



SEANAD ÉIREANN
BAILE ÁTHA CLIATH
(Dublin 2.)

Barry Tsinn Esq.

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22 January 1997

Dear Barry,

I enclose a reference for Ezra which I hope will be of use to him in his forthcoming case. I hope you and the family keep well.

Best wishes.

Yours sincerely,

Senator David Norris.



To whom it may concern,

I have known Mr. Ezra Yizhak for the last twenty one years. He is a man of the highest integrity and one in whom I place complete confidence. He has visited Ireland and stayed with me on a number of occasions over the last two decades and I have also been a guest in his home in Jerusalem on many occasions during visits to the Middle East. I feel that I know him very well and am in a position to give him a character reference attesting to his intelligence reliability and integrity. In fact I cannot speak highly enough of him.

He has a successful small business as a plumber in Jerusalem at which he has worked hard over the last ten years and I am aware of the very high level of satisfaction among his clients because of his honourable and efficient way of conducting business. He is known to many of my friends and colleagues in Ireland and they all share my high opinion of him. I would have no difficulty what ever in acting as guarantor, sponsor or character reference for him in any circumstances. If I can provide any additional information which would be useful to him or have a positive bearing on his life I would be honoured to do so.

Signed

Senator David Norris

Bureau Member Irish Foreign Affairs Committee.

To the Judges of the High Court in Jerusalem. Case of Ezra Yizhak.

29 August 1997

Respected Judges of the High Court of Israel,

I approach the court with a humble plea that my voice may be listened to in the case of Ezra Yizhak. I should like to explain the grounds for my request - my locus standi - so to speak. First of all I have known Mr. Yizhak for the last twenty three years. He has been a close and valued personal friend since we met in Dublin December 1975. Since then I have been a frequent visitor to his home in Jerusalem as he has been to mine in Dublin. He is very highly regarded by a wide circle of my friends. I know him to be an intelligent, honest, trustworthy, good and moral person for whom the present difficulty is quite uncharacteristic. He has been a loyal helpful and considerate friend to me since I first got to know him. During that period I have seen him make a useful career for himself in Israel by taking a course and qualifying as a plumber, subsequently establishing a small but successful plumbing business in Jerusalem. I have heard very many of his clients speak in terms of high praise of his honesty, integrity, efficiency and courtesy.

He is a very good son to his mother who is now becoming elderly and to whom he is devoted. He is a kind and caring brother and uncle and takes his position as the oldest male in the family very seriously. I could cite many instances of his practical goodness as a human being. In particular I am personally aware of the sacrifices he made in caring for two friends who died from aids. I have rarely witnessed such selflessness and humanity for no personal gain whatever. He has also over many years assisted in practical ways two elderly married couples in Jerusalem of whose difficult circumstances and Ezra's help to them I am personally directly aware of. His ability to make a good career and decent life for himself and to behave with charity and compassion towards his fellow humans has survived some difficult situations in his early life.

Ezra Yizhak grew up in a period when homosexuality was still a criminal offence in Israel. His family circumstances were also not easy as he and other members of the family were the victims of a violent and abusive father. Despite these circumstances which must initially have effected his socialisation he has emerged as a thoroughly good and decent man.

I therefore can I think claim to have a considerable knowledge of the defendant over a long number of years, and to have had an opportunity to form a mature and balanced view of his character.

Secondly I am a serious and respected person both within my own community and to some extent at least internationally. I am fifty three years old, a former senior lecturer in the University of Dublin, Trinity College, a member of the Upper House of the Irish Parliament and chairman of the James Joyce Centre in Dublin. I was elected to my parliamentary position ten years ago for the first time and have been reelected on several occasions since. At the recent election held last month I received the highest vote ever recorded in the Senate, being elected on the first count, and have been widely mentioned as a possible presidential candidate in the forthcoming elections for the Presidency of Ireland. I was educated at Trinity College where I received a double first class honours degree and was elected first foundation scholar of the university. I received the gold and silver medals of the university philosophical society and was nominated for the European Human Rights prize. My work in various fields has been recognised internationally and I have been honoured by institutions ranging from the Centre for the Study of Sexual Minorities in Paris to York University, Toronto. I am at present a senior member of the Foreign Affairs Committee of our parliament. I have published and broadcast extensively throughout Europe and America on a range of academic and social topics. In 1988 I won an important case at the European Court of Human Rights where my lawyer was Mrs. Mary Robinson (now President of Ireland).

Although not a citizen of Israel, indeed not even Jewish, I am a strong supporter of Israel and have visited the country very frequently. Last December I was in Jerusalem as part of a foreign affairs delegation from our parliament where we met with senior members of the major parties in the Knesset including Mr. Shimon Peres. I have raised money for Israeli charities both in Ireland and in Israel, such as the library of the Hebrew University in Jerusalem, the Mogen David Campaign against Road Traffic Deaths and the Israeli Aids Fund. I have consistently supported Israeli interests and have used my parliamentary role to advance issues of interest to Israel such as the difficulties experienced by Russian Jews, the case of Raoul Wallenberg and the case of Ron Arad, which I raised a number of times also with the Iranian authorities. I have great respect for the Israeli law, its court processes, and intend nothing that I say to be construed as a criticism of that system in the present case. I merely feel that my close personal knowledge of Mr. Yizhak may

prove helpful to the court in reaching a decision, and feel that it is important that the court should know in weighing up my plea that I am a person of some consequence whose views are not arrived at lightly or for no good reason.

Thirdly I believe that my experience and expert knowledge may be of value to the court. I say this because I was the founder of the most extensively used counselling service for gay people in my country for over twenty years, and have long experience of dealing with the emotional and legal difficulties experienced by gay people. My work in this area was recognised when I was conferred with the Diplome D'Honneur by the Centre for the Study of Sexual Minorities in Paris. I can therefore claim to have some expert qualification in the field and a very wide experience indeed.

Fourthly I travelled to Israel specifically for the hearing of the last case in May of this year and was present in court when the case was heard and the judgement read. I therefore personally witnessed some troubling anomalies in the majority verdict, such as the constant insistence by the presiding judge that there was absolutely no difference between this case and a similar case involving heterosexual relations. This is certainly factually incorrect. I would be more than happy to give the court the benefit of my expert knowledge on this and other matters if it were found possible for me to give evidence in the matter.

Fifthly although I am not conversant with Israeli law, I am aware of the fact that the original statutes forbidding homo sexual relations which were only recently relaxed in the Israeli jurisdiction, are precisely the same as those which operated in Ireland until I was able to overturn them some four years ago by a combination of court action and parliamentary debate. This means that I am familiar with the operation of precisely the law that existed until recently in Israel - a law under which for the first thirty four years of his life Mr. Yizhak suffered discrimination as a citizen. In view of this fact it might well be useful for the court to bear in mind some of the philosophical ideas which now obtain in Irish courts and some knowledge of sentencing policy. This information I am prepared to make available to the court either directly in oral evidence, or by making the information at my disposal available to Mr. Yizhak's lawyer Mr. Reuven Bar Chaim.

Sixthly I was a direct personal witness to some of the peripheral events surrounding the case before it came to the attention of the first court. I indicated this

fact to Mr. Yizhak's lawyers and requested that I should be called to give evidence. To my surprise I was not called to give this evidence which I think might have helped the court to come to a more lenient judgement. I would be more than happy if permitted to give evidence to pay myself for the services of a professional translator from Hebrew to English and vice versa in order to make the work of the court easier.

I would like to stress that should the court find it possible to show mercy to Mr. Yizhak I am more than happy to act as a personal guarantor for his continued good behaviour and to guarantee absolutely that there will be no reoffence.

My direct knowledge of the events surrounding the case is referred to in some detail in a letter of mine to Mr. Yizhak's lawyer Mr. Bar Chaim dated 27th May 1997. Rather than rehearsing this material at this point I would be happy for Mr. Bar Chaim to make available to the court a copy of my letter/fax to him of that date.

Perhaps I might be allowed here to make some random observation, and I rely upon the wisdom, discretion and compassion of the court to excuse me if any of the material to which I refer is viewed as either irrelevant or impertinent. Although familiar with the law and a contributor to learned law journals I am not qualified as a lawyer and in particular am not familiar with the refinements of Israeli law.

Firstly there is the question of the nature of the original intervention by the police. The arrest took place in a curious and troubling manner. The circumstances are deeply worrying. Mr. Yizhak was lured into a carefully prepared trap. The police did not permit the advice of a lawyer. In the Irish jurisdiction dealing such circumstances would almost automatically lead to the dismissal of the case. I understand that had this been argued at the first case there is a strong probability that a similar situation would have resulted. However inexplicably to me this defence is apparently very difficult to raise at this stage. In the Irish jurisdiction the doctrine that the fruit of the rotten tree is itself also rotten would prevail even at this stage of the proceedings.

Secondly the fact that Mr. Yizhak however unwisely pleaded guilt would be seen in the Irish jurisdiction as a very strong mitigating fact very likely to result in a non custodial sentence. As a result of so doing Mr. Yizhak spared the young man who is the other party to the incident from the traumatic necessity of giving

evidence.

Thirdly the doctrine of the "fresh complaint" under which (a) the complaint must have been made as soon as reasonably possible and (b) the complaint must have been made voluntarily, would certainly in Irish law raise serious doubts about the strength of the prosecution case and again could lead to dismissal of the case.

Fourthly I have determined by expert research and can produce documentary evidence that the sentence imposed on Mr. Yizhak by the district court would in similar circumstances in the Irish court be the absolute maximum.

Fifthly there are a large number of precedents in similar cases in which under Irish law within the last twelve months non-custodial sentences have been imposed including in cases of a far more serious nature than that before the court presently.

Sixthly the violation of Mr. Yizhak's anonymity in the first case through extensive newspaper publicity, despite the fact that there was an appeal to be heard, would be taken as another mitigating factor.

Seventhly the total absence of any corroborative evidence would clearly be seen as a weakness in the prosecution case.

Eighthly very importantly there is a growing tradition in the Irish court for non-custodial or suspended sentences in such cases depending of course upon the circumstances. This has particularly come into operation since the passage of the Criminal Justice (Community Service) Act 1983 which established community service orders as a further sentencing option in Irish law. Under this a convicted person is required to engage in a specified numbers of hours of service to the benefit of the community in reparation for his or her misdeeds.

Ninthly a very important principle in Irish law is the role of proportionality. In the state (Healy) versus Donoghue, Henchy J. in the High Court said that the cumulative effect of the individual's rights to a fair trial, personal liberty and other fundamental rights was to guarantee at the very least:

"That a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from

a reasonable opportunity of establishing his innocence; or where his guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances".

In a further case the people (DPP) versus W.C. Flood J. a judge at the high court expressed the view that:

"The selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality, a particular sentence must strike a balance between the particular circumstances of the commission of the relevant offence and the relevant personal circumstances of the person sentenced."

Further in the people (DPP) versus M., Denham J. a judge of the supreme court outlined the following procedure for the determination of sentence:

"Having assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered".

Among the important mitigating facts in Irish and English law there are a number which operate in this case. These are (a) cooperation with the police (b) the entering of a plea of guilty (c) the expression of remorse (d) consent, even in situations where one of the parties to the sexual act was found to be under the legal age of consent. In the people (Attorney General) versus Kearns the accused having pleaded guilt to unlawful carnal knowledge of a girl under the age of fifteen years sought to adduce evidence, as part of his mitigation plea that her appearance led him to believe that she was over seventeen years. The court of criminal appeal held that the trial judge erred in refusing to admit such evidence for the purposes of sentence. The clear implication was that consent may be relevant to sentence even in cases where one or both of the parties involved were under the legal age of consent at the time of the incident. The Supreme Court of Nova Scotia adopted the same principle in Rex versus Baton. In their study of sentencing law and practice in the state of Victoria, Fox and Feinberg note that:

"Where the victim not only consents but could be considered the instigator or at least a willing participant, a sentence towards the lower end of the range will be

appropriate."

Tenthly non custodial sentences are routinely considered where the offender seeks treatment or counselling. In this case Mr. Yizhak has been under the care of a psychotherapist and wishes to continue with this treatment. Moreover numerous additional hardships maybe taken into consideration i.e. for an offender for whom custody would be an unusually difficult or traumatic experience and also the offender who has already been subject to unlawful punishment because he was suspected of having committed a certain offence (and of which he has now, perhaps, been convicted). And finally the impact of sentence on offenders families is considered.

I believe it very important that the court should be made aware of certain anomalies in the original trial. For example the original judge Ms. Hanna Ben Ami in passing sentence introduced material which had not been presented as evidence during the case and which consequently was not subject to challenge by lawyers on behalf of the defence. I refer specifically to her expressed concern about the impact upon the victim, although no victim impact assessment was before the court nor was there any evidence to this effect. In Irish law it is certain that an appeal would find that the judge in this instance misdirected herself in law. In philosophical terms the principle of Occam's razor would come into play. This excludes the hypothetical discussion of the nonexistent. By contrast Ms. Ben Ami having first of all included material that was not technically relevant excluded material that clearly was. I refer here to the appointment of two special psychiatric social workers to make recommendations to the court. They both strongly recommended against a custodial sentence. However the judge chose to ignore this professional advice. Surely questions arise when things that should not have been considered were, while things that should have been considered were ignored.

However my most urgent plea would not be on technical grounds, which at the end of the day I feel diffident in attempting to argue before this distinguished court. The strongest argument is ad misericordiam. Secure in the knowledge that Mr. Yizhak will not offend again in the same way, that he is prepared to make financial compensation available to the young man involved, that lasting and perhaps permanent damage will be done to his psychological and material welfare by being imprisoned, by virtue of the fact that there is a possibility that he may attempt suicide in prison, by virtue of the fact that his elderly mother's principal support and reassurance will be removed, I earnestly beg that the court may see the possibility

of securing justice not by sending him to prison but by imposing a non custodial sentence.

Senator David Norris