

THE HIGH COURT

RECORD NUMBER 2019/42 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ZORKA ROGIĆ

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 14th day of December, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Croatia ("Croatia") pursuant to a European arrest warrant dated 14th November, 2017 ("the EAW") issued by Judge Tatjana Čargonja, of the Municipal Court in Rijeka, Croatia, as the issuing judicial authority. The EAW seeks the surrender of the respondent to face prosecution in respect of two offences of unlawful possession of narcotics and unlawful possession of ammunition, respectively.
2. The EAW was endorsed on 11th February, 2019 and the respondent was arrested and brought before this Court on 11th April, 2019. The respondent was originally granted bail but failed to appear at the hearing date for the surrender application and remained at large until arrested and brought before the High Court again on 30th January, 2020. She was remanded in custody and then re-admitted to bail on 31st July, 2020 due to the length of time spent in custody as a result of the protracted nature of the disputed proceedings.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. This was not put in issue by the respondent.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), are met. The offences in respect of which surrender is sought carry a maximum penalty of 12 years' imprisonment in respect of the narcotics offence and 3 years' imprisonment in respect of the ammunition offence.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
6. An issue was taken in respect of correspondence between the offences referred to in the EAW and offences under Irish law.
7. Points of objection were delivered which can be summarised as follows:-
 - (i) surrender is precluded under s. 38 of the Act of 2003 as correspondence cannot be established between the offences in the EAW and offences under the law of the State;

- (ii) surrender is precluded under ss. 10 and 21A of the Act of 2003 as it was unclear that a decision had been made in the issuing state to charge and try the respondent; and
 - (iii) surrender is precluded as the particulars set out in the EAW were insufficient to meet the requirements of s. 11 of the Act of 2003.
8. Subsequently, the respondent delivered a supplemental notice of objection dated 9th March, 2020 to the effect that:-
- (iv) surrender is precluded under s. 37 of the Act of 2003 as it would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR"), in particular:-
 - (a) due to the conditions in which the respondent is likely to be detained in the issuing state and/or that she would be exposed to threats or violence; and
 - (b) as state actors had influenced the investigation and/or the prosecution of the respondent.
9. Prior to the arrest of the respondent, additional information was requested from the issuing judicial authority and replied to by letter dated 14th November, 2018, setting out the maximum penalties for each of the offences, giving the location for the offences and explaining that the narcotics offence consisted of two separate acts, essentially of possessing and selling. By letter dated 5th February, 2019, the issuing state confirmed that the respondent was not registered in respect of any weapon.
10. By further letter dated 8th March, 2019, the issuing judicial authority confirmed that on the relevant date, the police had seized from the respondent one 7.65mm bullet found in the search of her bedroom, but stated that it had no detailed description of the ammunition or its characteristics.
11. The respondent swore an affidavit dated 29th April, 2019 for the purposes of a bail application.
12. By letter dated 20th February, 2020, the solicitor for the respondent queried whether the EAW had been issued by a competent court in Croatia according to Croatian law. Following a request for additional information in this regard, the issuing judicial authority, by letters dated 28th February, 2020 and 13th March, 2020, confirmed that the issuing court was competent to issue the EAW.

Issuing Judicial Authority

13. I am satisfied that the EAW was issued by a competent issuing judicial authority. This has been confirmed by the issuing state and was not seriously challenged at the hearing of this matter.

Correspondence

14. Section 38 of the Act of 2003 provides as follows:-

"(1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State, and—

- (i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or*
- (ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment,*

or

(b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years.

(2) The surrender of a person to an issuing state under this Act shall not be refused on the ground that, in relation to a revenue offence—

(a) no tax or duty of the kind to which the offence relates is imposed in the State,

or

(b) the rules relating to taxes, duties, customs or exchange control that apply in the issuing state differ in nature from the rules that apply in the State to taxes, duties, customs or exchange control.

(3) In this section 'revenue offence' means, in relation to an issuing state, an offence in connection with taxes, duties, customs or exchange control."

In effect, s. 38(1)(a) of the Act of 2003 precludes surrender in respect of an offence unless the acts stated to constitute that offence would also constitute an offence in this State and carry a maximum penalty in the issuing state of at least 12 months' imprisonment, or a sentence of at least 4 months' imprisonment has been imposed by the issuing state in respect of the offence. However, s. 38(1)(b) provides an alternative procedure whereby it is not necessary for the applicant to establish the requirements of s. 38(1)(a) where the offence is an offence to which article 2(2) of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States ("the Framework Decision") applies and which carries a maximum penalty of at least 3 years' imprisonment under the law of the issuing state.

15. The issuing state has not indicated a reliance upon article 2(2) of the Framework Decision in respect of either offence referred to in the EAW, and therefore the Court must be

satisfied that each of those offences corresponds with an offence under the law of the State before surrender in respect of such offence in the EAW can be ordered.

16. At part E of the EAW, a description of the offences is given as follows:-

- "1. on 23 September 2014 in Viškovo, in her flat, she sold to [MP] 4.69 grams of heroin, of the value of HRK 2 000.00, and on 24 September 2014, in her flat in Viškovo, she kept 42.88 grams of heroin, a narcotic which is listed on the List of narcotic drugs, psychotropic substances and plants from which drugs can be obtained and substances which can be used for the production of narcotic substances.
2. in the period between 23 and 24 September 2014, in Viškovo, in her flat, she held 7.65 mm ammunition."

17. Section 5 of the Act of 2003, which deals with correspondence, provides:-

"For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence under the law of the issuing state would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

18. In *Minister for Justice, Equality & Law Reform v Dolny* [2009] IESC 48, Denham J., as she then was, stated at para. 38, of her judgment:-

"In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction."

19. As regards offence 1. in the EAW, I am satisfied that correspondence exists with offences under the law of the State, viz. offences contrary to ss. 3 and 15 of the Misuse of Drugs Act, 1977, as amended. This was not seriously put in issue.

20. As regards offence 2. in the EAW, by way of correspondence, the applicant proposed s. 2(1) of the Firearms Act, 1925, as amended ("the Act of 1925"), which provides as follows:-

"Subject to the exceptions from this section hereinafter mentioned, it shall not be lawful for any person after the commencement of this Act to have in his possession,

use, or carry any firearm or ammunition save in so far as such possession, use, or carriage is authorised by a firearm certificate granted under this Act and for the time being in force."

Ammunition is defined in s. 1(1) of the Act of 1925 as follows:-

"In this Act—

'ammunition' (except where used in relation to a prohibited weapon) means ammunition for a firearm and includes —

- (a) grenades, bombs and other similar missiles, whether or not capable of being used with a firearm,*
- (b) any ingredient or component part of any such ammunition or missile, and*
- (c) restricted ammunition, unless the context otherwise requires."*

21. Counsel on behalf of the respondent submitted that in the absence of a ballistics analysis or a more detailed description of the ammunition or its characteristics, the Court could not be satisfied as to correspondence with s. 2 of the Act of 1925.
22. In *Minister for Justice and Equality v. AW* [2019] IEHC 251, the surrender of the respondent was sought in respect of an offence of conspiracy to possess a firearm and ammunition. It was argued on behalf of AW that information as to the nature of the firearms and the nature of the ammunition was required before the court could hold that there was correspondence. The issuing state had described the ammunition by setting out the calibre and make of same in the following terms, as Donnelly J. outlined at para. 25 of her judgment:-

"25. (iii) 65x 2.2 long rifle calibre cartridges, 64 of Winchester brand and 1 of CCI brand. They had all been loaded with bullets designed to expand on impact,

(iv) 5 9x19mm Parabellum Winchester brand cartridges. One was dismantled and found to consist of a semi – jacketed hollow point bullet and propellant in a primed case. They are a projectile designed to expand on impact,

(v) 4x7.65 BR calibre cartridges with various head stamps,

(vi) A 0.32in unfired rimfire calibre cartridge and two fired 12 gauge calibre cartridge cases, one of Ely brand and the other of the Kent brand together with two unfired 12 gauge calibre shotgun cartridges."

In dealing with the respondent's objections as regards correspondence, Donnelly J. stated at paras. 41-44 of her judgment:-

"41. In the decision of Dyer, the Supreme Court held that the enquiry into correspondence of offences was concerned with the factual components of the offence specified in the warrant. Although that case concerned the provisions of the

Extradition Act 1965, the Supreme Court in the case of Minister for Justice, Equality and Law Reform v. Szall [2013] IESC 7 confirmed that the same principles applied to offences under the Act of 2003.

42. *The Supreme Court in Dyer also confirmed that:-*

'Normally words used in an extradition warrant will be given their ordinary meaning. This enables the courts to give effect, without resort to extrinsic evidence, to extradition requests where words such as 'steal' 'rob' and 'murder' are used. It is possible that such words have different meanings in the law of the requesting state, but, in the absence of anything suggesting that, the courts will examine correspondence by attributing to such words, when used in a warrant, the meaning that they would have in Irish law. In some cases however, the word used in the requesting jurisdiction may be unfamiliar to Irish law.'

43. *Despite the Court having sought further information with a view to assisting in establishing whether there was correspondence, it is appropriate for the Court to assess in the course of this judgment, whether such information was truly necessary. The Court has considered that the above dicta in Dyer, covers the situation in the present case. In Irish law words such as 'steal', 'rob' and 'murder' have particular legal meanings. They are also words in common usage and understanding. Words such as 'conspiracy', 'firearm' and 'ammunition' also have particular legal meanings in this jurisdiction. On the other hand, they are common words in everyday usage. For example, conspiracy when given its ordinary and natural meaning in the context in which it appears, namely in respect of a criminal allegation, means an agreement between two persons to carry out an act that is criminal. Firearm is commonly understood to be a lethal weapon which discharges ammunition which, by definition, may cause death.*

44. *Unlike in the Swacha case, where a particular description of the firearm had been used in the EAW which gave rise to concerns about whether it was a firearm within the meaning of Irish law, there is nothing to suggest in the present EAW to suggest meanings that are different to what is meant in Irish law. In the absence of the respondent providing any information that they have different meanings, this Court must accept that there is correspondence of offences based upon the ordinary and nature meaning of 'conspiracy', 'firearm' and 'ammunition'."*

23. Applying the reasoning in *Dolny*, *AW* and *Dyer*, I am satisfied that ammunition and bullets can be given their ordinary meaning of a projectile fired from a firearm. I am satisfied that the offence referred to in the EAW concerns the unlawful possession of ammunition and that the information from the issuing state alleges that the respondent possessed ammunition without having the requisite registration to render such possession lawful. I am satisfied that correspondence has been established with the offence under s. 2 of the Act of 1925 in this State. Moreover, I am satisfied that in so far as the offence in the issuing state and the offence in this State consist of a breach of the regulatory regime in place in each state for the regulation of possession of firearms and ammunition, such

regulatory regimes are sufficiently similar to allow correspondence to be established, as provided for by the Supreme Court in *Min for Justice v. Szall* [2013] IESC 7, [2013] 1 IR 470.

Decision to Charge and Try the Respondent

24. Section 21A of the Act of 2003 provides:-

"(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.

(2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

25. I am satisfied that a decision has been made in the issuing state to charge and try the respondent with the offences set out in the EAW. The respondent has failed to adduce any cogent evidence to displace the presumption contained in s. 21A(2) of the Act of 2003. The EAW states on its face that surrender is sought for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order. In fairness to counsel for the respondent, this was not seriously pursued at hearing.

Section 11 of the Act of 2003

26. I am satisfied that taking the EAW and additional information received as a whole, the issuing state has provided sufficient details so as to satisfy the requirements of s. 11 of the Act of 2003. In particular, sufficient details have been provided as to the offences alleged against the respondent, including the date and place of same and the degree of involvement of the respondent.

Prison Conditions in Croatia

27. It was submitted on behalf of the respondent that surrender was precluded under s. 37 of the Act of 2003 as it would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR"), in particular article 3 thereof, due to the conditions in which the respondent was likely to be detained in the issuing state and/or that she would be exposed to threats or violence. The objection as regards state actors having influenced the investigation or prosecution of the respondent was not followed up.

28. As regards the likely conditions which the respondent would face if detained in the issuing state, the respondent's solicitor, Ms. Kate McGhee, swore an affidavit dated 13th May, 2020 in which she averred that she had been instructed that the respondent had spent two months on remand in prison in Rijeka, and set out various criticisms the respondent had of the said prison conditions. The respondent also relied upon an affidavit of a Croatian lawyer, Lidija Horvat, dated 19th March, 2020, exhibiting her opinion dated the

same date. The opinion set out Ms. Horvat's views as to the conditions the respondent was likely to be held in if detained as well as judgments of the European Court of Human Rights in which Croatia had been found to be in violation of article 3 ECHR as a result of prison conditions, and ultimately expressed the opinion that there was a risk that the respondent would be subjected to inhuman and degrading treatment if surrendered.

29. The Court sought additional information from the issuing judicial authority as to the conditions in which the respondent would be held if detained following surrender. By reply dated 2nd June, 2020, the issuing judicial authority indicated that if held in pre-trial detention, the respondent would be detained in prison in Rijeka, and set out the relevant provisions of Croatian Law regulating conditions in pre-trial detention. The Court sought further and more detailed information concerning the actual conditions in which the respondent would be held if detained following surrender, as regards pre-trial and post-trial detention. The affidavit of Ms. McGhee and the opinion of Ms. Horvat were enclosed with the request for additional information.
30. In additional information dated 2nd July, 2020, the Ministry of Justice set out in considerable detail the conditions in which the respondent would be held in Rijeka Prison while in pre-trial detention. It was indicated that if the respondent received a custodial sentence of up to six months' imprisonment, she would also be detained in Rijeka Prison. For sentences in excess of six months' imprisonment she would be detained in the Diagnostic Centre in Zagreb for up to 30 days to determine where the remainder of the sentence should be served. It was indicated that regardless of which prison the balance of the sentence was to be served in, the fundamental rights of the inmates are protected.
31. In a further opinion dated 8th July, 2020, exhibited by way of affidavit dated 16th July, 2020, Ms. Horvat took issue with the reply of the Ministry of Justice dated 2nd July, 2020. She referred to the Ombudsman for the Republic of Croatia report for 2019 which highlighted overcrowding in Croatian prisons and a lack of appropriate conditions in many prisons.
32. The Court again sought more specific information from the issuing judicial authority and by reply dated 18th August, 2020, the Croatian Ministry of Justice indicated that during pre-trial detention in prison in Rijeka, the respondent would have a minimum individual floor space of 3 m² and would be allowed to spend a minimum of two hours in the open prison yard, with the rest of the time being spent in her bedroom. The same conditions would apply if she had to serve a sentence in Rijeka Prison or if she had to go to the Diagnostic Centre. It was indicated that following a maximum of 30 days in the Diagnostic Centre she would likely be detained in a specialised women's prison in Požega and a description of the conditions there was set out including a minimum of two hours in the open air for prisoners in the closed category and several hours in the open air for prisoners in the semi-open and open categories. Work and leisure facilities are available and prisoners can move around their units during the day. The reply did not state the minimum floor space available to prisoners in prison in Požega. Following a further request for additional information, the Croatian Ministry for Justice confirmed that if

required to serve a sentence in prison in Požega, the respondent would have a minimum personal floor space of 3 m², excluding sanitary facilities, and indicated that the occupancy level of that prison was only 57.58%.

33. In a letter dated 26th November, 2020, Ms. Horvat expressed her disagreement with the contents of the additional information received from the issuing state. In particular, Ms. Horvat referred to the Ombudsman's report for 2019 indicating that in closed condition the capacity of Požega Prison was 167% in December 2019. She also referred to the criticism in the said report of conditions in Zagreb Prison, within which is the Diagnostic Centre, and advised that this Court should seek additional data on the capacity of Rijeka Prison. Ms. Horvat's letter did not deal with the issue of capacity within the Diagnostic Centre.
34. In *Minister for Justice and Equality v. Pal* [2020] IEHC 143, McDermott J. carried out a review of the relevant authorities from which the following non-exhaustive list of principles emerges:-
 - (a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;
 - (b) a refusal to execute a European arrest warrant is intended to be an exception;
 - (c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the European Union Charter of Fundamental Rights ("the Charter");
 - (d) the prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;
 - (e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;
 - (f) the threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;
 - (g) in examining whether there is a real risk, the Court should consider all of the material before it and, if necessary, material obtained of its own motion;
 - (h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;

- (i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;
- (j) when the personal space available to a detainee falls below 3 m² of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met: -
 - (i) the reductions in the required minimum personal space of 3 m² are short, occasional and minor;
 - (ii) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and
 - (iii) the detainee is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention;
- (k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to a refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The executing judicial authority should request of the issuing member state all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained;
- (l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and
- (m) it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member states.

35. Applying those principles and taking all of the information before the Court into account, I find that the respondent has failed to establish by way of cogent evidence a real risk that,

if surrendered, she will be subjected to inhuman or degrading treatment as to constitute a breach of article 3 ECHR, or article 4 of the Charter, that would justify a refusal of surrender. I note the additional information furnished by the issuing state as to the minimum individual floor space of 3m² to be afforded to the respondent if detained. However, I do not reach my finding on this simple mathematical calculation of floor space, but rather I have also considered the other circumstances and conditions pertaining to any likely detention of the respondent as set out in the various pieces of additional information provided. As regards any points of difference between the opinions of Ms. Horvat and the additional information provided by the issuing state, I accept the information provided by the issuing state on the basis of the mutual trust and confidence between member states which underpins the Framework Decision and also because it is more up to date. Furthermore, I note that counsel for the respondent submitted that less weight should be attached to the additional information which came from the Ministry of Justice as opposed to the issuing judicial authority. However, even taking that into account it seems to me that such information must carry considerable weight as the information requested is more likely to be within the knowledge of the Ministry of Justice as opposed to an individual judge or the judiciary in general. Indeed, it seems clear that while the request for information was sent to the issuing judicial authority, it was then forwarded to the Ministry of Justice by the issuing judicial authority and the reply was directed to the issuing judicial authority.

36. The additional information in question is too lengthy to set out herein but is appended to this judgment.
37. I dismiss the respondent's objections relating to the likely conditions of detention if detained following surrender.
38. I am satisfied that the surrender of the respondent is not precluded by reason of s. 37 of the Act of 2003 or any other provision contained within part 3 of the Act of 2003.

Conclusion

39. Having dismissed the respondent's objections it follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to Croatia.

Appendix 1: Additional information dated 2nd July, 2020.

Appendix 2: Additional information dated 18th August, 2020.

Appendix 3: Additional information dated 12th November, 2020.