

## THE HIGH COURT

2008 No. 28 EXT

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND  
ANTHONY ABIMBOLA

RESPONDENT

**Judgment of Mr Justice Michael Peart delivered on the 15th day of October 2008**

1. The surrender of the respondent is sought by a judicial authority in the Federal Republic of Germany under a European arrest warrant which issued there on the 18th February 2005. In unusual circumstances which I shall come to in due course, this warrant was not endorsed here for execution until the 23rd January 2008.

2. The respondent was duly arrested on foot of this warrant on the 29th January 2008, and on the following day the respondent was brought before the Court as required by s.13 of the European Arrest Warrant Act, 2003, as amended. Since that date he has been remanded from time to time on bail, pending the hearing of this application for his surrender.

3. His surrender is sought so that he can serve a sentence of five years and six months' imprisonment which was imposed on him following his conviction on the 25th October 2000 for an offence of rape committed in Germany. That offence is one of the offences listed in Article 2.2 of the Framework Decision, and has been marked on the warrant as being such an offence, and therefore one in respect of which double criminality is not required to be verified. The minimum gravity requirement is satisfied in this case since the respondent has been sentenced to more than four months' imprisonment in respect of the offence.

4. There is no issue raised by the respondent as to his identity, and the Court is in any event satisfied from the evidence on affidavit of Sgt. Linehan who arrested him on the 29th January 2008 that he is the person in respect of whom this European arrest warrant has been issued.

5. Since it is apparent from the documentation in this case that the respondent attended for his trial, even though he had absented himself just prior to conviction and sentence being pronounced by the court in Germany, no undertaking pursuant to s. 45 of the Act is required to be given by the issuing judicial authority.

6. There is no reason under sections 21A, 22, 23 or 24 of the Act to refuse to order surrender.

**Factual Background**

7. Before addressing the Points of Objection being raised by the respondent, I will set out a history of events which form the background to this present application for the surrender of the respondent, and much of which is relevant to the points of objection being submitted.

8. The present application is the second attempt by the authorities in Germany to achieve the extradition of the respondent. The first application proceeded, eventually unsuccessfully, under Part II of the Extradition Act, 1965.

9. It appears that on the 3rd September 2003 a request was made to the Minister for Justice, Equality and Law Reform for the extradition of the respondent under Part II of the 1965 Act, and that early in 2004 certain additional information was received from the German authorities for that purpose. It is a fact, however, that the European Arrest Warrant Act, 2003 came into force here on the 1st January 2004. But it was not until the 24th November 2004 that Part II of the 1965 Act was actually disapplied in respect of the Federal Republic of Germany. On the 18th February 2005, the German judicial authority issued the present European arrest warrant, but that warrant was not transmitted to this State until much later, and the application to achieve the extradition of the respondent continued to be pursued here under Part II of the 1965 Act.

10. One can only assume that a decision was taken at some level here that since the Request for the respondent's extradition under Part II had been received here prior to 1st January 2004, it was appropriate to proceed thereunder, even after the disapplication of Part II in respect of Germany in November 2004.

11. In due course, a warrant under Part II was issued here by the High Court for the arrest of the respondent and he was duly arrested on foot of same on the 19th July 2006. That application took its normal course, and an order for his extradition was duly made by the High Court. That decision was successfully appealed to the Supreme Court. The respondent had spent some sixteen months in custody before being released by the Supreme Court by its order dated 28th November 2007. His release was ordered since Part II of the 1965 Act had been disapplied in respect of Germany as of the 24th November 2004 by Statutory Instrument 725/2004, and the High Court therefore had no jurisdiction to make the order for extradition under that Act, on the date on which it so ordered, even though the Request was received here prior to the coming into force of the European Arrest Warrant Act, 2003 on the 1st January 2004.

12. As of that time the European arrest warrant had already been issued in Germany but not acted upon, as I have stated. But it was in due course transmitted to this State on the 17th January 2008 following upon the said decision by the Supreme Court, and was later on the 23rd January 2008 endorsed for execution by the High Court, following which the respondent was again arrested on the 29th January 2008 and brought before the High Court, when, as I have stated already, he was remanded *on bail* to await the hearing of the present application for his surrender on foot of same.

**Objections raised**

13. A number of objections arising from these events have been raised in Points of Objection filed by the respondent.

**Warrant not "duly issued" under German law**

14. It is contended first of all that there may have been some difficulties of a constitutional nature under German law in relation to the issue of this warrant at the time it was issued on the 18th February 2005, and it is speculated by the respondent that this may have been the reason why that warrant was held back so to speak, and that the application for surrender proceeded under Part II of the 1965 Act. No evidence has been adduced on this application from any legal or other expert from Germany or elsewhere in this regard. It is however a fact that the respondent, through his solicitors, sought information from the applicant as to the reason why the present warrant was not proceeded with following its issue, and that the applicant declined to provide any information as to the

reason in that regard. In due course an application was made by the respondent by way of Notice of Motion in order to compel the applicant to provide this and certain other information, but that application was refused by this Court.

15. Kieran Kelly BL on behalf of the respondent has submitted that the respondent has been denied fair procedures by this refusal of the applicant to provide information as to the reason why the initial application was not proceeded with under the European arrest warrant.

16. In my view there is no evidential basis for this point of objection. It is mere speculation by the respondent. It is not incumbent upon the issuing judicial authority to justify the manner in which it proceeded at that time. If the respondent wishes to mount an objection of this nature, he is of course entitled to do so, but the onus is upon him to do so by the adducing of the necessary evidence to support it. The discharge of that onus is not dependent on obtaining information or admissions from the applicant, and by extension, the German authorities. If the respondent is correct that there was some constitutional difficulty in Germany in relation to the issue of European arrest warrants at the time this warrant issued, this is a matter of German law, which could be supported by an affidavit from a German lawyer. No such evidence has been put forward. I reject this point of objection.

#### **Section 10 of the Act**

17. The second objection is under s. 10 of the Act. In that regard it is submitted that the respondent is not someone who fled the issuing state after the imposition of sentence and before serving that sentence, since he left that jurisdiction before conviction and sentence. It is submitted therefore that he does not come within s. 10(d) of the Act, which provides:

*"10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—*

*(a)*

*(b)*

*(c)*

*(d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she—*

*(i) commenced serving that sentence, or*

*(ii) completed serving that sentence,*

*that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."*

18. Paragraphs (a), (b) and (c) do not apply in this case.

19. Mr Kelly has referred to my comments in my judgment in the case of *Minister for Justice, Equality and Law Reform v. Tobin*, (Unreported, 12th January 2007), when I expressed some views about the way this section was worded, indicating my view in that judgment at that time, that the section covered certain categories of persons and that there was "logical time sequence" apparent from the way the section was worded. In that regard, I stated at p.11 of my judgment:

*".....the entire of section 10 appears to follow a logical time sequence. Paragraph (a) refers to a situation where the person sought may not even have been charged but is wanted to face prosecution, and where a decision has been made to prosecute. Paragraph (b) refers to a time after indictment where a person is subject to proceedings and where a trial has not yet taken place. Paragraph (c) refers to a case where the trial has taken place, but sentence has not yet been passed. Paragraph (d) then covers a situation where both conviction and sentencing has taken place and the person has "fled" before that sentence was served."*

20. These remarks are 'obiter' in nature, and in his judgment on the appeal to the Supreme Court in *Tobin*, Fennelly J. considered what was stated in this regard, again on an 'obiter' basis, and stated:

*"... Peart J. considered that the sentence imposed, in order to come within paragraph (d) must have been imposed prior to the flight. I am not convinced that this is necessarily so. That paragraph may equally apply where the sentence has been imposed at the time the European arrest warrant is issued. However, I prefer not to express a concluded opinion..."*

21. Clearly the meaning to be given to s. 10(d) of the Act is a matter not yet concluded definitively. However Mr Kelly seeks to rely on what was stated by me in *Tobin*, since it is clear that the present respondent left Germany immediately prior to his conviction and sentence being pronounced. It is necessary therefore to revisit the question of whether the respondent in those circumstances is someone who comes within s. 10 of the Act. Ultimately the *Tobin* decision rested upon the precise meaning to be given to the word "fled" used by the Oireachtas in the section. The respondent in this case does not make any assertions on affidavit that he did not leave the jurisdiction of the German courts in circumstances amounting to fleeing. The only question arising in the present case is whether he comes within the section at all given that he left the jurisdiction before he was convicted and sentenced.

22. I have no doubt at all that it was intended by the Framework Decision that a person in the position of the respondent should be amenable to an order of surrender so that he can serve the sentence lawfully imposed upon him. But that is not determinative since the Framework Decision does not have direct effect, and required the 2003 Act to give effect to it. What the Oireachtas intended by the Act is to be gleaned from the precise words used in the Act to express that intention. Nevertheless the Act must be interpreted as far as possible having regard to the aims and objectives of the Framework Decision unless to do so would be '*contra legem*'.

23. The question which arises therefore on this application is whether s.10 (d) of the Act, as enacted, can be given a meaning which conforms to the intention of the Framework Decision that the respondent should be surrendered to serve this sentence imposed upon him after he fled Germany, without that interpretation being so strained as to be contrary to the express provisions of s. 10(d) of the Act, and therefore '*contra legem*'. It is not for this Court to give the provision such a purposive or expansive interpretation so as to fill some lacuna in the section. It is for the Oireachtas to amend its legislation if there be such a lacuna.

24. The decision both in the High Court and the Supreme Court in *Tobin* turned essentially on the meaning to be given to the word

'fled' in s. 10(d) of the Act. That decision was not concerned so much with the time at which that respondent left Hungary, but rather as to whether or not he 'fled'. The present case is different, since there is no evidence offered or suggestion made that the respondent did not flee.

25. I am quite satisfied that what I stated in Tobin in relation to the sequencing of the paragraphs in s.10 cannot be regarded as the final word on the matter, and that, as Fennelly J. suggests in his judgment in Tobin, the precise and clear words of the section can be read as indicating in paragraph (d) that a European arrest warrant may be issued following the imposition of a sentence simpliciter, whether or not the person left before or after the imposition of sentence. That meaning is clearly open on the plain and ordinary meaning of the words of the section. Such an interpretation is also clearly consistent with the aims and objectives of the Framework Decision. For example, Recital (5) thereof states:

*"...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." (my emphasis)*

26. In addition, Article 1 states:

*Article 1. Definition of the European arrest warrant and obligation to execute it*

*The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. (my emphasis)*

27. In my judgment in Tobin I stated in relation to s. 10(d) of the Act:

*"... that paragraph speaks specifically of 'a person... (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence ... and who has fled...before he or she (i) commenced serving that sentence, or (ii) completed serving that sentence."*

*"I am satisfied that by the plain and ordinary meaning of these words, the fleeing must occur following the imposition of sentence, and not as in this case, where the respondent left before his trial."*

28. I am no longer content that this statement, albeit obiter, is correct, and that paragraph (d) is so limited. I am satisfied that paragraph (d) can also include a situation such as the present one where the respondent has fled the issuing state before the sentence was imposed. That meaning can be seen from the plain and ordinary meaning of the words used in the section. That meaning is also in conformity with the objectives of the Framework Decision as gleaned therefrom. No absurdity arises.

29. I am satisfied therefore that this point of objection fails.

#### **Delay in proceeding under the European arrest warrant**

30. The second objection arises from the length of time which has passed from the date of issue of the European arrest warrant on the 18th February 2005, and before it was acted upon following the decision of the Supreme Court in November 2007 in relation to the Part II application. It is submitted that this delay has displayed such an ignoring of the urgency and expedition with which these warrants are to be dealt with, as provided for in Article 17 (1) of the Framework Decision, that this Court should refuse to make the order for surrender, since it is now at this stage not possible to execute same in accordance with the dictates of the Framework Decision.

31. That Article provides:

*"(1). A European arrest warrant shall be dealt with and executed as a matter of urgency."*

32. Mr Kelly refers to the provisions of s. 10 of the Act again, but this time to the fact that the section provides that:

*"10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—*

*(a)*

*(b)*

*(c)*

*(d)*

*that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."*

33. Mr Kelly submits that this Court is therefore required to ensure that surrender occurs not only in accordance with the provisions of the Act but also the Framework Decision, and that where there has been a breach of the requirement for urgency set forth in Article 17, the Court has no jurisdiction under the Act to order surrender. Mr Kelly relies also on the fact that the applicant has refused to provide any explanation for this delay in dealing with European arrest warrant and executing it, and that it cannot therefore be simply presumed that the reason why it was not acted upon is that a decision had been made somewhere to continue to seek extradition under Part II of the 1965 Act.

34. Remy Farrell BL has submitted on the applicant's behalf that it was clearly the decision to proceed by way of Part II of the 1965 Act, albeit an incorrect decision, that resulted in the European arrest warrant lying fallow for so long. Nevertheless he submits that the respondent was never entitled to be told by way of replies to particulars, what precisely the reason was, and that the statement in Article 17 of the Framework Decision as to the need for urgency in the manner in which European arrest warrants are dealt with is not something upon which a respondent can rely in order to resist an order for surrender being made.

35. In my recent judgment in *Minister for Justice, Equality and Law Reform v. O'Fallúin*, (Unreported, High Court, 8th October 2008), I

reached a conclusion on the same point of objection as follows:

*"My view is that Article 17 of the Framework Decision reflects the fact that Member States when adopting same, wanted to put in place a new simplified and expeditious system of surrender between Member States in order to replace existing arrangements which were seen to result in complexity and delay. The Framework Decision contains both mandatory and non-mandatory grounds for refusal of surrender. Delay between the issue of the European arrest warrant and the transmission and execution of same is not such a ground, either mandatory or non-mandatory. Article 17 represents more an intention by Member States that when one Member State seeks the surrender of a person from another Member State, the latter will deal with it expeditiously, since one of the purposes of the new arrangements was to simplify and speed up the process of surrender. The respondent gains no rights from that provision in the Framework Decision as such. There are of course procedures and time limits referred to therein, and some of these are to protect an arrested person's fundamental rights, and have been reflected in the Act, as for example in Rimsa v. the Governor of Cloverhill Prison, (Unreported, Supreme Court, 23rd July 2008), where surrender was not completed within the time-frame contained in the Framework Decision. But others are simply reflective of the intention as to the surrender arrangements between Member States, and if there is a breach in that regard it is a matter of complaint by an issuing member state, and not the respondent.*

*Were a Member State to persistently ignore the need for urgency in the manner in which European arrest warrants are dealt with following transmission to that State of such warrants, and thereby fail to adhere to one of the purposes and aims of the Framework Decision, an issuing state or states may make complaint in that regard to the European Council, and the provisions of Article 17 (7) can apply, which provide:*

*(7). Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level."*

36. I have no reason to reach a different conclusion on the facts and submissions in the present case.

37 In my view, the situation in the present case, where the issuing state for whatever reason did not transmit a warrant to this State for some three years after its issue, is not something upon which the respondent can rely under the Framework Decision in order to resist the order for surrender, even though s.10 of the Act requires that a person be arrested and surrendered in accordance with both the Act and the Framework Decision.

38 This ground of objection fails.

**Surrender prohibited under s. 37 of the Act – no guarantee that time spent in custody already will be credited against the sentence to be served in Germany**

39. This objection arises because the respondent was in custody here on foot of the Part II application for a period of some sixteen months before being released by the order of the Supreme Court to which I have already referred. He has been trying to obtain a confirmation from the applicant that if surrendered he will be given credit for that time spent in custody here against the sentence of imprisonment to be served in Germany. No such confirmation has been forthcoming either from the applicant or from the German authorities.

40. The Framework Decision at Article 26 provides for such a deduction in respect of any period spent in custody *on foot of a European arrest warrant*. That Article provides:

*"Article 26: Deduction of the period of detention served in the executing Member State.*

*1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.*

*2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."*

41. The position is therefore clear in respect of European arrest warrants. But, as Mr Farrell has pointed out, there was never such a provision in Part II of the 1965 Act. Whether as a matter of practice, persons extradited under Part II, or even Part III, of the 1965 Act were given credit for time spent in custody prior to extradition or surrender, is a moot point, and I have no knowledge or evidence in that regard. But what is clear is that firstly the respondent has no entitlement either under the Act itself or the Framework Decision to an undertaking or other assurance that upon surrender he will be given credit for time spent in custody here while the Part II application went ahead unsuccessfully. No doubt the Member States did not anticipate this type of situation arising. But I am concerned only with whether he is entitled to be provided with this confirmation or assurance on this application, and whether in the absence of it being provided, *"it would be oppressive, contrary to due process and fair procedures and would contravene his constitutional rights"* to order his surrender, as has been submitted in the respondent's helpful written legal submissions.

42. I am satisfied that the respondent is not entitled to be provided with this confirmation in advance of surrender being ordered. If the custody period had been on foot of a European arrest warrant, no such further confirmation would be required as the Framework Decision provides for the deduction, and the issuing state must comply with its obligations thereunder. Under the previous extradition arrangements given effect to in Part II and Part III of the 1965 Act, it was never considered to be a breach of constitutional rights that there was no guarantee of such a deduction being given. It cannot suddenly become one now, simply because of the unusual history of this case. It will be a matter for the respondent to take up with the authorities in Germany upon surrender. This point of objection fails.

**Surrender should be refused since the issuing state has refused to provide certain information sought by the respondent**

43. The respondent sought certain information from the applicant by letter dated 8th April 2008. When that information was not provided, the respondent sought an order from this Court that the information be provided. This Court refused to make such an order, since there was no entitlement to such information, in particular since none of the information was necessary in the interests of due

process, fairness or otherwise, in relation to any point of objection being raised by the respondent. I am satisfied that the failure to provide the information sought does not disentitle the applicant to the order for surrender in this case, and his surrender is not thereby prohibited under Part III of the 2003 Act.

44. For all these reasons I am satisfied that this Court is required to make the order sought for the surrender of the respondent, and I will so order.