

THE HIGH COURT

[2020 No. 136 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SEAN FITTON

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 27th day of January, 2021

1. By this application the applicant seeks an order for the surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to a European arrest warrant ("the EAW") dated 12th June, 2020, issued by District Judge Michael Snow, Westminster Magistrates' Court, as the issuing judicial authority. The surrender of the respondent is sought in order to execute the remainder of a custodial sentence imposed upon him in respect of an offence of causing grievous bodily harm to another prisoner while the respondent was in custody.
2. The EAW was endorsed by the High Court on 1st July, 2020 and the respondent was arrested and brought before this Court on 2nd August, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. On foot of additional information received from the issuing state, I am satisfied that the respondent appeared in person at the hearing resulting in his conviction and sentence, and that no issue arises in respect of s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").
5. I am satisfied that the minimum gravity requirements of the Act of 2003 are met. The term of imprisonment in respect of which the respondent's surrender is sought amounts to 1 year, 9 months and 13 days.
6. As regards correspondence, by virtue of s. 38(1)(b) of the Act of 2003, it is not necessary for the applicant to show correspondence between an offence in the EAW and an offence under Irish law where the offence in the EAW is an offence to which article 2(2) of the 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 under the law of the issuing state, the offence is punishable with a maximum term of not less than 3 years' imprisonment. In this instance, the issuing judicial authority has certified that the offence is an offence to which article 2(2) of the Framework Decision applies, the offence is punishable by imprisonment for a maximum period of not less than 3 years and has indicated the relevant box at part E of the EAW for "*murder/grievous bodily injury*". There is nothing in the EAW that gives rise to any ambiguity or perceived manifest error, such as would justify this Court in looking behind that certification. In any event, I am satisfied on reading the EAW that correspondence clearly exists in respect of the offence in the EAW and the offence under Irish law of

assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act, 1997. No issue was taken in respect of correspondence.

7. The respondent filed points of objection to his surrender, dated 21st September, 2020, which amounted to a submission that surrender is precluded by reason of s. 37 of the Act of 2003 as it would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR") and/or the Constitution, and in particular:-
 - (i) there was a real risk the respondent would be subjected to inhuman and degrading treatment in detention;
 - (ii) the respondent had not been arrested, questioned, charged or convicted in relation to the alleged behaviour relied upon to revoke his release on licence;
 - (iii) the respondent's family rights would be breached; and
 - (iv) the length of sentence remaining to be served was incorrectly stated in the EAW.
8. The hearing date in this matter was set for 5th November, 2020 but the matter was not in a position to proceed that day. A new hearing date was set for 4th December, 2020, and on that date, the Court was informed that the respondent had decided to discharge his legal representatives, and new legal representatives appeared on his behalf and sought an adjournment of the matter. No notice was given to the Court or the applicant of this intended change of legal representation and it seems that the respondent's then legal team were also given very short notice of same. The new legal representatives indicated that the respondent wished to argue different grounds of objection, including that surrender should be refused as a result of the UK having withdrawn from the European Union ("the EU") and the then imminent end of the relevant transition arrangements on 31st December, 2020. It was with some reluctance that the Court granted the application for an adjournment in such circumstances. A new hearing date was set for 10th December, 2020.
9. The respondent filed an amended notice of objection to surrender dated 8th December, 2020, which can be summarised as follows:-
 - (i) surrender is precluded under s. 37 of the Act of 2003 as it would amount to a breach of his right to life;
 - (ii) surrender is precluded under s. 37 of the Act of 2003 as it would amount to a breach of his right not to be subjected to inhuman or degrading treatment; and
 - (iii) surrender is precluded by s. 22 of the Act of 2003 as he believed the UK intended to prosecute him for offences which are not the subject of the EAW.
10. On 10th December, 2020, counsel for the respondent indicated he was in a position to deal with the matter and the application proceeded. At hearing, counsel for the respondent argued three grounds of opposition, being the risk of harm to the respondent

if surrendered, the risk of prosecution for other offences and the departure of the UK from the EU.

Section 37 of the Act of 2003

11. The solicitor for the respondent, Ms. Sinead Mulhall, swore an affidavit dated 8th December, 2020 in which she averred that she had been instructed by the respondent that he had received five notifications from the London Metropolitan Police of a threat to his life. No further details were set out, such as the approximate date of the threats or the background to same. He had also instructed her that he had been assaulted on a number of occasions while previously in custody, but again no further details were set out, such as the approximate dates of same, the location, the perpetrators or the background to such assaults.

12. By way of additional information dated 11th January 2021, the issuing state confirms there is no known, immediate or identifiable risk to the respondent if surrendered and detained in custody. It also confirms that the prison service would assess any risk to the respondent's safety and afford him reasonable protection while in detention. It is indicated that there was no information of any threat to the respondent's life if surrendered. On 4th October, 2019, an attempt had been made to serve a notice on the respondent that he posed a threat to the personal safety of another/others as there were grounds to believe at that time, he was planning serious violence. It was not served due to concerns for his safety. The respondent refused to sign an acknowledgement of receipt of same. The reference in the notice to a threat to his life was an error and a statement from a police officer confirming the error is enclosed with the reply. The respondent's mother and aunt had reported suspicious vehicles outside their home and suspected the occupants of the vehicles were looking for the respondent. As regards the issue of inter-prisoner violence, the police and prosecution service are unaware of any such violence concerning the respondent, other than the circumstances of the offence committed by the respondent, the subject matter of the EAW. In the reply, the issuing state provides the Court with an assurance that if surrendered, an assessment of any risk of harm to the respondent would be carried out and on foot of same, reasonable steps would be taken to provide for his safety while in detention. Details of such assessment and possible protective measures are set out. The reply states that the respondent's previous prison records have been reviewed and there are five other persons currently in detention with whom the respondent had been associated and who might pose a risk to him. It is noted that it was likely the respondent would be detained at HMP Wandsworth and the five other prisoners in question are detained in other prisons.

13. The respondent expressed concern about the error which the UK authorities now say had occurred in respect of the notice served upon him and their failure to inform him of such error. However, on foot of the additional information received from the issuing state, I am satisfied that if there is any risk to the respondent's health and safety in custody upon surrender, of which there appears to be very little evidence, same will be adequately assessed and addressed by the UK authorities. I dismiss the respondent's objection based on an alleged threat to his life or safety if surrendered.

Section 22 of the Act of 2003

14. Counsel on behalf of the respondent submitted that there was a real risk that, if surrendered, the respondent would be prosecuted for offences which are not the subject of the EAW. He referred the Court to part E of the EAW which set out that the respondent had been sentenced on 11th March, 2014 to 8 years, 4 months and 18 days' imprisonment in respect of his part in a group assault upon another prisoner at HMP Woodhill. The respondent had been released on licence on 5th October, 2018. A licence recall notification was issued on 9th March, 2020, as he had been determined to be in breach of the conditions of his licence on the basis of information received from the police that he was operating an illegal drugs and prostitution network and had seriously assaulted a female sex worker. Having indicated his intention to hand himself in on foot of the said notification, he failed to do so. Counsel submitted that given the reference to other offences grounding the licence recall notification, there was a real risk that the respondent would be prosecuted for such other offences in breach of the principle of specialty as provided for by s. 22 of the Act of 2003. However, he was not able to point to any other evidence to support his submission.

15. Section 22(3) of the Act of 2003 provides:-

"It shall be presumed that, in relation to a person to whom a European arrest warrant applies, the issuing state does not intend to —

(a) proceed against him or her,

*(b) sentence or detain him or her for a purpose referred to in subsection (2)(a) ,
or*

(c) otherwise restrict him or her in his or her personal liberty,

in respect of an offence, unless the contrary is proved."

16. I am satisfied that the respondent has failed to adduce any cogent evidence to rebut the said presumption.

UK Withdrawal from the EU

17. Counsel on behalf of the respondent accepted that the withdrawal of the UK from the EU could not of itself justify refusal of surrender but he submitted that the Court could not give the same weight to assurances from the UK as hitherto, or afford the UK the hitherto degree of mutual trust and confidence, as it would be out of the European arrest warrant system, and, post-surrender of the respondent, might not abide by the terms of the Framework Decision.

18. Following the UK serving notice of its intention to leave the EU, an agreement was entered into between those parties, known as the EU - UK Withdrawal Agreement 2019, agreed on 17th October, 2019 ("the Withdrawal Agreement"). Article 62.1 of the Withdrawal Agreement provided that:-

" ...

(b) *Council Framework Decision 2002/584/JHA shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released.*"

The 'transition period' referred to ended at 11:00 p.m. on 31st December, 2020.

19. From the foregoing, it is clear that the EU and the UK have agreed that the Framework Decision applies to European arrest warrants in respect of which the requested person was arrested prior to 11:00 p.m. on 31st December, 2020. The UK has thereby committed itself to comply with the Framework Decision where the requested person was arrested on foot of a European arrest warrant prior to 11:00 p.m. on 31st January, 2020.
20. A statutory instrument has been signed which is designed to give domestic effect to such agreement, viz. SI 719/2020 European Arrest Warrant Act 2003 (Designated Member states) (Amendment) Order, 2020 (S.I. No. 719 of 2020). In simple terms, this designates the UK as a Member State for the purposes of the Act of 2003, provided the European arrest warrant was issued by a judicial authority in the UK and the requested person was arrested prior to 11.00 p.m. on 31st December, 2020 for the purpose of execution of the European arrest warrant.
21. In this instance, the EAW was issued by District Judge Michael Snow, Westminster Magistrates' Court, a judicial authority in the UK, and the respondent was arrested on foot thereof on 2nd August, 2020. Thus, the necessary conditions for the continued application of the Act of 2003 to these proceedings have been satisfied. Furthermore, in such circumstances the UK has committed itself to abiding by the Framework Decision in respect of this matter.
22. As the UK has been designated as a Member State for the purposes of the Act of 2003 and this application thereunder, the presumption in s.4A of the Act of 2003 applies to the UK as a Member State. Section 4A of the Act of 2003 provides:-

"It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."
23. The respondent has adduced no cogent evidence to rebut the said presumption in s. 4A of the Act of 2003. Furthermore, even in the absence of such presumption, I am satisfied that the UK has entered into international treaties by which it is committed to upholding fundamental human rights and has incorporated such rights into its domestic legislation.
24. The case of *RO* (Case C-327/18 PPU) (2018) involved a reference from the High Court to the CJEU ("the Court of Justice of the European Union") seeking a preliminary ruling following the UK serving notice of its intention to withdraw from the EU. The issue before the CJEU was whether the uncertainty as to the extent to which a national of a Member

State would in practice be able to enjoy rights under the relevant EU treaties, the European Charter of Fundamental Rights ("the Charter") or relevant legislation, if surrendered to the UK on foot of a European arrest warrant required a Member State to refuse surrender to the UK. The CJEU determined that mere notification by a member state of its intention to withdraw from the EU in accordance with article 50 of the Treaty on the European Union ("the TEU") cannot be regarded, as such, as constituting an exceptional circumstance within the meaning of the case law capable of justifying a refusal to execute a European arrest warrant issued by that Member State. The CJEU went on to state at para. 49:-

"[49] However, it remains the task of the executing judicial authority to examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds for believing that, after withdrawal from the European Union of the issuing Member State, the person who is the subject of that arrest warrant is at risk of being deprived of his fundamental rights and the rights derived, in essence, from Articles 26 to 28 of the Framework Decision..."

25. At para. 61 of its decision, the CJEU noted that the UK is a party to the ECHR. It noted the UK had incorporated the provisions of the ECHR into its national law and that after the withdrawal of a Member State, a presumption can still be made that the former Member State would apply the substantive content of the rights derived from the Framework Decision if the national law of the former state incorporated the substantive content of those rights and, in particular, if the former Member State continued to participate in international conventions such as the European Convention on Extradition and the ECHR after withdrawal from the EU. Only if there is concrete evidence to the contrary could the judicial authorities of a Member State refuse to execute the European arrest warrant. I note that the UK continues to participate in the ECHR and UK domestic legislation continues to incorporate the substantive content of ECHR.

26. In *Minister for Justice and Equality v. O'Connor* [2018] IESC 47, the Supreme Court considered the decision in *RO* and at para. 4.10., Clarke C.J. pointed out the effect of that decision to be as follows:-

"[4.10.] Therefore, a mere theoretical possibility of impairment of rights is not sufficient to override the obligation to surrender."

Clarke C.J. went on to state at para. 4.13.:-

"[4.13.] The key question advanced to the CJEU was as to whether, in all the relevant circumstances, the effect of Brexit was to prevent surrender either in all cases, no cases or in certain circumstances only. In essence, the answer of the CJEU was to say that it was possible that Brexit might prevent surrender but only where there were substantial grounds to believe that the person concerned was at risk of being deprived of rights recognised by the Charter and the Framework Decision."

27. The essential question is whether this Court is satisfied that the respondent has established substantial grounds for believing that, if surrendered, there is a real risk that his fundamental rights under the Charter, the ECHR or the Constitution will be breached. The bare assertions made by the respondent, through his solicitor, fall far short of the cogent evidence required to establish that there are such substantial grounds. I dismiss the respondent's objection in that regard.

Conclusion

28. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
29. I am satisfied that the surrender of the respondent is not precluded by s. 37 of the Act of 2003 or any other provision of part 3 of the Act of 2003, or indeed any provision of that Act.
30. Having dismissed the respondent's objections to surrender, it follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to the UK.