

# THE HIGH COURT

[2022] IEHC 702

Record No. 2022/126 EXT

**BETWEEN**

**MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**BENJAMIN KORTE**

**RESPONDENT**

**JUDGMENT of Ms. Justice Stack delivered on the 14<sup>th</sup> day of December, 2022.**

1. On 10 December 2021, the respondent consented to surrender to Germany pursuant to a European Arrest Warrant that had issued on 31 August 2021 (“the August EAW”). An order for his surrender pursuant to s. 15 of the Europe Arrest Warrant Act, 2003, as amended, (“the 2003 Act”) was made by this Court (Biggs. J.) and he was duly surrendered to Germany on 29 December 2021, where I understand he is still in prison.

2. On the same date, 10 December 2021, a further European Arrest Warrant (“the December EAW”) was issued by a different German Regional Court Judge. That warrant is stamped with the stamp of the Stolzenau court and it is signed by a Regional Court Judge, Judge Ek, as the issuing judicial authority. This signature is required by the form contained in the Annex to Council Framework Decision of 13 June 2002 on the European arrest warrant

and the surrender procedures between Member States (“the Framework Decision”), and by Article 8.1(b) of the Framework Decision which requires that a European arrest warrant shall state the name, address, telephone, fax numbers and e-mail address of the issuing judicial authority. The Warrant therefore clearly identifies the Regional Court Judge as the issuing judicial authority.

3. The December EAW clearly states that the respondent is wanted in Germany to serve an eight month sentence for a single offence of fraud contrary to s. 263 (1) of the German Criminal Code, and a box is ticked for “*swindling*”, indicating that the German state has designated the offence of fraud as one within the meaning of Article 2, para. 2 of the Framework Decision.

4. No issue is taken by counsel for the respondent in the course of this application on the basis of any invalidity in the Warrant by reference to s. 38 or s. 45 of the 2003 Act, nor does there appear to be any such invalidity, and it appears that the December EAW would require the respondent to serve an eight month sentence in Germany.

5. There is some confusion in the papers before me as to what happened after the issue of the December EAW and how it was transmitted to the Minister. The Minister’s written submissions state that on 9 May 2022, a request was received from the German authorities seeking “*Mutual Legal Assistance*” in respect of the December EAW. The submissions go on to say that a further request was sent on 8 June 2022 and the matter was listed before this court (Biggs J.) on 27 June 2022. She held there was insufficient information before her as to the nature of the request. No order was made, but Biggs J. confirmed that there was liberty to list the case once all relevant information was available. This was subsequently done, Biggs J. was satisfied that consent was being sought pursuant to s. 22 (7) of the 2003 Act and the application for consent was listed for 9 December 2022.

6. In fact, it seems clear that the December EAW was sent to the Minister under cover of a letter dated 14 February 2022 from the German Public Prosecutor in which Prosecutor Khenkar explained that, as it had been transmitted to the Irish authorities too late, he was requesting approval of the extradition of the respondent in respect of the offence set out in the December EAW, and he referred to Article 27 of the Framework Decision.

7. Article 27, paragraph 4 of the Framework Decision, provides (in material part):

*“A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. ...”*

8. This is implemented in Irish law by s. 22 (7) of the 2003 Act, which provides:

*“The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to - ... (c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence, upon receiving a request in writing from the issuing state in that behalf.”*

9. A net issue has been raised by the respondent as to whether the request for consent has in fact been made by the issuing judicial authority and it is not contested that such a request must emanate from the issuing judicial authority.

10. “Judicial authority” is defined in s. 2 of the 2003 Act as “*the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State*”, which meant that the issuing State was at liberty to designate a person other than a judge to perform the functions of the issuing judicial authority and that had to be respected by this court.

**11.** It is therefore possible for a public prosecutor, rather than a court or judge, to be designated under the law of a member state as the issuing judicial authority of that state for the purposes of the Framework Decision (provided of course the requirement of independence on the part of such a prosecutor, as established in the caselaw of the Court of Justice of the European Union, is present). The issue which arises in this application is whether I can be satisfied that the request pursuant to s. 22 (7) was made by or with the authority of the issuing judicial authority in Germany.

**12.** The argument of the Minister was, essentially, that there was nothing to say that the Public Prosecutor in Germany was not the issuing judicial authority in that State and that the principle of mutual trust and confidence operated to require this court to accept a request for consent under s. 22 (7), even when it was made by the Public Prosecutor rather than the judge who issued the December EAW. In essence, it was submitted that I could accept, based on the principle of mutual trust and confidence, without it being stated anywhere, that the Public Prosecutor was the issuing judicial authority.

**13.** It is clear from the letters of 14 February 2022, and 30 August 2022, which have been furnished to me in the course of the application, that the December EAW has been transmitted to this state as a request pursuant to Article 27, para. 4 of the Framework Decision, and consequently pursuant to s. 22 (7) of the 2003 Act, as amended.

**14.** The letter of 14 February 2022 states that it encloses a copy of the December EAW and also a copy of the underlying domestic warrant, which was an arrest warrant for execution of prison sentence issued by the Public Prosecutor's office on 18 August 2021. The letter is headed:

*“Mutual legal assistance in criminal matters with Switzerland\*/Ireland*

*(translator's note: The German source text wrongly reads “Switzerland” instead of “Ireland”).*

here: *Supplementary request concerning the extradition of the German national Benjamin Korte, born in Lübbecke/Germany on 7 May 1985*”

15. The letter states, *inter alia*:

*“Regrettably, the European Arrest Warrant of 10 December 2021 and the corresponding request for extradition were sent to the Irish authorities too late, which is why extradition could not (any more) be also based on this offence prosecuted by us.*

*By means of a supplementary request, I therefore respectfully request your approval of the extradition of the accused Benjamin Korte also in respect of the offence set out in the European Arrest Warrant issued by the Stolzenau local court on 10 December, 2021 (Article 27 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), as last amended by Article 2 of the Amended Framework Decision 2009/299/EC of 26 February, 2009).”* [Emphasis added.]

The letter concludes *“By order”* and is then signed by Public Prosecutor Khenkar and stamped with the stamp of the Chief Public Prosecutor of the Verden Public Prosecutor’s Office.

16. That letter was not before Biggs J. when she dealt with the matter last June. However, it is clear from a further copy letter handed up to me, which is a letter from the Minister to the Stolzenau Local Court (which is either undated or is dated on the next page and that page has not been copied) and which is stamped as received by the Public Prosecutor in Verden on 19 April 2022, that the Minister has received the letter of 14 February 2022 as she acknowledges that the German original version of the December EAW has been received. However, the required English translation had not been received as the translation which had been sent by the German Public Prosecutor was that of the August EAW.

17. In this undated copy letter, the Minister then asked the German Public Prosecutor to transmit “*the correct EAW*” so that the Article 27 request can be progressed and furnished to this court. It appears that what is being sought is the English translation of the December EAW, to go with the original German version which had been received.

18. The Minister also points out in this letter that she was unable to respond to any of the email addresses provided in the request as they all seemed to be currently inactive, and she therefore says that she “*had no option but to return the request we received on 6 April 2022 by post*”. This appears to be a reference to the letter of 14 February 2022, though it is not entirely clear whether 6 April 2022 is the date when the request of 14 February 2022 was received or the date on which it was returned, but nothing turns on this for the purpose of this application.

19. The letter also asks the German Public Prosecutor to provide “*the full name of the Public Prosecutor who has signed the EAW dated 10 December 2021*”. This appears to be an error as the December EAW was clearly signed by a judge.

20. The letter of 30 August 2022, from the Verden Public Prosecutor’s office refers to an email from the Minister of 25 August 2022, which I have not seen, and continues

“*[I] hereby confirm that pursuant to Article 27 Paragraph 4 of the Framework Decision, consent is requested and refer again to my cover letter of 02/14/2022, which I have attached again in the annex. I would like to point out that the public prosecutor’s office, as the enforcement authority in Germany, is responsible for making the request.*” [Emphasis added.]

21. It therefore seems to me that there has been a series of unfortunate mishaps and delays commencing with the fact that the warrant was not issued in time in Germany, and was then sent by post under cover of letter of 14 February 2022. However, the English translation of

the wrong warrant was sent, even though such a translation was required under the Article 27, para. 4 of the Framework Decision.

**22.** The letter of 30 August 2022 appears to have been written to clarify the nature of the request, presumably because neither the letter of 14 February 2022, nor a copy of it, was before Biggs J. when she considered the matter on 27 June 2022.

**23.** It therefore seems clear that the December EAW, which was issued by a judge who was stated to be the issuing judicial authority, was not issued in time to be considered with the August EAW, on foot of which the respondent was surrendered to Germany on 29 December 2021.

**24.** A s. 22 (7) request was then sent by the Public Prosecutor's office in Germany by letter dated 14 February 2022. I think it is abundantly clear that what has occurred is that the German Public Prosecutor has decided that, as the second warrant had been issued too late, it should now be sent as a request pursuant to s. 22 (7) or, so far as the German authorities are concerned, a request pursuant to Article 27 paragraph 4 of the Framework Decision.

**25.** In other words, the request for surrender contained in the December EAW, and issued by a judge for that purpose, was then in effect repackaged by the German Public Prosecutor to become a request for consent pursuant to Article 27 para. 4 of the Framework Decision, so that the sentence to which it referred could be enforced in Germany.

**26.** In my view, the situation is indistinguishable from that which occurred in *Minister for Justice v. Connors* [2022] IEHC 119. In that case, there was a mix up between the Irish and UK authorities as to whether two warrants had been sent or only one. The Minister had only a record of receiving one, whereas the UK authorities thought that two had been sent.

Accordingly, the respondent, having been surrendered on foot of a warrant issued by a District Judge in Northern Ireland, a request pursuant to s. 22 (7) was then received in respect for a warrant issued by the District Judge sitting at Reading Magistrate's Court.

**27.** At para. 26 of her judgment, Biggs J. stated that:

*“The basic requirement of the Framework Decision is that any request for surrender must be on foot of a decision made by a judicial authority in the issuing state”*

**28.** I am in complete agreement with that statement as the whole system for surrender under the Framework Decision is one operated by the judicial authorities in the member states: see, for example, recital (5) to the Framework Decision and the discussion in *Minister for Justice v. Rimsa* [2010] IESC 47. A request for consent, which may materially alter the nature of the offences for which a surrendered person stands trial, or materially alter the sentence which they serve in the issuing state, must be made by the issuing judicial authority.

**29.** As Mr. Kelly, counsel for the respondent, points out, the respondent may have been prejudiced by the delay on the part of the German authorities here, in that the time he spent in detention in Ireland prior to his surrender on 29 December 2021 would not now count as part of the sentence which the German authorities are now seeking he would serve in Germany. The respondent was arrested on foot of an alert entered in the Schengen Information System (SIS II) by Germany on 14 September 2021, and he was in custody for at least part of the period between that date and his surrender on 29 December 2021. In the context of an eight month sentence, that is potentially material (though I do not think the test is whether the difference is material, and any alteration in the time spent in custody would have to be subject to judicial control).

**30.** A request pursuant to Article 27, para. 4 can, of course, be transmitted by the central authority designated for that purpose in the issuing state: see recital (9) to the Framework Decision. It is routine in this jurisdiction for this Court, as executing judicial authority, to request further information pursuant to s. 20 of the 2003 Act (which implements Article 15 of the Framework Decision) but the actual request is sent by the Minister, on behalf of the Court, as the Central Authority designated as such pursuant to s. 6 of the 2003 Act.



**31.** In *Connors*, Biggs J. found that there appeared to have been a decision made by those charged with the administrative management of the warrant in the issuing state to determine that the matter should be “*reconfigured and become a request for a further prosecution under Article 27(2) of the Framework Decision.*” She then refused the request on the basis that there was “*no evidence whatsoever that this decision to reconfigure was a judicial one*”.

**32.** On the evidence before me, that is exactly what has happened here.

**33.** The Minister relies on the decision of the Court of Appeal in *Minister for Justice v. Fassih* [2021] IECA 159 for the proposition that I can be satisfied that the request was made by the issuing judicial authority in Germany. However, that case was different on its facts. There, a second European Arrest Warrant was sent for the purposes of s. 22 (7) request, accompanied by a document which was a request from the Public Prosecutor in the Netherlands to the investigating judge in that state. This stated that the Public Prosecutor was requesting “*that the investigating judge issues an (additional) EAW against the individual... in order to obtain the additional permission as laid down in Article 27 paragraph 4 of the Framework Decision to prosecute and bring to trial with sentencing in the Netherlands*”.

**34.** In other words, the evidence in that case was that the Public Prosecutor made a request to the investigating judge in the issuing state, which was the Netherlands, to issue an additional European Arrest Warrant for the purposes of sending a request pursuant to Article 27 para. 4 of the Framework Decision to Ireland.

**35.** That is not the evidence here. This case is on all fours, in my view, with the *Connors* decision.

**36.** Counsel for the Minister submitted that the principle of mutual trust and confidence was such that it should be, in effect, presumed that the s. 22 (7) request came from the issuing judicial authority in Germany. If I understood the argument correctly, he submitted that the

Public Prosecutor was – or at least could be presumed to be - the issuing judicial authority in Germany.

**37.** It is true that no affidavit of laws is required for these matters, as warrants and other applications pursuant to the 2003 Act are dealt with on the principle of mutual trust and confidence, which is that, in effect, this Court does not look behind the statements made by the authorities of the issuing state in warrants and in requests such those made pursuant to s. 22 (7).

**38.** The problem here is that there is no statement anywhere that the German Public Prosecutor is defined under German law as the issuing judicial authority, and indeed the December EAW was issued by Judge Ek who purports to do so in his capacity as an issuing judicial authority. That is the only document identifying the issuing judicial authority in Germany. Furthermore, it is clear from the letter of 14 February 2022 that the August EAW was also issued by a judge.

**39.** Indeed, the Public Prosecutor seems to state in his letter of 14 February 2022 that it is he who is making the request and he makes no reference whatsoever to any involvement on the part of the issuing judicial authority, nor does he purport to write on behalf of the issuing judicial authority.

**40.** He also clearly states in the letter of 30 August 2022, that the Public Prosecutor's office is the "*enforcement authority in Germany*". This appears to me to be something materially different from the issuing judicial authority as defined under German law for the purposes of the Framework Decision and relates to the fact that the Public Prosecutor take steps to enforce prison sentences in Germany, which is an entirely different matter. It may mean that the Public Prosecutor can take steps under German law to bring the matter back before the issuing judicial authority to request that an application be made for consent pursuant to Article 27, para. 4, but that is an entirely different matter from the public

prosecutor actually deciding himself or herself to apply to this Court for its consent to the enforcement of a sentence for which the respondent was not surrendered.

**41.** There being no information therefore to state that the German Public Prosecutor is the issuing judicial authority, and such information as has been given tending to contradict the assertion that the Public Prosecutor is an issuing judicial authority in Germany, the principle of mutual trust and confidence does not apply so as to allow the Court to assume, without any basis at all, that the Public Prosecutor is designated under German law as an issuing judicial authority.

**42.** In the circumstances I do not need to deal with, the issue which the respondent says arises because the judgment of the Supreme Court is awaited in *Minister for Justice v. Kairys* [2022] IESCDET 75.

**43.** In the circumstances, I refuse the request.