

THE HIGH COURT

Record No. 2011/74 EXT

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

And

SYLWESTER JOZEF STRZELECKI (No 2)

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 31st day of October, 2013

Introduction:

The respondent was the subject of a European arrest warrant issued by the Republic of Poland on the 25th May, 2010 seeking his surrender for the purposes of prosecuting him for seven drug trafficking type offences as particularised in that warrant. The warrant was endorsed by the High Court for execution in this jurisdiction on the 16th February, 2011 and it was duly executed on the 26th August, 2011. On the 2nd of July 2012, following a surrender hearing, this Court made an order pursuant to s. 16 of the European Arrest Warrant Act 2003 (hereinafter the Act of 2003). A short time after that the respondent was transferred to Poland where he is, the Court has been told, currently remanded in custody and awaiting trial.

This Court has now received a request from the Republic of Poland seeking its consent for the prosecution of the respondent in respect of two further drug trafficking type offences that were not covered by the EAW dated the 25th of May 2010. The request is dated the 27th of December 2012.

Council Framework Decision 02/584/J.H.A. on the European arrest warrant and the surrender procedures between Member States, O.J. No. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") contemplates and provides for the making of such a request, and the granting of such consent, in certain circumstances, in as much as Article 27 thereof provides (to the extent relevant):

"1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

[...]

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request."

Those provisions of Article 27 have received transposition in our domestic legislation by means of s. 22(7) and (8) of the Act of 2003 (as amended by s.80 of the Criminal Justice (Terrorist Offences) Act 2005 and s. 15 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012). Those provisions state:

"(7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to

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(a) proceedings being brought against the person in the issuing state for an offence,

(b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or

(c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence,

upon receiving a request in writing from the issuing state in that behalf.

(8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under this Act."

For completeness it should be stated that prior to the amendment recently effected by s. 15 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, s.22(8) had read:

(8) The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 or the Framework Decision (including the recitals thereto) be surrendered under this Act."

For reasons that will become apparent when the preliminary issue that the Court is presently being asked to determine has been identified, and is being ruled upon, this recent change assumes some slight relevance.

The Preliminary Issue

A Notice of Objection has been filed on behalf of the respondent raising various objections to the granting of consent based upon the provisions of Part 3 of the Act of 2003. The majority of the objections raised invoke s.37 of the Act of 2003 and raise what might broadly be characterised as human or fundamental rights based objections relying on various provisions of the European Convention on Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union and the Constitution of Ireland.

The applicant contends that upon a correct interpretation of s.22(8) of the Act of 2003 (as amended) such issues are not justiciable by this Court in considering whether or not to grant its consent to the prosecution of the respondent in the issuing state for the further offences to which the request relates. Counsel for the respondent advances an alternative interpretation that would allow this Court to consider the s.37 issues that he has raised, and he further invokes Article 13 of the European Convention on Human Rights saying that his client has a right thereunder to seek an effective remedy at the first available opportunity, i.e., before this Court at the present s. 22 hearing. The Court has been asked to treat the question raised as to the correct interpretation of s.22(8) as a preliminary issue, and to give a ruling on it before proceeding to consider any other aspects of the matter.

The applicant's submissions

The applicant submits that s. 22(8) is focussed upon the offence rather the situation of the person affected. This, it was submitted, is logical in circumstances where the person is no longer within this jurisdiction having already been surrendered to the requesting state. Accordingly, the legislature was concerned to ensure where a request for consent to prosecute an additional offence has been received, that consent should only be given where the Court can be satisfied that none of the grounds for mandatory non-execution of a European arrest warrant under Article 3 of the Framework Decision would apply to the offence in question, and equally to the extent that Ireland has opted in to grounds for optional non-execution of a European arrest warrant under Article 4 of the Framework Decision, that none of those would apply to the offence in question. The grounds in question are all matters that, following transposition of the relevant provisions of the Framework Decision into Irish domestic law, are contained within Part 3 of the Act., e.g., s. 38 dealing with correspondence and minimum gravity requirements, s.39 dealing with offences in respect of which pardons or immunities have been granted, s. 41 dealing with offences already the subject of a final judgment in the issuing state, s. 43 dealing with age related legal capacity, and s.44 dealing with extraterritoriality.

However, not all of the provisions of Part 3 of the Act of 2003 relate to grounds for mandatory non-execution of a European arrest warrant under Article 3 of the Framework Decision, or optional non-execution of a European arrest warrant under Article 4 of the Framework Decision. It was urged to the extent that Part 3 contains provisions that are not offence specific it does not come within the requirements of s.22(8) and is of no relevance to an application for this Court's consent under s. 22(7).

It was further urged that the correctness of this interpretation is manifest from the terms of s. 37 of the Act of 2003 itself. Although contained within Part 3 of the Act of 2003 it is not offence specific. Rather, unlike the majority of the provisions within Part 3, its focus is on the person facing surrender and it is concerned with prohibiting surrender in specific circumstances in which a breach of that person's rights is apprehended, or where to surrender him would be incompatible with this State's obligations to that person either under the European Convention on Human Rights (including applicable protocols thereto) or would contravene that person's rights under the Irish Constitution.

S. 37 is in the following terms:

37.—(1) A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38 (1)(b) applies),

(c) there are reasonable grounds for believing that—

(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—

(I) is not his or her sex, race, religion, nationality or ethnic origin,

(II) does not hold the same political opinions as him or her,

(III) speaks a different language than he or she does, or

(IV) does not have the same sexual orientation as he or she does,

or

(iii) were the person to be surrendered to the issuing state—

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment.

(2) In this section—

“Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994; and

“Protocols to the Convention” means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:

(a) the Protocol to the Convention done at Paris on the 20th day of March, 1952;

(b) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of September, 1963;

(c) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;

(d) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984.”

It was urged that the meaning of s. 22(8) is completely clear, there is no ambiguity or absurdity in the wording and in the circumstances the Court is obliged to adopt and apply the literal meaning of the provision.

Submissions on behalf of the respondent

It was submitted to the Court by counsel for the respondent that s. 22(8), correctly interpreted, allows a person who would potentially be adversely affected by a consent granted pursuant to s.22(7) of the Act of 2003 to raise any ground of objection provided for within Part 3 of that Act for the purpose of resisting the granting of such consent. S.22(8) specifically refers to Part 3 issues and one of the most important provisions in Part 3 is s.37 which concerns fundamental rights.

It was further urged that the Court has to proceed as though the person concerned was in fact before the Court facing possible surrender for the offences in question and be prepared to entertain and have regard to any Part 3 issue that might avail the person in that situation.

It was further submitted that if the respondent was before this Court today for the purposes of surrender a case could, and would, be made on his behalf that his surrender should be regarded by the Court as being prohibited under s.37 of the Act of 2003.

In counsel's submission the only tenable interpretation of s. 22(8), having regard in particular to the values espoused in recital no. 12 to the Framework Decision, is that human rights issues must be capable of being ventilated at an s.22(7) consent hearing. He submitted that it could never have been envisaged by the legislature that the High Court could give consent to a further prosecution in circumstances where it could lead to a breach of Article 13 of the European Convention on Human Rights. It was contended that if fundamental rights concerns are capable of being ventilated at a s. 15 or s.16 surrender hearing then *mutatis mutandis* they must be capable of being ventilated at an s.22(7) consent hearing.

Recital 12 to the Framework Decision is in the following terms:

“This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.”

Counsel for the respondent has further submitted that Article 13 of the European Convention on Human Rights entitles a person to an effective remedy and that is an effective remedy before the first court where an issue is ventilated. It was further contended that this court is the first court in which the respondent seeks to ventilate the concerns that he has concerning a possible breach of his fundamental rights in the issuing state in the event that he has to face prosecution there for the offences to which the present request relates. It was submitted that in the circumstances this Court not only has jurisdiction, but is indeed obliged to take account of the fundamental rights issues that the respondent seeks to raise.

The Court's Decision

In circumstances where the Framework Decision is not a directly effective instrument, and where the Act of 2003 no longer provides for direct regard to be had to the Framework Decision and its recitals in the present particular context *i.e.*, in considering a request for consent to further prosecution under s. 22(7) of the said Act, this court must determine the extent of its jurisdiction and obligations in this matter solely by reference to the terms of s.22(7) and (8), respectively, of the Act of 2003.

In this Court's view the interpretation of s. 22(8) of the Act of 2003 contended for by counsel for the applicant is the correct interpretation, applying s.5 of the Interpretation Act 2005, the well established canons of statutory interpretation and the jurisprudence of the superior courts in the matter of statutory interpretation.

S.5 of the Interpretation Act, 2005 provides:

"5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

In this case the wording of the provision in question is quite clear and unambiguous. Moreover, the Court does not agree with the suggestion made by counsel for the respondent that it can be said to reflect the plain intention of the Oireachtas.

It will be recalled that it was suggested that it could never have been envisaged by the legislature (the Oireachtas) that the High Court could give consent to a further prosecution in circumstances where to do so could lead to a breach of Article 13 of the European Convention on Human Rights, and that therefore it must be assumed that the Oireachtas intended that fundamental rights concerns could be ventilated before this Court at a s. 22(7) hearing. The Court fundamentally disagrees that speculation of that variety, which fails to acknowledge or take account of very many potentially relevant considerations, can be characterised as reflecting the "plain intention of the Oireachtas."

The intention of the Oireachtas is not something to be speculated upon. It is to be discerned where possible from a consideration of the Act as a whole, and with due regard to the context in which the provision in question is to be found within the scheme of the Act. The starting point is the long title to the Act which in this case is expressed to be:

"AN ACT TO GIVE EFFECT TO COUNCIL FRAMEWORK DECISION OF 13 JUNE 2002 ON THE EUROPEAN ARREST WARRANT AND THE SURRENDER PROCEDURES BETWEEN MEMBER STATES; TO AMEND THE EXTRADITION ACT 1965 AND CERTAIN OTHER ENACTMENTS; AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH."

One of the principal purposes of the Act is therefore to transpose for the purposes of Irish domestic law the relevant provisions of the Framework Decision. It must in the circumstances be given a conforming interpretation in accordance with the case of *Pupino (Case C- 105/03)*, [2005] E.C.R. I-5285, where that is possible and without stretching any existing language so as to result in a *contra legem* interpretation.

The Court in fact finds itself in agreement with counsel for the applicant who submitted that her interpretation of s.22(8) is entirely consistent with the terms of Article 27(4) of the Framework Decision. Article 27(4) refers specifically to Article 3 and 4, respectively, of the Framework Decision which are, as counsel for the applicant has correctly stated, concerned with mandatory grounds for non execution and optional grounds for non execution. Neither of those provisions is concerned with fundamental rights.

It is certainly true that recital 12 to the Framework Decision emphasises that it respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. However, confining the grounds for possibly refusing a request for further prosecution to an objection to the mandatory grounds for non execution and the optional grounds for non execution contemplated in Articles 3 and 4 of the Framework Decision is not to disrespect fundamental rights or to fail to observe the principles recognised by Article 6 TEU. It is entirely reasonable that the Framework Decision should contemplate that fundamental rights guaranteed under the ECHR and, indeed, under the Charter of Fundamental Rights of the European Union, to a person in the position of the respondent, *i.e.*, a person who has already been surrendered and is no longer in the territory of the executing state, are enforceable rights to be invoked before the courts of the issuing state. The issuing state is a signatory to, and has ratified, the ECHR, and as a member of the EU is of course also bound to recognise and apply the Charter. This is not a situation in which there are no remedies available to a person in the position of the respondent in the place where he now is. Moreover, in this Court's belief, it is his entitlement under Article 13 ECHR, but also his obligation, to seek an effective remedy in respect of those concerning his fundamental rights of which he complains before the courts of the issuing state, rather than before this Court which is much less well equipped to adjudicate upon whether there is substance or otherwise to what he contends may happen to him.

It is an entirely different situation where the person concerned is still present in the executing state awaiting surrender. Insofar as persons facing possible surrender by this state are concerned, our domestic legislation has gone beyond what is expressly required by the Framework Decision and has provided in s. 37 of the Act of 2003 for an objection to *surrender* (the word "surrender" requires emphasis) on either Convention or constitutional grounds. Moreover, it is certainly the case that the courts in this and other jurisdictions have exhibited a readiness to intervene, and in an appropriate case to refuse surrender on fundamental rights grounds, where there is a legally justifiable basis for doing so. In our case that basis is provided by s. 37 of the Act of 2003. However, even where our courts might potentially be entitled to intervene and refuse surrender they will not necessarily do so if the remedy being sought ought to be more appropriately pursued before the courts of the issuing state. A good example of this from our own jurisdiction is *Minister for Justice Equality and Law Reform v Stapleton* [2008] 1 I.R. 699.

I do not therefore consider that there is any basis for believing that a literal interpretation of s.22(8) of the Act of 2008 would fail to reflect the intention of the Oireachtas. I am satisfied that the literal meaning of the provision is clear and unambiguous and that there are no grounds for believing that the Oireachtas intended other than that it should mean what it says.

In the circumstances I determine this preliminary issue in favour of the applicant.