THE HIGH COURT

[Record No. 2013/225 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ALAN GRAY

RESONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 7th day of March, 2016.

1. On 31st July, 2013, the section of the Judge in charge of Preliminary Investigations in the Court of Genoa, Italy, issued a European Arrest Warrant ("EAW") for the above respondent. The EAW seeks the surrender of respondent for the purpose of a criminal prosecution in relation to the alleged offences of:

> (a) Aggravated smuggling of foreign finished tobacco; and,
>
> (b) False swearing by a public officer and public documents by mistake determined by someone else's cheating.

The respondent's case was linked to, and heard with, the case of *Minister for Justice and Equality v. Patrick Meegan* in which I will also deliver judgment today. The respondent in that case and the respondent herein were represented by the same solicitor and junior and senior counsel and identical arguments were made in each case.

2. A number of points of objection were filed in this case. At the hearing of the applications for surrender, counsel for the respondent indicated that he was confining his opposition to two points. The major point of objection was that no decision had been made to charge and try the respondent in Italy and that surrender is therefore prohibited under s. 21A of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). A second objection concerned the putative lack of availability of bail in Italy.

Section 16 of the Act of 2003, as amended

Uncontroversial Issues

3. I am satisfied that the Minister for Foreign Affairs has by the European Arrest Warrant Act 2003 (Designated Member States) (No. 2) Order 2005 (SI. No. 240 of 2005), designated Italy as a member state that has, under its national law, given affect to the Framework Decision of 13th June, 2002 on the European Arrest Warrant and surrender procedures between Member States ("the 2002 Framework Decision").

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

5. Having scrutinised the EAW and the affidavit of Seán Fallon, member of An Garda Síochána, I am satisfied that Alan Gray is the person in respect of whom the EAW has been issued.

6. I am satisfied that the provisions of s. 45 of the Act of 2003 are not applicable to this EAW as it has been issued for the purpose of criminal prosecution.

7. I am satisfied that I am not required to refuse the respondent's surrender under s. 22, s. 23 or s. 24 of the Act of 2003, as amended.

8. In each case, the Italian judicial authority has ticked the box "forgery of administrative documents and trafficking therein", thereby indicating that the offences are offences to which Article 2 para. 2 of the 2002 Framework Decision on the EAW applies. The EAW sets out the circumstances of the offences as follows:

> "[a, b, c, d, e, f, and g] associated to commit more than one offence involving the smuggling of foreign finished tobacco; the cigarettes were imported from the Arab Emirates in containers, and were concealed by covering hauls. [The respondent] participated also as purchaser in the import of 9.890 kilograms of foreign finished tobacco on 13/12/2011, as a result a false customs statement was issued:
>
> the fact took place on 13/12/2011
>
> the fact was established in Genoa, where the container containing the cigarettes, subjected to the control of the Customs Agency, arrived."

9. The offences carry a custodial sentence or detention order of a maximum of at least three years. In all the circumstances, I am satisfied that there has been no manifest error in the ticking of the box. I am therefore satisfied that the provisions of s. 38 of the Act of 2003 do not prohibit the surrender of this respondent.

10. I am satisfied that the respondent's surrender is not prohibited by any section contained in Part 3 of the Act of 2003, as amended, subject to further consideration of s. 37 below in respect of the right to bail.

Points of Objection

Section 37 - The Right to Bail
11. In his points of objection, the respondent asserted he would be held in custody for the purpose of facilitating investigation with no right to apply for bail and that this would be in breach of his rights under Article 5 and Article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and that his constitutional rights would also be breached in that respect. He submitted that surrender was therefore prohibited under the provisions of s. 37(1) of the Act of 2003.

12. This objection was based upon a reply of the Italian issuing judicial authority to a request for information by the central authority as to whether this respondent could apply for bail if surrendered. The reply was as follows:

> "In case of surrender the Italian system does not provide for a bail or the equivalent of a bail while a trial for the offences contained in the Arrest Warrant is ongoing."

13. It was a curious feature of this case that the opinion of the Italian lawyer obtained by the respondent, had in fact stated that the respondent might submit an application for release or for the reduction of the precautionary measure and that such a decision would be up to the relevant judge. As this Court has observed in the case of *Minister for Justice and Equality v. W.B.* [2015] IEHC 805, there can be a difficulty with the use of the word "bail". The word can imply a system of monetary recognisances that must be set before a person may be released pending trial. In the circumstances, where there may have been some confusion over the understanding of the word "bail", I was of the opinion that the documentation was not sufficient to enable me to perform my functions and I exercised my discretion to make a request under s. 20 seeking the following information:

> "Is there a system of pre-trial release in Italy where a person charged with an offence can apply to be released while awaiting trial, subject to travel restrictions or an obligation to report to the police or other such restrictions as are deemed to be necessary, and where a Court will consider whether it is appropriate to release a person charged with an offence with conditions, or to remand that person in custody?".

14. On 27th November, 2015, the Italian judicial authority replied as follows:

> "In Italy, the judge can decide during the whole course of the proceedings whether to revoke the precautionary custody in prison or convert it into a less restrictive measure (house arrest - also using the electronic bracelet -; obligation or prohibition to reside at a given address; obligation to report to the Law enforcement authorities; prohibition to leave the country). The suspect/defendant can in any moment ask to revoke or convert the precautionary measure imposed on him/her, but the decision lies with the prosecuting judge (see Articles 272 and following of the code of criminal procedure)."

15. When the matter came back for further hearing on 14th December, 2015, counsel for the respondent accepted that this indication by the Italian judicial authority was in accord with his own expert's view. In short, he accepted what was being stated therein and this was no longer a point of contention. In the circumstances, I am satisfied that there is a system of pre-trial release in Italy and there are no grounds for believing that this respondent is at real risk of having his right to liberty violated on surrender.

Section 21(A) of the Act of 2003

The facts
16. The respondent submitted that no decision has been made to charge him with and try him for the offences set out in the EAW and therefore his surrender is prohibited under s. 21A of the Act of 2003. It is necessary to give context to the submissions of the respondent by detailing the contents of the communications of the issuing judicial authority, together with the opinion of the expert in Italian law relied upon by the respondents. In the first place, the EAW states that the decision on which the EAW is based is an order for precautionary custody in prison of 22nd July, 2013 of the judge in charge of Preliminary Investigations at the Court of Genoa. Following receipt of the initial points of opposition from the respondent, the central authority wrote to the issuing judicial authority on 21st May, 2014, as follows:

> "Please confirm that a decision has been made by the prosecutor to charge [the respondent] and put him on trial for the offences on the basis that there is sufficient evidence existing for that to happen at this time, notwithstanding that the investigation is continuing and further evidence may come to light."

17. The issuing judicial authority replied that:

> "[a]s soon as the [requested] Irish nationals are surrendered, a hearing before an Italian judge […] will be held, for the purposes of giving them the possibility to defend themselves with the assistance of a lawyer.
>
> Criminal proceedings will be conducted against them in compliance with the provisions of the Italian Code of Criminal Procedure, and always within the limits of the charges on which the EAW was based. The phrase referred to above, called "preliminary investigation stage" is led by the prosecution (Public Prosecutor) and constitutes a stage of the judicial proceedings in every respect, since it is constantly supervised by the judge for preliminary investigations. At the end of this phase, the Public Prosecutor can ask for the Irish nationals surrendered in execution of the aforesaid EAWs to be permitted to stand trial. Subsequently, the trial in its strict sense will take place, which can go through three instances according to the Italian law.
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> In light of the above, we underline the urgency of executing the EAWs in respect of the persons […] for the purposes of conducting criminal proceedings against them and their accomplices in Italy."

18. Having been refused by the central authority, the solicitors for the respondent issued a motion requesting further documentation be provided pursuant to s. 20 of the Act of 2003. This motion sought the order for precautionary custody in prison of 22nd July, 2013 by the judge in charge of Preliminary Investigations and also the request to the application by the relevant prosecutor to the judge in charge of the Preliminary Investigations of the Court of Genoa. Also sought was correspondence between the Minister and the Italian authorities concerning in particular the issue of whether a genuine decision had been made to charge or try the respondent in relation to the charges in the EAW. Those motions had been left to the hearing of the applications and while they were referred to in written submissions there was little, if any, focus on them in the course of oral submissions. Counsel appeared content to rest his submissions on the evidence before the Court.

19. The respondent relied upon the expert opinion of Mr. Stefano Nicastro, an Italian lawyer based in Milan. He swore an affidavit in these proceedings and confirmed that he had been asked for his opinion regarding the purpose of precautionary detention under

Italian law and the function under Italian law of a preliminary investigating judge and whether, in his independent expert opinion, a decision was made, and could lawfully have been made, at the date of the issue of the EAW, to charge and commit the respondent for trial in respect of the offences specified in the warrant. From the evidence of Mr. Nicastro, it appears that in Italy the power to carry out preliminary investigation is under the exclusive jurisdiction of the public prosecutor; however, the legislator has provided that a specific judge guarantees an impartial control on the main measures at that stage and that judge is the preliminary investigation judge. The function of that judge is to protect the fundamental freedoms of the person. The judge cannot issue any decree in his own initiative but only on request from the public prosecutor, the private parties or the person affected by the crime.

20. Mr. Nicastro states that at the end of the investigation, the public prosecutor must issue a request for committal for trial. Thus, the precautionary detention order fixes a charge that can always be changed by the public prosecutor during investigation. The public prosecutor at the end of the investigation must request the preliminary investigating judge to either drop the case or to take criminal action formulating the charge. If that is done, the person has to be notified of various matters and the person under investigation has various rights with regard to being interrogated, submitting defences or asking for witnesses to be heard.

21. After the expiration of his term of investigation, if the public prosecutor believes there are elements to commit for trial, the public prosecutor submits a request for committal for trial. In this particular case, because the maximum punishment for the crimes alleged exceed four years, a preliminary hearing must be fixed before the judge of preliminary hearing after the request for committal for trial by the public prosecutor. The request for trial and the notice to fix the preliminary hearing must be compulsorily notified, under punishment of nullity, to the person under investigation and his defending counsel at least ten days before the date of the hearing.

22. At that preliminary hearing, there can be a summary trial or there can be plea bargaining. If the preliminary hearing proceeds, the judge of preliminary hearing can either issue a judgment of no grounds receipt or issue a decree for committal for trial.

23. Mr. Nicastro says that he cannot rule out that the Italian judicial authority has declared the respondent "untraceable" and/or "a fugitive" and consequently has served the notice of the fixing of preliminary hearing and/or the decree that orders the trial on a court appointed defending counsel.

24. With respect to whether a decision has been made to charge and try the respondent, he says that because of the principle of document confidentiality, the Italian legal system only gives the people involved and their defending counsel (whether appointed by the defendant or the court) the option to access documents and/or the relevant service. He has not been able to see those documents but he says and believes that usually on issuing a preliminary detention order, the public prosecutor has not yet formulated any request for committal trial. He does say that in relation to the "Avviso Della Conclusione Delle Indagini Preliminari" served upon the respondent, this is the last deed provided for by the Italian law in cases of criminal investigation. Only after the procedures arising are carried out will the public prosecutor be able to formulate a request for committal for trial or ask for the proceedings to be dismissed. He says that it cannot be said with accuracy that a decision has been made, as of the date of swearing his affidavit in these proceedings, to try the respondent for the offences set out in the warrant.

25. The central authority sent a further letter dated 25th September, 2015 to the issuing judicial authority pursuant to s. 20 of the Act of 2003. This letter set out the requirements provided by s. 21A of the Act of 2003. The central authority indicated that the crucial point therefore "is that at the time of the issue of the European arrest warrant there must have been an intention on the part of the prosecutor to charge and try the respondent and there was enough evidence known to the prosecutor at that time to justify charging the respondent with the offences and to put the person on trial for the offences."

26. By reply dated 8th October, 2015, the issuing judicial authority stated:

> "[t]he EAW was issued by this Office on 31 July 2013 in view of the execution of the order for preliminary custody in prison issued by the judge for Preliminary Investigations attached to the Court of Genoa on 22 July 2013 against the aforesaid persons, based on serious circumstantial evidence; […].[o]n 25 May 2015 the prosecutor, based on the elements which had led to precautionary measure and then to EAW, submitted to our office a request for committal for trial of the above Irish nationals and our Office, with an order dated 5 October 2015, scheduled preliminary hearing for 5 December 2015; the preliminary hearing will be held in chambers and the judges to verify the evidence collected by the public prosecutor to uphold prosecution in a trial or consider defense's investigations, if any; during preliminary hearing the defendants can also request to make spontaneous statements or to be formally examined and can produce documents; if preliminary investigations are incomplete the Judge could instruct the Public Prosecutor to carry out new investigations within a deadline and could also order that new evidence which appear conclusive in view of acquittal be acquired; defendants can also request alternative procedures or the application of penalties (with a reduction up to one third of the penalty) or a trial at that stage of the proceeding (with a reduction of up to one third of the penalty). Preliminary hearing, except in the case of alternative procedures, could therefore lead to a judgment dismissing the case or to an order putting the defendant on trial."

The law

27. Section 21(A) provides as follows:

> "(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.
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> (2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

28. Counsel for both sides were agreed that the Supreme Court had set out the law relating to s. 21A in two cases in particular, namely *Minister for Justice and Equality v. Olsson* [2011] IESC 1 [2011] 1 I.R. 384 and in the case of *Minister for Justice and Equality v. Bailey* [2012] 4 I.R. 1. In the decision in Bailey, the court cited with approval the previous *dicta* of the Supreme Court (O'Donnell J.) in Olsson.

29. As Murray J. stated in *Bailey*, the question of whether a decision had been made either expressly or implicitly to put that appellant on trial was a fairly net issue of fact. Prior to determining that net issue of fact in the present case, it may be observed that a decision to charge and try the respondent must have been taken in the issuing state at the time of the issue of the EAW. The minister had phrased its question to the issuing judicial authority on that basis. In oral submissions, counsel for the minister submitted

that it was at the point of return that the decision to charge and try has been made. No legal authority was referred to and the inconsistency between that submission and the view of the minister as expressed in the letter to the issuing judicial authority was not explained. Indeed, most of the submission focussed on the subsequent decision of the prosecutor to seek the committal for trial being based upon the evidence that was available at the time of the issue of the EAW.

30. The observations of the Supreme Court in *Bailey* and in *Olsson*, must have played a role in the emphasis on the date of the issue of the EAW by the minister of her request to the issuing judicial authority. In a passage later cited with approval by the Chief Justice in *Bailey*, O'Donnell J. stated at para. 33 in *Olsson* that:

> *"[a] court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution." (emphasis added)*

31. Denham C.J. in her judgment in *Bailey* quotes the above passage in the course of her extensive quote from that judgment. It may also be telling that the Chief Justice placed an emphasis on that particular paragraph in the course of that quote. Furthermore, the Chief Justice states at para. 97 that:

> *"[a] warrant issued for the purposes of their investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient." (emphasis added).*

32. The emphasis on the issuance of the EAW for the purposes of conducting a criminal prosecution is understandable because Article 1.1 of the 2002 Framework Decision defines an EAW, *inter alia*, in those terms. Further, the Supreme Court in *Minister for Justice and Equality v. Herman,* [2015] IESC 49 confirmed, albeit in a different context, that an EAW issued for one purpose was not to be relied upon to seek surrender for another purpose. Denham C.J., delivering the judgment of the Supreme Court, stated at para. 33: "[*w]here the national judicial authority which issued a European Arrest Warrant seeks to change a fundamental element in the nature or purpose of the warrant, as opposed to providing further information or corrections of a minor nature, a new warrant should be issued in the form required by the Act, namely, in the form in the Annex to the Framework Decision, so that it may be endorsed for execution in the State by the High Court.*"

33. From the foregoing, I am satisfied that if the warrant has been issued for the purposes of investigation, and not for the purposes of conducting a criminal prosecution where a decision has been made to charge and try the requested person, then surrender is prohibited by s. 21A of the Act of 2003, even if such a decision to charge and try the requested person is taken prior to the application for surrender before the High Court.

34. In the present case, there is very little disagreement of fact. Mr. Nicastro's opinion as to Italian law, and in particular the preliminary investigation procedure, has been borne out by the statements of the Italian issuing judicial authority. The legal position in Italy, as put forward by both Mr. Nicastro and the issuing judicial authority, is that it is only at the end of the investigation procedure, which said procedure is led by the public prosecutor but overseen by the judge for preliminary investigations, that the prosecutor will ask for a committal for trial. As to the particular factual situation here, in answer to the clear question of the central authority as to whether the prosecutor had that intention, the issuing judicial authority replied on 8th October, 2015, indicating that it was only on 28th May, 2015 that such a request for committal for trial was made.

35. Counsel for the minister has relied upon the fact that the order for preliminary custody in prison was based on serious circumstantial evidence, in submitting that this Court may infer that a decision had been made at that point to try the respondent. I am satisfied that such a decision is not an indication of a decision to try the respondent. I do accept, however, it is indicative that a decision to charge them had been made and that, in effect, the serious circumstantial evidence amounted to both probable cause for such charge and probable cause for the detention order. The decision to charge and the decision to try are separate decisions, both must be present.

36. Counsel for the minister also submitted that the decision of 25th May, 2015 was based upon the elements that led to the precautionary measure and then to the EAW. In that respect, she submitted that there is evidence of the requisite intention on the part of the prosecutor. In the view of the Court, this submission does not take into account what is agreed to be the legal and factual position here*, i.e*. that it is only at the end of the "preliminary investigation stage", that the public prosecutor can ask for the person to stand trial ***and*** that it was only after the issue of the EAW that such a request was made in this case. Furthermore, when asked the specific question as to whether an intention to charge and try had been made prior to the issue of the EAW, the issuing judicial authority simply confirmed that the request for the committal for trial was made after the issue of the EAW but on the basis of documentation that was available earlier. By that answer, the issuing judicial authority goes no further than equating the request for the committal for trial with the intention to try. On the basis of what the Italian judicial authority state, no decision to try had been made at the date of the EAW as there was no intention on the part of the prosecutor to try him until at the earliest the request for the committal for trial.

37. It is of course the situation that, under Italian law, criminal proceedings were in being against this respondent. On the basis of s. 21A and the decision in *Olsson* and *Bailey*, that is not sufficient. The absence of a decision (even in the form of an intention) to charge a person with and try them for the offence or offences on the EAW is fatal to an application for surrender.

38. In an application for surrender, the court acts with the benefit of the presumption in s. 21A(2) that a decision has been made in the issuing state to charge a person with, and try him or her for, the offence the subject matter of the EAW. In the present case, for the reasons set out above, I am satisfied on the evidence I have received from both the issuing judicial authority and the Italian lawyer on behalf of the respondent, that the presumption that a decision has been made to try the respondent has been displaced. In the circumstances, having found that no such decision was made at the time of the issuance of the EAW, I do not have to consider whether the subsequent action of the public prosecutor in seeking the committal for trial amounts to a decision to charge and try this respondent.

39. Finally, I will note that in this case, the central authority has taken the view that s. 21A of the Act of 2003 does not prohibit surrender if a prosecuting authority has an intention to charge and try the person and that there is enough evidence known to the prosecutor at that time to justify charging the respondent with the offences and putting the person on trial for the offences. This would mean that the decision to charge and try does not have to be taken by an issuing judicial authority even where it is the judicial authority that makes the decision to put the person on trial. Perhaps this is the true interpretation of s. 21A in light of *Olsson* and *Bailey*. Requiring such an intention from a prosecutor puts a far higher threshold on a respondent seeking to show his surrender is prohibited and in light of my findings in this case, it is unnecessary to make comment as to whether that is so. Suffice to say in this

case, it is abundantly clear that no judicial authority in Italy has made a decision to try the respondent.

Conclusion

40. For the reasons set out above, I am satisfied that on the sole ground that no decision had been made in Italy to try this respondent at the date of issue of the EAW, his surrender is prohibited under the provisions of s. 21A of the Act of 2003.