

THE HIGH COURT

[2019 No. 149 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

MICHAEL KUBALEK

RESPONDENT

**JUDGMENT of Mr. Justice Binchy delivered on the 5th day of December, 2019**

1. By this application the applicant seeks an order for the surrender of the respondent to the Czech Republic pursuant to a European Arrest Warrant dated 10th October, 2016 (*"the EAW"*). The EAW was issued by a District Judge of the District Court in Nový Jičín as issuing judicial authority.
2. The EAW was endorsed by the High Court on 13th May, 2018. The respondent was arrested and brought before this Court on 13th September, 2019 and this application proceeded before the Court on 27th November, 2019.
3. At the opening of this application, I was satisfied that the person before the Court is the person in respect of whom the EAW was issued, and no objection was raised to this application on the basis that the person before the Court is not the person to whom the EAW refers.
4. No issue was raised by either of the parties that the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 are applicable and this Court is not aware of any reason as to why the surrender of the respondent might be prohibited for any of the reasons set forth in any of those sections.
5. The basis for the issue of the EAW is stated at para. B of the same to be a *"warrant to commitment to prison of 12th September, 2016"*. Paragraph B.2 refers to an enforceable judgment of the District Court of Nový Jičín of 15th December, 2015, and also to a judgment of the Regional Court in Ostrava of 8th April, 2016.
6. At para. C of the EAW it is stated that the maximum length of the custodial sentence or detention order which may be imposed for the offences is eight years, and that a sentence of four years and three months was imposed, with four years one month and 27 days remaining to be served. Accordingly, minimum gravity in respect of the offences with which the EAW is concerned is established. Significantly however, the sentence imposed on the respondent was, under the law of the Czech Republic, an aggregate sentence in respect of four offences.
7. At para. D of the EAW, the issuing judicial authority has ticked the box at para. D.2, stating that the respondent did not appear in person at the trial resulting in the decision. The issuing judicial authority has also ticked box D.3.4, stating that the respondent, if surrendered, will be personally served with the decision, and informed of his right of appeal against both conviction and sentence. He will be informed of this within eight days

of his surrender. Accordingly, the surrender of the respondent is not prohibited by s. 45 of the European Arrest Warrant Act, 2003 (*"the Act of 2003"*).

8. At para. E of the EAW it is stated that it relates to four offences. However, the EAW then proceeds to describe nine different incidents alleged to have occurred between 7th October, 2012, and 18th April, 2013, in which the respondent, together with others, broke into various identified premises, in some cases damaging the premises, and stealing goods. Additionally, para. E of the EAW refers to an offence in respect of failure to pay child maintenance and also another offence relating to his failure to answer a warrant of committal to prison issued by the District Court in Karvina not later than 15th April, 2013, having been served with that warrant on 9th April, 2013. This arose out of a conviction on 20th July, 2012.
9. Particulars of the offences under the law of the Czech Republic are given in para. E of the EAW. The offences referred to are the offence of theft, contrary to s. 205 of the criminal code, the offence of causing damage to a thing of another, contrary to s. 228 of the criminal code, the offence of negligence of mandatory support contrary to s. 196 of the criminal code and the offence of obstruction of justice and obstruction of a sentence of banishment, contrary to s. 337 of the criminal code.
10. Additional information was provided by the issuing judicial authority in response to enquiries made by the central authority here. By letter dated 29th November, 2018, the issuing judicial authority confirmed that the sentence imposed on the respondent includes a term of imprisonment for the criminal offence of failing to pay child maintenance. It is also stated that pursuant to s. 83(3) of Act No. 104/2013 that: -

*"If the person was extradited for execution of an unsuspended sentence of imprisonment only in relation to some of the criminal offences, for which accumulative or aggregated sentence has been imposed, or in relation to only some of the component attacks of a continuing criminal offence, the court that tried the case in the first instance will proportionately decrease the sentence in a public session. A complaint is admissible against this decision, which has a dilatory effect."*

11. This letter concludes with a statement that should the sentenced individual not be surrendered for the criminal offence of failing to pay child maintenance, his sentence would be proportionately decreased after surrender, pursuant to this statutory provision.
12. The applicant sought further information from the issuing judicial authority by letter dated 19th September, 2019, in relation to this and other matters. In this letter, it is stated that both Article 8(F) of the Framework Decision and domestic law in the State require an indication of the exact penalty which awaits the respondent, and the issuing judicial authority was asked to indicate the exact period of the sentence imposed which refers to the offence of failing to pay child maintenance, or alternatively, to indicate the exact reduction in sentence which would be applied if the respondent is surrendered for the other offences to which the EAW refers. In reply to this enquiry, by letter dated 3rd

October, 2019, the issuing judicial authority stated that the respondent was not separately sentenced for the offence of failing to pay child maintenance. The letter continues: -

*"...he was sentenced only an aggregate sentence together with the already imposed sentence of imprisonment for one year, he was sentenced to the total punishment of one year and three months. In case of Michael Kubalek's surrender for the other offences, it is therefore possible to consider the sentence reduction by three months."*

13. Points of objection were filed on behalf of the respondent dated 30th October, 2019. These points of objection were framed in general terms and stated that the surrender of the respondent is prohibited by s. 37 of the Act of 2003 and that it would also be contrary to Article 40 of Bunreacht na hÉireann and Article 8 of the European Convention on Human Rights. Particulars of these assertions were not provided, but in any case these objections were not pursued at the hearing of the application. Instead the respondent argued that further information is required as regards the exact reduction in sentence that will be afforded to the respondent if he is surrendered for all of the offences other than that relating to failure to pay child maintenance. It was also argued that it is not clear that there is correspondence in this jurisdiction with the offence of obstruction of justice by failing to commence execution of a sentence of imprisonment when required to do so.
14. I will address the latter point first. The particulars of this offence are stated in para. E of the EAW as being a failure to appear (without reason) to serve the aggregate unconditional sentence of imprisonment of 18 months, imposed by judgment of the District Court in Karvina on 20th July, 2012, which judgment became final and binding on 30th January, 2013, *"despite personally taking over (on 9th April, 2013) the warrant of committal to prison issued by the District Court of Karvina to appear in prison not later than on 15th April, 2013"*. Those are the acts relied upon in relation to this offence, provision for which is made in s. 337 of the criminal code under the heading of *"Obstruction of justice and obstruction of a sentence of banishment"*. This provision then provides at s. 337(1) (F): *"Whoever interferes or considerably aggravates execution of a decision of court or another public authority by failing without a serious reason to commence execution of a sentence of imprisonment upon a notice of a court or by resisting to commence execution of this sentence in another way"* is guilty of an offence and liable to imprisonment for up to two years.
15. Counsel for the respondent argues that the acts described in the EAW in relation to this matter would, if committed in this jurisdiction, amount to an offence under s. 13(1) of the Criminal Justice Act, 1984. That section states: *"If a person who has been released on bail in criminal proceedings fails to appear before a court in accordance with his recognisance, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or both."* It seems to me that there is a substantive difference between failing to appear

before a court in criminal proceedings in accordance with a recognisance, and failing to commence execution of a sentence of imprisonment following upon service of a notice by a court to do so. Of its very nature, the offence created by s. 13(1) is concerned with the attendance in court by a person accused or convicted of an offence, while those proceedings are on-going. In this jurisdiction the proceedings are no longer on-going once the sentence of imprisonment has been handed down. We do not have a system in this jurisdiction whereby a person is released following imposition of a sentence, and later served with a notice requiring him to present himself at a prison in order to serve the sentence imposed by the court. That being the case, correspondence in relation to this offence is not in my view established.

16. It is accepted that there is no offence in this jurisdiction of failing to pay child maintenance. The remaining offences are concerned with theft and damage to property which clearly correspond to offences in this jurisdiction (and it was not argued otherwise). Accordingly, therefore, of the four offences in respect of which the surrender of the respondent is sought, it is possible to surrender the respondent for two of the offences only, that of theft and that of causing damage to the property of another. In turn, those offences are related to nine separate incidents detailed particulars of which are given in the EAW.
17. The question that arises is whether or not it is possible to surrender the respondent in respect of the offences of theft and damage to property in circumstances where the sentence imposed on the respondent is an aggregate sentence in respect of all four offences. It will be apparent from the above that the issuing judicial authority has already indicated that, if the respondent is surrendered for all offences except that relating to child maintenance, there will be a proportionate reduction in the sentence imposed on him of up to three months. However, it seems to me that this is an estimate only and the actual period to be deducted from the sentence falls to be determined by a court, pursuant to s. 83(3) of Act No. 104/2013 (see para. 10 above).
18. Counsel for the applicant referred the Court to the decisions of the Supreme Court in the *Minister for Justice, Equality & Law Reform v. Michael Martin Connolly* [2014] IESC 34 and the *Minister for Justice, Equality & Law Reform v. Saulius Ferenca* [2008] IESC 52. He does not so much rely on these authorities, as bring them to the attention of the Court in aid of its decision in the matter.
19. In the concluding passage of his judgment in *Connolly*, Hardiman J. stated: "*I consider it to be an imperative duty of a court asked to order the compulsory delivery of a person for trial outside the State to ensure that it is affirmatively and unambiguously aware of the nature of the offences for which it is asked to have him forcibly delivered, and for which he may be tried abroad, and of the number of such offences.*" This passage is relevant in the context that the warrant states that the respondent is required to serve sentences imposed by courts in the Czech Republic in respect of four offences, whereas particulars of 11 offences are provided. This issue was addressed in a request sent by the applicant to the issuing judicial authority on 19th September, 2019. In reply to this query, the

issuing judicial authority, by letter dated 3rd October, 2019, stated that the reason that the respondent is required for four offences is because according to the legal order of the Czech Republic, his acts are “classified as four facts of an offence/merits of an offence/of four offences committed in total by nine attacks”. This cannot be correct because of the four offences, two of the offences relate to matters that have nothing to do with the nine attacks i.e. the offences associated with non-payment of child maintenance and failure to serve a sentence of imprisonment. That said, I think it is clear that by its reply of 3rd October, 2019, the issuing judicial authority is stating that offences of an identical kind may be grouped together and treated as one offence and I can see no reason why this should operate in any way so as to prohibit the surrender of the respondent.

20. *In Ferenca, the Supreme Court had to consider the impact of an aggregate sentence imposed in relation to three offences, in circumstances where the High Court had found that one of those offences did not correspond to an offence under Irish law. Noting that s. 17 of the Act of 2003 does make provision for surrender in respect of some of the offences, while refusing surrender for others, Murray CJ. stated that that section is clearly only intended to apply where the request in relation to each offence in the warrant is distinct and separate. Since in that case also a composite sentence had been imposed on the respondent, Murray CJ. held that the sentence for which his return was sought was not severable from the offence in respect of which there was no correspondence and for which he could not be surrendered. That being the case, it was not possible for the respondent to be surrendered for the purpose of serving part only of the sentence.*
21. These proceedings introduce an issue that was not considered by the court in Ferenca and that is that the issuing judicial authority has indicated that there will be a reduction in sentence in respect of the conviction for failing to pay child maintenance, if the respondent is not surrendered for that offence. This arises by reason of the express provision in the law of the Czech Republic which the issuing judicial authority drew to the attention of the applicant in its letter of 29 November, 2018, and which I have set out in full at para. 10 above.
22. Of course since it is only by this decision that I have held that the offence of failing to present oneself to serve a prison sentence does not correspond to any offence in this jurisdiction. However, the same provision of the legislation providing for a proportionate reduction in sentence will apply to this offence also. The question that I have to consider is whether the surrender of the respondent in respect of two offences out of four only is prohibited because he has received a single, composite, sentence of imprisonment in respect of all four offences, in circumstances where there is express statutory provision to apply for a reduction in sentence proportionate to the offences for which he is surrendered?
23. In considering this issue, it is, I think, important to remember that the EAW states that, because he was not present at the trial that resulted in his conviction and sentence, he will, after his surrender, be personally served with the decision and be afforded the opportunity to appeal against the same. It is made clear that that opportunity includes

the opportunity to a retrial on the merits of the case. Accordingly, therefore, if surrendered in relation to the theft and damage to property offences only, it is open to the respondent to request a retrial in relation to those matters only so that there will be then a new decision resulting in sentences in respect of those offences only.

24. It is apparent from the above that the respondent has available to him two remedies to address the problems associated with the fact that the sentence imposed on him includes periods of detention relating to matters for which he will not be surrendered. The first is that he may apply to the court for a proportionate reduction in his sentence, pursuant to the provision of the law of the Czech Republic referred to above, so that it is reduced proportionately to reflect that he has not been surrendered to serve a sentence in relation to specific matters. The second is that he may elect to appeal his conviction, and if again convicted, this will result in a definitive sentence of imprisonment in relation to the matters for which he is surrendered. While therefore it is not possible for the issuing judicial authority to comply exactly with s. 11(1) (G) (III) of the Act of 2003, which requires that the EAW provides particulars of a sentence imposed on an individual by reference to the offence of which he or she was convicted, that difficulty is negated by the options available to the respondent in this case, and should not operate as bar to his surrender for offences which correspond to offences in this jurisdiction.
25. Accordingly, I will make an order for the surrender of the respondent in relation to the offences concerning theft and damage to property only, but not in relation to the offences of failing to pay child maintenance and obstruction of justice.