

THE HIGH COURT

Record Number: 2007 No. 152 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
JAROSLAW PIOTR GOTSZLIK

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 2nd day of November 2007

1. In this case two European arrest warrants were issued by the same judicial authority in Poland in respect of the respondent. One is dated 21st November 2006 and the other is dated the 28th November 2006. Each such warrant is in respect of a separate offence for which the surrender of the respondent is sought.

2. The offence referred to in the first warrant is marked on that warrant as being one contained in the list of offences in Article 2.2 of the Framework Decision, namely "sexual exploitation of children and child pornography". That is an offence in which double criminality is not required to be verified. The respondent's surrender is sought on this offence so that he may face a prosecution. The minimum gravity requirement is satisfied since the maximum sentence which can be given for that offence in Poland is twelve years' imprisonment.

3. The offence in the second warrant is one which by reference to the facts alleged against the respondent would correspond here to an offence of assault contrary to s. 3 of the Non-Fatal Offences against the Person Act, 1997. In respect of this offence the respondent has already been convicted on the 2nd December 2003 for which he received a sentence of one year and four months none of which has yet been served by the respondent. The minimum gravity requirement is therefore satisfied since there are more than four months of sentence still to be served by the respondent.

4. On the 19th September 2007, an application was made in respect of each of these warrants to the High Court for endorsement thereof for execution as required under s. 13 of the European Arrest Warrant Act, 2003, as amended. Following these applications the Registrar of the High Court duly endorsed each warrant for execution. Normally, what happens in this regard is that the Registrar will make the endorsement on each original warrant being that in the language of the issuing state. If that document is in a language other than English there will always be an officially certified translation thereof into English. But the document actually bearing the original endorsement will be that in the language of the issuing state. In the present case, the Registrar following the making of the applications for endorsement placed the endorsement on not only the warrants in the Polish language but also the translations thereof, resulting in there being four documents which bear an original endorsement. I mention this matter in some detail since Kieran Kelly BL for the respondent has made a submission to the effect that each such document is an endorsed warrant and therefore his client has been arrested not on foot of two warrants but on foot of four warrants. He submits that the endorsement of both the original language warrant and the translation is contrary to what is required to be done under the Act, and that the arrest of the respondent has therefore been invalid and his release should therefore be ordered by this Court.

5. In my view this is an argument of no weight whatsoever. It is perfectly obvious what happened and simply because a translated copy of each warrant was endorsed in addition to the original in the Polish language cannot on any sensible application of the law render the arrest of the respondent unlawful. To decide otherwise would enable form to triumph over substance in a way which would run completely contrary to the aim expressed in the Framework Decision at recital (5) in the Preamble thereof, namely:

(5) the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

6. I reject this point of objection.

7. In any event the respondent was arrested on foot of the two warrants to which I have referred on the 3rd October 2007 and was, as required by the Act, brought before the Court and remanded from time to time pending the hearing of this application for an order of surrender. No issue is raised as to his identity, and I am completely satisfied that the respondent before the Court is the person in respect of whom these two European arrest warrants have been issued.

8. I am satisfied also that there is no reason under sections 21A, 23, or 24 of the Act to refuse to order his surrender. An issue has been raised in respect of section 22 and I will come to that shortly. I am satisfied also that, subject to addressing the other objections raised by the respondent that there his surrender is not prohibited by any provision in Part III of the Act or the Framework Decision.

The Remaining Points of Objection**Section 22 of the Act**

9. The foundation for this point of objection is the wording of s. 22 of the Act (as substituted by s. 80 of the Criminal Justice (Terrorist Offences) Act, 2005) which provides, as follows:

"22.—(1) In this section, except where the context otherwise requires, 'offence' means, in relation to a person to whom a European arrest warrant applies, an offence (other than an offence specified in the European arrest warrant in respect of which the person's surrender is ordered under this Act) under the law of the issuing state committed before the person's surrender, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the European arrest warrant consists in whole or in part.

(2) Subject to this section, the High Court shall refuse to surrender a person under this Act if it is satisfied that—

(a) the law of the issuing state does not provide that a person who is surrendered to it pursuant to a European arrest warrant shall not be proceeded against, sentenced or detained for the purposes of executing a sentence or

detention order, or otherwise restricted in his or her personal liberty, in respect of an offence, and

(b) the person will be proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence.

(3) It shall be presumed that, in relation to a person to whom a European arrest warrant applies, the issuing state does not intend to—

(a) proceed against him or her,

(b) sentence or detain him or her for a purpose referred to in subsection (2)(a), or

(c) otherwise restrict him or her in his or her personal liberty, in respect of an offence, unless the contrary is proved.

(4) The surrender of a person under this Act shall not be refused under subsection (2) if—

(a) upon conviction in respect of the offence concerned he or she is not liable to a term of imprisonment or detention, or

(b) the High Court is satisfied that, where upon such conviction he or she is liable to a term of imprisonment or detention and such other penalty as does not involve a restriction of his or her personal liberty, the said other penalty only will be imposed if he or she is convicted of the offence.

(5) The surrender of a person under this Act shall not be refused under subsection (2) if it is intended to impose in the issuing state a penalty (other than a penalty consisting of a restriction of the person's liberty) including a financial penalty in respect of an offence of which the person claimed has been convicted, notwithstanding that where such person fails or refuses to pay the penalty concerned (or, in the case of a penalty that is not a financial penalty, fails or refuses to submit to any measure or comply with any requirements of which the penalty consists) he or she may, under the law of the issuing state be detained or otherwise deprived of his or her personal liberty.

(6) The surrender of a person under this Act shall not be refused under subsection (2) if the High Court—

(a) is satisfied that—

(i) proceedings will not be brought against the person in respect of an offence,

(ii) a penalty will not be imposed on the person in respect of an offence, and

(iii) the person will not be detained or otherwise restricted in his or her personal liberty for the purposes of an offence, without the issuing judicial authority first obtaining the consent thereto of the High Court,

(b) is satisfied that—

(i) the person consents to being surrendered under section 15,

(ii) at the time of so consenting he or she consented to being so proceeded against, to such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and was aware of the consequences of his or her so consenting, and

(iii) the person obtained or was afforded the opportunity of obtaining, or being provided with, professional legal advice in relation to the matters to which this section relates,

(c) is satisfied that—

(i) such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or otherwise restricted in his or her personal liberty before the expiration of a period of 45 days from the date of the person's final discharge in respect of the offence for which he or she is surrendered, and

(ii) during that period he or she will be free to leave the issuing state, except where having been so discharged he or she leaves the issuing state and later returns thereto (whether during that period or later), or

(d) is satisfied that such proceedings will not be brought, such penalty will not be imposed and the person will not be so detained or restricted in his or her personal liberty unless—

(i) the person voluntarily gives his or her consent to being so proceeded against, such a penalty being imposed, or being so detained or restricted in his or her personal liberty, and is fully aware of the consequences of so doing,

(ii) that consent is given before the competent judicial authority in the issuing state, and

(iii) the person obtains or is afforded the opportunity of obtaining, or being provided with, professional legal advice in the issuing state in relation to the matters to which this section relates before he or she gives that consent.

(7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to—

(a) proceedings being brought against the person in the issuing state for an offence,

(b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or

(c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence, upon receiving a request in writing from the issuing state in that behalf.

(8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 or the Framework Decision (including the recitals thereto) be surrendered under this Act.”.

10. Section 22 was enacted to give effect to Article 27 of the Framework Decision which provides as follows:

“Article 27 Possible prosecution for other offences

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;

(b) the offence is not punishable by a custodial sentence or detention order;

(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;

(d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;

(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;

(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.”

11. The point being made by the respondent in relation to these provisions arises solely because the issuing state has issued two separate warrants, one for each offence for which his surrender is sought, rather than including the two offences on a single warrant as invariably happens. The submission is first of all that each warrant must give rise to a separate application for surrender under s. 16 of the Act, and therefore that in respect of each such application, the offence contained in the other warrant is an offence covered by the definition of ‘an offence’ in section 22(1) for the purpose of that section, and in respect therefore of which surrender must be refused unless it comes within one of the exceptions provided for within the section as set forth above. In this way, it is submitted that the Court is precluded from ordering surrender on either warrant.

12. Mr Kelly submits that the fact that the two offences could have been contained within one warrant thereby avoiding the point of objection now being made, is irrelevant, and that the plain and ordinary meaning of the words used in the Act must be considered. He submits also that while it has been made clear in the judgment of the European Court of Justice in the *Pupino* case [Case C-105/03] that national legislation must be interpreted as far as possible in the light of and so as not to be in conflict with the provisions of Framework Decision, he emphasises that this requirement is subject to such interpretation not being ‘*contra legem*’. He submits that if this Court was to order surrender in respect of both warrants, it would be doing so contrary to the specific provisions of s. 22 of the Act and therefore ‘*contra legem*’.

13. Mr Kelly submits that even though there is the presumption provided for in s. 22(3) of the Act, as seen above, that is a presumption which is rebuttable, and that in the present case where a second warrant has been issued, it is clear that the issuing

state does intend to proceed against the respondent in respect of an offence as defined in s. 22(1).

14. Anne-Marie Lawlor BL on behalf of the applicant submits that the respondent is attempting to play one warrant off against the other and that in a situation where each of these offences could very easily have been contained in a single warrant thereby avoiding the point being raised under s. 22, it would be contrary to the intention and purpose of the Framework Decision to refuse to order surrender for the reason put forward by Mr Kelly under the s. 22 point of objection. She submits that the purpose of the specialty rule was always to avoid a situation where a person was surrendered on foot of a warrant for a particular offence or offences specified therein and for which the Court was satisfied that surrender or extradition was allowed (correspondence having been made out, for example), only for that person to discover upon surrender that he is to face prosecution for another offence never mentioned in the warrant or Request and in respect of which surrender/extradition may not or would not have been ordered. That is a mischief which the rule of specialty was designed to avoid, and she submits that in the present case there is no such potential mischief, since the Court and the respondent is fully aware of the fact that upon surrender the respondent will be dealt with in respect of the two offences referred to in the two warrants. There is no mystery about it and therefore no situation arises where the protections provided by the specialty provisions need to be invoked. Ms. Lawlor has submitted that this Court should give effect to the intention of the Framework Decision which, she submits, is that in a situation where two separate warrants are issued there is no bar on specialty grounds which ought to arise.

15. I have considered this matter carefully. I have arrived at the conclusion that since s.22 has been worded in the way appearing and since those words are clear and unambiguous as to their meaning by reference to the plain and ordinary meaning to be given to the words used by the Oireachtas, the Court must, as required by that section refuse to surrender this respondent. The Framework Decision does not have direct effect. It requires an Act of the Oireachtas to give effect to its Articles. The Court is required to follow that legislation as passed for the purpose of giving effect to that instrument here. As I have already stated, the Act must be interpreted in the light of the intention of the Framework Decision provided that to do so is not 'contra legem'. In my view, for this Court to order surrender on foot of either warrant or both warrants because it is of the view that the Framework Decision clearly intended that each of these offences should give rise to surrender even if requested on foot of separate warrants, would be to ignore the specific provisions of s. 22 of the Act, and would be contrary to the clear meaning of s. 22 and therefore 'contra legem'. The fact that the circumstances in which this has arisen may not have been the intended target of the specialty provisions passed by the Oireachtas for the purpose of giving effect to Article 27 of the Framework Decision is neither here nor there. If there is a lacuna or an anomaly in the manner in which the section operates in a particular and exceptional case it is not for this Court to plug the gap by a purposive interpretation which runs contrary to the specific provision of the section. The Court must apply the law as gleaned from the wording of the section, taking account of course of the manner of interpretation prescribed by the *Pupino* judgment already referred to.

16. I am of the view that the presumption contained in s. 22(3) of the Act does not save the situation given the contents of both warrants and the request in each that the respondent be surrendered to be dealt with under both.

17. I hasten to add that this situation arises only from the fact that for whatever reason the Polish judicial authority has chosen to send over two separate warrants. That need not have occurred, and indeed there would appear to be nothing to inhibit that authority from issuing a new warrant on another occasion containing within it both offences and then this point would not arise.

18. Two other points of objection have been raised.

19. The first is the same point which this Court dealt with in its judgment in *Biggins*, and although Mr Kelly has invited the Court to revisit that decision by reference to a case not argued in *Biggins*, namely *Carron v. McMahon* [1990] 1 IR. 239, I am satisfied that the use of the phrase 'connected with' as used in s. 37 the Act appears in so different a context to the context in which it is used in the section under scrutiny in *Carron v. McMahon*, the latter case does not require me to arrive at a different conclusion than I did in *Biggins*.

20. Finally, Mr Kelly has submitted that to surrender the respondent to Poland in circumstances where he is living happily in this jurisdiction with his wife and family would be contrary to Article 8 of the Convention and Article 41 of the Constitution. In that his surrender would operate as an unjust interference with and an intrusion upon his private and family rights. I easily reject that ground. Those rights are not absolute rights and may be circumscribed by law, as when a person is required to serve a term of imprisonment or be otherwise detained in accordance with law. Similarly, the requirement upon this State to surrender in certain circumstances a person to another state for prosecution or to serve a sentence there is a circumstance prescribed by law, and a legitimate curtailment of the rights referred to and which would otherwise stand to be protected.

21. Some other points were raised which have already been the subject of decisions of this Court and which are awaiting appeals in the Supreme Court. They are raised in case the results of those appeals are such that they might avail the respondent in the present case and it is not necessary to express further views upon them.

22. Since the Court is required to refuse to order surrender in this case because of the provisions of s. 22 of the Act for the reasons appearing above, the Court must order the release of the respondent pursuant to the provisions of s. 16(8) of the Act.