

**THE HIGH COURT****Record Nos: 2010/108 EXT****2010/109 EXT****2010/392 EXT****Between:****THE MINISTER FOR JUSTICE AND EQUALITY****Applicant****-And-****D. M.****Respondent****JUDGMENT of Mr. Justice Edwards delivered on the 7th day of November, 2012.**

In this case the respondent is the subject of three separate European arrest warrants, dated the 18th June, 2009, the 4th February, 2010 and the 7th October, 2010, respectively, and on foot of which the Republic of Poland seeks his rendition for the purposes of having him serve sentences, or the balance(s) thereof remaining to be served, as the case may be, imposed upon him by courts in Myszków, Poland in respect of the various offences that are the subject of the three warrants in question.

The warrants were indorsed for execution by this Honourable Court and were executed together on the 12th August, 2011 when the respondent was arrested by Garda Ray Moloney. Following execution of the warrants the respondent was brought before the High Court as required by s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). This took place on the 13th August 2011, and oral evidence was received as to arrest and identity which was not challenged. In each case the Court, being satisfied at the s. 13 hearing as to execution of the warrant, and also as to identity, fixed a date for the purposes of s. 16 of the Act of 2003, such date being a date falling not more than 21 days from the date of arrest. Thereafter each case was adjourned from time to time until ultimately a date was fixed for a substantive surrender hearing.

The respondent filed separate Points of Objection to his surrender in each set of proceedings on the 18th June, 2009, the 4th February, 2010 and the 7th October, 2010, respectively. He subsequently, with the consent of the applicant, sought this Court's leave to file additional Points of Objection in each set of proceedings, and having been granted such leave filed additional Points of Objection on the 20th February, 2012.

The matter first came on for hearing on the 21st June, 2012. It was not concluded on that date and was adjourned part heard until the 16th July, 2012. There was a further hearing on that date but again it was not concluded and the matter was further adjourned part heard and was listed for mention on the 2nd October, 2012 for the purposes of fixing a date for resumption of the hearing with a view to concluding the case. On the 2nd October, 2012 a date was fixed for resumption of the hearing, namely the 23rd October, 2012.

When the matter resumed on the 23rd October, 2012 the respondent sought informally, and without the service of a formal motion, further leave of the Court to amend his Points of Objection a second time to add yet another ground of objection. Having regard to the lateness of the application, and the fact that no prior notice had been given, the Court refused to entertain it on the informal basis on which it was being presented, and insisted upon the respondent bringing a formal motion to amend his pleadings. The Court granted short service for the service of the required motion for the following day.

The respondent duly filed a Notice of Motion returnable for the 24th October, 2012 seeking "An Order granting the Respondent liberty to adduce additional points of objection", and grounded upon an affidavit of the respondent sworn on the 23rd October, 2012.

The respondent's affidavit may be summarised as follows. He has one child W who was born on a date in 2008 in Poland. Her mother T is his former partner. W and T came to Ireland in 2009 shortly after W was born. They have settled in Co. Kildare and W is at school there. The respondent is registered as W's father on her birth certificate. The respondent deposes that he and T split up as a couple on the 6th September, 2012. Since then T has exhibited a declining ability to look after W. T has started to drink heavily and has allowed W to travel in vehicles with persons who have consumed alcohol. T has also on one occasion been discovered by the respondent, who was accompanied at the time by W, having sex with another man. The respondent contends that T has no job, is not in receipt of social welfare and lives solely on money that the respondent provides to her. He also pays her rent, and pays money for W's support, including buying all W's clothes and paying for her school requirements. The respondent says that T has declined all offers of work on the basis that she has to look after W, but that in fact she has no will to work.

The respondent contends that if he is surrendered T will be unable to support W either emotionally or financially. W now has roots here, and speaks both Polish and English. T lives with her new partner in bad conditions. The partner's only income is permanent disability benefit. There is no running water or heating in the home. They can barely support themselves. T has no support network in this jurisdiction, no ties and no income. The respondent sees himself as W's primary carer in terms of financial welfare and emotional welfare. He has applied for guardianship rights and that case is due to be heard in the District Court on the 11th December, 2012. He says that he faces "an evidential deficit in that I do not have any money to pay for an expert report from a Consultant Clinical Psychologist or other relevant expert."

The respondent has exhibited draft additional Points of Objection which are pleaded in the following terms:

"1. The surrender of the respondent is prohibited pursuant to Part 3 section 37(1)(a) and/or s. 37(1)(b) [of the European Arrest Warrant Act 2003] and/or under the Framework Decision as:

(a) If the respondent is surrendered there is a real risk that his daughter [W] would suffer treatment constituting a breach of family rights under Article 8 of the European Convention on Human Rights.

(b) Further or in the alternative, the Respondent believes that if surrendered to the Republic of Poland there is a real risk that he would suffer treatment constituting a breach of his family rights under Article 8 of the European Convention on Human Rights.

2. Further, or in the alternative and without prejudice to the foregoing, to Order the surrender of the respondent would be a disproportionate interference with [W's] rights and/or the respondent's rights under Article 8 of the European Convention on Human Rights and Article 7 and 24 of the Charter of Fundamental Rights of the European Union and as a consequence surrender of the respondent would be in breach of section 37 of the European Arrest Warrant Act, 2003."

In *Minister for Justice and Equality v. Doyle* (Unreported, High Court, Edwards J., 17th October 2012), I stated that I considered that Points of Objection in a European arrest warrant case should be treated as being more akin to a Statement of Grounds or Points of Opposition in a judicial review, than to a Statement of Claim, or a Defence, in a civil action. In doing so I was indicating agreement with, and my intention to follow, views to that effect expressed previously by my predecessor as judge in charge of the European arrest warrant list, Peart J., in the case of *Minister for Justice, Equality and Law Reform v. Skowronski* [2006] I.E.H.C. 321 (Unreported, High Court, Peart J., 31st October, 2006). Accordingly, the Court's approach to applications to amend Points of Objection in a European arrest warrant case should mirror the approach that would be taken to an application to amend a Statement of Grounds or Points of Opposition in a judicial review.

The Court is entitled to have regard to the general requirements of the Rules of the Superior Courts in regard to the filing of Points of Objection, the stage of the proceedings at which the application is made, the reasons for the late application and whether it could have been made earlier, the nature of the proposed amendment, the likelihood of the point being successful in the event of the amendment being allowed, the rights of interested third parties who might be affected (if any) e.g. in this case the child W, the overall circumstances of the case and the interests of justice. In addition, it should also have regard to the imperatives of the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)) including the public interest in the return of fugitives to justice, and the objective of the speedy and efficient disposition of European arrest warrant cases.

The Court has carefully considered the application to amend the pleadings in this case. As was pointed out in *Doyle*, to which I have already referred, O. 98, r. 5(1) of the Rules of the Superior Courts requires Points of Objection to be filed within four days of the date fixed for the purposes of s. 16 of the Act of 2003 and further requires such Points of Objection to contain a statement in summary form of the grounds and of the material facts on which the respondent relies to resist the execution of the European arrest warrant. It is true that in practice the date fixed for the purposes of s. 16 of the Act of 2003 is almost always treated as a notional hearing date only, and that cases are usually adjourned from time to time until a hearing is ready to proceed. It is also the case that the time for filing of Points of Objection is, in those circumstances, usually extended under O. 122, r. 7 of the Rules of the Superior Courts. Nevertheless, what the Rules require is that Points of Objection should be filed before the hearing date. They were not filed before the hearing date in this case.

The Court accepts, of course, that in some cases it is not possible to raise a particular point of objection before the hearing date where, for example, the circumstances giving rise to the need to do so only arise after the fact. In this case, the matter was at hearing when the 2012 long vacation intervened, and stood adjourned on a part heard basis to October 2012 when it was to be resumed. The circumstances giving rise to the respondent's wish to raise a late s. 37 objection based on Article 8 of the European Convention on Human Rights ("E.C.H.R.") only arose in early September 2012. The Court accepts that in the circumstances the respondent has sought to raise the issue in a timely fashion.

However, the real problem from the respondent's point of view is that, even if the amendment is allowed, he has little prospects of success in sustaining the new point. There is an acknowledged evidential deficit. As this Court has made clear in a succession of cases such as *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2011] I.E.H.C. 136 (Unreported, High Court, Edwards J., 5th April, 2011); *Minister for Justice and Equality v. D.L.* [2011] I.E.H.C. 248 (Unreported, High Court, Edwards J., 22nd June, 2011); *Minister for Justice, Equality and Law Reform v. F.L.J.* (Unreported, High Court, Edwards J., 8th April, 2011), and most recently in *Minister for Justice and Equality v. Machaczka* (Unreported, High Court, Edwards J., 12th October, 2012) the bar has been set very high with respect to Article 8 based s. 37 objections. To successfully resist surrender requires the establishment of truly exceptional circumstances. While the recent decision of the U.K. Supreme Court in *H.H. & Ors. v. Deputy Prosecutor of the Italian Republic, Genoa (Italian Judicial Authority) & Ors.* [2012] U.K.S.C. 25 may be of some persuasive influence, it has not as yet been considered in detail by this Court, nor by the Supreme Court, and does not represent the law in Ireland at this time. Moreover, it is in this Court's view unlikely to assist the respondent in circumstances where the acknowledged evidential deficit exists. In the Court's view, approaching the matter not just from the perspective of the respondent personally, but also with due regard to the best interests of W, the respondent is not able to adduce evidence of sufficient cogency to have any realistic prospect of satisfying this Court that to surrender the respondent would disrespect either the respondent's, or W's, right to respect for family life under Article 8 E.C.H.R.. There are many steps that could be taken to address the issues raised, other than the non-surrender of the respondent.

In all the circumstances of the case, the Court is not satisfied that the interests of justice require the granting of the amendment sought, and I must therefore refuse this application.