

THE HIGH COURT

[2021] IEHC 294
[2020 No. 168 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DUMITRU MARIAN LUPU

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 23rd day of April, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European arrest warrant dated 4th November, 2019 ("the EAW"). The EAW was issued by Judge Filipoaia Mihai Mures, of the Darabani Court of Law, as the issuing judicial authority. The EAW seeks the surrender of the respondent in order to enforce a sentence of 3 years and 4 months' imprisonment imposed on 25th September, 2019, all of which remains to be served.
2. The EAW was endorsed by the High Court on 27th July, 2020 and the respondent was arrested and brought before the High Court on 17th December, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
4. I am satisfied that none of the matters referred to in ss. 21A, 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.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
6. At part E of the EAW, it is indicated that it relates to two offences and the description of the circumstances in which the offences were committed is set out as follows:-

"Convict Lupu Dumitru-Marian, on 03.05.2016 during 02:55 – 03:40 a.m., after he drank alcohol, drove the vehicle make Crystel Voyager with the registration mark: CN-043-HR on public roads, between Havarna and Tataraseni, the county of Botosani, without holding a driving licence and on the request of police officers, he refused to undergo blood sampling in order to establish the alcohol level in his blood."
7. The nature and legal classification of the offences and the applicable statutory provision/code is stated to be:-
 - (1) driving a vehicle without holding a driving licence, stipulated by article 335, para. 1 of the Romanian Criminal Code; and

- (2) refusal to undergo blood sampling, stipulated by article 337 of the Romanian Criminal Code.
8. At part F of the EAW, it is indicated that the offences were committed as multiple offences and were committed during supervision of a suspended sentence imposed in respect of a previous conviction on 28th September, 2015 by the Saveni Court of Law. It is indicated that, in respect of the two offences referred to at part of E of the EAW, a sentence of 1 year and 4 months' imprisonment was imposed which was added to the previous suspended sentence of 2 years' imprisonment, making a total of 3 years and 4 months' imprisonment. It is indicated that a number of short periods of detention were deducted from the resulting punishment.
9. At part D of the EAW, it is indicated that the respondent was not present during the trial at the end of which the decision was rendered. It appears, therefore, that the sentence was imposed *in absentia* and, by virtue of s. 45 of the Act of 2003, surrender in respect of same is precluded unless the EAW indicates the matters required by points 2, 3 and 4 of point D of the table set out at that section.
10. At part D of the EAW, the issuing judicial authority has ticked point 3.1a but this is not in the form required by s. 45 of the Act of 2003 or article 4a of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"). Part D of the EAW merely states:-

"The person was personally served, being absent in court for every judgment term; or."

11. The issuing judicial authority has also ticked point 3.2 of table D in the EAW (which purports to conform with point 1(b) of article 4a of the Framework Decision) as follows:-

"Being informed about the set trial, he appointed a lawyer in order to represent him in court and he was defended by that lawyer during the trial."

The issuing judicial authority has also ticked point 3.3 of table D in the EAW (which purports to conform with point 1(c) of article 4a of the Framework Decision) as follows:-

"The person was handed the decision on 01.10.2019, the convict being informed about the decision rendered and that is why he appealed the sentence above mentioned, but not within the set term, on 22.10.2019."

At point D.4 of the EAW, the issuing judicial authority has provided additional information as to how the relevant requirements were met as follows:-

"Being informed about the set trial, he benefitted from legal assistance from the chosen lawyer, Mrs. Dascalu Rodica who, on 25.09.2018 informed the court that they cancelled the contract and because the offender was arrested for another matter (file no.1102/193/2018) he had another lawyer appointed ex officio, Mr.

Lazar Razvan Claudiu. During the trial the measure of preventive arrest was replaced with the preventive measure of legal control, the offender being released on 07.11.2018 when the compulsory legal assistance was cancelled, the case for which he was put on trial for is not in line with the provisions of art.90 of the Criminal Prosecution Code.”

12. It is difficult to comprehend precisely what is being indicated at point D.4 of the EAW.
13. At part F of the EAW, a long narrative attempts to set out the history of how the sentence of 3 years and 4 months' imprisonment was arrived at. Reference is made to an earlier suspended sentence of 2 years' imprisonment imposed on 28th September, 2015, which was added to a sentence of 1 year and 4 months' imprisonment imposed for the offences referred to at part E of the EAW. Reference was also made to periods in detention having been deducted from the sentence imposed.
14. Having considered the affidavit of the respondent dated 21st January, 2021 and the affidavit of Ms. Danica Kinnane, solicitor for the respondent, dated 20th January, 2021, together with the exhibits thereto concerning prison conditions in Romania, and having heard submissions from counsel, the Court, by letter dated 3rd February, 2021, sought the following additional information:-
 - (a) further details of the offence referred to in the EAW;
 - (b) a properly completed table D (and enclosing a copy of same for convenience) in relation to the hearing on 25th September, 2019;
 - (c) details of any other hearings in respect of the offence at part E of the EAW;
 - (d) further details of the matters referred to at part D of the EAW;
 - (e) details concerning the earlier suspended sentence and a completed table D in respect of same; and
 - (f) details as to the likely place and conditions in which the respondent would be detained, if surrendered.
15. By reply dated 26th February, 2021, the issuing judicial authority indicated that on 25th September, 2019, the respondent received two sentences of 1 years' imprisonment, respectively, as regards the offences referred to at part E of the EAW, i.e. driving without a driving licence and refusing to supply a sample. After applying certain provisions of Romanian law, this was reduced to a single sentence of 1 year and 4 months' imprisonment. Due to the commission of these offences, the suspension of an earlier sentence of 2 years' imprisonment was revoked and that 2 years was added to the sentence of 1 year and 4 months' imprisonment to give a total of 3 years and 4 months imprisonment. Further details of the offending referred to at part E of the EAW are provided. Further details of the history of the proceedings relating to the offences referred to at part E of the EAW are provided. It is indicated that the respondent had a lawyer at

an early stage but his power of attorney was unilaterally cancelled, and that the respondent was not in attendance but the decision was served on his mother. An appeal was filed but it was out of time. Despite the request for a completed table D in respect of the decision imposing the suspended sentence, this was not completed. No reply was given in respect of the request for information concerning prison conditions but rather the Court was informed it should refer the query to the Ministry for Foreign Affairs.

16. Upon hearing further submissions, the Court reverted to the issuing judicial authority by letter dated 18th March, 2021 seeking the following additional information:-
- (a) details of the offence to which the suspended sentence relates and once again seeking a completed table D in respect of that sentence;
 - (b) clarification concerning the reference to unilateral cancellation of the lawyer's power of attorney;
 - (c) details of the remaining term of imprisonment to be served; and
 - (d) a response to the request for details concerning the conditions of detention.
17. By reply dated 13th April, 2021, the issuing judicial authority indicates that the suspended sentence was in respect of an aggravated robbery and details of same are set out. However, again no table D was completed in respect of the suspended sentence, despite it being confirmed he was not present. The letter states:-

"The offender was not present, he was not heard during the trial, being investigated at large during the trial, during the prosecution he was heard and did not admit his offences and during the inquiry, the offender, being legally summoned was not present in court in order to be heard even if the court issued a FTA bench warrant on his name and he was also notified and eventually he was judged in absence."

The letter also indicates that, as regards the offences referred to in part E of the EAW, the contract of legal assistance had been unilaterally cancelled by the lawyer and the court did not appoint any other lawyer *ex officio* as this was not required under Romanian law as the offence did not carry a maximum penalty of more than five years' imprisonment. It is indicated that the relevant deductions from the sentence will be made when the custodial sentence is enforced. The letter attaches a letter from the National Administration of Penitentiaries in relation to prison conditions.

18. On the documents before the Court, the issuing state seeks the surrender of the respondent to enforce a single sentence of 3 years and 4 months' imprisonment imposed on the respondent on 25th September, 2019 in respect of three offences, viz. driving without a licence, refusing to give a biological sample and an earlier offence of aggravated robbery in respect of which a suspended sentence had been imposed. As regards the hearing on 25th September, 2019, the table at part D of the EAW has not been completed by the issuing judicial authority in conformity with the requirements of article 4a of the Framework Decision or s. 45 of the Act of 2003. Despite being provided with a copy of

table D in conformity with those provisions and being asked to complete same, the issuing judicial authority declined to do so. I am not satisfied that the issuing state has met the requirements of point 3.1a of the table set out in s. 45 of the Act of 2003 as regards personally serving the respondent with notice of the date of the scheduled trial and advising him that a decision could be given in his absence. Nor am I satisfied that the issuing state has met the requirements of point 3.2 of that table, in particular that the respondent was actually defended by the lawyer at the trial. Furthermore, I am not satisfied that the issuing state has met the requirements of point 3.3 of that table, in so far as he was not personally served with the decision and service upon his mother is not sufficient service to meet the requirements of art 4a of the Framework Decision or s. 45 of the Act of 2003. As regards the earlier conviction and sentence for the offence of aggravated robbery, the respondent was convicted and sentenced in his absence and yet the issuing judicial authority has declined to complete any table D in respect thereof despite being asked to do so and being provided with a sample table D for convenience.

19. It would appear that as regards the decision of 25th September, 2019 and the earlier decision of 28th September, 2015, both these decisions and sentences were imposed upon the respondent in his absence. In such circumstances, the surrender of the respondent is precluded by s. 45 of the Act of 2003 unless the EAW indicates the matters required by points 2, 3 and 4 of table D as set out in that section. Having considered all of the documentation in this matter, I am not satisfied that the requirements of s. 45 of the Act of 2003 have been met. As regards the sentence imposed on 25th September, 2019, the table D was not appropriately completed and, taking into account all of the information furnished, I am not satisfied that any of the alternative conditions set out in table D have been complied with. Even taking a purposive interpretation or approach in line with the decision of the Supreme Court in *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, I am not satisfied that the defence rights of the respondent were adequately protected or given effect to. Similarly, in respect of the suspended sentence imposed on 28th September, 2015, no table D has been completed and, on the basis of all of the information furnished, I am not satisfied that any of the conditions provided for at table D have been complied with and nor am I satisfied that the defence rights of the respondent were adequately protected and given effect to.
20. In such circumstances, I refuse the application for surrender.