

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

AND

RADOMIR HOPJAN

APPLICANT

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Donnelly delivered the 25th day of July, 2017.

1. The respondent is sought pursuant to a European Arrest Warrant ("EAW") issued by a Czech judicial authority to serve the remaining 44 months of a four and a half year sentence imposed upon him in respect of two separate offences. Although a number of points of objection were raised by the respondent, by the time the matter came on for hearing, these objections had been boiled down to a single ground: that it would be a disproportionate interference with the respondent's right to respect for his private life under Article 8 of the European Convention on Human Rights ("ECHR") to surrender him.

A Member State that has given effect to the 2002 Framework Decision

2. The surrender provisions of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") apply to those member states of the European Union ("E.U.") that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European Arrest Warrant and the surrender procedures between member states ("2002 Framework Decision"). I am satisfied that by the European Arrest Warrant Act 2003 (Designated Member States) Order 2005(S.I. No. 27/2005), the Minister for Foreign Affairs has designated the Czech Republic as a member state for the purposes of the Act of 2003.

Identity

3. I am satisfied on the basis of the affidavit of Oliver Nevin, member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW, that the respondent, Radomir Hopjan, who appears before me, is the person in respect of whom the EAW has issued.

Endorsement

4. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003

5. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under the above provisions of the Act of 2003.

Part 3 of the Act of 2003

6. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003 and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Section 38 of the Act of 2003

7. The issuing judicial authority ticked the box of "swindling" at point (e)1 of the European arrest warrant. In so doing, they gave an indication that they were relying on Article 2 para. 2 of the 2002 Framework Decision so that double criminality did not have to be established. The offences, which are set out in considerable detail in the EAW, concern issues of fraud. There is therefore no manifestly incorrect designation under point (e)1 of the European arrest warrant. The offences carry a maximum sentence in excess of the minimum required for an offence to come within Article 2 para. 2 of the 2002 Framework Decision. In the circumstances, surrender of the respondent is not prohibited by the provisions of s. 38 of the Act of 2003.

8. For the sake of completeness, the Court notes that the initial points of objection included objections based upon the fact that an aggregate sentence had been imposed on this respondent in respect of the two separate offences. By the time the aggregate sentence was imposed, the respondent had already served the sentence imposed in respect of one of the offences. The respondent raised points of objection about double jeopardy contrary to s. 41 of the Act of 2003 and a general abuse of process point. In light of the decision in *Minister for Justice and Equality v. Stawera* [2017] IEHC 420, the respondent did not persist with these points of objection. This Court is quite satisfied, for the reasons set out in *Stawera*, that there is no basis for refusing to surrender this respondent in the circumstances.

Section 45 of the Act of 2003

9. The EAW sets out that the respondent appeared in person at the trial of these offences. Following a request by the central authority, the issuing judicial authority addressed the presence of the respondent at each individual trial. I am quite satisfied from the information received that the respondent was personally present at the individual trials in relation to each matter, as well as at the appellate proceedings in relation to each matter. The respondent in his affidavit stated that he was not present at one of those trials but this was not pursued by him at the hearing of this application for his surrender and I am satisfied that his surrender is not prohibited by the provisions of s. 45 of the Act of 2003.

Section 37 of the Act of 2003

10. The respondent objected to his surrender on the basis that to surrender him would be a violation of his rights under Article 8 of the ECHR arising specifically from the fact that there has been considerable unexplained delay in this case. That delay arose in circumstances where a first EAW had been issued for this respondent in 2006. That EAW had only been transmitted to this jurisdiction in January 2013. What followed thereafter was a series of requests by the central authority which were answered to varying degrees by the issuing judicial authority. There seems to have been delays in responding and perhaps some delay in requesting various information.

11. Part of the queries arose because a new point (d) was required as the EAW had been issued prior to the amendments brought in subsequent to the Council (EC) Framework Decision of 26th February, 2009 (2009/299/JHA) on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision"). Ultimately, in November 2015, the central authority wrote seeking the information under point (d) but also enquiring if a fresh EAW could be provided. It appears that request triggered the issue of this present EAW in late November 2015. That final EAW was presented to this Court for endorsement and was duly endorsed on 3rd October, 2016. The respondent was arrested on 7th February, 2017.

12. The respondent has set out his personal circumstances for the consideration of the Court when assessing whether it would be disproportionate to surrender him. The respondent states that he has lived in Ireland since in or around the year 2006 and the majority of his time in this country has been spent in Co. Clare. He has been employed for most of that time, working as a kitchen porter in hotels and restaurants in Co. Clare. He also worked as a green keeper for three seasons at a golf club. He is not working at present nor has he worked for the last number of months but the court is informed that he has a job offer at present.

13. The respondent claims that he has suffered significant and specific prejudice by virtue of the delay. He does not give any indication as to the nature of that specific prejudice. What the respondent says in respect of the delay is that he has moved on with his life in this country and has worked and lived in the community here during that period of time.

14. From the above, it can be seen that this case presents a rather stark set of facts. From the point of view of interference with his private life, the respondent has very little to offer over and above the simple fact that he now lives in Ireland and is seeking employment here again. He does not complain of any particular impact upon him over and above the impact that surrender to face a sentence of imprisonment would cause to any person in that situation. The point has been made repeatedly in the case law that exceptionality of facts is not a criterion required to be established before surrender must be prohibited. It will, however, only be in a rare case that a person will not be surrendered for trial or to serve a sentence already imposed based on a claim that to do so would interfere with their Article 8 rights.

15. In the case of *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17, O'Donnell J., with whom the Supreme Court agreed, addressed in a general way the issue of objection to surrender on the grounds of due process or interference with rights. O'Donnell J. stated at para. 4 as follows:-

"There is, therefore, a closer analogy in this regard to be drawn between the analysis of claims involved in domestic criminal proceedings and surrender/extradition than there is between surrender and deportation, for example. Trial and, if appropriate, sentence in this jurisdiction may always involve an interference with family and other relationships, and it is necessary, therefore, to assess the additional interference occasioned by trial abroad in circumstances where it may also be appropriate to take account of the fact that arrangements exist to facilitate prisoners who wish to serve their sentences in their home state. I think it is fair to say that it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. It is important that courts should also rigorously scrutinise the factual basis for any such claims against that background."

16. Later in *Minister for Justice and Equality v. J.A.T. (No. 2)*, O'Donnell J. stated at paras. 10-11:-

"These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin."

In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."

17. The present offences, although not crimes of violence, are significant fraud offences. The first offence involved a series of separate transactions carried out between early October 2000 and late January 2001. Although the value of the goods and services involved are listed in Czech crowns, it is clear from the description therein that the values are significant. The respondent is alleged to have caused damage of CZK 1,573,948 and attempted to cause further damage of CZK 140,061. The Court does not have a conversion price into Euro but it is clear that in just one of the examples at issue was the swindling of approximately CZK 48,000 (being the differential between the price contracted for and the usual price) in respect of 43.74 tonnes of bread wheat. The second offence involved fraudulent leasing of a passenger car of a Skoda make. The seriousness of the offences can be gauged from the fact that the respondent received a total sentence of four and a half years of imprisonment. The Court is satisfied that the respondent was convicted of financial crimes, requiring a degree of organisation (even if this respondent was not the leader of the enterprise), which caused reasonably significant losses.

18. It is also important to bear in mind that this respondent was present on 20th May, 2005, when convicted of the offence and was present at the appellate court on 11th October, 2005. He was also personally present in July 2003 and October 2003, in the separate proceedings. It is established, therefore, that this respondent knew that he was facing a four and a half year sentence. This respondent has not sought to deny knowledge of the overall sentence, he has simply avoided dealing with it in his affidavit. The Court is quite satisfied that he left the Czech Republic for the purpose of evading that sentence. The truth of the matter is that the delay in this case was initiated by the respondent's deliberate choice to leave the Czech Republic and come to Ireland.

19. This Court has, however, particular concerns about the subsequent delay from 2006 when the issuing state knew that not only was this respondent living in Ireland, but that he was in Co. Clare. No explanation has been forthcoming from the issuing state as to why this delay occurred; on the other hand, they have not been asked to explain it by either the central authority or this Court. A question arises as to whether this Court should seek an explanation for that delay. The delay has resulted in an effectively ten year delay from the issuing of the first EAW, when the issuing state knew that this respondent was in Ireland, and the endorsement of the second EAW when all the difficulties of the first EAW were resolved.

20. The Court has decided to proceed on the basis that there was significant culpable delay on the part of the issuing state as there is certainly prima facie cause to demonstrate such culpability. This Court has dealt with issues of culpable delay in a number of cases including *Minister for Justice and Equality v. Corry* [2016] IEHC 678. At para. 44 thereof, this Court stated:-

"I am quite satisfied that a finding of significant or culpable delay does not mean the court must regard the public interest as having been nullified. Significant or culpable delay is a factor that is to be taken into account in assessing the weight to be attached to the public interest. This is another way of saying that delay, even significant and culpable delay, is one factor in the calculation of the pressing social need. The court is obliged to have regard to other factors, not least that there is a constant public interest in the surrender of individuals to face criminal prosecution or to serve sentences already imposed."

21. In assessing the proportionality of the proposed surrender in this case, the Court has taken into account the delay as culpable delay but must consider that delay in the context of the public interest in ensuring that a person is surrendered to face a significant custodial sentence imposed for criminal offences. The public interest remains moderately high in this respondent's case, even though there has been a culpable delay, particularly where the offences are serious and the respondent has clearly contributed to the delay by not making himself available for the execution of the sentence.

22. Arising from what was said by O'Donnell J. in *J.A.T. (No. 2)*, there was an exploration at the hearing of this application as to the position in this jurisdiction if a person was required to serve a significant sentence imposed on indictment after significant delay by the authorities in the execution of that warrant. It was submitted by the respondent that there would certainly be jurisdiction for the High Court to take into account the delay in deciding whether fair procedures required the person to serve the sentence.

23. In the view of the Court, in circumstances such as these, where the delay is significant but nonetheless the offences are serious and the sentence lengthy and on the other side of the equation, there is nothing beyond the ordinary consequences of having to serve such a sentence more than ten years later, the Court would have no hesitation in holding that the public interest outweighed any private interest on the part of the sentenced person. Even culpable delay on the part of the authorities would not nullify the public interest in requiring a person to serve a significant custodial sentence imposed previously. Such public interest would not be outweighed by private interests that did not demonstrate that to require the person to serve the sentence at that late stage would be particularly injurious, harmful or prejudicial.

24. If these circumstances were transposed to Ireland, there is no doubt but that the respondent would be required to serve his sentence notwithstanding the culpable delay on the part of the authorities. In this case, where his surrender is sought pursuant to an EAW, the Court finds that the provisions of Article 8 of the ECHR do not prohibit the surrender of this respondent to the Czech Republic for the purpose of serving the remaining part of the four and a half year sentence imposed upon him in respect of these two fraud offences.

Conclusion

25. For the reasons set out above, this Court rejects the respondent's point of objection. The EAW being otherwise in order, this Court may make an order for the surrender of this respondent to such other person as is duly authorised by the Czech Republic to receive him.