

THE HIGH COURT

Record Number: 2008 48 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

James Anthony Tighe

Respondent

Judgment of Mr Justice Michael Peart delivered on the 28th day of January 2009:

The surrender of the respondent is sought so that he can be prosecuted in the United Kingdom for four offences as set forth in the European arrest warrant herein dated 7th March 2008. That warrant was endorsed for execution here on the 12th March 2008, and the respondent was arrested on foot of same on the 3rd April 2008 and brought before the Court as required by s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act"). He has been on bail awaiting the outcome of this application.

I will come to the particulars of these offences in due course. Each satisfies the minimum gravity requirement, but issues have been raised as to correspondence, even though three of the offences have been marked as being offences within the categories of offences contained in Article 2.2 of the Framework Decision.

The identity of the respondent is not in issue on this application, and I am in any event that the respondent is the person in respect of whom the warrant has been issued.

A number of issues have been raised by Michael O'Higgins SC for the respondent by way of objection to surrender being ordered. Subject to reaching conclusions on these issues, I am satisfied that there is no reason under sections 21A, 22, 23 or 24 of the Act to refuse to order surrender, and that there is no reason why the surrender of the respondent is prohibited by any provision of Part III of the Act, or the Framework Decision.

The Points of Objection:**1. A second domestic warrant?:**

The basis for this objection is that on page 7 of the warrant reference has been made to the fact that prior to the 7th March 2008, being the date of the domestic warrant on which the European arrest warrant is said in paragraph (b) to be based, an earlier domestic warrant had issued on the 15th January 2007. The narrative in the warrant refers to the earlier warrant, and goes on to say that subsequently further charges were "*proposed*" and that "*a new arrest warrant reflecting the extended charges was obtained on 7 March 2008*".

The respondent has exhibited a copy of each domestic warrant referred to.

The earlier warrant of arrest sets out two offences, the first being one of conspiracy basically to cheat the revenue, and the other being one of conspiracy "to enter into or otherwise be concerned in arrangement to facilitate the retention or control the proceeds of criminal conduct of contractors in the construction industry". Each of these offences is said to have been committed between 6th April 1998 and 14th July 2005.

The subsequent warrant of arrest refers to four charges, being those set forth in the European arrest warrant itself. All offences are said to have been committed between 1st January 1997 and 31st December 2005. The first and second offences are of conspiracy to cheat the public revenue contrary to s. 1(1) of the Criminal Law Act, 1977; the third offence is one of cheating the public revenue contrary to common law; and the fourth offence is headed 'money-laundering' and set out as "conspiracy to enter into or otherwise be concerned in arrangements to facilitate the retention or control of the proceeds of crime of others".

Mr O'Higgins submits that the reference to a previous warrant causes confusion at the least, and may have implications for the rule of specialty, and that the issuing judicial authority would be in a position to clarify the situation regarding the earlier warrant and as to its status, but has failed to provide any such explanation. He submits that as a result there is such uncertainty arising from this that the warrant should be regarded as being void for uncertainty and/or duplicity, and is otherwise than in accordance with law.

I am not satisfied that anything turns on the fact that an earlier warrant existed prior to the later warrant on foot of which the European arrest warrant issued. This Court must simply be satisfied that there was a domestic warrant in existence at the time the European arrest warrant was issued. The latter document sets out that there was, and the fact that this later warrant may have superseded an earlier one, albeit that the earlier may or may not have been cancelled, is neither here nor there as far as the present application for surrender is concerned.

2. That the warrant does not comply with s. 11 of the Act:

Under this head of objection, it is submitted that there is an inadequate description of the alleged offences in so far as the respondent's involvement in the alleged crimes is concerned, and that in so far as there is any such description it fails to give sufficient particulars or information as to exactly what the respondent is alleged to have done in order to give rise to the offences laid, and that for these reasons the European arrest warrant fails to comply with the requirements of s. 11 of the Act.

Mr O'Higgins has referred to the fact that three of the offences are inchoate offences, being conspiracy to cheat the public revenue, and that while under the heading '*Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person*', there is a lengthy exposition related to an investigation leading to these charges, and as to the nature of the scheme by which the alleged frauds occurred, there is little within the detail to implicate the respondent. It is suggested that there is nothing in the information provided to indicate that the respondent actually did anything, and merely that he may have been involved in the planning of the fraud. In this way, it is submitted that the description fails to adequately meet the requirements of s. 11 of the Act, and that the warrant is therefore defective.

In the narrative there is quite an elaborate description of how the fraud the subject of these offences is said to have been planned. The respondent at an early part of the narrative is said to have been one of the subjects of the investigation in question, referred to as Operation Digits. The elaboration of the scheme uncovered is largely unspecific as to names of those involved, but at the conclusion of the narrative the following appears:

"Tighe secured the use and control of a string of businesses which possessed CIS6 Certificates. Those businesses were used to take in funds from numerous other businesses before arranging for those funds to be withdrawn as cash and paid to a workforce without deduction of tax. Tighe and his associates were involved in making false invoices to support the dishonest use of CIS documentation.

Tighe worked closely with a [named person]. Their main activity was the control of off-record cash in hand work forces. Funds laundered into cash were used to pay off-record, cash in hand workforces, or were returned, after Tighe had taken a cut, to other contractors to pay their off-record cash in hand workforce or for the contractors' personal use."

Mr O'Higgins submits that what is lacking in this entire narrative is any detail about how, why, when, and where the respondent is alleged to have done anything related to the offences the subject of the warrant. He suggests that it would have been a simple enough task for the requesting authority to have given fuller information as to the respondent's involvement in the alleged criminal activity.

Micheál P. O'Higgins SC for the applicant, on the other hand, submits that there is more than sufficient in this narrative, when read as a whole, to satisfy the requirement and purpose of s. 11 of the Act. He urges that it is not incumbent on the issuing judicial authority to demonstrate a prima facie case, but merely to give sufficient of a general nature so that the respondent can glean from the warrant what it is that the offences relate to. He submits that there is ample information in this warrant for that purpose.

I am satisfied that there is sufficient information in paragraph (e) of the warrant to comply with s. 11 of the Act. Clearly the charges laid against the respondent have emerged from a very extensive investigation into the fraud uncovered. It would not be feasible in a case such as this to give a complete recitation of all the allegations and evidence which may exist which implicates the respondent, such as may be possible in a different type of case such as an assault or a robbery.

The purpose of s. 11 in my view is to ensure that there is within the warrant or within additional information provided, sufficient information so that, firstly, the respondent may know in a general way what it is that the offences relate to and consist of. That enables a respondent to consider what objections may be raised to the order being sought for his/her surrender. In my view that purpose is fulfilled in the present warrant. Secondly, such information must obviously be sufficient, in a case where correspondence must be established in one or more of the offences, for the Court to be satisfied that what is alleged against the respondent would, if done in this State, give to an offence here for the purposes of sections 5 and s. 38 of the Act.

This ground of objection in my view fails.

3. Surrender is prohibited by s. 44 of the Act due to lack of proof as to where the offences are alleged to have been committed:

"44.—A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

Mr O'Higgins for the respondent has submitted that there is no clarity from the information in the warrant to indicate where these offences are said to have been committed, due to the very lack of specificity about which he complains under the previous head of objection. In my view this point of objection fails to get off the ground at all. The section prohibits surrender if the offences are alleged to have been committed in a place other than the issuing state, and if "*the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State*".

There is absolutely nothing in the warrant to remotely suggest that any part of these offences were committed other than within the United Kingdom. Line 4 of the narrative to which I have referred makes specific reference to the fact that the investigation in question was one "into major fraud carried out in various locations throughout the United Kingdom" (my emphasis). The respondent has given no evidence to any contrary effect.

This ground must fail *in limine*.

4. Article 2.2 and correspondence:

As I have already set out in an earlier paragraph, the first and second offences are of conspiracy to cheat the public revenue contrary to s. 1(1) of the Criminal Law Act, 1977; the third offence is one of cheating the public revenue contrary to common law; and the fourth offence is headed 'money-laundering' and set out as "*conspiracy to enter into or*

otherwise be concerned in arrangements to facilitate the retention or control of the proceeds of crime of others”.

The issuing judicial authority in paragraph E.1 of the warrant has marked 'fraud' and 'money-laundering' in the boxes provided for categories of offences coming within Article 2.2 of the Framework Decision. This indicates that offence three (cheating the public revenue) is an offence in respect of which double criminality does not require verification, and that the offences behind the inchoate conspiracy offences (fraud and money laundering) are offences coming within Article 2 of the Framework Decision.

In paragraph E.II of the warrant, the issuing authority has indicated that the offence of conspiracy is not covered by the marking of the boxes referred to, and that correspondence must be established in that regard. It is provided in that paragraph that under UK law conspiracy to commit an offence is provided for by s. 1(1) of the Criminal Law Act, 1977, and the text of the section is set forth.

There is no such equivalent provision in this jurisdiction, but the existence of the common law offence of conspiracy here is sufficient to satisfy correspondence for conspiracy.

Mr O'Higgins for the respondent submits that the issue of correspondence is not so simple. He submits that it is not appropriate to simply mark the box in relation to the offences underlying the conspiracy. He submits that a conspiracy offence is different to other inchoate offences such as attempted murder. He refers to the fact that the warrant refers to the plan alleged to give rise to the conspiracy offences span about eight years, but that the details are unspecific as to dates and are so unclear that the Court should require correspondence to be made out in relation to the conspiracy charges despite the fact that the boxes have been marked.

I see no difficulty in relation to this issue.

Firstly, in relation to the third offence (cheating the revenue), the fraud box has been marked to indicate that the offence is within Article 2.2 of the Framework Decision.

Secondly, in relation to the conspiracy charges, it is necessary to show that in this State conspiracy to commit an offence (which itself is an offence here) is an offence under the law of the State. That requirement is satisfied by the existence here of the offence of conspiracy contrary to common law. In the case of conspiracy, it is necessary in addition to either establish correspondence in relation to the underlying offence(s) or that those offences are offences coming within Article 2.2 of the Framework Decision. The latter has occurred in this case.

5. Breach of Constitutional/Convention rights:

It is submitted by the respondent that an order for his surrender would result in a number of breaches of rights protected by the Constitution and/or the Convention, and that therefore, pursuant to s. 37 of the Act, his surrender is prohibited. Under this head of objection, it is submitted that surrender would breach the right to fair procedures, his right to bodily integrity in view of his current state of health and/or would present a risk to his life. It is further submitted that surrender would breach his right to enjoyment of family life and would be an unjust and disproportionate interference with his family life, and therefore contrary to fair procedures. Finally, it is submitted that the criminal proceedings in the United Kingdom for which surrender is sought are unfair and constitute an abuse of process, such that his right to fair procedures is violated since threats from a prosecution witness have been received, the issuing judicial authority has failed to outline a fair representation of the facts surrounding the respondent's failure to attend court on the 26th January 2006 when he failed to answer his bail, and lastly that the facts giving rise to these criminal proceedings in the United Kingdom have not been stated with sufficient particularity in the warrant or at all.

In order to ground these objections the respondent has sworn three affidavits.

In his second affidavit, the respondent has given details of a diagnosis of skin cancer made by his doctor on the 6th September 2007. That cancer has been treated surgically on the 26th September 2007 and he has received aftercare treatment in relation to same. In more recent months he has developed stomach pains which resulted in further investigations, and a biopsy was carried out and a "nodular lesion" was removed. No evidence of cancer was present according to the affidavit. The respondent is naturally anxious and stressed about these matters, and consulted a psychiatrist in relation to his own problems but also in relation to certain mental ailments affecting his son. These matters are referred to in a report from Dr W. Flannery, Consultant Psychiatrist in Addictions. I do not propose setting out the very detailed psychiatric histories provided in this report both in respect of the respondent and his son, given the nature of the material contained therein. But I have considered that material carefully. Suffice to say that it is clear that the respondent is concerned about threats received by him in May 2008 from a man in prison and who is in some way involved in the offence for which the respondent's surrender is being sought, that he suffers from alcohol dependency, and has serious concerns for his son's care in the future. He also made an attempt on his own life in May 2008 according to the report. The report, as far as the respondent is concerned confirms that he is fit to attend court, that he suffers from alcohol dependency, that he suffers from "a depressive episode mild in intensity", that his mood is improving such that anti-depressants have not been prescribed, and that if he resume excessive alcohol use this could result in a relapse in relation to depression.

The respondent's first affidavit sets out considerable detail as to his personal circumstances, his health, and his concerns for his son, and his concerns as to the effect that an order for surrender would have in a number of ways including how the mortgage on his family home will be paid, and that his home will be put in jeopardy as a result.

Failure to appear in Court on 26th January 2006:

It will be recalled that one of the respondent's complaints is that the issuing judicial authority has failed to outline a fair representation of the facts surrounding the respondent's failure to attend court on the 26th January 2006 when he failed to answer his bail. The respondent's first affidavit deals with this at paragraphs 27 and 27

The respondent avers in his first affidavit that he takes issue what is stated in the warrant that the reason for the issue of the European arrest warrant was his non-attendance at Court on the 26th January 2006 when it is stated he failed to answer his bail. The warrant states in this regard that in December 2006 (though it would appear that this date should read December 2005) the respondent was re-assessed as a flight risk because it had been discovered that he had put his house up for sale, and that his solicitor was informed about his. His solicitor is stated to have confirmed to the authorities that the respondent had left the jurisdiction, but that he would answer his bail on the 26th January 2006. He failed to do

this, but it appears that the UK authorities came to this State in June 2006 and spoke to the respondent's legal adviser who later indicated that the respondent would return to the UK in October 2006 to face the charges, but that he failed to do so. That failure is said to have led to the issue of the first domestic warrant in January 2007 and the second such warrant, when further charges were added, in March 2007, as already set forth.

Dealing with these assertions, the respondent states in his first affidavit that he provided information to his solicitor in the UK which he understands was passed on to the authorities in order to show that he was in poor health at that time and could not travel to attend court as had been his intention. That information consisted of a medical certificate from his General Practitioner, and he understands that in fact the authorities contacted his GP to confirm the contents of the certificate.

In his fourth affidavit, the respondent has exhibited a copy of the medical reports furnished to the authorities by his UK solicitor, as well as a copy of that solicitor's letters when he furnished the reports and informed the authorities on the 25th January 2006 that because of his medical condition the respondent would not be returning to court on 26th January 2006 to answer his bail.

It does not seem to me that these averments and documents can assist the respondent in resisting this application for his surrender, even if the respondent does not agree with the manner in which the warrants set forth his non-attendance on the 26th January 2006. Clearly the Court in the UK was entitled to form a view on the material provided and, at its discretion to refuse to extend bail, and to issue a warrant given the failure to attend court as required, whatever the reasons may have been for his non-attendance. It cannot be seen as a breach of fair procedures or an abuse of process such that his surrender is now prohibited under s. 37 of the Act or the Framework Decision.

The threats:

The respondent has averred that he is extremely concerned about his safety if he is surrendered to the UK. He states that he has received threatening phone calls in the first six months of 2008 from a person who he believes is connected with the criminal prosecution against him, and that in so far as the identity of that person is known to him, this person is a witness in those proceedings. That person is not named, but he states that these communications are the subject of an investigation by the Gardai at Mullingar to whom he has handed his mobile phone so that it can be assessed by a technical expert in An Garda Síochána. He goes on to say that it he has been advised by his legal advisers that "it may be contrary to the interests of justice to prejudice any such investigation and do not wish to do so by revealing details of the allegations made by me in such a manner that might be considered to be prejudicial to that by Gardai and/or the Director of Public Prosecutions". He goes on to say that if required on this application to show what has occurred he is prepared to give further information about these communications. He has not given any information as to what the nature of these alleged threats were, even without naming any particular person.

The respondent says also that threats were received by his daughter who lives in London, and that this was reported to the police there.

Arising from these threats the respondent fears for his health and safety if he is surrendered, and he regards these threats as having had an adverse effect on his health and well-being. He states that he believes that the person has the means and capacity to do harm to him if surrendered, regardless of any safety measures that may be imposed by the UK authorities.

This Court cannot regard the existence of these threats, and their effect on the respondent's health as being sufficient to prohibit his surrender. There is no evidence of any kind adduced by the respondent to even suggest that adequate safeguards do not exist in the prison to which he may be sent upon surrender in order to protect him from any such risk of danger. Neither is the evidence of the effect of these threats upon his health sufficient to prohibit surrender.

For all these reasons I am satisfied that the requirements of s. 16 of the Act are satisfied, and that the Court is required to make the order for surrender and I will so order.