

THE HIGH COURT

[2021] IEHC 445
[2021 No. 055 EXT]

BETWEEN

THE MINISTER FOR JUSTICE

APPLICANT

AND

FRANTIŠEK RAJZ

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 29th day of June, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Slovak Republic pursuant to a European arrest warrant dated 6th April, 2021 ("the EAW"). The EAW was issued by Judge Peter Šut'ak, of Prešov District Court, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of one year's imprisonment imposed upon the respondent on 4th August, 2010, all of which remains to be served.
3. The respondent was arrested on 17th March, 2021 on foot of a Schengen Information System II alert and brought before the High Court on the same day. The EAW was produced to the High Court on 31st March, 2021.
4. 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 that regard.
5. 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.
6. 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.
7. I am satisfied that correspondence can be established between the offence referred to in the EAW and an offence under the law of this State, viz. the offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 or the offence at common law of attempting to commit that offence. No issue was raised in respect of correspondence.
8. At part D of the EAW, it is indicated that the respondent did not appear in person at the hearing which resulted in the decision which is sought to be enforced. The issuing judicial authority has indicated that it is relying upon point 3.4. of part (d) of the EAW as follows:-

"3.4 the person was not personally served with the decision, but

- *the person will be personally served with this decision without delay after the surrender; and*
- *when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and*
- *the person will be informed of the timeframe within which he or she has to request a retrial or appeal, which will be..... days.*

The person will be informed about the following:

Pursuant to Section 362 (1) of the Criminal Procedure Code any convicted person in the proceedings held under this Section has the right to file for reconsideration of his case by the court in his presence due to a failure to comply with the conditions in Section 358 (1) within the 6 months' period of the date on which he learned of the criminal proceedings or the conviction, however, not later than within the limitation period determined by the Criminal Code."

9. The respondent objects to surrender on the following grounds:-
 - (i) surrender is precluded by reason of s. 45 of the Act of 2003; and
 - (ii) surrender is precluded by reason of s. 37 of the Act of 2003.
10. The respondent swore an affidavit dated 19th April, 2021, in which he avers that he left the issuing state in mid to late March 2010 and travelled to the United Kingdom where he resided up until late 2019 when he travelled to Ireland. He avers that he lives in Cork with his long-term partner and two children, aged approximately eight years' old and seven years' old, respectively. He avers that his wife is not in good health due to heart problems and anxiety attacks. He accepts that he is the person named in the EAW and that on 3rd March, 2020, he was arrested by Slovakian police and subsequently released without charge. He avers that he gave the Slovakian police his personal details including his address in the issuing state. He avers that he resided at that address for a further one or two weeks after the incident in question and that his mother continued to reside there for a further year. He avers that no documentation was received by his mother and that his mother is now deceased. He avers that he had no knowledge of being sentenced until arrested by the Gardaí. He avers that if offered a retrial or appeal, he would intend to fully contest the charges against him. He avers that his Irish solicitor has been in contact with a Slovakian lawyer.

Section 45 of the Act of 2003

11. Section 45 of the Act of 2003 transposes into Irish law 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"), and provides:-

"45. – A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant or the Trade and Cooperation Agreement arrest warrant, as the case may be, was issued, unless in the case of a European arrest warrant, the warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA and in the case of a Trade and Cooperation Agreement arrest warrant, the warrant indicates the matters required by paragraph 1(i) of Article LAW.SURR.81 of the Cooperation and Trade Agreement, as set out in the table to this section." [table set out thereafter]

12. It is submitted on behalf of the respondent that the table as completed in the EAW at part D does not meet the requirements of s. 45 of the Act of 2003. He submits that the issuing judicial authority, while appearing to rely upon point 3.4. in the EAW (the equivalent of point 3.3. in the table to s. 45 of the Act of 2003), it has not properly complied with same as it has not set out that the respondent will be entitled to an appeal and set out the time which he has to request such appeal.
13. The Court sought additional information from the issuing judicial authority and by reply dated 12th May, 2021, the issuing judicial authority indicates that the respondent will be served with the decision after his surrender. It further indicates that proceedings were held against the respondent as a fugitive and:-

"That is why he has the right under Section 362 (1) of the Criminal Procedure Code effective until 31.08.2011 to file for a retrial of his case before the court in his presence within 6 months' period of the date he learned of the criminal prosecution or the conviction, however, not later than within the limitation period stipulated by the Criminal Code.

Should the court establish the satisfaction of the conditions in (1), it will cancel the precedent decisions and continue the proceedings based on the original charges; otherwise it will reject the motion. A complaint may be lodged against this decision."

14. After hearing submissions, this Court sought further additional information and by reply dated 31st May, 2021, the issuing judicial authority explains that under s. 362(1) of the Criminal Procedure Code, which was effective up to 31st August, 2011, the respondent has a guaranteed right to retrial before the court subject to the single condition that he files a motion for retrial within the deadline specified in the code, which is six months starting on the date he learned of his conviction. When considering the application, the court only examines the compliance with the deadline to file the motion. Once the deadline is complied with, the court allows the retrial, cancels the previous decision in its entirety and the criminal proceedings are held based on the original indictment. The letter further states:-

"The Prešov District Court hereby guarantees that in the event that the convict is extradited and the motion is filed by him within the deadline stipulated by the law, all the previous decisions will be cancelled and the proceedings will continue based on the original indictment."

15. Having evaluated all the information before the Court, I am satisfied that the respondent will have a right to a full retrial subject to the single condition that he applies for same within six months from the date on which he learned of the conviction. I am satisfied that the issuing judicial authority has indicated the matters required by s. 45 of the Act of 2003 and, in particular, has indicated its reliance upon the equivalent of point 3.4. thereof. I am satisfied that the reliance upon the equivalent of point 3.4. of the table set out at s. 45 of the Act of 2003 has been properly and appropriately indicated by the issuing judicial authority. I am satisfied that the respondent's defence rights will be respected and given effect to. I dismiss the respondent's objection to surrender based upon s. 45 of the Act of 2003.

Section 37 of the Act of 2003

16. Section 37 of the Act of 2003 provides, *inter alia*, that a person shall not be surrendered under the Act of 2003 if his or her surrender would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR"), the protocols thereto, or would constitute a contravention of any provision of the Constitution. The respondent objects to his surrender on the basis that same would constitute a breach of his right to a private and family life as recognised by article 8 ECHR. The respondent relies upon the fact that the offence which is alleged to have occurred on 3rd March, 2010 appears to be at the lower end of criminality; he has effectively established a new life for himself in this country; he has a long-term partner and two children who are fully integrated into Irish society. He also relies upon the fact that his wife has health problems relating to her heart and suffers from anxiety. It should be noted that no medical report was put before the Court as regards the respondent's wife's medical status, although unless same constituted truly exceptional circumstances, it is unlikely that such a report could have any decisive impact upon the proceedings.
17. It is inherent in the criminal process and extradition system that the personal and family life of an accused or surrendered person and his immediate family will be disrupted and often significantly so. As pointed out in *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, it is only where the personal family circumstances of the requested person are truly exceptional that same could be regarded as possibly justifying refusal of surrender.
18. In *Vestartas*, MacMenamin J., delivering the judgment of the Supreme Court, stated at para. 23:-

"23. Article 8(1) ECHR guarantees the right to respect for an individual's private and family life, home and correspondence. But that guarantee is subject to the proviso that public authorities shall not interfere with the exercise of that right, except such as in accordance with law, and is necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2)). The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider."

As regards delay or lapse of time, MacMenamin J. stated at para. 89:-

"89. Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this, it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances."

At para. 94, MacMenamin J. stated:-

"94. The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself."

19. As regards the respondent's personal and family circumstances, including lapse of time, I do not regard same as truly exceptional or coming anywhere near the threshold whereby same could possibly justify a refusal of surrender. Bearing in mind the wording of s. 37 of the Act of 2003, this Court must determine whether surrender of the respondent is incompatible with the State's obligations under the ECHR, the protocols thereto and/or the Constitution. I am satisfied that surrender is not incompatible with the State's obligations in that regard. Therefore, I dismiss the respondent's objections to surrender grounded upon his private and family life.

Conclusion

20. I am satisfied that surrender of the respondent is not precluded by part 3 of the Act of 2003 or any other provision of that Act.
21. Having dismissed the respondent's objections to surrender it follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to the Slovak Republic.