

THE HIGH COURT

2009 135 EXT

2009 313 EXT

2010 181 EXT

BETWEEN:

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

TOMÁS ORSZÁGH

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 8th day of March 2011:

The surrender of the respondent is sought by judicial authorities in Slovak Republic on foot of three separate European arrest warrant which issued there on different dates and in respect of separate offences.

The first warrant:

The first warrant issued on the 9th October 2008. It was thereafter transmitted to the Central Authority here and on the 10th June 2009 this warrant was endorsed for execution. Thereafter on the 5th July 2010 the respondent was arrested on foot of same, and was brought before the High Court on the following day, the 6th July 2010, as required by section 13 of the European Arrest Act, 2003, as amended ("the Act of 2003").

This warrant seeks the surrender of the respondent so that he can serve a sentence of 28 months imprisonment which was imposed in absentia on the 19th May 2008. An undertaking has been provided by the issuing judicial authority which is sufficient to satisfy the requirements of section 45 of the Act of 2003 in relation to affording the respondent the opportunity of a retrial.

The offence for which he was convicted and sentenced is essentially one whereby he obtained a loan of money on the basis of false information which he provided in support of his application in relation to his employment.

I am satisfied that this offence if committed here would be an offence here under section 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, namely the offence of making a gain by deception.

Minimum gravity is satisfied by the length of sentence imposed upon him, namely one in excess of four months.

The respondent has not pursued the only point of objection which was raised in Points of Objection, which was in relation to the requirement that an undertaking for a retrial is required. There is such an undertaking in relation to the conviction which is the subject of this warrant.

There is no reason to refuse surrender under sections 21A, 22, 23 or 24 of the Act of 2003, and I am satisfied that his surrender is not prohibited by reason of any provision of Part III of the Act of 2003 or the Framework Decision.

The second warrant:

The second warrant is one which issued on the 29th January 2009. It was endorsed for execution here on the 25th November 2009, and, he was arrested on the 5th July 2010 also on foot of this warrant and brought before the High Court on the 6th July 2010, as required.

This warrant is in respect of two offences for which he was convicted and for which he received a cumulative sentence of 8 months imprisonment following his conviction on the 21st September 2005. He was present for his trial for these offences, so no undertaking is required under section 45 of the Act of 2003. However, this 8 month sentence was conditionally suspended for a period of 18 months, and it appears that because he was in breach of the conditions attaching to the suspension. the sentence was activated, so that his surrender is now sought to enable that sentence to be served.

The conditions attaching to that suspension of sentence were not set forth in the warrant, and it became necessary to seek further information in that regard in view of an issue raised by the respondent that he did not 'flee' from the Slovak Republic when he came to this country. I will come to that matter in due course.

He was not present for the hearing which led to the activation of the sentence, and he submits that an undertaking under section 45 of the Act of 2003 is required for retrial, or presumably a rehearing of the activation application since he was not present at the hearing which led to the deprivation of his liberty. Edward Dwyer BL for the respondent has submitted that such an undertaking is required since the concept of a trial must include the sentence hearing also, and it was only on foot of the activation hearing that the respondent is required to serve this 8 month sentence. I cannot agree with that submission. He was present at his trial and when the sentence was imposed. The fact that it was what we call a suspended sentence does not mean that it is not a sentence. There is no requirement that he be afforded a rehearing of the activation hearing or a retrial of the case.

The offences are set out in detail in the warrant and since no issue is raised in relation to correspondence in relation both offences, I will not set out those details, but rather, simply indicate that I am satisfied that the first offence corresponds to an offence of either careless driving or even dangerous driving contrary to section 52 or section 53 of the Road Traffic Act, 1961. The second offence is one of causing criminal damage and would correspond here to that offence under section 2 of the Criminal Damage Act, 1991.

Minimum gravity is satisfied by the length of sentence imposed, and the fact that it was at first suspended does not affect that.

Subject to addressing the fleeing point I am satisfied that there is no reason to refuse to order surrender under the provisions of sections 21A, 22, 23 or 24 of the Act of 2003 and that surrender is not prohibited by any provision of Part III of the Act of 2003 or the Framework Decision.

The third warrant:

This warrant is dated 13th October 2008, and it was endorsed for execution by the High Court on the 2nd June 2010. The respondent was arrested on foot of this warrant on the 6th July 2010 and brought before the Court on that date, as required.

This warrant relates to two offences of driving while he was disqualified from driving. I am satisfied that these offences correspond to offences of driving without a licence contrary to the Road Traffic Act, 1961 as amended.

He was convicted of these offences in his absence and received a 10 month sentence, which was not suspended. Minimum gravity is satisfied.

An undertaking has been provided in the terms appearing in section 45 of the Act of 2003 except that the issuing judicial authority has included therein the text of section 362, paragraph 1 of the Criminal Code No. 301/2005, which indicates that a person convicted in his absence may apply for a retrial "*no later than 6 months from the date on which he found out that he was convicted but not later than the relevant limitation period set out in the Criminal Act*". Paragraph 2 of section 362 provides that if the court is satisfied that the conditions in paragraph 1 are met the ruling will be cancelled but "*otherwise the application will be dismissed*". Further information was sought in relation to this undertaking, but the information provided has not altered the position.

Such an undertaking cannot be regarded as an unequivocal undertaking for a retrial. It seems clear that the respondent could not possibly come within the time limit referred to in paragraph 1 of section 362 of the Criminal Code, and his application for a retrial would have to be dismissed. In my view in the absence of a clear and unequivocal undertaking for a retrial, the Court may not order his surrender in respect of these offences.

The 'fleeing' issue:

Since I have refused to surrender the respondent on foot of the third warrant, the section 10 fleeing point is relevant only to the first and third warrants.

The respondent has filed an affidavit to ground this point of objection. In it he states that he is 25 years of age and is a qualified electrician and worked as such in Slovakia from 2004 to 2006, and that in 2006 he came to this country for economic reasons in order to improve his standard of living, as there was not much work available in his home country. He states that he came here in June 2006 with his partner, and gives some details of what work he obtained here since his arrival.

He was in this country in October 2008 when he was convicted in his absence for the offences recited in the third warrant. Those offences of driving while disqualified were committed on the 31st October 2005 and 8th March 2006 respectively. He states that the disqualification from driving was imposed on the 29th September 2005 (the offence in the second warrant), but he states also that he was informed by the police that he could continue driving until his licence was formally revoked, and that this had not happened by the time the offences were committed on 31st October 2005 and 8th March 2006, and that if he had an opportunity to defend these offences he would do so.

The disqualification from driving was imposed for the offence of dangerous driving referred to in the second warrant, and in addition he received a sentence of 8 months which was suspended, and he states that it is the two offences in the third warrant of driving while disqualified which gave rise to the lifting of the suspended sentences in relation to the offences in the second warrant, and that he was not present for the hearing which led to the activation of the 8 month sentence because he was in this country, and that while the warrant states that a lawyer represented him at that hearing, he never instructed such a lawyer.

In relation to the offence in the first warrant for which he was convicted in his absence, and for which he received a sentence 28 months in his absence, and in respect of which an undertaking for a retrial has been provided under section 45 of the Act of 2003, he states that the amount of the loan which he obtained on false pretences was 20,000 Sk, which amounts to €663. He denies that the information provided as to his employment was false, and that the first he heard of this offence was when he received this European arrest warrant.

Curiously in paragraph 7 of his grounding affidavit states that in relation to all three warrants he was unaware of the proceedings and not given an opportunity to appear to defend them, and that he was not in Slovakia at those times, that he never instructed a lawyer in relation to any of them, and was never served with proceedings in relation to them. That is curious because the second warrant which is dated 29th January 2009 it is clearly stated that the respondent participated in his trial, was served with the judgment on the 4th October 2005, and that an application which he made for a new trial was dismissed.

The issue remains as to whether the respondent fled from the issuing state when he departed that country in June 2006 as he states he did on that date for economic reasons, and if he did not, then this Court has no jurisdiction under section 10 of the Act of 2003 to make an order for surrender in relation to either the first warrant or the second warrant.

The sequence of events has some relevance to this question, and I should set out a chronology of some events.

6 th July 2004	the offence of dangerous driving and criminal damage was committed.
21 st September 2005	he was convicted of those offences, disqualified from driving for two years, and sentenced to 8 months suspended for 18 months i.e. until March 2007.
31 st October 2005	driving while disqualified
8 th March 2006	driving while disqualified.
24 th April 2006	loan obtained on false information.
June 2006	respondent comes to Ireland.

20 th October 2008	8 month sentence activated because he drove while disqualified between 21 st September 2005 and March 2007 (the period of suspension of the 8 month sentence imposed on 21 st September 2005.
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He was convicted on the 21st September 2005 of a driving offence and was disqualified from driving for two years. He says he was told by the police that he could drive until his licence was formally revoked but has adduced no evidence to support this, and the statement is clearly self-serving. It is hard to accept his statement at face value, and I have to say that I do not accept it as being truthful. It follows in my view that he was aware, when he drove again some weeks later in October 2005 and again in March 2006, and was caught doing so, this would lead to a lifting of the suspended sentence which had been imposed on him. If that is so, he left Slovakia in June 2006, shortly after obtaining a loan facility, albeit of the value of €663, by false pretences, and in circumstances where he must be fixed with the knowledge that, or at least the apprehension that, the 8 month sentence would have to be served. He had not by then been convicted of the offence of obtaining that loan, or the offences of driving while disqualified.

In my view the fact that he must have been aware that there was a likelihood that the suspended sentence would be activated at the time he left Slovakia, it must be concluded that he 'fled' in order to avoid that sentence, and his own averment to the contrary cannot be accepted at face value without any attempt at corroboration. His credibility is also in question given the averment in his affidavit that he knew nothing about the trial of the offences referred to in the warrant dated 29th January 2009, and in the light of what is contained in that warrant about his being present at the trial. Additional information obtained from the issuing judicial authority has confirmed that he was present for this trial and sentence. There is also information from the issuing judicial authority that it was the offence of obtaining the loan by false pretences in April 2006 that gave rise to the lifting of the suspension of sentence and that the respondent would have been aware that this was an offence which would result in him having to serve that sentence.

In my view he must be regarded as a person who fled.

In these circumstances I am satisfied that this Court must make an order for surrender on foot of the warrant dated 9th October 2008 and the warrant dated 29th January 2009, and I will so order.