

THE HIGH COURT

[2021] IEHC 670
[2021 No. 125 EXT]
[2021 No. 144 EXT]

BETWEEN

THE MINISTER FOR JUSTICE

APPLICANT

AND

ROBERT GABCO

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 11th day of October, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Slovak Republic pursuant to two European arrest warrants both dated 17th February, 2021 and issued by Judge Beata Sutakova of Presov District Court as the issuing judicial authority.
2. The first of the European arrest warrants bears file reference number 6T/18/2020 and is the subject matter of the proceedings bearing record number 2021/125 EXT ("EAW No. 1").
3. The second warrant bears file reference number 6T/117/2019 and is the subject matter of the proceedings bearing record number 2021/144 EXT ("EAW No. 2").
4. EAW No. 1 seeks the surrender of the respondent in order to prosecute him in respect of a single offence consisting of two shoplifting incidents said to have occurred on 22nd July, 2019 and 22nd November, 2019, respectively. EAW No. 1 is based upon a domestic order of arrest issued by Presov District Court on 8th October, 2020 (file reference number 6T/18/2020, as per EAW No. 1). I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), are met as the maximum length of the custodial sentence which can be imposed for the offence is stated to be two years' imprisonment. I am satisfied that correspondence can be established between the offence, the subject matter of EAW No. 1, and an offence under the law of this State, namely an offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
5. EAW No. 1 indicates that it is an accusation warrant. In fact, the surrender of the respondent on foot thereof is to impose/enforce a single sentence of eight months' imprisonment upon him in respect of the two offences. There is no reference in EAW No. 1 to a sentence of eight months' imprisonment having been imposed. The first reference to this is in the additional information dated 24th May, 2021. It would appear that the reason for this is that the eight-month sentence cannot become enforceable until a previous six-month sentence imposed in respect of the offence of 22nd July, 2019 is formally nullified and that the respondent's surrender is required in order to bring that about. Thus, it is described as an accusation warrant although, in effect, it is a conviction warrant.

6. EAW No. 2 seeks the surrender of the respondent in order to enforce a sentence of six months' imprisonment imposed upon the respondent on 28th November, 2019 by Presov District Court (file reference number 6T/117/2019 as per EAW No. 2), all of which remains to be served. EAW No. 2 is stated to relate to one offence, being a shoplifting offence which occurred on 22nd July, 2019. It should be noted that this offence is one of the incidents comprising the offence to which EAW No. 1 relates. The minimum gravity requirements of the Act of 2003 are met as regards EAW No. 2 as the sentence in respect which surrender is sought is in excess of four months' imprisonment. I am satisfied that correspondence can be established between the offence to which EAW No. 2 relates and an offence under the law of the State, namely an offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
7. The offences to which the EAWs relate are minor matters. It emerged in the course of a bail hearing that the respondent has a very significant history of criminal convictions, including convictions for serious offences. These other convictions are not relevant to the issues to be decided herein.
8. The respondent was arrested on foot of a Schengen Information System II alert and brought before the High Court on 14th May, 2021. The two EAWs were produced to the High Court on 26th May, 2021.
9. I am satisfied that the person before the Court, the respondent, is the person in respect of whom each of the EAWs was issued. No issue was raised in that regard.
10. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of 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.
11. This matter is rather unusual. The offence in respect of which the six-month sentence was imposed, to which EAW No. 2 relates, is incorporated within the offence to which EAW No. 1 relates, seeking surrender for the purposes of prosecuting same. In such circumstances, the Court sought clarification from the issuing judicial authority. By letter dated 24th May, 2021, the issuing judicial authority indicates that the respondent was found guilty of the offence committed on 22nd July, 2019 and sentenced to six months' imprisonment by order dated 28th November, 2019. This order came into force on 22nd February, 2020. Subsequently, by order of the same court on 28th February, 2020, the respondent was found guilty of a continuing offence of theft and a concurrent sentence of eight months' imprisonment was imposed. At the same time, the Presov District Court reversed its earlier determination of guilt dated 28th November, 2019 as regards the offence committed on 22nd July, 2019. It is stated that the respondent has not yet been served with the criminal order of 28th February, 2020 and therefore the case is not validly closed. It is indicated that the EAWs were issued in respect of each of the cases on the grounds that:-

"... if the accused person eventually exercised the principle of speciality, the criminal proceedings would be extended, and it was therefore necessary to issue an

EAW in both criminal proceedings, because both criminal proceedings may only be continued if the accused person has been surrendered on the basis of a European arrest warrant in each case."

It is stated that there is no concern that the respondent might be convicted twice for the same matter because the statement determining the guilt, the entire statement specifying punishment and other statements related to this statement in terms of content from the criminal order of the Presov District Court in file case reference number 6T/117/2019 (the conviction to which EAW No. 2 relates) were set aside in the criminal order file reference number 6T/18/2020 (the order to which EAW No. 1 relates) and in the event that the criminal order 6T/18/2020 comes into force, both statements determining the guilt and the statement specifying punishment of the criminal order 6T/117/2019 should be set aside and shall *de facto* become null and void.

12. On my reading of the additional information dated 24th May, 2021, it is explained that under the relevant criminal code, when an offender is sentenced for another incident ("partial attack") which is part of a continuing criminal offence and where another partial attack was already tried at first instance and a final and conclusive judgment given, the court shall reverse the earlier determination of guilt and sentence. Then the court, being bound by the facts found in the reversed judgment, shall again decide on the guilt of the continuing criminal offence including the new partial attack, or on joinder criminal offences, as well as on a final punishment for the continuing criminal offence, which may be less severe than the punishment awarded by the earlier judgment. It is indicated that if the criminal offences are considered as having been committed continuously, then:-

"The punishability of all the partial acts shall be considered as one criminal offence, if all the partial acts by the identical offender are objectively related to each other with regard to time, a mode of their commission and the target of the act, and also subjectively related, in particular through a unifying intention of the offender to commit the criminal offence concerned."

13. The additional information concludes as follows:-

"In conclusion, I add, as mentioned above, if the Criminal Order File Reference No. 6T/18/2020 came into force, the principle of ne bis in idem would not be violated, as this Criminal Order sets aside the statement determining the guilt and the entire statement specifying punishment imposed by the Criminal Order File Reference No. 6T/117/2019 and with reference to Section 41 of the Criminal Code, the act must be 'reflected' in the decision imposing concurrent sentence (the Criminal Order File Reference No. 6T/18/2020), and he therefore would be convicted for the act committed on 22/07/2019 only once (in the event that the Criminal Order File Reference No. 6T/18/2020 becomes valid - only by this decision)."

It is indicated that the issuing judicial authority is relying upon both EAWs.

14. As regards EAW No. 2, at part D thereof it is indicated that:-

"The criminal order was served to the person concerned on 13.02.2020 and the person concerned was expressly instructed about his rights to appeal, but did not appeal within the timeframe."

It seems clear from the above that the respondent was not present at the trial which resulted in the imposition of the sentence of six months' imprisonment to which EAW No. 2 relates and that the issuing judicial authority is relying upon the equivalent of point 3.3 of the Table to s. 45 of the Act of 2003.

15. Counsel on behalf of the respondent submits that the wording employed by the issuing judicial authority did not identically match the wording of point 3.3 of the Table at s. 45 of the Act of 2003 and therefore the requirements of that section have not been met. He also pointed out that at part E of EAW No. 2, it is stated that the respondent appropriated a thing of another by taking possession of it, despite being previously punished for a similar offence in the previous 12 months and reference is made to "*Misdemeanour of theft under Section 212 (2) (a) of the Criminal Code effective as of 22nd July, 2019*". However, further on in part E, s. 212 of the Criminal Code is set out it and it appears that s. 212(2)(a) relates to committing the offence by breaking and entering. Counsel for the respondent pointed out that at part E of EAW No. 1, the offence was stated to be contrary to s. 212(1)(g) of the Criminal Code. Furthermore, he pointed out that in the additional information dated 24th May, 2021, reference is made to the respondent having been found guilty of the continuing minor offence of theft pursuant to s. 212(2)(f) of the Criminal Code.
16. By additional information dated 23rd June, 2021, the issuing judicial authority enclosed a copy of the penal order of the Presov District Court (case reference number 6T/117/2019) which was collected by the respondent on 13th February, 2020 along with the advice of delivery. It is indicated that this penal order became final on 22nd February, 2020 and that if the respondent is surrendered, he will start to serve the said sentence. It is indicated that the respondent duly collected the penal order and had not taken the opportunity to file an appeal. For that reason, he no longer has the opportunity to appeal in this case. While he could file for a retrial, there is no automatic right to same and the decision on retrial permission is subject to a complaint of the prosecutor.
17. In response to a request to complete a Table D in respect of case reference number 6T/117/2019, to which EAW No. 2 relates, in the reply dated 23rd June, 2021, the issuing judicial authority encloses a Table D which indicated reliance upon point 1 thereof: "*Yes, the person appeared in person at the trial resulting in the decision*". The notice of the penal order served upon the respondent is enclosed. This sets out the offence committed on 22nd July, 2019, in respect of which a sentence of six months' imprisonment was imposed. The notice also advises that the penal order is subject to a protest which may be filed in writing within eight days from its delivery. It is indicated that if the protest is filed in due time and not withdrawn, then the penal order will be cancelled by reading of the indictment at the main hearing.

18. Also, in the additional information dated 23rd June, 2021, the issuing judicial authority explained that two incidents may be treated as a single criminal offence. It is indicated that the penal order in case reference 6T/18/2020 has not yet been delivered to the respondent and, once delivered, he will have eight days to file an appeal. It is indicated that the respondent was found guilty by penal order in case reference 6T/117/19 dated 28th November, 2019 of the offence of theft pursuant to s. 212(2)(f) of the Criminal Code as he appropriated a thing belonging to another by seizing it and he had been sanctioned for such offence in the past 12 months. He was found guilty by penal order in case reference 6T/18/2020 dated 28th February, 2020 of the offence of theft pursuant to s. 212(1)(g) of the Criminal Code (the continuing one) as he appropriated a thing belonging to another by seizing it, and he has been sanctioned for such offence in the past 12 months. The additional information concludes:-

"In both cases, therefore, it is a minor offence of theft by having supposedly appropriated a thing belonging to another by seizing it, and he has been sanctioned for such offence in the past twelve months. They are different sections, although in both cases it is the above-mentioned minor offence of theft, due to the fact that the Criminal Code was amended by Act No. 214/2019 Coll., amending and supplementing Act No. 300/2005 Coll., the Criminal Code, as amended, and amending certain laws with effect from 01/08/2019."

19. After hearing further submissions, the Court sought additional information from the issuing judicial authority. By further additional information dated 14th July, 2021, the issuing judicial authority indicates:-

"Pursuant to Section 353 of the Code of Criminal Procedure, a single judge may issue a penal order without hearing the case at a main hearing provided that the facts are established with the acquired evidence beyond doubt what was carried out by the Court in the criminal case in question. The manner of completion of Table D in the EAW meant that the proceedings against a fugitive were not applied in this case, but Róbert Gabčo knew about the prosecution, as the penal order was delivered into his own hands via post office, in accordance with the valid provisions of the Code of Criminal Procedure."

The additional information also indicates:-

"In the criminal case 6T/18/2020, Róbert Gabčo is entitled to file standard remedial measure. If he files such standard remedial measure, only the valid penal order issued in the criminal case 6T/117/2019 will remain in force. In the event that Róbert Gabčo does not file standard remedial measure against the penal order Ref 6T/18/2020, this penal order (6T/18/2020) will enter into force and at the same time the statement determining the guilt and the entire sentence specifying the punishment imposed by the penal order Ref 6T/117/2019 will be reversed."

20. It is indicated in the additional information that, with reference to s. 41(3) of the Criminal Code, the act of 22nd July, 2019 listed under point 1 of EAW No. 1 had to be "reflected"

in the penal order in case reference number 6T/18/2020 imposing the concurrent sentence of eight months' imprisonment, and in the event that this penal order becomes valid, the respondent will serve only this sentence, as the penal order in case reference number 6T/117/2019 for which the sentence of six months' imprisonment had been imposed, will be reversed as regards guilt and sentence.

21. There is no doubt that the procedure adopted by the issuing judicial authority in this case is unusual. It is a situation which this Court has not come across before. In effect, the issuing judicial authority is seeking surrender of the respondent in order to enforce a sentence of eight months' imprisonment imposed upon him in respect of a continuing offence consisting of two separate incidents of shoplifting. One of those incidents of shoplifting was the subject matter of an earlier sentence of six months' imprisonment which was effectively subsumed into the latter sentence of eight months' imprisonment.
22. On the basis of the information furnished, the respondent can appeal the sentence of eight months' imprisonment imposed for the two incidents of shoplifting but cannot appeal the determination of guilt as regards the first incident as that is already the subject matter of a judicial determination which was not appealed. However, if he does not appeal the latter sentence of eight months' imprisonment, then that is the only sentence to be served and the earlier sentence is annulled.
23. As regards the earlier sentence of six months' imprisonment, to which EAW No. 2 relates, I am satisfied that this was imposed in the absence of the respondent but the requirements of s. 45 of the Act of 2003, in particular point 3.3 of the Table thereto, have been complied with insofar as the respondent was served with notice of the order and advised of his right to appeal but did not do so. It was suggested by counsel on behalf of the respondent that the signature acknowledging receipt of the notice of the penal order and advice as to appeal was not that of the respondent. However, no evidence to support that suggestion was put before the Court. No request for an adjournment was sought in order to put same on affidavit. The information of the issuing judicial authority is accepted as accurate in such circumstances.
24. As regards the later sentence of eight months' imprisonment, to which EAW No. 1 relates, I am satisfied that the requirements of s. 45 of the Act of 2003, in particular point 3.4 of the Table thereto, have been complied with insofar as the respondent, if surrendered, will be entitled to appeal same.
25. Having evaluated all of the information before the Court, I accept the applicant's submission that the issuing judicial authority seeks the surrender of the respondent in order to serve a sentence of eight months' imprisonment imposed upon him in respect of two instances of shoplifting treated as a single offence under the law of the issuing state. It is not intended that he should serve the separate sentence of six months' imprisonment imposed earlier in respect of one of those instances of shoplifting but, by virtue of domestic law of the issuing state, it is necessary to have the respondent surrendered in respect of that separate sentence also in order that same can be formally nullified.

26. While the procedure adopted in respect of these EAWs is somewhat unusual, I do not see any reason in principle why surrender should not take place in respect thereof.
27. I have taken a step back in order to satisfy myself that the defence rights of the respondent have been respected and given effect to. Having done so, I am satisfied that such defence rights have been respected and given effect to and that the respondent's defence rights will also be respected upon surrender. He declined to appeal the earlier sentence and he can, upon surrender, appeal the later sentence. If the later sentence becomes operative then the earlier sentence is annulled. There is no risk of the respondent having to serve two separate sentences in respect of the same offence. In such circumstances, I dismiss the respondent's objections to surrender.
28. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any other provision of that Act.
29. 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.