

THE HIGH COURT

Record No 2010/17 EXT

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

ARBEN KOSTERRI

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 5th day of March, 2013

Introduction:

This judgment is issued pursuant to s. 16(7) of the European Arrest Warrant Act, 2003 as amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (hereinafter "the Act of 2003 as amended") giving the Court's reasons for refusing to make an Order under s. 16(1) of the Act of 2003 as amended.

The circumstances of the case

The respondent in these proceedings is the subject of a European Arrest Warrant issued by the Italian Republic on the 19th June 2008 and transmitted to this State under the name, signature and seal of an issuing judicial authority for the purposes of the European Arrest Warrant, namely, "Giudice Per Le Indagini Preliminari del Tribunale Di Milano", [per the accompanying translation, Judge for preliminary investigations of the Court of Milan / Appeal Magistrate], whose representative was identified in Part (I) of the warrant in each case as Cesare Tacconi, Judge for Preliminary Investigations of the Court of Milan / Appeal Magistrate.

The warrant was transmitted to the Irish Central Authority by the Italian Central Authority, namely "Ministero della Giustizia – Direzione Generale delle Giustizie Penale – Ufficio II" [Ministry of Justice – General Directorate for Criminal Justice – Office II] under cover of a letter dated the 14th of January 2010 from the Italian Central Authority addressed both to the Irish Central Authority and to SIRENE, and the letter were signed "for and on behalf of the Minister for Justice" by Luigi Frunzio who is described as " Director General".

The warrant seeks the rendition of the respondent for the purpose of prosecuting him for the seven offences charged under Art 110 of the Italian Code Penale., and Articles 73 or 74 of the Italian Law on Drugs (D.P.R. 309/90), and particularised in Part (E) of the warrant, and in respect of which paragraph 2 of article 2 of the Framework Decision has been invoked by the ticking of the boxes in Part E I of the warrant relating to "participation in a criminal organisation", and "illicit trafficking in narcotic drugs and psychotropic substances", respectively. The offences charged carry potential sentences of between 6 and 20 years imprisonment where Art 73 D.P.R. applies, and up to 24 years imprisonment where Art 74 D.P.R. applies.

The Irish Central Authority, having received the European arrest warrant in the latter part of January, 2010, caused it to be placed before the High Court for endorsement as required by s. 13 of the Act of 2003 as amended. The warrants were duly endorsed by the High Court for execution in this jurisdiction on the 27th of January 2010.

On the 14th of June 2012 the warrants were executed by Detective Sergeant Tom Molloy who arrested the respondent at The Eglinton Hotel, Salthill, Galway. Following his arrest the respondents was brought before the High Court in Dublin pursuant to s. 13 of the Act of 2003 as amended. In the course of the s. 13 hearing evidence was received concerning his arrest and a date was fixed for the purposes of s. 16 of the Act of 2003 as amended, and the respondent was remanded in custody in the first instance to the date fixed. (He was subsequently admitted to bail.) Thereafter the matter was adjourned from time to time, ultimately coming before the Court on the 12th of February 2013 for the purposes of a surrender hearing.

The objections to surrender

The respondent filed Points of Objection in the proceedings on the 29th of October 2012 and these were supported by an affidavit sworn by him on the 22nd of November 2012. In both the Points of Objection and in this affidavit it was claimed that in fact Mr Kosterrri had already been convicted of the offences in question, as opposed to what was stated in the warrant, namely that his rendition was being sought for the purposes of prosecuting him for those offences.

Further information

In the light of what was set out in the Points of Objection and the aforementioned affidavit the Irish Central Authority sought additional information from the Italian Central Authority. This was received under cover of a letter of the 28th of January 2013 and stated (first in Italian, followed by the accompanying translation) :



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Re. Arben Kosterrri_En.pdf

The effect of this additional information is to confirm that Mr Kosterrri was tried *in absentia* after a European arrest warrant had issued for him seeking his surrender for the purposes of prosecution. It is clear that he was not actually notified of the time and place of his trial in the manner required for the purposes of s. 45 of the Act of 2003. Further, he was convicted and sentenced *in absentia* and, it appears, he will not be permitted to appeal in circumstances where the time has now passed for the lodgement of such an appeal. In those circumstances the applicant is unable to satisfy the terms of s. 45 of the Act of 2003. The Court has therefore no option but to refuse surrender.

However, quite apart from having to refuse surrender on s. 45 grounds, this Court regards it as extremely disconcerting that the European arrest warrant in this case was placed before it for endorsement on the basis that the respondent was wanted for prosecution, i.e that the respondent was merely an accused person, who had yet to be tried, and who enjoyed the presumption of innocence, when he had in fact already been tried, convicted and sentenced more than a month previously. Nobody from the Italian

Republic had seen fit to inform the Irish Central Authority (who would in accordance with their duty have immediately informed this Court) as to what had occurred. Moreover, they had clearly been planning for many months to try the respondent and they never informed the Irish Central Authority of their plans. If they had done so, the Irish Central Authority would almost certainly not have placed the warrant in question before this Court for endorsement, or if it was thought appropriate to do so would at least have made this Court aware of the circumstances. What occurred is very serious. As a result of the non – communication by the Italian Authorities either of their plans to proceed to try the respondent *in absentia*, and, as has now transpired, of the fact that they actually did so leading to the conviction and imposition of a sentence upon the respondent, the respondent was arrested and deprived of his liberty (albeit only briefly) on foot of a jurisdictionally flawed warrant.

This is the second time in the last year that a problem of this sort has arisen involving a European arrest warrant issued by the Italian Republic. In the previous case *Minister for Justice and Equality v Gherine* [2012] IEHC 536 (unreported, High Court, Edwards J, 30th of November, 2012) European arrest warrants were placed before this Court for endorsement, and following endorsement were acted upon, on the basis that Italy was seeking the surrender of the *Gherines* (a brother and sister respectively) for prosecution. It turned out that they had been tried *in absentia* after the warrant had been issued and were acquitted of some of the offences to which the warrants related and convicted of others. Nobody on the Italian side had thought to inform the Irish Central Authority of what had taken place in Italy, and consequently this Court was caused to proceed upon warrants which were fatally flawed, but of which it had not been made aware by the Italian Authorities.

I stated in my judgement in *Gherine*:

"The European arrest warrant system depends upon member states having mutual trust and confidence in each other. Moreover, it is predicated upon the principle of mutual recognition, which is described in recital no 6 to the Framework Decision as "the cornerstone of judicial co-operation". This Court was asked to "recognise" the European arrest warrants in this case on the basis of mutual recognition, and further, on the basis of trust and confidence between member states, to give effect to European arrest warrants that purported to seek the respondents for the purpose of prosecuting them, in circumstances where they had already been tried!

While there may not have been a deliberate attempt to abuse this Court's process, what occurred in the present case, if replicated, could potentially have implications for the trust and confidence which this Court currently has in relation to the Italian State, its Courts and institutions."

Regrettably, that which the Court complained of in *Gherine* has been repeated in the present case. In the circumstances the Court must again register its protest.

S. 16(10) of the Act of 2003 provides (to the extent relevant) :

"If the High Courthas decided not to make an order under subsection (1) or (2), it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reason therefor specified in the direction, and the Central Authority in the State shall comply with such direction."

Just as it was in the *Gherine* case, the Court regards what has occurred in the present matter as being of sufficient seriousness to cause it to invoke its power under s. 16(10) of the Act of 2003 as amended, and to direct the Central Authority in the State to inform both the issuing judicial authority and Eurojust of the reasons for this Court's refusal to order surrender in each of these cases. To that end, I further direct the Central Authority in the State to transmit this judgment to both the issuing judicial authority and to Eurojust.