

THE HIGH COURT

[2023] IEHC 754

[2023 No. 40 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

AUGUSTIN MARGEL

RESPONDENT

Judgment of Mr. Justice Kerida Naidoo delivered on the 21st day of November, 2023.

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Italy pursuant to a European Arrest Warrant dated 27th January 2023 ("the EAW"). The EAW was issued by a Deputy Prosecutor General at the Court of Appeal, as the Issuing Judicial Authority ("the IJA").
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 1 year and 10 months imprisonment imposed upon him on 6th June 2016, which became final on 15th July 2016, of which 10 months and 19 days remains to be served.
3. The Issuing State has certified the provisions of Italian law contrary to which the two offences in the warrant are said to have been committed.
4. The respondent was arrested on 11th March 2023, on foot of a Schengen Information System II alert, and brought before the High Court on the same date. The EAW was produced to the High Court on 20th March 2023.
5. 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.
6. 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 this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
7. 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.
8. I am satisfied that correspondence can be established between the two offences referred to in the EAW and offences under the law of this State, namely:
 - a. Offence 1: possession of an article with intent to commit a robbery contrary to section 15 of the Criminal Justice (Theft and Fraud Offences) Act, 2001,
 - b. Offence 2: possession of certain articles contrary to section 15 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

Section 45

9. The respondent objects to surrender on the basis of section 45 of the Act of 2003. He submits that he was not present during the initial trial or at the appeal that took place on 6th June 2016, which became final on 15th July 2016 and is the judicial decision upon which the warrant is based.
10. Part D of the EAW indicates that the respondent did not appear in person at the hearing that resulted in the decision which is sought to be enforced. The IJA has indicated that it relies on Part D.3.1b of the warrant, which provides that the respondent was not summoned in person, but by other means actually received official information of the scheduled date and place of the trial that resulted in the decision, in such a manner that it was unequivocally established that he was aware of the scheduled trial and was informed that a decision may be handed down if he did not appear for the trial. That notification was serviced at the address of the legal counsel appointed to represent the respondent, which he nominated for service when detained following his arrest on 11th September 2011.
11. In his grounding affidavit of 18th June 2023, the respondent says he was questioned by Italian authorities in 2011 and that he was not aware that he was under any obligation provide an address or notify them of any change of address as he was not charged with any offence.
12. He says the EAW indicates that defence counsel was nominated by the investigating police officers. He says he never spoke to the lawyer appointed and gave her no instructions. He says he first became aware of the underlying proceedings and sentence when arrested on 29th October 2020 (which should be 2019) at a train station when he was travelling on holiday. He says he spoke to the lawyer following his arrest and they applied for his sentence to be suspended. He says he was present when the sentence was delivered that resulted in him being under house arrest at Marsala, Via Colocasio 12.
13. In his supplemental affidavit of 7th July 2023, he says that it is his signature on the minutes prepared when he was arrested on 11th September 2011, which was provided by the IJA as part of additional information dated 27th June 2023. He says that at the time he understood that that document referred to procedural matters connected to his questioning. He says he did not have a legal representative and was not accompanied or advised by any lawyer. He says when he signed the document, he was not aware that it referenced a named defence counsel ("GG") and that prior to his arrest on 29th October 2019 he did not speak to her and was not advised by her. He also says that at the time of his arrest in 2011 he gave the authorities his address which was Trapani, Via Spalgi nr. 11 and that when he left that property, he arranged for his mail to be forwarded to his new address in Romania. He also says that prior to his arrest on 29th October 2019 he was never contacted by, and had no dealings with, GG.
14. The core submission that the respondent makes is that he did not instruct or give any mandate to the counsel who was appointed to represent him on 11th September 2011, the day of his arrest. He says that on the basis of the *Zarnescu* principles he cannot be

taken to have waived his entitlement to appear at his trial and the appeal because he was not charged with any criminal offence on 11th September 2011 and therefore there was no hearing or pending trial in respect of which he could have made a decision to waive his right to appear. He also says that he was unaware that the address of the legal counsel appointed to represent him was the address for service of notice about the offences to which the warrant relates.

15. A request for additional information was made by letter dated 25th April 2023. A reply was received by letter dated 5th May 2023. It sets out the following:
 - a. The sentence was imposed by the Court of First Instance on the 24th September 2014, in case reference 2176/2014. It became final on 15th July 2016.
 - b. The two offences were committed in execution of the same criminal plan and therefore a single sentence was imposed for both. That comprised the basic sentence for the more serious offence of robbery of 3 years 6 months imprisonment, increased to a sentence of 4 years 2 months imprisonment to take into account the second offence.
 - c. The respondent served a portion of the sentence from 29th October 2019, when he was arrested, to 25th August 2020, which is described as being the date when he escaped from prison.
 - d. On 15th May 2020 he was granted 45 days early release from prison.
 - e. Counsel (GG) was appointed by the investigating police officers to represent the respondent on 11th September 2011.
 - f. On 11th September 2011, the respondent was asked by the investigating police officers to nominate an address for service. In that regard he was obliged to make a specific statement in the proper form to the relevant judicial authority.
 - g. In accordance the law of the issuing State, the respondent was obliged to inform the relevant authorities about any change of address.
 - h. The respondent did not give any notification of change of address to the relevant authorities.
 - i. The respondent was notified of the first instance trial by subpoena on 22nd March 2013. He was notified of the appeal by subpoena on 5th May 2016. Those notifications were sent to the address he had given for service. He failed to appear at both hearings.
 - j. The lawyer appointed to represent the respondent appeared at the first instance and second instance (appeal) hearings on 12th March 2016, 28th May 2014 and 24th September 2014. She also appeared at the appeal on 6th June 2016.

- k. The sentence of 1 year 10 months imprisonment imposed on 6th June 2016 was not suspended by the appellate court. On 15th September 2016, the Public Prosecution General Office of Messina suspended the execution of the sentence of imprisonment and informed the respondent that he was allowed to submit a request within 30 days from that notification for the grant of one of the measures alternative to prison.
- l. On 15th September 2016, the prosecutor issued a detention execution order and a suspension execution order for the sentence passed on 6th June 2016. That was to give the respondent the chance to make a request for measures alternative to prison, such as probation or house arrest.
- m. The decision of 6th June 2016 became final on 15th July 2016. On 13th September 2016, an executive extract was received and on 14th September 2016 the judgment was entered in the Register of Sentence Execution.
- n. On 27th December 2017, the Public Prosecution General Office of Messina issued the revocation order against the suspension order of detention of 15th September 2016.
- o. That order was to enforce the order issued by the Court of Messina on 13th December 2017, rejecting the application for probation with welfare services and house arrest filed on behalf of the respondent by his lawyer.
- p. The Public Prosecution General Office is not empowered to change the sentence imposed by the Appellate Court of Messina on 6th June 2016. The Public Prosecution General Office did not change the sentence imposed by the Appellate Court of Messina, which reduced the original sentence imposed on 24th September 2014 from 4 years and 2 months to 1 year and 10 months. The Prosecution General Office therefore exercised no discretion in respect of the sentence. The hearing on 27th December 2017 was not, therefore, a trial for the purpose of the *Ardic* decision.
- q. On 23rd May 2020, the Probate Court of Genoa granted house arrest to the respondent as an alternative to prison. The respondent was present when that decision was made.
- r. On 29th August 2020, the Probate Court of Trapani made an execution order because when the police attended at respondent's address of Marsala, Via Colocasio 12., he was not there, and his mother informed them that he had left home the day before. Searches for him then proved negative.
- s. On 24th September 2020, the Probate Court of Palermo revoked the benefit of the execution of the sentence from 29th August 2020 and ordered that the respondent serve the sentence at a correctional facility.

16. The additional information also confirmed that the Public Prosecution General Office at the Appellate Court of Messina participates in the administration of justice in Italy, acts independently, and that the decision to issue the EAW of 23rd January 2023 and the detention order on 24th September 2020 may be subject to judicial control procedures in Italy. It also says that the Public Prosecution General Office at the Appellate Court of Messina is a judicial authority which is competent for enforcement of the EAW of 27th January 2023 under Italian law. No issue therefore arises about whether the EAW was signed by a judicial authority.
17. By letter dated 27th June 2023 the following additional information was provided:
 - a. When being interviewed on 11th September 2011 the respondent contested the offences.
 - b. He made a declaration about his personal identification and was asked to appoint a lawyer.
 - c. He nominated his counsel's law firm as his domicile in Italy for the purpose of service.
 - d. He was informed he was obliged to communicate every change of the stated or elected domicile to the prosecuting judicial authorities.
 - e. The respondent did not personally appoint GG, she was designated as his public defender by the prosecuting authorities.
 - f. The means by which the respondent was summoned to both the trial and appeal was service of notification at his nominated address for domicile in Italy.
 - g. When being interviewed the respondent's place of residence was given as Trapani, Via Spalgi nr. 11, but he expressly nominated his lawyer's address as his place of domicile for the purpose of notification about the offences.
18. Further additional information dated 26th July 2023 states that the respondent was in fact charged with the offences to which the warrant relates on 11th September 2011, the day of his arrest. It says, *"the offences that are the object of the European arrest warrant were charged against the requested person on 11 September 2011, after the body search performed on him at the moment identification pursuant to article 161 of the Italian code of criminal procedure."*
19. The same information also says that on 29th of September 2011 the public prosecutor before the court of Messina *"issued a notice of investigation along with information on the right of defence of the person under investigation and notice of conclusion of the preliminary investigations"* and that *"On 12 March 2013 the judge for preliminary investigations issued the decree ordering the judgement summoning the accused for hearing"*.

20. The respondent argues the above means that he was not in fact charged, in the sense of the legal process commencing. I do not accept that submission. Responses received from the IJA are subject to the governing principle of mutual trust and confidence between Member States. There is in my view no ambiguity about the language used by the IJA when it says that the respondent was charged on 11th September 2011.
21. The respondent makes a number of other specific submissions. He says that minutes prepared while he was under arrest on 11th September 2011 mean that the legal counsel who represented him at the trial and on appeal did not have a mandate from him.
22. The minutes include the following: "*At this point, Mr. MARGEL AUGUSTIN said: I take note that the lawyer [GG], member of the Bar Association of Messina, has been appointed as my public defender and I elect domicile at her law firm for notification purposes.*" They also say that the above was recorded, read and confirmed, signed by the drafters and the suspect, who received a copy on the date, time and place as specified in it. It also says the respondent received a recommendation to immediately enter in contact with the aforementioned public defender.
23. The relevant minutes were prepared, and signed by the respondent when he was arrested, which happened on the day the offences to which the warrant relate were committed. There is no ambiguity about the contents of the minutes. The respondent was clearly asked whether or not he wanted to nominate a lawyer to represent him and when he indicated he did not, a public defender was appointed. The respondent then explicitly nominated the address of the named public defender as the address for notification about the offences that he had been arrested for.
24. It is to be noted that the respondent's first affidavit was not sworn until after receipt of the first reply to a request for additional information of 5th May 2023 in which the IJA gave details about the address for service the respondent had provided. The second affidavit was not sworn until after the further additional information dated 28th June 2023 was received which included the minutes prepared during the respondent's detention following his arrest on 11th September 2011. Up to that point he remained silent about the interactions between him and the police investigating the offences.
25. Based on the information provided in the minutes, I reject the respondent's averment that he knew nothing about the lawyer who had been appointed to represent him and that he did not nominate the address of her law firm for notification purposes.
26. Applying the principle of mutual trust and confidence, I accept the information from the IJA that the respondent did provide an address for notification of the proceedings at the time of his arrest. I also accept that the address given was that of the lawyer who had been appointed for him. That being so, I do not accept the respondent's averment that he did not provide an address for service or notify the relevant authorities of any change of address.

27. Defence counsel GG appeared for the respondent at the trial that resulted in his conviction and the imposition of a sentence of 4 years 2 months imprisonment. His counsel appealed that decision, and the sentence was reduced to 1 year 10 months imprisonment. The respondent did not appear in person at either the trial or the appeal. Notification of the relevant dates had clearly been served on his legal counsel and I think it highly unlikely he was not told what those dates were. An application for probation with the welfare services and house arrest as an alternative to imprisonment was filed on behalf of the respondent by his counsel, which was rejected on 13th December 2017 by the Probate Court of Messina. The respondent effectively avers that his counsel acted throughout without any instructions from him up until his arrest on 29th October 2019.
28. I accept the applicant's submission that the court is entitled to take into account that a lawyer will, in the normal course, only act on instructions. The counsel who appeared for the respondent at the trial also submitted an appeal on his behalf and made the application for the respondent's sentence to be reduced to one of house arrest. I find it highly unlikely that she carried out those professional duties without any instructions from the respondent. That is particularly so in light of the fact that she was acting on instructions when she applied for house arrest as an alternative to incarceration and that the respondent nominated his lawyer's address for receipt of notification about the offences. I therefore do not find his averment to the effect that she acted without instructions to be credible.
29. I do accept his averment that he was present when the sentence was altered to provide for house arrest, which he was obliged to serve at Marsala, Via Colocasio 12. That is consistent with the information from the IJA that the respondent left that address in breach of the conditions of the sentence imposed on him, of which he was fully aware.
30. The incident in respect of which the charges arose was a serious one. The respondent was arrested and questioned by the police about it on 11th September 2011. It is suggested that he was not charged for another eighteen months with any offence, but even if that was so there is no basis upon which the respondent could reasonably have believed that the proceedings were at an end when released following his arrest. In any event, for reasons given earlier, I accept the information that the respondent was charged on the day of his arrest and reject his averments to the contrary. The respondent was therefore fully aware that he had been charged and that a criminal prosecution was being pursued.
31. He was told that the offence would be communicated to the Office of the Prosecutor of the Republic at the Ordinary Court of Messina, a lawyer was appointed to represent him, and he gave that lawyer's address for service of notification about the proceedings. I am satisfied that the respondent knew further steps were going to be taken in relation to the offences.
32. In the circumstances, I think it highly likely that the respondent did receive information of the scheduled date and place of the trial which resulted in the decision in accordance with Part D.3.1b of the warrant. However, if I am wrong in that, the case falls to be considered in accordance with the *Zarnescu* decision in which the Supreme Court indicated that

section 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 section 45 have been substantially met. However, as Baker J. pointed out in *Zarnescu*, 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.

33. The respondent says the court cannot conclude he had unequivocally waived his entitlement to be present at the trial and appeal because he says he was not formally charged for eighteen months after his arrest in September 2011. The applicant draws the court's attention to *Minister for Justice v. Kasprzyk* [2022] IEHC 50, a decision of Burns J., in which the court held the respondent had deliberately brought about a situation in which it was not possible for the prosecution to notify him of the relevant hearing date. During preparatory proceedings on 21st June 2008 the respondent had furnished two addresses to the authorities, his registered permanent address and his residential address, and he was informed of his obligation to notify the authorities of any change of address. In that case the respondent was not charged at the time he provided the addresses for notification purposes. He was not present at the trial which did not take place until 24th March 2016.
34. *Kasprzyk* is authority for the proposition that the *Zarnescu* principles can be applied even if an accused had not been charged with any offence at the time when he gave an address for service in respect of criminal proceedings. What the court must be satisfied of is that an accused knew that he was the subject of a criminal process.
35. This is not a case in which the central issue is the failure of the respondent to notify the relevant authorities that he had changed his address. He gave his lawyer's address for service. The logical reason for doing so was so that she would keep him apprised of any developments in the case and, as pointed out earlier, I find it very difficult to believe that she would not have done so given the seriousness of the incident. It is also almost impossible to accept that the respondent would not have maintained contact with her.
36. The lawyer appointed to represent the respondent had a mandate from him to do so. She appeared at the first instance hearings on 12th March 2016, 28th May 2014 and 24th September 2014. She also appeared at the appeal on 6th June 2016. The respondent knew there was going to be a hearing. That effectively brings the case within Part D 3.2 because it means that the respondent was aware of a scheduled trial, had appointed a counsellor to defend him at the trial and was defended by that counsellor at the trial.
37. The various decisions made by the prosecutor in the case after the sentence had been imposed by the appeal court on 6th June 2016 did not involve the exercise of any discretion. The respondent acknowledges that he was present when house arrest was imposed on 23rd May 2020. The revocation of the house arrest and execution of the sentence clearly did not involve the exercise of a discretion. It was, in any event, because the respondent was not complying with the order imposing house arrest.

38. I have considered all of the materials before the court, in particular the Supreme Court decision in *Zarnescu* and the authorities referred to therein. In the unlikely event that his lawyer did not tell him the date of the trial and appeal did in the circumstances outlined earlier, I am satisfied that the respondent had, in any event, made an informed decision not to be present at the trial or appeal and that this case falls within the category of cases set out at paragraph 90(o) of the *Zarnescu* judgment:

"(o)In a suitable case a manifest absence of diligence may lead a requested authority to the view that the accused person made an informed decision not to be present at trial, or where it can be shown that there was an informed choice made by the person to avoid service."

39. I am therefore satisfied that in substance Part D 3.2 have been satisfied. I am also satisfied that the respondent unequivocally made an informed decision not to be present at the trial or the appeal. More importantly, I am satisfied that his defence rights were protected.

40. In arriving at the above conclusions, I am fully aware of the central importance in any fair criminal procedure that an accused person has the opportunity to be present at any hearing that will affect his fundamental rights. I have therefore carefully considered whether, in the circumstances, I can be satisfied that the rights to defence have not been breached and were adequately protected.

41. I therefore dismiss the respondent's objection to surrender pursuant to section 45 of the Act of 2003.

Section 37 – Fundamental Rights, Personal and Family Rights

42. In his notice of objection, the respondent objected to surrender on the basis that his surrender would be in breach of section 37 of the European Arrest Warrant Act 2003, as amended, in that it would interfere with his right to respect for his private and family life as guaranteed by Article 8 of the European Convention on Human Rights and the Constitution.

43. That argument is grounded on the respondent's affidavit of 18th June 2023. He says that before his arrest he was living with his wife in Newry, County Down, and had been in the country for approximately seven or eight months prior to his arrest. He says they have two children who currently reside in Romania with family members, but the plan was to bring them to Ireland once they were settled and had put down roots. He says he had secured employment with a named employer and had been working there for about 10 weeks. He says he wants to remain in the State.

44. The section 37 point was not pursued at the hearing but for completeness, having considered the contents of the respondent's affidavit I am satisfied that the grounds relied on by him, either in isolation or when taken together, are not so truly exceptional or egregious as to provide a basis for refusal of surrender under section 37 of the Act of 2003.

45. 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.
46. It, therefore, follows that this Court will make an order pursuant to section 16 of the Act of 2003 for the surrender of the respondent to the Republic of Italy.