

THE HIGH COURT

**[2023] IEHC 397
[2022 No. 240 EXT.]**

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

TD (AKA TÓ'R)

RESPONDENT

Judgment of Mr. Justice Kerida Naidoo delivered on the 25th day of April, 2023.

- 1.** By this application, the applicant seeks an order for the surrender of the respondent to Northern Ireland pursuant to a Trade and Cooperation Agreement Warrant dated 11th November 2022 ("the TCAW"). The TCAW was issued by a District Judge (Magistrates' Courts), as the Issuing Judicial Authority ("the IJA").
- 2.** The TCAW seeks the surrender of the respondent to prosecute him in respect of 17 alleged possession of pornography-type offences.
- 3.** The Issuing Judicial Authority has certified that the offences in respect of which surrender is sought are contrary to the following provisions of Northern Irish law: 15 offences of making indecent photographs of children contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 and 2 offences of possession of an extreme pornographic image contrary to section 63 of the Criminal Justice and Immigration Act 2008.
- 4.** The TCAW was endorsed by the High Court on the 12th December 2022 and the respondent was arrested and brought before the High Court on the 3rd January 2023 on foot of same.
- 5.** I am satisfied that the person before the court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
- 6.** I am satisfied that none of the matters referred to in section 21, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
- 7.** I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. Each of the offences in respect of which surrender of the respondent is sought carry a maximum penalty in excess of twelve months' imprisonment.
- 8.** As surrender is sought to prosecute the respondent, no issue arises under section 45 of the Act of 2003.

Lack of Clarity – Section 11(1A)(f)

9. In his Notice of Objection the respondent raised an objection to surrender on the basis that the allegations in the warrant were insufficiently specified and therefore, in the absence of additional clarifying information, the warrant does not comply with the requirements of section 11(1A)(f) of the Act of 2003. Following the provision of additional information that point was not pursued at the hearing.
10. For the avoidance of doubt, I am satisfied that sufficient information has been provided for the court to carry out its functions under the Act of 2003.
11. I am therefore satisfied that no issue arises under section 11 of the Act of 2003.

Correspondence

12. The offences in the warrant concern the alleged possession by the respondent of 17 pornographic images. No issue is taken with correspondence in respect of the offences numbered 1-15 in the warrant. They are pornographic images of children. The only issue of substance being raised is that there is a lack of correspondence in respect of the offences to which images 16 and 17 relate.
13. The information provided in respect of images 1-15 referred to "a female child". The details provided about images 16 and 17 referred to "a female" and not "a female child". On the application by counsel for the applicant additional information was therefore sought to clarify whether the female referred to in images 16 and 17 was a child. Additional information dated 15th March 2023 confirmed that images 16 and 17 depict adult females, not children.
14. In the additional information provided by letter dated 3rd March 2023, the IJA informed this court that, in relation to images 16 and 17, the respondent was: "*required to stand trial for two counts of possessing an extreme pornographic image contrary to section 63 of the Criminal Justice and Immigration Act 2008.*" The IJA described images 16 and 17 as follows:

"16. This is extreme pornography and depicts a female having her mouth penetrated by a dog's penis.

17. This is extreme pornography and depicts a female having her vagina penetrated by a dog's penis."
15. The respondent objects to surrender under section 5 and 38 of the Act of 2003 on the basis that the offences at Part E of the warrant to which images 16 and 17 relate do not correspond with any offence under the law of the State.
16. The applicant submits that possession of images 16 and 17 corresponds with the offence of exposure, offensive conduct of sexual nature contrary to section 45(3) of the Criminal Law (Sexual Offences) Act 2017 ("the Act of 2017") which provides:

"45. (1) A person who exposes his or her genitals intending to cause fear, distress or alarm to another person is guilty of an offence.

(2) A person who, in a public place, engages in –

(a) sexual intercourse,

(b) an act of buggery, or

(c) an act of masturbation,

is guilty of an offence.

(3) A person who intentionally engages in offensive conduct of a sexual nature is guilty of an offence.

[...]

(6) In this section –

"offensive conduct of a sexual nature" means any behaviour of a sexual nature which, having regard to all the circumstances, is likely to cause fear, distress or alarm to any person who is, or might be reasonably be expected to be, aware of any such behaviour;

"public place" means any place to which the public have access whether as of right or by permission and whether subject to or free of charge;

"sexual intercourse" shall be construed in accordance with section 1(2) of the Criminal Law (Rape) Act 1981."

- 17.** The applicant contends that the phrase *"engages in offensive conduct of a sexual nature"* in section 45(3) of the Act of 2017, as defined in section 45(6), captures the possession of the pornographic images referred to by the IJA in images 16 and 17.
- 18.** The applicant says that in order to decide the kind of conduct proscribed by section 45(3) of the Act of 2017 the court can have regard to the definition of *"sexual activity"* in section 2(1) of the Act of 2017. The phrase *"sexual activity"* is not, however, used in section 45 of the Act of 2017 and is, in my view, primarily applicable to the definition of *"child pornography"* for the purposes of the offence of possession of child pornography contrary to section 6(1) of the Child Trafficking and Pornography Act 1998, as substituted by section 14 of the Criminal Law (Sexual Offences) Act 2017. The definition of the phrase *"sexual activity"* in section 2(1) of the Act of 1998 does not, therefore, assist with the interpretation of section 45 of the Act of 2017.
- 19.** The applicant quite properly draws the court's attention to the fact that offences contrary to section 45 of the Criminal Law (Sexual Offences) Act 2017, are not scheduled offences

for the purposes of the Sex Offenders Act 2001. Possession of child pornography, on the other hand, is a scheduled offence for the purposes of the Act of 2001.

- 20.** The respondent submits that giving the relevant language used in section 45 of the Act of 2017 its ordinary natural meaning, the phrase "*offensive conduct of a sexual nature*" means acts done by an accused which are intrinsically sexual in nature. He says that possession of a pornographic image does not, in and of itself, amount to behaviour that is sexual.
- 21.** In my view the phrase "*offensive conduct of a sexual nature*" as defined in section 45 of the Act of 2017 has two components. The first is that the conduct must itself amount to behaviour that is by its nature sexual. The second is that it must be offensive, which means that the behaviour is likely to cause fear, distress or alarm to any person who is, or might reasonably be expected to be, aware of any such behaviour.
- 22.** I therefore accept the respondent's submission that the act of possessing a pornographic image is not conduct that is itself sexual within the meaning of the Act of 2017. I am further satisfied that the act of possessing a pornographic image is not offensive conduct within the meaning of section 45 of the Act because, reading the subsection as a whole, conduct that "*is likely to cause fear, distress or alarm to any person who is, or might reasonably be expected to be, aware of any such behaviour*" refers to conduct that is itself offensive. In the instant case the contended for offensive conduct is not the possession of the image, it is the content of the image itself.
- 23.** That analysis is supported when section 45(3) is considered in the context of subsections 45(1) and (2) of the Act of 2017, both of which are concerned with specific conduct criminalised by the section. Subsection (1) makes it an offence for a person to expose his or her genitals, intending to cause fear, distress or alarm. Subsection (2) makes it an offence to engage in sexual intercourse, an act of buggery or an act of masturbation in a public place. The acts criminalised are all in and of themselves sexual in nature. I am satisfied that subsection (3) is intended to capture other similar conduct that is inherently sexual, and which is "*likely to cause fear, distress or alarm*".
- 24.** Furthermore, had the legislature intended to criminalise the possession of adult pornography they would, in my view, have done so using clear and unambiguous language to that effect. That is what is provided for in the requesting State by section 63 of their Criminal Justice and Immigration Act 2008.
- 25.** I am therefore not satisfied that correspondence can be established between the offences relating to images 16 and 17 referred to in the TCAW and offences under the law of the State, in particular the offence of exposure, offensive conduct of sexual nature contrary to section 45(3) of the Criminal Law (Sexual Offences) Act 2017.
- 26.** I am satisfied that correspondence can be established between the offences relating to images 1-15 referred to in the TCAW and offences under the law of the State, namely:

possession of child pornography contrary to section 6 of the Child Trafficking and Pornography Act 1998 as amended by section 14 of the Criminal Law (Sexual Offences) Act 2017.

- 27.** I am satisfied that surrender of the respondent in respect of the offences to which images 1-15 relate as referred to in the warrant is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.
- 28.** It, therefore, follows that this court will make an order pursuant to section 16 of the Act of 2003 for the surrender of the respondent to the requesting State in respect of the offences to which images 1-15 referred to in the TCAW relate.
- 29.** It also follows that this court will make an order refusing the application for surrender in respect of the offences to which images 16 and 17 referred to in the TCAW relate.