Neutral Citation Number: [2007] IEHC 47

THE HIGH COURT

Record Number: 2006 No. 55 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
C. MCG.

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 30th day of January 2007

The surrender of the respondent is sought on foot of a European Arrest Warrant dated the 17th May 2006 so that he can face trial in London in respect of offences of rape, indecent assault and gross indecency alleged to have been committed on dates between 1st September 1995 and 20th February 1999. That warrant was endorsed for execution by order of this Court on the 16th June 2006, and the respondent was duly arrested on foot of same on the 5th July 2006. He was brought before the Court on the 6th July 2006, and thereafter remanded on bail pending the hearing of the present application for his surrender.

Identity of the respondent

I should add at the outset that a previous European arrest warrant issued on the 12th October 2004 in which the surrender of the same person now before the Court was sought, and on foot of which he was arrested on the 18th October 2004. That application was refused by Ms. Justice Macken for the reasons set forth in her judgment in *Minister for Justice, Equality and Law Reform v. McGrath* [2006] 1 IR. 321. On that application the Court was not satisfied, as it is required to be, that the person before the Court was that in respect of whom that European arrest warrant had been issued. The doubt as to the identity of the person referred to in that warrant arose from a particular photograph appended to that warrant, and which contained thereon a date of birth for the person shown therein which did not coincide with the date of birth stated in the warrant itself for the person whose surrender was sought.

On the present application, the identity of the respondent before the Court is not sought to be established with the assistance of any photograph, but rather by other evidence. Therefore the source of the doubt established on the previous application is absent from the present application. But since it is not actually conceded on behalf of the person before the Court that he is the person in respect of whom the warrant has been issued, I should set out the basis on which I am satisfied as to that matter.

The respondent has sworn an affidavit in which he states that he is not "the proper respondent being sought by the Applicant in the warrant, and as deposed in the aforesaid affidavits of Richard Glenister and Matthew Longman". He also states in the same affidavit that he has "a reasonable apprehension that the said warrant of Arrest does not pertain to this Deponent" by reason firstly of the fact that on the previous application for his surrender on foot of the same domestic warrant the Court was not satisfied in this regard; and secondly for some reason not clear, on account of what he describes as "excessive, inordinate, unconscionable and inexcusable delay". I am not clear as to how delay is thought to speak to the issue of whether or not he is the person referred to in the European arrest warrant.

The arresting officer, Sgt. Martin O'Neill has sworn an affidavit in which he states that he arrested the respondent in Bridgend, Co. Donegal on the 5th July 2006. He asked him whether he was C. McG. to which the respondent replied "Yes". He then asked him was his date of birth the 19th February 1953 in Donegal, to which the respondent replied "Yes". That is the date of birth given in the European arrest warrant for the man referred to therein, He asked him further if he lived at the address shown in the warrant, to which he replied "Yes". He asked him further if he had previously lived at a particular address in Basingstoke, England (being the address at which many the offences are alleged to have occurred) to which he replied "Yes". How the respondent can at the same time in an affidavit swear that he has a reasonable apprehension that he is not the person in respect of whom the European arrest warrant has been issued is somewhat of a mystery. Even on that evidence, I am satisfied that he is the person referred to therein. There is other evidence in the form of an affidavit from Teague Whoriskey, a construction worker who has known the respondent all his life, and had been working in Basingstoke with the respondent between 1995 and 1999. He is able to confirm that the respondent resided for a time at the address of the complainant because he used to pick up the respondent from that address, or leave him back to it, when going to work or if they had been out in the evening. No doubt that affidavit was sworn as a precaution in view of the problem encountered on the previous occasion in relation to identity.

As I have stated, the source of the difficulty over identity on the previous occasion is absent completely on this occasion. I have absolutely no doubt based on the evidence on this occasion that the person before the Court is the person in respect of whom this warrant has been issued. Richard Glenister, of the Crown Prosecution Service in London has sworn an affidavit in which he acknowledges the difficulty created on the last occasion by the photograph taken from the Police National Computer, but avers that he still believes the respondent named in the European arrest warrant is the same C. McG. who lived at the particular address in Basingstoke, and he refers to Mr Whoriskey's evidence in this regard. As I have stated the Court has no doubt about this matter, and in case there be any doubt about the matter, I am satisfied to a standard above mere probability and nearer to the criminal standard of beyond all reasonable doubt. In fact I have no doubt of any kind in this case.

Correspondence

As I have stated, there are three categories of offence alleged, namely rape, indecent assault and gross indecency. Rape is one of the offences referred to in the list of offences in Article 2.2 of the Framework Decision, and in respect of which therefore double criminality does not require to be verified. The respondent does not contest that the acts set forth in the warrant as giving rise to the offences of indecent assault would, if committed in this State constitute offences of sexual assault contrary to Section 2 of the Criminal Law (Rape)(Amendment) Act, 1990. The Court is satisfied that this is so. It is in relation to the offences charged as gross indecency that the respondent submits that there is no correspondence, since in this State the offence of gross indecency can be committed only by a male upon another male under the age of seventeen, and not by a male upon a female under that age, according to s.4 of the Criminal Law (Sexual Offences) Act, 1993. That is certainly so, but the question which this Court must be satisfied about is not whether in this State the respondent would have committed an offence of gross indecency, but rather whether the alleged acts of the respondent which ground the offence charged as gross indecency in England would give rise to "an offence" in this State. The answer to that question is quite clear in my view, and it is that what is said to have been done by the respondent under the heading of gross indecency would give rise to an offence of sexual assault in this State. The acts alleged in this regard are set out in the warrant as follows: "[the respondent] would force her to touch the tops of his legs first, along his stomach and then his penis. He told her to hold it and stroke it. She would have to lick the same places that she was made to touch…". Patrick McCarthy SC for the respondent on the other hand submits that the warrant alleges a separate and third offence in the warrant, whereas at best in this State there would be but two committed. However, it does not seem to me that that factor is one relevant to correspondence given the specific manner in which correspondence is to be determined according to s. 5 of the European Arrest Warrant Act, 2003, as

amended. I am satisfied that correspondence is made out in respect of the offences referred to in the warrant. I note in passing that on the previous application, Ms. Justice Macken was satisfied also as to correspondence, although that fact alone would not absolve this Court from itself being satisfied in that regard. I am so satisfied.

Abuse of process
Mr McCarthy also submits that there is an abuse of process by the applicant proceeding a second time to seek the surrender of the respondent having failed on the first occasion, particularly, as he submits on behalf of the respondent, where the issue of identity has not been resolved by the applicant. He suggests that there is nothing in the Framework Decision or the Act which permits such a second application to be brought. He refers to the fact that the applicant did not appeal the refusal of surrender on the first application, and that in those circumstances the applicant cannot simply bring a fresh application on foot of the same domestic warrant. I have already been satisfied that any difficulty which arose in relation to identity on the last occasion from the manner in which it was sought to satisfy the Court in that regard, does not arise on the present application. The issue of identity has been resolved on this application, and there can be no abuse of process in that regard. Neither is there any bar to bringing a second application for surrender in the present case.

Delay/Fair procedures
Finally it is submitted on behalf of the respondent that there has been such a delay from the date of the alleged commission of these offences that the respondent's constitutional and Convention rights to a fair trial, and one within a reasonable time have been breached. The offences are said to have occurred between 1999 and 2005. The domestic warrant on foot of which the present European arrest warrant as well as the previous such warrant were issued, is dated 26th February 2004. The first complaint in respect of these alleged offences was made to the police in 2002.

The respondent has sworn an affidavit in which he makes no averment as to any particular prejudice or as to any particular manner in which any subsequent trial may be an unfair one. He makes the point that there has been no attempt to explain the delay which has occurred from the time of the first complaint to the police in September 2002 to the present time. He points to a period of delay of one year and four months from the date of refusal of surrender on foot of the first such application in March 2005 until the date of his arrest on foot of the present European arrest warrant. He says that he has lived and worked openly in Donegal and that he has never sought to evade the authorities. He makes the point that it is now eleven years since the date of the first alleged offences and that the complainant's recollection of events and that of any prosecution witnesses will be unreliable after such a length of time, and that these delays have made it impossible for him to call any evidence in his defence.

No prejudice has been identified other than this general assertion that recollections will have faded over the years. He has not stated that there is any particular evidence which he cannot now call which he could have called if his trial were to have occurred earlier than it now will. The allegations in any event are of the kind where it is obvious that there will be no witnesses to the alleged events themselves, and as in most such cases it will be a matter of credibility, with the complainant saying what she recalls happening and the respondent perhaps giving evidence on his own behalf. He has not stated that in any way whatsoever a possible alibi witness is no longer available to him for his trial. This submission does not even begin to hold weight given the relatively short period of delay in any event. But the fact that no particular prejudice is even identified puts the matter beyond any doubt whatsoever. No case is made out that a trial of the respondent now for these offences will be unfair so as infringe his constitutional and/or his Convention rights as asserted. It is common in this jurisdiction that persons will face trial for offences dating back as far as these offences date, and even longer. In many such cases, applications have been made to prohibit trial after such a delay, whether complainant delay or prosecutorial delay. In cases where a trial has been restrained on grounds of delay, some very exceptional circumstance must be present, such as a specified prejudice which is found to present a real risk that a fair trial cannot be had, or where the delay itself is of such a truly exceptional length that it can be presumed that no trial can be fair to the accused. The present case comes within neither of these categories of cases.

Mr McCarthy has attempted to submit the delay point on another basis, namely that it constitutes an unfair procedure. But I reject that point for the same reason as I have rejected the delay point in relation to constitutional and Convention rights. No unfairness exists in my view, and in any event one cannot discount the presumption which this Court is entitled to rely upon, that the trial judge in the issuing state will be in a position to ensure, just as a trial judge in this state will ensure, that the jury will be suitably directed as to the potential for the passage of time to affect the recollection of witnesses, and that appropriate care must be taken by them in reaching their verdict. This Court on an application for surrender cannot too easily presume that any trial will be an unfair one, especially in the face of nothing of any substance alleged by the respondent as to prejudice arising from any delay or passage of time.

I am satisfied that there is no reason why surrender ought to be refused by virtue of sections 21A, 22, 23 or 24 of the Act, as amended, and also that surrender is not prohibited by anything in Part III of the Act or the Framework Decision. I am therefore satisfied that the requirements of s. 16 of the Act have been satisfied and that the offences correspond. The Court is therefore required to make the order sought, and I so order.