Neutral Citation Number: [2008] IEHC 460

THE HIGH COURT

Record Number: 2006 88 Ext

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
KASPARS KONCIS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 12th day of November 2008

1. The surrender of the respondent is sought by a judicial authority in Latvia on foot of a European Arrest Warrant dated 13th November 2007 which was endorsed for execution here on the 13th of February 2008. The respondent was duly arrested on foot of this warrant on the 11th March 2008 and brought before the court on the following day, in accordance with the provisions of Section 13 of the European Arrest Warrant Act 2003, as amended. No issue is raised as to the identity of the respondent, and I satisfied in any event that the person who is before the court is the person in respect of whom this European arrest warrant was issued.

2. Surrender is sought for the purposes of conducting a criminal prosecution against the respondent in respect of four offences which are set out in the warrant. No issue is raised in relation to correspondence, and I am satisfied that the offences in respect of which his surrender is sought would, if committed in this jurisdiction, give rise to offences of robbery under section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, an offence of theft under the same Act, and an offence of assault under either Section 2 or Section 3 of the Non-Fatal Offences against the Person Act 1997. Minimum gravity is satisfied in respect of each of these offences.

3. I am satisfied that there is no reason to refuse to order surrender by virtue of any provisions contained in sections 21A, 22, 23 or 24 of the Act, and, subject to addressing the Points of Objection raised by the respondent, I am satisfied that his surrender is not prohibited by any provision of Part III of the Act, or the Framework Decision.

4. Before considering the points of objections which have been raised, it is necessary to set out a somewhat unusual history to the present application which has relevance to some of those points of objection, since the warrant on foot of which his surrender is currently sought is in fact the third such warrant to be transmitted to this jurisdiction by issuing judicial authority.

5. The first warrant transmitted to the Central Authority here was dated 4th December 2004. However, that warrant was never the subject of an application for endorsement.

6. A second warrant transmitted to the Central Authority here was one dated 21st September 2005 which was endorsed for execution by order dated the 3rd August 2006, and on foot of which the respondent was duly arrested on the 23rd August 2006. In due course, an order was made by this Court on the 24th November 2006 for the surrender of the respondent on foot of that warrant to the authorities in Latvia. A Notice of Appeal was filed and delivered by the respondent against that Order.

7. That second warrant had sought the surrender of the respondent so that he could be prosecuted for precisely the same offences which are the subject matter of the present warrant. Following the making of that order for surrender, the respondent learned through a friend in Latvia that in fact by the time that order was made, he had already been tried and convicted in his absence in Latvia for these offences on the 9th November 2005, being after the issue in Latvia of that second warrant, but before the order was made for his surrender.

8. When this fact was brought to the attention of the Central Authority here, confirmation was sought from the issuing judicial authority that this was in fact correct. From information provided by the Latvian judicial authority by letter dated 27th April 2007 it is stated that the said in absentia conviction was set aside by the Criminal Cases Department of the Supreme Court Senate of the Republic of Latvia. It appears from a letter dated 22nd June 2007 from the General Prosecutor's office that this step was taken because "*the Court did not have the legal basis for making the judgments in absentia*".

9. On the 23rd January 2008, the Applicant was informed by fax that the European arrest warrant dated 21st September 2005 (the second warrant) had been cancelled by the issuing judicial authority.

10. Once it had been confirmed by the Latvian judicial authority that the respondent had indeed been convicted in his absence between the date of issue of the second warrant and the order for surrender being made on foot of that warrant, the respondent was released following an application under Article 40 of the Constitution, since the order for his surrender and committal had been made on wrong facts, since the warrant had sought surrender for the purpose of prosecution.

11. The respondent withdrew his appeal against that order for surrender on the 21st December 2007. At that stage the respondent was unaware that a further European arrest warrant had been issued by the Latvian judicial authority. It appears that the Central Authority here had informed the Latvian authority that if they wished to again seek the surrender of the respondent it would be necessary to issue a new warrant.

12. It is against this factual background that the respondent makes his objections to a fresh order for surrender being made on foot of the present third warrant seeking his surrender.

Points of Objection

1. New warrant not 'duly issued' for the purpose of s. 10 of the Act

13. The point under s.10 is not a 'fleeing' point. Rather, Kieran Kelly for the respondent submits that this Court has no jurisdiction to make an order on foot of the present warrant because, in his submission, the Court cannot consider that the latest warrant has been 'duly' issued, in the sense that it is issued in accordance with what is required to be done. It is submitted that an important feature of the background is that the respondent was not informed of what was happening with regard, and that at the time when he withdrew his appeal from the Supreme Court he was unaware that a new European arrest warrant was already in existence, following advices being given to the Latvian authorities by the Central Authority here. It is also submitted that the respondent should have been informed that the Latvian court intended to vacate the convictions, so that he would be provided with an opportunity, should he wish to avail of it, to make submissions as to why perhaps those convictions should not be set aside. In that regard it is submitted for example that the respondent's position was potentially prejudiced by having the convictions set aside to facilitate the issue of a fresh warrant for prosecution purposes, since where convictions have been made in absentia, the provisions of s. 45 of the European Arrest Warrant Act, 2003, as amended would have to be complied with by the provision of an undertaking as to an opportunity for retrial,

and this may not have been forthcoming, depending on the law of Latvia and the capacity of the court in Latvia to give such undertakings.

14. It is pointed out by Mr Kelly that the authorities in Latvia and the Central Authority here were well aware of where the respondent was residing here and could easily have made him aware of the steps which were being taken in relation to the setting aside of the convictions and the issue of the new warrant, and that consequently there has been a breach of the respondent's '*audi alteram partem*' rights. The result, it is submitted, is that the new warrant cannot be seen as having been 'duly' issued, since what ought to be been done has not been done i.e. the respondent was not kept informed of what was happening.

15. Emily Farrell BL for the applicant submits that there is no evidence that the existence of two previous European arrest warrants is any bar to the issue of a third warrant, in the circumstances in which this occurred. No evidence of Latvian law has been adduced in that regard, and she submits that in such circumstances this Court must recognise the validity of the new warrant and presume that it is duly issued in the absence of any substantiated argument to the contrary. She submits that in so far as Mr Kelly has stated that the respondent was denied an opportunity to be heard in relation to the setting aside of the convictions and the decision to issue a new warrant, there is no reality to that submission, and that the respondent has not stated what benefit he might have derived from being heard.

16. This Court must give full recognition to decisions made by the courts of Latvia, and it would only be in the clearest case demonstrated by cogent and relevant evidence, if necessary from a Latvian lawyer, that this Court could conclude that a European arrest warrant issued in that State has not been duly issued. There is certainly nothing in the Framework Decision which precludes the issue of a second warrant or a third warrant. In the present case, there is no evidence that the Latvian authorities acted other than in good faith. Clearly somewhere along the line an error occurred whereby the respondent was convicted in his absence of the offences, whereas the second warrant sought his surrender so that he could be present at his trial. That was an error made, and the Latvian court has taken steps to correct it and resume their efforts to seek an order for surrender for the purpose of prosecution. No evidence has been adduced that this has not occurred lawfully in Latvia. The fact that the respondent was not given notice of that application or of the application to cancel the second European arrest warrant is insufficient to deny the lawfulness of the issue of a fresh warrant on foot of which his surrender is now sought. No substantiated prejudice has been demonstrated. It has been submitted that the steps taken has denied the respondent the opportunity to possibly avail of a situation where perhaps no undertaking under s. 45 of the Act may have been possible or forthcoming. But that is not something which could persuade this Court not to give full recognition to the new warrant issued under the Framework Decision. These arrangements are underpinned by a high level of trust and confidence between Member States, and only in an extreme situation, fully established by relevant evidence, could this Court consider that the warrant has not been duly issued for the purpose of s.10 of the Act. There is no such evidence in this case.

2. Abuse of process:
17. Mr Kelly has submitted that if the Court concludes that the warrant has been duly issued, the Court should nevertheless consider whether in all the circumstances of this case there has been an abuse of process, and that the inherent jurisdiction of the Court should be invoked to prevent such abuse resulting in an order for surrender being made. In my view, for much the same reason that I have reached the conclusion on point 1 above, there can be no question of an abuse of process. This Court is entitled to presume that under Latvian law the issuing judicial authority was entitled to address the error which was made in the way that has occurred. There does not seem to me to be anything wrong about correcting an error by setting aside the convictions which were made in absentia, and thereafter cancelling the second warrant and issuing a third warrant on foot of which his surrender is now sought for the purpose of prosecuting the respondent in his presence. Again, the possibility that the reason why this occurred in the way it has done is because the issuing judicial authority may not have been in a position to give a s. 45 undertaking, is not something which could lead to a conclusion that the processes of the Court have been abused either in this jurisdiction or in Latvia.

3. Breach of constitutional rights:
18. It is submitted under this heading of objection that the respondent's right to liberty has been infringed by the fact that he was arrested on the 23rd August 2006 on foot of the second warrant which proceeded on an incorrect basis, and that he was in custody following the order for surrender being made on that application on the 24th November 2006 until his release from custody under Article 40 of the Constitution in February 2007. It is also submitted that his rights to due process and fair procedures were infringed also. I have already addressed questions of due process and fair procedures, and for the reasons already appearing those rights cannot be seen as infringed. In relation to the right to liberty, it is true that he was deprived of his liberty by an order obtained on incorrect facts. There is nothing to even suggest that this occurred deliberately or *mala fides*. If convicted and sentenced to any term of imprisonment as a result of any trial which will take place, he is entitled to have any time spent in custody here during the surrender application process deducted from any such term. The mere fact that he has spent that time already in custody cannot be a reason why his surrender should be found to be prohibited under Part III of the Act or the Framework Decision.

19. Another feature submitted to constitute an unconstitutional unfairness is that because the respondent's surrender is sought so that he can be prosecuted for offences which have as an ingredient the fact that the respondent has previous convictions, he cannot receive a fair trial, since the court of trial will have knowledge from the way the offences are laid that he has previous convictions. This submission refers to the fact that in the warrant at paragraph (e) thereof, three of the four offences refer to previous such offences having been committed. However, that feature of the warrant cannot be a reason for a finding that he cannot receive a fair trial. It is a feature of the laws of several other countries that recidivism gives rise to heavier penalty, and that reference to previous offending forms part of the description of the offences in question in the warrant. The laws and procedures of Member State of the European Union vary inevitably. This Court respects those differences and cannot for one moment find that as a result there would be an unfairness in any trial. Latvia has been designated for the purpose of s. 3 of the Act, and it follows that the laws of Latvia are fully respected and presumed to meet necessary standards of fairness under the European Convention on Human Rights and Fundamental Freedoms.

4. Delay
20. The only matter pointed to for this submission is the fact that the offences for which surrender is sought occurred in 2004, and that no information has been provided as to why the first European arrest warrant was never endorsed for execution and was later followed by the second warrant, and, for the reasons set out, a third warrant. No evidence has been provided by the respondent as to any prejudice to the fairness of any trial which he may suffer if surrendered. That delay point of objection can be rejected *in limine.*

Section 45 undertaking
21. Mr Kelly has submitted at the outset that s. 45 of the Act must be strictly interpreted, and points to the fact that it is an undisputed fact that the respondent has been convicted of the offences referred to in the warrant, and that he was not present for the trial leading to those convictions, and further that he was not notified of the time when and place at which he would be tried for these offences. Given these facts, it is submitted that the fact that the convictions have been vacated or set aside is irrelevant and

insufficient to remove the requirement contained in s. 45 that he be not surrendered unless an undertaking under this section is given by the issuing judicial authority. He submits also that the evidence as to the setting aside of the convictions is only hearsay evidence received in the form of a letter from the General Prosecutor's office.

22. Section 45 of the Act provides:

> *"45.— A person shall not be surrendered under this Act if—*
>
> *(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and*
>
> *(i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence,*
>
> *or*
>
> *he or she was not permitted to attend the trial in respect of the offence concerned,*
>
> *unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—*
>
> *be retried for that offence or be given the opportunity of a retrial in respect of that offence,*
>
> *be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and*
>
> *(iii) be permitted to be present when any such retrial takes place."*

23. Ms. Farrell has submitted that the hearsay aspect of the information as to the setting aside of the convictions is not relevant, and that it does not matter that this information has not emanated from the issuing judicial authority itself. She submits also that the fact is that there are no convictions in place at the moment, and that the provisions of s. 45 of the Act are not in play on this application.

24. My view is that this Court is entitled to accept the information from the General Prosecutor's office. It would of course be open to the respondent to seek to adduce evidence which contradicts or even casts doubt on the accuracy of what has been stated, but he has chosen not to do so. This Court proceeds on the basis of having a high level of trust and confidence in the Republic of Latvia and all its emanations and office holders. I am entitled to accept as fact what I am told has occurred.

25. Secondly, while I agree that the Act must be interpreted by reference to the words used by the Oireachtas to express its intention, it is nevertheless also the case that under *Pupino* principles, the Act must so far as possible be interpreted in conformity with the objectives and purposes of the Framework Decision. The Court must not however give an interpretation which would be '*contra legem'*. In the present case, one can see the purpose of s. 45 of the Act as being that where a person has been convicted in absentia, and was not notified of the date and place of his trial, he/she is entitled to be retried upon surrender. The objective is to guarantee the opportunity of a retrial. The present warrant has been issued so that the respondent is tried in his presence for the offences in question. The fact that on a literal reading of the section, an undertaking may still be seen as required, as submitted by Mr Kelly, does not mean that in circumstances where the convictions have been set aside, that literal interpretation can be allowed to override an interpretation which, considered in the light of the objective of the Framework Decision, dictates that such an undertaking is not required. The objective of the Framework Decision in this regard is fulfilled. The respondent will receive the opportunity of a retrial, and it is possible and permissible to interpret the section as meaning that the undertaking is required where the in absentia conviction is extant. The setting aside of the conviction means that there is no extant conviction against the respondent in this case. In such circumstances no undertaking under s. 45 of the Act is required.

Setting aside previous orders

26. I should refer to the fact that ahead of the present application being heard, a Notice of Motion was issued by the Applicant in which an order is sought to vacate the order made by this Court on the 3rd August 2006 for the endorsement of the second warrant, and also the order for surrender made subsequently on the 24th November 2006. This application was moved on the basis that the underlying European arrest warrant (the second warrant) has been cancelled following the discovery that the respondent had been convicted in his absence.

27. I adjourned my decision on that application to the date on which the present application was listed, and at the commencement of this application I indicated that I would proceed with the application for surrender, and include my decision on the Notice of Motion in my judgment on the surrender application.

28. I see no reason to make any order vacating the previous orders. Mr Kelly suggests that since the question of surrender is in the face of the order dated 24th November 2006 '*res judicata*', the Court cannot again decide the question. I disagree. The present application is free-standing on foot of the third warrant. The previous order was made in respect of the second warrant. That decision is no bar to the present order for surrender being made on foot of the later application. Such an order does not contradict any earlier order or decide any issue differently which has already been decided. I will make no order on the Notice of Motion dated 14th October 2008.

29. For all these reasons I am satisfied that an order for the respondent's surrender must be made, and I will so order.