Neutral Citation Number [2007] IEHC 199

THE HIGH COURT

Record Number: 2007 No. 25 Ext.

BETWEEN:

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

SAULIUS FERENCA

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 24th day of May 2007

The surrender of the respondent is sought by the judicial authority in the Republic of Lithuania on foot of a European arrest warrant dated 5th January 2007, which was duly endorsed here by the High Court on the 6th February 2007. The respondent was duly arrested on foot of same on the 7th February 2007 and brought before the High Court as required by the provisions of s. 13 of the European arrest Warrant Act, 2003, as amended ("the Act"). He has been remanded in custody from time to time pending the hearing of the present application for his surrender under s. 16 of the Act.

His surrender is sought so that he can serve a sentence of two years and nine months imprisonment which was imposed on him by a court in the requesting state following his conviction in respect of three offences which are set out in the warrant. Since correspondence has been raised as a Point of Objection on this application I will be dealing with the detail of what actions by the respondent gave rise to the offences in the requesting state.

I am satisfied that the person who has been arrested and brought before the Court is the person in respect of whom this European arrest warrant has been issued. No issue has been raised in that regard.

I am satisfied that there is no reason why surrender should be refused by reference to anything in sections 21A, 22, 23 or 24 of the Act. The relevant presumptions have not been rebutted. I am also satisfied, subject to addressing the points of objection now relied upon by the respondent, that the surrender of the respondent is not prohibited by Part III of the Act or the Framework Decision.

Points of Objection:

1. Section 16(4) Bail point

The respondent raises this point which has been decided by me already in a number of cases, such as Draisey, Butenas, Puta and Sulej. These cases are currently the subject of appeals to the Supreme Court. I have no reason to decide the point differently in the present case and I reject it as a point of objection for the same reasons which I have given in the other cases referred to.

1. Improper ratification by the Oireachtas of the Framework Decision of 13th June 2002

This is also a point which has been raised in other cases such as Iqbal, Sulej and Puta, and which I have rejected. Again these judgments are the subject of appeals to the Supreme Court, and I have no reason to decide the point differently in the present case, and I reject it.

3. The warrant has been issued by the Minister for Justice in Lithuania and not by a judge

The respondent pleads in his Points of Objection that the fact that the Minister for Justice, as the judicial authority, has issued the European arrest warrant in this case, rather than a judge "flies in the face of the rationale underlying the European arrest warrant system and does not trigger the principle of mutual recognition, the cornerstone of judicial co-operation".

In my view it is not for the respondent to raise the question of whether the Minister for Justice in the Republic of Lithuania should or should not be a judicial authority for the purpose of issuing g a European arrest warrant. That country has been designated by the Minister for Foreign Affairs for the purpose of s.3 of the Act, and therefore if a European arrest warrant has been issued by a Minister for Justice in the issuing state in his or capacity as "the judicial authority" this Court respects that warrant as one properly issued in the issuing state for the purpose of the Framework Decision and the Act. It would be a matter for the Minister for Foreign Affairs to be satisfied about such a matter before designation takes place, and not for a respondent to raise the matter on an application such as the present one.

4. No undertaking has been given under section 45 of the Act

The warrant recites the fact that at all stages of the prosecution process, including his trial and conviction, the respondent was present. It states in this regard:

> "Saulius Ferenca was present in person at the hearings of all his criminal cases and at the pronouncement of all judgments."

While the Points of Objection filed by the respondent deny that this is so, and written submissions given to the Court have stated that while he was present in Court when the suspended sentence was originally imposed, he was not present when the suspension was lifted in view of the respondent's breach of conditions of suspension, no affidavit in support of that point of objection has been filed.

I accept the statement in this regard which is contained in the warrant at paragraph (b) thereof. It seems perfectly clear from the text of the warrant that he was present when convicted, and when sentence was passed, and when that sentence was varied on appeal. What is also clear is that he did not comply with the conditions of that suspended sentence, and that he changed his residence without the court's authorisation thereby avoiding the court's supervision during the period of suspension. The fact that his breach of the conditions of that suspension have led to the lifting of the suspension, requiring him therefore to serve the sentence imposed does not amount to a conviction or sentence being imposed in absentia. In my view s. 45 of the Act has not been brought into play in the manner sought to be argued by the respondent.

5. Correspondence

It is submitted by Kieran Kelly BL for the respondent that while the offences for which the respondent was convicted in Lithuania are in the nature of 'fraud' offences, the issuing authority has for some reason chosen not to tick the box marked 'fraud' in paragraph (e) of the European arrest warrant, being one of the offences referred to in Article 2.2 of the Framework Decision and, as such, an offence in respect of which correspondence or double criminality does not have to be verified on the application for surrender. He submits that this cannot be regarded as mere accident, and that there must have been a reason for not so doing.

Mr Kelly submits correctly that the question of whether or not there is correspondence must be considered by reference to what is provided in s. 5 of the Act, as amended. This provides as follows:

> "5.— 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 so specified 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."

He submits that when the acts described in the warrant and which led to the conviction of the respondent in Lithuania are examined, it is clear that in the case of at least one of the offences, and possibly a second one, correspondence is not made out.

Mr Kelly also submits that in the circumstances where the court might agree that correspondence has not been made out in at least one of the offences, then surrender cannot be ordered because the sentence of imprisonment of two years and nine months is a composite sentence, and it would not be possible for this court to be satisfied that any remaining offence or offences, in which correspondence has been made out, are offences that do not offend against one of the requirements of s. 38 of the Act, namely that the offence for which surrender is ordered be one where a term of imprisonment of not less than four months has been imposed in the issuing state. He submits that if one offence is severed on the basis of lack of correspondence, it is not possible to establish the length of any portion of the sentence imposed which is applicable only to the remaining offences.

Kerida Naidoo BL for the applicant on the other hand submits that when the acts alleged to constitute the offences are examined it is clear that correspondence can be made out by reference to certain offences here under the Criminal Justice (Theft and Fraud Offences) Act, 2001, but that in any event, and even though the box marked 'fraud' has not been ticked in the warrant itself, the offences come within the provisions of s. 38(1)(b) of the Act, namely "the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies *or is an offence that consists of conduct specified in that paragraph*, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years." (my emphasis)

In order to reach a conclusion on this point I will set out first of all what acts by the respondent are said to give rise to the offences for which he received the sentence imposed upon him.

1st offence
This is described in paragraph (e) of the warrant as being an accessory with another person, J. Sabataitis, "in producing a forged payment instrument".

The facts giving rise to this offence are set out as follows:

> "Late in May 2004, [the respondent] received from J. Sabataitis a Maestro payment card No. 6763760057794763 of AB bank Hansabankas and handed it over to unidentified persons for the purpose of forging it and the later (sic) forged it by re-writing the magnet tape information belonging to the bank teller A.S. Oslo, Norway."

I have assumed that the word appearing as 'later' is intended to read 'latter'.

Mr Naidoo submits that the acts disclosed by these facts would if done here give rise to an offence under s. 25 (1) of the Criminal Justice (Theft and Fraud offences) Act, 2001 which provides:

> "25. – (1) A person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that person or any other person."

The facts giving rise to the offence can be paraphrased by saying that the respondent received a bank card from J. Sabataitis, and then handed it over to another person so that it could be 'forged', and that other person forged it by re-writing the magnetic information. The essence of the offence under s. 25(1) of that Act is that it is the accused who forges the instrument. It is not alleged in this case that the respondent took any part in the act of forgery, but merely that he handed over the card so that it could be forged. To my mind that act does not give rise to an offence under s. 25(1) of that Act. My own inquiries have not revealed any other offence here which that act would give rise to. Correspondence in accordance with the requirements of s. 5 of the 2003 Act has not therefore been established.

2nd offence
This is described in the warrant as "abetting J. Sabataitis to use a forged instrument to initiate a financial transaction and for attempting to misappropriate another's property by means of deceit."

3rd offence
This is described as "attempting to acquire by deceit for his benefit a digital camera…"

The facts underlying the 2nd and 3rd offences are set forth as follows:

> "On 5th September 2005 at about 4pm in the premises of the store Gulbé, located at ……, he suggested J. Sabataitis to buy a Samsung i5Digimax digital camera from the domestic appliance department ……by using knowingly forged documents to initiate a financial transaction. When J. Sabataitis agreed and they were together in the aforementioned store, J. Sabataitis gave, with the intent of initiating a financial transaction, to the seller the AB bank Hansabankas payment card No. 6736760057794763 containing re-written information of Bank Teller AS Oslo, Norway that he possessed and that was knowingly forged, and by such actions they attempted to acquire by deceit for his benefit a digital camera Samsung i5 Digimac that cost LTL 1,125, but did not completed (sic) the offence due to the circumstances beyond their control because the seller suspected that the payment card No. 6763760057794763 of AB bank Hansabankas was forged and J. Sabataitis was detained by police officers."

Mr Naidoo suggests that these acts if committed here would give rise firstly to an offence under s. 26 of the same Act, which provides:

> "26. – (1) A person who uses an instrument which is, and which he or she knows, or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence."

But, secondly, it is submitted that these facts if done here would comprise an *attempt contrary to common law, to commit* an offence under s.6 of the same Act, which provides:

> "6. – (1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence".

I am satisfied that the offences suggested by Mr Naidoo would be committed if the acts said to have been done by the respondent were done here, and that correspondence in respect of the second and third offences of which the respondent was convicted and sentenced is made out.

The question of whether the minimum gravity requirement can be seen to be satisfied in respect of these two corresponding offences is something to which I shall return in due course, after considering the interesting question as to whether in spite of the fact that I am satisfied that correspondence has not been made out in respect of the first offence, the surrender of the respondent is not in fact prohibited in respect of that offence in view of the provisions of s. 38 of the Act.

Section 38 of the Act
Section 38 in Part III of the Act provides as follows for certain offences in respect of which surrender is prohibited:

> "38.—(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 *or is an offence that consists of conduct specified in that paragraph*, 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) ……
>
> (3) ……" (my emphasis)

Section 38 (1) consists of alternative two parts, namely (a) or (b). There are two sub-paragraphs (i) and (ii) within (a). In view of my finding in relation to correspondence in relation to the first offence, s. 38(1)(a) would act as a prohibition against the surrender of the respondent for that offence, and the Court would have to proceed to consider the impact of that on the question of minimum gravity in relation to the remaining offences in respect of which correspondence has been made out.

But the following paragraph (b) of s. 38(1) exists, and the wording of it suggests clearly that surrender is not prohibited under Part III, not only where the offence is one of those offences to which Article 2.2 of the Framework Decision applies – in other words one of the listed offences – but also to "*an offence that consists of conduct specified in that paragraph*" (my emphasis).

The addition of the last sentence is deliberate and must serve the purpose of extending the category of exception from prohibition of surrender beyond either an offence which does not correspond, as well as an offence which is a listed offence under Article 2.2 of the Framework Decision. The Court must give a meaning to the sentence. It suggests to me for the purpose of the first offence in the present case, that even though there is no offence here which directly corresponds to the first offence, and even though the issuing state has not ticked the box in paragraph (e) of the warrant to indicate that it is an Article 2.2 offence, this Court must nonetheless make the order for surrender if the conduct disclosed in the warrant is conduct which consists of acts which are fraudulent in a general sense. There must be a distinction to be drawn between it being the ticked offence of 'fraud' and being an offence, albeit one which is not corresponding to one here, consisting of conducting of a fraudulent nature. This seems to spread the net very wide; so that surrender will be prohibited under Part III only in very exceptional cases. While the addition of the sentence under scrutiny seems to serve the purpose of limiting the scope of the prohibition against surrender, it is nevertheless a feature of the arrangements which the Member States have signed up to in the Framework Decision that a margin of appreciation is allowed for the differences which will inevitably exist between the criminal laws of the many Member States operating the European arrest warrant. One of the expressed purposes of the Framework Decision is to remove the complexities and causes of delay under the former extradition arrangements between Member States. Each country now participates in the new arrangements on the basis of mutual trust and confidence in the laws of the other states. That would suggest that if one Member State has convicted a requested person for conduct which is an offence in that state, then this State should respect that law and allow the requesting state to recover the fugitive offender so that he or she can serve the sentence which has been imposed. The exception provided for here in s. 38(1)(b) of the Act is where, even though the listed offence has not been ticked, the conduct concerned comes within the concept of some offence within Article 2.2 – in this case being of fraud.

In my view, the conduct of which the respondent was convicted in the first offence is conduct coming under a broad concept of fraud, even though the precise activity would not be covered by a particular offence in this country as I have found, and even though the box marked 'fraud' has not been ticked. It is relevant in this regard to point to the fact that the card referred to in the first offence in May 2004 is the same card which was used in the later offences in September 2005.

I should perhaps say that if the box marked 'fraud' had in fact been ticked, it would have been acceptable given the outline of the offences contained within the warrant itself, and the question of double criminality would not have been open to argument at all on the application for surrender.

It follows from this conclusion that the surrender of the respondent is not prohibited under Part III of the Act or the Framework Decision. It follows also that the minimum gravity requirement in respect of a sentence to be served has been satisfied.

Accordingly I am satisfied that the order for surrender sought must be made, and I so order.