

THE HIGH COURT

Record Number: 2007 No. 125 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
FLORIN GHEORGHE

RESPONDENT

THE HIGH COURT

Record Number: 2007 No. 126 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
VIOLETA CORINA GHEORGHE

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 9th day of April 2008

1. The respondents are husband and wife, and their surrender is sought on foot of two European arrest warrants, each dated the 17th January 2007. Each warrant was endorsed by the High Court for execution on the 25th July 2007. The first named respondent, Florin Gheorghe, was duly arrested here on 9th November 2007, and his wife Violeta Gheorghe, the second-named respondent was duly arrested here on the 14th November 2007. Each respondent was brought before the court immediately following arrest as required by section 13 of the European Arrest Warrant Act 2003, and each was reminded from time to time, on bail, pending the hearing of the present applications for their surrender.

2. To a large extent, the applications can be dealt with together since the basic facts underlying the application for surrender on foot of these warrants are identical, as are the points of objection in relation to each. In so far as there may be some points of distinction as to the facts relating to one or other of the respondents, I will deal with those as they arise.

3. No issue arises as to the identity of either respondent, and the court is satisfied by the affidavit evidence provided by the arresting Garda officer, Sgt Anthony Linehan that the persons he arrested on the 9th November 2007 and the 14th November 2007 are the persons in respect of whom each European arrest warrant has been issued.

4. In each case, the respondent has been convicted of the offences set forth in the warrant, and each has been sentenced to terms of imprisonment on foot of those convictions which satisfy the minimum gravity requirement under the Framework Decision, namely that there is more than four months outstanding in respect of the sentences to be served. Each respondent was convicted and sentenced in absentia, and a point arises in each case as to whether an undertaking is required in order to comply with the provisions of section 45 of the Act. I will address that point of objection in due course.

5. In each also an objection has been raised under section 10 of the Act in so far as it is contended that neither respondent can be deemed to have "fled" from Romania in order to escape justice, given the circumstances of their departure from that country as sworn to in their grounding affidavits.

6. The final point of objection is that to order their surrender will breach the respondents' constitutional rights under Article 41 of the Constitution and Article 8 of the European Convention of Human Rights as such surrender would operate as "*an unjust interference with and intrusion upon the private and family rights of the respondents*".

7. Subject to reaching conclusions upon the points of objection which have been raised, I am satisfied that all the provisions of section 16 of the Act have been complied with, and that there is no reason under sections 21A, 22, 23 or 24 of the Act why surrender should be refused, and I am also satisfied that the surrender in each case is not prohibited by any provision of Part III of the Act or the Framework Decision.

Background facts

8. It appears from the warrants that on the 24th January 2005 the respondents were convicted and sentenced. The first named respondent was convicted on two offences of swindling for which he received sentences of 8 years and 12 years imprisonment respectively. The second-named respondent was convicted on three offences, being two in respect of swindling and one in respect of forgery of administrative documents, and for which she received three sentences of imprisonment namely 12 years, 8 years, and 2 years respectively. It would appear from the facts contained in the warrant that these sentences were the subject of review through an appeal process and were confirmed.

9. Each warrant contains approximately 6 full pages of text which describes in great detail the nature of the offences for which the respondents were convicted. There is no need to set out all of that factual detail in my judgement. It suffices to say that between August 1999 and March 2000 the respondents were involved in achieving the sale of a premises in Bucharest through fraud from which they obtained a significant sum of money. Forgery of documents by the second named respondent was involved also.

10. According to the warrant in the case of the first named respondent, he did not appear before the court at any of the hearings which resulted in his conviction. However at paragraph (d) of the warrant in his case, it is stated:

"The person was personally summoned at all his known addresses and by display at the 1st district City Hall of the date and place of the hearing at which the decision was pronounced in absentia, the person eluded the summons, not appearing before the court at any of the hearings. We should mention that before the appeal court he was represented by a chosen defender Antal Radu. In the stage of penal prosecution he also eluded the authorities, a preventive arrest in absentia being ordered, by preventive arrest warrant no. 65 on 29th May 2002, issued by the Prosecutor's Office by the Supreme Court of Justice."

In respect of the second-named respondent, the warrant recites that in respect of the decision rendered in absentia "the respective person has been summoned in person of the date and place of the hearing and was present at the first

hearing, then he/she eludes the court and does not attend any other hearing, the decision being pronounced in absentia, but he/she was represented by a public defender appointed by the court."

11. Each respondent has filed an affidavit in support of the grounds of objection being argued. The first named respondent has filed a supplemental affidavit also.

12. In his first affidavit, the first named respondent has stated that he was born in Romania but that he presently enjoys legal status in Ireland, since he is the parent of an Irish-born child. He states that he is a Romanian national by birth and resided in Romania for the entirety of his life until August 2000. It will be recalled that, according to the warrant, the offences in this case were committed between August 1999 and March 2000. His affidavit goes on to state that in the year 2000 he was residing with his wife and his son Adrian and his daughter Georgina in Bucharest. He states that in the summer of the year 2000 both he and his wife were out of work and decided that they would leave Romania and make a new life elsewhere since it was difficult at that time to find work and they wished to provide a better future for their children. He then describes how on the 22nd August 2000 he and his wife travelled from Bucharest to London, that the arrangements were made through a travel agent and that for the purposes of their trip it was necessary to obtain a visa from the British Embassy. He states that they informed the British Embassy that they wished to leave Romania on holiday and would be returning to Romania. He then describes how they travelled to London and that upon arrival they then travelled by bus and boat to Belfast and thence by taxi to Dublin where they made an application for refugee status. Later in his affidavit he states that prior to his departure from Romania he was never questioned or informed of any accusations made against him and was unaware of any criminal investigation into his activities. He states that he is innocent of all the offences set out in the warrant and that he has an unblemished character record with no previous convictions in Ireland or Romania and that he was shocked to learn of the allegations against him. He avers that his departure from Romania was not for the purpose of fleeing any criminal charges, but rather to make a new and better life for himself and his family.

13. In that affidavit, he states also that he was not aware of the trial date and received no notification of it. He goes on to say that in 2002 his wife was contacted by her mother who informed her that she had discovered from a court letter that he and his wife had been convicted of an offence and sentenced to 12 years imprisonment. Upon hearing this news, it is stated that a solicitor in Romania was contacted for the purposes of lodging an appeal, which appeal, he understands, was a limited appeal and not a full reinvestigation of the case.

14. His affidavit sets out some details as to where he and his family have resided since they arrived in Ireland and he states that they have fully integrated themselves into the community here. He has also stated that two children have been born in this jurisdiction, a son and a daughter, in March 2004 and September 2005 respectively. He states also that the two children who accompanied him and his wife to Ireland have attended schools here as well as attending further education thereafter.

15. His supplemental affidavit adds nothing to the information contained in his first affidavit, and simply corrects a couple of errors appearing in that first affidavit.

16. The second-named respondent's affidavit repeats the factual detail contained in the affidavit of the first respondent to which I have referred, in relation to the departure from Romania in August 2000 and relating to the birth of two children here, as well as the details as to where they have lived and how they have integrated into the community here since they arrived. It is not necessary to repeat that information, save to remark that in paragraph 17 of her affidavit she states:

"I say that prior to my departure from Romania I was never informed of any accusations made against me. I say that I was contacted on one occasion in the spring of 2000 and asked to attend at the prosecutor's office to answer questions. I say these questions related to what I had seen, heard and carried out on behalf of Popa Marilena, a judge for whom I had been working for a period of time....."

17. She refers to the offences which are the subject of the warrant in her case and she states that at no time was she informed prior to her departure that there were allegations of impropriety or criminality being made against her and that she was not directed to return to the prosecutor or to attend court on any occasion. She says that she was unaware of any criminal investigations into her activities and that she is innocent of all the offences set out in the warrant and that she also has an unblemished character record with no previous convictions in Ireland or in Romania and that she also was shocked to learn of the allegations against her. She states also that her departure from Romania was not for the purpose of fleeing any criminal charges but rather to make a new and better life for herself and her family.

18. She states that she was not aware of the trial date in respect of these offences and had received no notification thereof. She also refers to the fact that they were contacted in 2002 and informed that they had been convicted of the offences and that a solicitor in Romania was contacted for the purpose of lodging an appeal and, again, she states that this appeal was a limited appeal and not a full reinvestigation of the case.

19. Each respondent states in their affidavit that to be surrendered to Romania would adversely affect them and their family, that their entire family has integrated fully into the community in which they live here, and they each believe that their surrender would infringe their family rights under the Constitution.

The respondents' legal submissions

1. Section 10 of the Act -- they did not "flee"

20. Fiona Murphy B. L. on behalf of the respondents submits that since the respondents have stated in their affidavits that the purpose of their departure from Romania in August 2000 was not for the purpose of fleeing from any criminal charges, but rather to make a new and better life for themselves and their family, and that since then they were convicted and sentenced after their departure from Romania, they are not persons who come within section 10 (d) of the Act, and accordingly that this court may not make an order for their surrender on foot of the warrant. Ms Murphy has referred to what I stated in my judgement in *Minister for Justice Equality and Law Reform v. Tobin*, unreported, High Court, 12th January 2007, namely that "... section 10 appears to follow a logical time sequence". My comments in relation to that time sequence in relation to the different parts of section 10 must be seen as obiter comments, and in that regard, it is necessary to refer to a passage from the judgement of Mr Justice Fennelly in the same case in the Supreme Court on appeal, wherein he referred to what I had stated in that regard and that he was not convinced that this was necessarily so, and that the "paragraph may equally apply where the sentence has been imposed at the time the European Arrest Warrant is issued". He stated however that he preferred not to express a concluded opinion on that question.

21. It must be remembered that the Tobin case was decided on the narrow question as to whether in the particular and unusual circumstances of that case, which were very clearly proven, the respondent could be said to have "fled". Given that he was found

not to have left in circumstances which amounted to fleeing, none of the provisions of section 10 were engaged.

22. In the present case, the evidence available to support the submission that the present respondents did not flee in order to evade justice is, firstly, their own assertion contained in their affidavits to that effect, and, secondly, by inference, that the decision to prosecute them for these offences was not made finally by the authorities until January 2002 after they had already left Romania. I have already referred to the fact that in her affidavit, the second-named respondent has stated that before they left Romania in August 2000, she had been contacted in "the spring of 2000" and had attended at the prosecutor's office in order to answer some questions. She states that those questions were concerning the judge for whom she had been working for a period of time, but the detail contained in the warrant in each case discloses that this particular judge was in fact tried and acquitted in relation to the same property transaction which is the subject of the fraud described in the warrants and in respect of which these respondents have been convicted.

23. In view of the very extensive detail contained in the warrants in this case, this Court cannot ignore the fact that within a relatively short period of the date on which the second-named respondent was questioned "in the spring of 2000" in relation to matters clearly connected with the offences for which both respondents have been convicted, they made arrangements, including by giving false information to the British embassy as to the purpose of their departure, to travel to this country. They each say that the purpose of their departure was to make a better life for themselves and their family in this country, but this Court cannot simply accept that statement at face value and ignore the other features of the case. I am not satisfied that there is any sufficient evidence to establish the fact that they were not intending to avoid any action by the prosecutor's office in relation to the property transaction in question and about which the second-named respondent had been questioned a short time previously. There is no distinction to be drawn between the position of the first named respondent and the second-named respondent in this regard. The facts averred to by them do not go any way near the state of proof found to exist in the Tobin case where very clear evidence was established that the respondent in that case was entitled under the laws applicable in Hungary to depart that country when he did. In the present case the respondents have failed to discharge the onus of proof which rests upon them, even if the Court was to disregard the additional information which has been provided on this application by the Romanian authorities. If it was necessary to have regard to that additional information, it can be seen as showing that both respondents, and not simply the second named respondent had had contact with the authorities and had made statements in relation to matters related to these offences. In my view the first named respondent in particular has been shown to be less than candid in the affidavit which he has sworn as to his knowledge of relevant matters.

24. It is now shown that on the 20th March 2000, which must have been very shortly before he left Romania in August 2000 according to his affidavit, he made a statement to the Prosecutor's Office in Bucharest relating to the alleged sale which has formed the basis of the prosecution for the offences referred to in the warrant. This was a statement given under oath, and a translation has been provided. On the 11th April 2000, the second named respondent also made a short statement denying any involvement in the criminal complaint which was made by the man who purchased the property in question. In her statement made on that date the second named respondent refers to *"the criminal complaint filed by Mr Coca Radu against me and my husband"*. This clearly indicates that before they left Romania they were aware that they were the subject of a criminal complaint by this man. The averments by each respondent in their affidavits that prior to their departure from Romania in August 2000 they were never contacted or aware of criminal accusations against them, or questioned in relation to this matter must now be seen as either false or grossly misleading, and cannot be relied upon in their favour. The fact that under the criminal procedures for prosecutions the final decision to charge and try them for the offences alleged was not made until a later date does not remove them from the category of persons who at the time they left were the subject of criminal proceedings. It follows that it is clear that their departure from Romania must be seen as a flight from justice.

25. Accordingly, section 10 of the Act is engaged and am satisfied in this case that the two relevant matters arising from section 10, namely that a European arrest warrant has been issued in respect of each respondent *"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 sentence..."* have been satisfied. I therefore reject the submissions made in relation to section 10 of the Act.

2. Section 45 of the Act -- no notification of the date of trial

26. In the case of the first named respondent, the warrant states that he *"was personally summoned at all his known addresses and by display at the 1st district City Hall and the 5th City Hall of the date and place of the hearing at which the decision was pronounced in absentia, the person eluded the summons, not appearing before the court at any of the hearings. We should mention that before the appeal court he was represented by the chosen defender..."*

27. In the case of the second-named respondent it is stated that she *"has been summoned in person of the date and place of the hearing and was present at the first hearing, then he/she eludes the court and does not attend any other hearing, the decision being pronounced in absentia, but he/she was represented by a public defender appointed by the court."*

28. It is in the face of these contents of his warrant that the first named respondent states in his grounding affidavit that he was not aware of the trial date and had received no notification of it. It is submitted on his behalf that it is not clear from the contents of his warrant exactly when the summons was served and whether it was before or after his departure from Romania, and further that it is not clear whether the summons was served directly upon him personally or by an individual person led to the addresses concerned.

29. The second-named respondent at paragraph 17 of her grounding affidavit has stated that she was never informed of any accusations made against her and it is submitted on her behalf in view of what she has stated, that it is unclear from what is contained in her warrant as to whether, when she attended before the court on the first occasion referred to, she was informed of the date of the next hearing.

30. It is submitted on behalf of both respondents that given this lack of clarity, the necessary undertaking required by in section 45 of the Act must be furnished, and it is submitted also that the provision of the Romanian Code of Penal Procedure at Article 522 thereof, which is set out in each warrant, is an insufficient guarantee of a retrial in circumstances where the respondent has been convicted and sentenced in absentia. That Article, according to the warrant, states:

"in the case in which the extradition of a person tried and convicted in absentia is requested, the cause may be retried by the court that had tried it in the first instance, at the convict's request".

31. In other words, upon surrender the respondents are entitled to request a retrial should they wish that to happen. This is not a case in which the law of the requesting state makes no provision for such a retrial upon surrender.

32. In my view, since the warrant in each case states explicitly that each respondent was notified of the date and place of the hearing, this Court is entitled to presume that such notification was given in accordance with the rules of procedure with regard to such notifications, and it is not open to the respondents to contend now that since they were not present at the addresses which the authority had for them at the time such notification was given, this notification should be regarded as invalid for the purpose of section 45 of the Act. It is not permissible in my view for the respondents to rely on their fleeing the jurisdiction in order to impugn the notification by the authorities to their known addresses. It must also be borne in mind that the authorities had no reason to believe that the respondents would not be available at that address to receive any notification, since they had left that country supposedly only for a holiday, and not permanently.

33. Section 45 of the Act provides that a person shall not be surrendered "if he or she was not notified of the time when, and place at which, he or she would be tried for the offence..... unless the issuing a judicial authority gives an undertaking in writing that the person will, upon being surrendered (1) be retried for that offence or be given the opportunity of a retrial in respect of that offence...". Since they were, according to the warrants, so notified in accordance with the rules of procedure applicable in the issuing state, no such undertaking is required, and the fact that they failed to receive this notification due to their own actions in fleeing from that jurisdiction without so notifying the relevant authorities, cannot avail them.

34. The Framework Decision in Article 5 (1) provides:

"1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment; ..." (my emphasis)

35. I have already set forth the relevant part of s. 45 of the Act which gives effect to this Article. I have already concluded that the respondents were duly notified of the date, time and place of the trial. But even if I am wrong about that, it is clear from the provisions of the warrant that the respondents are entitled to apply for a retrial upon surrender should they wish to do so. It is relevant in that regard that Romania is a party which has adopted the Framework Decision. Consequently, it is to be presumed by this Court that should the respondents wish to apply for a retrial upon surrender, an opportunity for doing so will be afforded to them in accordance with Article 522 of the Romanian Criminal Code. Section 45 entitles this Court to refuse to order surrender unless the issuing judicial authority gives an undertaking in writing that upon being surrendered the person will "*be retried for that offence or be given the opportunity of a retrial....*". Article 522 of the Code clearly gives that "opportunity for a retrial". In my view this Court is entitled to regard the fact that the issuing judicial authority has in writing (i.e. within the warrant) set forth the relevant law in this regard which exists in the issuing state for a retrial, as fulfilling the requirement of an undertaking in writing in that regard referred to in s. 45 of the Act. That is an interpretation of the section which conforms to the aims and objectives of the Framework Decision without being 'contra legem', as stated by the European Court of Justice in (Case C-105/03) *Criminal Proceedings against Pupino* [2005] ECR I-5285.

3. Article 41 of the Constitution, and Article 8 of the European Convention of Human Rights -- interference with private and family rights

36. Under this heading of objection, it is contended that, since the respondents have settled in this jurisdiction as described in their grounding affidavits, and since they have children who reside here now and who have settled here, including having attended school and college here, an order of surrender whereby these respondents are required to now leave this jurisdiction and be returned to Romania would breach their rights and under Article 41 of the Constitution, and in addition would contravene Article 8 of the European Convention of Human Rights.

37. In my view this objection must be rejected *in limine*. There can be no basis for the contention that persons, who have by absconding settled in another jurisdiction, cannot be the subject of a surrender order pursuant to extradition or surrender arrangements entered into between states. No authority has been put forward on behalf of the respondents in this regard, and it could not possibly be the case, since the circumstances in which the respondents contend such breaches arise are likely to arise in very many cases where persons have left one jurisdiction and, by the time their surrender or extradition is sought, have settled in another jurisdiction with other members of their family. It is nowhere contemplated that such circumstances could prevent an order of surrender or extradition being made.

38. For all these reasons, I am satisfied that the court is required to make the order sought under section 16 of the European Arrest Warrant out as amended, and I will so order.