

## THE HIGH COURT

2004 No. 35 Ext

BETWEEN

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

APPLICANT

AND  
CATHAL McGRATH

RESPONDENT

**Judgment of Macken, J. delivered on the 16th day of March, 2005**

1. This is an application pursuant to the provisions of s. 16 of the European Arrest Warrant Act, 2003 (hereinafter referred to as "the Act of 2003"), for the surrender of the respondent to the United Kingdom, pursuant to a European Arrest Warrant.

2. The Act of 2003 gave effect to a Framework decision of the Council of the European Communities, of 13th June, 2002 on the European Arrest Warrant and provided for a procedure to exist in that regard between member States of the European Union. The terms of the Council Framework decision are set out in the schedule to the Act of 2003. The definition of the European Arrest Warrant and the obligation to execute it which appear in Article 1 of the Framework Decision itself are set out as follows:

"1. The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European Arrest Warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union."

3. To understand the manner in which the system works, certain terms should be noted. The warrant is issued by an "issuing authority" which is a judicial authority in the Member State which issues the warrant seeking to have the person surrendered. The warrant, which is in a technical format, is sent to the authorities in the country from which the person named is sought to be surrendered. In this jurisdiction the Minister for Justice Equality and Law Reform is the "central authority", within the meaning of the Framework decision, as implemented by the Act of 2003. The High Court is designated, pursuant to s. 9 of the same Act, as the "executing judicial authority" in the State. The central authority, that is to say, the Minister, makes an application to the High Court to have the European Arrest Warrant or a facsimile copy of the warrant endorsed for execution and it may then be executed pursuant to the Act of 2003, by a member of An Garda Síochána.

4. Further, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, and may not be handed over to a non Member State, save with special permission of the courts in the executing state. In that regard, the Framework decision provides for certain undertakings to be made available by the issuing authority, in conjunction with the warrant.

5. For the purposes of this case, the issuing Member State authority is the United Kingdom.

**The Facts**

6. On 12th October, 2004, Christopher Leslie Pratt, a District Judge of the Magistrates' Courts, at 28 Bow Street, London WC2E 7AS, England, in his capacity as a competent judicial authority, issued a European Arrest Warrant for the arrest and surrender of a person named in the warrant for the stated purposes of conducting a criminal prosecution and/or sentencing following conviction or of executing a custodial sentence or detention order. In the present case it is clear that the primary purpose is to prosecute the person sought.

7. The warrant, in facsimile copy form, was endorsed for execution in this jurisdiction by Order of The High Court (Peart, J.) dated 7th October, 2004.

8. Following the said endorsement, the warrant was executed in Co. Donegal on 18th October, 2004 by a member of the Crime Branch, Garda Headquarters, Sgt. Martin O'Neill, who on that date arrested the person whom he believed at the time to be the person named in the warrant, who was then held at Buncrana Garda Station overnight, and on 19th October was brought before the High Court in accordance with the provisions of s. 13 of the Act.

9. On that occasion, this Court, being then satisfied that the person arrested and brought before the Court was the person in respect of whom the European Arrest Warrant was issued, remanded the respondent on bail..

10. The offences specified in the warrant are those of rape, indecent assault and gross indecency against a girl under the age of 14, in the United Kingdom. The rape offences carry a sentence of life imprisonment, the indecent assault offence 10 years and the gross indecency offences 2 years to 10 years depending on the dates of the offences.

11. Section 16(1)(a) of the Act of 2003 provides as follows:

"(1) Where a person does not consent to his or her surrender to the issuing state or has withdrawn his or her consent under s. 15(9), the High Court may, upon such date as is fixed under s. 13, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her"

*provided that –*

*(a) the High Court is satisfied that the person before it is the person in respect of whom the European Arrest Warrant was issued (emphasis added)*

12. The respondent did not consent to his surrender. Points of Objection dated 8th November, 2004 were delivered and filed on his behalf, and the respondent swore an affidavit on 9th November, 2004. In the Points of Objection the respondent pleads *inter alia*,

that:

(a) the warrant is fundamentally defective and/or bad on its face, in particular because

(i) s. (a) of the warrant contains details that are factually incorrect and refers to documentation that is either defective, unsupported or unsubstantiated,

(ii) it relates to a person other than the respondent, and

(iii) details on the copy warrant furnished are illegible.

(b) the warrant is bad and defective in that it lists among the offences those of gross indecency for which there is no corresponding offence in Irish law.

(c) there is no evidence of the decision supporting the purported warrant in that no copy of the warrant of arrest dated 26th February, 2004, issued at Basingstoke Magistrates Court, referred to in s. (b) as being the decision on which the warrant in the present proceedings was based was made available..

13. Insofar as the respondent's affidavit is concerned, the salient parts of this concern the dates of birth given, and the photograph relied upon by the applicant. He denies that he has ever used the date of birth in 1933 appearing in the warrant, and he also denies that the person in the photograph attached to the warrant is him.

14. Before dealing with the legal submissions on behalf of the respective parties, there are two further matters I wish to refer to. The first concerns the above affidavit of Sgt. O'Neill sworn on a date in October and filed on the 29th October 2004. Since the key issue in these proceedings is whether the respondent is in fact the person in respect of whom the warrant has issued, I should set out relevant passages in the affidavit of Sgt. O'Neill. He stated, *inter alia*:

"3. On 18th October, 2004 I was on duty in the Burt area of County Donegal and had the European Arrest Warrant for the arrest of Cathal Mc Grath in my possession. The warrant had been received from the United Kingdom authorities and had been endorsed by the High Court for execution.

4. I went to an address at 291 Moness, Burt, County Donegal. There I met a man whom I believed to be Cathal McGrath. I introduced myself to him by producing and showing him my official Garda identification card and telling him my name, rank and station.

5. I asked him "are you Cathal McGrath?" to which he replied "Yes." I then asked him "is your date of birth 19th February, 1953?" to which he replied "Yes." I also asked him "do you use the date of birth 19th February, 1933?" to which he replied "no". I next asked him "are you of Moness, Burt, County Donegal?" to which he replied "yes". I further asked him "did you live at 94 Worting Road, Basingstoke, Hampshire, England?" and he replied "Yes".

15. In the final paragraph of that affidavit, Sgt. O'Neill avers in the following terms:

"7. I then served Cathal McGrath with a copy of the European Arrest Warrant and a copy of s. 15 of the European Arrest Warrant Act, 2003. I then asked him the question 'Do you know the girl Sarah Bartlett?' and he replied "I do but this is a load of bollocks..."

16. As to the second matter, after the Points of Objection and the affidavit of the respondent were served, two affidavits were sworn on behalf of the applicant. One was sworn by Richard Edwin Glenister on 7th December, 2004 and one by Sgt. Matthew Longman on 14th December, 2004. They too contain certain relevant information.

17. As to the latter, Sgt. Longman says he is currently serving in the Devon & Cornwall Constabulary. Prior to then he served for six years in the Hampshire Constabulary and spent the first of three of those years in Basingstoke. During this time, he avers:

"... my duties lead me to arrest a male by the name of Cathal McGrath after I found him to be in possession of a controlled substance in Basingstoke Town Centre. Having arrested Cathal McGrath, I transported him, interviewed him and then took his fingerprints and photograph."

18. Sgt. Longman then referred to an exhibit of a copy of the photograph in question, but no such exhibit (or exhibit sheet) was actually attached to the copy affidavit furnished to the court or subsequently presented to court, and then continued:

"I understand that Mr. McGrath contests this is a photograph of him and I can confirm that it is the photograph and a true likeness of the male I dealt with on 20th February, 1999 who gave the name Cathal McGrath."

19. He continued:

"I beg to refer to a copy of the custody record in respect of the arrest of Cathal McGrath on 20th February, 1999. As appears therefrom, he gave his place of birth as Donegal, his date of birth as 19th February, 1953 and his then address as 94 Worting Road, Basingstoke."

20. Although referred to, no custody record was exhibited by him to his affidavit. As to the absence of these two documents from this affidavit, while no explanation was tendered, I believe it is explained by the fact that Sgt. Longman is no longer based in Hampshire, and, as will be seen, a copy of what is said to be the same photograph has been exhibited by the next deponent.

21. Mr. Glenister in turn averred to the fact that he is a barrister employed as Crown Prosecutor by the Crown Prosecution Services, and "is responsible for the extradition of the respondent in the proceedings". He swore as follows:

2. "On 20th February, 1999 Police Constable Matthew Longman ... arrested a male by the name of Cathal McGrath after he found him to be in possession of a controlled substance in Basingstoke Town Centre, in Hampshire and then took his fingerprints and photograph."

22. Mr. Glenister then exhibited a copy photograph and confirmed that the photograph attached to the European Arrest Warrant issued on 6th August, 2004 is "a further copy of the same one".

23. On this basis, I accept that the copy photograph to which Sgt. Longman referred is probably that exhibited by Mr. Glenister, or if not, it is no different. He then continued:

"3. The custody record in respect of the arrest of Cathal McGrath on 20th February, 1999 shows that Cathal McGrath gave his place of birth as Donegal, his date of birth as 19th February, 1953 and his then address as 94 Worting Road, Basingstoke.

4. In addition to the matters set out above, I confirm that in her witness statement, on 4th October, 2002, Mrs. Bartlett (the mother of the complainant in this case) states as follows: 'I learnt from Cathal that he was from Donegal in Southern Ireland ... I can describe him as late 40s, approximately 5'7", skinny, greying hair and he had a front tooth missing.' I say and believe that this description corresponds with the description obtained from the police national computer following the arrest of Mr. McGrath by Police Constable Longman on 20th February, 1999. It is of the same person.

5. I therefore say and believe that the person arrested in Basingstoke by Police Constable Longman in 1999, whose details appear on the European Arrest Warrant in this application, is one and the same as the Cathal McGrath arrested by Sergeant Martin O'Neill on 18th October, 2004 and the person that is before this Honourable Court."

24. I have set out in some detail the actual content of these affidavits, as the conclusions sought to be drawn from them by the applicant are heavily contested by the respondent. My understanding of the averments of Mr. Glenister and of Sgt. Longman, as well as from my enquiry of counsel for the applicant, is that, both the copy photograph attached to the warrant as well as the copy photograph exhibited in Mr. Glenister's affidavit, are taken from the photograph appearing on the United Kingdom national police computer, and that the source of the photograph on the national police computer is the photograph taken by Sgt. Longman in 1999 on the arrest of the man he refers to in his affidavit.

25. To complete the factual context in which the arguments of counsel are placed, I need to refer also to parts of the warrant itself and to the additional material attached to it. It is in a standard printed form, with space for additional typed matter to be inserted.

26. In s. (a) the person is clearly named as "Cathal McGrath". As his residence or last known address is typed "Monasa, Burt, Donegal, Ireland formerly of 94 Worting Road, Basingstoke, Hampshire, England." In the part marked "Date of birth" there is recorded "19.2.1953 (has also given 19.2.1933)". And finally, in this section of the warrant there is a subsection providing for photographs or fingerprints, and typed in this section is "photograph attached."

27. What has been furnished under this last item is an extremely unclear, dark and muddy copy of what is obviously a photograph. This appeared on a single sheet of paper, without identification as to name, provenance or otherwise. It is simply a copy of a photograph placed on plain paper.

28. Subsequently, after service of the Points of Objection and the respondent's affidavit, however, a further but only very slightly clearer copy photograph was exhibited in Mr. Glenister's affidavit, This included additional material in the form of details inserted into a printed box under the photograph. The additional material is the following:

Surname McGrath ++ BB

5

8

9

First Names Cathal

D.O.B. 19/02/33 N Date 20/02/99

29. In the course of the hearing, I enquired of counsel for the applicant whether this additional information also appears on the actual computer from which the print attached to the warrant was taken, because Mr. Glenister had said in his affidavit that the photograph attached to the warrant was "a further copy of this same photograph", and "that the description given by the complainant's mother corresponded with the description obtained from the police national computer". It was confirmed to me by counsel, after enquiry, that this was the case.

30. In addition to the copy photograph attached to the warrant, but not referred to at all in s. (a) or elsewhere in the warrant, there were furnished copies of two pages of palmprints and fingerprints. It is clear that these formed part of the warrant as sent because the facsimile series of ten pages constituting the warrant and its attachments, including these two pages, are all head "29.09.2004" and were sent between 15.30 and 15.31 and are indicated as consisting of eleven pages, (including a cover page, the first page of the warrant being marked page 002).

31. As to these I will return to them in due course. However, at this point in the judgment it is sufficient to say that the document contains the name "Cathal McGrath" with no address, present or former, and no nationality, and a typed date of birth of "19.02.1933".

### **Legal Submissions**

32. Mr. Robert Barron, B.L. for the applicant referred the Court to the various matters which are required to be satisfied under the Act of 2003 in order for the Court to make the order sought in respect of the respondent. In that regard he relied on the affidavit of Sgt. O'Neill to which I have referred, as to the formalities of the arrest.

33. Having addressed the court as to the form of the European Arrest Warrant, he submitted that it conformed with that provided for in the Framework decision, and of the Act of 2003.

34. On the question of the offence of gross indecency which the respondent had claimed did not exist in this jurisdiction, he argued that while such an offence does not exist under that designation or name in the State, nevertheless the same facts described,

including force or threats of unlawful force as described, do constitute an offence in this jurisdiction, the penalty for which was established by statute, and in that regard he relied on the case of *DPP v. Doolan* [1993] I.L.R.M. 387. He argued therefore that the warrant could not be attacked on the ground that there is no corresponding offence in the State to that of gross indecency in the United Kingdom.

35. Mr. Barron submitted that all of the requirements of s. 16 were met in the present case, including the necessary undertakings referred to in the warrant. The undertakings were before the Court. He submitted that District Justice Pratt had certified in the proper manner to the receipt by him of the necessary undertakings. The first of these was signed Caroline Flint, Undersecretary of State to the effect that the person sought, if surrendered, would not be extradited to a non Member state of the European Union, and the second of them, signed by Mr. Ken McDonald, QC, Director of Public Prosecutions undertook that he would not be tried for other prior offences. Mr. Barron said that these undertakings complied fully with ss. 22 and 24 of the Act.

36. He contended that on foot of the affidavit of Sgt. O'Neill, the respondent is the person sought to be surrendered, and is the person described in the warrant. He submitted that this complied with the list of requirements or criteria referred to in the case of *Crowley v. Director of Public Prosecutions* [1990] I.L.R.M. 220.

37. Mr. Whelan, S.C. on behalf of the respondent took a diametrically opposed view to that of Mr. Barron, and submitted that the warrant was, in fact, fundamentally flawed. He referred firstly to the insertion of the phrase at the date of birth section "(has also given 19.2.1933)", and submitted that there was a clear question as to why this had been included without explanation. He submitted that a person born in 1933 would now be 71 years old, and that it was inconceivable that the respondent could be a person of that age. The respondent had always, he said, given his correct age, and according to his affidavit had never given his age as 19.2.1933. And further, the respondent denied he was the person in the photograph attached to the warrant.

38. He argued that since the judicial authority seeking the surrender of the respondent had the respondent's Points of Objection and his affidavit before the affidavits of Mr. Glenister and of Sgt. Longman were sworn in response, the discrepancy in age ought to have been fully explained to the Court by reference to the statement made in the warrant itself.

39. Next, Mr. Whelan addressed the issue of the copy photograph furnished with the warrant. In the present case, what is presented, he said, is a poor photocopy of a person, totally black, and with nothing at all to attach or connect the person in the photograph to any person sought to be surrendered, and certainly nothing to attach it to the respondent.

40. In referring to the copy of the photograph exhibited in Mr. Glenister's affidavit, and the additional material exhibited in it, he submitted that if the judicial authority seeking the surrender of a person, and in support of that chooses to present fingerprint or photographic material, there should be no ambiguity about what is presented. However, he argued, both the photograph exhibited by Mr. Glenister as well as the fingerprint pages sent with the warrant in fact refer to a person born on 19th February, 1933, that is to say a person, who in 1999 when allegedly photographed and fingerprinted, was 69 years of age, which, he said, could not be the respondent, even on the description furnished by the complainant's mother, as contained in Mr. Glenister's affidavit.

41. Mr. Whelan contended that while there is a presumption in favour of the warrant, pursuant to s. 12(9) of the Act of 2003, that presumption extends only to the warrant itself. According to counsel for the respondent, all other documents relied on should be subject to an appropriate affidavit as to the chain which connects the document with the person sought to be surrendered. If that presumption were wider, he argued, it would be possible to attach anything to the warrant, without any proof. The same principles, he argued, therefore, apply as applied in former extradition cases, that is to say, the penal onus of proof, and he invoked also the decision of Peart, J. in the case of *Minister for Justice equality and Law Reform v. Landi Gokano, also known as Florenc Bita*, (Unreported) 20th July, 2004, in support of his contention that in cases such as this it is extremely important that obligations imposed on the party seeking extradition, are complied with strictly.

42. He submitted further that when an issuing authority chooses to include documents, as here, which lead to confusion which is not subsequently addressed, as it was not here, notwithstanding that the content of those same documents was part of the very basis for the respondent's refusal to consent to surrender, then further confusion is caused by the absence of any explanation, such that the Court cannot be satisfied that the respondent, in this case, is the person named in the warrant.

43. Turning to the offences, while he accepted the rape offence causes no difficulty, and the facts described could constitute sexual assault, he argued that a problem arises not only in relation to the offence of gross indecency, but also as to the issue of duplication of offences. In regard to the latter, he says that offence 6 is the same as offence 11, 7 is the same as 12, 8 is the same as 13, and so forth. This he said is not permissible in law. He disagreed with Mr. Barron as to the existence in the State of an offence corresponding to an offence of gross indecency in the United Kingdom.

44. Finally, Mr. Whelan contended that the undertakings were not in a form acceptable for the purposes of the Act of 2003, and also that the underlying warrant alleged to have issued in Basingstoke, and referred to in s. (b) of the arrest warrant had not been furnished to him, despite requesting this, and despite the recommendation by Peart J. on the 19th. October that this warrant should be made available to the respondent.

45. In reply, Mr. Barron submitted that notwithstanding the submissions made by counsel on behalf of the respondent, the affidavit of Sgt. O'Neill was always sufficient to establish that the respondent is the person sought in the warrant. On the other hand, as to the photographs furnished, he accepted that if they caused real difficulties, then the order could probably not be made. However, he argued that notwithstanding the unsatisfactory way in which these photographs were presented to the Court, if the Court was nevertheless satisfied that the respondent is the person named in the warrant, that would permit the court to surrender him.

46. He made further argument on the offence of gross indecency, and as to the alleged duplicate offences, submitting that the same facts could properly give rise to charges in respect of more than one offence, and therefore there was no duplication of the type alleged on behalf of the respondent.

47. And finally, he argued that the respondent did not actually say he is not the person sought.

## Conclusions

48. In this case, while a number of issues have been raised, the kernel of the matter is the dispute between the applicant and the respondent as to the identity of the person sought in the warrant, and as to whether that person is the respondent. If the Court is satisfied that the respondent is the person in respect of whom the warrant issued, then I must make an Order that the respondent should be surrendered to the issuing authority, or its nominee. On the other hand, if I am not so satisfied, then it follows that I cannot make the order sought.

49. There are two initial issues to be considered in relation to this application. One is the nature of the proceedings in which this court is engaged, in this context, and the second is to decide what is meant by the court being "satisfied" within the meaning of S. 16 of the Act of 2003 that the respondent is the person in respect of whom the warrant was issued. Concerning the first issue, is the nature of the proceedings such that the court is engaged in a simple examination of what has been presented by the applicant in support of the warrant, or the respondent against the warrant, in typical adversarial manner, and either on the criminal or civil standard of proof, or should the Court satisfy itself by its own independent or additional enquiries of counsel or of witnesses, if necessary, that the respondent is the person in respect of whom the warrant issued and on what standard of proof?

50. As a starting point it seems to me that Article 2 of the Framework decision sets out clearly the basis upon which Member States shall execute any European Arrest Warrant, namely on the basis of the principle of mutual recognition. This is a well established as a principle of Community Law, and if applied correctly envisages one Member State accepting that authorities in another Member State have exercised or carried out their obligations in an appropriate manner and to an appropriate standard, so that it is no longer necessary for the authorities in the second Member State to embark on a second separate independent enquiry into the same matters.

51. Moreover, the sixth recital to the Framework decision itself declares that it is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation, and the tenth recital declares that the mechanism of the European arrest warrant is based on a high level of confidence between Member states.

52. In the present case, the Court must therefore commence its exercise confident, *prima facie*, in the belief that the issuing authority in the issuing Member state carried out its exercises and enquiries for the purposes of the warrant and of any undertakings given, with all appropriate care. That is the essence of mutual recognition.

53. If nothing therefore arises from the documents, materials or evidence presented which might put in issue that confident belief, then it is not part of the executing judicial authority's role to gainsay the warrant or the materials or evidence presented therewith.

54. However, while, the warrant should be accepted on that basis, if, in the event of an objection to surrender being made by the person arrested, it becomes evident in the course of the hearing concerning that matter, that confusing or contradictory materials have been presented which thereby put in issue the identification of the person in respect of whom the warrant issued, it is proper for the executing authority to look at those ambiguities or conflicting materials so as to be satisfied, pursuant to s. 16 of the Act of 2003, that the person before the court is nevertheless the person in respect of whom the arrest warrant has issued.

55. When doing so, it seems to me that the type of investigation which the court is engaged in, in the circumstances which arise in the last paragraph, is no different to that which previously existed in the State pursuant to then extant legislation on extradition. In that regard I gain considerable assistance and guidance from the decision of the Supreme Court in *Attorney General v. Parke*, (Unreported) 6th December, 2004, and in particular the judgments of Murray C.J., and Denham, J. As Murray, C.J., pointed out, the enquiry is not of an adversarial nature, but rather is in the nature of a *sui generis* enquiry. At page 11, he stated:

"... I should first of all state the obvious, namely, that although extradition may entail serious consequences for a person subjected to it, such as the loss of liberty, extradition proceedings are not a criminal process and are not in the nature of a criminal trial. The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. ... An extradition proceeding, pursuant to the relevant Acts, has its own special features which in a certain sense makes it *sui generis*."

56. And it is clear why the Court considered it be so. Referring to the judgment of Walsh, J. in *Wyatt v. McLoughlin* [1974] I.R. 378 in which he had considered the nature of extradition and its provenance in, *inter alia*, treaties, Murray C.J. continued:

"These reciprocating arrangements referred to by Walsh J. may arise from bilateral arrangements or, as is more often the case nowadays, multilateral treaties".

57. As to the arrangements then existing between Ireland and the United Kingdom, he said:

"The role of the requested State, indeed its duty, is to give effect to a lawful request from a requesting State once it is determined that the request fulfils the criteria laid down by the relevant legislation."

58. In the judgment of Denham, J. in the same case *Attorney General v Parke*, *supra*, she stated, regarding the nature of the enquiry:

"The role of the trial judge in an application for an order of extradition is unique. The hearing is not a criminal trial, in the adversarial sense, where the State must prove the guilt of the accused beyond all reasonable doubt. Nor is it a civil case between parties. It is a unique procedure where the court holds an inquiry as to whether the criteria set out in the Extradition Act 1965, as amended, has been met. Further this law has been established against the backdrop that the State has entered into an agreement with the requesting State that there be extradition arrangements between the two States. Thus these cases are founded on the comity of nations and the comity of courts."

59. Notwithstanding that these extracts refer to the position arising under treaties or arrangements existing prior to the Framework decision and the Act of 2003, they nevertheless make clear how I should approach the enquiry in this case, arising from obligations flowing, not merely from a bilateral or multilateral treaty, but from the Council Framework decision itself.

60. Having regard to the foregoing, I am satisfied that, contrary to what the respondent contends for, this is not an enquiry in which there is an onus on the applicant to prove beyond reasonable doubt that the respondent is the person sought to be surrendered. Nor is it appropriate, as was stated by Denham J. in the above case, to adopt the civil standard of proof "on the balance of probabilities", although this might be closer to what is apt. In my view the obligation on the court is to take full account of the warrant and the accompanying materials and affidavits filed and make all appropriate enquiries which I consider necessary, including, pursuant to the Framework decision, requesting further information from the issuing authority, with a view to reaching my decision as to whether the respondent is the person in respect of whom the warrant issued.

61. As to what is meant, in that context, by "satisfied" in Section 16 of the Act of 2003, it means, I believe, no more than that the court should be in a position to make up its mind, on the facts and materials presented and/or on its own enquiry, and come to a conclusion on the matter before it, without having a genuine or reasonable doubt in that regard. It may well be that, in the course of the exercise, certain doubts will arise in relation to one or more of the facts or materials before the court, but overall those doubts

should not be of a nature to prevent the court coming to a view which is conclusive and certain on the decision required

62. Having regard to the foregoing, I will now deal with the warrant first. The name of the person sought is clear and unambiguous. So also the sex and nationality indicated. Not so, however, the last known address of the person. In the copy warrant which is of very poor quality indeed, it appears to me to be "Monasa", Burt, Donegal, Ireland. In his affidavit sworn in these proceedings, concerning the arrest of the respondent, Sgt. O'Neill gives the address at which he found the respondent as "291 Moness". I am prepared to accept that what I have indicated as being the address, appearing in the poor copy facsimile warrant before the Court, might be "Moness", and not "Monasa", but there is certainly no number. On the other hand, the respondent accepted that he resided at "Moness", although without any number attached. .

63. I do, however, note that Sgt. O'Neill did not aver to knowing the respondent personally, and I note also that nowhere in any of the other materials furnished in support of the warrant, or in the affidavit evidence presented is there any indication of any address in the State for the person in respect of whom the warrant issued, the only information being that a person on being arrested in Basingstoke England had given as his place of birth "Donegal", according to the affidavits of Mr. Glenister and of Sgt. Longman, and "Donegal Southern Ireland", according to the mother of the complainant, as averred to also in Mr. Glenister's affidavit.

64. While I have some doubts about this aspect of the matter, on its own, these doubts are not such as to prevent me coming to a definitive conclusion on the issue which I have to decide.

65. A further, but more serious difficulty arises in respect of the dates of birth given and in respect of the attached copy photograph and fingerprint pages furnished. As previously mentioned, the warrant gives the date of birth: "19.2.1953 (has also given 19.2.1953)", without further explanation.

66. In order to consider whether, having regard to this discrepancy, I can be satisfied, as a result of the materials presented and the explanations given in answer to my own enquiry of counsel, that the respondent is the person in respect of whom the warrant issued, I need to consider the materials available to the court on the question of date of birth. As will be seen below, the affidavits presented on behalf of the applicant, make it clear that the applicant relies, for the purposes of identifying the person sought to be surrendered, on the fact that the same person, and not just a person with the same name, was arrested in Basingstoke, England in 1999, as well as on the description of the person sought given by the mother of the complainant, which according to Mr. Glenister's affidavit is alleged to correspond with the description obtained from the police national computer following the arrest by Sgt. Longman in 1999 of the person with the name of Cathal McGrath.. I consider the question of the date of birth by reference to the photographs furnished, the pages of fingerprints furnished, and the contents of the affidavits filed.

67. As to the photograph presented with the warrant, I have already indicated that it was supplied on a plain sheet of paper, which bore no writing or any other markings of any kind whatsoever. I leave aside altogether at this time, the poor quality of the copy. The respondent has, in his affidavit, denied it is a photograph of him. The photograph so presented would not permit the Court to make any decision as to the likely date of birth of the person in the photograph, nor as to the date of birth of the person in respect of whom the warrant issued.

68. It became clear during the course of the exchanges of affidavits, but was not previously known when the warrant was originally endorsed for execution, or during the hearing following the arrest of the respondent, that the copy photograph furnished with the warrant was taken from the national police computer in the United Kingdom. It also became clear from my own additional enquiries of counsel in the course of the hearing, that information appearing on that computer also appears on the second copy photograph, taken from the same computer, exhibited by Mr. Glenister, included certain identifying information which would have been, and is, relevant to the court's enquiry. I have set out this additional information above. The record appearing on the computer under the photograph gives a date of birth clearly as "D.O.B. 19/02/33", and only that date, and no other. This record is, on its face, an official record of identification.

69. In that record, apart from the name, which corresponds to that of the respondent, the only other information is under "date" and that says "20/02/99", which I understand from the affidavits, is the date of arrest of the person identified in the photograph. It seems reasonable to believe that the information was inserted in this identification box, not by the person arrested, but rather by an official, either Sgt. Longman, or some other person assisting in the processing of such photographs in the Hampshire constabulary, at the time, or when it was transferred onto the national police computer..

70. No indication was given to the court as to why this relevant material, appearing under the photograph, and which formed an integral part of the identification record of the person photographed, was not included in the copy furnished with the warrant..

71. It is clear from the last matters mentioned, that the record under the photograph – when that was exhibited – shows a name identical to that of the respondent, but no other connection. The record below the photograph does not contain any address, either in the United Kingdom or in the State, existing, known or former, nor any indication of nationality or place of birth of the person, no special features of identification nor any description whatsoever of the person in the photograph, and no reference to any custody record. It contains no reference to a date of birth in 1953 or to either of the English or Irish addresses appearing in the warrant.

72. So far as the affidavit of Mr. Glenister is concerned, he confines his averments, on this aspect of the matter, to a statement that Sgt. Longman had arrested a male in Basingstoke on 20th February, 1999, and that Sgt. Longman "interviewed that male person, took his fingerprints and photograph". He then made the averments I have set out above in relation to the common source of the two copy photographs and the description by the complainant's mother.

73. Both Sgt. Longman and Mr. Glenister also refer to a custody record, with information on it, and Sgt. Longman purported to exhibit this, but neither one nor the other has actually exhibited this record.. I can understand and I accept that it might not have been readily available to Sgt. Longman, as he is no longer with the Hampshire constabulary. However, I have to assume the custody record must have been available and could, no doubt, have been exhibited. It is the only document in which both Sgt. Longman and Mr. Glenister say there is a record of a date of birth of a "Cathal McGrath", and which the respondent accepts as his date of birth. Since both Sgt. Longman and Mr. Glenister have referred to it, but neither has exhibited it, I must assume it was appropriately considered by the relevant authorities in the course of the preparation of the warrant and prior to the issue of the same, and also since the receipt of the Points of Objection and the affidavit of the respondent, but that it was assessed as not being of relevance or of assistance to the court. I therefore did not consider it necessary in the course of the hearing to seek to examine any deponent, nor to adjourn the matter, as the Act of 2003 permits, to await the possible production of such document.

74. In still considering the question of the two dates of birth, I now turn to the last of the documents furnished in support of the arrest warrant, namely two pages of fingerprints and palmprints, since these too were apparently taken by Sgt. Longman when he

took into custody the person in the copy photographs, as I understand his affidavit in that regard. Even though they were presented at the same time as the facsimile warrant, as pages 10 and 11 of the material, it is likely that they are in fact prepared in reverse order. They consist of a "Finger/Palm Form", a printed standard form document. They include on the first page several fingerprints and on the second page two palm prints. As to identifying the person whose prints they are, the typed name given is "Cathal McGrath" and the date of birth as "19/02/1933." The forms contain no address, either in the United Kingdom or in the State, current, former or known. The form itself does not appear to provide for the inclusion of any address. Nor do the forms contain any indication of the person's nationality nor of his place of birth. The form refers to a custody record number, and has a date "20/02/99", but since no custody record number is given in any of the affidavits furnished to the Court, it is not possible to relate the number appearing on these documents with any particular custody record.. Although this fingerprint record was furnished with the warrant, unlike the photograph which is referred to in part (a) there is no reference whatsoever in that section to fingerprints, although there is provision in s. (a) for additional material such as "photographs or fingerprints". Nevertheless, I have considered it appropriate to take them into account in my enquiry, as part of the materials actually supplied. As in the case of the copy photographs and the information appearing below the photograph as recorded on the national police register, it seems to me highly likely that the information inserted into the forms was done either by Sgt. Longman himself, or by some person charged with assisting in such matters on the arrest of a person, and not by the person arrested.

75. The information in the documents above referred to can be summarised as follows:

(a) The copy photograph furnished with the warrant gives no information whatsoever.

(b) The second slightly better but still difficult to analyse, copy, which did contain material appearing on the national police computer, gives a name identical to that of the respondent, but the date of birth of the man in the photograph as 1933. Apart from the name, there is nothing to link the material to the respondent, or to any person although there is a reference to a date 20/02/99 which from the affidavit of Sgt. Longman is the date on which the person was arrested in Basingstoke.

(c) The two pages of fingerprints furnished are also those purportedly of a person stated to be born in 1933. While they refer to a custody record number but nothing further in that regard, they make no mention of photographs taken on the same day. Apart from the name appearing on these two pages, there is no other matter linking them with the respondent, or to any person, save the same date of arrest as in the photograph last mentioned.

76. As to the existence of a custody record, even if I were to accept at face value the averments made both by Mr. Glenister and by Sgt. Longman that a custody record exists which gives a date of birth in 1953, and which I am prepared to consider, pursuant to the principle of mutual recognition, that would still leave me with a substantial doubt, and not just a mere doubt, in the absence of any explanation for the discrepancy between the dates in the three documents all concerning contemporaneous matters of identification and in the absence of any tie in between such a custody record and the other materials furnished, as to whether the respondent is the person in respect of whom the warrant issued.

77. I return now, to the affidavits of Mr. Glenister, and of Sgt. Longman, to see whether, notwithstanding that substantial doubt, there is sufficient other information before the court upon which I would be satisfied that the respondent is nevertheless the person in respect of whom the warrant has issued. After referring to the arrest by Sgt. Longman of a male with the name "Cathal McGrath" on the above date in 1999, Mr. Glenister refers to what the complainant's mother said. Although I set this out earlier in the judgment I now repeat it:

"4. In addition to the matters set out above, I confirm that in her witness statement, on 4th October, 2002, Mrs. Bartlett (the mother of the complainant in this case) states as follows: 'I learnt from Cathal that he was from Donegal in Southern Ireland ... I can describe him as late 40s, approximately 5'7", skinny, greying hair and he had a front tooth missing.' I say and believe that this description corresponds with the description obtained from the police national computer following the arrest of Mr. McGrath by Police Constable Longman on 20th February, 1999. It is of the same person."

He then concludes:

"5. I therefore say and believe that the person arrested in Basingstoke by Police Constable Longman in 1999, whose details appear on the European Arrest Warrant in this application, is one and the same as the Cathal McGrath arrested by Sergeant Martin O'Neill on 18th October, 2004 and the person that is before this Honourable Court."

78. It is clear from the forgoing that the Applicant relies on the existence of an arrest of a person in Basingstoke, England, and on what the complainant's mother said, in support of the contention that the respondent is indeed the person in respect of whom the warrant issued. While it is clear, according to the above extract, that the complainant's mother described a person as detailed above, it is not possible, in my view, to connect that person either to the copy photograph furnished with the warrant, which had no identification attaching to it at all, and which was impossible to analyse because of its poor quality, nor to the slight clearly copy photograph furnished by Mr. Glenister, on which the only identification is the name of a male, with the much older date of birth, which does not correspond with the age given by the complainant's mother, and which gives no address either in the United Kingdom or in the State. And further if I consider the characteristics which the mother of the complainant ascribes to the person she was describing in 2002, it is not possible to glean from the warrant or from the photographs or palmprint documents, any of those characteristics. Nor is it possible to find or establish the alleged "correspondence" of this description by the complainant's mother, with what has been presented to the court from the police national computer, as Mr. Glenister contends for at paragraph 4 of his affidavit.

79. Even if it were intended to utilise what the mother of the complainant stated as set out in Mr. Glenister's affidavit, by reference also to the custody record, which is nowhere mentioned as having come from the national computer, but which I am nevertheless prepared to consider as a possible source for it, it is still not possible to glean from her description that the respondent is the person in respect of whom the warrant has issued. She speaks only of a person being simply from "Donegal in Southern Ireland", being "late 40's" – a possible but very vague reference to a specific or approximate date of birth – and having certain bodily and facial characteristics, which are nowhere recorded in the custody record, at least not according to anything contained in the affidavits of Mr. Glenister or of Sgt. Longman.

80. Although Mr. Glenister's affidavit contains a number of matters of which it is clear he does not speak of his own knowledge, I have dealt with the averments therein on the basis that they correctly reflect true facts, even those which would ordinarily be considered to be "hearsay", or even hearsay upon hearsay, that is to say, by accepting his evidence at its very strongest.

81. Nor is it possible to identify the respondent as being the person sought in the warrant, by reference to Sgt. Longman's affidavit.

What he says, in that regard, is as follows:

"I understand that Mr. McGrath contests this is a photograph of him and I can confirm that it is the photograph and a true likeness of the male I dealt with on 20th February, 1999 who gave the name Cathal McGrath."

82. This is a very carefully drawn statement indeed, in which Sgt. Longman says no more than that when he arrested a person who gave his name as Cathal McGrath in 1999 he took a photograph, and that the photograph attached to the arrest warrant is of that person.

83. There remains, however, the fact that there is no record before the court of any nature, either photographic or by means of fingerprints (whatever the status of such might be), or by means of any other written document which connects the person sought in the warrant to the respondent. I am not satisfied that the contents of the affidavits of Mr. Glenister or of Sgt. Longman resolve the matter.

84. Once the respondent did not consent to surrender, and once he challenged his date of birth as being 1933, and said he had never used such a date, it was necessary, to have had before the court some explanation of the existence of another, conflicting date. It does seem unusual that, of three official sets of documents, all arising from the occasion of the arrest of the person in Basingstoke in 1999 and upon which arrest the applicant so heavily relies, two of the three created on the same occasion or from the same incident show the same date of birth, significantly different – by twenty years – from the third document, and that it is only this latter document which is not before the court.

85. Notwithstanding the well established principle of European law that Member States should clearly respect the decisions of authorities in other Member States, pursuant to the principle of mutual recognition, it is proper also that an issuing authority in a case such as this, must furnish sufficient information, of a reliable nature, to enable the member state central authority and this court carry out their respective functions under the Framework decision, and in this State pursuant to the Act of 2003 which implements that decision. This required, in my view, in the present case, that the issuing authority furnish to this court, as the executing authority, clear data or information which would have assisted this court to satisfy itself – as it is bound to do – that the respondent is the person I respect of whom the warrant issued.

86. While, from the jurisprudence cited above, I do not have to satisfy myself beyond a reasonable doubt that the respondent is indeed the person in respect of whom the warrant issued, I do have to be able to make up my mind without genuine and real doubt as to this fact. If I cannot do so without those genuine doubts remaining, then I cannot be satisfied that the respondent is indeed the person in respect of whom the warrant issued.

87. Before deciding the matter finally, I should also consider the argument which the applicant makes, namely, that, leaving aside or notwithstanding the above difficulties, the affidavit of Sgt. O'Neill is in any event sufficient on its own, because it complies with the several requirements which Blayney, J. found to be sufficient in his decision in the case of *Crowley*, supra. I am not so satisfied, because I do not think that the circumstances of that latter case are at all similar to those in the present case. In that case, there was no dispute whatsoever as to the factual matters which would have persuaded the court that Mr. Crowley was the person sought. Indeed, one of four critical factors, and perhaps the most important one in that case, was the fact that while Mr. Crowley bore quite a common name, as might also be said of the respondent in this case, Mr. Crowley was, at the relevant time, incarcerated in prison, and was the only person with that name who was in that prison at the relevant time, a fact which was accepted by Mr. Crowley.

88. In the present case, there is no evidence in Sgt. O'Neill's affidavit or anywhere in the materials before the Court that the respondent was the only person with his name residing at the address in Basingstoke, England, at the time of commission of the offences, nor even evidence that the address given was not a multiple dwelling with no others of that name residing in it. Nor is there any evidence that the Respondent was actually residing at the address in question at the time of the commission of the offence. Nor is there any evidence that it was where the complainant also resided if that be relevant, nor any evidence such as would permit me to conclude that the respondent was the only person who could have been residing at the address in question at the time in question, such that I would be able to apply the same criterion as was applied by Blayney, J in the *Crowley* case.. In the present case the applicant seeks, very forcefully, to rely on the fact that he is not the person in respect of whom the arrest warrant was issued, and that the person arrested in 1999 is a person with a different date of birth, 20 years older than him, that he has never given a date of birth which would coincide with that of a date of birth twenty years earlier than his date of birth, and that he is not the person in the photographs furnished to the court. I could not therefore be satisfied the respondent is the person in respect of whom the warrant is sought, based only the material in the affidavit of Sgt. O'Neill.

89. Finally, I should undoubtedly consider the weight to be given to the statements made by the respondent, upon his arrest, as averred to in the affidavit of Sgt. O'Neill. While the respondent acknowledged his name and the fact that he resided at the address given as Moness, in Burt, Co. Donegal, and that he had previously resided at the address in the United Kingdom specified in the warrant, and that he knew the complainant, there is no question asked of him as to when precisely he resided at the address in the United Kingdom, nor any indication that he did so at a time of the commission of the alleged offences. When combined with the serious questions arising as to the date of birth, the absence of a custody record and the absence in any document of any address in the State linking the person arrested in the United Kingdom with the respondent, and the several other inconsistencies I have referred to,

90. I am not satisfied that the statements of the respondent as averred to in Sgt. O'Neill's affidavit set aside the serious doubts I have in respect of the warrant. In regard to this aspect of the case, I have not taken into consideration the denial of the respondent of any connection with the matters under investigation, the subject of the offences listed in the warrant.

91. Arising from all of the foregoing, I am not satisfied, in accordance with s. 16 of the Act of 2003 and following upon the hearing that the respondent is the person in respect of whom the arrest warrant issued.

92. In case, however, I should be considered to have misdirected myself as to the applicable law or as to the application of that law to the issues in the case, I should deal with the additional issues raised by Mr. Whelan against the surrender of the respondent, namely the question of the undertakings, the position concerning the offences themselves, and the absence of the underlying warrant.

93. As to the undertakings, while Mr. Whelan alleged these were not in proper form, and could not and ought not to be accepted, I do not think this is a good basis for resisting surrender, if I were satisfied on the question of identity. The two undertakings which I have referred to at the commencement of this judgment are in sufficiently clear and precise form, and have been adequately and sufficiently formally tendered by the judicial authority, District Judge Pratt, to satisfy the provisions of the Framework decision as



transposed by the Act of 2003, and I reject the respondent's argument. Undertakings in the format furnished have been accepted by this court, and I am satisfied that they conform with s. 22 and s. 24 of the Act of 2003, as Mr. Barron submits in reliance on the decision of O Caoimh, J. in the case of *In re Dundon*, and in the Matter of a European Arrest Warrant, (Unreported), 14th May, 2004.

94. On the question of an offence of gross indecency, and its possible equivalent in this jurisdiction, as well as on the question of alleged duplication of offences, I am also, but with some hesitation, persuaded by Mr. Barron's argument that no issue arises on the question of any duplication of offences, and that the same facts can give rise to more than one offence. As to whether, in this jurisdiction, there is an offence which is the equivalent to that of gross indecency, it seems to me that Mr. Barron is correct that such an offence exists, and that the issue appears to have been clarified in the case of *Doolan*, supra. And I accept also Mr. Barron's explanation that the same facts may constitute more than one offence, so that the question of duplication of offences does not truly arise.

95. Mr. Whelan also argued that he was entitled to have sight of the warrant mentioned in s. (b) of the European Arrest Warrant. This is a different warrant, but a part of the European arrest warrant process, by which, in the present case, an underlying warrant was issued in Basingstoke, for the arrest of the person named in it. I am satisfied that, whereas this is part of the process, and the Framework decision itself requires that the information in the warrant must include evidence of such underlying warrant, as part of the obligatory information to be furnished, there is nothing in this case to suggest that the person named in that warrant is not the person in respect of whom the warrant now before the Court issued. While it is clear that evidence of this warrant should form part of the information furnished by the issuing member state to the central authority in the executing member state, and while I can accept that in certain circumstances the information in that underlying warrant might assist a person who does not consent to surrender, it was not explained to the court how the availability of this underlying warrant could have assisted the respondent in this application. It would moreover, not be open to this Court to examine in any detail that underlying warrant, as that underlying warrant is matter entirely and exclusively within the remit, jurisdiction, control and purview of the courts in the issuing member state.

96. If there were not the difficulties I have outlined in relation to the identification of the respondent, none of these other matters would persuade me not to surrender the respondent to the appropriate person on behalf of the issuing authority.

97. However, on the basis of my findings concerning the identity of the person in respect of whom the warrant issued, I reject the application to surrender the respondent pursuant to the European Arrest Warrant dated 6th August 2000. The reasons are sufficiently set forth above, but in case there should be any doubt, I do so on the basis that I am not satisfied that the respondent is the person in respect of whom the European arrest warrant in question was issued.