

The High Court

[No. 2019/107 EXT]

In the Matter of the European Arrest Warrant Act 2003 (as amended)

Between:

Department of Justice and Equality

Applicant

-and-

Darren James Gleeson

Respondent

Judgment of Mr. Justice Alexander Owens delivered on 22nd July 2019

1. The principle that there should not be duplicity of trial or punishment for any criminal act is central to a variety of legal rules. These rules relate to duplication of offences in indictments or charges, *autrefois* convict and acquit, analogous legal rules relating to abuse of process by repeated prosecutions and what is referred to as *ne bis in idem* under Article 3 (2) of Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) which provides that a judicial authority of the Member State of execution must refuse to execute a European arrest warrant where the person named in the warrant has been finally judged by a Member State in respect of "*the same acts*" as are the subject of the European arrest warrant.

2. The respondent makes the case that his conviction in late 2017 for an offence of membership of the Irish Republican Army in the State precludes this Court from executing a European arrest warrant for his surrender to Northern Ireland to face a charge of the offence of belonging to the Irish Republican Army at the time of two meetings which he is alleged to have attended at an address in Newry in 2014.

3. He asserts that the Northern Ireland charge relates to a "*continuing offence*" of belonging to this unlawful organisation and that he has already been convicted of this offence in 2017. He is currently serving a term of imprisonment which was imposed following his 2017 conviction for membership of the Irish Republican Army. This related to activities which he was involved in within the State between February and May 2017.

4. I do not accept this view of the nature of the offence created by section 21 of the Offences against the State Act 1939 or of the nature the offence charged in Northern Ireland of belonging to the Continuity Irish Republican Army or that the offence charged in Northern Ireland is the same as the offence in respect of which he stands convicted in this jurisdiction. I do not accept that there is anything in the wording of section 41 (1) of the European Arrest Warrant Act 2003 which creates some sort of special rule in Ireland applicable to the circumstances of this case.

5. The phrase "*in whole or in part*" in section 41 (1) relates to repeated proceedings in relation to the same act where the facts relied on as constituting the offence include within them facts which have been the subject of a separate prosecution for another offence. This has nothing to do with the present case which involves two separate instances of offending in different years in different jurisdictions.

6. I do not agree with the respondent's contention that *Minister for Justice and Equality v. Guz* (2012) IEHC 388 is an authority for the proposition that the legal rules in Ireland relating to the *principle of ne bis in idem* are any different from the rules applicable anywhere else in Europe. The Irish courts must construe the implementing legislation in the 2003 Act in a manner consistent with the Framework Decision and apply the decisions of the European Court. I should point out that the Framework Decision does not contain an equivalent provision to Article 58 of the Convention Implementing the Schengen Agreement which expressly stated that its provisions did not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad. This is referred to in the Decision of the European Court of Justice in Case C-367/05 *Kraaijenbrink v. Netherlands* [2007] ECR I-6619 cited by the applicant.

7. This Court is obliged to look at the acts which are relied on as constituting the offending as set out in the warrant issued by the judicial authority of the issuing Member State. I must ask myself whether these acts are the same acts as were the subject matter of a final criminal determination in the State or another Member State. In my view the law on this is correctly stated in Nicholls, Montgomery and Knowles, *The Law of Extradition and Mutual Assistance*, (3rd edn, OUP 2013) paras 5.32-5.37. Applying this test, I conclude that it would not be a duplication of prosecution for the same offence or equivalent abuse of process for the respondent to stand trial in Northern Ireland for an offence of belonging to the Irish Republican Army at the time when it is alleged that he was at meetings in Newry in 2014. The particulars of that alleged offending have no relation to subsequent offending of the same type which he was involved in while in this jurisdiction in 2017.

8. On 1st November 2017 the respondent pleaded guilty at the Special Criminal Court to an offence of membership of the Irish Republican Army within the State on 18th May 2017, contrary to section 21 of the Offences against the State Act 1939 as amended by the Criminal Justice (Terrorist Offences) Act 2005.

9. An affidavit sets out the facts of the offending. An FBI operative carrying out an investigation on the dark web was contacted by him in February 2017 with a view to buying hand grenades. He indicated to that operative in April that if the deal went well he had people who "*want a lot of these so you will make very good buyers*". In May he was also looking for detonators, "*Semtex*" explosives and incendiary grenades. On 18th May 2017 DHL delivered a package to him at an address in Blanchardstown, County Dublin. The Gardaí then raided the house and arrested him. The prosecution also proposed to call evidence of a Chief Superintendent in an Garda Síochána of belief that the respondent was on 18th May 2017 a member of the Irish Republican Army. Section 3 (2) of the Offences against the State (Amendment) Act 1972 provides that if such an officer gives evidence in proceedings relating to an offence under section 21 stating "that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member."

10. Section 18 of the Offences against the State Act 1939 sets out what constitutes an "*unlawful organisation*" for the purposes of the that Act. The stated purpose of this section is "*to regulate and control in the public interest the constitutional right of citizens to form associations.*" It declares organisations which advocate objects or engage in activities such as raising or attempting to raise

a military or armed force without constitutional authority to be "unlawful".

11. The group styling itself as The Irish Republican Army has always operated both within the State and in Northern Ireland. It is proscribed in the State by a suppression order under section 19 of the 1939 Act which is conclusive for purposes of treating it as an unlawful organisation engaging in the activities prohibited by section 18.

12. As there is a cross-border element in alleged offending and the European arrest warrant concerns alleged involvement of the respondent in activities of the Irish Republican Army in Northern Ireland, it is useful to look at the provisions of the European Union Council Framework Decision of 13th June 2002 on Combatting Terrorism (2002/472/JHA) and the provisions of the Criminal Justice (Terrorist Offences) Act 2005 which implements that Framework Decision.

13. The Irish Republican army, wherever it operates, is a "terrorist group" within Article 2 (1) of that Framework Decision. By Article 2 (2) of that instrument the State was obliged "to take the necessary measures to ensure that the following international acts are punishable: (a) directing a terrorist group; (b) participating in the activities of a terrorist group..."

14. Provisions in the 1939 Act are now supplemented by sections 4, 5 and 6 of the Criminal Justice (Terrorist Offences) Act 2005 which criminalise international terrorist offending.

15. "an act ...that is committed in or outside the State and that is committed with a view to engaging in a terrorist activity or with a view to committing an act that, if committed in the State, would constitute an offence under section 21 or 21A of the Act of 1939."

16. By section 5 (1): "A terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning of and for the purposes of the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976."

17. By section 5 (2): "For the purposes of this Act the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976 apply with any necessary modifications and have effect in relation to a terrorist group referred to in subsection (1) as if that group were an organisation referred to in section 18 of the Act of 1939."

18. By section 5 (4): "Subsections (1) and (2) apply whether the terrorist group is situated in or outside the State."

19. The relevant provisions of section 6 are as follows:

"(1) Subject to subsections (2) to (4) a person is guilty of an offence if the person-

(a) in or outside the State-

(i) engages in a terrorist activity or a terrorist-linked activity,

(ii) attempts to engage in a terrorist activity or a terrorist-linked activity, other than public provocation to commit a terrorist offence or

(iii) makes a threat to engage in a terrorist activity,

or

(b) commits outside the State an act that, if committed in the State would constitute-

(i) an offence under section 21 or 21A of the Act of 1939, or

(ii) an offence under section 6 of the Act of 1998.

(2) Subsection (1) applies to an act committed outside the State if the act-

(a) is committed on board an Irish ship,

(b) is committed on an aircraft registered in the State,

(c) is committed by a citizen of Ireland or person who is resident in the State,

(d) is committed for the benefit of a legal person established in the State,

e) is directed against the State or an Irish Citizen, or

(f) is directed against-

(i) an institution of the European Union that is based in the State, or

(ii) a body that is based in the State and is set up in accordance with the Treaty establishing the European Community or the Treaty on European Union.

(3) Subsection (1) applies also to an act committed outside the State in circumstances other than those referred to in subsection (2), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43 (2) for an offence in respect of that act except as authorised by section 43 (3)."

20. Section 43 provides that in the case of an act to which section 6 (1) applies and which is committed outside the State in the circumstances referred to in section 6 (3), the Director of Public Prosecutions may only proceed further against a person if satisfied that any European arrest warrant received from an issuing Member State for an offence in respect of that act has been subject to a final determination that it should not be endorsed or that the person should not be surrendered to the issuing state, or, if there are special circumstances, it is expedient that the proceedings be taken against the person for an offence under the law of this State in respect of that act.

21. On 30th January 2019 the Magistrate's Court in Northern Ireland issued the European arrest warrant in respect of offences which the respondent is alleged to have committed. The charges relate to a period between 12th August 2014 and 3rd October 2014. One of the charges is that he belonged to the Continuity Irish Republican Army.

22. The case made in the warrant is that on the dates referred to the respondent attended meetings at an address in Newry along with other members of the Irish Republican Army which were for various terrorist purposes. If the evidence in the proposed prosecution matches what is in the warrant, there is material from which a court can infer that in the period between August and October 2014 the respondent belonged to the Continuity Irish Republican Army, which is proscribed in the United Kingdom as a terrorist group under the Terrorism Act 2000. By section 11 (1) of that Act, a person commits an offence if he belongs or professes to belong to a proscribed organisation. By section 17 of the Terrorism Act 2006, if a person does anything outside the United Kingdom and his action, if done in a part of the United Kingdom, would constitute an offence under section 11 (1) of the Act of 2000, that person is guilty of the offence under section 11 (1), irrespective of whether he is a British citizen. Section 11(4) provides that an offence of membership of a proscribed organisation can be committed wholly or partly outside the United Kingdom.

23. It can be seen from this that the Irish legislation in relation to extra-territorial terrorist offending is somewhat different from that in the United Kingdom. The Act of 2005 has created a separate offence in respect of acts committed outside the State, which, if committed within the State, would constitute contravention of section 21 of the Offences against the State Act 1939. Offences of belonging to terrorist groups do not now depend on the location of the group or the location of acts of adherence. There is potential for duplication of charging for this type of offence which could engage the ne bis idem rule in some cases. For example, a person might engage in adherence to the same unlawful organisation both in the State and in Northern Ireland during the one period of time. This application does not involve anything of that sort.

24. The conviction of the respondent in 2017 was solely based on his adherence to the Irish Republican Army within the State. It could not have referred to his activities in Newry back in 2014 because section 21 of the 1939 Act only relates to membership within the State of unlawful organisations as defined in section 18.

25. The European arrest warrant does not include any charge against the respondent which relates to his activities in the State which led to the 2017 conviction. Any such charge would have been precluded by Article 3 (2) of the Framework Decision.

26. This conviction could not and did not relate to any of the events in Newry in 2014. He was not prosecuted in the State for this activity in Newry, which, if proved, is also a criminal offence here as it involved a contravention of section 6 (1) (b) (i) of the 2005 Act.

27. The respondent argues that because the charge of belonging to a proscribed organisation in the European arrest warrant relates to the activities in Newry back in 2014 and that because the 2017 conviction also relates to an offence of belonging to the same proscribed organisation, this is "*an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State*" which comes within the prohibition on surrender set out in section 41 (1) of the European Arrest Warrant Act 2003. I do not accept this argument.

28. It is urged that as the offence of belonging to the Irish Republican Army is a "*continuing offence*", a conviction on a charge that a person was at one time a member of that unlawful organisation insulates that person from being prosecuted again for belonging to that organisation on a charge that he or she was at some later time or earlier time a member of that organisation.

29. On a most extreme application of this type of reasoning, it would follow that once a person is a member of an unlawful organisation such as the Irish Republican Army, he can never be convicted more than once of an offence of membership of that unlawful organisation either here or abroad. On this logic, unless he is proved to have retired, he can rely on a conviction as a bar to further prosecution and remain active from time to time in that unlawful organisation for as long as he chooses in any state and neither this State nor any other state which is bound by the Framework Decision annexed to the 2005 Act can lift a finger to prosecute him for his unlawful adherence or secure his surrender under a European arrest warrant.

30. This line of reasoning in a different context led to a peculiar result which was rejected by the Court of Appeal as erroneous in the judgment in *People (Director of Public Prosecutions) v. A.B. (2015) IECA 139*. I refer to paragraph 18 of that judgment and to the later judgment of the Court of Appeal in *People (Director of Public Prosecutions) v. Smyth (2018) IECA 278*.

31. The respondent relies on a passage at paragraph 16 in the judgment of the Court of Criminal Appeal delivered by O'Donnell J. in *People (Director of Public Prosecutions) v. Donnelly, McGarrigle and Murphy (2012) IECCA 78*. In that judgment the Court rejected a complaint that a Garda who arrested an appellant for membership of an unlawful organisation did not specify to him the date or location of the suspected offence. It is not necessary to have that detail in forming the suspicion necessary to effect an arrest or in giving an arrested person the reasons for arrest. In this context the Court of Criminal Appeal made the following observation:

"The submissions on behalf of the appellant do not recognise however, that normally the offence of membership is a continuing offence in the sense that an individual will be a member of an unlawful organisation over a period of time and ordinarily will continue to be a member as he moves from location to location during that time. It is true that the general, although the not invariable, practice is to charge offences of membership as being a member on a particular date within the State, but frequently the evidence will reflect the fact that the allegation against the accused is that he was in fact a member leading up to the date charged and remained and was a member on the date charged."

32. This is a statement of the obvious. To refer in this context to an offence as "*a continuing offence*" means nothing more or less than that the criminal conduct which constitutes the offending may take place over a period of time and that the manner in which the offence is charged may reflect this.

33. Taking the 2017 charge against the respondent as an example, it was open to the prosecution to lay that charge on the basis that he was a member of the Irish Republican Army from the February 2017 date when he made contact with the FBI operative to the May 2017 date when he received the parcel in the expectation that it contained grenades and was arrested.

34. This observation of Court of Criminal Appeal is of no assistance on other issues. It has nothing to say on whether a garda who suspects a person of having been a member of an unlawful organisation on a particular date or during a particular period can arrest that person under section 30 of the 1939 Act where that person has already been arrested under the same section on suspicion of membership of that unlawful organisation on a different date or during a different period by reference to different information. There is no reason why such an arrest cannot be made as the person previously arrested has not been arrested again for the one offence.

35. Many offences may involve criminal activity of a continuing nature. An example is a conspiracy which may involve plotting crime over a prolonged period.

36. It is necessary to say something about the ingredients of the offence of membership of an unlawful organisation. Offences of membership of or belonging to an unlawful or proscribed organisation or terrorist group involve more than having an intention to adhere to such an organisation or group. In this context I note in passing that section 6 (1) (b) (i) of the Act of 2005 refers to "acts" committed out of the State, which if committed in the State, would constitute an offence under section 21 of the 1939 Act.

37. The offence created by section 21 of Act of 1939 does not consist solely of a mental element. This point also applies to the offence created by section 11 of the 2000 Act. An essential ingredient is proof of adherence to the group in the sense of participation in the activities of the group. This participation may be an active participation, as where a person professes or declares adherence or engages in acts of association, or it may be the passive participation of a terrorist sleeper, or it may be both. The adherence may be evidenced by proof of a participation in a single event or in an activity over a period. Any participation may be intermittent. If it is charged that during different specific periods a person was a member of an unlawful organisation by reference to participation in the activities of that group during those periods, it does not follow that there is duplicity in separate charges relating to each of those periods because it cannot be proved that the person was not a member in the intervals not covered by the charges.

38. There are other examples of offences where criminal conduct involves an element of continuity which can be charged and prosecuted without unfairness or duplicity. During the course of argument in this case I gave an example of an old offence of treason by adherence of a subject to his King's enemies. Treasonable activities might have been a mixture of once-off acts and continuing activities and could be charged either as separate treasons or on a single count covering the whole period of events with particulars then given of the various separate treasons committed on specific occasions or during periods within that overall period. It was sufficient in the case of use of a single count to bring in a guilty verdict if any one of the separate instances of treason laid in the particulars was proved because of the penalty which that offence attracted. Courts dealing with offences which have a continuing element can be relied on to take care to ensure that an accused is not prosecuted for the one offence twice.

39. The remaining submissions by the respondent concern whether the description of the circumstances in which the offences were committed in the European arrest warrant contains sufficient information to establish that the facts relied on show that there is evidence available to support some of the charges set out in the warrant. There is ample material within the description of circumstances to support the charges that he belonged to a proscribed organisation and that he was conspiring to commit the criminal offences described in page 6 of the warrant and that he was attending two terrorist meetings. The supplementary information deals with the basis of the charge that he was in possession of documents likely to be of use to terrorists.

40. The only other queries relate to the offences charged of receiving training in terrorism and attending at a place used for terrorist training. I will direct under section 20 of the European Arrest Warrant Act 2003 that the issuing state provide me with information on the instructions or training in the making or use of firearms and explosives which the respondent is alleged to have received at the meetings in Newry and on what is being relied on to support what has to be established under section 8 of the 2006 Act and adjourn the application to 31st July 2019 with the respondent remanded in custody for this purpose. The other proofs set out in section 16 are in order and on that date, I intend to direct the surrender of the respondent under section 16 of the 2003 Act.