Neutral Citation Number: [2010] IEHC 203

THE HIGH COURT

2008 191 Ext.

Between:

Attorney General

Applicant

And

KME

Respondent

THE HIGH COURT

2008 192 Ext.

Between:

Attorney General

Applicant

And

TKE

Respondent

Judgment of Mr Justice Michael Peart delivered on the 11th day of February 2010:

On the 25th March, 2008 the Minister for Justice, Equality and Law Reform received a Request from the United States of America seeking the extradition of each of the above-named respondents. He issued a Certificate pursuant to s. 26 (1) (a) of the Extradition Act, 1965, as amended, and in due course the applicant made an application to this Court for a warrant for the arrest of each respondent. Those warrants duly issued, and on the 19th January, 2009 each respondent was arrested and brought before the Court. Each respondent has been on bail since that date awaiting the determination of the present application.

KME and TKE are mother and daughter respectively, and the grandmother and mother respectively of two children, who are the subject of a child custody order made by a District Judge in Collin County, Texas, USA on the 17th March, 2005 (and signed by him on the 1st April, 2005) which, *inter alia*, made provision for access to those children in favour of the husband of TKE from whom she was divorced since 3rd July, 1997. It is alleged that each respondent has interfered with that child custody order when on the 3rd April, 2005 the children were not brought by TKE to an appointed place for collection by the husband's parents as required by the said order. Police investigations carried out established TKE and KME had left the area with the children, so that the children would not have to visit their father, and it was also learned that TKE intended not to return to the United States of America until such time as the children were over the age of 18 years. It was later established through investigations that all had come to this jurisdiction.

The applicant seeks an order for extradition in respect of each respondent on foot of two Requests for extradition received from the United States of America. Their extradition is sought so that they can each stand trial on a charge of interfering with a child custody order, being a violation of Texas Penal Code Section 25.03. That section provides as follows:

> *"(a) A person commits an offence if the person takes or retains a child younger than 18 years when the person:*
>
> > *(1) knows that the person's taking or retention violates the express terms of a judgement or order, including a temporary order, of a court disposing of the child's custody; or*
> >
> > *(2) has not been awarded custody of the child by a court of competent jurisdiction, knows that a suit for divorce or a civil suit or application for habeas corpus to dispose of the child's custody has been filed, and takes the child out of the geographic area of the counties composing the judicial district, if the court is a district court, or the county if the court is a statutory County Court, without the permission of the court and with the intent to deprive the court of authority over the child.*
>
> *(b) a non-custodial parent commits an offence if, with the intent to interfere with the lawful custody of a child younger than 18 years, the non-custodial parent knowingly entices or persuades the child to leave the custody of the custodial parent, guardian, or person standing in the stead of the custodial parent or guardian of the child.*
>
> *(c) It is a defence to prosecution under subsection (a) (2) that the actor returned the child to the geographic area of the counties composing the judicial district, if the court is a district court, or the county if the court is a statutory County Court, within three days after the date of the commission of the offence.*
>
> *(d) an offence under this section is a state jail felony."*

The offence referred to at (a) above is that with which each respondent is charged on their respective indictments.

The Request for extradition in respect of each respondent contains the same statement of facts alleged for the purpose of grounding the offences for which extradition is sought. Those facts are set out in each warrant as follows:

> *"The facts of the case indicate that on August 15, 1992, [TKE] and [husband] were married. At the time of their marriage, they had a daughter, [KLP], who was born on February 16, 1992. During their marriage, [TKE] and husband had another daughter, [EEP], who was born on October 31, 1995. On July 3, 1997, [TKE] and husband were divorced and both parties were appointed as joint managing conservators of their children. The court also ordered [TKE] and [husband] not to plan out of town trips which would interfere with each other's custody of the children.*
>
> *On April 3, 2005, [husband] asked his father ... and his mother ... to pick up his children at 1: 00 pm. [Father and mother] went to the Plano Police Department, 7501 Independence Parkway to pick up their grandchildren, [KLP] and [EEP] but could not find them. While at the police department, husband showed a police officer a copy of the custody order and informed the officer that [TKE] had failed to drop off the children at the police department as required.*
>
> *On April 11, 2005, Plano police Detective Jeff Rich spoke to [GDE] (KME's husband). [He] informed Detective Rich that his wife, [KME], and his daughter, [TKE] had left the area so his grandchildren, [KLP] and [EEP] would not have to visit with her biological father. Further, that [TKE] stated she would not return to the United States until the children were over 18 years of age, and that [KME] stated she would see [GDE] when the children turned 18 years of age.*
>
> *On September 13, 2006, Detective Rich discovered that [KME] had submitted a request to update her nursing license and had indicated in the request that she was a resident of Ireland. As a result, Detective Rich contacted Irish law enforcement authorities and discovered (a) that Irish immigration records reflect that KME and [TKE] entered Ireland on April 25, 2005 at the port at Dun Laoghaire, and (b) that KME] was living with [TKE] and two children at [Irish address]."*

Before this court can make an order for the extradition of the respondents, the applicant must satisfy the court that the following provisions of section 29 of the Extradition Act 1965, as amended, are complied with:

> *"29. - (1) Where a person is before the High Court under section 26 or 27 and the court is satisfied that -*
>
> *(a) the extradition of that person has been duly requested, and*
>
> *(b) and this Part applies in relation to the requesting country, and*
>
> *(c) extradition of the person claimed is not prohibited by this Part or by the relevant extradition provisions, and*
>
> *(d) the documents required to support a request for extradition under section 25 have been produced,*
>
> *the Court shall make an order committing that person to a prison (or, if he is not more than 21 years of age, to a remand institution) they are to wait the order of the Minister, for his extradition."*

(a) the extradition of that person has been duly requested:

Section 23 of the Act provides that a request for the extradition of any person shall be made in writing and shall be communicated by (a) a diplomatic agent of the requesting country, accredited to the State, or (b) any other means provided in the relevant extradition provisions. In the present cases, each request was made in writing and was communicated to this State by diplomatic note dated March 12, 2008, signed by Thomas C Foley, Ambassador, Embassy of the United States of America. The provision of s. 29(1)(a) of the Act is therefore satisfied as far as the method of communication is concerned. I will come to the question arising under s. 29(l)(d) of the Act as to whether that request was supported by documents as are specified in section 25 (1) of the Act. Section 26 (6) of the Act provides that *"it shall be presumed, unless the contrary is proved, that a request for the extradition of the person has been duly made and has been duly received by the Minister."*

(b) Part II applies in relation to the requesting country:

Part II of the Act was applied to the United States of America by the Extradition Act 1965 (Application of Part II) Order 2000 (S.I. 474 of 2000).

(c) extradition of the person claimed is not prohibited by this Part or by the relevant extradition provisions:
Sections 11 - 19 of the Act provide for a number of circumstances and instances where extradition shall not be granted. None of those provisions are relevant to the present application.

Section 20 contains a Rule of Specialty, and an issue has been raised by the respondents in relation to specialty and I will deal with that matter in due course.

It is of course also a requirement that the offence in each case for which extradition is sought corresponds to an offence under the laws of this State as defined in section 10 of the Act. An issue is raised by the respondent's in relation to correspondence and I will come to that matter also. Clearly if the offence does not correspond then extradition would be prohibited.

I will come also in due course to some other issues that are raised under a broad constitutional rights grounds in relation to family rights and a breach of rights alleged to a rise from the prospect of these respondents being extradited and exposed to a mandatory sentence regime under the laws of Texas. Again, if the Court is satisfied that the making of an order for the extradition of the respondents would constitute a breach of constitutional rights, whether in relation to family rights or in relation to exposure to a mandatory sentence regime, then extradition should not be ordered. I will come to those issues which have been raised in due course.

(d) the documents required to support a request for extradition under section 25 have been produced:
Section 25 of the Act provides as follows:

> *"25. - (1) a request for extradition shall be supported by the following documents –*
>
> *(a) the original or an authenticated copy of the conviction and sentence of detention order immediately enforceable or, as the case may be, of the warrant of arrest or other order having the same effect and issued in*

accordance with the procedure laid down in the law of the requesting country;

(b) a statement of each offence for which extradition is requested specifying, as accurately as possible, the time and place of' commission, its legal description and a reference to the relevant provisions of the law of the requesting country;

(c) a copy of the relevant enactments of the requesting country or, where this is not possible, a statement of the relevant law,

(d) as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality, and

(e) any other document required under the relevant extradition provisions.

(2) for the purposes of a request for extradition from a Convention country, a document shall be deemed to be an authenticated copy if it has been certified as a true copy by the judicial authority that issued the original or by an officer of the central authority of the convention country concerned duly authorised to do so." (my emphasis)

Clearly, section 25 (2) does not apply in the present case as the United States of America is not "a Convention country" and therefore this deeming provision in relation to authenticated documents does not apply. The fact that subsection (2) is inserted in respect of requests from Convention countries only suggests that something further than a certificate by the issuing judicial authority is required in respect of requests from countries other than a convention country.

I mention this now because an issue arises on this application as to whether one of the documents which has been provided in support of the request for extradition i.e. the order for arrest (referred to as a 'capias order') is an authenticated copy as required. I am satisfied that the documents referred to in paragraphs (b), (c), (d) and (e) above have been provided, but it will be necessary to consider the submissions made in relation to whether or not the certified copy capias order in each case is an "authenticated copy" as required.

The following issues arise for determination in the present case: Authentication of documents; Rule of Specialty; Correspondence; Family rights; Mandatory sentence regime.

1. Authentication/Admissibility of certain documents:
(a) The 'capias' orders:

By section 25 of the Act it is a requirement that, *inter alia*, the original or an "*authenticated copy*" of the warrant of arrest or "*order having the same effect*" be provided in support of a request for extradition. In the present case the "order having the same effect" in each case is what has been referred to as "a capias order". The capias in the case of TKE is dated 16th February 2006, and that in the case of KME is dated 6th December 2006. The question arising is whether the copy of each 'capias' is an "authenticated copy". As I have already adverted to, the provision of Section 25 (2) above, whereby in respect of requests from a Convention country, a document shall be deemed to be an authenticated copy if it is certified as a true copy by the judicial authority that issued the original, does not apply in the present case.

However, section 37 of the 1965 Act, as substituted by section 17 (b) of the Extradition (European Union Conventions) Act 2001, provides:

"37. - (1) in proceedings to which this Part applies, a document supporting a request for extradition from the requesting country (other than a Convention country) shall be received in evidence without further proof if it purports -

(a) to be signed by a judge, magistrate or officer of the requesting country,

and

(b) to be certified by being sealed with the seal of a Minister of State, Ministry, Department of State or such other person as performs in that country functions the same as or similar to those performed by the Minister under this Act, as may be appropriate, and judicial measures shall be taken of such seal." (my emphasis)

Article VII.7 of the Treaty on Extradition Between The United States of America and Ireland, of 13th July, 1983, as amended on 14th July, 2005 provides:

"7. Documents that bear the certificate or seal of the Department of Justice, or Department responsible for foreign affairs, of the requesting state shall be admissible in extradition proceedings in the requested state without further certification, authentication or other legislation. "Department of Justice shall, for the United States Of America, mean the United States Department of Justice, and, for Ireland, the Department of Justice, Equality and Law Reform." (my emphasis)

What has happened in the present case is that accompanying the Request for extradition in each case communicated by the Ambassador of the United States of America by diplomatic note dated 12th March, 2008 is an affidavit and exhibits supporting the Request, to which is attached a certificate signed by an official in the United States Department of Justice, Lystra G. Blake stating that the document is the original affidavit of Curtis Howard, and to which is also attached a certificate signed by the Attorney General and under the Seal of the United States Department of Justice, which authenticates the status of Lystra G. Blake and stating that she was "duly commissioned and qualified".

It is evident from an examination of this bundle which is on the court file in its original form (rather than by reference to the copy bundle produced to the Court at the hearing) that this affidavit and exhibits and the two certificates attached thereto (i.e. that of Lystra G. Blake and that of the Attorney General) form a single bundle of documents since all are contained within a red ribbon over which is affixed a red adhesive seal of the United States Department of Justice.

That bundle was then obviously produced to the then Secretary of State, Condoleeza Rice, who in turn attached her certificate which is in the following terms:

"I certify that the document hereunto annexed is under the Seal the Department of Justice of the United States of America, and that such Seal is entitled to full faith and credit." (my emphasis)

The documents in this bundle in each case consist of an original affidavit of an Assistant District Attorney, Curtis Howard, which refers to, and to which are attached, eleven exhibits A to K. Exhibit C is included. This exhibit is an original certificate signed by one, Tonya Smith who is a records supervisor and custodian of records for the Collin County Sheriffs Office, and she certifies as follows:

"I certify and attest that the three (3) attached documents are true and correct copies of the originals on file with the Collin County Sheriffs Office, and that the originals constitute a part of the official records of the Collin County Sheriff's Office."

The copy capias attached to this certificate in each case is a photostatic copy and shows clearly a signature by the presiding judge who issued it. There is also on each a copy of the District Court seal or official stamp.

It is easy to be satisfied thus far that the copy capias in each case fulfils the requirement in s. 37(1)(a) of the Act. What remains is the question whether subsection (1)(b) is satisfied. The capias must also be shown to be "*certified by being sealed with the seal of a Minister of State*".

This certificate signed by the U.S. Secretary of State speaks of "the document annexed hereto" i.e. one document. Sean Guerin BL for the respondents refers to that feature of the certificate in order to submit that the certificate must therefore relate to the document in the bundle which is immediately after that certificate in the bundle, which in each case is the certificate by the Attorney General certifying the status of Lystra G. Blake, and that it does not serve to authenticate other documents later in the bundle such as the capias order.

The certificate by Lystra G. Blake in turn refers to one document, namely the affidavit. She does not refer specifically to the exhibits to that affidavit, presumably on the basis that the exhibits form part of the affidavit. Mr Guerin seeks to suggest that the certificate of the Secretary of State referring to "the document hereunto annexed" is intended to be a certificate referable only to the certificate of Lystra G. Blake, and is not referable to the affidavit of Curtis Howard and certainly not to the copy capias contained within the bundle. He submits that the only certification of the capias order is by Mr Howard by exhibiting it in his own affidavit, and that it cannot be seen as a document "*certified by being sealed with the seal of a Minister of State*".

This point in my view is really much ado about nothing. Section 37(1)(a) of the Act is clearly satisfied in relation to the capias orders. As to whether each copy capias is an authenticated copy, I should first of all say that I am satisfied that the affidavit and exhibits annexed thereto should be seen as a single document, and that when Lystra G. Blake certifies that the document attached to her certificate is the original affidavit of Curtis Howard in support of the Request for extradition, that statement includes the exhibits. What we have then is a certificate signed by the Attorney General who authenticates the status of Lystra G. Blake, and there is attached to that bundle of documents the Seal of the United States Department of Justice. In case there was some doubt as to whether the document signed by the Attorney General was or was not impressed by the Seal of that Department, there is in addition a Certificate signed by the Secretary of State which certifies that the document attached is under the Seal of the Department of Justice of the United States of America and that "such seal is entitled to full faith and credit". In my view it is unnecessary that the copies of the capias order in each case would need some sort of separate authentication. What has occurred in my view is in accordance with s. 37 of the Act, and also Article VII.7 of the Treaty as set forth above, and the presumption provided for in s. 26 (6) of the Act has not been rebutted by the respondents.

In my view these documents have been properly authenticated and are admissible without further certification or authentication.

(b) The affidavits (3) of Curtis Howard - Section 7B of the Act:
Under this heading of objection, Mr. Guerin submits that in each case, the three affidavits which have been sworn by Curtis Howard in support of the present applications do not appear to have been sworn in a manner which complies with the requirements of section 7B of the Act. That section provides as follows:

"7B. - (1) in proceedings under this Act, evidence as to any matter to which such proceedings relate may be given by affidavit or by a statement in writing ***that purports to have been sworn*** *-*

(a) by the deponent in a place other than the State, and

(b) in the presence of a person duly authorised under the law of the place concerned to attest to the swearing of such a statement by a deponent,

howsoever such a statement is described under the law of that place." (my emphasis*)*

Each of these affidavits has been signed by the deponent, Curtis Howard and below his signature the following jurat appears:

"Signed and sworn to before me this day of 200 at ... Texas, United States of America."

Below each such jurat is the signature of a District Judge before whom the affidavits were sworn.

In relation to the first affidavit of Mr. Howard executed on 8 February 2008, Mr. Guerin makes the point that the final page of this affidavit states that the document was executed at Collin County, Texas, but that the judge before whom the it is said to have been sworn as stated below his signature that he is the "Presiding Judge-416th Judicial District". It is submitted therefore that since a District Judge is a judge of local jurisdiction only, it is not clear that this particular judge before whom this affidavit sworn had jurisdiction to swear at this particular affidavit in Collin County. The point is also made in relation to the jurat on the first affidavits that the space provided after the word "at" and which is clearly intended to provide a space for the insertion of an address, has been completed by the insertion of "3.24 pin".

The second affidavit of Curtis Howard states that it has been "executed" at McKinney, Texas, and the jurat states that it is sworn at Collin County, and the judge has signed his name and stated that he is a judge of the 219th District Court, Collin County, Texas. In relation to these matters, Mr. Guerin submits that since a District Judge is a judge of local jurisdiction only it is unclear whether this judge has jurisdiction in relation to documents executed in "McKinney, Texas", and there is nothing to suggest that McKinney is within the area of Collin County.

The third affidavit is executed at "Collin County" by the deponent and the jurat indicates that it is sworn at "December, Texas" and the judge is of the "401st District Court, Collin County". Again the point is made that it is unclear if the address at which the affidavit was executed is within the 401st District Court, Collin County.

In my view there is no merit in the submission that it has not been established that these affidavits are ones which satisfy the requirements of s. 7B of the Act. What that section requires is that the affidavit "*purports to have been sworn .... in the presence of a person duly authorized .... to attest to the swearing etc*."

The fact that it is not specifically stated that the judge before whom each affidavit has been sworn is "duly authorized" does not mean that the document does not "purport" to be so sworn. The word "purport" suggests a meaning such as "to convey, imply, or have the appearance of". These documents have the appearance of properly sworn affidavits and are clearly intended to be such. In my view the very technical objections suggested by Mr. Guerin are insufficient to bring the affidavits outside the meaning of s. 7B of the Act.

2. Rule of Specialty:
Each respondent has in her affidavit expressed a concern that if extradited to the United States they will each be proceeded against both civilly and criminally for the purpose of securing the return of the two children to the State of Texas contrary to the decision of Mr Justice McGovern in Hague Convention proceedings brought by the husband which was delivered on the 4th May 2007, and in which the learned judge expressed the view, *inter alia*, that "*there would be a gross risk to the children of being exposed to physical or psychological harm if they were returned to the United States of America*."

In this regard TKE avers the following, and the affidavit of KME contains a similar averment:

> *"I have a very real concern that, if I am extradited to the United States and made and mean able to the jurisdiction of the courts of the State of Texas, I will be liable to being proceeded against, both civilly and criminally, for the purpose of securing the return of my children to the State of Texas contrary to the decision and judgement of the High Court in the Hague Convention proceedings. In that regard, I believe that the statements contained in the paper's grounding the extradition request relating to the purpose for which I am sought to be returned to the State of Texas are inaccurate and incomplete. I fear that the State of Texas, and/or the Federal Government of the United States of America, will not confine itself to prosecuting me for the offences alleged in the extradition papers, or to the punishments provided therefor. In particular, 1 fear that by means of a process of contempt, or other civil or criminal process, my liberty will be restrained as a means of securing compliance with an order of 26 September 2005 appointing my former husband as parent sole managing conservation in respect of my children. "*

Mr Guerin has submitted that simply because there is a Rule of Specialty contained in the Treaty is not sufficient to dispose of the question of whether the respondents may face detention or other proceedings above and beyond the extradition offence. Mr Guerin accepts that the respondents are not at risk of facing, for example, contempt proceedings arising out of breaching the child custody order because the rule of double jeopardy will protect them in that regard. But it is submitted that the specialty rule is wider than the double jeopardy rule, and that since the nature of the extradition offence is of a continuing nature, and that it is in that context that the respondents have made the averments to which I have already referred as to the risk that they may be "... *detained or otherwise restricted in his or her personal freedom in the requesting state for an offence other than that for which extradition has been granted ...".* In that regard I should set out the relevant specialty provision in the Treaty and in the Act.

Article XI. 1 of the Treaty provides as follows:

> *"1. A person extradited under this Treaty shall not be proceeded against, sentenced, punished, detained or otherwise restricted in his or her personal freedom in the requesting state for an offence other than that for which extradition has been granted, or be extradited by that State to a third State, unless:*
>
> > *(a) the person has left the requesting state after extradition and has voluntarily returned to it;*
> >
> > *(b) the person, having had an opportunity to leave the requesting state, has done so within forty-five days of final discharge in respect of the offence for which that person was extradited; or*
> >
> > *(c) the requested state has consented.*
>
> *2. ... ...*
>
> *3. ... ...*
>
> *4. ... ... ".* (my emphasis)

Section 20 of the Act provides:

> *"20.-(1) Subject to subsection (IA) (inserted by section 15(b) of the Extradition (European Union Conventions) Act, 2001), extradition shall not be granted unless provision is made by the law of 'the requesting country or by the extradition agreement -*
>
> > *(a) that the person claimed shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, or otherwise restricted in his personal freedom, for any offence committed prior to his surrender other than that for which his extradition is requested, except in the following cases --... ... ... ".*
> >
> > *(a) ... ...*
> >
> > *(b) ... ... ".*

It is unnecessary to set out those exceptions.

As I have set forth from the affidavits filed by the respondents there are specific see it is that "*by means of a process of contempt,*

or other civil or criminal process, [their] liberty will be restrained as a means of securing compliance with an order of 26th September 2005 appointing my former husband as parent sole managing conservation in respect of [the children]."

Mr Guerin places some emphasis on the fact that while Mr Howard filed a supplemental affidavit sworn some two months after the respondent's affidavit in which this fear is expressed, in response to that affidavit, there is no reference or response to the fear so expressed by each respondent. The affidavit of Mr Howard deals with a number of matters but not this particular concern expressed by the respondents.

I cannot see any reality in the suggestion that because of the nature of the nature of the offence i.e. a continuing type of offence, it is likely that these respondents will be deprived of their liberty or otherwise restricted or even punished in respect of matters beyond what they would be extradited for, should that be ordered. The rule of specialty exists. It is provided for in the Treaty as I have set forth, and s. 20 of the Act prohibits extradition *unless provision is made by the law of the requesting country or by the extradition agreement that a person will not be "proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, or otherwise restricted in his personal freedom, for any offence committed prior to his surrender other than that, for which his extradition is requested*.

Obviously the specialty rule is not intended to protect the extradited person from being prosecuted or otherwise punished in respect of new matters arising subsequent to extradition. It seems to me that in respect of past matters, the specialty rule is alive and well, and will protect the respondents appropriately. The fear that the respondents have about being detained or restricted in some way in an attempt to secure compliance with the custody order is firstly purely speculative, but it is relates to a fear of some action on their part in the future or yet to happen which may give rise to further action by the authorities. That is not something which this Court can take account of in the context of specialty.

5. Family rights:
It is submitted in this case that there is sufficient evidence available to establish a real risk to the respondents and in particular the children if the respondents are extradited to the United States of America. It is submitted that there is no reality in any suggestion that any extradition order made would apply only to the respondents and that the children can remain safely in this jurisdiction without their mother and grandmother. Reference is made again to the finding of McGovern J. in the Hague Convention proceedings unsuccessfully brought by the husband and in which the learned judge was satisfied as to a gross risk of physical and psychological injury to the children if returned to their father. Mr Guerin has submitted that the offences alleged against the respondents were, if they were committed, committed in defence of the children from that sort of real risk. He submits that the respondents were entitled to seek to protect these children from this real risk. Accordingly he submits that the children are entitled to be protected by being allowed to remain here, and by extension that it would be amount to a breach of constitutional family law rights to break up this family unit by separate mother and grandmother from the children either by ordering the extradition of the respondents, and by so doing exposing the children to the gross risk identified by McGovern J., since it is inevitable that if the respondents are extradited, these children will have to return also to the United States of America.

The grounding affidavit of TKE sets out some background information to the family difficulties which she experienced prior to her divorce. What she says in her affidavit does not appear to be contradicted. She sets out how between 1998 and 2003 there was conflict between herself and her former husband and that on occasion the police had to become involved. She states also that in January 2004 an older daughter began to experience symptoms of depression and stress and that in February 2004 that daughter was physically assaulted by her father as a result of which she sustained a shoulder injury. She says that following that assault, his access was changed from unsupervised access to supervised access. She says that the situation continued to deteriorate in June 2004 and she describes threatening phone calls, an attempt by her husband to run her over with her truck, and she states also that following that attempt, her former husband's then girlfriend (now his wife) damage to vehicles outside her house and then stabbed her repeatedly with a knife while her former husband watched from his truck. It appears that she was rushed to hospital in a critical condition and underwent emergency surgery. This incident, deprived her of the use of her left arm for over six months and that she has lost about 20% of the use of her arm and is in constant pain. She also avers that following these incidents, she was given sole custody of the children and that in March 2005 her former husband brought an application to the court and was again granted unsupervised access. That is the order in which she is in breach of and in respect of which extradition is being sought.

Some detail is also provided in relation to evidence that was given before McGovern J. in the Hague Convention proceedings already referred to. In that regard, she states that when the matter came on for hearing, "*both my former husband and I were cross-examined on both on our affidavits in the proceedings. During the course of those proceedings my former husband was cross-examined specifically in relation to the events leading to my being stabbed and the reason for his presence and his then girlfriend's presence in the vicinity of my home. He declined to answer any question, relying on the privilege against self-incrimination and a privilege he claimed against incriminating his spouse."*

Mr. Guerin submits that against this sort of background of violence, intimidation and injury, and the fact that it has already been concluded that there would be "a grave risk to the children of being exposed to physical or psychological harm if they were returned to the United States Of America", any order to extradite the respondents herein would amount to an interference with this family's family rights under the Constitution.

In support of the submission that this court should not make an order which would be in breach of constitutional family rights, Mr. Guerin has referred to the judgment of Walsh J. in *The People (DPP) v. J.T*. [1988] Vol. 3, Frewen 141. One of the issues arising in that case was whether, where a husband stood accused of sexual offences against his daughter, his wife could give evidence against her husband, clearly a very different issued to that arising in the present proceedings. In concluding that issue in the affirmative, Walsh J. stated as follows at page 159:

> *"The Constitution places upon the courts the obligation to enforce the protection given to the family and family life by the Constitution itself. That must necessarily include an obligation to enforce those protective provisions even against members of the family who are guilty or alleged to be guilty of injuries to members of the family.*
>
> *It would be difficult to consider or to imagine any matter which would be more subversive of family life than sexual offences committed against his child by a spouse of the nature alleged in the present case particularly when the child in question is less than fully normal. It is obviously the duty of one spouse to protect the child or children against the other in cases of any such abuse, and it would completely frustrate the obligation placed upon the State to protect the family if the very person upon whom the obligation is said to rest should be prevented or inhibited from testifying in a prosecution against the offending spouse ... ... In view of the sense of obligation placed upon this Court to assist insofar as it can in the protection of the family the Court must take the view that the maintenance of the common law rule relied on in this case would be a failure to comply with the obligations imposed by the Constitution. This is all the*

more so in cases of assault upon the children of the family by the parents. Such a case should not be more hampered in its proof by the existence or the enforcement of the rule than in the case of an assault by the husband upon the wife."

Mr. Guerin calls this passage in aid of his submission that the respondent has a duty to protect the family and that these children have a constitutional right to protection which this Court must vindicate, and that these constitutional rights ought to be protected even at the cost of having to refuse the order for extradition which is sought. In that regard, Mr. Guerin has referred to the decision of this Court in *The Attorney General v. Blake*, (Unreported, High Court, 16th November, 2006). It is submitted also that the effect of making an order for extradition in these cases would be to undermine the intention and effect of the decision made by Mr. Justice McGovern in the Hague Convention proceedings, since, as a matter of inevitability, the two children referred to in the present proceedings, could not remain here without the company of a mother and/or their grandmother and would have to return to a country where they would be exposed to the grave risk identified by the learned judge. It is also a fact of course that since the month of April 2005, these two children have been in this State, and have settled in well here. The elder child will reach the age of 18 and on the in a few days time, and the younger child is presently aged 14 years.

Jeremy Maher SC on behalf of the applicant submits that this case is not about the children who are living here with the respondents, but rather is about the respondents themselves. He submits that the constitutional rights identified by Mr Guerin are not absolute rights, and cannot in all cases be availed of so as to prevent an order for extradition being made. He has referred to a judgment of this Court, and that of Fennelly J. in the Supreme Court on appeal therefrom in *Minister for Justice, Equality, and Law Reform v. Gheorghe.* In the latter, Fennelly J. stated in relation to the submission made under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights:

"Like Peart J, I would also dismiss the third ground of appeal in limine. It is a regrettable but inescapable incident of extradition in general and, as in this case, surrender pursuant to the system of the European arrest warrant, that persons sought for prosecution in another state will very often suffer disruption of their personal and family life. Some states have historically refused to extradite their own nationals, but that is a special case. The Framework Decision expressly provides that, in Article l, that it does 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 European Union." No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffer disruption, even severe disruption of family relationships."

Mr. Maher submits that in the present case if an order for surrender is made the children can either remain here if arrangements can be put in place, or alternatively they can return to the United States of America, and he suggests that it must be presumed that there are laws in place which are designed to protect children from harm, and that they can reside there, and of course he submits that such a submission is consistent with the statement by Fennelly J. in *Gheorghe* above.

6. Mandatory sentence regime:
The offence for which each respondent is indicted and which is described as "a state jail felony" in the relevant statute, carries the penalty prescribed by Section 12.35 under Texas law. That provision states, as relevant:

"(a) except as provided by subsection (c) an individual judged guilty of a state jail felony shall be punished by confinement in a state jail <u>for any term of not more than two years or less than 180 days</u>.

(b) …

(c) …"

Mr Curtis in his second supplemental affidavit has stated also at paragraph 11 thereof that such a sentence can be "*probated*" and he explains that "*confinement will be suspended and the defendant will be required to meet with a community supervision officer and follow instructions as provided by the court. If a defendant meets all obligations set by the court and the community supervision department, then confinement in a state jail facility will never be imposed.*"

The respondents have not sought to contradict this statement by any expert or other evidence.

In my view the possibility that a sentence can be suspended by the judge, at his/her discretion, is sufficient to defeat any argument that the extradition of the respondents so that they are exposed to a regime of mandatory sentencing would breach their constitutional rights. The facts in the case of *Attorney General v. Blake*, (Unreported, High Court, 16th November, 2006) were very different, and the decision was based on the facts derived from the evidence available in that case. It is not authority in my view for a general prohibition of surrender where a prescribed period of imprisonment is a minimum punishment for an offence. Each case will have to be determined on its own facts. In my view this point of objection is without merit on the known facts of this case.

7. Correspondence:
I have already set forth on pages 3-4 hereof the facts behind these offences and which are contained in the Request for extradition in each case. It is alleged simply that on 3rd April, 2005, each respondent interfered with a child custody order, in the circumstances outlined whereby TKE was obliged by the order to have the children at a designated place on Sunday 3rd April, 2005 at l.00 pm, and failed to do so.

That order was, *inter alia*, that [the husband] have possession of the children on Sundays beginning April 3, 2005. It provided also that *"the parties shall not plan out of town trips which would interfere with the other parent's possession as set forth above", and further that "each conservator may designate any competent adult to pick up and return the children, as applicable ... ".*

This order was made in proceedings in which TKE is petitioner and her husband is the respondent.

The indictment in each case lays the charge in identical terms as follows:

"That [KME/TKE] hereinafter called defendant on or about the <u>3rd day of April</u> A.D. 2005, in said county and State, did <u>then and there</u> intentionally and knowingly retain [children], younger than eighteen (18) years of age, when the said defendant knew that said retention violated the express terms of an order of a court disposing of the children's custody ... ... " (my emphasis)

Correspondence re: KME (grandmother):

KME is not a party in these proceedings, and was not ordered to do or refrain from doing anything under the terms of the order either on the 3rd April, 2005 or any other date. In so far as the facts outlined in the Request implicate KME in relation to interfering with the custody, it seems to be alleged, firstly, that over a week later on 11th April, 2005 KME's husband told Detective Rich that KME and TKE "*had left the area so his grandchildren ... ... would not have to visit with their biological father*", and secondly, that some seventeen months later in September 2006 it was discovered that KME had submitted a request to update her nursing licence and had at that stage indicated that she was resident in Ireland.

It is clear from the indictment that the offence charged is what is alleged to have occurred on the 3rd April, 2005. The offence charged does not depend on or rely upon any action by KME or other facts which may have occurred at some later date. The indictment specifically charges that KME on the 3rd April, 2005 intentionally and knowingly retained the children when she knew that this violated the child custody order. That charge does not depend in any way for its completion on any event or fact occurring after the 3rd April, 2005.

In order to be satisfied that correspondence has been established I would have to be satisfied that what is alleged to have been done by KME on the 3rd April, 2005 would, if that were done in this State, amount to a criminal offence of the required minimum gravity. She is not charged as an accessory after the fact. She is not charged with aiding and abetting TKE. She is charged with knowingly retaining these two children on the 3rd April, 2005. It seems to imply, though it is nowhere alleged, that she was in some way required under the order to bring, or at least ensure in some way that the children were brought to the designated place on Sunday 3rd April, 2005 to facilitate their father's access on that date, and that she committed an offence by not so doing.

The offence put forward by the applicant (i.e. non-parent) for correspondence in respect of KME is one, under Section 17 of the Non-Fatal Offences Against the Person Act, 1997 since KME is neither a parent, guardian or a person to whom custody of the child has been granted by a court - see s. 16(1) and (2) of the Act.

Section 17 provides as follows:

> *"17.-(1) A person, other than a person to whom section 16 applies, shall be guilty of an offence who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16 years or causes a child under that age to be so taken or detained-*
>
> > *(a) so as to remove the child from the lawful control of any person having lawful control of the child; or*
> >
> > *(b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child.*
>
> *(2) It shall be a defence to a charge under this section that the defendant believed that the child had attained the age of 16 years.*
>
> *(3) A person guilty of an offence under this section shall be liable-*
>
> > *(a) on summary conviction to a fine not exceeding ^1,500 or to imprisonment for a term not exceeding 12 months or to both, or*
> >
> > *(b) on conviction on indictment to a fine or to imprisonment, for a term not exceeding 7 years or to both.*

In my view there are no facts contained in the statement of the facts of this case as they relate to KME that she did anything on 3rd April, 2005, which if done in this State would amount to an offence under s. 17 of the 1997 Act. In fact there is no fact alleged against her that is said to have occurred on the 3rd April, 2005, and that is the date on which the offence alleged against her is said to have taken place. The fact that her husband told Detective Rich on the 11th April, 2005 that she would not see him again until the children reached the age of 18 years, and that his wife and his daughter had left the area so that the children would not have to visit their biological father, is not sufficient to establish that KME did anything on the 3rd April, 2005 which if done here would be an offence under s. 17 of the Act. In my view, therefore there is no correspondence and this Court is precluded from making an order for the extradition of KME as sought by reason of the provisions of s. 10 of the Extradition Act, 1965, as amended.

Correspondence re: TKE (grandmother):
The offence put forward by the applicant for correspondence is one under Section 16 of the Non-Fatal Offences Against the Person Act, 1997. That section provides:

> *16.-(1) A person to whom this section applies shall be guilty of an offence, who takes, sends or keeps a child under the age of 16 years out of the State or causes a child under that age to be so taken, sent or kept-*
>
> > *(a) in defiance of a court order, or*
> >
> > *(b) without the consent of each person who is a parent, or guardian or person to whom custody of the child has been granted by a court unless the consent of a court was obtained.*
>
> *(2) This section applies to a parent, guardian or a person to whom custody of the child has been granted by a court but does not apply to a parent who is not a guardian of the child.*
>
> *(3) It shall be a defence to a charge under this section that the defendant-*
>
> > *(a) has been unable to communicate with the persons referred to in subsection (1)(b) but believes they would consent if they were aware of the relevant circumstances; or*
> >
> > *(b) did not intend to deprive others having rights of guardianship or custody in relation to the child of those rights.*

(4) A person guilty of an offence under this section shall be liable-

(a) on summary conviction to a fine not exceeding ^l, 500 or to imprisonment for a term not exceeding 12 months or to both, or (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

(5) Any proceedings under this section shall not be instituted except by or with the consent of the Director of Public Prosecutions."

Mr Guerin has referred to the fact that for the offence under s. 16 to correspond it is necessary that the indictment charging the offence against TKE should include an allegation that she took the children out of the United States of America, since the offence under s. 16 requires that the child be taken, kept or sent out of the State. When one reads the indictment for TKE there is no such allegation contained therein. It alleges simply that on the 3rd April, 2005 TKE "*intentionally and knowingly retained [the children] when [she] knew that the said retention violated the express terms of an order of a court .... "*

It is only in the setting out of the facts of the case in the extradition Request itself that one learns that subsequently TKE left the United States with the children and came to this country. The question which arises is whether for the purpose of establishing correspondence to an offence here under s. 16 of the 1997 Act, these additional facts which do not form part of the facts alleged in the indictment for the purpose of the offence under Texas law can be had regard to. Mr Guerin submits that this is impermissible and that it amounts to what in another context would be referred to as "dressing up the warrant".

What is required to be done for the purpose of establishing that there is correspondence is to examine the facts which are alleged to give rise to the offence charged. Those are the relevant facts from which to decide if they would be sufficient to amount to an offence under Irish law.

In my view it is not appropriate or correct to look at the entire request for extradition, and see if within all the facts disclosed, including facts unrelated to the offence which is the subject of the indictment, some other or any offence would have been committed on those facts under Irish law. Let us suppose, for example, that the foreign offence charged on the indictment was clearly not an offence under Irish law, but among the request documents was a recital of events on the day following the commission of the offence which included that while travelling away from the town in which the offence had been committed the accused pulled up at a garage to fill his car with petrol and left without paying for it. If the Court here was not satisfied that the original offence corresponded to an Irish offence, it could not go on to conclude nevertheless that there was an offence of theft disclosed on all the known facts contained in the Request and that such offence corresponds to one, say, under section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and that therefore an order for extradition could be made in relation to the actual offence charged. That would in my view make a nonsense of the reason for the correspondence/double criminality rule, whose purpose is to ensure that a person will not be prosecuted and punished for actions which in this State are not regarded as criminal or giving rise to a criminal offence.

TKE is not charged in the indictment with removing the children from the United States of America. She is charged with intentionally and knowingly retaining the children etc. There is no reference to taking them out of that jurisdiction. One could summarise by saying that she is charged with failing to comply with the child custody order on the 3rd April, 2005. In my view if she were to have done just that on the 3rd April, 2005 in this jurisdiction, she would not commit any offence here, even though she would undoubtedly be exposed to an application for her attachment and committal for being in breach of the child custody order. She would certainly not be amenable to a charge under s. 16 of the Act which depends for its existence on the taking of the child or children out of the jurisdiction.

If I was to rely on the known subsequent fact that she came to this jurisdiction with the children, it would be akin to finding correspondence by reference to the theft of petrol in the example which I have given above.

It follows in my view that there is no corresponding offence in this jurisdiction to the offence for which her extradition is being sought, and that this Court has no jurisdiction to make the order sought.

For all this reason, I therefore refuse to make the order sought in respect of each respondent.