

THE HIGH COURT

Record Number: 2006 No. 128 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
JOHN KINSELLA

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 20th day of June 2007

1. Before the Court at present is an application by the Belgian judicial authority for the surrender to Belgium of the respondent on foot of a European arrest warrant dated 28th September 2006. That warrant was duly endorsed here for execution on the 29th September 2006, and the respondent was arrested on foot of same on the 5th December 2006, and brought before the Court under the provisions of s. 13 of the Act as required. He was then remanded in custody pending the hearing of the application for his surrender.

2. The offence under Belgian law for which he is sought to face prosecution is described in the warrant as illicit trafficking in narcotic drugs and psychotropic substances.

3. According to the statement in the warrant outlining the facts alleged against him in this regard, the accused is believed to be involved in the export out of the Netherlands of 48 kilos of heroine. It is further stated that he is believed to have helped recruit the persons who ensured transport of the drugs from the airfield at Wevelgem to Ireland. He is also believed to be involved in the organisation of the smuggling of the heroin to Ireland.

4. The Director of Public Prosecutions here has made a decision to indict the respondent here on charges of importing the said drugs into this country. The respondent has been so charged and is currently held on remand and in custody awaiting his trial on these charges.

5. Some weeks ago when the application for his surrender under s. 16 of the European Arrest Warrant Act, 2003 as amended ("the Act") was listed in the ordinary way, the respondent sought to consent to his surrender to the requesting state under the provisions in that regard of s. 15 of the Act. This Court concluded at that time that in the circumstances where the respondent was facing trial in this country on charges arising out of the same facts as underlie the charges set forth in the warrant from the requesting state, the Court was prohibited by Part III of the Act from making an order under s. 15 of the Act. That arises because of the provisions of section 15 and section 42 of the Act.

6. Section 15 of the Act provides as follows:

"15.—(1) Where a person is brought before the High Court under *section 13*, he or she may consent to his or her being surrendered to the issuing state and, if he or she so consents, the High Court shall—

(a) if the European arrest warrant, or a facsimile or true copy thereof, has been endorsed in accordance with section 13 for execution of the warrant,

(b) if it is satisfied that—

(i) the person voluntarily consents to his or her being surrendered to the issuing state concerned and is aware of the consequences of his or her so consenting, and

(ii) the person has obtained, or has been afforded the opportunity of obtaining or being provided with professional legal advice before consenting to his or her surrender,

(c) if it is not required, under sections 21A, 22, 23 or 24 (inserted by sections 79, 80, 81, and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(d) *if the surrender of the person is not prohibited by Part 3 or the Framework Decision (including the recitals thereto),*

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." (my emphasis)

7. Section 42 of the Act (as substituted by s. 83 of the 2005 Act) and which is contained within Part III thereof provides:

42.— *A person shall not be surrendered under this Act if—*

(a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence, or

(b) *proceedings have been brought in the State against the person for an offence consisting of an act or omission of which the offence specified in the European arrest warrant issued in respect of him or her consists in whole or in part*" (my emphasis)

8. The Court therefore concluded that since it had been informed by the applicant that such proceedings have been brought against the respondent in the State, surrender could not be ordered.

9. The applicant has subsequently sought an adjournment of the application for surrender under s. 16 until after the respondent's trial here on the said charges. The respondent on the other hand argues that there is no impediment to this Court hearing the present application, and indeed urges upon the Court, in the light of the warrant having been received here, and on foot of which the respondent has been arrested and is in custody, and in the light of the requirement that applications for surrender be dealt with expeditiously under the terms of the Framework Decision, that the Court must proceed to hear the present application under s. 16 for

surrender, and that the application for an adjournment which is made by the applicant should be refused and that such an adjournment would amount to an abuse of process.

10. Both parties agree, as does the Court, that the provisions of s. 18 of the Act, which enable the Court, having made an order for surrender under either s. 15 or s. 16 of the Act, to postpone that order in certain circumstances, including where the respondent is required to serve a period of imprisonment arising from domestic charges, are not applicable at this point in time, since the court could not in the present circumstances make any order for surrender under either section. This section operates only after such an order has been made and has therefore non application at the present stage of the application for the surrender of this respondent.

11. For the sake of completeness in this regard, s. 18 (3) of the Act provides:

(3) Subject to section 19, *where a person to whom an order under section 15 or 16 applies --*

- (a) is being proceeded against for an offence in the State, or
- (b) (i) has been sentenced to a term of imprisonment for an offence of which he or she was convicted in the State, and
- (ii) is required to serve all or part of that term of imprisonment,

the High Court may direct the postponement of that person's surrender to the issuing state until—

- (i) in the case of a person who is being proceeded against for an offence, the date of his or her acquittal or conviction (where he or she is not required to serve a term of imprisonment), or
- (ii) in the case of a person who is required to serve all or part of a term of imprisonment, the date on which he or she is no longer required to serve any part of that term of imprisonment.” (my emphasis)

12. Section 19, referred to at the commencement of that subsection is not relevant for present purposes.

Conclusions:

13. In considering the issue raised herein it is useful to look at the relevant provisions of the Framework Decision itself, which has been given effect here by the Act. Article 4 thereof allows Member States a certain level of discretion in relation to providing for grounds upon which surrender may not be ordered. I will set out those optional grounds for refusal of surrender as are relevant to the present application. They are:

Article 4 : Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

1.
2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;
4.
5.
- 6,
7. where the European arrest warrant relates to offences which:
 - (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such.”or
 - (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.”

14. It is paragraphs 2 and 3 above which are of immediate relevance. The Framework Decision itself does not have direct effect, but clearly s. 42 has given effect to those provisions whereby this State has chosen to require this Court to refuse to order surrender to the issuing state where the Director of Public Prosecutions has decided to prosecute the respondent for an offence arising from the facts underlying the offence referred to in the warrant. Curiously the Act is silent as what is to happen in the event that the respondent is either acquitted or convicted of the offences for which proceedings are brought here. The section refers simply to proceedings which are “brought”. That suggests that once proceedings have been “brought”, it is sufficient for a refusal of surrender regardless of the outcome of those proceedings.

15. An interesting question might arise, though so far not in this case, in the event that the Director of Prosecutions was to at some stage prior to the trial enter a *nolle prosequi*. It could be argued presumably in such an event that although proceedings were brought in the historical sense, they were no longer ‘brought’ since they were discontinued. Furthermore, since the Act makes no provision in respect of the optional circumstance set out in paragraph 3 of Article 4 set out above, effect has not been given to the terms of that paragraph which refers to a decision to “halt” proceedings.

16. However I express non view on what the Court’s decision would be in such an event. It must await argument in an appropriate case. But it is quite clearly provided in s. 42 that once the Director of Public Prosecutions has decided to prosecute the charge here,

then this Court shall not order surrender.

17. In such circumstances, it seems to me that it is inappropriate that the Court should grant an adjournment of the application for the order of surrender, since such an adjournment can serve no useful purpose. The reason for this is that, subject to arguments relating to the entry of a *nolle prosequi* to which I have referred, this Court, regardless of the outcome of the prosecution of the charges here, will always be required to refuse the order sought under s. 16 of the Act. The hearing of the application on any adjourned date can yield but one result, namely a refusal to order surrender. While the Court has at all times a discretion to grant an adjournment of any pending application, it seems to me that such a discretion ought not to be granted where no possible useful purpose can be served.

18. In my view the applicant is left with two possible courses of action. He can proceed now with his application under s. 16 and make submissions on that application that despite the provisions of s. 42 of the Act, and the view which I have expressed for the purpose of this application for adjournment that this Court may nevertheless order surrender, or he can apply to withdraw the present warrant in the knowledge that, should the requesting state choose to issue a fresh European arrest warrant at some future date, same can be endorsed for execution leading to the arrest again of the respondent and the hearing of an application for his surrender, when the outcome of the present prosecution has become known. But of course the question of double jeopardy might then emerge in relation to any further prosecution of him in Belgium on foot of offences arising from the same facts, given the provisions of s. 41(1) of the Act which provides:

"41.—(1) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State."

19. However, that is for another day perhaps.

20. In these circumstances I will allow time, if time is sought for this purpose, for instructions to be taken as to which course of action is favoured by the applicant or the requesting state. But in the absence of an application to withdraw the warrant, the Court proposes to hear the application to a conclusion, and not to adjourn same.