Neutral Citation Number: [2008] IEHC 302

THE HIGH COURT

2007 No. 115 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
MICHEÁL Ó FALLÚIN

RESPONDENT

Judgment of Mr. Justice Michael Peart delivered on the 8th day of October 2008

1. This is the third attempt on the part of the authorities in the United Kingdom to seek the surrender of the respondent to that jurisdiction so that he can face prosecution on a charge of conspiracy to defraud. It will be necessary to refer to the previous history of these attempts in order to address the objections to surrender relied upon by the respondent on the present application.

2. The present application for his surrender proceeds on foot of a European arrest warrant which issued on the 17th April 2007, which was endorsed by the High Court on the 4th July 2007, and on foot of which the respondent was duly arrested by Sgt Anthony Linehan on the 13th July 2007 and brought before the court as required by section 13 of the European Arrest Warrant Act 2003, as amended. He was remanded from time to time on bail pending the hearing of this application for his surrender under section 16 (1) of the Act.

3. No issue is raised as to the identity of the respondent, and I am satisfied in any event from the affidavit evidence of Sgt. Linehan that the person whom he arrested on the 13th July 2007 is the person in respect from which this European arrest warrant was issued.

4. The offence for which the respondent's surrender is sought for the purpose of prosecution has already been found to correspond to an offence in this jurisdiction by Finlay Geoghegan J. when she determined the previous application for surrender under a European arrest warrant, and no further issue arises in relation to correspondence on the present application. That offence also satisfies the minimum gravity requirement since it has the capacity to attract a maximum sentence of 10 years imprisonment.

5. No undertaking is required under Section 45 of the Act since any trial of the respondent has yet to take place in the issuing state.

6. I am satisfied also that there is no reason to refuse to order surrender under sections 21A, 22, 23 or 24 of the Act, and no issue has been raised in relation to those sections on the present application.

7. However, a number of objections are raised against the making of an order for the respondent's surrender, including under Part III of the Act and the Framework Decision, and I will deal with these in due course having first set out some relevant background history to the present application.

The application under Part III of the Extradition Act 1965

8. The surrender of the respondent was first sought on foot of an extradition request from the United Kingdom which was made under the 'backing of warrants' procedure provided for in Part III of the Extradition Act 1965, and in respect of the same offence as that for which his surrender is now sought in the present application. That first request for surrender was made on foot of a United Kingdom warrant dated the 16th December 2003 which was sent over to this jurisdiction under the provisions of the 1965 Act. It was "produced" to the Assistant Commissioner of An Garda Siochána on the 2nd January 2004 for endorsement, and was endorsed by him on that day for execution here. However, the European Arrest Warrant Act, 2003 had come into force on the previous day, the 1st January 2004. Section 50 of that Act repealed Part III of the 1965 Act, save in respect of any Part III warrants which had been "produced" to the Assistant Commissioner *prior* to the 1st January 2004. Notwithstanding, the respondent was arrested on foot of that "backed" warrant on the 8th January 2004, thereafter being held in custody until the 30th January 2004 when he was granted bail.

9. Following the Supreme Court's decision in *O'Rourke v. Governor of Cloverhill Prison* [2004] 2 I.R. 456, an application was made to the High Court on the 22nd June 2004 to have the Part III application struck out on consent, and the applicant was thereupon released. The basis for the applicant's consent was that the warrant on foot of which the respondent had been arrested had not been 'produced' to the Assistant Commissioner for endorsement prior to the coming into operation of the European Arrest Warrant Act 2003, as had occurred also in the case of *O'Rourke*, and accordingly there was no lawful basis for the arrest of the respondent on foot of it.

The application under the first European Arrest Warrant

10. The first European arrest warrant issued from Bow Street Magistrates Court, London on the 21st June 2004, being the day prior to the said application for the respondent's release. The underlying domestic warrant leading to the issue of that European arrest warrant was the same domestic warrant which had been the subject of the Part III endorsement already referred to, and on foot of which the respondent had previously been arrested. That European arrest warrant was endorsed for execution by order of the High Court dated the 5th July 2005, and the respondent was duly arrested on foot of it and brought before the Court as required. He was remanded in custody pending the hearing of the application for his surrender. On that application, Finlay Geoghegan J. ordered his surrender, and his committal to prison pending surrender, by order dated 20th October 2005, having found as a fact, on the evidence then available to her on that application, that the first arrest of the respondent on foot of the Part III warrant already referred to on the 8th January 2004 did not constitute 'execution' of that warrant, and had therefore not rendered the said domestic warrant "spent" as, according to the evidence of English law before her, a warrant is not fully executed under English law, until the arrested person has been brought before Bow Street Magistrates Court on foot thereof following his arrest. The basis of that finding was, as set forth by Clive Nicholls QC in his affidavit of law, s.125 of the Magistrate Courts Act 1980.

11. No stay was placed on that order for surrender in the event of an appeal being lodged by the respondent prior to his surrender being implemented within the time prescribed by the Act. As it happened, the respondent lodged an appeal to the Supreme Court on 4th November 2005. The Notice of Appeal was served in the usual way on the Chief State Solicitor's Office. The surrender of the respondent was not implemented thereafter by the applicant, presumably, and it appears to have been the case, so that the appeal would not be rendered a moot, even though no stay was placed on the said order. However, that resulted in the respondent not being surrendered within the time limited for surrender contained in section 16 of the Act.

12. Following the expiration of that time limit, the respondent made an application for his release pursuant to the provisions of Article 40.4 of the Constitution. That application was refused in the High Court, but was allowed on appeal to the Supreme Court, resulting in the respondent being released from custody on the 3rd May 2007. In those circumstances, the respondent withdrew the notice of

appeal against the order for surrender made by Finlay Geoghegan J., and in that regard the Chief Justice noted that the order of Finlay Geoghegan J. for the surrender of the respondent was extant. However the time for implementing surrender had long since passed.

13. Prior to his release being ordered, the respondent had spent 1 year, 5 months and 24 days in custody following his arrest on foot of that European arrest warrant. In addition, he had spent 23 days in custody on foot of the initial Part III application prior to his being granted bail.

14. The present European arrest warrant, perhaps in anticipation that the respondent would, by consent, be released on foot of that Supreme Court order referred to, issued on the 17th April 2007 as I have stated. The domestic warrant underlying that European arrest warrant is still the original domestic warrant which was sent over for endorsement and execution under Part III of the 1965 Act, and on foot of which the first European arrest warrant was also issued.

15. *Points of Objection* have been filed and delivered and a number of points are raised therein as follows:

> 1. The underlying a domestic warrant is "spent", resulting in this European arrest warrant being not "duly issued" for the purposes of section 10 of the Act.
>
> 2. The underlying domestic warrant, even if still extant, cannot be now executed by the production of the respondent to Bow Street Magistrates' Court since that building has been vacated by the Magistrates so that the site can be developed by developers.
>
> 3. The surrender of the respondent is prohibited by Part III of the Act and the Framework Decision by reason of the delay which has occurred
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> 4. Res Judicata/Estoppel:
>
> 5. Failure to observe the requirement of urgency and expedition in seeking the surrender of the respondent.

Is the domestic warrant spent under English law?

16. This issue was ventilated before Finlay Geoghegan J. during the hearing of the first application for surrender on foot of a European arrest warrant in respect of this respondent, as I have already referred to. She determined *on the evidence given to her on that application as to English law that, as a matter of English law*, the domestic warrant was not spent as a result of the respondent having been arrested in this jurisdiction on foot of same, and that there was therefore no bar to the same warrant being used for the purpose of issuing a European arrest warrant. She was therefore able to conclude that the first European arrest warrant was "duly issued" for the purposes of section 10 of the Act.

17. The same issue arises on the present application, but on additional evidence provided as to English law. In most applications for surrender on foot of a European arrest warrant, the Court can presume, without enquiry, that the European arrest warrant has been "duly issued" for the purposes of section 10 of the Act. However, it was decided by Finlay Geoghegan J. in the first application, that where an issue was raised which questioned whether the European arrest warrant was in fact "duly issued", and where that issue was supported by expert evidence as to English law, the Court was entitled to determine whether as a matter of English law the European arrest warrant was duly issued in that jurisdiction.

18. On that application the learned judge had affidavit evidence from Peter Caldwell B. L. on behalf of the respondent, as well as affidavit evidence on behalf of the applicant from Clive Nicholls QC. Having considered that evidence, the learned judge reached a conclusion that the European arrest warrant had been duly issued. Based on that evidence, she was satisfied that what Mr Nicholls stated was correct, namely that by virtue s.125 of the Magistrate Courts Act 1980, the English domestic warrant was not executed under English law simply by the arrest of the respondent in Ireland, since he had never been brought before Bow Street Magistrates Court, as the warrant commanded. She noted in her judgment that Mr Caldwell "*has not sought by a further affidavit to dispute the express and reasoned averments of Mr Nicholls*".

19. On the present application, however, Mr Caldwell has sworn a further affidavit, in which he addresses the opinion of Mr Nicholls and the basis for it, and I will come to what he says in that regard. But before doing so I should refer to what was stated by Mr Caldwell in his first affidavit which he swore on the previous application, and to the affidavit in response thereto by Clive Nicholls QC to which I have already referred and upon which reliance was placed by Finlay Geoghegan J., particularly in the absence of any further affidavit by Mr Caldwell against what was contained therein.

20. In that first affidavit Mr Caldwell referred first of all to the requirement expressed in Article 8 (1) of the Framework Decision, namely that the European arrest warrant shall contain, *inter alia, "(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2…"*. He then avers that under s. 142 of the Extradition Act, 2003, being the Act giving effect in the United Kingdom to the Framework Decision, a judge may issue a European arrest warrant only "*if a domestic warrant has been issued for the arrest of that person and there are reasonable grounds for believing that the person has committed extradition offences ….*". He then avers that a domestic English warrant is valid until it is executed, and that it is so executed when the person is arrested in *accordance with the command contained in the warrant*. He states that following execution the warrant has served its purpose and can no longer be regarded as an enforceable order. He went further and stated that the domestic English warrant in this case dated 16th December 2003 was executed and thereafter 'spent' once the respondent was arrested here on foot of it and brought before the High Court on the 8th January 2004, and was no longer an enforceable warrant on the 21st June 2004, being the date on which the first European arrest warrant in this case was issued, and that the latter was therefore "not lawfully issued".

21. As I have said, Clive Nicholls QC responded to this argument in his affidavit by disagreeing with what Mr Caldwell has stated regarding when a domestic warrant is executed and spent under English law. While he agrees with Mr Caldwell's statement that a domestic warrant is executed when the person is arrested in accordance with the command in the warrant, but then refers to the content of that command, which states as per the warrant:

> *"To each and all the Constables of the Metropolitan Police: You, the Constables of the Metropolitan Police are hereby required to arrest the accused and to bring the accused before the above Magistrates' Court immediately".*

22. He draws attention to the fact that it is not addressed to any persons other than the Metropolitan Police, for example, members of An Garda Siochána. Mr Nicholls disagrees that the warrant was spent once the respondent had been arrested on foot of it by An Garda Siochána and being brought before the High Court here, and says that Mr Caldwell is in error in so stating. He opines that the question as to whether or not an English domestic warrant is or is not executed depends upon English statute law, and in that regard he states that under s. 125 of the Magistrates' Courts Act, 1980 this warrant had not been executed after the arrest of the respondent on the 8th January 2004 and his being brought before the High Court. He set out the provisions of that section as follows:

> *"125. Warrants. (1) A warrant of arrest issued by a justice of the peace shall remain in force until it is executed or withdrawn or it ceases to have effect in accordance with rules of court.*
>
> *(2) A warrant of arrest, warrant of committal, warrant of detention, warrant of distress or search warrant issued by a justice of the peace may be executed anywhere in England and Wales by any person to whom it is directed or by any constable acting within his police area." (emphasis added by Mr Nicholls)*

23. By reference to these provisions he concluded that "*it is plain therefore that a domestic English warrant is not 'executed' within the meaning of section 125 of the 1980 Act unless and until it is (i) executed in England and Wales, and (ii) by the Constables of the Metropolitan Police to whom it was addressed and directed. Further, a warrant is not executed simply by the act of arrest (which must take place in England or Wales) but additionally by the accused being brought before the court in the UK …"*

24. He concludes his affidavit by referring to the specific provisions contained in the Backing of Warrants (Republic of Ireland) Act 1965 which made provision for the execution in the United Kingdom of Irish domestic warrants sent over, and to the equivalent provisions here contained in Part III of the Extradition Act 1965 in respect of the execution of UK warrants here, and to the procedure for the endorsement of such warrants for execution by each country's law officers, but refers to such execution as being only "*execution in their country*" by the requested country's law enforcement officers.

25. As I have stated, Ms. Justice Finlay Geoghegan referred to the fact that on the application before her there was no further affidavit sworn on behalf of the respondent by Mr Caldwell in answer to Mr Nicholls' affidavit. However, on the present application, Mr Caldwell has sworn a further affidavit in which he takes issue with the basis of Mr Nicholls' opinion that the domestic warrant has not become spent. He states that s.125 of the Magistrates Courts Act, 1980 is not the section of that Act which governs the question of execution of warrants outside England and Wales, and that it is s. 126 of that Act which should be considered and he sets it out. That section in turn refers to s. 12 of the Indictable Offences Act, 1848, which at the time of its passing made provision in respect of any person who may have escaped or otherwise gone to "*that Part of the United Kingdom called Ireland*", and for the endorsement by any Justice of the Peace in any County etc to which such person has escaped or gone to, of any such warrant issued by a Justice of the Peace or Judge in England or Wales. The section goes on to provide that such an endorsed warrant shall be a sufficient authority to execute the warrant in the place where the person is and apprehending him and conveying him before the Justice or Justices who granted the warrant.

26. Mr Caldwell then refers to the fact that the Backing of Warrants (Republic of Ireland) Act, 1965 "replaced the provisions of the Indictable Offences Act in so far as the Republic of Ireland is concerned, so that references therein to "Ireland" were thereafter interpreted as references to Northern Ireland only. But he concludes his paragraph 6 by stating "*I remain of the view therefore that the warrant of 16th December 2003 was executed upon the arrest and production of the respondent in the earlier proceedings*".

27. Mr Caldwell then goes on to say that he would be most surprised if a Magistrate on being told of the full background of the present case would, on the 17th April 2007, have issued the present European arrest warrant, and that if the Magistrate in question was not so informed of the relevant background, this would constitute a breach of the principal of *'uberrima fides'* requiring full disclosure to the court of relevant matters to a court on any application.

28. The applicant has not responded to this particular issue precisely, though there has been filed a further affidavit as to aspects of the respondent's objections by Melanie Cumberland BL, a practising barrister in England and Wales. She states that she was asked to advise on two questions, one of which is "*whether a judge in the United Kingdom is required to investigate the validity of an underlying warrant or enquire into the history of the proceedings when issuing a European arrest warrant under s. 142 of the Extradition Act, 2003*". What she states relates really to the issue raised by Mr Caldwell as to '*uberrima fides'*, and not to the question as to whether s.126 of the Magistrates Courts Act 1980, and by reference thereto s. 12 of the Indictable Offences Act 1848, is the legislative provision by which the question as to whether the domestic warrant is spent should be determined by this Court. In that regard she expresses the opinion that there is no obligation on the Magistrate under s. 142 of the Extradition Act 2003 to investigate the validity of the underlying domestic warrant when an application is made for a European arrest warrant, since that section requires only that a domestic warrant has been issued in respect of the person and there are reasonable grounds for believing that the person has committed an extradition offence or that the person is unlawfully at large following conviction for such an offence by a court in the United Kingdom. She states also that as a matter of practice the issuing judge does not normally have sight of the domestic warrant, but that it would be produced to him for inspection if so requested. She states that a judge will in all but the most unusual circumstances accept in good faith and without further enquiry that a domestic warrant has been issued in respect of the offence.

29. Micheál P. O'Higgins BL for the applicant has made submissions in line with the averments contained in the affidavits of both Mr Nicholls and Ms. Cumberland, and Kieran Kelly BL has made submissions on the respondent's behalf in accordance with what has been stated by Mr Caldwell. In addition, very comprehensive and helpful written submissions have been provided to the Court by both sides, for which I am grateful.

30. Briefly stated, Mr O'Higgins has submitted that this Court should not involve itself in what would amount to a judicial review here of the European arrest warrant on foot of which the respondent has now been arrested, and that the principle of mutual recognition should be respected in that regard. He suggests that when surrendered, it is open to the respondent in any event to bring an application to quash the European arrest warrant before the English court, and that the courts here should desist from making any pronouncement on that question out of respect for the comity of courts.

31. He submits also in any event that, as averred by Ms.Cumberland in her affidavit, the European arrest warrant enjoys an independent validity and existence, and that the question of the validity of the underlying domestic warrant is not something which must be established before such a warrant can be issued.

32. He submits finally that regardless of the above two submissions, the position appears to be clear that under English law the underlying domestic warrant has not become spent by the arrest of the respondent on the 8th January 2004, since, as averred by Mr Nicholls, the command contained in the warrant has not been complied with to the point of completion, namely by the bringing of the

respondent before the court which issued the warrant. He refers to the reliance placed already by Ms. Justice Finlay Geoghegan in her judgment on this issue when the matter was before her for decision. He refers to the fact that the respondent appealed to the Supreme Court on the point of the warrant being spent, but that he chose to withdraw that Notice of Appeal in favour of proceeding before the Supreme Court on the Article 40 application for release. In addition he submits that the second affidavit filed on this application does not advance the respondent's argument to any significant extent given that that the provisions of the 1848 Act in England to which he has referred have been by now superseded by the provisions of the Backing of Warrants (Republic of Ireland) Act, 1965 to which he himself has referred in that affidavit. For that reason, Mr O'Higgins submits that the provisions of s.126 of the Magistrates Courts Act, 1980 in England are of no relevance to the issue of whether or not the domestic warrant is spent by the arrest of the respondent on the 8th January 2004, and that Mr Nicholls' view should prevail, as concluded by Finlay Geoghegan J. in her judgment, in spite of the further evidence of Mr Caldwell.

33. Kieran Kelly BL on the other hand submits that this Court must, under s. 10 of the Act, be satisfied that a European arrest warrant has been "duly issued" where a real issue supported by expert evidence is raised on the application for surrender. He submits that such a submission is in line with what was stated by the Chief Justice in his judgment in *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 IR 148. He accepts that in the absence of any such issue being raised on the application this Court must proceed on the basis of mutual recognition of the issuing judicial authority's warrant, and that there is no requirement to be satisfied in such circumstances that the warrant has in fact been issued in accordance with the law of the issuing state. In the present case, he submits, a real issue has been raised, and that, as decided also by Finlay Geoghegan J, this Court is entitled and required to decide the question of English law arising.

34. Mr Kelly makes the point also that the additional evidence in Mr Caldwell's second affidavit regarding s. 126 of the Magistrates Courts Act 1980 being the relevant section of that Act rather than s. 125 of the Act referred to by Mr Nicholls, has not been contradicted on affidavit either by Mr Nicholls or Ms. Cumberland and that this Court should therefore accept same as being the position.

35. Firstly I am satisfied that in the very unusual circumstances of this case, given its history, and in view of the expert evidence which has been adduced in support of the issue, and by reason of the use by the Oireachtas of the word "duly" in section 10 of the Act, this Court, as already concluded by Finlay Geoghegan J, can and indeed must determine the issue raised, even if it is one of English law. Under most circumstances such a step is to be avoided in favour of allowing the Court in England determine the validity under English law of its own orders.

36. On this point I am not satisfied that the second affidavit of law sworn by Mr Caldwell and in which he refers instead to s. 126 of the Magistrates Courts Act, 1980 rather than s.125 is a convincing reply to the averments of Mr Nicholls and upon which Ms Justice Finlay Geoghegan placed reliance in coming to the conclusion which she did in her earlier judgment referred to. Mr Caldwell has stated, as he must, that the provisions of the Indictable Offences Act 1848 to which he refers have been replaced by the provisions of the Backing of Warrants (Republic of Ireland) Act, 1965, and that any continued relevance which it may have to "Ireland" is confined to Northern Ireland. It follows that I reach the same conclusion as she did in deciding on the present application that the domestic warrant was not executed under English law, and is therefore not spent, since the command stated therein has not been yet complied with. Such a conclusion is also entirely consistent with permitting of a situation where, following a lawful arrest and prior to reaching the court an arrested person escapes from police custody and is later again arrested under the same warrant, when found. Could it be said that following the escape, the police were required to obtain a fresh warrant before they could again arrest the person? I think not.

37. But I reach that same conclusion by another route not advanced by the applicant before me, nor, it would appear, before Finlay Geoghegan J. It is this. The submissions being made by the respondent as to the domestic warrant being spent must, in order to have any viability at all, be dependent upon the respondent having been arrested on the 8th January 2004 on foot of an English warrant properly endorsed for execution in this State pursuant to the provisions of Part III of the 1965 Act. Without any arrest having occurred on the 8th October 2004, the issue of law simply does not arise.

38. Following the judgment of the Supreme Court in *O'Rourke*, an application was made to this Court on consent to have the proceedings struck out, a consequence being that the respondent was released from his bail. It is accepted by the respondent in his written submissions that the domestic warrant which issued on the 16th December 2003 in Bow Street Magistrates' Court falls into the same category of warrant as existed in *O'Rourke* and on foot of which that respondent had been arrested, i.e. a warrant which was not produced to the Assistant Commissioner of An Garda Siochána prior to the 1st January 2004, and was therefore not saved by the provisions of s. 50 of the 2004 Act. Part III of the 1965 Act had therefore been repealed as far as that warrant is concerned. The consequence inevitably from that happening is that the endorsement for execution in this jurisdiction was done without any legal authority, and was therefore of no effect in giving power to Sgt. Linehan to arrest the respondent, as he did, on the 8th January 2004. It was because that arrest was without any lawful authority *ab initio*, by reference to the judgment in *O'Rourke*, that an application was made to this Court on the 22nd June 2004 *by consent* that the proceedings be struck out. I note also that at a later stage when the respondent's application for release under Article 40 of the Constitution, and his appeal from the order of Finlay Geoghegan J. for his surrender, both came before the Supreme Court, the respondent chose, as was sensible perhaps for a number of reasons, to withdraw his appeal against the order for surrender. That has resulted in the issue as to the spent warrant being still open to an extent, but only in the sense that this issue was decided by Finlay Geoghegan J. only on the basis that Mr Caldwell had not responded to the affidavit of Clive Nicholls QC. As I have stated already, the respondent's written submissions make it clear that he regards this domestic warrant as being in exactly the same category as that in *O'Rourke*. It is therefore one which could never have been, and was not validly endorsed by Assistant Commissioner Egan on the 2nd January 2004. That is correct as a matter of established law following the decision in *O'Rourke*. It follows inexorably therefore in my view that what occurred on the 8th January 2004 was a legal nullity. There was no arrest of the respondent since the purported arrest was without any lawful basis. Therefore, even if it be correct (which it is not in my view for the reasons already stated) that the domestic warrant was spent once the respondent was arrested here on foot of it, that arrest would have to have been a lawful arrest. The fact that the arrest on the 8th January 2004 was without any lawful authority is what led to the application by consent to have the Part III proceedings struck out. In my view the respondent cannot have it both ways, as it were, and now contend that he was lawfully arrested on the 8th January 2004 resulting in the domestic warrant having been executed and it now being spent.

The closure of Bow Street Magistrates' Court

39. This is a second basis on which the respondent submits that the European arrest warrant on foot of which he has now been arrested is invalid because the command contained within the domestic warrant on which it is based is incapable of fulfilment since that command to the Constables of England and Wales is to arrest the respondent and bring him before Bow Street Magistrates Court. Mr Caldwell has stated in his second affidavit that Bow Street Magistrates' Court closed on the 21st July 2006 and that no court business has been conducted there since that date. It is submitted that if Judge Evans, the Magistrate who issued the present European arrest warrant on the 17th April 2007, had been made aware of this fact, he would not have issued that warrant. Ms.

Cumberland has dealt with this issue in her affidavit and has stated that in July 2006 the building in question was closed down following the sale thereof to developers and that the case load of that court was transferred to another court which had until then been known as Horseferry Road Magistrates' Court, and that when the staff and caseload of the Bow Street Magistrates Court transferred to Horseferry Road Magistrates Court, the latter court was renamed the City of Westminster Magistrates Court. She states also that when Bow Street Magistrates' Court was still open it was within the Petty Sessions Area of South Westminster, being the same area as the City of Westminster Magistrates Court. She goes on to state that under s. 1(1)(b) of the Magistrates Court Act, 1980 a summons or warrant for arrest may be issued so that a person may be arrested and brought before "a magistrates' court for the area" in which the offence is alleged to have been committed – in other words before any Magistrates Court in the relevant Petty Sessions Area. That is what happened in this case. There is no further affidavit filed by the respondent to contradict what Ms. Cumberland has stated and I reject the point urged as being without any merit whatsoever. In fairness to Mr Kelly he quite rightly did not characterise this point as being amongst his strongest.

40. My conclusion therefore is that the European arrest warrant dated 17th April 2007 and on foot of which the respondent is before this Court was "duly issued" for the purposes of s. 10 of the 2003 Act.

41. The surrender of the respondent is prohibited by Part III of the Act and the Framework Decision by reason of the delay which has occurred:

42. This is a simple delay point based on the time which has passed since the alleged commission of the offences referred to in the warrant between 14th September 1998 and 8th October 1999. I have set forth the history of events. The domestic warrant was first issued on the 16th December 2003. For reasons already outlined the respondent's surrender has still not been achieved by the authorities in England. The only basis on which the respondent can urge that his surrender should be refused on this ground is that his surrender is prohibited by reason of a provision of Part III of the Act, and specifically s. 37 thereof. However, the delay is relied upon also for a further objection which I come to in due course arising out of the requirement in the Framework Decision that European arrest warrants be dealt with by Member States as a matter of urgency.

43. As far as the delay objection based on s.37 is concerned, no case whatsoever has been made out in order to bring this respondent outside the terms of the Supreme Court's judgments in Minister for Justice, Equality and Law Reform v. Stapleton, unreported, Supreme Court, July 2006, where in the face of very much greater passage of time, and in the face of some evidence that the delay had caused prejudice to that respondent, the Court decided that the issue of whether or not the respondent could receive a fair trial given the length of the delay, albeit one largely contrived by the respondent himself, was a matter for decision before the English Court, and was not a reason under s. 37 of the Act to refuse to order his surrender. In the present case there is simply the fact that there has been a passage of some ten years since the date of these alleged offences. The respondent has sworn no evidence as to any prejudice resulting to him from that delay. Neither has there been even any suggestion or evidence that the delay is unexplained or unexcused. In my view the respondent has not discharged the very heavy onus upon him when mounting an objection based on a breach of constitutional rights. Mr Kelly urged the Court to consider the oppression caused to the respondent by the fact that this was the third set of proceedings commenced against this respondent in order to achieve his arrest and surrender. I do not feel it necessary to get into the whole issue of whether this Court under s.37 of the Act can indulge in the sort of exercise required to be done under the former s. 50(2)(bbb) applications under Part III of the Extradition Act, 1965, as amended. The respondent has put forward no evidence in that regard. I can simply reject the ground of objection on the basis that the respondent has not discharged the onus of proof which is upon him in this regard.

Res Judicata/Estoppel
44. This is really a similar issue to that of oppression. Mr Kelly has referred to the fact that the present proceedings are the third set of proceedings in which the respondent has been arrested and brought before the Court so that an order for his surrender can be made. He suggests that the principle of finality should be invoked in the present case on the basis that the respondent has endured enough at this stage, and that accordingly the applicant should be estopped from seeking a further order. In making his submissions, Mr Kelly has referred to the acknowledgement in the Framework Decision that it respects fundamental rights, and to the provisions of s. 37 of the Act. He has submitted also as a basis for estoppel that the Magistrates' Court in England has failed to respect or mutually recognise the existence of an order already made for the surrender of the respondent but in respect of which the time limit for implementation has long since expired, which in turn led to the release of the respondent from custody. He urges that the same authority should not be permitted to ignore that event by simply re-issuing the same warrant and recommencing the whole procedure, and that they are estopped from doing so. He raises the question as to how often an unsuccessful applicant for a person's surrender can simply issue a fresh European arrest warrant and try again.

45. In my view there is no question of estoppel in this case, or *res judicata* as it has also been characterised. The first application under Part III of the 1965 Act was unsuccessful for the reasons arising from the decision in *O'Rourke*. No such issue has arisen again on this application for obvious reasons. In relation to the first application under a European arrest warrant, an order for surrender was made by Finlay Geoghegan J. Any Notice of Appeal against that decision was withdrawn by the respondent. The situation regarding estoppel might be different if she had refused to order surrender for some particular reason, and the applicant judicial authority sought by the issue of a second warrant to have the respondent again arrested and surrendered, and on exactly the same basis as the first unsuccessful attempt. In such a case the question of issue estoppel or *res judicata* would legitimately arise. But in the present case, or in a case where a situation has changed or further information or facts have come to light which enable a further application to be brought which avoids the pitfalls encountered on a previous unsuccessful application, I can see no basis for concluding that an issuing judicial authority cannot issue a second European arrest warrant and thereby make a second application for surrender. In the present case the applicant has not attempted to re-litigate any point decided against him on the earlier application. This point must fail.

Failure to observe the requirement of urgency and expedition in seeking the surrender of the respondent
46. The basis for this point of objection is what is contained in Article 17 (1) of the Framework Decision, namely:

> *" 1. A European arrest warrant shall be dealt with and executed as a matter of urgency."*

47. Mr Kelly refers also to the provisions of s.10 of the Act which provides as relevant:

> *"10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—*
>
> *(a) …*
>
> *(b) …*

(c) …

(d) …

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state." (my emphasis)

48. Mr Kelly submits that since a person may be surrendered only in accordance with the Framework Decision, it must follow that his surrender is prohibited given the failure by the applicant to adhere to the requirement for urgency specified in Article 17(1) thereof.

49. My view is that Article 17 of the Framework Decision reflects the fact that Member States when adopting same, wanted to put in place a new simplified and expeditious system of surrender between Member States in order to replace existing arrangements which were seen to result in complexity and delay. The Framework Decision contains both mandatory and non-mandatory grounds for refusal of surrender. Delay between the issue of the European arrest warrant and the transmission and execution of same is not such a ground, either mandatory or non-mandatory. Article 17 represents more an intention by Member States that when one Member State seeks the surrender of a person from another Member State, the latter will deal with it expeditiously, since one of the purposes of the new arrangements is to simplify and speed up the process of surrender. The respondent gains no rights from that provision in the Framework Decision as such. There are of course procedures and time limits referred to therein, and some of these are to protect an arrested person's fundamental rights, and have been reflected in the Act, as for example in *Rimsa v. the Governor of Cloverhill Prison*, unreported, Supreme Court, 23rd July 2008 where surrender was not completed within the time-frame contained in the Framework Decision. But others are simply reflective of the intention as to the surrender arrangements between Member States, and if there is a breach in that regard it is a matter of complaint by an issuing member state, and not the respondent.

50. Were a Member State to persistently ignore the need for urgency in the manner in which European arrest warrants are dealt with following transmission to that State of such warrants, and thereby fail to adhere to one of the purposes and aims of the Framework Decision, an issuing state or states may make complaint in that regard to the European Council, and the provisions of Article 17 (7) can apply, which provide:

"(7). Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level."

51. This ground of objection fails.

52. Having reached the above conclusions on the issues raised by the respondent, I am obliged to make the order sought for his surrender, and I will so order.