

THE HIGH COURT

[2014 No. 150 EXT]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JOHNATHAN JAMES AYTON

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 10th day of March 2015

Introduction

1. The Respondent is the subject of European Arrest Warrant issued by the presiding District Judge of the Magistrates Court in Laganside Courts, Oxford Street, Belfast, Northern Ireland. The warrant was dated the 27th June 2014. On the 7th August 2014 on arrest he admitted he was the person named within the warrant. He has been in custody since that date. The matter was adjourned from time to time until it came on for hearing before this Court initially on the 12th February 2015 and continuing on the 20th February 2015. Following the s. 16 hearing, the court reserved its judgment which it now delivers. The court is asked by the Applicant to make an order pursuant to s. 16 of the European Arrest Warrant Act 2003 directing that the Respondent be surrendered to such person as duly authorised by the issuing state to receive him. The Respondent does not consent to his surrender to Northern Ireland and this Court's jurisdiction to make an order directing the Respondent to be surrendered is dependent upon a judicial review finding that the requirements of s. 16 of the Act of 2003 have been satisfied.

2. In addition to the European Arrest Warrant there was a request for additional information from the Applicant to the National Crime Agency in London dated the 16th July 2014. This was responded to on the 21st July 2014 by the Crown Solicitor for Northern Ireland. A further request for additional information was sought dated the 15th January 2015 and this was responded to by the Assistant Director of Public Prosecution Service of Northern Ireland dated the 19th January 2015. A further request for additional information was sought dated the 13th February 2015 and this was responded to by the Public Prosecution Service of Northern Ireland on the 16th February 2015.

3. Points of objection were lodged by the Respondent on the 6th October 2014. On the 9th February 2015, Detective Sergeant James Kirwan swore an affidavit outlining the arrest and detention of the Respondent. Subsequently submissions were lodged by the Applicant and additional submissions were filed by both parties.

Uncontroversial matters

4. The court has before it an affidavit of arrest sworn by Detective Sergeant James Kirwan. No issue has been raised as to identity. There is an acceptance by the Respondent that he is the person to whom the European Arrest Warrant relates.

5. The court has received and scrutinised a true copy of the European Arrest Warrant in this case together with the additional information dated the 1st July 2014, the 19th January 2015 and the 16th February 2015. The court is satisfied following its consideration of this evidence and documentation that:

- a) The European Arrest Warrant in this case has been endorsed for execution in accordance with s. 16 of the Act of 2003.
- b) The European Arrest Warrant in this case was duly executed and the person who was arrested and brought before the court is the person in respect of whom the European Arrest Warrant is issued.
- c) The European Arrest Warrant in this case is manifestly in the correct form and although the European Arrest Warrant is a conviction type warrant there is no suggestion that the Respondent was tried *in absentia*

6. In addition the court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2014. It duly notes that by a combination of s. 3 (1) of the Act of 2003 and Article 2 of and Schedule 2 the 2004 Designation Order, the United Kingdom of Great Britain and Northern Ireland 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.

The warrant and controversial matters

7. The United Kingdom seeks the surrender of the Respondent who had been convicted of various offences and was sentenced to a total determinative custodial sentence imposed on the requested person of 12 months in custody followed by 18 months on licence.

8. The Respondent was sentenced on the 6th September 2014 by the Crown Court sitting at Derry, Co Londonderry, Northern Ireland on the 17th April 2012. On the 6th September 2012 the said Crown Court sentenced the requested person in respect of all of the offences. He was released on the 13th June 2013 having signed a licence and agreed to the terms therein. The licence was revoked on the 17th September 2013 and he was thereafter deemed under the Northern Ireland legislation to be unlawfully at large and was therefore liable to immediate arrest to "serve the remainder of the sentence imposed by the court".

Corresponding Offences and s. 38 (1)(a)(ii) of the Act of 2003

9. I will recite the offences in full with the penalties imposed:-

"1. That he on the 30th day of October 2010 in the County Court Division of Londonderry without lawful excuse knowing that certain property namely a Ford Mondeo car VRM..ECZ6744 had been obtained in the Republic of Ireland under such circumstances that if it had been so obtained in Northern Ireland the person obtaining it would have been guilty of theft, had such property in his possession, contrary to s. 23 (4) of the Theft Act (Northern Ireland) 1969.

Sentenced to imprisonment for 12 months followed by a period on licence of 12 months.

2. That he on the 30th day of October 2010 in the County Court Division of Londonderry drove a mechanically propelled vehicle dangerously on roads namely Craigavon Bridge and Foyle Road, Londonderry contrary to article 10 of the Road Traffic (Northern Ireland) Order 1995.

Sentenced to imprisonment for 9 months followed by a period on licence of 9 months and disqualified from driving for 5 years.

3. That on the 30th day of October 2010 in the County Court Division of Londonderry, drove on a road a motor vehicle namely a Ford Mondeo car VRM ECZ 6744 without being the holder of a driving licence authorising him to drive a motor vehicle of that class, contrary to article 3 (1) of the Road Traffic (Northern Ireland) Order 1981.

Fined £100 and disqualified from driving for 12 months.

4. That he on the 30th day of October 2010 in the County Court Division of Londonderry being the driver of a mechanically propelled vehicle on a road or other public place namely, Craigavon Bridge, Londonderry, failed to stop when required to do so by a Constable in uniform, contrary to article 180 of the Road Traffic (Northern Ireland) Order 198.

Fined £100 and disqualified from driving for 12 months.

5. That he on the 30th day of October 2010 in the County Court Division of Londonderry used a motor vehicle namely a Ford Mondeo car VRM ECZ6744 on a road or other public place namely Foyle Road, Londonderry, without there being in force in relation to the user of the said motor vehicle by him such a policy of insurance or such security in respect of a third-parties risks as complied with the requirement of part VIII of the Road Traffic (Northern Ireland) Order 1981 and contrary to article 90 (4) of the Road Traffic (Northern Ireland) Order 1981.

Fined £100 and disqualified from driving for 12 months.

6. That he on the 16th day of September 2010 in the County Court Division of Londonderry being a person connected with a child under the age of 16 namely Chloe Hunter did take the said Chloe Hunter out of the United Kingdom without the appropriate consent contrary to article 3 of the Child Abduction (Northern Ireland) Order 1985.

Imprisoned for 12 months followed by a period on licence of 18 months.

7. That he on the 16th day of September 2010 in County Court Division of Londonderry not being the parent or guardian or a person who has been awarded custody whether solely or jointly of a child namely Tammi Lee Diver without lawful authority or reasonable excuse to take the said Tammi Lee Diver so as to keep her out of the lawful control of any person having lawful control of her contrary to article 4 of the Child Abduction (Northern Ireland) 1985.

Imprisonment for 10 months followed by a period on licence of 10 months.

8.. That on the 16th day of September 2010 in the County Court Division of Londonderry having taken a motor vehicle namely a Volvo V70 Estate Hearse VRM WCZ2256 for his own or another's use without the consent of the owner or such lawful authority or knowing that the said vehicle had been taken without such consent or authority drove or attempted to drive the said vehicle or allowed himself to be carried in the said vehicle in contravention of article 172 of the Road Traffic (Northern Ireland) Order 1981 and after the said vehicle was taken before it was recovered damage was caused to the vehicle contrary to article 172 A(2)(d) of the Road Traffic (Northern Ireland) Order 1981.

Imprisonment for a period of 12 months followed by a period on licence of 18 months.

9. That he on the 16th day of September 2010 in the County Court Division of Londonderry without lawful excuse damaged funeral reeds and flowers belonging to David Hay intending to destroy or damage such property or being reckless as to whether such property would be destroyed or damaged contrary to article 3 (1) of the Criminal Damage (Northern Ireland) Order 1977.

Imprisonment for 6 months followed by a period on licence of 6 months.

10. That he on the 16th day of September 2010 in the County Court Division of Londonderry drove on a road a motor vehicle namely a Volvo V740 Estate Hearse without of a driving licence authorising him to drive a motor vehicle of that class, contrary to article 3(1) of the Road Traffic (Northern Ireland) Order 1981.

A fine of £100 and disqualified from driving for 12 months.

11. That he on the 16th day of September 2010 in the County Court Division of Londonderry without lawful excuse damaged or destroyed a Group 4 electronic security tag belonging to Group 4 intending to destroy or damage such property or being reckless as to whether such property would be damaged or destroyed contrary to article 3(1) of the Criminal Damage (Northern Ireland) Order 1977.

Imprisonment for 6 months followed by a period on licence of 6 months.

12. That he on the 16th day of September 2010 in the County Court Division of Londonderry used a motor vehicle namely a Volvo V70 Hearse VRM WCZ 2256 on a road or other public place namely, Spencer Road, Londonderry without there being in force in relation to the user of the said motor vehicle by him such a policy of insurance or such a security in respect of third-party risks as complied with the requirements of part VIII of the Road Traffic (Northern Ireland)

A fine of £100, disqualified from driving for 12 months and the court ordered that all the above sentences were to run concurrently.

10. For the purposes of this controversy, the offences at number 3, 4, 5, 10 and 12 did not arise and I will give a decision in relation to those five offences at the end of the judgment.

11. The Applicant had indicated that the appropriate offence which corresponded to offence 1 of the warrant was that of Possession of Stolen Property contrary to s. 18 of the Criminal Justice (Theft and Fraud) Offences Act 2001. Counsel on behalf of the Respondent argued that, taking into account the additional information supplied, the details merely disclose that the requested person did not stop for the PSNI when requested and failed to provide any explanation during his interview. There is no clarification as to whether it is alleged that the requested person actually stole the car in the Republic of Ireland or whether he was in possession of the car *"otherwise than in the course of stealing"* as required by s. 18. She further submitted that the circumstances set out in the additional information did not amount to an allegation that the person either knew the vehicle was stolen or was reckless as to whether it was stolen. Counsel on behalf of the Applicant argued that this submission ignored the plain wording of the warrant. The warrant said that on the 30th October 2010 *"in the County of Londonderry without lawful excuse knowing that certain property namely a Ford Mondeo car had been obtained in the Republic of Ireland under such circumstances that if had been so obtained in Northern Ireland the person obtaining it would have been guilty of theft has such property in his possession"* (emphasis added).

12. Counsel on behalf of the Applicant indicated that in each case he had been convicted of the offences and it was not a question of the charge and that the court could rely on the conviction.

13. This Court holds from the warrant, from the additional information supplied and from the conviction of the Respondent, that s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001 was the appropriate corresponding offence.

14. The second relevant offence was dangerous driving (offence 2 in the warrant). This Court holds that the offence of s. 53 of the Road Traffic Act 1961 (as amended) is clearly a corresponding offence.

15. The third and fourth relevant offences concerned child abduction - s.16 and s.17 of the Non- Fatal Offences Against the Person Act 1997 (offences 6 and 7 in the warrant). There was an issue as to whether or not Chloe Hunter was the daughter of the Respondent and whether or not this came within s. 16 of the Non- Fatal Offences Against the Person Act 1997. However counsel on behalf of the Respondent conceded from the information submitted that the issues that arise in relation to the custody of that child meant that it too had to be looked at as in the case of Tammi Lee Diver under s. 17 of the Act of 1997. Counsel on behalf of the Respondent submitted that there was nothing in the factual narrative set out in either the warrant or the additional information which would suggest that the Respondent intended to remove either of the children from the lawful custody of any person having lawful control of her and there was nothing on the face of the warrant which would permit this Court even to conclude that s. 17 applies. Counsel on behalf of the Applicant submitted that s. 17 of the Act corresponds clearly to both of the child abduction offences set out in the warrant in circumstances where:-

1) In both instances the Respondent is someone to whom s. 16 does not apply. He is neither the parent nor guardian of Tammi Lee Diver and although he is a parent of Chloe Hunter he is not her guardian where her mother is the sole guardian.

2) He plainly removed both children from the lawful custody of their parents and guardians and it is clearly stated he did so without their permission. It is also stated in the information quoted that the girls asked to return home but Jonathan James Ayton kept them in the Republic of Ireland against their will.

16. I am satisfied that s. 17 of the Non- Fatal Offences Against the Person Act 1997 is the appropriate corresponding offence for those two offences in the warrant.

17. From the information supplied it is not clear if it is the same vehicle or whether there was any consent from the owner.

18. The fifth relevant offence is using a mechanically propelled vehicle (offence 8 in the warrant). Counsel on behalf of the Respondent complained that s. 112 of the Road Traffic Act 1961 (as amended) created a number of offences but also suggested that the information did not disclose whether or not the Respondent knew of the taking of the vehicle.

19. Counsel on behalf of the Applicant suggested that the full information was not being quoted to the court that the vehicle in question was stolen and the Respondent was convicted of the offence which requires knowledge or recklessness as to this fact.

20. I agree with counsel for the Applicant and say that s. 112 of the Road Traffic Act 1961 (as amended) is the corresponding offence to the offence contained at offence 8 in the warrant.

21. Finally an issue arose in relation to offences 9 and 11 in the warrant in relation to damage. Counsel for the Respondent indicated that there was nothing in the warrant or information that actually indicated which of the offences was involved. She also suggested that the offence of damaging the Group 4 electronic security tag took place outside of Northern Ireland and therefore inside the Republic of Ireland. Counsel on behalf of the Applicant said that on the contrary, the conviction records that on the 16th September 2010 at the County Court Division of Londonderry without lawful excuse he damaged or destroyed a Group 4 electronic security tag belonged to Group 4 intending to destroy or damage this property or being reckless as to whether this property would be damaged or destroyed.

22. In response counsel on behalf of the Applicant said the Respondent was convicted of these offences and that the warrant on its face indicates that in relation to offence 9 the criminal damage in relation to the funeral wreaths took place in the County Court Division of Londonderry. I am satisfied that the offences of damage have corresponding offences in the Republic of Ireland of criminal damage contrary to s.2 of the Criminal Damage Act 1991.

23. In those circumstances I am satisfied that s. 38 of the European Arrest Warrant Act 2003 (as amended) is satisfied as the correspondence of offences has been established.

Minimum gravity – s. 38(1)(a)(ii) of the European Arrest Warrant Act 2003

24. The information discloses that the Respondent had been released on licence on the 13th June 2013 and in those circumstances the issuing state are now dealing with the licence period (that is the 18 months on licence period, the 12 months detention period

already regarded as being served). The Applicant was released on licence on the 13th June 2013 and enjoyed a period of licence until the 17th September 2013 when his licence was revoked. It appears he was arrested and charged with motoring offences arising out of an incident on the 16th September 2013 in Co. Londonderry. The Department of Justice revoked his licence on the 17th September 2013.

25. On the 15th November 2013 the Public Prosecution Service of Northern Ireland took a decision not to prosecute the Respondent for the offences of the 16th September 2013. Nevertheless the revocation of the Respondent's licence still stands. The remaining period served by the Respondent is the period between the 17th September 2013 (the day his licence was revoked) and today's date which was cited as a period of 1 year and 101 days, although it appears he was serving a sentence imposed in this jurisdiction until January.

26. Section 38 (1)(a)(ii) of the European Arrest Warrant 2003 reads as follows:-

"38.—(1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) (ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment."

27. The relevant offences in the warrant have a maximum of 12 months and 18 months licence and a minimum of 6 months and 6 months licence. Counsel on behalf of the Respondent stated that the Minister must show that a term of imprisonment or detention of not less than four months has been imposed on the person in respect of the offence in the issuing State and the precedents required under the law of the issuing State to serve all or part of that term of imprisonment. In relation to the 9 month licence, she argued that he had been in custody in this jurisdiction on the European Arrest Warrant for over 6 months. She said that it was accepted by the issuing State that the Respondent had in fact served the entire sentence of imprisonment and that the Respondent is only wanted in relation to the licence period and submits that the licence period is not punishment in respect of the offence but is a preventive measure to protect the public from the commission of future offences. She further argued that the recall was not in respect of the offences, the subject matter of the warrant, but two entirely separate offences and where the prosecutor of the issuing State has decided not to proceed with any offence. She also raised the question as to whether there are four months remaining.

28. Counsel on behalf of the Respondent quoted Article 26 of the Council Framework decision of the 13th June 2002 with the heading "Deduction of the Period of Detention Served in the Executing Member State". Article 26 reads:-

"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."

29. Counsel on behalf of the Respondent conceded that the Respondent had been in custody on a warrant here since the 7th August in relation to a custody serving sentence and the sentence of imprisonment in relation to these charges terminated on the 25th January 2015. She argued that a month had elapsed since the ending of the sentence on the 25th January 2015. Counsel for the Respondent quoted the decision of *Saralis* which was a judgment of Edwards J. where he accepted the argument in a case where the Lithuanian authorities said that they would not deduct time spent in custody. There is no suggestion in this case however that such is proposed by the United Kingdom authorities. She also quoted from *Sweeney v. The Governor of Loughan House Open Centre & Ors* [2014] IESC 42 and this related to the transfer of sentenced prisoners and is really not helpful to the Respondent for this reason.

30. Counsel on behalf of the Applicant said the court had to construe the warrant and the sentence as a whole and that the warrant is expressed to be a total determinant custodial sentence imposed on the requested party being 12 months in custody followed by 18 months on licence. Counsel on behalf of the Respondent said that the Act as amended did not give legal effect to the whole of the Framework Decision. He argued the original Act made it a requirement that a surrender had to comply not merely with the Act but also with the Framework Decision. When the words "and the Framework Decision" were taken out by the 2012 Act so that surrender in terms of the Act of 2003 is based upon it being subject to and in accordance with the provisions of the Act. Counsel on behalf of the Applicant argued that Article 26 is not therefore directly transposed or applicable as a matter of law such that it can be invoked at pre-surrender stage as a binding obligation on this Court. The requirement of the Framework document requires the issuing State to deduct all periods of detention from the execution of the European Arrest Warrant from the total period of detention to be served in the issuing State as a result of the custodial sentence or detention being passed. It is a post surrender obligation and not one which is imposed on this Court.

31. With regard to the question of minimum gravity in accordance with s. 38(1)(a)(ii) of the European Arrest Warrant Act 2003 I am satisfied that an order directing that Mr Ayton be surrendered is not breach of the Act. As it is clear that the sentence imposed was one of imprisonment and licence and that because he is person subject to the sentence imposed which includes both imprisonment and licence.

Preventive Detention and s. 37 (1)(b) of the Act of 2003

32. Counsel on behalf of the Respondent commenced her argument in reciting the detail which had been given about the revocation of the licence. The Respondent was arrested and charged with motoring offences arising out of an incident on the 16th September 2013 in Co. Londonderry. The Department of Justice revoked his licence on the 17th September 2013. On the 15th November 2013 the Public Prosecutions Service took a decision not to prosecute the requested person for the offences of the 16th September 2013. The Offence Recall Unit advised that when considering revocation of licences, they have to consider not only the evidential aspect but also public protection. In considering the protection of the public they consider whether a person on licence can be managed within the community. Counsel on behalf Respondent opened *Lynch & Whelan v. Minister for Justice Equality and Law Reform* [2010] IESC 34 and the issue of life sentence and the case involved a finding by the Supreme Court that there is nothing in the release which affects the punitive nature or character of a life sentence. She also opened *Sweeney v. The Governor of Loughan House Open Centre & Ors* [2014] IESC 42. This involved a person who sought to service the balance of his sentence in Ireland in accordance with the provisions of the Council of Europe Convention on the transfer of sentenced prisoners. In this case the Supreme Court looked at the English law governing the nature of the appellant's sentence but this decision related to the actual sentence imposed.

33. Counsel on behalf of the Applicant stated that it is easy to see how attractive it is to take the *Sweeney* case and say it is the same application in relation to a European Arrest Warrant case because it is a sentence comprised of two halves, a custodial element and a licensed element and that the context is that of the Transfer of Sentenced Prisoners Act and Convention 1995. In this case however the Respondent is here and he served the requisite immediate custodial period. He is subject to recall. He has been recalled. He is unlawfully at large. The licence starts running and he is liable under the order to serve the remaining period of the sentence specifically envisaged under the order. *Sweeney* is of no assistance in this regard.

34. Counsel for the Applicant pointed to the European Court of Human Rights case in *Grosskopf v. Germany*, Case Number 24478/03 (2011 53EHRR, page 7). This is a case where the German criminal code distinguished between penalties and so called measures of correction and prevention. Grosskopf had argued that the preventive detention under Article 66.1 of the German Penal Code was contrary to the European Convention on Human Rights. However the court considered that as long as there remained a causal connection between the conviction and the detention there was no breach of Article 5 of the European Convention on Human Rights. The court had no difficulty with the concept of preventive detention. Counsel on behalf of the Applicant submitted that the supposition that Article 38 should be applied so as to disentitle other states to practice what they individually collectively consider to be an acceptable form of detention is irreconcilable with the respect for international law and sovereignty of other states implicit in the Constitution.

Decision of the Court

35. I am satisfied that the sentence for which the Respondent is sought is not one which is unlawful either by reference to the European Convention on Human Rights or the Constitution.

36. For the reasons stated above I make an order under s. 16 of the European Arrest Warrant Act of 2003 (as amended) in relation to the offences in the warrant at 1, 2, 6, 7, 8, 9 and 11 to the person authorised by the United Kingdom to receive him. I make no order in relation to the offences in the warrant at 3, 4, 5, 10 and 12 as fines and disqualifications were imposed in relation to these offences.