Neutral Citation Number: [2011] IEHC 194

THE HIGH COURT

2010 79 EXT

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

- AND -

P. N.

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 10th day of May 2011

Introduction

The respondent is the subject of a European Arrest Warrant issued by the Republic of Poland on the 22nd of December, 2009. That warrant was subsequently endorsed for execution by the High Court in this jurisdiction. The respondent was arrested by Garda Michele Power at [a named place] on the 24th of May 2010. He was brought before the High Court later that day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the 2003 Act") and was remanded on bail pending a s. 16 hearing. The respondent does not consent to his surrender to the Republic of Poland on foot of the European Arrest Warrant. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the 2003 Act directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the 2003 Act.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the 2003 Act, 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. In so far as specific points of objection are concerned, the Court is required to consider two specific objections to the respondent's surrender that are pleaded as follows:

> 1. The surrender of the respondent is prohibited by s.37 of the European Arrest Warrant Act 2003, as amended, in that it would amount to a breach of his family rights under Article 8 of the European convention on Human Rights and in all the circumstances would be contrary to the principles of fundamental fairness and contrary to justice.
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> 2. The surrender of the respondent is prohibited by s. 11(1A)(g)(iii) of the European Arrest Warrant Act 2003, as amended, in that where the respondent has been convicted of offences specified in the European Arrest Warrant and sentences have been imposed in respect thereof, the warrant does not specify the penalties of which those sentences consist.

Uncontroversial s. 16 issues

The Court has received an affidavit of Garda Michele Power sworn on the 28th of May, 2010 and has also received and scrutinised a copy of the European Arrest Warrant in this case. Moreover the Court has also inspected the original European Arrest Warrant which is on the Court's file and notes that it bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

> (a) the person before it is the person in respect of whom the European arrest warrant was issued;
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> (b) the European arrest warrant has been endorsed for execution in accordance with s. 13 of the 2003 Act;
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> (c) subject to the specific objection raised based upon s. 11(1A)(g)(iii) of the 2003 Act, the European Arrest Warrant in this case is otherwise in the correct form;
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> (d) the respondent was not tried in absentia and so no undertaking for a re-trial is required;
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> (e) the High Court is not required, under s. 21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the 2003 Act;
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> (f) subject to the s.37 objection that has been raised, the surrender of the respondent is not otherwise prohibited by Part 3 of the 2003 Act, or by the Framework Decision (including the recitals thereto).

The European Arrest Warrant in this case is a sentence type warrant and the respondent is wanted in the Republic of Poland to serve outstanding sentences in respect of six offences (particularised in the warrant with reference to three prosecution file reference numbers, namely file II K 295/03/S; file II K 889/03/S, and file II K 482/04/N) imposed upon him on various dates between 2003 and 2004, both years inclusive, either by the Regional Court in Krakow-Œródmieœcie or by the Regional Court in Krakow-Nowa Huta. The sentences imposed, the Courts concerned, the relevant dates, and the periods remaining to be served were as follows:

> • File II K 295/03/S – one (1) year and six (6) months imprisonment imposed by the Regional Court in Krakow-Œródmieœcie on the 17th of July 2003 in respect of a single offence, with one (1) year and six (6) months less one (1) day of imprisonment remaining to be served;

• File II K 889/03/S – an aggregate sentence of two (2) years imprisonment imposed by the Regional Court in Krakow-Œródmieœcie on the 16th of September 2003, in respect of three offences, with two (2) years less one hundred and thirty two (132) days of imprisonment remaining to be served;

• file II K 482/04/N – an aggregate sentence of one (1) year and two (2) months imprisonment imposed by the Regional Court in Krakow-Nowa Huta on the 28th of September 2004, in respect of two offences, with the full one (1) year and two (2) months imprisonment remaining to be served;

The offences in question are thefts / attempted thefts / assaults / and one instance of a threat to kill. In the Court's view, no issue arises with respect to correspondence or minimum gravity in the circumstances of this case, and the Court is satisfied that the requirements of s. 38 of the 2003 Act are met in each instance.

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No 3) Order 2004, S.I. 206/2004 (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s 3(1) of the 2003 Act, and article 2 of, and the Schedule to, the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the 2003 Act as being a state that has under its national law given effect to the Framework Decision.

The s.37 objection
The evidence in support of the respondent's s.37 objection is contained in two affidavits and the documents therein exhibited, one of which affidavits was sworn by the respondent personally on the 25th of June 2010, and the other of which was sworn by the respondent's solicitor, a Mr Eric Furlong, on the 21st of March 2011.

The respondent has deposed that he is 28 years old and has been living in Ireland for three years. At the moment he works for about two days per week and earns about €100. He also does some part-time work with horses. He claims he is not in receipt of social welfare. The respondent says that he lives with his parents, four brothers and two sisters in [a named place]. He is the eldest in the family. His father works in a petrol station and his mother does some housekeeping work.

The respondent further avers that he has a three-year-old daughter who lives with his ex-partner in [a named place]. He says that his daughter, whose name is W, is autistic and she has special needs. He states that he is currently a party to family law proceedings in respect of his daughter and does not have access to her at the moment. He suggests that if he is sent back to Poland to serve the sentences referred to in the European arrest warrant he will be deprived of an opportunity to apply to the court for access to and/or guardianship of his daughter. He states that this would be a breach of his family rights. He further states that in the light of his daughter's special needs, he would like to have contact with her so that he can monitor her medical condition. He states that he used to go to meetings with other parents of autistic children.

The respondent's solicitor avers in his affidavit that the respondent has, since the swearing of his affidavit, brought District Court family law proceedings before the ……. District Court in respect of his dependent child W. He states that Orders were made at ……. District Court on the 12th of July 2010 and on the 13th of September 2010, respectively. He has exhibited copies of these Orders and they are noted to be interim Orders. The interim Order of the 12th of July 2010 granted him access to his daughter W on each Saturday from 1 PM to 2 PM. The interim Order of the 13th of September 2010 granted him increased access to W for a period on each Saturday from 1 PM to 2:45 PM. The respondent's solicitor has further deposed that the interim Order made on the 13th of September 2010 was continued and affirmed on the 8th of November 2010, and again on the 14th of February 2011. The matter now stands adjourned to the 12th of September 2011. He further states that on the 14th of February 2011 a section 47 report which they HSE had been directed by the court to prepare in November 2010 was unavailable for the court. He exhibits a copy of this section 47 report. He further exhibits a copy of a report presented by his ex-partner to …… District Court in relation to the child, W. He characterises this document as "a summary report under the Disability Act, and the document is entitled "Disability Act 2005, Independent Assessment of Need – Summary Report."

It is clear that the approach that a court such as this should adopt in considering whether an order for the surrender of the respondent would constitute a breach of this State's obligations under the Convention or its Protocols is that set out by Peart J in *Minister for Justice, Equality and Law Reform v Gorman* [2010] IEHC 210. It will be recalled that in his judgment in the Gorman case, Peart J said:

> "It seems to me to follow that for the purposes of the present application for the respondent's surrender, this Court is required to consider the following questions in arriving at a conclusion as to whether an order for the surrender of the respondent to the United Kingdom would constitute a breach of this State's obligations under the Convention or its Protocols: (1) does surrender constitute an interference with the respondent's private/family right; (2) if so, is that interference one that is in accordance with law; (3) if further so, is the interference, by surrender of the respondent, in pursuit of a legitimate aim or objective; (4) and further if so, whether that interference is necessary in a democratic society (the latter meaning that it is justified by a pressing social need) and proportionate to the legitimate aim pursued."

In this case, of the four questions commended by Peart J, the first three must undoubtedly be answered in the affirmative. If the respondent is surrendered there will be unquestionably be some interference with his enjoyment of family life, albeit one that is in accordance with law. Further, it must be accepted that in seeking the respondent's surrender for the purpose of having him serve out sentences already imposed upon him for crimes of which he has been convicted, the Polish Government, acting in the Polish public interest (which public interest includes the prevention of crime and disorder and the protection of the rights and freedoms of Polish citizens and others), is pursuing a legitimate aim or objective. However the respondent contends that in all the circumstances of his case his surrender would be a disproportionate interference with his right, and the corresponding right of his child W, to respect for family life as guaranteed by article 8 of the Convention, notwithstanding the legitimate aims being pursued.

In *Minister for Justice Equality & Law Reform v Bednarczyk* [2011] IEHC 136 this Court considered in detail for the first time a claim under article 8 of the Convention invoked by a respondent facing surrender on foot of a European Arrest Warrant not just on his own behalf but also on behalf of his spouse and children. The Court accepted that in a case in which article 8 is engaged it is appropriate that the Court should consider the matter not just from the perspective of the respondent personally but with due regard to the Article 8 rights of all of the family members that might be affected by the Court's decision. I propose to adopt the same approach in this case.

Further, the Court also held in the *Bednarczyk* case that in seeking to strike the appropriate balance it is appropriate to take account of the best interests and well being of children who may be affected by a decision to surrender the respondent as one of a number of

potentially relevant factors, including the legitimate aims and objectives of the issuing state in seeking the respondent's rendition. However, it cannot, in the course of its balancing exercise, afford that consideration "primary" (or "paramount") status to the prejudice of other relevant considerations. Again, I propose to adopt the same approach in this case.

The respondent was unsuccessful in his s. 37 objection in the *Bednarczyk* case on the basis that surrender is not to be refused just because a person may suffer disruption, even severe disruption, of family relationships. I stated that:

> "In my view the bar for judicial intervention is set at a significantly higher level than that. A refusal of surrender on article 8 grounds should only be contemplated where the interference is a gross one and constitutes a clear and unequivocal failure to respect the article 8 rights of those affected.
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> The level of disruption of family relationships occasioned by the imprisonment of a family member, even the parent of a minor child, will not normally be regarded as a gross interference with the right to respect for family life or a breach of the article 8 rights of those affected. It is of the essence of statehood that a sovereign state should be free to operate a police and criminal justice system for the prevention of crime and disorder and the protection of the rights and freedoms of its citizens and others. The entitlement to operate a police and criminal justice system must include the entitlement to operate a prison system, and in appropriate cases to deprive people of their liberty by sending them to prison.
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> It is in the nature of imprisonment that many of the personal rights (whether they be constitutional or convention rights) enjoyed by persons at liberty will be suspended or abrogated by the very fact of that person being remanded to or detained in a prison, especially where he or she has been sentenced to a term of imprisonment. Of course, a prisoner will always have certain residual personal rights which are not abrogated or suspended, such as the right to life and the right to be treated humanely and with human dignity. However, it needs to be said that the sending of a person to prison will inevitably severely impinge upon their opportunity to have society with, and to enjoy the company of, their family members including any children they may have. Such society as is permitted is likely to be occasional, limited and restricted in a multitude of ways in the interests of security and good order within the prison system. Moreover, the ability of a prisoner to earn a salary or wage to support his family will be suspended, and his ability to exercise his guardianship rights with respect to his children will also inevitably be severely curtailed. Such interferences with family life are a usual feature of, and are to be expected of, any prison system. Many of the rights or entitlements in that regard that the prisoner would otherwise have, but for the fact that he is in prison, are suspended or abrogated for the duration of his or her sentence or period of remand. Moreover such suspension or abrogation of the prisoner's rights to participation in family life will in most circumstances be considered to be a measure proportionate to legitimate aims and objectives of the imprisoning state.
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> That this is so is reflected in Article 8(2) of the Convention which permits interference by a public authority with the exercise of the right to respect for family life where that 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*". It would be preposterous to suggest that persons could not, or should not, be sent to prison simply because that would interfere, and indeed significantly interfere, with their enjoyment of family life, or that the sending of persons, particularly any person with a spouse and children, to prison would amount to a failure to respect the right of those affected to family life. That is not to say that there can never be circumstances in which a person's imprisonment could amount to a failure to respect family life but such circumstances would be highly exceptional and are likely to be exceedingly rare. Before a Court would intervene in that regard it would have to be satisfied as to the existence of some truly exceptional circumstance that would render the usually permitted level of interference with family life that imprisonment normally entails unacceptable in the circumstances of the particular case and disrespectful of the right to family life as guaranteed by article 8."

This Court considers that its approach in *Bednarczyk* was entirely consistent, and in accordance, with that commended by Peart J in the earlier case of *Minister for Justice Equality & Law Reform v Gorman*. It may be recalled that in refusing to surrender the respondent in the *Gorman* case, Peart J specifically alluded to "*the unique and exceptional facts of this case*", thereby underlining the need for exceptional circumstances to be demonstrated.

The issue arose again for consideration in *Minister for Justice Equality & Law Reform v F.L.J.* (Unreported, High Court, Edwards J., 8th April, 2011). In that case the respondent, an immigrant who is presently in prison in Ireland for a domestic offence, sought to resist an application for his eventual surrender to his country of origin on foot of a European Arrest Warrant, and to that end invoked Article 8 not just on his own behalf but also on behalf of a child of which he was the biological father. He sought to establish the type of exceptional circumstance spoken of in my judgment in the *Bednarczyk* case on the basis that his child is the subject of a Care Order under s. 18 of the Child Care Act, 1991; that he was anxious to turn over a new leaf and become involved in his son's life; that there was, in all the circumstances of the case, absolutely no reality to the child following him to Poland for the purposes of access visits in circumstances where the child is in care here; and that if he was surrendered he would be deprived of any meaningful opportunity of getting to know and building a bond with his infant son, of having regular or possibly any access to him, or of being involved in the making of important decisions concerning his welfare.

The Court, although satisfied that Article 8 was engaged, was not satisfied in all the circumstances of the particular case that the respondent had established the type of exceptional circumstances that would justify the Court in refusing to surrender him. I stated:

> "I consider that at the present time, the State is manifestly respecting both the respondent's family life, and the family life of his child. In accordance with its duty under Article 42.5 of the Constitution, this being an exceptional case where the parents for physical or moral reasons have failed in their duty towards the child in question, the State as the guardian of the common good, and in the interests both of parents and child, have endeavoured to supply the place of the parents, with due regard to the natural and imprescriptible rights of the child. Moreover, the evidence indicates there was a willingness on the part of the social services to facilitate contact between the respondent and his child while he in prison in Ireland, and there has in fact been such contact, although the Court notes that he is dissatisfied with the level of it.
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> Of course, the fact that the respondent has failed in his duty up to now will not necessarily preclude him from being further involved with his child in the future, but he will have to get his life in order and behave responsibly and he will have to seek to actively involve himself in the child's life, for example by seeking guardianship rights (in circumstances where to do so is realistic) under s. 6A of the Guardianship of Infants Act, 1964. He is not in a position to do that now, and that is not primarily to do with the fact that he is wanted in Poland, though obviously that fact may have the effect

of further postponing his ability to do so.

While there is, I believe, no reality to the child following him to Poland for the purposes of access visits in circumstances where the child is in care here, any sentences he may have to serve in Poland are, or if yet to be imposed will be, finite and will eventually come to an end following which it will be his choice as to whether or not he returns to Ireland. If he is serious about building a relationship with his child, who will still be quite young, it is reasonable to expect that he may indeed return and seek to become involved again in the child's life. Pending that, the child will continue to be nurtured and cared for in the care of the Irish State pursuant to the s.18 Care Order that has been made. However, the question for the Court today is whether the inevitable interference with the building of a family relationship between the respondent and his child that would arise consequent upon his surrender on foot of the European Arrest Warrants in this case would be so damaging to the rights of this family as to outweigh this Court's obligation to surrender the respondent. I do not think it would be in all the circumstances of the case.

Accordingly, the Court is satisfied that it would not be a breach of the respondent's right to respect for his family life under Article 8 of the Convention, or of the corresponding Article 8 rights of his son, who might be affected by his rendition, to surrender him to the issuing State."

Returning then to the case at hand, I am satisfied on the evidence that has been adduced by the respondent that article 8 is engaged. That being so, the question for the Court is once again whether the respondent has established the type of exceptional circumstances that I spoke of in the *Bednarczyk* case such as might justify the Court in concluding that his surrender would be a disproportionate measure.

I have carefully considered the evidence adduced by, and on behalf of, the respondent, and I have had due regard to the contents of both of the reports exhibited. While I do not consider it appropriate to quote extensively from the s. 47 report it is, I believe, fair to say that the high water mark of it, in so far as it provides evidence relevant to the s. 37 issue in this case, is that such involvement as the respondent has had with his daughter W, since he was afforded the limited access to her that he presently enjoys, has been "*positive and in line with the components of the recommended educational behavioural programme*" that has been put in place for her. With respect to the respondent's desire to have increased access to his child, the s.47 report further recommends that he attend access visits consistently for a period of 6 months (in circumstances where there was apparently a track record of some inconsistency) and that he address, or continue to address, certain other issues of concern (which it is not necessary for the Court to specify for the purposes of this judgment.) The report also recommends (*inter alia*) that the respondent become more involved in W's education if she is to benefit from their contact and their relationship is to grow.

Accordingly, the s. 47 report does provide some support for the respondent's contention that he wishes to have a relationship with his daughter and that he is seeking to develop and progress that relationship.

It does not, however, establish that if that relationship is temporarily suspended, or if contact between father and daughter is necessarily abrogated, by virtue of the respondent being surrendered to the issuing state and having to serve out the balance of the sentences imposed upon him for the offences to which the European Arrest Warrant relates, that it will have more of an adverse effect on W by virtue of her autism than it would in the case of a non-autistic child, or that it would significantly impair or cause significant prejudice to the recommended educational behavioural programme that has been designed for her.

Nor does it indicate that if society between the respondent and W is abrogated while the respondent is serving out the balance of his sentences he will, by virtue of W's autism, have significantly greater difficulty in re-establishing the degree of relationship with his daughter that he presently enjoys, or in progressing that relationship, than he would otherwise have. Indeed, the "Disability Act 2005, Independent Assessment of Need – Summary Report" on W indicates that at present there is little social interaction between W and her parents as she presents with significant impairments to her social interaction, social communication and social imagination. It is hoped that this situation may improve if the recommendations of the report are implemented, namely if W has the benefit of special pre-school with Autism specific interventions, and those involved in parenting her participate in the "Early Bird Parenting Programme" which is specifically for parents of children with autism. Obviously, the respondent would be unable participate immediately in the Early Bird Parenting Programme if he is surrendered to the issuing state and this is a factor that the Court will take into account. However, by the same token he would equally be unable to do so if he were liable to serve a sentence in this jurisdiction.

The Court considers that there is no reality in the circumstances of this case to W and her mother following the respondent back to Poland and living there pending his release from prison, and I also take this into account. However, once again, the point must be made that even if he were in prison in Ireland there would, having regard to W's autism, be no possibility of the respondent having meaningful access to her for the duration of his imprisonment, and the respondent could not expect to avoid or be spared prison solely on account of the fact that his daughter is autistic.

I therefore consider that in all the circumstances of the case the respondent has not demonstrated sufficiently exceptional circumstances to justify this Court in refusing to surrender him to the issuing State. He has not discharged the evidential burden upon him of showing that if he is surrendered the level of interference with his right, and the right of his family members, to respect for family life would so great, and disproportionate, as to amount to a breach of what is guaranteed to them by the Article 8 of the Convention.

In the circumstances I am satisfied that the respondent's surrender is not prohibited by Part 3 of the 2003 Act, or by the Framework Decision (including the recitals thereto), and the Court is not therefore disposed to uphold the s.37 objection.

The objection based upon s. 11(1A)(g)(iii) of the 2003 Act.

This objection is based primarily upon a bald assertion in the affidavit of the respondent sworn on the 25th of June 2010 that "each of the three sentences imposed upon me" …. "was suspended". However, he provides no evidence in support of his assertion and he exhibits no documents relevant to this issue. Further, he does not specify the terms on which the sentences were allegedly suspended, or assert that he complied with the terms or conditions of the alleged suspensions.

The European Arrest Warrant is silent as to the suspension or suspensions of any or all of the three sentences. On the contrary, it states clearly and unambiguously that the sentences became enforceable on the 25th of July, 2003; the 24th of September 2003 and the 7th of December, 2004 respectively. In the absence of cogent and persuasive evidence from the respondent that his sentences were in fact suspended this Court does not consider that it would be justified in seeking to look behind the warrant. While the

respondent bears no legal burden of proof, he does bear an evidential burden which he must discharge if he is to persuade the Court to look behind what is clearly stated on the face of the warrant. He has not discharged that burden in this case. Accordingly, the Court is not disposed to uphold the objection based upon s. 11(1A)(g)(iii) of the 2003 Act.