Neutral Citation No: [2017] NIQB 103 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **BUR10433** *Delivered:* **12/10/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

BEFORE A DIVISIONAL COURT

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2016/120319

IN THE MATTER OF AN APPLICATION UNDER THE EXTRADITION ACT 2003

BETWEEN:

DONAL RIORDAN

Requested Person/Appellant;

-and-

REPUBLIC OF IRELAND

Requesting State/Respondent.

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Before: Deeny LJ and Burgess J

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BURGESS J (delivering the judgment of the Court)

[1] Donal Riordan appeals against the judgment and order of HHJ McFarland, Recorder of Belfast, the Appropriate Judge, of 19 May 2017 ordering that the appellant be extradited to Ireland to face trial for the alleged sexual assault of a woman on the evening of 16 June 2011. Leave to appeal was refused by McBride J on 7 June 2017.

[2] The assault is alleged to have occurred in the apartment of the Requested Person in North Main Street, Youghal, Co Cork. It is alleged that the clothes of the lady in question were forcibly removed and that the Requested Person then masturbated and ejaculated in her direction. The Gardai recorded that when

reporting the incident that evening the lady was distressed and there was bruising to her neck and arms. The Requested Person denies the allegations, which clearly are of a very serious nature.

[3] The appellant states that he contacted the local Gardai the next day and asked if they wish to speak to him about anything. He says he was told that they were not looking to interview him 'at present but that he should keep his head down'. This seemingly arises from a background of threat the appellant states he was under from a criminal gang in the Republic of Ireland, which he identified and the background to which he has set out in an affidavit grounding his defence in this matter.

[4] The appellant left the Republic of Ireland a few days later and has remained in this jurisdiction ever since. He acknowledges that on several occasions he was contacted by the Gardai who were seeking to interview him, but that he had refused to return in order to allow any interview to take place. He states that at all times his whereabouts, including this address, were known to the Garda, and that therefore he was 'not on the run'.

[5] The Arrest Warrant was issued on 16 October 2015 and the European Arrest Warrant was issued on 18 April 2016. The NCA Certificate was issued on 2 June 2016 and the Requested Person was arrested on 7 December 2016.

Grounds of Appeal

[6] In the application for Leave to Appeal the Requested Person set out two grounds namely:

(a) a failure of the United Kingdom to transpose Articles 4 (6) and 5(3) of the European Council Framework Decision of 16 June 2002 on the European Arrest Warrants and Surrender Procedures between Member States ('the Framework Decision') into United Kingdom law, depriving him of certain rights to serve a prison sentence in Northern Ireland: and

(b) a potential breach of his, and his wife's and stepchildren's Article 8 European Convention rights.

Ground 1

[7] The court can deal with this in short terms. First, Article 4(6) refers to where the Requested Person has been convicted and a period of imprisonment imposed. That is not the case here, where it is an accusatory warrant. Secondly, the Court today has decided in the case of *Kociolek v Poland* [2017] that, for the reasons set out in the judgement of the court, it is not mandatory for the United Kingdom to transpose this Article into United Kingdom law, but rather is a matter of discretion, which the United Kingdom has decided not to exercise.

[8] Similarly the court believes that the same decision pertains in relation to Article 5(3), which relates to Warrants issued for the purpose of prosecuting 'a national or resident of the executing state' who is sought to be returned to 'the issuing state', and who if convicted and a sentence of imprisonment was imposed would be returned to the executing state. It is headed 'Guarantees to be given by the issuing Member State in particular cases'. In its introductory paragraph to such guarantees the Article provides that the execution of the European arrest warrant by the executing judicial authority 'may' by the law of the executing Member state be subject to the following provisions, which includes Article 5(3). This does not in our view impose a mandatory obligation on the United Kingdom to introduce the terms of Article 5.

Ground 2

[9] This ground represents the gravamen of the Requested Person's appeal. The appellant is 50 years of age. Until 2011 he resided in the Republic of Ireland. He had a daughter with an ex-partner 4 years ago in the Republic of Ireland. He stated to Dr Maria O'Kane, whose Report is referred to below, that 'he couldn't attend the birth'; that he has contact with his ex-partner through skype; and that his ex-partner wants his daughter to know him. Also in the history taken by Dr O'Kane reference is made to two step-sons by a previous marriage with whom he has 'an excellent relationship'. There is no reference to where they live or their ages. Nevertheless, in terms of his family life, any contact that might be sought in future, by the Requested Person or any of the children, certainly his daughter, would potentially be adversely affected if the Requested Person were to remain in Northern Ireland and not return to the Republic of Ireland.

[10] He has a criminal record in the Republic of Ireland, acknowledged to be somewhat historic, namely a prison sentence for attempted rape in July 1992, and probation for burglary in 1986. In Northern Ireland he has nine convictions but all arising out of one incident on 3 January 2012 involving aggravated vehicle taking, burglary, possession of an article with a point in a public place, driving whilst unfit due to drink or drugs, and the series of failures to stop and report the accident. A sentence of four months imprisonment together with a two-year driving disqualification was imposed. There are no further convictions since that date.

[11] In his affidavit dated 4 May 2017 the Requested Person states that he met his present wife, Emma, in 2013 and they married some three years ago. There are no children of this relationship. The Requested Person states that he is a full-time carer for his wife, and it is this role, and the reasons for it, namely his wife's mental problems, that forms the basis of his argument that the Recorder was wrong in determining that he should be extradited - namely that the impact of his being extradited would have serious, adverse impacts on his wife, namely:

(i) the removal of the support and aid he gives her on a daily basis, the absence of which would adversely affect her mental condition; and

(ii) the removal of her present stability would adversely affect her attempts to engage with some of her children who are in care, but with whom she has some supervised contact.

The Legal Framework

[12] The appropriate test to be applied by this court has been considered by a three man Divisional Court in England recently: *Polish Judicial Authorities v Celinski et alia* [2015] EWHC 1274 (Admin). The court (Lord Thomas CJ, Ryder LJ and Ouseley J) considered a number of cases and expressly considered the approach of the court and we adopt the conclusions as set out in the judgment of Lord Thomas. At paragraph 18 the court considered the approach of this court on appeal. They referred to the decision of the Supreme Court in *Re B (A Child)* [2013] UKSC 33. The majority therein held that an Appellate Court should treat the determination of the proportionality of an interference with the rights protected by the ECHR as an appellate exercise and not a fresh determination of necessity or proportionality, notwithstanding the duty of the court as a public body to consider human rights.

[13] The Divisional Court followed the analysis by Lord Neuberger at paragraph [93] of *Re B* as to the approach of an Appellate Judge:

> "There is a danger in over-analysis, but I would add this. An appellant judge may conclude that the trial judge's conclusion on proportionality was:
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> (i) The only possible view.
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> (ii) A view which she considers was right.
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> (iii) A view in which she has doubts, but on balance considers was right.
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> (iv) A view which she cannot say was right or wrong.
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> (v) A view on which she has doubts but on balance considers was wrong.
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> (vi) A view which she considers was wrong.
>
> (vii) A view which is unsupportable.

> The appeal must be dismissed if the Appellant Judge's view is in category (i) and (iv) and allowed if it is in category (vi) or (vii).
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> 94. …. So far as category (v) is concerned, the Appellate Judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an Appellate Judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

[14] Lord Thomas at paragraph [24] of *Celinski* then said the following:

> "The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger said, as set out above, that the appeal can be allowed."

The Facts

[15] The court has set out above the relevant facts in respect of the personal background of the Requested Person. As regards his wife, we have carefully considered her affidavit of 4 May 2017: her General Practitioner's notes and records: and a report from Dr Maria O'Kane dated 3 April 2017.

[16] In her affidavit Mrs Riordan, who is now aged 37, describes a turbulent life up until the time she met the Requested Person. She has been pregnant 15 times, the first at the age of 15, with seven live births - the last in April 2012. All the children have been taken into care, some having been fostered or adopted. She was in a violent relationship for a number of years up to 2011, stating that she had been the victim of sexual abuse, and psychological and financial controlling behaviour.

[17] Dr O'Kane's report records all the salient issues and events recorded in the General Practitioner's notes and records. Those records reflect the background given by Mrs Riordan in terms of historic relationships and events and the adverse impact these have had on her - including admissions to Downpatrick Hospital Psychiatric Unit, the latest being in March to April 2011 and July to August 2011. Those records also record the improvement in her mental health and the presence of stability in her life since she met the Requested Person.

[18] On being examined by Dr O'Kane Mrs Riordan told her that she had frequent panic attacks and is very avoidant of anything that is stressful because of this. She stated that she did not believe she could manage without the support of her husband. She continues to attend a Consultant Psychiatrist at Downpatrick Hospital every four months. She also advised Dr O'Kane that she has 'a fantastic relationship with her mother, who is always extremely supportive'. It would therefore appear that there are other supports available to Mrs Riordan, other than that of her husband.

[19] Dr O'Kane opines that the reason for Mrs Riordan's mental health problems has been the taking of her children into welfare or child protection systems, something which has left her bewildered and angry. She says she wishes to have contact with the children, and indeed there is at present contact with two of them, one being supervised contact. Certainly there appears to the court to be a linkage between her mental health and the removal of the children - although it is not clear which came first.

[20] Under the heading 'Opinion', Dr O'Kane states:

> "In my opinion Mr Riordan has provided stability to Emma Riordan. She has been identified as being a vulnerable person since at least the age of 17. She has been pregnant on 15 occasions with seven live pregnancies and each of her children was removed from her and placed on the At Risk Register because she was unable to manage them and manage herself. In the context of all of this she was diagnosed in 2008 with Emotionally Unstable Personality Disorder and as her children were more formally removed from her through adoption her mental state broke down and she became actively psychotic on a number of occasions requiring admission on a number of occasions. Her most recent episode of psychosis was in 2016 and this resolved reasonably quickly as an outpatient with medication and with support. Reviewing the pattern and presentation since she has been in a relationship with Mr Riordan and married to him this situation has stabilised greatly. There is less concern about her being chaotic and psychotic. She is engaging better with mental health services, has been able to engage in voluntary work and education and has started to undertake exams successfully.
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> Emotionally Unstable Personality Disorder …… is an attachment disorder. That is, exacerbations of this condition are provoked by the making and breaking of

> emotional bonds. As such she is most vulnerable whenever she loses relationships that are extremely important to her. If Mr Riordan is separated from her, her mental state will deteriorate and she is liable to become psychotic as before. The more frequently she become psychotic the worst her overall prognosis. Despite his own difficulties Mr Riordan has been a constructive influence in this woman's life. There are concerns at times that he is over controlling but she does not complain about this. In my opinion if he is removed her mental state will deteriorate and she is likely to become seriously mentally ill, that is psychotic again, potentially to the point of requiring inpatient admission as before."

[21] In their skeleton argument counsel for the appellant do not submit that the Appropriate Judge failed to take into account all the factors in the General Practitioner's notes and in Dr O'Kane's report. No attempt has been made to suggest that he ignored any of them in his carefully constructed Judgement. Indeed, those matters missing, namely the reference to his children and to the acceptance by Mrs Riordan that her mother is extremely supportive at all times, in no way reinforce the argument of the appellant, but rather in carrying out any balancing exercise the court may place them on the side of the scales which may argue in favour of the appellant's extradition - although the weight may be not great.

[22] There is also nothing in the skeleton argument from the Requested Person that argues that the Recorder included any factor that he should not have taken into account that would support the extradition of Mr Riordan, nor the weight he accorded to them. The obligations of the Requested State under the Framework Decision are a substantial factor, and the offence for which the Requested Person is sought for prosecution is a serious sexual offence. Delay is not argued as a standalone bar to extradition. It was referred to by the Recorder at [17] of his judgment.

Conclusion

[23] This is a case where the court accepts that the role of Mr Riordan in his wife's life both in respect of her general mental health and, to a much lesser extent, in respect of the role it may play in relation to her children in the future, all of whom are adopted or in care, are relevant factors. But the interference in his family life here is balanced, in part, by the potential to engage with his own three children in the south, particularly if, as he says, he has not committed the crimes alleged against him and is thus set at liberty.

The learned Recorder found at page 1 of his judgment that Mr Riordan had "declined to make a formal statement, be interviewed by police and to return to Ireland". This was not disputed before us.

We have concluded that on the facts of this case it does not fall within headings (v), (vi) or (vii) of paragraph [93] of *Re B* – see above at paragraph [13] - and conclude that the Appropriate Judge was not wrong but correct in rejecting the Article 8 contention.

[24] For these reasons we uphold the judgment of the court below.

[25] Finally, in submission during the hearing counsel for the appellant suggested that if the court decided to order the extradition of the appellant one possible course was to submit a relevant question on the issues raised by Articles 4(6) and 5(3) to the ECJ for a preliminary ruling. On further reflection, we are advised that they accept that such a course is not possible or proper, and we agree with that view.