

THE HIGH COURT

Record Number: 2007 NO. 102 Ext.

BETWEEN

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

APPLICANT

AND
EAMON DEVLIN

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 24th day of January 2008

1. The surrender of the respondent is sought by a judicial authority in Northern Ireland on foot of a European arrest warrant which issued there on the 4th April 2007. That warrant was duly endorsed here for execution by order of the High Court dated the 6th June 2007. The respondent was duly arrested on foot of this warrant on the 21st June 2007 and was brought before the High Court as required on the following day, the 22nd of June 2007.

2. The respondent's surrender is sought so that he can face prosecution for one offence described in the warrant as "cheating the public revenue". The issuing judicial authority has at paragraph (e) of the warrant certified, *inter alia*, that the conduct constituting this offence specified in the warrant falls within what is described in that paragraph as "the European framework list". That is a reference to the list of offences set forth in Article 2.2 of the Framework Decision, and in this regard, the issuing judicial authority has ticked the relevant box in paragraph (e) to indicate that the offence comes within that category of offence namely "*fraud, including that of affecting the financial interests of the European communities within the meaning of the Convention of 26 July 1995 on the protection of European Community's financial interests*".

3. According to the warrant, the offence of cheating the public revenue satisfies the minimum gravity requirement under the Framework Decision in respect of an offence contained within the list set forth in Article 2.2 of the Framework Decision, since it is punishable under the law of the United Kingdom by a term of imprisonment in excess of three years.

4. Points of Objection have been delivered on behalf of the respondent in which he raises a number of issues which are submitted to constitute grounds for refusing to make the order sought for the surrender of the respondent to the issuing state. These objections relate to the question of correspondence of the offence set forth in the warrant with an offence in this jurisdiction, the issue of delay in seeking the surrender of the respondent given that these offences are alleged to have occurred in 1997 and the European arrest warrant did not issue until the 4th April 2007. Linked to the question of delay is an issue raised in relation to the ill-health of the respondent. An issue is raised also in relation to whether the offence the subject of the warrant was committed in whole or in part of the "territory of the executing member state", and as such is not one for which his surrender can be ordered.

5. Subject to reaching conclusions in relation to the issues raised on behalf of the respondent by way of objection to surrender, I am satisfied that the requirements of section 16 of the Act have been complied with. In that regard, I am satisfied that the original European arrest warrant was duly endorsed for execution by the High Court prior to the arrest of the respondent. I am satisfied that the person who was arrested on the 21st June 2007 is the person in respect of whom the European arrest warrant has been issued. I am satisfied that no undertaking is required under section 45 of the Act since no prosecution has yet concluded in respect of the offence referred to in the warrant. I am further satisfied that there is no reason to refuse to order surrender by anything contained in sections 21A, 22, 23 or 24 of the Act. I am further satisfied, subject to dealing with the points of objection raised, that surrender is not prohibited by any provision of Part III of the Act or the Framework Decision itself.

6. The Court is also required to be satisfied either that correspondence/double criminality does not require to be made out in view of the fact that the issuing judicial authority has ticked the relevant box in respect of an Article 2.2 offence in the European arrest warrant, or, that the offence referred to in the warrant corresponds to an offence in this jurisdiction or otherwise comes within the provisions of section 38 of the Act. I will reach a conclusion on this point in due course.

Points of Objection**Correspondence**

7. Michael O'Higgins S. C. on behalf of the respondent has sought to go behind the ticking of the box in paragraph (e) of the warrant and submits that the mere fact that this box has been ticked to indicate that the offence contained in the warrant is one within the list contained in Article 2.2 of the Framework Decision is not itself determinative in relation to the question of correspondence or double criminality. He has referred to the wording of Article 2.2 which provides as follows:

"the following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:...". (my emphasis)

8. Mr O'Higgins submits that the wording which I have underlined in the preceding paragraph indicates that this court must be satisfied that the offence of cheating the public revenue under the law of the United Kingdom comes within Article 2.2, and he submits that before the court can be so satisfied an affidavit of United Kingdom law must be required. He points to the fact that in this case there is no affidavit of law and that the only basis upon which this court is asked to be satisfied in this regard is the certificate by the issuing judicial authority to which I have already referred and which is contained in paragraph (e) of the warrant to the effect that "*the conduct constituting the extradition offence specified in this warrant falls within the European framework list*". Mr O'Higgins has submitted that it is not provided anywhere in the Framework Decision that this matter can be dealt with merely by way of the certification, even though he accepts that the template form of European arrest warrant provided for in the Framework Decision can be added to as required. However, he submits that even though he makes that concession, there is no basis for this court being satisfied about this particular matter simply because the issuing judicial authority in the United Kingdom has given a certificate in that regard within the text of the warrant. He submits that no such certificate can displace the obligation upon the issuing judicial authority to prove matters in relation to United Kingdom law.

9. Mr O'Higgins submits also that the expression of mutual trust and confidence contained in the Recitals to the Framework Decision cannot relieve this Court of its obligation to be satisfied as to a matter of United Kingdom law, given that it is a fundamental matter which determines whether or not a person should be surrendered, and that if such a certificate is all that is needed in order to satisfy this Court, then the issue of double criminality is unassailable, given the unlikelihood that a UK barrister would swear an affidavit

contrary to what a UK judge has certified the law to be.

10. I have considered these submissions in relation to correspondence, but I cannot accept that this Court is obliged in this case to look behind the fact that the issuing judicial authority has ticked the box in question in paragraph (e) of the warrant. Indeed, I would go so far as to state that the insertion of the certificate referred to is something which is not essential, given that the same judicial authority has already ticked the box to indicate that the alleged acts on the part of the respondent constitute acts giving rise to an offence of a nature contained in the categories of offences set forth in Article 2.2 of the Framework Decision. It would require something in the nature of a genuine and manifest error on the face of the warrant before this Court could disregard the fact that the offence has been ticked, and conclude that the matter of double criminality has not been satisfied by the ticking of the box.

11. One could perhaps foresee a possible situation arising where a respondent's surrender was being sought for an offence of, say, murder and where the box was ticked in error in respect of fraud. That would be so blatant a mistake given the facts of the offence disclosed in the warrant, that the Court would be required to seek a clarification as to that mistake before any order could be made, but that is not the situation in the present case. Absent such an obvious mistake, I cannot think of any circumstances in which this Court is required not to accept the fact that the box is ticked and that double criminality therefore is not required to be verified. The presence of the words in Article 2.2 as highlighted by Mr O'Higgins, namely "*as they are defined in the law of the issuing state*" merely indicates that it is unnecessary that the acts alleged should be viewed at all by reference to the law of the executing state. These are not words, in my view, which are intended to mean that any law of the issuing state must be proven by an affidavit of law or other evidence. In my view, as I have stated, the certificate referred to in paragraph (e) is in fact surplus to requirement, and certainly does not give rise to any frailty in the warrant. To find otherwise would run completely contrary to the mutual trust and confidence and mutual recognition which underpin the adoption of the Framework Decision, and would reinstate the sort of difficulty and complexity in extradition matters, which the Framework Decision by its own terms sets out to remove by putting in place a simpler and more expeditious arrangement between member States of the European Union for the surrender of persons between them.

Offence committed in whole or in part of the territory of the executing state

12. This point of objection is novel to say the least. The alleged acts by the respondent which give rise to the fraud offence the subject of the warrant were done in the territory of Northern Ireland in 1997, and Mr O'Higgins refers to the fact that this date precedes the amendment to Article 2 of Bunreacht na h-Eireann which had defined the national territory as consisting of "the whole island of Ireland, its islands and the territorial seas."

13. Mr O'Higgins referred also to Article 4.7 of the Framework Decision in this regard which provides:

"Where the European arrest warrant relates to offences which: (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

14. In my view, this ground of objection is untenable given the provisions of Article 3 (prior to its amendment) which prohibited the enactment of any laws by the Oireachtas beyond, in effect, the extent of the twenty six counties comprising the Republic of Ireland. It cannot possibly be argued that this State regards the offence referred to in the warrant as having been committed in this State. The fact that the then Article 3 of Bunreacht na h-Eireann was worded as it was at the date of the offence does not alter that in any way. This is an imaginative, yet far-fetched submission, about which I need say no more in order to conclude that it is devoid of merit.

Delay/ill-health

Medical condition

15. The respondent has sworn an affidavit in which he has stated that in the year 2000 he had a liver transplant carried out at St Vincent's University Hospital here and he has exhibited a medical report from Professor Hegarty in relation to that surgery and his recuperation thereafter. Professor Hegarty states that the respondent is required to take immuno-suppressive therapy in order to prevent organ rejection, and that he is monitored at regular intervals at the National Liver Transplant Unit. It is stated also that he is required to attend on an indefinite basis and to continue on his current drug regime. It is stated also in this medical report that it is likely into the future that he will develop medium/long-term complications of his surgery, in which case he will be required to be transferred to a specialist liver transplant unit for evaluation and treatment of these complications. In a later affidavit, a further medical report is exhibited from the respondent's general practitioner, Dr Grehan. Dr Grehan has stated in his medical report that the respondent has suffered a number of severe episodes of encephalitis. He states also that these have been life threatening and have required urgent admissions to hospital on a number of occasions. This report states that subsequent to the liver transplant, the respondent developed severe diabetes, and he describes how this can complicate matters for the respondent as a result of which the respondent must have access to a liver unit in the event of difficulties arising. This report also states that it is important that the respondent stays away from obvious sources of infection, since even a mild infection can be fatal for the respondent.

Delay

16. In the points of objection filed, the respondent has stated that the issuing judicial authority has been guilty of culpable and unacceptable delay in seeking his surrender in respect of an offence which is said to have taken place between the 3rd July 1997 and 14th May 1998. It is stated also that the proceedings are oppressive, disproportionate and have put the respondent as a manifest disadvantage and that the delay is entirely without explanation. This delay is stated to have infringed the respondent's right to a fair and expeditious trial in due course of law under both the Constitution and the European Convention on Human Rights. It is stated also under this point of objection that the further prosecution of these offences in the issuing jurisdiction will be subject to further considerable delay.

17. Mr O'Higgins has submitted that it is in the context of this overall delay that the respondent's medical condition is a relevant matter to have regard to, given that the respondent's deteriorating state of health occurred during that time. Mr O'Higgins places considerable emphasis on the fact that the applicant has submitted no explanation, either by way of affidavit or otherwise, and that this court accordingly must accept that it is culpable delay and that it is inexcusable.

18. Patrick McGrath B. L. has submitted on the other hand that, given the Supreme Court's judgment in *Minister for Justice and Equality and Law Reform v. Stapleton*, the question of whether any delay which has occurred gives rise to a claim that the respondent cannot receive a fair trial in Northern Ireland is a matter to be dealt with by a court in Northern Ireland, and is not a matter which this court should consider and adjudicate upon on the hearing of this application for surrender.

19. Mr McGrath has submitted that, in any event, the respondent has failed to identify any particular prejudice which he may suffer in

relation to his right to a fair trial.

20. Mr O'Higgins submitted also in the context of delay, that between the date of these alleged offences in 1997 and the introduction of the European Arrest Warrant Act 2003 on the 1st January 2004, the extradition of the respondent would have to have been sought under the provisions of Part III of the Extradition Act, 1965 as amended, and that under that legislation the offence for which the respondent is sought might well have been categorized as a revenue offence and as such, one for which the respondent could not have been extradited. Accordingly, it is submitted, that the delay has produced a situation where surrender can now be sought and ordered in respect of that offence under the European arrest warrant issued, and that the position of the respondent has thereby been adversely affected by the delay in seeking his surrender, given that the warrant in the present application did not issue until the 4th April 2007. I am however satisfied that this is not a reason for refusing surrender, given that it is specifically provided for in the Framework Decision that a European arrest warrant may issue in respect of an offence alleged to have been committed prior to the adoption of that Framework Decision.

21. I am satisfied that since the Supreme Court judgment in Stapleton, the position now is that if the respondent wishes to claim that any delay in seeking his surrender has resulted in a situation where it is not possible for him to obtain a fair trial in respect of the offences contained in the European arrest warrant, this is a matter which must be dealt with by way of an application to prohibit trial in the issuing state, and is not a matter which can be the subject of a determination in this jurisdiction under section 37 of the European Arrest Warrant Act 2003, as amended. In any event, in the present case the respondent has not demonstrated any particular prejudice other than the circumstances derived solely from his medical condition. In that regard, there is no evidence whatsoever to suggest that his medical condition in any way contributes to any inability to receive a fair trial. In my view, it has not been established in any way that a reason exists under Part III of the Act or the Framework Decision that prohibits surrender. As I have already stated, the case is not being made by the respondent that there is a real risk to his health or life as a result of any order being made for his surrender. It is to be presumed, in the absence of any evidence to the contrary, that during any period of the detention of the respondent following his surrender to the issuing state, that conditions exist in the issuing state whereby the foreseeable medical needs of the respondent will be properly taken care of within the prison system there.

22. I am satisfied that therefore that all the requirements of section 16 (1) of the Act has been complied with, and that is no reason exists not to order surrender. I will therefore make the necessary order in that regard.