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Neutral Citation Number: [2006] IEHC 191

THE HIGH COURT

Record Number: 2006 No. 18 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
J. B. F.

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 30th day of May 2006

1. The respondent's surrender is sought pursuant to a European arrest warrant which issued from the judicial authority in England on the 26th November 2004, and so that he can be prosecuted in respect of three offences of indecent assault under English law. The complainant was aged sixteen years on the date of these alleged offences, which are alleged to have been committed on the 26th May 2002.

2. It is not necessary to set forth the detail of what the respondent is alleged to have done, except to say that very full details are contained in the Statement in paragraph (c) of that warrant. It emerges from that statement that the first complaint made by the complainant to the police in respect of these allegations was made in September 2002, although it is also alleged that the complainant disclosed the matter to her mother on the 27th May 2002, being the day following the alleged acts being committed.

3. It was not until the 28th April 2004 that a domestic warrant was issued for the arrest of the respondent at Coventry Magistrates' Court, West Midlands, England. According to an affidavit sworn by Peter Frisby, an official in the Department of Justice, Equality and Law Reform in relation to the delay in having the warrant endorsed, the European arrest warrant which issued on the 26th November 2004 was received by the Central Authority in this State on the 24th February 2005. He has averred that thereafter certain advices were sought from counsel in relation thereto at the behest of the Attorney General, and following the receipt of those advices, the Central Authority communicated with the requesting authority in England by letter dated 1st April 2005. It was some nine months later on the 6th January 2006 that a response was received from the English authority.

4. Thereafter on the 14th February 2006 an application was made to the High Court pursuant to s. 13 of the European Arrest Warrant Act, 2003 (as amended) ("the Act") for the endorsement of the European arrest warrant for execution.

5. The respondent was arrested in this jurisdiction by Sgt. M. O'N. of An Garda Siochána on the 17th February 2006 and immediately brought before the High Court on that date, whereupon, having been satisfied as to compliance with the requirements of s. 13 of the Act the respondent was remanded on bail pending the hearing of the present application under s. 16 of the Act, the respondent having also filed and delivered his Points of Objection on the 27th February 2006.

6. I have set forth this chronology of relevant events as one of these Points of Objection relates to delay/lapse of time, and its consequences for the respondent. I will come to those submissions in due course.

7. Patrick McGrath BL, on behalf of the applicant, applied for an order for the surrender of the respondent.

8. Under s. 16(1) of the Act, this Court may make the order sought in this case provided it is satisfied as to a number of matters set out in that section, namely:

> (a) that the person before the Court is the person in respect of whom the warrant was issued;
>
> (b) the warrant has been endorsed in accordance with section 13 of the Act for execution;
>
> (c) where appropriate (i.e. in cases of a conviction/sentence imposed in absentia) an undertaking as required by section 45 of the Act;
>
> (d) that the Court is not required to refuse to surrender the respondent under sections 21A, 22, 23 or 24 of the Act;
>
> (e) that the surrender of the respondent is not prohibited by Part III of the Act, or the Framework Decision annexed thereto.

9. In addition the Court must be satisfied in relation to correspondence of the offences charged, and that the offences referred to in the warrant would carry in requesting state a penalty of the required minimum gravity, namely a maximum term of imprisonment of not less than twelve months, and also, as required by section 10 of the Act as amended, that a decision has been made by the requesting authority to charge and prosecute the respondent with the offences specified in the warrant.

10. Mr McGrath has submitted that the Court can be satisfied in relation to all of these matters in the case of the respondent. Specifically, in relation to correspondence he submits that the acts alleged against the respondent would, if committed in this State on the relevant date constitute offences of sexual assault under s. 2, sub-section (1) of the Criminal Law Rape (Amendment) Act 1990 which provides:

> ***"Sexual assault.***
>
> *2. (1) The offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall be known as sexual assault."*

11. He submits also that the minimum gravity requirement for such an offence for the purpose of an order of surrender is fulfilled by the provisions of s.2 (2) of the said Act namely:

> *"(2) A person guilty of sexual assault shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years."*

12. Mr McGrath has submitted that the narrative of the alleged acts and surrounding circumstances of the alleged offences as contained in the warrant make it clear that what is alleged to have occurred would be an assault accompanied by circumstances of indecency. Mr Kelly on the other hand has submitted that there is nothing alleged in the narrative to disclose an assault, in the sense that there is nothing which suggests that there was no consent on the part of the complainant to what is alleged to have taken place. Mr McGrath submits however that there is ample factual description within the statement from which an inference can be drawn that the complainant did not consent to what was alleged to be taking place. I agree. For example, and without setting out any verbatim content, it is clearly stated that when the acts occurred the complainant got up from where she was in the room and went to sit on a chair away from the respondent, but that he then told her to sit on his lap. She stated that she was scared and did not know what to do. On the way home it is alleged she asked her sister if she had seen what had happened, and that she told her sister to say nothing to their mother because she did not want to cause trouble. In my view there is sufficient narrative from which to infer the necessary lack of consent for the purpose of correspondence on this application.

13. Mr Kelly raises a second point namely whether there are in fact three offences raised at all in the narrative of facts set forth in the warrant, or only one offence. While it is clear that all the individual acts alleged took place within a short enough space of time on the same date, there are clear grounds for potentially regarding them as separate events. I am satisfied about this from a reading of that narrative. The alleged acts are different both as what was done and as to time. It is not just one continuum of action which is alleged against the respondent.

14. I can add also that Kieran Kelly BL for the respondent has helpfully conceded that no issue is raised by the respondent in relation to the warrant being duly issued in the requesting state. Neither has any issue been raised as to the identification of the respondent or the manner in which his arrest was carried out and compliance with the requirements of s. 13 regarding what documentation is furnished to the respondent and what he was informed as to his rights and entitlements thereunder.

15. The respondent raises other objections to surrender on the basis that his surrender is prohibited under Part III of the Act.

16. Firstly, Mr Kelly submits that his surrender is prohibited under s. 37(1) of the Act, which provides:

> "37.—(1) A person shall not be surrendered under this Act if—
>
> (a) his or her surrender would be incompatible with the State's obligations under—
>
> (i) the Convention, or
>
> (ii) the Protocols to the Convention,
>
> (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies."

17. In this respect, he submits that on the facts of this case the surrender of the respondent would infringe Articles 38, 40.1, 40.3, 41 and 42 of the Constitution. Essentially this submission is grounded on what Mr Kelly regards as the unreasonable and excessive delay on the part of the U.K. authorities and the relevant authorities in this State in the various steps leading up to the arrest of the respondent and the application for his surrender on foot of the European arrest warrant.

18. This delay is said to cause an infringement of a number of constitutional rights, including under Articles 34.1, and 35.2 of the Constitution. While these articles are referred to in the Points of Objection filed, no written or oral submissions referred to them, and since they are clearly not of any relevance to the present case I do not propose to consider them.

19. Mr Kelly points to the delay in this application coming before the Court. I will set out the history of the matter as it appears from the respondent's affidavit.

20. As I have already set forth the alleged offences are said to have occurred in 26th May 2002. In his affidavit, the respondent has sworn that on the 27th May 2002 he received a phone-call in which he states that he was verbally abused. He does not say from whom the call was received, but goes on to state that on the following day he returned to the complainant's grand-parents house to find out what the problem was. He states that he was physically attacked on that occasion by the complainant's grand-parents and that an accusation was levelled against him that he had done something of a sexual nature. He states that he was not aware of that, he went to the police, reported the allegation to them, and was told by the police that no report of any such allegation had been made to them at that stage, and that since it was a family matter he would be well advised to go back to Ireland.

21. He states that on his return he continued to receive threatening phone-calls and text messages, which included a threat that his house would be burnt down, which caused him to move out of his home. He returned home about August 2004, and then set about dealing with home difficulties that had resulted from his moving out, such as school non-attendance by his sons, and some debts which had built up. He is of the view that in the one and a half years which followed his return he turned things around domestically, ensuring that his sons returned to school. He has stated that he works as a b. d. and has arranged his work around his family requirements. He cooks and helps his sons with homework, and he is of the view that he has built strong bonds with his sons and that they have now a strong family unit. I should perhaps have referred to the fact that he is separated from his wife who resides in Northern Ireland, according to his affidavit. He has also taken out some loans with a Credit Union to address the debts which had built up.

22. He does not understand how it has taken from May 2002 until the present time to progress matters to the present stage where his surrender is being sought. He has never been questioned about any allegations and has not been invited to interview. He feels prejudiced by this delay and the allegations being made, and he suggests that the delay has resulted in a situation where all he can do by way of defending himself against the allegations at any trial is to deny that anything happened. He believes that if he is surrendered to England he will be in custody awaiting trial and that the family

23. life which he has succeeded in building up will be destroyed to the detriment of the health, welfare and education of his children.

24. Any order for surrender is submitted to constitute a breach of constitutional rights guaranteed by Articles 38 and 40 of the Constitution, which as relevant provide as follows:

> ***"Article 38***

1. No person shall be tried on any criminal charge save in due course of law……

Article 40

1. All citizens shall, as human persons, be held equal before the law……

2. 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen…"

25. Mr Kelly submits firstly that none of the delay can be laid at the door of the respondent. I agree. He is not in any way responsible for any of the delay which has undoubtedly taken place. He submits also that the fact that he has never been asked to make a statement or submit to interview in relation to the allegations is a breach of his right to fair procedures, and that he should have been afforded the opportunity to give an account of the matter before his liberty was removed without any warning when the Gardaí arrived at his door to arrest him on foot of this warrant. The submission is that if the warrant had been executed in a timely fashion the respondent's constitutional rights would not have been compromised as to the ability to defend himself and having a trial in due course of law in the sense of within a reasonable time.

26. Mr McGrath for the applicant submits on the other hand that even if there has been some delay on the part of the requesting authority in progressing the matter, and in this respect he acknowledges that there seems to have been a delay of about nine months in providing a response to the Central Authority's letter of the 1st April 2005, it is nowhere near the sort of length of delay which the Courts have considered to justify a refusal to extradite in the past, and that the respondent has failed to demonstrate a violation of his rights or any factor which would justify a refusal of the order sought.

27. I cannot regard the sort of delay which occurred in this case as coming anywhere near the sort of length of delay which could give rise to a breach of constitutional right such that would warrant a refusal of the obligation to order surrender under the Act and the Framework Decision. It requires something quite exceptional both in terms of length and consequence/prejudice to bring the s. 37 provisions into play. There is nothing of any significance contained in the respondent's affidavit as to how he is prejudiced in the ability to defend himself. There is no suggestion that any witness is no longer available, and I suspect that he is in the same position now to defend himself as he would have been at any stage since May 2002.

28. As regard the submissions related to breach of family rights, the following articles are referred to:

"Article 41

1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

Article 42

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."

29. Mr Kelly submits that the surrender of the applicant will shatter his family life which he has tried so hard to build up, and that there will be a breach his constitutional family rights. But the submission as to interference with family rights is insubstantial. The respondent is in the same position as most other persons whose surrender is sought in another jurisdiction. It is obvious that family life will be disturbed in the event that surrender is ordered. There is nothing unique or significant in what is being put forward in this regard and it is not sufficient to deny surrender, even allowing for the fact that the delay is not the fault of the respondent, and the explanations given, in so far as there is explanation.

Article 17 of the Framework Decision

30. Mr Kelly has referred to the exhortation contained in article 17 of the Framework Decision which provides, *inter alia*, that a European arrest warrant shall "*be dealt with and executed as a matter of urgency.*" He submits that in the present case there has been no urgency shown in the manner in which the authorities have proceeded and that surrender accordingly should not be ordered. He refers also to the provisions of s.13 of the Act which provides:

"13.—(1) The Central Authority in the State shall, as soon as may be after it receives a European arrest warrant …… apply, or cause an application to be made, to the High Court for the endorsement by it of the European arrest warrant, or a facsimile copy or true copy thereof, for execution of the European arrest warrant concerned.

(2) If, upon an application under subsection (1), the High Court is satisfied that, in relation to a European arrest warrant, there has been compliance with the provisions of this Act, it may endorse—

(a) the European arrest warrant for execution……" (my emphasis)

31. He refers to the fact that it has been averred that the warrant was received in this State in February 2005 having been issued in November 2004. The latter date itself was some seven months after the domestic warrant was issued. But Mr Kelly refers also to the fact that after the European arrest warrant was received in this State by the Central Authority (the Minister), it was decided to communicate with the Attorney General, and that this led to the obtaining of Counsel's Opinion, following which the Central Authority wrote to the authorities in the United Kingdom on the 1st April 2005. A delay of nine months then followed before a response was received. Mr Kelly submits firstly that this action is not authorised or provided for by the Act, and that the provisions of s. 13 are very clear as to what is to be done, namely that "*the Central Authority in the State shall, as soon as may be after it receives a European arrest warrant transmitted to it … apply… to the High Court for the endorsement by it of the European arrest warrant…for execution…*"

32. Mr Kelly submits that under the scheme of the Act and the Framework Decision the Central Authority is merely an administrative back-up to the High Court which is the judicial authority, which has the obligation to surrender.

33. In this respect, Mr Kelly has referred also to s. 10 of the Act which provides, as relevant:

> *"10. —Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—*
>
> *(a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates……*
>
> *that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state." (my emphasis)*

34. He submits that since the provisions of the Act have not been complied with as the application to endorse the warrant was not made "as soon as may be", the Court is not empowered to order surrender, since the Court may make the order sought only where the provisions of the Act have been complied with.

35. Mr McGrath submits on the other hand that the Central Authority has not delayed unreasonably in the matter, and that it is entitled to seek Counsel's advice where necessary, and that there was no delay after that was obtained. He submits that while this precise question has not yet been the subject of a judicial determination, namely the meaning to be given to "as soon as may be" the judgments of the Supreme Court in the *Dundon* make it clear that the reference to urgency in the manner in which these matters are to be attended to, and the time limits referred to in the Act and the Framework Decision are exhortationary rather than mandatory, and that even though there may have been some delay, albeit not on the part of the Central Authority here, it is not something which should result in the refusal to order surrender to the issuing state. He refers to the fact that the Framework Decision sets forth both mandatory and non-mandatory grounds upon which surrender may be refused, and that delay of the kind alleged by the respondent in this case is not within either category.

36. There is no doubt about the fact that the Framework Decision requires that extradition arrangements be dealt with urgently. The wording of Article 17 of that Decision makes that clear. But the consequences of a delay which either can not be explained or is not explained adequately are not spelt out. In the present case there has been some delay between the time that the European arrest warrant was issued in November 2005 and when the application for endorsement was made to the High Court here on the 14th February 2006. It is a delay of some fifteen months. Some of the time spent has been explained, but there is no explanation for the time it took the requesting state to respond to the correspondence from the Central Authority dated 1st April 2005 until 6th January 2006. That is not a delay by the Central Authority here. The delay alleged by the latter is alleged on the basis that the Act does not allow for the Central Authority seeking the advice of Counsel.

37. In my view the Central Authority is the body charged with bringing an application under s. 13 of the Act to the High Court. The Central Authority in the State is the Minister for Justice, Equality and Law Reform. The Attorney General is the legal adviser to the Government, and it is perfectly reasonable that the Minister should refer the matter to the Attorney General before proceeding with an application to the High Court. It is equally reasonable that such advices as the Attorney General gives be heeded and where necessary the advice of Counsel be obtained before an application is made to the High Court. It would seem to be the case that the requesting state was somewhat tardy in the matter of responding to the letter dated 1st April 2005, but that fact alone is not in my view sufficient to amount to a ground to refuse the order of surrender. Any lack of respect for the exhortation contained in article 17 is not in my view something from which it is intended that a respondent should derive benefit.

38. In a different context the Supreme Court has pronounced on the question of time limits under these new arrangements in the *Dundon* case. Specifically the Court was addressing the consequences for an order of surrender not being made within the time limits specified in Article 17 of the Framework Decision, and in particular whether it gave rise to an obligation to release the respondent. Geoghegan J. was of the view, inter alia, that the time limits of 60 days and 90 days within which under the Act and the Framework Decision an order of surrender should be made, are "with a view to internal discipline and not with a view to conferring individual rights in individual cases." Denham J. in her judgment in *Dundon* stated that the Act [of 2003] "makes provisions aspiring to have the matter dealt with urgently", and also to "the exhortation in the Council Framework Decision" as to these time limits. In *Dundon*, of course, there was the distinct feature that the respondent had himself contributed to the exceeding of the time limits since he had exercised his entitlement to access to the courts including by way of appeal. That feature is absent in the present case. The respondent has not contributed to the delay complained of in relation to the making of the application for the endorsement of the warrant under s. 13 of the Act.

39. But, is it possible that in a situation where it has been held that to exceed a specified time limit for the making of an order does not give an entitlement to an individual right to be released, it can nevertheless be said that where the Central Authority has not made its application for endorsement "as soon as may be" because the requesting state incurred a delay in answering some correspondence, a respondent arrested on foot of such an endorsed warrant should be released? I think not. It would be to apply an interpretation inconsistent with the interpretation of time limits in Dundon.

40. There is no doubt that the Framework Decision urges that matters be dealt with urgently and that the Act reflects that aspiration including by requiring that the application under s. 13 be made "as soon as may be". That is an imprecise phrase. It cannot mean "forthwith" as that word has not been used. Neither has the Framework Decision or the Act used a precise time period from date of receipt of the warrant by the Central Authority, such as, say, "within fourteen days". Neither has the Framework Decision or the Act used the phrase "as soon as practicable" or "as soon as possible" or even "as soon as reasonably possible". The legislature has, in order to reflect the need for urgency as far as the application for endorsement is concerned, reflected the concept of urgency mandated in the Framework Decision, by the use of "as soon as may be" following receipt. So what does that mean? Does it preclude the Central Authority taking advice or communicating with the requesting state prior to making the application for endorsement? Again I think not. It is perfectly reasonable that matters could arise on which advice needs to be taken or further information needs to be obtained before the application is made. In that way the requested state can be seen to be cooperating with the issuing state in the matter of extradition, and that spirit of mutual cooperation is another aspiration of the Framework Decision, so there is no conflict arising with the Framework Decision by the Central Authority assisting the issuing state in this way. This co-operation was referred to by the Chief Justice in his recent judgment in *Minister for Justice, Equality and Law Reform v. Altaravicius*, unreported, 5th April 2006 where he states:

> *"The process by which one State transfers a person to the custody of another State for the purpose of standing trial on a criminal charge or serving a sentence, whether it be called extradition, rendition or surrender, is a long established means of cooperation between States with a view to upholding the rule of law and combating all forms of criminal*

activity whether national or transnational……"

41. If it be the situation that upon receipt of the warrant in this State the Central Authority, even in the glare of an obvious defect or lacuna, cannot ask for further information or documentation, or even take legal advice, before immediately launching a futile application under s. 13 of the Act for the endorsement of the European arrest warrant, it would be an absurdity, and make nonsense of the procedures put in place for the stated purpose of speeding up and simplifying the surrender procedures between member states. In my view the phrase "as soon as may be" must allow for reasonable necessary steps to be taken before the application is made, such as corresponding with the requesting judicial authority or taking advice. It is to be distinguished from "forthwith" in this respect. There could be exceptional circumstances, perhaps, where there has been such dilatoriness on the part of the Central Authority as to bring the time factor outside any reasonable meaning of "as soon as may be" but the present case is far from that, even if there has been some delay, not by the Central Authority, but by the requesting authority, if Mr Frisby's affidavit is correct as to what happened.

42. A similar, though not identical question was considered by Scott Baker LJ in *Nikonovs v. Governor of Brixton Prison* [2006] 1 All ER 927. In habeas corpus proceedings brought following the making of an order for the surrender of the applicant on foot of a European arrest warrant, the issue was whether the applicant following his arrest on foot of the endorsed warrant had been brought before the Court "as soon as practicable" in accordance with the wording of s. 4(3) of the English Act. S. 4(5) of the same act provided that where a person was not brought before the Court as soon as practicable following arrest, he must be discharged. It happened in the case that the applicant had been arrested on a Friday afternoon, but was not brought before the Court until the following Monday afternoon. This was because it was mistakenly thought by those whose duty it was to bring him to Court that there was no Court sitting until Monday, whereas in fact there was a court available on the Saturday following the arrest. Scott Baker LJ considered the meaning to be given to "as soon as practicable. He stated as follows at p. 932:

> *"Whether or not the claimant was brought before the judge at Bow Street as soon as practicable is a question of fact. Two points should be noted. First the criterion is 'practicable' rather than the more elastic 'reasonably practicable'. Second the draftsman has chosen the practicability rather than the more precise criterion of a specified period as, for example, 48 hours in s. 6(3) of the 2003 Act. There will no doubt be cases at the margins where views could reasonably differ whether the applicant was indeed brought before the appropriate judge as soon as practicable. But that is not this case. …….. No one suggests that it was not practicable to bring him to London that day. He could have been brought to Bow Street and the District Judge was very unhappy that he was not…… I have no hesitation in concluding that the applicant was not brought before an appropriate judge as soon as practicable."*

43. In the present case, the words "as soon as may be" contain the same elasticity as the words "as soon as reasonably practicable" referred to by Scott Baker LJ. They do not equate to 'as soon as practicable. If more precision was to be involved, different words would have been used, or indeed a precise timeframe such as "within 24 hours". It must of course be pointed out, if that be necessary, that in *Nikonovs* the Court was dealing with a period of time in which the claimant was in custody. That is not the situation in the present case, and there would be less concern therefore as to the length of time involved in the process prior to the endorsement of the warrant.

44. The term "as soon as may be" has been deliberately chosen by the Oireachtas and allows for the passage of reasonable time so that the application can be made to the High Court following receipt of the warrant by the Central Authority, when that application is ready to be made, rather than in terms such as "forthwith". Having already decided that the Central Authority was entitled to seek the advices which it sought prior to the application for endorsement being made, I am also satisfied that it made the application "as soon as may be". There is no evidence that the Central Authority here delayed unreasonably in bringing the application for endorsement. In my view the exhortation of urgency contained in Article 17 of the Framework Decision has not been ignored or overlooked by the Central Authority in this regard.

45. Being therefore satisfied as to all the matters that I am required to be satisfied about under s. 16(1) of the Act, as well as in relation to correspondence and the minimum gravity of the alleged offences, the Court is required to make the order under s. 16, namely that the respondent be committed to prison to await arrangements being put in place for his surrender into the hands of those authorised to receive him in the issuing state. I so order.