

THE HIGH COURT

2010 324 EXT

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

BETWEEN/

THE MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

- AND -

P.P.H

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 24th day of May 2011

Introduction:

The respondent is said to be the subject of a European Arrest Warrant issued by the United Kingdom of Great Britain and Northern Ireland on the 7th of July, 2010. That warrant was endorsed for execution by the High Court in this jurisdiction on the 19th of August, 2010. The man before the Court was arrested on the 22nd of March 2011 by Sgt Kirwan. However it is not conceded that he is the person to whom the European Arrest Warrant relates, and identity is an issue.

This Court is now being asked by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter referred to as "the 2003 Act") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the 2003 Act.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the 2003 Act, 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. In so far as specific points of objection are concerned, the Court is required to consider a number of specific objections to the respondent's surrender. These will be identified and considered later in this judgment.

The person named in the European Arrest Warrant is wanted for prosecution for five offences in the United Kingdom. These are particularised as being three offences of abducting a child, contrary to s.2 (1) (b) of the Child Abduction Act, 1984 and two offences of sexual activity with a child, contrary to s.9 of the Sexual Offences Act 2003. The issuing state is relying upon paragraph 2 of Article 2 of the Framework Decision and has ticked the box in Part E.I of the European Arrest Warrant relating to "sexual exploitation of children and child pornography." Part E.II is not filled in at all and accordingly Article 2(2) is being invoked in respect of all five offences.

Minimum gravity is *prima facie* satisfied because the maximum sentence that may be imposed for each offence of abducting a child is imprisonment not exceeding seven years, and the maximum sentence that may be imposed for each offence of sexual activity with a child is imprisonment not exceeding fourteen years.

Uncontroversial s. 16 issues

The Court has received and scrutinised a 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 notes that it bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

- (a) the European Arrest Warrant in question has been endorsed for execution in accordance with s. 13 of the 2003 Act;
- (b) as the person named in the European Arrest Warrant is wanted for prosecution no issue can arise as to trial *in absentia* such as to require an undertaking under s. 45 of the 2003 Act;
- (c) subject to the Court being satisfied that the respondent is the person named in the European Arrest Warrant, the Court is not required, under s. 21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the 2003 Act;

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004, S.I. 4/2004 (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s 3(1) of the 2003 Act, and article 2 of, and the Schedule to, the 2004 Designation Order, the "United Kingdom of Great Britain & Northern Ireland" is designated for the purposes of the 2003 Act as being a state that has under its national law given effect to the Framework Decision.

Specific objections raised by the respondent

The respondent has filed a fourteen paragraph document setting out his points of objection. As paragraph 1 merely purports to put the applicant on full proof (although legally the applicant bears no burden of proof, it is for the Court to be "satisfied" following due enquiry); as paragraph 14 contains nothing of substance and as the Court has been informed that the objections set out at paragraphs 2 and 10 respectively are not being proceeded with, the substantive objections are therefore those set out in paragraphs 3 to 9 inclusive and 11 to 13 inclusive. They are in the following terms:

- "3. The European Arrest Warrant is not in the form required by section 11 (1 A) of the European Arrest Warrant Act 2003

as amended, and/or the Framework Decision in that does not disclose the name and nationality of the person in respect of whom it is issued. The European Arrest Warrant, together with the 'National Fingerprint Form' appended thereto, specifies three different names and two different nationalities, together with two different dates of birth. The European Arrest Warrant is accordingly invalid.

4. The offences specified in the European Arrest Warrant do not constitute 'sexual exploitation of children and child pornography' and as such article 2.2 of the Framework Decision does not apply. The European Arrest Warrant is therefore invalid.

5. The requesting State has failed to identify any other offence, in the section of the Warrant designed for that purpose, to which the Warrant applies. The European Arrest Warrant is therefore invalid.

6. Without prejudice to the other points of objection set forth herein, the Respondent contends that the offences specified in the European Arrest Warrant under the Child Abduction Act 1984 do not correspond to an offence under the law of the State and the Respondent's surrender is precluded in relation to the 'child abduction' offences and the Respondent shall rely on section 22 of the European Arrest Warrant Act 2003, as amended, in this regard.

7. The 'description of circumstances' set forth in the European Arrest Warrant specifies that on the 23rd of December 2008 the Applicant was served with 'the section 2 Child Abduction Act Notice'. Section 2 of the Child Abduction Act 1984 makes no reference to nor provision for the service of any notice and accordingly the European Arrest Warrant is invalid.

8. The 'nature and legal classification of the offences and the applicable statutory provision' describes the alleged child abduction offences as 'abducting a child, contrary to section 21 (b) of the Child Abduction Act 1984'. There is no such legal provision, and there is no section 21 (b) of the Child Abduction Act 1984. Accordingly the European Arrest Warrant is invalid.

9. The European Arrest Warrant offends against the principle of proportionality and is a breach of the Respondent's right to privacy in so far as it purports to authorise the seizure of the Respondents cash, mobile phones, identity documents, correspondence, and firearms, in circumstances where the European Arrest Warrant does not disclose any basis for such seizure nor does it disclose, on even a *prima facie* level, how the seizure of such items is in any way relevant to the alleged offences. Accordingly the European Arrest Warrant is invalid

11. The Respondent will not receive a fair trial, if surrendered, and his rights under the Irish Constitution and the European Convention on Human Rights (including the protocols thereto) will be breached. In this regard the Respondent will rely on section 37 of the European Arrest Warrant Act 2003. The Respondent contends that he will not receive a fair trial due to significant and widespread adverse pre-trial publicity.

12 As a result of the excessive delay in the execution of the warrant the subject matter of these proceedings, the surrender of the Respondent herein would be incompatible with the States obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms.

13. There is an onus on the Applicant to ensure that the High Court has jurisdiction to act on foot of a purported European Arrest Warrant and that such a purported Warrant on its face complies with the requirements of the said Act to a certain minimal standard and contains sufficient particulars free from internal contradictions or inconsistencies so as to be capable of being characterised properly as a European Arrest Warrant. The Applicant has failed to discharge these obligations. In all the circumstances the application on foot of the Warrant, the subject matter of these proceedings amounts to an abuse of process and the application should be refused on that ground alone and that therefore the Respondent should not be surrendered as it would be unjust, invidious, oppressive or in breach of his constitutional rights to do so."

The evidence as to arrest and identity

The Court has before it an affidavit of Sgt James Kirwan sworn on the 16th day of May 2011. Sgt Kirwan's affidavit is in the following terms:

1. I am a member of An Garda Síochána of the rank of Sergeant attached to the Crime Branch, Garda Headquarters and I am duly authorised to make this Affidavit on behalf of the Applicant which I do from facts within my own knowledge save where otherwise appears and where so otherwise appearing I believe the same to be true.

2. I beg to refer to the European Arrest Warrant for the arrest of P.P.H upon which this application is based when produced.

3. On the 22nd March, 2011 I was on duty at Market Square, Longford. I was in possession of a copy of the European Arrest Warrant for the arrest of one P.P.H. The warrant had been endorsed by the High Court for execution.

4. At Market Square, Longford I met a man who I believed to be P.P.H. I introduced myself to this man by telling him my name, rank and station and producing and showing to him my official Garda Identification Card. I asked him "Are you P.P.H" and he replied "G.H". I asked him his date of birth and he replied "29th April, 1941". I asked him was his country of birth Ireland and he replied "Yes". I asked him did he previously reside in [a specified place] and he replied "Yes". I showed him the photograph attached to the warrant and asked him "Is this a photograph of you?" and he replied "I guess so".

5. I then informed him that I had in my possession a European Arrest Warrant for his arrest. I showed him the warrant and brought to his attention where it had been endorsed by the High Court.

6. Following that, I then arrested Mr. H on foot of the European Arrest Warrant in my possession. I cautioned him as follows "You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence". I showed him the warrant and brought to his attention where it had been endorsed by the High Court. I then served him with a copy of the European Arrest Warrant in the English language and a copy of Section 15 of the European Arrest Warrant Act, 2003.

7. I informed Mr. H that under s.15 of the European Arrest Warrant Act he could consent to his early surrender to the requesting state. I also informed him that under the European Arrest Warrant Act he had the right to be provided with professional legal advice and representation. I informed him that under the European Arrest Warrant Act he had the right to be provided with the services of an interpreter.

8. I read over a précis of the offences set out in the warrant and asked Mr. H did he know what these were about to which he replied "Yes. There are hundreds perhaps thousands. I am happy for you." Mr. H was then conveyed to Longford Garda Station and processed as an arrested person.

9. Thereafter, Mr. H was brought before the High Court on the 22nd March, 2011 where I gave evidence of executing the warrant before the High Court. I also identified Mr. H in court on that date. I endorsed the original warrant as having been executed and handed it into the High Court where it was retained.

10. On the basis of the foregoing, I say and believe that the man I arrested on the 22nd March, 2011 and brought before the High Court on the same day is the same person identified as P.P.H in the European Arrest Warrant and I gave evidence to that effect about my belief before the High Court on the 22nd March, 2011.

11. On a subsequent date, I received an intelligence document from the English Police at P and F Crown Court Unit which also contains relevant evidence for identity purposes. That document was used during a bail application made by the Respondent herein, which said application was refused by the High Court. I beg to refer to a copy of that two page document, upon which marked with the letters "J.K 1" I have signed my name prior to the swearing hereof. I believe that this document further confirms that the Respondent is the person named in the European Arrest Warrant."

Evidence adduced on behalf of the respondent

The respondent has not filed an affidavit personally in relation to the matters at issue in these proceedings. However, an affidavit has been filed on his behalf and sworn by his solicitor, Mr T.R of J.J.Q & Co, Solicitors, of L, in support of the points of objection filed. The relevant portion of Mr R's affidavit which was sworn on the 11th of April 2001 is that contained in paragraphs 4 to 23 inclusive.

"Compliance with Section 11 of the European Arrest Warrant Act 2003

4 I say that Section 11(1 A) requires that 'a European Arrest warrant **shall** specify (a) the name and nationality of the person in respect of who it is issued [...] [and] (f) the circumstances in which the offence was committed or is alleged to have been committed, including **the time and place** of its commission or alleged commission [...]' (emphasis added).

5. I say that the warrant the subject of the proceedings does not specify the place of commission of the alleged offences, or any of them, nor does it specify the time of commission of the alleged offences, or any of them.

6. I say that the warrant the subject of the proceedings describes the Respondent as P.P.H, an Irish national, whereas the National Fingerprint Form enclosed with the said warrant describes the Respondent as G.P.H, a Northern Irish national.

Article 2.2 of the Framework Decision

7 I say that the European Arrest Warrant specifies on its face that the Respondent has committed offences of 'sexual exploitation of children and child pornography'. I say that the particulars of offence stated on the warrant do not disclose any offence of sexual exploitation of children or child pornography.

8. I say that there are two offences charged on the European Arrest Warrant, namely:-

- Sexual Activity with a child, contrary to Section 9 of the Sexual Offences Act 2003; and,
- Abducting a child contrary to Section 21(b) of the Child Abduction Act 1984.

I say that I caused an examination of the UK Statute Book (www.legislation.gov.uk) to be carried out and I say and believe that the above provisions are as follows:-

Section 9 of the Sexual Offences Act 2003:

"(1) A person aged 18 or over (A) commits an offence if

(a) he intentionally touches another person (B),

(b) the touching is sexual, and

(c) either-

(i) B is under 16 and A does not reasonably believe that B is 16 or over, or

(ii) B is under 13.

(2) A person guilty of an offence under this section if the touching involved --

(a) penetration of B's anus or vagina with a part of A's body or anything else.

- (b) penetration of B's mouth with A's penis,*
- (c) penetration of A's anus or vagina with a part of B's body, or*
- (d) penetration of A's mouth with B's penis.*

is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(3) Unless subsection (2) applies, a person guilty of an offence under this section is liable-

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;*
- (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years."*

Section 21(b) Child Abduction Act 1984:

The Child Abduction Act 1984 only has thirteen sections. I therefore say and believe that there is no 'Section 21 (b)' of the Child Abduction Act 1984.

9. I say and believe and as appears above that there is nothing in either Section which could properly be described as 'sexual exploitation of children and child pornography' or as 'sexual exploitation of children' or as 'child pornography'.

10. I say and believe that it is instructive to consider that the list of Article 2.2 offences makes no provision for simple sexual assault type offences and, aside from the 'sexual exploitation of children and child pornography' category, the only sexual offence provided for is rape.

11. In the circumstances I say and believe that Article 2.2 of the Framework Decision does not apply.

Correspondence

12. I say and believe that there is no Section 21(b) of the Child Abduction Act 1984 and as a consequence I say that there is no offence under UK Law against which correspondence can be measured. I therefore say and believe that there can be no correspondence between the child abduction offence specified in the warrant (which offence does not exist) and any offence in the State.

13. I say and believe that the alleged offence under section 9 of the Sexual Offences Act 2003 does not have a corresponding offence in the State. In this regard, and without prejudice to the generality of the preceding sentence, I say that the provisions of

- Section 14, Criminal Law Amendment Act 1935;
- Section 2, Criminal Law (Rape) (Amendment) Act 1990; and,
- Section 37, Sex: Offenders Act 2001

represent the closest thing in Irish law to a corresponding offence. I say and believe, however, that the offences do not correspond because there is no defence of consent in the UK provision, whereas there is a defence of consent in Ireland where the victim is not under the age of fifteen years.

14. I say that the European Arrest Warrant states, under 'description of circumstances' at page 3 thereof, that the Respondent was served, on the 23rd December 2008, with 'a notice under section 2 of the Child Abduction Act 1984'.

I say that I caused an examination of the UK Statute Book (www.legislation.gov.uk) to be carried out and I say and believe that Section 2 of the Child Abduction Act provides as follows:-

- "2. (1) Subject to subsection (3) below, a person, other than one mentioned in subsection (2) below, commits an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen—*
- (a) so as to remove him from the lawful control of any person having lawful control of the child; or*
 - (b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.*
- (2) The persons are—*
- (a) where the father and mother of the child in question were married to each other at the time of his birth, the child's father and mother;*
 - (b) where the father and mother of the child in question were not married to each other at the time of his birth, the child's mother; and*
 - (c) any other person mentioned in section 1(2) (c) to (e) above.*
- (3) In proceedings against any person for an offence under this section, it shall be a defence for that person to*

prove—

(a) where the father and mother of the child in question were not married to each other at the time of his birth—

(i) that he is the child's father; or

(ii) that, at the time of the alleged offence, he believed, on reasonable grounds, that he was the child's father; or

(b) that, at the time of the alleged offence, he believed that the child had attained the age of sixteen.”

15. I say and as is evident from the terms of Section 2 of the Child Abduction Act 1984 that there is no provision for the service of any form of notice whatsoever, nor is there any stipulation that any breach of such a (non-existent) notice constitutes an offence.

16. I say that I have caused the remainder of the Child Abduction Act 1984 to be examined and I say and believe that there is no provision in that Act for the service of any form of notice, nor is there any provision for an offence of breaching the terms of any such (non-existent) notice.

17. I say that the Respondent instructs that he has been living in this jurisdiction for almost two years, since in or about April 2009. I say that the Respondent is purportedly charged in the requesting State, with offences of sexual assault and of breaching a (non-existent) notice. I say that it is not at all clear why the requesting State has requested that the Respondent's cash, mobile phones, identity documents, correspondence, and firearms be seized by the Irish authorities. I say that there is no allegation that the Respondent's cash, mobile phones, identity documents, correspondence, and firearms (if any) are connected to the commission of the alleged subject offences, arise out of the commission of the alleged subject offences, or that the said items are required for the purposes of the proper investigation of the alleged subject offences. I say that the Respondent has already been charged with the alleged subject offences and it is therefore reasonable to suppose that the requesting State's authorities have concluded their investigations of the subject offences. I say and believe that there is therefore no logical reason or basis for the request for the search and seizure of the items listed above. I say that this Honourable Court is entitled to take the illogical nature of this request into account in considering the request for the Respondent's surrender. I say that this Honourable Court is entitled to infer that the requesting State does not have sufficient evidence to mount even a *prima facie* case against the Respondent and that the request for search and seizure constitutes a fishing expedition by which the requesting State hopes to somehow acquire further evidence which may assist in the prosecution of the Respondent. I say that this Honourable Court is entitled to take the view that the Respondent has been charged with the alleged subject offences (two of which do not exist) on the flimsiest of evidence. I say that this Honourable Court is entitled to take the view that the issue of a European Arrest Warrant by the requesting State constitutes an abuse of process.

Fair Trial Rights – Pre-trial Publicity

18. I say that the Respondent has been the subject of significant adverse pre-trial publicity, which publicity tends to suggest that he is wanted for a string of child sexual abuse and child abduction offences. I say that the said publicity has been widespread, particularly in the United Kingdom, and has emanated from a public campaign run by a UK organisation known as 'Crimestoppers'.

19. I say that on or about the 21st February 2011 a campaign known as 'Operation Captura' was launched on the Costa del Sol, Spain, by the aforementioned Crimestoppers organisation.

20. I say that the said campaign was featured and reported on by the following media outlets:

- BBC News: 'Operation Captura targets UK crime suspects in Spain'
- Sky News: 'Mad Frankie Grandson tops most wanted list'
- The Independent: 'Police release names of Costa del Crime' wanted
- The Sun: 'Costa del Crime's most wanted'
- Euro Weekly News: 'Criminals hiding on the Costa beware as Operation Captura returns'
- Minster FM: 'Help trace the Costal del Sol most wanted'.

I say that the above are but six examples of media coverage of the Respondent. I say and believe that the same story has been repeated by media outlets in the United Kingdom, Spain, Ireland, and across Europe. I say that the publication of the story in jurisdictions other than the United Kingdom is not strictly speaking relevant to the question of whether the Respondent can receive a fair trial in the United Kingdom.

I say that the story has been reported by global media organizations (BBC, Sky, Independent, Sun) that would have significant exposure within the United Kingdom. I say that the Respondent also featured on the website of the 'Crimestoppers' organisation. I say and believe that the said website provides data by location and any member of the public using the website could search for offenders sought in respect of offences in B or P. I say and believe that any user would have been directed to data concerning the Respondent, and I say that this further undermines the possibility that the Respondent can get a fair trial in the United Kingdom or, in particular, in the B or P courts.

I beg to refer to copies of internet printouts from the above named media outlets (the story having been published on or about the 21st February 2011) upon which pinned together and marked with the letters 'TRI' I have endorsed my name

prior to the swearing hereof. I say that I have thus far been unable to ascertain whether the story was reported in the television media (BBC, Sky) or on national radio (BBC) but that it is evident from the above mentioned printouts that the story received widespread coverage in the United Kingdom.

21. I say that the occasion of the Respondent's arrest was also the subject of widespread coverage in the media and, in particular, in the United Kingdom media. In this regard I beg to refer to printouts from the 'Crimestoppers' website and from the website of the Serious Organised Crime Agency, dated the 24th and 25th March respectively, upon which pinned together and marked with the letters 'TR.2' I have endorsed my name prior to the swearing hereof. I say and believe that both of these websites are available to anyone with an Internet connection, anywhere in the world, but particularly in the United Kingdom.

22. I say and believe that the media coverage of the Respondent is unrelenting, extensive, sensationalist, inaccurate, and misleading, and is such as to make it difficult for any jury in the United Kingdom to approach its task with an open mind, and further so affects the Respondent that his ability to properly conduct his Defence may be hampered. I say and believe that the said media coverage creates a real risk of prejudice against the Respondent. I say and believe that there is a real and/or serious risk that the Respondent may not receive a fair trial.

23. I further say and believe and am advised by the Respondent that the barrister assigned to conduct his defence in the United Kingdom indicated that he 'did not care' whether the accused pleaded guilty or not guilty as he (the barrister) would get paid anyway."

Additional information received from the issuing judicial authority/ issuing state.

The applicant in his role as the Irish Central Authority requested certain additional information from the issuing State pursuant to s. 20(2) of the 2003 Act. This was responded to by letter dated the 28th of March 2011 from the Crown Prosecution Service on behalf of the issuing State, which letter was in the following terms:

"We note the request for additional information relating to the dates that each of the five offences was committed as well as the location where each offence was committed.

The first three offences, charged contrary to S (1) (b) Child Abduction Act 1984, represent specimen charges. The particulars reflect the evidence of the child witness, 14 year old D.R., who makes reference to seeing Mr. H "in the last three weeks", in the video recorded interview on 6 February 2009. D is unable to be specific as to dates and times. She states that she had been in his car "quite a few times". "more than five occasions" On each occasion the child witness said that she met with the Respondent, P.H., [at a specified address]. This is the location where each of these three charges was committed

The charges of Child Abduction were drafted specifying dates which represent the date he was served with the Abduction Notice prohibiting contact with D.R., that is 23 December 2008, and the date of his arrest for these offences, that is 14 February 2009. The indictment lodged with the Court is as follows:

Count 1.

STATEMENT OF OFFENCE

ABDUCTING A CHILD, contrary to section 2(1) (b) of the Child Abduction Act 1984

PARTICULARS OF OFFENCE

P.P.H between the 23rd day of December 2008 and the 14th day of February 2009 at [at specified place], without lawful authority or reasonable excuse took D.J. R, a child under the age of 16 years, so as to keep her out of the lawful control of a person entitled to lawful control of the said child.

Count 2.

STATEMENT OF OFFENCE

ABDUCTING A CHILD, contrary to section 2(1) (b) of the Child Abduction Act 1984

PARTICULARS OF OFFENCE

P.P.H between the 23rd day of December 2008 and the 14th day of February 2009 on an occasion other than that stated in Count one, at [at specified place], without lawful authority or reasonable excuse, took D.J. R, a child under the age of 16 years, so as to keep her out of the lawful control of a person entitled to lawful control of the said child.

Count 3.

STATEMENT OF OFFENCE

ABDUCTING A CHILD, contrary to section 2(1) (b) of the Child Abduction Act 1984

PARTICULARS OF OFFENCE

P.P.H between the 23rd day of December 2008 and the 14th day of February 2009 on an occasion other than that stated in Counts one and two, at [at specified place], without lawful authority or reasonable excuse, took D.J.R, a child under the age of 16 years, so as to keep her out of the lawful control of a person entitled to lawful control of the said child.

Charge 4 is in the form of a draft indictment as follows:

STATEMENT OF OFFENCE

SEXUAL ACTIVITY WITH A CHILD, contrary to section 9(1) of the Sexual Offences Act 2003

PARTICULARS OF OFFENCE

P.P.H between the 1st day of August 2008 and the 31st day of October 2008, being a person aged 18 or over, intentionally touched a child under the age of 16, namely D.J. R, a female child aged 13, and that touching was sexual not reasonably believing that she was 16 or over.

The dates, specified in the charge and draft indictment reflect the child's recollection in her video recorded interview that she "thinks it was [a specified occurrence]". This is believed to be a reference to [a specified event]. The [specified occurrence takes place] on occasions within the few days before the formal [specified event], which is the first Friday in September. Dates were therefore selected, for the purpose of charging to provide a margin on either side of the [specified occurrence], D's evidence is that this offence occurred at the rear of [a named] Public House, in [at specified place].

Charge 5 is in the form of a draft indictment as follows:

STATEMENT OF OFFENCE

SEXUAL ACTIVITY WITH A CHILD, contrary to section 9(1) of the Sexual Offences Act 2003

PARTICULARS OF OFFENCE

P.P.H between the 1st day of March 2008 and 1st day of December 2008, being a person aged 18 or over, intentionally touched a child under the age of 16, namely D.J. R, a female aged 13 years, and that touching was sexual, not reasonably believing that she was aged 16 years or over,

The dates selected were chosen as in her video interview of [a specified date], D states that she had known the Respondent for 8 months. She is asked how long after their meeting the sexual touching she describes started. Her reply is, "about two months", When asked how many time Mr. H has touched her around the vagina, over clothing, she estimates seven or eight times. D gives no specific dates for the touching incidents. This charge is a specimen charge. The incidents, and therefore this offence, occurred at the Respondent's home address at [a specified address]."

The identity issue and the S. 11(1A) (a) objection

The Court is satisfied that in so far as the European Arrest Warrant itself is concerned it contains sufficiently clear details relating to the identity of the person to which it relates, in terms of setting out that person's name and aliases, date of birth and nationality, to comply with s.11(1A)(a). The warrant makes it quite clear in Part A thereof that the name of the person in respect of whom it is issued is P.P.H, who was born on the 29th of May 1943 and who is Irish. The other names mentioned in the warrant itself are clearly identified as aliases.

While the European Arrest Warrant in this case has appended to it a UK National Fingerprint Form that records the fingerprints on that form as belonging to a G.P.H alias P.P.H, born on the 29th of May 1943, and who is Northern Irish, these apparent inconsistencies are, in the Court's view, not particularly significant in the circumstances of this case. The National Fingerprint form is only an appendix to the European Arrest Warrant. It is not a part of it. It is provided as an aid to the police in the executing state in identifying the person to whom the warrant relates. The police in the executing State may or may not decide to make use of the fingerprint evidence provided. The same situation obtains with respect to any photograph appended to the warrant. There is no evidence that Sgt Kirwan, or any member of An Garda Síochána, made any use of the fingerprint material supplied for the purpose of identifying the respondent as the man named in the European Arrest Warrant. Certainly, Sgt Kirwan has not sought to rely on fingerprints to identify him before this Court. On the contrary, Sgt Kirwan's identification to this Court is primarily based on cautioned admissions made by the respondent when he was confronted both with the European Arrest Warrant and the photograph accompanying it.

That said, the Court also notes that no evidence has been adduced by or on behalf of the respondent to suggest that the fingerprints appended to the warrant are not in fact the respondent's fingerprints.

Further, the Court endorses the view expressed by Remy Farrell & Anthony Hanrahan, Barristers at Law, in their recent work entitled *The European Arrest Warrant in Ireland* (2011; Clarus Press) that the purpose of the details to be set out in accordance with s.11 (1A) (a) is to allow the Court to determine the question of identity rather than an exercise in formalism. In this case, the European Arrest Warrant states clearly the name, date of birth and nationality of the person to which it relates, and in the absence of cogent evidence from the respondent tending to suggest the contrary the Court is entitled to proceed on the basis that it accurately sets out the name, date of birth and nationality of the person to whom it relates.

The Court has carefully considered the evidence of Sgt Kirwan and is fully satisfied that the person who has been brought before the court is one and the same person as the P.P.H named in the European Arrest Warrant.

Points of Objection Nos 4, 5, 6, 7 & 8 – alleged non application of article 2.2

There is clearly a minor typographical error in the narrative section of Part E where it refers to s. 21(b) of the Child Abduction Act 1984 instead of s. 2(1) (b) of that Act. The position was clarified in the additional information and the error is of no consequence in terms of the issues that this Court is required to address.

The substantive issue that the Court is required to address is the respondent's suggestion that it should look behind the ticking of the box relating to sexual exploitation of children and child pornography in Part E.I of the European Arrest Warrant in this case. Counsel for the respondent urges that I should do so primarily on the basis that the offences specified in the European Arrest Warrant do not constitute 'sexual exploitation of children and child pornography' and as such Article 2.2 of the Framework Decision does not apply. It is urged that that being so the warrant must be regarded as containing a manifest error and that the Court should look behind the

ticking of the box and insist on proof of correspondence.

In the case of *Minister for Justice, Equality & Law Reform v Butenas* [2006] IEHC 378 it is suggested in an *obiter dictum* of Peart J that some little room might exist for looking behind the ticking of a box where there is evidence of a manifest error or a suggestion of bad faith on the part of the requesting authority. At page 2 of his judgment in *Butenas* Peart J stated:

"The Court is precluded from looking at that question further, and there is absolutely no question in this case but that the facts set forth in the warrant justify the ticking of that box. There can be no question of it having been ticked through some manifest error, and neither is there any room for any suggestion of bad faith on the part of the requesting authority."

In the present case, Mr McGillicuddy B.L., representing the applicant, does not disagree that there may be extreme cases in which a Court might be justified in looking behind the ticking of a box but he contends that exceptional and egregious circumstances would have to exist before it would be justified in doing so. He contends that there are no such circumstances in the respondent's case. In support of his arguments he relies upon *Minister for Justice, Equality & Law Reform v Ferenca* [2008] 4 I.R. 480 and *Minister for Justice, Equality & Law Reform v Desjatnikovs* [2009] 1 I.R. 618. The Court agrees with counsel for the applicant. The mere fact that it may not be immediately obvious how some of the offences particularised could come within the category of offences described as "sexual exploitation of children and child pornography" does not, for the reasons hereinafter stated, justify an inference of manifest error or establish the existence of extraordinary or egregious circumstances.

The Supreme Court has stated clearly in *Minister for Justice, Equality & Law Reform v Ferenca* [2008] 4 I.R. 480 that article 2.2 of the Framework Decision does not refer to offences in any conceptual way but simply lists a number of offences by way of general name or label and it is exclusively for the issuing member state to determine what offences as defined by its law are offences to which the paragraph applies.

I am satisfied that the approach which this Court must adopt to the ticking of the box in this case is that set out in following paragraphs from the judgment of Murray C.J. in *Ferenca* [at pp 495/496 of the report]:

"[58] Article 2.2 does it not itself specify a form or course of conduct from which it can be deduced that a particular offence is one to which it applies. The paragraph does not refer to offences in any conceptual way but simply lists a number of offences by way of general name or label and it is exclusively for the issuing member state to determine what offences as defined by its law are offences to which article 2.2 are applicable. This is what Ireland has done in s. 32 of the Act. The section is quoted later in the judgment. In *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* (Case C-303/05) [2007] E.C.R. I-3633 it was argued that article 2.2 of the Framework Decision breached a fundamental principle of the community law, namely legal certainty in the application of community law on the grounds that the list of offences contained in article 2.2 was so vague and imprecise. It was also claimed that "the offences set out in that list are not accompanied by their legal definition but constitute very vaguely defined categories of undesirable conduct".

[59] At para. 50 of the judgment of the court in that case it acknowledged that the principle of certainty or of "the legality of criminal offences and penalties" implies "that legislation must define clearly offences and the penalties which they attract".

[60] In rejecting the allegation of breach of such a principle the court referred (at para. 51) to article 2.2 of the Framework Decision, according to which the offences listed in that provision give rise to surrender if they are punishable in the issuing member state "as they are defined by the law of the issuing member state". It then went on to make the statement, cited earlier in this judgment, that "the Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract".

[61] The court then concluded in the ensuing paragraph: - "Accordingly, while article 2.2. of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, *the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing member state which ...* must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties" [emphasis added].

[62] In short the principle of legal certainty or "of the legality of criminal offences" is observed because the offences to which article 2.2 applies are not defined by the vague terms of article 2.2 itself but by the national law of the issuing state and only by that means. Thus it is not open to a court to ascertain whether an offence in a warrant is an offence to which article 2.2 applies by looking at some conceptual element by reference to article 2.2 alone."

Accordingly, in all the circumstances of the case this Court is not disposed to look behind the ticking of the box relating to sexual exploitation of children and child pornography in Part E. I of the European Arrest Warrant in this case. Part E.II is not filled in at all and in the absence of any extraordinary or egregious circumstances there is nothing in this case to warrant any such enquiry by the Court.

Point of Objection No 9 – proportionality of the seizure power in the warrant.

While it is true to say that the European Arrest Warrant does, in Part G thereof, authorise the seizure and handing over of property belonging to the respondent which may be required as evidence, including cash, mobile phones, identity documents, correspondence, and firearms, there is no evidence before the Court that this power has in fact been utilised or availed in the circumstances of this case. There is no suggestion that Sgt Kirwan, in executing the European Arrest Warrant in this case, seized any property belonging to the respondent on the basis that it was required as evidence. Moreover, the affidavit filed on the respondent's behalf by his solicitor does not contain any complaint or suggestion to the effect that property belonging to the respondent was seized as evidence by Sgt Kirwan in purported exercise of the power in question. Therefore, this Court, in as much as it is being asked to consider the proportionality of a seizure power that has not been actually utilised or availed of, is being asked to consider, and decide upon, a moot point. The Court is not disposed to do that.

Point of Objection No 11 – alleged inability to receive a fair trial.

There is a presumption that the issuing state will respect the respondent's fundamental rights which rights, of course, include the right to a fair trial. The respondent's apprehension that he will not receive a fair trial is based upon adverse pre-trial publicity. It is undoubtedly the case that both under our Constitution, and also under the European Convention on Human Rights, the right to a fair trial cannot be trumped by the public's right to prosecute. However, it is to be presumed that the Courts of the issuing state will be in a position to put in place such safeguards and protective measures as may be necessary to ensure that the respondent receives a

fair trial.

Cases involving adverse pre-trial publicity also arise from time to time in our own jurisdiction and most cases are dealt with by means of strong jury warnings. On one or two occasions a temporary stay or adjournment of the proceedings has been granted to allow a so-called "fade factor" to set in. Be that as it may, it is clear that the Courts who best placed to determine what measures, if any, ought to be taken to ensure that the respondent can get a fair trial are the Courts of the issuing State. If the respondent has concerns about whether or not he can get a fair trial on account of adverse pre-trial publicity the place to air those concerns is before the Courts of the issuing State, unless there is some reason to believe that there is no effective remedy available to him there.

In *Minister for Justice, Equality & Law Reform v Puta and Sulej* [2008] IESC 30, a case in which the Supreme Court considered objections to the respondents surrender to the Czech Republic based upon their alleged inability to receive a fair trial, Fennelly J said:

"It is, of course, clear that persons in the position of the appellants are entitled to resist the making of the order by producing proof that they face the risk of mistreatment on their return. That is clear from the recitals to the Framework Decision and from section 37 of the Act of 2003. But they must discharge a heavy onus. They must rebut the presumption that the issuing state generally respects human rights. The evidence must be cogent. That is that it must be coherent and persuasive. It is easy to make unsupported and unverifiable assertions about the state of affairs in another country."

This Court would only be justified in seeking to look behind the presumption that the issuing state will respect the respondent's fundamental rights if the respondent had placed cogent evidence before it tending to suggest the contrary. The respondent has not discharged that evidential burden in this case. There is no reason to believe that any legitimate concerns that the respondent may have arising out of adverse pre-trial publicity cannot be raised before the Court of trial, or that the Court of trial would not take them seriously, or that the Court of trial would not seek to address them by an appropriate means so as to ensure that the respondent can receive a fair trial. The respondent has not put a scintilla of evidence before this Court to suggest that the Courts of the requesting State cannot be trusted to afford him a fair trial. Accordingly, the Court is not prohibited under s. 37 of the 2003 Act from surrendering the respondent on the basis of concerns that he would not get a fair trial due to adverse pre-trial publicity. This Court has no such concerns.

Point of Objection No 12 – alleged delay.

Even if there has been culpable prosecutorial delay in this case, and this Court makes no finding in that regard, it is clear from the judgments of the Supreme Court in *Minister for Justice, Equality & Law Reform v Stapleton* [2008] 1 IR 668 and in *Minister for Justice, Equality & Law Reform v Hall* [2009] IESC 40 that, in general, issues such as prosecutorial delay and its consequences, are more appropriately litigated in the requesting state.

In his judgment in *Stapleton* Fennelly J said:

"...it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried. The prosecuting and police authorities as well as other witnesses are available to and amenable to the jurisdiction of the courts of that country. Documentary evidence, of the type demanded by the respondent, will be more readily available there. If not, its absence may be more readily explained. There may, in addition, be arguments or points of domestic law, whether based on precedents or otherwise, which the respondent can advantageously argue or rely upon which may not be available to him in this jurisdiction and of which an Irish court might not necessarily be aware. I would echo and adapt the words of Simon Brown L.J. in *Woodcock v. Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 W.L.R. 1979 and say that the English courts "will have an altogether clearer picture than we have of precisely what evidence is available and the issues likely to arise ...".

In her judgment in *Hall*, Denham J stated:

"There may be situations where a court in this requested State would consider the issue of a delay, it would depend on the circumstances. However, in general, issues such as prosecutorial delay and its consequences, are more appropriately litigated in the requesting state, which is the state of trial. This presumption is based on the existence of remedies, such as access to judicial review or a process to review an allegation of abuse of process. It is grounded on the foundation of mutual trust of the European Arrest Warrant scheme. It all depends on the circumstances of the case. In the circumstances of this case the principle described in *Stapleton* applies and the issue of delay is a matter for the Courts in England."

In the present case the respondent has adduced no evidence to suggest that he would be unable to ventilate his complaints based upon alleged culpable prosecutorial delay before the Courts of the issuing state, or tending to suggest that there is no effective remedy that he could seek before those Courts. Accordingly, the Court is not prohibited under s. 37 of the 2003 Act from surrendering the respondent on the basis of concerns that he would not get a fair trial due to culpable prosecutorial delay.

Point of Objection No 13 – surrender would be unjust, invidious and in breach of the respondent's constitutional rights.

The respondent has not identified any article of the Constitution that would allegedly be breached by his surrender.

The Court is satisfied that the respondent's surrender would be neither unjust nor invidious and that it is not prohibited by Part 3 of the 2003 Act, or by the Framework Decision including the recitals thereto.

Conclusion

The Court is satisfied that the requirements of s.16 of the 2003 Act are met and that there is no legal inhibition to the respondent's surrender to the issuing state pursuant to the European Arrest Warrant dated the 9th of July, 2010.