

THE HIGH COURT

[2021] IEHC 587
[2021 No. 127 EXT]

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

RADOSLAV SIPKA

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 6th day of September, 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 9th January, 2020 ("the EAW"). The EAW was issued by Judge Beata Sutakova, of the District Court of Presov, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of ten years' imprisonment imposed upon the respondent on 14th January, 2019 and upheld on appeal on 10th October, 2019, all of which remains to be served.
3. The respondent was arrested on on foot of a Schengen Information System II alert and brought before the High Court on 18th May, 2021. The EAW was produced to the High Court on 26th May, 2021.
4. 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.
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. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between an offence to which the EAW relates and an offence under the law of the State, where the offence referred to in the EAW is an offence to which Article 2.2 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"), applies and carries a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "*swindling*". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same. In any event, I am

satisfied that, if necessary, correspondence could be established between the offence referred to in the EAW and that an offence under the law of this State, viz. an offence of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

8. At part D of the EAW, it is indicated that the decision issued *in absentia* but the normal Table D provided for by the Framework Decision has not been set out or completed. The issuing judicial authority merely indicates:-

"the person was not summoned in person nor informed of the scheduled date and place of the trial which resulted in the decision in absentia by other means; but after issuing such decision he has the following legal guarantees (these guarantees may be provided beforehand).

State the legal guarantees:"

No indication of any such legal guarantees is given in the EAW.

9. The respondent objects to surrender on the following grounds:-
- i. There is insufficient clarity as regards the number of offences to which the EAW relates and as to how the sentence of ten years was arrived at; and
 - ii. Surrender is precluded by reason of s. 45 of the Act of 2003.

Lack of Clarity

10. At part E of the EAW, it is stated that it relates to one criminal offence but a number of different instances of wrongdoing are set out numbered 1 to 5. These detail different instances in which the respondent deceived persons into providing him with funds to their detriment. Counsel on behalf of the respondent submits that it appears that the EAW relates to more than one offence and further that it is not clear whether a separate sentence was imposed in respect of each of the alleged instances of wrongdoing so as to arrive at the sentence of ten years' imprisonment. By additional information dated 24th June, 2021, it is confirmed that the EAW relates to only one offence and that a single sentence of ten years' imprisonment was imposed in respect of that offence. From the experience of this Court, it is not unusual in other jurisdictions for offences of a similar type committed within a certain period to be treated as a single offence before the court trying such matters.
11. I am satisfied that there is no lack of clarity as regards the number of offences to which the EAW relates or the sentence in respect of which surrender of the respondent is sought. I dismiss the respondent's objections based upon a lack of clarity.

Section 45 of the Act of 2003

12. Section 45 of the Act of 2003 transposes Article 4A of the Framework Decision into Irish law 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 ... was issued, unless ... 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 ... as set out in the table to this section.” [Table set out thereafter]

13. Counsel on behalf of the respondent submits that the respondent was not present at the hearing resulting in the decision, the subject matter of this EAW, and that the requirements of s. 45 of the Act of 2003 have not been met.
14. The respondent swore an affidavit dated 11th June, 2021 in which he avers that he was not aware of any intended proceedings against him in the issuing state when he left that jurisdiction. He avers that he was not served with a summons to appear in court or otherwise notified of any trial in respect of the offence to which the EAW relates. He avers that he did not authorise or otherwise mandate any lawyer to represent him in respect of the offence. He avers that he left the issuing state in 2006 and returned for a brief period around late 2010/early 2011. He avers that he was in Ireland in 2015 when a defence counsel was supposedly assigned to him by the District Court of Presov on 16th December, 2015.
15. The respondent swore a supplemental affidavit dated 20th July, 2021 in which he avers that he was not arrested, interviewed, interrogated or otherwise aware of any intended proceedings or pending trial against him in Slovakia in respect of the offence to which the EAW relates.
16. By additional information dated 3rd June, 2021, the issuing judicial authority completed a Table D confirming that the respondent did not appear in person at the trial resulting in the decision and invoking point 3.2. as follows:-

"3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial."

The additional information goes on to state that defence counsel was assigned by the District Court of Presov on 16th December, 2015 and that the defence counsel participated in all the main hearings and was present when the judgment was rendered at first instance on 14th January, 2019 and lodged an appeal. The judgment of the District Court of Presov dated 14th January, 2019 and the judgment of the Regional Court of Presov dated 10th October, 2019 were duly served on the defence counsel.

17. By additional information dated 24th June, 2021, it is indicated that both the defence and prosecution filed appeals. It is confirmed that the Table D completed applies to both the trial of first instance and on appeal. It indicates that the proceedings against the respondent were conducted as against a fugitive in which his rights during the entire proceedings were exercised by the assigned defence counsel. A single sentence of ten years imprisonment was imposed.

18. By further additional information dated the 8th July, 2021, it confirms that no hearing was held on 16th December, 2015, this being the date on which the defence counsel had been assigned. The defence counsel was assigned in accordance with domestic law in proceedings against a fugitive. The charges were brought against the respondent by a resolution dated 19th October, 2011. Due to the absence of the respondent, and upon the proposal of the prosecutor, an arrest warrant and European arrest warrant were issued on 7th February, 2012 and 22nd March, 2013, respectively. The criminal prosecution was suspended by resolution dated 17th April, 2013 due to the absence of the respondent and was resumed on 1st October, 2015. It is ruled by measure of the District Prosecutor's Office of 9th December, 2015 that the proceedings against the fugitive would be conducted in respect of the respondent and on 16th December, 2015, a lawyer was assigned to the respondent. The date of the main hearing was 14th January, 2019, which defence counsel attended. The respondent was notified of same by posting a notice of the date of the main hearing on the official notice board of the District Court of Presov on 4th October, 2018. As regards the hearing on 10th October, 2019, this was published on the official notice board of the Regional Court from 24th September, 2019 to 10th October, 2019. It is confirmed that as the respondent was regarded as a fugitive, defence counsel was assigned to him ex officio. It is confirmed that the appeal was lodged by defence counsel and the respondent does not have a standard right of appeal but is entitled to file a motion for retrial which would be decided by the court.
19. By additional information dated 26th July, 2021, it is confirmed that the respondent was not arrested or interviewed as a suspect in respect of the offence listed in the EAW. He did not provide the prosecution authorities with any address for service. He was not advised of any rights or obligations as a suspect or an accused as he was not interviewed. He was not advised of any obligation to inform the prosecution authorities of any change of address. He was not advised of any consequences of failing to inform of a change of address. It is further confirmed that the summons for the hearings were not delivered to his permanent address but notification took place by posting notice of the date of the main hearing on the official notice board of the courts. The police had attempted to ascertain the whereabouts of the respondent but had not been successful. It is confirmed that the respondent was not personally informed of the proceedings by the prosecution authorities or the court. Some information emerged about a stay in the United States of America but his whereabouts could not be ascertained. It was found that he had an intention to avoid the criminal proceedings by staying abroad and, therefore, it was determined that the proceedings against a fugitive would be applied.
20. Having evaluated all of the documentation before the Court, I am satisfied that the respondent did not appear at the trial at first instance or the appeal. I am satisfied he was not personally summoned to appear at either hearing and I am also satisfied that he was not aware by any other means of the hearing dates scheduled, either at first instance or on appeal. I am satisfied that the respondent was represented by a lawyer appointed by the court in his absence and that, at no stage, did the respondent mandate such a lawyer to act on his behalf. I am satisfied that the respondent has no automatic right to an appeal or retrial in which he would have the right to participate and which would allow the

merits of the case including fresh evidence to be re-examined and which could lead to the original decision being reversed. I am satisfied that the respondent was not served with a copy of the conviction either at first instance or on appeal.

21. In light of the additional information, counsel on behalf of the applicant had to concede that the requirements of s. 45 of the Act of 2003 and Article 4A of the Framework Decision had not been met either in form or in substance and nor was there evidence of any express or implied waiver of defence rights on the part of the respondent.
22. I am satisfied that as the requirements of s. 45 of the Act of 2003 have not been met, either in form or in substance, and as there was no unequivocal waiver of defence rights on the part of the respondent, the surrender of the respondent is precluded.
23. It follows that this Court will refuse the application for an order for surrender.