

**THE HIGH COURT**

[2022] IEHC 285  
[2021 No. 314 EXT.]

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**MIGUEL ALVES DE SOUSA**

**RESPONDENT**

**JUDGMENT of Ms. Justice Caroline Biggs delivered on the 2nd day of March, 2022**

1. By this application, the applicant seeks an order for the surrender of the respondent to the Portuguese Republic pursuant to a European Arrest Warrant dated the 3rd of September 2021 ("the EAW"). The EAW was issued by Dr Cristina Calado, Judge of the District Court of Faro, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of imprisonment of 3 years imposed upon the respondent on the 8th day of October 2015.
3. The respondent was arrested on 7th of November 2021, on foot of a Schengen Information System II alert, and brought before the High Court on that day. The EAW was produced to the High Court on 16th of November 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. Part (e) of the European arrest warrant states that the warrant relates to 2 offences. The offences are described as the crime of aggravated theft and the crime of driving without legal qualification.
8. It is necessary to show correspondence in relation to the two offences listed in the European arrest warrant. In *Minister for Justice v. Dolny* [2009] IESC 48, the Supreme Court emphasised that when considering correspondence, the question should be asked in general terms as to whether the conduct set out in the warrant is contrary to the criminal law of the State. Denham J., as she then was, outlined at para. 38: -

*In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a*

*corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction."*

9. I am satisfied the offences listed at part (e) of the EAW correspond with the following offences if committed in this jurisdiction;

**Offence 1**

Crime of aggravated theft – corresponds with the offence of burglary in this jurisdiction:

Section 12 Criminal Justice (Theft and Fraud) Offences Act, 2001 states

*A person is guilty of burglary if he or she*

- a. Enters any building or part of a building as a trespasser with intent to commit an arrestable offence, or*
- b. Having entered any building or part of a building as a trespasser, commits or attempts to commit any such offence therein.*

**Offence 2**

Crime of driving without legal qualification – corresponds with the offence of driving without a driving licence contrary to Section 38 of the Road Traffic Act 1961 (as amended), in this jurisdiction: Section 38(i) of the Road Traffic Act 1961 states:

*38 (i) A person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being having effect and licensing him to drive the vehicle.*

10. At Part D of the EAW, it is indicated that the respondent appeared at the hearing which resulted in the decision which is sought to be enforced. The respondent disputed this assertion and in a section 20 request dated 6th December 2021, this Court asked the following:

"Mr. De Sousa objects to his surrender on grounds that he was not present at any hearing or sentencing date relating to Case No. 422/13.7GDPTM. The High Court requests that the following information be provided;

1. Please clarify if Mr. De Sousa was present at the hearing of the case Ref No: 422/13.7GDPTM and if he was present on the 08.10.2015 when the sentence with executive force was imposed.
2. Please clarify if there was any alteration in the sentence between the date of the sentence with executive force on the 08.10.2015 and the 09.11.2015 when the sentence became final.

3. Please provide any further information/observations in light of the statement of Mr. De Sousa that he was not present for any hearing or sentencing date in relation to this case.”
11. In a Section 20 response dated 7th December 2021, the issuing judicial authority stated as follows:

“By order of the Honourable Judge, it is noted that the defendant was present at the trial hearing, at the hearing of the reading of the sentence, and was duly notified of the decision, which became *res judicata*.

It is further informed that the defendant was also notified under the terms of Portuguese Criminal Procedural Law, at the address he provided in the process for all notifications, of the order revoking the suspension of the execution of the prison sentence he had been convicted and to serve the prison sentence.

I promote that it be informed that the defendant was present both at the trial hearing, held on 29/09/2015, and at the reading of the sentence passed on 08/10/2015, for which reason it became *res judicata* and final on 09/11/2015.

I further request that copies of the trial and reading of the sentence minutes be forwarded for further clarification, and that it be informed that, subsequently, the defendant was notified, in the light of Portuguese criminal procedural law, at the address provided in the proceedings for the purpose of notifications, of the order revoking the suspension of the execution of the prison sentence of which he had been convicted and determining that he serve this prison sentence effectively.”
12. The additional information confirms that the respondent was present both on the trial and the sentence date. In addition it seems that he had received a suspended sentence that was in due course revoked.
13. A further Section 20 was raised in relation to this issue and was sent on the 9th of February 2022 requesting further information in respect of the following:

**“1. Re: European arrest warrant – Case No. 324/13.GDPTM d on 02/01/2020**  
The High Court requests that the following information be provided:

  - A. Was Mr. De Sousa present at the revocation hearing on 26th May 2017?
  - B. Was Mr. De Sousa notified and informed that he was entitled to attend the revocation hearing on the 26th May 2017?
  - C. In respect of notification, what address was provided for Mr. de Sousa and who provided same?
  - D. What was the legal basis for the revocation of the suspended sentence by order on the 26th May 2017?

- E. Was there any alteration between date of sentence 7/4/15 and date of sentence with executive force 7/5/15?
- F. Please provide information on the reason why the suspended sentence was revoked by order dated 26th May 2017.
- G. How did Mr. De Sousa fail to comply with the reintegration plan to which he was subjected?
- H. Did the Court vary or alter the nature or the level of the sentence initially imposed by the order of the 16th May 2017?
- I. Was Mr. De Sousa notified of the reintegration plan?
- J. When was he notified of the reintegration plan?
- K. Did the Court that activated the sentence have the power to vary or alter the level of the sentence imposed?"

14. A response was received on 10th February 2022 as follows:

"By order of the Honourable Judge and as requested, and in the scope of the present proceedings, referring to the defendant Miguel Angelo Alves de Sousa, please be informed of the following:

- a) The order revoking the suspension of the enforcement of the prison sentence was issued on 26/05/2017 but there was no hearing on that date;
- b) A date had been set (on 03/03/2017), for the hearing of the defendant on the reasons for the non-compliance with the conditions set for the suspension of the enforcement of the prison sentence, which was not held, because it was not possible to notify the defendant at the addresses he had provided to the proceedings. Given that it was not possible to notify the defendant for that hearing, his defender was notified to comment on the possibility of revoking that suspension;
- c) Personal service on the defendant was requested at the address he himself had provided for the purpose of notifications and to all the other addresses in the proceedings;
- d) The legal basis for the revocation of the suspension of the enforcement of the prison sentence is article 56 of the Penal Code;
- e) There was no alteration between the date when the sentence was read (on 07/04/2015) and the date of the sentence becoming final (07/05/2015);
- f) The suspended sentence was revoked because the defendant failed to comply with the social reintegration plan, which consisted of treating drug addiction, obtaining

and maintaining work as a source of sustenance and accepting norms and a sense of social responsibility, and strict compliance with judicial decisions;

The defendant did not comply with the plan because he revealed, from the beginning of the monitoring by the General Directorate of Reintegration and Prison Services (DGRSP). personal, family and professional instability, with several changes of address, telephone contacts and employers, and from July 2016 he no longer went to or contacted the technicians or services, not responding to any summons, either by personal or postal contact, and since December 2015 he also did not attend the Technical Teams for Specialized Treatment (ETET) consultations.

- g) No, the Court did not change or increase the prison sentence originally imposed; the Court only ordered that the prison sentence no longer be suspended and that the defendant has to effectively serve it;
- h) and j) The defendant was notified of the Social Reintegration Plan on 07/12/2015, by simple mail at the address that he himself had provided for notification purposes;
- k) Yes, the Court that ordered the defendant to serve the prison sentence effectively had the power to do so.

For better clarification, please find attached a copy of articles 54 and 56 of the Penal Code, on social reintegration and revocation of suspension of the prison sentence.

#### **Article 54**

##### **Social Reintegration Plan**

- 1 - The social reintegration plan shall contain the objectives of reintegration to be achieved by the offender, the activities to be carried out, the respective stages and the support and supervision measures to be adopted by the social reintegration services.
- 2 - The social reintegration plan shall be made known to the offender and, whenever possible, his or her prior agreement shall be obtained.
- 3 - The court may impose the duties and rules of conduct referred to in articles 51 and 52, as well as other obligations of interest to the offender's reintegration plan and to the improvement of his or her sense of social responsibility, namely:
  - a) Respond to summons from the responsible magistrate responsible for the enforcement and the social reintegration technician;
  - b) receive visits from the probation officer and communicate to him or place at his disposal information and documents proving his means of subsistence;
  - c) inform the probation officer about changes of residence and employment, as well as about any displacement exceeding 8 days and the date of the foreseeable return;

- d) Obtain prior authorization from the magistrate responsible for the enforcement of the sentence to go abroad.
- 4 - In the cases provided for in paragraph 4 of the previous article, the probation regime must particularly aim at preventing re-offending and, for this purpose, it must always include the technical monitoring of the offender that is deemed necessary, namely through attendance at reintegration programmes for child and youth sex offenders.

## **Article 56**

### **Revocation of suspension**

- 1 - Suspension of the enforcement of the prison sentence shall be revoked whenever, during its term, the convicted person:
- (a) Grossly or repeatedly breaches the imposed duties or rules of conduct or the social reintegration plan; or
  - b) Commits a crime for which he or she will be convicted, and reveals that the purposes for which the suspension was granted could not be achieved thereby.
2. Revocation shall determine the fulfilment of the prison sentence established in the sentence, without the convicted person being able to demand the return of any benefits he or she has provided.”
15. In light of this information this court finds that the respondent was present for both the trial and the sentence dates in the original set of proceedings. His previously suspended sentence was activated due to his failure to comply with the conditions of suspension. It is clear from the additional information that the court that activated the sentence did not have the right to alter or vary the sentence on the basis of its statutory powers, under Section Article 56 (above). In any case the failure on the part of the authorities to notify the respondent of the activation date was entirely his own fault as he failed to comply with clear obligations under the supervision order including providing an address. In the circumstances, this court is satisfied that the respondents rights under Section 45 of the Act of 2003 have been fully adhered to.
16. The respondent objected to surrender on the following grounds:
- 1. The Respondent hereby places the Applicant on strict proof of all matters that the Applicant bears the burden of proving in order to succeed in the application for an order for the Respondent’s surrender to the issuing State pursuant to the European Arrest Warrant Act 2003 as amended (hereafter “the 2003 Act”).
  - 2. The warrant the subject matter of these proceedings does not contain all required or sufficient detail and/or information and/or inaccurate information, and is not, therefore, a valid warrant within the meaning of the 2003 Act. The requirements of section 11 of the 2003 Act and the Framework Decision have not been complied

with and the Respondent's surrender on foot of the European arrest warrant is therefore prohibited.

17. In relation to point of objection no. 2 and the issue of compliance with section 11 the Respondent has referred to the different sentence periods referred to at part e.II of the warrant when compared with the period of the outstanding sentence at part c of the warrant. Part c states that there is an outstanding sentence of 3 years. Part e.II states that the Respondent was sentenced to two years' imprisonment for the offence of aggravated theft and to a sentence of fifteen months for the offence of driving without a legal license. The Respondent has submitted that the European arrest warrant is not in compliance with section 11 (1A) (g) (iii) as it does not clearly state the penalties of which the sentence consists.
18. Section 11 (1A) (g) (iii) states that a European arrest warrant shall specify: where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists.
19. In light of this inconsistency this court sought clarification on the issue of sentence and by way of additional information dated the 4th of February 2022 the issuing judicial authority stated:

"By order of the Honourable Judge, please be informed that in the scope of the present proceedings, the European Arrest Warrant in relation to the defendant Miguel Angelo Alves de Sousa, with a prison sentence of 2 years, for the crime of aggravated theft, and the crime with legal qualification, in the information provided on 17/01/2022, is due to lapses in the translation into the English language.

Please be also informed that:

- The defendant was convicted of one crime of aggravated theft and one crime of driving without legal qualification;
- The defendant agreed with the social reinsertion plan when it was prepared by the General Directorate of Reintegration and Prison Services (DGRSP) and was notified, on 13/05/2016, of all the content of the plan and of the order that homologated it. The defendant was expressly notified that he should comply with the established plan, under penalty of revocation of the suspension of the enforcement of the prison sentence.

According to the Portuguese legal system, when the defendant is convicted of more than one crime, he/she should be sentenced to a single sentence, which is more favourable to the defendant because it is less than the sum of the sentence for which he/she was convicted for all crimes.

**For further clarification, attached please find a copy of article No. 77 of the Portuguese Penal Code:**

**Article 77 Cumulation of punishment rules**

1. *When someone has committed several crimes before the conviction for any of them has become final, he or she shall be sentenced to a single penalty. In assessing the penalty, the facts and personality of the perpetrator shall be considered together.*
2. *The maximum limit of the applicable penalty shall be the sum of the penalties actually applied to the various crimes, which may not exceed 25 years in the case of a prison sentence and 900 days in the case of a fine penalty; and the minimum limit shall be the highest of the penalties actually applied to the various crimes.*

*If the penalties applied to the cumulation crimes are prison sentences and fines, the different nature of these penalties shall be maintained in the single penalty resulting from the application of the criteria established in the preceding numbers.*

3. *Accessory penalties and security measures shall always be applied to the perpetrator, even if provided for by only one of the applicable laws."*

20. The requirement for clarity in EAW's has been considered in a number of cases in this jurisdiction. In *Minister for Justice & Equality v Herman* [2015] IESC 49, the Supreme Court stated at para. 17;-

*"17. At the core of this appeal is the issue of clarity; or the lack of it. It is essential when a court has before it a request in a European arrest warrant that there be clarity as to the offences for which surrender is sought, and as to any proposed sentencing."*

21. In *Minister for Justice and Equality -v- Connolly* [2014] IESC 34, [2014] 1 IR 720, Hardiman J. stated at paragraphs 30 and 31;-

*"[30]This matter is of the greatest importance since the ability of the requesting State to put the respondent on trial is limited to the offences specified in the warrant. It is a mandatory requirement of the European arrest warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought. Presumably, the Spanish authorities know for how many offences they intend to put him on trial. I cannot understand why this has not been made clear. The relevance of this requirement, contained in s. 11 of the Act of 2003 is particularly clear in the present case because the objection was one to which s. 44 of the Act applies, and therefore one that requires a very specific knowledge of the precise Spanish offences for which delivery is sought. *Minister for Justice v. Bailey* [2012] IESC 16, [2012] 4 I.R. 1 emphasises the need to consider the issue of reciprocal offences which cannot be done without the specific knowledge of the Spanish offences referred to. This specific and unambiguous information is also required, as several citations above make clear, for the purpose of the implementation of the rule of specialty.*



*[31] I consider it to be an imperative duty of a court asked to order the compulsory delivery of a person for trial outside the State to ensure that it is affirmatively and unambiguously aware of the nature of the offences for which it is asked to have him forcibly delivered, and for which he may be tried abroad, and of the number of such offences.*

*I would, therefore, dismiss the appeal and decline to make an order for the delivery of the respondent."*

22. In *Minister for Justice, Equality and Law Reform v Desjatnikovs* [2008] IESC 53, [2009] 1 IR 618, the Supreme Court indicated at para. 35;-

*"[35] The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the speciality rule, the facts upon which a warrant is based should be clearly stated."*

23. In *Minister for Justice and Equality -v- AW* [2019] IEHC 251, Donnelly J. indicated at paragraphs 48 and 49;-

*"48. The respondent has also claimed that his surrender is prohibited because the information does not set out the degree of participation of the respondent in the offences. The information in the EAW has already been set out. This does not list the names of the people he conspired with. The requirement for detail in the EAW is set out in the Framework Decision and in the Act of 2003. The Superior Courts in a number of cases have examined the reasons for the giving of details. These are to permit the High Court to carry out its functions under the Act of 2003 of endorsing the EAW and establishing correspondence and also to permit the respondent to challenge his surrender on grounds such as the rule of speciality (s.22), ne bis in idem and extraterritoriality (See *Minister for Justice and Equality v Cahill* [2012] IEHC 315 and *Minister for Justice Equality and Law Reform v Desjatnikovs* [2008] IESC 53). The respondent also has the right to know the reason for his arrest.*

*49. In the present case, any claimed lack of detail by the respondent, does not affect any of those items. The respondent has not indicated any real difficulty and therefore his complaints about lack of detail are only theoretical in nature. The issuing judicial authority is not required to give every single detail as to the degree of participation. (*Minister for Justice, Equality and Law Reform v Stafford* [2009] IESC 83). The details required are those which relate back to the reasons why such detail is required."*

24. The requirement for clarity therefore serves two purposes:

- (i) It allows the Court to carry out its functions under the act endorsing the EAW and establishing correspondence and also to permit the respondent to challenge his surrender on grounds such as the rule of specialty (s.22), *ne bis in idem* and extraterritoriality.
  - (ii) The respondent also has the right to know the reason for his arrest.
25. This court considers that there is sufficient information in the EAW and in the additional information to allow this court to fulfil its duties under the 2003 Act. In addition the respondent knows that he has been arrested and surrender is sought in order that she would serve a sentence of three years. The Court therefore finds that the objection to surrender based on Section 11 of the 2003 Act is without merit and is dismissed.
26. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.
27. It, therefore, follows that this Court will make an order pursuant to s. 16(2) of the Act of 2003 for the surrender of the respondent to the Portuguese Republic.