Neutral Citation Number: [2010] IEHC 198

THE HIGH COURT

2007 82 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Jindrich Marek

Respondent

Judgment of Mr Justice Michael Peart delivered on the 3rd day of February 2010:

The surrender of the respondent to the Czech Republic was ordered by order of the High Court dated 23rd November 2007, the court being satisfied on that occasion that all the requirements of section 16 of the European Arrest Warrant Act 2003, as amended, were complied with. However, following an appeal to the Supreme Court by the respondent, the application for surrender has been remitted by that Court for a determination as to whether the provisions of section 45 of the Act have been complied with.

Since that date, there has been correspondence between the Central Authority here and the issuing judicial authority in order to clarify the form and nature of any retrial of the respondent which would take place, following surrender being ordered, if the respondent chose to exercise his right to a retrial. This arises, of course, because the issuing judicial authority acknowledges that the conviction and sentence for which his surrender is being sought, was rendered in absentia.

Section 45 of the Act, as amended, provides as follows:

> *45. A person shall not be surrendered under this Act if –*
>
> > *(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and*
> >
> > *(a) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence,*
> >
> > *or*
> >
> > *(ii) he or she was not permitted to attend the trial in respect of the offence concerned,*
>
> *unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered*
>
> > *(i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,*
> >
> > *(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and*
> >
> > *(iii) be permitted to be present when any such retrial takes place.*

While the issuing judicial authority provided an undertaking in the precise terms referred to above, the Supreme Court was of the view that in deciding whether this undertaking was a sufficient compliance with the terms of section 45, some material contained in page 2 of the European Arrest Warrant could not be ignored. On page 2 at paragraph D of the warrant the issuing judicial authority first of all stated that the respondent, following surrender, would have the right to a new trial in his presence, and that this right was guaranteed to him by section 306a, para 2 of the Code of Criminal Procedure. The provisions of section 306a are set out in full and include a paragraph which was of concern to the Supreme Court. That paragraph states as follows:

> *"(1) ... ... If the defendant so demands, new evidence shall be submitted to the court, which had not been presented in the previous proceedings, whose character can allow it or which cannot be prevented by any other relevant matter, otherwise the statements of the evidence will be read to the accused and he will have a possibility to comment on them."*

In that regard, the Chief Justice stated the following:

> *"That raises the question in the mind of the Court as to the meaning and effect and the interpretation to be given to the undertakings provided by the requesting judicial authority pursuant to s. 45. Simply reading statements of evidence rather than hearing witnesses does not suggest a retrial.*
>
> *The Court is not satisfied that there is, in relation to the request for surrender founded on the European Arrest Warrant, sufficient documentation or information regarding the nature and form of the retrial that will take place if the applicant is returned to it, and therefore it does not consider that the order for surrender made by the High Court was correctly made in the circumstances outlined. That however is not the end of the matter. The European Arrest Warrant and the scheme and system of surrender envisaged by it anticipated that that there may be circumstances in which there is a lack of clarity or a gap in the information before Court dealing with such a request. That this should be anticipated is not surprising considering the number of countries covered by the system of surrender and the different languages which*

require a translation of relevant documentation which may give rise to ambiguities.

Having come to the conclusion that because of, at the very least, an ambiguity in respect of the undertakings given having regard to what is contained in page 2 of the European Arrest Warrant, the Court, as I have indicated, feels it should set aside the Order of the High Court, it having been incorrectly made, and considers that the matter should be remitted to the High Court in order that the High Court can, pursuant to s. 20 of the Act, require the issuing judicial authority to provide it with such additional documentation or information as will enable it to determine the nature and form of the retrial which the requesting judicial authority says may take place, and will if the appellant so requests, on his return to the Czech Republic, should that Order eventually be made."

As I said, the Central Authority requested further information on the nature of the retrial which, if the respondent so requests, will be afforded to him if he is surrendered.

By letter dated 31st March 2009 the issuing judicial authority in its opening paragraph states first of all that the Code of Criminal Procedure guarantees the right of the respondent to what is described as "a righteous trial", and that the existing judgment of the court may be annulled at the request of the convicted person. Regarding the nature of the retrial the following is stated:

"The retrial shall be held from the beginning, i.e. after reading the charge, with maintaining all the procedural rights of the respondent. The retrial shall be held in the presence of the respondent. The respondent is entitled to have a defender under section 36 subsection 1, letter a) of the Code of Criminal Procedure. If he does not choose one, a defender shall be appointed for him. The respondent has the right to refuse the statement and such a fact shall not be considered an aggravation. The respondent has the right for all evidence to be repeatedly presented, when the nature of them allows it or when no significant circumstance could prevent it, under section 306a of the Code of Criminal Procedure, which is enclosed. In such a case the records of evidence and proofs shall be read to the respondent and he will have the possibility to comment on them. The respondent has the right to express his opinion on all the proofs, i. e. to each proof individually. He can also offer new evidence for his defence. After the decision of the court of first instance, the respondent has the right to appeal against it under the law. The respondent shall be duly instructed about all his rights."

This letter goes on to state that *"the nature and, form of the retrial will be the same, as already mentioned above. It will be a repeated trial in the presence of the respondent and all his procedural rights will be respected".*

It is also stated in this letter that *"the respondent has the right to be present during the interrogation of witnesses, he may ask questions (cross-examine), either personally or through his defender, he may comment on the witnesses' statements and express his opinion on them".*

Before proceeding to further information, I should refer to the fact that this letter concludes by stating that *"the retrial might not decide to the detriment of the respondent..... This requirement not to aggravate the position of the respondent is represented with the interest to guarantee the respondent has full procedural rights, especially the right to defence".* I have taken this last statement to mean that at any retrial the fact that the respondent may have absconded and later seeks a retrial cannot aggravate his situation in the sense that it results in any more onerous penalty being imposed than if this had not occurred.

Following receipt of this information, the Central Authority wrote again to the issuing judicial authority seeking further clarifications, since, in the meantime, the matter had come back before this court on 30th June 2009 for consideration and submissions.

On that occasion, I was of the view that some uncertainty or ambiguity still remained, and so the matter was again adjourned so that the matter could be clarified. The letter written by the Central Authority dated 30th June 2009 describes this in the following way and requests information as set forth:

"Judge Peart was of the view that the responses provided in the letter of 31 March 2009 meant that all witnesses that gave evidence at the respondent's trial in absentia would give evidence again at the new trial, subject to their-availability. However, if they were unavailable, then records of their evidence would be read to the respondent and he could comment upon such records of evidence. Judge Peart felt that this was not a "de novo" trial.

In these circumstances, and pursuant to section 20 of the E AW Act, he directed that we (the Central Authority) seek the following additional information:

"1. Confirmation that all witnesses who gave evidence at the respondent's trial in absentia will be available to give evidence and be cross examined the new trial.

2. If witnesses are not available, then confirmation that their previous evidence will not form part of the respondent's new trial, i.e. their previous evidence will not be read from transcripts."

To these questions the following answers were received by letter dated 15th July 2009:

"1. In the "de novo" trial all the witnesses that gave evidence in the previous trial will give evidence in the new trial.

2. If witnesses are not available the court will proceed in accordance with ***section 211, subsection 1 of the Code of Criminal Procedure****, which reads as follows:*

Instead of the witness's interrogation in the trial it is possible to read the statement of his/her testimony, if the court does not consider his/her personal interrogation necessary, and if the Public Prosecutor and the Accused agree with it. If the accused person, who had been summoned for the trial does not appear without an excuse or if he leaves the courtroom without any serious reason, the consent of the accused to read the statement is not necessary and the consent of the Public Prosecutor shall suffice. The accused must however be informed of such facts in the summons.

With respect to the above it is clear that in the new trial the statements of the witnesses' testimonies may not be read without the consent of the accused person."

I take this latest information to mean, first of all, that in any retrial, all the witnesses who gave evidence at the previous trial will be called to give evidence in the new trial; and secondly, that if one or more witnesses who gave evidence at the first trial are not available to give evidence at the retrial, the statement of his/her evidence at the first trial may be read out at the retrial if the court considers that personal interrogation is on necessary, but then only if both the Public Prosecutor and the accused agree to that happening. The penultimate paragraph of the issuing judicial authority's letter dated 15th July 2009 seems to emphasise that this is the position. The issuing judicial authority has itself underlined the words *"and the Accused agree with it".*

However, a Czech lawyer, Dr. Jaroslav Ortman, whose advice in relation to these matters has been sought by the respondent, has written a letter to the respondent's solicitor here and which is dated 2nd October 2009. I will set out relevant passages from that letter in its translated form:

> *"The proceedings lead against the escaped are governed by the Czech system of law, the provisions of section 306 (a) of the Criminal Code. The repetition of the trial concluded against the escaped is conditioned by a motion submitted by the convicted, which must be submitted by the extradited escaped within eight days from the delivery of the verdict of the first instance court to the convicted. Therefore the trial may only be repeated on the basis of the motion submitted by the convicted, submitted within the statutory time limit of eight days from the delivery of the verdict of the first instance court."*

This paragraph is uncontroversial, I think, since it seems to confirm simply that the respondent may, if he wishes to exercise his right to a retrial, bring a motion to set aside the existing conviction, and must do so within eight days from the date on which the verdict of the first instance court is delivered to him upon surrender.

That letter dated 2nd October 2009 proceeds:

> *"If the extradited convicted requires presentation of evidence, presented in the proceedings before court in the absence of the convicted, such evidence shall be presented, if allowed so by its nature. Thus, the Court need not present all evidence but only that evidence the nature of which enables its presentation or the repetition of which is not prevented from by a serious fact. The decision of whether it concerns the first case, i. e. the nature admits it, or the second case, that the repetition is not prevented from by a serious fact, is a matter to be decided exclusively by the court. It is not possible to lodge a legal remedy against this judicial decision on the presentation or non presentation of such evidence; such objections may be raised in the appeal itself Then it is the case of deciding on the remedy against the decision of the court of first instance."*

This sentence, according to the translation, is somewhat more difficult to understand. However it seems to me to state that if the respondent wants all the evidence at the first trial to be presented again at the second trial, then that is allowed, provided that such evidence is of such a nature as to permit that to happen. That seems to mean that if for one reason or another that evidence is either not available at all (perhaps because a witness has died or is otherwise unavailable), or is of such a kind as cannot be repeated, then it is simply not part of the evidence in the second trial. But, the paragraph also suggests that the question as to whether the nature of the evidence permits of its re-presentation or whether it is prevented "by a serious fact" is a matter to be decided exclusively by the court, that decision not being subject to appeal other than by way of an overall appeal against the verdict following the retrial.

The following paragraph in the letter dated 2nd October 2009 states as follows:

> *"What I stated is also applicable to the presentation of evidence, such as examination of a witness. The general rule is that, if possible -- and in such examination is generally possible -- such evidence is presented by the examination of a witness. There may also be reasons why the examination should not be made. These reasons must be determined by the court. If the evidence is not presented as decided by the court, the protocol on the presentation of evidence shall be read and the convicted, extradited for criminal proceedings, may comment on it. Thus, he may present his/her opinion on the evidence which had been presented in his/her absence and is not repeated."* (my emphasis)

The two sentences which I have underlined in the preceding paragraph, on their face, suggest that if the court decides that the evidence of an unavailable witness should be presented at the retrial, this can be done and the respondent "may comment on it". It is noticeable however, that this lawyer, has not stated this opinion by reference specifically to the provisions of section 211 of the Code of Criminal Procedure which was referred to specifically in the letter dated 15th July 2009 from the issuing judicial authority, which section referred to the fact that evidence which had been given at the first trial, and which could not be presented again at the second trial, could be read out from the statement or transcript only if the Public Prosecutor and the accused agree to that happening. When the Central Authority here received a copy of this letter from the Czech lawyer from the solicitors acting for the respondent, it wrote again to the issuing judicial authority by letter dated 23rd November 2009 and asked some further questions in an effort to clarify certain matters, including what is contained in the paragraph which I have just quoted. In relation to that paragraph the issuing judicial authority states the following:

> *"... according to the Czech Code of Criminal Procedure, it is in fact possible that in cases where an interrogation of a witness who already gave evidence before the court cannot be carried out in the renewed main proceedings, the records of the evidence of this witness is read out as an exception. However, this may not be carried out on grounds of any reason, but only in those cases, when this is prohibited by serious objective reality (e.g. if the witness dies during that time). As it is stated in answer Ad. 3, the summary of the court in relation to the impossibility to conduct a repeated interrogation of a witness is subject to an enquiry by the appeals court. The convict must always have the right to be able to provide his stance to such an interrogation of a witness, otherwise, the records of the witnesses' evidence may not be used. Only such a witness records may be read out, which was obtained by the employment of legal methods. This means that in the proceedings against a runaway, an interrogation of the witness can be attended also by the legal representative of the accused at all times, and therefore, in the events when a renewed main proceedings and tailored to the impossibility to re-interrogator witness and a reading of the witness evidence followed, this would always be in relation to witness evidence of a witness, owned the legal representative of the accused already has had the opportunity to ask questions. If the records of the witness evidence were not obtained by employment of legal methods, it would not be possible to utilise them during the decision process on the guilt or innocence at all."*

This is a somewhat lengthy paragraph and requires careful reading, but it seems to me that the sentence which I have underlined confirms the situation that the reading out of the evidence of an unavailable witness who gave evidence at the first trial can only

happen if the respondent agrees. It is also clear from the earlier information that such a procedure will occur only if a particular witness who gave evidence at first trial is for some good reason no longer available. But the important thing is that even in such a situation, the previous evidence can only be used if the respondent agrees to it being used.

Submissions:
Robert Barron SC for the respondent submits that he additional information which has been provided by the issuing judicial authority still does not make the position clear to the point where this court can be satisfied that any retrial of the respondent which would take place following surrender would be a trial 'de novo'. He suggests that the information first provided by the issuing judicial authority in its letter dated 31st March 2009 has turned out to be incorrect, and he refers to what is stated by Mr. Ortman, the Czech lawyer which it is submitted makes it clear that the judge at any retrial may allow a statement of a missing witness to be read out if he/she considers that to be necessary, and that the respondent will be left only with an opportunity to comment on it. In that regard he refers to the third and fourth paragraphs of Mr. Ortman's letter dated 2nd October 2009. It is submitted that what is stated by Mr. Ortman in his letter has shown also that what is stated by the issuing judicial authority in its letter dated 15th July 2009 is not correct i.e. that a statement of previous evidence given by an unavailable witness may be presented at a retrial only if the accused is agreeable to that being done. Mr. Barron submits that Mr. Ortman's letter makes it clear that even if the accused person does not consent to such a statement of evidence being presented, it will be allowed if the court considers that to be necessary, and that accordingly the retrial will not be a trial de novo or one, in other words, which proceeds as if the first trial had never occurred.

Anthony Collins SC for the applicant submits by way of reply that the position has now been made abundantly clear by the information that has been received from the issuing judicial authority, and that the ambiguity which Mr. Barron submits still remains and the interpretation which he seeks to put by reference to Mr. Ortman's letter ignores entirely the contents of the letter dated 15th July 2009 from the issuing judicial authority where it states specifically that the reading out of a statement of a witness given at the first trial, and who is unavailable at the retrial, may only occur if both the Public Prosecutor and the accused agree to that being done. Mr. Collins submits that in fact Mr. Ortman has not sought to address directly the provisions of Section 211 of the Criminal Code which are set forth in that letter. If he had done so, then of course the Central Authority here could have sought the views of the issuing judicial authority on anything which might have been said.

Conclusion:
In judgment delivered on 5th February 2009 (ex-tempore), the Chief Justice was concerned as to the sufficiency of the undertaking provided by the issuing judicial authority for the purposes of section 45 of the Act, because of the uncertainty or doubt created as to the nature of any retrial by reason of the paragraph, quoted in his judgment, which seemed to suggest that in certain circumstances statements of evidence given at the first trial "will be read to the accused and he will have the possibility to comment on them".

The information which has been obtained now from the issuing judicial authority and which I have set forth above, seems to me to put the position beyond any doubt and, in spite of what is said by Mr. Ortman, confirms that all witnesses who gave evidence at the first trial will be required to give evidence at any retrial, but that where any such witness is unavailable, and the court considers that such witnesses evidence is required, the statement of the evidence given by that witness at the first trial can be presented at any retrial by being read out, but only if, *inter alios*, the accused agrees to this being done. The provisions of section 211 of the Code of Criminal Procedure has been set for by the issuing judicial authority in its letter dated 15th July 2009. I appreciate that Mr. Ortman has expressed his views in relation to this procedure on any retrial, but, as Mr. Collins has pointed out, he does not address specifically the provisions of Section 211, and he certainly had an opportunity of doing so. It is this question of whether, at a retrial, evidence from the previous trial can simply be read into the record of the retrial with only an opportunity for the accused to comment upon it, that gave rise to the possibility that such a retrial would not be a trial de novo. I am satisfied that, while such a possibility exists, it only exists if both the Public Prosecutor and, importantly, the accused agree.

This requirement that at any retrial the respondent must consent to the admission into evidence of any statement of evidence given at the earlier trial by any unavailable witness, before such statement evidence can be presented, is sufficient in my view to guarantee a retrial which is a trial *de novo*.

I am satisfied therefore that the undertaking which has been provided by the issuing judicial authority pursuant to section 45 of the Act is an undertaking which meets the requirements of that section and is sufficient to guarantee to the respondent a retrial to which he is entitled under the Framework Decision.

The Supreme Court has already decided that all the other requirements under section 16 of the Act are satisfied, and accordingly I will make the order for the surrender of the respondent to the Czech Republic.