Neutral Citation Number: [2010] IEHC 402

THE HIGH COURT

2009 145 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Magdalena Mareka

Respondent

THE HIGH COURT

2009 146 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Jerzy Miziak

Respondent

Judgment of Mr Justice Michael Peart delivered on the 14th day of October 2010:

The first named respondent is the partner of the second named respondent, and they have three children. I will for convenience refer to them respectively as the first named respondent and second named respondent, or alternatively when appropriate as the respondents, even though each is the subject of a separate European arrest warrant.

Each is sought for prosecution in respect of the same offence of fraud, and the issues which arise on these applications for their surrender are largely the same, and the submissions made on their behalf are common to both. Those issues, briefly stated for the moment, involve a consideration of whether in the circumstances the family rights of the respondents would be unjustifiably interfered with by any order for their surrender, and the question of proportionality.

The first named respondent:

The surrender of the first named respondent and the second named respondent is sought on foot of separate warrants both of which issued in Poland on the 29th April 2009. Each warrant was duly transmitted to the Central Authority here and on the 24th June 2009 each was endorsed for execution by order of the High Court. Each respondent was duly arrested on foot of same on the 21st April 2010, and, as required under section 13 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), each was brought before the High Court from where they have been remanded from time to time on bail.

No issue arises as to their identity and I am satisfied in any event from the affidavit of Sgt James Kirwan filed herein that each is the person referred to in the respective warrants.

Each warrant alleges the same offence alleged to have been committed by the respondents. In each warrant the offence has been marked as being an offence of fraud and within the categories of offence set forth in Article 2.2 of the Framework Decision, and as such an offence for which it is unnecessary for correspondence or double criminality to be established or verified. Minimum gravity is satisfied by the length of the potential sentence which such an offence attracts under the law of Poland.

The only facts relating to the offence which are relevant to the submissions being put forward on their behalf are that it is alleged to have occurred almost ten years ago on the 2nd November 2000, and that the goods acquired under false pretences was a computer worth 4887 PLN, which equates today to a sum of €1200, and that this sum has been repaid to the injured party.

There is no reason to refuse to order the respondents' under sections 21A, 22, 23 or 24 of the Act of 2003, and, subject to reaching a conclusion on the issue raised by them, I am satisfied that their surrender is not prohibited by any provision of Part III of the Act of 2003 or the Framework Decision.

Objection:

It is submitted that surrender of each would constitute an unjust and disproportionate interference with the respondents' family life, and that it is a breach of fair procedures. In support of that submission reference is made to the fact that the warrants relate to a single offence, the delay between the date of the alleged offence and the date of issue of the warrants almost nine years later, the fact that the respondents continued to reside in Poland until November 2004 during which time the offence was never brought to their

attention by the authorities, the respondents' residence in this country with their teenage daughters since 2004, and the impact which their surrender will have on the lives of their said children.

Each respondent has sworn a grounding affidavit, and the first named respondent has in addition sworn a supplemental affidavit. From these affidavit it appears that they at all times lived openly and for a lengthy period at a particular address in Gorzow Wikp in Poland. They say that there was no difficulty in locating them had the authorities wished to prosecute these offences before they left Poland in November 2004. In fact they each state that each of them had been the subject of a different prosecution for a separate offence in 2003/2004 and there had been no difficulty locating them at that time. They believe that they received a suspended sentence at that time, and that the offence referred to in the European arrest warrant could easily have been brought to attention at that time.

They say that they left Poland using their passports and did not do so surreptitiously, and that in fact they had made arrangements for any post addressed to them at their address in Poland would be forwarded to them in Ireland and that none was received relating to the offence in the warrants. In fact, they say that the first they knew about the allegations contained in the warrants was upon their arrest on the 21st April 2010. Upon arrest when asked if they knew what this was all about, each made no reply, according to the affidavit of Sgt. Kirwan.

They say that the delay which has occurred since the date of the alleged offence has prejudiced their chances of defending themselves since they would need to access and check documentation relating to their work and financial transactions, and these will now be unavailable to them given the passage of time involved.

Their daughters are now aged respectively 24, 20 and 17, and the two youngest daughters continue to reside with them in a rented family home in Dublin. Their eldest daughter has her own rented accommodation here. At the time of swearing their grounding affidavits each respondent was in gainful employment in Dublin, and it appears that at no time have either of them come to the adverse attention of An Garda Siochána. Their eldest daughter is a student at Trinity College, and both younger daughters are attending secondary school. It is submitted that this family has integrated itself into the community over the past six years, and that surrender would have a devastating effect on their family and family life, and particularly in relation to their two younger daughters, since they would be left without anybody who can provide financial support them in this country, as has been the case up to this point in time. They do not believe that their eldest daughter would be in a position to look after her younger sisters since she is in a student accommodation and has the benefit only of a student scholarship. The first named respondent also gives some detail of an incident related to her youngest daughter, which it is unnecessary to set forth here, but clearly it would add to the anxieties which she and her partner would have in the event that they be surrendered.

The second named respondent has stated in addition that he suffers from a heart complaint and that these proceedings are the cause of great stress for him and his family. He confirms that he has paid the amount of money which is involved in the offence to the injured party and exhibits a receipt in that regard. The first named respondent's supplemental affidavit states, *inter alia*, that she suffers from depression and anxiety for many years and is on medication.

It is in all these circumstances that the respondents submit that to be surrendered after such a long time to face prosecution for an offence ten years ago, and in respect of which the amount involved has been repaid, is a disproportionate interference with their family rights, to such an extent that their surrender is prohibited by virtue of the provisions of section 37 of the Act of 2003.

Submissions:

John Fitzgerald BL for the respondents has stated very properly at the outset that the delay which has occurred is being relied upon only in so far as it feeds into or supports the principal argument on proportionality. He relies on a judgment of this Court in *Minister for Justice, Equality and Law Reform v. Gorman*, (Unreported, High Court, 22nd April 2010). He accepts that in that case the respondent's family ties to this State were far greater than those of the respondents herein, but on the other hand refers to the fact that in the present case the offence is of a relatively minor fraud in respect of which the injured party has been reimbursed, whereas in Gorman the offence was murder. He submits that the nature and seriousness of the offence is something which this Court must weigh in the balance when considering whether in all the circumstances the surrender of the respondents is necessary in a democratic society (i.e. justified by some pressing social need) and proportionate to the legitimate aim pursued. In that regard, he submits that the uncontroverted and significant interference with the respondents' family must outweigh the need to have these respondents prosecuted for such a minor offence and one of such relative antiquity.

Mr Fitzgerald has sought support for his argument by reference to a decision of the European Court of Human Rights in *Khan v. The United Kingdom* (Case 47486/06), 12th January 2010 where that Court decided that the deportation of the applicant following his conviction for an offence of importing drugs was found to be a violation of Article 8 rights. That applicant had come to the United Kingdom when he was three years of age, and while understanding the authorities serious attitude to drugs offences, the Court had regard to the fact that the applicant had not previously or since committed any offences in the United Kingdom, and to the fact that as he had arrived in the United Kingdom at the age of three, he no longer had any real social, cultural or family ties to Pakistan, especially as he had never returned to that country even for a short period. I do not believe that this case is of assistance to the respondents in the present case, as the facts are so different. It cannot be said that the family position of the respondents is in any way comparable to that in Khan.

Eileen Stack BL for the applicant has submitted that facts of the present case are very different to the unique facts of the Gorman case referred to by Mr Fitzgerald and the Khan case also. She has submitted that the ages of the respondents' children is a significant matter in considering the seriousness of any interference with family rights which the surrender of the respondents would involve, and she has referred also to their relatively recent arrival in this State in 2004. She has referred to the judgment of Fennelly J. in *Minister for Justice, Equality and Law Reform v. Gheorghe*, (Unreported, Supreme Court, 18th November 2009) where at p.18 of his unreported judgment, he states:

> *"Like Peart J. 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."*

In addition, Ms. Stack submits that in reality these respondents are in no different a position than if they were to be prosecuted in

this State for an offence committed here and which on conviction could expose them to a period away from their family while in prison. In that regard she points to the undoubted fact that although the family has been here since November 2004, Poland is still their home country, and in any event even if convicted and imprisoned it will be for a short period. She has referred also to the ages of the daughters and to the fact that Poland is easily accessed from this country should they wish to return there, even for the purpose of visiting their parents if they are in prison.

Conclusion:

There is no doubt that the respondents are entitled to feel some sense of grievance that these offences have been brought to their attention so long after the date of their commission, and some six years after they came to this State. However, that alone is insufficient to be a bar to their surrender being sought. There is certainly no case made out that as a result they are prejudiced in any serious way from dealing with them upon surrender, in spite of their averment to the contrary.

The real question is whether the family circumstances which have been put on affidavit constitute a sufficient counterweight to the undoubted right of the Republic of Poland to prosecute the offences there. The prosecution of crime is a legitimate aim when considering the question of proportionality. The fact that the offence in question may be seen to be at the lower end of the scale as far as its seriousness is concerned, and indeed that any loss to the injured party has been made good, is not something which a Court in this State can pay much attention to. The Framework Decision has defined minimum gravity, and this offence comes within that definition. This Court must respect the entitlement of the issuing judicial authority to prosecute these offences where it has expressed a wish to do so. The facts of the Gorman case referred to and relied upon by the respondents were unique. The facts and circumstances of the present case come nowhere near the sort of facts and circumstances which arose in Gorman.

I accept that an order for surrender will undoubtedly cause stress and anxiety to both respondents, given their concerns for their daughters, and I accept that such an order will inevitably impact upon the lives of their children too. But one must have regard to their ages when considering the matter, and also the fact that while they have sought to make their home here, their departure from Poland is relatively recent. One can also, as submitted by Ms. Stack, have regard to the likelihood that if convicted and sentenced to a period of imprisonment, and that cannot be assumed, that the time spent in Poland will not be lengthy, unlike in Gorman where a sentence of life imprisonment was mandatory upon conviction.

In all these circumstances I cannot conclude that an order for the surrender of the respondents will constitute an impermissible interference with the respondents' family rights under Article 8 of the Convention or under Article 41 of Bunreacht na h-Éireann. The entitlement of the issuing state to prosecute these offences must prevail.

I will therefore make an order for the surrender of each respondent to the issuing state.