

## THE HIGH COURT

Record No.: 2010/412 EXT

## IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

and

B. H.

Respondent

**JUDGMENT of Mr. Justice Edwards delivered on the 30th day of July, 2014.****Introduction:**

This is the Court's ruling on a fitness to plead type issue raised on behalf of the respondent. Having considered the extensive medical evidence adduced, and the overall circumstances of the case, the Court is satisfied that the respondent is now, and has been at all critical times during these proceedings, able to comprehend what is going on in the proceedings, to make judgments with respect to the various aspects of the proceedings in respect of which his judgment is required or was required, and to give appropriate instructions. The Court sets out in detail below the reasons for its decision.

**The proceedings**

The respondent is the subject of a European arrest warrant dated the 10th of March, 2009, issued by a competent judicial authority in Poland which seeks the rendition of the respondent for the purpose of the execution of two custodial sentences, of 2 years imprisonment and of 1 years imprisonment respectively, imposed upon him by the local court in Koszalin, Poland on the 16th of June 2003 and on the 2nd of July 2003, respectively. In the first case 1 year, 8 months and 8 days remains to be served. In the second case the entire sentence of 1 year remains to be served.

The 2 year sentence was in respect of one multiact deception offence particularised in Part (e)1. I of the warrant, and the 1 year sentence was a composite sentence covering two theft type offences particularised in Part (e)1.II and Part (e)1. V of the warrant, respectively, and two forgery type offences particularised in Part (e)1. III and Part (e)1.IV of the warrant, respectively.

The warrant was endorsed for execution in this jurisdiction by the High Court and the respondent was arrested in execution of the warrant on the 14th of March, 2013 by Sergeant James Kirwan and was brought before the High Court on the same day pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s.13 hearing a notional date was fixed for the purposes of s.16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing on the 11th of November 2013.

Prior to the matter coming on for hearing detailed points of objection had been filed in the matter on behalf of the respondent raising objections as to the form of the warrant; alleged inadequate particularisation; correspondence; alleged unfairness of procedures in the issuing state; alleged historical breach of fundamental rights including Articles 3 & 6 ECHR, and Articles 2,3, & 4 of Protocol 7 to the ECHR; delay; an allegation that surrender would further breach the respondent's fundamental rights, specifically would breach his right to family life under Article 8 ECHR, and that surrender would also interfere with his treatment regime in respect of his medical issues, particularly his Hodgkins disease, and thereby endanger his life, health, welfare and family life. The points of objection were supported by detailed affidavits sworn by the respondent himself and by his wife J.D. The respondent's own affidavit refers to the fact that he was a troubled teenager at the time of the offences and that he fell under the influence of an older criminally disposed individual. It goes on to say, inter alia:

"I suffered at the time (and continue to suffer) from Hodgkinson's (*sic*) Disease (an often – fatal, cancerous disease of the lymphatic tissue, characterised by enlargement of the Spleen and Lymph Nodes). I also suffered from severe delusional behaviour known as Delusional Syndrome, apparently associated with that disease. I was not diagnosed with or treated for these conditions until 2003/2004 and had at that time begun to abuse alcohol."

The respondent exhibited two medical records, one being a short report from the hospital in Koszalin that was treating him for his cancer, and confirming his histopathology findings, one a document entitled "Hospital Treatment Record Card" recording a diagnosis of "delusional syndrome, Hodgkin's disease".

While the respondent's affidavit does refer to delusional disorder in the past tense i.e. as being something from which he "suffered" previously, neither the points of objection, nor the affidavits filed in support of those points, refer to any on-going psychiatric problem. Indeed, it is clear that the points of objection were carefully pleaded, and are in such terms that they could only have been pleaded on instructions received. Moreover, the details in the respondent's affidavits are indicative of understanding and appreciation on his part, at least at that time (his affidavit was sworn on the 31st of June 2013), of the nature of the proceedings and their consequences for him, and the potential bases upon which he might resist surrender.

When the matter came on for hearing on the 11th of November 2013, counsel for the respondent informed the Court that his instructing solicitor had recently become concerned about the respondent's "fitness to plead" as it was characterised and that the solicitor had, of his own initiative, referred the respondent to a consultant psychiatrist, a Dr Leader, for assessment and the preparation of a report. Dr Leader had furnished a report dated the 3rd of October 2013, which was handed in, indicating that he was displaying definite symptoms of psychosis, and that he was being prescribed anti-psychotic medication and would be kept under review. The report made no mention of his fitness or ability to give instructions, to follow and understand the proceedings, and to

make judgments in his own interests. Indeed it was entirely silent on that issue. Dr Leader had indicated that she would provide a more comprehensive report after a planned review of the respondent. With some reluctance the Court acceded to an application to adjourn the hearing pending receipt of Dr Leader's second report, but expressed the view that it might be helpful if the respondent were to submit to a further independent psychiatric assessment to be conducted at the behest of the Court. The respondent's agreement to this was secured and Professor Harry Kennedy was asked to see the respondent with a view to assessing his ability to engage with the present proceedings, and to report to the Court.

Professor Kennedy duly saw and assessed the respondent and produced a report for the Court dated the 13th of December 2013. In the meantime, Dr Leader conducted her planned review and produced a second report dated the 16th of January 2014. The Court considered both reports and it was apparent that there was a conflict in the expert opinions being expressed and that the experts were not in agreement as to the respondent's ability to engage with the present proceedings or "fitness to plead" as it was persistently referred to euphemistically.

Dr Leader had stated that:

"In my opinion he is unfit to plead. His thinking and judgment is influenced by bizarre delusions and psychosis. He is very vulnerable."

Conversely, Professor Kennedy's view was that:

"Mr H. is by his own account capable of instructing his solicitors in relation to his business affairs and in relation to this matter. Mr H. expressed negative beliefs regarding one member of his legal team. These opinions are not the product of any mental illness.

Mr H. is capable of making a proper defence in relation to the present matters. Mr H. is capable of expressing his own preferences. Mr H. is capable of understanding the evidence that might be presented, with the aid of a translator. Mr H. would be capable of pleading to a charge if this was required. Mr H. would be capable of challenging a juror if this was required. In my opinion Mr H. is fit to appear in court, participate in court proceedings and he would be fit to stand trial if this was required."

This Court took the view that it was impossible to resolve the conflicts in the expert opinions expressed on the basis of reports, and requested that the experts on each side make themselves available for cross-examination. It took some time to arrange this but eventually on the 1st of July 2014 the Court heard oral evidence from both Dr Leader and Professor Kennedy. The procedure adopted was that each expert formally verified the contents of his/her respective report(s), the said contents being then treated as being the witness's evidence in chief, and each witness then submitted to cross-examination by counsel representing the side promoting the contrary view.

#### **Assessment of the medical evidence**

The views of both experts were thoroughly tested in the crucible of cross-examination. The Court listened carefully to their respective testimonies and, in addition to assimilating the content of what was being stated, the court also observed each witness's demeanour and engagement as they were being tested as to their convictions. Ultimately, the Court has determined that the evidence of Professor Kennedy was more persuasive, and the Court prefers his views to those of Dr Leader. It is appropriate to state that the Court has had no doubt at any stage as to Dr Leader's bona fides, professionalism or sincerity. The Court is satisfied that she genuinely holds the views that she has expressed, and indeed has expressed with great conviction. However, it was ultimately persuaded that as Dr Leader had not taken steps to exclude one possible explanation put forward by Professor Kennedy for the behaviours that she had observed and was attributing to psychosis, namely cannabis intoxication, and as evidence concerning whether the respondent is getting any beneficial response from the anti-psychotic medication prescribed to him is far from conclusive, the Court finds itself more impressed with Professor Kennedy's testimony. In particular it accepts his testimony that "the international diagnostic criteria say that in the presence of an intoxicant, one can't diagnose a mental illness." (DAR transcript, p.75, line 75.)

In her testimony, Dr Leader testified to the following matters (*inter alia*) in response to questions from the respondent's counsel:

"Q. .... can I ask you this; as a result of your diagnosis of his condition, how do you say that affects his capacity with respect to these proceedings?

A. Yes. Well, I think he's suffering from acute psychosis, he has a history of psychosis going back to 2002 or the beginnings of a psychosis, he presents with paranoid delusions, with mistrust, with voices, he misinterprets situations, he's very paranoid about his wife, he's very paranoid about the customers in his shop, he's very paranoid about his partner, he's paranoid about his legal team, he's paranoid about the whole process. He may even be paranoid about myself, he refuses to go I wanted him to go to the local psychiatric services because I feel that's where he would be best treated, but he refuses to go there.

Q. I see. And in your opinion, is it possible for him to understand the nature of these proceedings and to cope and to deal with them as a party to ?

A. Well, I don't think I don't think he's suffering from any cognitive defects, in other words, he's not suffering from dementia or anything like that. But I think the severity of his judgment and delusions and psychotic symptoms make him incapable of fully trusting and understanding this process.

Q. Yes. And that would ?

A. I think he's very psychotic.

Q. Yes. And that would include even communicating with his solicitor; is that correct, or with counsel or with anybody else?

A. It could, yes, he could become in fact, he is very mistrustful of a member of his legal team.

Q. Yes?

A. And even of other members of his legal team.

Q. Yes. There are comments in respect of that included in the reports, are there not, without necessarily reading them in open court?

A. Yes, there are, yes, and even more recently more comments.

Q. Yes. And that in your experience of dealing with him, those comments and those observations on his part continue, do they?

A. They've been there all the time that I've seen him, he did improve slightly when I began anti psychotic medication, and that was I must also say I've seen his wife on a number of occasions, he improved slightly, but then he stopped taking the medication and then he dis-improved and I started the medication again. Now, in my opinion, he probably should be on much higher doses of medication, he should be being treated by local psychiatric services, and he should have a full treatment team. But you know, I can't I can't do anything about that.

Q. Yes. He manifests an inability or a reluctance, or an incapacity to go?

A. He won't go he won't go to anybody else.

Q. Right?

A. And he's not I don't think it there is, you know, he's not detainable at the moment.

Q. Yes. If I can just if I can just read a line, and perhaps you'll just confirm in your report of the 27th of January 2014, you say, "In my opinion, he is unfit to plead ..." this is at page 2, "In my opinion, he is unfit to plead, his thinking and judgment is influenced bizarre delusions and psychosis"?

A. Yes.

Q. "He is very vulnerable. If untreated, his delusions will not improve ". Now, in your estimation, even with treatment his delusions are not improving at this stage?

A. They're very present and active

Q. Yes?

A. as recently as the 5th of June."

(Transcript, p.6, line 22 to page 8, line 4)

A further important portion of the evidence of Dr Leader appears at p.24 et seq, and also bears quotation:

"JUDGE: But I'd just like to hear Dr Leader expand a little bit, if she wouldn't mind, on the views she's already stressed, that as a consequence of the psychosis that she has diagnosed, there would be difficulties, if I understand her correctly, in exercising judgment in circumstances where he's incapable of trusting those who might have his best interests at heart, such as his lawyers and advisers, notwithstanding that there isn't any cognitive deficit, is it fair to say that that he could engage in the way in which engagement is required in proceedings such as this in circumstances where he's suffering under the adversities that he suffers, whatever label one puts on it?

MR Ó SÍOTHCHÁIN: Yes, yes. Well, I can actually just direct the doctor, and in fact I was going to anyway fairly shortly, the first report of Dr Kennedy at page 15 and page 16, he comes to his opinion of in relation to the interview which he has conducted and he says, "I understand that general practice and other medical records may eventually be available, I have received sufficient material in which to base the following assessment and opinion on the limited issue of fitness to instruct and participate in court proceedings." And then he goes on to say, "At the time of my interview with Mr H. he appeared to be an inconsistent historian, Mr H. told Dr Leader that he runs two supermarkets, he told me that shops were his wife's business. However, Mr H. did describe to me his careful use of translators when he arranges business matters concerning his shops with his solicitor. Mr H. appeared to be prone to exaggeration as a habitual mode of speech rather than as a form of delusion or thought disorder. Mr H. described persecutory delusions that he may be poisoned and auditory hallucinations. By his own account, a sleep disturbance had improved since Dr Leader prescribed oral anti psychotic medication in modest dose in October 2013, the symptoms described by Dr Leader include command hallucinations and numerous psychotic symptoms, psychiatric symptoms were not in evidence by the time I interviewed him." Do you have any comment just in relation to that, those findings at that stage, it's paragraph four in particular.

A. Well, I mean Professor Kennedy is agreeing there that he does, that Mr H. described the persecutory delusions and the auditory hallucinations. He disagrees with me, in that or not disagrees with me, but he didn't he didn't elicit from Mr H. the command hallucinations, but I definitely did and a whole series of paranoid symptoms. It may be that he might have been a little bit better when he saw Professor Kennedy. But I don't think he ever really improved substantially since the first time I saw him.

Q. Right?

A. On every occasion I have seen him, he has been in my view extremely psychotic.

Q. Right.

Q. JUDGE: Is it the case, Dr Leader, that every person who exhibits psychotic symptoms is incapable of participating in legal proceedings?

A. Absolutely not, no, no, it's only if the psychotic symptoms affect the judgment in relation to his capacity

Q. JUDGE: To give a history, for example, is he effected in his ability to give a history as to procedurally what happened him in the ... state, you know, in other words, is he able to talk about the case in Poland, and tell his lawyers as to what

happened in the course of that case?

A. Yes, he probably is, yes.

Q. JUDGE: All right. Is he in a position to know where he was at the material time, and for the purposes of setting up an extraterritoriality defence ?

A. Yes. There's no cognitive

Q. JUDGE: he's able to know in time and place where he was at a particular stage?

A. Oh yes, there's no cognitive impairment.

Q. JUDGE: All right. Would he be able to say whether he was the subject of a previous set of legal proceedings, for example if it was suggested that he was being subjected to double jeopardy in some respect, would he be able to say, "Well, I was tried for this offence before, and I was acquitted or convicted"?

A. Well, he may, I can't say about that, because if he's psychotic it could interfere with all of that.

Q. JUDGE: Yes, okay?

A. You know, and I didn't specifically ask him about that.

Q. JUDGE: Yes?

A. All I can say at the moment is that he is extremely psychotic, in my opinion, I have no doubt whatsoever about that, and his psychosis spreads into his relationships with almost everybody, possibly myself, although he says he has some trust in me, but it spreads into his relationship with his wife, it spreads into his relationship with his partner, with his customers, with his solicitors, and because it spreads into all those relationships, I don't feel that if that is the case, which I feel it is, that he can accurately you know, that is so influential in his thinking, that it is interfering with his capacity to act really in his own best interests and advise his solicitors what

Q. JUDGE: Is he in a position to accept advice, for example if he's given options in the context of the present proceedings. I mean, one one option that every respondent has is the possibility of voluntarily surrendering, there are advantages sometimes to somebody voluntarily surrendering in terms of how they might be treated there the issuing state. If he was if the pros and cons of a particular course of action were laid out for him by his legal advisers, would he be able to make a judgment from the in regard to that?

A. I don't think, I think his I would doubt that greatly, I think the level of his psychosis, because it is so interfering in so many areas would that it would interfere with his judgment to make good decisions for himself.

Q. JUDGE: Right?

A. I mean, he clearly told me he wanted to go back to Poland, to go into prison because he was going to get all these people to come and work for him in Ireland, I mean that does not seem to me a sort of a logical I think he's very psychotic.

JUDGE: Yes, yes.

Q. MR Ó SÍOTHCHÁIN: Could I just refer you to paragraph seven of the opinion there on page 15, it says, "Mr H. is, by his own account, capable of instructing his solicitors in relation to his business affairs and in relation to this matter. Mr H. expressed negative beliefs regarding one member of his legal team. These opinions are not the products of any mental illness"?

A. Well, I think they are, I think

Q. Yes?

A. I really do believe he's very paranoid of a huge number of people.

Q. Yes. He goes on to say then in paragraph eight, "Mr H. is capable of making a proper defence in relation to the present matters. Mr H. is capable of expressing his own preferences. Mr H. is capable of understanding the evidence that might be presented with the aid of a translator. Mr H. would be capable of pleading to a charge if this was required. Mr H. would be capable of challenging a juror if this was required. In my opinion, Mr H. is fit to appear in court, participate in court proceedings and he would be fit to stand trial if this was required"?

JUDGE: Right. The difficulty with all of that is that it's all irrelevant because he's not on trial.

MR Ó SÍOTHCHÁIN: He's not.

JUDGE: He has actually already been convicted.

MR Ó SÍOTHCHÁIN: Yes.

JUDGE: He left another state as a fugitive, and the only question is do I send him back or not. Does he meet the technical requirements for being sent back? Now, some of those, as I say can be decided without reference to him, but some of those may require if the if an objection is to be legitimately raised, his input and his cogent instructions. And really the issue for me is, is he in a position to give such instructions and to receive and act on advice.

Q. MR Ó SÍOTHCHÁIN: I wonder if Dr Leader can answer that question as the judge has put it?

A. Well, I actually think this man should probably be in the psychiatric hospital, if he were if he were I think the level of his psychosis but I can't, I don't think he's he would satisfy the criteria for mental disorder, so he's not an acute danger to himself or others, so you couldn't commit him. But I don't think he's been adequately treated with anti psychotic medication, and I think he

Q. JUDGE: Well, that really doesn't answer my question?

A. Yes.

Q. JUDGE: That merely speaks to the gravity of his illness, but it doesn't speak to his abilities in terms of engagement with these proceedings?

A. Yes.

Q. JUDGE: I mean, can you give me your opinion based on your assessment of him as to whether he can engage in these proceedings in his best interests?

A. I think he can't."

(DAR transcript, p.24, line 2 to p.27, line 27.)

The Court has considered the entirety of the evidence in arriving at its conclusions. However, in addition to paying close attention to the passages just quoted from the testimony of Dr Leader, the Court was also particularly influenced by following exchanges from the cross-examination of Professor Kennedy:

"A. Throughout her reports though, Dr Leader has very properly described the symptoms she elicited as being symptoms of psychosis. Psychosis is a very broad term which covers many different things, including schizophrenia, including delusional disorder, indeed, and also including drug induced psychosis. Now, what's really helpful about the reports that have come to us from Poland, particularly the most recent translations, the ones that have only just come to light very recently is that in my reading of them, the only times when it appears that Mr H. had symptoms such as delusions or hallucinations was when he was intoxicated, either with cannabis or with alcohol. And it's fairly well documented that the following day when he had sobered up, those were no longer there, there

Q. JUDGE: Well, what do you make then of Dr Leader's evidence that on a number of occasions that she saw him, he was manifesting such symptoms, and didn't ?

A. Well, he

Q. JUDGE: and didn't appear to be intoxicated?

A. Well, of course intoxication is a subtle thing, alcohol is easy enough to smell on someone's breath, but cannabis is necessary to test for it to know. Now, as a treating doctor, I would routinely test the urine when this question arises, and indeed in forensic practice, one tests the urine of the patients one is treating every time one sees them. Of course, when seeing somebody in my position here, it's not in position to incriminate someone so it's not possible for me to do that, but as a treating doctor I would expect to do that. So a doubt remains about that. Having said that, what we can agree on, I think, is that whether there is a mental disorder or not, or whether that because a self-induced intoxication is not something that I would count as a mental disorder for these purposes. The question is does Mr H. have the mental capacities to understand proceedings, to give instructions, to follow evidence and I believe he does.

Q. JUDGE: And to make judgements in his best interests?

A. To make judgements in his best interests, I believe he does based on my interview with him, and the information that he gave me about how he conducts for example his business affairs and I was particularly influenced by how he described to me how careful he is to use an interpreter when he goes to see his solicitor about his business matters. Now, I took that as evidence that he exercises prudence, he acknowledges that he speaks some English, indeed as he left the clinic I had to communicate with him directly rather than through the interpreter to show him how to operate a release on the door, and he understood that perfectly well. He seems to me to be able to prudently exercise a judgment in using an interpreter for example when doing serious business, such as seeing his solicitor about his shops. Throughout the interview, he, for example and a particular point I'd draw attention to, he clearly wished to impress upon me that he was not well, and perhaps in a fairly natural way to do that seemed to me to exaggerate at times.

Q. JUDGE: Okay?

A. So for example, he told me he couldn't remember his birthday, he couldn't remember his address. Now, there is no even the more advanced form of Alzheimer's have to be very very severe before you forget such core matters. There's certainly no, no mental illness

Q. JUDGE: So you're saying there was an element of contrived feigning in his in the history he gave you?

A. No mental illness could account for it, that's what I would say.

Q. JUDGE: Or let's just leave that line there for a moment ?

A. What I

Q. JUDGE: No, can I just ask you, because I want to get to the nub of this thing if you don't mind, I apologise Ms [Noctor] and Mr Ó Sióthcháin, you can come back in relation to anything I'm asking, but I want to confront Dr Kennedy with what's troubling me. Is it possible that Dr Leader may have witnessed psychotic episodes and that you may not have witnessed one on the occasion that you saw him. In other words, is it possible he could have been in a lucid interval and that you may both be right in terms of what you observed?

A. That is certainly possible, Judge, that is certainly possible.

Q. JUDGE: Right. Well, let's if one acknowledges that possibility, and one were to just approach it on the basis that at some point he has been experiencing psychotic episodes, is a person in the throes of a psychotic episode capable of handling proceedings such as these and looking after their best interests or does it depend on the severity of the episode?

A. It can be either. Again, listening very carefully to Dr Leader's evidence, and Dr Leader is a distinguished colleague, I was struck by a clinical question, because if one decides to treat a psychosis and prescribes a modern effective anti psychotic in a low dose, and it isn't effective so you increase the dose and you increase again and it's still not effective, there are a number of common possibilities one must consider. The first is that the person is continuing to use or is using some intoxicant which interferes with the effectiveness of the medication.

Q. JUDGE: Okay?

A. Whether there's an illness or a substance induced state or not. The second is that the person actually isn't taking the medication, and in those circumstances, again in forensic practice I would normally ask to see the prescriptions and to ask the pharmacist if the prescriptions have been filled as evidence at the very least, tablets have been bought. And the third option

Q. JUDGE: Well, I mean I anticipate the third is he doesn't need it?

A. Precisely."

(DAR transcript, p 67, line 3 to p.69, line 12)

Also,

"A. May I be of assistance, because I really wasn't

JUDGE: Certainly, Doctor.

A. trying to do poor Mr H. down.

JUDGE: Again, in the lateness of the hour, I think that we can try and keep this thing very focused if we can, yes.

A. Your original question to me, Judge, was about capacity to fulfil these functions, and I started by saying that although Mr H. presented to me that he believed he had a problem with his memory, I didn't think he had a problem with his memory because he sustained his attention and concentration very well during a long interview, he was able to remember in the course of the interview the purpose of the interview, things we had already discussed. He was able to respond to my questions in a reasoned way, at times there was some rather light-hearted banter indeed in the exchange when he asked me if I had a license and I said I did, he told me he hadn't, in a rather jocular way, which wasn't inappropriate. So in a sense, all of the interview is an assessment of capacity and he conducted himself well from a cognitive point of view, sustaining concentration, remaining on point remaining relevant. At the end of the interview, when Mr H. had gone, I did something which I commonly do, which is to ask the interpreter for the interpreter's view of his use of language, thought disorder is a terribly important sign of a mental illness in psychiatry. And of course, one is at a disadvantage when conducting an interview through a language that you don't speak. And the interpreter's view was that in fact he spoke very grammatically, that he was succinct and clear in his replies, although sometimes holding back information for reasons of caution or indeed sensitivity, paranoia with a small P. So I was satisfied that he did exercise mental capacity and indeed when I asked him the normal things one asks to assess capacity to participate in a trial, he was able to answer those well. The issue for instance, about him having a negative view of one of his solicitors was quite clear, that he had a negative view of one of his solicitors. I took the view that what he expressed were common racist views, I didn't take the view that they were delusional views. And regarding his solicitor who he named as he named, he named him as Philip, he simply told me that he would keep him under observation, in effect monitor his performance, which did not seem to me to be delusional."

(DAR transcript p.69, line 15 to p.70, line 12)

Further, at p.72 of the transcript, when counsel for the respondent is cross-examining Professor Kennedy concerning a supplemental report produced by him in the light of further medical records received from Poland, it is suggested to Professor Kennedy that he had stepped back somewhat from his initial views. Professor Kennedy disagreed and the critical issue of possible cannabis intoxication is then further addressed in the following exchanges:

"A. You'll have to help me, which comments do you say I have stepped back from?

Q. Yes, yes. Well, we've just been looking at your opinion, and the points which were raised there and I just see that in the report here you've taken extracts from the two reports, February and March 2004 and then the hospital treatment in 2006, and you say, "This additional material indicates only alcohol and drug related paranoia, there is no evidence of any primary mental illness." But perhaps you missed the reference to the fact that there was a two year history of a difficulty with Mr H. before he went for hospital treatment at that stage, dating from about the time that he was detained in prison, is it not the case that the reports from Poland find in fact that he had a mental disorder at that stage?

A. Perhaps you've missed the two year history of using cannabis, bear with me because it's mentioned in several places.

Q. I disagree with you, Doctor, I think you'll find that there's no mention of a two year history of using cannabis at all?

A. He says he commenced using cannabis at 16.

JUDGE: The discharge note says he had probably been smoking cannabis for about two years.

A. Thank you. And recommends the treatment recommended is treatment for addictions."

(DAR transcript p. 72, line 22 to p.73, line 6.)

The issue is again re-visited on page 75 of the transcript where Professor Kennedy is asked about a passage in the Polish records describing the respondent's clinical presentation on the 12th of February 2004. The following exchange occurs:

"Q. Again it's, "Having left remand prison two years ago, he became a different person, he is now worn out, fearful, does not talk much, cannot sleep, thinks he is spied on by illegible, cannot rest at home, looks around all the time, being observed, interview with family and others", his parents are about how different he is, he is now worn out, fearful, does not talk much, he cannot sleep. And that's repeated more or less in the next page again?

A. Yes.

Q. "Subject full of insecurity, lives in fear, et cetera?

A. Yes.

Q. And again doesn't that give again a picture of somebody who has an incipient or kind of ongoing difficulty of a psychosis or a problem of that type?

A. It's a picture entirely typical of somebody using too much cannabis also, that's the problem, and we know that he was using cannabis.

Q. You don't know how much he was using, do you?

A. We don't know how much he was using, except that his urine was positive for it when tested in the hospital.

Q. Yes?

A. So he was certainly using sufficient and again it's important to say all of that is entirely typical of someone using cannabis, I have to say in the interests of balance, it could be due to a mental illness, but in the present the international diagnostic criteria say that in the presence of an intoxicant, one can't diagnose a mental illness. So the intoxicant takes precedents, it's the concrete evidence available.

Q. I think it's probably fair to say that Dr Leader has more or less agreed with you on that point. But that she has had no difficulty herself with her client in that regard, would you agree with that as

A. I missed I'm terribly sorry, because my cold, I'm actually having difficulty hearing you sometimes, your last part of your sentence?

Q. Yes. Just in respect of Dr Leader's I think would probably agree with you on that, and she has I think herself said though that she has had no difficulty, as far as she's aware with taking of dealing with her client in that regard, that he hasn't turned up smelling of drink, he hasn't been, as she saw it, disorientated by substances of that type and she has been satisfied that she is able to conclude in fact that he has a psychosis and that it is likely to have been a very long running one?

A. Clinically, the only way to establish whether a person is substantially intoxicated with cannabis or not is to test for it, there's nothing else that's obvious on clinical examination.

Q. Yes?

A. You must test.

Q. You didn't test him either when you examined him, did you?

A. As I explained earlier, had I been seeing him clinically, I would have done, when I'm seeing him for the state I don't think it's proper for me to do that.

Q. Right. But you then had to take it that he was in a position whereas far as you were concerned, he was not high on some substance or other, is that the case?

A. No. Would you explain that to me again?

Q. Well, you didn't examine him yourself as to whether he had any alcohol or any cannabis on him; isn't that right?

A. I can normally recognise if somebody is so intoxicated that one can't assess their mental state, that's quite relevant to the second of the notes when in fact the evidence for a disturbed mental state was there only when he was intoxicated with alcohol, interestingly. I was quite satisfied that he wasn't that intoxicated or visibly intoxicated with alcohol. But I repeat again, the only way one can be sure that a person is not intoxicated with cannabis is to test for it.

Q. And you didn't do that?

A. I was not in a position to do that.

Q. Yes, okay. But the position, in any event, and I suppose there is going to be a continued divergence of view on this, that Dr Leader, who has been my client's treating doctor for a considerable period now, certainly a period of I think about eight months and has seen him, I think she says five occasions and she's had an interview with his wife, she's convinced that he is not in a position to deal with these proceedings?

A. We disagree about that."

In addition to the issues raised by this evidence, the Court considers that some significance requires to be attached to the fact that the respondent's alleged mental incapacity was only raised at a very late stage of the proceedings, and that the respondent's lawyers seem to have had no difficulty in taking instructions from him before the matter was set down for hearing for the purposes of preparing detailed points of objection, and preparing a detailed affidavit for him to swear in support of those points of objection. In addition, the respondent's wife has never at any stage of the proceedings, and she has sworn her own affidavit as has been noted, sought to suggest that he husband is incapable of engaging with the proceedings. There was a contested bail hearing at which the Court heard that this man owns and runs two substantial supermarkets in the Dublin area, one in [a named location] and one in [another named location]. There was no evidence adduced, or any suggestion made, of any inability on his part to engage in the usual commercial activities required of a person running such businesses.

While the evidence does not go far enough to establish that the respondent is deliberately feigning, the Court has had to approach this claim of incapacity raised late in the day, and against the background that I have described, with a healthy degree of scepticism. I have done so, but have at all stages been open to persuasion as to the respondent's alleged incapacity by the medical evidence adduced in support of it. At the end of the day, however, I have not found that medical evidence to be persuasive, preferring as I do the testimony of Professor Kennedy.

**Conclusions and Ruling:**

The Court is satisfied that the respondent is now, and has at all material times been, able to comprehend what is going on in the proceedings and to engage with them. He is further capable of making judgments with respect to the various aspects of the proceedings in respect of which his judgment is required. He is capable of receiving and comprehending advice, and is able to give appropriate instructions.

In the circumstances I am satisfied that the case must proceed.