

THE HIGH COURT

Record Number: 2008 37 Ext.

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

BRENDAN McGUIGAN

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 12th day of May 2010:

The respondent seeks discovery of certain material/documents which are set out in a general way in a letter of request for voluntary discovery, as well as in the Notice of Motion issued herein on the 25th November 2009, and are the same documents that were the subject of a Freedom of Information Act request, which was refused.

The respondent's surrender is sought by a judicial authority in Lithuania so that he can be prosecuted there for 3 offences set forth in the European arrest warrant. These offences are marked in the warrant as being offences of terrorism and illicit trafficking in weapons, munitions and explosives. The offences as described in the warrant allege, *inter alia*, that the respondent and others agreed that they would acquire a considerable amount of firearms, ammunition and explosive devices and explosive substances and to transport them from Lithuania to Ireland in order to provide support to the Real IRA.

The respondent believes that the authorities in Lithuania sought and obtained assistance from the authorities here under mutual assistance procedures and arrangements in order to obtain evidence against the respondent and other suspects in relation to these alleged offences, and it has been suggested that such assistance as has been given, and there is no denial that material was harvested and provided, was obtained other than in accordance with law.

I do not think it is going to far to say that what the respondent is suspecting and suggesting on this application is that there was either an unlawful entry into his house or unlawful telephone surveillance, or both, which has resulted in the harvesting of information and material which has been provided to the Lithuanian authorities. He has submitted that since it is in the nature of such action by the authorities it cannot be proven, but he points to the fact that there has been no denial of these allegations on this application or in the recent application to the High Court by way of appeal against the exemption certificate signed by the Minister for Justice, Equality and Law Reform in respect of documents sought under Freedom of Information procedures.

It is submitted that on this application for surrender the respondent is entitled to oppose his surrender, including by establishing to a point of probability that the methods by which any such material as has been provided to the Lithuanian authorities has been obtained other than by lawful means, and that various constitutional and Convention rights have been breached in this regard.

Having failed to succeed in his said appeal, the respondent now seeks the same material by way of discovery within these proceedings for his surrender on the European arrest warrant.

The respondent has filed Points of Objection and Additional Points of Objection. It is submitted that the documents sought are both relevant and necessary for the fair disposal of some of the issues raised therein. The following issues are identified in this regard:

Original points of objection

8. The surrender of the respondent should be refused under section 37 of the European Arrest Warrant Act, 2003, since having regard to the fundamental defects in the criminal justice system in the requesting state, the respondent's constitutional rights to fair procedures and his right not to be deprived of his liberty save in accordance with law would thereby be breached.

Additional points of objection:

11. The surrender of the respondent should be refused under section 37 of the European Arrest Warrant Act, 2003 in circumstances where no undertakings or guarantees have been given as to the respondent's entitlement to challenge the admissibility of any evidence allegedly obtained from the respondent's home in the Republic of Ireland; and the respondent will not or may not be permitted to make such a challenge. Efforts on the part of the respondent to establish the nature and extent of such evidence sought through a request made pursuant to the Freedom of Information Act [have been unsuccessful].

12. The trial process in the requesting state vests discretion in the prosecuting authorities as to whether or not material should be disclosed at the pre-trial investigative stage. In circumstances where the testimony of witnesses and their examination at the pre-trial stage may be admitted in evidence for the purposes of the trial, an accused person is put at a fundamental disadvantage as compared with the prosecuting authorities. Specifically the respondent would be denied an entitlement to carry out any meaningful examination of any witnesses that might be called during the pre-trial stage.

17. It appears that (a) it is the intention of the requesting state to prosecute the respondent on foot of the evidence of an agent or agent provocateur of the United Kingdom's military intelligence service; and (b) the evidence which will be adduced as against the respondent will in large part derive from an unauthorised operation conducted by the said intelligence service within the State. As such a substantial part of the evidence which will be led as against the respondent derives from within the State and was gathered within the State. In the premises the surrender of the respondent for the purpose of trial outside the State in respect of offences alleged to have occurred within the State will

have the effect of depriving the respondent of the ability to contest the admission of such evidence on the grounds that it contravenes the provisions of the Constitution and/or the law of the State. As such the surrender of the respondent ought to be refused on the grounds that the respondent will be unable to litigate or canvass such issues in the course of any subsequent trial.

18. Further or in the alternative to the matters pleaded at paragraph 17 above the surrender of the respondent amounts to a device whereby the provisions of the Constitution and/or the law of the State insofar as they may relate to the admission of evidence the manner in which evidence is gathered, the conduct of any investigation and/or the entitlement of foreign police or military intelligence agents to conduct operations or investigations will be avoided or defeated. As such the surrender of the respondent ought to be refused on the grounds that such surrender is precluded by the provisions of section 37 of the European Arrest Warrant Act, 2003, and in that it would amount to a breach of his Constitutional rights and a usurpation of the role of the courts in protecting constitutional rights of citizens generally. In particular the respondent's entitlement to a trial in due course of law would be defeated.

All these issues in one way or another plead that because of the criminal trial and pre-trial procedures to which the respondent would be exposed if surrendered, he will not be able, as he would if tried here, to put forward arguments as to the inadmissibility of evidence on the basis that it was unlawfully obtained in this State, *inter alia*, through the intervention of foreign agents, and that any pre-trial investigative process and any subsequent trial will be unfair, but even more so if he is not even able to gain access in advance of any such hearings of any evidence being relied upon by the prosecution.

He has sought expert evidence from a criminal trial lawyer in Lithuania which supports his fears that material will not be disclosed to him in advance as it would be here, and that he will not be given any opportunity to contest admissibility and will not be able to know in advance what witnesses are being called, and that he will have no opportunity to cross-examine witnesses. That lawyer has provided an affidavit in this regard in which she supports what the respondent is saying in relation to what he feels are shortcomings in the pre-trial and trial procedures in Lithuania.

If the respondent is successful in his submissions as to the inability to contest at his trial the admissibility of material harvested in this State and furnished to the authorities in Lithuania, and in particular on the basis that it was unlawfully obtained, as he would be in this jurisdiction, then the process whereby he may be convicted would, it is submitted, be sufficient for this Court to prohibit surrender since he would have established that surrender would constitute a breach of this State's obligations under the European Convention on Human Rights and his constitutional rights.

It is appreciated that the hurdle over which the respondent must successfully pass is a high threshold of proof if the Court is to prohibit surrender. He must do so by way of establishing a prospective breach of such rights by adducing cogent and compelling evidence that surrender would constitute such a breach. The main anchor for his submissions is undoubtedly the question of what material has been provided, and by what means it was obtained and by whom. Without knowing what material has been provided and how it was obtained, it is submitted that what he suspects has occurred is pure speculation and comes within the concept of a fishing expedition.

It is submitted that where if he was prosecuted in this State on these charges he would know in advance by way of disclosure what if any material had been obtained, and would also be provided with any such material even where the prosecution was not intending to adduce that evidence or rely upon it, and that he would be able to apply to have any evidence being relied upon by the prosecution excluded on the basis that it was unlawfully obtained. In the circumstances which prevail under procedures in Lithuania, it is submitted that he will be denied that opportunity, and it is submitted therefore that if such unlawfully obtained material can be used against him in Lithuania it would amount to an abuse of process to surrender him to face such a prospect.

It seems to me that before such a submission can even get off the ground on the hearing of this application for his surrender, the respondent will have to overcome the obvious problem that his fears as to the unlawful harvesting and provision of material to the authorities in Lithuania is pure unsubstantiated speculation. Without establishing that such a thing may have occurred, it seems to me that the question of abuse of process or the abuse of Convention or other rights does not arise. The submissions being made in that regard will have to be based on cogent evidence.

That task will be at least assisted if the respondent can show that in fact material was provided, and to an even greater extent if he can prove what material was provided and how it was obtained.

It seems to me that taking all the facts or likely facts known on this application, including by reference to the material supporting the previous application by way of appeal from the exemption certificate under Freedom of Information, it is sufficiently established that some material in the nature being sought by the respondent exists. This is not a classic fishing exercise.

Such material would, if it exists, be relevant to the issue of abuse of process and breach of rights, and may well speak to the question as to how it was obtained. If such material exists I would conclude that, given the extent of the onus upon the respondent to base his legal submissions on cogent evidence, that material is necessary for a fair determination of the issues raised in these proceedings, and should be made the subject of an order for discovery.

The documents in respect of which discovery is sought are set forth in the Notice of Motion as follows:

1. All requests, and responses to requests, of any nature or kind for the provision of information regarding the respondent to the authorities, of whatever nature and kind, in any third country, whether made pursuant to international Mutual Assistance Conventions, or pursuant to the Criminal Justice Act 1994 or other statutory authority whatsoever.
2. Copies of all records maintained, and authorities granted in respect of interception and surveillance whether pursuant to the Postal and Telecommunications Service Act 1983, the Interception of Postal Packages and Telecommunications Messages (Regulations) Act 1993 and the Criminal Justice (Terrorist Offence Act) or other authority.

Questions of executive or other privilege arise only after such an order is made, and should not prevent an order for discovery being made in the normal way.

The terms in which discovery is sought on this application are unnecessarily wide, but I will make an order for discovery as follows:

1. All requests to the authorities in this State, and responses to such requests, from the authorities in the Republic of Lithuania or the United Kingdom for the provision of assistance, whether made pursuant to international Mutual Assistance

Conventions, or pursuant to the Criminal Justice Act 1994 or other statutory authority whatsoever, in respect of the respondent, but limited to those related to or connected with the offences referred to in the European arrest warrant, or any of them and to the period 1st January 2007 to 8th February 2010.

2. Copies of all records maintained, and authorities granted, in respect of interception and surveillance of the respondent whether pursuant to the Postal and Telecommunications Service Act 1983, the Interception of Postal Packages and Telecommunications Messages (Regulations) Act 1993 and the Criminal Justice (Terrorist Offence Act) or other authority, but limited to the period 1st January 2007 to 8th February 2008.

Note:

Following the delivery of the within judgment, submissions were made as to the terms in which discovery should be ordered, particularly as to the category of documents referred to at 2 above, there being a statutory prohibition against disclosure in respect of some at least of those therein referred to. Counsel for both parties agreed the form which the Court's order should take, and an order was drawn accordingly.