Neutral Citation: [2016] IEHC 587

THE HIGH COURT

Record No: 2015/236 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Plaintiff

AND

M.Z.

Respondent

JUDGMENT of Ms. Justice Donnelly delivered this 26th day of July, 2016.

1. The respondent's surrender is sought on foot of a European Arrest Warrant ("EAW") dated 5th October, 2015, issued by the Public Prosecutor of Lyon, France, in relation to the prosecution of two alleged offences of abduction of a child and repeated failure to deliver a child to the person requiring delivery. The EAW was endorsed by the High Court on 3rd November, 2015 in accordance with s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") and the respondent was arrested on 17th December, 2015. The respondent was granted bail on 21st December, 2015 and has been remanded on bail from time to time since.

2. It was agreed that prior to determining s. 37 "rights" issues, the case should proceed with submissions on the following procedural or technical issues raised by the respondent:-

- whether the offences outlined in the EAW correspond with offences under the law of this jurisdiction;

- whether there has been a decision made by the issuing state to charge and try the respondent for the alleged offences outlined in the EAW in the context of s. 21A of the Act of 2003;

- whether these alleged offences were extraterritorial offences for which, in the circumstances, surrender was prohibited in the context of s. 44 of the Act of 2003;

- whether s. 41 of the Act of 2003 prohibits surrender for the second offence on the grounds of double jeopardy.

3. It was also agreed that, if possible, a separate judgment or ruling would issue from this Court before the "rights" issues would be heard by the Court. This was regarded as the most expeditious means of dealing with the case in circumstances where the Minister for Justice and Equality ("the minister") required further time to deal with the extensive issues raised in the affidavits filed on behalf of the respondent.

The Offences Alleged in the European Arrest Warrant

4. At point (b) of the EAW, the decision on which the EAW is based is set out as being an "Arrest Warrant issued on 2 October 2015 by Mr. Thomas HIRTH, Investigating Judge ['juge d'instruction'] of the Court of First Instance ['tribunal de grande instance'] in LYON in the context of judicial investigations commenced on 30 September 2015 for the offences cited in the Warrant."

5. At point (e) of the EAW, it is stated that the warrant relates to two offences and a description of the circumstances in which the offences were committed appears as follows: –

> "M.Z. and C. D. are the parents of X., born on [redacted] who is autistic. Following the separation of the parents the exercise of parental authority was provided by an Order of the Court of Appeal of Lyon dated 19 May 2015.
>
> This Order gave residence of the child to his father, and gave visiting rights of alternate weekends from 6pm on Friday to 6pm on Sunday *[TN: to the mother]*, with Mrs. Z being responsible for ensuring transportation.
>
> In early September the minor was hospitalised. When released, the child was handed over to his mother in accordance with the order of the Court of Appeal. In the evening of Sunday 13 September she did not had (sic) over the child who has been with her ever since.
>
> On Friday 25 September, a new hearing before the Judge for Children ['juge des enfants'] in Lyon dismissed her application to see that X. be entrusted to her again. The judge reminded of the utmost necessity to comply with court orders. It was agreed between the parties that X. would stay with Mrs. Z. until 6pm on 27 September, which she did not do [TN – intended meaning 'but she did not return him.]
>
> A police investigation was initiated on the Monday. On Tuesday 29th police went to the home of Mrs. S. (sic) and noted her absence and that of her child. It appeared that they had gone to the Republic of Ireland by airplane."

6. The nature and legal classification of the offences are described as being "[t]he abduction of a child from the care of those entrusted with his or her care and retention outside of France" and "[t]he repeated offence of unlawfully refusing to deliver a child to a person with the right to require delivery", both of which are contrary to provisions of the French Penal Code.

7. As Article 2.2 of the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedure between Member States ("the 2002 Framework Decision") was not being invoked, point E.II of the EAW provides an expanded description of the offences as follows:

> "**1) ABDUCTION OF CHILD FROM THE CARE OF THOSE ENTRUSTED WITH HIS CARE AND RETENTION OUTSIDE FRANCE**
>
> Committed in Lyon (69), Marchamp (01), in and outside French national territory, notably in the Republic of Ireland since 28 September 2015 to the prejudice of C.D. concerning X., their son born on [redacted] whose residence is fixed at the home of his father C.D. by order of the Court of Appeal of Lyon dated 19 May 2015.

> **2) THE REPEATED OFFENCE OF FAILING TO DELIVER A CHILD TO A PERSON HAVING THE RIGHT TO REQUIRE IT** in Lyon (69) on Sunday 13 and 27 September 2015 to the prejudice of C.D. concerning X., their son born on [redacted] whose residence is fixed at the home of his father C. D. by order of the Court of Appeal of Lyon dated 19 May 2015 providing Mme Z. with the right to contact visits on alternative weekends, with her being responsible for the return of the minor to his father on the Sunday at 6pm being a repeat offender having been convicted on 1st September 2014 by the Criminal Court in Lyon for identical offences."

8. It is outlined in the EAW that the maximum sentence which may be imposed for the offences is that of three years imprisonment and I am satisfied that the requirements of minimum gravity have been satisfied in this regard.

The Putative Corresponding Offence

9. The offence of abduction of a child by a parent in this jurisdiction applies only to children under the age of 16 years (see s. 16 of the Non-Fatal Offences against the Person Act, 1997 ("the Act of 1997")). As X. was 16 years old at the date of the alleged offences, counsel for the minister relied upon the offence of false imprisonment as outlined in s. 15 of the Act of 1997. This provides as follows:

> "15.—(1) A person shall be guilty of the offence of false imprisonment who intentionally or recklessly—
>
> (a) takes or detains, or (b) causes to be taken or detained, or (c) otherwise restricts the personal liberty of, another without that other's consent.
>
> (2) For the purposes of this section, a person acts without the consent of another if the person obtains the other's consent by force or threat of force, or by deception causing the other to believe that he or she is under legal compulsion to consent. […]"

The Additional Information

10. The central authority sent a request to the issuing judicial authority on 28th April, 2016, asking "whether X., at the time he left France with the respondent, had the requisite mental capacity to fully consent to accompanying his mother to Ireland? If X. did not have the capacity to fully consent, then please provide the reason for such a conclusion." The request indicates that this information was sought for the purpose of establishing dual criminality with an offence in this jurisdiction.

11. The issuing judicial authority replied by e-mail also dated 28th April, 2016, as follows: "It is difficult for me to give to confirm you (sic) that X., at the time he left France with M.Z., had the requisite mental capacity to fully consent to accompanying his mother because I don't have medical skills and I have never seen X. However and this is an opinion based on some elements which are in my file, it would be surprising if this is the case. I send you a copy of an (sic) psychiatric expertise (February 2015) about the whole family (M.Z. has refused to be examined)."

12. The translated accompanying psychiatric report, of Dr. Thierry Alberhne, a psychiatrist and child psychiatrist and Head of the Children South Unit, Montfavet Hospital Centre in France, was relied upon by counsel for the minister. This report had apparently been requested by the Court of Appeal in Lyon in relation to child care proceedings in France, in order to assess the needs of the child in circumstances where the parents could not agree on the best course of treatment for him with the aim of assisting that court to put in place a plan of action for the child's care.

13. At p. 3 of the report, Dr. Alberhne stated, as regards physical/psychological deficiencies that can influence the child's behaviour:

> "X. currently shows atypical autistic qualities which could be classified as what one would consequently call P.D.D.'s (Persuasive Development Disorders) and demonstrates clinical signs such as: massively invasive language problem (X. showed himself to be echolalic during his interview, which, according to his father, happens very often), communication problems and socialising, stereotypies (particularly gestural: during his interview, the adolescent "did the butterfly" several times with his hands and his forearms), and various sensory troubles (various sound effects, and a hyper-sensibility to certain noises). On a pyschometer level, he is right handed and can certainly manifest a finely attuned manual skill. He can present massive anxiety, of the archaic type, which overwhelms him entirely. His father has indicated that the young man had "rarely been as calm" as during the interview (at the end of the interview, X. kissed the expert on the cheek and said his goodbyes, even though he had previously spoken very little). X. is capable of expressing himself using simple sentences, very short and basic, and not necessarily well adapted to the situation, and always with a lag (for example he will respond to a question with an echolalia, and then return to the same question a few minutes later. He shows several behavioural issues […]. He did not, however, manifest any disorderly conduct. His capacities for autonomy are limited."

14. Later in his report, Dr. Alberhne, in relation to any problems or deficiencies that necessitate a certain measure of protection, help, or re-education, stated:

> "Furthermore, X. is not capable of giving a clear idea on the type of ad hoc care given, and even when he could, this would place him in a position of loyalty psycho-affective conflict which could affect and destabilize him (the dilemma is therefore the following: should the father be justified by going to the IME, or should the mother be proven right by not going?)."

Minister's Submissions on Correspondence of Offences

15. Counsel for the minister submitted that the offence committed by the respondent is akin to the common law offence of kidnapping which was repealed and replaced by s. 15 of the Act of 1997. He submitted that a parent who has guardianship rights can commit the offence of false imprisonment over their own minor child and submitted that such a finding was made in the U.K. case of *R. v. Mohammed Moqbular Rahman* (1985) 81 Cr. App. R. 349, a case in which a father was charged with the false imprisonment of his daughter. In that case, Lord Lane LCJ held that "*a parent can in certain circumstances be guilty of kidnapping his own child […] [i]n our judgment [the trial judge] would have been correct in refusing to stop the case because it was for the jury to say whether they felt sure that what the appellant did was outside the bounds of legitimate parental discipline and correction. There was certainly evidence upon which they could come to that conclusion as will have been seen from the precis of the facts which we have endeavoured to give. There was therefore no wrong decision of law. A plea of guilty was therefore not based on any wrong decision of law. The appeal against conviction is accordingly dismissed*."

16. In *R v. Rahman*, the evidence revealed that the father had grabbed his daughter and pushed her into a car, despite her struggles. In that case, the court stated that the prosecution may prove unlawful restraint in many ways; the existence of a court order showing that parental control of the minor had been given to someone other than the parent and that the detention by the parent was contrary to that order "*may perhaps be one*". Counsel, therefore, submitted that by the respondent's own admission, she took the child X. in breach of the French court order and without the consent of the child's father who had custodial rights over the child.

17. Counsel relied on the medical report of Dr. Alberhne to prove lack of capacity of X. to consent to the actions of the respondent regarding his custody and travel to and presence in Ireland. It was also submitted that the respondent was aware that the State would make the argument that the corresponding offence equated with that of false imprisonment and in order to make out the offence, the necessity of proving lack of consent would be required in order to secure a conviction. Counsel pointed out that no medical evidence had been produced by the respondent to indicate that that X. had the capacity to consent to his removal from his home.

18. Counsel for the minister submitted that the respondent is misguided in her view that, merely because of the age of her son X., that there exists a presumption that he consents to be in her company. Counsel outlined that there is a court order in France of which the respondent is fully aware and that when she and her son resided in France, she was compelled to comply with the law of that country.

19. Counsel for the minister also relied upon the case of *HM (An Adult) PM v. KH, HM v. The States of Guernsey* [2010] EWHC 870 (Fam) in support of his contention that the removal of a person (adult or child) who lacked capacity to consent was wrongful and unlawful. Referencing the case of *R. v. Daily*, (Court of Criminal Appeal, Criminal Division, 31st October 1993), counsel stated that if there is evidence of false imprisonment in breach of a court order, rarely would there be a situation where a person would be charged with contempt, the expected charge would be one of false imprisonment. Counsel also relied upon Council Regulation (EC) No. 2201/2003 of 27 November, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, in submitting that an Irish court is obliged to consider the stage and state of matrimonial disputes, including matters of parental responsibility, that are in being in Member States.

Respondent's Submissions on Correspondence of Offences

20. Counsel for the respondent noted that both offences in the EAW differ from one another, one involving abduction and retention, the other being the refusal to deliver up the child. Counsel submitted that neither offence corresponded with s. 15 of the Act of 1997. Counsel submitted that nowhere in the EAW does it stipulate that there was any absence of consent on the part of the respondent's child and that, in all the circumstances, the matters alleged cannot amount to false imprisonment. If there was consent, which on the respondent's case there was, there can be no offence of false imprisonment. It was also submitted that nowhere in the EAW was it alleged that the respondent had restricted the liberty of, or detained, her child.

21. The respondent referred to the investigating judge's e-mail of 28th April, 2016 in which he said he has no medical skills and that he has not seen her son X. Counsel referred to the medical report sent by the issuing judicial authority and submitted there is no statement in the said report to the effect that X. does/did not have capacity to consent to accompanying the respondent to Ireland. Counsel also referred to a medical report of Professor Paul Trouillas dated 26th May, 2015, exhibited by the respondent, in which the professor swore that "the child wishes to remain with his mother, a statement very clearly made this day at 7.30pm".

22. In addressing the issue of whether the suggested course of action of going to Ireland is such as to constitute what is, in effect, a deprivation of X.'s liberty, counsel submitted that the act of X. simply going to Ireland with his mother would not, of itself, constitute a deprivation of liberty, or any form of imprisonment. Counsel further submitted that, even were the actions of his mother somehow to deprive X. of his liberty, there would have to be proof that he did not consent to the course of action, or that his consent was obtained by force, threat of force or deception. Counsel stated that no such situation is alleged, so no issue of false imprisonment arises. Counsel also challenged the rationale behind the central authority's request concerning whether X. had the capacity to consent – merely because he has autism did not mean he could not consent.

23. In supplemental submissions, in relation to "restriction of liberty" as an essential element of s. 15 of the Act of 1997, counsel for the respondent sought assistance from the Law Reform Commission's "Report on Non-Fatal Offences against the Person" (LRC 45-1994) ("the 1994 LRC Report"). He submitted that this report supports the proposition advanced by the respondent that false imprisonment requires a deprivation of liberty and so should not be conflated with a parental failure to deliver a child to a particular person, where the latter does not require a restriction on liberty. It was submitted by counsel that where a child accompanies his mother and is not deprived of his liberty (albeit that the mother does not comply with her duty to deliver the child to his father), then there is no false imprisonment.

24. Counsel also submitted to the Court that there is nothing in the EAW which suggests that the child's mother detained him or acted against his wishes in any way. On the contrary, the investigating judge or *juge d'instruction* stated in an e-mail of 15th February, 2016, having been sent the points of objection and affidavit: "I am only seized about the abduction of a child and the repeated offence of unlawfully refusing to deliver a child to a person with a right to require delivery."

25. Counsel contended that, although the Hague Convention on the Civil Aspects of International Child Abduction only applies to children under the age of sixteen years and so does not apply to the respondent's son, it is instructive as to what is meant by the abduction of a child. Counsel emphasised Article 3 of the Hague Convention in this regard, which outlines that the wrongful removal or retention of a child occurs where "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised but for the removal or retention."

26. Counsel also made reference to para. 2.2 of the 1994 LRC Report as follows: "[…] false imprisonment derives from the former writ of criminal trespass to the person.

> 'False imprisonment is the unlawful and total restraint of the personal liberty of another whether by constraining him or compelling him to go to a particular place or confining him in a prison or police station or private place or by detaining him against his will in a public place. The essential element in the offence is the unlawful detention of the person, or the unlawful restraint on his liberty. The fact that a person is not actually aware that he is being imprisoned does not amount to evidence that he is not imprisoned, it being possible for a person to be imprisoned in law, without his being conscious of the fact and appreciating the position in which he is placed, laying hands upon the person of the party imprisoned not being essential. There may be an effectual imprisonment without the party's freedom of motion in all directions. In effect, imprisonment is a total restraint of the liberty of

> the person. The offence is committed by mere detention without violence. Per Fawsitt J. in Dullaghan v Hillen and King [1957] Ir. Jur. Rep. 10.'"

27. Counsel also referred to paras. 2.7 to 2.15 of the 1994 LRC Report where it considers the offence in detail and refers to the restraint of a person's freedom as being essential at para. 2.8, as follows:

> "In this respect, the victim's freedom of movement must be limited in all directions so as to be confined within fixed bounds. So it is not an imprisonment wrongfully to prevent the victim from going in a particular direction if he is free to go in others. [*R. v Rahman* (1885) 81 Cr. App. Rep. 349 at 353] […] In other words, the restraint must be total."

28. In respect of a child, the 1994 LRC Report states at para. 2.10: "a person may be imprisoned without being aware of the fact, as where a child […] is confined without his knowledge [Dullaghan v Hillen and King, supra, n.2. The English authorities on this question are in conflict: see Smith and Hogan, Criminal Law (6th ed., 1988), p.407.]"

29. Para. 2.13 of the 1994 LRC Report refers to restraint in contravention of a court order and states: "A parent or person *in loco parentis* may exercise restraint over a child so long as such restraint remains within the bounds of reasonable parental discipline and is not in contravention of a court order. [*R. v Rahman* (1985) 81 Cr. App. R. 349 (C.A.)] A parent would very seldom be guilty of false imprisonment in relation to his or her own child, however, as the duration and circumstances of such restraints are usually well within the realms of reasonable parental discipline. [*R. v Rahman* (1985) 81 Cr. App. R. 349 (C.A.)]".

30. Counsel for the respondent submitted that the above commentary at para. 2.13 is in the context of "restraint" being placed on the child but that in this case, there is no suggestion that the respondent "restrained" X. - what is alleged is that she failed to deliver him to his father. Counsel, therefore, contended that there is a fundamental difference between false imprisonment and abduction, the latter being an offence without deprivation of liberty and that it is not aimed at protecting the child but is aimed at protecting the rights of a parent.

31. It was indicated that s. 15 of the Act of 1997 was subsequently passed in almost identical terms to that recommended by the LRC. Counsel submitted that it is clear from this statutory definition that "restriction of liberty" is essential. Counsel submitted that the clause "or *otherwise* restricts the person's liberty" implies this and referred by analogy to the judgment in *Minister for Justice and Equality v. Sliwa* [2016] IEHC 185 at paragraph 58.

32. Counsel stated that this is consistent with the 1994 LRC Report's analysis of what false imprisonment entails, and with previous authority. In *Kane v. The Governor of Mountjoy Prison* [1988] I.R. 757, Finlay C.J. (as he then was) at p. 768 in commenting upon the nature of detention, stated:

> *"The essential feature of detention in this legal context is that the detainee is effectively prevented from going or being where he wants to go or be and instead is forced to remain or go where his jailer wishes him to remain or go."*

Counsel stated that in respect to the issue of consent as referred to in s. 15 of the Act of 1997, there is nothing to suggest that X. has not at all times consented to being with his mother, or that his consent has been obtained "by force or threat of force" or "by deception".

33. It was also submitted that X. must be presumed to have capacity having reached the age of more than 14 years. Counsel in this regard opened the case of *The People (Attorney General) v. Edge* [1943] I.R. 115 which concerned a 14 year old child's ability to consent to a kidnapping in which the accused was charged with kidnapping being an aggravated version of false imprisonment. Counsel referred to the *dicta* of Geoghegan J. at pp. 139-140 regarding the extent to which a minor could consent to his own kidnapping (or, by analogy, to his own false imprisonment):

> *"It appears to me from these judgments and the authorities referred to in them that in both England and Ireland effect will be given to a boy's choice, if he is capable of really consenting or not consenting, or, in other words, if he has reached the age of discretion and is normal. In the Irish case words are used that seem to determine 14 as the age at which a normal boy acquires the right of election; while there is no case in England which fixes 14 it is rather indicated that a boy reaches the age of discretion at 14."*

34. Counsel also drew the Court's attention to the comments of Byrne J. where he stated the following:

> *"It by no means follows from this that an invasion of that right, by taking away a boy between the ages of 14 and 21 years, with the boy's consent but against the will of the father, constitutes a criminal offence."*

35. Counsel therefore submitted that if the presumption of capacity is to be rebutted, clear and cogent evidence would have to be put before this Court that X. lacked the capacity to decide to accompany and reside with his mother and there is no such evidence before the Court.

36. Finally, in addressing the issue of whether the order requiring X. to be delivered to his father vitiates X.'s capacity to accompany his mother, counsel submitted that these court orders are directed at X.'s parents and there is nothing to suggest that they impose any legal obligation on X. himself in that they concern how his parents' rights of custody and access to him are to be shared.

37. Counsel referred to the general contention that court orders, of their nature, act *in personam*. In *Iveson v. Harris* (1802) 7 Ves Jun 251 at p. 256, it was stated by the judge in that case: "*I have no conception that it is competent to this Court to hold a man bound by injunction, who is not a party in the cause for the purposes of the cause*.". It is therefore submitted that the French court orders were made to regulate the parents' custody and access arrangements in respect of X. because the parents could not agree and they do not impose a binding legal obligation on him and consequently cannot invalidate his capacity to decide what he wishes to do.

38. It was also indicated, however, that it may be that certain obligations can fall on a third party as a consequence of a court order. In this regard, counsel referred the Court to the case of *Moore v. Attorney General* [1930] 1 I.R. 471 in which the plaintiffs claimed various perpetual injunctions against the State and certain named defendants restraining them from fishing in certain areas near Donegal. Having held that an injunction acts *in personam* and can only bind third parties to the proceedings, Kennedy C.J. stated the following at p. 487:

> *"The case, therefore, of persons not parties to a suit, knowing of an injunction granted in that suit, yet doing or aiding*

and abetting acts in breach of the injunction, falls under the jurisdiction of the Court to deal with contempt of its proceedings and obstruction of the course of justice."

It was submitted, therefore, that while a party who is not a party to the proceedings is not bound by the terms of an injunction, in this jurisdiction a party who, with knowledge of an injunction aids in its breach, is *prima facie* guilty of criminal contempt of court for obstructing the course of justice.

39. Counsel referred to the case of *Scott v. Scott* [1913] AC 417 where at p. 456 Lord Atkinson noted the apparent absurdity of such a conclusion where he stated as follows:

> *"It would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this: that a principal who does an act he is expressly prohibited by injunction from doing should only be guilty of a civil contempt of Court, while a person not expressly or at all prohibited who aids and abets the principal in doing that very act should be held guilty of a crime, a criminal contempt of Court."*

40. Counsel concluded that, whether a minor could in theory be held in contempt of court for wilfully aiding in the breach of a custody order concerning him or her, does not arise for resolution in these proceedings. The important point is that X.'s capacity to consent is not vitiated by the order – whether or not he has committed some form of wrong in law as a consequence of his action is of no relevance to the request for his mother's surrender.

Analysis and Determination on Correspondence of Offences

41. The respondent in this case is wanted for the alleged offences of abduction of a child and failure to deliver a child to the person requiring delivery in accordance with French law. As regards an offence of child abduction, under s. 16 of the Act of 1997, the offence is only committed in this jurisdiction where the child in question is under the age of 16 years at the time of the offence. This element is not present in the respondent's case as her son was aged 16 years at the time of the alleged offence. The issue that the Court must address is whether the allegations set out in the EAW and the additional documentation would amount, if proven, to an offence of false imprisonment under s. 15 of the Act of 1997.

42. At the outset, it is important to clarify a number of issues. The Court does not accept the criticism of the central authority made expressly or impliedly on behalf of the respondent, that in seeking confirmation that X. did not consent to remaining with his mother, there was any suggestion of discrimination against X. or lack of respect for him on account of his autistic condition. It is the duty of the central authority under s. 20(2) of the Act of 2003, if of the opinion that the documentation or information before the Court is not sufficient for the High Court or central authority to perform functions under the said Act, to require an issuing state to provide it with such documentation or information. As the central authority was apparently of the view that information was required in respect of whether X. had consented, the central authority, correctly, sought this information.

43. The Court also wishes to clarify that this judgment concerns only the request by the judicial authority in France for the surrender of the respondent under this EAW. It is not a decision which goes to the correctness of any legal proceedings, civil or criminal, in France. It is not a decision which has any bearing on any child abduction proceedings that may or may not be in being or proposed in this jurisdiction. The Court has made the parties aware that it has received direct correspondence from a lawyer in France, apparently acting on behalf of the child's father. None of this correspondence has been read, save to the extent necessary to understand its provenance. As an application for surrender pursuant to an EAW issued by a judicial authority in France, the proper parties before the High Court are the minister, as central authority and the respondent who is the requested person. It is improper for any other party to communicate with the Court in respect of surrender proceedings (other than by way of an application in open court to do so). This is of course subject to the right of an issuing judicial authority/issuing state to communicate with the Court most properly through the channel of the central authority as set out in the Act of 2003.

44. Finally, the Court also clarifies that the mutual recognition that this jurisdiction must give to a French custodial order in respect of a child is satisfied when the Irish court makes the appropriate order in proceedings brought under child abduction processes and the relevant regulations relating thereto. Such mutual recognition has no bearing on the functions that the High Court must undertake as an executing authority in respect of the EAW that has been issued for the surrender of this respondent. The High Court does note and take cognisance of the existence of the French custodial order.

The law on correspondence of offences

45. The law as regards the proof of correspondence is well established. The starting point is s. 5 of the Act of 2003 which provides: "For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

46. In the case of the *Minister for Justice, Equality and Law Reform v. Szall* [2013] 1 I.R. 470, the Supreme Court (Clarke J.) stated at p. 484 "*in* Attorney General v. Dyer *[2004] 1 IR 40, Fennelly J. re-emphasised the principle, which can be traced back to* State (Furlong) v. Kelly *[1970] IR 132, to the effect that the comparison which requires to be conducted in order to determine correspondence is to be based on the acts or omissions which are said to constitute the offence*." After discussing the provisions of s. 5 of the Act of 2003, the Supreme Court in *Szall* also held "*there is not, therefore, any material difference, so far as correspondence is concerned, between the law as it stood under the 1965 Act and the law as it now stands under the 2003 Act.*" (p. 484).

47. In *Attorney General v. Dyer* [2004] 1 I.R. 40, Fennelly J. stated at p. 52:

> *"[h]owever, in the absence of any allegation, either express or to be implied, of intent to defraud, I do not believe the warrants in the present case satisfy the requirement of Part III of the Extradition Act 1965 in respect of correspondence of offences, I would, therefore, allow the appeal and substitute an order dismissing the application of the applicant."*

In the light of this *dicta*, if certain requirements of the Irish offence can be implied from the allegations of fact set out in the EAW, then that is sufficient for proof of correspondence.

48. As stated by the Supreme Court in *Minister for Justice v. Dolny* [2009] IESC 48, the court must consider the totality of the EAW when assessing correspondence. That includes the additional information as forwarded by the issuing judicial authority, which in this case includes the psychiatric report.

The requirement of restriction of liberty

49. The respondent's case that s. 15 requires restriction of liberty is based upon s. 15(1)(c) and the reference therein to "*otherwise* restricts the personal liberty of […]" (emphasis added). Counsel submitted that the word "otherwise" demonstrates that the reference to "takes or detains" in the other sub-sections necessarily involve an element of restraint of liberty. The Court agrees with this submission. As the Court has said in the case of *Minister for Justice v. Sliwa* [2016] IEHC 185 at para. 58, concerning the interpretation of a sub-section of s. 22 of the Act of 2003: "*The use of the word "otherwise" acts as a qualifier to the words in the prior clause*", the words "take and detain" are therefore to be understood as including an element of restraint of personal liberty.

50. The argument of the respondent that no restraint has been demonstrated in this case is one that, in the view of the Court, is premised on a conception of restraint of liberty that fails to take into account the reality of the care and custody of children. Indeed, even the 1994 LRC Report, referred to by the respondent, stated that false imprisonment at common law had also required the unlawful and total restraint of personal liberty of another. However, the Report went on to say that it was possible for a person to be imprisoned in law without his being conscious of the fact or appreciating the position in which he is placed. As for a child, the law recognises that a parent may exercise restraint, so long as such restraint remains within the bounds of reasonable parental discipline. As found in *R v. Rahman*, the existence of a court order may establish that the restraint is not within the bounds of reasonable parental discipline.

51. In the view of the Court, day to day decisions and actions regarding young children involve an element of restraint on personal liberty. Decisions about where to live, where to go to school, where to travel, when to leave the house, *etc.*, are taken by a parent rather than a child (particularly with regard to young children). Some of these restrictions may be viewed as restraints on personal liberty and, depending on the age of the child, he or she may not be conscious of that fact. They are not however, criminal acts in and of themselves if they are, to quote the 1994 LRC Report, "within the bounds of reasonable discipline and not in contravention of a court order."

52. Indeed, the case relied upon by the respondent, *Attorney General v. Edge*, provides some clarity to the issue of restraint, although it should be borne in mind that the offence alleged in the indictment was one of kidnapping (which was stated to be an aggravated form of false imprisonment). The question in that case, as identified by Geoghegan J. at p.137 was "*whether one who takes away and secretes a boy over the age of 14 and under 21 with the consent of the boy obtained without fraud or coercion but without the consent of his guardian is guilty of an offence indictable at common law*." The very question is posited on the basis that where a child is in the company or care of an adult who is not a parent or guardian, there is a restriction of personal liberty.

53. To have the custody of a child, to leave a country with a child, and to remain in another country with that child, is the exercise of a restraint over the personal liberty of that child. The Court accepts that the allegation being made in each of the counts in the EAW amounts to a restriction of the personal liberty of the child X. It is immaterial if he is conscious of the fact that his liberty was being restrained. It is a question of fact to be determined by the tribunal of fact as to whether that restraint is outside the bonds of legitimate parental discipline and correction. The existence of the court order is a matter that goes to the proof of that. I am satisfied, however, that the facts alleged in the EAW amount by implication to an allegation that by her breach of the French Court Order, the respondent had acted to restrain the liberty of her son X. in a manner beyond the bounds of legitimate parental control and discipline.

The requirement of consent

54. Section 15 of the Act of 1997 expressly requires that, for an act of restraint of liberty to amount to the offence of false imprisonment, it must be done without the consent of the person whose liberty is being restrained. For the resolution of this case, the issue is whether the allegation contained in the EAW and additional documentation is that X. was taken and/or detained by his mother without his consent.

55. It is necessary to clarify a matter raised by the minister with regard to proof of consent. It is not for a respondent to prove "consent" when challenging correspondence, in the same way as it is not for a respondent to prove "lack of intent" where intent is relevant to a particular putative corresponding offence. To require such proof would be to convert the surrender hearing into a mini-trial of the action. The opposite is the case: it is for the court to assess, on the basis of the facts (or alleged facts) asserted by the issuing judicial authority in the EAW, whether those facts or alleged facts would, if committed in this jurisdiction, amount to a criminal offence.

56. The first offence set out in the EAW is a statutory offence of "abduction of a child from the care of those entrusted with his care […]". Nowhere in the factual details of the offences described in the EAW and set out above, is the word "abduction" used. On the contrary, what is described is a case of a mother defying a court order to return her 16 year old son to his father and then leaving France to travel to Ireland and thereafter remaining in Ireland. In its plain and ordinary meaning, "abduction" connotes a sense of forcing a person to go with you, usually by means of threats or violence. The facts, however, as set out in the EAW do not give that meaning to the offence.

57. Although the decision in *Minister for Justice v. Dolny* requires the court to consider the EAW as a whole in assessing correspondence, it does not remove the necessity to consider the actual facts alleged. At its highest, the wording of the statutory offence may assist in interpreting what is meant by the facts alleged, but resort to the statutory wording of the offence cannot trump the requirement under s. 5 of the Act of 2003 as interpreted by the Supreme Court in *Minister for Justice v. Szall*, to have regard to the facts or alleged facts set out in the EAW. Furthermore, in the particular circumstances of this case, the use of the word "abduction" must be viewed in light of the Hague Convention on the Civil Aspects of International Child Abduction. Section 16 and also s. 17 of the Act of 1997 deal with the crime of international child abduction. Indeed, those sections have as their marginal or shoulder notes the heading which references "abduction of child…". However, there is no requirement in those sections for the act to have been carried out by force or against the will of the child. It is reasonable to infer, from the facts set out in the EAW and the reply of the issuing judicial authority, who was less than emphatic about the lack of consent in the offence, that the use of the word "abduction" in the statutory definition of the offence in France is the implementation in France of her duties under relevant international child abduction conventions. In other words, "abduction" is being used in the sense used in the Convention and not in its ordinary meaning.

58. In light of the foregoing, the Court is satisfied that despite the use of the word "abduction" in the description of the statutory offence, the offence alleged is not necessarily an offence carried out against the will of the child. I am satisfied that in the original EAW, there is nothing to suggest that the retaining of him and the trip to Ireland, all in contravention of the French court order, were against the will of X. Indeed, when the central authority sent the points of objection and affidavits to the issuing judicial authority, the issuing judicial authority replied that he was "only seized about the abduction of a child and the repeated offence of unlawfully refusing to deliver a child to a person with right to require delivery." The issuing judicial authority went on to say "[t]o my mind, the debate is not about how French authorities take care about autistic people but rather to know if M.Z. has the right to run away with his son, despite the rights of X.'s father." Thus, it can be seen that the issue is framed as a dispute centred on parental rights, rather

than as a violation of the child's autonomy.

59. It is also appropriate to observe that the case made on behalf of the minister was primarily that there was a lack of capacity to consent, rather than that an express statement of lack of consent had been made in the EAW and accompanying documentation. This is reflected in the central authority's request for confirmation of whether X. had the requisite mental capacity to fully consent to accompanying his mother to Ireland. It is not entirely clear why the request was restricted to his capacity to consent to going to Ireland, perhaps it was because going to Ireland forms part of the first offence expressly, while the second offence includes the period of time when he went/was taken to Ireland and also while he remained there.

60. The answer by the issuing judicial authority to that request for confirmation of lack of capacity is highly revealing. In his answer set out at para. 11 above, the issuing judicial authority is in essence stating that he cannot so confirm as he does not have medical skills and has never seen X. He says, based upon the material in the case, it would not be surprising if this is the case and he refers to the psychiatric file.

61. Counsel for the minister invited the Court to interpret the report as showing that X. had a lack of capacity. In the view of the Court, this is not a correct manner in which to approach this particular case. If the statement of alleged facts sets out expressly or by necessary implication that the child did not have the capacity to consent (*e.g.* by reference to the age of the child as an infant), the Court must act upon that assertion, in the absence of *mala fides*. However, when a judicial authority is asked a direct question as to whether a person had a particular capacity and they chose to answer that question by saying that it is difficult to confirm that position, then the High Court cannot engage in its own assessment of the facts for the purpose of reaching a determination as to the facts.

62. This Court does recognise that there may be occasions where a judicial authority cannot expressly answer a request to confirm a statement of facts as this may violate the presumption of innocence and amount to a prejudging of issues in the requesting state. In such a situation, the judicial authority may and perhaps should set out what the factual allegations are and it will be for the High Court to assess if those facts either expressly or by necessary implication, amount to a particular allegation. The Court observes that in a case where a person is sought for prosecution, the request being made by the central authority or the court under the provisions of s. 20 of the Act of 2003 should, more properly, be phrased as an enquiry into whether the facts alleged amount to an allegation of "….". This allows an issuing judicial authority to address the matter as a question of allegation rather than as presumed fact.

63. However, in this case, the issuing judicial authority did reply to the question as posed. The issuing judicial authority, by stating that it was difficult to confirm that there was a lack of capacity to consent, was thereby confirming to the High Court that it was not expressly or impliedly part of the factual allegations being made against the respondent, that her son had lacked capacity to consent. That is perhaps unsurprising, as the offence of child abduction under the Hague Convention is not concerned with the presence or absence of consent of the child, but is concerned with the violation by one parent or person of the custodial rights of a parent or guardian.

64. In those circumstances, this Court is bound to find that the facts alleged against the respondent do not include an express allegation that her son did not have "the requisite mental capacity" to fully consent to accompanying his mother to Ireland. Furthermore, it is clear from the facts set out in the EAW and the additional documentation that the allegation does not include by necessary implication a claim of lack of "requisite mental capacity". The issuing judicial authority has himself stated that he has difficulty in confirming lack of capacity and therefore it cannot be implied that such lack of capacity exists.

65. For the avoidance of doubt, if the Court is wrong in its view that in the circumstances of this case, the Court should not consider the psychiatric report furnished by the issuing judicial authority, the Court will give its conclusion of the psychiatric report and capacity to consent. That report was not conducted with a view to ascertaining his capacity to consent to such a proposition. It does not address the necessary questions which require to be addressed in a situation of capacity. What is relied upon is the reference to his "limited capacity to be autonomous". Without an explanation as to the limited areas in which he has capacity, such a statement cannot be relied upon to demonstrate that he had no capacity to consent to remaining with his mother and travelling with her to Ireland. Where the report does delve into the capacity issue it states: "Furthermore, X. is not capable of giving a clear idea on the type of ad hoc care given, and even when he could, this could place him in a position of loyalty psycho-affective conflict which could affect and destabilise him…". That is not a clear statement of lack of capacity on the central issue of consent to being with his mother – it is equivocal. This Court is not satisfied that this statement in the report amounts to an express or implied statement that he had the lack of capacity to consent to remaining with his mother and travelling with her to Ireland.

66. The above findings do not finally dispose of the matter because the task of the High Court is to consider if the facts, when transposed to this jurisdiction, would amount to the offence of false imprisonment. Therefore, the Court must consider whether a child, aged 16 years, who is the subject of a custodial order in favour of his father, can consent to going with or remaining with his mother in breach of that court order. The case of *Attorney General v. Edge* dealt with the issue of consent by a minor over the age of 14 years to being taken or retained by another person. The case did not involve a court order but dealt with the natural custodial or guardianship rights of a father as against a non-parent. From the point of view of the consent of a child, the case establishes that at common law, a child over the age of 14 years has the capacity to consent to going or remaining with a person who is not the custodial person.

67. No overarching principles of law with regard to the capacity of a child to consent have been furnished to the Court by either party. That may well be because there are none. The legal capacity of a child to consent varies depending on the subject matter. For example, a child under the age of 17 years cannot consent to sexual intercourse, buggery and certain acts involving penetration, whereas a child under the age of 15 years cannot consent to a sexual act. Under the Act of 1997, a child over 16 years can consent to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to the person.

68. While the statutory offence of false imprisonment does not expressly deal with the age of consent of a child, there is no reason why the principles established in *Attorney General v. Edge* should not apply. As relied upon by the respondent, the authors of "Criminal Liability" (McCauley and McCutcheon, 2000, 1st Ed., Roundhall, Dublin) at p. 514 footnote 50, stated:

> *"Unlike false imprisonment the abduction offences under ss. 16 and 17 (which apply to children under the age of 16 years) do not require absence of consent. By analogy to the offences of rape and unlawful carnal knowledge to a minor, it is conceivable that the principle in Edge will be retained in relation to false imprisonment, i.e. consent of a 15-year-old would be a defence to false imprisonment but not to child abduction."*

In particular, as the statutory offence of false imprisonment replaces the common law position but is silent as to the parameters of the consent requirement relating to a child, the common law principle that a child over a certain age has the capacity to consent to a

restraint being placed upon his or her liberty at a minimum, should not be considered to have been ousted. There is certainly no reason to believe that the legislature intended, by its omission to refer to an age of consent of a child, to reverse the common law position as to capacity. The precise age at which a child has the capacity to give such consent may be at issue, *e.g*. the above authors appear to posit that age at 15 years, however, this Court is satisfied that the law recognises that at 16 years of age, a child has the autonomy to consent to what may otherwise be a restraint on his or her liberty.

69. There is, however, a further aspect to the question of capacity to consent. The decision in *Attorney General v. Edge* did not deal with the situation where a court order as to custody had been made, instead it dealt with the right of the father of the child to guardianship at common law. In particular, counsel for the minister relied upon the case of *R v. Rahman* to show that a court order is one of the means by which unlawful restraint by a parent might be shown. Although that is an argument more properly addressed under the heading of unlawful restraint, it is useful to consider it in the context of consideration of consent.

70. In *R v. Rahman*, the facts were entirely different and it was clearly a restraint of liberty that went outside the bounds of legitimate parental discipline and correction. In so far as the Court of Appeal made reference to a court order, it said that the detention by the parent contrary to such an order "may perhaps be one" way in which the prosecution may prove unlawful restraint. In the view of the Court, that is not a wholehearted endorsement of the existence of a court order being proof of unlawful restraint. More importantly, however, the decision in *R v. Rahman* does not deal with the issue of consent – indeed in that case, it did not have to. The child herself clearly did not consent to the forcible act of being taken away. However, in other circumstances where consent may not be an issue due to the young age or lack of capacity of the child or the compliant nature of a child, the action by a parent in breach of a court order may provide the proof of restraint of liberty beyond that legitimately exercised by a parent. The existence of the court order does not however assist in proving or disproving lack of consent on the part of the child.

71. Finally, in the absence of any statement to the contrary with regard to French law, the Court must approach this as if it were dealing with a court order in this jurisdiction which granted custody rights to the father and access rights to the mother. The central issue is whether a child, who is subject to a court order of custody, lacks capacity to consent to a decision regarding the parent with which he or she will live and/or where he or she will live. Clearly, from the point of view of the non-custodial parent, there is no legal right to the custody of the child: furthermore, depending on age, taking the child may constitute the criminal offence of child abduction, but only where there is no consent of the child will such an act constitute the offence of false imprisonment. An order granting custody to one parent over another is an order made for the purpose of regulating the parent's rights of custody and access – indeed, the issuing judicial authority made that clear when he stated that this was a debate about whether the respondent had the right to run away with her son, despite the rights of the boy's father.

72. I accept the submission of counsel for the respondent that, in general, the nature of court orders is that they act *in personam* (see *Iveson v. Harris* (1802) 7 Ves Jun 251). The order granting custody to a father does not impose a binding legal obligation on the child simply by virtue of its existence. A child is not a party to the custody proceedings and is not so bound by it. Therefore, his legal capacity to make decisions about the very matter at hand, have not been taken away.

73. Counsel for the respondent has quite properly placed before the Court the case of *Moore v. Attorney General* as set out above. Even if it were possible that a child, who having knowledge of the Order regarding his custody violates that Order by going to or remaining with the other parent, was guilty of criminal contempt of court, this does not demonstrate that his capacity to give consent to that course of action has been taken from him. It may simply make his exercise of capacity a criminal offence. The Court is not satisfied that it has been demonstrated that the facts alleged in the EAW and accompanying documentation amount, expressly or by necessary implication, that X. lacked the legal or factual capacity to consent to being taken by his mother to Ireland and being detained by her contrary to a French court order giving custody to his father.

74. For the avoidance of doubt, the Court confirms that little, if any, assistance could be gleaned from the case of *R v. Daily* relied upon by the minister. The issue here is whether the facts amount to an offence of false imprisonment and *R v. Daily* did not assist in understanding the essential ingredients of such an offence.

Conclusion

75. The offence of child abduction in this jurisdiction refers only to a child under the age of 16 years. The child at the centre of the custody dispute in France giving rise to the issuance of this EAW was aged 16 years at the relevant time. It is, therefore, necessary for the facts set out in the EAW and additional documentation to correspond with the offence of false imprisonment in this jurisdiction under s. 15 of the Act of 1997. A vital element of proof of an offence of false imprisonment is that the restraint of liberty takes place without the consent of the restrained person.

76. Neither the EAW nor the additional statements of the issuing judicial authority state expressly or impliedly that these offences were committed without the consent of the child. The issue turned on whether the child, in the particular circumstances of this case, could be said to lack the capacity to consent. The issuing judicial authority did not assert that such lack of capacity was necessarily involved – the issuing judicial authority expressly stated his difficulty in doing so as he did not have medical skills and had never seen the child. He referred to a medical report upon which, in all the circumstances, it is not appropriate for this Court to embark on an adjudication of whether the child lacks the capacity to consent.

77. Furthermore, at common law, a child over the age of 14 years could consent to being taken or detained by another contrary to the guardianship rights of a father. The ability of a child over a certain age to consent to acts of restraint that, in the absence of consent, would constitute false imprisonment, is to be implied into the relevant portions of s. 15 of the Act of 1997. The existence of a court order regulating custody and access issues between mother and father does not invalidate the capacity of the child to consent to aspects of custody.

78. In all the circumstances, I am satisfied that on the facts set out in the EAW and additional documentation, the requirement that the restraint of liberty be without the consent of the child who was aged 16 years at the relevant time, has not been demonstrated. Therefore, there is no correspondence with the offence of false imprisonment in this jurisdiction. These findings are specific to the facts set out in this EAW and additional documentation. In particular, these findings do not affect the domestic proceedings in France or any proceedings proposed or in being in this jurisdiction regarding the enforcement of the custody order in France.

79. In light of this finding, it is not necessary for the Court to rule on any of the other issues raised by the respondent in her points of objection. I therefore refuse to surrender this respondent to France on foot of this European Arrest Warrant.