

THE HIGH COURT

Record Number 2007 No. 206 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
FLORIN HAHUI

RESPONDENT

Judgement of Mr. Justice Michael Peart delivered on the 18th day of July 2008

1. The surrender of the Respondent is sought so that he can serve a sentence of 14 years imprisonment which was imposed upon him on the 22nd March 1999 in respect of an offence of robbery in Romania. The entire of this sentence remains to be served.

2. The European Arrest Warrant on foot of which his surrender is sought is dated the 26th January 2007. That warrant was endorsed for execution here by the High Court on the 19th December 2007. He was arrested on foot of that warrant on the 22nd April 2008, following which he was brought before the High Court as required by Section 13 of the European Arrest Warrant Act 2003, as amended, and was remanded from time to time thereafter pending the hearing of the present application for his surrender under Section 16 of that Act.

3. Two Points of Objections are raised on his behalf.

Firstly, it is submitted that an undertaking by the issuing judicial authority is required under section 45 of the Act since he was tried, convicted and sentenced in his absence. The applicant states that no such undertaking is required since the European Arrest Warrant states that he was notified of the date, time and place of his trial in accordance with the rules for service of such notification under the Romanian Criminal Code.

Secondly, the Respondent submits that correspondence is not made out in relation to the offence for which his surrender is sought. The Applicant submits that the acts of the Respondent which gave rise to the offence in Romania and for which he was convicted and sentenced, would if committed in this jurisdiction correspond to the offence of robbery under Section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

4. Subject to reaching conclusions on these two of objections, I am satisfied that there is no reason under Sections 21A, 22, 23 or 24 of the Act to refuse to order his surrender, and that his surrender is not prohibited by any provision of Part III of the Act or the Framework Decision.

Points of Objection**Section 45**

5. The European Arrest Warrant states with regard to the notification to the Respondent of the date, time and place of his trial, that the Respondent was summoned in person or informed through other means regarding the date and place of his trial. The warrant states that he was summoned at his residence and address and by posting up a notice at the Local Council of Suceava, and that the Respondent "eluded the proceedings and consequently the phase of the judicial inquiry". With regard to the procedure whereby the subpoena notifying him of his trial was posted up at the Local Council, the issuing judicial authority has included with further information supplied to the Central Authority here an Extract from Article 177 of the Romanian Criminal Procedure Act which states, as translated:

"If there is no knowledge of the place of residence or work of the defendant or accused, the subpoena is posted at the Social Office of the Local Council in the area where the offence was committed..."

6. In support of his submission that he was not notified of his trial and that in the absence of an undertaking his surrender is prohibited, the respondent has sworn a grounding affidavit in which he states that he left Romania in February 1999, which was about one month prior to his conviction on the 22nd March 1999. He states also that he was not aware of the proceedings by the time he left Romania, and that he first heard of these proceedings "sometime in 2003" as a result of a telephone conversation with a friend in Romania. He states that he was unaware of these proceedings as he had not been notified of them and goes on to say that he never received a personal subpoena and never received a subpoena at his address, and never saw a note on the door of his house and never saw any notice in the local council's office.

7. Emily Farrell B. L. for the applicant submits that the respondent was notified of the trial by the methods provided for under the Romanian Code of Criminal Procedure since a subpoena was sent to the address of the Respondent, as well as by a notice being posted up at the Local Council office, as provided for, even if by his own actions by leaving Romania, he did not receive the notification so sent, or so posted at the Local Council office. She submits also that, in any event, the European Arrest Warrant makes it clear that the Respondent is entitled under Article 522 of the Romanian Criminal Code to apply for a retrial, and that there is power to grant that. The European Arrest Warrant sets out the provisions of that Article.

8. 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

(b) (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

(ii) 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 --

- (i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,
- (ii) 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."

9. That section is the manner in which the Oireachtas has chosen to give effect to Article 5.1 of the Framework Decision which provides as follows:

"1. Where the European arrest warrant has been issued for the purpose of executing a sentence or a detention order imposed by a decision rendered, and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment."

10. In the present case the issuing judicial authority has stated in the warrant that the respondent was notified of his trial at his place of residence and by posting up a notice at the Local Council office. Those methods of notification provided for under the Romanian Criminal Code of Procedure. This Court must respect that statement and regarding her as having been duly notified of his trial. Against that statement the Respondent has simply stated that he left Romanian sometime in February 1999 which, as it happens, was a very shortly before the date of his trial since his conviction is dated the 22nd March 1999, and that he never received that of notification. In my view the Respondent has a heavy onus to satisfy this Court, in the face of a statement by the issuing judicial authority that he was duly notified, that this is not the case, and a simple statement or assertion in an affidavit is insufficient to provide this Court with cogent evidence to the contrary. He has provided no other evidence as to his date of departure and there is no corroboration of his own assertion in that regard. The Framework Decision is based on a high level of trust and confidence between Member States and before this Court can disregard what the issuing judicial authority has stated with regard to the notification of the Respondent in relation to his trial, very clear evidence would be required to the contrary. I am satisfied that no undertaking is required to be provided under section 45 of the Act.

Correspondence

11. The facts giving rise to the offence of robbery for which the respondent was convicted on the 22nd March 1999 are set out in the warrant. It is stated therein that on the 26th May 1998 the respondent and another person struck two injured parties on the staircase of a block of flats where they lived in order to steal a leather handbag in which there was a large quantity of cash in four different foreign currencies. From the warrant, it appears that the perpetrator was had information that the injured parties had large amounts of cash with them in their flat, and goes on in paragraph (f) of the warrant to state that on this occasion, the respondent struck the injured party many times with "a contusive tool", knocking him down and dispossessing him of the various currencies. Emily Farrell B. L. submits that these facts are sufficient to correspond, for the purposes of section 5 of the Act, to an offence of robbery under section 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 since the elements of stealing with the use of force are met.

12. Section 14 of that Act provides:

"14. -- (1) a person is guilty of robbery if he or she steals, and immediately before or at the time of doing so, and in order to do so, uses force on any person or books or seeks to put any person in fear of being then and they are subjected to force."

13. Mr. Dwyer on behalf of the respondent submits that these facts alone are insufficient to enable correspondence with the offence under section 14 of the 2001 Act to be met, and he makes that submission by reference to the definition of stealing which is contained in that Act. In that regard, Section 2 defines "stealing" as the commission of an offence under Section 4, which is the offence of theft. Section 4 in turn provides that is "a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner offered."

14. Mr. Dwyer submits that the facts contained in the warrant in relation to the offence of robbery set out therein make no reference to any dishonest intention or that the property was taken without consent of its owner and with the intention of depriving its owner of it. He submits that it is not appropriate for this Court to infer these elements as being present, and that their absence prevents this Court from being in a position to be satisfied that the acts for which the respondent was convicted would, if committed in this jurisdiction, give rise to an offence here.

15. As a fallback position, Miss Farrell has submitted that, apart altogether from any offence under section 14 of the Act, the facts clearly disclose an offence of assault under section 2 of the Non-Fatal Offences Against the Person Act, 1997, and that this alone is sufficient for the purposes of establishing correspondence with "an offence" under the law of this State. That section provides:

"2. -- (1) a person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly --

(a) directly or indirectly applies force to or causes an impact on the body of another, or

(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact, without the consent of the other."

16. Mr. Dwyer on the other hand submits that there is nothing in the facts contained in this warrant to fulfil the requirement for this offence that the assault which took place was "without the consent" of the victim.

17. In my view correspondence is made out both in respect of the offence of robbery and an offence of assault under Irish law. Without reading words into the contents of the offence as stated in the warrant, this Court is nevertheless entitled to adopt a realistic approach to the establishment of correspondence and look at all the circumstances of the offence has contained in the warrant. It is quite clear that the respondent was convicted on facts which include the striking of the victim with an implement referred to as a contusive tool, knocking him to the ground, and taking from him a leather handbag containing a large amount of money. On that set of facts, it is fanciful to suggest that this may have occurred with the consent of the victim. These circumstances themselves, clear from the warrant, demonstrate a lack of consent and the dishonest intent of the respondent. In my view there is no room for argument that the absence of any reference to dishonesty or lack of consent is fatal to the issue of

correspondence, given the circumstances of the crime. There have been cases before this Court where on the facts of the warrant, the possibility of consent and/or lack of dishonesty, was open. But this is not such a case. In my view the position is clear from the contents of the warrant. In these circumstances, I am satisfied that the offence corresponds to an offence or offences in this jurisdiction of the purposes of section 5 of the Act.

18. Being satisfied in relation to all of these matters, I will therefore make the necessary order for the surrender of the respondent to Romania.