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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF THE EXTRADITION ACT 2003

BETWEEN:

THE REPUBLIC OF IRELAND

Requesting State/Respondent;

-and-

AB

Defendant/Applicant.

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Before: Stephens LJ, McCloskey LJ and McBride J

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McBRIDE J (delivering the judgment of the court)

Introduction

[1] This is an application under Section 26 of the Extradition Act 2003 for leave to appeal a decision made by His Honour Judge McFarland ("the learned trial judge") on 10 May 2019 whereby he ordered that the applicant be extradited under a European Arrest Warrant.

[2] In his judgment the learned trial judge anonymised the name of the applicant (using the cipher "AB"), in light of his connection to the complainant in the criminal proceedings in the Republic of Ireland ("ROI"). AB is the complainant's uncle. We adopt the same approach as the learned trial judge.

Representation

[3] AB, was represented by Mr Frank O'Donoghue QC and Mr Sean Devine of counsel. The respondent, the requesting State (ROI), was represented by Mr Stephen Ritchie of counsel. We are grateful to all counsel for their skeleton arguments and oral submissions which were of great assistance to the court.

Factual Background

[4] The ROI requested the extradition of AB, an EU citizen residing in Northern Ireland ("NI"), under a European Arrest Warrant ("*the Warrant*") dated 8 September 2017 and certified by the National Crime Agency on 26 September 2017.

[5] The Warrant seeks the extradition of AB from NI to the ROI so that he can be returned to the Republic of Ireland ("ROI") to face trial for three alleged offences of sexual assault of a child (hereinafter "the complainant") perpetrated in that jurisdiction over 25 years ago. Each offence carries a maximum sentence of five years' imprisonment.

Chronology

[6] As appears from: the Warrant; the affidavit evidence of Tom Conlon, prosecuting solicitor in the Office of the DPP (ROI) sworn on 10 April 2018; the affidavit of Detective Garda Siobhan Tighe sworn on 12 June 2018; and AB's undated affidavit, the following is a chronology of the important dates which arise in respect of this application:

(a) July 1991 - Alleged offences occurred in the ROI.

(b) 9 August 1993 - The complainant reported the allegations to the RUC in NI (now the "PSNI") who forwarded the complaint to the Garda Siochana (ROI – "*the Gardai*")) for investigation.

(c) ROI Social Services undertook safeguarding enquiries.

(d) 1993 - AB left the ROI and moved to NI where he has since resided. The learned trial judge found that he left the ROI to avoid investigation, interview and trial and the applicant accepts that the learned trial judge was entitled to so find.

(e) January 1995 - The authorities in the ROI decided not to prosecute AB as there was no corroborating evidence.

(f) Summer 2006 – The Complainant saw AB at work at a location in NI.

(g) July 2007 - The complainant contacted NI Social Services alerting them to her concerns regarding AB.

(h) From 2008 onwards AB engaged with social workers and doctors in NI and allegedly made admissions to them concerning the alleged offences.

(i) January 2010 – The Complainant contacted the Gardai to reactivate her complaint.

(j) April 2012 - AB was interviewed by the police in NI.

(k) July 2015 - A file was submitted to the ROI DPP.

(l) November 2015 – the ROI DP decided to prosecute AB.

(m) June 2016 - Domestic warrant issued in the ROI.

(n) September 2017 - European Arrest Warrant issued.

(o) November 2017 - AB arrested.

[7] Requests for information were made via mutual assistance and at a date unknown the PSNI forwarded to the Gardai social work records and medical reports which related to AB which had been voluntarily given to the PSNI by the Northern Health and Social Services Board (NI).

Grounds of appeal

[8] The following three grounds of appeal were advanced before the court namely:

(a) The request constitutes an abuse of process of the courts of Northern Ireland. ("abuse of process")

(b) The passage of time is such that AB ought not to have been extradited. The learned trial judge failed to consider sufficiently or at all the applicability of Section 14 of the Extradition Act 2003. ("Delay")

(c) To grant the request would constitute a breach of the AB's rights under Article 8 of the European Convention on Human Rights. ("Article 8"), in contravention of s 6 of the Human Rights Act 1998 and s 21A(1) of the Extradition Act 2003.

<u>Ground (a) - Abuse of process</u>

The learned trial judge's findings

[9] The learned trial judge rejected AB's submission that there was an abuse of the court's processes on the basis of either delay or on the basis that the prosecuting authorities in the ROI were seeking to rely on evidence which had been improperly obtained.

[10] The learned trial judge found that there was no evidence to suggest that the delay in this case was the result of a deliberate manipulation by the ROI. He further held that delay in and of itself would not give rise to an abuse of process unless a fair trial was no longer possible, which was a matter for the trial judge in the ROI to determine. Secondly he found that there was no evidence that AB had been induced to speak to NI Social Services and/or health professionals as a result of an unequivocal representation that he would never be prosecuted and accordingly their actions did not amount to an abuse of process. Thirdly, he found that there was no absolute right to confidentiality and ultimately it was a matter for the trial judge in the ROI to determine the admissibility of AB's social work and medical records and accordingly the abuse of process argument was not established.

Submissions on behalf of AB

[11] Mr O'Donoghue conceded that he was not relying on the ground of delay as a ground of abuse of process. We consider that this was an appropriate concession given that there was no evidence to show that the delay arose as a result of any manipulation of this court's processes.

[12] He submitted that the gravamen of the abuse of process argument related to the creation of Social Services records/medical reports and provision of them to the Gardai who are now seeking to rely on them to support the application for the applicant's extradition. Mr O'Donoghue submitted that the actions of NI social services in creating and providing the notes and records to the PSNI, and the actions of the Gardai in obtaining these records without lawful authority, amounted to an abuse of process as these actions represented a deliberate manipulation of the court's processes.

[13] In particular he submitted that there was a suspicion that the interviews which led to AB making disclosures may have been the product of some form of ulterior motive on the part of social services.

[14] Secondly he submitted that the records had not been lawfully provided to the authorities in the ROI as AB did not consent to their disclosure and there was no evidence that there had been compliance with the requirements of sections 13-15 of the Crime International Co-operation Act 2003 for disclosure of the records. Accordingly, he submitted there were reasonable grounds to believe that the receipt of the records by the ROI and their use in any prosecution amounted to a manipulation of the processes of this court.

[15] In these circumstances he submitted that it was incumbent on the learned trial judge to have ensured that all relevant materials were before the court to enable him to determine the matter. His failure to obtain the relevant materials meant that AB was deprived of the relevant information to enable him to mount a proper abuse of process argument. Further, the learned trial judge's failure to conduct a more thorough examination of the issues and in particular his failure to make an enquiry

as to the circumstances by which the documents and records came into the hands of the ROI meant he was unable to make a proper adjudication about whether there was any abuse of process.

Submissions of the respondent

[16] Mr Ritchie submitted that the residual jurisdiction of abuse of process concerned abuse of the extradition process by the prosecuting authorities of the requesting state. In this case the alleged abuse of process was by NI Social Services and not the ROI prosecuting authority and therefore the abuse argument must fail in accordance with the decision in *Symeou v Greece* [2009] 1 WLR 2384.

[17] Secondly, he submitted that the issue raised went directly to the admissibility of evidence which is a trial issue for the relevant court in the ROI to determine. The enquiries which AB wished this court to make would therefore be in breach of the principle of mutual respect and confidence and recognition of the judicial decisions of other Member States. Any enquiry into the merits of a proposed prosecution in another Member State was both inappropriate and unwarranted, as per Lord Hope in *Office of the King's Prosecutor, Brussels v Cando Armas and Another* [2006] 2 AC 1 at paragraphs [50] to [52].

Relevant Legal Principles

[18] The relevant legal principles in respect of an abuse of process application in extradition proceedings were set out in *R v Bow Street Magistrates' Court and Tollman* [2007] 1 WLR 1157. At paragraphs [82]-[84] the court endorsed a line of authority which included *R (Kashamu) v Governor of Brixton Prison* [2002] QB 887 and *R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635 and held as follows:

> "… We simply endorse the conclusion that the judge conducting extradition proceedings has jurisdiction to consider an allegation of abuse of process. Indeed we would go further than this and apply to extradition proceedings the statement made by Bingham LJ, in relation to conventional criminal proceedings in *R v Liverpool Stipendiary Magistrate, ex p Ellison* [1990] RTR 220, 227:
>
> > 'If any criminal court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court, I have no doubt that it is the duty of the court to

> enquire into the situation and ensure that its procedure is not being so abused. Usually no doubt such inquiry will be prompted by a complaint on the part of the defendant. But the duty of the court in my view exists even in the absence of a complaint.'
>
> 83. The 2003 Act places a duty on the judge to decide a large number of matters before acceding to a request for extradition. To these should be added the duty to decide whether the process is being abused, if put on inquiry as to the possibility of this. The judge will usually, though no inevitably, be put on inquiry as to the possibility of abuse of process by allegations made by the person whose extradition is sought.
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> 84. The judge should be alert to the possibility of allegations of abuse of process being made by way of delaying tactics. No steps should be taken to investigate an alleged abuse of process unless the judge is satisfied that there is reason to believe that an abuse may have taken place. Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred."

Consideration

[19] In accordance with *R v Bow Street Magistrates* in any extradition case in which abuse of process is alleged the first step for the court is to insist on the conduct alleged to constitute the abuse being identified with particularity. When pressed by the court to set out the particulars of the conduct alleged to constitute the abuse, Mr O'Donoghue provided a written document to the court in the following terms:

> "**Particulars of potential abuse of process**
>
> (1) That the decision of those employed with or acting on behalf of Social Services to interview and

> gather information from the applicant in the period 2007 to 2010 relating to his alleged criminal conduct occurring in the Republic of Ireland on 1 July 1991 was motivated by an intention to provide that information, once gathered, to the authorities in the Republic of Ireland so that the relevant authorities in the Republic of Ireland could (be persuaded to) commence criminal proceedings against the applicant in the Republic of Ireland.
>
> (2) That the aforementioned information was disclosed by Social Services, either orally or in writing, to a third party (either within or without the jurisdiction of this court) without the applicant's consent and in circumstances by which the disclosures were no only unlawful but also amounted to a deliberate breach of the obligation of confidentiality to the applicant."

[20] The thrust of AB's abuse of process argument is that, if he is returned, ROI will rely on evidence which was unlawfully obtained.

[21] Under the Crime International Co-operation Act 2003 the authorities in ROI could have applied for the disclosure of the social work records/medical reports Given that the duty of confidentiality is not absolute and the social work and medical records contained information which was relevant to the criminal investigation, we consider that it is likely that the information would have been provided on foot of this Act. We are therefore satisfied that there is nothing unconscionable in the requesting State seeking to rely on these documents for the purpose of seeking AB's extradition for the purposes of prosecution, given that ROI could have obtained these documents by lawful means. Accordingly, we find, the alleged conduct, even if established, is not capable of amounting to an abuse of the court processes.

[22] Secondly, we are satisfied that there are no reasonable grounds to believe that there was any abuse of the court processes by the authorities of ROI. The particulars of abuse provided in written form by the applicant at their height amounted to no more than mere speculation about what may have happened. In his oral submissions Mr O'Donoghue stated AB's case at its height in these terms:

> "There is a suspicion the interviews which led to the applicant making disclosures may have been the product of some form of ulterior motive on the part of Social Services."

[23] Consistent with this manifestly tentative submission, we consider that there is not a jot of evidence grounding the allegations of abuse of process in reality or giving them a basis in fact. There is absolutely nothing which points to or suggests that the Gardai came into possession of the records in a way which amounted to an abuse of process of the court. There is no evidence to suggest any manipulation by the Requesting State of this Court's processes. Mr O'Donoghue's submission is purely speculative. The evidence shows that the records were provided voluntarily by the Northern Health and Social Services Board to the PSNI who then forwarded them to the Gardai. There is no evidence to suggest there was any ulterior motive on the part of NI Social Services in obtaining these records particularly as AB was never given any assurance that he would not be prosecuted and he engaged in work with NI Social services to enable him to enjoy family life with his children. We conclude that the particulars of abuse represent a "fishing expedition". AB has manifestly failed to establish any grounds, reasonable or otherwise, for believing that there was any abuse of process by the authorities of ROI.

[24] Given that there were no reasonable grounds to believe an abuse had taken place, the learned trial judge was not required to investigate the matter further and accordingly we reject the argument that the learned trial judge erred in refusing to investigate the matter further.

[25] We consider that when distilled, AB's abuse of process argument is essentially about the admissibility of evidence. In *Pakstys v Lituania* [2017] EWHC 47 the court noted that the underlying purpose of the abuse jurisdiction in extradition cases is to protect the integrity of the European Arrest Warrant system and the statutory scheme of the 2003 Act, as well as to protect a requested person from oppression and unfair prejudice. The extradition process is founded on concepts of comity and reciprocity and as set out in *Symeou v Greece* [2009] 1 WLR 2384:

> "It is for the courts of the requesting state to try the issues relevant to the guilt or otherwise of the individual. This necessarily includes deciding what evidence is admissible."

It is therefore for the courts of ROI to determine the admissibility of the social work/medical reports. It would therefore be wholly contrary to the Framework Decision for this court to seek to police that process. Accordingly it is our view that AB's abuse of process cannot succeed as he is seeking to use the abuse of process argument to contest the admissibility of evidence, which is not a matter for this court.

Ground (b) - Delay

The learned trial judge's findings

[26] The learned trial judge found that AB had left ROI to avoid being apprehended, investigated and prosecuted. He applied the rule in *Kakis v Government of Cyprus* [1978] 1 WLR 779 and held that AB was a fugitive and accordingly Section 14 was not available to him.

Submissions of AB

[27] AB submitted that he was not a fugitive and therefore the learned trial judge erred in not applying Section 14. He further submitted that the delay in this case, being 26 years, meant that it was oppressive for him to be returned, in light of his settled life in NI; his employment record; his family ties and his lack of criminal record.

Submissions of the respondent

[28] On behalf of ROI Mr Ritchie accepted that AB was not a fugitive and accordingly Section 14 was applicable. He submitted however that AB's evidence regarding his settlement in NI amounted to no more than hardship and accordingly he did not fulfil the test in Section 14 of "oppressive". He further submitted that in determining the question whether AB would have a fair trial in the Republic of Ireland, the learned trial judge was correct to have regard to the principle of mutual confidence and to respect the ability of the judicial authorities in the Republic of Ireland to respect and protect AB's human rights.

Legal principles

[29] Section 11 of the Extradition Act at paragraph (c) provides at follows:

> "11. **Bars to extradition**
>
> (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of—
>
> (a) the rule against double jeopardy;
>
> (b) extraneous considerations;
>
> (c) the passage of time;
>
> (d) the person's age;

(e) hostage-taking considerations;

(f) speciality;

(g) the person's earlier extradition to the United Kingdom from another category 1 territory;

(h) the person's earlier extradition to the United Kingdom from a non-category 1 territory.

(2) Sections 12 to 19 apply for the interpretation of subsection (1).

(3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.

(4) If the judge decides those questions in the negative and the person is alleged to be unlawfully at large after conviction of the extradition offence, the judge must proceed under section 20.

(5) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 21."

Section 14 provides as follows:

"14. Passage of time

A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be)."

Section 21 provides as follows:

"21 **Human Rights**

> (1) If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42). Extradition Act 2003 (c. 41) Part 1 — Extradition to category 1 territories 11
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.
>
> (4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
>
> (5) If the judge remands the person in custody he may later grant bail."

[30] The House of Lords decisions in *Kakis v Government of Cyprus* [1978] 1 WLR 779 and *Gomes v Trinidad and Tobago* [2009] UKHL 21 authoritatively state the effect of Section 14. In *Kakis*, Lord Diplock at page 785 stated as follows:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room of overlapping, and between them they will cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of delay due to such causes are of his own choice or making. Save in most exceptional circumstances it would be

> neither unjust nor oppressive that he should be required to accept them.
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under Section 8(3) is based upon the "passage of time" under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requesting government or its prosecuting authorities which resulted in delay was blameworthy or otherwise."

[31] In *Gomes* Lord Brown stated at paragraph [31] as follows:

> "… So far as concerns oppression, it is worth noting too Lord Diplock's statement at page 284 that:
>
> > 'the gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand his trial oppressive'.
>
> That said, the test of oppression will not easily be satisfied: hardship, a comparatively commonplace consequence of an order for extradition, is not enough."

Consideration of delay

[32] Lord Diplock stated in *Kakis* that a party could not rely on delay in the commencement or conduct of extradition proceedings brought about by his own actions in fleeing the country, concealing his whereabouts or evading arrest. Although AB left the ROI to avoid arrest, the reason there was no prosecution at that time was because there was no corroborating evidence of the complainant's account. Therefore the delay in the commencement and conduct of the extradition proceedings was not brought about by the actions of AB in leaving ROI. Rather the

delay arose from the lack of corroborating evidence. Accordingly it is our view that the applicant can rely on the provisions of Section 14 and the learned trial judge erred in stating it was not applicable. Indeed the respondent never argued that AB was a fugitive or that section 14 did not apply.

[33] In accordance with section 14, AB must establish that it would be "unjust" or "oppressive" to extradite him by reason of the passage of time since he is alleged to have committed the extradition offences. As noted by Lord Diplock in *Kakis* there is room of overlapping between these two concepts and between them they cover all cases where it would not be "fair" "to return him.

[34] AB did not seek to rely on the "unjust" limb of Section 14 but submitted that it would be "oppressive" to return him in light of the delay of 26 years. The effect of this delay meant he was now well settled in NI and had established a professional and family life and had not come to police attention.

[35] We consider there is nothing in the material before this court to lead to a conclusion that as a result of the passage of time there is prejudice to AB in the conduct of his trial or otherwise that it would be impossible for him to have a fair trial in ROI. Notwithstanding the passage of time there is no missing documentary evidence and there are no dead or missing witnesses. Secondly AB's right to a fair trial is protected by the ability of the trial judge to rule on the admissibility of evidence and to give directions to the jury. As the learned trial judge rightly observed this court must proceed on the basis of mutual confidence and respect between the judicial authorities of the Member States of the EU and must therefore have respect for the trial process within the Republic of Ireland and the ability of its judicial authorities to protect AB's rights to a fair trial, as outlined in *Celinski v Poland* [2016] 1 WLR 551 and *Symeou v Greece* [2009] 1 WLR 2384.

[36] In the present case there has been a substantial delay of some 25 years and during that time AB has established a settled and professional life in NI and has not come to the attention of the authorities.

[37] We accept that there will be hardship to AB if a return order is made especially as he has made a life here and there has been substantial delay. Fairness however means looking at all the factors. In this case we do not consider that it would be unjust, oppressive or unfair to return AB having regard to all the circumstances, including, in particular, the seriousness of the offences he faces; the fact that delay has not led to any missing evidence or witnesses; the fact the trial judge is able to ensure he has a fair trial and his Article 6 ECHR rights are not infringed; the fact that he was never given any assurance that he would never be prosecuted; and the fact that the hardship caused to AB is no more than the commonplace consequence of an order for extradition. Accordingly we find that the provisions of section 14 are not satisfied.

Ground (c) - Article 8 ECHR

Findings of the learned trial judge

[38] In determining whether AB's extradition would be compatible with his and his wife's Article 8 rights, the learned trial judge referred to the relevant principles set out in *HH v Italy* [2012] UKSC 25 and *Norris v USA (No. 2)* [2010] UKSC 9. He then carried out the balancing exercise recommended by Lord Thomas in *Celinski v Poland* [2015] EWHC 1274. At paragraph [35] of his judgment the learned trial judge identified the following factors in favour of AB's surrender:

> "(a) The offences that are alleged against AB are serious offences constituting sexual abuse of the complainant, including touching her breasts and getting her to masturbate him. They involve a breach of trust (for the reasons elaborated).
>
> (b) There is a strong public interest in the prosecution of cases involving sexual abuse of children with appropriate punishments should a perpetrator of such abuse be convicted with suitable safeguarding measures put into place.
>
> (c) There is a strong public interest in the United Kingdom honouring its treaty obligations under the Framework Decision and by fulfilling its obligations it will thereby obtain benefits for the citizens of the United Kingdom.
>
> (d) A failure of the courts in this jurisdiction to honour to treaty obligations could result in this jurisdiction being considered as a refuge for fugitives from justice.
>
> (e) In the context of cooperation between police, prosecution and judicial authorities on the island of Ireland, there is a very strong benefit to be achieved for the citizens of NI in having effective and mutual cooperation with ROI in the field of criminal law and investigation."

[39] He then identified the factors against AB's surrender as:

> "(a) AB has established a home life in NI for some 25 years.

(b) During that time he has maintained a law abiding lifestyle, has been in employment and has had a stable and settled life.

(c) There has been significant delay since the date of the complaint. At the early stages of the 25 year period, he became aware that he was not going to be prosecuted, although he later became aware of a reactivation of the investigation and a decision that he would now be prosecuted.

(d) AB's wife has contributed to, and enjoyed, a stable lifestyle in NI over the last 25 years.

(e) As the sole income earner in the household, removal of that income (in full or in part) will impact on the family's finances, which in turn may have an impact on the family home."

[40] He then went on to note that AB standing trial in a ROI county in close proximity to NI or in Dublin would have significantly less impact than if he were to be transferred to another part of the United Kingdom. He analysed the evidence concerning the Article 8 implications for the applicant and his wife. He pointed out that only modest information had been provided about his life in NI and about the effects it would have on him and his wife. He acknowledged the delay and noted that there was a period of two years of culpable delay. He concluded however that there was a strong public interest that the allegations at the heart of the offences should be put before a court in ROI and proper determination made as to AB's guilt based on what the court in ROI considered to be admissible evidence. He ultimately came to the following conclusion:

> "The issue to determine is whether the consequences of the interference with AB's and his wife's Article 8 rights are 'exceptionally serious' so as to outweigh the importance of his surrender to the Republic of Ireland to face these charges in compliance with the United Kingdom's Treaty obligations. … I consider that they are not exceptionally serious taking into account all the circumstances and I order a surrender on foot of the European Arrest Warrant."

[41] Specifically in relation to delay the learned trial judge found that there were three periods of delay namely:

(a) A 16 year period of delay from the date of the alleged offences (January 1991) to 2007 when the complainant contacted Social Services. He found that there was no culpable delay on the part of ROI

(b) Delay from 2007 until the decision to prosecute in November 2015. He held that there was a period of one year's culpable delay between November 2013, when all the statements were received, and the date of the decision to prosecute.

(c) From November 2015 to September 2017 when the warrant was issued, the learned trial judge found that there was one year's culpable delay as AB's whereabouts were known and it was known that he was not going to make himself amenable. In total he found that there was a total period of 25 years delay of which 2 years was culpable delay.

[42] The learned trial judge took the fact of delay, the reasons for the delay and the effect of delay into account in the balancing exercise. Ultimately he found that the interference with Article 8 rights of AB and his family was not exceptionally serious and therefore did not outweigh the public interest in his extradition.

AB's Submissions

[43] Mr O'Donoghue submitted that the delay of 25 years served to reduce the weight to be attached to the public interest in extradition and the weight to be attached to the seriousness of the offences. The passage of time also served to increase the weight to be attached to AB's family connections in Northern Ireland. Accordingly he submitted that the balance lay in favour of not extraditing him and in all the circumstances the learned trial judge's decision to extradite was disproportionate. Counsel relied on a number of decided cases in which extradition was refused on the basis of delay. In particular he relied on the case of *De Zokzi v France* [2019] EWHC 2062. In that case 19 years had elapsed since the commission of the offence and only 3 years of sentencing remained outstanding. During the 19 year period, the applicant had continued her well established life in the Netherlands and had avoided any form of criminality. She was in full-time employment and resided with her adult daughter, to whom she provided some financial and emotional support. The court held that on the facts of that case the Article 8 rights tipped the balance in favour of the applicant and extradition was refused.

Respondent's Submissions

[44] On behalf of ROI it was submitted that the learned trial judge had referred to all the relevant principles to be derived from the authorities and had carried out the appropriate balancing exercise by listing the pros and cons of extradition correctly. In particular he submitted the learned trial judge had referred to the nature of the delay and its impact on AB and his wife. The learned trial judge had found that the evidence in support of the impact of extradition upon AB and his wife was modest

and therefore the consequence of interference with AB and his wife's Article 8 rights did not meet the test of 'exceptionally serious'. In all the circumstances therefore he submitted the court should not interfere with the learned trial judge's decision.

Relevant Legal Principles

[45] The relevant legal principles in respect of Article 8 are set out in *Norris v Government of the USA* [2010] 2 AC 487, *HH v Italy* [2013] 1 AC 338 and *Celinski*. In *HH* at paragraph [8] Lady Hale drew out the following conclusions from the jurisprudence:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has 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 crime 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 upon private and family life.
>
> (7) Hence it is likely that public interest in extradition will outweigh the Article 8 rights of

> family unless the consequences of the interference with family life will be exceptionally severe."

[46] The effect of culpable/unexplained delay in respect of section 14 and the Article 8 balancing exercise was considered by the House of Lords in *Kakis*. Lord Diplock at page 785 stated:

> "… The question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under Section 8(3) is based upon the 'passage of time' under paragraph (b) and not an absence of good faith under paragraph (c), the court is not normally concerned with what would be an invidious task of considering whether mere inaction of the requesting government or its prosecuting authorities which resulted in delay was blameworthy or otherwise."

[47] The House of Lords however was not unanimous in this view as Lord Edmund Davies said at page 786:

> "… The answer to the question of where responsibility lies to the delay may well have a direct bearing on the issues of injustice and oppression. Thus, the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return, whereas the issue might be left in some doubt that the only known fact related to the extent of the passage of time, and it has been customary in practice to avert to that factor."

Further Lord Keith stated at page 787:

> "The case of *Narang* [1978] AC 247 also indicates that it may be relevant to consider the extent to which the passage of time has been due to dilatoriness on the part of the requesting authority."

[48] In *Gomes*, Lord Brown stated at paragraph [27]:

> "It would often be by no means clear whether the passage of time in requesting the accused's extradition has involved fault on the part of the Requesting State and certainly the extradition of such a question may not only be invidious (involving an exploration of the State's resources, practices and so forth), but also expensive and time consuming. It is one thing to say as Lord Edmund Davies said in *Kakis* and later Lord Woolf said in *Ex p Osman (No. 4)* [1992] 1 All ER 579 and Laws LJ in *La Torre v Republic of Italy* [2007] EWHC 1370 at paragraph [37] - that in borderline cases, where the accused himself is not to blame, culpable delay by the Requesting State can tip the balance; quite another to say that it can be relevant to and needs to be explored even in cases where the accused is to blame."

The question of culpable/unexplained delay has not been addressed directly by the Supreme Court. The only reference to culpable/unexplained delay appears in *Konecny v Czech Republic* [2019] UKSC 8 where the court stated at paragraph [69]:

> **"**The District Judge was not wrong in failing to infer from the length of the delay that the requesting judicial authority or the National Crime Agency were guilty of culpable delay."

[49] The only other reference to culpable delay is in *HH v Italy* where Lady Hale said at paragraph [46]:

> "… Whatever the reasons (for delay), it does not suggest any urgency about bringing the appellant to justice, which is also some indication of the importance attached to her offending."

[50] We consider that the following principles regarding delay can be gleaned from the jurisprudence:

(a) Delay in seeking extradition *may* reduce the weight to be attached to the public interest in extradition:- that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentence; 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.

(b) The public interest always carries great weight although the weight can vary according to the nature and seriousness of the crime or crimes involved.

(c) The passage of time *may* impact on the nature and extent of the private and family life developed by the requested person in this country. The burden remains on the requested person to demonstrate by evidence the actual impact the delay has had on his family and private life.

(d) Culpable delay on the part of the Requesting State is not determinative of either section 14 or Article 8. To be discharged under section 14 there must be evidence that the passage of time means that extradition is oppressive or unfair. In the Article 8 proportionality balancing exercise culpable delay is but one of the factors to be taken into account, along with all the other relevant factors which include;- the nature and seriousness of the offence(s), the public interest in extradition and the effect of the delay on the requested person and his family's private and family life.

(e) Culpable delay alone cannot be determinative of the Article 8 balance otherwise Article 8 could be used to dilute or circumvent section 14.

(f) The public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference will be "exceptionally severe".

(g) In borderline cases, where the requested person is not a fugitive from justice, culpable delay on the part of the requesting state can tip the balance against extradition.

(h) The requested court should not engage in what could be an invidious task of seeking to determine whether inaction on the part of the requesting state which resulted in delays was blameworthy or otherwise. It is only in very clear cut cases where there is obvious culpable delay that the court can use this in what is an otherwise borderline case to tip the balance against extradition.

Consideration

[51] The learned trial judge heard the evidence from the applicant. He found that he only provided sparse evidence regarding the impact the delay had had on his private and family life. Further he analysed the delay and found that of the 25 year period of delay only two years were culpable delay.

[52] As appears from the judgment the learned trial judge carried out the appropriate balancing exercise and took all the relevant factors, including delay into account.

[53] We consider that no criticism can be made of the learned trial judge's decision or the reasoning behind his decision. He did not err in attributing great weight to the public interest especially as the offences AB faces are serious offences involving sexual abuse of a child in circumstances which involved a breach of trust and where the strength of the case against him was strong. Further, although there was a period of 25 years delay this did not arise as a result of dilatoriness on the part of the authorities of the requesting state as only a period of 2 years could be described as culpable. On the other side of the balance the evidence of AB failed to establish that delay had impacted significantly on his private and family life. Therefore the consequences of the interference with private and family life would not be "exceptionally severe" and accordingly the public interest in extradition outweighed the Article 8 rights of AB and his family. We do not consider that this was a borderline case where the culpable delay would have tipped the balance against extradition.

Conclusion

[54] We therefore consider that the learned trial judge's conclusion is one which we consider to be right. Accordingly, we refuse leave to appeal and will hear counsel in respect of costs.