Neutral Citation: [2017] IEHC 563

THE HIGH COURT

Record No. 2017 No. 71 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

G.A.P.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 26th day of July, 2017.

1. In the present proceedings, the respondent is sought pursuant to a European Arrest Warrant ("EAW") issued by a judicial authority in the United Kingdom of Great Britain and Northern Ireland ("the U.K.") for the purposes of prosecuting him for a single offence of indecent assault. This is an offence alleged to have occurred some considerable time ago and for which the respondent was questioned by the police in the days following the alleged offence and again in 2014 when he attended a police station in Northern Ireland voluntarily. After each of those periods of questioning, the respondent was informed that no prosecution would be taken against him.

2. The information provided by the U.K. establishes that on review following a complaint from the alleged victim, the Crown Prosecution Service ("CPS") made a decision to prosecute the respondent thereby reversing the decision not to prosecute. Confusion about the date of the alleged offence on the EAW, the reversal of the decisions not to prosecute him, the delay since the alleged offence, and his family and personal circumstances form the basis for the objections to surrender in this case.

A Member State that has given effect to the 2002 Framework Decision
3. The surrender provisions of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") apply to those member states of the European Union ("E.U.") that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European Arrest Warrant and the surrender proceedings between Member States ("the 2002 Framework Decision"). I am satisfied that by the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4/2004), the Minister for Foreign Affairs has designated the United Kingdom of Great Britain and Northern Ireland as a member state for the purpose of the Act of 2003.

Identity
4. I am satisfied on the basis of the affidavit of Stephen McGonigle, member of An Garda Síochána, the affidavit of the respondent and the details set out in the EAW, that the respondent, G.A.P., who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
5. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003
6. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under the above provisions of the Act of 2003, as amended.

Part 3 of the Act of 2003
7. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003 and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Section 45 of the Act of 2003
8. The respondent is sought for prosecution in this case and therefore the provisions of s. 45 of the Act of 2003, which concern trials in absentia, are not applicable. The surrender of the respondent is therefore not prohibited under s. 45 of the Act of 2003.

Section 38 of the Act of 2003
9. The respondent is sought for the purpose of being prosecuted in the U.K. on one charge of indecent assault contrary to s. 14(1) of the Sexual Offences Act, 1956. This offence carries a maximum sentence of five years imprisonment. The terms of minimum gravity have clearly been met in those circumstances.

10. Correspondence with an offence in this jurisdiction must be established for surrender to be permitted in this case. The allegation is that the respondent, who is a teacher, took the complainant, a ten-year old student, under his wing and indecently assaulted her on one occasion when they were alone in a school staff room by penetrating her vagina with his fingers. Those acts would, if committed in this jurisdiction, amount to an offence of sexual assault contrary to common law and contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990.

11. The surrender of the respondent is therefore not prohibited by the provisions of s. 38 of the Act of 2003.

The Contested Points of Objection

Section 11(1A)(f) of the Act of 2003
12. This point arises in circumstances where the EAW refers to the alleged offence as having occurred in June/July 1977, but the respondent contended that the date and circumstances of the alleged offence are not correct. The respondent submitted that "he is a stranger to what happened in June/July of 1977 as outlined in the warrant".

13. Prior to the EAW being endorsed for execution in this jurisdiction, this Court expressed concerns in relation to the passage of time between the alleged commission of the offence and the issue of the European arrest warrant. This arose in the particular circumstances where the EAW stated on its face that, subsequent to the complainant making her initial complaint, "the case was closed". Although there is a reference in the EAW to the respondent being interviewed some time subsequently, there was no

explanation as to how or why this happened when "the case was closed". The issuing judicial authority replied that the EAW related to an offence committed in 1977 when the alleged victim was aged about ten years of age. It says that the matter was reported at the time but the alleged victim's mother (now deceased) decided that she did not want her daughter to be involved in the investigation.

14. The respondent's affidavit gives a great deal of information about his knowledge of an allegation that was made against him by a particular pupil in his class in the year 1978. On its face, apart from the date and surname of the pupil, this would appear to be the same circumstances as set out in the EAW, although the respondent denies that anything untoward took place. He states that he was arrested and brought to Dagenham police station where he gave a voluntary statement to the police denying any wrongdoing. He states that in August 1978, he was told that the complaint was being taken no further. He refers to the fact that in September 1977, he was to take up a position in a school in Luxembourg and that it was on the penultimate day in the school in Dagenham that he was arrested.

15. The central authority made a last minute request for confirmation of the year of the commission of the alleged offences arising out of the averment by the respondent. With commendable haste the issuing state, through the National Crime Agency, replied as best they could at such short notice. The senior investigating officer was not on duty but a named detective constable confirmed the following information: "reading the crime report it would appear that the offences (*sic*) has occurred in the victim's last year of primary school, this would be September 1977 – August 1978, this appeared to be in the June or July 1978."

16. The respondent maintains that this confirmation has not provided him with the unambiguous clarity required in EAWs as determined by the Supreme Court (Hardiman J.) in the case of *Minister for Justice, Equality and Law Reform v. Connolly* [2014] 1 I.R. 720. He submitted that there is still doubt about the date of the offence and the number of those offences.

17. This issue of clarity has been well canvassed before the courts on a number of occasions. The Supreme Court has dealt with it in the case of *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2009] 1 I.R. 618, *Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83 and in the Connolly case cited above. The High Court has also dealt with this issue in a number of cases as well (e.g. *Minister for Justice, Equality and Law Reform v. Cahill* [2012] IEHC 315).

18. The case law indicates that what is required to be stated in the EAW is a sufficiently precise description of the (alleged) offence(s) so that the court can carry out all of the functions it has under the provisions of the Act of 2003. These include questions of double criminality and the rule of specialty. Furthermore, the arrested person is entitled to be informed of the reasons for his/her arrest and of any charge against him/her so that he/she can be immediately aware in broad outline what it is they have been arrested in relation to. This will allow the requested person challenge his/her proposed surrender.

19. In this case, there is no doubt that the respondent is being sought in respect of a single count of alleged indecent assault against a pupil which occurred in a staff room in a named school in Dagenham. In his affidavit, the respondent alludes to an incident that apparently occurred in the staff room at that school while he was alone there with one of the pupils. He accepts that an incident occurred between them but denies that he ever touched her in the fashion described in the European arrest warrant. The only two differences are that he dates this incident to in or about July 1978 rather than to June/July 1977 as set out in the EAW and that, although no specific complaint by the respondent was made, the pupil had a different surname although her first name was the same.

20. I am satisfied that the respondent has been made aware of the incident for which he is accused. I am satisfied that it is not a separate incident than the one for which he has previously been questioned in Dagenham and subsequently in 2014 in Northern Ireland. It is highly unfortunate that the EAW was not more carefully drafted and that the date in the EAW was not more clearly stated. I am satisfied, however, that the only proper interpretation that can be given to the information received from the issuing state that the reference to June/July 1977 was an error and that it should have read June/July 1978. Furthermore, I do not accept the respondent's submission that the reference to offences in the plural casts further doubt on this issue. That is clearly a typographical error as can be seen from the quote above.

21. In this case, there is no doubt as to the nature of the offence and the number of offences for which he is being sought. The date of the offence is now clarified but even more importantly, the information before this Court establishes that the incident alleged is the same incident that the respondent has already been questioned about by the U.K. authorities. No difficulty with double jeopardy, the rule of speciality or correspondence of offences arises or could possibly arise due to the manner in which the offence has been described. The Court rejects that this is an invalid EAW by virtue of the lack of clarity in the description of the offences. This point of objection is therefore rejected.

Section 37 of the Act of 2003

Blameworthy Prosecutorial Delay/Lack of Fair Procedures

22. Counsel for the respondent has gone to great lengths to seek out case law that would support his contention that what has occurred in this case in the U.K. amounts to culpable prosecutorial delay. In particular, he relied on the decision of the High Court (MacMenamin J.) in *L.O'N v. The Director of Public Prosecutions* [2007] 4 I.R. 481 which was delivered before the authoritative decision of the Supreme Court in *S.H. v. The Director of Public Prosecutions* [2006] 3 I.R. 575. Nonetheless, counsel for the respondent submitted that it provides support for the view that culpable prosecutorial delay has occurred here in circumstances where the facts were known to the prosecution as a complaint had been made.

23. Counsel for the respondent also relied heavily on *L.O'N.* to support his argument that it would be unfair to surrender the respondent where he had been told on two occasions that no prosecution would proceed against him and he was not given any opportunity to make submissions when a decision to prosecute him was being considered. In that sense, he submitted that the present case is more like *Eviston v. The Director of Public Prosecutions* [2002] 3 I.R. 260 than later cases in which *Eviston* was distinguished.

24. In the view of this Court, the High Court is not the appropriate forum for determining the issue of culpable prosecutorial delay as it may have arisen in this case in the United Kingdom. While culpable prosecutorial behaviour could possibly lead to an abuse of process of the Irish courts, the action or inaction of the Crown Prosecution Service ("CPS") in this case is not the type of activity that gives rise to any issue of abuse of process in this jurisdiction. The courts have repeatedly stated with respect to issues of delay that:-

> *"[…] it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried. The prosecuting and police authorities as well as other witnesses are available to and amenable to the jurisdiction of the courts of that country. Documentary evidence, of the type demanded by the respondent, will be more readily available there. If not, its absence may be more readily explained.*

> *There may, in addition, be arguments or points of domestic law, whether based on precedents or otherwise, which the respondent can advantageously argue or rely upon which may not be available to him in this jurisdiction and of which an Irish court might not necessarily be aware." (as per Fennelly J. in Minister for Justice, Equality and Law Reform v. Stapleton [2008] 1 I.R. 669, para. 76, p. 692).*

25. Denham J. (as she then was) similarly stated in *Minister for Justice, Equality and Law Reform v. Hall* [2009] IESC 40 at para. 19 that "*issues such as delay and the right to a fair trial are more appropriately raised in the requesting state, if there is a remedy available in that state*". There is a presumption that remedies are available in the issuing state.

26. There is no evidence at all to suggest that remedies as regards the delay in this case, the prejudice that the respondent may have suffered, or the lack of opportunity to have an input into the decision to recharge him, cannot be dealt with in the United Kingdom. For these reasons, this Court rejects the respondent's submission that, because of culpable prosecutorial delay or behaviour, his surrender is prohibited under the provisions of s. 37 of the Act of 2003.

Article 8 of the European Convention on Human Rights

27. The respondent objects to his surrender on the ground that to do so would interfere with his right to respect for his private and family life as guaranteed by Article 8 of the European Convention on Human Rights ("ECHR"). Counsel pointed to the twenty-two principles set out in *Minister for Justice and Equality v. P.G.* [2013] IEHC 54 as the basis upon which the Court should approach this issue. Counsel submitted that this was a test of proportionality and not one of exceptionality. Counsel pointed to facts that went to a reduction in the public interest and thereafter pointed to issues regarding the respondent's personal circumstances.

28. On the public interest side, while acknowledging this was a serious allegation, counsel submitted that it was a single incident that is alleged to have occurred almost 40 years ago. A factor that must be taken into account is the delay itself and the grounds for that delay. Of even greater importance, counsel submitted, was the fact that the respondent had been told on two separate occasions that no prosecution would entail, issues regarding the potential for the loss of evidence, and he refers to the respondent's affidavit in which the respondent says he does not recall police taking a copy of the statement he made in 1978.

29. This Court has dealt with issues of culpable delay in a number of cases including *Minister for Justice and Equality v. Corry* [2016] IEHC 678. At para. 44, thereof, this Court stated:-

> *"I am quite satisfied that a finding of significant or culpable delay does not mean the court must regard the public interest as having been nullified. Significant or culpable delay is a factor that is to be taken into account in assessing the weight to be attached to the public interest. This is another way of saying that delay, even significant and culpable delay, is one factor in the calculation of the pressing social need. The court is obliged to have regard to other factors, not least that there is a constant public interest in the surrender of individuals to face criminal prosecution or to serve sentences already imposed."*

30. In the *Corry* case, there was significant culpable delay but nonetheless the seriousness of the offence meant that there was still a high public interest in the surrender of that particular respondent. In this case, the Court has been asked to find significant culpable delay. I do not find any in this case. The alleged victim was ten years old when this occurred. Her mother decided against the prosecution at an early stage. As has been stated by this Court in the case of *Minister for Justice and Equality v. A.M.* [2016] IEHC 568, the courts have a lot of experience of dealing with cases of alleged and proven child sexual abuse. It is not at all uncommon for a parent not to wish a prosecution to go any further out of concern for the position of their child. There can be no criticism of the complainant in these circumstances. There is also no blameworthy delay in the complainant taking further time to make the complaint after she attained the age of majority.

31. I do not accept that there has been any culpable delay on the part of the CPS in England and Wales. Faced with an unwilling parent of a ten-year old, a reluctance to embark on a prosecution is entirely understandable at that point. Once the complainant made her own complaint in 2013, the matter appears to have proceeded relatively quickly. The respondent was traced and was called to interview in Northern Ireland. In September 2014, the CPS decided on the evidence available at that time to take no further action. The complainant then asked for a review, an entitlement which also exists in this jurisdiction, and further actions for investigation were identified. Ultimately, a decision to prosecute the respondent was given in January, 2017. In those circumstances, I do not consider that there has been any culpable delay on the part of the Crown Prosecution Service.

32. The overall length of the delay is, nevertheless, a factor to be taken into account in the assessment of the overall public interest in surrender. That delay must be weighed against the nature of the alleged offence: a case of alleged indecent assault against a child. The allegation itself is an indecent assault against a child of considerable seriousness, involving an allegation of digital penetration of the vagina. Although it is a single incident, the child was a young child. Added to the seriousness of the offence is that the respondent was in a position of authority over that child at the time of the alleged offence.

33. Counsel for the respondent urged the Court to accept that issues regarding fair trial should be taken into account in the calculation of the public interest and he referred to the respondent's recollection that no notes were taken of his original interview by the police. In the view of the Court, the respondent has not reached an evidential threshold in establishing a potential issue of breach of fair trial rights. He has only stated that he has no recollection of notes being taken. This is not a definitive position. In any event, it does not seem to be at issue that he denied the alleged offence when he was first questioned about it. The Court also rejects the respondent's submission that, because he was asked about further or different issues in the interview in 2014, that this gives rise to a potential fair trial breach. If there are discrepancies between what the complainant alleged occurred in 1978 when she first made her statement, and what she alleged in 2013 when she made her own complaint, these are all matters for exploration at the trial. Perhaps in another case, where the evidence established a fair trial issue of substance, the Court could take that into account in the calculation of the public interest, particularly regarding an offence of considerable antiquity. The facts of this case do not raise any matter of substance that points to the potential for an unfair trial.

34. The respondent's strongest argument is perhaps that he has been told on two occasions that he will not be prosecuted. He submitted that this affects the public interest in his surrender. In the view of the Court that does not follow inexorably. The public interest is in the prosecution of crime and the fulfilment of extradition treaties for that purpose. That is unaffected by the fact that an accused person has been told previously that he will not be prosecuted. There can be many reasons for not prosecuting at a particular moment in time and correspondingly many reasons why the position may change. The most obvious reason is the availability of evidence and in that regard, the unavailability of a willing child witness due to the reluctance of the child's parent(s), is a factor that a prosecutor would have to take into account in deciding whether to prosecute or not.

35. When the child made her complaint, there was an investigation and an initial decision not to prosecute. The respondent was told

he was not being prosecuted due to insufficiency of evidence. The complainant sought a review. That review led to new avenues of investigation being pursued and the decision not to prosecute being reversed. The availability of a review of a decision not to prosecute is a common feature of prosecutorial decision-making across jurisdictions. Article 11 of the E.U. Victims' Directive contains a right to review. It is not a matter which affects the public interest in the prosecution of the crime, that the decision to prosecute only came about after a review. In the view of the Court, however, the issue of the fact that the respondent was twice told that he would not face prosecution is a matter that the Court may consider as potentially relevant when considering the interference with his private life.

36. In circumstances as set out above, the Court is satisfied that the public interest in prosecuting this single offence of indecent assault by means of digital penetration of the vagina of a ten-year old which took place almost 40 years ago, carries with it a high public interest. The Court must proceed to consider the private interests of the respondent and calculate whether it would be a disproportionate interference with his right to respect for his personal and family life to surrender him.

37. On the side of his private rights, the respondent has put forward a number of issues. An overarching issue is that there is a significant delay in the prosecution of these offences, that he has been taxed with them and interviewed in relation to them on two occasions in the past and has on both occasions been told that no prosecution will take place. On each occasion, he got on with his life.

38. In his affidavit, the respondent sets out how he had already planned to leave the school in Dagenham to take up a position with a school in Luxembourg at the start of the school year in September 1978. He sets out how this had been a significant achievement for him as his route into teaching had not been straightforward. He had trained as an apprentice electrician with the Coal Board but after marrying and starting a family, had applied to a teacher training college. He had attended night school and ultimately qualified as a teacher in 1968.

39. From 1983, he moved to a school in Northern Italy. This coincided with his son's graduation from school and he returned to England to commence university. The respondent's wife was diagnosed with cancer at the end of 1984 and returned to England where she died the following July. This had a particularly profound effect on his son who left university and returned to Italy to be with his father. His son remained with him for some time but returned later to England to take care of his grandmother who passed away in 1999. In the year 2000, the respondent retired and having discussed the issue with his son beforehand, he decided to go to Donegal to live there. His wife's family had come from there.

40. He had some part-time work after moving to Ireland including teaching special needs students. He said that the allegation in the EAW was the only complaint that had ever been made against him in 42 years of teaching. He was furthermore granted an enhanced police clearance in order to hold the positions he later held in Northern Ireland.

41. The respondent says that when he heard of the first reinvestigation, this caused him a huge degree of stress and he attended his general practitioner. A letter from his GP was exhibited and it states that the respondent "has been under a significant level [of] stress/anxiety with depressive symptoms since the case in question was re-opened." The GP says that similarly in 2014, the respondent was prescribed Lexapro 4 mg and sleeping medication in the form Zilese 3.75 mg daily. The GP says that, on that occasion, the respondent was also quite tearful and very anxious. The respondent is 77 years of age.

42. The respondent also makes the case that his surrender to the U.K. will have a great impact upon his son. Although his son is 53 years of age, he has certain mental health issues. The respondent's son lives alone but close to the residence of his father. Since his father's arrest on foot of the EAW, his severe anxiety has been triggered. His son told his consultant psychiatrist that he has always been very close to his father and feels totally dependant upon him. His son has been unable to relax and has ongoing feelings of powerlessness and decompensation. The respondent's son has described a severe type of generalised anxiety symptoms associated with severe panic attacks; he has given classic symptoms of panic attacks. His son is not sleeping properly and has had deterioration in his mood, with him feeling depressed all the time. His son has had fleeting suicidal ideation and is afraid he might act on the matter.

43. The psychiatrist who examined the respondent's son has diagnosed him with a relapse into his existing conditions which are mixed depression with anxiety, particularly generalised type, as well as obsessive compulsive disorder traits. His psychiatrist recommended that he has regular psychiatric follow-up and states that he will need a further trial of medications including anti-depressant and anti-anxiety medications. He is also recommending another course of supportive psychotherapy (he had such psychotherapy in 2006). His psychiatrist is concerned about the possibility of severe mental state deterioration and also for his safety as he will be left in Ireland with no family support in addition to feeling self-isolated and having no other social networks as support. He views him as a vulnerable person.

44. In *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17, the Supreme Court (O'Donnell J.) opined that there is a closer analogy to be drawn between the analysis of claims involved in domestic criminal proceedings and surrender/extradition than there is between surrender and deportation. With respect to the specific issue of an Article 8 application, O'Donnell J. stated at para. 10:

> *"These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin."*

45. As this Court has said on many previous occasions, it is not a helpful exercise to compare the facts in one case with the facts in another. It is important to note that O'Donnell J., with whom the other judges of the Supreme Court agreed, went on to clarify that it is only exceptionally that the features of a case will be sufficient to prevent surrender:

> *"In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously." (para. 11, J.A.T. (No. 2)).*

46. From the foregoing, it can be seen that it will be the rare case which relates to a serious crime of violence or allegation thereof that surrender will be refused on the basis of an interference with personal or family rights. In this case, there is no suggestion that either the U.K. authorities or the Irish authorities had specific knowledge of the plight of the respondent and his son over the relevant time period, and, although there has been a delay, this has been caused by the requirement of investigation of the offence and its

reconsideration by the UK prosecution authorities. The Court accepts, however, that there has been an impact on the respondent, especially as there was a real shock at being told he was being prosecuted despite previously being told on two occasions that that would not occur. Notwithstanding that situation, the level of interference with his right to respect for his personal life on any surrender is not so particularly injurious, harmful or prejudicial that, in the context of the nature of this offence, on its own would be disproportionate to the high public interest in the prosecution of the offence.

47. The Court has also considered the respondent's right to family life and in particular the situation with regard to his adult son who has mental health difficulties. Although this Court accepts that an adult child comes within the concept of family rights for the purpose of considering Article 8 rights, the circumstances of this respondent's son do not reach a level that demonstrates particularly injurious or harmful consequences that would make it disproportionate to surrender this respondent. In that regard, it is noted that his son lives alone and is receiving care in the community. He did not seem to be receiving care prior to the arrest of his father and it has not been made clear that he is receiving medication at present, although this has been recommended. In the context of the high public interest in prosecuting the case being brought against the respondent, the impact on his adult son, which is highly regrettable, does not render it disproportionate to surrender him.

48. I have considered each of the factors that have been relied upon, both individually and cumulatively. The long delay, especially in circumstances where the respondent was twice told that he would not be prosecuted and the undoubted stress that each reinvestigation has caused him, are factors that do weigh significantly in the balance as to his private life. The Court has had the opportunity to see the e-mail that was sent by the investigating police officer to the respondent's solicitor informing him that he would not be prosecuted. This states "[j]ust to let you know that the case has been presented to the CPS and they have said that there is insufficient evidence to take the matter any further." It appears that he was not told that there was a possibility of review on request from a complainant but equally it seems he was not told at an official level that he would never be liable to prosecution in the future.

49. I must consider whether the surrender gives rise to exceptionally injurious and harmful consequences for the respondent that are disproportionate to the legitimate aim to prosecute him for the alleged offence of indecent assault of a child. Although the respondent has suffered stress from the situation that has arisen, in particular where he had been twice told there would be no prosecution and his son has found this particularly stressful given his pre-existing vulnerabilities, the totality of the circumstances are not such that it would be particularly injurious, prejudicial or harmful to surrender the respondent for prosecution in light of the high public interest in prosecuting him for this alleged serious offence of sexual violence against a young child.

Conclusion

50. For the reasons set out above, this Court rejects the respondent's points of objection in this case. This Court may make an order for his surrender to such other person as is duly authorised by the U.K. to receive him.