

**THE HIGH COURT**

**[2009 No. 24 Ext.]**

**[2009 No. 124 Ext.]**

**BETWEEN:**

**MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**APPLICANT**

**AND**

**VERA DUNKOVA**

**RESPONDENT**

**Judgment of Mr Justice Michael Peart delivered on the 28th day of January 2011:**

The surrender of the respondent is sought by a judicial authority in the Czech Republic on foot of two European arrest warrants which issued there on the 26th January 2009 and the 15th January 2008 respectively. Each warrant was transmitted to the Central Authority in this State on different dates, and in respect of each warrant this Court ordered their endorsement for execution, and the respondent was duly arrested on each on separate dates namely 3rd November 2009 and 11th June 2010, and she was brought before the High Court immediately after her arrest and was remanded on bail from time to time thereafter pending the completion of the applications made for an orders of surrender. These applications were heard together before me.

I am satisfied that the respondent before the Court is the person in respect of whom these two warrants have been issued. No issue to the contrary arises.

The warrant dated 26th February 2009 seeks surrender so that she may serve the remainder of a sentence of 2 years and 6 months which was imposed upon her following her conviction for one offence committed in 1995, the details of which are set forth in that warrant. A period of 2 years, 2 months and 22 days remains to be served.

No issue is pursued on this application in respect of correspondence. Accordingly I do not propose to set forth the details of that offence. On a previous application for surrender in respect of this offence, this Court was not satisfied that the warrant disclosed facts sufficient for this Court to be satisfied that there was a corresponding offence under the laws of this State. However, on the present application, further information has been supplied by the issuing judicial authority, and I am satisfied now that the offence corresponds to an offence of theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Any objection by the respondent in relation to correspondence has been withdrawn.

The other warrant dated 15th January 2008 seeks surrender so that the respondent can serve a sentence of 1 year and 6 months which was imposed upon her following her conviction for one offence set out therein and which was committed in 1994. I will not set out the details of that offence but, again, I am satisfied that this offence corresponds to an offence of attempted robbery – robbery being an offence contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Again, the objection raised as to correspondence by the respondent has been withdrawn.

Minimum gravity has been satisfied in respect of each warrant on account of the length of the two sentences which have been imposed.

No undertaking is required to be provided under section 45 of the European Arrest Warrant Act, 2003, as amended, as neither conviction was imposed in absentia.

Paul McDermott SC for the respondent has very helpfully stated that the only point of objection being pursued on these applications is that raised in respect of family rights derived from Article 8 of the European Convention on Human Rights and under the Constitution. In support of that objection, a number of affidavits have been filed. These are sworn by the respondent herself and other members of her family all of whom reside here with her.

**The affidavits of the respondent:**

The respondent has stated that she came to this country in July 2003 out of fear for her safety and that of her family. She and her family of Roma origin, and that she and her family had been the subject of intimidation and violence for that reason. She has given details of specific incidents which happened before they left, including that they received death threats if they did not leave their area. They applied for asylum here upon arrival but these applications were refused. She refers to the offence the subject of the first above mentioned warrant and states that she subsequently repaid the amount of the theft to the injured party, and states that in June 1995 she had been released from prison because she was at that time pregnant and was suffering from a heart condition from which she has suffered since she was 28 years of age. She is on medication for this condition (angina) and will remain on it for the remainder of her life. She has provided medical evidence in relation to this. She believes that imprisonment if surrendered will give rise to a rave risk of harm to her and that the Czech prison system will not be able to provide adequately for her care.

She also states that her husband is unwell. He suffers from a lung disease and requires to be on an oxygen machine for several hours each day, and that he needs her to care for him, and that if surrendered to the Czech Republic there would be nobody at home here who could look after him.

She goes on to state that following her release in 1995 and before she left that country in 2003 no effort was ever made to re-arrest her. She applied for a pardon but received no response to that application. She also refers to the long delay following her arrival here before any effort was made to seek her surrender, even though the authorities appear to have known her whereabouts here.

She swore a further affidavit in October 2010. Again, she refers to her bad health, stating that she has heart disease as well as diabetes and exhibits evidence in relation to these ailments. She states that she and her family are very happy and by now well settled in this State. She gives details of how her children have integrated here both in terms of schools and other activities in the community in which they live. School reports and other testimonials are exhibited.

She believes that because of her ill health and that of her husband, she needs to remain in this State, and asks this Court to refuse an order for her surrender.

The respondent's husband has also provided an affidavit in which he speaks of his own ill health, and also of the incidents which led to the family leaving the Czech Republic and coming to this country. He states that he suffers from asthma and from an oxygen deficiency in his blood for which he requires oxygen each night. He relies on his wife, the respondent "for everything", and states that when his wife went to hospital here his daughter was very helpful around the house and looking after the younger children, but he believes that it not fair to her to have to do so. Her affidavit discloses that she is now aged 21 years. She completed her Leaving Certificate examinations in 2009 and commenced a course in healthcare support in September 2010. She confirms that when her mother is in hospital she looks after the family, does the cooking and assists in looking after her father. She feels no wish to return to the Czech Republic, and has many friends here. The other children have sworn affidavits which set out similar facts and how they have settled here and have no wish to return to the Czech Republic. Those affidavits also refer to incidents which occurred before they left for this country.

Paul McDermott SC submits that before this Court should order surrender it must be satisfied that not only that surrender is required in pursuit of a legitimate aim and necessary in a democratic society, but also that the surrender is not disproportionate to that aim. He submits that there are facts in this case which support the submission that surrender would be disproportionate. He refers to the length of time which has passed since these offences were committed, and to what he submits is the relatively minor nature of the offences in question. It is submitted that the more minor the offences are the more likely it is that surrender is not proportionate. Conversely, where an offence is a serious offence, surrender is more likely to be found to be proportionate, being necessary in a democratic society. He refers to the fact that this lengthy delay in seeking surrender for these minor offences has resulted in the family putting down firm roots here, the children having been educated here and having integrated into their community. This is a factor which, it is submitted, this Court should attach weight to when carrying out the exercise of balancing the right of the issuing judicial authority to have the sentences served against the family rights of the respondent and those rights of the other family members. He of course also points to the serious medical conditions from which both the respondent and she suffer.

Mr McDermott has also referred to the rehabilitative purpose of any sentence of imprisonment, and in that regard points to the fact, which it is, that the respondent has not come to the adverse attention of An Garda Síochána while in this State, and he submits that this is evidence that there is no need for the respondent to serve the sentences for the purposes of being rehabilitated, since she clearly has turned over a new leaf, as it were. This is a matter which he urges that this Court should have regard to when considering whether surrender is necessary in the context of Article 8 rights.

In the context of proportionality he submits also that if surrendered the respondent will be alone in the Czech Republic in view of the fact that it is unreasonable that her family can return to that country to be near her, especially given the length of time that they have been here, thereby losing whatever contacts they may have had there before they left. But he also draws support in that submission from the facts averred to as to the intimidation and violence which they experienced before they left in 2003.

A number of authorities were opened to the Court, but I do not feel that it necessary to refer to them specifically, as this case must be decided on its own facts and circumstances, and the basis on which this Court must arrive at its conclusion is clear.

Firstly, I should say that I cannot regard the offences in this case as minor offences in a technical sense. They are of course not at the higher end of the spectrum of criminality, but they are not minor or of little importance. Minimum gravity is clearly defined in the Framework Decision and it is satisfied. Nevertheless I can take some account of the nature of the offences when balancing the competing rights in this case.

Secondly, I accept from the evidence adduced that both the respondent and her husband suffer from ill health, the latter to a greater extent than the former. But no evidence has been adduced that the respondent if surrendered will not receive from the prison authorities whatever medication or other assistance she requires in relation to her medical condition. In relation to her husband's needs in this respect, I accept that a burden may fall upon other family members to assist him, but that alone is not a compelling reason why her surrender should not be ordered. It is a sad fact of life that where a parent is sent to prison, it will almost inevitably be the case that this will impact adversely on the remaining members of the family.

Thirdly, I accept that the respondent's children have integrated into their community here, and regard this country as their home, and have no wish to return to the Czech Republic, even temporarily. That will impact on their ability to visit their mother if she is surrendered.

The issuing state is entitled to seek the surrender of the respondent. The Framework Decision provides the basis on which this can be done. The application for her surrender is in pursuit of a legitimate aim, namely the public interest the maintenance of law and order, and to ensure that persons who commit offences in the Czech Republic cannot escape their criminal responsibility for such offences by leaving that State before either being prosecuted, or in the case of conviction and sentence, before that sentence has been served. That is a legitimate aim.

Section 37 of the Act of 2003 prohibits surrender if to so order would constitute a breach of this State's obligations under the Convention or its Protocols, or would contravene a provision of the Constitution, such as the family rights of the respondent.

The Court must balance those rights against the right of the issuing state to prosecute and punish persons in respect of offences committed in that state, and consider the proportionality of making an order for surrender taking into account all the circumstances of the case.

In my view, given the inevitability that the imprisonment of any parent or indeed any other person will always impact negatively on family rights, it requires some exceptional facts and circumstances for this Court to conclude that the respondent's family rights should trump the competing right of the issuing state.

The facts in the present case are not exceptional. For a respondent to suffer illness is not itself exceptional. In so far as the respondent is unwell, there is no evidence that she cannot receive appropriate medication and treatment while in prison. Her husband is also unwell and requires help at home here. But again that is not so exceptional as to require that the respondent be not

surrendered. While it will impose some additional burdens on the remaining family members, that can be done. In addition, the services of this State are available if required in order to assist him.

While it is unfortunate that these offences occurred a long time ago, the Framework Decision makes it clear that even offences which occurred before the adoption of the Framework Decision may be the subject of a surrender application. I have considered the fact that it would appear to be the case that the respondent has rehabilitated herself in the sense that since she came here she has not committed offences, and to that extent the rehabilitative element of a sentence may not be required, but that alone is insufficient to prohibit surrender since the issuing state is entitled to seek to punish the respondent for the offences in question. The question of the need for rehabilitation can be taken into account possibly by reference to parole or release on licence, but that is a matter entirely within the discretion of the issuing state. Indeed, they seem to have been sympathetic to the respondent's plight when they gave her the benefit of a temporary release in June 1995 when she was pregnant and suffering from a heart condition.

In all the circumstances of this case, I am satisfied that this Court is required to make the order for surrender in respect of the two offences for which her surrender is sought on foot of the two warrants on foot of which she has been arrested here, and I so order.