

THE HIGH COURT

Record No.: 2012/232 Ext.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Between/

THE MINISTER FOR JUSTICE & EQUALITY

Applicant

-AND-

B.H.

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 25th day of September 2013

Introduction:

The respondent is the subject of a European arrest warrant issued by Germany on the 5th March, 2012. The warrant was endorsed by the High Court for execution in this jurisdiction on the 22nd August, 2012, and it was duly executed on the 15th January, 2013. The respondent was arrested by Sergeant Martin O'Neill on that date, following which she was brought before the High Court on the same day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter, the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing. However, before the matter came on for hearing the respondent's bail was revoked in circumstances where she had breached the terms of her bail. She had deliberately failed to answer her bail as a result of which this Court had had to issue a bench warrant for her arrest. She was duly arrested on foot of that bench warrant and brought before the Court which then remanded her in custody. As the respondent was the sole carer of a ten year old child at the time, i.e., her daughter A.B, it was necessary for the arresting Garda at the time of arrest to also invoke s. 12 of the Child Care Act 1991 and bring the child to a place of safety. In circumstances where there was nobody else to look after the child the Health Service Executive (hereinafter "the H.S.E.") initiated care proceedings and A.B. was taken into care initially on foot of an Emergency Care Order granted by the District Court and placed with foster parents, where she currently remains. However, there is no longer any compulsory Care Order in place as the respondent has since agreed to the continued placement of A.B. with the said foster parents on a voluntary basis under s. 4 of the Child Care Act 1991.

The respondent does not consent to her surrender to Germany. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive her. The Court must consider whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 Issues

The Court has received an affidavit of Sergeant Martin O'Neill sworn on the 14th May 2013 testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. Sergeant O'Neill has stated that he is satisfied that the person named in the warrant is the same person that he arrested, namely B.H.. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity of the respondent.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

I am satisfied following my consideration of these matters that:

- (a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the Act of 2003;
- (b) the warrant was duly executed;
- (c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
- (d) the warrant is in the correct form;
- (e) the warrant purports to be a prosecution type warrant and the respondent is wanted in Germany for trial in respect of the twenty two offences particularised in Part E of the warrant, which may be broadly characterised as consisting of twenty one fraud type offences and one offence of attempted arson;
- (f) the underlying domestic decision on which the warrant is based is a "pre-trial custody" type arrest warrant issued on the 25th of January, 2012 by the "Local court Traunstein" bearing reference no 5 Gs 132/12;
- (g) the issuing judicial authority has invoked paragraph 2 of article 2 of Council Framework Decision 02/584/J.H.A. on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of all of the offences listed in Part E, by the ticking of boxes in Part E.I of the warrant relating to "fraud" and "arson". Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (i.e. that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence;

(h) the minimum gravity threshold in a case in which para. 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It is clear from Part C (1) of the warrant, read in conjunction with the information concerning the nature and legal classification of the offences set out within Part E that offences no's 1 to 21 with the exception of offence no 19 all carry a potential penalty of up to 10 years imprisonment, offence no 19 carries a potential penalty of up to 5 years imprisonment, and offence no 22 carries a potential penalty of up to 15 years imprisonment. Accordingly, the minimum gravity threshold is comfortably met in every instance.

(i) the description of the circumstances in which the offences in question were committed as set out in the warrant as follows:

"Time of the offence/period of time of the offence: September 24th, 2008 - August 21 2011

Crime scenes: 83125 Eggstätt

Facts of the case:

At the subsequent points in time, the accused obtained, pretending her ability and her willingness to payback, loans from the named aggrieved parties and did not pay them back in accordance with her previous intention; that caused a corresponding damage:

1. On September 24th, 2008, a loan in the amount of 500 Euro by Hildegund Heller.
2. In the end of October 2008, a loan in the amount of 10,000 Euro by Hildegund Heller.
3. In December 2008, a loan in the amount of 4,500 Euro by Hildegund Heller.
4. On September 3rd, 2010, a loan in the amount of 2,000 Euro by Alfred Pohner.
5. In early spring 2011, a loan in the amount of 3,000 Euro by Bernhard Hering.

At subsequent points in time, the accused ordered, pretending her ability and willingness to pay and stating the name of her sister, I.H., various goods via the internet and did not pay them in accordance with her previous intention. This caused a corresponding damage.

These are the following cases:

6. On December 16th, 2010, shoes at a price of 199.90 Euro at Zalando Shoes and Fashion Online in the Sonnenburger Str. 73 in 10437 Berlin.
7. On December 16th, 2010, unknown goods in the value of 74.75 Euro at the Sanetta Gebr. Ammann GmbH & Co. KG in the Sanettastr. 1 in 72469 Meßstetten.
8. On December 16th resp. 17th, 2010, various goods in a total value of 113.93 Euro at the Hugendubel publishing group Weltbild GmbH, Steinerne Furt 70 in 86131 Augsburg.
9. On December 20th, 2010, DVD's and a Schleich-Figurine in a total value of 93.97 Euro at the Buecher.de GmbH & Co. KG, Steinerne Furt 65 a in 86167 Augsburg.
10. On December 21st, 2010, foodstuffs in a total value of 174.25 Euro at the Gustini GmbH, Stallbaumstr. 11 in 04155 Leipzig.
11. On December 28th, clothes in the value of 72.75 Euro at the Erwin Muller mail order company GmbH, Buttstr. 2 in 86647 Buttenwiesen.
12. On January 4th, 2011, clothes in a value of 58.70 Euro at best-underwear.de, Guterreihe 2 a in 04736 Waldheim.
13. On January 6th, 2011, unknown goods at a price of 92.85 Euro at Land's End, In der Langwiese, 66693 Mettlach.
14. On January 7th, 2011, clothes in the value of 276.39 Euro at the Cyrillus Germany GmbH, Limitenstr. 31 in 41236 Mönchengladbach.
15. On January 11th, 2011, clothes in the value of 141.75 Euro at the Bon A Parte GmbH, Bei der Stadtwassermühle 7 in 20355 Hamburg.
16. On February 28th, 2011, unknown goods at a price of 47.85 Euro at the Esprit retail B. V. & Co. KG, Esprit-Allee 1 in 40882 Ratingen.

At subsequent points in time, the accused stole the following items from the estate Priener Street 15 a in 83125 Eggstätt in order to permanently keep those illegally for herself:

17. Around July 12th, 2011, 50 Euro in cash from the purse of Barbara Hein.
18. Around July 12th, 2011, three golden necklaces in a value of ca. 600 of Barbara Hein.
19. Around July 17th, 2011, a key to the p. o. box of the aggrieved party K.H.

20. With this key, she then got access to the p. o. box and stole from there postal items that were addressed to I.H. and K.H.

21. Around July 20th, 2011, six rings in the total value of ca. 1000 Euro of I.H.

22. On August 21st, 2011, around 2:20 a.m., the accused threw a sock that had been soaked with fire accelerant and lighted through the inclined terrace door of the estate of her brother K.H. in the XXX in XXX onto the kitchen table. According to her previous intention, the sock burned on the kitchen table with a flame of ca. 40 cm. Thereby, she had at least anticipated and tacitly accepted that the building itself would start burning without further intervention."

There is no reason, upon a consideration of the underlying facts as set out above, to believe that the ticking of the boxes relating to "fraud" and "arson" respectively was in error;

(j) no issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(k) there are no circumstances that would cause the Court to refuse to surrender the respondent under s.21A, 22, s.23 or s.24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 6) Order 2004 (S.I. No. 532 of 2004) (hereinafter "the Designation Order of 2004"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 and the Schedule to the Designation Order of 2004, "Germany" is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision.

Points of Objection

The respondent relies upon just one substantive point of objection. She argues that the Court should regard her surrender as being prohibited under s. 37(1) of the Act of 2003 because her surrender would be a disproportionate measure in terms of any legitimate aim being pursued in that it would breach her right to respect for family life, and the cognate and corresponding right to respect for family life of her daughter, guaranteed under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the Convention" or "the ECHR")

The Respondent's Evidence

The respondent relies upon an affidavit sworn by her in these proceedings on the 13th of May 2013, and deposes to the following matters:

"3. I was born on 17th September 1961 in XXX in XXX, Germany. I was the eldest of three siblings, one brother and one sister. My father was an engineer, my mother used to work part time. From my early childhood I had to take on a lot of responsibilities, such as minding my siblings. Things became easier for me when my grandmother moved in with us. All in all my childhood has been happy and my parents taught me to value education, music and arts.

4. School has never been a problem and I finished the German equivalent of high school with good grades and permission to go to university. While waiting for a place in XXX University, I started a management internship at Hotel Hilton International in XXX. Despite my parent's offer to contribute towards my costs of living I managed to be independent.

5. I finished university with a degree in Business Administration in 1987 and started my professional life as a junior consultant at XXX. In my 12 years with this company I have been working in Hong Kong, Cape Town and Milan. I got married to a co-worker in 1990 but got divorced in 1997. During my marriage I signed as guarantor in order for my husband to get a loan and after he stopped making payments I was left with a debt of over 120.000 Deutsch Marks (€60.000) which I had to pay back on my own.

6. In 1999 after a severe burn -out I decided to move to Dublin where I started working with XXX. This was a new experience with regular working hours, new friends as well as a new relationship. To my utter surprise and joy I got pregnant in 2002 at the age of 41. Unfortunately, my partner suddenly realised he was not up to having a family and moved to Australia.

7. On 3rd October 2002 I gave birth to a healthy baby girl, my daughter A.B. After a few months of consideration I decided to move back to Germany. Child-care options in Dublin were not ideal at the time and as a sole carer I had to go back to work as soon as possible. I started a new job with XXX, XXX and my parents took care of A.B. during the days. Creating a stable environment for my child has always been an absolute priority for me but there has always been the strong wish of move back to Ireland. When A.B. was one year old she developed a serious kidney infection and a year later she had surgery, called "reflux plastic". In her first three years she has been in and out of hospital but eventually and to our relief she got the all clear. As A.B.'s father has never provided any contact details and never paid any child maintenance, finances have always been tight. At the age of three, A.B. attended kindergarten and later primary school. Since an early age she turned out to be an exceptionally intelligent and curious child and I did everything I could to make sure she gets the education and love she needed and deserved.

8. Despite the loving care of her grandparents, A.B. and I have always been extremely close. We understand each other perfectly and spent quality time together, going to concerts, mountain hiking or travelling.

9. In 2009, after having suffered three strokes, my father's health began to deteriorate and within a very short time he needed care 24/7. My mother, who has been in and out of hospital herself, has not been able to provide the necessary care on her own. I therefore gave up my job to support my parents during this difficult time. In mid 2009 we received the devastating news that my father was also suffering from Parkinson's disease which made it almost impossible to reason of communicate with him. This has also affected A.B. who loved her grandfather dearly and watching him suffer has not been easy for her. She wanted to be involved and tried to help by taking up little chores such as giving him drinks or reading stories to him. My siblings thought this was not a healthy environment for a child and kept interfering in a very annoying way. I always believed it is important for children not to be left out, it is just what life is about – caring for loved ones. Money has always been an issue for my siblings and despite the fact I have had only disadvantages by staying at home and being not only daughter, but also nurse and above all a mother, there have always been worries

there might not been much left to inherit for my siblings and their partners.

10. The stress has of course taken its toll and no human being can go on without sleep for long. In order to spend more time with A.B. and to get some rest myself, my mother and I decided to move my father to a nursing home. After three months we took him back home. I felt terribly guilty and could not bear leaving my father in the care of strangers.

11. During this time I told A.B. a lot about Ireland and she insisted that one day we will move back. We have visited friends in Dublin twice and she was excited about being born in Ireland. She used to tell her classmates about her plans and even her teacher approached me once because A.B. has told her we would move to Dublin soon.

12. On 10th July 2011, my father passed away and left my mother, A.B. and myself empty and incredibly sad. Although I was quite reluctant to leave my mother alone as she has serious health issues herself, we finally decided to move back to Dublin. My mother even encouraged me to finally do what I wanted and not to stay with her out of duty.

13. We left Germany on 31st August and restarted our life in Ireland. The first few months were not easy as A.B. was in a new environment, new school, new friends. However, she has managed everything surprisingly well and in many ways is coping far better than I do. After only a few months in school she even wrote a book and since then she has been "flying" through school. She made many friends and her class teacher is full of praise. We both love music and poetry and I have therefore encouraged her to take violin lessons. In her own words, the violin and a voucher for School of Irish Music have been the "best Christmas present ever". We have always been very close but the experience of moving to Ireland and starting a new life has made us inseparable. On Sundays we attend mass at XXX church in XXX. Her grandmother visited twice, for Christmas and Easter.

14. Then, a few days before Christmas last year while A.B. and I were doing some baking and other preparations together with a few of A.B.'s friends, I got a phone call from the Gardaí and later Det. Sergeant M.O.N. called the house and presented a European Arrest Warrant. My world fell apart. Since then I am living in fear and the stress is unbearable. I decided to tell my mother and she also agreed to try everything possible for us to stay in Ireland. She made it clear however that she won't be able to take care of A.B. in the event I am extradited. Whereas I did not initially tell her about my situation I have asked A.B. where she wanted to live in case something happened to me and she told me in no uncertain terms she would never leave Ireland.

15. A.B. noticed my stress and has repeatedly asked me why I was so sad. However, I just could not tell her the truth. She kept saying "as long as we are together, nothing can happen to us". The only important thing in my life is the wellbeing of my child. Being separated from me would take her world apart and destroy a confident, happy child.

16. Eventually, last Tuesday, 7th May 2013, after A.B. had repeatedly asked me why I am so sad I finally talked to her and informed her about this whole matter and my predicament. Unsurprisingly, this came as devastating news for her and since then her whole world has been crumbling. She refuses to eat and somehow thinks it is all her fault. She even told me she would not want to live without me and I feel I have to constantly watch her out of fear she would do something stupid.

17. Whereas going back to Germany to clear my name is important to me because I am not an arsonist and haven't done anything wrong. However I am extremely worried about A.B. and have sought counselling for her. Unfortunately, there are no appointments available within the next three weeks. We have to try and do everything to help her through this and give her time to get used to the new situation with professional help. I cannot imagine it is in anyone's interest to destroy a confident, happy child.

18. The only important thing in my life is the wellbeing of my child. Being separated from me would take her world apart. I have given a lot of thought to where A.B. would live and what would become of her should I be surrendered. Apart from my mother who is not well herself and my siblings who are utterly unsuitable as parents and music, arts and religion are considered unnecessary, there is no one left in Germany who could look after her and nobody who is willing to do so. While we are friends with some of her classmate's parents t [sic.] there is nobody who could or would act as a guardian should I have to leave her.

19. I am the sole carer and being more or less on our own, we have the strongest bond. If I am surrendered I believe the effect on A.B. would be absolutely devastating and unimaginable. If it was only I who was to be considered I would not be as worried but I beg the court to consider if a child's welfare does not outweigh any other issue and ask for the decision to be adjourned .until the end of this school term.

20. I ask the court to give both of us a chance and not to order my surrender. In any event I request that A.B. should be allowed to finish her school term and attend a counselling [sic.] and for me to have a chance to help her through this terrible ordeal. I am not running away from the situation, quite the opposite. I have always fulfilled my bail terms and never made any attempt to avoid prosecution. I am not at all using my child to avoid extradition but this is about A.B.'s wellbeing and development.

21. I am most concerned and I humbly ask for a full and fair consideration of my plight and of A.B.'s situation."

The Health Service Executive Social Work Report

In circumstances where the article 8 rights of both the respondent, and her daughter A.B., are being relied upon in the context of an objection to surrender based on s. 37(1) of the Act of 2003, this Court requested the Central Authority to obtain a report from the Child and Family Services section of the H.S.E. concerning possible arrangements for A.B. in the event of the respondent being surrendered to Germany. In response, the Court has been provided with a detailed and most helpful report by a Ms Máiréad Egan, Social Worker, dated the 26th of July 2013.

This report sets out the background to H.S.E. involvement with the H. family and confirms that if the respondent is not extradited to Germany there is no basis to suggest that she is in any way unfit to care for her daughter A.B.. The report sets out the current position with respect to A.B.'s placement with foster parents, and reports on both the respondent's own views, and A.B.'s views, concerning their present situation and as to how A.B. might be cared for in the event of the respondent being surrendered to Germany. The report then continues:

"12. If B.H. is extradited to Germany, and remains in custody, the two most important factors for A.B. are:

- (a) The care-giving that she receives while her Mother is in prison; and
- (b) Maintenance of a relationship with her Mother.

Given that A.B. has only been living with her foster family in Ireland for a very short period, it is unlikely to cause her any extreme disruption to move to Germany. Additionally, A.B. lived in Germany until two years ago, and therefore she is likely to re-integrate into the education system with minimum disruption. She is fluent in the German language.

13. Although A.B. has presented as nervous regarding the option of a foster family in Germany, which is very understandable given all of the uncertainty and unknowns in her life of late, A.B. has presented as very adaptable and resilient, and is likely to adapt well to a new home.

14. In terms of a placement with family, there are a number of familial relationship difficulties which may impact negatively on A.B.. Although it is often best to place children with family members, given what appears to be extremely fraught extended family relationships, in this instance, it may not necessarily be in A.B.'s best interest to be placed with family. However, it must be noted that A.B. herself identified her Grandmother as the person she would like to live with. The Social Work Department would therefore like to continue to explore this as a possible option with B.H., should there be definite plans to extradite her to Germany.

15. A.B. does not have contact or a relationship with her father, who apparently lives in Australia. Her paternal Aunt and Grandmother live in the United Kingdom, and A.B. has very little contact with them. In terms of placements, the Social Work department are of the view that a paternal family option would not be in A.B.'s best interest, as it would not facilitate regular contact with her Mother.

H.S.E. contact with International Social Services:

16. To progress the Health Service Executive's inquiries, Ms Máiréad Egan, Social Worker made contact with and provided information to the International Social Services (ISS) office in Ireland. It is through the ISS that a link with local Child Protection agencies in other jurisdictions is best achieved.

17. The local Child Protection Agency in Germany with responsibility for XXX (where the H. family reside) have been asked about the following:

- a. The legal situation regarding children going into State care in Germany, (whether B.H. could agree to A.B. going into state care; or whether the German Child Protection Services need to apply to the Courts for an Order admitting the child to state care).
- b. If B.H. were to be extradited to Germany and imprisoned there, would the German Social Services be willing to:
 - i. Meet with family members in Germany, in consultation with B.H. to explore the possibility of a family placement for A.B.. However, Mairead Egan Social Worker made clear that she is not currently requesting that this visit definitely take place, as B.H. has not consented to it at present.
 - ii. If B.H. continues to be unable to identify a family member to care for A.B., would the German Child Protection services look at the option of State care for A.B..

18. The Health Service Executive will work with B.H. around the possible option of her family caring for A.B., should she be extradited to Germany and is placed in custody. Given the fact that B.H. is currently not open to any family members or members of her extended network caring for A.B., alternative care arrangements in Germany will also need to be explored. The Health Service Executive have been advised that the High Court is imminently seeking a plan from them regarding A.B.'s care arrangements should her Mother be extradited to Germany, and the Health Service Executive have sought the German Child Protection Agencies' assistance in putting this plan in place.

19. Máiréad Egan, Social Worker received a phone call from U.S. of the International Social Services Office in Germany on the 26th of July 2013. Ms Schwarz stated that she contacted the responsible Youth Welfare Office in XXX (the relevant equivalent of the Social Work Department) on the 26th July by telephone on a number of occasions however U.S. has received no response from them. U.S. has sent the Youth Welfare Office in XXX this Social Work Report and requests by post. U.S. will be back in the office on Tuesday the 30th July and she will follow up this matter at that point.

Conclusion and Summary

20. Should B.H. be extradited to Germany, the Health Service Executive believes that it would be in A.B.'s best interest for her to also return to Germany with her Mother. This is in order to give A.B. the best possible opportunity to maintain her relationship with her Mother through regular contact.

21. A.B. has identified her maternal Grandmother as the person she would like to care for her in Germany. B.H. does not want her Mother to care for A.B., however, nor can she identify any other appropriate carer. M.E. Social Worker would like to explore familial options further with B.H.. The alternative is that A.B. would go into the care of Social Services in Germany, and live with a foster family there. Máiréad Egan, Social Worker made contact with the International Social Services, who have sent a report to the affiliated office in Germany regarding this case.

22. In the event that B.H. is extradited to Germany, the Health Service Executive will continue to liaise with the International Social Services and the German Child Protection Authorities to arrange the most appropriate care placement for A.B. in Germany. Until the most suitable care arrangement that is in A.B.'s best interests is identified, and a concrete plan is put in place in relation to A.B., the Health Service Executive plans for A.B. to remain in her current foster care placement in Ireland. When a suitable placement is identified in Germany, the Health Service Executive will ensure that the necessary travel and supervisory arrangements are put in place for A.B.."

The Child's Wishes

The Court was asked to, and agreed, to receive a letter from A.B. so that her wishes with regard to her future care might be taken into account. I confirm that I have received such a letter dated the 10th September 2013. I do not propose to recite its contents although I have taken full account of everything urged upon me by A.B.. It is sufficient to state that she is particularly worried about the possibility of her mother being imprisoned in Germany and concerning the difficulty she would have in visiting her and seeing her in that event.

Relevant Statutory and Convention Provisions

S. 37(1)(a) of the Act of 2003 provides:

"A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention,"

S.37(2) defines "Convention" as follows:

"In this section—

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994"

Article 8 of the ECHR provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Applicable Legal Principles

In my recent judgments in *Minister for Justice and Equality v T.E.* [2013] I.E.H.C. 323 (Unreported, High Court, Edwards J, 21st June 2013) and *Minister for Justice and Equality v. R.P.G.* [2013] I.E.H.C. 54 (Unreported, High Court, Edwards J, 18th July 2013) this Court conducted an extensive review of relevant Irish, English, and European Court of Human Rights (hereinafter "E.Ct.H.R") case law and sought to distill from that jurisprudence a series of principles for application both in those and in future cases.

Among the cases reviewed were *Minister for Justice, Equality and Law Reform v. Gorman* [2010] 3 I.R. 583; *Minister for Justice, Equality and Law Reform v. Gheorgie* [2009] IESC 76 (Unreported, Supreme Court, Fennelly J, 9th April 2009); *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J, 5th April 2011) ; *Launder v. United Kingdom* (1997) 25 E.H.R.R. CD67; *King v. United Kingdom* [2010] E.C.H.R. 164; *Babar Ahmad and Others v United Kingdom* [2012] E.C.H.R. 609 ; *Huang v. Secretary of State for the Home Department* [2007] 2 A.C. 167; *Zigor Ruiz Jaso v. Central Criminal Court (No 2) Madrid* [2007] E.W.H.C. 2983 ; *Norris v. Government of United States of America (No 2)*, [2010] 2 A.C. 487; *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166 ; *R.(H.H.) & (P.H.) v. the Deputy Prosecutor of the Italian Republic, Genoa, also R.(F-K) v. Polish Judicial Authority*, [2012] 1 A.C. 338 and *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24 (Unreported, Supreme Court, 15th of May 2013 – in particular the judgment of McKechnie J.) This represents an indicative, but by no means exhaustive, list of the cases and judgments reviewed.

As a result of its review the Court was satisfied to set forth and adopt the following principles of law for application in the European Arrest Warrant context in cases where article 8 is engaged:

1. the test imposed by article 8(2) is not whether extradition is on balance desirable but whether it is necessary in a democratic society;
2. there is no presumption against the application of article 8 in extradition cases and no requirement that exceptional circumstances must be demonstrated before article 8 grounds can succeed;
3. the test is one of proportionality, not exceptionality;
4. where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;
- 5 in conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against the level of respect to be afforded generally to the private and family life of persons;
- 6 rather, the assessment must be individual and particular to the requested person and family concerned. The correct approach is to balance the public interest in the extradition of the particular requested person against the damage which would be done to the private life of that person and his or her family in the event of the requested person being surrendered;
7. in the required balancing exercise the public interest must be properly recognized and duly rated;
8. the public interest is a constant factor in the horizontal sense, i.e., it is a factor of which due account must be taken in every case;
9. however, the public interest is a variable factor in the vertical sense, i.e., the weight to be attached to it, though never insignificant, may vary depending on the circumstances of the case;
10. no fixed or specific attribution should be assigned to the importance of the public interest in extradition and it is

unwise to approach any evaluation of the degree of weight to be attached to it on the basis of assumptions. The precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case specific assessment. That said, the public interest in extradition will in most cases be afforded significant weight.

11. the gravity of the crime is relevant to the assessment of the weight to be attached to the public interest. The graver the crime, the greater the public interest. However, the opposite effect, namely 'the lesser the crime the lesser the interest' may not follow in corresponding proportion. Where on the spectrum the subject offence may sit, is an aspect of each case which must also be explored as part of the process.

12. the public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing an alien who has been convicted of a crime and who has served his sentence for it, or whose presence in the country is for some other reason not acceptable. This does not mean, however, that the Court is required to adopt a different approach to article 8 rights depending on whether a case is an extradition case or an expulsion case. The approach should be the same, but the weight to be afforded to the public interest will not necessarily be the same in each case.

13. delay may be taken into account in assessing the weight to be attached to the public interest in extradition;

14. in so far as it is necessary to weigh in the balance the rights of potentially affected individuals on the one hand, with the public interest in the extradition of the requested person, on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a proportionate measure both in terms of the legitimate aim or objective being pursued and the pressing social need which it is suggested renders such interference necessary.

15. it is self evident that a proposed surrender on foot of an extradition request will, if carried into effect, result in the requested person being arrested, being possibly detained in custody in this State for a period pending transfer to the requesting state, and being forcibly expelled from the State. In addition, he/she may have to face a trial (and may possibly be further detained pending such trial) and/or may have to serve a sentence in the requesting State. Such factors, in and of themselves, will rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the affected person.

16. article 8 does not guarantee the right to a private or family life. Rather it guarantees the right to respect for one's private or family life. That right can only be breached if a proposed measure would operate to so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful consequences for an affected individual, disproportionate to both the legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and breach the affected individual's rights under Article 8.

17. it will be necessary for any Court concerned with the proportionality of a proposed extradition measure to examine with great care in a fact specific enquiry how the requested person, and relevant members of that person's family, would be affected by it, and in particular to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person.

18. such an exercise ought not to be governed by any predetermined approach or by pre-set formula: it is for the Court seized of the issue to decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise.

19. the demonstration of exceptional circumstances is not required to sustain an article 8 type objection because in some cases the existence of commonplace or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the consequences of the proposed extradition measure for the potentially affected person or persons, rather than on the circumstances giving rise to those consequences.

20. where the article 8 rights of a child or children are engaged by a proposed extradition measure the best interests of the child or children concerned must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance.

21. if children's interest are to be properly taken into account by an extradition court, it will require to have detailed information about them, and about the family as a whole, covering all considerations material to or bearing upon their welfare, both present and future. Primary responsibility for the adduction of the necessary evidence rests upon the party raising article 8 rights in support of an objection to his or her surrender.

22. in an appropriate case, where it is satisfied that there are special features requiring further investigation to establish how the welfare of a child or children might be affected by a proposed extradition measure, and/or as to what the best interests of the child or children in question might require, an extradition court can, of its own motion, seek further evidence.

Analysis

It is necessary to consider the public interest in the extradition of the respondent in the first instance. This is a case in which her surrender is being sought so that she may be tried for a total of twenty two offences as particularised in the warrant. Twenty one of these involve alleged crimes of dishonesty, and while in some cases the alleged monetary loss suffered by the victims is small, in other cases it runs into thousands of euro. Moreover, these cases allege multiple incidents of a broadly similar type over a time span of approximately three years. It is therefore clearly being alleged that the respondent is not a one-off offender but rather that she is a persistent recidivist offender

In addition, the respondent is wanted to be tried for an offence of attempted arson. It is not alleged that anybody was killed or physically injured in the incident, or that major material damage was caused. Nevertheless, the particulars set out in the warrant, if

proven in evidence, suggest at the very least considerable recklessness with regard to whether or not death, injury or serious damage would be caused.

The respondent, if convicted, faces potential sentences of up to ten years imprisonment in respect of all but two of the offences, and potential sentences of up to five years imprisonment and fifteen years imprisonment, respectively, in respect of those remaining two offences.

The evidence establishes that the respondent left Germany on the 31st of August, 2011, just ten days after the alleged attempted arson is said to have occurred. In all the circumstances of the case it is reasonable to infer that she did so as a fugitive and for the purpose of seeking to evade justice.

In the circumstances there is clearly a significant public interest in the surrender of the respondent. The issuing state is entitled to maintain a police and criminal justice system and to charge and try persons who are alleged to have committed criminal offences within its territory. It would be inimical to that legitimate public interest if the alleged offender could seek to evade justice by simply crossing into the territory of another state. For that reason, there have long been extradition/rendition arrangements between states on the basis of bi-lateral or multi-lateral treaties, or international agreements. In recent years the member states of the European Union have all subscribed to the Framework Decision and now operate the simplified and more expeditious rendition arrangement that constitutes the European arrest warrant system. It is therefore reasonable and legitimate for the issuing state to seek to pursue the present respondent using that system and to seek to have the respondent surrendered to it on foot of a European arrest warrant so that she may face trial for the offences to which that warrant relates.

There has been no delay or other extrinsic circumstance such as might tend to reduce or dilute what this Court accepts is a pressing social need for the respondent's extradition, or more correctly rendition.

That is not, however, the end of the matter. The private rights of the respondent and her daughter A.B. must also be considered and taken into account. The respondent alleges that to surrender her in the circumstances of this case would be a disproportionate measure in terms of the legitimate aim being pursued by the issuing state. The contention is that the proposed surrender of the respondent would have such profound consequences for the respondent, and/or her daughter A.B., in terms of the maintenance of the mother/daughter relationship and the care and nurture of A.B., as to be unjustified and in breach of their rights to respect for family life as guaranteed under article 8 of the ECHR.

This is a most difficult case. The respondent is A.B.'s sole carer in this country. As a result of the respondent breaching her bail A.B. has had to be taken into State care, because at age 10 she is incapable of fending for herself. In the present circumstances where the respondent is detained in custody pending the outcome of this case, A.B. is already separated from her mother save for occasional visits to see her in the Dóchas Centre facilitated by the H.S.E.'s social worker, and the foster parents with whom A.B. is currently placed. However, the separation from her mother is very real. The present unhappy but unfortunately necessary situation, in circumstances where the respondent acted in flagrant breach of the bail previously granted to her, will undoubtedly be aggravated if the respondent is surrendered to Germany. Not only will A.B. be separated from her mother, her mother will have been removed to Germany where she may, or may not, be remanded in custody to await trial, and ultimately may or may not have to serve a prison sentence depending on the outcome of that trial. A.B.'s visits to her mother are only occasional and are difficult at present. I accept the evidence that mother and daughter are close and that this represents a real hardship. If the respondent is removed to Germany it will be even more difficult for them to maintain any kind of close relationship, and it will certainly require A.B.'s relocation to Germany if there is to be any hope of regular personal contact. In that context it is a matter of some significance that A.B. is an Irish citizen. However, her mother is German and A.B. herself has been predominantly exposed to German life and culture having lived in Germany from 2002 until 2011.

On the plus side, it seems that A.B.'s material welfare is being well catered for at the present time in the foster placement arranged by the H.S.E. Moreover, if it became necessary for A.B. to relocate to Germany there is every reason for confidence that the H.S.E.'s counterparts in Germany would provide comparable care if it was not possible for A.B. to be re-united with her mother.

The social work report suggests that A.B. is a healthy, intelligent and pleasant young girl, who is coping well in a difficult situation. She has been in Ireland for two years now and is in full time National School education here, having been previously educated within the German primary school system. She is doing well in her foster placement and has adapted quickly to this new home environment. The child's letter to the Court is age appropriate in its terms and, as might be expected, expresses worries about her mother and anxieties about the future in the event of her mother being surrendered.

I am left with the impression that although it will be very difficult and distressing for this mother and daughter to be separated in the event of the respondent being surrendered, it would not breach their respective rights under article 8 of the ECHR to do so. Visiting arrangements can be put in place with a view to maintaining the mother/daughter relationship. Arrangements can also be put in place to ensure the material care, education and nurture of A.B. in her mother's absence. Difficult choices will have to be made, and A.B.'s relocation to Germany and engagement at some level with social services there will almost certainly be required. While this Court does not for a moment underestimate the level of disruption there will be to the lives of those concerned, I am satisfied that there is no evidence before me to suggest that the respondent's surrender will be injurious and harmful (as opposed to distressing and difficult) in its consequences to those concerned, and in particular in the case of A.B. who appears on the evidence to be a resilient child. The situation is far from ideal, but ultimately I am not satisfied that the adversities that may have to be faced in the event of the respondent being surrendered are such as to render the proposed surrender a disproportionate measure.

The Court's Decision

The evidence, such as it is, does not establish that the private interests of the respondent and her dependent child outweigh the public interest in her extradition in the circumstances of this case. The proposed surrender does not constitute a disproportionate measure in the circumstances of this case and would not operate to disrespect the rights of the respondent, and/or her child, in breach of article 8 of the ECHR. The Court is not disposed therefore to uphold the s. 37 objection in this case.