Neutral Citation Number: [2010] IEHC 315

THE HIGH COURT

2010 42 EXT

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Jan Odstrcilik

Respondent

Judgment of Mr Justice Michael Peart delivered on the 30th day of July, 2010:

The surrender of the respondent is sought on foot of a European arrest warrant which issued in Czech Republic on the 10th June, 2009. That warrant was endorsed for execution here on the 10th February, 2010, and in due course on the 27th April, 2010 the respondent was arrested on foot of same and brought before the High Court as required by the provisions of section 13 of the European Arrest Warrant Act 2003, as amended, and from where he has been remanded from time to time pending the determination of this application for his surrender to the authorities in Czech Republic.

The warrant relates to two offences in respect of which he has been convicted. They are offences of theft and of driving a vehicle while disqualified.

He was present for his trial on the 16th May, 2005. It appears that the trial proceeded to an extent, but for reasons which are set out in a letter from the Czech judicial authority dated 16th December, 2009 the balance of the trial was adjourned until the 26th August, 2009. He did not attend court on the adjourned date and therefore the remainder of the trial, conviction and imposition of sentence occurred in his absence. While sentence has been imposed, it appears from the additional information provided, it is not yet enforceable under Polish law as the respondent has not been served with the judgment.

Clearly he was personally notified of the adjourned date since he was present in court when the matter was adjourned, but an issue arises as to whether the respondent is a person who comes within the provisions of section 10 of the Act of 2003 in circumstances where sentence has been passed but it is not yet enforceable, and I will come to that shortly in more detail.

An issue has been raised in relation to correspondence as well as that under section 10 referred to above.

But subject to addressing these issues, I am satisfied that here is no reason why his surrender must be refused under sections 21A, 22, 23 or 24 of the Act, and neither is his surrender prohibited by any provision of Part III of the Act or the Framework Decision.

Objections:

1. Correspondence:

Driving while disqualified:

According to warrant this offence comprises five occasions on which in June and July 2004 and on a number of named streets in the town of Plzen, the respondent drove a car "*even though he had been disqualified from driving all the motor vehicles for a period of 10 months by the decision of the Metropolitan Authority in the town of Plzen, the Department of Transport ….".*

At first glance there seems to be no difficulty in concluding that if the respondent was to have driven a car on a street in this jurisdiction during a period of disqualification from driving, he would commit an offence contrary to section 38(1) of the Road Traffic Act 1961 which provides:

> *"38. – (1) A person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being in force having effect and licensing him to drive the vehicle."*

However, Kieran Kelly B.L. for the respondent makes two submissions to the contrary. Firstly, he suggests that the Polish offence is more an offence of driving in breach of a court order than driving while not holding a current driving licence. Secondly, he refers to the requirement in the s. 38 offence to the commission of that offence where the driving occurs in a "public place" and he submits that simply because the warrant states that the driving took place on a street, it cannot be presumed that the street constituted a public place for the purpose of the offence here. I need not dwell too long on these two submissions. In relation to the first, it is clear that even if the offence under Polish law is somewhat different, though not greatly, the respondent would commit an offence under s. 38 of the Act of 1961 if while he had been disqualified from driving he drove in a public place during the period of disqualification. I dealt with such an offence in *Minister for Justice, Equality and Law Reform v. Anderson,* (Unreported, High Court, 14th March, 2006) and concluded that there was no distinction of relevance to correspondence between driving while under a disqualification and driving while not holding a licence. I have no reason to reach a different conclusion on this occasion.

In relation to the possibility that the street on which the respondent was driving on the various dates not being a public place, and that for correspondence purposes he would have to have been driving in a public place, that possibility is contrived in my view to the point absurdity. I appreciate that Mr. Kelly referred the court to a decision in this jurisdiction wherein in relation to a particular driving

offence alleged to have been committed on Grafton Street at a time when traffic was prohibited from entering upon that street it was held that on that occasion it could not be regarded as having been a public place i.e. a place to which the public had access, but for the purposes of the present application, this court can assume that if the warrant alleges that the respondent drove while disqualified on a street or streets in Plzen, he was driving in a public place. The other situation is of an exceptional nature and in the absence of information to the contrary it is safe to assume for the purpose of finding correspondence that a street is a public place.

Theft:

The facts which gave rise to the theft offence referred to in the warrant are set out as follows:

> *"On August 8, 2004 in Plzen when he was employed as a cashier at the petrol station Hypernova at Pisecka street No. 1 he reduced the takings by CZK 6,000 – he did not hand in this sum together with the rest of the takings and used the money for his own needs; he caused damage to the injured company AHOLD Czech Republic …".*

Additional information provided states that when reducing the takings of the petrol station he "unlawfully" retained the 6,000 CZK by handing in the takings less that sum, and that he did so without any authorization. It goes on to state that in fact the respondent repaid that sum to the injured party one year later, but that this repayment does not alter the fact that the offence was committed.

It is submitted by Siobhan Stack B.L. for the applicant that if this act was done in this State an offence of theft would be committed contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and that all the ingredients of that offence are met by the facts as disclosed by the warrant and the additional information provided, those ingredients being that the property was taken was appropriated, dishonestly without the consent of the owner and with the intention of depriving the owner of it. In this regard "appropriates" is defined as meaning "usurps or adversely interferes with the proprietary rights of the owner of the property"; "depriving" is defined as meaning "temporarily or permanently depriving"; and "dishonestly" is defined as meaning "without a claim of right made in good faith". Without the consent of the owner is not defined but is self-explanatory.

Mr. Kelly submits that the facts as disclosed do not show that the respondent acted dishonestly, and refers to the fact that about a year later the respondent paid the money back to his employer, and he suggests that there would be nothing unusual about an employee taking a sum of money from the takings and repaying it some time later. However, I am completely satisfied that all the ingredients of the s. 4 theft offence are made out, especially when one has regard to the definitions of the various terms used in the Act of 2001. There is ample information from which one can conclude that what was done was done dishonestly as defined.

Section 10 objection:

This objection arises from a particular procedure required under Czech law, namely that after sentence is passed and before it is enforceable the judgment by which sentence was passed must be served on the convicted person. Until that is done, the person is not required to serve the sentence in question. In the present case the respondent attended part of his trial but failed to appear on the date to which it had been adjourned, and on which occasion he was convicted and sentenced to the period of imprisonment to which this European arrest warrant relates. That sentencing occurred in the respondent's absence, and the additional information provided makes it clear that his presence was not necessary. They regard the absence of the respondent as a voluntary absence following his having been properly notified of the date and place of his trial, and they note that he attended the first date of his trial and that he was aware of the date to which it was adjourned.

The issuing judicial authority has stated that upon surrender he will be given a copy of the written judgment, and that his time for appealing against that judgment will run from that time. The information goes on to state that if he chooses to appeal the judgment the appeal will be heard by the superior Regional Court in Plzen, which will review not only the decision but also the entire criminal proceedings prior to the judgment. They go on to state:

> *"The judgment still is not final and enforceable. Therefore the European arrest warrant has not been issued for the purpose of surrender of the convict to serve the unconditional sentence of imprisonment but to detail the accused for the purpose of still running criminal proceedings."*

As I have stated, Mr. Kelly submits that the respondent does not come within any of the four categories of person referred to in section 10 of the Act of 2003 which as of the date on which this warrant issued provided as follows:

> *"10.—Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—*
>
> *(a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates, or*
>
> *(b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,*
>
> *(c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the European arrest warrant relates, or*
>
> *(d) on whom a sentence of imprisonment or detention has been imposed in the state 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, or*
>
> *(ii) completed serving that sentence,*
>
> *that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision be arrested and surrendered to the issuing state."*

Mr. Kelly has submitted that the unusual situation in the present case is not one provided for in section 10 as it is a case where there has been a conviction and a sentence imposed but there has never been any obligation or requirement that this sentence be served

since the judgment has not yet been handed to the respondent. In such circumstances it is submitted that the respondent cannot be regarded as a person on whom a sentence of imprisonment has been imposed "and who fled from the issuing state before he or she commenced serving that sentence" because where there is no obligation on him to serve the sentence he cannot be regarded as having fled in the sense of evading justice.

In my view, if one reads section 10 literally, and not in the manner I suggested in my judgment in Minister for Justice, Equality and Law Reform v. Stapleton (Unreported, High Court, 21st February, 2006), it seems to me that the respondent is a person who is still "*the subject of proceedings in that state for an offence to which the European arrest warrant relates*", *i.e*. a person within s. 10(b) of the Act. I had suggested a certain temporal sequence evident in the way s. 10 is worded, but there is no reason to so restrict one's reading of the section. Clearly, where a person has been convicted and sentenced but where some procedural step is still required to be taken before that sentence can be enforced, the convicted person is still the subject of proceedings in the issuing state.

Such an interpretation is clearly within the objectives of Article 1.1 and 2.1 of the Framework Decision which provide as follows:

> ***Article 1: Definition of the European arrest warrant and obligation to execute it***
>
> *1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.*
>
> ***Article 2: Scope of the European arrest warrant***
>
> *1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.*

As for Article 1.1 above, the warrant in the present case has clearly been issued for the purposes of executing a custodial sentence or detention, and as for Article 2.1 it is clear that a sentence of more than four months has been passed in the issuing state. This Court is required to adopt a conforming interpretation unless to do so is to arrive at a result which is *contra legem*. Given the provisions of s. 10(b) of the Act, I do not believe that it is *contra legem* to hold that the respondent is a person who may be the subject of a European arrest warrant.

However, Mr. Kelly refers also to the provisions of section 38(1)(a)(ii) of the Act of 2003, which prohibits the surrender of a person in certain circumstances set forth therein. Mr. Kelly relies upon s. 38(1)(a)(ii) of the Act of 2003, which prohibits the surrender of a person in certain circumstances set forth therein. Mr. Kelly relies upon s. 38(1)(a)(ii)

> *38.—(1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence <u>unless</u>—*
>
> *(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) <u>a term of imprisonment or detention of not less than 4 months has been imposed</u> on the person in respect of the offence in the issuing state, <u>and the person is required under the law of the issuing state to serve all or part of that term of imprisonment</u> …….."* (my emphasis)

Mr. Kelly's submission is that since the judgment has not been given to the respondent and it has been confirmed that until this occurs he is not required to serve the sentence,, it cannot be said that he is a "*person is required under the law of the issuing state to serve all or part of that term of imprisonment*".

In my view Mr. Kelly's submission is predicated on too restrictive a meaning for the word "required". The additional information provided by the issuing judicial authority makes the position clear. I have already set forth the relevant portion of that information, but for convenience will do so again:

> *"The judgment still is not final and enforceable. Therefore the European arrest warrant has not issued for the purpose of surrender of the convict to serve the unconditional sentence of imprisonment but to detail the accused for the purpose of still running criminal proceedings."*

Even though the respondent is not yet "required" to serve the sentence in the sense that there is presently in force a lawful judgment in that regard, it is nevertheless the case that the respondent is still required by the issuing state to serve the sentence in the sense that they wish him to do so, and it remains only that he be handed a copy of the court's decision or judgment in that regard. There is no question of this sentence having been set aside in some way, whether by pardon or otherwise. Clearly if the issuing judicial authority had convicted him and sentenced him, but that sentence was not one which it required him to serve, for whatever reason, then his surrender would be prohibited since there would be no purpose served by his surrender or the issuing of the warrant in the first place. In the present case, the respondent is still required by the issuing judicial authority to serve this sentence following the service of the judgment upon him. The additional information referred to above refers to the proceedings as being "still running". In my view that means in the present case that as provided for in paragraph (b) of s. 10 of the Act of 2003, the respondent is still the subject of proceedings for the purpose of that section, and for the purposes of s. 38(1)(a)(ii) of the Act of 2003 is a person who is still required by the law of the issuing state to serve the sentence imposed, even if there is some procedural step to be taken in that regard. The present situation whereby the judgment has not been served is insufficient to trigger the prohibition against surrender provided for in that section, and I believe that to so interpret the section is in conformity with a clear objective of Framework decision, namely that lawfully imposed sentences of imprisonment in excess of four months be executed.

For all these reasons, this Court is required to make the order for surrender, and I will so order.