

Neutral Citation No: [2021] NICty 2

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: [2021] NICty 2

Delivered: 1/06/2021

IN THE COUNTY COURT FOR THE DIVISION OF LONDONDERRY

IN THE MATTER OF THE EXTRADITION ACT 2003

Between

REPUBLIC OF IRELAND

Applicant

v

KEVIN BARRY HARKIN

Defendant

By Her Honour Judge McCaffrey

Introduction

[1] This is an application by the Republic of Ireland for extradition pursuant to the Extradition Act 2003 (“the Act”). The requested person is a UK citizen who lives in Northern Ireland and who is sought by the requesting state (“the applicant”) under the provisions of the Act for the purposes of conducting a criminal prosecution. The defendant is charged with two offences of extortion and demanding money with menaces alleged to have been committed on 20 April 2016 and 22 April 2016. The requested party was charged and brought before the courts in the Republic of Ireland and the matter was returned for trial before Donegal Circuit Court. On 5 December 2017 he failed to appear for trial and a warrant was then issued for his arrest. He is a fugitive.

[2] The European Arrest Warrant (“EAW”) was issued on 4 February 2019 and a certificate was issued from the NCA on 23 April 2020. On 6 August 2020 the defendant (“requested party”) was arrested for driving offences in Northern Ireland. He was deemed unfit and was then arrested later and the EAW was served on him. No issue has been taken in relation to the arrest of the requested party by the PSNI or the validity of the EAW.

[3] The requested party was then sentenced in Northern Ireland on 22 January 2021. He was refused bail and remains presently in custody.

[4] The requested party objects to being extradited under section 21 A of the Act and asserts that his extradition would be incompatible with his rights under Articles 2 , 3 and 8 of the European Convention on Human Rights (ECHR).

[5] I have received submissions and addendum submissions on behalf of the requested party prepared by his counsel Mr Sean Doherty BL, together with supporting documents and the medical report in relation to the requested party's health from Dr Michael Curran, consultant psychiatrist. I have also received a statement on behalf of the requested party, and heard oral evidence from him. I have also received submissions on behalf of the requesting state from Mr Ritchie BL which set out the case against the defendant and which argue that there is no basis or substance in the defence arguments.

Evidence

[6] The requested party in this case asserted in his evidence that his primary objection to a request for extradition to the Republic of Ireland was that his life would be in danger if remanded in Castlerea Prison in Co. Roscommon. He sets out the detail in paragraphs 4 to 6 of his statement as follows: -

"4. The offences for which extradition is sought has some connection with a gang of Irish travellers from the Kelly family who are heavily involved in criminality. The family hold a grievance toward me further to my alleged involvement in this matter.

5. After my initial arrest I was detained at Castlerea prison for several months, during that period I experienced a number of violent attacks by inmates from the travelling community connected to the grievance.

6. I was attacked on one occasion with a shank as I was leaving my cell as a result of which I suffered a punctured lung. This has left me with permanent shortness of breath. I am currently awaiting a referral in relation to this issue. On another occasion I suffered what can only be described as a serious physical and sexual assault in ablutions within the jail when I was attacked with a brush shaft and a blade with injuries sustained including lacerations to my head, face and groin area. Again this is carried out by prisoners from a travelling background who are also responsible for another attack in the prison yard when I was jumped by other inmates and kicked and punched. Along with the physical attacks I was subject to verbal taunting with physical threats on an ongoing basis during my time in the prison."

The defendant goes on to say that he is no doubt that if he is returned to the same prison he will once more be subjected to violent attacks on his person. In response to questions during cross-examination he agreed that he had no objection to extradition as such and that he would consent to extradition if he was not sent to this particular

prison. In his statement, the defendant said frankly that he had spent many years in prison and that imprisonment itself held no fears for him.

When asked, the defendant confirmed that he had not reported any of these incidents to the prison officers, although he said they saw one incident, but in his words "they did not want to know". As regards the incident when the requested party allegedly sustained a punctured lung, he said that he saw a medic, but was not sent to hospital. He said the prison officers did not do anything. He said that he had "confided" in his solicitor in relation to the incidents but had not requested him to contact the Garda Siochana in the Republic of Ireland to make a complaint in relation to these incidents. He did not provide any medical evidence to substantiate the injuries he says he sustained, or any written confirmation that he was being referred to a consultant in relation to his shortness of breath.

[7] In the supplementary submissions provided on behalf of the requested party on 11 March 2021, Mr Doherty BL argued on behalf of the defendant that he was in a fragile mental state and vulnerabilities particular to him may render a breach of Article 3 where it would not for a fit and well person. Dr Curran's report dated 5 March 2021 was provided after a Zoom videoconference with the defendant. Dr Curran notes in his report that he did not have the defendant's GP notes and records and so he could not comment on the frequency and extent of polysubstance misuse though the defendant himself did refer to attending a drug and addiction service. He also noted that the defendant had been exposed to a very dysfunctional upbringing and noted his suspicion that the defendant's personality defects could in part be attributed to the exceptional instability and adversity to which he was exposed during his childhood years. Dr Curran noted that there may be benefits in the defendant being offered a consultation with a senior member of the prison healthcare team which might more appropriately deal with the risk of self-harm which had been reported to him. He suggested, too, that there may be a need to review Mr Harkin's prescribed medication to address his elevated anxiety. He further opined that if the court should direct transfer to Castlerea prison it was important that the defendant's mental health needs were fully appreciated and SPAR procedures put in immediately in place to maintain his personal safety and what he views as a potentially hostile environment. He concludes:

"I cannot predict exactly when or if Mr Harkin might seek to self-harm but it is inevitable that his subjective anxiety will further heighten over the next week or so with the approach of the hearing into his proposed extradition."

[8] In relation to his rights under Article 8, the defendant said that he has four children with whom he had regular contact before being remanded in custody in August 2020. The papers before me show that the applicant has four children, two of whom live in foster homes arranged by the Western Health and Social Care Trust, while the other two children live with their mothers. The defendant asserts that he was closely involved in the life of his youngest child and while in prison he had daily telephone calls with his son and a weekly Zoom call.

The relevant law

[9] In relation to the requested party's Article 2 and Article 3 rights, the test I have to consider was originally set out in the case of **Soering v UK** (1989) ECHR 439, namely whether there is sufficient evidence of a cogent nature to establish substantial grounds for believing that the requested person would face a real risk of being subjected to treatment contrary to Article 3 if removed to the relevant state. The prohibition provided by Article 3 against ill-treatment is absolute.

Counsel referred me to the decision of the House of Lords in **R (Ullah) v The Special Adjudicator** [2004] 2 AC 323 where Lord Bingham restated the principle in these words: –

*“24 While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment... In **Dehwari**, para 61 the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a near certainty... The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states.”*

It was also pointed out to me that, if I were concerned that there were substantial grounds to believe that the requested party would run a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3, then I may request all necessary supplementary information on the conditions in which it was envisaged the individual concerned would be detained in the requesting member state, under the principles set out in the case of **Re Aranoyssi** [2016] CMLR.

[10] In relation to the defendant's rights under Article 8 ECHR, the principles were set out in **Norris V The Government of the United States of America (number 2)**

[2010] 2 AC, a decision of the Supreme Court, where the principles were set out by Lady Hale as follows: –

“1. There may be a closer analogy between extradition and the domestic criminal process and between extradition and deportation or expulsion, but the courts have still to examine carefully the way in which it will interfere with family life.

2 There is no test of exceptionality in either context.

3 The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.

4. There is a constant and weighty public interest in extradition: that people accused of crime should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no “safe havens” to which either can flee in the belief that they will not be sent back.

5. That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.

6. The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact on private and family life.

7. Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference of family life will be exceptionally severe. “

These tests were considered by Stephens LJ (as he then was) in **Jankowski v The Republic of Poland** [2018] NIQB 63 at paragraph [33] when he said as follows: –

“The balancing exercise set out by Lady Hale at (3) is fact specific in each particular case subject to the constant element at (4). The nature and quality of factual detail required from an extraditee is informed by the likelihood of extradition unless the consequences of interference with family life will be exceptionally severe. As set out at (6), delay since the crimes were committed may both diminish the weight to be attached to the public interest in extradition and increase the impact on family life. This means that delays which have resulted in the concerned person building and consolidating life with his family in this country will increase the weight to be attached to family life in the balancing exercise. Depending on the facts delays which are culpable or unexplained may substantially call into question the weight to be

attached to the public interest in extradition even allowing for the fact that the concerned person is a fugitive."

In the case of **Celinski**, Lord Thomas CJ summarised the principles which underpin extradition proceedings as follows: –

"... The decisions of the judicial authority of the member state making a request should be accorded a proper degree of mutual confidence and respect. In applying the principles to requests by judicial authorities within the European Union, it is essential therefore to bear in mind the procedures are based on principles of mutual confidence and respect between the judicial authorities of the member states of the European Union... It is important for the courts of Wales to have regard to the jurisprudence of that court on the framework decision and the importance of mutual confidence and respect."

Consideration

[11] The defendant submits that extradition would be incompatible with his Article 3 and Article 2 rights, but this is based on nothing more than a bare assertion that he has been subjected to ill-treatment by fellow prisoners while on remand in Castlereagh prison. In support of that allegation, Mr Doherty has produced a report prepared by the Inspectorate of prisons in the Republic of Ireland which shows that there is indeed a high percentage of prisoners from the travelling community in that prison. It does not however follow that the requested party is at risk from some of his fellow prisoners. He has not provided any supportive evidence to show that he was attacked as he asserts, he did not make any formal complaint either to the prison authorities or to the police in the Republic of Ireland, even though he confided in his solicitor. He has not provided any medical evidence either, to support his assertions in relation to the injuries which he says he suffered. In my view therefore there are no substantial grounds for believing that there is a real risk of death or ill-treatment of the requisite degree of severity in the requesting state. In light of that I do not consider it necessary to seek any additional information from the requesting state on the issue.

[12] I remind myself that, even if there was credible evidence of a threat to the defendant in the event of his incarceration, the burden is on him to show that the requesting state is not able to obviate the risk by providing adequate protection. The authorities are clear that cogent and compelling evidence on this issue may be difficult to obtain, but in this case there is absolutely no evidence which supports a submission that the requesting state could not provide sufficient protection, particularly given that the defendant failed to report the treatment to which he says he was subjected.

[13] In relation to the Article 8 issues, the factors in favour of extradition are as follows: –

- There is an important public interest in upholding extradition arrangements and preventing the UK being seen as a safe haven for fugitives.
- The important public interest in ensuring that those who are suspected of crime are prosecuted and if found guilty, punished accordingly. In respect of both of these public interests, very strong counterbalancing reasons would be required before extradition could be deemed disproportionate.
- The offences in respect of which the defendant is sought are serious offences and there are 2 distinct events giving rise to the charges.
- On indictment the maximum sentence in relation to these charges is 14 years' imprisonment. The principle of mutual recognition which underpins the extradition process and the 2003 Act means it is not for this court to pre-empt or make assumptions about prosecutorial decisions in another member state but it is reasonable to say that the offences of which the defendant is accused are serious.
- I do not have before me exact details of how much time the defendant says he spent with his children, except to say that he was involved in the care of his son and stayed with his ex-partner on occasion to help in the child's care. The report from Dr Curran notes however that one of his daughters has refused telephone calls from him. I have no details of exactly how long the requested person was in custody in the Republic of Ireland in connection with these offences, but he says it was some months. It is apparent that he failed to appear for his trial in December 2017, the defendant was arrested on foot of the EAW on 6 August 2020 and was refused bail on the basis that he was a flight risk. He has been in custody therefore since August 2020 and as such has not had any direct contact with his children or involvement in their care since then. It is evident from the papers before me that two of his children are in foster care in any event and so his contact with them would be limited, even if he were at liberty.

[14] The factors which have been identified against extradition are as follows: -

- The defendant has been assessed by Dr Michael Curran consultant psychiatrist and in Dr Curran's view, he presents with subjectively raised anxiety which appears to have been increasing over latter weeks. The defendant's mood is low and he continued to threaten to self-harm rather than accept his extradition. Dr Curran recommended that if the defendant was transferred to Castlerea prison, it was important that the defendant's mental health needs were fully appreciated and SPAR procedures immediately implemented to maintain his personal safety in what he viewed as a potentially hostile environment. It is also relevant to note that Dr Curran did not have the defendant's GP notes and records and that he suggested there may be benefit in the defendant being offered an urgent consultation

with the senior member of the prison healthcare team which might more appropriately deal with the risk of self harming, together with the review of the defendant's prescribed medication. I'm certainly not satisfied on this basis that the evidence provided by Dr Curran meets the standard of that that would be required to demonstrate oppression on grounds of mental condition under section 25 of the Act or that there is substantial interference with the defendant's right to a family life. In my view the balance is firmly in favour of extradition, given the principles of mutual confidence and respect between judicial authorities of the EU under the European Arrest warrant.

[15] I do consider that it would be appropriate for the authorities in the Republic of Ireland to be provided with a copy of Dr Curran's report and details of the diagnosis, medication and treatment of the defendant's condition so as to ensure that the Republic of Ireland authorities are fully aware of the risk of self-harming by the defendant. I therefore direct that all relevant medical reports and records relating to the defendant should be provided to the authorities in the Republic of Ireland in advance of his return to that jurisdiction so that the Irish authorities are fully informed of the situation by the time the defendant returns to the Republic of Ireland and becomes subject to Irish supervision under the extradition order.

[16] I order the defendant's extradition.