**THE HIGH COURT**

**[2023] IEHC 698**

**[2022 No. 145 EXT.]**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**ZDENKO BUTOR**

**RESPONDENT**

**Judgment of Mr. Justice Kerida Naidoo delivered on the 20th day of November 2023.**

1. By this application, the applicant seeks an order for the surrender of the respondent to The Republic of Croatia pursuant to an European Arrest Warrant dated 9th October 2018 ("the EAW"). The EAW was issued by a named judge as the Issuing Judicial Authority. This EAW is 145/2022. Surrender was also sought for different offences on foot of a separate EAW (147/2020) in respect of which this Court refused surrender.

2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 2 years imprisonment originally imposed on 8th June 2015, of which 2 years remains to be served. The IJA has certified the applicable law of the requesting State.

3. The EAW was endorsed by the High Court on 8th July 2022 and the respondent was arrested and brought before the High Court on the same date.

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 section 21A, 22, 23 and 24 of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), arise for consideration in the 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. I am satisfied that no issue arises under s. 11 of the Act.

**Correspondence**

8. In his notice of objection, the respondent puts the applicant on full proof of correspondence.

9. Extradition is sought in respect of what is described as *"one continuing criminal offence".* The offence consists of 16 separate incidents described in part (e) of the warrant and particularised as incidents a-p. The incidents are said to have occurred between 25th January 2004 and 22nd March 2004.

10. The applicant says that the incidents that comprise the offence in the EAW correspond with one or more of the following offences:

a. Theft contrary to s. 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001.

b. Criminal Damage contrary to s. 2 of the Criminal Damage Act 1991.

c. Unauthorised interference with the mechanism of a mechanically propelled vehicle contrary to section 113 of the Road Traffic Act 1961.

d. Attempted theft contrary to common law.

11. All bar 3 of the 16 incidents involve entering a motor vehicle and removing various items from within. Offence g also involved using a bankcard taken from one of the cars to withdraw two sums of money. On three occasions the respondent is said to have entered motor vehicles but did not remove anything from them. They are incidents n, o and p.

12. All of the individual acts are described in the beginning of Part (e) as having been carried out *"with an intent to acquire valuable items suitable for further resale, and money…"*, which makes it clear that there was an intention to deprive the relevant owner of the goods. The particular circumstances of each offence are then set out in the warrant.

13. There is a further overarching statement in the warrant that applies to all the individual acts:

> *"Thus, in the state of diminished mental capacity by breaking in and picking the lock he took away the movable property of another within closed rooms with an aim to unlawfully appropriate them".*

14. The use of the phrase *"unlawfully appropriate"* connotes an absence of lawful excuse. That phrase also makes appropriation explicit in each instance.

**Incidents a-m**

15. The particulars of incidents a-m are sufficiently similar that they can be considered on the basis of an analysis of one offence as a representative incident. Incident a is described as follows in the warrant:

> *"a/ On 25 and 26 January, at the time from 5 p.m. until 8 a.m. after he had approached a parked but locked car "Opel Ascona" with licence plates OS 496-BO, the property of [a named individual], in the street of St. Ana in front of the house number 23, he unlocked the driver's door with a skeleton key, and thus entered the interior of the vehicle, for he pulled out from the console above the gearbox a car radio cassette player with CD player, make Pioneer DEH P 3500 MP, serial number CEH102847EW, black colour, with a white display and a detachable front grille, a property worth HRK 1,800 thus causing damage to [a named individual], for the indicated amount."*

16. The applicant says that the incidents a-m correspond with the offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001.

17. The respondent submits that theft is not a corresponding offence because loss is not shown to the owner in each instance. In that regard the respondent relies on the decision of Binchy J. in *Minister for Justice and Equality v Tomas Ziznevskis* IEHC 415. The particulars of that case were materially different because the particulars were to the effect that the respondent broke into an unlocked car and found articles to a certain value inside the glove compartment of the car. The particulars did not state that there was an intention to appropriate either the car or the items found inside it or that any loss was caused to the owner.

18. In the instant case the IJA says, in effect, that entry to the car was for the purpose of acquiring movable property suitable for further resale. The taking of the property is also stated to amount to unlawful appropriation. Furthermore, in each case the use of the phrase *"caused damage to"* the injured parties involved is clearly an allegation to the effect that the owner of the property suffered loss.

19. The particulars as described, taken together with the context in which the acts were done and the fact they are described as having been done unlawfully is in my view sufficient to establish dishonesty and a want of consent. The taking of the property is stated to have caused damage to the owner. All of the acts are said to have been done to acquire valuable items for resale and therefore necessarily involved an intention of depriving the owner of the items involved. Appropriation is explicit, need not be permanent and in the circumstances described involved interference with the property rights of each of the owners.

20. I am therefore satisfied that all of the elements of the offence of theft are made out in respect of offences a-m.

21. I am therefore satisfied that correspondence can be established between offences a-m referred to in the EAW and an offence under the law of the State, namely; theft contrary to section 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001.

22. The applicant says that incidents a-m also correspond with the offence of interference with the mechanism of a mechanically propelled vehicle contrary to s. 113 of the Road Traffic Act 1961.

23. In each of the incident's a-m the respondent is said to have opened the relevant vehicle using either a skeleton key or "*a suitable tool",* that amounts to interference with a vehicle. It is apparent from the circumstances that all of the vehicles were stationary. The purpose of entry was for unlawful appropriation of property and is stated to have been for the purpose of acquiring valuable items for resale. In the circumstances there was therefore no lawful authority or reasonable cause for the entry.

24. I am therefore satisfied that all of the elements of the offence of unauthorised interference with the mechanism of a vehicle are present in respect of offences a-m.

25. I am therefore satisfied that correspondence can be established between incidents a-m referred to in the EAW and offences under the law of the State, namely unauthorised interference with the mechanism of a vehicle contrary to section 113(1) of the Road Traffic Act 1961.

**Incidents n, o and p**

26. Incidents n, o and p are sufficiently similar to each other that they can be considered together on the basis of treating incident n as a representative sample. Incident n is described in the warrant as follows:

> *"n/ On 8 and 9 February 2004, at the time from 8 PM and 10:30 AM in Osijek, after he had approached in Psunjska Street, in front of the number 120 a locked car make "Opel Astra", licence plates OS 478 AG, property of [a named person] and unlocked the drivers door of the car by manipulating the cylinder of the lock by using a suitable tool and entered inside of the car and on this occasion he did not complete the criminal offence since by rummaging inside the vehicle he did not find suitable items to take away."*

27. These three incidents are similar in almost all respects to offences a-m, but no items were removed from the cars in question. Like the other offences they are also subject to the same to overarching statements as the other incidents in the warrant. Entry to the three vehicles was therefore carried out *"with an intent to acquire valuable items suitable for further resale".* The respondent is therefore said to have entered vehicles with an intent to commit theft but failed to complete the offence.

28. I am therefore satisfied that all of the elements of the offence of attempted theft are present, and that correspondence can therefore be established between offences n, o and p referred to in the EAW and an offence under the law of the State, namely; attempted theft contrary to common law.

29. I am also satisfied that all of the elements of the offence of unauthorised interference with the mechanism of a vehicle are made out in respect of offences n-p and that correspondence can therefore be established between offences n-p referred to in the EAW and offences under the law of the State, namely unauthorised interference with the mechanism of a vehicle contrary to section 113(1) of the Road Traffic Act.

**Section 45**

30. The respondent says that his surrender would be in breach of s. 45 of the Act of 2003.

31. Paragraph (b)2 of the EAW, dealing with the decision on which the warrant is based, says: *"Enforceable judgement"* and then refers to a judgment of the Municipal Court in Osijek of 8th of June 2015, confirmed on appeal by the judgment of the County Court in Osijek on 24 September 2015, which became enforceable on 6 October 2015.

32. Part D.1 of the warrant is relied on and says as follows: *"Yes, the person concerned has been summoned in person to the hearing which led to the decision rendered".*

33. By additional information dated 27th June 2023, in response to a request for additional information dated 16th June 2023, the IJA said that the appeal was submitted by the Respondent's defence attorney, Renato Ivanovic, who had been appointed ex-officio to represent the respondent. At the time of the lodging of the appeal and on 24th September 2015, and when the appeal was heard, the respondent was serving a 10-month prison sentence in Osijek prison.

34. By letter dated 8th February 2023 the IJA confirmed that the respondent was present and represented at the first instance hearing. It also says that he was not present for the second instance hearing. The IJA says the second instance decision was properly delivered to him.

35. By a request for further information dated 31st March 2023 the IJA was asked to confirm that the respondent was personally served with the decision of 24th September 2015. The reply was received dated 18th April 2023 confirming the decision was delivered to him on 6th October 2015 and to his defence lawyer on 9th October 2015. Copies of the delivery notes were included.

36. The delivery note to the respondent appears to be signed "Butor" on the part of the form that refers to the document having been received by the respondent. The part of the form that would be filled in if the respondent was not found and the document had to be left at his residence or workplace is not filled in. Likewise, the part to be filled in if nobody will accept service is also not filled in.

37. Based on the assurance given by the IJA and the material provided I am satisfied he was personally served with the decision of 24th September 2015.

38. Additional information was sought to establish whether the respondent's legal representative was present at the hearing of the appeal. By response dated 21st August 2023 the IJA confirmed that the respondent's lawyer is Renato Ivanovic. The IJA also says, in effect, that under the law of the issuing State either the appellant or their legal representative can request to be present at an appeal, alternatively the President of the court can decide to inform the parties *"if their presence would be useful for clarifying the matter",* failing which the appeal can proceed without the respondent or their lawyer being present or notified of the hearing date. The IJA says neither the respondent nor his lawyer requested to be informed about the date of the hearing of the appeal in this instance and the court did not request his presence. He was not therefore served with notice of the date of the appeal.

39. The respondent has filed two affidavits from which it is apparent that he was fully aware of the offences to which the warrant relates and engaged with the legal process throughout. He kept himself appraised of the outcome of the appeals in relation to all 50 offences he refers to, including those that happened in his absence. He does not deny

that he appealed the decision of the trial court but claims not to have been aware of the outcome of that appeal, which was unsuccessful. It appears the issue in the appeal was that it was statute barred. For reasons set out above I am satisfied that he was served with that decision.

40. What also emerges from his affidavits is that the respondent had some knowledge of the workings of the criminal justice system of the issuing State, both at first instance and on appeal. Specifically, he knew that appeals could proceed in his absence. His knowledge of the legal system is not, however, a factor this Court will have regard to for the purpose of determining the section 45 issue in this particular case.

41. Both the applicant and the respondent submit that the case falls to be considered in accordance with the *Zarnescu* decision. In *Zarnescu* the Supreme Court indicated that s. 45 of the Act of 2003 is to be given a purposive interpretation and that even though a particular set of circumstances may not fit neatly into one of the scenarios set out in Table D, it may nevertheless be permissible for the court to order surrender if satisfied that the requirements of s. 45 have been substantially met. However, as Baker J. pointed out, before making an order for surrender in such circumstances the court must take a step back and satisfy itself that the defence rights of the respondent have not been breached and will not be breached.

42. The respondent relies on the ECHR decision of *Seliwiak v Poland* dated 21st October 2009. That case concerned a situation where notice of an appeal was served on the applicant's home address when he was in fact in prison in relation to a different offence. The service was deemed to be good by the court dealing with the matter. In addition, notice that his legal aid lawyer had been replaced by another one was also sent to the applicant's home and treated as having been properly served on him. A summons to the hearing before the appellate court was also sent to the home address and not served on him in the place of detention. The second lawyer appointed declined to follow the applicant's instructions to lodge a further appeal. The applicant complained under article 6 ECHR that the proceedings in his case were unfair, and his defence rights seriously limited because he could not attend the only hearing held before the appellate court.

43. The ECHR held there had been a violation of article 6. The decision was on the factual circumstances that the applicant was in custody and notice of the appeal was not served on him. He was also unaware of the fact that his legal aid lawyer had been changed, he could not get in touch with the new lawyer and had not received a copy of the appeal prepared by that lawyer.

44. The facts of the case before me are materially different. Based on the information supplied by the IJA the appeal in this case was taken on the appellant's behalf by his lawyer. From what the IJA says it is also apparent that the respondent was represented by the same lawyer at the trial and for the purpose of the appeal, although, for the reasons given by the IJA about the legal system of the issuing State, neither the respondent nor that lawyer appeared at the hearing of that appeal. He was, however, in

custody at the time of the hearing of the appeal and caution must be exercised by this court in those circumstances.

45. The respondent also relies on *Tupikas*, Case-270/17 PPU, as authority for the uncontroversial proposition that a final appeal can be a trial for the purposes of the relevant Framework Decision. I accept the submission that because the court of second instance had a discretion to substantively vary the judgment delivered at first instance, the appeal was a trial resulting in a decision within the meaning of *Ardic*.

46. Reliance is also placed by the respondent on *Minister for Justice and Equality v Piotr Marian Mocek* [2021] IEHC 405. That was a case in which surrender was refused in circumstances where the respondent was in prison at the time of an in absentia trial. It is similar to the instant case in that the issuing State relied on the fact that under their law the accused's attendance at the hearing was not mandatory and he had not filed a request to be produced at the relevant court hearing. He was notified of the date of the trial but for the reason given was not produced. The two potentially important differences between *Mocek* and the instant case are that, firstly; here the respondent was present at his trial and lodged an appeal against that decision and, secondly; he had representation for the purpose of the appeal.

47. The applicant has drawn the court's attention to *The Minister for Justice and Equality v Tomasz Skwierczynski*, a decision of the Court of Appeal, Hedigan J., [2018] IECA 204. The relevant facts are that the appellant had been convicted in his absence but exercised his right to a full appeal, which was unsuccessful. The court held, applying *Tupikas*, Case-270/17 PPU, and *Zdziaszek,* C- 271/17 PPU, that because the appellant had the right to a full appeal in accordance with the Framework Decision, any defect that might have arisen in relation to the first instance trial was cured thereby.

48. The respondent's complaint under section 45 is that he was not informed of the date of the appeal or produced at the hearing and that his legal representative was also not present at the appeal. He says that the issuing State cannot satisfy any of the relevant conditions in Part D and that the *Zarnescu* principles mean his surrender should therefore be refused.

49. In *Tupikas* the Court said the following at paragraphs 62 when discussing the relationship between domestic procedures and national obligations under the EAW regime:

> *"62…Article 1(1) of Framework Decision must be interpreted in such a way as to ensure compliance with the requirements of respect for the fundamental rights of the persons concerned, without, however, calling into question the effectiveness of the system of judicial cooperation between the Member States of which the European Arrest Warrant, as provided for by the Union legislature, is one of the key elements."*

50. In *Zarnescu* the Supreme Court made clear that the central issue to which a court should have regard when deciding whether or not to order surrender in circumstances where the

issuing State cannot satisfy one of the express conditions provided for by section 45 of the Act where a decision has been made in absentia, is whether the requested person waived his or her right to defence. At the conclusion of its summary of the relevant principles the Court concluded as follows at paragraph 90(r) of the judgement:

*"The enquiry has as its aim the assessment of whether rights of defence have been breached. It is not therefore a wide-ranging or freestanding enquiry into the behaviour or lack of diligence of the requested person, and the purpose is to ascertain if rights of defence were adequately protected."*

51. It is apparent that the respondent was not served with notice of the date of the appeal or produced at the appeal hearing. However, the particular circumstances of this case are that he took the appeal through the lawyer appointed to represent him, which necessarily means he was aware there would be an appeal hearing. Furthermore, his legal representative is taken to have been acting on instructions and to be aware of the rules that govern appeal hearings in the issuing State, including the fact that an appeal could proceed in the absence of the appellant, or his legal representative, unless the respondent requested to be present, or the court decided his presence was necessary. No such request was made by the respondent or his lawyer.

52. For the reasons set out above and relying on the information provided by the IJA I am also satisfied that the outcome of the appeal was served on both the respondent and his lawyer. Furthermore, the judgement of the appellate court did not come into effect until 6 October 2015. The respondent says he left Croatia in 2016. Having been served with the decision he could therefore, either himself or through his lawyer, have sought to make representations about any aspect of the procedure before the sentence came into effect.

53. Having carefully considered the authorities and submissions of the parties, including the respondent's submission that there is a positive obligation on Member States to produce an appellant at the hearing of their appeal, and bearing in mind the Supreme Court decision in *Zarnescu* and the other authorities referred to by the parties, I am satisfied that this is a case in which the respondent made a decision not to participate in the hearing of the appeal he had taken. The appeal proceeded in accordance with the relevant principles of the issuing State that govern the conduct of appeals. There is nothing to suggest that the respondent was not fully advised by his lawyer about the relevant procedures, indeed it is to be presumed that he was so advised.

54. He was present at the trial, legally represented for the purpose of the appeal in accordance with the law of the issuing State and was notified of the outcome. He left the requesting State being aware that there had been an appeal of the decision of the court of trial, which had been unsuccessful.

55. I am fully aware of the central importance in any fair criminal procedure that an accused person have the opportunity to be present at any hearing that will affect his fundamental rights. Having carefully considered the circumstances outlined earlier I am satisfied that the respondent's right to defence have not been breached and were adequately protected.

56. I therefore dismissed the respondent's objection to surrender based on section 45 of the Act of 2003.

**Prison conditions**

57. The respondent submits that his surrender would expose him to a real risk of a breach of his rights under article 2, 3 or 8 of the European Convention on Human Rights or his right to bodily integrity pursuant to Article 40.3.1 of the Constitution or Articles 2 and 4 of the Charter of Fundamental Rights of the European Union, and as a consequence surrender would be in breach of section 37(1)(c) of the European Arrest Warrant Act 2003 because prison conditions in Croatia are such that there are reasonable grounds for believing that he will be subjected to inhuman or degrading treatment in the requesting state. Proof of that issue rests with the respondent.

58. This point of objection is grounded on country-of-origin material, which has been summarised in a précis of the document relied on. The respondent submits the contents of that material is sufficient for the court to conclude that there is a real risk of a breach of his fundamental rights.

59. The respondent relies on a number of authorities including *Aranyosi, Bivolaru & Molovan* and *Mursic v Croatia.* The principles set out in those authorities are not in dispute.

60. By request for the additional information dated 19th December 2022 the issuing State was asked for assurances about the prison conditions in which the respondent will be held if surrendered. A reply was received dated 13th December 2022.

61. The respondent submits that the assurances given are generalised assurances and do not address specific issues of concern highlighted by him. I have considered each of the submissions made on behalf of the respondent and the authorities and material relied on.

62. The assurances identify the prison where the respondent will initially be held while a decision is made about the appropriate sentencing regime is assessed in light of the individual needs of the respondent. That includes procedures aimed at rehabilitation and resocialisation. The information says that thereafter, as a rule, he will be transferred to a prison closest to his place of residence. The information does not identify the prison to which the respondent will likely be transferred, but I am satisfied that is because such information will not be available until after the assessment of his individual needs.

63. The information provided specifically says:

    a. *"In view of the above, if Zdenko Butor is extradited, an appropriate assessment of any risk will be carried out and, based on this acceptable steps will be taken to guarantee and ensure the basic human rights of prisoners, security and prison and the right to bodily integrity, if required.*

    b. *"The Republic of Croatia is dedicated to the protection of the rights guaranteed by the European Convention for the protection of human rights, and especially the protection of all persons, including prisoners, from being subjected to torture,*

*inhuman or degrading treatment. For the above reasons, all prisoners staying in cells with more prisoners are provided with a space of at least 4 m2 at all times while serving the prison sentence."*

c. *"The requested person will be medically assessed on arrival at the prison of the issuing state and will provided with appropriate treatment, as necessary at all relevant times during their stay in prison."*

64. A further letter dated 31st March 2023 asked the IJA to confirm that the assurances previously given apply to both warrants. By letter dated 18th April 2023 the IJA confirmed that they did.

65. Taken together I am satisfied that the information provided addresses the issues raised by the Court about the conditions in which the respondent will be held if surrendered. The information provided is signed by the Executing Judge.

66. I am satisfied that the totality of the information provided above is sufficient for me to be satisfied that the respondent will not be subjected to inhuman or degrading treatment and that the information specifically addresses and gives assurances in respect of the three principal assurances requested.

67. I accept the applicant's submission that the assurances given address each of the particulars raised by the court in its requests for additional information. The information addresses cell size, hygiene conditions, lighting, temperature, ventilation, division of clothing, rest, nutrition and medical care.

68. Section 4A of the Act of 2003 provides that it shall be presumed that an issuing State will comply with the requirements of the Framework Decision, unless the contrary is shown. The Framework Decision incorporates respect for fundamental human rights.

69. In adjudicating on this issue, the Court should first ask whether the general deficiencies in the prison system of the requesting state are such that the Court should conduct an enquiry into the conditions in which the respondent will be held if surrendered.

70. I have considered the material put before me by the respondent, including his affidavit, and the submissions of both the respondent and the applicant. In order to succeed the respondent must demonstrate a real risk that the respondent himself would suffer inhumane and or degrading treatment if surrendered. I have received a large quantity of material but no specific submission, either in writing or orally, has been made to advance the proposition that the respondent himself will be at risk of being denied any of his fundamental rights if surrendered. The respondent was himself in custody in the issuing State for a period of time, yet surprisingly his own affidavit contains no details about the conditions in which he was held or any kind of specific complaint about overcrowding or any feature of his imprisonment to ground his submission.

71. The respondent has not satisfied me he is likely to be held in less than 3 metres squared. I am therefore satisfied that the minimum standard of living space provided for in *Mursic* will be observed.

72. I find that the respondent has failed to satisfy the Court that general deficiencies in the prison system of the issuing State are not such that there are substantial grounds for believing that, if surrendered, the respondent will face a real risk of a breach of any of his fundamental rights including article 3 and, in particular, his right not to be subjected to inhuman or degrading treatment or punishment. The respondent has therefore not reached the first limb of the *Aranyosi* test.

73. I am satisfied that the presumption provided for in s. 4A of the Act of 2003 has not been rebutted in this instance. I am also satisfied that surrender of the Respondent to the issuing State would not constitute a breach of any provision of the Constitution, is not incompatible with the State's obligations under the European Convention on Human Rights or the protocols thereto.

74. I am satisfied that the surrender of the respondent would not expose him to a real risk of a breach of his rights under Articles 2, 3 or 8 of the European Convention on Human Rights or his right to bodily integrity pursuant to Article 40.3.1 of the Constitution or Articles 2 and 4 of the Charter of Fundamental Rights of the European Union, and as a consequence surrender of the respondent would not be in breach of Section 37 of the European Arrest Warrant Act, 2003.

75. Even applying the higher standard provided for under the second limb of *Arynosi*, I am satisfied the respondent's surrender is not prohibited on the basis of his prison conditions argument.

76. I therefore reject the respondent's objection to surrender based on prison conditions in the requesting state.

**Family/personal rights and Kairys**

77. In his Notice of Objection the respondent objected to surrender on the basis that his surrender would be a breach of  or a disproportionate interference with his rights, or those of his family, pursuant to Article 8 of the European Convention of Human Rights, or his rights, or those of his family, under Article 8 of the European Convention of Human Rights or the Constitution or article 7 of the Charter of Fundamental Rights of the European Union and as a consequence surrender of the respondent would be in breach of s. 37 of the Act of 2003.

78. That point was not pursued at the hearing and I am satisfied there is, in any event, no evidential basis for it.

79. In his Notice of Objection the respondent objected to surrender on the basis of the failure of the State to make provision for the respondent to serve his sentence in the State. That point was not pursued at the hearing.

80. 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.

81. It, therefore, follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Republic of Croatia.