Neutral Citation: [2015] IEHC 806

THE HIGH COURT

[2013 No. 144 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MÁRIO TULIS

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 16th day of December, 2015.

1. Pursuant to a European arrest warrant ("EAW") dated 6th May, 2013, the Slovak Republic seeks the surrender of the respondent to serve an eighteen month sentence imposed upon him in respect of an offence of burglary. The only contentious issue in this case is whether his surrender is prohibited under s. 45 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").

Section 45 of the Act of 2003

2. For the purpose of providing context to this judgment, it is necessary to set out in some detail the information provided in the EAW and the additional documentation. Point (d) of the EAW indicates that the respondent had not been present at the *hearing* which led to the decision rendered (emphasis added). "Hearing" is the word used in the translated version of the EAW before the Court. "Trial" is the word used in the English version of the Framework Decision. (2009/299/JHA) of 26th February, 2009 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"). However, a comparison reveals that the Slovakian version of the relevant part of point (d) of the EAW accords with the wording in the Slovakian version of the 2009 Framework Decision.

3. The EAW indicates reliance by the issuing judicial authority upon point (d) 3.2 in order to justify the recognition and execution of the decision which was rendered following the hearing in the absence of the respondent. The EAW shows that a box has been ticked at point (d) 3.2, which in the English translation recites: "The person concerned, conscious of the planned hearing, has authorised a legal representative, who has been either appointed by the person concerned or assigned by the state, to defend him at the hearing, and the legal representative has defended him at the hearing." Again, however, comparison with the Slovak version of the 2009 Framework Decision reveals that the Slovak version of the EAW contains the same language.

4. The information provided under point (d) 4, the EAW recites:

> "Since the Court has decided that the criminal matter will be proceeded in the proceedings against the escaped, the Court appointed a defence lawyer for the accused by the court provision dated 12.09.2008, ref. 2T/92/2005, who was present at the hearing which led to the decision rendered, the decision has been properly delivered to him and after the decision has been announced he has waived his right to file an appeal."

5. In his affidavit grounding his points of objection, the respondent stated that he recalled being arrested and questioned by police in respect of the alleged offence on 18th June, 2005. He stated that he never had any access to a lawyer and was never in court. He further stated that he was released by the police but sometime later, he said he received a letter stating that he had received a one year sentence and he exhibited that letter to this Court.

6. The respondent stated that he utilised the available process of appeal where he could apply by post to appeal the sentence. He said he did not receive any reply to the request for the appeal and was never made aware of any appeal hearing. He emphatically stated that he was not aware of the proceedings and was not present in court and did not waive his subsequent right to appeal as he was not aware of the final decision. He then outlined how he came to Ireland in search of work in September 2006. He set out his family circumstances.

7. Having received the affidavit of the respondent, the central authority requested comments from the issuing judicial authority on the variations in detail between the EAW and the respondent's affidavit. The central authority also sought an explanation of the document that the respondent had exhibited and confirmation as to whether efforts were made by him to appeal by post.

8. A reply was received from the issuing judicial authority on 10th June, 2015. The issuing judicial authority stated that the proceedings had been carried out against the accused due to his absence as a fugitive person who had been evading criminal proceedings by staying abroad. Somewhat confusingly, the information initially appeared to suggest that the proceedings were held in the absence of a solicitor but in the second paragraph, it was stated that he was represented by a solicitor. Not surprisingly, the central authority sought further clarification in respect of this matter. Clarification was also sought as to how the issuing judicial authority was relying on point (d) 3.2. The central authority asked "[f]or example, is there any record of the authorisation of the lawyer by the respondent or is the [sic] case that the lawyer was appointed by the court without the input of the respondent because he could not be located."

9. The issuing judicial authority replied on 16th July, 2015, confirming that the district prosecutor had issued an accusation against the accused. Based on that accusation, the judge had issued a criminal order finding the accused guilty and sentencing him to one year imprisonment. On 12th January, 2006, the respondent filed an appeal against that court order. At the time he filed the appeal, he was serving a prison sentence. The issuing judicial authority then stated:

> "[d]ue to the fact that the accused Mário Tulis appealed a court ruling, the Court proceeded to determine the date of hearing being 31/03/2006 and requested the accused to choose a defence lawyer as his case called for having a mandatory defence lawyer acting in his stead (the accused at that time had been serving his custodial sentence in another criminal case) and at the same time was legally cautioned regarding the fact that should he fail to choose his

> defence lawyer, one shall be appointed to him by court, following the pertinent legal provisions. Since accused Mário Tulis was released on 03/05/2006 from serving his custodial sentence by another ruling, his entitlement to a mandatory defence lawyer became extinct. Therefore, the Court proceeded to hear the case with no existing legal grounds for mandatory defence and thus without a defence lawyer. On this day, 02/06/2006, Court heard the accused Mário Tulis with respect to the offence with which he had been formally charged…"

10. It appears that the court heard both the respondent and the co-accused at that hearing on 2nd June, 2006. The co-accused implicated the respondent in his testimony. The court then scheduled a further hearing to take place on 13th September, 2006 in order to hear three witnesses whose testimony was required. The accused did not appear at that hearing and did not provide any justification for that failure. The court proceeded to schedule another date for hearing. As he again failed to appear "without even receiving the delivered mail whereby he had been summonsed thereto", consequently the main hearing was scheduled for 14th February, 2007. The police, at the request of the court, sought to find the respondent. He could not be found and, in accordance with Slovakian national law, the respondent was criminally processed as a fugitive person. The issuing judicial authority states:

> "For this process the Court appointed on the 12/09/2008 a defence attorney who represented the accused throughout the whole process in court. Once lapsed the legal periods of the proceedings against a fugitive person, Court proceeded to determine a date of hearing for 10/12/2008 (if the Court is to issue resolution in the process against a fugitive person, such resolution must be announced on the court's legal noticeboard as well as on the internet and all possible means must be employed to notify of the hearing's date – all this has been followed)."

11. The information then states that the court held a hearing on 7th January, 2009 in the presence of the named appointed attorney and took all the evidence. The respondent was given a cumulative eighteen months prison sentence. The information then detailed the further attempts to make him serve this sentence.

Submissions
12. Counsel on behalf of the minister submitted that point (d) 3.2 and point (d) 4 had been duly completed by the issuing judicial authority. The minister expressly relied upon that designation. Counsel submitted that, from the information provided to this Court, it is established that the respondent was aware of the scheduled trial, was aware that if he did not turn up at a date that he would be represented by a lawyer and was so represented by a lawyer. In those circumstances, all the requirements of point (d) 3.2 of the Table in s. 45 of the Act of 2003 are met.

13. On behalf of the respondent, counsel submitted that there was no mandate given to the lawyer. Counsel pointed out that the lawyer first represented him two years after the day upon which he first turned up for the hearing. Counsel submitted that in the circumstances set out in the information, no mandate had in fact been given.

The Court's analysis and determination on the Section 45 issue
14. In *Minister for Justice and Equality v. Palonka* [2015] IECA 69, Peart J. at para [37] approved the *dicta* of the High Court (Edwards J.) in *Minister for Justice and Equality v. Surma* [2013] IEHC 618 as follows:

> *"…it could not be the case that all competence on the part of an executing judicial authority is ousted by a purported certification in the manner provided for, because point 4 of point (d) requires the provision of amplifying information to support a bald certification in any of the alternative scenarios contemplated under points 3.1b, 3.2 or 3.3 of point (d)."*

15. Peart J. also held that the High Court (Edwards J.) had been correct to state that:

> *"The scheme clearly contemplates that the executing judicial authority must have some entitlement to review the assessment of the issuing judicial authority in those scenarios, otherwise there is no logical reason why amplifying information would be required to be provided at point 4."*

16. Peart J. also observed that when the EAW includes the detail as to the basis for its certification under point (d) 4, a person facing surrender has the opportunity to focus concentration on the facts and perhaps raise some issue.

17. Therefore, the Court is entitled to assess the information provided to it as required in point (d) 4 and make a determination as to whether the certification may properly be relied upon. In accordance with the decision in Palonka, there is no onus upon a respondent to raise, by cogent evidence, an objection or contradiction in relation to the issuing judicial authority certification before the executing judicial authority need concern itself with the failure by the issuing judicial authority to complete the warrant at point (d) 4. The obligation on the executing judicial authority exists regardless of any particular challenge by a respondent.

18. Information in this case has been provided by the issuing judicial authority to support their designation. Ultimately, the issue for this Court, as executing judicial authority, is whether the designation by the issuing judicial authority under point (d) 3.2 is appropriately relied upon. In assessing any designation or statement by an issuing judicial authority in an EAW, this Court must bear in mind the principles of mutual trust and mutual confidence that these courts have in the institutions, particularly the judicial institutions, of another Member State of the European Union.

19. In the present case, I accept the history of events leading to the conviction and appeal presented by the issuing judicial authority. The respondent has been, at the very least, inaccurate as to the chain of events which occurred in Slovakia. I find it more likely than not that he has been deliberately evasive about the extent of his dealings with the Slovakian authorities. He did not aver to the fact that he had appeared in court in relation to the appeal which he himself had originated. That is not a factor a person is likely to forget, particularly where this was the first time he had appeared in any court in relation to the offence. It is noteworthy that he did not swear a replying affidavit to the information sent by the issuing judicial authority dated 16th July, 2015 but only received in a readable condition in October 2015.

20. Furthermore, I note from the information provided by the issuing judicial authority, the respondent's recently appointed lawyer in Slovakia sought and received a copy of his file after his arrest. It appears that this file was received after he swore his affidavit. That file, or the information contained therein, must have been transmitted to the respondent, yet no correction of his clearly wrong averments was made. That file will have shown the true position as indicated to this Court by the issuing judicial authority. In other circumstances, an issue might arise about the extent of the duty to correct any obvious errors in an affidavit that subsequently come to light. I do note, however, that, in this case, counsel only relied upon the argument that the information provided by the issuing judicial authority showed that he had not given a mandate to a lawyer.

21. Having held that the respondent may have told untruths, it is necessary to acknowledge that this does not affect the duty of the

High Court to carry out its functions under the Act of 2003 and to determine if the criteria for surrender have been properly met. Therefore, the Court has to assess the designation of the issuing judicial authority for the purpose of establishing whether the surrender is prohibited under the provisions of s. 16, having considered the terms of s. 45 of the Act of 2003.

22. Where reliance is placed upon a certification under point (d) 3.2 in an EAW, three requirements must be met before it is appropriate to surrender the requested person. The first is that the person was aware of the scheduled trial, the second is that he or she had given a mandate to a legal representative, and the third is that the legal representative had actually defended him or her at the hearing.

23. For the reasons set out in the case of *Minister for Justice and Equality v. Fiszer* [2015] IEHC 664, the knowledge of the scheduled trial is to be contrasted with the knowledge of the date and place of the trial referred to in 3.1a and 3.1b of point (d). In this case, I have no hesitation in holding that the respondent was aware of his scheduled trial. He had appeared in the initial stages of the proceedings against him and then failed to appear "notwithstanding the fact that he had acknowledged the date at the previous hearing". I conclude that the nature of the proceedings were such that he was aware that a trial was scheduled.

24. After his failure to appear, the Slovakian authorities made every effort to seek out the respondent and, if necessary, bring him by warrant to court. It is unsurprising that they could not find him as he had left the jurisdiction by that stage. The Slovakian court ultimately declared him to be a fugitive person. A defence attorney was then appointed by the court to represent the respondent and this defence attorney represented him throughout the "whole process in court". The hearing was held in the presence of the named attorney and the respondent was duly convicted.

25. In the case of *Fiszer*, I identified the importance of the recitals in the 2009 Framework Decision when interpreting aspects of s. 45 of the Act of 2003. The phrase contained in point (d) 3.2 in the Table in s. 45 and in the 2009 Framework Decision is directly referenced in the tenth recital. The recital is as follows: "The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused where the person concerned, being aware of the scheduled trial, was defended at the trial by a legal counsellor to whom he or she had given a mandate to do so, ensuring that legal assistance is practical and effective. In this context, it should not matter whether the legal counsellor was chosen, appointed and paid by the person concerned, or whether this legal counsellor was appointed and paid by the State, it being understood that the person concerned should deliberately have chosen to be represented by a legal counsellor instead of appearing in person at the trial. The appointment of the legal counsellor and related issues are a matter of national law."

26. Both parties relied on the phrase "deliberately chosen" to advance their cause. Counsel for the respondent submitted that there was no element of deliberately choosing to be represented by a lawyer here as there was no communication at all with the lawyer. Counsel for the minister submitted the fact that the respondent was told at the earlier stage when in custody, that there would be a mandatory counsel appointed for him should he fail to choose a defence lawyer, demonstrated his awareness that a defence lawyer would be appointed. Therefore, counsel submitted, this was a deliberate decision to be represented by that lawyer in the absence of turning up at the hearing in person.

27. The 2009 Framework Decision had as an objective the enhancement of "the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States." As Edwards J. said at para. 115 in *Minister for Justice and Equality v. Surma* [2013] IEHC 618: *"the effect of these provisions is to reflect an inter-state agreement on the part of those member states who have opted in to the arrangement, that where a judicial authority in the executing state is asked to surrender a person on foot of a European arrest warrant, who has been tried in absentia in the issuing state, the executing judicial authority will not as a matter of procedure surrender that person unless it has certain information, and/or certain undertakings have been given".*

28. The 2009 Framework Decision was aimed, in part to bring consistency to the issue of decisions rendered following a trial within various Framework Decisions implementing the principle of mutual recognition of final judicial decisions. The lack of consistency could complicate the work of both the practitioners and hamper judicial co-operation. Recital four stated "[i]t is therefore necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person."

29. Having delivered the judgment in *Fiszer*, I invited both parties to make any further submissions they saw fit in light of that decision. Counsel for the respondent sought to distinguish the present situation from that in *Fiszer*. It is correct to highlight the clear distinction between the facts herein and the facts in *Fiszer*. *Fiszer* seeks to place point (d) 3.2 to the Table in s. 45 of the Act of 2003, as amended, in its correct context within the 2009 Framework Decision. It addressed what is meant by "scheduled trial." In circumstances where Mr. Fiszer had clearly been represented by a lawyer when he was present in the course of the proceedings, there was no necessity to examine in depth the meaning of the term "mandate to a legal counsellor".

30. The phrase "mandate to a legal counsellor" can be readily understood as a commission by which a party entrusts to a lawyer the performance of a service. The lawyer to whom the commission is entrusted may be chosen by the person or indeed assigned by the court. While the appointment of the lawyer by the State, as referred to in point (d) 3.2, could refer to a situation where an indigent accused opts for legal representation and the State appoints a lawyer under legal aid, it is not necessarily confined to such legal aid appointments. Indeed, nothing in s. 45, or in the 2009 Framework Decision, indicates that such a restriction was intended. It is a broad provision and in my view it includes, for example, the situation where the State provides for mandatory lawyers in certain cases such as may occur when a person does not appear at the trial.

31. When the appointment of a lawyer by the State is understood in that broad sense, it raises the possibility that a person can give a mandate to such a State appointed lawyer. If a person, with knowledge of a scheduled trial and of the fact that there will be a mandatory appointment of a lawyer, chooses to absent his or herself from the trial, he or she has deliberatively chosen to be represented by that State appointed lawyer. The important matter is that the mandate is only given where the absence from the trial by the accused is with knowledge of both the scheduled trial and of the resultant appointment of a lawyer to represent him should he fail to attend. It is that complete knowledge and chosen absence from trial that amounts to a deliberate choice to be represented by a lawyer at that trial.

32. However, the appointment of a lawyer to represent a person who does not appear at trial is insufficient *on its own* to comply with the conditions set out in the 2009 Framework Decision for an acceptable trial in absentia. Given that the phrase "deliberately chosen" is used in the recital to the 2009 Framework Decision, knowledge that a mandatory lawyer will be appointed is required before a person who flees could be said to have deliberately chosen a lawyer, and thereby given a mandate, within the terms of 3.2 of point (d) of the Table set out in s. 45 of the Act of 2003, as amended. There must be a deliberate choice to be represented by a lawyer. Such a choice can only take place when there is knowledge that such a lawyer will be appointed.

33. In this case, the issuing judicial authority, in explaining the background to the provision of the lawyer as required under the 2009 Framework Decision, have made, what appears to this Court to be, a deliberate distinction between the provision of a mandatory defence lawyer to a person who is in custody and the provision of a defence lawyer to a person who is out of custody. In the passage from the response of the issuing judicial authority relied upon by the minister, the provision of the mandatory lawyer is explained by reference to the fact that "the accused at that time had been serving his custodial sentence in another criminal case". At the later point in the same response, when referring to the appointment of the defence lawyer to represent the respondent, there was no reference to this being a mandatory consequence of his failure to appear. Furthermore, there was no reference to whether he was told at the point he acknowledged the next day of the hearing that should he fail to appear, a lawyer would be appointed in his stead. This is in direct contrast to the information the respondent was given by virtue of being in custody that the court would appoint a lawyer should he fail to so appear at the trial.

34. There is simply no evidence of knowledge on the part of the respondent that a mandatory appointment of a lawyer could take place. Indeed, the evidence from the issuing judicial authority points to the contrary conclusion. The reference to the mandatory lawyer was immediately followed by a sub-clause explaining the particular circumstances in his case which called for the mandatory appointment of a defence attorney, namely that he was in custody on another matter. The only reasonable conclusion open to the Court on the evidence before it, is that the mandatory defence lawyer provisions in operation in Slovakia, applied to the respondent as a person who is being held in custody. There is no other reference to the respondent being expressly told that a mandatory lawyer would be provided in his absence from the scheduled trial. There is also no reference to any circumstances which might suggest that he had general knowledge or should have had general knowledge that such a mandatory lawyer would be appointed. Indeed, it is not clear if the decision of the court to appoint the lawyer was mandated by law or was a discretionary power. In those circumstances, I am not satisfied that the respondent knew that a mandatory lawyer would be appointed.

Not truly a trial in absentia?
35. In *Fiszer*, the minister contended that, despite the designation by the issuing judicial authority that the respondent had not appeared at his trial, the court was entitled to go behind that designation to see if the primary focus of s. 45 was satisfied, i.e. appearance in person at the proceedings which determined guilt or innocence and which resulted in the sentence order the subject matter of the EAW. In this case, despite the invitation to make further submissions in the light of *Fiszer*, the minister did not seek to go behind the designation of non-appearance in person and trial in point (d) 2 and reliance upon point (d) 3.2. That is understandable as the facts in *Fiszer* can be viewed differently.

36. In *Fiszer*, there had been an express reference in the additional information to the appearance of the respondent "for the trial". In the present case, while there is a reference to his presence at "the hearing" in the additional information, the designation in point (d) quite clearly pointed to him not being present at proceedings which could constitute a trial. This is because point (d) 4 expressly refers to the court appointing a defence lawyer "who was present at the hearing which led to the decision rendered." The clear inference is that it was only the defence lawyer who was present at such a hearing and not the respondent.

37. The Court acknowledges its duty to inquire into whether the conditions of the Act of 2003 have been satisfied. In the circumstances of this particular case, including, the reference in the EAW to the respondent's lawyer being present "at the hearing which led to the decision rendered" implying the respondent was not present at such a hearing, where there is express reliance on para. (d) 3.2 and where no arguments have been made in the case to the effect that the Court should disregard the designation of the issuing judicial authority, the Court concludes that it would be wrong to disregard the designation of the issuing judicial authority to the effect that this was a trial in absentia. The Court is also mindful that the High Court has already held with respect to a designation that an offence comes within the list of offences set out at Article 2, para. 2 of the 2002 Framework Decision, that it is only where there is a "gross and manifest error" that the court may disregard the designation (*Minister for Justice and Equality v. Ciupe* (unreported, High Court, Edwards J., 13th September, 2013)). The issue of whether the High Court, as executing judicial authority, is entitled to look behind the designation of the issuing judicial authority that the respondent was not present at his or her trial and if so, the conditions under which such review might take occur, remain to be decided in another case.

Conclusion
38. The Court, in the exercise of its duty to review the designation in light of the information provided at point (d) 4, finds that the conditions laid down for permissible surrender for trial in absentia have not been satisfied. In those circumstances, the surrender of the respondent is prohibited under s. 45 and s. 16 of the Act of 2003, as amended.

Other Section 16 Issues
39. For the sake of completeness, I will also deal with the remaining requirements of s. 16 of the Act of 2003, as amended. Having considered all the papers before me, I am quite satisfied that the person who appears before me is the person in respect of whom the EAW has issued. I am also satisfied that the EAW has been endorsed in accordance with s. 13 for execution in this jurisdiction. I am not required under ss. 21A, 22, 23 or 24 of the Act of 2003 to refuse his surrender. I am satisfied that the offence for which he is sought to serve a sentence corresponds with the offence of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and that minimum gravity requirements have been met. Apart from s. 45, his surrender is not prohibited by any other section contained in Part 3 of the Act of 2003, as amended.

Conclusion
40. For the reasons set out above, I must refuse his surrender under s. 45 of the Act of 2003, as although the EAW sets out the matters indicated in the Table to s. 45, on an assessment thereof, the conditions set out in the Table have not in fact been truly met in the issuing state.