

THE HIGH COURT

**[2023] IEHC 755
[2022 No.131 EXT.]**

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

NDRICIM QEMA

RESPONDENT

Judgment of Mr. Justice Kerida Naidoo delivered on the 13th day of November, 2023.

1. By this application, the applicant seeks an order for the surrender of the respondent to the United Kingdom pursuant to a Trade and Cooperation Agreement Warrant dated 25th March 2022 ("the TCAW"). The TCAW was issued by a named judge, as the Issuing Judicial Authority ("the IJA").
2. The TCAW seeks the surrender of the respondent in order to prosecute him in respect of alleged smuggling and fraud-type offences.
3. The IJA has certified that the six offences in the warrant are contrary to the following provisions of the law of the Issuing State, namely:
 - a. In relation to offences 1 and 5: possession of false identity documents without reasonable excuse contrary to section 6(1)(a) of the Identity Documents Act 2010.
 - b. In relation to offences 2, 3, 4 and 6: assisting unlawful immigration to a member State or the United Kingdom contrary to section 25(1) of the Immigration Act 1971, as amended.
4. The TCAW was endorsed on the 4th July 2022 and the respondent was arrested and brought before the High Court on the 20th October 2022 on foot of same.
5. I am satisfied that the person before the court, the respondent, is the person in respect of whom the TCAW 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. Each of the offences in respect of which surrender of the respondent is sought carry a maximum penalty in excess of twelve months' imprisonment.
8. As surrender is sought to prosecute the respondent, no issue arises under section 45 of the Act of 2003.

Correspondence

9. In his Notice of Objection, the respondent raised an objection to surrender pursuant to sections 5 and 38 of the Act of 2003 on the basis that double criminality is not clearly demonstrated for each of the offences on the warrant. That point was not pursued by him.
10. I am satisfied that correspondence can be established between the offences referred to in the TCAW and offences under the law of this State as follows:
 - a. Correspondence can be established between offence 1 and the offence of using false instrument contrary to section 26 of the Criminal Justice (Theft and Fraud) Offences Act, 2001.
 - b. Correspondence can be established between offence 5 and the offence of custody or control of false instruments contrary to section 29 of the Criminal Justice (Theft and Fraud) Offences Act, 2001.
 - c. Correspondence can be established between offences 2, 3, 4 and 6, and the offence of assisting unlawful entry into, transit across or presence in a designated state contrary to section 6(1) of the Criminal Justice (Smuggling of Persons) Act, 2021.

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11. The respondent objects to surrender in respect of offences 2-5 pursuant to section 41 of the Act of 2003 on the basis of the *ne bis in idem* principle. He says that he has already been tried and convicted in the State for the same offences for which his surrender is now sought by the Issuing State.
12. The objection arises because the respondent pleaded guilty to a number of offences before Dublin Circuit Court and was sentenced to 5 years imprisonment on 12th July 2022 in Bill No. DUDP 1796/2021. In that case, he was charged with the following offences:
 - a. One count of conspiracy to commit a serious offence contrary to section 71 of the Criminal Justice Act, 2006, the conspiracy being to facilitate unlawful immigration into the United Kingdom.
 - b. Five counts of money-laundering contrary to section 7(1)(a)(a), 7(1)(b) and 7(3) of the Criminal Justice (Money Laundering & Terrorist Financing) Act, 2010.
 - c. Four counts of use of a false instrument contrary to section 26 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
 - d. Ten counts of custody or control of a false instrument contrary to section 29(2) and 6(a) of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
 - e. One count of making a false instrument contrary to section 25 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

- f. Three counts of knowingly facilitating the entry into the State of a person he knew or had reasonable cause to believe was an illegal immigrant or a person who intended to seek asylum contrary to section 2(1) of the Illegal Immigrants (Trafficking) Act, 2000.
13. The ne bis in idem principle is enshrined in Article 3(2) of the Framework Decision. It is given effect to by section 41(1) of the Act of 2003, which provides:
- "A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State."*
14. The phrase 'in whole or in part' has been considered in *Minister for Justice and Equality v. Guz* [2012] IEHC 388, in which the High Court, Edwards J., concluded that it "is considerably more restrictive (in the sense of potentially capturing more cases) than is the reference to 'same acts' that appears in Article 3(2) of the Framework Decision". *Guz* involved a request for surrender to prosecute what was effectively a dangerous or careless driving type offence, in circumstances where he had already been convicted of a drink driving type offence arising out of the same incident. Although the act of driving while intoxicated was not the same act as the offence against safety, and therefore surrender could have been ordered on the basis that the two offences did not involve 'the same acts', the court concluded that the respondent had already been convicted of an offence that constituted 'in whole or in part' the offence in the warrant, which meant surrender had to be refused.
15. *Guz* was applied by Donnelly J. in *Minister for Justice and Equality v. Imran* [2017] IEHC 245. That case involved a respondent sought by the United Kingdom in respect of an offence of dangerous driving causing death arising from the same circumstances for which he had previously served a 21-month sentence of imprisonment in the issuing State, following a guilty plea for an offence of dangerous driving. Surrender was refused on the basis that, according to Donnelly J., the decision in *Guz*, "clarifies that the phrase 'in whole or in part' is not the same as a reference to 'the same acts'. It would be to apply the Act of 2003 contra legem to attempt to give it a meaning that would permit surrender where the offence alleged constitutes in whole or in part an offence to which there had been a final judgment."
16. In Case C-436/04 *Van Esbroeck*, the CJEU found a breach of the ne bis in idem principle on the basis that the relevant acts consisted of importing drugs to Norway and then later exporting the same drugs from Belgium, which was regarded as the same continuous act. The principle was applied by the High Court, Biggs J., to refuse surrender in *Minister for Justice and Equality v. Ebaid* [2022] IEHC 382. That case concerned a request for surrender to Spain for the exportation of drugs where the respondent had previously been tried and acquitted for the importation of the same drugs in Egypt.

17. Based on the above authorities the respondent argues that the acts for which he was convicted and sentenced in the State were part of the same continuing criminal acts to which the warrant relates.
18. Illegal trafficking of people is a transnational offence that can be prosecuted in more than one state. It follows that if a respondent was convicted of illegal trafficking of identified individuals from state A into state B before the courts of state B, he could not be surrendered to state A to be prosecuted or sentenced in respect of the trafficking of the same individuals. That is the effect of *Van Esbroeck* and *Ebaid*.
19. Applying *Guz* and *Imran*, it also follows that a respondent could not be surrendered by state A to state B to be prosecuted for possession of false identity documents that were used to facilitate the commission of the illegal trafficking charges if state A was Ireland. That is because although they would not be 'the same acts' the offence would be 'in whole or in part' an offence for which there had been a final judgment, because the possession of the false identity documents was part of the illegal trafficking.
20. The issue in the instant case therefore turns on what the respondent was in fact sentenced for in the State.
21. I have been provided with a copy of the indictment and Book of Evidence in Bill No. DUDP 1796/2021 as well as a copy of the transcript of the sentencing hearing. The respondent pleaded guilty to counts 5, 10, 11, 22, 23 and 24. Evidence was received by the Circuit Court on a full fact's basis.
22. A *nolle prosequi* was entered in respect of counts 1, 2 and 3. Count 1 was an allegation of conspiring to facilitate unlawful immigration into the UK. The respondent was not therefore convicted or sentenced for that offence.
23. The names of the persons to which the offences in the warrant relate appear in the Book of Evidence. There was no count on the indictment, and no evidence given at the sentencing hearing, about facilitating the trafficking of the people to which offences 2, 3, 4 and 6 in the TCAW relate and it is clear from the transcript what conduct the sentence related to. When imposing sentence, the learned Circuit Judge said: "*It seems over a period of time this defendant helped bring to this country, illegally, a number of Albanians, I think 12 in total. At least that's the number this court has to deal with.*" In fact it appears there were 13 people identified in the indictment, but that does not alter the nature of the sentence. The five-year term of imprisonment was then imposed in respect of count 24, with all of the other counts being taken into consideration. Because a *nolle prosequi* was entered in count 1, it cannot be said that the conviction and sentence related to any of the conduct to which offences 2, 3, 4 and 6 in the TCAW relate.
24. The conduct in respect of which the respondent pleaded guilty and was sentenced therefore related to identified individuals and specific documents. He did not plead guilty to, and was not sentenced for, acts to which offences 1, 2, 3, 4 and 6 in the warrant relate. The particulars of offences 2, 3, 4 and 6 in the warrant could not therefore be said

to be the same acts or constitute in whole or in part offences for which there had been a final judgment, because they involve different people and documents that formed no part of the sentence imposed by the Circuit Court.

25. I am therefore satisfied that his surrender is not prohibited by section 41 of the Act of 2003 in respect of offences 2, 3, 4 and 6.
26. The particulars of offence 5 in the warrant refer to a document that the respondent had in his possession or under his control, which appears to be the same false Slovakian identification card he is alleged to have been in possession of at Belfast International Airport in the name Georg Oravec on 12th September 2019. Counts 10 and 11 of the indictment in Bill No. DUPD 1796/2021 referred to using and being in custody or control within the state of, a false Slovakian identification card in the name Georg Oravec on 12th August 2019.
27. In additional information dated 5th June 2023, the IJA says that the offence for which the respondent is required to stand trial in the issuing State relates specifically to his possession of a false identity document in the territory of the issuing State on 12th September 2019 and is therefore a distinct and separate offence to that for which he was sentenced in the State.
28. Based on the available information, it is apparent the respondent was in possession of that document on a continuing basis at all relevant times. The conduct to which that offence relates is therefore possession of the same identity card on a different date in the issuing State.
29. I am satisfied final judgment has been given in the State for the offence of having custody or control of the false identity card to which offence 5 in the warrant relates. On the basis of *Guz* and *Imran* the respondent has therefore already been sentenced for the same acts as those to which offence 5 relates. Alternatively, he has been sentenced, in whole or in part, for that offence.
30. I am therefore satisfied that surrender in respect of offence 5 should be refused.

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31. In his notice of objection, the respondent raised an objection pursuant to section 37 of the Act of 2003. That point was not pursued at the hearing.
32. 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.
33. This court will therefore make an order pursuant to section 16 of the Act of 2003 for the surrender of the respondent to the United Kingdom in respect of offences 1, 2, 3, 4 and 6 in the warrant.
34. The court will also make an order pursuant to section 16 of the Act of 2003 refusing surrender of the respondent to the United Kingdom in respect of offence 5.