

## THE HIGH COURT

RECORD NO. 2004/26 EXT

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND  
MICHAEL DERMOT McARDLE

RESPONDENT

**Judgment of Finnegan P. delivered on the 27th day of May 2005**

1. This matter comes before me pursuant to the European Arrest Warrant Act 2003 section 16. As the warrant was endorsed under section 13 of the Act prior to the passing of the Criminal Justice (Terrorist Offences) Act 2005 the amendments effected by that Act to the 2003 Act do not apply.

2. The Respondent filed points of objection which were refined at the hearing to the following:-

1. Abuse of process.
2. Delay.
3. Breach of the Respondent's rights under the Constitution and/or the European Convention on Human Rights.
4. It would be unjust, oppressive or invidious to surrender the Respondent.
5. The purpose of the European Arrest Warrant is to procure the return of the Respondent to Spain for the purposes of carrying out a form of preliminary enquiry or investigation.

3. The European Arrest Warrant Act 2003 section 16 provides as follows –

"16(1) Where a person does not consent to his or her surrender to the issuing state or has withdrawn his or her consent under section 15(9), the High Court may, upon such date as is fixed under section 13, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her provided that –

- (a) the High Court is satisfied that the person before it is the person in respect of whom the European Arrest Warrant was issued,
- (b) the European Arrest Warrant, or a facsimile or true copy thereof has been endorsed in accordance with section 13 for the execution of the warrant,
- (c) such undertakings as are required under this Act, or facsimile or true copies thereof, are provided to the court,
- (d) The surrender of the person is not prohibited by section 22, 23 or 24 and
- (e) the surrender of the person is not prohibited by Part III or the Framework Decision (including the Recitals thereto)."

4. On the evidence before me I am satisfied on the matters mentioned in paragraph 16(1)(a), (b), (c). With regard to section 22, 23 and 24 of the Act the necessary undertakings have been given and I am satisfied as required by the said sections. I am satisfied that the surrender of the Respondent is not prohibited by the Framework Decision including the Recitals thereto.

5. In these circumstances I must now consider the grounds of objection relied upon.

**Abuse of Process**

6. In short it was submitted that having regard to irregularities in the proceedings in Spain the Respondent ought not to be surrendered. I had in addition to Affidavit evidence the evidence of a Spanish lawyer called on behalf of the Respondent. The offence in respect of which surrender was sought occurred within the jurisdiction of the Court of Marbella, El Juzgado No. 3 and the warrant was issued by this Court. However the preliminary investigation of the death took place in Malaga within the jurisdiction of El Juzgado No. 5 where the hospital to which the victim was taken is situate. On Affidavit it was contended that the warrant ought to have been issued by the latter Court. The matter was however clarified both on Affidavit and on evidence and I am satisfied that in each case the jurisdiction was properly exercised under the law of Spain and that the correct Court to issue the warrant was El Juzgado No. 3.

7. With regard to the procedures undertaken in El Juzgado No. 5 these approximate to an inquest. The Respondent complains that following the proceedings in that Court his wife's (the victim) body was released to him for repatriation and burial. No conditions or restrictions were placed on the release. He believed at that point that all investigations were concluded. At no time was he informed that an investigation was continuing or that there were any outstanding issues relating to his wife's death or that he was suspected of having murdered or otherwise harmed her. On behalf of the Respondent it is argued that there was a decision not to proceed with any criminal investigation. I am satisfied that this is not the case. The proceedings before El Juzgado No. 5 were not criminal in nature but were akin to a coroners inquest in this jurisdiction. I am satisfied that the manner in which the matter progressed does not amount to an abuse of process on this ground. There was no decision not to pursue a criminal investigation: Juzgado No. 3 did not have jurisdiction in relation to criminal proceedings that jurisdiction being vested in Juzgado No. 5 within whose jurisdiction the alleged offence was committed.

8. The Respondent next argues that on the 21st October 2001 he was arrested on foot of a provisional warrant of arrest issued pursuant to the Extradition Act 1965 section 27(1) but was subsequently released the request for extradition having been withdrawn. I am satisfied that this was because at that time the State would not extradite one of its own citizens to Spain. Such extradition only became possible with the coming into effect of the European Arrest Warrant Act 2003 on the 1st January 2004. In these circumstances there is no abuse of process in seeking for the second time to extradite the Respondent.

## Delay

9. The European Arrest Warrant Act 2003 section 40 provides as follows –

“40. A person shall not be surrendered under this Act where

(a) the act or omission constituting the offence specified in the European Arrest Warrant issued in respect of him or her is an offence under the law of the State, and

(b) the person could not, by reason of the passage of time, be proceeded against, in the State in respect of the second mentioned offence.

10. I take the view that the section requires me to consider delay in the same manner in which the same would have been considered under the Extradition Act 1965 section 50(2)(bbb). See *Kwok Ming Wan v Assistant Commissioner Noel Conroy* 1998 3 I.R. 527. The first matter to which I have regard is that prior to the coming into effect on the 1st January 2004 of the European Arrest Warrant Act 2003 extradition was not possible. The European Arrest Warrant was in fact issued on the 19th August 2004. In these circumstances I am satisfied that the delay itself is not exceptional. As to other exceptional circumstances, while having regard to my decision that the delay is not exceptional these are not relevant, these are set out in an Affidavit sworn on behalf of the Respondent by E. Braxton Reynolds a Forensic Scientist. He deposes that the elapse of almost five years since the victim's death denies the Respondent the opportunity to test any of the forensic findings. Had the Respondent been aware that a criminal investigation had been envisaged he could have conducted his own autopsy or post mortem and sought information of the tests which had been carried out by the Spanish Authorities prior to the burial of the victim. I have no information as to the forensic evidence which will be available for the purposes of the prosecution of the Respondent. However it would be wrong to have regard to the delay from the commission of the alleged offence until the date of the issue of the European Arrest Warrant: regard must also be had to the attempt to extradite the Respondent made by the issue of the provisional warrant of arrest on the 20th October 2001, the date of the alleged offence being the 12th February 2000, at which time the Respondent became aware of the intention to prosecute. Delay at that time could not be regarded as exceptional and the Respondent at that time was in no better position to obtain forensic evidence. In these circumstances the Respondent has not satisfied me that there exists in this case any exceptional circumstance in the sense outlined in *Kwok Ming Wan v Conroy*. Having considered the circumstances as a whole I am satisfied that there has not been such delay as to prevent the Court making an order for the Respondent's surrender.

## Breach of the Respondent's Rights under the Constitution and/or the European Convention on Human Rights

11. The European Arrest Warrant Act 2003 section 37 provides that a person shall not be surrendered if his surrender would be incompatible with the State's obligations under the European Convention on Human Rights and the protocols to the Convention or any provision of the Constitution. Insofar as the Constitution is concerned this has always been the case: *Larkin v O'Dea* 1995 2 I.R. 485. With regard to the European Convention on Human Rights I believe the approach adopted in *R. v Secretary of State Ex Parte Rachid Rimda* 2002 EWHC 1278 (Admin) is the correct one. Sedley L.J. giving the judgment of the Court had this to say:

“There is however, one issue of law in which it may be helpful to express our view now. This concerns the Home Secretary's reliance on recourse to the European Court of Human Rights to correct any eventual failure on the part of France to accord the claimant a fair trial. The European Court of Human Rights is not a court of appeal, and there is no recourse to it as of right (see Article 28) as Articles 13 and 35 of the Convention make clear, and as the Court itself has gone out of its way to stress (*Kidla v Poland* (2001) 10 BHRC 269). It is on national authorities that the primary duty both of compliance and of affording redress for non compliance rests. We do not consider that the Home Secretary would be justified, in spite of France's monist system of law, in treating Strasbourg as part of the French legal system.”

12. Nothing has been urged upon me to suggest that in surrendering the Respondent for trial in Spain his constitutional rights or the rights enshrined in the European Convention on Human Rights will be abrogated.

## It would be unjust, oppressive or invidious to surrender the Respondent.

13. The only argument to arise here is based on the same circumstances as relied upon in relation to delay. The delay is not such as to justify a refusal to surrender. The circumstances outlined in the Affidavit of the Forensic Scientist filed in the matter could not in my view render the surrender unjust, oppressive or invidious. These are matters to which any court would have regard at trial and it would run contrary to the policy underlying the Act of 2003 of mutual recognition to hold otherwise without cogent evidence. Indeed the argument for the Respondent necessarily involves the proposition that he should have been made aware prior to his wife's burial at least of the possibility that he might be prosecuted: so to hold would place an impossible burden on prosecuting authorities.

14. The Purpose of the European Arrest Warrant is to Procure the Return of the Respondent to Spain for the Purposes of Carrying Out a Form of Preliminary Enquiry or Investigation

15. The warrant itself issued from El Juzgado de Instrucción No. 5. Having regard to the Spanish criminal law system the description of the court might raise a concern in this regard. However I must have regard for the provisions of the Act. The Act in section 10 sets out the obligation to surrender –

“10. Where a judicial authority in an issuing state duly issues a European Arrest Warrant in respect of a person –

(a) against whom that State intends to bring proceedings for the offence to which the European Arrest Warrant relates.

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.”

16. The Arrest Warrant certifies as follows –

“That in the course of the enquiry carried out in this Court under NR 152/2000 for homicide against Michael Dermot McArdle a writ has been passed on date 9/19/01 with the agreement of the Public Prosecution ordaining the judicial arrest of Michael Dermot McArdle as accused of an alleged offence of homicide, in order to try him for that offence; and that it has also been agreed, by writ of the 10/26/01 and also in agreement with the Public Prosecutor's request to propose to the Spanish Government the extradition of the accused, which was reiterated by writ of the 2/17/04. All of this to the aforementioned purpose of his trial for the said offence of homicide.”

17. On the basis of this certificate I am satisfied that the Respondent is a person against whom Spain intends to bring proceedings for

the offence to which the European Arrest Warrant relates.

18. In the light of the foregoing findings I propose making an Order that the Respondent be surrendered.