Neutral Citation Number: [2010] IEHC 403

THE HIGH COURT

2009 222 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Kieran Daly Doran

Respondent

Judgment of Mr Justice Michael Peart delivered on the 5th day of November 2010:

The surrender of the respondent is sought by a judicial authority in France on foot of a European arrest warrant which issued there on the 21st March 2008. This warrant was transmitted to the Central Authority here by fax on the 5th May 2008, but it was not until the 10th September 2009 that an application was made to the High Court to endorse same for execution. I mention that feature of the case since an issue is raised by the respondent to the effect that this delay in having the warrant endorsed for execution has resulted in same not being endorsed "as soon as may be" following transmission, as provided by section 13 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). I will come to that in point of objection in due course. In any event, following the endorsement of the warrant by the High Court, the respondent was arrested on foot of same on the 12th January 2010, and was brought before the High Court from where he has been remanded from time to time pending the completion of the present application for his surrender. On that date the respondent was granted bail and remained on bail until he voluntarily went into custody on the 14th April 2010.

The surrender of the respondent is sought so that he can serve a four year sentence of imprisonment which was imposed upon him by a French court on the 11th December 2006 in respect of two offences. That sentence was imposed in absentia, and it is stated in the warrant that the respondent had not been served with any notification of the date and place of his trial nor was he otherwise notified. The provisions of section 45 must therefore be fulfilled by the provision of an appropriate undertaking as to a retrial following surrender, should the respondent so request. I am satisfied that the letter dated 17th August 2009 which has been provided by the issuing judicial authority constitutes an undertaking sufficient to satisfy the requirements of section 45 of the Act of 2003. It is in the same form that I considered in a previous case from France (Gritunic, 30th June 2009), and coincidentally from the same judicial personage as in that case, and found to be sufficient. The respondent in the present application has not strongly argued that it is not sufficient to satisfy the requirements of section 45.

Paragraph E of the warrant indicates that the respondent was convicted of offences stated to be *"Conspiracy aimed at committing acts of terror; violation of the legislation regarding weapons and ammunition of the 1st and 4th categories in connection principally or incidentally with terrorist undertakings …",* and in that regard the issuing judicial authority has indicted in the warrant that these offences come within two categories of offences set forth in Article 2.2 of the Framework Decision, namely *"terrorism"* and *"illegal trafficking in weapons, ammunition and explosives"*, and as such double criminality/correspondence is not required to be verified or established on this application.

Minimum gravity is satisfied in all respects.

The identity of the respondent is not put in issue and I am satisfied in any event from the affidavit evidence of the Garda officer who arrested him that he is the person in respect of whom this warrant has been issued.

I am satisfied that the Court is not required to refuse to order surrender under sections 21A, 22, 23 or 24 of the Act of 2003, and subject to reaching conclusions in relation to the Points of Objection pursued on this application, I am satisfied that surrender is not prohibited by any provision of Part III of the Act of 2003 or the Framework Decision.

Points of Objection relied upon:

Section 13 – delay in endorsement of the warrant:
I have referred to this issue earlier. It arises due to the fact that while the warrant was transmitted here on the 5th May 2008, the application to the High Court to endorse the warrant was not made until 10th September 2009. Section 13 (1) of the Act of 2003 provides:

> *"13.—(1) The Central Authority in the State shall**, as soon as may be after it receives a European arrest warrant transmitted to it** in accordance with section 12, apply, or cause an application to be made, to the High Court for the endorsement by it of the European arrest warrant, or a facsimile copy or true copy thereof, for execution of the European arrest warrant concerned.*
>
> *(2) If, upon an application under subsection (1), **the High Court is satisfied that**, in relation to a European arrest warrant, **there has been compliance with the provisions of this Act,** it may endorse the European arrest warrant for execution."* (my emphasis)

The warrant as transmitted in this case makes it clear that the respondent was convicted and sentenced in his absence, and it acknowledges that he was not notified in any way of the date and place of his trial. I am informed that in such circumstances it was thought prudent, prior to any application to endorse this warrant, to communicate with the issuing judicial authority about the availability of an undertaking that would be required if an application for surrender was to be successful. Given the provisions of section 13 (2) of the Act of 2003, I consider that to be a reasonable thing to do, as to endorse the warrant without that undertaking being available at that stage could result in a respondent being arrested and brought to Court on an application which had no prospect of success. Relevant also to the delay which occurred in the application for endorsement is that from November 2008 the

Gritunic case was progressing towards a hearing and the adequacy of an undertaking for the purpose of section 45 was a live issue in that case, and judgment was given eventually on 30th June 2009 in which I concluded that the undertaking provided in that case was sufficient. In my view it was reasonable that the Central Authority here might wait until that issue was decided before making an application to endorse the warrant in this case. The undertaking in the present case was sent by fax on the 18th August 2009, and the application to endorse the warrant proceeded on the 10th September 2010 during the Long Vacation.

I am satisfied in these circumstances that the application to endorse the warrant in the present case was made "as soon as may be" after transmission. That phrase allows for some latitude, and enables the Central Authority to wait a reasonable period of time until it is satisfied that it is appropriate to make such application.

Section 11 – insufficient information as to the offences:
Kathleen Leader BL for the respondent has submitted that while the description of the offences contained in the warrant is quite lengthy, it nevertheless fails to say precisely what the respondent is said to have done in order to have committed the conspiracy offences for which he was convicted. She makes the point that it is silent as to exactly where the respondent is alleged to have conspired, and fails to disclose the commission of any offence. I will not set out the entire description of the offences as contained in the warrant, but it quite clearly identifies the respondent as one of a number of named persons whose movements in the north of France in August 2003 are set forth, as are details of journeys to and from Belgium, Netherlands and Ireland. Other details are contained including the finding by French investigators of a cache of weapons and ammunition.

In my view there is more than sufficient information contained in this warrant to fulfil the requirements of section 11 of the Act in this case. Correspondence is not required to be verified, so the Court is not required to be satisfied that the information is sufficient to establish correspondence with an offence or offences in this State. What is required is that there should be sufficient factual material contained in the warrant to enable the respondent upon arrest to know what offences he has been convicted and sentenced for in his absence, and to enable him and his legal advisers to consider what points of objection might be advanced against an order for his surrender being made in due course. In that regard it is worth noting in passing that when he was arrested, he was asked by Sgt. Kirwan whether he knew what this warrant was about and he replied: "*Yeah – I know all about it*".

Section 37 – surrender would constitute a breach of constitutional/Convention

rights – family rights
It is fair to say that this point of objection is the principal point of objection relied upon by the respondent. Ms. Leader submits that in the circumstances of this case, and has been evidenced by the grounding affidavit of the respondent and that of his wife, an order for surrender would constitute an unlawful, unjust and disproportionate interference with their family rights under Article 41.1 of the Constitution, as well as a violation of family rights under Article 8 of the Convention, and as such surrender is prohibited under section 37 of the Act of 2003. Ms. Leader has referred to this Court's judgment in *Minister for Justice, Equality and Law Reform v. Gorman, unreported*, High Court, 22nd April 2010, and relies on same.

Before addressing the respondent's legal submissions, I should refer to the contents of the grounding affidavits from which the family circumstances of the respondent can be ascertained.

In his grounding affidavit the respondent states that he was at the date of swearing aged 31 years. He is now 32. He has resided at all times in this State, and principally in the area of Tallaght, Dublin. He has two brothers and both of his parents are still alive and he enjoys a close relationship with them. According to his affidavit he has been in regular employment for most of the time since completing his education. He goes on to state that in 1997 he began a relationship with the lady who he subsequently married in 2004.They have seven young children aged now twelve, ten, nine, five, 2 (twins) and 8 months respectively. He states that in about November 2003 he and another man were arrested, that other man being one of those persons who are referred to in the description of these offences contained in the warrant herein. He states that he was questioned about membership of an unlawful organisation and about his movements in the days and months leading up to his arrest, but that he was released without charge. He was apparently informed at that time that a file would be sent to the Director of Public Prosecutions, but that he has heard nothing further about the matter since then. On the present application the DPP has stated in a letter dated 29th September 2010 that he is not considering whether to bring proceedings against the respondent, and further that no such proceedings have been brought or are pending in respect of the matters referred to in the warrant, and that accordingly the provisions of section 42 of the Act of 2003 do not apply. The respondent has stated that the other person arrested with him for questioning in fact was charged with membership of an unlawful organisation but was later acquitted on that charge by the Special Criminal Court.

The respondent goes to say that in November 2006 he became aware that he had been tried and convicted in his absence by the court in Paris and that he had been sentenced to four years' imprisonment, as was his co-accused, the other man referred to above. Following his becoming aware of his conviction, he instructed his solicitor to write to An Garda Siochana and that letter contained an inquiry as to whether or not any request for his extradition had been received in relation to his conviction and sentence, and stated also that the respondent was anxious to regularise his position with An Garda Siochana and if necessary hand himself over if a European arrest warrant had been received. That letter was dated 26th November 2006 and a reply dated 30th November 2006 was received to the effect that An Garda Siochana were "*not in possession of a valid extradition request…*". By letter dated 12th December 2006 the respondent's solicitor wrote again stating, inter alia, that he had received instructions from the respondent that once they receive a valid warrant he was willing to surrender himself by appointment to the extradition section at a mutually convenient time.

Having heard no more about the matter the respondent's solicitor again wrote to An Garda Siochana by letter dated 29th March 2007 enquiring what was the then current status of the matter and stating that the respondent was *"anxious to have some clarity over whether it is intended to seek his extradition to France"*. No reply was received to that letter, following which a further letter was written on the 12th June 2007 to which a reply was received by letter dated 15th June 2007 which again stated that An Garda Siochana was not in possession of a valid extradition request, and suggested that any further query about the matter should be directed to the French Embassy.

In fact the respondent heard nothing further about the matter until he was arrested on foot of the present warrant, without any prior notice, on the 12th January 2010. He states in his affidavit that having heard nothing further for so long prior to January 2010 he became reassured that he would hear no more about it and began to believe that his surrender would not be sought. His twin daughters were born in 2008 at a time when he was under the belief that his surrender would not be sought, as was his youngest child who was born in February of this year, shortly after his arrest on the present warrant.

He submits that the above facts mean that any surrender to France to serve this four year sentence would constitute a very significant interference with his family and private life, and that given that all his family, including his wife and seven children, all

reside here, and have support here, it would not be possible for them to move to France in order to be nearer to where he would be imprisoned, and that accordingly it would be a very lengthy period of time before he would be able to see his family if surrendered.

The respondent's wife has also sworn a grounding affidavit. She refers to the fact that the respondent is currently in Portlaoise Prison and that accordingly she and their children can visit him on a regular basis in order to maintain a relationship with him. She goes on to state that there is no question of her being in a position to move to France with their children, since all her family are in this State, she does not speak French, and she has no funds with which to relocate there. She is also responsible for the support of her own father who is not in good health and is living with her and the children in Tallaght. She thinks that she would not be able to travel to France to visit the respondent in prison more than once or twice a year.

Peter Connolly, the respondent's solicitor has sworn an affidavit also, in which he states that following the respondent's arrest and the granting of bail he was instructed by the respondent to make enquiries and advise on the possibility that the respondent might be permitted to serve this sentence of imprisonment in this State rather than in France. In that regard he refers to Article 5.3 of the Framework Decision which contains an optional provision to the effect that the execution of a European arrest warrant may under the law of the executing state be subject to the following:

> *"5.3:*
>
> > *where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."*

He refers also to the arrangements in this regard which are contained in The Transfer of Execution of Sentences Act, 2005. Section 7 of that Act provides:

> *"7. – (1) Subject to subsection (2), the Minister may, upon receipt of a request in writing from a sentencing country to consent to the execution in the State of a sentence imposed in the sentencing country, or part of a sentence so imposed, on a person who fled to the State before he or she (a) commenced serving that sentence, or (b) completed serving that sentence, give such consent."*

Mr Connolly states in his affidavit that he has received no reply to his inquiries in this regard. However, as was pointed out in legal submissions, the respondent would appear in any event to be excluded from this provision since he is not a person who ever fled from France as such. He left France before ever being charged with these offences, and was tried and convicted in his absence. Mr Connolly has stated however that he advised the respondent that if he is surrendered to France on the present warrant he could thereafter, having been surrendered, make an application to serve his sentence in this State. However, he goes on to state that such a procedure takes about two years to complete.

Legal submissions:
Ms. Leader has at the outset referred to the mandatory nature of section 37 of the Act of 2003 where it provides, inter alia, that a person shall not be surrendered if a respondent's surrender would be incompatible with the State's obligations under the Convention or if surrender would constitute a contravention of any provision of the Constitution. She relies on this Court's judgment in Minister for Justice, Equality and Law Reform v. Gorman, unreported, High Court, 22nd April 2010 where surrender was refused on the grounds that surrender in that case constituted a disproportionate interference with family rights. While acknowledging that the Gorman case had unusual, if not unique facts, she nevertheless points to the facts of the present case and in particular that the respondent was sentenced in absentia to four years imprisonment without any opportunity to put forward any mitigating facts relevant to sentencing, the fact that he has already been acquitted here by the Special Criminal Court on a charge of membership of an unlawful organisation, the number of children he has, four of whom were born at a time when he believed, as a result of delay by the French authorities in seeking his surrender, the fact that all his family ties and family are resident in this State, the fact that he made efforts to try and deal with this matter in a cooperative way once he had become aware that he had been convicted in his absence in 2006, both by offering to make himself available if a warrant was here for his arrest, and by exploring the possibility that he could serve the sentence in this State rather than be surrendered to France. She emphasises also the fact that there is no reality to expecting that the respondent's wife and seven children could reasonably be expected to relocate in France in order to be able to maintain contact between the respondent and his wife and children.

In these circumstances she submits that while all orders for surrender will impact negatively on the family rights of the person surrendered and his/her family members and their private life, as does any sentence of imprisonment, even one served in the ordinary way in this State for an offence committed here, nevertheless in the present case the surrender of this respondent to France to serve a four year sentence will impact particularly severely for the reasons which have been outlined already, and that in balancing the undoubted right of the French authorities to prosecute and punish offenders against the Convention and constitutional rights of the respondent to family and private life, this Court should conclude that in all the circumstances surrender would be a disproportionate and unjust interference with these rights.

Ms. Leader submits that a proportionate manner of dealing with the respondent's situation would be for him to be permitted to serve the sentence in this State, as envisaged as a possibility by Article 5.3 of the Framework Decision set forth above, and as provided for in section 7 of The Transfer of Execution of Sentences Act, 2005 above. However, his efforts to achieve that situation have not borne fruit.

Patrick McGrath BL for the applicant has submitted firstly that if the respondent was genuinely attempting to cooperate with the French authorities and deal with the matter in 2006 once he became aware that he had been sentenced, he would have taken up the suggestion contained in the letter referred to above that he make contact with the French Embassy. He submits that the respondent made a choice to wait for things to happen and that he cannot be entitled to have concluded that the French authorities would not in due course seek his surrender on a European arrest warrant, and that he was not entitled to take any comfort from that fact that it was not until January 2010 that he was arrested. It is submitted that he must at all times after 2006 be taken as knowing that his situation was precarious and uncertain in this regard.

Mr McGrath emphasises the legitimate aim which is pursued by the French authorities in seeking the respondent's surrender and that it would take something truly exceptional in the facts of the case for that legitimate aim to be trumped by the family rights of the respondent and his family whether under the Convention or the Constitution. Such exceptional facts in his submission are absent in this case, and are to be contrasted to the exceptional nature of the facts in the Gorman case referred to.

Mr McGrath submits that the arrangements under The Transfer of Execution of Sentences Act, 2005 are separate and apart from arrangements under the European arrest warrant. He goes on to submit that in any event section 7 of that Act provides that one of the conditions for such a transfer is where the order imposing sentence is final, and he refers to the fact in the present case that upon surrender the respondent will have a retrial if he seeks one and that it cannot be considered therefore that the order of the French court is a final order at this stage.

He refers also to Article 4 of the Framework Decision which provides for optional non-execution in certain circumstances set forth in that Article, and specifically, as relevant to the present case, Article 4.6:

> *"4. 6: if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and* ***that State undertakes*** *to execute the sentence or detention order in accordance with its domestic law." (*My emphasis*)*

Mr McGrath submits that the judicial authorities have no function in this regard, and that it is not something that this Court can have regard to when considering whether or not to make an order for surrender. As far as Article 5.3 of the Framework Decision is concerned, Mr McGrath has pointed to the fact that this Article is an optional provision and that the Act of 2003 in spite of its various amendments since its first enactment has not given effect to that provision.

Conclusions:
There is of course no doubt that all the respondent's family ties, including his wife and seven young children, are in the State, and that any order for his surrender will constitute n interference with his family and private life. The fact that his surrender is to France will mean that the interference with that life here will be far greater than it would be if for instance he was convicted of an offence in this State and imprisoned here for a period of four years. In the latter situation his family would enjoy the possibility of reasonable access to him by way of visits to the prison holding him. In the respondent's actual position it is very easy to accept that it is improbable, even impossible, that his wife and family could reasonably relocate to France in order to maintain regular contact with him for the duration of his imprisonment there.

The Framework Decision recognises the fact that for a national of a particular state to be imprisoned in another state following surrender seriously impacts on family life in this way. It has made provision in Article 4.6 on an optional basis for a judicial authority in any Member State to refuse to execute a European arrest warrant if that State undertakes to execute the sentence or detention order in accordance with national law. It is a matter for any such Member State to give effect to that provision should it wish to do so. There is no provision in that regard in the Act of 2003. Nevertheless there are certain provisions in section 7 of the Transfer of Executed Sentences Act, 2005.That Act gives effect, inter alia, to Article 2 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons, done at Strasbourg on the 18th December 1997. Apart from the fact that it is uncertain whether the respondent, if surrendered, can avail of section 7 of that Act, since it appears that he could not be considered to have 'fled' from France when he returned to this State, Mr McGrath is correct in my view that this legislation operates independently from the European arrest warrant arrangements. There may also be an issue at this stage because the French judgment by which the respondent was sentenced may not be considered to be a final order for the purpose of section 7(2)(b) of the Act.

The fact that the respondent cannot avail, in spite of his efforts in that regard, of these provisions which otherwise may enable him to serve his sentence in this State is something which this Court must have regard to in weighing the competing interests touching upon the question of proportionality of any order for surrender which may be made.

There were facts in the Gorman case which distinguish it significantly from the present case. A very important feature of the Gorman case was that in 1994, having arrested on foot of a 'backed' warrant under the procedures provided for in Part III of the Extradition Act, 1965 so that an order for his extradition could be obtained, the authorities withdrew that application and he was released. This occurred after the application for the extradition of a co-accused had been refused in the High Court on the basis that the offence in question was a political offence, and therefore one for which extradition could not be ordered. Following that event, that person was no longer at risk of extradition and got on with his life in that knowledge. It was only following the enactment of the Act of 2003 that it became possible to again seek his surrender on foot of a European arrest warrant, since the political exception no longer exists as a bar to surrender. These facts were a significant feature of the Gorman case which enabled this Court to weigh the competing interests in favour of refusing to make the order for surrender sought. The respondent's case does not present facts of that strength. The facts of the present case are not such as to have provided the sort of comfort to the respondent that he would not be subject to an application on foot of a European arrest warrant, as provided the respondent in Gorman with an assurance in 1994 that he would not be extradited. The present respondent's situation was at all times precarious at least from the time in 2006 that he became aware that he had been convicted and sentenced in his absence in France. It is understandable that as time passed with nothing appearing to happen, the respondent and his wife may have thought that perhaps the matter would go away, but that is not sufficient in my view to amount to a rational belief that his surrender would not be sought.

There is no doubt that the authorities in France are entitled to pursue the legitimate aim of ensuring that a person sentenced to a term of imprisonment under French law serves that sentence – subject of course in the case of the respondent to his entitlement to a retrial should he choose to seek one. Applications for surrender are necessary in a democratic society in order to enforce the rule of law.

It is true that the respondent has a large and young family in this State from whom he will of necessity be separated while he serves the sentence in France, but that is, sadly, a feature of many such cases, but it requires something as exceptional as the unique facts and circumstances of the Gorman case to lead to a prohibition of surrender pursuant to the provisions of section 37 of the Act of 2003.

In these circumstances, an order for surrender is not a disproportionate measure. The family rights of the respondent are not interfered with to such an extent as to outweigh the right of the French authorities to seek his surrender.

I will therefore make the order sought.