice Equality and Law Reform v. Rodnov*, (Unreported, Supreme Court, 1st June 2006), and where, even though the warrant did not conform exactly with that which was prescribed, *"it was not a want of formality which affected in any way the substance or effect of the European arrest warrant"*.

*Warrant does not disclose any or any adequate circumstances or degree of participation in the offence by the respondent:*

This point of objection is closely related to the previous one and to the fact that such a brief description of the circumstances of these events is included in paragraph (d) of the warrant. I am of the view that the essentials of the offence are contained in that paragraph, since it is clear from a reading of that sentence that the respondent can be under no misapprehension as to exactly what it is alleged against him namely that he was involved in receiving 20 kg of heroin between 9 a.m. and 5:30 p.m. on the 9th November 2007. In my view nothing further is needed to be said in order to fulfil the requirements of that paragraph, and I have already addressed to the question arising from the fact that no "place" is contained within that sentence.

*Warrant does not specify an), or any adequate nature and legal classification of the alleged offence:*

Paragraph (e) of the warrant contains a heading "nature and legal classification of the offences and the applicable statutory provision/code:" Under that heading, a box has been ticked beside the words "illicit trafficking in narcotic drugs and psychotropic substances". It is true that in this paragraph there is nothing to indicate the particular Dutch law which is said to be contravened by the offence in question. However that information is contained within paragraph (b) of the warrant, and I am satisfied that the fact that it is not repeated within paragraph (e) is insufficient to invalidate the warrant.

*Insufficient detail as to the applicable statutory provisions/code:*

In my view this is a repeat of the point of objection which I have dealt with in the previous paragraph and there is no need to reach any separate conclusion.

*Warrant has not been signed by a judicial authority in the Netherlands:*

In my view this is the only point of any substance which has been raised by the respondent by way of opposition to an order for his surrender is made. It is a fact that the copy of the warrant which was transmitted to the central authority here and which was endorsed by the High Court for execution on the 5th December 2007 contained only the printed name of the issuing judicial authority and not an original or a copy of any signature of that issuing judicial authority. The question which arises is whether that is a fatal defect.

18. I cannot recall any other case since the 1st January 2004 in which the warrant on which a respondent has been arrested was not either an original warrant duly signed by the issuing judicial authority, or a photocopy of the original warrant showing a copy of such signature. The present objection is therefore unusual. When this point of objection was raised, the Central Authority here sought further information in relation to the fact that the copy warrant on foot of which the respondent was arrested here did not appear to be signed by the issuing judicial authority. A letter has been received from the person whose name appears on the warrant as the issuing judicial authority namely "H.A.L.M. de Kort". In that letter he states, *inter alia*:

*"1. The European arrest warrant was issued by me, H.A.L.M. de Kort, public prosecutor at the district public prosecutor's office in Rotterdam and, in my absence, signed by my colleague, W.D. de Boer, public prosecutor at the district public prosecutor's office in Rotterdam ....*

*V. .... for reasons not clear to me, you are not in possession of the copy of the European arrest warrant signed by the public prosecution service. I will send you a copy and translation of this sign warrant and added to this fax message. In any case, the contents of the warrant which had not been signed, is identical to the contents of the signed warrant."*

19. As promised, a copy of the warrant signed by Mr de Boer was sent and has been produced to the Court. It follows that this court can be completely satisfied that a European arrest warrant had been signed by the issuing judicial authority prior to the transmission of an unsigned copy thereof to this jurisdiction, albeit one which contained the name of the issuing judicial authority only, and whose colleague appears to have actually signed it on behalf of the public prosecutor. The person who signed it is also a public prosecutor according to the information available. Counsel has submitted that this is not an insubstantial defect in the warrant and that it is fundamental because, in his submission, an unsigned warrant cannot be a warrant which is "a duly issued" and accordingly is not a warrant referred to in section 10 of the Act which refers to *"where a judicial authority in an issuing state duly issues a European arrest warrant"*. Counsel has referred also to the comments of the Chief Justice in *Rodnov* to which I have already referred and where in his judgment he stated:

*"I would add that there is nonetheless a duty on the applicant in these proceedings to examine requests for surrender and all documents which may be associated with a request in order to ensure that they are complete and correct. It would be wholly unsatisfactory if such an obligation on an applicant was disregarded on the basis that the Court could be asked to look for further information pursuant to s. 20 of the Act ....."*

20. Counsel has submitted that the Central Authority is failing in its duty to ensure that the document on foot of which the respondent has been arrested is *"complete and correct"* and in particular, that it was signed.

21. In section 2 of the Act, a European arrest warrant is defined as *"a warrant, order or decision of a judicial authority of a Member*

*State, issued under such laws as give effect to the Framework Decision in that Member State, for the arrest and surrender by the State to that Member State of a person in respect of an offence committed or alleged to have been committed by him or her under the law of that Member State."*

22. As I have referred to already, section 10 of the Act refers to "*where a judicial authority in an issuing state duly issues a European arrest warrant ...*". I have already set out the provisions of section 11 of the Act in so far as it specifies the contents of a European arrest warrant.

23. It is worth referring also to the provisions of section 12(3) and (4) of the Act which include provisions for the transmission to the Central Authority of "*facsimile copies of the European arrest warrant*".

24. Section 12(6) provides:

*"(6) if the Central Authority in the State or the High Court is not satisfied that the facsimile copy of a document transmitted in accordance with the section corresponds to the document of which it purports to be a facsimile copy, he or she, or it, shall require the issuing judicial authority or the issuing state, as may be appropriate, to cause the original of the document or a true copy thereof to be transmitted to the Central Authority in the State, and shall agree with the issuing judicial authority or the issuing state, as may be appropriate, the manner in which such original or true copy shall be transmitted."*

25. Section 12(8) provides as follows:

*"(8) in proceedings to which this Act applies, a document that purports to be –*

*(a) a European arrest warrant issued by a juridical authority in the issuing state.*

*(b) ...*

*(c) ...*

*(d) ...*

*(e) a true copy of such a document,*

*shall be received in evidence without further proof."*

26. Finally, section 12(9) of the Act provides:

*"(9) in proceedings to which this Act applies, a document that purports to be a facsimile copy or true copy, of the European arrest warrant, undertaking or translation referred to in subsection (8) shall, unless the country is shown, the evidence of the European arrest warrant, undertaking or translation concerned, as the case may be."*

27. I have set out to these provisions in order to demonstrate that less than strict formality may exist in the manner in which a European arrest warrant comes to the Central Authority in this jurisdiction. A faxed copy can be transmitted, and where a document which purports to be a European arrest warrant or a true copy of such a document is used and is before the court, it must be received in evidence without further proof. The essential requirement for the purpose of section 10 of the Act, and the Act generally, it is that before the respondent is arrested, a European arrest warrant must have been "issued" by a judicial authority in the issuing state. There is nothing in the Act which requires that if a respondent is arrested on foot of a document which purports to be a European arrest warrant or a copy thereof, that it bears a written signature or photo of a signature.

28. Section 13 of the Act provides that upon receipt of a European arrest warrant transmitted to it in accordance with section 12, the Central Authority must make an application to the High Court for its endorsement and it is specifically provided in that section that the document to be endorsed can be either "*the European arrest warrant, or a facsimile copy or true copy thereof*". A facsimile copy of the European arrest warrant will be the original European arrest warrant in photocopied form and which is received in this jurisdiction having been transmitted "by fax". On the assumption that the original European arrest warrant in the issuing state has been signed by a judicial authority, the faxed copy received here by the Central Authority will show the actual signature of the issuing judicial authority. That situation must be distinguished from the receipt of "a true copy". The latter is a document which purports to be a true copy of the original European arrest warrant, and must be distinguished from a photo copy or faxed copy of the original warrant. In other words, "a true copy" is a copy of the original warrant containing all the words appearing in the original, and the text of both documents will be the same. In the present case, the document received here by the Central Authority and which was endorsed by the High Court for execution can be seen to be "a true copy" of the original European arrest warrant. It is not a photostatic copy of the original warrant since it is not a photograph of the original warrant as signed. But it is a copy in the sense that it contains everything that is contained in the original warrant. In my view there is no provision within the Act which prevents the respondent from being arrested on foot of "a true copy" of the original European arrest warrant issued in the issuing state, provided that the true copy has been endorsed by the High Court here for execution. On the contrary, the receipt of a true copy of the warrant is expressly envisaged as one possibility.

29. Strictly speaking, there was no necessity for a photo copy of the original European arrest warrant to be obtained by the Central Authority and for it to be produced both to the respondent and to this Court, since this Court is entitled to presume that if an issuing judicial authority in a state designated for the purposes of section 3 of the Act transmits to this jurisdiction a document which purports to be a copy of a European arrest warrant, this court is perfectly entitled to presume that a European arrest warrant has been duly issued in the issuing State.

30. For all these reasons, I am satisfied that the court is required to make the order of a surrender which is sought on this application and I will so order.