THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 303

Birmingham J.
Sheehan J.
Mahon J.
No. 2016/184

MINISTER FOR JUSTICE AND EQUALITY

APPELLANT

V

P.K.

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered on the 25th day of October 2016

1. This is an appeal from a decision of the High Court (Hunt J.) of the 3rd March, 2016. On the 7th April, 2016, two points of law were certified by him as being of exceptional public importance and such that it was desirable in the public interest that an appeal should be taken to the Court of Appeal pursuant to s. 16(11) of the European Arrest Warrant Act 2003, as amended.

2. The points certified are as follows:-

> "1. Whether [the judge] correctly identified and/or correctly applied the principles governing the issues of administrative delay and proportionality to the facts and circumstances of this case.
>
> 2. Whether [the judge] correctly interpreted and/or correctly applied the provisions of s. 43 of the European Arrest Warrant Act, to the facts and circumstances of this case."

3. The background to the present appeal is that the surrender of the respondent, as I will refer to him, to the United Kingdom is sought on foot of a European Arrest Warrant issued in Liverpool Magistrates' Court on the 21st May, 2015, in respect of two offences of indecent assault which are alleged to have occurred in 1994. At the time of the alleged offences, the injured party was six years of age and the respondent was either thirteen or fourteen years of age, having turned fourteen on the 15th April, 1994. As we will see, it seems more probable that he was in fact thirteen years of age at the relevant time. It was on that basis that the High Court approached the matter and it is on that basis that this Court will proceed.

4. The respondent, Mr. PK., is the step brother of the complainant. The nature of the alleged offending as described in the warrant is as follows:

> G. [the complainant] states that on the first occasion, she was playing in a park at the rear of her house with her brothers and sisters. PK told her to tell her brothers and sisters she wanted to go to the toilet. PK took G to a different area of the park where he placed his coat on the floor. PK laid G down on the floor, lifted her dress and pulled her underwear down. PK then licked G's vagina for a couple of minutes. Afterwards he told her that is how he loved her and not to tell anybody else."

5. A second incident is then described, involving PK rubbing his penis against G's vagina over a duvet, having entered her bedroom to read a bedtime story.

6. The complainant would have been aged six years old between the 3rd January, 1994 and the 3rd January, 1995. The respondent turned fourteen years on the 15th April, 1994 and appears to have left Merseyside for Ireland in June 1995. Because it is potentially of some legal significance whether the appellant had actually turned fourteen years old or was still thirteen years of age at the time of the alleged offending, efforts have been made to clarify this point. However the results of those efforts have been inconclusive and the possibility that he was thirteen years of age rather than fourteen years old has not been excluded. Indeed thirteen years is if anything, the more probable.

7. In this case, the complainant came forward to report matters to the police in 2011. As the question of delay was an issue before the High Court and again before this Court, it is necessary to refer to the sequence of events thereafter. In 2013, the respondent was contacted by a member of the gardaí, who gave him contact details for a named member of the police in Liverpool. According to Mr. PK, the respondent, he contacted this police constable and was informed that there was a historic allegation of indecent assault against him. Mr. PK offered to travel over to Liverpool the next day, but was advised to defer doing so until the necessary arrangements could be made. In August, 2013, he travelled to Liverpool and was interviewed by the police there. He was informed of the details of the allegations and denied them in full.

8. The next specific development was the issue of a warrant of arrest at Liverpool Magistrates' Court on the 19th December, 2014, and then there was a further delay of five months before the issue of the European Arrest Warrant on the 21st May, 2015. That warrant was endorsed for execution by the High Court on the 9th June, 2015, and was executed on the 23rd September, 2015.

9. In the High Court, the focus of the parties and indeed of the judge was on the period between the complaint being made in 2011, a precise date for this was not provided, and the bringing of Mr. PK before the High Court on the 23rd September, 2015, when the warrant was executed.

The approach of the judge to the delay issue

10. So far as the delay on the part of the complainant in coming forward is concerned, the judge took the view that such a period of delay would not be a bar to prosecuting the respondent for such alleged offences in this jurisdiction where such delays and indeed much longer delays are not uncommon. However, he felt that where complainant delay is present, it behoves the authorities to act

with particular alacrity in processing the complaint. He felt that there was legitimate concern arising in respect of the period of the delay that occurred between 2011 and the date upon which the respondent was eventually brought before the High Court for the purpose of the application for his surrender.

11. To put that sequence of events in a proper context and to address the arguments advanced in relation to them, it is necessary to have regard to the personal circumstances of the respondent. The situation here is that:-

- He was 36 years of age earlier this year;
- He has lived most of his life in the Dublin area;
- He has full time employment;
- He and his partner are together eight years and they have a four year old daughter. His partner has an eleven year old son and the respondent acts as father to him;
- The respondent has three children from a previous relationship and plays a role in all their lives;
- His eldest daughter will be sitting the leaving cert in June, 2017;
- His second daughter, SG is 13 years old. She suffers from Aspergers syndrome. She stays with the respondent every second weekend and an affidavit submitted to this Court without objection, indicates that it has now become common place for her to spend a night during the week in addition.

12. On the 25th January, 2016, SG was the subject of a serious sexual assault performed by a number of individuals who forced her to perform oral sex. This matter is the subject of a garda investigation. SG was brought to a Sexual Assault Treatment Unit and has been interviewed by specialist interviewers. It is said in the updating affidavit that this assault has placed great strain on the family and that SG's behaviour has become extremely erratic. The respondent brings his daughter to her appointments at St. Louise's Unit, as her mother has difficulties in doing this due to work commitments.

13. The High Court judge conducted a careful and detailed analysis of all the facts in play and concluded that the balance had been tipped against ordering surrender. This conclusion was heavily influenced by the sexual assault of the respondent's daughter in January, 2016. He felt that there had been avoidable administrative delay which compounded a reasonably lengthy period of complainant delay. So far as the offences in respect of which surrender was sought were concerned, he commented that most jurisdictions rightly regard such activities as grave crimes. However having regard to the nature of the activities alleged in the case, and where he describes the relative youth of both the alleged victim and alleged offender, he would place the offences if proved at about the mid point of the range in terms of gravity. He assessed the public interest in surrendering the respondent to be strong, rather than very strong.

14. He felt that the avoidable administrative delay which had been permitted to occur considerably diluted the otherwise strong public interest in rendition and that as a result, the remaining public interest was moderately strong at the very highest. He saw that diluted public interest as allowing for the conduct of a proportionality exercise as between the public interest and the private interest of the respondent. In terms of the respondent's personal circumstances, he felt that the factors that were in play pre-January 2016, were not so unusual or burdensome that proper respect for the respondent's family life or respect of the person's for whom he had responsibilities would compel a finding that the moderately strong public interest in surrender had been outweighed. However, he took a different view in relation to the assault on the 25th January, 2016. He felt that dealing with the consequences and impact of such an event would represent a significant challenge for any parent of a teenage girl. The consequences of that development, he saw as being sufficiently extraordinary in nature and burdensome in effect, so as to tip the scales in favour of refusing surrender.

The trial judge's approach to the s. 43 point

15. So far as the second point in the case is concerned, the contention that surrender was barred by s. 43 of the Act, which provides that a person shall not be surrendered if the offence, the subject of the request, corresponds to an offence in respect of which a person of the same age could not be proceeded against because of his/her age in this jurisdiction, the judge took the position that in fairness to the respondent he should approach the case on the basis that at the relevant time in 1994, the respondent was thirteen years of age. Consequently the common law doctrine of *doli incapax* was relevant.

16. The judge was firmly of the opinion that the question he had to consider was whether by reason of the suspect's age, the jurisdiction of the Irish courts could not be invoked, whether because of his age there could be no proceedings as distinct from a situation where the young age of an alleged offender would raise questions and issues which would have to be addressed during the course of proceedings. He observed that age was not a factor which would prevent proceedings being instituted in this jurisdiction but age would be relevant in providing the defendant with the assistance of a rebuttable presumption that he lacked criminal capacity.

17. Counsel for the respondent argued that the question had to be approached from a wider perspective. It was suggested that a requested State had to be presented with sufficient evidence in order to determine whether the suspect had in fact the capacity to commit the offence at the relevant time. Alternatively, it was submitted that there had to be material before the courts which would provide an evidential basis for the judge in the requesting State to conclude that the presumption was rebutted. Hunt J. was of the view that neither proposition needed to be established. However, he went on to add that if contrary to his view, the section was to be interpreted in the way contended for by the respondent that he would have concluded that there was in fact evidence, such as the fact that the victim was separated from her siblings on a pretext, that the respondent knew that his conduct was seriously wrong as distinct from merely naughty or mischievous. I should add that on this point, I find myself in complete agreement with the trial judge.

8. I propose to deal with the two issues certified in the same order as did the trial judge and so will deal first with the s. 43 point. As a preliminary point, it is necessary to outline section 43:-

> "A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her corresponds to an offence under the law of the State in respect of which a person of the same age as the person in respect of whom the European arrest warrant was issued could not be proceeded against by reason of his or her age."

19. The trial judge said that the wording of the section is very clear in precluding surrender where the *invocation of proceedings* was excluded because of the age of the suspect (emphasis added). Counsel for the respondent has drawn attention to the fact that the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (2002/584) provides at Article 3 for refusal of surrender where the situation is that the individual suspect, may not, owing to his age, be held criminally responsible. The language of the Framework Decision and the Irish statute diverge appreciably. My focus, as was that of the trial judge, is on the wording of the statute and that wording could scarcely be clearer. It is not the case that Mr. PK could not have been proceeded against in this jurisdiction because of his age. His age would not have prevented proceedings and would not have prevented him being put on trial. I would uphold the conclusions of the trial judge in this regard and would reject this ground of the appeal.

The issue of proportionality

20. Turning then to what is really the main point in the case, whether on the facts of this particular case, surrender would be disproportionate. I should say at the outset that I find myself in agreement with what I understand to be the view of Hunt J. that prior to the 25th January, 2016, there would not have been any basis for refusing surrender. Indeed I do not believe that approach is really in controversy. The net question is whether the very serious events that occurred on the 25th January, 2016 and their aftermath which were dealt with in an affidavit submitted on the day when the case was listed before the High Court have tipped the balance against surrender.

21. It seems to me that the starting point for consideration of the issue has to be that the public interest in ensuring that extradition arrangements are honoured is very high. The Supreme Court has considered challenges to surrender in cases such *as MJELR v. Gheorghe* [2009] IESC 76 and *MJELR v. Ostrowski* [2013] 4 I.R. 206. In *Gheorghe*, one of the points of objection to the surrender was that it would contravene the private and family rights in issue pursuant to Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The appellants resided in Ireland as a family along with their children, two of whom were Irish born. In the Supreme Court in *Gheorghe*, Fennelly J. dealt with the issue as follows:-

> "Like Peart J. [the judge in the High Court], I would also dismiss the third ground of appeal *in limine*. It is a regrettable but inescapable incident of extradition in general and, as in this case, surrender pursuant to the system of the European Arrest Warrant that persons sought for prosecution in another state will very often suffer disruption of their personal and family life. Some states have historically refused to extradite their own nationals, but that is a special case. The Framework Decision expressly provides that, in Article 1, that it does not 'have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the Treaty on European Union'. No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffer disruption, even severe disruption of family relationships."

22. These comments were approved in *Ostrowski*. That was a case where a surrender of a long term Irish resident to his native Poland in respect of an offence alleging possession of a small amount of cannabis during the course of a holiday visit was sought. In the course of her judgment, Denham C.J. observed that the High Court had clearly considered the offence in question trivial, but that once an offence is a corresponding offence and the minimum gravity requirements are met, the question of whether the offence is trivial is *not* a matter for the High Court. (Emphasis that of the Chief Justice). She went on to say that the High Court has no role in looking at possible sentences which might be awarded. Once the minimum gravity test was satisfied, it is not for the High Court to create and apply a proportionality test to a potential sentence.

23. I regard these observations as significant in the context of the present case. While I accept that the High Court judge made no mention of the likely sentence, it does seem to me that the exercise in which the judge engaged must have involved an exercise in weighing issues such as the seriousness of the offending behaviour alleged, the fact that the allegation was of some antiquity and that the offences were alleged to have been committed by a juvenile, all of which were factors that could be expected to impact on the likely sentence. He was, I think, implicitly concluding that to surrender where there was unlikely to be a substantial sentence was disproportionate.

24. A review of the authorities establish that it is recognised that almost all requests for surrender give rise to Article 8 issues, but it is only in rare circumstances that such Article 8 considerations could overrule the requirement to surrender. In *Ostrowski*, McKechnie J., who was the member of the Supreme Court most sympathetic to arguments based on proportionality, referred at para. 102 of his judgment to the fact that he had not been able to identify a single case from the Strasbourg Court in which it was said that extradition would be an interference with Article 8 rights. This he observed was a powerful reflection of the positioning of the public interest in the process.

25. In the course of his judgment in *Minister for Justice and Equality v J.A.T. (No. 2)* [2016] IESC 17, O'Donnell J. expressed the view that in assessing the effect of surrender on family rights that the better analogy was with a request to prohibit a domestic prosecution rather than with a deportation situation. He did so in these terms:-

> "An important starting point, in my view, is that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial. That is a fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes, in other member states or in states with whom Ireland has entered into an extradition agreement, are brought to trial also. There is an important and weighty interest in ensuring that Ireland honours its treaty obligations, and if anything, a greater interest and value in ensuring performance of those obligations entailed by membership of the European Union. All agreements are based on broad reciprocity and there is, therefore, a further interest and benefit in securing the return to Ireland for trial of persons accused of crimes, or the return of sentenced offenders. There is also a corresponding public interest in avoiding one country becoming, even involuntarily, a haven for persons seeking to evade trial in other countries. There is no option in this jurisdiction for a court, in most cases, to direct a trial of the offence here (whatever the practical difficulties involved). This means that the decision to refuse to surrender in individual cases will provide a form of limited immunity to a person so long as they remain in this jurisdiction. The question is, therefore, not where a person should be tried, but whether they should be tried at all so long as they remain in Ireland. There is, therefore, a closer analogy in this regard to be drawn between the analysis of claims involved in domestic criminal proceedings and surrender/extradition than there is between surrender and deportation, for example. Trial and, if appropriate, sentence in this jurisdiction may always involve an interference with family and other relationships, and it is necessary, therefore, to assess the additional interference occasioned by trial abroad in circumstances where it may also be appropriate to take account of the fact that arrangements exist to facilitate prisoners who wish to serve their sentences in their home state. I think it is fair to say that it is only if some quite

compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. It is important that courts should also rigorously scrutinise the factual basis for any such claims against that background."

26. In this case what occurred on the 25th January, 2016, was very serious indeed. Any sexual assault directed against a young person is inherently serious. In that regard though, one must not lose sight of the fact that the alleged offence in respect of which surrender is sought was directed against a victim less than half the age of Mr. PK's daughter. When the thirteen year old victim of such a serious assault suffers from Asperger's Syndrome that further increases the seriousness of the situation and adds considerably to the pressure on family members and all those involved in the care and support of the young victim. That such a situation would weight heavily with the trial judge is entirely understandable. However, if the question is asked whether the circumstances, troubling as they are, would prevent the charge being preferred in this country or a trial proceeding in this jurisdiction there can be no doubt about the answer. A trial would not be prohibited, indeed it is very unlikely that there would even be an application for an order of prohibition. While a trial would, I am convinced, not be prohibited, the fact of the assault and the role of Mr. PK in responding to the assault and to its aftermath, in particular in providing support and comfort for the victim, would be highly relevant to the question of sentence, if that stage was ever reached and also would be relevant to the question of bail, in the perhaps unlikely event of that being an issue. While what would be expected to happen in the context of a domestic prosecution is certainly not determinative of the issue as there may be factors in an extradition that do not apply domestically, such as access by family members to the transferred individual if in detention whether pre or post trial, it is a relevant consideration. By analogy, with the domestic scenario, it seems to me that the combination of circumstances present here, concerning though they are, do not provide a basis for refusing surrender to a neighbouring jurisdiction, just as they would not prevent a trial in this jurisdiction. They are however issues which can be sought to be canvassed before the courts of the requesting state, and it would be for those courts to consider how to proceed in light of all the factors that are present. In the circumstances of the case I am prepared to defer having the order for surrender made up for a brief period in order to allow Mr. PK explore possibilities such as a voluntary return and in order to facilitate an application for bail.

27. In the circumstances I would answer the question certified as follows:-

(i) No.

(ii) Yes

and I would therefore accede to the application by the Minister for an order directing the surrender of the respondent.