

THE HIGH COURT

2008 51 Ext

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

ONDREJ POLLAK

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 19th day of May 2010.

The surrender of the respondent is sought by a judicial authority in Czech Republic so that he can serve a sentence of two years imprisonment imposed upon him by a court in Pardubice, Czech Republic on the 6th March 2001 in respect of two offences committed on the 3rd March 1990.

The respondent was not present for his trial although he had been present at earlier stages of the proceedings against him, and the European arrest warrant has made reference to the provisions of section 306a of the Rules of Criminal Procedure which makes certain provisions for a retrial upon surrender, should a person seek a retrial upon being surrendered.

The offences are of causing bodily harm and of causing a breach of the peace. The issuing judicial authority has indicated by marking paragraph E.I of the warrant that these two offences are within the categories of offences set forth in Article 2.2 of the Framework Decision, and as such there is no requirement to establish double criminality/correspondence. Minimum gravity is also satisfied in respect of each.

The warrant is dated 3rd January 2008. It was endorsed for execution on the 5th March 2008, and on the 1st April 2008 the respondent was duly arrested by Sgt. James Kirwan, and brought before the court as required by s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act").

No issue is raised as to his identity, and I am satisfied in any event from Sgt. Kirwan's affidavit that the person arrested and brought before the court is the person in respect of whom this European arrest warrant has been issued.

Points of Objection filed and delivered by the respondent raise a number of different issues against an order for surrender being made. One issue raised was under the specialty rule on the basis that the presumption in relation to specialty as provided for in s. 23 of the Act is rebutted since two persons surrendered from this jurisdiction to the Czech Republic were proceeded against upon surrender for offences other than those for which surrender was ordered. That issue does not seem to have been pursued in oral argument.

Another issue arises from the fact that the trial in 2001 which led to his conviction in relation to these offences dating back to 1990 was *in absentia* and breached his rights to a fair trial accordingly. Linked to that is an objection on the basis that an undertaking under s. 45 of the Act has not been provided whereby the respondent can be guaranteed the opportunity of a retrial if he is surrendered, and that the reference to the provisions of article 306a of the Czech Criminal Code in the warrant is an insufficient guarantee of a fair and proper retrial *ab initio*.

Another issue raised is on the basis of unexplained delay/lapse of time since these offences are said to have been committed.

While these issues have been raised in the Points of Objection, and for the most part have been argued in oral submissions, the main issue argued and relied upon by the respondent is an important issue, namely whether the fact that the respondent is a person who has been granted a declaration of refugee status on the 15th February 2001 on the basis of a well-founded fear of persecution in the Czech Republic means that his surrender is prohibited under s. 37 of the Act, or on some other basis. The Framework Decision and the Act are silent as to the position of persons who are refugees from the issuing state in question.

To my knowledge this issue has not arisen for determination previously in this jurisdiction, though I am aware of at least one such case which came for decision in the United Kingdom, namely District Court in *Ostroleka, Second Criminal Division (A Polish Judicial Authority) v. Dytlow* [2009] EWHC 1009 (Admin).

I propose dealing with that issue since its resolution makes it unnecessary to dispose of the remaining issues raised.

Refugee status:

It is a fact that the respondent enjoys the protections provided to him by a declaration that he is a refugee. He is a member of the Roma community, and in 1998 before he left the Czech Republic he was active politically. That political activity involved protests including a demonstration in 1999 in a town named Usti nad Labem against the erection of a wall to separate the members of the Roma community in that town from other residents there.

As a result of threats made against him and his family he left the Czech Republic and sought asylum firstly in Belgium where his application was unsuccessful, and later in this jurisdiction, having arrived here in December 2000. He was granted a declaration of refugee status here in 2001, and the Minister for Justice, Equality and Law Reform has not sought to revoke that declaration on the basis of the Czech Republic's subsequent membership of the European Union, or for any other reason there might be to suggest that if he were to return or be returned to that country he would no longer be at risk of persecution. As long as his status remains unchanged in that regard he enjoys refugee status here, and it is not up to this Court to consider in any way whether there is any reality now at this point in time to the respondent's well-founded fear of persecution which existed in 2000 and 2001.

In numerous international Conventions, provisions exist which express the principle that a person who has a well founded fear of persecution must not be returned to the country from where that fear derives, whether by way of deportation, extradition or otherwise. It appears in different forms but one way or the other reflects the well-known principle of *non-refoulement* emanating from Article 33 of the U.N. Convention Relating to the Status of Refugees, 1951 which provides:

"(1) No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life, or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

There is nothing in the present case to suggest that the respondent comes within the exception to the principle in paragraph (2).

Art. 3 of the U.N. Convention Against Torture, 1984 to which Ireland acceded on 11th April 2002 and Art. 7 of the International Convention on Civil and Political Rights, 1966 to which Ireland acceded 8th December 1989 contain similar provisions.

Section 5 of the Refugee Act, 1996 reflects this principle of non-refoulement:

"5. – A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion."

Among the rights to which a person who has been declared a refugee is entitled is one whereby under s. 3(2)(a)(iii) of the Refugee Act, 1996 he/she is entitled to reside in the State.

Since the ratification of the Lisbon Treaty this State has obligations arising under Articles 18 and 19 of the Charter of Fundamental Rights of the European Union, 7th December, 2000.

Article 18 provides:

"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

Art. 19(2) of the Charter, under the heading "Protection in the event of removal, expulsion or extradition" provides:

"No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". (my emphasis)

Section 37 of the European Arrest Warrant Act, 2003 as amended provides:

"37.—(1) A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),

(c) there are reasonable grounds for believing that—

(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation,

or

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—

(I) is not his or her sex, race, religion, nationality or ethnic origin,

(II) does not hold the same political opinions as him or her,

(III) speaks a different language than he or she does, or

(IV) does not have the same sexual orientation as he or she does,

or

(iii) were the person to be surrendered to the issuing state—

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out,

or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment.

The only Convention referred to in that section which has the potential to prohibit surrender is the European Convention on Human Rights and its Protocols. Article 3 of the European Convention on Human Rights which provides:

"3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

However, the Framework Decision at Recital (12) states as follows:

"(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media." (my emphasis)

I have already set forth above the provisions of Article 18 and Article 19(2) of the Charter of Fundamental Rights of the European Union regarding asylum and certain extradition guarantees.

The European Court of Human Rights has considered the whole question of whether Article 3 rights are engaged in extradition proceedings, and it has concluded that it is – see *Soering v. United Kingdom* [1989] ECHR. 14. Paragraphs 88 – 91 of the Court's judgment in *Soering* are of relevance and I will set out portions thereof:

"88. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. (See Article 15(2) ECHR) This absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention.

It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intentment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

89. ...

90. ...

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has a direct consequence the exposure of an individual to proscribed ill-treatment."

I have already referred to the fact that the question of surrender of a refugee is not referred to directly either in the Framework Decision or in the 2003 Act. However, it is clear that this fact does not mean the obligation to surrender must in all cases trump the right of the refugee against refoulement, and his rights under Article 3 of the Convention. Some EU member states have enacted particular provisions in its domestic extradition legislation in relation to prohibition or otherwise in relation to refugees. Some, such as the United Kingdom, have provided that where a person whose surrender is sought on foot of a European arrest warrant has a pending application for refugee status he/she may not be surrendered pending the completion of that application. That legislation does not go on to provide that in the event of the application for refugee status being successful he/she may not be surrendered to the requesting state. However, it has been decided that such a prohibition must be inferred, and that to surrender such a person would constitute an abuse of process. I have already referred to the case of *Ostroleka, Second Criminal Division (A Polish Judicial Authority) v. Dytlow* in which this question arose. In his judgment in that case Lord Justice Keene stated in this regard at paragraph 11 thereof :

"Consequently, one has here a statutory scheme in Part 1 cases where a person cannot be extradited to the territory of which he is a national or citizen while his asylum claim remains pending, in the sense of not having been finally determined. It seems to me clearly implicit that if the asylum claim is eventually granted, the refugee cannot then be extradited. If he could, little purpose would be served by the inherently temporary restriction imposed by section 39. There are similar provisions to be found in section 121 of the 2003 Act relating to Part 2 extradition proceedings, those arising from requests by countries other than those falling within the European arrest warrant system."

Lord Justice Keene went on to state:

"..... the position generally is that Article 33.1 [Refugee Convention] would prevent the extradition of a person to his home territory (or indeed any other territory) where his life or freedom would be threatened on account of his race or other factor there referred to (essentially the Refugee Convention grounds). To sum up the legal position thus far, it appears to me that once refugee status has been granted to a person, and so long as it persists, that person cannot be extradited to his country of nationality, of whose protection he, by definition, cannot avail himself."

Lord Justice Keene disposed of the appeal by concluding that the pursuit of the application for surrender in respect of a person enjoying refugee status amounted to an abuse of process and that accordingly the District Judge ought, by virtue of an implied power (as opposed to an inherent jurisdiction, which as a District Judge he did not have) to have so found and discharged the respondent.

That finding was in the light of the fact that the UK Extradition Act contained no express provision dealing with the discharge of a person because that person enjoys refugee status, albeit that there was a provision for the discharge of a person on a number of bases, including because surrender was incompatible with Convention rights, and therefore including Articles 2 and 3 thereof. That provision would appear to mirror the provisions of s. 37 of the 2003 Act here.

It goes without saying that this judgment is not an authority which is binding in any way here, but it is at least interesting to note how a similar situation is approached and concluded in a neighbouring Common Law jurisdiction operating the same surrender arrangements under the European arrest warrant Framework Decision.

It seems to me that one way or another, whether by way of a finding that the application for the respondent's surrender amounts to an abuse of process since he is a person currently enjoying refugee status, or by way of finding that to order his surrender in such circumstances would constitute a breach of this State's obligations under the European Convention on Human Rights to guarantee to the respondent his rights under Article 3 of the Convention, there can be no question but that this respondent's surrender is prohibited by reason of his having an extant refugee status.

To order his surrender would amount to this Court compelling emanations of this State to breach internationally recognised obligations arising from a number of treaty and convention obligations, some of which I have set forth above, and which were helpfully identified by Aileen Donnelly SC for the respondent both in her submissions to the Court and in her helpful written submissions.

I must say I think it is undesirable to conclude in the present case that the application for surrender in the circumstances of this case would amount to an abuse of process. That concept usually imports some element of *mala fides*. Neither should this Court impute such *mala fides* or abuse of process to the issuing judicial authority in circumstances where there is no evidence of the kind which would justify such a conclusion against an issuing judicial authority in a Member State of the European Union. It is safe to conclude that nobody having any role in this application was aware of the fact that this respondent was a refugee from Czech Republic until such time as he brought that fact to attention. I appreciate that the Minister for Justice, Equality and Law Reform will have been the corporation sole which declared him to be a refugee, but it is going too far to conclude that as a result there has been an abuse of process in bringing this application for surrender before the High Court. In fact under the 2003 Act he is required to do so whenever a European arrest warrant is transmitted to the Central Authority by an issuing state. The Minister is not invested with any discretion to refuse to make the application in such circumstances.

I suppose one could say that if on the application for endorsement of the warrant the Minister was already aware that the proposed respondent was a refugee here and from the issuing state, that matter if brought to the Court's attention would properly permit the Court to refuse to endorse the warrant, just as where the warrant discloses an offence which it is accepted has no corresponding offence in this State the Court will refuse to endorse the warrant; firstly on the grounds of futility, but secondly and more importantly because no person should be arrested and deprived of his liberty, no matter how short the period thereof, where there can be no possibility of the application for surrender succeeding.

It seems to me to be far more appropriate to reach a conclusion that surrender is prohibited under the provisions of s. 37 of the Act as to surrender this respondent would amount to a breach of this State's obligations under Article 3 of the European Convention on Human Rights to guarantee to the respondent his right not to "*be subjected to torture or to inhuman or degrading treatment or punishment*", possibly also its obligations under Article 5. A declaration of refugee status entitles the refugee to reside in this State as a protection from his country of origin from where he has fled on account of a substantiated well-founded fear of persecution. That persecution can take different and various forms, all of which, it seems to me, are embraced by the protections afforded as well under the identified article of the Convention. The declaration of refugee status makes it unnecessary in my view for the Court to be satisfied by any other means that the respondent's rights would be violated if surrender were to be effected. The fact that circumstances in the country of origin may have changed between the date on which he was declared a refugee and the date of the Court's determination of the application for surrender does not matter. The reason why that consideration should not be relevant to the application for surrender is that the Minister under the legislation has power to consider and to decide to revoke a declaration of refugee status, and there is a mechanism and procedure by which such a decision is to be made, which affords a large measure of fair procedure protections to the refugee on such an application. It would not be appropriate for a Court hearing an application for surrender to embark on a fact-finding mission and to reach a conclusion that the fear of persecution is no longer a well-founded one, where the Minister himself has not decided to do so.

In so far as it might be argued that the obligation to surrender a person under a European arrest warrant is in conflict with the *non-refoulement* principle, I would have no hesitation in concluding that the former must yield. This view is consistent with UNHCR Guidance Note on Extradition and International Refugee Protection, April 2008 – see paras. 52-53 thereof.

It is for the above reasons that I refused to make the order for surrender and discharged the respondent on the 26th March 2010.