Neutral Citation Number: [2008] IEHC 61

THE HIGH COURT

Record Number; 2007 No. 166 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

MARIAN - CONSTANTIN CIOBANICA

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 5th day of March 2008

1. The surrender of the Respondent is sought by a judicial authority in Romania so that he can be surrendered for the purposes of serving a sentence of three years' imprisonment which was imposed upon him for the offence of theft. That sentence remains to be served.

2. The European arrest warrant in this case issued from a judicial authority in Romania on the 22nd August 2007. Having been transmitted to this jurisdiction, the warrant was endorsed here by the High Court on the 2nd October 2007. The respondent was duly arrested on foot of this warrant on the third of October 2007 and immediately brought before the High Court as required by section 13 of the European Arrest Warrant Act 2003, as amended. He was remanded from time to time thereafter pending the hearing of the present application for his surrender under section 16 of the Act.

3. No issue has been raised by the respondent as to his identity, and the court is satisfied in any event that the warrant has been issued in respect of the person who was arrested on the 3rd October 2007.

4. The issuing judicial authority has indicated in the warrant that this offence, described in the warrant as "qualified theft", comes within the categories of offences set forth in Article 2.2 of the Framework Decision, and therefore one in respect of which double criminality does not require verification, and in that regard it has marked the offence as being "organised or armed robbery". In so far as the warrant contains no facts which would suggest that it was an armed robbery or an organised robbery, I should for the sake of completion state that the facts as disclosed would indicate that if the same act of entering a premises and stealing copper wire was done in this State a corresponding offence would be committed under the provisions of both s.4 and s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, namely theft and robbery.

5. Subject to reaching conclusions on the two points of objection which have been raised on the respondent's behalf on this application, the Court is satisfied that there is no reason to refuse his surrender under sections 21A, 22, 23 or 24 of the Act, and is further satisfied that his surrender is not prohibited by any of the provisions contained in Part III of the Act or the Framework Decision.

6. The sentence of imprisonment to which I have referred was imposed upon the respondent on the 5 March 2002 at a time and in circumstances where the respondent was not present when he was tried and convicted and sentenced. He was therefore convicted and sentenced in absentia, but the warrant states "and the convict was subpoenaed at his residence". In this way, it is submitted by the applicant that the provisions of section 45 of the Act do not apply, and that, accordingly, no undertaking is required that upon his surrender to the issuing state, an opportunity for a retrial will be afforded to him. Further information concerning the manner in which the respondent was notified of the date time and place of his trial has been provided by the issuing judicial authority in the form of letters to the Central Authority here dated respectively 1st January 2008 and 22nd January 2008.

7. In the first of these letters it is stated:

> *"During the criminal pursuit [the Respondent] was aware of the fact that documents regarding his pursuit were issued by giving declarations on March 17, 2000 and April 14, 2000. This happened during the criminal investigation.*
>
> *During the trial [the Respondent] was legally summoned at his residence according to the Code of Criminal Procedure and also by being financed at the local council (art.177 line 1 and 4 Code of Criminal Procedure);*
>
> *Referring to the retrial and taking in consideration the fact that the defendant was judged in absencia we reproduce you the text stipulated by art.522 Code of Criminal Procedure:*
>
> *Retrial in Case of Extradition*
>
> *Art 522*
>
> *Retrial of the Person Is Judged in Absentia in Case of Extradition*
>
> *When it is required a person's extradition and that person was trialed and sentenced in absencia, the cause can be pleaded again by the instance who trialed the case the first time, if the defendant requires so."*(sic)

8. This text is a translation of the document provided, and manifestly is imperfect, but it seems clear nevertheless that it states firstly that the respondent was "legally summoned at his residence", although I should record that the respondent draws attention to the fact that it states in this regard that he was legally summoned "during the trial". Some reliance is placed upon this phrase by the respondent in seeking to show that he was not summoned prior to the trial, or at least that the document is ambiguous in this regard.

9. The later letter dated 22nd January 2008 states, *inter alia*, as follows:

> *" during the trial [the Respondent] was legally summoned according to the Penal Procedure Code at his domicile and by displaying it to the local council headquarters (art. 177 paragraph 1 and 4 of PPC);*
>
> *The address where [the Respondent] was summoned according to the declarations which he personally made during the criminal prosecutions phase on 17.03.2000 respectively 14.04.2000 is: Craivova, Decebal street, block S2, stair 1, apartment 28, Dolj County (the same address is also found in the defendant's criminal record);*
>
> *The calling of [the Respondent] before the criminal prosecution authority and the law court was carried out by written*

summons;

During the trial, [the Respondent] was summoned for the law term as of 05.06.2001 by a warrant of arrest of defaulting witness and according to the affidavit concluded by Craivova police on 06.05.2001 it appears that the summons was received by his mother;

All mentions provided by law were found within the summons respectively:

· Name of the law court which issued a summons, its headquarters, its issuing date and the file number;

· surname, name of the summoned person, the position he was summoned for and the indication of the trial object;

· deep address of the summoned person;

· Hour, date, month and year, the place of presentation.

Regarding the observance of the requisitions of section 45 in Law regarding the European arrest warrant as of 2003, respectively in those related to the trial on review of the cause, we have already communicated you the text of article 522 Penal Procedure Code, which gives the possibility to the extradited person to request the re-judging of the cause, if he was absent both from the trial and his conviction."(sic)

10. Again the translation is not perfect but nonetheless the real meaning can be understood without great difficulty.

11. In his grounding affidavit the respondent has stated that at the age of seven years he was placed in child-care by his mother, and that, as a result, he did not get on well with his mother. On his release, he states, he lived with his grandmother, but that he also stayed with his mother at her address from time to time, and that it was her address which appears on the warrant, and that he used that address for what he calls in his affidavit "*official purposes*". He goes on to state that he does not remember the 16th September 1999 which is the date on which he is alleged to have committed the act of theft for which he was convicted and he states that he did not steal anything. He goes on to state as follows:

"However, I was stopped on the street by the local police towards the end of 1999 and I attended court by arrangement with them to answer the judge's questions. I was told that consideration of my case was being postponed to another date yet to be fixed. I was not charged with the offence or any other offence.

Officially I lived at my mother's address and I lived there until April 2001. I have two brothers and one sister. By April 2001 we had all emigrated. I went to join my brother, Viorel, in Rome, Italy. His papers were in order and he had a job. He is still living and working in Rome, Italy.

However I had no papers. In and around June 2001 I was served with a notice giving me 10 days to leave Italy. I threw the notice away and continued to live in the black economy."

12. He proceeds in his affidavit to describe how he decided to travel to this country and made an application for asylum here which was refused in 2006, and that he then left for South America in May 2006 and that he was injured in a car crash in Bolivia and decided to seek medical attention in Madrid, Spain. He states that he obtained a travel document from the Romanian embassy in order to travel home. He goes on to state that it was necessary for him to obtain this emergency document because he lost his documents or, perhaps, they were stolen from him when he was in Bolivia. However he used this document to travel to Ireland via Madrid, Spain and states that he has stayed in Ireland since the end of December 2006 to the present day.

13. He further states in his affidavit that he never received a subpoena to attend court in Romania and that his mother never informed him of a subpoena. He states that his contact with her has been irregular since 2001, and that in any event she has left her old address. He states that he attended court in Romania on a voluntary basis once at the end of 1999, and that no decision arising out of his questioning on that occasion was posted to him by April 2001 when he left Romania for Rome, Italy. He states that he left Rome in order to join his brother and make some money, and did not flee in order to avoid serving a sentence. This latter averment relates to a second point of objection which he makes under section 10 of the Act and which I will deal with in due course.

14. Before setting out the submissions made by counsel for both the applicant and the respondent, I will set out the provisions of section 45 of the Act, which provide as follows:

"45. -- -- a person shall not be surrendered under this Act if

(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and

(b) (i) he or she was not notified of the time when, and the place at which, he or she would be tried for the offence, or

(ii) he or she was not permitted to attend the trial in respect of the offence concerned,

Unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered --

(i) be re- tried for that offence or be given the opportunity of a retrial in respect of that offence,

(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and

(iii) *be permitted to be present when any such retrial takes place*." (my emphasis)

15. Remy Farrell B. L. for the applicant submits that the documentation which has been produced by the issuing judicial authority

makes it clear that the Romanian court notified the respondent of the date time and place of his trial in accordance with the rules contained in the Code of Criminal Procedure, by sending a letter containing the necessary information to the address which it had for the respondent, namely his mother's address, and which he has stated he used for "official purposes". He submits also that it is immaterial and irrelevant that, having provided that address to the authorities, he was not present for whatever reason at that address at the time that the notification was posted to him. Accordingly, it is submitted, the provisions of section 45 (a) and (b) of the Act are satisfied, and that therefore the undertaking referred to in section 45 is not required. In any event, he submits that it is clear from the documents in question that upon surrender, the respondent is entitled to apply to the Romanian court for a retrial, should he so request. But his primary submission is that no undertaking is required to be provided under section 45 of the Act.

16. Mr Farrell has referred to the decision of the European Court of Human Rights in the case *Hennings v. Germany*, the 16th December 1992. In that case the applicant was a sent a letter by the relevant court in Germany that it was accusing him of the offence in question, telling him that proceedings would not be brought against him if he paid a specified fine by a certain date, and a form enclosed with the letter was to be returned by a certain date for the purpose of consenting to this method of settlement which would result in the termination of the proceedings without further notice. The letter apparently indicated that a failure to agree to this course of action would result in criminal proceedings being brought against him without further notice, no explicit mention being made of the way in which the proceedings would be brought, namely a summary procedure whereby a peanut order is issued as opposed to being summoned to appear in court.

17. That judgement sets out that when the postman found nobody at the applicant's home the order was served "in accordance with the relevant legal provisions" by way of a notification in his letter box to collect a letter deposited at the post office in his absence. There being no objection lodged by the applicant within the specified time, the applicant was convicted. That applicant alleged that the prosecuting authorities had failed to ensure that he was *in actual receipt* of the penal order through personal service and that due to the shortness of the time limit for lodging an objection to it he was deprived of the possibility of getting legal assistance in time. In its judgement, the court found that "*the authorities cannot be held responsible for barring his access to a court because he failed to take the necessary steps to ensure receipt of his mail and was thereby unable to comply with the requisite time limits laid down under German law*". It concluded that it cannot be said that the applicant was denied his right of access to a court, and accordingly found that there had been no violation of Article 6 of the Convention.

18. Sean Holt B.L. on behalf of the respondent has submitted that since the respondent did not in fact receive the notification which was sent to his mother's address, because he was not at that address or even in that country at that time, he cannot be said to have been notified of the date time and place of his trial, and that in those circumstances an undertaking in writing is required by the provisions of section 45 of the Act, and that his s surrender therefore should be refused.

19. Even though the translations of the letters which have been furnished to this court in order to explain the nature of the notification given to the respondent in accordance with the Code of Criminal Procedure in Romania are not perfect, it is quite clear from these letters that the position is that when the respondent was questioned by the court in relation to the offence alleged to have taken place in 1999 he gave his mother's address. He has stated that this is the address which he used for official purposes, and this Court is entitled to assume therefore that any document required to be sent to him, including a letter notifying him of the date time and a place that his trial would take place, could be sent to him at that address. Thereafter it is a matter for himself as to whether he produces a situation whereby the contents of a letter addressed to him at that address remain unknown to him by reason of his having left the country, or otherwise not keeping in touch with his mother in relation to any post which may have been directed to him at her address. I am satisfied that he was "notified" in accordance with the requirements of the Romanian Code of Criminal Procedure, and that this court is not required to look beyond that in order to be certain that he was actually aware of the contents of the letter in question.

20. I am satisfied that no undertaking is required under section 45 of the Act and that this ground of objection does not require that his surrender be refused.

21. As I have mentioned already, with the respondent has stated in his grounding affidavit did not "flee" from Romania in order to avoid serving a sentence of imprisonment. He has stated that he had emigrated with his two brothers and sister by April 2001 and that, up to that point, he had not been charged with the offence contained in the warrant or any other offence, even though he acknowledges that at the end of 1999, having been stopped on the street by the local police, he attended court by arrangement with them in order to answer questions in relation to the alleged offence. He has stated also that he was told that his case would be considered and that it was being postponed to another date yet to be fixed. It is submitted on his behalf that these facts are sufficient to take the respondent outside the provisions of section 10 of the Act, since the purpose of his leaving Romania following his court appearance in 1999 was not in order to evade justice, but rather because he and other members of his family had decided to emigrate. Reliance is placed upon the judgement of this court in Minister of Justice Equality and Law Reform v. Tobin, unreported, 12th January 2007. That judgement has in recent times been upheld upon appeal to the Supreme Court. Mr Holt has referred to what I said in my judgement in that case in the High Court regarding the meaning to be given to the provisions of section 10 of the Act, and refers to the fact that in the present case, the evidence of the respondent is that he left Romania between the time that he was "subject of proceedings in that state" and the time he was convicted and sentenced, and it is submitted therefore that he does not come within the provisions of paragraphs (a), (b), (c) or (d) of section 10, and that therefore this court has no jurisdiction under the Act to order his surrender.

22. First of all, I am satisfied that the respondent has not established that he did not "flee" in the sense of intending to evade justice. He must be taken to have been aware prior to his departure from Romania that he faced prosecution in relation to the offence, given that he had been stopped by the police in relation to this matter and that he had appeared before a court where he was questioned in relation to it. No affidavit of law has been adduced to the effect that at the stage of this questioning there was no prosecution process in being in accordance with the provisions of the Romanian Criminal Code of Procedure.

23. It is also clear that my comments in the Tobin case in relation to the meaning of section 10 must be seen as being *obiter*, and in that regard, it is worth noting what is said by Mr Justice Fennelly in his judgement of the Supreme Court on that appeal in relation those comments. Considering section 10 in the context of the facts in Tobin, Mr Justice Fennelly stated:

> *"Clearly, the sub-paragraph (d) is the only provision capable of applying to the respondent. There are two components to this provision:*
>
> *· That a sentence of imprisonment has been imposed;*
>
> *· That the person in question " fled" the jurisdiction which imposed the sentence.*

> *This court has to ask itself, firstly, whether the respondent "fled" Hungary. If he did, then he should be surrendered. If he did not, the further question arises as to whether the principle of "conforming interpretation", nonetheless, obliges the Irish courts to order his surrender. As already noted, Peart J. considered that the sentence imposed, in order to come within paragraph (d), must have been imposed prior to the flight. I am not convinced that this is necessarily so. That paragraph may equally apply where the sentence has been imposed at the time the European Arrest Warrant is issued. However, I prefer not to express a concluded view."*

24. My *obiter* comments in Tobin as to the meaning to be given to the relevant provision of section 10 is not therefore the final word in that regard. The Tobin case was decided upon the very nett point of whether or not the circumstances in which that person left Hungary meant that he had "fled". It was decided that he had not. In the present case I am satisfied that the respondent fled Romania in the knowledge that a prosecution was under way against him. Section 10 provides, as relevant to this application:

> *"10. -- -- where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person ... (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she (i) commenced serving that a sentence, or (ii) completed serving their sentence, that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."*

25. It seems to me now in the present case that the issuing judicial authority has issued the warrant in respect of a person (i) on whom a sentence of imprisonment has been imposed, and (ii) who fled before he commenced serving in that sentence. It seems to follow therefore that the respondent comes within these provisions, and that the court therefore must order his surrender, subject to compliance with the other requirements of the Act and the Framework Decision.

26. I am therefore satisfied in this case that the court is required to make the order sought for the surrender of the respondent, since I am satisfied that all the requirements of section 16 of the Act have been complied with. I will therefore make the order sought.