Neutral Citation Number: [2011] IEHC 87

THE HIGH COURT

2010 197 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

- AND -

JOSEF ADAM

RESPONDENT

JUDGMENT of Mr Justice John Edwards delivered on the 10th day of March 2011

Introduction:
The respondent is the subject of a European Arrest Warrant issued by the Czech Republic on the 9th of March, 2010. The warrant was endorsed for execution by the High Court in this jurisdiction on the 19th of May 2010 and it was duly executed on the 20th of July 2010. The respondent did not consent to his surrender to the Czech Republic and the Court was requested by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter referred to as "the 2003 Act") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The principle ground upon which the respondent opposed his surrender was his contention that, having regard to alleged unreasonable prosecutorial delay in this case, it would violate the his rights under Article 47 of the Charter of Fundamental Rights and/or under Article 6 of the European Convention on Human Rights and Fundamental Freedoms to return him to the issuing state. This Court has not been disposed to uphold the respondent's objection and indicated its reasons for not doing so in a reserved judgment delivered on the 3rd of March 2011. Further, on the same day the Court made an order pursuant to s. 16 of the 2003 Act directing that the respondent be should be surrendered and remanded the respondent on continuing bail pending his surrender.

S.16(3) of the 2003 Act provides that *"an order under this section shall not take effect until the expiration of 15 days beginning on the date of the making of the order or such earlier date as the High Court, upon the request of the person to whom the order applies, directs."* In this case the respondent has not waived the 15 day period, nor has he requested that he be surrendered earlier than is provided for by the statute.

On the contrary, the respondent has requested the Court to exercise in his favour the discretion that the Court has under s. 18(3) of the 2003 Act and to make an order directing that his surrender should be postponed until proceedings currently in being against him for an offence committed in the State until the date of the final determination of those proceedings in the event that he is not required to serve a term of imprisonment; alternatively if he is required to serve a term of imprisonment the date on which he is no longer required to serve any part of that term of imprisonment.

The Court has been informed that the proceedings in question are before Tralee District Court, the charge concerns the theft of a laptop computer, the respondent has pleaded guilty to the charge and the proceedings presently stand adjourned by District Judge James O'Connor to the 15th of September 2011 to facilitate the respondent making a contribution to the court "poor box".

As this is, the Court understands, the first case to come before the High Court involving a request for a postponement of surrender to enable a respondent to avail of an opportunity afforded to him, or perhaps to comply with a requirement, to make a contribution to a court "poor box" in proceedings against him for an offence committed in the State, and as important issues arise, the Court has decided that it should give a further reserved judgment in this case.

The "Poor Box" System
The "poor box" system is a non-statutory procedure adopted by the courts over many years, particularly by the District Court, in which the court affords an opportunity to, and sometimes requires, a defendant to make a payment to charity as an indication of remorse and an earnest of intention not to offend again, most frequently on the basis that if the payment is made no conviction will be recorded against that defendant, and less frequently on the basis that although a conviction will recorded against the defendant he or she may be dealt with more leniently than might otherwise be the case, particularly if the payment can be made to achieve a measure of restorative justice. This précis or summary statement requires to be elaborated upon to some extent in the circumstances of this case.

It is fair to say that the poor box system is controversial and it has both its proponents and its critics. It was closely examined by the Law Reform Commission ("the LRC") some years ago, and in March 2004 the LRC published its Consultation Paper on the Court Poor Box (LRC CP 31 – 2004).

Among the issues examined by the LRC were the circumstances in which the court poor box is applied. It looked first of all at how the possibility of making a contribution arises in a particular case and stated that the most frequent way in which a contribution to the court poor box arises is as a result of a request by or more usually on behalf of an offender. The possibility of making a contribution also frequently arises at the instance of the court and, in particular, as a result of:

(a) a suggestion by the court that a contribution would be appropriate;

(b) a request by the court that the offender should make a contribution;

(c) a direction by the court that the offender should or must make a contribution;

(d) an indication by the court of a willingness "to deal with the case in a particular way" or "to adopt a certain course";

or

(e) an indication by the court that it would dismiss a charge on condition that the offender pay a particular sum to the court poor box.

The LRC noted that it is only on very rare occasions and only in certain courts that the possibility of making a contribution arises as a result of a request made by the prosecution.

The LRC then examined the type of offences in respect of which the option of making a contribution to the court poor box arises and stated that, in general, the court poor box is applied in respect of minor offences which do not merit a custodial sentence although, on occasion, it has been applied in relation to more culpable offences which might seem to merit a significant fine or custodial sentence.

It also examined the reasons why the option of making a contribution to the court poor box arises, and noted that a variety of factors are taken into account by the courts when determining whether to apply the court poor box in a particular case. It addressed the most significant of these factors under the following sub-headings, and stated:

"(a)The first occasion on which the offender had committed the offence in question (or any offence)

The most significant factor which underlies a decision to apply the court poor box is that the offender was never previously charged with the offence in question or was never previously charged with any other offence. Many judges will only consider applying the court poor box in relation to persons who satisfy this condition and, in this sense, the absence of a prior criminal record constitutes a "prerequisite" to the application of this method of dealing with an offender. Other judges do not apply this rule rigidly and may, for example, consider the court poor box in respect of a person who had not offended for a very long time.

(b) A plea of guilty by the offender

1.23 Another factor which weighs very heavily in the decision making process is a plea of guilty by the offender. Indeed, many judges also consider such a plea to be a "prerequisite" to the application of the court poor box.

(c) A concern to avoid a conviction

1.24 A concern on the part of the court to avoid a conviction is also a very significant factor. For reasons which overlap with the other factors outlined in this section, a court may consider that it would be inappropriate to impose a conviction on an offender in a particular case. This frequently occurs where a conviction would adversely affect employment prospects or prevent an offender from securing the necessary visa to work or travel abroad. The permanency of a conviction once recorded is another factor in this regard.

(d) The minor or trivial nature of the offence

1.25 The minor or trivial nature of the offence with which an offender is charged is another factor which frequently underlies a court's decision to apply the court poor box.

(e) A lack of proportionality between any outcome other than a contribution to the court poor box and the offence in question

1.26 A lack of proportionality between any outcome other than the court poor box and the offence in question is also a significant factor.

(f) The family circumstances of the offender

1.27 The courts frequently have regard to the family circumstances of the offender when considering whether to apply the court poor box. Where an outcome other than the court poor box would, in effect, also punish the members of the family who depend for particular help and needs on the offender, the courts are likely to take this into account as a factor which favours application of the court poor box.

(g) A concern to avoid an injustice

1.28 In broad terms, many of the factors considered in this section are concerned with avoiding an injustice. Some judges, however, specifically limit the application of the court poor box to cases in which the imposition of a penalty provided by law would result in an unjust and disproportionately penal outcome.

(h) The inadequacy of the maximum fine in respect of the offence because of the effects of inflation

1.29 Some judges employ the court poor box as a means of countering the effects of inflation over time on the maximum value of fines for particular offences.

(i) A concern to avoid a fine

1.30 A concern on the part of the court to avoid imposing a fine is very rarely a factor which influences a decision to apply the court poor box. Indeed, a majority of judges consider that the financial penalty inherent in a contribution to the court poor box as an integral part of this approach to dealing with an offender without the need to record a conviction but yet to require some evidence of an earnest of good intention. Accordingly, most judges do not apply the court poor box for the purpose of enabling an offender to avoid paying a fine.

(j) A concern to avoid imprisonment

1.31 Similarly, a concern on the part of the court to avoid imposing a term of imprisonment is very rarely a factor which influences a decision to apply the court poor box.

1.32 To the extent that it is a factor, it would appear that it is only considered in circumstances which, in the judge's view, merit a suspended sentence. However, most judges do not apply the court poor box for the purpose of enabling a person to avoid a term of imprisonment (including a suspended sentence).

The LRC then considered the application of section 1(1) of the Probation of Offenders Act 1907. Section 1(1) provides as follows:

"Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the

court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either –

(a) dismissing the information or charge; or

(b) discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

The LRC observed that Section 1(1) thus affords a judge an opportunity to determine the facts and find the ingredients of the charge proved but yet ultimately to dismiss a charge in the light of the circumstances referred to therein. It noted that some judges believe that the court poor box option dovetails effectively with section 1(1) because it affords a court a means of dealing with an offender in circumstances where some financial penalty is merited but a conviction and any other sentence would be inappropriate. It also recorded that the practice of individual judges varies to a significant degree; it appears that, in some courts, the court poor box is often applied in conjunction with section 1(1) of the 1907 Act, whilst in others, this practice is never followed. At District Court level, a significant number of judges who utilise the court poor box always apply it in conjunction with section 1(1). The practice of applying the court poor box in conjunction with section 1(1) appears to be less frequent in the Circuit Court.

The LRC in chapter 2 of its consultation paper considered the arguments both for and against the court poor box system. It is not necessary for the purposes of this judgment to review these. However, it appropriate to observe that the LRC went on to provisionally recommend (*inter alia*) that the court poor box jurisdiction should be replaced by a statutory scheme based on the provisions of the Probation of Offenders Act 1907 and the Criminal Justice Act 1993 which would provide a revised method of avoiding a conviction for minor offences while introducing an appropriate system allowing for the making of a financial contribution akin to an "earnest of intention", which also accords with the principles of restorative justice. To date, neither this nor any other recommendations of the LRC in relation to the court poor box system have been implemented.

The respondent's application for a postponement of his surrender
The respondent's application for a postponement of his surrender is based upon the premise that if he is surrendered imminently to the Czech Republic where he is wanted for trial in respect of 22 offences in the nature of theft and criminal damage he will be not be in a position to make any court poor box contribution when the matter comes back before the District Court on the 15th of September next. This may have the effect of depriving him of the possibility of avoiding having a conviction recorded against him, alternatively, if a conviction is to be recorded against him, of receiving a more lenient sentence than he would otherwise receive.

It has to be said that the manner in which the application has been put forward is not very satisfactory. The evidential burden in respect of an application such as this rests upon the moving party, i.e. the respondent in this particular instance. However, no evidence whatever has been put before the Court, whether by way of affidavit, or by calling as a witness the respondent and/or his legal representative in the matter before Tralee District Court. While the applicant does not contest the respondent's contention that he is being proceeded against for an offence in the State, or that the District Court has decided to have recourse to the poor box system in the context of those proceedings, there is a distinct lack of clarity concerning the exact circumstances of the case.

The Court has not been told whether the decision to utilise the poor box was the result of a request to the Court by the respondent that it should do so, or whether the Court itself took the initiative in that regard. Moreover, if the initiative did come from the District Judge this Court has not been told whether the respondent was faced with a mere suggestion only, alternatively a definite request, alternatively a firm direction, that he should make a poor box contribution. Neither has the Court been told if it was indicated why the District Judge felt this was an appropriate case in which to make use of the poor box system, or to what end a poor box contribution was being sought by the District Judge e.g., that it would be used in conjunction with section 1(1) of the Probation of Offenders Act 1907 on the basis that if a payment is made as an indication of the respondent's remorse and an earnest of his intention not to offend again no conviction will be recorded against him; or alternatively, on the basis that a conviction will be recorded but that if a payment is made as an indication of the respondent's remorse and an earnest of his intention not to offend again the respondent will be dealt with more leniently than would otherwise be the case. The Court has also not been told if the District Judge gave any indication as to whether he views a poor box contribution as a potential restorative justice measure in the circumstances of this particular case. Moreover no information has been provided concerning whether any specific sum was mentioned, or as to what exactly it was said might happen in the event of (a) a payment being made and (b) a payment not being made.

I am told by Counsel that the District Judge was made aware at the time of adjourning the case for a year that the respondent was the subject of a European Arrest Warrant and that he might be facing surrender before the adjourned date.

The applicant's attitude
The applicant opposes the respondent's application. However, no reason for the applicant's opposition has been advanced. The applicant has not suggested that the application is misconceived in any way. In so far as the Court has been able to ascertain it, the implicit basis for the objection is that the applicant considers that this is a cynical attempt by the respondent to postpone yet again the day of his surrender, particularly in circumstances where he has been complaining heretofore that his right to a trial with reasonable expedition for the offences which are the subject matter of the European Arrest Warrant has been, and continues to be, breached.

The relevant statutory provision
S. 18 (3) of the 2003 Act provides:

"(3) Subject to section 19, where a person to whom an order under section 15 or 16 applies—

(a) is being proceeded against for an offence in the State, or

(b) (i) has been sentenced to a term of imprisonment for an offence of which he or she was convicted in the State, and

(ii) is required to serve all or part of that term of imprisonment,

the High Court may direct the postponement of that person's surrender to the issuing state until—

(I) in the case of a person who is being proceeded against for an offence, the date of the final

determination of those proceedings (where he or she is not required to serve a term of imprisonment), or

(II) in the case of a person who is required to serve all or part of a term of imprisonment, the date on which he or she is no longer required to serve any part of that term of imprisonment.",

The Oireachtas enacted the 2003 Act to implement and give effect in national law to the Framework Decision - an instrument which, of its very nature, is not directly effective. In interpreting s. 18 (3) of the 2003 Act the Court must therefore have regard to the Framework Decision, and in so far as possible adopt a conforming interpretation. In that regard this Court has considered the Framework Decision as a whole, and in particular Article 24 (1) thereof which provides:

> "The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant."

It is clear to the Court that the primary objective of s.18 (3) of the 2003 Act is to give effect to Article 24(1) of the Framework Decision which in turn reflects Article 29 of the Treaty on European Union which calls, *inter alia*, for judicial cooperation in criminal matters. The principles underpinning the European Arrest Warrant system which is based upon the Framework Decision are those of mutual trust and confidence between Member States on the one hand, and mutual recognition of judicial decisions, as a 'cornerstone' of judicial co-operation and judicial comity, on the other hand. The European Arrest Warrant system implicitly recognises that each member state has an interest in the prosecution of persons who have committed crimes within their jurisdiction, and in ensuring that due effect is given to sentences imposed upon persons convicted of such crimes. It is a logical corollary of this that it would be entirely contrary to the spirit of the European Arrest Warrant system if a requirement to surrender a person to an issuing member state were to frustrate the prosecution of that person for a crime committed by him within the executing member state, or where such a person had been convicted of an offence within the executing member state for which he had been sentenced if it prevented him from serving that sentence. For this reason the Framework Decision makes provision in Article 24(1) for a member state in implementing the European Arrest Warrant system to provide for the postponement of a persons surrender *"so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant."*

This Court considers that the Oireachtas in enacting s. 18(3) of the 2003 Act intended to give effect to the principles just outlined, which are specifically directed towards vindication of an executing member state's right to prosecute, and punish, crimes committed within its own jurisdiction, and not the vindication of anybody else's rights. Accordingly the applicant has the right, which it may or may not elect to avail of, to seek an order of the High Court in an appropriate case postponing a respondent's surrender, and the High Court as the relevant judicial authority has been given a discretion in that regard. Although the provision does not expressly exclude the possibility of it being invoked by a respondent, the Court is satisfied, having regard to the Framework decision as a whole and the terms of Article 24(1) in particular, that the Oireachtas did not intend that S. 18(3) might be invoked by a respondent for the purpose of seeking a postponement effectively on *ad miseracordiam* grounds, alternatively on humanitarian grounds.

As regards the latter the Court notes that both the Act (in s. 18(1) & s. 18 (2), and the underlying Framework Decision in Article 23(4), make specific alternative provisions for a possible temporary postponement on humanitarian grounds but the relevant provisions have not been invoked by the respondent in this case. Moreover, the Court is by no means convinced that the hampering of the respondent's ability to make a poor box contribution; and, indirectly, of persuading the District Judge to apply s.1 (1) of the Probation of Offenders Act, 1907, alternatively of persuading the District Judge to impose a more lenient sentence than he might otherwise do, could provide a basis for seeking a postponement on humanitarian grounds. Whilst the terms of s. 18(2) are expressed to be without prejudice to the generality of s. 18 (1), Article 23(4) of the Framework Decision, which these provisions were intended to implement, speaks of such postponement arising "exceptionally" and for "serious" humanitarian reasons such as danger to the requested person's life or health. In the present case, any potential prejudice might be to the character or good name of the requested person, and/or possibly to his liberty. However, if such prejudice were to arise it would be in accordance with law, which requires, *inter alia*, that any sentence that might be imposed should be proportionate to the admitted crime. The Court considers it doubtful in such circumstances that any such prejudice could be characterised as giving rise to humanitarian considerations, much less serious considerations of that sort.

It also requires to be said that the surrender of the respondent will not provide any *legal obstacle* to the making of a poor box contribution by the respondent, nor will it prevent the District Judge from exercising the power that he has under s.1(1) of the Probation of Offenders Act, 1907, if that is what he has in mind, nor will it prevent the District Judge from giving the respondent a non-custodial sentence or a lenient custodial sentence. However, it has to be acknowledged as a possibility, although there is a dearth of concrete evidence in this regard, that surrender may create *practical difficulties* for the respondent in making such a contribution, particularly if he is remanded in custody in the Czech Republic upon his return there, and that these might in fact prove insurmountable for him.

In many ways, however, if the respondent is unable to make a poor box contribution due to practical difficulties consequent upon his surrender, it is more of a problem for the District Judge than it is for the respondent. It may mean that the District Judge will, from a practical point of view, have fewer options available to him in order to do justice in the particular case, and of course that will make his task more difficult. However, the District Judge will not be without options, and the respondent will have the comfort provided by the judicial oath, or more correctly the constitutional declaration, made by every judge upon assuming office that he will execute his office without fear or favour, affection or ill-will towards any man, and that he will uphold the Constitution and the laws. The law specifically requires that that the judge act judicially and if the respondent is unable to make a poor box contribution due to circumstances beyond his effective control that fact cannot be held against him. However, the likely consequence is that the District Judge will have to endeavour to do justice in the case, and achieve a proportionate result, by some other means other than recourse to the court poor box system. As this Court has already observed the District Judge will have a range, albeit a somewhat reduced range, of options in that regard.

The Court's Decision

The Court is satisfied that in the circumstances of the case the respondent's purported invocation of s.18 (3) of the 2003 Act is misconceived and inappropriate. The Court will therefore refuse the application to postpone the respondents surrender.