Neutral Citation Number: [2012] IEHC 508

THE HIGH COURT

Record No.: 2012/133 EXT

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

KAROL STANIAK

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 22nd day of November, 2012

Introduction:
The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 20th March, 2012. The warrant was endorsed by the High Court for execution in this jurisdiction on the 17th April, 2012 and it was duly executed on the 24th April, 2012. The respondent was arrested by Sgt. James Kirwan on that date, following which he was brought before the High Court later 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 on the 9th November, 2012 for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court must consider whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 issues:
The Court has received an affidavit of Sgt. James Kirwan sworn on the 8th November, 2012 and has received and scrutinised a true copy of the European arrest warrant in this case. Moreover the Court has also inspected the original European arrest warrant which is on the Court's file and which bears this Court's endorsement. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity. The Court is satisfied following its consideration of these matters that:

(a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;

(b) the warrant was duly executed;

(c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) the warrant is in the correct form;

(e) the warrant is a conviction type warrant and the respondent, having been sentenced to nine months imprisonment by the District Court in Szczecin on the 21st of January 2004, in case reference no. XIV 621/03, in respect of the single offence particularised in Part E of the warrant, is wanted in Poland to serve an outstanding balance of three months and five days imprisonment in respect of that sentence;

(f) Both correspondence and minimum gravity require to be demonstrated in the circumstances of this case;

(g) Correspondence can readily be demonstrated with the offence of possession of a controlled drug for sale or supply, contrary to s. 15 of the Misuse of Drugs Act 1977;

(h) The threshold for the purposes of minimum gravity is that the respondent should have received a sentence of at least four months imprisonment or detention in the issuing state. The sentence imposed in this case was one of nine months imprisonment and so the minimum gravity requirement is satisfied;

(i) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(h) There are no circumstances that would cause the Court to refuse to surrender the respondent under ss. 21A, 22, 23 or 24 of the Act of 2003 as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004, S.I. No. 206/2004 (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA).

The Points of Objection:
The respondent filed a number of points of objection but not all of them were proceeded with at the hearing. The relevant points of objection are as follows:

> "1. The surrender of the Respondent in respect of the matters the subject of the European arrest warrant is prohibited by the provisions of Part 3 of the European Arrest Warrant Act, 2003, as amended, and in particular his surrender is so prohibited by section 37 thereof on the grounds of the breach of his Constitutional and Convention Rights, is prohibited by section 38 on the grounds of the lack of correspondence and is prohibited by section 41 on the grounds of "double jeopardy"
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> 2. Without prejudice to the foregoing, the offence in respect of which the Respondent's surrender is sought is now nine years old and he has strong personal and family ties in this jurisdiction and his surrender would violate the Constitution and the Convention.
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> 3. Without prejudice to the foregoing, the offences the subject matter of the within proceedings were previously the subject of a European arrest warrant that issued in Poland on 13th April 2010 and the those proceedings were unilaterally and without adequate explanation withdrawn by the Applicant herein on 15th November 2011 that being the date fixed by this Honourable Court for the hearing of the application for surrender under section 16 of the European Arrest Warrant Act, 2003, as amended.
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> 4. Without prejudice to both the foregoing, if the Respondent is surrendered to Poland he will be exposed to prison conditions and/or there will be inadequate facilities to cater for his medical condition thereby causing concern for his health such that his fundamental rights would be infringed and/or and in all the circumstances there are substantial grounds for so believing he will be exposed to a real risk to his health and well-being and/or of ill-treatment and/or inhumane or degrading treatment.
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> 5. [Not being proceeded with]
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> 6. Without prejudice to the foregoing, whereas the Respondent herein was the subject of a suspended sentence in Poland for the offences outlined in the European arrest warrant and although that suspension was irregularly lifted in Poland in 2004 rendering operative the sentence, that decision to lift the suspension has since been reversed and the Respondent is not now required to serve sentence.
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> 7. The surrender of the Respondent would be disproportionate and unfair in all the circumstances."

The respondent's points of objection are unsatisfactory in as much as they purport (in objection no. 7) to raise a proportionality issue but fail to identify the right (or rights) that it is alleged would be disproportionately interfered with in the event of the respondent being surrendered. In response to a query in that regard raised by the Court, counsel for the respondent indicated orally that he would seek to rely upon the right to respect for family life under Article 8 of the European Convention on Human Rights (hereinafter "the ECHR"), the right to family life under Article 41 of the Constitution of Ireland, the right to liberty under Article 40 of the Constitution of Ireland, and what counsel described as the respondent's "right to an absence of oppressive behaviour", which he further characterised as being "an un-enumerated right within Article 40".

In the Court's view objection no. 7 as pleaded does not comply with Order 98 Rule 5 of the Rules of the Superior Courts. The Rules require that the points of objection should contain "a statement in summary form of the grounds and of the material facts on which the person relies to resist the execution of the European arrest warrant". It is not enough to simply plead that the surrender of the respondent would be disproportionate. Proportionality does not exist as a stand alone and autonomous legal concept. It is concerned with legal relativity. Something is said to be proportionate or disproportionate to something else. It is concerned with the inter-relationship between (i) an action (or intended action) by one party; (ii) the objective that is sought to be achieved by that action (or intended action); and (iii) the consequences (or potential consequences) of that action (or intended action) for another party (or other parties). Therefore, one speaks of an action carried out in pursuit of a legitimate objective as representing either a proportionate or disproportionate interference with rights or interests of another party who will be (or may be) affected by that action. Both the applicant and the Court are entitled to have the right or interest that it is contended will be adversely affected specifically identified in the respondent's points of objection. That was not done here.

Counsel for the respondent also indicated that, within the parameters of objection no. 3, he wished to make the case that the issuing state, in pursuing the respondent on foot of a third warrant, was engaging in an abuse of the process of this Court. Counsel accepted that the words "abuse of the process" do not appear anywhere within objection no. 3. However, he stated, both the Court and the applicant were made aware at the endorsement stage of these proceedings that an abuse of the process argument would be made. Unusually, and exceptionally, counsel for the respondent had intervened at the endorsement stage and had urged the Court not to endorse the warrant in all the circumstances of the case, and particularly having regard to the fact that the warrant in this case was a third warrant, two earlier warrants having been withdrawn at the eleventh hour. Counsel for the applicant accepts that that is so. Nevertheless, in this Court's view it is a serious matter to allege that an issuing state, or issuing judicial authority, is abusing, or attempting to abuse, the process of this Court, and it really ought to have been pleaded in specific terms.

In circumstances where counsel for the applicant was not objecting, I was persuaded, exceptionally and with some reluctance, that the interests of justice required that counsel for the respondent should be permitted to advance his proportionality argument on the basis indicated by him orally at the hearing. The Court also agreed that he could advance his abuse of the process argument, notwithstanding the inadequacy of the pleading, in circumstances where the applicant was not objecting and it was accepted that an early oral indication had been given of an intention to pursue that aspect of the matter.

However, and for the benefit of practitioners in future cases, the indulgence shown to the respondent in this case is not to be taken as representing a precedent. I wish the message to go out that points of objection pleaded with excessive generality and with insufficient specificity, risk being struck out or disallowed. Moreover, late applications to add basic particulars that should have pleaded in the first place, will in future have to be made by Notice of Motion and be grounded upon an affidavit demonstrating good and substantial reasons as to why the Rules of the Superior Courts were not adhered to in the particular case, and why the late amendment should be allowed in the circumstances of the case notwithstanding non-adherence to the Rules.

Evidence on behalf of the Respondent:
The Court has before it an affidavit sworn by the respondent on the 12th June, 2012, the material portion of which states:

> "2. I beg to refer to the European arrest warrant that issued in my case on 20th March 2012 and that was indorsed by this Honourable Court on 24th April 2012. This is the third European arrest warrant that has issued in my case and it is the third time I have been arrested in the last eighteen months. The first set of proceedings was withdrawn on 15th November 2011, the date fixed for hearing under section 16 of the European Arrest Warrant Act. I was arrested on the

second warrant on 7th December 2012 and this was withdrawn on 17th April 2012. I also beg to refer to true copies of the other European arrest warrants when produced.

3. I was born in Szczecin, Poland, on June 6th 1979. My mother passed away in 1994 after she lost her battle with cancer. After mum's death my father was distraught, he became depressed and he developed a serious drink habit. He regularly came home drunk and did not remember anything even that there were three children waiting for him to come home and provide for us. I was 15 year old at the time, my brother was 13 years and our little sister was only 10 years old. It was really tough for us. Although we had two older half-sisters, they lived in other towns and had their own small children and babies to look after. We felt so lost and helpless.

4. The next few years were really tough. It was very difficult to go through each minute of every day wanting to turn around and leave, but I was only teenage boy. My Father fell deeper into drinking and poverty, soon we had no food, electricity and gas due to bills were not paid. The only option was to sell the house to pay the bills. So my Father, my brother, little sister and I soon moved into the one bedroom apartment. Instead of finishing school my brother and I had to start looking for a job. Unfortunately a decision was taken that our little sister should be taken away from my father because he was not able to look after her. We lost contact with her, she was living now in another town and we could only visit her at Christmas or Easter time. Life was not getting better.

5. In year 2000, my 26-year old half-sister who was married, and had a little girl age 6 (born exactly the same year and month that our Mum passed away) decided to take care of me. I moved in with my sister, my brother-in-law and my little niece. My sister did the best as she could to support me and help me to get a proper job. Meantime I babysit her little girl when she and her husband were at work. In September 2000, myself and my brother-in-law left a party late at night, we both were drunk so we decided to walk home. I was too drunk to remember anything but in general, the same night we were taken to the police station and very next day I was informed that we had an issue and argument with military officers. I could not give my statement while I was interviewed by Police because I was too drunk to remember anything. The same day myself and my brother-in-law were put into custody. I was told that I was to be kept in custody awaiting a trial.

6. In October 2000 while I was still on remand in custody in prison I collapsed and had to be removed to the Intensive Care Unit (ICU) of the prison's hospital in Szczecin where I was admitted in an unconscious condition. I was in coma for a week. A CT head scan was held and the diagnosis was of a cerebral oedema and coma *causa ignota*, (brain edema, coma and fever of unknown origin). Although further laboratory tests were performed (toxicology screening), abdominal ultrasonography, cerebrospinal fluid examination, lungs RTG. Tests showed that I had no chemicals in my system, I was not intoxicated, all urine and blood tests were negative. All my organs were in good conditions and there was no inflammation of lung tissue. I believe there was no evaluation of soft tissue or general examination such as an inspection or analysis of my skin for bruises, wounds, cuts, scrapes etc. In my medical history the finding was: coma *causa ignota* and retrograde amnesia because I was not able to recall events that occurred before I collapsed. The polish doctors were unable to comment upon what caused the coma. I believe that life threatening incident was never properly investigated or explained. That time I could not afford to pay solicitor to assist me.

7. In November 2000, my sister collected me right from the hospital, as I was told I am free to go. I stayed with my sister as she looked after me. It took a long time for me to fully return to normal. Six months after the incident the Court informed me that it would make a final decision on 21st March 2001. On that day the Court imposed a 2 year sentence of imprisonment but suspended it for a probation period of 5 years. As a free person and with help from my sister I found a job and decided to continue my education. I got back in touch with my younger brother and sister as well and I often visited them while they were in my father's house.

8. In year 2003 I was arrested for a drug related matter and I was kept in custody again. Prison conditions were horrible, inhumane, not to mention guards abusing their position of authority. I was packed in a very small cell with another seven other people awaiting for the trial. It was overcrowded, stuffy, smelly, dark, filthy, (we were allowed to take shower once a week and the bathroom was outside the cell) inside there was only one sink and an open toilet. I was awaiting trial for the next six months. Then in January 2004 I was taken straight from the prison to the Court when I was told that a nine months sentence was imposed. That very same day I was told that I was free to go. From 21st January 2004 I have tried to put my life back together. However, unfortunately I could not continue with my schooling because it was too late and I could not find a job. In May 2004 I informed my probation officer of my intention to leave Poland because I could not ask my family any longer for financial support. I decided to leave Poland in July 2004 to find a job and better life.

9. In July 2004 my partner and I came to Ireland, both we found job very quickly, I was working full time during the week plus the weekends, my partner had a full time position as well. Soon enough my partner became pregnant. We started to save money and to look forward to our future as a family. In January 2005 our son was born in the Coombe hospital, Dublin. Since then all three of us have been a very happy family. We had an independent happy life, we were financially independent and as parents we were completely focused on our little boy. Time passed in Ireland. I got my driving licence, attended English classes, did my safe-pass, got my fork lift licence. Our son finished playschool, went to school Junior Infants class.

10. When the recession hit I lost my job but luckily in 2009 as Irish residents we were offered a new apartment from Kildare County Council. We moved in and spent the next year furnishing the place. That is where we now live happily together.

11. In September 2010, my son started senior infants class and the same month I was arrested by Gardai who explained to me that Poland had issued European Arrest Warrant. I was shocked as by that time I had been living in Ireland more than six years and I knew nothing about the warrant. I could not understand the situation. I had been in regular contact with my sister who lived at my contact address in Poland and she had heard nothing either.

12. The European arrest warrant concerned a request for my surrender to serve three month sentence for the drugs offence committed in 2003 XIX K 621/03 the subject of this current request and also a cumulative one year, ten month and thirteen day sentence III K 389/00 for assaulting and insulting military police in 2000.

13. I contacted a Polish lawyer to help me and I explained to him my understanding of what had happened in Poland. The Polish lawyer investigated the matter and I now understand that the suspension of the sentence in 2001 had been lifted in 2004 without informing me.

14 I understand that what occurred in Poland in relation to the lifting of the suspension was quite irregular and was remedied and reversed by the Regional Court. I beg to refer to a true copy translation of the decision of the Regional Court in Szczecin of 18th October 2011 upon which marked with the letters "KS-1" I have signed my name prior to the swearing hereof.

15. I spent practically the entire of 2011 worrying about being surrendered to Poland to serve a prison sentence as I have very bad memories of my time there. I was agitated and stressed and I believe that was very detrimental to me. However when I got the good news about the Polish court determination in relation to the invalidity attaching to the lifting of the suspension I became more relaxed. However, it was only on 15th November 2011 when the Irish High Court was informed that the surrender request was being withdrawn by the Polish authorities, that I could properly relax. I do not recall any explanation being furnished to this Court as to why the request was being withdrawn.

16. I was very disappointed to subsequently learn that the Polish authorities decided to issue a new warrant and again sought my surrender. They issued the new (second) warrant for the offences against the military committed in 2000 and they did not proceed against me for the drugs offence the subject of the current warrant.

17. After the second warrant was withdrawn on 17th April 2012 I was arrested on 24th April 2012 for this current warrant concerning the same drugs offence that featured in the first request but withdrawn without explanation on 15th November 2011.

18. I believe the decision to proceed against me for a third time in the circumstances such as they have done so is very unfair and unjust and I am advised that it does not conform with the requirement to show due respect to this Court. It has again caused me worry and anxiety.

19. It is now June 2012. My partner is afraid of being left on her own with little child and I just cannot imagine leaving the life I now have in light of my background in Poland. I have almost a perfect life in Ireland. We are a happy family integrated into Ireland and I shudder at the thought that I could lose it all be required to go back to the place I have left behind and have tried to forgot as I forge a new life in Ireland.

20. I am 33 years old. Since 2009 I have been diagnosed by my Irish G.P. with both hypertension and hypercholesterolaemia. It is in my family history and perhaps it should have been diagnosed in Poland. I understand it is quite serious and I am on daily medication (tablets) to control that and I understand I will have to stay on tablets probably for the rest of my life. Every month I get new prescription from his doctor. Against that background and all the matters outlined in this affidavit, I do not want to return to Poland.

21. I believe it would be disproportionate, unjust and fundamentally unfair to surrender me to Poland given the long passage of time and all that has occurred in the case."

Procedural History:
It is common case that there have been two previous European arrest warrants in relation to this respondent. The first of these was dated the 13th April, 2010. It covered the single drugs offence which is the subject of the present warrant, and also two public order type offences. It was endorsed and executed in this jurisdiction but was subsequently withdrawn by the Polish authorities and no surrender was effected on foot of it. A new (second) warrant was issued dated the 8th November, 2011. The new warrant related only to the two public order offences, and did not cover the present drugs offence. That warrant was also withdrawn. The present (third) warrant, dated 20th March, 2012, covers the drugs offence alone.

Counsel for the applicant has referred the Court to additional information from the issuing judicial authority dated the 4th April, 2012, which had in fact been opened previously to the Court at the endorsement stage of these proceedings, and which seeks to explain the procedural history. The additional information states:

"The European Arrest Warrant dated 13.04.2010 was limited by the decision of this Court dated 8.11.2011 to case XIV K 621/03 of the Szczecin - Right Bank and West District Court and due to the above a new warrant was issued on 8.11.2011.

The Irish authorities were informed about the above in the letter dated 10.11.2011.

A new warrant was issued on 20.03.2012 because the European Arrest Warrant dated 8 11.2011 contained errors. The appropriate documents were forwarded to the Irish authorities on 20.03.2012.

In view of the above, please carry out the proceedings on foot of the new warrant issued on 20.03.2012."

Counsel for the applicant has confirmed to the Court that no order for surrender was made either on foot of the warrant dated the 13th April, 2010, or on foot of the warrant dated the 8th November, 2011. Both warrants were withdrawn on hearing dates, or just shortly before hearing dates. Counsel for the applicant admits that both warrants were withdrawn very late in the day, but emphasises that in neither instance was there any finding on the merits, nor was any substantive order made.

The Court has had the opportunity to inspect all three European arrest warrants.

Some further light has been shed on the matter in the following circumstances. The Court has been informed by counsel for the applicant that, in relation to the incident described by the respondent at paragraph 5 of his affidavit, the respondent was charged with the two public order offences referred to earlier in this judgment. Moreover, it appears from further additional information exhibited with the affidavit of the respondent consisting of a Decision of the Regional Court in Szczecin (5th Division for Penitentiary Affairs and Supervision of the Execution of Criminal Judgments) dated the 18th October, 2011, that a cumulative sentence of 2 years imprisonment was imposed upon the respondent for these offences by the Regional Court in Szczecin, Poland on the 12th March, 2001, but it was initially suspended. Subsequent to that, on the 9th November, 2004, the suspension was lifted by the District Court in Szczecin because the respondent had committed another offence within the period of his probation (the drugs offence to which the present (third) warrant now solely relates), and the respondent was called upon to serve this sentence. He did not turn up to serve his sentence when called upon to do so, and as a result a domestic wanted notice was issued for him in the first instance. Then, as it was suspected that he had gone abroad, a European arrest warrant, dated the 13th April 2010, was also issued for him. This European arrest warrant included both these public order offences and also the drugs offence in question. It appears that subsequent to the execution of the European arrest warrant of the 13th April, 2010 in this State, but before the scheduled surrender hearing in

this Court, a case was made to the Regional Court in Szczecin, 3rd Penal Division, on behalf of the respondent that the suspension of the sentence in respect of the public order offences had been wrongly lifted (the basis of this argument is not relevant), and seemingly this contention was accepted by the Regional Court which issued a reasoned decision on the 18th October, 2011 overruling the decision of the District Court in Szczecin of the 9th November, 2004. On the 8th November, 2011 the Regional Court, ostensibly for the purpose of giving effect to its decision of the 18th October, 2011, limited the European arrest warrant dated the 13th April, 2010 to Case XIV K 621/03 (the drugs case). This resulted in the warrant of the 13th April, 2010 being withdrawn.

The precise circumstances and chronology in which that warrant came to be withdrawn are as follows. On the 8th November, 2011, the Regional Court made its Order limiting the European arrest warrant dated the 13th April, 2010 to Case XIV K 621/03 (the drugs case) and two days later it forwarded a new European arrest warrant dated 8th November, 2011 (the second warrant) under cover of a letter dated the 10th November, 2011 to the Irish Central Authority. That letter was in the following terms:

> "The Regional Court in Szczecin, 3rd Penal Division, is kindly sending the European Arrest Warrant concerning Karol Staniak, bom on 6.06.1979 in Szczecin, son of [J.S.], and is informing that the warrant sent on 5.05.2010 is not valid any more. The decision of the Court dated 8.11.2010 limited the European Arrest Warrant concerning Karol Staniak issued by the decision of the Regional Court in Szczecin dated 13.04.2010 in cases XIV K 621/03 of the Szczecin-Right Bank and West District Court in Szczecin and III K 389/00 of the Regional Court in Szczecin to case XIV K 621/03 of the Szczecin-Right Bank and West District Court, and due to the above a new warrant was issued. Please carry out the proceedings according to the new warrant."

This Court was then informed on the 15th November, 2012 that the warrant of the 13th April, 2010 was being withdrawn, and that the issuing judicial authority would be seeking to start again on foot of a new (second) European arrest warrant.

It is clearly to be inferred from the letter of the 10th November, 2011 that the new (second) European arrest warrant was intended to cover only the drugs offence, i.e., case XIV K 621/03, as the Regional Court had expressed its unequivocal intention of limiting the warrant to that case. However, for unexplained reasons, although it may be reasonably be inferred that it was due to some administrative error, the second warrant did not in fact seek the surrender of the respondent in respect of the drugs offence, but rather incorrectly sought his surrender for the public order offences in respect of which there was now a re-instated suspended sentence. When the error was realised, it was decided that this second warrant would also have to be withdrawn. The actual withdrawal occurred on the 17th April, 2012 (It is perhaps remarkable that the second warrant was put forward for endorsement at all, given the terms of the letter of the 10th November, 2012, but no bad faith is suggested on the part of the Central Authority here. Whatever the reason for not doing so, it seems that the Central Authority did not advert to the error until after the second warrant had been put forward for endorsement, and, indeed, had been executed.)

The third and present European arrest warrant was issued on the 20th March, 2012 to replace the incorrect warrant dated the 8th November, 2011, and is correctly concerned only with the drugs offence the subject of case XIV K 621/03.

Submissions on behalf of the Respondent:
Counsel for the respondent has argued that it would be wholly unfair and oppressive to surrender his client to the issuing state in all the circumstances of this case. He points to the fact that his client came to Ireland when Poland joined the European Union to look for work. His evidence, which is uncontroverted, is that he was told by a court in Poland that he could go. While the overall sentence of nine months imprisonment admittedly scales the minimum gravity threshold, the balance to be served is only three months and five days. In addition, there has been significant delay in the case. Although his conviction dates from the 21st January, 2004, the first European arrest warrant was not issued until the 13th April, 2010. That warrant was withdrawn in the circumstances already rehearsed, and the present warrant represents the third attempt to extradite him for this matter. In the period since coming to Ireland he has put down roots here, he has not come to adverse notice and he is contributing positively to his family and to the community in which he lives.

It was further submitted that the Court should regard the situation in the respondent's case as being analogous to an attempt by the Director of Public Prosecutors to "come again" after a *nolle prosequi* has been entered in a criminal case. While acknowledging that the taking of such a step is theoretically possible, it was submitted that the convention is that the Irish courts will only permit it in exceptional circumstances. It was submitted that a similar approach must be adopted to attempts by an issuing state to "come again" on foot of a second or subsequent European arrest warrant where a previous attempt (or attempts) to secure the respondent's extradition either failed, or was/were aborted. It was urged that a respondent is entitled to certainty and to assurance that a proceeding that has been pursued against him unsuccessfully, or which having been commenced was abandoned without being adjudicated upon, has brought matters to an end.

The Court was referred to a number of cases including *Kwok Ming Wan v. Conroy* [1998] 3. I.R. 527; *O'Keeffe v. O'Toole* [2008] I.R. 227 and *Minister for Justice, Equality and Law Reform v. Tobin* [2012] I.E.S.C. 37 (Unreported, Supreme Court, 19th June, 2012).

Although counsel for the respondent was prepared to acknowledge that *Kwok Ming Wan v. Conroy* and *O'Keeffe v. O'Toole*, respectively, concerned the application of s. 50(2)(bbb) of the Extradition Act, 1965 (hereinafter "the Act of 1965"), which provision has been repealed by s. 50 of the Act of 2003, he urged upon the Court that, as it "must be part of the EAW scheme not to surrender if it would be unjust, invidious or oppressive to do so" (to quote his submission *verbatim* from the DAR record), regard should nevertheless be had to these cases as illustrating how the principle has been applied in the admittedly somewhat different context of traditional extradition arrangements.

In so far as reliance was being placed by the respondent upon the Supreme Court's decision in the recent Tobin case, counsel urged that the persistent attempts to extradite his client must, in the circumstances of this case, be regarded as an attempt by the Polish authorities to abuse the process of this Court. In support of this suggestion particular reliance was placed on the following passages from para. 111 of the judgment of Hardiman J. in Tobin:

"Was there an abuse of process?

> Abuse of process is a many headed concept whose manifestations range from the deliberate maintenance of legal proceedings without of probable cause as in *Dorene v. Suedes* [1982] ILRM 126 to a ham fisted or unthought out conduct of litigation, particularly by making two or more actions where one would do, which tends to oppress the other party and to cause him expense and/or distress."

The learned Supreme Court judge then proceeded to review the caselaw on abuse of the process including the cases of *Henderson v. Henderson* (1843) 3 Hare 100; *AA v. the Medical Council* [2003] 4 I.R. 302; Johnson v. Gore Wood and Company [2002] 2 A.C. 1;

Woodhouse v. Consignia PLC [2002] 1 W.L.R. 2258; *Gairy v. Attorney General of Granada* [2002] 1 A.C. 167; In *Re Vantive Holdings* [2009] 2 I.R. 118; In *Re Greendale Developments Limited* [2000] 2 I.R. 514 and *Hamburg Public Prosecutors Office v. Altun* [2011] E.W.H.C. 397 (Admin). He then continued at para. 129:-

> "I wish to emphasise certain phrases from the cases just cited, firstly the reference in *Johnson v. Gore Wood*, to "the underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter". Secondly, the fact that it is unnecessary "before abuse may be found, to identify any additional element such as collateral attack on a previous decision, or some dishonesty…". Thirdly, to the need "to protect the respondents to successive applications… from oppression" and fourthly, the emphasis on the desirability "… that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do", and the important legal value of "finality", so as to provide "closure" for the parties.
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> It appears, therefore, to be well established that abuse of process of the sort alleged here is separate and distinct from *res judicata*, which is not relied upon in the circumstances of this case. It is, instead, a separate but conceptually related weapon in the armoury of the Courts to protect a litigant from oppression or harassment, to use two of the words employed in the cases. It is necessary that the Court should have such powers, over and above the strict rules of *res judicata*, because the right to be free of harassment and vexatious litigation, and to fair procedures and equality of arms in litigation, are rights of a Constitutional nature and arise fundamentally from respect for the dignity of the human person. It is salutary to recall the important if general words spoken in this Court by Ó Dálaigh C.J. in *The State (Quinn) v. Ryan* [1965] IR 70, at 122:
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> > "It was not the intention of the Constitution in safeguarding the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary that follows no-one can within impunity set those rights at nought or circumvent them, and that the Courts powers in this regard are as ample as the defence of the Constitution requires".
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> A specific application of those principles arose in *The State (O'Callaghan v. h-Úadhaigh* [1977] IR 42. There, Finlay P. (as he then was) was dealing with a case of a defendant who, as a result of an application for a direction at the end of his criminal trial in the Central Criminal Court, was about to succeed in relation to all but one of the numerous charges against him. This was clear from the learned trial judge's expression of his view of the law. In that situation, the State entered a *nolle prosequi* bringing the trial to an end, and subsequently sought to prosecute O'Callaghan again on the same charges, hoping for a new trial before a different judge where it might be possible to avoid the consequences of the learned trial judge's view of the law. It would have been possible to deal with that case on a purely technical basis related to the requirements for the entry of a *nolle prosequi* but Finlay P. addressed the issue in principle, as follows:
>
> > "If the contention of the [State] is correct, the [defendant] having undergone that form of trial (and remand awaiting trial) and having succeeded in confining the issues to be tried, would be deprived of all that advantage by the simple operation of the statutory power on the part of the Director of Public Prosecutions. In that way, the [defendant] would have the entire of his remand awaiting trial set at nought and he would have to start afresh to face a criminal prosecution in which the prosecution, by adopting a different procedure, could avoid the consequences of the learned trial judge's view of the law. No such right exists in the accused: if the trial judge makes decisions adverse to the interests of the accused, the latter cannot obtain relief from them otherwise than by an appeal…
> >
> > It seems to me that so to interpret the provisions of s.12 of the Act of 1924 as to create such an extraordinary imbalance between the rights and powers of the prosecution and those of the accused respectively, and to give the Director such a relative independence from the decision of the Court in any trial, would be to concur in a proposition of law that would singly have failed to import fairness and fair procedures".
>
> I regard this as an illuminating passage and would very respectfully adopt what was said by the learned judge. I would particularly emphasise his invocation of the concepts of "an extraordinary imbalance between the rights and the powers of the prosecution and those of the accused respectively"; to the necessity to avoid such an imbalance in order to ensure fairness and fair procedure."

Submissions on behalf of the Applicant

Counsel for the applicant submitted that notwithstanding the plea in the points of objection (which in fairness was not pursued in oral argument by the respondent) the issue of double jeopardy does not arise. The respondent has not been convicted twice. The issuance of a second or subsequent European arrest warrant, in circumstances where previous warrants were withdrawn or not proceeded with, does not engage the prohibition on double jeopardy */ ne bis in idem principle*. Section 41 of the Act of 2003 has no application in the circumstances.

Counsel for the applicant further submitted there is clear authority for the proposition that in an appropriate case there may be a second or subsequent attempt to extradite a respondent.

It was submitted that there is nothing inappropriate, or abusive of this Court's process, in the issuing judicial authority asking this Court to execute and give effect to the present (third) European arrest warrant. The circumstances of the present case are clearly distinguishable from the circumstances in Tobin in as much as there has been no previous order refusing to surrender the respondent, and equally there has been no attempt to unfairly exploit or take advantage of a change in the law, as had occurred in *Tobin*.

In so far as it is suggested that the present proceedings are oppressive of the respondent, and that to surrender him would be a disproportionate interference with the rights nominated by counsel for the respondent, counsel for the applicant urged the Court to reject these suggestions. It was submitted that the present proceedings are not oppressive of the respondent in terms of his fundamental rights. A sentence of nine months was imposed upon him in the issuing state, of which three months remains to be served, and such a sentence is unremarkable. Indeed, if anything, it indicates, on the contrary, that he was not treated unduly harshly or oppressively by the Courts of the issuing state. Moreover, the case meets the requirements of Framework Decision (reflected in s. 38 of the Act of 2003) in terms of minimum gravity. It was submitted that it is an entirely legitimate aim for the issuing

state to seek his surrender in the circumstances.

On the issue of proportionality, it was urged that Article 41 of the Constitution of Ireland is simply not engaged in circumstances where the respondent is not married. The applicant submitted that in so far as the respondent's Article 8 rights under the ECHR are concerned, and those of his partner and child, there are no truly exceptional circumstances that would justify the Court in not surrendering the respondent on Article 8 grounds. In so far as the right to liberty under Article 40 is concerned, the applicant submits that the right to liberty is not an absolute right and it may legitimately be abrogated in appropriate circumstances, as happens day in and day out in our Courts when people are lawfully sentenced to imprisonment or detention. According to the applicant, there is nothing in the circumstances of the present case to suggest that to surrender the respondent to serve the remaining three months of his sentence would breach his right to liberty, or that it would in some way constitute a disproportionate interference with his right to liberty.

Finally, it was urged that far from being an abuse of the process, the steps taken in this case showed respect for the process.

The Court's Decision:
The Court is satisfied that the applicant's submission that in an appropriate case there may be a second or subsequent attempt to extradite a respondent is correct; the crucial words, however, being "in an appropriate case". The right to come again in an appropriate case within the context of traditional extradition arrangements was established in *Bolger v. O'Toole* (Unreported, Supreme Court, 2nd December 2002), a case relied upon by the Minister in Tobin; and, in the European arrest warrant context, in the cases of *Minister for Justice, Equality and Law Reform v. O'Fallúin* [2010] I.E.S.C. 37 (unreported, Supreme Court, 19th May 2010) (see in particular the judgment of Finnegan J.) and *Minister for Justice, Equality and Law Reform v. Koncis* [2011] I.E.S.C. 37 (Unreported, Supreme Court, 29th July, 2011).

In *Tobin* there had been a substantive determination in the respondent's favour that resulted in his non-surrender. The law was then changed in Ireland so as to remove, for future cases, the obstacle to surrender that had benefited the respondent. The goalposts, so to speak, were moved by an amendment to s. 10 of the Act of 2003 (as substituted by s. 71 of the Criminal Justice (Terrorist Offences) Act, 2005) effected by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act, 2009. The issuing state sought to take advantage of this change in the law by issuing a second warrant. This was considered, certainly by Hardiman J., to be unfair, oppressive and an abuse of the process in all the circumstances of the particular case, including, inter alia, the delay involved, the multiple court hearings involved, the respondent's entitlement to legal certainty and to believe that matters were at an end following a substantive ruling his favour in the first proceedings, and his non-fugitive status.

However, in the present case a very important distinguishing feature is that there has been no substantive ruling in the respondent's favour at any stage. The first substantive consideration given by a Court in this State to the issue of whether or not the respondent should be surrendered, on any of the three warrants, was at the s. 16 hearing in the present proceedings. In the case of both the first and second warrants there was a withdrawal before the Court had embarked upon any consideration of whether or not the respondent should be surrendered. Moreover, unlike in Tobin, no expectation that the matter might be at an end was encouraged in the present respondent's mind following the withdrawal of the first warrant. On the contrary, the letter of the 10th November, 2011 made it plain that a new warrant was to be issued and that, in the light of the Regional Court's Order of the 8th December, 2011, it could only relate to the drugs offence. Equally, following the execution of the second warrant it must have been immediately obvious to the respondent, and indeed to his solicitors (who it may be inferred would not have been dealing with anything like the number of warrants that the solicitors for the Central Authority would be dealing with at any point in time, and therefore were more readily in a position to spot an error of the type that arose in this case), that it related to the wrong offence and would almost certainly be withdrawn shortly thereafter, as in fact occurred. In the circumstances, this is not a case in which the respondent was led into a false sense of security and induced to believe that the matter was at an end. In fact, all the indicators were to the contrary. The Court does not consider that there has been any attempt to abuse its process in the circumstances of this case.

Further, the Court agrees with the submission of the applicant that as a matter of fact these proceedings have not been oppressive of the respondent, at least in terms of his fundamental rights. In so holding, I have afforded the same meaning to the notion of oppression as that afforded by Smyth J. at first instance in *Kwok Ming Wan v. Conroy* [1998] 3. I.R. 527, *i.e.*, that oppression means "imposing hardship in the sense of being unduly harsh". It is noteworthy in particular that although the respondent asserts in his affidavit that he has been caused worry and anxiety, there is no suggestion that that this has caused him illness or any physical or mental pathology. There has been no medical evidence of any sort placed before the Court suggestive of that.

Though I do not wish to express a definitive view on it, it being unnecessary to do so in the circumstances where I find as a fact that the respondent has not been oppressed in terms of his fundamental rights, I am not inclined to agree with counsel for the respondent that there is a "right to an absence of oppressive behaviour", and that this is itself "an un-enumerated right within Article 40" of the Constitution.

In addition, I am not inclined to accept that, as a general proposition, it "must be part of the EAW scheme not to surrender if it would be …oppressive to do so", at least to the extent that that may be interpreted as suggesting that there exists a wide and free-standing non-statutory jurisdiction in that regard, and one which broadly equates to the former statutory jurisdiction under s. 50(2)(bbb) of the Act of 1965 that used to exist in the case of traditional extradition.

That said, I accept unhesitatingly that oppression may indeed be relevant and capable of giving rise to non-surrender in certain specific situations provided for by statute, namely those now catered for by s. 37 of the Act of 2003. Accordingly, if by reason of oppressive circumstances, whatever they might be (considered individually or cumulatively), to surrender the respondent would result in a breach of the respondent's fundamental rights, arising either under the Constitution or under the ECHR, the Court is obliged not to surrender him or her by virtue of s. 37.

Moreover, even if there was no statutory jurisdiction such as that provided by the present s. 37 of the Act of 2003, I consider that the Court would have a jurisdiction in any event deriving directly from the Constitution to refuse to surrender a person if to do so would breach that person's personal rights as guaranteed under the Constitution, whether those rights be enumerated or un-enumerated. This necessarily arises, in my view, by virtue of the constitutional guarantee in Article 40.3.1o that the State in its laws should respect, and, as far as practicable, by its laws defend and vindicate the personal rights of the citizen (although the Court notes the remarks of the Supreme Court in Re *Article 26 and the Offences Against the State (Amendment) Bill*, 1940 [1940] I.R. 470 at 481 that, on one view of it, might support a contrary view), and also, in the vast majority of cases, by virtue of the further constitutional guarantee in Article 40.3.2^{o} that the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

The important point in regard to such jurisdiction as does exist, whether it be statutory or constitutional, is that oppression must

reach a threshold level before the Court can act upon it. It must lead to, or be likely to lead to (or in some instances, such as where Article 3 of the ECHR is engaged, merely give rise to a real risk of), breach of some fundamental right or rights enjoyed by the respondent. Not all circumstances that might be regarded as oppressive will breach fundamental rights. It is perfectly possible for circumstances to oppress at a level below the threshold that I have identified. For example, a person may be put to trouble or inconvenience, even severe inconvenience, without that person having his or her fundamental rights breached. On the other hand, if, in the example given, the trouble or inconvenience generated stress that in turn caused physical or mental illness, then arguably the threshold would have been reached because of impingement upon the right to bodily integrity. Whether or not the threshold is reached in any instance must obviously depend on the facts of the particular case.

However, absent the existence of oppression at a level leading to a breach of constitutional or ECHR rights, there does not seem to be any statutory, common law or inherent jurisdiction not to surrender on grounds of oppression that does not reach that threshold of severity.

Moreover, to not surrender a respondent on the grounds of the existence of oppressive circumstances at a level that impinges upon fundamental rights is often just to apply a proportionality test, and to conclude that surrender would in the circumstances of the case constitute a disproportionate interference with the fundamental right(s) in question, whatever it or they might be, notwithstanding the legitimate aim being pursued. To approach matters in this way is, in this Court's view, perfectly acceptable and constitutes an approach consistent with our Constitution, with the ECHR, with the Act of 2003, and indeed with the Framework Decision, to the extent that direct regard can still be had to the latter post the enactment of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (hereinafter "the Act of 2012"). (The Act of 2012 removed the words "and the Framework Decision" from various sections of the Act of 2003 as previously enacted, including from s. 10 of the Act of 2003, an amendment which is particularly relevant in this context.) Some rights are absolute, of course, such as those under Article 3 of the ECHR, and in the case of absolute rights considerations of proportionality do not arise because any interference at all, or even a real risk of interference, with those rights will be enough to justify non-surrender.

In the present case, counsel for the respondent has confined his case, to the extent that it is based upon proportionality, to the right to respect for family life under Article 8 of the ECHR, the right to family life under Article 41 of the Constitution of Ireland, and the right to liberty under Article 40 of the Constitution of Ireland. It is necessary to consider the proportionality argument in the context of those rights. However, and as previously stated, counsel for the respondent also submitted that his client has, in addition, a further discrete, stand alone and un-enumerated "right to an absence of oppressive behaviour" within Article 40 (presumably within Article 40.3, specifically). As I have previously said, I am not convinced that a constitutional right exists in that form. Therefore I do not propose to address a proportionality argument in the context of what I believe to be a non-existent right.

In so far as Article 8 considerations are concerned, this Court has noted in *Minister for Justice Equality & Law Reform v. Bednarczyk* [2011] I.E.H.C. 136 (Unreported, High Court, Edwards J., 5th April, 2011) that Article 8(2) of the ECHR permits interference by a public authority with the exercise of the right to respect for family life where that is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". I went on to say that:-

> "It would be preposterous to suggest that persons could not, or should not, be sent to prison simply because that would interfere, and indeed significantly interfere, with their enjoyment of family life, or that the sending of persons, particularly any person with a spouse and children, to prison would amount to a failure to respect the right of those affected to family life. That is not to say that there can never be circumstances in which a person's imprisonment could amount to a failure to respect family life but such circumstances would be highly exceptional and are likely to be exceedingly rare. Before a Court would intervene in that regard it would have to be satisfied as to the existence of some truly exceptional circumstance that would render the usually permitted level of interference with family life that imprisonment normally entails unacceptable in the circumstances of the particular case and disrespectful of the right to family life as guaranteed by article 8."

These principles have most recently been applied by this Court in its judgment in *Minister for Justice Equality & Law Reform v. Machaczka* [2012] I.E.H.C. 434 (Unreported, High Court, Edwards J., 12th October, 2012), a case in which surrender was in fact refused on Article 8 grounds, the Court being satisfied as to the existence of truly exceptional circumstances in that case. The respondent in that case suffered from a serious psychiatric condition which placed him at grave risk of suicide the only effective medical treatment for which, while licensed in Ireland by the Irish Medicines Board, was not licensed in the issuing state, *i.e.* Poland. Further, even with medication, maintenance of the respondent's mental stability was heavily dependent on the strong support he was receiving from his family who were based in Ireland.

In the present case, however, there is nothing approaching the level of truly exceptional circumstances that would be required to justify non-surrender on Article 8 grounds. The Court has considered, and has taken account of, all of the evidence adduced by the respondent, and the submissions of counsel made on his behalf, but it does not consider that the evidence, such as it is, is sufficient to establish that the respondent's surrender would represent a disproportionate interference with his right, and the rights of his partner and child, to respect for family life. Indeed, while not dispositive of the issue in itself, the fact that he is only wanted to serve three months indicates the contrary. While accepting that it is not easy for any person to have to face prison, the period involved here is comparatively short and there is every reason to expect that the respondent will not have to abandon forever the new life that he has made in Ireland, nor uproot his family. There is no evidence to suggest that once he has served the relatively short remaining portion of his sentence that he will not be able to return to Ireland and pick up again the life, and particularly the family life, that he enjoys at present.

The Court agrees with Counsel for the applicant that Article 41 of the Constitution of Ireland has no application to a family that is not based on marriage.

In so far as the right to liberty is concerned, the right to liberty is not an absolute right. It may be abrogated in accordance with law. It is not normally inconsistent with the right to liberty, or in any way disproportionate, to require a person who has been lawfully sentenced to a term of imprisonment to have to serve that sentence. While the Court must accept that the respondent did not flee from the issuing state in the *Tobin* sense, the fact remains that he has not voluntarily returned to serve the balance of the sentence that he is now required to serve, and in those circumstances a European arrest warrant has been issued to bring him back. If, as a result of that, he is now deprived of his liberty he cannot complain in the Court's view. Moreover, this is not a case involving a person whose surrender is sought for the purposes of putting him on trial, and who has the benefit of the presumption of innocence. The respondent here is a convicted person. Accordingly, he will pursuant to Article 26 of the Framework Decision get full credit against the sentence that he has to serve in the issuing state for any time served in this jurisdiction in connection with these European arrest

warrant procedures. In those circumstances it cannot be said that to surrender him would represent a disproportionate interference with his right to liberty.

The Court also agrees with the submissions of counsel for the applicant to the effect that s. 41 of the Act of 2003 has no application to this case.

In so far as the objection based upon prison conditions is concerned, that was not proceeded with in argument. In addition, the evidence adduced by the respondent is of insufficient cogency to displace the presumption that the issuing state will respect the respondent's rights in the event that he is sent to prison there.

In all the circumstances of the case, the Court is not disposed to uphold any of the objections raised by the respondent to his surrender, and I will therefore make an Order under s. 16(1) of the Act of 2003 surrendering him to the issuing state.