

THE HIGH COURT

Record Number: 2007 No. 178 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
OLIMPIA IORDACHE

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 13th day of June 2008

1. Under a European arrest warrant dated the 14th March 2007 ("the warrant") the Romanian judicial authority seeks the surrender of the respondent to Romania so that she can serve a three year sentence of imprisonment imposed upon her there on the 12th November 2001 following her conviction in absentia for the offence of theft.

2. The warrant was transmitted to this country, and on the 24th October 2007 was endorsed by the High Court for execution here. The respondent was duly arrested on foot of this warrant on the 7th November 2007, and, as required by s. 13 of the European Arrest Warrant Act, 2003, as amended, was immediately thereafter brought before the High Court so that a date for hearing this application could be fixed. She has been remanded on bail from time to time until such time as this application for her surrender was ready to be determined.

3. No issue has been raised in Points of Objection filed in relation to the identity of the respondent. In any event this Court is satisfied from the affidavit evidence of her arrest that she is the person in respect of whom this warrant has been issued.

4. A point of objection was initially raised in the Points of Objection filed that her surrender could not be ordered in the absence of an undertaking as regards her right to a re-trial upon surrender as provided for in s. 45 of the Act, but in view of the information provided as to her right to seek a re-trial under Article 522 of the Romanian Criminal Code, this point is no longer being pursued.

5. No issue has been raised in relation to correspondence/double criminality, and the Court is satisfied that the facts contained in the warrant as to the offence committed in Romania would correspond to an offence of theft under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

6. Minimum gravity is satisfied given the length of sentence imposed on the respondent.

7. Subject to addressing the points of objection being pursued, I am satisfied that there is no reason to refuse surrender by virtue of sections 21A, 22, 23 or 24 of the Act, and that her surrender is not prohibited by any provision contained in Part 3 of the Act or the Framework Decision.

Points of Objection relied upon

1. The respondent is not a person to whom s. 10 of the Act applies
2. The respondent is the mother of a child under the age of 12 months and the Prison rules in Romania do not permit that child to enter prison with her to be nursed until over age 12 months
3. The length of sentence for the offence is indicative of discrimination on the ground that the respondent is a member of the Roma ethnic group
4. Delay in seeking the surrender of the respondent.

8. I will deal with these points individually.

1. The respondent is not a person to whom s. 10 of the Act applies:

9. The warrant states in paragraph (d) that the respondent was personally summoned or informed by other means about the date and place of the session, and that the "injunction was pronounced in absentia". However, the respondent states that while she attended at a police station for questioning, and at the prosecutor's office, she in fact paid compensation to the injured party in respect of the theft of goods in question, and thereafter believed that this was an end of the matter and that no proceedings would follow. The offences are said to have been committed by her on 23rd May 1998. Her Romanian lawyer has sworn an affidavit which states that in August 2001 he represented the respondent "while she was under criminal investigation at the police station in Sibiu and at the prosecutor's office connected to the court of Sibiu". His services had been engaged by a relative of the respondent. He states that at some later date he was engaged to prepare and file her appeal. He goes on to state that from the time she was "released" on the 28th August 2001 the respondent "was not prohibited from leaving the country". This lawyer's covering letter to the respondent's solicitor here has annexed certain documents listed therein, including the statements of the respondent made "while under criminal investigation", and "copies of the public prosecutor's charges against her".

10. The respondent avers that she left Romania and came to this country on the 12th December 2001 and has resided here since that date, and has given birth to three children here. At the time she left Romania she already had four Romanian children, but left these children behind. They have subsequently arrived here also and live with her. She states that before she left Romania she applied for a passport> She states in that regards follows:

"(8) I say that, in August 2001 when making an application for a passport, I was arrested by police in Romania and questioned in relation to the theft of property from an apartment in Sibiu, Romania. The property taken had a total value of approximately €50. I was detained in custody for one day only. I was told by the police that the injured party/owner of the property wanted the return of the property which was stolen. Having paid full compensation to the injured party, I was released without charge. While in custody, I was legally represented by a lawyer, Mr Gheorghe Dobrin. When released from custody, it was my understanding that the matter was concluded."

11. She goes on to aver that she never attended a court in Romania in relation to this matter as she was never informed or was never aware that she was required to attend court. She also states that by leaving Romania when she did, she did not breach any condition of bail.

12. The respondent then states that she came to Ireland to seek a better life for herself and her children, and that there was nothing "surreptitious" about her departure from Romania. She has never returned to Romania since her arrival in this country.

13. The above contents of her affidavit are what support her submission that she is not a person referred to in s. 10(d) of the Act:

"(d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she—

(i) commenced serving that sentence, or

(ii) completed serving that sentence, ..." (my emphasis)

14. Mary Ellen Ring SC for the respondent has referred to the judgment of this Court and that of Fennelly in the Supreme Court in *Minister for Justice, Equality and law reform v. Tobin*, both unreported. She refers to the respondent's state of knowledge in relation to any criminal charge against her at the time she left Romania, and to the fact that the respondent has stated that when she left Romania she believed, having paid compensation to the injured party, that she was free to leave that country, and that the matter was closed. In this way it is submitted that she cannot be considered to be someone who left with the intention of evading or escaping justice i.e. fleeing for the purpose of s. 10 of the Act. She highlights the fact that in Tobin the respondent was in fact well aware of the proceedings, whereas the respondent in this case was not even aware of any continued proceedings against her. She refers to the Romanian lawyer's averment that he was not representing her at any time after her attendance after August 2001 until he was engaged again to prepare and file an appeal against the conviction and sentence. Ms. Ring submits that like the case of Tobin there was no lawful impediment against her departure from Romania, and that since in all these circumstances she did not "flee", she does not come within s. 10(d) of the Act, this Court is precluded from making the order for surrender.

15. On behalf of the applicant, Diarmuid McGuinness SC refers to the fact that the information supplied by the issuing judicial authority on this application states, inter alia, that when she was provided in person with all the prosecution materials when she attended in the prosecutor's office in August 2001. I take this to mean that she was given what might be referred to in this jurisdiction as a Book of Evidence.

16. He refers also to the information provided, that she failed to give any information as to change of address, and that she never informed the authorities that she was intending to leave Romania.

17. He submits that the circumstances of this case are very different to the circumstances in which the respondent in the Tobin case left Hungary, and that while there may have been no legal prohibition on her leaving the country, that fact alone is insufficient to establish that she was not seeking to evade justice when she did so in December 2001, shortly after she had been questioned about this offence. He submits that she must be taken to have been aware that she was under investigation for this offence, and that her simple averment as to her subjective state of mind as averred (namely that she believed that the payment of compensation was an end of the matter) is not sufficient to discharge the onus of proof which rests upon her. He refers also to what he considers a relevant fact, namely that when she left Romania having been questioned and served with the prosecution materials, she must have done so in some haste since she left her four children behind her and came to this country where, as she states herself, she resided for some months here with one of her nephews who was already residing here.

18. Mr McGuinness submits that the payment of compensation is an irrelevant fact before this Court, since it cannot mean that no offence has been committed.

19. In order to avoid the ambit of s. 10(d) of the Act the respondent must discharge the onus of proof upon her to establish, and not simply assert, that by leaving the issuing state when she did, she was not 'fleeing' in the sense of evading justice. The assertions contained in the respondent's grounding affidavit attempt to establish a subjective state of mind. The assertion of a subjective state of mind is easy to assert in an affidavit, and indeed as such is almost impossible to contradict. For this reason alone, something more is necessary to be established on an objective basis which establishes that her departure from the issuing state does not amount to 'fleeing' in the sense of evading or at least avoiding criminal proceedings against her. Her statement of her subjective state of mind is made in a vacuum, unsupported by any evidence of the nature of the criminal process upon which she entered in August 2001, when she was clearly arrested and detained and questioned about this offence both in the police station in Sibiu, and in the prosecutor's office, on which occasion it would appear she was served with all the prosecution materials. Her lawyer who has sworn an affidavit has not provided any information on the way in which the criminal process works in Romania. While he has asserted that she was at all times free to leave Romania in the sense that there was no condition of bail which such departure would contravene, and this is confirmed by the issuing judicial authority, that fact is insufficient to establish that she was not intending to evade justice by so leaving.

20. In my view, unless clear evidence is adduced, and around which there is no controversy on the part of the issuing authority, as was the position in the Tobin case whose facts are very distinctive and unique to that case, this Court must proceed on the basis that having been arrested and questioned and served with the prosecution papers, she was thereafter within the prosecution process under the rules of criminal procedure in existence in Romania. It must also be borne in mind that the very 'raison d'être' of the Framework Decision itself is expressed therein to be the introduction of a simplified method of surrender between member states of the European Union with the aim of replacing the existing extradition treaty arrangements with a system of surrender which removes the complexities and possibility of delays which had previously existed. The new arrangements are intended to take account of the undoubted fact that criminal procedure rules will vary significantly from member state to member state. The fact, for example, that the mere questioning of a person in this jurisdiction in a police station may not be regarded as being part of the prosecution process itself since charges would necessarily be preferred only after directions are obtained from the Director of Public Prosecutions, does not mean that this Court should regard the respondent as not having been charged and not within the prosecution procedure under the Romanian Criminal Code. At face value at least, and particularly in the absence of any averment to the contrary by the respondent's Romanian lawyer, there is a clear implication or inference to be drawn that her presence before the prosecutor in August 2001 is indicative that she was to be prosecuted for the offence alleged against her, and in respect of which she made reparation to the injured party. It cannot be concluded that by reason of this payment she was entitled to presume that the offence itself would not be proceeded with. Her lawyer has made no averment to support such a presumption, and in my view at best such a payment might have had the self-serving purpose of mitigating the seriousness of the offence in the eyes of the Romanian Court, and could have had some bearing on the severity of the punishment to be imposed in the event of conviction.

21. In any event there is information contained in further information provided by the issuing judicial authority by letter dated 25th February 2008 that states:

"From the moment she was sent to trial (17.09.2001) and the registration of the file on the court's docket (26.09.2001), Mrs. Iordache Olimpia has never presented herself in court for the proceedings initiated against her".

22. This statement as to proceedings having been initiated against her has not been contradicted by any affidavit from the same lawyer who previously swore an affidavit on her behalf, or any other. That all occurred before the date of her departure on 2nd December 2001. The fact that she says that she did not know about this prosecution, or maybe chose not to know about it, is not of importance.

23. Equally, the fact that she was given a passport by the authorities does not of itself mean that the prosecutor's office was satisfied that she was not going to face trial. We do not even know if the prosecutor's office could have known that she had applied for a passport. We do not know whether the body which issues passports in that country make any checks on an applicant for a passport before deciding whether or not to issue such a document. There is no evidence to support this contention. The onus is on the respondent at all times in this regard and in relation to the other matters on which she relies and she has failed completely to discharge that onus. It is not even necessary for the applicant to rely in any way on the fact that she left Romania shortly after she was questioned about this offence and served with the prosecution's materials, and left her four children behind her in Romania, as indicative of a hasty flight from justice.

24. The very purpose and objective of the Framework Decision is likely to be emasculated completely if it was to be permissible for respondents to assert their subjective intention of their departure as being to establish a better life for themselves in this country, where the fact is that before leaving they were alleged to have committed a crime, and departed before that prosecution could be concluded in their presence. This Court's obligations are clearly stated in the Framework Decision. There is an obligation to surrender under a European arrest warrant. The Framework Decision has been given effect to by the Act, and in the circumstances of this case I am completely satisfied that the respondent is a person who comes within s. 10(d) of the Act. I reject the submissions to the contrary.

2. The respondent is the mother of a child under the age of 12 months and the Prison rules in Romania do not permit that child to enter prison with her to be nursed until over age 12 months

25. Since her arrival in this country in December 2001, the respondent has given birth to three children here, the youngest of whom was born on the 10th October 2007, and is now therefore aged almost 8 months old. In her grounding affidavit she states in relation to this point of objection that should she be surrendered she will be separated from her seven children, and in particular from her youngest child. She states that she has been advised by her solicitor and counsel that there are no facilities in Romanian prisons whereby a female prisoner can serve a sentence "and continue to nurse an infant child". Curiously, in that regard, paragraph (15) of the affidavit continues:

"... I am advised that should I be surrendered to the Romanian authorities, I will not be required to commence serving my sentence of imprisonment until such time as my infant child has reached the age of one year."

26. This averment does not seem to match the submission being made that if she is imprisoned upon surrender she will not be permitted to nurse her infant child. From the information furnished by the issuing judicial authority in its said letter to the Central Authority here dated 25th February 2008 it appears that there is the possibility for the respondent upon surrender under Articles 455 and 453 of the Romanian Penal Procedure Code "to request the interruption of the penalty service in order to care for the child less than one year old until the child shall be one year old".

27. It is relevant to draw attention to the manner in which this particular point of objection is described in the Points of Objection. Paragraph (5) states:

"(a) Having regard to the fact that the respondent is the mother of an infant child (born on the 10th October 2007), no provision is made in the issuing state for the respondent to continue to nurse her infant child while serving a sentence of imprisonment.

(b) The absence of provisions whereby the respondent can continue to nurse her infant child while serving a sentence of imprisonment is incompatible with the requirements of the European Prison Rules (adopted by the Council of Europe (Committee of Ministers) on the 11th January 2006) and, in particular, the requirements of women prisoners (as acknowledged in paragraph 34 thereof)"

28. This is a confused submission to say the least in the face of the information that there is available a procedure whereby a mother in the position of the respondent may apply for the postponement of her sentence if she has an infant who is aged less than twelve months. Paragraph (a) is factually correct, but the fact that it is so seems to be at least to be a situation which is in ease of the respondent since it is accompanied by the procedure whereby such an application can be made for postponement. It could not be reasonably argued that the situation is that such a mother would be forced to go to prison and required to leave her child outside the prison. The application seems to guard against that possibility, and it cannot be presumed that the court would refuse such an application if the respondent chose to bring it. Indeed her own lawyer in his affidavit avers that according to Article 453(b) of the Romanian Code of Procedure "when a convict is pregnant or has a small child under the age of one year, the execution of the punishment is adjourned until the end of the cause which determined the cause of the adjournment itself. The competent court which decides over the granting of the adjournment of the execution of the punishment is the instance of execution, in this particular case, the court of Sibiu".

29. Finally, it is clear in my view that there is no life in this point of objection since without dispute in this case the respondent upon surrender has the right to a re-trial for the offence in her presence. Accordingly, the entire basis for the submission falls away, since upon surrender she can, if she wishes, and it can be presumed that she so wishes, make the appropriate application for a re-trial which is guaranteed to her. In such circumstances there is at least the possibility not only by then that her infant child will have reached the age of twelve months, but also that a different determination of the case or perhaps the sentence, will be arrived at when she is present to defend herself and make submissions through her lawyer in respect of any sentence sought to be imposed upon her. The fact that, through her counsel on this application, this Court has been informed that she is again pregnant is not relevant to the point of objection raised, but I note the provisions of Article 453 of the Code regarding convicts who are pregnant at the time of sentence in any event.

3. The length of sentence for the offence is indicative of discrimination on the ground that the respondent is a member of the Roma ethnic group

30. This point of objection has not been factually based. It is simply asserted in view of the relatively small value of the goods stolen (though the applicant contends that the value is more like €200 rather than the €50 stated by the respondent) the sentence for the

offence, a first offence apparently, is unduly harsh and lacking proportionality. Ms. Ring submits that there is no apparent justification for such a sentence given that the respondent cannot be considered to be a recidivist since it is her first conviction and therefore no deterrent purpose is served by such a sentence. However, her lawyer has made no comment in relation to the claim that the sentence is severe because of her membership of the Roma ethnic group. There is simply the respondent's assertion in that regard. It is not supported by any country of origin information, or by reference to any case-law, for example from the European Court of Human Rights which addresses the question of discrimination in Romania at the hands of the judicial system. The sentence was appealed by the respondent through her lawyer and was found to be correct. Mutual recognition of and respect for the judicial decisions in other EU member states implies that this Court must respect such decisions. No evidence has been produced to rebut this. There is no factual or other legal basis for upholding this point of objection.

4. Delay in seeking the surrender of the respondent

31. The only matter advanced on this point is that the conviction for the offence was on the 12th November 2001, and finally sentenced in October 2002, yet the European arrest warrant was not issued until the 14th March 2007, and that in the meantime the respondent has established herself in this country and given birth to three more children here. That fact cannot ground a plea of delay, particularly in circumstances where the respondent has left the jurisdiction of the issuing authority without informing them of her intention to do so, and, without their knowledge coming to this country. I reject the point *in limine*.

32. For all these reasons I find no obstacle to this Court fulfilling its obligation to order the surrender of the respondent on foot of this warrant since all the requirements of the Act and the Framework Decision have been met, and I will so order.