[2019] IEHC 790

THE HIGH COURT

[2019 No. 197 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DAVID KERRIGAN

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 7th day of November, 2019

1. In these proceedings, the applicant seeks an order for the surrender of the respondent to the United Kingdom for the purpose of the prosecution of the respondent of offences described in a European Arrest Warrant ("EAW") issued by district judge Sarah Jane Griffiths of Westminster Magistrates' Court, as issuing judicial authority, on 6th June, 2019. The EAW was endorsed by this Court on 7th June, 2019, and the respondent was arrested thereunder on 10th June, 2019, and remanded in custody thereafter.

2. The warrant is stated to relate to two offences, one of murder, contrary to common law, and the other of attempted murder, contrary to an act entitled the Criminal Attempts Act 1981. At para. (E) of the EAW, it is stated that the respondent along with two others who have already been charged, together with a fourth person, murdered a named individual (the first offence), and were subsequently involved in the attempted murder of another (the second offence). It is stated that this is a gang-related case, and that the attack on the deceased was a pre-planned attack. It is stated that CCTV footage shows three males including the respondent chasing the victim and striking him with knives.

3. As regards the second offence, the EAW states that the vehicle in which the respondent and the others with him were travelling at the time of the first offence left the scene of that offence and, within approximately 15 minutes, two males got out of their vehicle, armed with knives, which they punched at the back of the victim. The victim has four stab wounds in the middle of his back. The police arrive in a police vehicle, and, following upon a chase, the respondent is identified as one of the people who later alights from the vehicle used in connection with both offences. It is stated that he runs away and turns back to face the camera and the police vehicle. It is stated that at this stage his face is partially covered in a white T-shirt and he is carrying something in his hand. Later, police find a white T-shirt and a knife discarded close by, both of which contain the DNA of the respondent. The issuing judicial authority has ticked murder/grievous bodily injury at para. (E)/I of the EAW, apparently in relation to both offences.

4. The respondent swore an affidavit in opposition to this application dated 19th July, 2019, and points of objection were delivered on his behalf on 2nd October, 2019. In his affidavit, the respondent asserts that if he is convicted in the United Kingdom of the offences described in the EAW he wishes to be returned to this country to serve his sentence. However, he avers that if he is convicted in respect of the attempted murder charge he will face a determinate sentence, and at present requests for the transfer of

determinate sentences from the United Kingdom to Ireland are not being processed because of the absence of legislation.

5. He further avers that if he is surrendered, he has been advised by lawyers in the United Kingdom that he may be sent to HMP Wormwood Scrubs depending on the magistrates' court that he first attends. However, he could also be sent to either of HMP Pentonville, or HMP Thameside. Since his case will go to the Old Bailey, another possibility is that he might be sent to HMP Belmarsh.

6. The respondent then refers to criticisms of these prisons by HM Chief Inspector of Prisons (the "Chief Inspector") and refers to reports issued by the Chief Inspector in 2017 in connection with the first three prisons, and in 2018 in connection with Belmarsh. He avers that he is concerned for his safety and well-being if returned to the United Kingdom. He says that he resided with his aunt in London and there have been a number of attacks on her property. These attacks have continued while he has been detained here in Cloverhill prison. He also says that his life has been openly threatened on social media on a number of occasions, and having regard to all of this he believes that his life would be in danger if he is incarcerated in the United Kingdom.

7. A notice of objection to surrender was filed on behalf of the respondent on 2nd October, 2019. This application then came on for hearing on 30th October, 2019. Thirteen points of objection were raised on behalf of the respondent, but not all were pursued and in this decision I will address only those that were pursued by the respondent at the hearing of this application.

Objections

8. Ambiguity in EAW

It was contended on behalf of the respondent that the EAW was unclear or ambiguous as to whether the surrender of the respondent was required for the purpose of prosecution, sentencing or execution of a sentence. In this regard the respondent was effectively relying upon the failure on the part of the issuing authority to strike out standard form portions of the EAW that were not of application in this case. So, for example, the opening paragraph of the EAW states: "I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" and at para. (F) of the warrant it is stated: "if the executing judicial authority is required by its domestic law to refuse to surrender the requested person on the grounds of Article 4 (6) of the Council Framework Decision on the European arrest warrant, it is requested to supply an undertaking that it will execute the sentence in accordance with its domestic law". The text relied upon by the respondent in support of this objection is text that appears in all EAWs issued by the United Kingdom, and while it is true that it would be preferable that EAWs were always properly completed and superfluous text deleted, it does not follow that a failure to do so will result in a refusal of surrender where the intention of the warrant is clear. In this regard at para. (B), sub para. 1 of the EAW it is stated that the decision on which the warrant is based is a warrant of arrest in first instance issued by Westminster Magistrates' Court on 6th June, 2019, and at sub para. 2 where the words "enforceable judgment:"

appear, they are followed by N/A. The EAW clearly states that no sentence has been imposed, and later, at para. (E) it is stated: “charges have been authorised as follows in relation to Kerrigan:”. Particulars of the charges then follow.

9. Finally, in relation to this objection, at para. (D) it is stated that this section of the EAW, which only applies to trials in absentia, is not applicable. In my opinion, it could not be more clear that the purpose of the warrant is to prosecute the respondent for the offences described therein at para. (E).

10. Correspondence

An objection made that the respondent did not know with clarity the number of offences for which his surrender was sought was not pursued and it was conceded that the EAW makes it clear that his surrender is sought for two offences, murder and attempted murder. As regards the latter, it was argued that the warrant discloses no more than the possible presence of the respondent at the scene of the attempted murder, and mere presence at the scene is not a crime in this jurisdiction. This argument was advanced on the basis that attempted murder cannot be considered, for the purpose of the “ticked box offences” as being the same as murder. It is argued that it is therefore necessary to demonstrate correspondence between the acts described in the EAW and the offence of attempted murder or some other offence in this jurisdiction.

11. Counsel for the applicant argued that murder includes attempted murder for the purpose of the “ticked box offences”. I think that this is unlikely to be correct. But in the circumstances of this case it hardly matters. The EAW makes it clear that the respondent is to be charged with attempted murder, which is an offence in this jurisdiction. Moreover, I do not think that there can be any doubt that the description of the actions comprising the attempted murder described in the EAW, and as summarised at para. 3 above, would certainly amount to an offence in this jurisdiction. Section 5 of the European Arrest Warrant Act 2003 (the “Act of 2003”) requires the Court to consider whether the acts allegedly carried out by the respondent as described in the EAW would, if committed in the State on the date on which the EAW is issued, constitute an offence under the law of the State. The EAW describes how the victim of the attempted murder was stabbed in the back by two individuals who alighted from a car in which the respondent was travelling. It also describes how a person believed to be the respondent is seen to be one of those alighting from the vehicle and thereafter dropping the knife, which was later found to contain the respondent’s DNA. Whether or not the respondent can be proven to have been at the scene and actively involved in the events described in the EAW is a matter for the trial. For the purpose of this application the Court is only required to be satisfied that the activities described would constitute an offence in this jurisdiction if committed as of the date of the EAW. I am absolutely satisfied that this is the case. As Mr. Farrell for the applicant put it, the actions concerned could amount to any number of offences, including attempted murder, assault causing harm and assault causing serious harm.

12. No Transfer of Sentence Available

In relation to the offence of attempted murder, the respondent also objects to his surrender because, if convicted, he will be sentenced to a determinate sentence with a

custodial element and a licence element in the issuing state. The laws of this State do not at the moment provide a legal basis for giving force and effect to such a sentence in this jurisdiction, and the respondent has stated that if convicted and sentenced he wishes to serve his sentence here, and the respondent argues that this is oppressive and arbitrary and contrary to law. No authority was opened to me for this proposition. Nor do I consider that a sentencing regime which affords a significant concession to a convicted person by way of his release upon a licence could be considered as oppressive or arbitrary. Furthermore, the Framework Decision provides for very limited and exhaustive grounds for refusal of surrender. This argument is not one of those grounds, and this objection must also be rejected. I should add however that at the hearing of this application counsel for the respondent made the point that even if this ground of objection is unsustainable in and of itself, it serves to emphasise and support the arguments of the respondent made below as to a violation of his rights under the European Convention on Human Rights, the Constitution and the Charter of Fundamental Rights of the European Union.

13. Does the Arrest Warrant precede the EAW?

Counsel for the respondent also expressed concern that the arrest warrant on which the EAW is based bears the same date as the EAW itself. Counsel refers to an affidavit of laws sworn on behalf of the respondent, in connection with these proceedings, by a Benjamin Seifert, barrister of Temple Garden Chambers, London. Mr. Seifert refers to section 142 of the Extradition Act 2003 in the United Kingdom which requires that the issuing authority in that jurisdiction may issue an EAW when satisfied that there are reasonable grounds for believing that the person has committed an extradition offence, and that a domestic warrant has been issued in respect of that person. There are also other alternatives but this is the one that applies in this case. Mr. Seifert also refers to the decision of the CJEU in the case of *Bob-Dogi* (C-241/15, EU;C:2016:385) in which, at para. 64, the CJEU held that an EAW must, in an accusation case, be based on a prior separate national arrest warrant. Since both the arrest warrant on which the EAW is based and the EAW bear the same date, Mr. Seifert expresses the view that, notwithstanding the mutual trust which member states of the EU must accord to each other in these matters, this Court should ensure that a warrant for the arrest of the respondent had in fact been issued prior to the issue of the EAW by raising this query with the issuing judicial authority. Counsel for the respondent submits that it would not be an affront to the concept of mutual trust to request this assurance in circumstances where the arrest warrant is stated to bear the same date as the EAW.

14. In my view however, such a course would be inappropriate. Both the arrest warrant referred to in the EAW, and in the EAW itself were issued on the same day by the same court i.e. Westminster Magistrates' Court. The trust and confidence which member states are required to afford each other for the purposes of implementing the Framework Decision require that, unless there is an obvious error or lack of clarity on the face of the EAW, facts that are clearly and unambiguously stated must be accepted, and the Court must further accept that procedures have been followed correctly. The Court is not entitled to ask for a copy of an arrest warrant either to satisfy itself as to its existence, its

contents or the date of its issue. It must accept what is stated in the face of the EAW in this regard. The fact that the warrant and the EAW bear the same date does not create any uncertainty or ambiguity, and nor does it alter the general obligation of the Court to presume that these procedures have been correctly followed. It is not at all unusual for documents completed at the same date to be completed in a particular or specified order as the circumstances may require. It is in my view correct and appropriate for this Court to proceed on the basis that the issue of the arrest warrant preceded the issue of the EAW.

15. Section 37 Argument

This brings me to the final ground of objection which is that if the respondent is surrendered, he will be exposed to a real risk of a violation of his rights under either or both of Articles 2 and 3 of the European Convention on Human Rights (the "Convention") and/or his right to bodily integrity pursuant to Article 40.3.1 of the Constitution and/or Article 2 and Article 6 of the Charter of Fundamental Rights of the European Union (the "Charter"). Consequently, the surrender of the respondent would be in breach of section 37 of the Act of 2003. The risk identified by the plaintiff is that, by reason of the extent of inter-prisoner violence in those prisons in which he is most likely to be incarcerated, he will be exposed to the risk of violent assault. Counsel for the respondent relies upon the reports of the Chief Inspector referred to above. I turn now to address these reports.

16. HMP Pentonville

In his report for the period 1st-12th April, 2019, the Chief Inspector stated in his summary that: "This inspection found a prison that was delivering weak outcomes for prisoners in most areas and unacceptably poor outcomes in safety". Later, at para. S 7, it is stated that about one third of prisoners in the Chief Inspector's survey said that they currently felt unsafe, which was similar to other prisons. He also stated that the prison had yet to develop an effective strategic response to these concerns. He noted that levels of violence had increased by over 50% since the previous inspection, and at para. S 49, he noted that use of force in the prison was higher than comparator prisons.

17. The Chief Inspector expressed concern about the management of violence in the prison which he felt was weak. However, he noted that the relatively new Governor and his senior team, with active support from the group director, appears to be getting to grips with long-standing problems, and that managers appear to be working together to bring about the changes that were needed. Many managers expressed the view that within 12 months the prison would be vastly improved.

18. Wormwood Scrubs

The report of the Chief Inspector in this case relates to the period of 31st July-11th August 2017. In his introduction, the Chief Inspector notes that: "the prison was still not safe enough, with high levels of often serious violence. It would be wrong to say that there had been no work to try to improve the situation, yet in our survey prisoners told us they felt less safe than at our last visit…"

19. At para. S 4, he records that "too many prisoners did not feel safe. In our survey around two thirds of prisoners said they felt unsafe at the prison at some time, and over one

third that they currently felt unsafe, both of which were worse than at similar prisons and at the previous inspection. Levels of violence were high, and much of it serious, including a dramatic increase in assaults against staff…"

20. The Chief Inspector considered that the strategic response to violence was weak, and insufficient staff are allocated to safer custody work. He recommended that sufficient staff should be allocated to safer custody and other key tasks to ensure a proactive approach to keeping prisoners safe.

21. Belmarsh and Thameside

Counsel for the respondent also refers to the report of the Chief Inspector in relation to these prisons, mainly for the purpose of contrasting the conditions in these prisons with those prevailing at Pentonville and Wormwood Scrubs. The Chief Inspector noted that "Like many other prisons, Thameside faced challenges connected to violence. Levels of violence were high, and had not reduced since the last inspection. However, there was a good violence reduction plan in place and although there has not been a reduction in violence, Thameside had bucked the trend in comparable prisons as it had not experienced the huge rises in violence seen elsewhere. This was a significant achievement."

22. In his introduction he concludes that "overall, HMP Thameside was a relatively good prison, and we have identified an unusually high number of good practice points from which other establishments could learn…"

23. Safety for prisoners at Belmarsh was found to be reasonably good and while the inspector noted that the number of incidents of violence had increased since his last inspection, nonetheless he found the prison to be well run notwithstanding that it presented unusually complex challenges for prison management by reason of the diversity of prison inmates and the fact that it is a high security prison, housing some of the highest risk prisoners in the country.

24. Counsel for the respondent in this case submitted that the reports of the Chief Inspector in relation to Pentonville and Wormwood Scrubs disclose conditions in these prisons that are such as to constitute substantial grounds for believing that the respondent, if surrendered to either of those prisons, would be subject to a real risk of a violation of his Convention, Charter and Constitutional rights. On the other hand he conceded that if the respondent had assurances that he would not be incarcerated in one of these establishments (or equivalent) and that he would instead be incarcerated in a modern prison where safety problems are satisfactorily addressed (such as Belmarsh or Thameside) he could not oppose surrender. He relied upon the decision of Donnelly J. in *Minister for Justice and Equality v R.O* [2017] IEHC 663 in which case the respondent was certain to be detained in Maghaberry in Northern Ireland, if surrendered.

25. In *R.O* Donnelly J. considered two reports concerning Maghaberry. These were reports of 2015 and 2016 prepared by the UK national preventive mechanism against torture. The latter report stated that levels of violence in the prison were too high and that a

significant amount of work remained to make the prison safer for prisoners. Donnelly J. was also satisfied that Maghaberry was the prison in which the respondent would most likely be detained, if surrendered.

26. She further found that the respondent in that case was particularly vulnerable because of the seriousness of the offences for which his surrender was sought, because of specific threats to his life and because he continued to suffer from health difficulties arising out of a stroke that he had previously suffered.

27. Donnelly J. then considered all of these factors in the light of the principles laid down by the Supreme Court in *Minister for Justice, Equality and Law reform v Rettinger* [2010] IESC 45 and also the decision of the European Court of Justice in the joined cases of *Aranyosi* (C-404/15) and *Căldăraru* (C-659/15 PPU). She considered that the respondent had adduced cogent evidence to establish to her satisfaction that, there were substantial grounds for believing that, if he were surrendered, the respondent in that case would be exposed to a real risk of being subjected to treatment prohibited by Article 3 of the Convention. She arrived at this conclusion on the very specific facts of the case, i.e. the particular vulnerabilities of the respondent in that case as described above, coupled with the fact that, if surrendered, the respondent would almost certainly be detained in Maghaberry, where he would be subject to particular risks of ill-treatment because of his vulnerabilities and the prevailing prison conditions.

28. Having arrived at that conclusion, Donnelly J. then held that the appropriate course to take was for the court to exercise its powers under section 20 of the Act of 2003 to seek further information from the issuing judicial authority as to the conditions in which the respondent would be held if he were to be surrendered to face trial in Northern Ireland.

29. In this case, and on the basis of the authority of *R.O*, the respondent invites the Court to go further, and to seek assurances from the issuing judicial authority that the respondent will not be detained in either of HMP Pentonville or HMP Wormwood Scrubs, and instead will be detained in either of Belmarsh or Thameside prisons.

30. Counsel for the Minister however argues that there is no authority for the proposition that the shortcomings at Wormwood Scrubs and Pentonville identified in the reports of the Chief Inspector amount to a breach of Article 3 of the Convention. He submits that inter-prisoner violence of itself does not constitute a violation of Article 3. He further submits that the risk of inter-prisoner violence is a fact of prison life and could not of itself constitute a violation of Article 3 rights, which he submits requires deliberate state action.

31. He further submits that the conclusions of the reports concerning Wormwood Scrubs and Pentonville should not be re-cast as conclusions that the conditions in those prisons give rise to a violation of Article 3 rights. He submits that the respondent's arguments in relation to this issue revolve around degrees of risk of violence in different prisons, and while the risk of inter-prisoner violence may be greater in one prison than another, this does not mean that detention in the former gives rise to a violation of Convention or equivalent rights.

32. He argued that the decision of Donnelly J. in *R.O* is confined to its own facts, and the prisoner safety problems at Maghaberry in and of themselves would not have been sufficient for Donnelly J. to seek the additional information that she did in that case. She did so because of the combination of those problems and the particular vulnerabilities of the respondent in that case. In this case, it is submitted, the evidence of the respondent's personal circumstances fall considerably short of establishing that he is likely to be at any real risk or any greater risk than that of any prisoner.

33. Conclusion on Section 37 Argument

Firstly, it is unnecessary to arrive at any conclusion on the argument that inter-prisoner violence *per se* cannot form the basis of a claim under Article 3 of the Convention. That issue can await decision on another day when it may be argued more fully than in these proceedings. This application can be decided by the application of the principles set forth in *Rettinger* and *Aranyosi*, which are broadly the same. As Donnelly J. noted in *R.O*, at para. 57 " the test identified by the CJEU [in *Aranyosi*] that must be met before surrender is prohibited, is the same as that identified in *Rettinger* (and indeed other cases from the ECtHR identified in *Rettinger*); there must be substantial grounds for believing that following surrender a person will run a real risk of being subject, in the issuing member state, to inhuman or degrading treatment…"

34. In *Aranyosi*, the CJEU held that: -

> "[W]here there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State."

35. The reports of the Chief Inspector clearly constitute updated, objective and reliable evidence. Arguably however, they are not specific enough for the purpose for which they are being used by the respondent and the reports of the Chief Inspector stop short of saying that inter-prisoner violence is systemic at those prisons. In any case, the fact that there is a greater risk of inter-prisoner violence in one prison more than in another falls a long way short of constituting substantial grounds for believing that an individual would be exposed, because of the conditions of detention in the prison where the risk of inter-prisoner violence is greater, to a real risk of inhuman or degrading treatment. It is inevitable that there will be varying degrees of risks of such violence in different prisons and in order to be satisfied that there are substantial grounds of the kind required to meet the test in *Aranayosi* it is necessary to establish that the extent of the violence is so great that the degree of risk posed to the individual concerned, is a *"real risk".* It was

held in *Rettinger* that the risk of inhuman or degrading treatment need not be a probability, but it must be more than a mere possibility. In this case, the reports of the Chief Inspector in relation to HMP Pentonville and HMP Wormwood Scrubs undeniably raise serious concerns about prisoner safety, such as to require action on the part of the prison authorities (as per the recommendations of the Chief Inspector). However, it seems to me that they do not elevate the risk posed to the respondent, if surrendered and subsequently detained in either of those institutions, to that of a "real risk".

36. There is no data or statistical information in the reports of the Chief Inspector such as might help the Court assess the likelihood of being assaulted in either of these institutions, but it is interesting to note that in HMP Pentonville, with all its faults, the report states that about a third of prisoners feel unsafe, and the Chief Inspector noted that this is similar to other prisons. This is the case also at Wormwood Scrubs at the time of inspection (see para. 19 above), although somewhat confusingly in his report on Wormwood Scrubs he suggests that the proportion of one third is higher than in similar prisons. Moreover, and very importantly, the respondent failed to put forward any objective evidence that he personally is at a greater risk than anybody else in the prison population, such as was available to the court in *R.O*.

37. Finally, the Court must not lose sight of the fact that there is a presumption that the requesting state will respect the fundamental rights of the requested person. While this presumption may be rebutted when a real risk of inhuman or degrading treatment is established (in accordance with the tests in *Rettinger* and *Aranyosi*) it is obviously a factor which the Court needs to bear in mind when such objections are raised.

38. For these reasons this objection too must be rejected. Since all of the respondent's objections to his surrender have been rejected, and since I have also found the requirements of the Act of 2003 to have been fully complied with, I hereby order the surrender of the respondent to the authorities in the United Kingdom for the purposes set forth in the EAW.

Non-Contentious Matters

39. Finally, I should address non-contentious matters. At the hearing of this application I was satisfied that the person before the Court was one and the same as the person referred to in the EAW, namely David Kerrigan.

40. I was also satisfied that the EAW contains all of the information required by s. 11 of the Act of 2003.

41. Since the EAW seeks the surrender of the respondent for prosecution, his surrender is not prohibited by s. 45 of the Act of 2003.

42. Finally, I am satisfied that the Court is not required to refuse the surrender of the respondent on the basis of any of ss. 21a, 22, 23 and 24 of the Act of 2003.